

Probate & Fiduciary Litigation Newsletter - April 2022

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This newsletter is intended to keep readers informed about developments in probate and fiduciary litigation in Massachusetts and New York. 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.

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New York Court of Appeals Affirms that Child's "Position of Trust" with Mother Not Enough to Establish Undue Influence

Matter of Kotsones, 37 N.Y.3d 1154 (2022)

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? As we wrote in our October 2020 newsletter, in *Matter of Kotsones*, 185 A.D.3d 1473 (4th Dep't 2020), New York's Appellate Division answered that question in the negative, reversing the decision of the Surrogate following a nonjury trial. New York's highest court has now affirmed that decision, albeit with one judge dissenting. *Matter of Kotsones*, 37 N.Y.3d 1154 (2022).

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.

New York’s Court of Appeals has affirmed the Appellate Division’s decision, stating that “[t]he Appellate Division applied the correct standards for determining whether a confidential relationship existed or whether undue influence was exercised.”

Takeaway: *Kotsones* 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.

Massachusetts Appeals Court Declines to Exercise Discretionary Review of Breach of Fiduciary Duty Claim Against Attorneys-in-Fact on Mootness Grounds

Sloane v. Sloane, 100 Mass. App. Ct. 1125 (2022)

The Massachusetts Appeals Court recently expressed unwillingness to consider the merits of a breach-of-fiduciary-duty claim rendered moot by the death of the principal at issue, in *Sloane v. Sloane*, 100 Mass. App. Ct. 1125 (2022). Plaintiff Jonathan Sloane (“Jonathan”) brought an action against his siblings, defendants Barry Sloane and Linda Sloane Kay (collectively, “Barry and Linda”), in his individual capacity and as next friend of the siblings’ mother, Barbara Sloane (“Barbara”). Jonathan claimed that Barry and Linda, whom Barbara had named as her attorneys-in-fact under a durable power of attorney, breached their fiduciary duty to Barbara (who was suffering from dementia at the time Jonathan filed his complaint) by transferring real property from Barbara’s sole ownership into a realty trust, of which Barry and Linda were the trustees, for the stated consideration of one dollar, and using the property to the exclusion of others, including Barbara. Jonathan sought damages in his capacity as Barbara’s Next Friend, and injunctive relief prohibiting his siblings from using the property exclusively without paying rent.

The trial court granted judgment on the pleadings in favor of Barry and Linda, and Jonathan appealed. However, before oral argument, Barbara died, and the parties filed suggestions of death. Barry and Linda also provided copies of Barbara’s will and revocable trust documents to the Court, showing that Barbara had directed that her entire estate pour over into a revocable trust, of which Barry and Linda were the named trustees. Additionally, Barry and Linda were appointed to serve as the personal representatives of Barbara’s estate, while Jonathan and his descendants were expressly excluded from inheriting under either Barbara’s will or trust.

The Appeals Court determined that Barbara’s death and estate plan mooted the need to make an appellate decision, and declined to exercise its discretion to review the merits. It reasoned that “all relief sought in this action would revert to Barbara’s estate, of which Barry and Linda, and not Jonathan, are beneficiaries.”

Takeaway: This case provides a helpful example as to the value of cohesive estate planning. Where a client does not wish to leave assets to one child but seeks flexibility in transferring assets while still living, consistency across naming attorneys-in-fact, personal representatives of one's estate, and/or trusteeships will provide courts with a clear picture of a client's intent in directing disposition of assets.

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