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## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Appellate Courts Offer Guidance On Gifts, Wills, Procedural Issues

Trusts and estates played an important role in the appellate roster this past year, and continues to do so as we move through 2009. Indeed, a multitude of opinions were rendered at the appellate level addressed to this area, concerning such significant issues as fiduciary duty, gifts, sanctions, statute of limitations, and the validity and construction of wills. The following discussion provides highlights of a select few of the decisions rendered.

### First Department

**Deed Declared Invalid.** In *Bryant v. Bryant*, the Appellate Division, First Department, unanimously affirmed a Decree of the Surrogate's Court, Bronx County (Holzman, S.), which, after a non-jury trial, declared a deed null and void. The court found that the plaintiff had demonstrated by clear and convincing evidence that the deed conveying the decedent's interest in the subject property to defendant was a forgery.

Plaintiff's forensic expert presented detailed testimony regarding the discrepancy between the signature on the deed and those on the exemplars in evidence. Moreover, there was additional documentary evidence and testimony indicating that the deed was not properly executed, acknowledged and delivered. The court refused to disturb the Surrogate's credibility determinations.

*Bryant v. Bryant*, 2009 NY Slip Op 00133, decided Jan. 15, 2009 (App. Div. 1st Dept.).

**Issuance of Temporary Letters of Administration Reversed/Preliminary Executor Found Eligible to Serve.** In a probate proceeding, the petitioner appealed from an Order of the Surrogate's Court, New York County (Roth, S.), which denied the application of petitioner and the two other nominated co-executors under the propounded will for preliminary letters testamentary, and instead granted temporary letters of administration to the Bank of New York.

The court found that there was no viable basis for the Surrogate's Court to deny preliminary letters to the nominated executor, even though it had the discretion to do so under circumstances where process has not yet issued. While the distant

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cousin of the decedent remained to be served, there was nothing in the record which indicated that this individual had any information that would impact upon the administration of the decedent's estate. Further, the court concluded that the possibility that the propounded will could be contested did not militate against appointing the named executor to serve during the pendency of the probate proceeding.

As the nominated executor, the petitioner had a prior right to appointment as fiduciary unless declared ineligible. The court held that there was nothing in the record that established petitioner was unfit, or lacked the requisite understanding

In *'Matter of Esposito'*, the Second Department found that sufficient basis existed for vacating objectants' default on the basis of law office failure.

or qualifications to manage the decedent's assets. Petitioner's business relationship with the decedent did not constitute such a conflict as would disqualify him. Finally, the court concluded that the Surrogate's concern that a bond would be required at the estate's expense was misplaced, finding that under SCPA 1412(5), a bond may be required solely upon a finding of "extraordinary circumstances," and not on the basis of what the Surrogate determined to be "problematic facts underlying the propounded instrument."

Accordingly, the Order of the Surrogate's Court, insofar as appealed from, was reversed, the letters of temporary administration issued to the Bank of New York were vacated, and petitioner's application for preliminary letters testamentary was granted.

*Matter of Lurie*, 2009 NY Slip Op 00446, decided Jan. 29, 2009 (App. Div. 1st Dept.).

### Second Department

**Counsel Directed to Pay Sanctions for Law Office Failure.** In a proceeding for a compulsory accounting, the objectants appealed from so much of an Order of the Surrogate's Court, Richmond County (Fusco, S.), which denied their motion to vacate an order dismissing their objections to the accounting upon their failure to appear at a compliance conference, and to restore the matter to the conference calendar.

The record revealed that over the course of three years since the filing of objections to the accounting, the objectants had failed to appear for court-ordered discovery and two compliance conferences. As a result of one of those failures, the Surrogate dismissed the objections, but then reversed himself. Thereafter, objectants once again failed to appear at a second conference, and their objections were dismissed. The objectants moved to vacate the dismissal, claiming it was attributable to the law office failure of their counsel, an excuse which they had proffered for their earlier default. The Surrogate denied the motion.

On appeal, the Appellate Division, Second Department, opined that in order to be relieved of their default, objectants were required to show a reasonable excuse and a substantial basis for their objections. With regard to the asserted law office failure of counsel, the attorney for the objectants submitted an affirmation explaining that his office was downsizing, and that the two attorneys who had been handling objectants' case, as well as the secretary of the newly assigned attorney for the matter, who kept track of the firm's calendar, were no longer with the firm. Based upon the details set forth in counsel's affirmation, the court found that sufficient basis existed for vacating objectants' default on the basis of law office failure. Further, the court concluded that objectants had established substantial grounds for their objections.

Nevertheless, the court held, in light of the fact that the objectants had failed to appear on more than one occasion as a result of law office failure, that it was appropriate to direct objectants' counsel to pay petitioner the sum of \$10,000 to cover the expenses of the objectants' default.

*Matter of Esposito*, 57 AD3d 894 (2d Dept. 2008)

Residuary Estate Held to Pass by Intestacy.

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In *Matter of Michella*, the Second Department affirmed a Decree of the Surrogate's Court, Orange County (Slobod, S.) which, inter alia, denied the petition for construction of the decedent's will and determined that the residuary estate passed by intestacy.

Pursuant to the provisions of Article Second of his will, the decedent bequeathed his residuary estate in two equal shares which he directed be disposed of in separate trust in accordance with the provisions of Article Third. In pertinent part, the terms of Article Third provided that each trust for a child's benefit was to be administered for the benefit of the child until he or she attained the age of 30, at which time it was to be paid to the child outright. In the event that a child should die after the death of the testator but before the age of 30, the provisions of the trust directed the trustee to pay and distribute such child's share to such child's issue, or if none, to the decedent's other living child, if living.

At the time of the decedent's death, almost 40 years after the execution of the instrument, he was survived by his son, the petitioner, and two grandchildren, who were the children of his predeceased daughter. Accordingly, the petitioner requested that the provisions of the decedent's will be construed such that he be entitled to the entire residuary estate, as the sole surviving child of the decedent, pursuant to the provisions of EPTL 3-3.4.

The Surrogate denied the relief and determined that the decedent's residuary clause was ineffective. The Appellate Division affirmed, finding that the decedent had intended the trusts to be funded only in the event his children were younger than 30 years of age at the time of his death. Since this condition was not met, and no alternate provision addressing this contingency had been made in the will, the court held that the residuary estate passed by intestacy to the decedent's son, and the issue of her predeceased daughter in accordance with her overall dispositive plan.

*In re Michella*, 54 AD3d 764 (2d Dept. 2009)

### Third Department

**Statute of Limitations Not a Bar to Accounting Objections.** In a contested accounting proceeding, the petitioner appealed from an Order of the Surrogate's Court, Delaware County (Burns, S.), which denied petitioner's motion for summary judgment dismissing respondent's objections to the trust accounting.

Petitioner was the sole trustee of the testamentary trust created under the decedent's will. Upon the death of the income beneficiary of said trust, the trustee filed his account, and respondent objected, contending that it was a breach of fiduciary duty for the trustee to retain its own stock and invest in its own securities. The petitioner moved for summary judgment, and the Surrogate's Court denied the motion.

The Appellate Division, Third Department, affirmed. In support of its application, the petitioner argued that respondent's claims, to the extent they addressed transactions prior to Nov. 14, 1999, were time-barred by the six-year statute of limitations. Although petitioner acknowledged that the statute of limitations for breach of fiduciary duty does not

accrue until there is either an open repudiation of the fiduciary obligation or a judicial settlement of the fiduciary's account, it maintained that its annual filings of account of trust, submitted to the respondent each year, constituted an open repudiation since these accountings reflected that it held its own securities.

The court rejected petitioner's contentions, finding that the annual accountings refuted petitioner's argument that it openly repudiated its obligations as trustee, since they contained an affirmation by petitioner attesting that it was the trustee of the subject trust. Moreover, the court held that the lack of proof of an open repudiation rendered unavailing petitioner's defense of laches.

*Matter of Baird*, 2009 NY Slip Op 00151, decided Jan. 15, 2009 (App. Div. 3d Dept.)

**Summary Judgment Dismissing Objections to Probate Affirmed.** In *Matter of Turner*, appeal was taken from an Order of the Surrogate's Court, Albany County (Doyle, S.), which granted petitioner's motion for summary judgment dismissing the objections to probate.

The decedent was survived by two daughters and one son. Under the propounded instrument, the decedent made provision for her son, one of her two daughters, whom she also named as executor, and that daughter's child and grandchild, but made no provision for her second daughter. Under prior wills, the decedent bequeathed her entire estate in three equal shares to her children. Objections to the propounded will were filed by the daughter who had been disinherited, which alleged that the will was the result of an insane delusion or petitioner's undue influence. Petitioner moved for and prevailed on a motion for summary judgment.

The Appellate Division affirmed. The court opined that to invalidate a will on the basis of an insane delusion, an objectant must establish that the decedent exhibited a "persistent belief in supposed facts, which have no real existence, coupled with conduct taken upon the assumption of their existence." (citations omitted). If there is any basis for the testator's belief, the belief is not a delusion. Objectant alleged that the decedent's delusion was lodged in her belief that she was stealing from her.

The record revealed that the objectant had served as a trustee of a trust created for the benefit of the decedent under the will of her late father. The terms of the trust provided for discretionary payments of income and principal to the decedent. While objectant exercised her discretion by making income payments from the trust to her mother, she declined to invade principal on the grounds that the decedent had sufficient other resources. The result was a breakdown in the relationship between the objectant and decedent, and accusations by the petitioner in front of the decedent that objectant was stealing from her. Although the decedent refused to take phone calls from the objectant or to allow her into her home, she nevertheless continued to have lunch with her, and interact with her in a positive manner when they did meet.

On the basis of the foregoing, the court held that objectant had failed to demonstrate that the decedent suffered from an insane delusion at the time she executed her will. The only evidence objectant offered in support of her

contentions was the deposition testimony of her former attorney, who testified that the decedent was confused by the trust and believed that the objectant had taken her money. Moreover, there was no evidence that the decedent had accused the objectant of stealing, only the petitioner. The court opined that even if the decedent distrusted objectant, an unfounded opinion or misunderstanding, without more, is insufficient to establish an insane delusion.

Further, the court concluded that the objectant had failed to establish undue influence in the making of the propounded will. Indeed, the record revealed that the decedent was extremely independent until her death, and had directly addressed counsel with regard to her dispositive plan. Although decedent suffered a stroke and was caused to live with the petitioner, this took place nearly a year after the will was executed. The fact that petitioner had suggested the name of the attorney-draftsman to the decedent, had driven her to counsel's office, and was present when the will was executed, was not, in the court's opinion, sufficient to raise an issue of undue influence under the circumstances.

*Matter of Turner*, 56 AD3d 863 (3rd Dept. 2008)

### Fourth Department

**Gift of Real Property Sustained.** In *Bader v. Digney*, appeal was taken from an Order of the Supreme Court, Onondaga County (Paris, J.), which, inter alia, denied the defendant's motion for summary judgment dismissing the complaint.

The action was commenced by the plaintiff, the public administrator of the estate, to set aside a deed of real property given by the decedent to her son, the defendant. The decedent and the defendant continued to live at the subject premises until the decedent's death, during which time the decedent paid the taxes on the property. The decedent did not record the deed reflecting the transfer allegedly because she was concerned that her daughters would create trouble if she learned that the property had been transferred to the defendant. Moreover, the record revealed that the decedent executed the deed in the presence of the defendant and her attorney, and that upon doing so, it was handed to the defendant at the decedent's direction, and accepted by the defendant.

Based upon the foregoing, the Appellate Division concluded that defendant had established an inter vivos gift had been made of the property in question, and that summary judgment should have been granted in his favor. Significantly, the court opined that the delivery of the deed to the defendant was not changed by the decedent's subsequent access to the deed or even her repossession of it. Nor was the fact that the decedent continued to pay taxes on the property inconsistent with the making of a present gift, in view of the decedent's continued residence at the property. *Bader v. Digney*, 55 AD3d 1290 (4th Dept. 2008)

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