

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Back to Basics: Opinions Refresh Essential Principles

As is true in all aspects of life, it is often beneficial to return to the basics of our practice—the essential substantive and procedural principles that underlie the advice we provide to our clients, the pleadings we draw on their behalf, and the positions we advocate. The following opinions serve as a refresher for many of these fundamental tenets, and serve as valuable guideposts in the area of trusts and estates.

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While many of us have been involved in jury trials, there are avenues that can be pursued in order to request judgment as a matter of law prior to verdict during the course of the proceeding, or to set aside a verdict after trial. These alternatives are provided by CPLR 4401 and CPLR 4404(a), respectively.

In *Matter of O'Malley*, the Appellate Division, Second Department, explained the analysis required before relief may be accorded a litigant under these statutes. In *O'Malley*, appeals were taken from a decree of the Surrogate's Court, Queens County (Nahman, S.), which, inter alia, denied the fiduciary's motion, pursuant to CPLR 4404, to set aside the verdict of the jury as contrary to the weight of the evidence and for a new trial on the issue of the transfer of certain real property, dismissed, pursuant to CPLR 4401, that branch of the petition that asserted a claim for fraud against the respondent, and granted the fiduciary's motion pursuant to CPLR 4401 for judgment as a matter of law directing the respondent to return certain cash withdrawals to the decedent's estate.

In affirming the decree of the Surrogate's Court, the Second Department opined that a trial court's grant of a motion pursuant to CPLR 4401 is appropriate only when the court finds that, upon the evidence presented, there is no rational basis upon which the trier of fact could render a finding in favor of the nonmoving party.

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The court instructed that the party opposing the motion must be afforded every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to that party.

Considered within this context, the court concluded that the Surrogate's Court had properly granted the motion of the respondent dismissing the claim against him for fraud, finding that the evidence presented at the jury trial, viewed in the light most favorable to the fiduciary, failed to establish that the respondent had engaged in a misrepresentation of a material fact in connection with the subject transfer of real property.

The issue of testamentary capacity is frequently an issue raised during the course of a contested probate proceeding, but can also be the subject of the court's independent inquiry.

The court further held that the Surrogate's Court had properly granted the fiduciary's motion for judgment as a matter of law on the issue of the cash withdrawals by the respondent from his parents' joint bank accounts. Viewing the evidence in the light most favorable to the respondent, the court found that there was no rational process by which the trier of fact could have found in his favor, particularly given his failure to satisfy his burden of establishing with contemporaneous records the legitimacy of the cash payments he allegedly made with the funds in issue.

Finally, the court concluded, under the particular circumstances of the case, the determination

of the Surrogate's Court made after a nonjury trial was not inconsistent with the jury verdict.

*In re O'Malley*, NYLJ, Sept. 21, 2011, at p. 22 (2d Dept.)

### Testamentary Capacity

The issue of testamentary capacity is frequently an issue raised during the course of a contested probate proceeding, but can also be the subject of the court's independent inquiry, pursuant to its duty to inquire into the validity of the propounded instrument before admitting it to probate. This responsibility was recently invoked by the Surrogate's Court, Westchester County, in *In re Haynes*.

Before the court was a contested probate proceeding in which the objectants moved for summary judgment. The decedent died survived by his wife of 34 years, and six children, five from a prior marriage, and one from his marriage to his surviving spouse.

The propounded will, which was allegedly executed one month before the decedent's death, provided the decedent's wife with her elective share, and left the balance of his estate equally to his six children. The attorney-draftsman of the instrument appeared on behalf of the nominated executrix, one of the decedent's six children, in seeking its probate. Preliminary letters testamentary issued to the nominated executrix, but were not renewed due to her failure to comply with court orders.

Objections to probate were filed by the decedent's spouse, and the child borne of her marriage to him. Thereafter, multiple discovery orders by the court issued; however, the proponent failed to fully comply with them. After approximately one year of noncompliance, the objectants moved for summary judgment. The motion was unopposed by the proponent.

Significantly, before examining the issues raised by the motion, the court addressed the provisions of CPLR 3126, which authorize the imposition of penalties against a party for failure to obey an order for disclosure, including dismissal, striking a pleading, or entering a default judgment. On this basis, the court held that the proponent's

repeated disregard of its orders directing disclosure required dismissal of the probate proceeding. Nevertheless, the court opined that it had a duty to inquire into the genuineness of the instrument pursuant to the provisions of SCPA 1408. That statute requires a court to inquire particularly into all the facts and to be satisfied with the genuineness of the will and the validity of its execution, before admitting a will to probate.

The statute further requires that a will be admitted to probate if it appears that the will was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint. See SCPA1408(1), (2). Within this context, the court reviewed the probate petition, and the documents submitted in support of the motion for summary judgment to ascertain the validity of the propounded instrument.

Based upon this review, the court determined that the decedent lacked testamentary capacity on the date of its execution. Although the court recognized that when a will is executed under the supervision of an attorney and contains an attestation clause there is an inference of due execution, it found that the conduct of the proponent and the attorney-draftsman negated any such inference, and, in effect, constituted a refusal by the proponent to defend the validity of the will.

The court further concluded that proponent's conduct vitiated the presumption of testamentary capacity that might otherwise be accorded in support of the instrument's probate. To that extent, it found that the documents submitted by the objectants in support of their motion for summary relief demonstrated that the decedent was suffering from progressive dementia, hypertensive heart disease, and cerebrovascular disease commencing in 2008 and continuing through the date the propounded will was executed.

Accordingly, the court held that the decedent lacked the mental capacity to execute a will, that the proponent had failed to establish with even a scintilla of evidence that decedent was capable of making a will, and that denial of probate was required.

*In re Hynes*, NYLJ, Sept. 13, 2011, at p. 20 (Sur. Ct. Westchester County).

### Jurisdiction, Partition Action

The provisions of SCPA §1901 authorize the Surrogate's Court to direct the "disposition" of a decedent's real property for the purposes set forth in SCPA §1902, including but not limited to the payment and distribution of shares in a decedent's estate. SCPA §1901(2)(i) includes within the meaning of the term "disposition," the authority of the executor or the administrator, upon application to the surrogate, to bring a partition action or to intervene in a pending partition action on behalf of the estate, in the event the estate of the decedent is the owner of an estate in common in real property.

The statute has generally been interpreted as providing the means by which an estate fiduciary can seek court approval to participate in a partition action brought in a tribunal other than the Surrogate's Court, but not as a basis for the Surrogate Court's jurisdiction over such an action. In *Wagenstein v. Shwarts*, the Appellate Division, First Department, reached a different result.

Before the court in *Wagenstein* was an appeal from an order of the Supreme Court (Friedman, J.), which denied a motion to vacate a prior order of the court transferring a partition action to the Surrogate's Court. The record before the court revealed that the decedent had created an inter vivos trust during her lifetime for the benefit of her two children, her son and daughter. The trust assets consisted principally of the decedent's condominium and a securities account. On the death of the decedent, the trust terminated, and the assets thereof were to be distributed to the decedent's children, who were also the co-trustees of the trust, per stirpes. The decedent's will also left all of her real and personal property to her two children.

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In 'Ramos,' the court opined that in uncomplicated estates of modest size, generally compensation within the range of 5 percent of the gross estate and a single executor's commission will be considered reasonable.

Following the decedent's death, her daughter was appointed voluntary administrator of her estate. Thereafter, her son commenced an action in the Supreme Court seeking partition of the decedent's real property, or in the alternative, an order directing its sale and a division of the proceeds. The daughter interposed an answer and moved, pursuant to CPLR 325(e) to transfer the partition action to the Surrogate's Court, on the grounds that the action was intertwined with issues relating to the administration of the decedent's estate.

The action was thereafter transferred to the Surrogate's Court, on consent. Approximately two years later, the son moved in the Supreme Court for an order vacating the transfer and retransferring the partition action to the Supreme Court, alleging that the Surrogate's Court lacked jurisdiction over the dispute between the parties regarding the distribution of the trust assets. The Supreme Court denied the motion, and the son appealed.

The First Department affirmed, relying on the broad jurisdiction accorded the Surrogate's Court with respect to all matters pertaining to the affairs of a decedent and the administration of a decedent's estate. Further, the court noted those provisions of the SCPA which specifically

grant the Surrogate's Court jurisdiction over lifetime trusts. The issues raised by the parties, involving claims of dishonesty, an alleged agreement regarding the distribution of trust assets, and the carrying costs of the realty, were found by the court to be within the scope of the Surrogate Court's authority. Significantly, the court reached this result despite the pendency of the partition action. Rather, the court found that the Supreme Court properly exercised its discretion in transferring the partition action to the Surrogate's Court so that all of the issues relating to the distribution of the decedent's assets, including the decedent's real property, could be determined by one tribunal. Notably, the court rejected the son's argument that the Surrogate's Court lacked jurisdiction over a partition action pursuant to SCPA §1901.

*Wagenstein v. Shwarts*, 82 A.D.3d 628 (1st Dept. 2011).

### Affidavit and Legal Fees

Practitioners often find themselves in the position of having to justify their legal fees, and they sometimes overlook some of the essential components of an affidavit of legal services. In *In re Ramos*, the court set forth some of the criteria to be considered in the fixation of fees.

After referring to the factors set forth by the courts in *Matter of Freeman*, 34 NY2d 1, and *Matter of Potts*, 213 App. Div. 59, affd. 241 NY 593, the court noted that the size of an estate is not dispositive of the fee to be awarded. In uncomplicated estates of modest size, the court opined that generally compensation within the range of 5 percent of the gross estate and a single executor's commission will be considered reasonable. On the other hand, the court reasoned that when an estate is complex, or bitterly contested, substantial legal fees are appropriate.

Further, in the context of contingency fee arrangements, the court held that regardless of whether the fees of counsel on an hourly basis are less than the fees afforded by the retainer agreement, the inherent reasonableness of the fee must nevertheless be substantiated. To this extent, the court opined that, while time is the least important factor in determining a reasonable fee, contemporaneous time records are important to the assessment. Toward this end, the court cautioned that time records must be descriptive of the services performed, rather than written in terms that are general and vague regarding the nature of the services performed.

*In re Ramos*, NYLJ, July 27, 2011 at p. 28 (Sur. Ct. Kings County).