

# New York Law Journal



WWW.NYLJ.COM

VOLUME 245—NO. 68

©2010 ALM

An **ALM** Publication

MONDAY, APRIL 11, 2011

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Wintery Mix: Guidance On Substantive and Procedural Issues

**J**ust as this winter has provided us with a mix of sun, clouds, snow, sleet and ice, so, too, has the Surrogate's Court and Appellate Division provided us with an array of opinions to instruct and guide us on substantive and procedural issues affecting trusts and estates practice. Here are but a few.

**Court Authorizes Sale of Property as Proof of Gift Fails.** In a Surrogate's Court proceeding in Kings County to determine ownership of the decedent's real property, the petitioner moved for a preliminary injunction barring the Public Administrator from selling the property or continuing a proceeding to evict petitioner pending determination of the petition.

The subject real property was owned by the decedent at death. She lived in an apartment on the second floor and rented out the first floor apartment. The Public Administrator was appointed the administrator of the decedent's estate, and thereafter sought to evict the petitioner. In opposition, the petitioner claimed the premises were a gift from the decedent and instituted a proceeding pursuant to Article 19 seeking to determine his right to the property.

In support of his argument, the petitioner alleged that soon after he began living in the apartment, the decedent's health deteriorated and that as a result he began to provide assistance to her in her household chores. He claimed that, in return, the decedent refused to accept any rental payments from him. He further claimed that the decedent told him that she had no close relatives and offered to give him her house. Thereafter, she purportedly gave him the deed to the premises, together with insurance papers and the original contract of sale. The petitioner stated that he agreed to allow the decedent to reside in the property until her death.

In opposition to the petitioner's application, the Public Administrator attached as an exhibit a verified claim by the petitioner in which he

By  
**Joel Cohen**



asserted that he was entitled to be paid for his services rendered to the decedent and that the decedent intended to compensate him out of her estate. The affidavit also stated that the decedent appointed petitioner as her agent and custodian of the property, and that his services in this regard were part of the claim.

The court held that the petitioner failed to establish that the decedent had made

The Appellate Division opined that New York's marriage recognition rule affords comity to out-of-state marriages that are valid in the place where celebrated.

a completed gift to him prior to her death. The court found that delivery of the deed to the property and the related documents did not satisfy petitioner's burden, but rather were consistent with petitioner's role as the decedent's agent in managing the premises. Further, the court found it significant that petitioner's affidavit in support of his claim never alleged that the decedent had made a gift to him of the subject premises.

Accordingly, petitioner's motion for a preliminary injunction was denied.

*In re Goldberg*, NYLJ, Dec. 27, 2010, at 29 (Sur. Ct. Kings County) (Sur. Johnson)

**Creditor Seeking Legal Fees Against Estate Beneficiary Held Without Standing to Recover in Estate Accounting.** In a contested trustee's accounting proceeding, a motion was made to dismiss the objections of the remainder beneficiary. These objections were directed to the petitioner's proposed payment of counsel

fees to the attorney for the beneficiary in connection with litigation involving the estate of the income beneficiary, as well as to the poundage fees of the sheriff.

The record revealed that counsel had been awarded fees in a proceeding pursuant to SCPA §2110. Thereafter, pursuant to CPLR 603(1), the Clerk of the Court furnished a transcript of the order to counsel, which was then filed with the New York County Clerk. Counsel arranged for the city marshal to levy upon the remainder interest of the beneficiary in the subject trust, which resulted in the poundage fees in issue.

The beneficiary objected to the proposed payment of fees to counsel alleging that it failed to credit him with fees previously paid. The court opined that this claim was essentially seeking a construction of the court's order in the SCPA §2110 proceeding, which relief was unavailable in the trustee's accounting proceeding. Rather, the court held that the beneficiary's remedy was to seek a clarification of the court order in connection with the estate in which it was rendered.

Further, the court held that the subject accounting proceeding was not the proper forum to settle counsel's claims against the beneficiary for fees. Although both counsel and the sheriff were served with citation in the proceeding, the court found that they were not proper parties inasmuch as counsel's status as a creditor of the beneficiary was not sufficient to provide him with standing to object. Similarly, the court held that the payment of poundage fees to the sheriff was not a proper issue to be raised in the accounting.

Accordingly, the court, on its own motion, dismissed the petitioner's request for approval of the poundage fees, dismissed the motion of counsel for lack of standing, and dismissed the objections of the beneficiary as moot.

*Matter of the Third and Final Account of Proceedings of JPMorgan Chase Bank, N.A. et al.*, NYLJ, Jan. 28, 2011, at 26 (Sur. Ct. New York County) (Sur. Glen).

**Recognition of Same-Sex Marriage Upheld.** In *Ranftle v. Leiby*, the Appellate Division, First Department, affirmed an order of the

ILENE SHERWYN COOPER is a partner with Farrell Fritz, in Uniondale, and an officer of the New York State Bar Association's Trusts and Estates Law Section.

Surrogate's Court, New York County (Glen, S.), which denied the appellant's petition to vacate the decree admitting the decedent's will to probate.

Pursuant to the provisions of his will, the decedent made bequests to his three brothers, one of whom was the appellant, and left the residue of his estate to his same-sex partner, whom he had also named the executor. The will contained an in terrorem clause.

The decedent had married his same-sex partner in Canada. In the petition for probate of the will, the executor thus named himself as the decedent's surviving spouse and sole distributee. Probate was granted in December 2008. Thereafter, the Surrogate issued an opinion that found that the executor was the decedent's sole surviving spouse and distributee, and held, as a consequence, that he was not required to serve citation in the probate proceeding. In reaching its decision, the court relied upon the validity of the decedent's marriage pursuant to the laws of Canada, and concluded that it was entitled to recognition under New York law.

Following the foregoing, the appellant petitioned the Surrogate's Court for vacatur of the probate decree, alleging that citation should have issued in the proceeding, and that the court had erred in recognizing the decedent's same-sex marriage. The Surrogate rejected the petition, holding that appellant's position was patently without merit based upon the holding in *Martinez v. County of Monroe*, 50 A.D.2d 189 (2008), lv dismissed 10 N.Y.3d 856 (2008).

The First Department affirmed, opining that New York's marriage recognition rule affords comity to out of state marriages that are valid in the place where celebrated. Although the court recognized that this rule does not apply where the foreign marriage is contrary to the prohibitions of natural law or the express prohibitions of a statute, it held that same-sex marriages did not fall within either of these exceptions. Further, the court concluded that the Legislature's failure to expressly authorize same-sex marriages or require recognition of such marriages validly entered out of state could not be construed as an exception to the marriage recognition rule.

*Ranftle v. Leiby*, 2011 N.Y. Slip. Op. 01407 (1st Dept. 2011).

**Wrongful Death Suit Allowed to Proceed Based Upon Finding of Paternity.** Before the Appellate Division, Second Department, in *Seaton v. County of Suffolk* was whether the decedent's posthumous non-marital child had a claim for the wrongful death of his father.

The decedent died from a gun shot wound sustained during the course of a raid by the Suffolk County Police Department. Approximately seven months after his death, the decedent's girlfriend gave birth to a son. A DNA test subsequently performed revealed a 99.99 percent probability that the decedent was the child's father.

Following the commencement of a wrongful

death action, the County of Suffolk moved for partial summary judgment dismissing the claims asserted against it on behalf of the infant claiming that because the child was in utero at the time of the decedent's death he was not a distributee entitled to recover for pecuniary loss. In opposition to the motion, the plaintiffs submitted, inter alia, an affidavit from the decedent's friend, who stated that the decedent had advised him and others that his girlfriend was pregnant with his child, and that he intended to be there for the baby. Significantly, the decedent did not indicate that this information was to be kept a secret. The Supreme Court denied the motion pursuant to the provisions of EPTL §4-1.2(a)(2)(C). The Appellate Division affirmed.

The Second Department held that a non-

The Appellate Division held that a non-marital child has the right to inherit from the estate of his or her deceased father upon proof of paternity in accordance with the provisions of EPTL §4-1.2.

marital child has the right to inherit from the estate of his or her deceased father upon proof of paternity in accordance with the provisions of EPTL §4-1.2. At the time of the death of the decedent, the court noted that the provisions of that section had not yet been amended in order to provide that the results of a genetic marker test could be utilized as the basis for proving paternity by clear and convincing evidence. Rather, the statute, EPTL §4-1.2(a)(2)(C), as it then existed, provided that a non-marital child is the legitimate child of his father if paternity has been established by clear and convincing evidence and the father openly and notoriously acknowledged the child as his own.

Based upon the foregoing, the court held that the posthumous DNA test constituted clear and convincing proof of paternity. Further, the court held that the affidavit submitted in support of the petition was sufficient to establish that the decedent openly and notoriously acknowledged that he was the father of the child.

*Seaton v. County of Suffolk*, 78 A.D.3d 1158 (2d Dept. 2010).

**Claim of Constructive Trust Rejected.** Before the Surrogate's Court, Suffolk County, was a motion for summary judgment brought by the fiduciary in an action concerning the parties' rights with respect to the decedent's realty. The decedent's will was admitted to probate in Florida, and his son was appointed fiduciary of his estate. Thereafter, the fiduciary was appointed ancillary executor of the decedent's estate in order to pursue an eviction in connection with the decedent's home in Smithtown. The fiduciary alleged that the resident at the premises had been residing there rent-free for over a year since

the decedent's death.

Subsequently, the resident instituted an action, as plaintiff, in Supreme Court against the fiduciary alleging, inter alia, a cause of action in constructive trust, and requesting that she be given a life estate in the property. An answer was filed, and the fiduciary then moved for summary relief alleging, inter alia, that the decedent was the sole owner of the property, that there was no provision in the will for plaintiff, that there was no written instrument evidencing the plaintiff's right to occupy the premises, and that there was no proof of the promises alleged.

In opposition to the motion, plaintiff maintained that there were triable issues of fact as to whether the decedent had made an oral promise to plaintiff of a life estate in the premises, and, that there was part performance of same when decedent had plaintiff relocate from her home in Montauk to the Smithtown property. Further, plaintiff submitted her signed affidavit to support her claims, naming a number of witnesses who would testify on her behalf. The fiduciary replied.

In granting the fiduciary's motion for summary judgment, the court opined that in order to establish a claim for constructive trust, four elements must be proven: 1) a confidential or fiduciary relationship between the parties; 2) a promise; 3) a transfer in reliance on the promise; and 4) unjust enrichment. Although the court noted that plaintiff had a close, confidential relationship with the decedent, it found that plaintiff had failed to prove the other required elements of a constructive trust.

Significantly, the court found that plaintiff would be the primary witness in support of her claim, inasmuch as she failed to oppose the defendant fiduciary's contention that these witnesses expressed no knowledge of the purported promise to plaintiff by the decedent. Further, the court noted that although plaintiff alleged that she had other witnesses to testify on her behalf, she failed to offer any proof regarding these witnesses other than her own self-serving affidavit. Additionally, the court opined that plaintiff's contention that she gave up her home in Montauk based upon the decedent's alleged promise was insufficient to demonstrate a transfer in reliance or unjust enrichment.

Finally, the court held that plaintiff's theory based upon part performance of an oral contract to give plaintiff a life estate also failed, on the grounds that her move from her Montauk home could not reasonably be viewed as unequivocally referable to the alleged agreement she had with the decedent.

*Dext v. Rorech III, Individually and as Executor of the Estate of William Rorech, Jr.*, NYLJ, Feb. 18, 2011, at 33 (Sur. Ct. Suffolk County)