

TRUSTS AND ESTATES UPDATE

Expert Analysis

Sale of Estate Property, Records Inspection, Will Construction

As August moves along, and the summer sadly draws to an end, this month's column takes a different approach by addressing two uncontested matters of interest affecting trusts and estates practice, and a litigated issue addressed to the construction of a will.

Appellate Division Addresses Sale of Estate Property

Before the Appellate Division, Second Department, in *Matter of Kahn*, N.Y.L.J., June 7, 2019, at p. 25, was an appeal from an Order of the Surrogate's Court, Kings County, which denied a petition by the administrator of the decedent's estate to remove the restrictions on his letters of administration that prohibited

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him from selling real property owned by the decedent at death.

In support of his application to the Surrogate's Court, the administrator represented that the real property in issue was encumbered by an \$870,000 mortgage, together with interest and penalties, and was in foreclosure. Further, he alleged that the fair market value of the premises was \$325,000, and that it was in need of repairs that exceeded \$130,000. Accordingly, the petitioner sought authorization to conduct a short sale of the property for the sum of \$308,750.

The Surrogate's Court denied the petition finding, inter alia, that the petitioner had not made

an adequate showing that the proposed sale was in the best interests of the estate. Specifically, to this extent, the court noted that while the petitioner had submitted, inter alia, the lender's letter approving the proposed sale, an appraisal of the property, substantiation for the cost of repairs, and a waiver and consent executed by a distributee, he had failed to submit evidence establishing the existence of the mortgage or the sum owed, proof that the property was in foreclosure, or that there were no other distributees interested in the relief requested.

The Appellate Division affirmed, opining that in fulfilling its duty "to preserve and enhance, as far as possible, the assets of decedents' estates" (*Matter of Jones*, 8 N.Y.2d 24, 27, citing *Matter of Graves*, 197 Misc. 555, 557 (Sur. Ct. Erie County)), a Surrogate should be guided by an estate's best interests. To this extent, the

court observed that a decedent's personal property is the primary source for the payment of the decedent's debts, and that land cannot be used as a source of funds unless the personalty has been exhausted. On the other hand, the primary source for payment of a mortgage debt is the mortgaged premises. Thus, to obtain court authorization to sell real property to satisfy a decedent's debts, including mortgage debts, a personal representative must demonstrate that the decedent's personal property is otherwise insufficient to do so.

In view of the foregoing, the court concurred with the Surrogate's determination that, without other evidence, the petitioner's conclusory assertions regarding the extent of the decedent's personal property and debts, the existence and status of the mortgage, and the identity of potential distributees was insufficient to support the relief sought.

In Camera Inspection of Matrimonial Records Granted

In *In re Wichman*, N.Y.L.J., June 14, 2019, at p. 28 (Sur. Ct. Bronx County), the Surrogate's Court, Bronx County, was confronted with an unopposed motion by the decedent's sister to unseal the matrimonial records concerning

an alleged prior marriage of their predeceased father, and to permit her counsel, and counsel for an alleged niece and nephew of the decedent ("claimants") to copy pertinent portions of those records for purposes of determining kinship. Alternatively, the petitioner sought to have the

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file transferred to the Surrogate's Court for an in camera review.

The decedent died, intestate, survived by his sister. He was divorced, never had children, and his parents predeceased him. Based on her knowledge at the time, the decedent's sister filed a petition for letters of administration, together with an affidavit of heirship, listing herself as the decedent's sole distributee. Thereafter, she was informed by her counsel that her father had previously been married, that he had a son of that marriage, who had since deceased, and that the son's children were claiming to also be the decedent's

distributees. In support of their contention, the claimants submitted, inter alia, copies of the son's death certificate listing one of the claimant's as his daughter, and the father's first wife as his mother; the son's birth certificate, listing the decedent's father and his first wife as his parents, the son's certificate of marriage, listing the decedent's father, as his father, and a certificate of disposition by the New York County Clerk stating that a judgment of divorce between the decedent's father and his first wife had been entered.

The sister opposed the claimants' position, and moved to examine her father's divorce records in order to ascertain whether the son was listed as her father's child, or whether paternity was disputed. In support thereof, the sister argued that her father and his prior spouse, as well as the purported son of that marriage were long deceased, that the claimants did not oppose the application, and that no one would be harmed by the relief sought.

Pursuant to the pertinent provisions of Domestic Relations Law §235, the record in a matrimonial action shall not be available to any person other than a party, or the attorney or counsel of a party, except by order of the court.

The section further provides, *inter alia*, that the confidentiality accorded by the section shall expire 100 years after the date of filing, at which time it shall be fully subject to public inspection.

Within this context, the court noted that before access to matrimonial records can be ordered, it must be demonstrated that disclosure is warranted, and that special circumstances exist for breaching the confidentiality otherwise accorded the information. Given the present record, *i.e.*, that no father was listed on the son's death certificate, that the parties to the matrimonial action, and the alleged son of that marriage, were deceased, that the application was unopposed, and that 100 years had not elapsed since the entry of the judgment of divorce, the application was granted to the extent of providing for the court's *in camera* examination of the matrimonial records for the purpose of ascertaining whether there was a son of the marriage.

Will With No Dispositive Provisions Deemed Testamentary in Nature

Before the Surrogate's Court, New York County, in *In re Katz*, 2019 N.Y. Misc. LEXIS 1797, was a motion to compel the examination of witnesses pursuant to

SCPA 1404. The Public Administrator on behalf of unknown distributees cross-moved to dismiss the probate petition and to vacate the preliminary letters testamentary issued to the proponent.

The propounded instrument was prepared by a legal document preparation service and was executed at the proponent's office. The sole dispositive provision thereof bequeathed decedent's entire estate to proponent "to distribute to people and charities on a list to be provided to him by testator." It was undisputed that the list never existed.

In support of her motion, the Public Administrator contended that the propounded instrument was not a testamentary instrument because it lacked a dispositive provision. The court noted, however, that the pertinent provisions of EPTL 1-2.19 define a will as a "written instrument, made as prescribed by [EPTL] 3-2.1 or 3-2.2 to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of ... or makes any other provision for the administration of his estate ..." In view thereof, the court, citing precedent, rejected the Public Administrator's position and held that it has refused to deny probate to an instrument based

on the lack of a dispositive provision. Indeed, the court observed that the propounded instrument still contained provisions for the revocation of wills, the payment of debts and expenses with estate assets, and the designation of the person to serve as executor, each of which could serve as the basis for a testamentary document. Moreover, despite the Public Administrator's arguments to the contrary, the court found that her motion was nothing more than a request for construction of the decedent's will, which was procedurally improper prior to the admission of the instrument to probate.

Accordingly, the cross-motion was denied, and examinations pursuant to SCPA 1404 were directed.