

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Appellate Division Review

This past year has marked surrogate's court decisions and legislation of significant interest to the field of trusts and estates. From will construction proceedings, accounting proceedings, and the attorney-client privilege, to legislation affecting attorney-fiduciaries and pre-objection discovery, both the judiciary and the Legislature have been prolific.

The appellate division has been no less productive in rendering decisions of import to the practice:

First Department

• **Attorney-Client Privilege.** In *Matter of Kaminester*, the appeal was taken from an Order of the Supreme Court, New York County, which, inter alia, directed that the respondent's former counsel appear and testify as to conversations with the respondent in an ongoing hearing to determine whether the respondent should be held in contempt of court.

The application for contempt was based upon certain conduct allegedly engaged in by the respondent in violation of a temporary restraining order that directed her not to accept any funds or financial benefit from the decedent pending the outcome of a guardianship proceeding on the decedent's behalf. Subsequent to the issuance of the order, the decedent changed his life insurance policy to name respondent as beneficiary and deeded his vacation home to himself and respondent as joint tenants, and married respondent.

The appellate division found that since there was no testimony as to any consultation between respondent and her attorney prior to the alleged fraudulent transactions in issue, the supreme court erred in ordering counsel to testify as to communications with her former client in violation of the attorney-client privilege. Moreover, the court held



that there was no evidence that the attorney-client privilege had been waived, as respondent never placed the subject matter of her conversations with counsel in issue.

***Matter of Kaminester*, 841 NYS2d 587 (NYAD 1st Dept., Sept. 20, 2007).**

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• **Statute of Limitations for Fiduciary Breach of Conduct.** In a suit against former counsel for the fiduciary, the First Department reversed the Order of the Supreme Court, New York County, which granted the defendant's motion to dismiss the complaint.

Plaintiff retained counsel to represent her in a compulsory accounting proceeding that had been instituted against her by the grantor of an inter vivos trust of which she had been the trustee. The proceeding was instituted more than six years after plaintiff had resigned as trustee of the trust. Plaintiff's counsel filed a notice of appearance on her behalf but did not answer the petition. As a result, an order was entered directing the plaintiff to account. Plaintiff subsequently retained new counsel and accounted. Objections to the account were filed by the grantor of the trust requesting, inter alia, that plaintiff be surcharged for acts committed prior to her resignation. Plaintiff moved to dismiss the objections on the basis of the statute of limitations.

The surrogate's court denied plaintiff's motion, holding "that the statute of limitations can begin

to run on the beneficiary's right to an accounting, only where the former fiduciary has failed to have accounted after a reasonable time to do so has passed." (12 Misc3d 621,625 (2006)).

The First Department affirmed, but on different grounds, finding, instead, that the plaintiff waived her statute of limitations defense by failing to raise it in response to the grantor's petition to compel an accounting. The court noted that the statute of limitations begins to run on claims against a fiduciary either when a fiduciary judicially accounts or openly repudiates his administration to the knowledge of the beneficiary. The court held that such an open repudiation may be found when a fiduciary resigns and surrenders his stewardship. In addition, the court found that the statute of limitations defense does not run against particular acts committed by a fiduciary, but rather against a fiduciary's duty to account. (30 AD3d 211 (2006))

As a consequence of the foregoing rulings, plaintiff instituted suit against her former counsel. Former counsel moved to dismiss on grounds of collateral estoppel, arguing that the surrogate's court decision rejecting the statute of limitations defense, which was affirmed by the appellate division, established that plaintiff could not have prevailed in an accounting.

The appellate division held that plaintiff's claim against her former counsel for failure to assert the statute of limitations as a defense to the compulsory accounting petition set forth a cause of action. The court held that principles of collateral estoppel based upon its prior ruling did not preclude plaintiff's suit, inasmuch as it had not relied on the surrogate court's reasoning when it had denied the plaintiff's statute of limitations defense, but on an alternate ground, that had not been previously litigated. Given these circumstances, the court said that the surrogate's ruling was not the final determination of the matter, and, had no preclusive effect. Moreover, the court held that once the reasoning of the surrogate's court was replaced by the reasoning of the appellate court, it could not stand as a statement of the law, since the issue

was neither “squarely addressed” nor “specifically decided” on appeal. Further, the court found that as an equitable remedy, the doctrine of collateral estoppel could not be properly applied against the plaintiff.

According, the court denied the defendant’s motion to dismiss plaintiff’s complaint, and directed that it be reinstated.

Matter of Tydings, 2007 N.Y. Slip Op. 06734 (N.Y.A.D. 1st Dept., Sept. 13, 2007).

Second Department

• *The Enforceability of Arbitration Clauses.*

During the course of a probate proceeding, the executor of the estate instituted a proceeding against several named respondents, one individual and three corporations, to discover property purportedly withheld from the decedent’s estate based upon promissory notes executed by the decedent prior to his death. The petitioner moved to stay arbitration of the claims related to the notes and the respondents cross-moved to compel arbitration. The Surrogate’s Court, Queens County, granted petitioner’s motion and an appeal was taken.

In affirming the surrogate’s order, the appellate division held that while arbitration is favored as a means of resolving disputes and that courts will interfere as little as possible with agreements to arbitrate, this policy is counterbalanced by the fact that a party who agrees to arbitrate waives many of his rights under the procedural and substantive law of New York. Accordingly, a party will not be compelled to arbitrate without evidence that affirmatively establishes that the parties expressly agreed to arbitrate their disputes.

The record on appeal revealed that the dispute between the parties involved partnership agreements between the decedent and the individual party-respondent. The agreements were entered by the parties in their individual capacities and had broad arbitration clauses. Thereafter, four promissory notes were signed in which two of the corporate-respondents were obligors. The individual-respondent owned an interest in the entities and signed three of the notes as “president.” However, neither one of the corporate-respondents were parties to the partnership agreements.

Based upon the foregoing, the court concluded that the arbitration clauses in the partnership agreements did not apply to the promissory notes involving the corporate-respondents, and more particularly, that the decedent had not expressly agreed to arbitrate claims related to the promissory notes. Accordingly, the court held that the surrogate’s court properly determined that the petitioner could not be compelled to arbitrate claims on those notes.

Matter of Miller, 40 AD3d 861 (NYAD 2d Dept., May 15, 2007).

• *Order Granting Summary Judgment in Discovery Proceeding Affirmed.* In a discovery proceeding pursuant to SCPA 2103 to recover certain property withheld from the estate of the decedent, the petitioners appealed from much of an order of the Surrogate’s Court, Suffolk County which, inter alia, granted summary judgment in respondents’ favor dismissing those portions of the petition asserted against them.

The decedent purchased three annuities in the year and a half prior to his death, which paid him income only, with no death benefit. The petitioners alleged that the decedent’s insurance broker, who was also his financial adviser, made certain fraudulent representations to him that induced him to purchase the annuities. The insurance companies that issued the policies were also made party-respondents to the proceeding.

In affirming the order of the surrogate’s court, the appellate division found that the respondents had made a prima facie showing of entitlement to judgment as a matter of law, that no misrepresentations were made to the decedent, and that he purchased the annuities as part of his overall financial plan. The court concluded that the petitioners had offered nothing beyond mere surmise and conjecture to support their claims, and therefore, summary judgment dismissing the petition insofar as asserted against the respondents was proper.

Matter of Valentin, 841 NYS2d 781 (NYAD 2d Dept., Sept. 11, 2007).

Third Department

• *Probate of Lost Will.* In *Matter of Castiglione*, the appellate division affirmed an Order of the Surrogate’s Court, Fulton County, which granted petitioner’s motion to dismiss the objections to probate of the decedent’s will, and admitted the will to probate.

Probate was sought of a purported copy of the decedent’s will, and the original of a subsequently executed codicil. The objections alleged lack of due execution and testamentary capacity, as well as fraud and undue influence.

Based upon a reading of the provisions of the will, which the court found fair and natural in their scope, and the self-proving affidavits affixed to the will, wherein each of the witnesses stated that in their opinion the decedent suffered from no physical or mental impairment, the court held that the petitioner had made a prima facie case of testamentary capacity. The court concluded that the objectant had responded with only bare assertions that the decedent suffered from Alzheimer’s disease, and had failed to support their claim with any medical evidence or competent testimony.

Moreover, the court held that the objectant had failed to present a viable challenge to the execution of the will in the face of the prima facie evidence submitted by the petitioner.

Further, as to the issue of the lost will, the court concluded that the petitioner had sufficiently refuted any presumption of revocation through the affidavit of the attorney-draftsperson, who stated that the original will had been kept in his vault for safekeeping, but had been lost at the time he moved his office. The attorney-draftsperson of the codicil corroborated this chain of custody. In addition, the attorney-draftsperson of the will signed a sworn statement that the copy of the instrument was a true and accurate representation of the original.

Finally, the court held that the objectant had failed to satisfy her burden of demonstrating that the decedent was unduly influenced to execute the propounded will and that, as such, the objections on this ground had been properly dismissed.

Matter of Castiglione, 40 AD3d 1227 (NYAD 3d Dept., May 10, 2007).

Fourth Department

• *Petition for an Elective Share.* In *Matter of Britcher*, appeal was taken from an Order of the Surrogate’s Court, Oneida County, which denied petitioner’s motion for summary judgment dismissing respondent’s notices of election, and granted respondent’s cross-motion for summary judgment dismissing the petition. The order was affirmed.

The record revealed that the decedent and the respondent, his wife, entered into a separation agreement in 1988 that included a waiver of estate rights. Nevertheless, the parties never divorced, but rather reconciled and resumed their marital relationship in 1995. From 1995 until the decedent’s death in 2004, the couple lived together as husband and wife and evinced an intent to void the separation agreement in its entirety.

The appellate division rejected the petitioner’s reliance upon General Obligations Law §15-301(2), which requires a subsequent writing to invalidate a separation agreement. Further, the court declared void that portion of the separation agreement providing that it could not be invalidated without a separate writing, and held that the provisions could not be taken to render specific terms of the agreement from being independently enforceable, particularly where, as in the circumstances presented, the “agreement itself, rather than any one of its components, is brought to an end.”

Matter of Britcher, 38 AD3d 1223 (NYAD 4th Dept., March 16, 2007).