

TRUSTS AND ESTATES UPDATE

Expert Analysis

Appellate Review of Objections To Probate and Other Issues

This past year, the appellate courts have been busy with a variety of issues affecting the area of trusts and estates. The courts have addressed such matters as collateral estoppel, undue influence, due execution, summary judgment, the timeliness of objections to probate, and powers of attorney. The following decisions are instructive.

Defense of Collateral Estoppel Held No Bar to Discovery in Guardianship Accounting. In *In re Salvati*, the Appellate Division, First Department, unanimously reversed an Order of the Supreme Court, New York County (Wilkins, J.) which held that the nonparty executor of the decedent's estate was collaterally estopped from objecting to that portion of the respondent-guardian's final account that was based on annual accounts filed for the years 2003-2006, and denied the executor's motion for discovery as to those accounts.

The respondent was appointed guardian in 2003 for the incapacitated person (IP), who was then alive and in a coma. Thereafter, the guardian filed annual accounts for the years 2003-2007. The reports for the period 2003-2006 were reviewed by a court-appointed examiner and approved by the court.

Following the IP's death, the guardian prepared a final report and account and commenced a proceeding for the judicial approval of same, serving the executor of the IP's estate as a party. The executor filed preliminary objections to the account and sought review of the guardian's books and records, and discovery with respect to disbursements and property transactions. The court denied the executor's request for relief, except as to the accounts for 2007 and 2008, finding that the executor was collaterally estopped from objecting to the prior accountings, and therefore not entitled to discovery for the years 2003 to 2006.

The Appellate Division reversed, concluding that the guardian had failed to establish any basis for the defense of collateral estoppel. The court held that to invoke the doctrine of collateral estoppel the guardian had to demonstrate that the executor, the IP, or any other person on her

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behalf, received notice and had an opportunity to be heard, or that the guardian sought permission to render an intermediate report upon notice under the Mental Hygiene Law. The court opined that without this proof, the annual accounts were merely ex parte proceedings, which were not binding on the executor in the accounting proceeding.

In re Salvati, 2011 NY Slip Op 08666 (1st Dept.)

Reversal Ordered on the Issues of Testamentary Capacity and Undue Influence. The Surrogate's Court decision in *In re Moles*, which granted summary judgment in favor of the proponent of the will, was addressed in this column this past June. Recently, the decree issued by the court was reversed by the Appellate Division, First Department, on the grounds that questions of fact existed as to the issues of testamentary capacity and undue influence.

The court found that there was considerable circumstantial evidence of undue influence, including the facts and circumstances surrounding the will signing, the nature of the will, in which the decedent had disinherited all of the beneficiaries of her long-standing earlier will in order to leave her entire estate to her long-time companion and caregiver, the decedent's family relations, the condition of her health and mind, her dependency upon and subjection to the control of the petitioner, the petitioner's opportunity to wield undue influence on the decedent, and the petitioner's acts and declarations.

Specifically, the court relied upon a report issued by Adult Protective Services several months before the execution of the propounded will, finding that the decedent's judgment was impaired and recommending an Article 81 guardianship proceeding to safeguard her. Moreover, the court found it significant that the attesting witnesses were the petitioner's friend, who had recommended the draftsman of the will,

and one of his former employees. Further, the court noted that the draftsman of the will was not the same attorney who had prepared the decedent's prior will. Citing *Matter of Elmore*, 42 AD2d 240, 241, the court opined that "[w]here a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact for the jury as to whether the proffered explanation is adequate."

In addition, the court observed that the decedent, both before and after signing the propounded will, expressed her intent to maintain her nephew, the objectant, as the beneficiary of the bulk of her estate. To that extent, she confirmed her prior will in a discussion with her prior attorney at the time she signed a durable general power of attorney in favor of her financial advisor.

In re Moles, 2011 NY Slip Op 08966 (1st Dept.)

Summary Judgment Dismissing Objections to Probate Affirmed. In *Matter of Anella*, the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Kings County (Lopez Torres, S.), which, inter alia, granted proponent's motion for summary judgment

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dismissing the objections to probate based on lack of testamentary capacity and undue influence, and admitted the propounded will to probate.

The proponent and the objectant were two of the decedent's five children. The decedent's prior will bequeathed his home to the proponent and her sister, and a television and bank accounts to the objectant. Subsequent to the execution of this will, the decedent and objectant had an argument which provoked the objectant to cause damage to the decedent's home.

Thereafter, the decedent retained an attorney to draft his last will which disinherited the objectant and another child, named a third child the executor of his estate, and divided his residuary estate equally between his remaining two children.

The attorney-draftsman of the instrument and a psychiatrist, who evaluated the decedent prior to the will execution, opined that the decedent knew the natural objects of his bounty and was able to make decisions with respect to the distribution of his estate.

In support of her motion for summary judgment, the proponent submitted the deposition testimony of one of the attesting witnesses, the affidavit of the draftsman, the report of the psychiatrist, and affidavits of family and friends, all of whom averred that the decedent was competent to make a will and intended to disinherit two of his children. Based upon this proof, the court concluded that the proponent had established a prima facie case of capacity, which the objectant had failed to refute.

Moreover, the court found that the proponent had established that the 2005 will was not the product of undue influence. Specifically, the court held that even if the proponent had a confidential relationship with the decedent because she cared for him and tended to his financial affairs, that relationship was counterbalanced by the close family relationship that existed between them. The court concluded that the objectant had failed to raise a triable issue of fact under these circumstances.

In re Anella, 2011 NY Slip Op 07633 (2d Dept.)

Order Granting Summary Judgment on Grounds of Due Execution Affirmed. In *Matter of Williams*, the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Suffolk County (Czygier, S.), which, upon an order of the court granting the petitioner's motion for summary judgment dismissing the objections to probate based on due execution, admitted the decedent's will to probate.

The court found that the petitioner had made a prima facie showing that the propounded will was duly executed by submitting an instrument with an attestation clause, together with the affidavits of the attesting witnesses. The court concluded that the objectant had failed to raise a triable issue of fact relative to the petitioner's proof. Further, it held that objectant's claim that the Surrogate's Court erred in considering the interrogatories of the attesting witnesses had been improperly raised for the first time on appeal.

Matter of Williams, 2012 NY Slip Op 00219 (2d Dept.)

Dismissal of Objections for Untimeliness Affirmed. In a probate proceeding, the respondent appealed from a decree of the Surrogate's Court, Chemung County (Hayden, S.), which among other things, dismissed his objections to probate of the decedent's will.

In June 2009, after the filing of a petition for probate of the decedent's will, the respondent, on behalf of himself and other non-resident potential distributees, sought to examine the attesting witnesses prior to filing objections to probate. Although granted a 30-day extension to do so, respondent did not conduct the examinations, but instead, in January 2010, served discovery demands upon the petitioners in advance thereof. Apparently in response to the respondent's prolonged delay in seeking the discovery and the broad nature of the demands,

the Surrogate's Court directed respondent to post a \$15,000 bond prior to any discovery taking place. Respondent failed to post the bond, but filed objections to probate. The petitioners argued that the objections were untimely, the Surrogate's Court agreed and admitted the will to probate.

The Appellate Division, Third Department, affirmed. In doing so, the court opined that if pre-objection examinations pursuant to SCPA 1404 take place, objections to probate "must be filed within ten days after the completion of the examinations or such other time as is fixed by stipulation of the parties or the court." (SCPA 1410). The court found that although respondent was given a substantial amount of time to complete the examinations, he failed to do so. As such, the court concluded that his March 2010 objections, filed more than six months after the examinations were to be completed, were untimely. Further, given the conclusory nature of the objections, the court held that the Surrogate's Court did not abuse its discretion in rejecting them.

In re Scianni, 2011 NY Slip Op 06174 (3d Dept.)

The court opined in 'Scianni' that if pre-objection examinations pursuant to SCPA 1404 take place, objections to probate 'must be filed within ten days after the completion of the examinations or such other time as is fixed by stipulation of the parties or the court.'

Deed Executed by Agent Under Power of Attorney Held Invalid. In *In re Marriott*, the Appellate Division, Fourth Department, reversed an Order of the Surrogate's Court, Oneida County (Gigliotti, S.), which denied a motion for summary judgment as to the invalidity of a deed executed by an agent pursuant to a power of attorney executed by the decedent prior to her death.

The record revealed that the decedent executed the short form power of attorney granting certain powers to her sons and her daughter-in-law. She revoked the power two months later, after one of the decedent's sons transferred the property to himself and his brother, his co-agent, for \$1 consideration. Subsequent to the commencement of a discovery proceeding in Surrogate's Court by the executor of the estate, one of the decedent's sons transferred his one-half interest in the property back to the estate for no consideration, leaving the other one-half in the name of the decedent's other son. Thereafter, the premises were sold to a third party, and one-half the proceeds were held in escrow pending a determination as to the son's entitlement to them. The petitioner, who was executor, moved for summary judgment directing that the sale proceeds be released to the estate, and the Surrogate's Court denied the motion.

In reversing the Order of the Surrogate's Court, the Appellate Division held that the purported conveyance of the property was

unauthorized inasmuch as the power of attorney did not grant the agents power to transfer the property to themselves. Specifically, the statute in effect at the time the power of attorney form was executed and the directions on the form explicitly required the decedent to place her initials in the designated spaces on the form in order to provide a particular power to an agent. In the event the principal failed to initial a space, no such power was conferred to the agent.

Within this context, the court noted that while the decedent placed an "X" in the space conferring all the powers set forth in the form to her agents, she failed to place her initials next to the mark. The court acknowledged that while an "X" may constitute a signature or an individual's mark in circumstances where an individual cannot sign his/her name in full, this exception did not apply in cases in which, as in the case sub judice, the principal could sign her name in full.

Accordingly, the court held that no authority was granted to the decedent's sons to convey or otherwise dispose of the subject property, and directed that the sale proceeds thereof be released to the estate.

In re Marriott, 2011 NY Slip Op 05885 (4th Dept.)