



TRUSTS AND ESTATES UPDATE

Expert Analysis

Cutting It Short: Motions For Summary Judgment

Motions for summary judgment are often utilized in the Surrogate's Court to crystallize issues and reach a quick result in a litigation. While generally invoked in contested probate proceedings, summary relief has also been the subject of contested construction proceedings, and proceedings to fix and determine a claim against an estate. Consider the following:

Order Denying Summary Judgment Affirmed

In *Matter of Penick*, N.Y.L.J., Feb. 10, 2020 (1st Dept.), the Appellate Division, First Department, affirmed an Order of the Surrogate's Court, New York County (Mella, S.), which denied petitioner's motion for summary judgment dismissing objections to probate of a will purportedly executed by his spouse.

The court held that the Surrogate's Court had properly denied petitioner's motion since the record presented disputed issues of fact as to whether the document offered for probate was duly executed by the decedent

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in accordance with the provisions of EPTL 3-2.1. Although the petitioner submitted affidavits and testimony of the witnesses to the execution of the one-page instrument purporting to be the decedent's will, the court found their accounts to be inconsistent as to where and when they signed the document.

Moreover, assuming the burden shifted, the court noted that the objectants, in opposition, submitted admissible evidence raising issues of fact as to whether the decedent was able to read the instrument out loud, twice, as claimed, given her advanced ALS, and whether the execution of the will actually took place in her hospice room five days before her death. The court further concluded that the Surrogate's Court did not improperly rely on unauthenticated medical records submitted by the objectants, but noted that they buttressed other admissible

evidence concerning decedent's condition at the time.

Summary Judgment Construing Will Affirmed

Before the Appellate Division, Third Department, in *Matter of Dawe*, 179 A.D.3d 1182 (3d Dept. 2020), was an appeal from a decree of the Surrogate's Court, Madison County, which partially dismissed a petition of the decedent's brother that sought to void a portion of the decedent's will, on the grounds that it failed to designate a beneficiary of the trust created thereunder.

Pursuant to Article Sixth of his will, the decedent devised and bequeathed his residuary estate, in trust (the Dawe Family Trust), to fund a website devoted to genealogical research about his family. The provisions of the trust directed that the trust would "automatically terminate twenty one years after the death of the survivor of the decedent's brother and his nephew," and upon such termination, the remaining assets thereof would be paid outright to the respondent, the Godfrey Memorial Library. Article Sixth also directed that none of the decedent's relatives were to receive any testamentary gift.

In view of the foregoing, the petitioner sought a construction of the will and a determination that Article Sixth was

void for lack of a designated beneficiary and a charitable purpose, and therefore that he was entitled to the whole estate, as the decedent's sole distributee. Respondent filed a cross-petition, claiming that the decedent omitted his family members from his dispositive plan, and that it was the intended recipient of his residuary estate for the purpose specified. The Attorney General, pursuant to EPTL 8-1.1, answered the petition and supported the respondent's position.

Following a hearing on the issue, the Surrogate's Court dismissed the petition holding that the residuary trust was invalid due to the lack of a beneficiary, but that, based on evidence of the decedent's intent, the remainder interest in favor of the respondent survived and was accelerated, thereby entitling the respondent to the residue of the decedent's estate. The petitioner appealed.

In affirming the Surrogate's determination, the court opined that a testator is presumed to have intended to dispose of his/her entire estate by will, rather than to have any part pass by intestacy. Towards this end, the policy of the courts is to carry out the intention of the testator, by severing the valid from the invalid parts of the will, in order to preserve the decedent's general testamentary plan. Concluding that the Surrogate's Court was correct in invalidating the Article Sixth trust, the issue became whether the acceleration of the remainder comported with the decedent's intent.

In this regard, the court held that the language of the decedent's will unambiguously manifested his desire that the respondent receive his residuary estate with the hope that genealogical research would be continued. The court rejected petitioner's argument

that the bequest failed due to respondent's inability to continue the subject research, finding that continuing this research was not a condition of the testamentary provision. Further, it held it was harmless error for the Surrogate to consider extrinsic evidence in reaching its result, concluding that it did not impact upon the ultimate determination made.

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Summary Judgment Disallowing Claim

In *Matter of Hollis*, 180 A.D.3d 680 (2d Dept. 2020), the Appellate Division, Second Department, reversed an order of the Surrogate's Court, Nassau County, which denied a motion for summary judgment disallowing so much of a claim made by the executor of the decedent's estate as represented money borrowed from the decedent between April 2005 and January 2008.

The decedent died survived by six children. One of her children post-deceased her, and a claim was made against his estate by the executor of the decedent's estate, who contended that the decedent had loaned him monies that had not been repaid prior to her death. The administrator of the child's estate then instituted a proceeding to determine the validity of the claim, and thereafter moved for summary judgment on the ground that the recovery

was barred by the statute of limitations. The Surrogate's Court denied the motion, concluding that an email sent by the deceased child to the executor and their brother constituted a written acknowledgment of the debt sufficient to reset the statute of limitations, pursuant to General Obligations Law 17-101.

General Obligations Law 17-101 revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt. To constitute an acknowledgment of a debt, a writing "must recognize the existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (citing *Pugni v. Giannini*, 163 A.D.3d 1018, 1019-20).

Within this context, the court found that the administrator had demonstrated, *prima facie*, that so much of the executor's claim as was based on an alleged indebtedness incurred between April 2005 and January 2008 was barred by the applicable six year statute of limitations. The court disagreed with the determination of the Surrogate's Court that the subject email constituted an unqualified acknowledgment of the debt sufficient to reset the limitations period. More specifically, while noting that the email arguably acknowledged the debt to the extent that it stated, *inter alia*, "I have every intention of paying this debt," it continued by referring to some mitigating circumstances that would be provided at some future date. In view thereof, the court found that the subject email contained language inconsistent with an intention to pay the debt, and the Surrogate's Court erred in finding otherwise.