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TRUSTS AND ESTATES UPDATE

Expert Analysis

Decisions at Close of 2009 Address Wills, Witnesses, Revocation

The year 2009 was host to a multitude of opinions and legislation impacting trusts and estates. Indeed, no one would dispute that the legislation overhauling the form power of attorney has had a dramatic effect on the field. The final quarter of 2009 continued with the year's trend, producing decisions addressed to an array of significant issues affecting practice and procedure.

By **Ilene Sherwyn Cooper**

Revocation Issue

In *Matter of Sharp*, cross-appeals were taken from an Order of the Surrogate's Court, Broom County (Peckham, S.) which, inter alia, admitted a purported will of the decedent to probate.

The decedent died survived by two children. At the time of her death, she was the beneficiary of a trust that provided her with a general power of appointment. In order for the respondent, who was one of the decedent's two children, to inherit any portion of the trust corpus, it was necessary for the decedent to exercise her power of appointment. In default thereof, the trust corpus was to be paid to the children born of the decedent's marriage to the trust settlor. Respondent was adopted by the decedent as an adult, and thus, did not fall into the class of default takers.

Approximately one year after the decedent's death, the respondent produced five wills of the decedent, a holographic will, dated in 2001, copies of three wills, dated in 1972, 1977 and 1979, respectively, and an original will dated in 1974. All of the instruments, with the exception of the 2001 will, purported to exercise the trust power of appointment, and expressly revoked all prior wills.

Approximately two years after the decedent's death, the petitioner, who was a biological child of the decedent and the settlor, offered the 1974 instrument for probate. Objections to the propounded instrument were filed by the respondent, who offered the 1979 copy of the instrument for probate. The Surrogate's Court dismissed that application. Three years later, the petitioner filed a petition for letters of administration, and moved to dismiss the respondent's objections to that petition. The Surrogate's Court denied petitioner's request for letters of administration, and instead, admitted the 1974 will to probate.

In reaching this result, the Surrogate's Court applied the doctrine of Dependent Relative Revocation and determined that the decedent's intention that the 1979 will be revoked was conditioned upon the validity of the 2001 instrument. Since the 2001 instrument had not been properly executed, the court determined that the 1979 revocation was invalid. However, since only a copy of the 1979 will had been proffered, and the original had been known to be in the decedent's possession, the Surrogate concluded that the copy could not be probated. The court engaged in similar reasoning with respect to the 1977 instrument, thus leaving the 1974 original will, which had been duly executed, available to probate.

> The doctrine of dependent relative revocation was rejected. A new limit on small estates was applied retroactively.

The Appellate Division disagreed, finding that the mere inability to probate the 2001 will did not render the revocation of all prior wills ineffective, and result in the revival of the 1974 will. Rather, contrary to the Surrogate's determination, the court held that the decedent's revocation of each of her prior wills, in the 1977, 1979, and 2001 instruments, represented a present intention to make new testamentary dispositions, and not an equivocal or conditional act, as the doctrine of dependent relative revocation otherwise required. Moreover, the court held that any conclusion that the decedent would have preferred probate of the 1974 will rather than intestacy was purely speculative. Accordingly, the Order of the Surrogate was reversed.

Matter of Sharp, __NYS2d__, 2009 WL 4348341 (3d Dept. 2009).

Small Estates

Before the court was an application by the decedent's niece to serve as voluntary administrator of her late aunt's estate. The decedent died intestate in 1998 with an estate valued at approximately $22,000. The issue before the court was whether the estate was subject to the new value limit for a small estate administration, i.e. $30,000, or whether it was subject to the $20,000 limit in effect at the time the decedent died.

In concluding that the estate was subject to the $30,000 limitation, the court noted that the legislation amending the statute in order to increase the value of an estate subject to small estate administration contained no explicit language regarding the date of its application. Hence, the court referred to the general rules applicable to statutory construction, and found that with the exception of remedial statutes, which are presumed to apply retroactively, statutes are generally deemed to apply prospectively, unless the statute provides otherwise.

The court concluded that amendments increasing the limit on small estates are remedial in nature, intended to adjust for inflation or to extend the benefits of the statute further. Moreover, the court found that the Legislature's failure to include

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any direction for its applicable date indicated that the statute was not intended to only apply prospectively.

Accordingly, the court held that the application for voluntary administration would be subject to the provisions of the statute as amended, and accepted the petition for filing.

In re Garrick, New York Law Journal, Dec. 15, 2009, p. 26 (Sur. Ct., New York County).

In Terrorem Clauses

The opinion by the Court of Appeals in *Matter of Singer* resounded through the trusts and estates bar for its significance in eroding the vitality of in terrorem clauses in New York. Confronted with the issue of whether the safe harbor provisions of EPTL §3-3.5 and SCPA 1404 (4) were to be given a restrictive reading in a case involving a pre-objection examination of the decedent's former attorney, the Court held that the statutory exceptions were not exclusive, but rather were just the starting point for determining whether the conduct engaged in was violative of the testator's intent. As compared to the analysis as it once stood, the Court recognized that this assessment would require the Surrogate's Court to construe the in terrorem clause in a decedent's will on a case-by-case basis in order to ascertain whether it had been triggered.

In reaching this result, the Court relied upon the judicial trend that disfavored in terrorem clauses, and supported broad-based discovery as a precursor to the filing of objections. Toward this end, the Court concluded that its result achieved the proper balance between a testator's right to prevent will contests, with a beneficiary's right to investigate in order to evaluate the risks involved in contesting a will notwithstanding the existence of an in terrorem clause.

Matter of Singer, 2009 NY Slip Op 09265.

Will Denied Probate

In a contested probate proceeding, the objectants moved for summary judgment denying probate of the propounded will on the grounds of lack of testamentary capacity and due execution. The record revealed that the decedent was within a few days of death at the time he signed the instrument, which he executed at the behest of his ex-wife, who was its sole beneficiary, and in the presence of her lawyer. On the date in question, he was noted as being lethargic, confused, disoriented, and evidencing poor judgment and insight.

Significantly, the supervising attorney testified that during the 1½ hours he was with the decedent at the time of execution, he did not say a single word. Moreover, he stated that after he read the will to the decedent and asked him if it was his will, he simply nodded. He further acknowledged that he did not ask the decedent and the decedent did not state that he was aware of what property was being disposed of by his will, nor did he ask the decedent who the natural objects of his bounty were, or that he understood that he was leaving all of his property to his former wife.

Nevertheless, in an affirmation submitted to the court, the attorney stated that the three witnesses to the will were present when the decedent acknowledged the document and signed it. Further, he stated that during the execution ceremony, the decedent indicated that the instrument was his will, and that he wanted to sign it and have his signature witnessed by the witnesses. The decedent's ex-wife testified that she contacted the supervising attorney at her former husband's request. She further stated that she was at the hospital when the decedent signed his will, and that while he did not verbally discuss the instrument that day, she did see him sign the document.

The court in 'In re Stachiw' found that the execution ceremony was a rushed process that gave no consideration to the decedent's medical condition, or the strictures of the statute.

On the other hand, one of the witnesses to the will testified that he signed his name below a mark on the instrument, purporting to be the decedent's signature, but stated that he did not see the decedent make it. The second witness, a social worker at the hospital, testified that the decedent was quite lethargic and obviously dying on the date of the will execution, and that in her opinion he was unable to process complex information such as the content of a will. The witness did not recall the decedent asking her to serve as a witness to her will, nor the attorney asking the decedent if he wanted her or the other witnesses to witness its execution. The proponent was unable to offer any information with respect to the third witness, or an explanation as to why he did not testify in support of the will.

Based on the foregoing, the court held that the objectants had submitted sufficient evidence to overcome the presumption of due execution that arises from an attorney-supervised execution, and concluded that the propounded instrument had not been duly executed. In pertinent part, the court found the record devoid of any evidence that the decedent published his will, or that he signed the instrument in the presence of the witnesses, or acknowledged his signature to them. Further, the court noted that the attorney's affirmation lacked credibility, was replete with conclusory assertions, and appeared tailored to meet the statutory requirements rather than a true recitation of the circumstances underlying the execution of the document.

The court found that, in fact, the execution ceremony was not as depicted by counsel, but instead, was a rushed process that gave no consideration to the decedent's medical condition, or the strictures of the statute. Accordingly, summary judgment on the issue of due execution was granted in the objectants' favor.

In re Stachiw, NYLJ, Dec. 9, 2009, p. 25 (Sur. Ct., Dutchess County).

Attesting Witness-Beneficiary

In *In re Maset*, the propounded will in an uncontested probate proceeding was witnessed by three witnesses; the nominated executrix, a friend of the decedent who received a small monetary bequest, and the decedent's daughter, who received a bequest of personalty and the residue of the estate.

The court noted that pursuant to the provisions of EPTL 3-3.2 a disposition to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition under the instrument. Although the court recognized that the effect of the statute would cause both the decedent's friend and daughter to lose their bequests, it held, in the interests of fairness, that the decedent's friend would not be required to forfeit his legacy. To this extent, the court dispensed with the testimony of this witness, finding that although the decedent's daughter would lose her testamentary inheritance, as a result of her having to testify in support of the will, she would, pursuant to the statute, nevertheless, be entitled to receive the lesser of her intestate distribution or the disposition given to her by the instrument.

In re Maset, NYLJ, Dec. 1, 2009, p. 29 (Sur. Ct., Dutchess County).