

TRUSTS AND ESTATES UPDATE

Expert Analysis

Summer Blend—Decisions Cover Range of Matters

The torrential downpours of these past summer months have also brought with them a deluge of Surrogate's Court opinions addressed to an array of issues affecting the practice of trusts and estates. From such matters pertaining to the withdrawal of counsel, vacating decrees, the right of election, and the business judgment rule, decisions of interest abound in their variety and scope. Consider the following.

Retaining Lien

In a contested probate proceeding, application was made by counsel for the objectants to withdraw, due to a conflict of interest among its clients, the failure of its clients to cooperate, and significant fees owing to the firm. Counsel also requested that it be granted a retaining lien for all property, documents, monies or securities belonging to its clients in its possession, until its legal fees were paid in full, as well as a charging lien.

In view of the fact that the application was unopposed, the firm's request to be relieved as counsel was granted. The Suffolk County Surrogate's Court further granted counsel's request for a charging lien, but denied the firm's request for a retaining lien. The court held that a retaining lien is confined to property in the possession of an attorney and is entirely distinct from the lien of an attorney created by Judiciary Law §475. Specifically, the court noted that a statutory lien, as compared to a retaining lien, could be enforced by an order of the court, directing that it be satisfied out of monies or property to which the lien attached though not in the possession or control of the attorney. As such, the retaining lien sought by counsel, being a possessory right only, could not form the subject of a court order.

On the other hand, the court found that a charging lien was available to counsel, but that

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the firm had failed to submit any proof in the form of a retainer agreement, time records or an affirmation of services for the fees alleged to be owing. The court opined that when an attorney engaged under a contract for a definite purpose and not under a general retainer is discharged, such attorney is entitled to recover in quantum meruit the fair and reasonable value of the services rendered. Accordingly, while the court granted counsel a charging lien, it ordered that the amount of such lien would be determined in a separate application, pursuant to SCPA 2110, or in an appropriate action in another court for payment of its fees for services rendered.

In re Galfano, NYLJ, July 19, 2013, at 33 (Sur. Ct. Suffolk County).

In June, 'In re Boyer' held that the Surrogate's Court had jurisdiction over an eviction proceeding.

Laches

Before the Surrogate's Court, New York County, in *In re Tarka* was an uncontested motion by the public administrator, as fiduciary of the decedents' estates, for summary judgment dismissing the petitions of the respondent to set aside a stipulation of settlement and to vacate the accounting decrees entered in both matters, on the grounds of laches and failure of the petitioner to raise a triable issue of fact or to demonstrate the merits of her underlying claims.

The record revealed that the decedents, husband and wife, died survived by their two children, one of whom was the respondent. Although initially the respondent had been appointed the

executor of her mother's estate, she was subsequently removed due to her failure to comply with a court order directing her to account, and the public administrator was appointed in her place and stead. Upon the death of respondent's father, respondent's application to be appointed administrator of his estate was denied and the public administrator was appointed fiduciary, based on her failure to comply with the court's order in the estate of her mother, and the Appellate Division's affirmance of that order.

Subsequently, the public administrator and respondent entered a stipulation in open court whereby the parties agreed, inter alia, to the withdrawal of all pending appellate matters in both estates, withdrawal of objections by the respondent to the accounting of the public administrator in the estate of respondent's mother, the agreement by the respondent not to pursue objections to the account of the public administrator in the estate of her father, and withdrawal of claims by the public administrator against the respondent. The documents submitted by the public administrator in support of her motion established that she fulfilled the terms of the settlement with respondent, whereupon three years after it had been entered, respondent moved to set it aside.

In support of her application, respondent alleged that she had not been feeling well on the date she had entered the stipulation, and felt intimidated by the notion of having to proceed with a hearing in the event that she did not agree to the settlement.

In granting the motion by the public administrator for summary relief, the court opined that stipulations of settlement, especially those entered in open court, with the party seeking vacatur represented by counsel, are not lightly set aside. In order to succeed, a movant must establish grounds sufficient to invalidate a contract, such as new evidence, fraud, collusion, mistake or accident. An application to vacate a decree similarly will only be granted in extraordinary circumstances based upon a showing of a reasonable excuse for failing to file timely objections, and a probability of success on the merits.

Nevertheless, the court concluded that even if respondent had demonstrated sufficient grounds to set aside the settlement and vacate the court's decrees, her claims would be barred by laches, as a result of her unexcused delay in instituting the proceedings and prejudice to the public administrator. In reaching this result, the court was persuaded by the fact that the respondent had been represented by counsel at the time she entered the stipulation, and she agreed to its terms with the advice of counsel after lengthy negotiations in which she participated.

Further, the court found that respondents' claimed reasons for seeking vacatur of the stipulation and decrees did not establish a sufficient legal basis for doing so. Finally, the court noted that respondent provided no excuse for her lengthy delay, yet accepted all the benefits of her bargain to the detriment of the public administrator and the estate.

In re Tarka, NYLJ, June 28, 2013, at 38 (Sur. Ct. New York County)(Anderson, S.)

Relief From Late Filing

In a probate proceeding, the surviving spouse of the decedent appealed from an order of the Surrogate's Court, Kings County (Lopez Torres, S.), which denied her petition for leave to file a late notice of election against the decedent's estate. The record revealed that the decedent had been married to the petitioner for 49 years prior to his death in November 2004. Preliminary letters testamentary issued on April 19, 2006 to the executor named in the decedents' will, and on Dec. 6, 2006, the surviving spouse served her notice of election on his attorney. However, the notice of election was not filed with the Surrogate's Court as required by the provisions of EPTL 5-1.1-A(d)(1).

The surviving spouse retained new counsel in October 2007, who discovered that her notice of election had not been filed in court in November 2008. Accordingly, in April, 2009, the surviving spouse filed a petition for leave to file a late notice of election pursuant to EPTL 5-1.1-A(d)(2). Letters testamentary were issued in May 2009, and on Oct. 26, 2011, the Surrogate's Court denied the surviving spouse's application.

In reversing the order of the Surrogate's Court, the Appellate Division, Second Department, held that the surviving spouse had demonstrated reasonable cause for her failure to timely file her notice of election, by establishing that it was attributable to law office failure. In addition, she established that her late filing would not prejudice any party. Accordingly, the court held that the Surrogate's Court improvidently exercised its discretion in denying the application.

Matter of Sylvester, 2013 NY Slip Op 4613 (2d Dept.).

Business Judgment

In *In re LaVacca*, the administrator of the decedent's estate petitioned the Surrogate's Court, Dutchess County, for an order setting aside liens

on a commercial parcel of property so that it could be sold, directing that the sale proceeds be retained after payment of closing costs and expenses, and directing payment of the debts of the estate upon the filing of his final accounting.

Upon consideration of the relief, the court declined to grant the fiduciary's application, concluding that the administrator was essentially requesting that it substitute its business judgment for his. Specifically, the court opined that in order for a petition for advice and direction to be entertained, extraordinary circumstances must be demonstrated. The court held that no such showing had been made, and that the provisions of EPTL 11-1.1 granted broad powers to the fiduciary that enabled him to administer the estate without court intervention.

In re LaVacca, NYLJ, June 21, 2013, at p. 42 (Sur. Ct. Dutchess County).

The court in 'Galfano' opined that when an attorney engaged under a contract for a definite purpose and not under a general retainer is discharged, such attorney is entitled to recover in quantum meruit the fair and reasonable value of the services rendered.

Three Year/Two Year Rule

In a contested probate proceeding, an application was filed with the Surrogate's Court, New York County (Mella, S.) by the objectant, who requested that the scope of discovery be extended beyond the three year/two year period set forth in Uniform Court Rule 207.27, and the court's discovery order. Specifically, the objectant sought expansion of the rule in connection with the examinations before trial of four witnesses, the decedent's prior physician, the decedent's former employer, the decedent's prior attorney and draftsman of three prior wills, and the decedent's companion. The objectant alleged that a broader discovery period was needed in order to prove her claims of lack of testamentary capacity and undue influence by the decedent's companion over the course of many years.

In denying the relief requested by the objectant, the court held that deviation from the three year/two year rule would only be allowed upon a showing of special circumstances, based upon facts evidencing a scheme to defraud or a continuing course of conduct of undue influence. The court found that the objectant had failed to make such a showing, and that at most, the facts proffered demonstrated a long-term relationship between decedent and his companion. In addition, the court noted that medical records for the period covered by the rule and the examina-

tions of the decedent's prior physician, his prior counsel and his companion were available to the objectant to explore her claim of lack of capacity and undue influence.

In re Macguigan, NYLJ, July 3, 2013, at 22 (Sur. Ct. New York County)(Mella, S.).

Follow Up

Within the past year, I have discussed the broad approach generally taken by the Surrogate's Court when confronted with the issue of its subject matter jurisdiction, and, within that context, referred to the decision in *In re Johansson*, Sept. 4, 2012, at 26 (Sur. Ct. Richmond County), in which the surrogate found the court had jurisdiction over a foreclosure proceeding. Of like import, is the opinion rendered in June of this year by the Surrogate of Dutchess County in *In re Boyer*, 2009-97672/J. NYLJ, 1202603926757, at *1 (Decided June 7, 2013), in which it was held that the Surrogate's Court had jurisdiction over an eviction proceeding.

Before the Surrogate's Court was a request by the trustees of the testamentary trust under the decedent's will for a final judgment of possession of specified premises, and the issuance of a warrant of eviction to remove respondent from possession. The record revealed that the court had previously determined that the subject property belonged to the trust, and that the will of the decedent conferred no proprietary interest in the property to the respondent, who was a trust beneficiary and a tenant at will.

On the issue of its jurisdiction over the subject of the proceeding, the court held that it had the authority to direct an eviction of tenants from estate property, as it was a matter relating to the administration of a decedent's estate. The court found the fact that the application was made by testamentary trustees, rather than an executor or administrator was inconsequential, inasmuch as the issues raised were intertwined with significant issues relating to the trust. Accordingly, the court issued judgment in the petitioners' favor, concluding that the respondent had failed to submit competent evidence necessitating a plenary hearing.