New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Web address: http://www.nylj.com

An incisivemedia publication

VOLUME 240—NO. 96

MONDAY, NOVEMBER 17, 2008

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Fiduciary Relations: Role of the Fiduciary and Counsel

This month has seen decisions from the appellate and surrogate's court benches addressed to novel issues in the areas of fiduciary stewardship and liability. A review of these opinions provides guidance, and some cautionary advice, to estate practitioners and their fiduciary clients.

Summary Removal

• ***Of Fiduciary for Hostility Denied.*** Before the court in *In re Brody,* was an application by the decedent's son to, inter alia, remove his mother and sister as testamentary trustees of a trust for his mother's benefit based on their hostility towards him. The respondents-trustees moved to dismiss the petition for failure to state a cause of action, and the court converted it to a motion for summary judgment.

The trust in issue was created for the benefit of the decedent's spouse during her life, and was payable on her death equally to the decedent's three children, or their issue per stirpes. The basis of the alleged hostility between the parties was centered upon their ownership, both individually and through the trust, of a corporation holding a five-story industrial building located in Soho, New York City. Apparently, at a meeting of shareholders, the petitioner's sister, both individually and through the trust, voted their shares to remove the petitioner as a director of the corporation. The following month, the petitioner commenced an action in the Supreme Court for dissolution of the corporation. That proceeding was ultimately settled pursuant to a stipulation of settlement providing, inter alia, for the sale of the building, and for the eviction of the petitioner from the apartment located at the site of the property. Thereafter, the petitioner brought an action to enforce the stipulation.

In support of the petition for removal, the decedent's son alleged that he was the subject of "illegal and oppressive" threats by the trustees to evict him from his apartment, that he was unjustifiably ousted from the board of directors of the corporation, and that the trustees failed to fully comply with the stipulation of settlement. The application was opposed by the trustees.

In denying the application for summary judgment, the court said that every testator has the right to determine the most-suitable person to administer his estate and that such selection is not to be lightly disregarded by the court. While hostility may prove to be grounds for disqualifying a person from being appointed fiduciary, this result will only occur when the friction between such person and the beneficiary interferes with the proper administration of the estate. To this extent, the court held that the litigation between the parties pending in Supreme Court, albeit not involving the trust administration per se, was, nevertheless, relevant to the issue of whether the hostility between the parties resulting from that litigation improperly interfered with the proper administration of the trust estate. The court held that an assessment of that issue required an evidentiary hearing.

***In re Brody,* New York Law Journal, Oct. 17, 2008, p. 31 (Sur. Ct., Nassau County) (S. Riordan).**

Compulsory Accounting

• ***Failure to Assert Statute of Limitations in Compulsory Accounting Proceeding Gives Rise to Cause of Action for Legal Malpractice.*** The Court of Appeals affirmed a ruling of the First Department which sustained a cause of action for legal malpractice based upon counsel's failure to assert the statute of limitations as a defense to a compulsory accounting proceeding. In addition, the Court held that collateral estoppel did not prevent relitigation of the surrogate's ruling inasmuch as it was an alternative basis for the trial court's decision, and was not addressed by the Appellate Division in its opinion.

The record revealed that the plaintiff served for several years as a trustee of a grantor trust, before she resigned in 1997, and was succeeded by the grantor's brother. For more than six years after that the plaintiff rendered no accounting.

Thereafter, a compulsory accounting proceeding was instituted by the grantor against the plaintiff and the successor trustee. The plaintiff retained counsel to represent her in that proceeding, who appeared, but did not file an answer opposing the relief requested. The plaintiff filed an accounting, and in response to objections asserted by the grantor, moved to dismiss based upon the statute of limitations.

The surrogate denied the motion on two alternative grounds: 1) that plaintiff had failed to show that the statute of limitations had expired before the proceeding to compel an accounting had been instituted, and 2) that plaintiff had waived the statute of limitations as a defense because it had been asserted too late. The Appellate Division affirmed the surrogate's opinion, but on the second ground only, i.e., that the plaintiff had waived the statute of limitations defense because it had not been raised in response to the grantor's petition to compel an accounting.

As a result, plaintiff brought an action for legal malpractice against her former counsel, contending that the accounting proceeding against her would have been dismissed but for counsel's negligence in failing to assert, and thereby causing her to waive, the statute of limitations as a defense. Counsel moved to dismiss, claiming that plaintiff was bound by the surrogate's alternative holding rejecting her statute of limitations argument, and the Supreme Court granted the motion. The Appellate Division reversed, holding that the surrogate's ruling on the collateral estoppel issue should not be given effect. In reaching this result, the Appellate Division also rejected the surrogate's reasoning and said that the statute of limitations began to run upon plaintiff's resignation as trustee

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

and surrender of her trusteeship to a successor. The Appellate Division granted leave to appeal to the Court of Appeals on a certified question, and the Court affirmed.

In pertinent part, the Court held that principles of collateral estoppel do not apply to an alternative holding of a trial court when that holding is not considered by the appellate court in its review of the trial court's opinion. Moreover, the Court held that the statute of limitations defense, had it been asserted in the compulsory accounting proceeding, would have had merit and would have required dismissal of the accounting proceeding against the plaintiff had it been timely raised.

To this extent, the Court noted that the petition for a compulsory accounting had been brought more than six years after the plaintiff had resigned as trustee of the subject trust, and was, thus, too late. The Court rejected, as impractical, counsel's argument that the statute does not begin to run until the former trustee is asked but refuses to provide an accounting, finding that such a rule could have the effect of delaying the start of the statutory period for years if the trustee was never asked to account. The Court also concluded that its rule was clearer and easier to apply than the rule supported by the surrogate, to wit, that the statute should not begin to run on the beneficiary's right to an accounting until a reasonable time has passed. The Court said that the surrogate's theory would be too difficult to apply as it would leave the courts with the problem of deciding what a reasonable time was to account.

***Matter of Tydings*, 2008 WL 4585316 (N.Y., 2008 N.Y. Slip Op. 07763 (2008).**

Disclosure Under SCPA 2307-a

In two uncontested probate proceedings, the court had occasion to review the disclosure statements provided by the attorney-draftspersons fiduciaries under the propounded will.

The facts of the first case (*Moss*) revealed that the decedent executed a will in which she left the bulk of her estate to her issue and named as executors a friend, who predeceased her, and the attorney-draftsperson of the instrument. At the time she executed her will, the decedent signed a disclosure statement under SCPA 2307-a. Two years later the decedent executed a codicil to her will which did not involve any fiduciary appointments. At the time the codicil was executed, no disclosure statement was again signed. Accordingly, the issue before the court was whether the disclosure statement is effective to shield the attorney-draftsperson from a reduction of commissions pursuant to SCPA 2307-a.

Upon review of the legislative history and purpose of the statute, and upon consideration of the fact that the codicil did not involve any fiduciary appointments, the court concluded that the circumstances surrounding the execution of the said instrument did not require that a further disclosure statement be procured from the testator. Therefore, full statutory commissions were allowed to the named executor.

In the second case before the court (*Hess*), the court reached a different result. There, the record revealed that the decedent executed a will in which he left the bulk of his estate to his three children equally, and named one of his children and a lawyer to serve as executors. He also executed two codicils subsequent to the date of the will. While the first codicil made no changes in the fiduciary appointments, the second codicil changed the original fiduciary designations by naming as executors the draftsperson of the instrument and two of the decedent's children.

At the time he executed his will, the decedent executed a disclosure statement which conformed to the requirements of SCPA 2307-a as then in effect. His signing of such statement was witnessed by the attorney-draftsperson of the will and the two codicils, who was a partner of the named attorney-fiduciary in the propounded instrument and a named fiduciary in the second codicil.

The question before the court was whether the partner was qualified to serve as a witness to the disclosure statement for purposes of the statute. The court noted that under the express terms of the statute, a nominated executor is affiliated with the draftsperson if the two are "affiliated." That being the case, the court said that in view of the affiliation between the attorney-executor and the draftsperson/partner, the disclosure statement was not "witnessed" in accordance with the purpose of the statute, but rather a nominee of the attorney-fiduciary. The court observed that the law universally requires that a witness to a deed or other legal transaction be disinterested in the event. Thus, the court held that because of the partner's relationship with the named attorney-fiduciary, he was not independent, and could not serve as a witness to the disclosure statement. The commissions of the attorney-fiduciary were therefore limited to one-half as provided in the statute.

***In re Estate of Moss*, NYLJ, Sept. 24, 2008, p. 40 (Sur. Ct. New York County) (Sur. Roth)**

Fiduciary Liability

• ***For Failure to Marshal Estate Assets.*** In a contested accounting by a corporate fiduciary, the objectants challenged the valuation of a parcel of realty located in Italy, as well as the failure of the fiduciary to timely marshal and sell a block of IBM stock.

With respect to the issue pertaining to the estate realty, the court said that the accounting fiduciary has the burden of establishing that all estate assets have been accounted for and that the account is accurate and complete in all respects. This showing is typically made by the fiduciary's offering the account into evidence with sworn testimony by the fiduciary that the account is true and accurate. The burden then shifts to the objectants to show that the account is inaccurate or incomplete. Once established, the burden then shifts back to the fiduciary to show that the account is in fact accurate.

In support of their contentions, the objectants offered the testimony of an appraiser affiliated with a worldwide appraisal company, who examined the site and offered an opinion as to value which exceeded the value set forth in the fiduciary's account. Based upon this testimony, the court found the evidence sufficient to shift the burden back to the corporate fiduciary to present further evidence that the account was accurate as to the property's value. The corporate fiduciary failed to present any evidence in support of this burden. The court, therefore, determined that the fiduciary had misstated the value of the property as of the decedent's date of death, and directed that it amend its account accordingly.

As for the additional block of IBM stock, the evidence revealed that the corporate fiduciary had failed to discover this asset until almost four years after the decedent's death, and more than three years after its appointment as executor. This block was derived from a stock split, and the dividends were deposited automatically into a custodial account held by Northern Trust in connection with a revocable trust created by the decedent with himself as trustee. Although an officer of the corporate fiduciary admitted that he knew of this stock as early as one year after the decedent's death, he conceded that he took no action to ascertain its status, and made no inquiries as to its ownership, assuming that it was not an estate asset. Indeed, a worksheet prepared by the fiduciary in connection with the estate's fiduciary income tax return disclosed dividend income in connection with this asset, and yet, the corporate fiduciary failed to engage in a further search for its existence. Thereafter, despite the fact that this block of stock may have been an estate asset, the corporate fiduciary corresponded with the estate beneficiaries informing them that all disclosed probate assets had been inventoried.

Based upon this evidence, the court found that the corporate fiduciary had failed in its duties to marshal all probate assets, and not merely those that had been disclosed. The court held that the fiduciary was obligated to do so promptly, even despite possible roadblocks, and that its delay and lack of prudence and diligence in this regard constituted a breach of duty.

In determining the amount of damages sustained by the fiduciary's negligence, the court determined that this block of stock should have been sold together with the rest of the estate's IBM stock within a year of the decedent's death. Hence, the court calculated damages at $797,921, based upon the income that would have been generated by the proceeds of the sale of the stock had it been sold within a year of death, reduced by the amount of income actually earned by the retained stock, together with interest at the statutory rate of nine percent.

***Matter of Adams*, 20 Misc.3d 1143(A)(2008) (Wells, S.).**