

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Real Estate Issues Play Key Role in the Surrogate's Court

The practice of trusts and estates can involve a wide variety of issues ranging from disputed shareholder agreements, antenuptial agreements, partnership dissolutions, creditor's claims, and proof of paternity claims.

Most particularly, however, issues pertaining to real estate are often implicated in Surrogate's Court proceedings and have been at the heart of controversies involving the construction of a will, the validity of a gift, the rights-of-life tenants and fiduciary duties as to valuation, rental and sale. Indeed, as evidenced by the following opinions, real estate, its ownership, its title, and its administration, matters in the Surrogate's Court.

Mismanagement of Real Property

• **Fiduciary Surcharged for Mismanagement and Sale of Real Property.** In a contested accounting proceeding, the principal issues before the court involved the sale of the decedent's real property, the rents generated from the properties, brokerage commissions and legal fees.

The record revealed that the decedent died with six parcels of realty, three of which were in New York City, at death. These properties were offered for sale by the executor, without having first obtained an independent appraisal of their values. Instead the sales prices were established by a real estate broker, utilizing a list of comparable sales in the area. The evidence,



however, revealed that these listings were for properties that had been sold one to two years before the subject properties.

The objectants claimed that the properties were sold for below-market value. In support thereof, they offered the testimony of a licensed real estate broker, bank appraisals for two of the properties, and a comparable sale made on the same date as the third parcel. The court found the bank appraisals and comparable sale to be persuasive as to value, and sustained the objectants' claim that the properties were sold for below market.

Moreover, the court surcharged the executor in an amount equal to the difference between the sales price and actual market value on the date of sale, together with interest at the rate of 9 percent per annum. In reaching this result, the court found that the executor acted negligently and imprudently in the sale of the properties due to his failure to obtain appraisals for the real estate, his delegation of this responsibility to a broker, and thereafter, his sale of the properties at inadequate prices. While the court noted that a fiduciary may not be surcharged for failing to obtain the highest price

obtainable, liability will result where the fiduciary fails to act with diligence and prudence.

Further, the court surcharged the executor for the full amount of the brokerage commission paid on the subject sales, finding that instead of retaining an independent broker to market and sell the properties, the executor had breached his duty of undivided loyalty by giving an exclusive to a close family friend who failed to list the properties with a multiple listing service and, ultimately, sold them for less than fair market value to people who either knew the decedent or with whom she had prior dealings.

Finally, the court surcharged the executor for fees paid to his friend to manage and collect the rents from the subject properties. The court held that such services fell within the scope of the executor's duties and, while he could rightfully delegate such responsibility, payment for same would be from his commissions. However, inasmuch as the executor had waived commissions, the court directed that he personally pay the fees incurred by the estate.

In re Estate of Cristina, New York Law Journal, Dec. 23, 2005, p. 29 (Surrogate's Court, Queens Cty.) (Surr. Nahman).

Competing Offers to Purchase

• **Court Considers Competing Offers to Purchase Real Property.** Before the court in *In re Estate of Washington* was an application by the administratrix of the decedent's estate for permission to sell a parcel of real property.

The record revealed that the fiduciary had entered a contract for the sale of the subject premises to a nonfamily member, subject to court approval. On the return date of

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citation, a distributee of the decedent offered to purchase the property and, thereafter, entered a contract of sale with the fiduciary, subject to court approval, for \$150,000 more than the initial contract price.

In determining whether to approve the earlier or the later contract of sale, the court considered such factors as whether the earlier contract of sale was for fair market value, the length of time between the differing contracts, and the responsibility for the delay in closing title on the contracts. Principally, however, the issue requires a determination of which contract is in the best interests of the estate. While presumably this would be the contract that would yield a greater sum of money for the estate, the court noted that decisions addressing the question rely upon this criteria where the competing contracts are for at least fair market value and are entered within a month or two of each other.

Based upon the foregoing, the court concluded that the later contract was in the best interests of the estate. Appraisals revealed that the initial contract was for less than the fair market value of the property, and that most of the distributees had signed waivers and consents to the sale of the property at the later contract price.

In re Estate of Washington, New York Law Journal, Jan. 10, 2006, p. 28 (Surrogate's Court, Kings Cty.) (Surr. Tomei).

• **Determination of Title to Real Property.** In *In re Estate of Massaro*, the court was asked to determine title to real property, which had been in the name of the decedent at death. The petitioner, who claimed the property, maintained that the decedent had agreed with her to take title to the property in her name solely so that she could obtain a mortgage on the premises, and that, as such, she did not hold legal title to the premises. The application was opposed by the administrator of the estate and the decedent's distributees who claimed title to the property by operation of law, and that the court lacked jurisdiction over the subject matter of the proceeding.

With regard to the jurisdictional question, the administrator alleged that the dispute was between living persons inasmuch as the subject property was in the decedent's name and passed to his distributees at death. The court disagreed, holding that in cases where it is claimed that the decedent held only equitable title to property but not legal title,

a proceeding may be instituted in Surrogate's Court to recover the property on a theory of constructive trust.

Further, based upon the evidence adduced at the hearing of the matter, the court found that petitioner had established all the requisite elements of a constructive trust, i.e., a confidential relationship between herself and the decedent, a promise by the decedent to re-convey the premises to the petitioner and her husband when their credit permitted it, a transfer based upon a

The son of the deceased grantor sought a construction of an inter vivos trust that would provide decedent's surviving spouse with a right of occupancy....

promise, in the form of a purchase of the property in the decedent's name, and unjust enrichment.

Accordingly, the court concluded that the administrator of the estate was constructive trustee for the petitioner and directed the fiduciary to execute a deed transferring title to the premises to the petitioner and her husband.

In re Estate of Massaro, New York Law Journal, Feb. 23, 2006 (Surrogate's Court, Kings Cty.) (Surr. Torres).

Right of Occupancy

• **Construction of Trust Highlights Meaning of Right of Occupancy.** The son of the deceased grantor sought a construction of an inter vivos trust that would have provided the decedent's surviving spouse with a right of occupancy rather than a life estate in his residence property.

The trust provided that upon the grantor's death an undivided one-third interest in the property would be allocated to a continuing trust for the benefit of the grantor's spouse, together with the right to reside in the premises "for as long as she shall desire." The trust further provided that, at such time as the property was sold, one-third of the net proceeds would be paid to the spouse outright and the balance would be paid to the decedent's son and daughter.

The petitioner maintained that the

decedent's surviving spouse forfeited her right to occupy the premises when she moved to Tennessee after the decedent's death and permitted her daughter- and son-in-law to reside at the property. On this basis, the petitioner demanded rent from the daughter and requested that the trustees be directed to sell the property.

In opposition, the respondents argued, inter alia, that the surviving spouse had not forfeited her right to occupy the premises, despite the fact that she was not occupying same as her primary residence, and that the trust had granted her a life estate in the property, and consequently, she was not required to reside there.

The record revealed that the decedent and his wife had resided at the property for the entirety of their 36-year marriage, and that, subsequent to the decedent's death, the spouse had paid all the expenses and taxes on the property. Moreover, despite her residence in Tennessee, the uncontroverted proof indicated that the spouse had left all of her furniture and belongings at the premises, continued to vote in New York, pay taxes in New York, and retain her medical insurance and doctors in New York.

The court held that even if the spouse used her Tennessee home as her primary residence and allowed her daughter to reside at the subject premises without paying rent, the facts did not support a holding that she had forfeited her right to reside at the subject property "for as long as she desired." The court said that there was nothing in the language of the trust that required the decedent's spouse to live continuously in the home or to use it as her primary residence in order to prevent it from being sold against her wishes. Moreover, there was nothing in the record that indicated that the spouse no longer desired to reside at the premises, given the evidence of her continued ties to New York.

Matter of Jan Reynolds Trust, New York Law Journal, March 16, 2006, p. 26 (Surrogate's Court, Bronx Cty.) (Surr. Holzman)

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