

TRUSTS AND ESTATES UPDATE

Expert Analysis

Surrogates Address Security, Exoneration Clauses, Commissions

As trusts and estates practitioners have come to know, the financial crisis in New York, and particularly its judiciary, has imposed significant burdens on the Surrogate's Courts throughout the state. Nevertheless, despite its downsized staff and law departments, the Surrogate's Courts have tenaciously maintained their efficiency in producing a multitude of opinions at mid-year impacting the field. Consider the following.

Security for Costs

In a contested probate proceeding, the proponent, a nephew of the decedent, moved for an order directing the non-domiciliary objectant to post security for costs pursuant to SCPA 2303. The decedent died survived by seven nieces and nephews. The propounded will instrument nominated one of the decedent's nephews as executor, bequeathed her diamond ring to one of her nieces, and further bequeathed \$50,000 equally among her remaining nieces and nephews. Two of the decedent's nephews, one of whom was a non-domiciliary, filed objections to probate, and the proponent moved for an order directing that he post security for costs.

The Kings County Surrogate's Court opined that an application pursuant to SCPA 2303 is discretionary based upon considerations of whether (1) the non-domiciliary has an interest in the estate that can be resorted to if unsuccessful in the proceeding; and (2) there is substantial merit to the objections.

In support of his application, the proponent argued that the objectant was a non-domiciliary who stood to lose his bequest under the will, if unsuccessful, by virtue of the *in terrorem* clause in the instrument. The proponent further argued that the objectant had limited income and insufficient assets to cover any costs that might be imposed.

In opposition to the motion, the objectant maintained that he had a good faith basis for the objections; that the decedent was suffering from

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breast cancer, and was rushed to the hospital on the date she executed the propounded instrument, and then died eight days later. Moreover, the objectant alleged that the decedent's poor physical and mental condition prevented her from executing the instrument on her own, and submitted in support of this claim, an affidavit from the decedent's niece/beneficiary of her diamond ring, averring that she had assisted the decedent in executing the instrument.

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Based upon the foregoing, the court denied the motion. In reaching this result, the court opined that when there are resident and non-resident objectants, the court will not compel the non-resident member of the class to post security for costs. The court further noted that costs will not be required unless the moving party demonstrates that the non-resident objectant is using non-residency as a precaution against the consequences of a vexatious claim.

In re Ruoti, NYLJ, May 10, 2011, at 38 (Sur. Ct. Kings County) (Sur. Torres).

Objecting to Accounting

In a contested accounting proceeding, the petitioner sought to dismiss the objections on the grounds, *inter alia*, that the objectant lacked standing. The court opined that a person who has no interest in the estate of the decedent lacks standing to file objections to an accounting.

Within this context, the Queens County Surrogate's Court noted that the objectant was not a person entitled to share as a beneficiary of the decedent's estate, inasmuch as she was only an alleged legatee under a will that had not been located or offered for probate. Moreover, the court held that while the decedent died intestate, the objectant was neither a distributee nor an alleged distributee. At most, the objectant was a first cousin once removed of the decedent, which was a relationship too remote from the decedent to afford her with standing as a distributee. See EPTL 4-1.1(a)(6).

Accordingly, the petitioner's motion was granted, and the objections dismissed.

In re Estate of Maroni, NYLJ, June 29, 2011, at 29 (Sur. Ct. Queens County) (Sur. Kelly).

Contested Accounting

In a contested *inter vivos* trust accounting proceeding, the Bronx County Surrogate's Court had the opportunity to opine on the effect of the exoneration clause in the subject trust, commissions, and the legal fees incurred by the petitioner and objectant. The objectant in the proceeding was the grantor and income beneficiary of the trust, with a discretionary interest in the principal. The ultimate remainderman of the trust was the grantor's infant son.

With regard to the issue of the exoneration clause, the trust instrument authorized, *inter alia*, the trustee to retain an original investment for any length of time without liability for such retention, and to act on behalf of the trust and herself or another entity with regard to any transaction in which the trustee and the trust or the other entity had an interest. The trust also provided that the trustee would not be responsible for any loss to the trust unless such loss resulted from bad faith or fraud on the part of the trustee, and that the trustee would not be disqualified from acting because the trustee held an interest in any property or entity in which the trust also held an interest. The court noted that several of the objections raised in the proceeding hinged, *inter alia*, on the enforceability of this exoneration clause.

To this extent, the court opined that despite the absence of a statute applicable to exoneration clauses contained in lifetime trusts (*cf.* EPTL

11-1.7(a)(1)), the enforceability of such clauses were nevertheless subject to certain defined limitations. For instance, the court observed that a trustee of a lifetime trust who is guilty of wrongful negligence, impermissible self-dealing, bad faith or reckless indifference to the interests of the beneficiaries will not be shielded from liability by an exoneration clause. Moreover, when an attorney, named as trustee, is the draftsman of the instrument containing an exoneration clause, the clause limiting the trustee's liability to bad faith acts is void as against public policy. Further, the court noted that while improper self-dealing will not come under the umbrella of an exoneration clause, the rule of undivided loyalty due from a trustee may be relaxed by appropriate language in the trust instrument which directly or indirectly recognizes the trustee may be in a position of conflict with the trust.

Within this context, the court held that the petitioner would not be liable with respect to an interest-free loan that pre-existed the creation of the trust and that had been transferred into the trust by the grantor. On the other hand, the court found the petitioner liable for interest-free loans made by the trust subsequent to the inception of her stewardship. To this extent, the court concluded that petitioner's conduct exhibited a complete indifference to the best interests of the objectant, mandating that she be surcharged at the rate of 5 percent per annum for the income lost on the loan transactions.

Additionally, the court found that the exoneration clause in the instrument did not bar the objectant from recovering lost profits from the trustee attributable to her use of trust funds, without consideration, to benefit an entity in which she was personally interested.

As to the balance of the objections, the court concluded that the objectant was either estopped from raising the issues, or did not warrant the imposition of a surcharge.

With respect to the issue of commissions, the court opined that while not every surcharge warrants a denial of commissions, when the fiduciary has engaged in conduct evidencing bad faith, a complete indifference to his or her duties and responsibilities, or some act of malfeasance or misfeasance, commissions will be denied. Based on the record, the court found that the petitioner was lax with regard to managing the financial aspects of the trust. Indeed, although the court concluded that the petitioner had not acted in bad faith, it, nevertheless, held, particularly based on the interest-free loans that had been made, that she had exhibited indifference to her duties, and, accordingly, sufficient misfeasance to warrant a denial of commissions.

Further, the court denied the petitioner annual commissions on the grounds that she had failed to establish that she had furnished the objectant with an annual statement pursuant to the provisions of SCPA 2309(2), that the objectant had waived her right to receive the statement, or that there was sufficient income retained by the trust in any

particular year from which she could pay herself income commissions.

Finally, with regard to the issue of legal fees, the court held, in the exercise of discretion, that the petitioner and the objectant should each, individually, bear responsibility for their legal fees and expenses. The court observed that while many of the objections to the petitioner's account had not been sustained, the petitioner could not seek payment of fees from the trust for defending objections for which she was surcharged. Moreover, the court opined that a strong case could be made for holding the petitioner responsible for the expert witness fees incurred by the objectant in proving petitioner's liability in connection with the transactions for which she was surcharged. On the other hand, the court noted that the objectant vigorously pursued, and caused the petitioner to defend, numerous objections of which she was aware and had approved prior to their occurrence. Accordingly, under all the circumstances, the court determined it would be most equitable to have the petitioner and the objectant personally satisfy their own legal fees in connection with the proceeding.

Matter of the Accounting of Tydings, NYLJ, July 7, 2011, at p. 26 (Sur. Ct. Bronx County) (Sur. Holzman).

The 'Tydings' court opined that despite the absence of a statute applicable to exoneration clauses contained in lifetime trusts, the enforceability of such clauses were nevertheless subject to certain defined limitations.

Summary Judgment Denied

In a contested probate proceeding, the objectant, daughter of the decedent, moved for summary judgment dismissing the probate petition that had been filed by her sister, another daughter of the decedent. The propounded instrument disposed of the decedent's entire estate to the petitioner. Objections to probate were based on allegations that the will was not duly executed, that the decedent lacked testamentary capacity on the date of its execution, and that it had been procured by undue influence and fraud. The motion for summary relief was limited solely to the issue of due execution.

The propounded instrument was prepared by an attorney, and contained an attestation clause followed by the signature of two witnesses, one of whom was the attorney-draftsman.

The Kings County Surrogate's Court initially noted that the objectant failed to annex a copy of the pleadings to the motion, which could prove fatal to the relief sought. Nevertheless, because dismissal of the motion on this ground was subject to renewal, the court in the interests of judicial economy addressed the merits of the motion.

To that extent, the court observed that when an attorney supervises the execution of a will, there is a presumption of due execution. Nonetheless, the objectant argued that the presumption was inapplicable because the attorney-draftsman and attesting witnesses failed to establish a consistent procedure for the execution of wills in compliance with the provisions of EPTL 3-2.1. More specifically, the objectant claimed that the petitioner had not demonstrated that the testator had signed in front of both attesting witnesses and whether the witnesses had signed in front of the testator and each other. In this regard, the objectant relied upon the fact that one of the witnesses had no specific recollection of the will execution ceremony. Further, the objectant alleged that at the time of the will's execution, the attorney-draftsman had no knowledge that the decedent had a spouse and four children.

In opposition to the motion, the petitioner argued that a presumption of due execution attached to the instrument because its execution was supervised by an attorney, who testified that he followed a consistent procedure when executing wills. The petitioner further argued that this procedure was confirmed by the deposition of the witness to the will, who testified that it was the usual practice of the draftsman to first discuss and read the will to the testator and then to call her into the room to witness its execution. The petitioner also relied on the fact that the instrument contained an attestation clause and attesting witness affidavits.

The court opined that the existence of an attestation clause creates a presumption of due execution of a testamentary instrument, although it is nevertheless incumbent upon the court to insure its validity. To this extent, the court noted that the mere fact that an attesting witness cannot recall the circumstances surrounding the execution of a will is not fatal to its admission to probate, although it intensifies the scrutiny given by the court to the document.

Accordingly, under the circumstances, the court found a triable issue of fact on the issue of due execution, and denied the objectant's motion.

In re Pannone, NYLJ, July 13, 2011, at p. 30 (Sur. Ct. Kings County) (Sur. Torres).