

New York Law Journal



Web address: <http://www.law.com/ny>

VOLUME 229—NO. 97

WEDNESDAY, MAY 21, 2003

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

On Statute of Limitations, Summary Judgment, Attorney-in-Fact

IN RECENT MONTHS, the Appellate Division has addressed important issues affecting the field of trusts and estates. In addition to the decision by the Appellate Division, Second Department, in *Mayorga v. Tate*, reported at The New York Law Journal, Dec. 26, 2002, p. 18, and in my column on Jan. 23, 2003, dealing with waiver by an executor of the attorney-client privilege, appellate courts throughout the state have considered the statute of limitations relative to claims against a fiduciary, summary judgment in contested probate proceedings, the authority of an attorney-in-fact to make gifts and jurisdiction over assignments of an estate interest.

Summary Judgment

Appellate Division, First Department: Order Denying Summary Judgment Reversed/Objection on the Grounds of Undue Influence Dismissed.

In Matter of Camac, — AD2d —

Ilene Sherwyn Cooper is counsel with the law firm of Farrell Fritz in Uniondale, N.Y. In addition, she is the vice-chairwoman of the New York State Bar Association's Committee on Estate and Trust Administration and an adjunct professor of law at Touro College, Jacob D. Fuchsberg Law Center.



(1st Dept. 2002), the Appellate Court reversed an Order of the Surrogate's Court, Bronx County (Holzman, S.) which, insofar as appealed from, denied petitioner's motion for summary judgment dismissing the objections to probate on the grounds of undue influence.

The decedent died survived by three children, two daughters and one son. She began living with one of her two daughters shortly after the death of her husband in November 1997. Early in 1998, the decedent's son procured her signature on two letters that stated that it was her intention to leave her estate to her three children equally. Thereafter, in September 1998, the decedent executed the propounded will which left the bulk of her estate to her two daughters. The decedent died approximately six months later, and the son filed objections to probate.

The surrogate denied petitioners'

motion for summary judgment finding that questions of fact existed as to whether the will was the product of undue influence. The Appellate Division found that the objectant failed to adduce any evidence of undue influence by his sisters, and reversed.

The record revealed that the petitioners did not participate in the drafting or execution of the propounded will and that the decedent was able to take care of herself, independently of her daughters until five weeks before her death. There was no evidence that the decedent's free will was constrained as a result of her living with one of her daughters. Moreover, although the daughter with whom the decedent resided was a physician, the court concluded that this, in itself, did not give rise to a confidential relationship between the parties since whatever care was provided decedent by her daughter was not given by her as a treating physician. Finally, the court found that although the decedent had expressed some concern about equal estate distribution, the distributive formula utilized in her will was chosen by the decedent after careful consideration. There was nothing in the record that the resulting instrument was the result of petitioners' coercion or pressure.

Matter of Camac, — AD2d — (1st Dept. 2002)

Statute of Limitations

Appellate Division, Second Department: *Statute of Limitations/Compulsory Accounting*

In a proceeding to compel an accounting, the Appellate Division, Second Department, affirmed an Order of the Surrogate's Court, Queens County (Nahman, S.), which dismissed the fiduciary's defenses based upon the statute of limitations and laches and directed her to account.

The decedent died in 1971. Under her will, the decedent appointed the appellant the executor of her estate and the testamentary trustee of trust created thereunder. The terms of the trust provided for the income to be distributed to the appellant for life and, upon her death, the principal to be divided equally among the petitioner and her siblings. The trust was never funded.

In 2001, the petitioner commenced the proceeding to compel an accounting, and the fiduciary responded with affirmative defenses, including the statute of limitations and laches. Thereafter, the surrogate granted the petitioner's motion for summary judgment dismissing these defenses, and directed the fiduciary to account.

The court found that the surrogate had properly concluded that the proceeding was not barred by the statute of limitations since the fiduciary had neither judicially settled her account nor openly repudiated her fiduciary obligations. The court rejected the fiduciary's contention that the filing of the estate tax return in 1973 constituted a repudiation, on the grounds that the fiduciary had failed to establish that by filing this return she clearly made known to the beneficiaries that she was repudiating her

fiduciary obligations. Further, the court found that the fiduciary's defense of laches had been properly dismissed since that defense also required proof of an open repudiation of trust. No appeal was taken from the surrogate's dismissal of the remaining affirmative defenses.

Matter of Meyer, NYLJ, March 31, 2003, p. 30 (A.D. 2d Dept.)

.....●.....

Appellate Division, Third Department: *Gifts by Attorney-in-Fact Rejected*

In a contested accounting proceeding, the Appellate Court modified an

The court said that as to monies given for birthdays, anniversaries and Christmas of both the fiduciary and her siblings and their families, the facts established that the gifts were authorized.

Order of the Surrogate's Court, Schenectady County (Kramer, S.), by reversing so much thereof which determined that the fiduciary did not breach her duties as the decedent's attorney-in-fact, did not engage in any self-dealing, and awarded the fiduciary counsel fees.

The decedent died survived by three children, one of whom was named the executor under his will, and was appointed the decedent's attorney-in-fact approximately four years prior to his death. Two years after executing the power of attorney, the decedent deeded his residence to this child, reserving unto himself a life estate. The decedent's will devised his residence to this child,

made \$25,000 bequests to his other children and devised and bequeathed his residue to his three children equally.

According to the fiduciary's accounting, there were insufficient assets available to satisfy the \$25,000 bequests to the fiduciary's siblings. As a consequence, objections to the accounting were filed alleging that during the period of time in which the fiduciary acted as the decedent's attorney-in-fact, she made unauthorized transfers of funds to herself and her family.

The evidence at trial established that the fiduciary had utilized her power of attorney to distribute \$58,000 of decedent's funds to her or her family or both. Nevertheless, the court concluded that these distributions tended to "balance" earlier gifts that the decedent had made to her other children and served to compensate the fiduciary for the care she had rendered to the decedent prior to her death. The court therefore refused to find self-dealing by the fiduciary as attorney-in-fact and awarded her counsel fees to be paid by the objectants.

The Appellate Division held that an attorney-in-fact may not make a gift to himself or a third party of the money or property that is the subject of the agency relationship. Such gift carries with it a presumption of impropriety and self-dealing that can only be overcome with the clearest showing of intent on the part of the principal to make the gift.

Based on the record, the court concluded that no competent evidence had been adduced at trial to support a theory that the decedent specifically authorized the fiduciary's distribution of his funds to her or her family. Moreover, as to the fiduciary's alternate theory that the transfers

were a means of equalizing distributions of the decedent's funds among the decedent's three children, the court concluded that any evidence that the fiduciary deserved the money did not rise to the level of establishing the decedent's intention that the fiduciary have it or that he authorized the distributions to her.

Finally, the court said that the distributions to the fiduciary could not be considered reimbursement for services rendered, holding that, as between related parties, such services are presumably performed without expectation of payment. Further, the court found that the fiduciary had failed to produce any accurate records and accounts establishing the propriety of the monies paid for which reimbursement was sought.

On the other hand, the court found that as to monies distributed to memorialize birthdays, anniversaries and Christmas of both the fiduciary and her siblings and their respective families, the facts were sufficient to establish that the gifts were authorized by the decedent. Further, the court held that the fiduciary should not be surcharged for monies expended in connection with the preservation and repair of the decedent's residence.

In view of its findings, the court concluded that there was substantial merit to the objections, and set aside the surrogate's award of counsel fees to the fiduciary.

Matter of Naumoff, — AD2d — (3rd Dept. 2003)

Forum-Selection Clauses

Appellate Division, Fourth Department: *Forum-Selection Clauses and Assignments of Estate Interests.*

In *Matter of Betlem*, — AD2d — (4th Dept. 2002), the Appellate

Court modified a decree of the Surrogate's Court, Monroe County (Calvaruso, S.), which determined that petitioner's assignment to the respondent of 40 percent of his interest in the decedent's estate was ineffective.

Respondent maintained that the Surrogate's Court did not have jurisdiction over the matter due to the forum-selection clause in the parties' agreement providing that the assignment was valid and enforceable and placing exclusive jurisdiction thereof in a certain county in Florida. The surrogate held this clause to be unenforceable.

The Fourth Department agreed holding that a contractual choice-of-forum clause will be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought. Based upon this principle, the court concluded that the provisions of EPTL §13-2.3 barred the enforcement of the forum-selection clause at issue. Specifically, the court found that this statute subjects to the scrutiny of the Surrogate's Court every assignment of an interest in the estate of a New York domiciliary, in order to promote the strong public policy of protecting out-of-state beneficiaries of New York estates from those who seek an assignment of a portion of the inheritance of such beneficiaries in exchange for services that are often of little value.

Turning to the validity of the assignment, the court found that it failed to comply with the requirements of EPTL 13-2.3 inasmuch as it was not acknowledged or proved in the manner required for a conveyance of real property, nor was it recorded. Accordingly, the agreement was ineffective as an assignment and was unenforceable.

Matter of Betlem, — AD2d — (4th Dept. 2002)

A Follow-Up

In my March column, I recommended keeping a watchful eye on *Langan v. St. Vincents Hospital of New York*, 11618-02, which raised the issue of whether a surviving spouse in a same-sex marriage validly entered pursuant to the laws of a sister state had the right to sue for wrongful death as a spouse under New York's EPTL, in light of the provisions of the Federal Defense of Marriage Act, which defines "marriage" as the union of a man and a woman, and "spouse" as a person of the opposite sex.

Recently, Nassau County Supreme Court Justice John P. Dunne determined that the plaintiff had standing to pursue his claims for wrongful death of the decedent, as the decedent's surviving spouse. Justice Dunne's opinion was based, *inter alia*, on the law of Vermont, which recognized the civil union between the plaintiff and decedent. The court determined that inasmuch as the "marriage" between the parties was lawfully sanctioned by the laws of a sister state, New York's policy was to accord full faith and credit to such laws and, thus, recognize the spousal status of the plaintiff.

Langan v. St. Vincent's Hospital of New York, N.Y.L.J., 4/18/03, p.23 (Supreme Court, Nassau County).

This article is reprinted with permission from the May 21, 2003 edition of the NEW YORK LAW JOURNAL. © 2003 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-05-03-0020