Probate & Fiduciary Litigation Newsletter - November 2020

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Assailant's Spendthrift Trust Accessible to Child of Murdered Parents

de Prins v. Michaeles, SJC-12865 (October 20, 2020)

In *de Prins v. Michaeles*, the Massachusetts Supreme Judicial Court (SJC) tackled a trust issue arising under unusual circumstances when it answered a question of state law certified by the U.S. Court of Appeals for the First Circuit.

The case arises out of a double murder committed in Arizona by a former Massachusetts resident who, just prior to the murder, established and funded an irrevocable spendthrift trust that permitted unlimited distributions to himself during his lifetime. The question certified to the SJC was whether the assets of the trust were protected from a reach and apply action by the deceased settlor's creditors (the surviving child of the couple murdered in Arizona). The SJC answered "no" and provided an analysis of applicable law in support of its decision.

At the outset of its review, the SJC determined that Massachusetts common law, rather than the Massachusetts Uniform Probate Code ("MUPC"), governed the case because the MUPC expressly provides that it does not replace applicable common law unless specifically modified by the MUPC, which the Court found did not address the situation at bar (*i.e.*, the ability of a creditor to reach the assets of an irrevocable self-settled trust after the settlor's death).

The defendant-trustee argued that the trust should not be reached because he had not made any distributions to the settlor prior to his suicide (the day after the double murder), and because the trust could not make payments to or for the settlor after his death. Citing a line of cases including *Ware v. Gulda,* 331, Mass. 68 (1954), the SJC ruled that it is well-established in Massachusetts that a settlor may not use a self-settled trust to protect his assets from creditors. The Court went on to hold that there is no difference in the application of this law after a settlor's death, and ruled that the assets of the settlor in this matter were not protected from a reach and apply action by the settlor's creditors. The Court noted that the trustee's argument that he did not actually make distributions to the settlor missed the mark, stating that "the important point is what is within the trustee's power to do, not what he actually does." At the conclusion of its analysis, the SJC highlighted the equities of the case by pointing out that it would entirely contradict well-established policy of the Commonwealth to prevent the child of two murder victims from recovering assets that the murderer attempted to "shield … from the consequences of his violence."

Takeaway: A self-settled spendthrift trust with discretion for distributions to the settlor will not protect assets from creditors before or after the death of the settlor.

Co-Signor for Convenience

Matter of Estate of Zanconato, No. 19-P-454, 2020 WL 4577121, at *1 (Mass. App. Ct. Aug. 10, 2020).

In the *Matter of Estate of Zanconato*, the Appeals Court upheld the ruling of the trial court and ordered the transfer of the contents of various joint bank accounts from a surviving co-signor on the accounts to the estate.

The Appeals Court began its discussion of the case by reciting the well-established rule that naming additional account holders on a bank typically "operate[s] as a present and complete gift in joint ownership if [the owner] clearly intended such a result," and noting the similarly well-established exception to the rule applicable to joint accounts that are created for convenience only and not intended as a gift.

The Court noted that the nature of a joint account as either a gift or for convenience only is a question of fact that is determined by the donor's intent, and that the burden of proof is on the person challenging the claim of ownership of the account. Here, it was established that the decedent never told the co-signer that the accounts were a gift, (2) the co-signor was reimbursed by the decedent for tax liabilities that were incurred on interest from the accounts, (3) the co-signor admitted that the accounts were used to pay the decedent's bills, and (4) after the decedent's death, the co-signor told her siblings about the accounts and stated that depending on how they treated her, she might share. Based on these facts, the Appeals Court agreed with the trial court that the co-signor was named only for convenience.

Takeaway: When opening joint accounts or naming additional account holders on an existing account, documenting the intent of the donor will help eliminate future disputes and clarify the ownership of the account after the death of one or more of the account holders.

QTIP Taxed Twice

Shaffer v. Comm'r of Revenue, 485 Mass. 198 (2020).

In *Shaffer v. Commissioner of Revenue*, the SJC considered whether intangible assets in a qualified terminable interest property ("QTIP") trust were includable in the gross estate of a decedent for purpose of calculating the Massachusetts estate tax under G.L. c. 65C. In affirming the assessment of tax on the value of the QTIP trust assets, the SJC rejected the estate's argument and held that there was no constitutional or statutory barrier to the assessment at issue in the case.

The decedent died domiciled in Massachusetts, where she had moved after the death of her husband in New York. The husband had created a QTIP trust in New York as part of his estate plan for his wife's benefit. The QTIP trust was funded with intangible assets.

In challenging the assessment of tax on the QTIP trust assets after an audit, the representatives for the decedent's estate argued that there was only one transfer of the assets, which occurred at the time of the husband's death in New York, and therefore any assessment of estate tax by Massachusetts would violate the Fourteenth Amendment of the US Constitution and Article 10 of the Massachusetts Declaration of Rights. The SJC rejected this argument and affirmed the

determination of the Commissioner of Revenue and the Appellate Tax Board that there were two transfers of the trust property, one upon the death of the husband in New York, and a second transfer upon the death of the decedent in Massachusetts. The SJC held that as a result of the second transfer upon the decedent's death in Massachusetts, the QTIP trust assets were within the decedent's Massachusetts taxable estate.

The SJC also rejected a statutory argument advanced on behalf of the estate and determined that under the circumstances of this matter, G.L. c. 65C required the inclusion of all assets that were reported in the decedent's federal gross estate.

Takeaway: Depending on the circumstances of a particular situation, assets held in a QTIP trust may be includable in the estate for purposes of the Massachusetts estate tax.

Court Cautions Against Pre-Printed Will Forms and Non-Lawyer Supervision

Matter of Tsinopoulos, 68 Misc.3d 1201 (Surr. Ct. Rockland July 17, 2020)

Where the decedent used a pre-printed will form from the local bank, and signed the will at the bank under the supervision of a non-lawyer, does that stand up to a challenge from a dissatisfied child challenging the will? In *Matter of Tsinopoulos*, 68 Misc.3d 1201 (Surr. Ct. Rockland July 17, 2020), the Surrogate in New York's Rockland County answered that question in the affirmative – but cautioned against using pre-printed will forms and non-lawyer supervision so as to avoid the kind of challenges presented in this case.

The decedent mother, Pat, was survived by a daughter, Helena, and a son, John. A month after Pat passed, Helena discovered a will on a two-page pre-printed form, by which Pat left her entire estate to Helena except for one relatively small bequest to John. John challenged the will; discovery ensued, and the matter was decided by the Surrogate on summary judgment motions. The Court found that Pat went to the local bank and used their pre-printed form under the supervision of the bank manager. Neither the bank manager nor the witnesses recalled the particular signing by Pat, but they testified as to their regular routine for will executions, which the Court found satisfied New York EPTL § 3-2.1, if just barely. There were also questions raised by John about certain handwriting on the will, but the Court found the evidence in that regard insufficient to invalidate the will, and admitted the will to probate.

While Helena prevailed in getting this will admitted to probate, it was not without considerable litigation. The Surrogate cautioned that "the issues raised by the use of a preprinted form will and supervision of execution by a non-lawyer should give potential users of these forms reason to pause." The Court quoted a prior case stating, "Despite the simplicity of the form she utilized," the testator's mistakes in filling it out, "approached the brink of having her testamentary scheme fail due to statutory insufficiency." The Surrogate concluded, "Many, if not all, of [John's] concerns would have been avoided had [Pat] engaged an attorney to prepare her will and supervise its execution."

The Takeaway: Using pre-printed will forms and non-lawyer supervision can create unexpected challenges for beneficiaries and readers should consider engaging an attorney when preparing a will.

Child's "Position of Trust" with Mother Not Enough to Establish Undue Influence

Matter of Kotsones, 185 A.D.3d 1473 (4th Dep't July 17, 2020),

Is a child's "position of trust" with her mother enough to establish undue influence where the mother favors that child over another in her will, trust and related transactions? In *Matter of Kotsones*, 185 A.D.3d 1473 (4th Dep't July 17, 2020), New York's Appellate Division answered that question in the negative, reversing the decision of the Surrogate following a nonjury trial. The case is of interest for its factual detail as to what constitutes undue influence.

The mother-decedent (Sophie) left a will and trust and engaged in certain real estate transactions not long before her passing, to the dissatisfaction of her son (James) who felt that Sophie had favored his sister (Ellen) and nephew (Alexander, Ellen's son). Ellen and Alexander petitioned for probate of Sophie's will, and James counter-petitioned to set aside the will, the trust and the related transactions on the ground that Ellen had exerted undue influence over Sophie. The Surrogate ruled in James' favor that Ellen had exerted undue influence.

The Appellate Division reversed, finding "although the record establishes that Ellen and Alexander held a position of trust with decedent, and that Ellen assisted decedent with her finances and was named decedent's power of attorney, the record also reflects that, despite Ellen's position of trust, decedent was actively and personally involved in managing her real estate and in drafting her estate plan, and that she directed her personal attorney and the branch manager at her bank to act according to her own desires based on her own personal, stated reasons." Even though "Ellen and Alexander wanted to benefit from decedent's estate, and that Ellen assisted decedent in executing the relevant estate plan and making the disputed transactions," that was not enough to show undue influence over Sophie. "The relevant inquiry … is not what Ellen and Alexander may have wanted, asked for, or facilitated, but rather whether decedent's free will, independent action, and self-agency were overcome by their conduct." Examining the facts in detail, especially Sophie's interaction with her attorney who drafted the will and trust, the court found undue influence was not established because Sophie was exercising her free will in favoring Ellen and Alexander.

THE TAKEAWAY: The case is instructive as to how a record might be made by a trusts and estates attorney who has reason to believe one child may challenge a will favoring another, more trusted child. Documenting that the decedent-to-be is acting of her own free will, despite a role of trust given to the favored child, can be crucial in defeating a challenge to the will.