

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Amendment to Establish Limit for Electing Against Decedent's Will

As the curtain rises on 2005, and we begin a new year of professional and personal goals and aspirations, it serves to reflect on the year past and the many significant decisions and developments it brought to the field of trusts and estates.

From opinions on res judicata and collateral estoppel (*Matter of Hunter*, The New York Law Journal, April 6, 2004, p.18 (App. Div. 2d Dept.), to fiduciary duties of investment and diversification (*Matter of Dupont*, NYLJ, July 13, 2004, p.19 (Surr. Ct., Monroe Cty.), and to legislative change affecting attorney-fiduciaries, the year left a mark sure to reverberate into 2005.

In its closing moments, the year 2004 continued along this path as is evidenced by the following decisions of interest:

Right of Election: Timely Filing

In a miscellaneous proceeding, the decedent's surviving spouse sought to excuse his default in timely filing a notice to elect against the decedent's will and requested an extension of time for filing same.

The decedent died, testate, on Dec. 23, 2001, survived by her husband, who was the petitioner. Her will was filed with the court approximately one year later, however, it was not offered for probate until Dec. 2, 2003. On March 23, 2004, the decedent's will was admitted to probate and letters testamentary issued to the decedent's sister. In April, 2004, the decedent's



husband made application to be excused from his default in electing against the instrument, which application was denied as procedurally defective. Thereafter, this miscellaneous proceeding was commenced.

In analyzing the timeliness of the petitioner's application, the court referred to the provisions of Estates Powers and Trust Law (EPTL) §5-1.1-A(d)(1), (2) and (3), noting that significant debate existed as to whether they created a statute of limitations for asserting a right of election. More specifically, the question posited by this debate is whether the statutory period created by the provisions of EPTL §5-1.1-A(d)(1) can at all be extended, such that a surviving spouse can be excused from a default even if the application is made more than two years after the decedent's death.

In concluding that the two-year period set forth in EPTL §5-1.1-A(d)(1) permits no judicial discretion, the court said that while the right-of-election statute should generally be liberally construed in favor of a surviving spouse, the need for establishing a definite period of time for the disposition of a testator's estate is of

paramount importance.

Accordingly, inasmuch as the decedent's surviving spouse sought to be excused from his default more than two years after the decedent's date of death, the court held that his application was time-barred and denied the relief as a matter of law.

In re Estate of Wolfe, The New York Law Journal, Nov. 3, 2004, p. 31 (Surrogate's Court, Suffolk County, Surr. John M. Czygier).

Note: The Trusts and Estates Section of the New York State Bar Association has proposed an amendment to the provisions of EPTL §5-1.1-A(d)(2), which would establish a limitations period for electing against a decedent's will. This amendment was approved by the House of Delegates of the New York State Bar Association and is now pending before the New York State Legislature.

Construction of Will

Responsibilities of Life Tenant. Before the court was a request for a construction of those provisions of the decedent's will for the benefit of her husband. The petitioner suggested that the decedent intended to create an outright gift to her spouse of her entire estate.

The court disagreed, finding that the provisions of Article Second devising and bequeathing all of the income earned from the decedent's stocks to her husband "for as long as he shall live" created a life estate. The court held that the powers granted the executor in Article Sixth, to dispose of the decedent's estate, both real and personal, did not change this result, inasmuch as the provisions did not extend to the shares of stock subject to the life estate, which was subject to the possession of the life tenant

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and not the executor.

Moreover, the court held that since the decedent's will only relieved the executor and not the life tenant of the requirement of filing a bond, and the life tenant had no interest in or dispositive powers over the principal of the legacy to him, he would be required to post a bond to provide adequate security for the payment and delivery of the legacy to the remaindermen.

In re Estate of Freilich, NYLJ, 11/18/04, p. 31 (Surrogate's Court, New York County, Surr. Preminger).

Out of State Depositions

Costs of Open Commission. In a contested probate proceeding, the objectants moved for an open commission to take the testimony of an out-of-state nonparty witness. The witness, who received a nominal residuary bequest under the propounded instrument, questioned the capacity of the testator in an affidavit filed with the court. Previously, the witness had traveled to the court to be deposed; however, her deposition was never taken due to the prolonged deposition of another nonparty witness.

The petitioner for probate opposed the motion, but alternatively requested the right to cross-examine the witness at another time. Additionally, a 50 percent residuary beneficiary under the will opposed the motion, claiming that an open commission was inconvenient and costly. All parties, however, conceded that the witness' testimony was relevant to the proceeding.

In view of the foregoing, the court granted the application. Further, the court held that while it had the discretion to deviate from the general rule, which imposes the expenses of an open commission upon the respective parties, it was declining to apportion those expenses differently, pending application for such relief upon the conclusion of the proceeding.

In re Estate of Kruk, NYLJ, 11/3/04, p. 31 ((Surrogate's Court, Suffolk County, Surr. John M. Czygier).

Out-of-Court Settlements

Oral Agreement Held Unenforceable. Although all parties to an out-of-court oral

settlement did not dispute its terms, the Court of Appeals in *Bonnette v. Long Island College Hospital* held that it was unenforceable because it was not reduced to a writing or entered into in open court.

The Court referred to the provisions of CPLR 2104 for its opinion that an agreement relating to any matter in an action must be in writing and subscribed by a party or his attorney in order to be binding. Although the plaintiff argued, in pertinent part, that correspondence

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between her and the defendant memorialized the understanding between them, the Court rejected her contentions under the circumstances, saying that a contrary result would undermine the purpose of CPLR 2104, and policy concerns of certainty, judicial economy and "flexibility to engage in settlement negotiations without fear of being bound by preliminary offers."

Bonnette v. Long Island College Hospital, NYLJ, Oct. 22, 2004, p. 19 (N.Y.Ct. Appeals).

Construction of Will

Intestacy Ordered. In an accounting proceeding, the petitioner requested the court to exercise its cy pres powers in order to avoid a disposition of the decedent's estate by intestacy. The decedent's will lacked a residuary clause, but did contain specific bequests to the Tai Chi Society, or in the alternative, to the Buddha Law Foundation.

The petitioner argued that the decedent had a general charitable intent as was evidenced by the bequests to charity. The court disagreed.

The court said that where a will lacks a residuary clause and fails to disclose an intention on the testator's part to dispose

of his residuary estate, the presumption against intestacy cannot be invoked to supply the deficiency. Moreover, the court found that the omission of a residuary clause in the will was not an ambiguity which would have allowed the introduction of extrinsic evidence in order to determine the decedent's intent. Finally, the court concluded that the language of the will failed to support a gift by implication.

Accordingly, the court held that the testator's residuary estate passed by intestacy.

In re Estate of Da Liu, NYLJ, Dec. 17, 2004, p. 32 (Surrogate's Court, New York County, Surr. Eve Preminger).

Legislative Update

Legislative Amendment to SCPA §2307-a Signed by the Governor. On Nov. 16, 2004, Governor George Pataki signed into law Senate Bill 6986, which amends the Surrogate's Court Procedure Act (SCPA) in relation to clarifying disclosure requirements regarding commissions to an attorney-executor. As a result of this amendment, the provisions of SCPA §2307-a now require that the disclosure required by the statute be set forth in a writing separate from the will, but which may be annexed to the will, and which may be executed prior to, concurrently with or subsequently to a will in which an attorney or a then-affiliated attorney is named as an executor.

In addition, the amendment effectuates a change to the model disclosure form so as to include an acknowledgment by the testator that he or she was informed that absent execution of the disclosure acknowledgment, an attorney who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive.

The amendment takes effect immediately.

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