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## TRUST AND ESTATES UPDATE

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### *In Terrorem Clause, Constructive Trust, Fiduciary Liability*

While the nation and New York, in particular, is confronted with threats of terrorism, cautionary advice from government leaders, we attempt to move forward with our routines without inhibiting our thoughts and actions. It would be so easy for us to coil back in fear awaiting the final outcome, but we know life must go on, and so it does, both at home, and at work, as is evidenced by the productivity of the judiciary and this month's discussion of decisions of interest in the field of trusts and estates.

#### **In Terrorem Clause**

During the course of a contested probate proceeding, one of the decedent's sons sought limited letters of administration for the purpose of instituting a discovery proceeding against his step-mother, whom he claimed was withholding assets from the estate.

The decedent died survived by a wife and two sons from a prior marriage. Pursuant to his will, the decedent disposed of his interest in a partnership to one of his sons, bequeathed a pecuniary amount to his wife, and the residue of his estate, in trust, for the benefit of his wife for life, with remainder to his issue. The will contained an in terrorem clause or a no-contest clause, which, if triggered, would result in a forfeiture of the beneficiary's interest and the interest of his issue.

In assessing whether the application for limited letters should be granted, the court noted that the provisions of SCPA 702 had been amended, effective Jan. 1, 1994, in order to give the court discretion to appoint a fiduciary with circumscribed authority even though a fiduciary with full letters was in place. The court opined that both SCPA 702(8) and SCPA 702(9) reflected the "legislature's understanding that the individual interests of fiduciaries may be at odds with the interests of the estates that they have



been appointed to serve..." These provisions thus serve the purpose of ensuring the preservation of the estate, where the circumstances indicate that the fiduciary will not or cannot do so. On the other hand, where the estate is not under impending threat of harm or will not be prejudiced, the appointment of a limited fiduciary is not warranted.

Within this context, the court concluded that the petitioner had made no showing that any prejudice would result from deferring the commencement of a discovery proceeding against the decedent's spouse until the probate proceeding was concluded. The court found this result particularly compelled by the existence of the in terrorem clause in the propounded instrument, and the opportunity for abuse which it posed to the provisions of SCPA 702. Indeed, the court noted that under the guise of a wholly unrelated proceeding, which ostensibly would not trigger the clause, a litigant with limited letters could do indirectly, what he/she could not do directly without risking a forfeiture of his/her legacy, to wit, discover information which could ultimately be utilized to contest the will, and/or achieve an advantageous financial settlement with the proponent. The court held that such a result would undermine the provisions of SCPA 702 as well as defeat the purpose of a no-contest clause, i.e. to spare the estate the costs and delays of a challenge to the decedent's will.

Accordingly, the application was denied without prejudice to its renewal upon conclusion

of the probate proceeding. *In re Estate of Stoller*, New York Law Journal, June 28, p. 28 (Surrogate's Court, New York County, Surr. Renee Roth).

#### **Constructive Trust Stated**

Plaintiff commenced suit against the defendant, with whom he had had a romantic relationship, to impose a constructive trust on property which he had transferred to defendant, and to restrain the defendant from transferring, encumbering or otherwise disposing of the property. Plaintiff had transferred title to the property to the defendant approximately one year into his relationship with her. Shortly thereafter, the relationship terminated.

In support of his cause of action, plaintiff asserted that he had transferred the property to the defendant with the understanding that because they were romantically involved and committed to each other, and because he was clinically depressed at the time, he could trust her to manage his finances and business dealings. Specifically, as to the subject property, defendant claimed that it was expressly understood, at the time of the transfer, that he would continue to hold nominal title to the property in constructive trust and that the defendant would convey her interest in the property to him upon his request. Plaintiff alleged that when the defendant refused to comply with his request for reconveyance of the property, or to turn over the rental being derived from the property to him, he commenced suit.

In support of her motion to dismiss the complaint, defendant maintained, in pertinent part, that she had sold the property to a good faith buyer, and, as such, she no longer held title to the property upon which a constructive trust was sought. Therefore, according to the defendant, the court was without power to impose a constructive trust.

The court found the defendant's argument to be without merit. The court opined that a trust will follow property through all changes in its shape and form so long as the property or its proceeds are capable of identification. "Where a trustee in breach of trust disposes of trust

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property and receives other property in exchange, the beneficiaries can charge him as a constructive trustee of this property or at their option can enforce an equitable lien upon it to secure their claim against the trustee for damage for breach of trust." 5 Scott on Trusts, Sec. 508 at 555. Moreover, the court held that even where the specific proceeds cannot be traced, the plaintiff was not without a remedy, inasmuch as a personal judgment could be enforced against the wrongdoer.

Accordingly, the court denied the defendant's motion to dismiss the complaint for constructive trust.

Additionally, the court denied the plaintiff's motion to amend his complaint to allege fraud and conversion, finding that the cause of action for fraud was time-barred, and that a cause of action for conversion will not lie where the subject matter is real property. *Kupferman v. Scott*, NYLJ, July 28, 2004, p. 23 (Sup. Ct., Suffolk County, Justice Arthur Pitts)

## Lack of Standing

In *In re Estate of Bassen*, the court was confronted with a motion to dismiss a compulsory accounting proceeding instituted by the decedent's grandson.

The decedent died, testate, survived by two daughters. Pursuant to the pertinent provisions of her will, she provided for a number of legacies to named individuals, and devised and bequeathed the residue of her estate in equal shares to her surviving children. In addition, the decedent's will exercised a power of appointment granted to her under the will of her predeceased husband. Specifically, pursuant to the terms of her husband's will, the decedent received an income interest in trust, with a power to appoint the remainder upon her death. The decedent did so by appointing 1/7 of the trust remainder to the petitioner, and the remaining shares to other persons.

The petitioner sought a compulsory accounting of the decedent's estate based upon this interest as an appointee of the trust remainder under the will of the decedent's husband.

The estate fiduciary moved to dismiss the petition claiming that the petitioner lacked standing to institute the proceeding. In support of his position, the executor maintained that the petitioner was not a current or contingent beneficiary of the decedent's estate as he was neither a distributee nor a legatee or devisee under her will. The petitioner responded by claiming that he was a person named in the will of the decedent and was the decedent's grandson, and thus, a "person interested" as defined by the provisions of SCPA Secs. 103(39) and 2205.

The court disagreed with the petitioner holding that he was neither a distributee of the decedent nor a beneficiary of the decedent's estate. Specifically, in this latter regard, the court stated that the petitioner's interest as an

appointee of the power of appointment granted to the decedent by the will of her late husband did not make him a beneficiary of the decedent's estate but rather the estate of her predeceased spouse. Accordingly, inasmuch as the petitioner did not have the requisite interest in the estate of the deceased as defined by the provisions of SCPA Sec. 2205, the court held that he lacked standing to compel the fiduciary to account.

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Furthermore, citing the decision by the Appellate Division, Second Department, in *Mater of Lupoli*, 275 AD2d 780, the court held that petitioner lacked standing on the grounds that he did not fall within the category of persons entitled to citation pursuant to SCPA Sec. 2210.

Finally, the court rejected the petitioner's request to compel an accounting on its own motion, finding that the record failed to demonstrate any basis for such relief. *In re Estate of Bassen*, File No. 3179/2002, May 28, 2004 (Surrogate's Court, Westchester County, Surr. Anthony A. Scarpino, Jr.)

## Fiduciary Liability

The former trustee of an inter vivos trust established by the decedent moved to vacate a default judgment which directed he and his former attorney to jointly and severally refund excessive attorneys fees. The fiduciary had previously been removed by order of the court base upon his improvident management of the trust in his care, including payment of large sums of fees to his former counsel. The court noted that the fiduciary had arbitrarily capped fees at \$300,000, and that, in fact, the fees paid to former counsel exceeded \$448,000. The size of the trust in issue was approximately \$3.5 million dollars.

The record reflected that a proceeding in relation to the fees charged to the estate had been instituted by the fiduciary's sister, who was an estate beneficiary, and that the fiduciary had received notice from the court of its decision directing his former counsel to attend a hearing or file an affidavit of legal services in support of the sums paid. Thereafter, former counsel filed an affidavit of legal services with the court, in lieu of a hearing, and the court rendered a decision, based thereon, fixing counsel fees in the sum

of \$20,000, and directing that counsel and the fiduciary jointly and severally be responsible for refunding the estate the sum of \$428,475.63. In the interim, the fiduciary was removed as trustee, and a proceeding was instituted for the appointment of a successor.

In his motion to be relieved of his default in connection with the proceeding to fix fees, the court opined that the burden is on the moving party to show reasonable cause for the default but also to demonstrate that he has a meritorious defense by submitting an affidavit of merit by someone with personal knowledge of the facts. To this extent, the court found it significant that the former fiduciary failed to submit his own affidavit in support of the motion, but instead relied on an affidavit by his new counsel. Moreover, although counsel indicated that the former fiduciary had never received notice from his prior counsel as to the status of the fee application, he failed to refute the claims by opposing counsel that they had provided such notice to him.

Further, the court noted that the former fiduciary had retained counsel to represent him in proceedings before the court long before the actual decision of the court fixing fees, and yet, at no time did the former fiduciary through his new counsel seek to participate in the fee proceedings. Indeed, the former fiduciary did not seek to vacate his default until proceedings had been instituted in the Supreme Court, approximately one year after the order and judgment reducing fees had been entered, to enforce the judgment against funds that had been restrained. The court held that the fiduciary's delay in acting until such time could not be considered an excusable default.

Moreover, the court rejected the fiduciary's claims that he had relied upon the advice of counsel respecting the propriety of the legal fees charged to the estate. The court noted a fiduciary may not escape liability on the grounds that he was guided by the advice of an attorney. In the administration of an estate, a fiduciary is required to employ diligence and prudence, and cannot be excused in the discharge of these duties based upon his/her reliance upon counsel.

Accordingly, having been removed for his failure to properly manage the estate, most particularly insofar as the payment of legal fees was concerned, the court concluded that the former fiduciary could not be excused from suffering liability for the loss suffered by the trust estate. *In re Estate of Shapiro*, NYLJ, Aug. 4, p. 27 (Surrogate's Court, Nassau County, Surr. John Riordan).