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Probate & Fiduciary Litigation Newsletter: February 2020

February 7, 2020

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.

Brother Gets the Cat – and Not Much Else

Where the decedent left his brother his "beloved old cat" and a small sum of money, and bequeathed the rest to a testamentary trust that failed for having no named beneficiary, could the brother step in and claim what would have gone to the trust? In *Matter of Dawe*, 2020 WL 20399 (3rd Dep't January 2, 2020), the Appellate Division answered that question in the negative, finding unambiguous the will's provisions that the brother would receive nothing further and the residual estate would ultimately go to a not-for-profit institution.

Decedent had a strong interest in genealogy, and bequeathed his residual estate to a testamentary trust to fund a website devoted to genealogical research about his family. Upon the termination of the trust at a designated time, the corpus of the trust was to go to a not-for-profit library in Connecticut promoting and facilitating genealogical research. However, the trust itself designated no beneficiary and undisputedly was invalid as a result. The brother claimed that this meant the residual estate went to him.

The court disagreed, citing a proviso in the will that the decedent was "mindful" of his brother whom he "love[d] dearly," but "I do not make any other … disposition" to the brother. The courts found unambiguous the decedent's stated intent that the library would ultimately receive the residual estate "with the hope that decedent's genealogical research would be continued." That such research could benefit the decedent's family "d[id] not negate his express intent that his family not receive outright testamentary gifts."

THE TAKEAWAYS: *Drafters of a testamentary trust must be mindful of the need to designate a specific beneficiary, not just a purpose, of the trust; and provisions in a will that expressly provide for someone to receive little or nothing are likely to be enforced.*

Trustee Found Liable for Failure to Monitor Insurance Premium Payments

In a cautionary tale regarding a trustee's need to be diligent in monitoring trust assets, the Appellate Division, Second Department (covering Brooklyn, Queens and the New York City suburbs)

reversed the Surrogate's Court and found a trustee liable for negligence for failure to monitor trust assets – in this case, the payment of premiums on insurance policies.

In *Wilkinson v. Nielsen*, 2020 WL 216741 (2nd Dep't January 15, 2020), the decedent originally established, upon her death, a trust of income-producing assets. Subsequently, the trust beneficiaries and the trustee agreed to "substitute assets in the trust" so that the trust would become an "irrevocable insurance trust." The assets originally in the trust were distributed to the beneficiaries, and one of the beneficiaries (Robert) agreed to pay the premiums on the policies. If Robert failed to do so, the assets distributed to him would revert to the other beneficiary (Judith). The substitution agreement included a release of the trustee from any liability resulting from "the substitution of property hereinabove set forth."

Robert stopped paying the insurance premiums, causing the policies to lapse, and conveyed away the assets distributed to him. After both he and Judith passed away, the trustee petitioned for a final accounting of the assets of the trust, treating the policies as worthless. Judith's children, who were parties to the substitution agreement, objected and sought to surcharge the trustee for $420,000 (which the policies would have been worth), or alternatively the value of the property that Robert had conveyed away. The Surrogate's Court ruled for the trustee, finding that the insurance trust was a new trust not part of the testamentary trust (excluding it from New York EPTL § 11-1.7(a)(1), which prohibits exoneration of testamentary trustees for failure to exercise reasonable care), and that the release in the substitution agreement applied.

The Appellate Division reversed, holding that the substitution agreement did not create a new trust, but rather just substituted assets in the testamentary trust; and that the release only applied to the substitution itself, not "the obligation to monitor the status of payments for the insurance policies." The court held the trustee liable for negligence and remanded the matter to Surrogate's Court for "determination of damages," taking into account "an allowance … for premiums which should have been paid on those policies."

THE TAKEAWAY: *Trustees should not assume that a modification to a trust has relieved the trustee of the duty to diligently monitor trust assets.*

Executor Has Authority to Waive Decedent's Attorney-Client Privilege

Addressing an issue not yet decided by New York's highest court, the Appellate Division for the Fourth Department (covering western New York) joined two other Departments of the Appellate Division in holding that an executor has authority to waive a decedent's attorney-client privilege. This is a trial strategy issue of some importance since the best proof of a decedent's intent is often found in otherwise-privileged discussions with his or her attorney.

In *Matter of Thomas*, 179 A.D.3d 98 (4th Dep't 2019), the Surrogate's Court conducted a nonjury trial of claims by the decedent's children and grandchildren that valuable stock in a private company, which the decedent had transferred to the executor, should be included in rather than excluded from the estate. The executor called the decedent's attorney as a witness; and the attorney testified that the transfer to the executor was the decedent's intent, and was based on

valid business reasons involving the continued payment of a salary to the decedent following his retirement from the company.

THE TAKEAWAY: *The children and grandchildren objected to the attorney's testimony on the ground that the executor lacked authority to waive the decedent's attorney-client privilege. The Surrogate's Court rejected that argument and the Appellate Division affirmed, citing the Second Department's reasoning in Matter of Bassin, 28 A.D.3d 549, 500 (2nd Dep't 2006), that the attorney's "testimony provided the best evidence of the decedent's intent in executing" the transfer. The court expressly "conclud[ed] that the attorney-client privilege may be waived by an executor." This is an important point to bear in mind as to trial strategy in a matter where the decedent's intent is at issue.*

Premarital Agreement Applies Upon Death of Spouse

If a marriage ends in death instead of divorce, does a premarital agreement govern the surviving spouse's inheritance rights? In *Matter of Estate of Stacy*, the Appeals Court addressed, among other issues, whether a premarital agreement waiving rights in specific property brought to the marriage by the respective spouses governed the division of assets in the event of the death (and not just divorce). The Court held that it did.

The decedent executed a will in 2003 that left all of his property to a trust he established in 2001. He then married in 2008, but he did not make a new will. He and his wife executed a premarital agreement that provided they would retain the separate property each had brought into the marriage "after the marriage . . . as if the marriage had never taken place." *Id.* at 453.

After her husband died, the wife claimed that the premarital agreement only applied in the event of divorce. Therefore, she argued, she was entitled to an intestate spousal share of the decedent's property that he reserved in the premarital agreement. The Appeals Court disagreed. It found that the wife had permanently waived any interest in the decedent's property identified in the premarital agreement "as if [the] marriage had [never] been consummated" — and this included waiving any *future* marital claim to this property. *Id.* at 455 (quotation omitted). Therefore, the court found that the premarital agreement applied in the event of the decedent's death. To rule otherwise would be "insert[ing] language into the premarital agreement that provides that [the wife] and the decedent agreed to treat their separate property as if there had been no marriage unless one of them died." *Id.* And this, the court held, was something "we cannot do." *Id.*

THE TAKEAWAY: *When developing premarital agreements involving assets brought into the marriage be sure to include whether or not the premarital agreement should be applied upon the death of either spouse. Testators should also consider reassessing their will after major life events, such as marriage.*

Beneficiary's Vested Remainder Interest Subject to Creditor Claim for Reimbursement of Medical Expenses

When does a remainder interest vest, and what does "vest" mean? In *Dell'Olio v. Assistant Secretary of the Office of Medicaid*, the Appeals Court held that a remainder interest in real property vested upon the testator's death, and thus the estate of the testator's grandchild was entitled to a share of the sale proceeds that could be reached by her creditors. As part of its analysis, the Appeals Court reviewed the history of relevant case law, as well as the dual definition of the word "vest."

Mr. Dell'Olio died in 1956 with a will in which he devised two adjacent, triple-decker residences in Cambridge to various family members as life tenants, with the remainder interest to his grandchildren. One of his grandchildren, Emily, had developmental disabilities necessitating an institutional level of care. Emily died in 2008 and at issue on appeal was whether or not her interest in the properties had vested by the time she died, in which case her interest would pass to her heirs at law and be subject to claims by her creditors. The Massachusetts Office of Medicaid ("MassHealth") had paid more than a million dollars for Emily's care during her life and asserted that her interest in the properties vested upon her grandfather's death and, therefore, was subject to claims for reimbursement for medical expenses incurred on Emily's behalf. The six other surviving grandchildren argued that Emily's interest in the properties was contingent on her surviving the life tenants, and that her interest was extinguished when she predeceased them. The Probate and Family Court ruled in favor of the surviving grandchildren and the Appeals Court reversed.

In reversing the lower court, the Appeals Court reviewed and relied on "a rich body of case law" concerning the issue of when remainder interests vest. *Id.* at *3-4. The cases cited by the Court establish a strong presumption that a testator intends for remainder interests to vest upon the death of the testator unless there is clear and express language that establishes a different intent. The testator's grandchildren attempted to overcome this presumption by citing a provision of the will establishing life estate rights in favor of the testator's children's spouses "until the [properties] vest[] in my grandchildren," which they claimed established the testator's intent that the remainder interest not vest until the death of all life tenants. *Id* at *4.

The Appeals Court disagreed and noted that the term vest is used in two distinct ways. Vest is used in the context of possession, where there is a right of "present enjoyment," but it also is used to "confer a fixed right of taking possession in the future." *Id.* The Court held that the language in the will, though not explicit, "readily can be interpreted … to refer to when the grandchildren's right to possess and enjoy the properties went into effect." *Id.* Based upon this analysis, the Appeals Court ruled that the surviving grandchildren had not overcome strong presumption that the testator intended that the remainder interest in the properties vest upon his death. *Id.* at *5.

THE TAKEAWAY: *When drafting a will explicit language is necessary to overcome the strong presumption that a testator intends for a remainder interest in property to vest at point in time after his/her death.*

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.