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TRUSTS AND ESTATES UPDATE

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The Correlation Between Practice Areas

While trusts and estates encompasses a breadth of seemingly self-contained practice groups ranging from estate and gift tax, estate planning, estate administration, and estate litigation, in actuality, issues that affect one subspecialty often implicate concerns common to all practitioners in the field regardless of their area of concentration.

A contested construction proceeding, for example, involves issues that not only are of interest to the estate litigator, but to the estate planner as well. Similarly, contested accounting proceedings often bring to fore issues relating to estate administration and taxation. Indeed, as evidenced by the decisions discussed in this month's column, no one practice area is exclusive from another, requiring each of us to keep well-informed of developments in the field as a whole rather than in isolation.

Power of Attorney Interpretation

• ***Interpretation of Power of Attorney Triggers Waiver of the Attorney-Client Privilege.*** In a turnover proceeding involving transfers made pursuant to a power of attorney, the Appellate Division, First Department, reversed two separate orders of the Surrogate's Court, New York County, which denied respondent's motion to compel the examination before trial of the attorney-draftsperson of the instrument,

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and granted petitioner's motion for summary judgment.

The statutory short form durable power of attorney in issue named the respondent as the decedent's attorney-in-fact and granted respondent the power, inter alia, to make gifts to "my spouse, children and more remote descendants, and parents *in any amount, even to the attorney(s)-in-fact themselves*." (emphasis supplied). During the decedent's lifetime and, even for several days after the decedent's death, the respondent utilized the power of attorney to transfer to himself more than $1 million of the decedent's assets.

The fiduciary of the decedent's estate instituted a proceeding for the recovery of these transfers on the grounds that the attorney-in-fact was an impermissible donee under the power of attorney. In opposition, the respondent maintained that the language of the instrument expanded the class of permissible donees to include him, as the decedent's attorney-in-fact.

The Surrogate concluded that the word "even" as used in the power of attorney was intended to insure that a family member, albeit one who was the attorney-in-fact, was a permissible donee under the instrument. Upon consideration of the circumstances surrounding the execution of the power, the Appellate Division disagreed.

In particular, the court noted that at the time the power of attorney was signed by the decedent, the only surviving statutory permissible donee was his wife, who was not named as his attorney-in-fact. Inasmuch as the respondent was not a statutory donee, but was named as the attorney-in-fact, the court concluded that it was reasonable to assume that the language was added to the instrument in order to create an additional class of permissible donees, which would include the respondent, for gift-giving purposes. To this extent, the court said that regardless of any ambiguity in the document, respondent could present extrinsic evidence, including but not limited to the testimony of the attorney-draftsperson of the instrument, as to the decedent's donative intent and his authorization to make gifts of the decedent's property to himself.

Accordingly, the court held that it was error for the Surrogate to deny respondent's motion to compel the testimony of the decedent's attorney as to conversations with the decedent concerning the power of attorney. Although the court noted that such conversations might otherwise be protected by the attorney-client privilege, it concluded that petitioner had impliedly waived the privilege when he placed the validity of the gifts made pursuant to the instrument in issue.

In re Estate of Maikowski, **New York Law Journal, 12/17/05, p.25 (App. Div. 1st Dept.)**

In Terrorem Clause

• ***In Terrorem Clause Calls into Question the Scope of Surrogate's Court***

Procedure Act (SCPA) 1404 Examinations. The respondent in a probate proceeding sought, by way of subpoena, to depose the nominated alternate co-executor under the propounded will pursuant to the provisions of SCPA 1404(4). The instrument contained an in terrorem clause. The alternate co-executor moved to quash the subpoena contending that the provisions of SCPA 1404(4) did not authorize his examination. Specifically, the movant maintained that while the language of SCPA 1404(4) permitted the examination of "nominated executors" where the propounded will contains an in terrorem clause, no mention is made in the statute of successor or alternate executors.

In denying the motion to quash, the court noted that despite the movant's designation as alternate executor in the propounded instrument, his present status, given the pendency of the probate proceeding, was, like that of the petitioner, a nominated executor. Further, in reaching its result, the court was persuaded by the rationale underlying the broad discovery provisions of the statute, where an in terrorem clause is present, the purpose of which is to enable potential objectants to obtain sufficient information to make an intelligent decision as to whether to risk triggering an in terrorem clause and losing their inheritance. The court said that such wide latitude in discovery is particularly necessary where a claim of fraud or undue influence is contemplated, given the circumstantial evidence upon which these claims are based.

In re Estate of Marshall, **NYLJ, 1/9/06, p. 45 (Surrogate's Court, Suffolk Cty.) (Surr. John M. Czygier)**

Trustee's Discretion

• ***Exercise of Trustee's Discretion Provokes Proceeding to Set Aside Trust and for Removal of Trustee.*** In a proceeding seeking, inter alia, to set aside the transfer of assets into an irrevocable trust and for removal of the trustee, the petitioner, grantor and co-trustee of the trust, moved for payment of her legal fees amounting to approximately $170,000. The respondent co-trustee of the trust cross-moved for an order directing the grantor's deposition and for an accounting of her expenses and income independent of income derived from the trust.

The subject trust was created by the petitioner, as grantor, and named the petitioner, together with her son, the respondent, as co-trustees. The trust required that income be paid to the grantor for her lifetime, and authorized discretionary payments of principal to the grantor for her support, care, maintenance and general welfare, "…in keeping with the standard of living that has been enjoyed by the [g]rantor…"

The respondent trustee opposed the petitioner's request for invasion of trust principal on the grounds that the purpose of the trust was to preserve his mother's assets during her lifetime. He argued that acceding to his mother's wishes would contravene this purpose and was particularly troublesome in view of her increasing expenditure of funds since her recent marriage to a man 45 years her junior. Moreover, respondent maintained that without a demonstration by the petitioner as to the necessity for and reasonableness of the invasion of principal, he was not required to do so.

The court said it would not interfere with a trustee's discretion to distribute principal to a beneficiary, except when the trustee misinterpreted or abused the power.

The court held that it would not interfere with the exercise of discretion by a trustee to distribute principal to a beneficiary, except under circumstances where the trustee has misinterpreted the power granted or demonstrated an abuse of discretion. In determining whether there has been an abuse of discretion, the court noted that a discretionary distribution by a trustee without any exercise of judgment in itself would constitute abuse. Furthermore, the court said that while attorney's fees might be allowable from the trust if the services rendered were beneficial to the trust, the services at issue were performed in order to set aside or deplete the trust.

Accordingly, given the absence of any discovery or other proof, the court held the petitioner's motion was premature and denied the application without prejudice. Further, the court denied the respondent's cross-motion and directed that he proceed with the requirements of Civil Practice Law and Rules (CPLR) Article 31 discovery.

Matter of Celeste Irrevocable Trust, dated Nov. 22, 2002, **NYLJ, Dec. 14, 2005, p. 27 (Surrogate's Court, New York Cty.) (Surr. Eve Preminger)**

Uneconomical Trust

• ***Uneconomical Trust Precipitates Proceeding to Terminate.*** In an uncontested proceeding, the petitioner, trustee, sought termination of a trust created under the decedent's will pursuant to the recently enacted Estates Powers and Trust Law (EPTL) 7-1.19. The provisions of this statute authorize a trustee or beneficiary of a noncharitable trust to seek termination when the expense of administering the trust is uneconomical. In support of the application, the petitioner maintained that if the trust were to continue little, if any, income would be available to benefit the income beneficiary, the decedent's daughter, over the remaining course of her lifetime, estimated at an additional 20 years. Further, the petitioner argued that continuation of the trust would be uneconomical under any definition and would not be in the best interests of the trust beneficiaries.

Based upon the foregoing, and in the absence of opposition by the trust remainderpersons, the court granted the application pursuant to EPTL 7-1.19, and directed that the remaining trust income and principal be distributed to the income beneficiary of the trust.

In re Estate of Kistner, **NYLJ, Jan. 23, 2006, p. 35 (Surrogate's Court, Suffolk Cty.) (Surr. John M. Czygier).**