

## TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

### *The Meaning of a Life Estate and Other Decisions of Interest*

The past several months have seen decisions of interest addressed to testamentary dispositions of real property and, more specifically, the right of a beneficiary or a fiduciary to sell or otherwise exercise control over such property.

In the former context, the answer to the question has sometimes hinged upon a determination of whether the beneficiary holds a life estate in the premises or simply a right of occupancy. When this distinction is not at issue, a right to sell realty may be dependent upon a construction of the decedent's will and the extent of the property interest conveyed.

This column will discuss these opinions. Further, it will examine a recent decision pertaining to attorney work product.

#### **Sale of Real Property**

**The Rights of a Life Tenant.** In *In re Estate of Strohe*, the distinction between a life estate and right of occupancy arose within the context of a proceeding pursuant to Article 19 of the Surrogate's Court Procedure Act (SCPA) brought by the devisee of a life estate in the subject real property. Specifically, the petitioner sought an order authorizing the sale of a parcel of realty devised to him under the will, authority to engage a real estate broker for purposes of sale and a direction that the proceeds be distributed in accordance with the Internal Revenue Service (IRS) actuarial tables. In addition to being the devisee of a life estate in the real property, the petitioner was a 60 percent beneficiary of the residuary estate. Respondent was the remainder beneficiary of the realty.

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In support of the application, the petitioner argued that as a life tenant he could request a sale of the property, and that a sale in this case was necessary inasmuch as he could no longer reside at the premises. Petitioner further argued that a sale of the property was in the best interests of the estate given the strength of the real estate market.

Respondent opposed the application arguing that petitioner's life estate was merely a right of occupancy conditioned upon the performance of certain obligations, which petitioner failed to perform. Petitioner claimed that a life estate was more than simply a right to occupy.

The court agreed with the petitioner in holding that a life estate is something more than a right of occupancy. The court said that a life tenant is tantamount to, although not entirely the equivalent of, a fee owner of the property, with all the rights and benefits and burdens of such ownership, including the right to exclude others from possession, the right to lease and collect rents, and the rights to force a sale of the property and collect the value of his life estate therein over the objections of remaindermen. The court noted that, as compared to a life tenancy, a right of occupancy is merely a personal privilege, and does not carry with it the added rights and responsibilities of a life tenant.

Within the foregoing context, and based upon the express language of the decedent's will, the court concluded that the petitioner

had a life estate in the property. With regard to the question of whether petitioner had forfeited his interest as life tenant by virtue of his failure to perform certain obligations attendant to his use of the property, the court concluded that the will did not expressly condition the petitioner's life interest in the performance of these obligations, nor could such condition be inferred from the terms of the instrument. Further, the court held that petitioner's failure to satisfy certain obligations attendant to the property did not constitute a waiver or surrender of his rights to the property.

Finally, with respect to the proposed sale of the property, the court concluded, after examining the provisions and relevant case law under SCPA Article 19, and Real Property Actions and Proceedings Law (RPAPL) 1602, as well as the provisions of the decedent's will, that a sale would fulfill the intention of the decedent to provide for the petitioner for the duration of his life.

***In re Estate of Strohe*, New York Law Journal, Dec. 28, 2004, p. 19 (Surrogate's Court, Nassau Cty., Surr. Riordan)**

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Six months after rendering the decision in *Strohe*, Surrogate John B. Riordan was again confronted with the right of a life tenant to sell realty in *Matter of The William J. Bornkamp Family Trust*. In that case, the life tenant of trust property, who was also the settlor of the subject trust, sought a court order directing a sale of the premises and a distribution to him of the value of his life estate. The application was opposed by the trustee of the trust, who was, together with her children and the settlor's son, also a remainderman of the trust.

In assessing the application, the court, citing *Strohe*, held that a life tenant is entitled to all the benefits and burdens of an owner of property, so long as the remainder interest is

not affected. Hence, explained the court, a life tenant can exclude others from possession during his lifetime, or can lease and collect rents from the property or, even, under certain circumstances, force a sale of the property over objection of the remaindermen. In the latter instance, however, the life tenant must show that the proposed sale is expedient, i.e., suitable, practical and efficient in achieving a particular end which is proper and advantageous under the circumstances. (SCPA 1602).

The court noted that much like the situation in *Strohe*, the life tenant of the property could no longer reside at the premises, due to his residence at an assisted-living facility, and the proceeds of sale could be utilized towards his costs of living. In opposition, the trustee maintained, inter alia, that the sale of the property and payment of the value to the petitioner would contravene the purpose for which the trust was created, i.e., to protect the settlor's assets for Medicaid purposes.

The court nevertheless found that the settlor's primary purpose in creating the trust was to insure that he would have a place to live during his lifetime and that, as such, a sale would enable him to continue that purpose by paying the expenses of the assisted-living facility. The court held that granting the application was expedient, as well as suitable, practical and efficient. Additionally, the court directed that petitioner be paid the value of his life estate outright pursuant to the provisions of RPAPL §967.

**Matter of The William J. Bornkamp Family Trust**, N.Y.L.J., June 14, 2005, p. 18 (Surrogate's Court, Nassau Cty., Surr. Riordan)



Finally, the decision of Surrogate Albert Tomei, in *In re Estate of D'Elia*, addresses the issue of whether the petitioner's life estate in the subject premises extended to the whole thereof, or simply to the top floor of the building in which the decedent actually resided at death. A finding that the life estate was in the entire building would have supported the petitioner's request to evict her stepdaughter from her living quarters in the bottom portion of the property.

In pertinent part, the will of the decedent granted to the petitioner "a life estate in the real property which I occupy as my primary residence at my death." The court construed this language as granting the petitioner only a life estate in the unit that the decedent

occupied in the property and not in the entire property, reasoning that if the decedent had intended to give the petitioner a life estate in the entirety, he would not have further limited the disposition to the portion of the premises which he occupied at death.

Accordingly, the court held that while the petitioner, as life tenant, could lease the premises, sell her estate or bring a summary proceeding pursuant to RPAPL, she could only take such action with respect to that portion of the premises to which her life estate extended. The petitioner's application was, therefore, denied.

**In re Estate of D'Elia**, N.Y.L.J., Sept. 14, 2005, p. 19 (Surrogate's Ct., King's Cty., Surr. Tomei).

## Construction of Will

**Sale of Real Property Directed Upon Construction of Will.** In a miscellaneous proceeding, the court was asked by one of the decedent's children, who was also a co-executrix of the estate, to construe the provisions of the decedent's will which devised her real property to her three children, two daughters and one son, equally. The will further directed that the decedent's son or any one or all of the decedent's children be allowed to occupy the premises and that the property not be sold until the death of the decedent's son, or in the event the decedent's son neglected the property, or upon the consent of all the decedent's children. At the time of the proceeding, one of the decedent's two daughters occupied the premises to the exclusion of her siblings.

In support of her application for construction, the petitioner alleged that the primary purpose of the decedent insofar as the realty was concerned was to provide for her son, and that due to the exclusive occupancy of her sister, that purpose has not been fulfilled. Although the respondent denied the allegations regarding her occupancy of the premises, the court found that to be inconsequential in view of the fact that neither the petitioner nor her brother had enjoyed the benefits of the property since 1996, the time when the respondent took possession.

Upon consideration of the terms of the will, and the apparent intent of the decedent, the court concluded that her principal aim was to provide a home for her son to reside in, if that was feasible, or, if not, for the property to be sold and the proceeds divided equally among her children. The court found that

occupancy by the decedent's son was not feasible since he was financially incapable of maintaining the property. Moreover, the court found that the provisions of the will regarding disposition of the property were internally inconsistent and that resolution of that inconsistency required a construction which resulted in equality among the decedent's children.

Accordingly, the court directed that the property be sold and the net proceeds be divided among the three children of the decedent.

**In re Estate of Lewis**, N.Y.L.J., Oct. 4, 2005, p. 19 (Surrogate's Ct., Nassau Cty., Surr. Riordan).

• **Psychologist's Report Found to Be Attorney Work Product.** In a contested child custody proceeding, the respondent father moved to quash a subpoena served by the petitioner mother seeking the records and reports of a psychologist retained by the respondent. The motion was opposed by the petitioner, who maintained that since the psychologist was court-appointed, he could not be considered respondent's representative or expert.

The court granted the motion holding that a mental health professional retained by an attorney is that party's representative for purposes of Civil Practice Law and Rules (CPLR) 3101(d)(2) dealing with material prepared in anticipation of litigation. Moreover, the court held the psychologist's records and reports constituted attorney work product or material prepared in anticipation of litigation within the scope of CPLR 3101(c) and 3101(d)(2), and his source of compensation was irrelevant to the question of immunity.

Finally, the court rejected petitioner's assertion that respondent did not have standing to assert the privilege, finding that because the information contained in the records concerned the respondent, the privilege belonged to him and not to the psychologist.

**Matter of Lisa W. v. Seine W.**, N.Y.L.J., Sept. 23, 2005, p. 18 (Family Ct., Kings Cty., Judge Olshansky).

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