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TRUSTS AND ESTATES UPDATE

Expert Analysis

Summer Happenings: Impact on Practice of Law

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The steamy days of summer were far from slow-paced in the judiciary. Earmarked by the revolutionary decisions in *Matter of Schneider,* __N.E.2d__, 2010 N.Y. Slip Op. 05281, and *Matter of Hyde*, __N.E.2d__, 2010 N.Y. Slip Op. 05676, reported in my July column, the months of June, July and August were highlighted by decisions impacting the field of trusts and estates and the practice of law generally. Consider the following.

Sanctions Imposed

Although the imposition of sanctions lies within a court's discretion, a recent decision by the Appellate Division, First Department, reveals that under appropriate circumstances, sanctions are warranted.

In *Fish & Richardson, PC v. Schindler*, the Appellate Division affirmed an order of the Supreme Court (Kornreich, J.), which struck the defendant's answer pursuant to CPLR 3126 for failure to comply with its orders and discovery deadlines. The record revealed that the defendant had ignored his disclosure obligations since 2007, even before the court's involvement in the action.

Shortly after the complaint was filed, plaintiff served the defendant with a document request, to which he failed to respond. At a preliminary conference of the matter, the court issued an order directing the defendant to respond to the demand and to produce certain insurance information. Although the defendant responded to the document demand, the response was untimely, and he never produced the insurance information.

Thereafter, at a compliance conference, the defendant was directed to respond to an interrogatory request and a second demand for documents. Nevertheless, the defendant ignored the court order and failed to provide any responses. Plaintiff sent e-mails to defendant's then counsel requesting responses, but none were forthcoming. Defendant's recalcitrance provoked his counsel to move to withdraw from the action. Defendant did not oppose the motion, though lodged in counsel's claim that he was non-compliant with the court's discovery directives. The motion to withdraw was granted, and defendant was ordered to retain new counsel, or alternatively provide plaintiff with his residence address and appear pro se at a status conference of the matter.

A recent decision by the First Department reveals that under appropriate circumstances, sanctions are warranted.

Despite being served multiple times with the court's order, the defendant failed to appear at the status conference and ignored the court's order that he provide plaintiff with his residence address. The plaintiff moved for a default judgment and to strike defendant's answer, and the defendant opposed, claiming that he fully cooperated with his former counsel. Yet, he failed to provide any of the outstanding discovery. Plaintiff's motion was granted and the Appellate Division affirmed.

The court held that the Supreme Court had properly found, based upon the defendant's pattern of noncompliance, that his failure to abide by the court's orders was willful, contumacious and in bad faith. Of particular note was the defendant's failure to provide a reasonable excuse for his dilatoriness. Indeed, the court found the defendant's purported reasons for noncompliance less than persuasive. Although the defendant argued that the court had abused its discretion by failing to issue a conditional order of dismissal, the Appellate Division concluded that there was no requirement that a last chance warning be given before a pleading is stricken. In any event, the court found that the defendant had been provided ample warnings that he risked his answer being struck should he fail to comply with discovery orders.

Fish & Richardson, PC v. Schindler, NYLJ, June 1, 2010, p. 18 (1st Dept.).

Disqualification and Recusal

The summer months have also been witness to opinions addressing of counsel's representation, and the court's recusal.

Disqualification as Trial Counsel Granted. In *In re Popkin*, the objectant in a contested probate proceeding moved to disqualify petitioner's counsel from representing the estate. The record revealed that the decedent died survived by his spouse, who was the petitioner and primary beneficiary under the propounded instrument, and a son from a prior marriage, who was the recipient of a $25,000 bequest. Objections to probate were filed by the decedent's son

In support of his motion to disqualify petitioner's counsel, objectant maintained that counsel would be called as a witness in the will contest; that he had a unique knowledge as to decedent's mental capacity and the possible exertion of undue influence at the time he executed the propounded will, and that as one of the two attesting witnesses to the instrument, he could offer key testimony as to due execution.

The petitioner opposed the application

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claiming that it was premature, that nothing had been shown by the objectant to substantiate that his testimony was necessary, and that the advocate-witness rule did not preclude him from representing petitioner in connection with the administration of the estate.

The court opined that the provisions of Rule 3.7 prohibit, inter alia, an attorney from acting as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. The burden of proof on the issue of disqualification is on the party requesting it, who must demonstrate that the expected testimony of the attorney is necessary and prejudicial to the attorney's client. Because disqualification impacts upon a party's right to counsel of his own choosing, disqualification should not be applied mechanically.

Within the foregoing context, the court acknowledged that it had consistently adhered to the majority view that allowed the attorney draftsman in a contested probate proceeding to serve as counsel for the petitioner up until the time of trial. Finding that the language of the new advocate witness rule was substantially the same as the provisions of the prior disciplinary rule on the subject, the court concluded that established case law authorizing this pretrial representation continued to be applicable.

Accordingly, the court denied the motion to the extent that it allowed the attorney draftsman of the propounded will to represent the petitioner up to the point of trial, and otherwise granted the relief requested.

In re Popkin, NYLJ, June 4, 2010, p. 42 (Sur. Ct. Suffolk County).

Recusal in the Exercise of Discretion. In a hotly contested accounting proceeding in *In re Rella*, the executors moved to have the court recuse itself and for a change of venue, alleging a lack of impartiality because of an alleged relationship between counsel for one of the parties and the court. The application was opposed by the objectants.

The court opined that in the absence of statutory grounds, the decision on a recusal motion is discretionary and within the personal conscience of the court. Pursuant to the provisions of Section 14 of the Judiciary Law, the grounds for recusal include consanguinity, prior representation and a matter in which the court is interested. The court found none of these grounds applicable.

Nonetheless, in light of the hostility between the litigants, the court held that it did not want counsel to be concerned over its long-standing social relationship with a group that included counsel for the objectants. Accordingly, in the exercise of discretion, the court recused itself, and the matter was referred to the Chief Administrative Judge for the assignment of a judge to whom the matter should be transferred.

In re Rella, NYLJ, July 7, 2010, p. 34 (Sur. Ct. Bronx County).

'Singer' and 'Hyde' Applied

The Surrogate's Courts in Nassau County and Bronx County, respectively, had the opportunity this summer to apply the Court of Appeals' opinions in *Matter of Singer*, 11 NY3d 716 (2009), and *Matter of Hyde*, __N.E.2d__, 2010 N.Y. Slip Op. 05676.

In *In re Baugher*, the respondents, in a probate proceeding and a proceeding by the nominated executor for the recovery of property pursuant to SCPA §2103, moved the court for, inter alia, a construction of the in terrorem clause in the decedent's will, and an order granting them the right to depose the attorney-draftsman of a prior instrument and the nominated successor executor prior to filing objections.

The court denied the application for construction, holding that it had no authority to construe a will prior to its probate.

With respect to the requested examinations, the court opined that while in terrorem clauses are valid and enforceable, they are not favored by the courts and will be strictly construed. To this extent, the court noted that the subject clause, if found valid, was broad enough to impact the decedent's children and grandchildren, thus making a decision by a child to object potentially detrimental to that child's heirs. This was especially so in light of the fact that 40 percent of the decedent's residuary estate passed to her grandchildren, and that the value of that interest stood to be enhanced by nearly $20 million if the discovery proceeding proved successful.

Based on the recent decision by the Court of Appeals in *Matter of Singer*, 11 NY3d 716 (2009), the court recognized that the provisions of EPTL §3-3.5 no longer establish the parameters of who may be deposed without triggering an in terrorem clause. Rather, a deposition of any person with information of "potential value or relevance" may proceed, subject to the determination by the court on a case-by-case basis as to whether such examination resulted in a forfeiture, or was "in keeping with the testator's intent." Accordingly, the court granted the application to depose the nominated successor executor and attorney-draftsman of the decedent's prior will, but cautioned the respondents that they did so at their peril.

In re Baugher, NYLJ, July 2, 2010, p. 25 (Sur. Ct. Nassau County).

In *In re Rodriquez*, the petitioner, one of two sons, requested an order, inter alia, directing payment of his distributive share of the estate, a portion of which was previously ordered, denying administrator's commissions, and surcharging the administrator for the fees incurred by the petitioner for fees charged in bringing the application and a prior application for a distributive share, payable from the administrator's own funds or his presumptive share of the estate.

The decedent died intestate, and letters of administration issued to the respondent on consent of the petitioner upon his posting a bond. Thereafter, the petitioner and his counsel requested the respondent to account and to produce documents. An account was prepared but never signed. Based upon a prior petition filed with the court by the petitioner, the respondent was ordered to pay the petitioner his distributive share and to account. The respondent failed to comply with these directives.

As a consequence, the petitioner instituted the proceeding seeking the relief sub judice. The respondent failed to oppose the application. As a consequence of the respondent's default, the uncontroverted allegations in the petition regarding the administrator's failure to comply with the court's directives, to pay the petitioner his distributive share and to account were deemed due proof thereof pursuant to SCPA 509.

In view of the administrator's failure to account and to distribute estate assets, he was denied commissions. As such, the petitioner was awarded an additional distributive share of the estate equal to half the commissions that otherwise would have been paid to respondent.

In addition, the petitioner's request for his reasonable legal fees, costs and disbursements incurred in commencing the proceedings to recover his distributive share was granted, pursuant to *Matter of Hyde*, supra. The court directed that said award, as well as the distributive share of the petitioner be paid in the first instance by the respondent personally or from his distributive share before the surety was held liable for such sums.

In re Rodriquez, NYLJ, July 23, 2010, p. 35 (Sur. Ct. Bronx County).