

TRUSTS AND ESTATES UPDATE

Expert Analysis

Surrogate's Court: A Tutorial in Jurisdiction

The jurisdiction of the Surrogate's Court is not often the subject of decisions emanating from that bench. Indeed, since the decision in *Matter of Piccione*, 57 NY2d 278 (1982), the Surrogate's Court has taken an expansive view of its role in determining matters affecting the affairs of a decedent and the administration of a decedent's estate, and has found little need to opine on the subject. Nevertheless, within the past several months, both the Surrogate's Court and the Appellate Division have confronted the issue of the surrogate's jurisdiction with respect to such issues as attorney fees, foreclosure proceedings and Totten trust accounts. The divergent views of the bench on this subject are instructive.

Attorney Fees Disputes

The Surrogate's Court has generally taken a broad approach when confronted with the issue of its subject matter jurisdiction. Consider the following:

In *In re Lohausen*, *New York Law Journal*, July 20, 2012, at 38 (Sur. Ct. Queens Co.), the court addressed the issue of its jurisdiction to fix and determine legal fees in a proceeding instituted by the decedent's daughter, the sole distributee, residuary beneficiary and executor of his estate.

The record revealed that counsel was retained, by letter agreement, shortly after the decedent's death to "probate the estate." In addition, counsel agreed to prepare an inventory of estate assets, make required court appearances, marshal assets, obtain an ID number, and review assets for estate tax return purposes. The fee was set at 5 percent of the value of the gross taxable estate. Counsel billed the petitioner approximately \$103,000 for legal services pursuant to the retainer, which petitioner paid, in small part, from her own funds, and from estate funds.

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In support of the application to fix fees, the petitioner alleged that counsel took advantage of her in connection with their fee arrangement, and that the reasonable value of his services was not more than \$10,000. Counsel moved to dismiss the petition alleging that the estate had been fully administered and distributed, that counsel fees had been fully paid in accordance with the retainer, and that accordingly the court no longer had jurisdiction over the matter. Counsel further argued that because the petitioner executed the retainer in her individual capacity, the matter was a contractual dispute between living persons, which the court had no power to address.

The court rejected counsel's argument holding that it had the authority to determine issues concerning attorney fees involving an estate pursuant to the provisions of SCPA 2110. Although counsel argued that the provisions of the statute created a time limitation on the court's jurisdiction to "any time during the administration of the estate," the court concluded, based on a reading of the legislative history of the provision, that no such limitation was intended.

Moreover, and in any event, the court held that it had the inherent authority to supervise the conduct of counsel and the legal fees charged for services rendered, as well as the jurisdiction to do so pursuant to the New York State Constitution.

Counsel additionally argued that because the petitioner individually retained and paid counsel, she was bound by the retainer and the court could not modify its terms. Again, the court disagreed. The court opined that when a retainer prescribes the legal fee to be paid, an attorney bears the burden of establishing that its terms were fairly presented and understood by the client, and that

the fee is fair and reasonable. Thus, the court held that the existence of a retainer does not prohibit a review of legal fees, and an agreed upon fee, even based on a percentage, may be disallowed if the amount of the fee is so large to become out of proportion to the value of the professional services rendered.

The court noted that on a motion to dismiss, the facts alleged in a petition must be accepted as true, and the petitioner must be afforded every possible favorable inference. Accordingly, the court concluded that an evidentiary trial was required concerning the facts and circumstances surrounding the retainer agreement and to determine whether it was fully known and understood by the petitioner, and was fair and reasonable.

Foreclosure Action

Before the court in *In re Johanneson*, NYLJ, Sept. 4, 2012, at 26 (Sur. Ct. Richmond Co.) was the issue of the Surrogate Court's jurisdiction over a foreclosure action. The petitioner and administratrix of the decedent's estate sought the court's consent to a transfer of a pending foreclosure action from Supreme Court. The application was opposed by the bank, which claimed that the Surrogate's Court lacked subject matter jurisdiction over such matters. The record reflected that the subject real property was owned by the decedent and her spouse, as tenants by the entirety, and that the decedent's spouse was responsible for her death.

Despite the bank's contentions that the Surrogate's Court lacked the authority to grant judgments of foreclosure and sale, the court, relying on the provisions of the New York State Constitution, the Surrogate's Court Procedure Act, and the opinion in *Matter of Piccione*, supra., held that the foreclosure of a home in which the decedent had an interest at death affected or related to the administration of the decedent's estate, and was within the scope of its subject matter jurisdiction.

Nevertheless, the court held that it had the authority to decline a transfer of the action from

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the Supreme Court in the interests of judicial efficiency. To this extent, under the circumstances, the court determined that the Supreme Court was better equipped to hear and determine the foreclosure action, in view of its routine involvement with such matters, and the pendency of the action in that court since its inception.

Sale of Real Property

The court's jurisdiction over the sale of real property was also addressed by the court in *In re Marino*, NYLJ, Aug. 24, 2012, at 22 (Sur. Ct. Bronx Co.), in which, inter alia, the disposition of a specifically devised parcel of property was at issue.

The decedent died, testate, survived by a spouse, who post-deceased her, and four children, two sons and two daughters. One of her daughters was named the executrix of her estate. Pursuant to the terms of her will, the decedent devised and bequeathed her real property to her four children in equal shares, subject to a life estate in favor of her spouse. The will further provided that in the event the property was to be sold after the spouse's death, or with his consent during his lifetime, her daughter, the executrix, was to have the first right to purchase the premises at the then fair market value. On the date the will was executed, the decedent's spouse executed a deed transferring title to the subject property to the decedent subject to a life estate in himself.

The will of the decedent's spouse devised and bequeathed his entire estate to his four children equally. Further, prior to his death, he executed a renunciation and disclaimer of his right, title and interest in the decedent's estate, including his life estate, although that instrument was never filed with the court.

Following the death of the decedent's spouse, and in accordance with the provisions of the decedent's will, her daughter sought court authorization, pursuant to SCPA §§1902 and 2107, to purchase the property, as well as authorization to manage the property in the interim. The application was opposed by the executrix's sister and one of her two brothers, who sought the petitioner's removal, and raised issues regarding the construction of the clause in the decedent's will governing the disposition of the property. Following the filing of an answer, the executrix moved for summary judgment.

On the issue of relief pursuant to SCPA 2107, the court noted that the provision is available under circumstances in which the fiduciary is faced with uncertainty over the propriety of selling estate property, or extraordinary circumstances. Within this context, the court held that it would entertain the application inasmuch as the executrix was confronted with

an apparent self-dealing transaction directed by the terms of the decedent's will.

The court further held that the reserved life estate of the decedent's spouse gave him the right to enjoy and possess the realty during his lifetime only, and upon his death, the property, pursuant to the decedent's will, was specifically devised to the decedent's four children. Hence, upon admission of the decedent's will to probate, title to the property vested in the decedent's children as tenants in common dating back to the moment of her death. As a consequence, an executor does not have the power to manage or dispose of such realty without court approval, and only under those circumstances set forth in SCPA §1902.

In *Marino*, the court concluded that the proposed sale was inextricably intertwined with the administration of the decedent's estate, and was the only practical way of insuring the decedent's intent to benefit her children from the asset.

To this extent, the court noted that the provisions of SCPA §1901 grants the surrogate the authority to approve a disposition of the decedent's realty for any of the purposes set forth in SCPA §1902, including the payment and distribution of shares in an estate, and for any other purpose the court deems necessary. SCPA §1902(6) and (7).

While the court recognized that a sale of specifically devised real property could be construed as a matter between living persons beyond the scope of its jurisdiction, and more properly the subject of a partition action, it nevertheless concluded that such a determination would render the provisions of SCPA §1902 meaningless, and undermine the expansive view of the court's jurisdiction provided by the Court of Appeals in *Piccione*. Rather, the court opined that courts have liberally granted applications to sell real property pursuant to SCPA §1902(6) and (7) when there is sufficient nexus between the relief requested and the administration of the decedent's estate.

Within this context, the court considered the fact that the decedent's will clearly provided for the executrix to have the first option to purchase the property whenever the property was to be sold. Although the will did not address whether the executrix had a unilateral right to demand a sale of the property, the fact of the matter was that the four children could not coexist on the premises as tenants

in common. Under those circumstances, the court concluded that the proposed sale was inextricably intertwined with the administration of the decedent's estate, and was the only practical way of insuring the decedent's intent to benefit her children from the asset. Accordingly, the application by the executor was granted.

The Appellate View

Despite the foregoing opinions adopting an expansive perspective of the Surrogate Court's jurisdiction, the Appellate Division recently took a different, and ostensibly more limited approach in *Matter of O'Connell*, 2012 NY Slip Op 06027 (2d Dept.).

In *O'Connell*, the Second Department reversed an order of the Surrogate's Court, Kings County (Lopez Torres, S.), which granted a motion for summary judgment directing the decedent's surviving spouse to turn over the proceeds of a Totten trust, which she had withdrawn prior to his death utilizing a power of attorney, to the named beneficiaries thereof.

The court opined that the Surrogate's Court is a court of limited jurisdiction, and possesses only those powers granted to it by statute. To this extent, the court has jurisdiction over controversies relating to the affairs of the decedent and the administration of a decedent's estate, but does not have jurisdiction over matters involving controversies between living persons.

Within this context, the court held that the matter relating to the alleged wrongful conversion of the Totten trust account proceeds was a dispute between living persons, which "in no way affected the affairs of the decedent or the administration of his estate." Specifically, in this regard, the court noted that the Totten trust account was terminated prior to the decedent's death, and there was no claim by the petitioner that his estate was entitled to any of the proceeds.

Moreover, the court held that while the proceeding brought in the Surrogate's Court was pursuant to SCPA §207, conferring jurisdiction in that court over lifetime trusts, the statutory definition of a "lifetime trust" does not include a "trust created in deposits in any banking institution or savings and loan institution." SCPA §103(31).

Accordingly, the court held that the Surrogate's Court lacked subject matter jurisdiction over the controversy, and as such, the order of the court was void.