

TRUSTS AND ESTATES UPDATE

Expert Analysis

2019: A Formidable End To a Formidable Year

The final months of 2019 saw decisions that were as impactful as they were instructive. Addressed to digital assets, revocation of wills, the statute of limitations and fiduciary discretion, these decisions are discussed below.

Discovery of Digital Assets Curtailed

The December 2019 column addressed the all-too significant issues surrounding the discovery of digital assets when it reported on the decision of the Surrogate's Court, Suffolk County in *In re Murray*, N.Y.L.J., Oct. 7, 2019, at 27. Of equal import and consistent with the result in *Murray* is the opinion by the Surrogate's Court, Westchester County in *In re Paragon*, N.Y.L.J., Dec. 10, 2019, at 25.

Before the court was an SCPA 2103 proceeding, in which the petitioner, as administrator of the decedent's estate, moved, without opposition, for an order pursuant to EPTL 13-A-

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3.1 authorizing the release to her of the contents of electronic communications of the decedent stored in an email account held by Google. In support of the application, the petitioner alleged, inter alia, that the decedent had established and was the sole owner of the subject email account, and transmitted a significant part of his personal email correspondence through this account. In view thereof, the petitioner claimed that access to the account was necessary in order obtain and review the contents of emails to ascertain whether they related to the decedent's wishes and intent with respect to the real property that was the subject of the subject SCPA 2103 proceeding.

Upon consideration of the relevant provisions of the governing statute, the court denied the petitioner's request, finding, in relevant part, that the decedent used the subject email

account, at least partially, if not primarily, in his law practice. To this extent, the court expressed concern that if it were to grant petitioner's motion, disclosure of the decedent's email communications could reveal otherwise privileged communications between the decedent and his clients, which had no bearing on the administration of the decedent's estate.

On the other hand, the court concluded that it was more proper for it to grant the petitioner access to the non-

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content information of the emails; to wit, a catalogue of electronic communications sent or received by the decedent in the subject account, noting that in the event the catalogue revealed the existence of emails between the decedent and the respondent, the

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petitioner could, at that point, seek access to the contents of those specific email communications.

Presumption of Revocation Rebutted

In an uncontested proceeding, the Surrogate's Court, New York County (Mella, S.) was confronted with an application by the nominated executor and sole beneficiary under a one-page copy of a purported will of the decedent seeking its probate pursuant to SCPA 1407. *In re Balducci*, N.Y.L.J., Dec. 9, 2019, at 22.

The decedent died more than a decade after executing the purported will, leaving an estate of approximately \$8 million, and survived by six first cousins. The original instrument was last known to be in the possession of the decedent's accountant of 28 years. In an affidavit to the court, the accountant explained that the decedent had been the owner of a restaurant and the building in which it was located, in which he maintained an office and various business and financial documents. When the building was sold, the decedent allegedly entrusted to the accountant certain documents for safekeeping, including documents related to the building and its sale, as well as the original of the one-page document, which named his girlfriend and life partner, the petitioner, as the fiduciary and only beneficiary thereunder.

The instrument was retained by the accountant in a file cabinet for four years, after which time he and the decedent agreed that all documents relating to the sale could be shredded. Thereafter, after being informed of the decedent's death, the accountant looked for the decedent's original

purported will and realized that it had been inadvertently destroyed.

Based on the foregoing, the court concluded that all the conditions for probate of a will pursuant to SCPA 1407 had been satisfied. The record established that the decedent had not destroyed his original will, but instead had given the instrument to his accountant to be safeguarded. In addition, the court found that the pro-

In 'In re Flender,' the court held a three-day evidentiary hearing to determine whether the daughters' failure to purchase the property was due to petitioners' abuse of discretion as trustees of trusts in which the daughter had a beneficial interest.

pounded instrument had been proven in accordance with the provisions of SCPA 1407(2). Notably, although both of the attesting witnesses to the will had predeceased the decedent, in an affidavit to the court the accountant identified the handwriting of the decedent and one of the witnesses in accordance with the provisions of SCPA 1405(4). Finally, the accountant averred that the propounded copy of the will was an exact duplicate of the original.

Statute of Limitations Disability Toll

Before the Supreme Court, New York County in *Matter of Rita G.*, N.Y.L.J., Dec. 6, 2019, at 21, was a motion by the respondents for dismissal of three of the causes of action asserted against them in a proceeding commenced by the incapacitated person's (IP)

property and personal needs guardian for, inter alia, the discovery and turnover of property, and to set aside certain conveyances. In support of their motion, the respondents alleged that the claims were time-barred on the grounds that the disability toll of the statute of limitations set forth in CPLR 208 terminated when the petitioner was appointed permanent guardian in 2013, and suit was not commenced until the expiration of the statutory period more than three years later.

The IP was a wealthy 92-year-old woman, who was estranged from her two children, and suffered from various physical and mental impairments. The respondents, Jane and Bruce Pritikin, were friends of the IP and grew closer to her following the death of her husband. The record revealed that Mr. Pritikin was an attorney and accountant, who was suspended from the practice of law in February 2013 for a period of two years for, inter alia, engaging in dishonesty, fraud, deceit, misrepresentation, and writing checks to cash from an IOLA account. In addition, the record revealed that Mr. Pritikin was the IP's agent under a power of attorney, as well as her health care proxy, and served or was nominated as co-trustee under various inter vivos and testamentary documents.

Against this backdrop, it appeared that following the IP's receipt of a \$2 million check from Sotheby's in 2010, she endorsed same to the order of Jane Pritikin, who later claimed it was a gift. Nevertheless, the court noted that the IP was never informed of the gift tax implications of the alleged gift before it was made.

In March 2013, the court appointed the petitioner as the IP's personal and

property needs guardian, and authorized her, inter alia, to defend or maintain any judicial proceeding or action, to investigate any reimbursement of funds to the IP, and if need be, to initiate a turnover proceeding. In March 2017, the petitioner was authorized to retain counsel to assist her in the investigation and prosecution of a discovery and turnover proceeding against any individuals who wrongfully obtained property from the IP. After repeated attempts to obtain information from the respondents, petitioner commenced the proceeding sub judice. In response, the respondents moved to dismiss several of the causes of action alleged on the grounds that the statute of limitations, measured from the date a permanent guardian for the IP was appointed, had expired prior to the institution of the suit.

Relying on the opinion of the Appellate Division in *Mederos v. New York City Health and Hosps.*, 154 A.D.3d 597 (1st Dept. 2017) and the Court of Appeals in *Henry v. City of New York*, 94 N.Y.2d 275 (1999), the court determined that the disability toll did not expire upon the appointment of a permanent guardian for the IP, and found the cases relied on by the respondents to be inapposite. Rather, citing the opinion in *Held*, the court recognized and adopted the view that the toll was based upon the disability of a party, which was not eliminated by virtue of the appointment of a fiduciary on the party's behalf. Accordingly, respondents' motion to dismiss was denied.

Fiduciary Discretion Properly Exercised; Eviction Ordered

Before the Surrogate's New York County (Anderson, S.) in *In re Flender*,

N.Y.L.J., Dec. 24, 2019, at 22, was an application by the co-executors, who were also co-trustees of the estate, for an order awarding them possession of the estate's real property, and a warrant of eviction against the decedent's daughter, her companion, and their two children. The decedent's daughter opposed the application alleging that the executors had withheld a distribution of funds to which she, and/or a trust for her benefit, was entitled, and thus, effectively deprived her of her right to purchase the premises within the time frame authorized under the decedent's will. After denying the petitioners' motion for summary judgment, the court held a three-day evidentiary hearing to determine whether the daughters' failure to purchase the property was due to petitioners' abuse of discretion as trustees of trusts in which the daughter had a beneficial interest.

In determining that the petitioners acted properly in denying the daughter certain requested distributions, the court first considered the provisions of the decedent's will, which directed that the property be sold. Secondly, the court recognized that the will of the decedent expressly conferred absolute discretion on the petitioners as to how and when to invade the trust principal with which they were entrusted. The court noted that while this discretion could not be abused, where a fiduciary's discretion is exercised in good faith, it may not be superseded by a court's own sense of what might be wiser or fairer. Assessed within this context, the court found that there was no evidence of bad faith or misconduct in the petitioners' refusal to make a substantial invasion of trust

principal in order to enable the daughter to purchase the subject property, which was demonstrably beyond her means. Indeed, it appeared that the daughter would have been unable to maintain the property even if she obtained the requisite funds to satisfy the purchase price.

As such, the court found the record amply supported the petitioners' conclusion that the daughter and other trust beneficiaries would be better served by avoiding depletion of the trust assets in order to enable the daughter to continue to reside in the property. In fact, the court observed that the decedent's direction in his will that the premises be sold soon after her death reflected her intention that the property be utilized as a source of liquidity for his children's trusts, an objective that would have been undermined by a reduction of the trust funds in order to accommodate the daughter's requested invasion of principal.

Accordingly, the court granted the petitioners' application, and directed a turnover of the premises, and that an order be settled providing for the issuance of a warrant of eviction.