

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Probate Proceedings, Trust Disputes And Other Summer Happenings

This summer has brought with it opinions addressing a variety of issues impacting the field of trusts and estates. From questions relating to the revocation of letters, bills of particular, advice and direction, and wrongful death compromises, the Surrogate's Courts these past several months have provided valuable instruction to practitioners.

**Revocation of Letters Due to Status as Creditor Denied.** In a proceeding for revocation of letters of co-trusteeship issued to the decedent's son, the petitioner, the decedent's spouse, moved for summary judgment.

The trust at issue was created pursuant to the terms of the decedent's will for the benefit of his wife, during her lifetime, and upon her death, his three children. Upon admission of the will to probate, letters of trusteeship issued to the petitioner and the decedent's children, who were the nominated trustees thereunder. The assets of the trust allegedly consisted, in part, of shares of stock of two corporations, of which the decedent's son was also a shareholder.

These corporations were the subject of two other related proceedings commenced by the petitioner, one for discovery pursuant to SCPA 2103, and the second for judicial dissolution of the entities.

In opposition to the petition for his removal, the decedent's son asserted eight counterclaims against the decedent's estate based upon breach of contract and unjust enrichment. In support of her motion for summary relief, the petitioner argued that by alleging these counterclaims, the respondent placed himself in a conflict of interest with the estate that required his disqualification as trustee as a matter of law.

The Surrogate's Court, Queens County, opined that a conflict of interest in itself did not warrant removal of a fiduciary. Indeed, given the great deference accorded to the testator's selection of a fiduciary, only a finding of actual misconduct, as specified by the provisions of SCPA 707, would

By  
**Ilene  
Sherwyn  
Cooper**



justify the removal of a fiduciary or a refusal to issue fiduciary letters.

Within this context, the court found that the petitioner had failed to establish a basis for summary relief. Specifically, the court held that the mere fact that the decedent's son had asserted claims against the estate and was thereby an estate creditor did not constitute grounds for his removal as a matter of law. In fact, the court noted that the provisions of SCPA 1805 were designed to enable a fiduciary with a claim against an estate to serve by requiring that court approval be obtained for payment of such claim.

---

The Surrogate's Courts these past several months have provided valuable instruction to practitioners.

Further, the court opined that the counterclaims asserted by the decedent's son did not create a de facto conflict of interest with the trust since they were asserted against the estate. To this extent, the court found it significant that the decedent's son was not a fiduciary of the estate, and thus, was not in a position where he would be forced to make decisions regarding litigation strategy as a fiduciary of the estate that would conflict with the prosecution of his claims.

The court held the petitioner's claims that the subject trust was impacted by these claims conclusory and belied by the record, which revealed that the trust had already been funded. As in the case of the estate, the court concluded that even if the claims of the decedent's son were against assets purportedly owned in part by the trust, it was not sufficient to warrant his removal as trustee on the basis of a conflict of interest.

Accordingly, summary judgment was denied. *In re Estate of Hersh*, NYLJ, June 18, 2012, at 26 (Sur. Ct. Queens County).

**Objections Stricken Due to Deficiency and Delay of Bill of Particulars.** In a contested probate proceeding, the petitioner and sole beneficiary under the propounded instrument moved to preclude the objectant, the guardian of the property of one of the decedent's infant grandchildren, from offering any evidence or testimony in the proceeding on the grounds that his bill of particulars was untimely and not in compliance with the specificity requirements of Uniform Court Rule 207.23. In opposition to the application, the objectant relied on the likelihood of success of his objections, particularly on the grounds of lack of testamentary capacity, because the decedent was suffering from a terminal illness at the time the propounded will was executed, and undue influence.

The Surrogate's Court, Bronx County, noted that the object of a demand for a bill of particulars is to amplify the pleadings so as to eliminate surprise at trial, and not to serve as a disclosure device. Toward this end, a party is not obligated to respond to particulars on any issue on which the party does not have the burden of proof. The CPLR and the Uniform Rules authorize the court to fashion any remedy that is just for either a refusal to comply with a demand for a bill of particulars, or an unduly burdensome demand.

Within this context, the court struck objection number 1 alleging that the propounded will did not express the decedent's "true wishes and intent," on the grounds that it was not a cognizable independent objection. On the issue of testamentary capacity, the court conditionally granted the petitioner's motion, holding that the objection would be dismissed unless the objectant furnished the petitioner with information pertaining to the expert opinion and additional medical records he had obtained within 45 days of the date of the order to be entered.

With respect to the issue of undue influence, the objectant alleged that the purported will of the decedent was procured by the proponent and his girlfriend. Specifically, the objectant maintained that the propounded will was not natural in its provisions inasmuch as it devised her home to the proponent rather than her infant grandchild, who had lived there with the decedent, and whose

mother had committed suicide one month prior to the will execution ceremony.

Moreover, the objectant claimed that the decedent was suffering from physical and mental distress due to her protracted battle with cancer at the time the will was executed. Additionally, objectant alleged that the proponent arranged for the attorney-draftsman to meet the decedent, as well as for a \$50,000 bequest to his girlfriend in the event he predeceased the decedent. Based on the foregoing, the court held that the objectant's responses were sufficient to avoid striking the objection on the issue of undue influence.

On the other hand, the court granted preclusion on the issue of fraud based on the objectant's admission that he was unaware of any specifics about any false statement that constituted the alleged fraud.

Additionally, the court granted preclusion as to objections numbered 4 and 5, finding, in particular, that objection number 4 did not support any objection independent of other valid objections, and that the time to file additional objections as requested by objection number 5 had long expired.

*In re Estate of Krzyck*, NYLJ, June 15, 2012, at p. 23 (Sur. Ct. Bronx County).

#### **Request for Advice and Direction Denied.**

Before the Dutchess County Surrogate's Court in *In re Boyer* was a proceeding, pursuant to SCPA 2107, by two of the three trustees of the trust created under the decedent's will, for advice and direction regarding the listing for sale of the real property owned by the trust, and whether the beneficiary of the subject trust had the right to occupy the real property or alternatively be subject to eviction proceedings. The application was opposed by the trust beneficiary as well as the third trustee. Notably, one of the petitioning trustees was a remainderman of the trust, and the second petitioner was the spouse of a trust remainderman. The third trustee was the sister of the trust beneficiary.

The will of the decedent granted the trustees all the powers granted to fiduciaries in EPTL 11-1.1, and also specifically granted them the absolute discretion to sell all or any portion of any real or personal property of the estate or trust. The record also revealed that the subject real property consisted of a horse farm on approximately 67 acres of land. Prior to her death, the decedent owned a horse boarding business on the farm, on which the trust beneficiary resided and worked. The trust beneficiary continued to operate the horse boarding business and reside on the farm after the decedent's death.

In support of the application for advice and direction, and more specifically, for permission to liquidate the farm, the petitioners alleged that the business being operated on the farm did not generate sufficient income to cover the farm's expenses and that the funds contained in the trust for that purpose would be exhausted by 2013. In opposition to the application, the third trustee maintained that while she did not oppose the

sale, she opposed the manner in which it was being handled. Additionally, she claimed that the trustees should be removed and disinterested trustees appointed given each of their potential and actual conflicts of interest.

The court opined that trustees have broad powers to administer a trust including the authority to take possession of trust property, unless specifically disposed of, and to sell same on such terms as the trustees conclude will be the most advantageous to those interested in the trust estate. In exercising this authority, trustees are charged with the duty of equal loyalty to all beneficiaries whether income beneficiaries or remaindermen.

Although a fiduciary may petition the court for advice and direction concerning the administration of a trust, courts are generally loath to substitute their judgment for those of the fiduciary. On the other hand, the court noted that the statute authorizes a fiduciary to petition for advice and direction concerning the propriety, price, manner and time of a sale "whenever the value of property of an estate is uncertain or dependent upon the time and manner of sale..." SCPA 2107(1).

On this basis, the petitioners maintained that advice and direction were warranted because they received three different opinions as to the farm's

The court in 'Boyer' opined that trustees have broad powers to administer a trust including the authority to take possession of trust property, unless specifically disposed of, and to sell same on such terms as the trustees conclude will be the most advantageous to those interested in the trust estate.

value from four different brokers, and because of their concern that the sale would be thwarted by the trust beneficiary. Nevertheless, the court held that the circumstances did not present a novel or complex valuation issue or an issue of uncertain valuation as contemplated by the statute, so as to justify its rendering advice and direction in connection with the sale of the farm. Rather, the determination of the appropriate sale price and terms of sale were matters to be determined by the trustees in accordance with their fiduciary duties and business judgment. Accordingly, the application for advice and direction pursuant to SCPA 2107(1) was denied.

The court also rejected petitioners' request for relief pursuant to SCPA 2107(2). Although the petitioners alleged that extraordinary circumstances existed by virtue of the conflict among the parties, the court found that the provisions of EPTL 10-10.7 authorized the majority of the trustees to act in relation to the issue of the property sale. Indeed, while the court expressed an appreciation for the difficult situation in which the trustees found themselves, it nevertheless concluded that the question presented was one of business judg-

ment and not of law.

Finally, the court denied the application to remove the trustees finding that the allegations were not severe enough to constitute serious misconduct, or to demonstrate prima facie that the trustees were unfit to continue to serve.

*In re Estate of Boyer*, NYLJ, June 26, 2012, at p. 28 (Sur. Ct. Dutchess County).

**Wrongful Death Compromise Order Held Jurisdictionally Defective.** In a proceeding for the allocation and distribution of the proceeds of a wrongful death action, the Surrogate's Court, Queens County, in *In re Stokes*, scheduled a hearing on the grounds that the order of compromise issued by the Supreme Court, purportedly pursuant to EPTL 5-4.6, was not in compliance with the statute.

The court noted that the Supreme Court order allowed the payment of attorney fees and disbursements without requiring that those funds remain in an interest-bearing escrow account pending the filing of a petition for allocation and distribution. Additionally, the court found that one of the distributees of the decedent was a person under a disability for whom a guardian ad litem should have been appointed. Further, the court determined that in the application before the Supreme Court, the petitioner had not served all the necessary parties interested in the decedent's estate.

The court opined that the foregoing problems and issues raised by the Supreme Court proceedings were not isolated incidents within the context of wrongful death compromises. Indeed, the court indicated that there appeared to be a consistent misunderstanding of the provisions of EPTL 5-4.6, as evidenced by compromise orders that are facially and procedurally non-complaint with the statute. To this extent, while the court recognized the significant efforts of trial counsel in bringing a wrongful death action to fruition, it also found that the safeguards and procedural prerequisites of the statute were to be strictly adhered to by practitioners seeking relief in the Supreme Court. In like manner, it is the duty of the Surrogate's Court to insure compliance with the statute, especially when a person under a disability was interested in the proceeding.

Based on the foregoing, specifically, the jurisdictional deficiencies of the Supreme Court action, the fact that a guardian ad litem had not been appointed prior to entry of the Supreme Court order, and that counsel in the Supreme Court had appeared in the Surrogate's Court as counsel for the fiduciary, the court directed that counsel return all attorney fees previously paid and to deposit same in escrow, and that the petitioner amend her petition and accounting to include all necessary parties.

*In re Stokes*, NYLJ, May 30, 2012, at p. 27 (Sur. Ct. Queens County).