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TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Extrinsic Evidence in Construction of Decedent's Will

Summer has come and gone faster than we can stop to think about it, but it has given us much in the way of judicial opinions to reflect upon this fall. From construction proceedings to rules of discovery and contested probate proceedings, Surrogate's Court and appellate decisions have provided the trusts and estates practitioner with considerable practical and substantive material of interest.

Extrinsic Evidence

• **Utilized in the Construction of Decedent's Will.** In an uncontested proceeding, the petitioners/trustees requested that the decedent's charitable trust be reformed and construed to resolve certain ambiguities within the trust agreement.

The decedent created a charitable remainder unitrust several years prior to his death. One of the trustees was also the attorney-draftsperson of the instrument. Subsequent to the decedent's death, a charitable foundation was created for the benefit of three charities. Pursuant to Paragraph D of Article VIII of the trust, the foundation was to benefit the three charities in stated percentages of unequal amounts. Pursuant to Paragraph F of that same article, the trustees were directed to make specified payments to the charities for a 30-year period, and thereafter to commence making additional distributions so that all principal and income of the trust was fully distributed to the charities within 40 years after the decedent's death. However, as compared to Paragraph D, Paragraph F required the trustees to distribute or apply the funds thereunder in equal shares to the charities.

The petitioners maintained that the discrepancy was due to a scrivener's error. According to the draftsperson, when he prepared the final draft of the trust instrument containing the percentages set forth in Paragraph D, he inadvertently failed to make corresponding changes in Paragraph F. Petitioners thus



requested that Paragraph F be reformed to conform with the percentages in Paragraph D.

In granting the requested relief, the court considered the extrinsic evidence offered by the draftsperson, opining that an ambiguity was created by the inconsistent provisions of the instrument. Based upon this evidence, the court held that it was the decedent's intent to provide for distributions in the percentages set forth in paragraph D.

Application of Merrill Lynch Trust Company and Martin W. Ronan, Jr. for Construction of Charitable Trust, NYLJ, Aug. 12, 2008, p. 33 (Sur. Ct. New York County) (Sur. Glen).

Summary Judgment Granted

• **Admitting Will to Probate.** In a contested probate proceeding, the objectants appealed from an Order of the Surrogate's Court, Fulton County, which granted summary judgment to the petitioners.

The record revealed that the decedent's will was offered for probate by the named executor, who was the decedent's live-in companion of nearly 30 years. Three of the decedent's four children objected to probate claiming undue influence and fraud by the petitioner. After a substantial amount of discovery, the petitioner moved for summary judgment. The application was granted, and two of the objectants appealed.

On appeal, the objectants claimed, for the first time, that the decedent lacked testamentary capacity at the

time the propounded will was executed. Although the Appellate Division held that the issue had not been preserved properly for appeal, it nevertheless concluded, based upon the uncontroverted deposition testimony of the attorney-draftsperson-witness to the will, that at the time the decedent executed the propounded instrument the decedent was of sound mind and memory, was aware of the nature and extent of his property, and knew the persons who were the natural objects of his bounty. The court held that the objectants had only provided bare assertions regarding the decedent's illiteracy and incapacity that were insufficient to raise a triable issue of material fact.

As to the issue of undue influence, the court held that while the petitioner may have had the opportunity to exercise undue influence, objectants had not offered sufficient facts to prove that any undue influence was exerted. Petitioner had, indeed, demonstrated that she lacked motive to exercise undue influence since she had a sizeable estate in her own right, most certainly as compared to the relatively small estate of the decedent. Furthermore, the court found that petitioner did not participate in the drafting of the propounded will, and that the provisions of the instrument were rational, given the decedent's long-lasting relationship with the petitioner and his strained relationship with two of his children.

With respect to the issue of fraud, the objectants alleged that petitioner falsely induced decedent to leave his entire estate to her by promising him that she would execute her will in order to leave the bulk of her estate to two of his children. However, the record revealed that the petitioner executed a will on the same date as the decedent, and did in fact leave her estate as she had promised. Accordingly, the court held that the objectants had failed to allege sufficient facts to prove fraud.

As a consequence, the Order of the Surrogate's Court was affirmed.

In re Estate of Colverd, NYLJ, June 23, 2008, p. 20 (App. Div. 3d Dept.).

Further Examination

• **Of the Accounting Fiduciary Denied.** Before the court in a trust accounting proceeding was a motion for a further deposition of the fiduciary as

Ilene Sherwyn Cooper is a partner with the Uniondale firm of Farrell Fritz PC. In addition, she is a member-at-large of the New York State Bar Association Trusts and Estates Law Section.

well as to compel the production of documents, and a cross-motion for a protective order regarding the said examination.

The subject trust was established by the decedent during her lifetime for the purpose of creating an irrevocable family trust. The trust was to have been funded with a \$1 million life insurance policy issued by The Hartford Insurance Co. Nevertheless, it appeared that the trust was never funded, as the account reflected schedules with zero balances. The objectants alleged, inter alia, that the accounting was deficient for failing to show any trust assets, or any distributions from the trust.

During the course of discovery, Hartford produced documents relevant to the issues raised. As a consequence, objectants sought a further examination of the fiduciary concerning the creation and administration of the trust, as well as the production of documents the fiduciary shared with the attorney-draftsperson of the trust prior to the draftsperson's deposition. Petitioner opposed and cross-moved for a protective order arguing that he was previously deposed in a prior proceeding for a compulsory accounting, as well as in the pending accounting proceeding, pursuant to SCPA 2211. Further, petitioner maintained that the records objectants had recently obtained from Hartford could have been obtained by them prior to his examination, and that objectants' failure to obtain them sooner did not constitute "special circumstances" requiring that he be deposed again.

Objectants responded by asserting that they were not at fault for failing to obtain the Hartford records, and that the documents were directly relevant to the issues raised in the accounting proceeding. Moreover, they maintained that the attorney-draftsperson's file was in the fiduciary's possession at the time of the initial document demand but their existence had not been disclosed until months later.

In assessing the motion and cross-motion, the court reviewed the deposition of the fiduciary and noted that he was questioned in the compulsory accounting proceeding about cancelling the policy that had funded the trust and forwarding the check representing the cash surrender value to the grantor. The fiduciary further testified about the funding of the trust, the payment of premiums on the insurance policy, and the factors contributing to the decision to cancel and surrender the policy. The examination of the fiduciary pursuant to SCPA 2211 covered the same subjects. In addition, both examinations reflected that the fiduciary could not recall or did not know the specifics about some of these events.

The court also examined the documents received by the objectants from Hartford, which included copies of the policy, the insurance application, internal memoranda, and cancelled checks.

Having considered these records, and the prior examinations of the fiduciary, the court held that it was unclear whether there was "new material" that would justify a further examination of the fiduciary. Specifically, the court found that petitioner's examina-

tions thus far had delineated the circumstances surrounding the funding and distribution of the subject trust. Consequently, the court denied the motion for a further examination of the fiduciary and granted the cross-motion for a protective order.

As for the additional documents requested, the fiduciary turned over the records sought during the pendency of the motion, thus rendering the issue moot.

In re Piecuch Family Trust, NYLJ, July 23, 2008, p. 32 (Sur. Ct. Suffolk County) (Sur. Czygier).

Guardian ad Litem

• **Authorized to Retain Expert.** In a contested probate proceeding, the guardian ad litem requested authorization to retain a medical expert to be paid from the estate.

The decedent died survived by seven children and two grandchildren. Objections to probate were filed by the children as well as the grandchildren, by their guardian ad litem. The record revealed that the propounded will was executed three weeks prior to the decedent's death from lung cancer, and was a marked departure from the decedent's prior wills, all of which principally benefited the objectants.

Most significantly, the objectants alleged that the decedent became delusional during the final months of his life as a result of his abuse of prescription steroids, and that such drug abuse, combined with his advanced cancer and ongoing aggressive chemotherapy impaired his testamentary capacity.

In support of these objections, the guardian ad litem interviewed the decedent's home care attendants, employees and family members, and sought to retain a medical expert on the subject of "Steroid Dementia Syndrome," at a cost to the estate of \$40,000 for an initial consultation and review of decedent's medical records.

The proponent opposed the request contending that there was no precedent for such relief and that the result would be inequitable as it would favor the objectants.

Although the court found that there was no authority for the allowance sought by the guardian ad litem, it noted that courts, in similar situations, have allowed a guardian ad litem to retain professionals when it has been demonstrated that the professional services fall outside the guardian ad litem's expertise and are indispensable to the representation of his or her ward. To this extent, the court said that it was incumbent upon a guardian ad litem to serve as an advocate for his or her ward, and to incur the requisite expenses, including the cost of a medical expert, in order to prepare his case for trial. Hence, absent such authority, the court found that the guardian ad litem could be prevented from adequately representing his wards.

With respect to the source of payment of the fees paid to the expert, the court said that while there is no express provision which authorizes the expense,

the provisions of SCPA 405 and SCPA 2211 provide for the compensation of the guardian ad litem and the advance payment of such fees under appropriate circumstances. In view thereof, the court held that it possessed the requisite latitude to fix and determine the fees and disbursements of a guardian ad litem at any time during a proceeding, and granted the request of the guardian ad litem payable from the estate.

In re Will of Greene, NYLJ, June 13, 2008, p. 32 (Sur. Ct., Westchester County) (Sur. Scarpino).

Vacatur of Decree

• Issuing Letters of Administration Granted.

Before the court in *In re Estate of Benn*, was an unopposed motion to vacate the court's decree and the parties settlement agreement consenting to the issuance of limited letters of administration to the decedent's spouse.

Pursuant to the settlement agreement, the spouse was to, inter alia, provide the movants with an informal list of estate assets, and financial records relevant thereto, and was prohibited from selling or disposing of estate property without prior notice and approval from the court.

In support of their motion, the movants alleged that the decedent's spouse failed to adhere to the terms of the settlement by neglecting to post a bond, dissipating estate assets, converting estate assets and using them for her own benefit, and failing to establish an estate account with respect to estate monies she collected. For these reasons, the movants alleged that the spouse was unfit to serve and requested that she be disqualified.

Although recognizing that stipulations of settlement should not lightly be set aside, the court found that vacatur is warranted when there is cause sufficient to invalidate a contract. Based upon the uncontroverted allegations in the record, and the minimal prejudice that would ensue, the court held that vacatur of the stipulation was required. As a result, the court reinstated the movants' cross-petition for letters of administration, and appointed them co-administrators of the estate upon their due qualification. The spouse, having acted as de facto administrator since 2004, was directed to account and to turn over all estate assets in her possession to the movants/cross-petitioners. Finally, that branch of the motion seeking counsel fees was denied.

In re Estate of Benn, NYLJ, May 30, 2008, p. 25 (Sur. Ct. Kings County) (Sur. Johnson)