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## TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

### *Appellate Court Decisions*

As in the past, this month's column is devoted to decisions of appellate courts throughout the state that impact upon the field of trusts and estates. During the past year, these decisions have involved the appointment of attorney-fiduciaries, a suit for emotional distress, statutes of limitation and construction of wills. Their significance to practitioners makes them worthy of discussion.



#### Statutory Commissions

• **Statutory Commissions of Attorney-Executor.** In *Matter of Lustig*, the Appellate Division, First Department, unanimously affirmed the Order of the Surrogate's Court, New York County, (Surrogate Renee R. Roth), which directed that the commissions of the petitioner, as attorney-fiduciary, be limited to one-half the statutory commissions to which he would have otherwise been entitled pursuant to Surrogate's Court Procedure Act (SCPA) §2307-a.

Surrogate Roth found that the testator had failed to acknowledge in a writing separate from the will that the disclosure required by SCPA §2307-a had been provided.

The Appellate Division held that this disclosure was mandated by the provisions of SCPA §2307-a(5). The court further found that although the separate writing requirement was not clearly expressed in

the original version of the statute, a recent amendment to SCPA §2307-a rectified any ambiguity that may have previously existed by making it plain that the testator's acknowledgment of disclosure must be separate from the will.

*Matter of Lustig*, New York Law Journal, 2/7/05, p. 32 (App. Div. 1st Dept.).

#### Emotional Distress

• **Suit for Emotional Distress Over Decedent's Remains.** In an action by the decedent's estate and next of kin for negligence and emotional distress against the City of New York, the New York City Police Department, Parkchester Management Corp. and others, and Parkchester South Condominiums (Management and Condominiums), the Appellate Division, First Department held that all causes of action against the defendants should have been dismissed, but for the cause of action for emotional distress against Management and the Condominiums.

The record revealed that the 91-year-old decedent had wandered from her apartment

after her home health aide had left for the evening, and that it was not until three weeks later, after an unsuccessful search of the apartment complex by the New York City Police Department, that her body had been found by a Management employee in an unlocked, vacant apartment, two floors directly below her apartment. An autopsy disclosed that the decedent had died from a heart attack.

With regard to the allegations against the police department for negligence, the Appellate Court found that the department's missing persons investigation was a discretionary, and not a ministerial task, and that it owed no special duty to the decedent to search for her. Moreover, the court held that the claims against the police department for emotional distress arising from the purportedly negligent search should have also been dismissed, on the grounds that plaintiffs had failed to establish that they justifiably relied upon assurances by the department that they were conducting a search for the decedent such that they were caused to forgo other means available to them for conducting a search as well.

As for the claims against the Management and Condominiums, the court held that the causes of action for intentional infliction of emotional distress and for damages for the decedent's death and injuries were properly dismissed, as the decedent's act of wandering from her apartment was not foreseeable and there was no evidence that her fatal heart attack was the result of her leaving her apartment. Further, the court concluded that the acts alleged in the complaint did not support a claim for intentional infliction of emotional distress.

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However, the court held that a cause of action for emotional distress did exist against Management and the Condominiums based upon allegations that they denied the decedent's relatives access to her apartment in order to collect additional remains to be interred with her body. The court said that "surviving next of kin of a decedent have a right to immediate possession of the body for preservation and burial, and damages may be awarded against any party that unlawfully interferes with that right or improperly handles the decedent's body..."

*Scheuer v. City of New York*, 10 AD3d 272 (1st Dept. 2004)

## Statute of Limitations

• **Statute of Limitations in Wrongful Death Actions.** In an action to recover damages for wrongful death, the Appellate Division, Second Department reversed an Order of the Supreme Court, Kings County (Judge Lewis L. Douglass), which granted plaintiff's motion to strike an affirmative defense of the statute of limitations with respect to the wrongful death cause of action and denied plaintiff's cross-motion to dismiss that cause of action.

The decedent was survived by an adult son who petitioned for letters of administration. That proceeding, however, was contested, as a result of claims by two women who each alleged that she was the decedent's surviving spouse. As a result, the Surrogate's Court appointed the public administrator of Kings County as the administrator of the decedent's estate, who qualified more than six months prior to the expiration of the statute. Nevertheless, the public administrator did not interpose the wrongful death cause of action until after the statute of limitations expired.

The Appellate Division held that the appellant/defendant had made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that plaintiff had not commenced the action for wrongful death until more than two years had elapsed since the decedent's date of death.

Despite appellee/plaintiff's contentions, the appellate court determined that the

statute of limitations was not tolled during the pendency of the application for letters of administration, and that appellee's reliance upon *Hernandez v. New York City Health and Hosps. Corp.*, 78 NY2d 687, was misplaced. Specifically, the court noted that the decedent in *Hernandez* was

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survived by only one distributee, who was an infant, and not an adult as in the case before it and, therefore, the Court of Appeals held that the statute of limitations was tolled until the earlier of the infant attaining majority age or the appointment of a guardian.

Accordingly, the Appellate Division concluded that *Hernandez* was not applicable and that the Supreme Court should have granted appellant's cross-motion to dismiss the cause of action for wrongful death.

*Public Administrator of Kings County v. Canada Dry Bottling Company of New York*, 790 N.Y.S.2d 711 (2d Dept. 2005)

## Letters Testamentary

• **Decree Granting Letters Testamentary Affirmed.** In a proceeding for probate of a decedent's will, the Appellate Division, Second Department affirmed an amended decree of the Surrogate's Court, Suffolk County (Surrogate John M. Czigier), which, after a nonjury trial, granted the petitioner's application for letters testamentary.

The court said that a decision rendered by a court after a nonjury trial should be accorded deference and should not be disturbed "unless it is clear that the conclu-

sions could not have been reached under any fair interpretation of the evidence." (Citations omitted) The trial court, as compared to the appellate court, has the unique opportunity to assess the credibility of the witnesses, by hearing their testimony and observing their demeanor while on the stand.

Moreover, the court held, after a review of the record, that the Surrogate's Court had properly determined that the objectants had failed to demonstrate that the petitioner was unqualified to serve as fiduciary.

*In re Piterniak*, NYLJ, 3/22/05, p.32 (App. Div. 2d Dept.)

• **Construction of Residuary Clause in Will.** In *Matter of Stangle*, the Appellate Division, Third Department, affirmed a decree of the Surrogate's Court, Albany County (Surrogate Cathryn M. Doyle), which construed the residuary clause of the decedent's will, which devised and bequeathed the rest, residue and remainder of his estate to his "surviving sisters and brother..." The decedent's sisters survived him; the decedent's brother predeceased him. The decedent's surviving children claimed an interest in the residue by virtue of the antilapse statute. The Surrogate's Court disagreed, holding that the language of the residuary clause required survivorship for the gift to vest.

The Appellate Division affirmed holding that a residuary bequest that is ineffective by reason of the beneficiary's death will not vest if the testator has made an alternative disposition in the will. The court concluded from a reading of the subject will that the testator had made such an alternative disposition by directing that his residuary estate be shared only by his surviving siblings. Under such circumstances, the antilapse statute did not apply.

*Matter of Stangle*, 14 AD3d 828 (3d Dept. 2005)

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