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TRUSTS AND ESTATES UPDATE

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Perspectives of the Appellate Bench

Over the past several months, appellate courts have been confronted with a multitude of issues pertaining to the field of trusts and estates. Significantly, the bench has rendered opinions regarding such matters as contested probate proceedings, accounting proceedings and construction proceedings. A discussion of the court's views on these subjects follows.

Undue Influence and Fraud

• **Claims of Undue Influence and Fraud Dismissed on Appeal.** In a contested probate proceeding, the Appellate Division modified an Order of the Surrogate's Court, New York County, to the extent that it denied petitioner-appellant's motion for summary judgment dismissing the objections based upon fraud and undue influence, and the objectants' cross-motion for summary judgment denying probate on these grounds and on public policy grounds, and held that all such objections should be dismissed.

The decedent was 92 years of age at the time of her death. The propounded will disinherited three of her six children, and left the bulk of her estate to her remaining children, and to the wife of her eldest child, Tomas. In a statement in the will and in a handwritten statement attached to the will, the decedent explained that she had disinherited her three children because they had failed to terminate a lawsuit they had instituted against Tomas and his wife, which sought to remove them as co-fiduciaries of the estate of the decedent's brother-in-law. The three children who had been disinherited objected to probate.

At the conclusion of discovery, the Surrogate denied motions for summary judgment filed by the proponent and the objectants. The



Appellate Division disagreed, finding that there were no triable issues of fact as to the claims of fraud and undue influence, and as to objectants' contention that the propounded instrument violated public policy.

With respect to the issue of undue influence, the court noted that while summary judgment in contested probate proceedings should be exercised cautiously, it is appropriate where the proponent establishes a prima facie case for probate and the objectant fails to present proof sufficient to raise a genuine issue of fact to the contrary. Within this context, the court found persuasive the fact that the decedent had an especially close relationship with her firstborn son, Tomas, and in numerous letters to her children, had expressed extreme displeasure over the lawsuit against him commenced by her three children. When decedent's pleas to her children to withdraw the suit were ignored, the court concluded that she was left with no other alternative but to disinherit them.

Moreover, the court found the record devoid of any evidence that Tomas actually compelled the decedent to execute the propounded will. The fact that the instrument favored Tomas over his siblings was, in itself, insufficient. Further, the record established that Tomas was not present when the will was executed,

and that he had no direct involvement in its preparation or execution. The court held that the mere fact that the attorney who drafted the will was a close friend to Tomas was not, under the circumstances, sufficient to raise a triable issue of fact.

As to the issue of fraud, the court found the objectants' claims were nothing more than speculation and conclusory allegations, and therefore, insufficient to raise a triable issue of fact.

Lastly, the court found the claim that the will violated public policy to be unpersuasive.

In re Probate of the Will of Ryan, NYLJ, Nov. 6, 2006, p. 28 (App. Div., 1st Dept.).

Meaning of 'Household Items'

• **Construction of Will Determines Meaning of "Household Items."** Before the Appellate Division in *In re Estate of Isenberg*, was an appeal from an Order of the Surrogate's Court, New York County, which determined, inter alia, that the term "household items," as used in the decedent's will, encompassed paintings, figurines, and other artwork in the testator's home, both on display and stored, and allowed such items selected by the designated beneficiary thereof to be collected and shipped to the beneficiary rather requiring her to retrieve them in person.

In affirming the Order of the Surrogate's Court, the Appellate Division found that the testator's intent, as expressed in his will, was that his sister could select those items in his home that would be considered "household items" in her own home—i.e., items that she desired to keep. The remainder of the testator's property, if any, would then pass to the four residuary beneficiaries. Notably, the will did not mention any other type of personalty, and the only other bequests were of sums of money. Further, the court held that the Surrogate was correct in finding that the bequest of "household items" included all artwork in the testator's home, whether on display or stored in a

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closet. However, to the extent that the decedent's sister sold or gave away some of those pieces of art, the court concluded that the Surrogate properly ordered the return of the items, or the proceeds of their sale, to the estate.

Finally, the court held that the decedent's sister, who was elderly and living in Massachusetts at the time of her brother's death, did not have to travel to New York to physically retrieve the items she desired.

In re Estate of Isenberg, NYLJ, Nov. 6, 2006, p. 22 (App. Div., 1st Dept.).

Objections to Probate Found Untimely

In *Matter of Esteves*, the Appellate Division, Third Department, affirmed an Order of the Surrogate's Court, Columbia County, which rejected the appellants' objections to probate and granted letters testamentary to the petitioner.

The appellants were the respondents in a proceeding for the probate of the decedent's will. On the return date of citation, examinations pursuant to SCPA 1404 were requested, and were scheduled to take place on Oct. 20, 2005. The court order scheduling the examinations directed that objections, if any, to probate be filed within 10 days of the completion of the examination. Because Oct. 30, 2005 was a Sunday, objections to probate were mailed to petitioner's counsel and the court on Oct. 31, 2005, and were received by the court for filing on Nov. 1, 2005. Petitioner's counsel requested that the objections be rejected, and respondents' counsel opposed. The court concurred with the petitioner, and granted letters testamentary to the petitioner. The Appellate Division affirmed.

The court held that pursuant to the Uniform Rules, objections must be filed with the court within 10 days of an SCPA 1404 examination, and that papers are not deemed filed until received by the clerk of the court. Since the parties did not stipulate to a different time frame and the Surrogate Court's order was in accord with the time period established by the Uniform Rules, the Appellate Division concluded that the Surrogate was correct in finding that the objections were not timely filed. The court noted that when the time for filing objections has expired, objections may not be accepted for filing unless accompanied by a stipulation of the parties, or a court order.

Under the circumstances, the court determined that had the respondents wanted to proceed with their objections, they should have moved for leave to file late objections, and provide an excuse for their untimeliness. Failing to do so, respondents' objections were properly rejected by the Surrogate.

Matter of Esteves, 31 AD3d 1028 (3d Dept. 2006).

Contested Accounting

• *Sanctions Against Objectant in Contested Accounting Affirmed.* On an appeal from an Order of the Surrogate's Court, New York County, the Appellate Division affirmed the Surrogate's determination that approved the trustees' final account and imposed sanctions against the objectant.

The court held that the trustees made out a prima facie case that their account was accurate and complete by submitting the account as amended and a supporting affidavit, and that the objectant had failed to carry his burden of coming forward with any evidence showing the inaccuracy of the account. The court further concluded that the objectant's contentions that missing estate assets should have funded the subject trust was barred by res judicata as a result of a 1964 decree settling the executors' account, and that his objections regarding trustee misconduct were barred by collateral estoppel, since the issues were identical to those raised and decided in a related proceeding involving the same trust assets, in which the objectant had a full and fair opportunity to be heard.

Finally, the court held that the imposition of sanctions was warranted in light of the objectant's failure to support any of his objections with evidence, and his continued pursuit, despite warnings by the court, of claims lacking in merit and previously dismissed on appeal.

In re Judicial Settlement of the Account of Jack Rudin and Lewis Rudin, as Successor Trustees of the Trust for the Benefit of Lydia Heimlich, under the Will of Nathan Rudin, NYLJ, Nov. 30, 2006, p. 31 (App. Div., 1st Dept.).

New Trial

• *Inference of Undue Influence Requires New Trial.* In a contested probate proceeding, the objectants appealed from so much of a decree of the Surrogate's Court, Rockland County, as denied their motion to set aside the verdict of the jury and for judgment as a matter of law on the issue of undue influence, or alternatively, to set aside the verdict as against the weight of the evidence and for a new trial on the issue of undue influence. The Appellate Division reversed the decree and remitted the matter to the Surrogate's Court, Rockland County, for a new trial on the issue of undue influence.

Pursuant to the terms of her will, the decedent devised and bequeathed her estate to her niece and her great-nephew, her niece's son. She left nothing to her nephew or to the children of a predeceased niece, who objected

to probate. At trial, the testimony revealed that the decedent's great-nephew acted as her accountant, and that he assisted her with her finances. Moreover, it appeared that he played an active role in selecting the decedent's attorney, and was directly involved in the preparation of the testamentary instrument offered for probate.

Based upon this record, the Appellate Division said that an inference of undue influence arises when a beneficiary under a will is in a confidential or fiduciary relationship with the testator and is involved in the drafting of the will. Although the inference does not shift the burden of proof on the issue of undue influence, it places the burden of going forward on the beneficiary to explain the circumstances of the bequest. The adequacy of the explanation presents a question of fact for the jury.

Within this context, the Court found that since the decedent's great-nephew served as her accountant, chose an attorney for her, and was directly involved in the preparation of her will, the Surrogate's Court erred in declining to instruct the jury that there was an inference of undue influence, and that the burden was on him to explain the circumstances of his bequest. Accordingly, the court held that a new trial on the issue of undue influence was required.

Further, the court determined that the Surrogate properly refused to admit into evidence a photocopy of a prior will allegedly executed by the decedent, since the objectants failed to explain the unavailability of the original instrument. Additionally, the court found that the Surrogate was correct in declining to admit into evidence the entire guardianship file pertaining to the decedent on the grounds that such materials may have included damaging hearsay and would, therefore, have been severely prejudicial.

In re Estate of Neenan, __NYS2d__, 2006, WL 3525275, 2006 N.Y. Slip Op. 09250, (2d Dept. 2006).