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Trusts and Estates Law Section Journal

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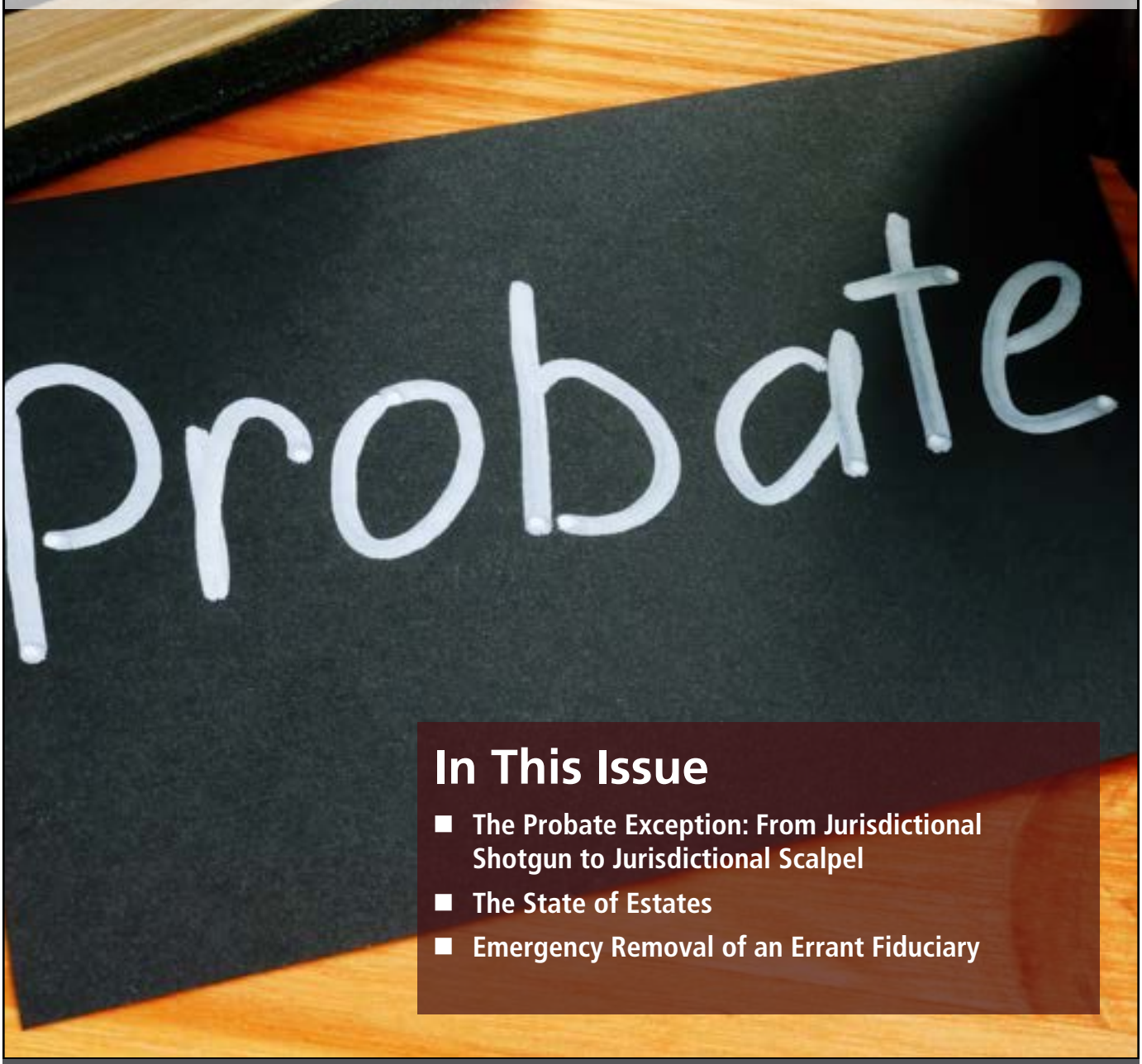

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Message from the Chair

By Jill Choate Beier

Jill Choate Beier

This is my last message as Chair of the Section and as we enter into the holiday season, I have spent some time reflecting on the events of the year. What a year it has been! For better or worse, we have learned a lot about each other and about ourselves since last March. We have proven each day that, as a profession, we are resourceful and resilient. Practitioners and court personnel statewide continue to work together to find creative solutions for our clients. NYSBA and members of this Section have worked tirelessly to provide assistance for attorneys and the constituents of this state in the form of pro bono programs, mental health services, continuing education programming, and advocacy in the Legislature. Truly, it has been an honor to serve the members of this Section and I look forward to a bright future.

Additional work has been done by the committees of this Section to develop cutting-edge legislation that addresses various COVID-19-related issues. These initiatives were approved by NYSBA and we hope to get them enacted by the state Legislature in the coming months. The committees continue to evaluate current legislation and new legislation to address the changes that COVID-19 has introduced to our practice area. Thank you to the members of all the committees who have worked hard to get the multitude of projects vetted and approved. We simply could not accomplish all that we do without your commitment to the Section.

Looking ahead, the 2021 NYSBA Annual Meeting in January will be held virtually. Our Section's continuing education program is scheduled for Wednesday, January 27. Program co-Chairs Kate Madigan and David Bamdad have logged many hours creating a great program for Section members. The program includes a session on the statute of limitations and the impact of the *Schneider* decision 10 years later. The program will also address representing clients and signing estate planning documents in a video conference world, including ways to avoid litigation. This is a timely and informative program and I look forward to "seeing" everyone there!

Recently, NYSBA made the announcement that there will be no in-person Section meetings or continuing education programs through June 2021. So, look for information for a virtual Section meeting in the spring. We hope to be together with all of you in person for the fall Section meeting and plans are in the works. Be on the lookout for more detailed information!

I hope everyone in the Trusts and Estates legal community, your friends, and your families are all safe and healthy. Wishing everyone a safe holiday and a Happy New Year!

Message from the Editors

By Jaclene D'Agostino and Nicholas G. Moneta

Jaclene D'Agostino

Nicholas G. Moneta

We hope that our members and their families continue to remain safe and healthy during these times. We extend a sincere thank you to all of our authors for their contributions to this volume of the *Journal*.

In this issue, Paul S. Forster reports on *Matter of Lipton*— a recent case addressing a surviving spouse's creative attempt to increase the value of her elective share; Gary E. Bashian and Andrew Frisenda discuss the probate exception doctrine and its effect on the jurisdiction of federal courts; and Michael A. Burger and Gina M. Ciorciari address the emergency removal of an errant fiduciary.

We continue to urge Section members to participate in our publication. CLE credits may be obtained. Please consider submitting an article for publication in the Journal.

The editorial board of the *Trusts and Estates Law Section Journal* is:

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Please note that after the publication of Anthony J. Enea, Esq.'s article entitled *New Medicaid Eligibility Rules Make Asset Protection Planning an Urgent Need!*, featured in the Summer/Fall 2020 issue, we were informed that the New York State Department of Health postponed the commencement of the Medicaid home care look-back and penalty **from January 1, 2020 to April 1, 2021**, for applications made before **April 1, 2021**.

New York State Bar Association

NYSBA Membership 2021 Renewal Is Now Open

NYSBA membership grants you access to exclusive benefits and to be part of monumental change. Whether it's adapting to the new virtual environment, participating in health law discussions, or speaking out on racial injustice, we are always looking to increase involvement via leadership and task force opportunities.

Here's a list of existing benefits and partners…*with additional ones added throughout the year!*

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The Probate Exception: From Jurisdictional Shotgun to Jurisdictional Scalpel

By Gary E. Bashian and Andrew Frisenda

"Jurisdiction is not given for the sake of the judge, but for that of the litigant."
- Pascal

If history serves as any guide, uncertainty promotes conflict.

There can be little doubt that the widespread socio-economic uncertainties caused by the COVID-19 pandemic will, among other things, likely result in a proliferation of litigation at both the federal and state court level regarding all manner of controversies, including litigated disputes regarding trusts, estates, and the fiduciaries entrusted with their administration and care.

While these lawsuits will take on many forms, litigators who find themselves representing these parties before a federal district court should consider how, if at all, the probate exception might affect the case—from inception to resolution.

The Probate Exception: Past and Present

The probate exception is a doctrine that divests the federal courts of diversity subject matter jurisdiction[1] if the gravamen of a plaintiff's claim involves a "purely probate matter" (i.e., the probate of a will or matters relating to the administration of an estate), or if a plaintiff asks a federal court to exercise its power over property that is "in the possession"[2] of a trust[3] and/or an estate (the "Probate Exception").

At root, the Probate Exception marks one of the boundaries of the federal courts' diversity subject matter jurisdiction.

However, the Probate Exception is not absolute, and the fact that a trust, estate, or "probate" issue is involved does not automatically deny a federal court's diversity subject matter jurisdiction.

In the seminal 2006 case of *Marshall v. Marshall*[4] (which involved a trust created by J. Howard Marshall II and claims made by his younger widow Vickie Lynn Marshall, a/k/a Anna Nicole Smith), the United States Supreme Court re-assessed the Probate Exception after years of neglect, misinterpretation, and misapplication, noting the doctrine has been described as "[o]ne of the most mysterious and esoteric branches of the law of Federal Jurisdiction."[5]

Nevertheless, since *Marshall*, the veil that once shrouded the Probate Exception has been—for the most part—lifted; its mysteries—largely—decoded; and its scope—upon further examination and consideration—redefined.

Indeed, in the pre-*Marshall* landscape, the Probate Exception was applied by the federal courts like a jurisdictional shotgun, whereas, post-*Marshall*, application of the doctrine is used surgically, like a jurisdictional scalpel.

The Past: The Probate Exception as a Jurisdictional Shotgun

Prior to 2006, many federal courts eagerly dismissed matters that were even loosely associated with trusts, estates, and/or "probate" issues by broadly interpreting and applying the Probate Exception. Where and when possible, it seemed as though the federal judiciary would quickly take aim at a matter involving a "probate" issue, and unleash the Probate Exception "double barreled" on those litigants who raised claims related to a probate matter in the federal courts. Notwithstanding the fact that the federal courts had consistently exercised jurisdiction over claims that were related, but not "purely" related, to probate matters throughout their history, the shotgun application of the Probate Exception has dominated judicial thinking since at least 1946.

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Andrew Frisenda is a senior attorney at the law firm of Bashian P.C., focusing his practice on trusts and estates litigation; legal malpractice; corporate litigation; appellate practice; estate planning and administration; guardianship matters; and business creation. Frisenda practices in the New York State Appellate Divisions; frequently appears in both the New York State Surrogate's and Supreme Courts; and lectures as a New York State Continuing Legal Education speaker. He is a Co-Chair of the WCBA Appellate Practice Committee, and a board member of the White Plains Bar Association.

This broad interpretation and application of the Probate Exception was in large part due to dicta found in *Markham v. Allen*[6] wherein the United States Supreme Court, somewhat opaquely, stated in its decision that the federal courts shall not "interfere with . . . probate proceedings . . . ." As the United States Supreme Court itself later recognized in *Marshall*, this language is not a model of clarity, and, post-*Markham*, only served to confuse the nature, jurisdictional effect, application, and scope of the Probate Exception thereafter.[7] The Court in *Marshall* went so far as to further note that the ambiguity embedded in the shall not "interfere" language resulted, post-*Markham*, in a pervasive and overly broad application of the Probate Exception, and had caused federal courts to puzzle "[o]ver the meaning of the words 'interfere with the probate proceedings . . . .'" leading some courts to "[h]ave read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate."[8]

Accordingly, in *Marshall*—and its progeny, in particular the Second Circuit's *Lefkowitz v. Bank of New York*[9]—the United States Supreme Court sought to define "interference" within the meaning of the Probate Exception, and re-surveyed the boundary of federal diversity subject matter jurisdiction when it comes to a testamentary trust, estate, and/or probate matters, effectively turning a jurisdictional shotgun into a jurisdictional scalpel.

The Present: The Probate Exception as a Jurisdictional Scalpel

Post-*Marshall*, the Probate Exception no longer serves as a sweeping power to remove a matter just because a testamentary trust, estate, or "probate" issue is merely or incidentally involved. The modern interpretation of the Probate Exception is "extraordinarily narrow,"[10] excises and precludes only very specific claims that fall under the Probate Exception test, and requires that a federal court preserve all otherwise properly asserted claims that are not barred by the doctrine.

Indeed, a federal court may (and is arguably mandated to) exercise diversity subject matter jurisdiction over all other asserted claims in a matter that are not directly and clearly precluded by the Probate Exception. For example, federal court diversity subject matter jurisdiction exists over many claims that are often asserted in conjunction with claims related to testamentary trusts and estates, such as breach of fiduciary duty claims, breach of contract claims, fraud, and—even as the Court recognized in *Markham*—"[s]uits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' . . . ."[11]—so long as the Probate Exception is not triggered.

Accordingly, the modern application of the Probate Exception respects diversity subject matter jurisdiction over certain claims, which might involve testamentary trusts and/or estates, while strictly acknowledging that the limits pertain to claims that:

(1) Involve a "purely probate matter"—such as asking a federal court to probate a will or administer an estate, and/or a matter where subject matter jurisdiction at the state level is exclusive to the applicable probate court;[12] or

(2) Ask the court to exercise its power over property that is already "in the possession"[13] of a trust and/or an estate.

A. "Purely" Probate Matters and Matters Exclusively in the Jurisdiction of the State Probate or Surrogate's Court

If a plaintiff seeks to administer an estate, probate a will, or conduct any other "purely" probate matter before a federal court, the Probate Exception will deny the court diversity subject matter jurisdiction to hear the matter.[14] This is a foundational tenet of the federal courts' jurisdiction—as noted by the Court in *Markham* in 1946—given that the "[e]quity jurisdiction conferred [to the federal courts] by the Judiciary Act of 1789 and § 24 of the Judicial code . . . did not extend to probate matters."[15]

The Probate Exception is rarely invoked because a plaintiff seldom seeks to administer an estate, probate a will, or adjudicate an otherwise "purely" probate matter[16] such as proceedings relating to the construction of a will or fiduciary accountings before a federal court. As the courts have even noted, most practitioners understand this basic limitation of the federal courts' diversity subject matter jurisdiction, and do not try to litigate these types of matters or issues in federal district court.[17] Similarly, a federal court's diversity subject matter jurisdiction does not extend to matters where jurisdiction at the state level is exclusive to the probate court.[18]

This prong of the Probate Exception analysis can be undertaken with relative ease; requires the litigants or court to examine the jurisdiction of the state court in which it sits to determine if the claim asserted is exclusive to the probate court, or if the claim can be heard by a state court of concurrent jurisdiction; and dovetails with the preclusion of "purely" probate matters, a matter being in the exclusive jurisdiction of a probate court likely being a "purely" probate matter in and of itself. However, the analysis to determine if the Probate Exception will preclude diversity subject matter jurisdiction does not end there.

B. Property in the "Possession" of a Trust or Estate

The second prong of the post-*Marshall* Probate Exception analysis turns on whether the federal court is

divested of diversity subject matter jurisdiction because the property, or *res*, at issue is "[i]n the possession of a Trust or an Estate."[19]

The Probate Exception clearly and specifically precludes the federal courts from exercising power over property that is in the custody of a state probate court[20] based on the traditional rule that once a court has properly exercised jurisdiction over a *res*, a subsequent court shall not usurp the primary court's jurisdictional authority.[21]

To that end, where the *res* is in the possession of a trust or estate, or a state probate court has already exercised *in rem,* or *quasi in rem*,[22] jurisdiction over the *res* in controversy before the federal suit has commenced, the Probate Exception will apply.

In rem jurisdiction is considered to have been exercised by the probate court where the fiduciary has already marshalled the asset;[23] the asset (including a debt owed)[24] is already subject to ownership or a claim of ownership by the trust and/or estate;[25] the asset is already held in trust,[26] etc. The federal courts have also held that *quasi in rem* jurisdiction has been exercised over a *res* by the probate court where the federal court is asked to compel a trust accounting, and such an accounting would necessarily "interfere" with the assets already held in trust.[27]

Notably, the "possession" prong of the Probate Exception test—and what constitutes "interference" of the state probate court's jurisdiction within the meaning of the Probate Exception—necessarily turns on a very specific and technical application of such court's jurisdictional authority.

Ultimately, this means that in New York, the jurisdictional scope of the Surrogate's Court must be closely examined in order to determine if such court has "possession" of the *res* at issue, and whether the exercise of a federal court's authority would constitute "interference" within the meaning of the Probate Exception.[28]

Conclusion

While it is impossible to predict exactly how the Probate Exception will develop and be applied in every case, the Post-*Marshall* trajectory of the doctrine makes clear that the federal courts are limited in their exercise of diversity subject matter jurisdiction over claims related to trusts and estates where the Probate Exception has been triggered. Nevertheless, when you find yourself in a federal district court, and a trust or an estate, or a fiduciary or beneficiary thereof is involved, the first doctrine that should come to mind is the Probate Exception, and how it can help—or hurt—your client's chances of success.

1. Appeals courts are split as to whether the Probate Exception applies to federal question cases. *See United States v. Blake*, 942 F. Supp. 2d 285 (E.D.N.Y. Apr. 20, 2013).
2. *Marshall v. Marshall*, 126 S. Ct. 1735, 1748 (2006) (citing *Markham v. Allen*, 326 U.S. 490 (1946)).
3. Prior to *Marshall*, the federal courts were split as to whether the Probate Exception encompassed *inter vivos* trusts. However, "[f]ollowing Marshall . . . it is clear that the probate exception does not apply to cases involving an inter vivos trust because those cases do not seek to probate a will or administer an estate." *Wellin v. Wellin*, 2015 WL 628071 (D.S.C. Feb. 12, 2015).
4. *Marshall v. Marshall*, 547 U.S. 293, 311 (2006).
5. *Matter of Boisseau*, 2017 WL 395124 (N.D.N.Y. Jan. 30, 2017) (citing *Blake*, 942 F. Supp. 2d 285).
6. *Markham,* 326 U.S. 490.
7. *See Marshall* at 296.
8. *Id.* at 311.
9. *Lefkowitz v. Bank of New York*, 528 F.3d 102 (2d Cir. 2007).
10. *Culwick v. Wood*, 384 F. Supp. 3d 328, 341 (E.D.N.Y. May 18, 2019).
11. *Markham* at 494.
12. *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir 1972).
13. *See generally Marshall*; *see also Lefkowitz*.
14. *See generally Marshall*.
15. *See Markham* at 494.
16. *Architectural Body Research Fd. v. Reversible Destiny Fd.*, 335 F. Supp. 3d 621, 635 (S.D.N.Y. Sept. 28, 2018) (citing *Moser v. Pollin*, 294 F.3d 335 (2d Cir. 2002)).
17. *Sechler-Hoar v. Trust u/w Gladys G. Hoart*, 2018 WL 3715277 (D. Conn. Aug. 3, 2018); *Sechler-Hoar v. Trust u/w Gladys G. Hoart*, 2020 WL 292314 (D. Conn. Jan. 21, 2020).
18. *See Lamberg*.
19. *See Marshall*.
20. *See id.*; *see also Lefkowitz*, 528 F.3d 102; *see also Marcus v. Quattrocchi*, 715 F. Supp. 2d 524 (S.D.N.Y. May 27, 2010).
21. *See Princess Lida of Thurn and Taxis v. Thompson*, 59 S. Ct. 275, 280 (1939); *see also Sexton v. NDEX West,* LLC, 713 F.3d 533, 536 (9th Cir. 2013) (discussing the doctrine of prior exclusive jurisdiction).
22. *Kleeberg v. Eber*, 2017 WL 2895913 (S.D.N.Y. Jul. 6, 2017) (citing *Chevalier v. Barnhardt*, 803 F.3d 789 (6th Cir. 2015)).
23. *Architectural Body Research Foundation*, 335 F. Supp. 3d 621.
24. *See Ghroman v. Cola*, 2007 WL 3340922 (S.D.N.Y. Nov. 7, 2007).
25. *See generally Princess Lida of Thurn.*
26. *Kennedy v. Trs. of Testamentary Tr. of Will of Kennedy*, 406 Fed. Appx. 507 (S.D.N.Y. Oct. 28, 2010) (citing *Marshall and Markham*).
27. *See Beach v. Rome Trust Co.*, 269 F.2d 367 (2d Cir. 1999).
28. *See, e.g.*, *United States v. Marin*, 2020 WL 378094 (S.D.N.Y. Jan. 23, 2020) (while a New York fiduciary may have the authority to take possession of, collect rents from, or manage trust and/or estate assets—but has not yet begun that process—this does not constitute "possession" within the meaning of the Probate Exception, and will not preclude diversity subject matter jurisdiction so long as the other prongs of the Probate Exception test have been passed); *see also Weingarten v. Warren*, 753 F. Supp. 491 (S.D.N.Y. Dec. 19, 1990) (once the appointment of a successor fiduciary pursuant to SCPA 1502 is completed, Surrogate's Court *quasi in rem* jurisdiction over the *res* was deemed to have ended).

The State of Estates

By Paul S. Forster

In this time of social distancing, hopefully readers will enjoy filling their time in isolation with this interesting case involving a mostly unsuccessful attempt to expand a surviving spouse's elective share by including therein the decedent's interest in the principal of a QTIP marital trust set up under the estate of the decedent's first spouse, as a result of some estate planning maneuvers the decedent engaged in immediately before his death.[1]

A proceeding under SCPA § 1421 was commenced by Audrey, the surviving spouse of David, who sought a determination that she was entitled to payment of $1,891,596 as the balance of her elective share under EPTL § 5-1.1-A. The decedent died at the age of 95, leaving a probate estate of approximately $8.5 million. He was survived by Audrey, his second wife, and by Arthur, Robert, and Heidi, his children with his predeceased first wife, Hortense. Arthur was executor of David's Will and was a co-trustee, along with Robert, of trusts under the Will of Hortense, David's first wife. Decedent was the lifetime income beneficiary of Hortense's trusts and was their discretionary principal beneficiary under the following terms: "[M]y Trustees shall be authorized and empowered, at any time or from time to time, to pay or to apply for the benefit of [David] any amount or amounts out of the principal of said trust which my Trustees, in their sole discretion, shall deem necessary or advisable for his maintenance, health, care or support . . . ."

Within ten months of his death, decedent wrote to Robert, in the latter's capacity as Co-Trustee of the Hortense trusts, as follows: "Please cease any and all additional distributions to me from the [trusts] and use your discretion for other distributions as you deem appropriate."[2]

About three weeks later, the Trustees drew a series of checks from the Trusts' accounts, payable to the separate order of the three children, Arthur, Robert and Heidi, in various amounts. Shortly thereafter, the Trustees formally forgave Arthur's personal indebtedness, to one or both of the Trusts, in the sum of $1 million. The checks and the loan forgiveness totaled $4,674,784.

Audrey posited that the payments constituted transfers of property subject to her right of election under EPTL § 5-1.1-A and that her elective share was thereby enlarged in the amount of the $1.89 million claimed.

Audrey pointed to a federal gift tax return (Form 709) filed by Arthur on behalf of the estate—reporting the payments as taxable gifts—as conclusive on the point that the payments in their entirety were "testamentary substitutes" and that as such they were requisite factors in the calculation of her elective share under the statute.

Arthur, as executor of David's estate, contended that the payments made within one year prior to death and properly treated as transfers by decedent for transfer tax purposes were not the type of transactions contemplated by the elective-share statute.

Audrey moved for summary judgment.

HOLDING—The Surrogate agreed that the elective-share statute provides that transfers of property by a decedent within one year of the death, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for such transfers, are considered "testamentary substitutes" and are included in the calculation of a spouse's right of election.[3]

However, the Surrogate stated that the parties' respective positions can be assessed properly only in light of the purposes of the elective-share statute invoked by Audrey. In the Surrogate's view the overall aim of the statute is to prevent one spouse from entirely disinheriting the other, and that to that end, the statute assures a surviving spouse a one-third share of the property that the deceased spouse owned at death, net of administration and other expenses.

The Surrogate pointed out that the fund as against which a surviving spouse may elect is not limited to the so-called "testamentary" estate, but includes what the statute denominates as "testamentary substitutes" to prevent one spouse from using lifetime transfers of property as a device to subvert the elective-share protections that public policy intended for the surviving spouse.[4] The Surrogate opined that by the provisions' operation, the values of testamentary substitutes are added to the base upon which the elective share is calculated, in effect compensating for what the probate estate lost by such transfers.

The Surrogate stated that whether or not the payments in question were testamentary substitutes within the meaning of the elective-share statute, was appar-

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ent when one considers the nature of decedent's two lifetime interests in the trusts, an entitlement to trust income, and a mere possibility that the trustees might invade trust principal for his benefit.

The Surrogate found that in his letter to his son-trustee, decedent had relinquished his right to further trust income for life, and ruled that that transfer clearly constituted a testamentary substitute within the statute's meaning, since the transfer diverted from the decedent's eventual probate estate the value of the future Trust income that he would have received until he died, and such diversion occurred within one year of the transferor's death. The Surrogate noted however that this testamentary substitute made only a very modest difference to the size of Audrey's elective share, given the actuarial value of future income for the balance of the 95-year-old decedent's life.

The Surrogate stated that the decedent's other interest in the trusts was no more than an expectancy, subject as it was to the trustees' limited and discretionary power to invade principal for his benefit. The Surrogate pointed out that that principal was derived from property that had been first spouse Hortense's, and that at no point thereafter had it become decedent's. Thus, the Surrogate opined that the decedent never was in a position to relinquish or otherwise transfer such principal, and that even if, ***arguendo***, he had purported to make such a transfer, his eventual probate estate would have been unaffected, since his mere expectancy as to a discretionary invasion of principal did not amount to an asset that would have otherwise been part of his probate estate. The Surrogate concluded that having had no effect on the size of decedent's ultimate probate estate, decedent's loss of such expectancy also had no effect on the size of Audrey's elective share, and that consequently Audrey therefore could not rationally ask that this major part of the payments be factored into the calculation of her elective share as purported testamentary substitutes.

The Surrogate rejected Audrey's contention that because the payments were treated as gifts for transfer tax purposes, they were to be treated as testamentary substitutes for right of election purposes.

The Surrogate pointed out that QTIP trusts such as those at issue are created by spouses for the lifetime benefit of their surviving spouses with the remainders left to third parties designated by the settlor-spouse. The Surrogate stated that under QTIP trusts the surviving spouse is assured net income from the trust for life but is never entitled to trust principal. The Surrogate noted that the IRC generally does not allow the estate of a settlor-spouse to take a marital deduction in respect of the surviving spouse's limited interest in a QTIP trust, because otherwise no estate tax would ever be payable by either of the spouses' estates, since the limited interest of the surviving spouse also would not be subject to estate tax. The Surrogate noted however, that the IRC gives the fiduciary of the settlor-spouse's estate a choice, either to claim the QTIP trust as a marital deduction or to decline to do so.[5] The Surrogate explained that if the fiduciary of the settlor-spouse's estate makes the QTIP Election and thus does not pay estate tax in respect of the QTIP trust, the fiduciary of the survivor's estate ultimately will be required to pay estate tax on the value of the QTIP trust upon the survivor's death.[6]

The Surrogate found there to be a fiction underlying this particular aspect of the Code—that the settlor-spouse gave, and the surviving spouse received, an interest in trust principal tantamount to ownership.

The Surrogate did not dispute that the fiduciary of Hortense's estate made a QTIP Election and took a marital deduction in respect of the trusts and that as a result those trusts ordinarily would have been reportable in the estate-tax return eventually filed by the fiduciary of the estate of decedent as the surviving spouse. The Surrogate noted, however, that the trusts were not reportable on decedent's estate-tax return because, as a result of decedent's lifetime transfer, i.e., his relinquishment of future Trust income, the trusts were reportable on his federal gift tax return.

The Surrogate noted that in parallel with the estate-tax chapter of the IRC, the gift-tax chapter of the IRC attempts to achieve in the gift-tax context the same type of counterbalance to the marital deduction as is afforded in the estate-tax context.[7] The Surrogate stated that although a surviving spouse's income interest in a QTIP trust by definition amounts to something less than entitlement to trust principal, where that limited interest is relinquished, the IRC provides that any disposition of a qualifying income interest for life in any property for which a marital deduction was allowed with respect to the transfer of such property to the donor is treated as a transfer of all interests in such property other than the qualifying income interest.[8]

The Surrogate pointed out that such gift tax provision proceeds from the same fiction as underlies the estate tax QTIP marital deduction, that the settlor-spouse gave the surviving spouse an ownership interest in trust principal and that the surviving spouse in turn was thus able to gift that ownership interest, albeit with the consequence of picking up the value for transfer tax purposes by the imposition of a gift, rather than estate tax.

The Surrogate thus rejected Audrey's theory that Arthur's gift-tax filing as preliminary executor estopped him from denying that decedent gifted millions of dollars of trust assets to his children shortly before he died and that such gifts constituted testamentary substitutes. The Surrogate ruled that the payments were deemed gifts by decedent for the particular purposes of federal tax law, but that apart from the

trust income that decedent did in fact give away, the payments could not be categorized as testamentary substitutes under the elective-share statute, since such categorization would serve none of the elective-share statute's purposes.

The Surrogate also rejected Audrey's contentions that (1) the payments constituted indirect distributions of principal to or for the benefit of decedent, since the three children were presumably objects of his bounty, (2) that the payments were an acceleration of the children's remainder interests in the Trusts at the behest of decedent, or (3) that some collusive agreement between decedent and the trustees would be rewarded if she were prevented from factoring the payments in their entirety into the calculation of her elective share.[9]

The Surrogate concluded that trust principal had never belonged to decedent, and his probate estate therefore would not have included it even if the Trusts had remained intact. Accordingly, the Surrogate found that Audrey had no basis for complaint that the millions of dollars of Trust principal that decedent never owned were beyond the reach of her elective share, and granted Audrey's motion for summary judgment only to the extent that the actuarial value of the future income of the trusts from the date of the decedent's letter to his son trustee was determined to be a testamentary substitute and therefore a factor in the calculation of Audrey's elective share.

Although not elucidated in the Decision, the cancellation of the decedent's indebtedness to the trusts in the amount of $1,000,000 would appear to have increased the elective share, since the elective share is calculated after the deduction of debts and administration expenses.

The cancellation of the debt also would seem to have created taxable income for the decedent, offset somewhat by the reduction in his taxable estate by reason of the income taxes paid.

Endnotes

1. *In re Lipton*, 2020 WL 4339298 (N.Y. Surr. Ct. July 21, 2020) (Anderson, S.).
2. *Id.* at *1.
3. *See* N.Y. Est. Powers & Trs. L. § 5-1.1-A (b)(1)(B).
4. *See id.* at (b).
5. *See* 26 U.S.C. § 2056(b)(7).
6. *See id.* § 2044(b)(1)(A).
7. *See id.* § 2519(b)(1).
8. *See id.*
9. *In re Lipton*, at *4.

Emergency Removal of an Errant Fiduciary

By Michael A. Burger and Gina M. Ciorciari

Fiduciary self-dealing, misappropriation, and commercial sabotage call for swift action and emergency injunctive relief to quickly suspend the errant fiduciary and preserve the assets of a trust. This article examines the litigator's toolbox when it is necessary to expeditiously suspend an errant fiduciary.

Where a trustee has engaged in self-dealing by diverting trust profits and revenues away from the trust and to himself, or threatens to compete with a trust-owned business for his own personal gain:

1. The court may temporarily restrain him from so acting to preserve the status quo pending a hearing on a preliminary injunction; and

2. The court may preliminarily enjoin him from acting as a trustee pending a ruling on a petition to remove him permanently from such office.[1]

For our purposes, let us suppose that an irrevocable trust (the "Trust") is governed by a three-member Board of Trustees. The Trust owns a parcel of commercial real estate and all the stock of a closely held corporation, which runs a lucrative business (an auto body shop) operating out of the commercial realty. One of the three trustees, Mickey, ostensibly runs the business for the Trust's wholly owned corporation.

The problem begins when Mickey takes and keeps all the corporate profits as his compensation for services rendered managing the business. Such profits are two to three times a reasonable salary for a body shop manager. As a result, the Trust is left with insufficient liquidity to meet its financial obligations. Mickey refuses to honor the lawful requests of the Board of Trustees that profits above a reasonable salary be deposited into the Trust's bank account. Worse, Mickey threatens to sabotage the business if the Trust attempts to restore its sole revenue stream, by opening up a competing shop and luring valued employees and customers away.

The Trust's best option is to seek injunctive relief from the court. Step one, prevent self-dealing and sabotage with a temporary restraining order. Step two, suspend Mickey through a preliminary injunction so that the Trust can restore its revenue stream. These steps will effectively stop the bleeding and prevent Mickey from rendering the Trust insolvent before the court can order permanent and just relief.

Temporary Restraining Order

A temporary restraining order (TRO) may be granted where "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had."[2] A "temporary restraining order may be granted without notice."[3]

Mickey has self-servingly refused to honor the lawful requests of the majority of the Board of Trustees to turn over Trust assets to the Trust.[4] Despite being a trustee himself, with a fiduciary duty to the Trust and its beneficiaries, Mickey has refused to redirect business profits to the Trust and threatens to solicit the business's employees and customers and compete with the business if the other trustees attempt to recover such profits, the Trust's sole revenue stream.

A petition to remove Mickey as a trustee and a petition to compel Mickey to account for his actions as a trustee should be successful in the long run, but a TRO will maintain the status quo and prevent sabotage of the business until the court can rule on these petitions.

Sabotage of the business would work an irreparable harm.[5] This is particularly so since Mickey has a fiduciary duty not to injure the Trust, its assets, or its beneficiaries.[6] The court should preserve the status quo and prevent Mickey from taking any action that would injure the business or the Trust, including without limitation soliciting the business's employees or customers or otherwise competing with the business. A TRO is appropriate to preserve Trust assets

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pending a decision on the motion for a preliminary injunction.[7]

A Preliminary Injunction May Suspend a Self-Dealing Fiduciary

The court may grant a preliminary injunction where:

> the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.[8]

To determine whether the Trust is entitled to a preliminary injunction the court must weigh (1) the probability of success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) the balance of equities tipping in petitioners' favor.[9]

Preliminary injunctions have historically been granted in "equitable actions where the defendant threatened to violate the rights of the plaintiff."[10] That is especially true for cases such as this one, where petitioners have no other remedy to protect the Trust from a self-dealing fiduciary who will not yield to the plain language of the Trust instrument or the reasonable requests of the majority of the Board of Trustees.

1. Petitioners Are Likely to Succeed on the Merits

To demonstrate a likelihood of success on the merits, petitioners need only show "a prima facie . . . right to relief."[11] Petitioner's burden "must not be equated with the showing of a certainty of success."[12] "It is well-settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive."[13]

The Trust instrument confers no rights upon Mickey to independently manage or control the Trust's assets. The Trust instrument confers no right of employment upon Mickey, much less a right to set his own salary and fringe benefits. Over the past three years, Mickey has openly embezzled over $250,000 from the Trust.

There can be no defense to Mickey's *ultra vires* inflation of his own salary. Mickey's fiduciary breach is manifest and warrants immediate removal.[14] Furthermore, Mickey lacks any corporate authority to run or control the corporation.

It is well-settled that removal of a self-dealing trustee with interests antagonistic to those of the trust is the proper remedy.[15] Mickey's misuse of his fiduciary office to increase his compensation at the expense of the Trust places him in direct conflict with the Trust and its beneficiaries, requiring his suspension and removal.[16] Where a trustee, like Mickey, "has placed himself in such a position that his personal interest has or may come in conflict with his interest as trustee, then, . . . the court never hesitates to remove him."[17]

In *Kim v. Solomon*,[18] the court affirmed the trial court's removal of conflicted trustees of a family trust whose "conduct at times harmed the trust, while benefitting themselves."[19] But removal is proper even where a conflict of interest is unaccompanied by actual "improper conduct."[20] The *Hall* court further noted that removal is also warranted where the trustee "acted in a way that prevented petitioner from performing her duties as co-trustee."[21]

An injunction is proper to prevent a fiduciary from "establishing and engaging in a business in direct competition."[22] Moreover, because Mickey's sabotage and looting of the business and the Trust "would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced."[23]

Under these facts, petitioners should easily be able to demonstrate a likelihood of success on the merits for the ultimate disqualification and removal of Mickey as a fiduciary.

2. Petitioners Would Suffer an Immediate and Irreparable Injury Absent a Preliminary Injunction

To show irreparable injury, petitioners must establish that monetary compensation cannot "make . . . [them] whole" and that there is "no adequate remedy at law."[24] The "threat to [the business's] good will and creditworthiness is sufficient to establish irreparable injury warranting the granting of injunctive relief."[25] Here, the petitioners will be able to show irreparable injury because Mickey "might significantly diminish the amount of business conducted . . . by virtue of the allegedly improper acts."[26] The Trust cannot function under these circumstances or fund its ordinary expenses, much less accumulate value, preserve funds and earn interest thereon. Notably, Mickey, who serves without bond, may well be judgment proof.

3. The Equities Favor Granting a Preliminary Injunction

In weighing whether the balance of equities favors granting injunctive relief, the court must determine whether the irreparable injury facing the Trust is greater than the harm an injunction would cause to Mickey.[27]

Where, as here, the petitioning trustees can demonstrate irreparable injury in continued unchecked control by an errant fiduciary starving it of resources for his own personal gain, and where the injunction would impose no harm to Mickey who has no present rights to business profits, control, or access to its funds, much less to engage in direct competition with the business, equity favors granting immediate injunctive relief.[28] Any harm Mickey may allege is readily addressed by a timely determination of the petition on the merits while the business's profits are deposited into the Trust, and under the court's ultimate control.

The other two trustees comprising the majority of the Board of Trustees have at all times acted faithfully and honored their fiduciary duties. They forthrightly bring this matter to the court as faithful fiduciaries seeking to protect the Trust without personal profit motive. The other trustees come to court for appropriate relief rather than act in a unilateral, extra-judicial, or heavy-handed fashion, as Mickey has done for years.

Mickey cannot be heard to complain of any harm resulting from his inability to keep looting the Trust, and he similarly has no right to compete with or sabotage the Trust's business.

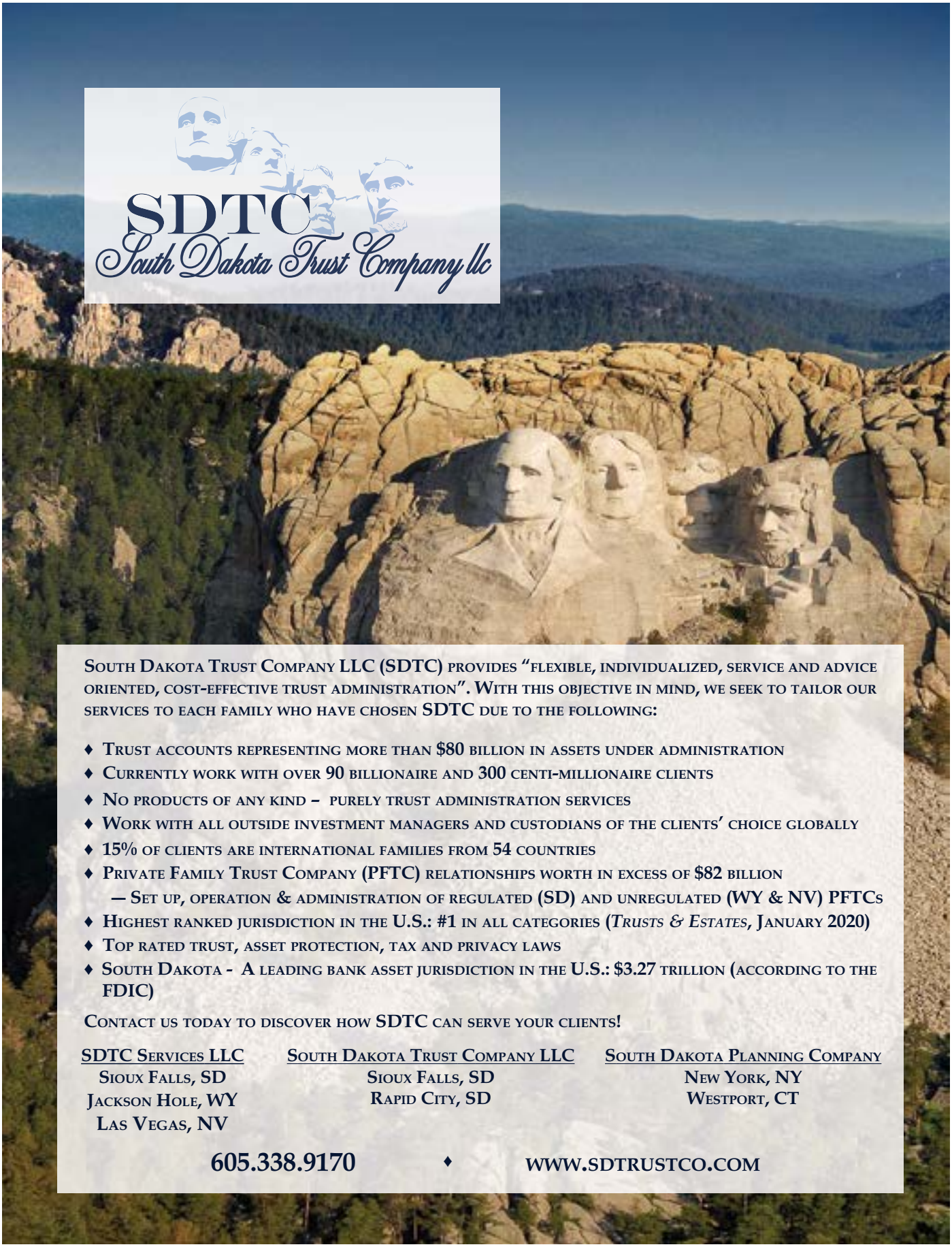
Conclusion

In the case of Mickey, the court would likely issue an immediate *ex parte* TRO, which would: (i) enjoin Mickey from interfering with, competing with, or sabotaging the business, and therefore the Trust, in any way, including by soliciting employees or customers; and (ii) direct Mickey to account for business cash receipts while he was employed by the business, pending a hearing on the preliminary injunction.

The court would also likely grant a preliminary injunction against Mickey, continuing the terms of the TRO, and suspending him as a trustee for his flagrant self-dealing, pending final determination of the petition for Mickey's permanent removal, accounting, and surcharge.

Endnotes

1. *See Nassau Soda Fountain Equip. Corp. v. Mason*, 118 A.D.2d 764, 765 (2d Dep't 1986); *In re Hirsch's Estate,* 116 A.D. 367, 377 (1st Dep't 1906), *aff'd,* 188 N.Y. 584 (1907); *see also* SCPA 102, 719(7) & (10), 711(2); CPLR 6301.
2. CPLR 6301 & 6313(a).
3. *Id.*
4. *See* EPTL 10-10.7.
5. *See Clarion Assoc., Inc. v. D.J. Colby Co., Inc.*, 276 A.D.2d 461, 463 (2d Dep't 2000) (enjoining "contacting and soliciting the customers").
6. *See generally Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).
7. *In re Rothko's Estate*, 43 N.Y.2d 305, 315 (1977) (noting that the surrogate issued a temporary restraining order to prevent dissipation of assets).
8. CPLR 6301.
9. *See Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990).
10. *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 545 (2000).
11. *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976).
12. *Id.*
13. *Four Times Sq. Assoc., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003); *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 605 (2d Dep't 2004).
14. *See* EPTL 11-1.6; SCPA 711, 719.
15. *See In re Hirsch's Estate*, 116 A.D. 367, 377 (1st Dep't 1906), *aff'd,* 188 N.Y. 584 (1907) (stating that a surrogate is "amply justified" in removing a trustee who awarded himself salary, took "personal advantage" and became in "active antagonism" with trust beneficiaries).
16. *See In re Hubbell's Will*, 302 N.Y. 246, 260 (1951).
17. *Pyle v. Pyle*, 137 A.D. 568, 572 (1st Dep't 1910), *aff'd*, 199 N.Y. 538 (1910) ("Under such circumstances, the court does not stop to inquire whether the transactions complained of were fair or unfair. It stops the inquiry when the relation is disclosed.").
18. *Kim v. Solomon*, 132 A.D.3d 463, 463-64 (1st Dep't 2015).
19. *Id.* (citations omitted).
20. *See In re Hall*, 275 A.D.2d 979, 979 (4th Dep't 2000).
21. *Id.; see In re Hirsch's Estate*, 116 A.D. at 367 (removal warranted "even though the salary received from the corporation may not have been in excess of the value of his services as president.").
22. *Nassau Soda Fountain Equip. Corp. v. Mason*, 118 A.D.2d 764, 765 (2d Dep't 1986).
23. *Deutsch v. Grunwald*, 165 A.D.3d 1035, 1037 (2d Dep't 2018) (internal quotation marks omitted).
24. *Olean Med. Group LLP v. Leckband*, 32 A.D.3d 1214, 1215 (4th Dep't 2006).
25. *Four Times Sq. Assoc., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 6 (1st Dep't 2003).
26. *Nassau Soda Fountain Equip. Corp.*, 118 A.D.2d at 765.
27. *See Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009); *see also Four Times Sq. Assoc., L.L.C.*, 306 A.D.2d at 6.
28. *See Felix v. Brand Serv. Grp. LLC*, 101 A.D.3d 1724, 1726 (4th Dep't 2012).



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Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

William P. LaPiana

DEAD BODIES

Right of Sepulcher Can Be Violated by Delay in Notifying Next-of-Kin

Decedent was admitted to the hospital where decedent died the same day. The hospital was unable to identify the decedent's next-of-kin. The task of identifying the next-of-kin then passed to the Public Administrator whose investigation was also unsuccessful. Decedent was buried and shortly thereafter the plaintiffs eventually learned of the decedent's death. Plaintiffs then sued the hospital, the Public Administrator, the county medical examiner, and the county (the "county defendants") for violation of the right of sepulcher, which may arise from failing to notify the next-of-kin of the death. The defendants moved for summary judgment and the Supreme Court denied the hospital's motion and granted that of the county and the county officials. All parties appealed and the Appellate Division for the Fourth Department affirmed.

While the hospital met its initial burden of showing that it made "reasonable and sufficient" efforts to find the decedent's next-of-kin, the plaintiffs' submissions showed that the hospital's records indicated that decedent had resided from time to time at a homeless shelter and that the hospital never contacted the shelter. In addition, the plaintiffs submitted deposition testimony from an employee of the shelter which stated that the employee could have contacted the next-of-kin had the employee been informed of the decedent's death. All of this raises a question of fact regarding whether it was reasonable for the hospital not to contact the shelter. In addition, the court rejected the hospital's assertion that the plaintiffs were required to submit an expert affidavit in opposition to the hospital's motion. The reasonableness of the hospital's efforts to contact the decedent's next-of-kin "lies within the common knowledge and expertise of a layperson."

The trial court correctly granted the motion of the county defendants. The Public Administrator is entitled to governmental function immunity because in trying to identify the next-of-kin the Public Administrator was performing a governmental role. It is irrelevant whether that role is ministerial or discretionary because the Public Administrator did not owe the plaintiffs a special duty beyond that owed to the general public. *Green v. Iacovangelo*, 184 A.D.3d 1198, 125 N.Y.S.3d 790 (4th Dep't 2020).

Municipality's Delay in Notifying Family After Identification of Decedent's Body Can Give Rise of Violation of Right of Sepulcher

In 2003, the plaintiff reported to the New York City Police Department (NYPD) that the plaintiff's child was missing. The child's body was found 10 days later and the autopsy conducted by the medical examiner's office came to an incorrect conclusion about the age and ethnicity of the decedent. The body was buried in the public cemetery on Hart Island. Five years later, the NYPD began an effort to resolve cases of unidentified bodies. The decedent's DNA profile was created from blood samples preserved from the autopsy and uploaded to a national database in 2009. Later that year, the plaintiff and the dece-

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dent's sibling provided DNA samples to the NYPD. In January 2011, the Office of the Medical Examiner identified the body buried at Hart Island as that of the decedent and the NYPD informed the plaintiff of the identification a month later. Plaintiff was not informed of the exact location in the cemetery of the decedent's grave until 2015.

Plaintiff sued the City of New York alleging violation of the common law right of sepulcher in Supreme Court, which denied the city's summary judgment motion. The city appealed and the Appellate Division for the Second Department affirmed.

The court agreed with a First Department case, *Rugova v City of New York*, 132 A.D.3d 220, 231 (1st Dep't 2015), holding that once a municipal defendant has identified human remains the obligation to inform the next-of-kin is a ministerial function that creates a special duty running to the next-of-kin rather than to the public at large. Because the city knew of the decedent's identity on January 10, 2011, but did not notify the plaintiff until February 16 of that year and did not notify the plaintiff of the location of the decedent's grave until 2015, there are triable issues of fact as to whether those delays violated the right of sepulcher. The court noted that there can be no liability based on the time between the report of the decedent as missing to the identification of the decedent's remains in January 2011. *Cansev v. City of New York*, 185 A.D.3d 894, 128 N.Y.S.3d 229 (2d Dep't 2020).

JURISDICTION

Personal Jurisdiction Upheld Based on SCPA 210

Executor of decedent's will brought a proceeding under SCPA 2103 to recover personal property or its value from Ruth Merns (Merns), a non-domiciliary of New York. Merns had borrowed a diamond ring from the decedent but lost it. Merns was properly served with a citation but failed to appear or answer. Surrogate's Court then issued an order that in effect directed Merns to return the value of the ring, $164,471.65, to the estate. Merns moved to vacate the order for lack of personal jurisdiction pursuant to CPLR 5015(a)(4). After a hearing, the court denied the motion, deciding that it had personal jurisdiction over Merns under SCPA 210(2)(a) because service of process was properly made and completed under SCPA 307(2) and 309. Merns appealed and the Appellate Division for the Second Department affirmed the order.

The appellate court decided that reliance on service of process to establish personal jurisdiction was incorrect. The court has subject matter jurisdiction because the ring is an estate asset and Surrogate's Court has jurisdiction over the estate. The court has personal jurisdiction over Merns under SCPA 210(a)(2) because Merns borrowed and lost the ring while in New York State and the statute gives personal jurisdiction over a non-domiciliary with regard to any matter over which the court has subject matter jurisdiction arising from any act or omission of or by the non-domiciliary while in the state. In addition, Merns did not deny the petitioner's allegation that Merns had promised the decedent compensation for the lost ring while Merns was in New York State but failed to make good on the promise. Finally, exercising personal jurisdiction over Merns comports with federal constitutional due process requirements of minimum contacts and traditional notions of fair play. *In re Steinman*, 183 A.D.3d 588, 123 N.Y.S.3d 612 (2d Dep't 2020).

MARITAL PROPERTY

Interest in Family Partnership Acquired by Assignment Accompanied by Promissory Notes Was Acquired by Gift for Purposes of Equitable Distribution

During marriage Spouse 1 acquired an interest in a limited partnership ("Grenmoor") by sale from Spouse 1's parent in exchange for promissory notes executed by Spouse 1. In the course of divorce proceedings, Supreme Court determined that the interest in Grenmoor was not subject to equitable distribution because it was acquired by gift. On appeal by Spouse 2, the Appellate Division for the First Department affirmed, finding that Supreme Court had properly credited Spouse 1's testimony that no money had changed hands, that there was no expectation that Spouse 1 would make good on the notes and that all the documents were created "for estate planning purposes only." The court found no basis for disturbing the trial court's determination of credibility.

The court also found that the trial court had correctly found that a residence held in Spouse 2's father's family trust is Spouse 2's separate property. Spouse 2 is not only the primary beneficiary but under the terms of the trust, Spouse 2 has the authority to remove and replace the trustee who has the authority to terminate the trust in the trustee's "absolute discretion." In addition, the appellate court approved the trial court's imputation of income to Spouse 2 based on the evidence and its determination of credibility related to use of vacation homes, employment in Spouse 2's parent's business, and payment of travel and entertainment expenses through that employment. *DeNiro v. DeNiro*, 185 A.D.3d 465, 128 N.Y.S.3d 7 (1st Dep't 2020).

WILLS

Military Will Validly Executed

Federal statute authorizes persons eligible for "military legal assistance" (defined to include members of the armed forces on active duty and their dependents among others, 10 U.S.C. § 1044(a)) to

execute a "Military Testamentary Instrument" admissible to probate in every state even if not complying with a state's statue of wills.[1] The first reported Surrogate's Court decision admitting such an instrument to probate provides a thorough analysis under New York law and of the constitutionality of the statute.

The will was signed by the testator and two witnesses, and includes an attestation clause, and self-proving affidavit which conforms to the federal statute. The testator and the witnesses also signed at the foot of each page of the will. The only question, according to the court, was whether the testator's signature at the end of each page runs afoul of the statutory requirement that the testator sign at the end of the will.[2] The court held that it did not. The purpose of the requirement is to prevent the fraudulent addition of material to the will. There is no evidence that the signing of every page involved any attempt to circumvent the testator's wishes; indeed, it is the testator's attempt to authenticate each page of the stapled document and therefore actually promotes the statutory purpose.

Although the self-proving affidavit does not follow the New York official form, the use of the official form, in the court's words, "merely triggers SCPA 106" which requires all Surrogate's Courts to accept official forms for filing. To reject the non-uniform form would exalt form over substance, and in any event the absence of a self-proving affidavit does not prevent the operation of the presumption of due execution because the will includes an attestation clause and the execution of the will was supervised by the drafting attorney.

Even if the document did not comply with the New York statute of wills, it would still be entitled to probate under the federal statute. The court notes that some commentators have suggested that the provision is unconstitutional because it violates the Tenth Amendment's express reservation to the states or to the people of all powers not delegated by the Constitution to the United States or prohibited to the states. The court examined the issue and agreed with those commentators who have concluded that the statute is constitutional as an exercise of the power given to Congress to raise and support armies and navies, the so-called War Powers Clause. Art. I § 8. clause 11. *In re Johnson*, 69 Misc. 3d 357, 129 N.Y.S.3d 304 (Sur. Ct., Dutchess Co. 2020).

Remainder Accelerates on Failure of Residuary Trust for Lack of Beneficiary

Decedent's will left the residuary estate to a trust to fund a website created by the decedent devoted to the decedent's research in his family's genealogy. The trust was to end 21 years after the deaths of the decedent's brother and nephew and the trust property distributed to a not-for-profit library. Another provision of the will acknowledged the decedent's relatives but stated that the decedent expressly made no "direct testamentary disposition for any of them."

One of decedent's distributees petitioned for construction of the will under SCPA 1420 asking for a determination that because the trust was invalid for lack of a beneficiary the residuary estate therefore passed in intestacy. The library filed a cross-petition maintaining that the decedent's express disinheritance of relatives, interest in genealogy, and membership in the library all indicates that the decedent's intent would be served by accelerating the library's vested remainder. The Attorney General intervened pursuant to EPTL 8-1.1 and supported the library's position.

After a hearing, Surrogate's Court held that the trust was invalid but that the gift to the library survived and accelerated into possession. The court therefore denied the petition, granted the cross-petition, and ordered the executor to deliver the residuary estate to the library. The petitioner appealed.

The Appellate Division for the Third Department affirmed. The trust was unquestionably invalid and therefore the issue was whether the Surrogate Court's decision effectuated the decedent's intent. The express statement making no gift to the decedent's family, coupled with the language of the gift of the remainder in the purported trust, which describes the library as promoting and facilitating genealogical research and expresses the hope that the library will preserve and continue the decedent's own research in the genealogy of the decedent's family, all unambiguously expressed the decedent's intent that the library was to receive the residuary estate.

Because the language of the will was unambiguous, the Surrogate erred when it considered extrinsic evidence including the decedent's obituary, and affidavits attesting to the decedent's intent. The error, however, was harmless because the holding below was what would have resulted from considering only the unambiguous provisions of the will. *In re Dawe*, 179 A.D.3d 1182, 115 N.Y.S.3d 568 (3d Dep't 2020).

Endnotes

1. 10 U.S.C. § 1044(d).
2. EPTL 3-2.1(a)(1).

Case Notes—New York Supreme and Surrogate's Court Decisions

By Ilene Sherwyn Cooper

Discovery

Before the Surrogate's Court, Albany County, in *In re Mahoney,* was a consolidated trial of two proceedings commenced pursuant to SCPA Article 21. The first proceeding was commenced by two of the decedent's children, as fiduciaries of the estate pursuant to SCPA 2103 and 2104, seeking the return of certain property allegedly being wrongfully withheld from the estate by the respondent, the decedent's "long-time companion" and "dear friend," and a trust beneficiary under her will. The second proceeding was commenced by the respondent against the fiduciaries, pursuant to SCPA 2102(4), seeking to compel payment of annual trust distributions to him as required by the decedent's will, together with interest, or alternatively, the removal of the fiduciaries as executors and trustees due to their failure to fund the trusts established under the will for his benefit.

Following the close of petitioners' case on the discovery petition, the court granted respondent's motion for a directed verdict as to some of the assets in issue, and reserved decision with respect to petitioners' allegations regarding a transfer of assets from the decedent's checking account to the respondent's personal account, the contents of a safe located in the decedent's Florida condominium, and a withdrawal of funds from a jointly held investment account.

To this extent, the court observed that in a turnover proceeding, the burden of establishing that the property was that of the decedent rests with the petitioner. Once that burden is met, it shifts to the respondent to establish, by clear and convincing evidence, that the subject property was a gift.

Within this context, the court turned to the fiduciaries' contentions regarding the decedent's ownership of funds in the subject checking account, and noted that the source of those funds was a joint account between the decedent and respondent. According to the respondent, the decedent was aware that a portion of the funds would be utilized by him to purchase certain coins, and that toward that end, the decedent authorized, by phone, a transfer of those funds into his personal checking account.

The evidence established that the respondent utilized the subject funds to purchase the coins. Moreover, the evidence revealed that when asked to examine the propriety of the transfer by the decedent's attorney-in-fact, the bank determined that it was not fraudulent. Although petitioners maintained that the decedent would not have typically authorized a transfer of funds, telephonically, they offered no documentary evidence to support that claim. Petitioners' additional contentions that the decedent never gifted money to anyone was belied by her checking account records, which revealed that she made gifts, sometimes sizeable, to family members and the respondent.

Accordingly, based on the foregoing, the court found that petitioners had failed to satisfy their burden that the funds in issue were an estate asset, and even assuming that they had, that they were not intended to be a gift to the respondent.

As for the claimed assets in the safe, known as "Bill's [the respondent's] safe" located in the decedent's condominium, the court found that petitioners had failed to provide any convincing documentary proof that the contents thereof, which included coins and cash, belonged to the decedent. Although the petitioners relied on notes written by the decedent regarding the coins, the court found that they were of little probative value due to the passage of time. Instead, the court noted that petitioners should have proffered receipts, bank statements and/or invoices demonstrative of the decedent's ownership of the cash and/or the coins in issue. Accordingly, petitioners request for recovery of the contents of the safe was denied.

With respect to the joint investment account, the record revealed that the respondent removed all of the funds from that account prior to the decedent's death. The court noted that had the funds remained in the account, the entire account would have belonged to the respondent as joint tenant. However,

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the petitioners maintained that since the account was improperly closed by the respondent, he was required to return half of the account to the decedent's estate.

The court observed that when funds of a joint account/tenancy are withdrawn in excess of each tenant's one-half interest or moiety, the withdrawing joint tenant is subject to suit for the excess, and has the burden of proving by clear and convincing evidence that the withdrawals were with the other joint tenant's consent. Where it is demonstrated that the withdrawals were made to or for the benefit of the other joint tenant, return of the excess funds will not be required. To this extent, the court found that while the respondent removed the funds from the account as a defensive measure, after a call from the brokerage institution that the account was being tampered with, the evidence as to his use of the monies thereafter was too vague and indirect to establish that they were used for the decedent's benefit. Accordingly, the court directed that the respondent and the decedent's estate were each entitled to one-half of the account.

Turning to the respondent's request for statutory interest on the annual trust distributions, the court found that in instituting the suit for discovery, the fiduciaries did not act in good faith or have the best interests of the estate or the wishes of the decedent in mind. Specifically, the court noted that the petitioners had minimal evidence to support their claims, yet nevertheless, deprived the respondent of the funds, which the decedent sought to provide for him. Accordingly, the court held that respondent was entitled to interest at the rate of 9% per annum on his yearly distributions to the date of its order.

In re Mahoney, N.Y.L.J., p.35, col. 3 (Sur. Ct., Albany Co.).

Objections to Probate

In *In re Tsinopulos,* the petitioner moved for summary judgment dismissing the objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence and fraud. The propounded instrument was a two-page pre-printed document with the blanks allegedly filled in by the testator, which left an $11,000 bequest to the objectant, and the balance of the decedent's estate to the petitioner.

The record revealed that the decedent executed the instrument at a bank under the guidance of the bank's manager. The court found that the petitioner established a prima facie case of due execution through the deposition testimony of the bank manager, and the existence of an attestation clause in the instrument, which created a presumption that the document had been duly executed. Although the objectant alleged a handwriting discrepancy between the two pages of the instrument, the court held that, even though true, it did not bear on the issue of due execution. Moreover, objectant conceded that the decedent was of sound mind, and could not be convinced by the petitioner to do something she did not want to do. Finally, the court found that while objectant argued that the propounded instrument was a fraud, and surmised that the petitioner could have substituted a page of the instrument, the court concluded that no proof of this allegation was submitted.

Accordingly, petitioner's motion for summary judgment was granted.

In re Tsinopoulos, 68 Misc.3d 1201(A) (Sur. Ct., Rockland Co.).

Republication and Revocation of Will

Before the Surrogate's Court, Queens County, in *In re Weiner,* was an uncontested probate proceeding in which the petitioner sought admission to probate of a 2014 will, a copy of a codicil, dated January 11, 2017, and a second codicil, dated January 26, 2017. The differences in the instruments lay in the appointment of the estate fiduciary. By her will, the decedent nominated her daughter as the executor of her estate; in the first codicil to the instrument, she nominated both of her children as the executors of her estate, and otherwise ratified and confirmed her Will; and in the second codicil, she appointed her attorney, the draftsperson of all three instruments, as the executor of her estate, and again, ratified and confirmed her Will.

In support of the petition, the attorney-draftsperson submitted an affirmation indicating that she retained the Will and codicils after their execution, but was unable to locate the first codicil following the decedent's death. As such, she requested that the first codicil be admitted to probate as a lost will, together with the original Will and second codicil.

The court opined that a codicil is a supplement to a Will, which does not necessarily revoke it in its entirety, and which republishes it as of the date of the codicil. To this extent, the court found that while each of the codicils republished the Will, the second codicil did not republish the first codicil, but instead, changed the provision appointing the estate fiduciary. In view thereof, the court held that there was no need to probate the copy of the first codicil, and admitted the Will and the second codicil to probate.

In re Weiner, N.Y.L.J., Jan. 17, 2020, p, 17, col.2 (Sur. Ct., Queens Co.).

Standing

Before the Surrogate's Court, New York County, in *In re Kaufman*, was a motion, *inter alia*, to strike the SCPA 1404 discovery demands of the decedent's wife based on lack of standing.

The record revealed that the decedent was in the midst of a divorce at the time of his death, and had executed a Stipulation of Settlement and Agreement providing for the division of their marital assets. That Agreement provided, in pertinent part, that each party waived and relinquished all claims, rights, or interests as a surviving spouse in or to any property of the other at death, including rights under the elective share statute, to exempt property, and pursuant to the laws of intestacy.

The decedent's will divided his estate equally between decedent's nephew and another family member. Notwithstanding the waiver language in the Agreement, the respondent/surviving spouse requested SCPA 1404 examinations and related discovery, in response to which the motion *sub judice* was filed.

In granting the motion, the court reasoned that the purpose of SCPA 1404 discovery was to acquire information that might provide a basis for filing objections to probate. Thus, the court observed that lack of standing to file objections to probate forecloses discovery pursuant to SCPA 1404. As defined by the provisions of SCPA 1410, any one whose interest—*i.e*. pecuniary interest—in the property or estate of the testator is adversely affected by the admission of the propounded will to probate, may file objections.

Within this context, the court found respondent's claim that the Settlement Agreement did not foreclose her rights under SCPA 1404 to be without merit. More specifically, the court concluded that by the terms of the Agreement the respondent unequivocally waived her right to object to probate, and thus, lacked the requisite pecuniary interest and standing to file objections. As a result, SCPA 1404 discovery would serve no useful purpose.

In re Kaufman, N.Y.L.J., July 10, 2020, p.22, col. 1 (Sur. Ct., N.Y. Co.).

Statute of Limitations

In *In re Morris*, the court found that the petitioner's claim based on fraud was time barred. Before the court was a proceeding commenced by the decedent's son, as administrator of his estate, seeking to recover the decedent's one-half interest in realty that he had conveyed to his daughter, on the grounds that the deed transferring title in 1992 was forged and lacked consideration. The subject realty had previously been owned by the decedent and a third party as tenants in common. Upon the death of the third party, the respondent was appointed the administrator of her estate and was bequeathed her one-half interest in the property. Thereafter, the decedent executed a deed conveying his interest in the property to the respondent in consideration of $10.

The petitioner alleged that prior to his purported execution of the deed, the decedent suffered a stroke, and was paralyzed and bedridden, and that as such, his signature was forged, and falsely notarized. Additionally, the petitioner argued that even if the deed had not been forged, at the time it was executed, the decedent did not have the benefit of his own counsel at the time of the transaction, and, given his frailties and incapacity, was the subject of fraud, duress and undue influence by the respondent. The petitioner claimed that he did not learn of the fraudulent conveyance until May, 2016, and therefore the proceeding was timely.

The respondent opposed the proceeding, and moved for its dismissal, alleging that the court lacked jurisdiction over the dispute, and that the petitioner's claims based on fraud and forgery were time-barred.

While the court disagreed with the respondent's jurisdictional claims, it concluded that the proceeding was time-barred, as the statute of limitations for a cause of action based upon fraud is the greater of six years from the date the cause of action accrued or two years from the time a plaintiff discovers the fraud, or with reasonable diligence could have discovered it. In view of the fact that the subject deed was executed in 1992, the court held that the six-year statute of limitations had long expired. Additionally, the court found that had the petitioner fulfilled his fiduciary duties by timely marshalling and ascertaining the assets of the estate, he should have, with reasonable diligence, discovered the alleged fraud no later than November 2012, and thereby commenced the proceeding for recovery of the realty two years later.

In re Morris, N.Y.L.J., Sept. 4, 2020, p.21, col. 3 (Sur. Ct., Bronx Co.).

Summary Judgment

In *In re Gennarelli*, summary judgment was granted in the petitioner's favor in a contested probate proceeding in which objections were filed on the grounds of lack of due execution, lack of testamentary capacity, fraud and/or undue influence perpetrated by the attorney-draftsperson, the petitioners, or someone acting in privity with them. In support of their motion for summary relief, the petitioners relied on the self-proving affidavit executed by the attesting witnesses, together with the deposition testimony of the attorney-draftsperson, the petitioners, and the decedent's housekeeper and aides, which the petitioners maintained supported their assertion that the decedent was a strong-willed person and impervious to influence.

On the issue of due execution, the court observed that the execution of the propounded will was supervised by an attorney with long experience in the area of trusts and estates, which created a presumption

of regularity and of proper execution. Further, a presumption of due execution was created by the will's self-proving affidavit, which also constituted prima facie evidence of the facts therein stated. The court found that these presumptions were supported by the deposition testimony of the attorney-draftsperson and attesting witnesses, none of which was refuted by the objectants. Accordingly, based on the prima facie evidence submitted by the petitioners, the objection based on lack of due execution was dismissed.

Additionally, the court found that the submission of the self-proving affidavit, together with the testimony of the attorney-draftsperson and the attesting witnesses, satisfied the petitioners' burden of establishing a prima facie case of testamentary capacity. In opposition, the objectants alleged that the decedent was diagnosed with a progressive degenerative condition, which was evidenced by her diminished mental faculties, and inability to participate in meaningful conversation and manage her financial affairs. Further, although the objectants admittedly never saw the decedent in the nine years prior to her death, they submitted the affirmation of her primary care physician, who stated that as a result of her illness, the decedent had difficulty walking, and progressive mental impairment, which manifested itself in periods of disorientation and confusion during office visits. The physician concluded that within a reasonable degree of medical certainty the decedent was unable to manage her financial affairs on the date the will was executed. Counsel for the objectants also submitted an affirmation asserting, *inter alia*, that the decedent's mental impairment precluded her from understanding the nature and extent of her assets, as evidenced by her failure to invest her great wealth, and extensive reliance on her bookkeeper and the attorney-draftsperson for assistance. Finally, counsel maintained that the decedent's refusal to sign her will when originally proffered to her by the attorney-draftsperson for signature raised an inference of lack of capacity. The petitioners replied asserting, *inter alia*, that the affirmation of the physician was unpersuasive as he was not a psychiatrist, and incapable of determining capacity to execute a will. Moreover, they maintained that an inability to manage financial affairs, even if that were true of the decedent, was not inconsistent with testamentary capacity.

Upon review, the court found objectants evidence unavailing and insufficient to contradict the petitioner's proof of capacity. Most pointedly, the court noted that the testimony of the attorney-draftsperson revealed a testator who was clear in her desires, was fully aware of her family ties and estate assets and was possessed of a coherent testamentary plan.

Finally, the court found the objectants' claims of undue influence and fraud to be unpersuasive and speculative. Indeed, despite objectants' contentions that the petitioners were motivated to procure the propounded will by revenge, securing a specific bequest in the propounded will of $20,000, together with commissions, and an expectation by the attorney-draftsperson that he would be retained as counsel or the estate by the petitioners, the court noted that the decedent's testamentary scheme essentially mirrored the dispositive plan in her prior will executed when her husband was alive, and the changes that were made were minimal and not reflective of any nefarious machinations. Accordingly, the objections to probate were dismissed, and the propounded will was admitted to probate.

In re Gennarelli, N.Y.L.J., June 22, 2020, p. 18 col. 6 (Sur. Ct., Kings Co.).

Summary Judgment

In *In re Brown*, the Surrogate's Court, Kings County, denied the petitioner's motion for summary judgment dismissing the objections to probate as premature.

The decedent died at the age of 99 without a spouse or issue. The petitioner described himself as a "godson" of the decedent, and the objectant described herself as a "goddaughter by love," who also bore no relation to the decedent. Pursuant to the pertinent provisions of the propounded will, dated January 31, 2014, the decedent devised and bequeathed his real estate, personal property, and residuary estate to the petitioner, and named the petitioner's son as the contingent beneficiary. The objectant received a $25,000 bequest under the instrument.

By comparison to the propounded will, a prior will of the decedent, dated December 1, 2004, devised all of his real estate in equal shares to the petitioner and the objectant, or, in the event that both of them should fail to survive the decedent, to the objectant's children. The 2004 will further bequeathed all personal property to the objectant, and the decedent's residuary estate to the proponent and objectant, with the objectant's children as contingent beneficiaries.

The instrument was drafted and its execution was supervised by an attorney, who, the court noted, had since been disbarred. The instrument was also witnessed by three individuals, who signed self-proving affidavits before a notary public, which attested to the due execution of the will, and stated that in the opinion of the witnesses the decedent was of sound mind, and not under restraint, duress, or undue influence.

SCPA 1404 examinations of the three witnesses were conducted, yet the examination of the attorney draftsperson had yet to proceed. Two of the witnesses testified that they were lifelong friends and distant

relatives of the petitioner, and that they attended the will execution ceremony at the request of the petitioner. The third witness testified that she attended the will execution ceremony at the request of her cousin, who was also a witness.

In support of the motion, the petitioner submitted an affidavit stating that the decedent informed him in or about 2009 that she wished to change her will, asked him to be present at the execution thereof, and to bring three witnesses as instructed by the attorney. He stated that he was unaware of the changes to the will being made, and that at the time of execution the decedent was of sound mind and memory and not under restraint. More specifically, the petitioner indicated that the decedent's mental faculties did not begin to fail until after the propounded will was executed, as evidenced by the hospital record she provided in support of the motion.

The hospital record revealed that decedent had been taken to the hospital by ambulance after she was found wandering outside without shoes. It further indicated that the objectant had reported to hospital staff that she was acting as the decedent's caretaker and that the decedent had several incidents of wandering in the past. In this regard, the record stated that the decedent had dementia, likely the result of "her previously diagnosed Alzheimer's."

In opposition, the objectant argued that the motion was premature because the parties had not conducted CPLR discovery following the filing of objections. Specifically, the objectant alleged that the attorney-draftsperson and the petitioner had yet to be deposed, and additional medical records had to be produced. Further, the objectant claimed that she had lived with the decedent for many years, until the petitioner moved her to his mother's home, and then to an unknown location, and that she believed the petitioner held a power of attorney for the decedent. Further, objectant claimed that at the time the will was executed, the decedent was suffering from advanced Alzheimer's disease, and was unable to manage her financial affairs.

The court held that "a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence."[1] In this regard, the court noted that petitioner had not yet been deposed, and because of his presence at the will execution ceremony, and his request that the three attesting witnesses be present, his testimony was of critical probative value to the issues in the proceeding. Further, the court observed that the hospital record submitted by the petitioner in support of the motion raised questions as to when the decedent's Alzheimer's and general mental decline began, and consequently, additional discovery was required.

Accordingly, given the numerous unanswered issues presented by the record, summary judgment was denied as premature, without prejudice to renewal upon completion of discovery.

In re Brown, N.Y.L.J., May 7, 2020, p. 18, col. 1 (Sur. Ct., Kings Co.).

Vacatur of Default

Before the Surrogate's Court, Orange County, in *In re Menzies*, was a petition to vacate a decree admitting the decedent's will to probate, revoke letters testamentary, and for leave to conduct SCPA 1404 examinations and to file objections to the validity of the will.

The record revealed that prior to the initial return date of citation, the petitioner's counsel filed a Notice of Appearance with the Court, which was rejected for certain deficiencies. On the return date of citation, counsel appeared with a facsimile of an Authorization of Appearance containing the petitioner's signature. Following the return date, the matter was adjourned for the issuance of supplemental citation. According to petitioner, his counsel was informed by the Clerk of the Court that he was not required to appear on the next return date, but was required to file an original Authorization of Appearance and an Amended Notice of Appearance indicating the distributees he would be representing.

Although the documents were filed with the court in advance of the return date of supplemental citation, petitioner's counsel failed to file objections on that date on petitioner's behalf or request SCPA 1404 examinations. Accordingly, a decree was entered admitting the propounded instrument to probate.

Almost one year later, the petitioner instituted the proceeding *sub judice* to vacate the decree. The petitioner alleged that the will was invalid on the grounds of lack of due execution, undue influence, and/or lack of capacity, inasmuch as the decedent had executed the instrument while in the hospital, after sustaining serious head/brain injuries from which he later died. Notably, it took petitioner almost three years to complete jurisdiction in the proceeding.

The court opined that in order to vacate a decree of probate made upon a default and obtain leave to file objections, the applicant must demonstrate (1) a reasonable excuse for the default/delay and the absence of willfulness and (2) a meritorious claim, which is not established by allegations in conclusory form, but instead, sets forth sufficient facts to afford a substantial basis for the contest and a reasonable probability of success. Further, the Court noted that whenever the time to file objections in a proceeding has expired, objections shall not be accepted for filing

unless accompanied by a stipulation of all parties to extend the time or unless ordered by the court.

Within this context, the court found that while ostensibly, petitioner failed to file objections or take affirmative steps to preserve his rights after the initial return date, petitioner's counsel could have reasonably believed that objections were not due until further notice from the court or opposing counsel, neither one of which was forthcoming. As such, the court accepted the petitioner's excuse for default as a reasonable excuse.

However, the court held that petitioner had submitted nothing more than conclusory allegations in support of his proposed objections to probate and thus, failed to establish meritorious grounds for contesting the decedent's will. Accordingly, petitioner's application was denied.

In re Menzies, N.Y.L.J., Mar. 20, 2020, p. 21 col. 2 (Sur. Ct., Orange Co.).

Endnote

1. *In re Brown*, N.Y.L.J., May 7, 2020, p. 18, col. 1 (Sur. Ct., Kings Co.) (*citing Lambert v. Bracco*, 18 AD3d 619, 620 [2d Dep't 2005]).

Florida Update

By David Pratt and Brett Rosecan

LEGISLATION OF INTEREST

Precious Metals—Tangible Personal Property

Effective July 1, 2020, a new law in Florida treats "precious metals in any tangible form, such as bullion or coins, kept and acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment, [as] tangible personal property." Fla. Stat. § 731.1065. Accordingly, unless such items are specifically addressed in a client's will or trust, the precious metals would pass to the beneficiary of the client's tangible personal property rather than to the beneficiary or beneficiaries of the client's residuary estate.

Grantor Trust Reimbursement

Effective July 1, 2020, Florida law allows, but does not require, an independent trustee of a grantor trust to reimburse the grantor for all or part of the income tax paid by the grantor and attributable to trust income or to pay such taxes directly on the grantor's behalf, provided that the trust instrument does not explicitly prohibit such tax reimbursements or payments. Fla. Stat. § 736.08145. The amended law applies to all trusts, regardless of when created, unless: (i) the trustee provides written notice to the grantor and any person who can remove and replace the trustee that he or she elects out of the tax reimbursement and payment provisions at least 60 days before the election takes effect; or (ii) applying such provisions would prevent a contribution to a trust from qualifying for, or would reduce, a federal tax benefit under the circumstances. Under prior Florida law, a trustee was only permitted to reimburse the grantor for income taxes attributable to grantor trust income if the trust instrument specifically provided for such reimbursement.

Conflict of Interest—Personal Representative

Effective July 1, 2020, new language has been added to the Florida Statutes to extend conflicts of interest for a personal representative to a sale or encumbrance to a corporation, trust, or other entity in which the personal representative or his or her spouse, agent, or attorney has a substantial beneficial or ownership interest. Fla. Stat. § 733.610. The new language renders such transactions voidable.

Notice to Interested Persons—Formal Notice Does Not Establish In Personam Jurisdiction

Florida law has been amended to confirm that formal notice in a probate proceeding is sufficient to establish in rem and quasi in rem jurisdiction over the person served, but said notice is insufficient to invoke the court's in personam jurisdiction over the person served. Fla. Stat. § 731.301(2). More simply, formal notice allows the court to acquire jurisdiction over a person for determining their rights to estate property; however, formal notice does not establish the court's personal jurisdiction over the person receiving notice. In Florida, formal notice may be served by sending a copy of a pleading or motion to an interested person by any commercial delivery service or mail carrier requiring a signed receipt. Fla. R. Prob. P. 5.040. A petitioner must obtain personal jurisdiction over an adverse party by service of a summons. A sheriff's deputy or process server may serve a summons by delivering a copy to an interested person's home, leaving the summons with any person residing at the home who is age 15 or older and informing the person of its contents. Fla. Stat. §§ 48.27, 48.031 and 48.201.

Efficient Administration—Small Estates

Effective July 1, 2020, Florida has amended and enacted a potpourri of laws intended to ease the administration of small estates. The legislature has expanded the exceptions to the general rule that a financial institution's books and records relating to deposit accounts must be kept confidential. Fla. Stat. § 655.059. Certain family members of a decedent are now authorized to present a sworn affidavit to a financial institution to receive up to $1,000 from certain "qualified accounts" held by a financial institution in the sole name of a decedent without a pay-on-death or any other survivor designation. The authorized family member can receive the funds from a financial institution without a court proceeding, order, or judgment. Fla. Stat. § 753.303. A new form of disposition of personal property without administration for intestate property in small estates has been created to permit a beneficiary to file an affidavit with the court to request distribution of certain assets if the estate consists only of personal property

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that is exempt from probate proceedings up to a net value of $20,000 and two vehicles, personal property that is constitutionally protected from creditors' claims valued at $1,000 or less, and nonexempt property valued at less than the sum of $10,000 and certain funeral and medical expenses. Fla. Stat. § 735.304.

Notice of Administration— (i) Elective Share and (ii) Right to Contest Trust Incorporated in a Will

Effective October 1, 2020, Florida law has been amended to require that notice of administration served on a surviving spouse must include language informing the surviving spouse that he or she may petition the court for an extension of time to choose the elective share if the petition is made within (i) six months after the date of service of a copy of the notice of administration on the surviving spouse, or (ii) two years after the date of the decedent's death. Fla. Stat. § 733.212. Under prior law, notice of administration served on a surviving spouse required notice of the deadlines to take an elective share, but did not require notice of the spouse's right to petition the court for an extension of time.

Florida law also now requires additional language to be included in a notice of administration to provide notice that a party may waive his or her right to contest a trust referenced in a will if he or she fails to timely contest the will.

Attorney Serving as Personal Representative or Trustee

Effective October 1, 2020, an attorney, or person related to the attorney, is prohibited from receiving compensation for serving as a fiduciary (personal representative or trustee) if the attorney prepared or supervised the execution of the will or trust, unless the attorney is related to the client or makes the following disclosures to the client in writing before the will or trust is executed: (i) a corporate fiduciary or any person, including a spouse, an adult child, a friend, or an attorney, is eligible to serve as a fiduciary; (ii) any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation; and (iii) compensation payable to the fiduciary is in addition to any attorneys' fees payable to the attorney or the attorney's firm for legal services. Fla. Stat. §§ 733.617 and § 736.0708.

Authority of Personal Representative—Cause of Action

Effective October 1, 2020, language has been added to the Florida Statutes to clarify that causes of action of the estate and causes of action the decedent had at the time of death are deemed to be "property" of an estate. Fla. Stat. § 731.201(32). The new language clarifies that such causes of action are within the authority of the personal representative.

DECISION OF INTEREST

Florida Common Law—Modification of Irrevocable Trusts

Florida's Third District Court of Appeal recently affirmed the modification of a trust pursuant to a common law rule of settlor and beneficiary consent instead of judicial modification per statute. The trustee, who opposed the modification of the trust, argued that the common law modification should not have been permitted because the court had not made certain evidentiary findings as required per statute under § 736, Florida Statutes. Section 736.04113(3)(a), Florida Statutes, provides that when a court exercises discretion to modify a trust, the court "shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification." However, the court articulated that Florida common law has long recognized the principle that the terms of a trust may be modified if the settlor and all the beneficiaries consent. *Preston v. City National Bank of Miami*, 294 So. 2d 11, 14 (Fla. 3d DCA 1974). Importantly, Section 736.04113(4), Florida Statutes, provides that "the provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts." As such, the consent of the settlor and beneficiaries was sufficient to modify the irrevocable trust under the common law rule espoused in *Preston*, without the need to apply the Florida statutory framework of trust modification.

Demircan v. Mikhaylov, 2020 WL 2550067 (Fla. 3d DCA May 2, 2020) (not yet final).

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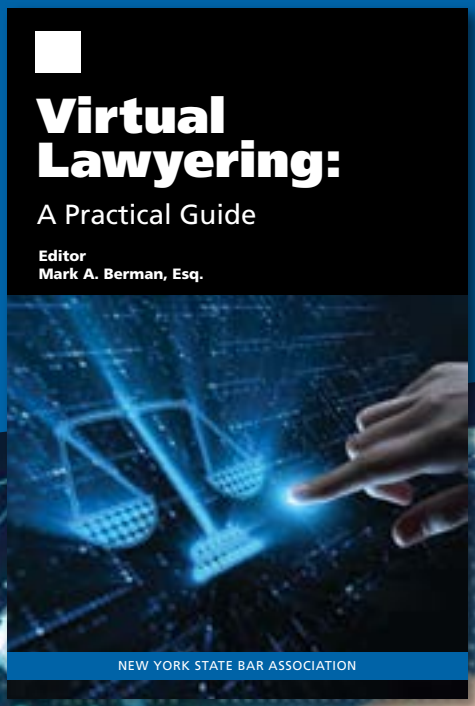

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