Probate & Fiduciary Litigation Newsletter - December 2019

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The *Probate & Fiduciary Litigation Newsletter* compiles recent Trust & Estate cases. Our lawyers are at the forefront of this area of the law, shaping how it is handled in the Probate and Family Court. Goulston & Storrs is the go-to firm in the Northeast for litigation involving Probate and Fiduciary matters.

Questions of Testamentary Capacity of Decedent Determined Speculative by Appellate Court

In *Buzbee v. Natale*, No. 18-P-774, 2019 WL 5446751 (Mass. App. Ct. Oct. 24, 2019), the appellate court reviewed a superior court judge's decision to exclude expert testimony on the decedent's lack of testamentary capacity. The decedent had left "essentially all" her property to her neighbor, and her son challenged his mother's capacity to execute her will and other estate planning documents. At trial, a jury found that she had possessed capacity to execute her will and other documents, and that she did so free of undue influence.

On appeal, the plaintiff challenged the trial judge's exclusion of his expert's testimony regarding the decedent's mental state. The expert, who never actually examined the decedent, testified that she "might have been mentally incompetent," but that he could not offer an actual diagnosis without having conducted an examination. The trial judge deemed this testimony to be speculative and excluded it. The judge also excluded testimony concerning the decedent's mental health history as irrelevant to the issue of her capacity at the time she executed estate planning documents.

The appellate court reviewed the trial judge's decision for an abuse of discretion, and, finding none, affirmed the jury's decision. In doing so, the court highlighted the tentative nature of the expert's testimony, agreeing with the trial judge that it was speculative.

THE TAKEAWAY: Expert testimony that a decedent "might" not have had testamentary capacity is subject to being excluded as speculative, as is testimony concerning a decedent's mental health at times other than the time of execution of the specific documents in question.

Decedent's Florida Property Available to Satisfy Debt to Nursing Home Despite Specific Devise of Property to Brother and Cousin

Can a nursing home in New York recover what it's owed from the sale of an out-of-state property (in this case, a condominium on Marco Island, Florida) even though the Florida condo was specifically devised to the decedent's brother and cousin? In *Matter of Estate of Young*, 65 Misc.3d 1228(A) (Sullivan Sur. November 27, 2019), the Surrogate answered that question in the

affirmative – under the circumstance that, based on its New York assets alone, the estate was otherwise insolvent.

At the time of decedent's death, she owed $127,624 to the nursing home where she had apparently been residing for some time prior to her death. Her New York assets were insufficient to pay that debt; thus, the estate was insolvent based on New York assets alone. However, decedent also owned the Florida condominium, of considerable value at least sufficient to pay what was owed to the nursing home. But decedent had specifically devised the Florida condo to her brother and her cousin (who was also the executor).

The nursing home petitioned for an accounting that included the Florida condo as part of the estate, and the executor opposed, arguing that the Surrogate lacked jurisdiction over the Florida property, that the specific devise in any event trumped a creditor's claim, and that the creditor's remedy, if any, was an ancillary probate proceeding in Florida. The Surrogate rejected all these arguments and ruled for the creditor nursing home. As to jurisdiction, the Surrogate found that the broad subject matter jurisdiction conferred on the court by New York SCPA § 201(3) gave the Surrogate "full authority and broad power to direct the [executor] to take appropriate action with regard to any … out of state realty." As to priority of claims, the Surrogate found that the hierarchy of asset distribution in New York EPTL § 13-1.3(c), which concerns insolvent estates, provides for abatement of specific devises, and that title did not vest in the brother and cousin until a full accounting had been rendered. The Surrogate further ruled that the nursing home did not have to file an ancillary probate proceeding in Florida as that would be "burdensome" and could bar the creditor "from pursuing a valid claim incurred during the Decedent's lifetime in New York State with a New York creditor."

THE TAKEAWAY: Out-of-state assets of the decedent, even if specifically devised by the decedent, are likely to be found available for distribution to creditors if the decedent's in-state assets are insufficient to satisfy the estate's debts.

Majority Distributees Can't Revoke their Prior Consent to Administrator of Estate

Can distributees comprising 75% of the beneficial interest in a $30,000,000 estate, who initially consented to the appointment of an administrator, change their minds and revoke their consent to that administrator? In *Matter of Corey*, 65 Misc.3d 524 (Erie Sur. August 27, 2019), the Surrogate's Court answered in the negative.

Decedent died at age 92, intestate despite having an estate worth an estimated $30,000,000. She was survived by three children and two grandchildren (the children of a fourth child who predeceased the decedent). On consent and designation of all five distributees, the Surrogate's Court appointed an administrator of the estate pursuant to New York SCPA § 1001[6]. It appears that the three children were dissatisfied with how the administrator was proceeding, as eight months later, they filed a petition to remove the administrator. The two grandchildren opposed the petition, as did the administrator himself.

The children relied primarily on the argument that their earlier consents were revocable and that, with a majority (75%) of the distributees no longer consenting to the administrator, the

appointment by consent was no longer valid. The Surrogate disagreed, noting that the grounds for removing a fiduciary are enumerated in SCPA § 711 (there are twelve of them), and revocation of a consent previously given under SCPA § 1001[6] is not among them. The Surrogate also rejected the children's fallback position that the administrator had developed a conflict of interest, noting that an alleged "[c]onflict … is not, on its own, a ground for removal unless this conflict jeopardizes the interest of beneficiaries and the proper administration of the estate," a test which the Court found was not met in this case. The Court noted that the administrator had acted in the interests "of *all* beneficiaries" (emphasis in the original), implying that the disagreement was really between the three children and the two grandchildren comprising the remaining 25% interest in the estate.

THE TAKEAWAY: Consents to designation of an administrator under New York SCPA § 1001[6] are irrevocable even when a majority of the beneficiaries wish to revoke them – a point to bear in mind before agreeing to give such a consent.

If you have a probate and fiduciary litigation question or other business concern, we invite you to reach out directly to any member of our Probate and Fiduciary Litigation group.

Disclaimer: *This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*