

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Appellate Decisions on Privity, Discovery, Gifts, Other Issues

**T**he past year has been witness to a multitude of decisions from the appellate bench throughout the state, addressed to the area of trusts and estates. From issues affecting privity, in *terrorem* clauses, lifetime gifts, and pretrial discovery, the Appellate Division has provided significant direction to Surrogate's Court practitioners.

### Lessons in Privity

In *Estate of Schneider v. Finman et al.*, the Appellate Division, Second Department, affirmed an Order of the Supreme Court (Woodard, J.), which dismissed a complaint by the estate of the decedent against the decedent's attorneys for legal malpractice. The complaint alleged that the decedent, on the advice of counsel, transferred ownership of a life insurance policy on his life from a limited liability partnership that he controlled to himself. This transfer of ownership allegedly resulted in an increased estate tax liability for the decedent's estate, causing the estate to sue for legal malpractice subsequent to the decedent's death in October 2006.

In defense to the complaint, the defendants alleged that the plaintiff had failed to state a cause of action for malpractice inasmuch as the alleged harm, i.e., increased estate tax liability, did not occur until the decedent's death. While the defendants recognized that, pursuant to the provisions of EPTL §§11-3.1 and 11-3.2, certain causes of action will survive a decedent's death, they argued that the section was only applicable to claims that arose during a decedent's lifetime. Inasmuch as the cause of action for malpractice did not accrue until death, the defendants maintained that the claim could not be brought by his estate. In addition, the defendants argued that neither the estate of the decedent, nor his intended beneficiaries, had a relationship of privity with them.

In opposition to the defendants' contentions, the plaintiff argued that the cause of action for malpractice survived the decedent's death, because had the decedent discovered that he had received incorrect advice during his lifetime, he would have had a cause of action for

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malpractice based on damages incurred to seek new counsel and correct the mistake that had been made. Additionally, plaintiff maintained that privity was not an issue, inasmuch as the complaint had been brought by the decedent's estate and not his beneficiaries.

The Supreme Court disagreed, reasoning that while a cause of action for legal malpractice can survive a decedent's death and can be pursued by his estate, pursuant to the provisions of EPTL 11-3.2, this is not the case

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when the damages do not occur until after the decedent's death. Under such circumstances, the court opined that the decedent has no claim for damages while alive, and as such, no such claim can survive his death. Further, the court concluded that even if the estate of the decedent had a claim pursuant to EPTL 11-3.2, the cause of action could not be pursued after the decedent's death due to the absence of privity between the estate and the defendants, and the absence of any allegations of fraud, collusion or malice.

The Appellate Division affirmed, holding that inasmuch as the estate was not in privity with the defendants, and none of the exceptions to the privity requirement were alleged, a cause of action by the estate for legal malpractice could not be pursued. Furthermore, the court found that since the decedent did not have a cause of action for legal malpractice

against the defendants during his lifetime, the provisions of EPTL 11-3.2 were inapplicable.

*Estate of Schneider v. Finman, et al.*, Index No. 07-010847, Entered May 14, 2008, aff'd. 60 A.D.3d 892 (2d Dept. 2009), leave to appeal granted, 12 N.Y.3d 715 (2009).

### In Terrorem Clause

In a proceeding to compel the trustee of an *intervivos* trust created by the petitioner's father to account, the petitioner appealed from an Order of the Supreme Court, which dismissed the proceeding, with prejudice, on the grounds that the petitioner lacked standing to pursue the claim.

The record revealed that the subject trust provided that upon the death of the petitioner's father, one-third of the trust remainder was to be distributed to the petitioner, and two-thirds was to be distributed to the respondent. The trust also contained an in *terrorem* clause, which prohibited any beneficiary from contesting the trust or any of its provisions, either directly or indirectly. The respondent moved to dismiss the proceeding for lack of standing, arguing that the petitioner had forfeited her interest in the trust, when she had requested that it be declared null and void in a prior proceeding she had commenced to become the temporary guardian of her father's person and property.

The Supreme Court granted the application, and the Appellate Division, Second Department, affirmed, finding that the actions taken by the petitioner in the guardianship proceeding attacked the validity of the trust in direct contravention to the grantor's apparent intention to prevent such actions by including an in *terrorem* clause.

*Tuminello v. Bolton*, 59 A.D.3d 727 (2d Dept. 2009).

### Temporary Administration

In *Matter of Cunningham*, a legatee under the purported last will and testament of the decedent appealed from an Order of the Surrogate's Court, Queens County (Nahman, S.), which issued letters of temporary administration to the Public Administrator.

The record revealed that at the time of his death, the decedent and appellant were living together in the former marital residence, which constituted the sole asset passing under his will. The appellant filed a petition to probate the instrument, which petition was subsequently

dismissed by the court on the grounds that the appellant had failed to join the decedent's brother as a necessary party to the proceeding, and had falsely represented that the decedent's mother had no other children.

Shortly thereafter, the Public Administrator sought temporary letters of administration with respect to the estate, and the successor executor named in the will petitioned for its probate. The Surrogate granted the application of the Public Administrator, pursuant to the provisions of SCPA 901(1), finding that there would be a delay in the probate of the propounded instrument.

On appeal, the appellant argued that there was no need for the issuance of temporary letters of administration since she was residing in the real property, and paying the expenses attendant to its upkeep. Additionally, the appellant argued that if a temporary administrator were required, the Public Administrator was not the appropriate person to serve, since she had filed objections to the probate of the will and was thus hostile to the estate, and to her interests, in particular, to the extent that she had attempted to sell the home in which appellant resided, and which passed to her pursuant to the terms of the propounded instrument.

The Public Administrator maintained that she was entitled to be appointed as temporary fiduciary of the estate, and that she had attempted to dispose of the decedent's home in an effort to preserve the estate in a declining real estate market.

Based upon the foregoing, the Appellate Division concluded that as a necessary party to the proceeding, the Public Administrator could file objections to probate on behalf of the distributees of the decedent, and that while such conduct generated estate expenses, it was not sufficient to disqualify her from serving as temporary administrator. However, the court modified the Order of the Surrogate in order to limit the letters of temporary administration, so as to preclude the sale of the real property during the pendency of the probate proceeding.

*Matter of Cunningham*, 63 A.D.3d 1061 (2d Dept. 2009).

### Gift Determined Invalid

In *Baum v. Greenly*, the Surrogate's Court, New York County (Glen, S.), issued an order finding that the decedent's surviving spouse did not receive a gift of his cooperative apartment, and the spouse appealed.

The record revealed that the appellant had found a document while going through some old papers of the decedent which purportedly made her the co-owner of the apartment. The document was dated and notarized, and stated that "it is my intention, via this statement, to notify all interested parties that my wife...is the 'co' and equal owner" of the shares in the cooperative apartment. No attempt was ever made to obtain the original stock certificates from the bank holding the mortgage on the apartment in order to change the title to reflect the gift.

The Appellate Division affirmed the Order of the Surrogate, holding that the appellant had

failed to sustain her burden of establishing a gift. Specifically, the court found that serious questions existed regarding the authenticity of the transfer document, since it lacked a proper acknowledgment. Additionally, the court noted that the appellant provided no explanation regarding the circumstances surrounding the alleged gift and the reasons why she waited so long to assert her claim.

Finally, the court found insufficient evidence of delivery. Appellant never asserted that the transfer document was given to her, or that its contents were ever communicated to anyone, including the bank. Thus, there was no evidence that the decedent had ever relinquished dominion and control over the shares to the apartment, and the decedent was free to change his mind at any time.

The court concluded that while the decedent could have effectuated a transfer of the shares prior to his death, he failed to do so. The fact that tax forms and correspondence from the management company were addressed to the decedent and the appellant was found inconsequential, since there was no proof that the decedent had requested that the appellant's name be added to these documents.

*Baum v. Greenly*, —NYS2d—, 2009 WL 3126634 (1st Dept. 2009).

### Discovery Sanctions

In a contested probate proceeding, the objectant appealed from Orders of the Surrogate's Court, Albany County (Doyle, S.), which, inter alia, denied objectant's motion to compel disclosure, granted petitioners' motion to preclude certain evidence, and granted petitioners' motion for summary judgment dismissing the objections to probate.

The decedent died, survived by two brothers, one of whom was a co-executor named in his will, and the other, who was the objectant to its probate. Pursuant to the terms of the instrument, the decedent divided her residuary estate equally among three nephews and two nieces. After the will was offered for probate, the objectant served discovery demands upon petitioners. At a court conference, a resolution regarding discovery was reached and examinations pursuant to SCPA 1404 were scheduled.

Thereafter, respondent filed objections to probate, and moved to compel the production previously sought. The Surrogate denied the motion, finding that the petitioners had already produced everything they had, and directed that discovery be completed within 30 days. Several months later, petitioners moved to preclude the objectant from offering evidence at trial, due to his refusal to comply with their discovery demands and demand for a bill of particulars. The objectant cross-moved to vacate the petitioners' demand for a bill of particulars. The Surrogate denied the objectant's cross-motion as untimely, and found that his objections to discovery were without merit. The court further conditionally granted preclusion, in the event that the objectant failed to comply with petitioners' demands within 10 days.

More than one month later, petitioners again moved for preclusion, arguing that objectant

had failed to comply with the time limits set by the court, and again, objectant cross-moved to vacate or modify petitioners' discovery demands. The Surrogate denied objectant's cross-motion, and granted petitioners' motion. Thereafter, the Surrogate's Court granted petitioners' motion for summary judgment, finding that the objectant had failed to rebut the presumption of due execution, or to offer any competent evidence to support his remaining objections to probate. The objectant appealed, and the Appellate Division affirmed.

On the issues relating to pretrial discovery, the court opined that only a clear abuse of discretion by the trial court will prompt appellate involvement in the discovery process. Within this context, based upon a review of the record, the court concluded that there was no evidence that petitioners had access to or were withholding any of the documents requested by the objectant, and declined to disturb the Surrogate's determinations regarding petitioners' compliance with objectant's demands.

Further, the court found no basis for reversing the Surrogate's Order granting the petitioners' motion to preclude. Again, the court held that absent a clear abuse of discretion it would not intercede with the Surrogate's determination. In this regard, the court noted that objectant's overall pattern of noncompliance over a two-year period gave rise to an inference of willful or contumacious conduct on his part, and that his proffered excuses for failing to comply with the directives and conditional order of the Surrogate were inadequate.

Finally, on the issue of summary judgment, the court found that objectant's claims regarding due execution to be without merit. The court found that the failed memory of the witnesses was insufficient to rebut the presumption of due execution resulting from the attorney-supervised execution ceremony, and the self-proving affidavit of the attesting witnesses.

With regard to the remaining objections, the court held that petitioners had submitted sufficient proof of testamentary capacity, in the form of the affidavit of attesting witnesses, the testimony of the attorney draftsman, and the overall testamentary plan of the decedent, to shift the burden to objectant to create a triable issue of fact, which he failed to do. Similarly, the court found objectant's conclusory and speculative allegations of undue influence and fraud, to be insufficient to withstand summary relief.

*Matter of Scaccia*, —N.Y.S.2d—, 2009 WL 3461185 (3d Dept. 2009).