REAL PROPERTY AND ESTATE ADMINISTRATION: A TRAP FOR THE UNWARY?
(Ethical Considerations when Dealing with Real Estate in Estates)

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ESTATE ADMINISTRATION AND REAL PROPERTY

- **The transfer and administration of real property in an estate can raise serious ethical issues, and often creates significant tension among estate beneficiaries, intestate distributees and fiduciaries.**
- **This material and discussion is intended to highlight some of the most common issues seen in Surrogate's Court related to real property, and the potential ethical issues that come with real estate in estates.**

ADVISING WHETHER TO ACCEPT APPOINTMENT AS FIDUCIARY

- **As you are aware, real estate in an estate can create many conflicts. Should a person, named or not, become the fiduciary?**
- **Acceptance of the fiduciary responsibility is voluntary. Having once accepted, the fiduciary cannot resign without permission of the court and accounting for the actions taken.**
- **The nominated fiduciary should carefully weigh the risks, responsibilities and duties involved in deciding whether to accept or decline the appointment (see EPTL Art. 11 authority of fiduciary).**
- **Relevant questions for making the decision:**

- **Does the fiduciary have a conflict that will make it difficult to administer the estate?**
- **Is there potential litigation against the attorney-drafter (see Schneider v. Finmann, 15 NY3d 306 [2010]), existing litigation in which the decedent was a plaintiff or defendant, an ongoing business that needs to be continued or sold, or administration of unusual assets (vacation property?) or assets subject to significant fluctuations in value?**
- **Does the fiduciary have authority under the will to deal with property (including complex assets subject to administration) and what protections, if any, are offered before and after the will is probated?**
- **Is the estate insolvent (or real estate heavy without liquid assets), and if so, will fiduciary still receive commissions?**

SPECIFICALLY DEVISED REAL PROPERTY

- **Title to specifically devised real property vests in the specific devisee immediately upon decedent's death (see Waxson Realty Corp. v Rothschild, 255 NY 332 [1931]; Matter of Payson, 132 Misc 2d 949 [Sur Ct, Nassau County 1986]).**
- **Immediate vesting means that an executor does not have the authority to manage the property or pay for the maintenance and upkeep of such property out of estate funds.**
- **The specific devisee, rather, is liable for the expenses of maintaining and operating the property from the date of death forward (see Matter of Williams, 71 Misc 2d 243 [Sur Ct, NY County 1972]).**

- **Specifically devised real property has priority over other assets with respect to abatement, is not subject to fiduciary commissions and does not carry out income earned by the estate (see EPTL 13-1.3; 26 USCA §§ 662, 663).**
- **In some cases, it may be necessary to sell specifically devised real property for the payment of debts and administration expenses of the estate (see SCPA 1902). Article 19 of the SCPA permits a fiduciary to obtain court approval to divest the beneficiaries of the property and sell real property in certain situations discussed herein.**

INTESTATE DISTRIBUTION

- **When a decedent dies without a will, real property vests in decedent's distributees at the time of death and, in general, is not subject to estate administration. Therefore, an administrator has no automatic right to list and sell real estate without consent of the distributees. Without consent, there is a title issue.**
- **Article 19 would also apply to property passing in intestacy; thus the administrator may apply to reclaim real property from vested distributees to sell if necessary to pay the debts and administration expenses of the estate.**

REAL ESTATE NOT SPECIFICALLY DEVISED IN A WILL

- **Under a will, real property which is not specifically devised vests in the residuary beneficiaries as of date of death, like specifically devised property, subject to a need to sell to satisfy debts and obligations of estate (see Matter of Katz, 55 AD3d 836 [2008]).**

- **Unless specifically devised, EPTL 11-1.1 (b) (5) permits a fiduciary to manage and sell property that is not specifically devised without court order (unless self-dealing).**
- **The authority to sell real property does not have to be expressly stated in the will, but rather may be implied as a necessary component to effectuate decedent's testamentary scheme (see Salisbury v Slade, 160 NY 278 [1899]).**
- **In general, courts will not interfere with an executor's decision to sell real property, but if the value of the property in an estate is uncertain or in dispute, the fiduciary may petition the Court for advice and direction as to the propriety, price, manner and time of sale (see SCPA 2107). A Surrogate has discretion to accept or deny making a determination on an advice and direction petition.**
- **A fiduciary may be limited, however, in the ability to sell the real property if the beneficiaries demand the real property in kind (see Matter of Sherburne, 95 AD2d 859 [2d Dept 1983]).**
- **Commissions are not payable on real property which vested and was not sold by the fiduciary.**

WHEN BENEFICIARIES DISAGREE, WHO IS YOUR CLIENT?

- **An attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not for the estate (In re Schrauth's Will, 249 A.D. 847, [2d Dep't 1937])**
- **"No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary" (CPLR 4503 [a] [2] [1]).**

- **What about when the fiduciary also has a personal interest as a beneficiary? What if the fiduciary wants to bring an Article 19 proceeding to sell the house to himself?**
- **Remember attorney fees paid by the estate for work performed by the fiduciary's attorney should be to benefit the estate, not the fiduciary in his personal status as beneficiary.**

ATTORNEY MAY NOT REPRESENT PARTY IN OPPOSITION TO FORMER CLIENT

Let's say the attorney is the "family attorney" who handled the client's real estate closings, drafted the will, dealt with one child's landlord issue and the other child's speeding ticket years ago. Now there's an estate, and one child is living in the house and won't leave. Both are named executors, and now, they don't agree on anything.

- **Counsel may not begin to represent a party where there was a prior attorney-client relationship with another party and the representations are both adverse and substantially related, unless the former client gives informed consent in writing (Solow v W.R. Grace & Co., 83 NY2d 303 [1994]).**
- **What constitutes a conflict tends to be fact-specific and is the subject of continued refinement by the courts. However, it is well settled that an attorney who has represented two fiduciaries cannot later represent one in a proceeding against the other involving the same estate (Matter of Hof, 102 AD2d 591 [2d Dept 1984]).**

STICKY ISSUES: MORTGAGES AND LIENS ON REAL PROPERTY

- **Without an express indication in the will to exonerate specifically devised real property from an encumbrance such as a mortgage or lien, a fiduciary is not responsible for the satisfaction of the encumbrance out of estate assets (see EPTL 3-3.6).**
- **The encumbrance is chargeable against the property and the beneficiary receives the property subject to the encumbrance.**
- **Where property encumbered by a lien or mortgage is transferred to two or more persons, the respective interests in the property share a proportionate share of such debt.**
- **Notably, a general provision in a will for the payment of debts is not an indication that such encumbrances be paid by the estate on specifically devised property.**

STICKY ISSUES: PROPERTY TAXES

- **A fiduciary may pay taxes which were assessed on real property prior to decedent's death, however, the specific devisees or vested distributees must reimburse the estate for the taxes (see SCPA 1811 [2] [b]).**
- **An executor does not need prior court approval to pay these taxes (see Matter of Steele, 33 Misc 2d 694 [Sur Ct, NY County 1962]).**
- **If decedent's will expressly indicates that such taxes or any liens on the real estate be paid out of estate funds, reimbursement will not be necessary.**
- **Property taxes levied after death are the responsibility of the devisees/beneficiaries of the real property.**

ANCILLARY PROBATE

- **The probate of a will or appointment of an administrator in New York does not give a fiduciary the authority to dispose of real property in another state.**
- **In that case, an ancillary probate or administration will be necessary in the other state.**
- **The manner in which such property descends when not disposed of by will is determined by the law of the jurisdiction in which the property is situated (see EPTL 3-5.1 [b] [1]). Intestacy statutes differ state by state.**

MORE MESSY ISSUES: DIVORCE

- **A divorce or a judicial decree of separation will terminate a joint tenancy (tenancy by entirety) between spouses and the spouses become tenants in common (see Kahn v Kahn, 43 NY2d 203 [1977]; EPTL 5-1.4).**
- **If the property is not transferred as part of the divorce proceeding or before the death of the first spouse, one-half of the property will pass by such spouse's will or in intestacy.**
- **In that case, the surviving ex-spouse may own the property with a potentially hostile co-owner.**

THE EFFECT OF THE ANTI-LAPSE STATUTE

- **If a specific devisee (or residuary beneficiary) predeceases the decedent and there is no survivorship language in the will, EPTL 3-3.3 provides that the property will not**

lapse, but rather will pass to the specific devisee's issue if such devisee was a brother, sister or issue of decedent.

- **In that case, it is possible that an infant may become an owner of the real property, which will create additional legal hurdles in the management or sale of the property.**
- **EXAMPLE: The home is devised in a will to two children equally. There is no direction if a child predeceases. One child predeceased with minor children. Result: Half is owned by living child, and half by minor grandchildren.**

BE WARY WHEN RENOUNCING REAL PROPERTY

- **If a renunciation (EPTL 2-1.11) of an estate interest in real property is made, the terms of the will and any applicable statutes control who will receive the property, as if the renouncing party predeceased the decedent. The renouncing party may not choose who receives the property, and the anti-lapse statute may be brought into play by a renunciation.**
- **EXAMPLE: Decedent's will leaves her Adirondack camp property to her son and her daughter, equally. Daughter files a renunciation of her interest in the property in Surrogate's Court, believing her brother would then own the entire camp.**
- **Unintended consequences: Daughter has 2 minor children, and the anti-lapse statute (EPTL 3-3.3) applies to cause her renounced interest to pass to her minor children as if she predeceased decedent, which, of course, was not intended. Brother now owns the camp with 2 minor children.**
- **Note: All renunciations are irrevocable and cannot be undone once filed (EPTL 2-1.11 [h]).**

SCPA ARTICLE 19 – DISPOSITION OF REAL PROPERTY

- **Real property may be sold by a fiduciary, if approved by Surrogate's Court, when necessary to pay administration and funeral expenses, debts existing at decedent's death, estate taxes, distributions to beneficiaries, and for any other purpose the court deems necessary (see SCPA 1902).**
- **This is true even when the real property is specifically devised or passes to decedent's intestate distributees. The application to sell real property may be made in an independent SCPA Article 19 proceeding or in a judicial settlement of the fiduciary's account.**
- **Surrogate's Court also has jurisdiction to evict a party or tenant (see Matter of Piccione, 57 NY2d at 288 [1982]).**
- **A "fiduciary or any person interested" may commence an Article 19 proceeding to sell real property (SCPA 1904). Notably, a creditor is not defined as "a person interested" who could commence this proceeding (see SCPA 103 [39]). Creditors may, however, compel an accounting and request the relief in the petition to compel an accounting.**
- **If an Art. 19 proceeding is commenced, the petitioner must serve a citation on all interested persons, including persons entitled to share under the will or by intestacy and guardians of such persons under a disability. The court may also order service on creditors of the estate, but is not required to do so (SCPA 1904 [2]).**
- **If the request to sell real property is brought in an accounting proceeding under SCPA 2210, process shall issue to all interested persons, including creditors, and notice that such relief is being sought must be included in the citation.**

DISPUTES BETWEEN ESTATE BENEFICIARIES OR BETWEEN LIVING PERSONS?

- **In some cases, one or more beneficiaries may take up residence in the property, specifically bequeathed or otherwise, to the exclusion of the other beneficiaries.**
- **In other cases, a disagreement among the beneficiaries may arise as to the eventual sale of the property.**
- **It is not always clear whether Surrogate's Court has subject matter jurisdiction of a particular dispute because the dispute is often determined to be one between living persons. Sometimes the cases seem to be in conflict, but a close look reveals some common threads. Are all of the parties interested in the estate or are there other additional parties involved? Is the real estate local to the Surrogate Court deciding the matter? How long ago did the real estate vest in the beneficiaries of the estate?**

DISPUTES BETWEEN LIVING PERSONS

- **Given that title to real property vests in the ultimate beneficiaries, subject to the fiduciary's right to petition to sell the property to pay debts and expenses, such disputes (at some point during administration) may be determined to be disputes between living parties and no longer under the jurisdiction of Surrogate's Court (see Matter of Van Dorn, 225 AD2d 969 [3rd Dept 1996]; Matter of O'Hara, 50 Misc 3d 1221 [A] [Sur Ct, Queens County 2016]); SCPA 201.).**
- **In such a case, a partition action or other similar action in Supreme Court may be necessary.**

<u>MATTER OF VAN DORN</u>, (225 AD2d 969 [3rd Dept 1996])

- **In this case, decedent died intestate in 1983 and was the owner of real property. Decedent's only distributees were her two sons, petitioner and respondent. Respondent resided at the property seven years after decedent's death, until Albany County acquired title pursuant to a judgment in an *in rem* tax foreclosure proceeding. Thereafter, petitioner and respondent paid the back taxes, and acquired title from the county as tenants in common.**
- **Petitioner, acting as administrator, filed a petition in Surrogate's Court seeking the removal of respondent from the premises. Respondent applied for an order dismissing the pending eviction proceeding on the ground that Surrogate's Court lacked subject matter jurisdiction. Petitioner then commenced a turn over proceeding seeking an order directing that the real property be re-conveyed by the parties back into the estate and that the estate be allowed to remove respondent from the property. Respondent sought an order dismissing the petition on the ground that Surrogate's Court lacked subject matter jurisdiction.**
- **The Appellate Division affirmed the order of Surrogate's Court which granted both the motion to dismiss the eviction proceeding and the motion to dismiss the turnover petition.**
- **The court observed that although it is fundamental that Surrogate's Court has exclusive jurisdiction over all the affairs of a decedent, the real property ceased to be an estate asset as a result of the tax foreclosure. The redemption of the real property by the sole distributees, as tenants in common after title had passed to the county, did not reestablish jurisdiction in the Surrogates Court.**

- **This had become a matter between living parties, no longer under Surrogate's Court jurisdiction.**

<u>GENERATION MORTGAGE CO. v JAKUBOSKY,</u> NYLJ 1202787596088, at *1 (Sur Ct Queens, 2017)

- **The real property was originally owned by two tenants in common, Frances and Lawrence Jakubosky, each with a 50% ownership. Frances died in 2007, survived by three issue (one of them being Lawrence). Lawrence, on his own, executed a reverse mortgage encumbering the entire premises, and died in 2014. Plaintiff Mortgage Co. moved for a default judgment in an action to foreclose on the mortgage. The action was transferred from Supreme Court to Surrogate's Court (apparently on the basis that both original owners were deceased).**
- **The court stated Lawrence was incapable of encumbering the entire premises with the mortgage - Frances died intestate and her interest passed by operation of law to her distributees. As such, Lawrence owned 66.67%, and the other two distributes owned 16.67 percent each at the time of Frances' death. Thus, to the extent plaintiff sought to foreclose against the interests the other two distributees obtained from Frances in intestacy, it would fail to state a claim, and as the dispute was between living parties, the matter was not within the court's jurisdiction. Hence, the mortgage company's motion was denied.**

MATTER OF HENNEL, 29 NY3d 487 (2017)

- **Decedent owned a four-unit rental. In 2006, decedent asked his grandsons to assume management responsibilities for the rentals. Decedent executed a deed to the property reserving a life estate and granted the remainder interest to grandsons. Decedent assured grandsons (while meeting with his attorney) that they would not be burdened by the mortgage on the property when they became full owners, and decedent contemporaneously executed a will directing that the mortgage on the property be paid from the assets of his estate upon his death. The grandsons maintained the property, including collecting the rents and paying the mortgage out of the rents collected, paying the net to the grandfather.**
- **Decedent executed a new will in 2008 that revoked the prior will and made no provision for discharging the mortgage. Decedent died in 2010. Decedent's widow/executor admitted the 2008 will to probate. The grandsons filed a notice of claim, asserting that they had entered into a valid agreement with decedent and in exchange for maintaining the property during decedent's lifetime they would receive the property free and clear of the mortgage upon his death.**
- **The Court of Appeals reversed the App. Div. and Surrogate's Court (who found for the grandsons). In doing so, the Court held petitioners were bound by the statute of frauds (agreement must be in writing), but the Court adopted promissory estoppel as an exception to the statute of frauds. The Court held that "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds**

would be unconscionable, the promisor should be estopped from reliance on the statute of frauds."

- **In this case, however, the Court held that petitioners' proof did not demonstrate "an unconscionable injury sufficient to estop respondent's reliance on the statute of frauds." The Court explained that petitioners were able to make the mortgage payments from the rental income, there was no claim that the management responsibilities were so overwhelming that they were forced to sacrifice other opportunities, and that they could still sell the property and net $150,000 (Matter of Hennel, 29 NY3d 487 [2017]).**

MATTER OF CAGINO, NYLJ, Dec. 19, 2017 at 41 (Sur Ct, Albany County 2017)

- **Decedent died survived by four adult children who had previously inherited their mother's half-interest in a valuable rental property in Brooklyn.**
- **Decedent's will left his half of the real estate to only three of his four children. Decedent's disinherited daughter commenced a partition action in Kings County Supreme Court against petitioner, individually and as preliminary executor of the estate, and against decedent's two other children. She also filed objections to probate of decedent's will in Albany Surrogate's Court.**
- **Petitioner moved to transfer the Kings County partition action to Albany Surrogate's Court, because the same parties were involved in both proceedings. Supreme Court would not grant without Surrogate's Court's order accepting the transfer. Petitioner then moved in Surrogate's Court to accept the transfer from Supreme Ct. Respondent opposed the motion.**

- **Surrogate's Court denied the motion and would not accept transfer of the partition action pending in Kings County Supreme.**
- **Determining Surrogate's Court lacked jurisdiction of the partition action even though it did have jurisdiction of decedent's estate, the following factors were important: 1) only half of the property is in the estate, while the other half is owned outright by the four children as living parties; 2) although all the parties are the same, the partition action concerns accounting for property management for many years prior to death of decedent; 3) a partition sale should take place in the County where the property lies; and 4) probate does not need to be determined before partition – proceeds of sale can be held in escrow pending the outcome of contested probate and determination of parties' interest in decedent's half of property.**

Lesson: While Surrogate's Court jurisdiction is expanding in many areas, real property issues may not always be appropriately reviewed in Surrogate's Court if living parties are involved and the property is located in a different venue.