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TRUSTS AND ESTATES UPDATE

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Many Decisions, Big and Small, Key to Mid-Year Coverage

The year-to-date has brought columns devoted to such topical issues as real estate, attorney-client relations, and the interrelationship between subspecialties in the area of trusts and estates.

While the decisions addressed in these columns were of interest to the practice and were pointed examples of the issues at hand, they were just a smattering of the many significant decisions rendered over the past six months that were of importance to the field. Indeed, although not previously considered, these opinions are hardly to be overlooked and, therefore, deservedly serve as the focal point of this month's column.

Disclosure Requirements of SCPA 2307-a

In *In re Estate of Brokken,* the court addressed the novel question of whether the disclosure requirements of the Surrogate's Court Procedure Act (SCPA) 2307-a could be waived by the beneficiaries of the decedent's estate so that the attorney-fiduciary could receive full commissions.

The decedent's will, dated Dec. 16, 1994, named his brother and his attorney as co-executors of his estate, and expressly acknowledged his awareness that his attorney would be entitled to both commissions and legal fees. The court said that this disclosure failed to satisfy the provisions of the statute, SCPA 2307-a (2), inasmuch as it was contained within the provisions of the will, rather than in the form of a separate written instrument.

Nevertheless, the record reflected that the beneficiaries under the instrument had executed written consents to the attorney-fiduciary's receipt of full commissions and acknowledged that they had been fully informed of the requirements of SCPA 2307-a. The question thus presented was whether these consents could be used to override the dictates of the statute so as to entitle the attorney-fiduciary to more than one-half the commission to which he would otherwise be entitled.

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In concluding that the beneficiaries could waive the statute's protection, the court reviewed the legislative history and purpose of the statute, and noted that as a practical matter the true object of the statute's protection was the beneficiaries of the estate, who would be responsible for the legal fees and commissions payable to the attorney-fiduciary. As such, the court held it stood to reason to allow the beneficiaries to consent to full commissions under the circumstances, where full disclosure of the statutory dictates was made.

In re Estate of Brokken, **New York Law Journal, March 28, 2006, p. 24 (Surrogate's Court, New York Co.) (Surr. Roth)**

Waiving Attorney-Client Privilege

In an appeal from an Order of the Surrogate's Court, Nassau County, the Appellate Division, Second Department, affirmed the Surrogate's determination of a valid gift of real property, and sustained the court's ruling that allowed the administrator to waive the attorney-client privilege.

With respect to the attorney-client privilege, the Court found that the Surrogate properly admitted the testimony of the attorney who advised the decedent with respect to the deed transferring ownership of the subject real property to the administrator. The Court concluded that the attorney's testimony provided the best evidence of the decedent's intent and the decedent would likely have waived the privilege because the dispute involved her only heirs.

Additionally, the Court held that the clear and convincing evidence established that the decedent made a valid inter vivos gift of the realty in issue. The evidence and testimony demonstrated that the decedent was alert and aware at the time of the transaction and had the mental capacity to understand the transfer.

Matter of Bassin, **NYLJ, April 17, 2006, p. 34 (App. Div. 2d Dept.)**

Partial Revocation of Will

In an uncontested probate proceeding, the court was confronted with a will wherein the decedent attempted to partially alter its provisions after the date of execution.

The instrument was dated Feb. 21, 2003, and it was not drafted nor was its execution supervised by an attorney. It was signed by the testator and witnessed by three attesting witnesses. An acknowledgment of the testator's signature was also taken at the time of execution.

Apparently, the decedent made changes to the instrument, through obliterations, strike-outs, interlineations, and a handwritten statement, all of which were made after the date of its execution. Correction fluid appeared on the original document where some changes in names and percentages were made.

With respect to the question of the validity of the alterations made, the court set forth the general rule that in the absence of evidence that an alteration was made with the formalities of due execution, alterations made after the execution date of a will form no part of the will and the instrument is to be admitted in its original form. Moreover, the court noted that the law in New York does not recognize partial revocation of a will by physical act.

However, the court said that where, as in the present circumstances, an alteration obliterates the original form of the will, such that admission of the instrument in its original form cannot be accomplished, an issue arises as to whether and to what extent the instrument, in its altered form, should be given effect. Upon analysis, the court concluded that while the rule as to partial revocation would dictate otherwise, case law has taken a more modified approach and admitted

the will in its altered form, unless it is apparent that the unascertainable portion of the will would materially affect the remaining parts and probate would wholly disregard the decedent's intent.

Nevertheless, because application of this principle could prejudice the infant beneficiaries of the estate, the court deemed it appropriate to appoint a guardian ad litem to safeguard their interests and to determine whether, perhaps, scientific or other extrinsic evidence could reveal the terms of the original will.

In re Estate of Menchel, **NYLJ, 5/30/06, p. 44 (Surrogate's Court, Nassau Co. (Surr. Riordan)**

In Terrorem Clauses

The past several months have seen decisions that addressed the impact of an in terrorem clause upon a beneficiary's right to seek judicial relief. In the first, *In re Estate of Egerer,* the court examined the effect of an in terrorem clause upon a beneficiary's right to question a fiduciary's conduct; in the second, the court considered whether a distributee had forfeited her right to seek a construction of the decedent's will. See *In re Bernstein v. LoPata,* infra.

Before the court in *In re Estate of Egerer* was a petition seeking a determination of the validity of the in terrorem clause in the decedent's will. The petitioner had previously sought and obtained court order directing the fiduciaries of the decedent's estate and inter vivos trust to file an accounting. Petitioner then instituted the subject proceeding in order to determine whether pursuit of her interests in each of these proceedings would trigger the clause.

In pertinent part, the language of the subject clause stated:

> TWENTY SECOND:…It is expressly understood that any attempt by any beneficiary under this my Last will and Testament to hinder or delay, either directly or indirectly, whether for probable cause or not, the probate or administration of my Estate, or who precipitates, directly or indirectly, any legal proceeding of any nature in any Court of competent jurisdiction by utilizing any pretrial proceeding as defined under New York State Surrogate's Court Procedure act or the Estates Powers and Trust Law of New York State, including but not limited to, document production, objections to fiduciaries' conduct, bad faith or for any other basis whatsoever, I give and bequeath the sum of one ($1) dollar…

The petitioner argued that the clause violated public policy and was void pursuant to Estates Powers and Trust Law (EPTL) 11-1.7.

The court agreed. Although recognizing that in terrorem clauses are valid in New York, the court noted that they are viewed with disfavor, and will be deemed void to the extent that they are aimed at precluding a beneficiary from questioning the conduct of a fiduciary, and in essence, exonerating the fiduciary from the duty of reasonable care. See EPTL 11-1.7.

Accordingly, the court determined as void as against public policy that portion of the in terrorem clause that sought to inhibit and prevent the estate beneficiaries from objecting to the fiduciaries' conduct, bad faith or the like, or precluding them from participating in pretrial discovery attendant to such proceedings.

In re Estate of Egerer, **NYLJ, March 15, 2006, p. 29 (Surrogate's Court, Suffolk Co.) (Surr. Czygier)**

In 'Bernstein,' the court received a petition for construction of the decedent's will by his daughter, who said the residuary clause of the instrument was void for indefiniteness and that the residue passed by intestacy.

In *In re Bernstein v. LoPata,* the court was presented with a petition for construction of the decedent's will by his daughter, who claimed that the residuary clause of the instrument was void for indefiniteness and that, as a result, the residue passed by intestacy.

The residuary clause provided:

> I direct that my Executor/ Executrix shall distribute the residuary of my estate to charities of his/her choice.

The construction proposed by the petitioner was opposed by the executor and by the attorney general.

As a threshold matter, however, the executor claimed that the proceeding should be dismissed on the grounds that the petitioner lacked standing.

The court said that, in order to have standing to seek a construction, the petitioner must have an interest in the property that will be affected by the construction. The executor argued that inasmuch as the petitioner waged an unsuccessful probate contest and thereby triggered the in terrorem clause under the decedent's will, she forfeited any interest in the decedent's estate that would have enabled her to pursue the requested construction.

In sustaining the executor's position, the court examined the language of the in terrorem clause of the decedent's will and found that inasmuch as it specifically disenfranchised a beneficiary, who participated in a court action "about the provisions of the Will," from an interest under the will "or otherwise," it could be construed to disinherit a beneficiary from a testate and intestate share of the estate. Accordingly, the court concluded that the petitioner lacked standing to seek a construction of the residuary clause and dismissed the petition.

Moreover, and in any event, the court held that the residuary clause did not fail for indefiniteness, and constituted a valid charitable bequest.

In re Bernstein v. LoPata, **NYLJ, May 30, 2006, p. 45 (Surrogate's Court, Nassau Co.) (Surr. Riordan)**

Summary Judgment Granted

Proof of Forfeiture Found. In a contested administration proceeding, the petitioner, who was the decedent's sister, sought an order holding that the decedent's surviving spouse was instrumental in her death, and as such, had forfeited his interest as a distributee.

The record revealed that the police found the body of the decedent in her home after being summoned there by her husband. He was arrested and, thereafter, confessed to shooting his wife in the head and killing her. After being indicted for murder in the second degree, and while arraignment, the decedent's husband post-deceased her.

The distributees of the decedent's husband filed an answer with general denials of the allegations in the petition, and an affirmative defense that he was not criminally culpable for the decedent's death by virtue of a mental disease that was triggered by the decedent's poor health. The court noted that it had previously ruled on this theory, and had concluded that because the "trigger" defense had not gained acceptance in New York, any proof lending credence to same would be excluded. The distributees also submitted an affidavit from a forensic psychiatrist who requested the opportunity to establish at trial that the psychiatric condition the decedent's husband made him mentally incapable of criminally causing the death of his wife.

Based upon the record, the court concluded that the respondents had failed to raise a triable issue of fact respecting the mental capacity of the decedent's husband at the time of the decedent's death. Specifically, the court noted that respondents' request to submit psychiatric proof of the husband's mental condition was based upon hospital records reflecting a condition that existed two years before the decedent's death and, therefore, was too remote from the incident involving her murder.

Accordingly, the motion for summary judgment was granted, and the decedent's husband was held to have forfeited his interest in the decedent's estate.

In re Estate of Stiehler, **NYLJ, April 20, 2006, p. 21 (Surrogate's Court, Richmond Co.) (Surr. Fusco)**