

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Yuletide Mix Of Surrogate's Courts Decisions

Since my last article, the Surrogate's Courts have been busy issuing decisions on a wide assortment of subjects ranging from pre-action disclosure, gifts, the scope of deposition testimony, and vacatur of decrees. Because variety is the spice of life, this article will address these topics and more for your holiday reading pleasure.

### Pre-Action Disclosure

The petitioner, a co-executor of the estates of a deceased husband and wife, filed an application with the court requesting an order permitting pre-action disclosure pursuant to CPLR 3102 (c). Specifically, the petitioner sought the deposition of the attorney-draftsman of the decedents' wills for ultimate use in a construction proceeding of the instruments. The petitioner further requested an order that neither the examination nor the construction proceeding would trigger the in terrorem clauses in the wills.

In support of the application, the petitioner alleged that the draftsman was 86 years old, and although in good health, his testimony might not be available at the time the construction proceedings were actually commenced. The Nassau County Surrogate's Court opined that pre-action disclosure is available despite the fact that the commencement of a proceeding may not be imminent. Accordingly, the court held that under the circumstances examination of the attorney-draftsman would be allowed.

However, the court denied that portion of the relief requesting an order that the examination would not trigger the in terrorem clause in the instruments, concluding that because the provisions of EPTL 3-3.5 create a safe harbor for construction proceedings, they implicitly permit any relevant discovery related to that proceeding without triggering the clause.

*In re Estate of Spiegel*, NYLJ, Oct. 31, 2011, p. 30 (Sur. Ct. Nassau County).

### Loan vs. Gift

In a contested discovery proceeding, the executor of the estate sought repayment of alleged loans made by the decedent to her son, amounting to \$375,000. The son post-deceased his mother, and the fiduciary of his estate moved for summary judgment dismissing the proceeding on the grounds, inter alia, that the proceeding was barred by the statute of limitations and the doctrine of quasi-estoppel, and that the note purportedly evidencing the loans was unenforceable for indefiniteness.

The record revealed that when the decedent's

son became seriously ill, she began to assist him in covering his expenses. Substantiation of this assistance was in the form of 117 canceled checks written by the decedent to her son, as well as a promissory demand note, which left the amount payable blank. Although the son's estate maintained that this note was not enforceable, the executor of the decedent's estate argued that he was not seeking to enforce the note, but rather to utilize

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In 'Vescio,' the court opined that the availability of the privilege against self-incrimination is not simply based upon a witness' declaration that an answer would be incriminatory.

the instrument as evidence of the decedent's intent, and the son's acknowledgment, that the transfers in issue were loans and not gifts.

In further support of his contention, the executor submitted the affidavit and deposition testimony of the decedent's nephew, an attorney who allegedly prepared the note at the decedent's request, and an affidavit from the decedent's sister, all attesting that the subject transfers were intended to be loans and not gifts.

The Surrogate's Court in New York County opined that although the affidavits and deposition testimony were excludable at trial as hearsay, they could be considered on a motion for summary judgment if offered together with other admissible evidence to create a question of fact. Within this context, the court concluded that the promissory note and the canceled checks, in combination with the hearsay statements of the witnesses, were sufficient to deny summary relief to the son's estate.

Further, the court concluded that a triable issue of fact existed on the issue of quasi-estoppel. To this extent, the son's estate argued that inasmuch as the executor failed to include the alleged loans as an asset of the decedent's estate on the estate's federal and New York estate tax return, the decedent's estate was estopped from claiming them as such in the proceeding sub judice. The court noted that the doctrine of quasi-estoppel, or estoppel

against inconsistent positions, has been applied in a situation when a party asserts a position in court that is contrary to a position taken on a tax return. Nevertheless, the court held that inasmuch as the executor claimed that he did not know of the alleged loans at the time the tax returns were filed, a question of fact had been presented requiring that summary judgment on this ground be denied.

However, the court granted partial summary judgment on the issue of the statute of limitations holding that the claim for recovery of funds based upon checks pre-dating May 10, 2004, i.e., six years prior to the commencement of the proceeding, was time barred. The court reasoned that for purposes of computing the statute of limitations each transfer by check was a separate loan, payable on demand, and that the cause of action thereon accrued as of the date of the check.

*In re Appleby*, NYLJ, Sept. 12, 2011, at 32 (Sur. Ct. New York County) (Sur. Glen).

### Self-Incrimination Privilege

In a miscellaneous proceeding challenging, inter alia, the validity of certain trusts and transactions involving the decedent's assets that occurred shortly prior to his death, the petitioner, surviving spouse and limited administrator of the decedent's estate, sought an order directing, inter alia, the resumption of the respondent's deposition and compelling him to respond to certain questions.

The record revealed that during the course of the respondent's deposition, he was advised by counsel to refuse to answer certain questions posed to him on the basis of the Fifth Amendment privilege against self-incrimination.

The Nassau County Surrogate's Court noted that a witness' refusal to answer a question during a deposition is governed by 22 NYCRR 221.2, which provides, in pertinent part, that a witness shall respond to all questions at a deposition, and an attorney shall not direct a witness not to answer a question, except as provided in CPLR 3115, or in order to preserve a privilege or right of confidentiality. The rule further provides that if the witness does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

The court found that the privilege against self-incrimination, asserted by the respondent, exists under both the U.S. Constitution, as well as the New York Constitution. The privilege will apply even when a resulting prosecution is possible, but not definite, and where the party's testimony may provide only a portion of the total proof necessary for prosecution of the witness. Nevertheless, the court opined that the availability of the privilege is not simply based upon a witness' declaration that an answer

would be incriminatory. Rather, it is dependent upon the court's assessment of whether the claim is justified.

In opposition to the petitioner's application, respondent's counsel alleged that while the respondent did not fear criminal prosecution as a result of any response to the questions posed, he was concerned that the questions might elicit responses indicating a "scintilla of belief" that his conduct was inappropriate, and thereby jeopardize his right to obtain a liquor license necessary to his business involving the sale of alcoholic beverages.

The court disagreed and refused to extend the privilege against self-incrimination to circumstances in which a party asserting a question posed during a deposition might reflect poorly on his conduct or impact upon his livelihood. Nevertheless, the court was sensitive to the claims of the respondent that a response to a question might result in self-incrimination.

Given the uncertainty of the situation, the court concluded that an in camera conference was appropriate. Accordingly, the respondent was directed to appear with counsel to testify, in camera, regarding the facts underlying his refusal to answer the questions presented by opposing counsel, so that a determination could be made regarding the application of the privilege, and the scope of his continued deposition.

*In re Vescio*, Sept. 27, 2011, File No. 355398/F, Dec. Nos. 27394, 27475 (Sur. Ct. Nassau County).

#### Vacatur of Default

Before the court was a proceeding by a claimant against the estate seeking to create a reserve for the purpose of preserving the unliquidated claim, pending the outcome of an action pending in the Supreme Court. The respondent, executor of the estate, failed to appear on the return date of citation. Accordingly, she moved to vacate her default, alleging that she had erroneously assumed, upon receipt of the order to show cause and the petition, that it concerned one of the other pending matters in which her attorney had appeared on her behalf, and that he was consequently aware of the matter. Her attorney argued that his firm was not aware of the proceeding until after the order was issued, and that respondent had a defense that should be heard on the merits.

In opposition to the motion, petitioner's counsel argued that respondent failed to satisfy the requirements of CPLR 5015(a), by establishing a reasonable excuse for her default or a meritorious defense, and by applying for relief by order to show cause, rather than by notice of motion. Respondent replied that petitioner had not asserted any prejudice that would result if the motion was to be granted.

The Suffolk County Surrogate's Court held that respondent's use of a notice of motion rather than an order to show cause was not fatal to her application, particularly since all parties had an opportunity to be heard with respect to the relief requested. Further, the court opined that in light of the strong public policy of resolving disputes on the merits, the brief delay of respondent in seeking vacatur of her default, and the lack of prejudice to petitioner, given the contest already waged by the guardian ad litem, vacatur was warranted.

*In re Betesh*, NYLJ, Nov. 4, 2011, at 29 (Sur. Ct. Suffolk County).

#### Files to Former Client

Before the court in *In re Estate of Llewellyn*, was a discovery proceeding instituted by the preliminary executors of the estate seeking an order directing former counsel for the decedent to turn over certain property belonging to the decedent, and to appear for a deposition

regarding the identity and location of any other such property.

Specifically, the property sought by petitioners included legal files and documents amassed by counsel in connection with their relationship with the decedent. Although counsel had also represented the decedent's wife, petitioners represented that they were not seeking any documents regarding counsel's representation of the wife alone, or any documents protected by the attorney-client privilege.

In considering the application, the New York County Surrogate's Court relied on the opinion by the Court of Appeals in *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 (1997), holding that, subject to narrow exceptions, upon termination of the attorney-client relationship, an attorney must afford the client presumptive access to the attorney's entire file on the represented matter. The court noted that the narrow exceptions referred to by the court were documents that might violate a duty of nondisclosure owed to a third party or otherwise imposed by law, and a limited range of documents intended for internal office review, and use, such as an attorney's view of the client or tentative impressions of the subject matter of the representation.

Accordingly, based upon the foregoing, counsel was directed to provide petitioners with all personal property in their possession or control within the limitations established by the Court of Appeals, and to provide a privilege log for those items withheld. Further, the court directed that counsel appear to be deposed regarding the existence, identity and location of any property of the decedent not yet in petitioners' possession or control.

*In re Llewellyn*, NYLJ, Oct. 31, 2011, at 18 (Sur. Ct. New York County).

#### Marriage Found Void

Prior to his death, the decedent's purported spouse filed a notice of election against the decedent's estate. The executor of the decedent's estate instituted a proceeding to determine the validity of the election. Jurisdiction was obtained over the distributees of the post-deceased spouse, i.e., his spouse and children, who opposed the relief requested by the petitioner. The petitioner moved for summary judgment, and the respondents opposed.

The petitioner maintained that the decedent's post-deceased spouse was not legally divorced from his prior spouse when he married the decedent, and therefore, his marriage to her was void. Specifically, the documentary evidence submitted by the petitioner demonstrated that at the time the decedent's post-deceased spouse married her on Jan. 12, 1996, he was still married to his first wife, and that his divorce from her did not become final until June 6, 1996.

While the respondents conceded that the subject marriage took place prior to the judgment of divorce being issued, they maintained that there may have been a marriage between the decedent and her post-deceased spouse after the June 6 date. To this extent, respondents offered evidence, including the decedent's death certificate, and correspondence from the Veteran's Administration and Social Security Administration, recognizing that the decedent was married at the time of her death. In any event, respondents argued that there was discovery yet to be had on the issue, and therefore, summary judgment was premature.

The Suffolk County Surrogate's Court opined that where there are essentially two competing claims that a marriage was valid at a given time, each supported by proof, there is a presumption that the second marriage is valid, and that

the prior marriage was dissolved. However, this presumption is rebuttable upon a proper showing. To this extent, the court noted that the respondents had conceded that the decedent had married her post-deceased spouse at a time when he was still embroiled in a contested divorce, which did not end until judgment was entered in June 1996. Further, the court noted that the accountant for the couple had submitted an affidavit stating that he had prepared their returns and listed their filing status as "single," as both had indicated to him on multiple occasions that they were not legally married.

Based on the foregoing, the court held that the petitioner had rebutted the presumption afforded the respondents that a valid marriage existed between the decedent and her post-deceased spouse at the time of her death. Further, the court concluded that the respondents had failed to create a genuine issue of material fact that a marriage was subsequently entered into by the parties. The court rejected such claims as based on nothing more than supposition, conjecture, and self-serving statements that were insufficient to refute the uncontroverted documentary evidence in the record.

*In re Newman*, NYLJ, Nov. 1, 2011, at 26 (Sur. Ct. Suffolk County).