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TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Trusts and Estates Issues in State and Federal Courts

WHILE THE surrogate's court, for the skill and expertise of its staff and its judiciary, is the preferred forum for matters related to the affairs of a decedent, issues affecting trusts and estates practice do not necessarily limit themselves to surrogate's court proceedings. Consider the following decisions of interest:

• *Supreme Court, Queens County: Death of Solo Practitioner/Release of Escrow Funds.* The administratrix of the decedent's estate moved, through counsel, to add the names of her attorney and his law partner as signatories to the decedent's escrow account.

The decedent was an attorney, with a practice that was limited to real estate matters, and a captain in the New York City Fire Department. He died on duty at the World Trade Center on Sept. 11, 2001.

In connection with his legal work, the decedent maintained an Interest on Lawyers Account Fund (IOLA) account with Citibank, on which he was the only signatory. When he died, the balance in the account was $54,537.65, which sum was principally attributable to down payments in connection with real estate transactions. The purpose of the administratrix's application to the court was to facilitate the release of these funds from escrow so that payments could be made to the rightful parties.

Pursuant to the provisions of DR 9-102(g), when an attorney, who is the sole signatory on an escrow account dies, a motion may be made in supreme court for an order "designating" an attorney in good standing and admitted to practice in New York as a "successor signatory" for the account.

Ilene Sherwyn Cooper *is counsel with the law firm of Farrell Fritz in Uniondale, N.Y., where she concentrates in the area of trusts and estates. 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. Fuchsburg Law Center.*

Upon consideration of the statute, the court determined that its requirements had been satisfied. In view thereof, together with the fact that no dispute existed as to the source of the escrow funds in issue, the application was granted.

***Hynes v. Citibank, N.A.*, New York Law Journal, 10/2/02 (Supreme Court, Queens County, Hart, J.)**

Infant's Malpractice Award

• *Supreme Court, Bronx County: Infant's Malpractice Award/Transfer to Foreign Bank Account Denied.*

The petitioner, guardian of the infant, moved to amend a compromise order entered in a medical malpractice action in order to transfer the infant's funds from a federally and state insured bank account to a bank account in the Dominican Republic. The court denied the application, finding that the proposed transfer would place the infant's funds at risk and impermissibly beyond its jurisdiction and control.

The court said that it had a duty to protect the rights of the infant in settling the malpractice action and to preserve the funds received in settlement. To that extent, the court held that it was bound by the provisions of CPLR §1206(c) to insure that the proceeds of an infant's claim be deposited in "one or more specified insured banks or trust companies or be invested in one or more specified accounts in insured savings and loan associations …." The court determined that the requested transfer would be violative of the provisions of this statute.

Further, the court held that the proposed transfer would place the infant's funds beyond its continuing jurisdiction, control, and supervision.

Finally, although the petitioner was planning to relocate with the infant to the Dominican Republic, the court found that retaining the funds in New York would not unduly interfere with her use of the funds on the infant's behalf, since any requested withdrawals could be made through her New York counsel and any necessary transfer of funds could be made electronically.

***Castillo v. The Presbyterian Hospital in the City of New York*, N.Y.L.J., 10/11/02 (Supreme Court, Bronx County, Renwick, J.)**

Pre-Nuptial and Post-Nuptial Agreements

• *Supreme Court, Queens County: Pre-Nuptial and PostNuptial Agreements/Belated Acknowledgments Found Insufficient.*

In a contested matrimonial action, the court was confronted with the issue as to whether the requirement that a pre-nuptial or post-nuptial agreement be acknowledged could be satisfied if the acknowledgment was executed subsequent to the execution of the agreement.

The facts revealed that several months after the marriage was entered, the parties entered an agreement declaring inter alia that the wife was owner of 50 percent of the marital residence. Simultaneous therewith, a deed was executed conveying the residence to husband and wife. The agreement was not acknowledged.

At the trial of the matter, counsel who prepared the agreement testified that although the document did not appear to be acknowledged before a notary or commissioner of deeds, she was the notary and had come to court to present it with a certificate of acknowledgment prepared by her after learning that its validity was at issue.

On the issue respecting the belated acknowledgment of the agreement, the court recognized that the Court of Appeals in *Matisoff v. Dobi,* 90 NY2d 127, had never directly addressed the question of whether and under what circumstances the absence of an acknowledgment can be cured. Nevertheless, the court determined that the policy considerations stressed by the decision in *Matisoff* were so persuasive as to leave no room for any exception based upon a belated acknowledgment. The court said that a subsequent acknowledgment necessarily violated the letter and spirit of the *Matisoff* court's decision, which established a "bright line test" to effectuate the Legislature's intent to curtail litigation surrounding antenuptial agreements.

Additionally, the court found that even if the agreement had been properly acknowledged, its execution was the result of fraud, duress and overreaching by the wife and the attorney-draftsman of the agreement, who was admittedly a friend of the wife, and who was determined to have acted in concert with her in having the agreement signed.

Significantly, insofar as counsel was concerned, the court found that she had not made even minimal efforts to bring home to the husband that she was operating under a clear conflict of interest in representing both husband and wife in connection with the transaction. The court concluded that "if [counsel's] actions were not an integral part of a transparent scheme, they represent in their very best light, a disturbing lack of sensitivity to her ethically compromised position."

***Anonymous v. Anonymous*, N.Y.L.J., 10/7/02 (Supreme Court, Queens County, Gartenstein, J.H.O.)**

Failure to Diversify

• *Southern District, New York: Damages for Failure to Diversify/Plaintiff Limited to Value of Capital Lost Rather Than Loss of Income or Appreciation.*

In a contested proceeding involving the administration of an inter vivos trust, plaintiff, the remainderman of the trust, and the defendant, trustee, J.P. Morgan & Co., respectively moved for summary judgment on the issue of damages calculation.

The trust in issue was created in 1958 with a corpus of approximately $500,000. The income beneficiary thereof was plaintiff's mother, a citizen of Brazil; plaintiff and his brother, as surviving descendants of the income beneficiary were the remaindermen. In or about November 1970, the assets of the trust had a fair market of $1.0 million. Morgan learned that a bilateral income tax treaty between the United States and Brazil was being negotiated. Morgan consulted its counsel to determine how to avoid the adverse income tax consequences for the income beneficiary that would result if the treaty were ratified by both nations. To this end, Morgan also liquidated the trust's stock portfolio and reinvested the proceeds in cash and tax-exempt bonds. On Jan. 18, 1971, the income beneficiary ratified the trustee's investment decision. The trustee did not seek the remaindermen's ratification, nor did it alter 1970 trust investments at any time thereafter.

The contemplated treaty between the United States and Brazil was never entered; thus plaintiff maintained that it was clear by the mid-1970s it no longer posed a risk to the beneficiary's interests and that the trustee was duty bound to diversify its investments with consideration of the remainderman's interests. Plaintiff did not claim that the trustee engaged in any fraud or self-dealing or misconduct apart from the negligent and imprudent failure to invest and/or diversify the trust assets.

In support of its motion for summary judgment, the trustee asserted that damages were to be calculated on the basis of lost capital. By the trustee's calculation, the value of the capital lost amounted to $3,114. Plaintiff, on the other hand, argued that if liability was established, he would be entitled to lost profits. By his calculation, had the trust assets been properly diversified and invested, the trust would have assets of "at least" $21 million. This figure was based on a hypothetical reinvestment of trust assets on Jan. 1, 1975, and measuring the performance by the Standard and Poor's 500 Index's performance. In the alternative, plaintiff asserted that, should he be due lost capital only, he was entitled to compound interest on the lost capital amount.

Under New York Law

The court held that under New York law as construed by the state Court of Appeals, the measure of damages for negligent and imprudent failure to invest and diversify, i.e., the negligent and imprudent retention of assets, is the value of the capital lost. See, *Matter of Janes,* 90 NY2d 41. The methodology established by the Court of Appeals for establishing lost capital requires a determination of the value of the asset on the date on which it should have been sold and, then, subtracting either (a) the value of the asset at the time of the accounting or (b) the value of the asset at the time of the court's decision. The court has the discretion to award interest, but must subtract therefrom any dividends or income attributable to the asset during the time the asset was retained.

Finding that it was bound to apply the rule of law as enunciated by the highest court of the state, the court concluded that the methodology established by *Janes* governed the calculation of damages should plaintiff prevail on liability. The court rejected plaintiff's arguments that a distinction should be drawn between investments in securities, as in *Janes,* as compared to investments in tax-exempt bonds, holding that it was a distinction without a difference, because both claims concerned inattentiveness and inaction on the part of the trustee.

Further, the court rejected plaintiff's application for lost profits, concluding that an award of appreciation damages or lost profits was inapplicable unless the fiduciary's conduct consisted of deliberate self-dealing and faithless transfers of trust property. Inasmuch as plaintiff's claims against the trustee were limited to allegations of negligence and imprudence, rather than self-dealing, damages for lost profits or appreciation damages were unavailable.

***Williams v. J.P. Morgan & Co., Inc.*, 199 F2d 189 (S.D.N.Y. 2002)**

Legislative Update

In their most recent column for The New York Law Journal, my colleagues, Colleen Carew and Charles Gibbs, reported on the recent amendments to SCPA §§711, 2205 and 2206.

Of additional interest to members of the trusts and estates bar is a recent bill allowing guardians of the mentally retarded to withhold or withdraw life-sustaining treatment. There are two major components of the bill. The first component adds a second paragraph to Article 1750 of the Surrogate's Court Procedure Act by requiring the certifying physician or licensed psychologist to include a specific determination as to whether the mentally retarded person has the capacity to make health care decisions. The second component adds a new §1750-b, Health Care Decisions Act for Persons with Mental Retardation, which authorizes guardians of persons with mental retardation to terminate life-sustaining treatment for the mentally retarded person under certain circumstances defined by the law. The bill was signed by Governor George Pataki on Sept. 17, 2002 and becomes effective 180 days thereafter.