

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

A Prolific Beginning to the Year 2007

The relatively mild winter season has seen a flourish of decisions impacting the field of trusts and estates. From opinions relating to the elective share, stipulations of settlement, tenancies by the entirety, jurisdiction, and service of process, both the Surrogate's Court and the Supreme Court were busy providing instructive guideposts for the estate practitioner.

The winter months also saw significant activity by the New York State Bar Association as its Executive Committee and House of Delegates approved, as affirmative legislation, five bills proposed by the Trusts and Estates Section of the Association.

Authority to Exercise Right of Election

Before the court was a petition by the guardian ad litem for the decedent's spouse for authority to exercise a right of election on the spouse's behalf. The application was supported by an alleged attorney-in-fact for the spouse, and was opposed by the co-executors of the decedent's estate.

The guardian ad litem maintained that it would be in the best interests of the spouse to receive more of the decedent's estate outright, rather than less, in trust, as the decedent's will provided. On the other hand, the executors claimed that the spouse had substantial wealth in her own right, and thus would not benefit from the elective share. Moreover, they argued that the spouse would likely dispose of the property she received in favor of her niece, who was her only heir, rather than in favor of the decedent's issue. The court found this latter argument unpersuasive, saying that the decedent's spouse should not be deprived of the benefit of disposing of her assets as she chose.

The court found compelling the guardian ad litem's report that the decedent's spouse was aware of the difference between outright and beneficial ownership, and "implored" him to do "everything within his power to make sure she receive[d] all property to which she [was] entitled." Similarly, her attorney-in-fact alleged that he had discussed the issue of the elective



share with the decedent's spouse, and that she was emphatic that he do everything he could to obtain for her the maximum to which she was entitled from her husband's estate.

The court noted that the attorney-in-fact had attempted to file a notice of election on behalf of the spouse prior to the commencement of the proceeding by the guardian ad litem, but was met with opposition by one of the two co-executors of the decedent's estate who maintained that the power had been superseded by a durable power of attorney in his favor. While the court stated that an attorney-in-fact could exercise a right of election on behalf of his principal, it concluded that the issue was not the validity of the attorney-in-fact's notice of election, but instead, whether the guardian ad litem should be authorized to exercise the right of election on the spouse's behalf. Accordingly, within this context, given the spouse's clearly expressed desire to obtain her elective share, the guardian ad litem's petition was granted.

In re Estate of Slade, New York Law Journal, 1/18/07, p. 31 (Surrogate's Court, New York County) (Surr. Roth)

Inadequate Consideration

• **Stipulation of Settlement Upheld Despite Claim of Inadequate Consideration.** In *In re Estate of Saviano*, the court was confronted with the issue of whether a stipulation of settlement could be vacated.

The record revealed that the decedent died, testate, survived by his ex-wife and four children. Pursuant to his will, he left his entire estate to his

infant granddaughter. The principal asset of his estate was a one-half interest in a home that he owned as tenants in common with his ex-wife. Subsequent to the decedent's death, his ex-wife died with a will that left her one-half interest in the subject property in trust for the benefit of one of her sons, who was under a disability, and upon his death, to her three remaining children. The disabled child and his guardian-brother had been living in the property rent-free since the death of the ex-wife.

Prior to her death, the decedent's ex-wife filed a claim against his estate for, inter alia, unpaid maintenance, and for one-half of his share of the real estate taxes, mortgage payments, insurance and capital improvements on the subject premises. The claim was opposed by the executrix of the decedent's estate, who filed a counterclaim for one-half the fair rental value of the property, and the matter was ultimately set down for a hearing.

On the date of the hearing, the parties entered a stipulation settling all claims the parties had against each other. The parties were then allocuted on the record to insure that they had freely entered the stipulation and fully understood its terms. Thereafter, a decree was signed incorporating the terms of the stipulation.

Thereafter, the guardian ad litem for the infant granddaughter of the decedent's estate moved to hold the executors of the decedent's estate and the ex-wife's estate in contempt for failing to abide by the terms of the settlement. A second stipulation was placed on the record whereby the original agreement between the parties was reiterated, but with the proviso that it could be challenged within 60 days by the executrix of the decedent's estate. That motion was timely made and was opposed by the executor of the ex-wife's estate and the guardian ad litem for the grandchild.

In upholding the stipulation, the court first rejected the executrix's argument that the settlement gave her the unilateral right to void the earlier stipulation between the parties. The court held that such a construction would deprive the stipulation of any binding force, and was contrary to the terms of the agreement entered on the record. Further, the court held that the executrix's claim that the stipulation was void because the executor of the ex-wife's estate failed to furnish

the check in accordance with its terms was unper-
suasive, inasmuch as the check had indeed been
furnished, albeit payable to the executrix per-
sonally, and had been deposited by her into her
personal account instead of the estate account.
The court said that a party in breach of a duty
under a contract cannot complain of breaches by
the other side, especially where the other side
had no knowledge or reason to know of his or
her own breach.

Finally, as to the executrix's claim that the
stipulation should be vacated because the con-
sideration was grossly unfair, the court held that
merely because the consideration was believed to
be too low was not grounds for vacating an oth-
erwise proper stipulation for which the ex-wife's
estate gave up various claims as consideration.

Accordingly, the motion to vacate the stipula-
tion was denied.

In re Estate of Saviano, NYLJ, Jan. 29, 2007,
p. 23 (Surrogate's Court, Kings County) (Surr.
Lopez Torres)

Tenancy by the Entirety

• **Ownership as Tenancy by the Entirety Sustained.** In an action regarding title to real property located in Queens, the Supreme Court was confronted with the issue of whether title to the property was in the decedent's name as tenant in common or as tenant by the entirety with his wife. The matter was assigned to a referee to hear and determine the matter.

The records in the Office of the Register of Queens County revealed that title to the subject property was in the name of the decedent and his wife. There was no evidence that the decedent ever divorced his wife or that the marriage between the parties was annulled or that the parties ever legally separated.

Approximately five weeks before his death, the decedent executed a will in which he devised the premises to his brother. Subsequent to the decedent's death, his brother died. Thereafter, the administrator cta (cum testamento annexo, "with the will annexed") of both the decedent's estate and the estate of his post-deceased brother brought suit seeking a determination that the premises was partly or wholly owned by the decedent at the time of his death. Specifically, the fiduciary claimed that the decedent was not married at the time the subject property was purchased, and that as such, he took title to the premises as tenant in common with his purported wife, and his 50 percent interest passed by his will to the heirs of his post-deceased brother.

The referee held that the fiduciary of the estates failed to sustain her burden of proof that the decedent was not married at the time the subject property was purchased, or that the marriage was subsequently severed or that the parties separated prior to the decedent's death. In particular, the referee rejected the evidence offered by the estates, and found the documentary evidence supporting the existence of the marriage to be persuasive. Significantly, the deed between the parties described title as being held in the names of the decedent and his wife, and the decedent's will made a bequest to this same woman whom he referred to as his wife. Furthermore, she was the informant on the decedent's death certificate, and described herself as the decedent's surviving widow.

With this evidence in mind, the referee said that "[w]here persons live as husband and wife and are reputed as such, a presumption arises that they have been legally married and this presumption can only be rebutted by the most cogent and satisfactory evidence (citations omitted)." The referee concluded that such evidence had not been presented by the fiduciary, and thus concluded that the property passed on the decedent's death by operation of law to his surviving spouse.

Bethae-Rowlett v. Sanders, NYLJ, Feb. 7, 2007, p. 20 (Supreme Court, Queens County) (Referee Lonschein)

In an action regarding title to real property located in Queens, the Supreme Court was confronted with the issue of whether title to the property was in the decedent's name as tenant in common or as tenant by the entirety with his wife. The matter was assigned to a referee to hear and determine the matter.

Jurisdiction: Lifetime Trusts

Before the court was a proceeding to set aside a deed in which the Grantor, by exercising a power of appointment transferred real property to an Inter Vivos Supplemental Needs Trust. The Trustee of the trust moved for an Order dismissing the petition on the grounds that the court lacked subject matter jurisdiction.

The court denied the motion, holding that pursuant to SCPA 207(1) the surrogate's court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state. Inasmuch as the subject asset of the trust was real property in New York State, and the trustee was a resident of New York State as well, and the provisions of SCPA 209(6) grants the court with the power to determine all matters relating to lifetime trusts, the court found that it had jurisdiction over the subject matter of the proceeding.

Matter of Petition by Harvey Greenberg to Revoke and Set Aside the Deed by Goldie Greenberg, NYLJ, Jan. 23, 2007, p. 31 (Surrogate's Court, Queens County) (Surr. Nahman)

Due Diligence

• **Due Diligence Requirement for Substituted Service.** In a breach of contract action, the plaintiff moved for a default judgment against the defendant on the grounds that the defendant failed to appear or plead, pursuant to CPLR 3215(a).

The record revealed that the plaintiff purportedly served the defendant with a summons and complaint by nail and mail service pursuant to CPLR 308(4). The affidavit of the process server regarding his attempt at personal service revealed that he only attempted on one occasion to serve the defendant prior to effecting substituted service.

The court held that the nail and mail method of service could only be utilized where personal service cannot be made with due diligence. Based on the facts presented, the court concluded that the plaintiff had failed to meet the due diligence requirement imposed by the CPLR. One prior attempt at service, particularly where the process server has not made any effort to locate the defendant's place of business and to effectuate personal service there will not suffice.

Moreover, the court found that the plaintiff's moving papers failed to provide the additional notice required under CPLR 3215(g)(3) before a default judgment could be obtained.

Accordingly, plaintiff's motion was denied.
Saitta v. Dichiaro, NYLJ, Feb. 1, 2007, p. 25 (Supreme Court, Suffolk County) (Justice Mayer)

Legislative News

The New York State Bar Association recently approved five pieces of legislation proposed by the Trusts and Estates Section. This legislation, which will form a part of the state Bar's legislative agenda, provided for the following critical statutory amendments affecting the practice:

- 1) An amendment to SCPA 2211 to provide for disclosure of documents in advance of an examination of the fiduciary pursuant to SCPA 2211.
- 2) An amendment to the Mental Hygiene Law to provide that the Supreme Court has no authority to determine the validity of a will.
- 3) An amendment to the Mental Hygiene Law to provide for the turnover of assets by the guardian to the personal representative of an estate.
- 4) An amendment to various statutes to substitute the term "birth parent" for "natural parent."
- 5) An amendment to the Public Health Law to provide a statutory right to make a living will.

Reprinted with permission from the March 22, 2007 edition of the NEW YORK LAW JOURNAL. © 2007 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit www.almreprints.com. #070-03-07-0041