

Probate & Fiduciary Litigation Newsletter - February 2023

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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.

Trust v. Code: What Trumps?

Matter of the Leo Kahn Revocable Trust, 102 Mass. App. Ct. 38 (2022)

If the terms of a trust instrument are inconsistent with a provision of the Massachusetts Uniform Trust Code ("MUTC" or the "Code"), do the terms of the trust prevail? The Massachusetts Appeals Court recently answered this question "yes" in the *Matter of the Leo Kahn Revocable Trust, 102 Mass. App. Ct. 38 (2022)*.

In *Kahn*, the petitioner – a beneficiary and trustee of the trust at issue – filed a petition to remove the two other trustees of the trust under Section 706(b)(4) of the MUTC. That section of the Code provides that "[t]he court may remove a trustee if: ... there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a suitable co-trustee or successor trustee is available."

One of the responding trustees moved to dismiss the petition, arguing that the terms of the trust state that a trustee may only be removed "for cause" and therefore prohibits resort to Section 706(b)(4) of as a viable basis of removal.

Before addressing the main question on appeal – whether the subject trust precludes resort to Section 706(b)(4) as a basis for removal of a trustee – the Appeals Court addressed the more general question of whether a trust provision that is inconsistent with a provision of the MUTC should prevail. In considering this question, the Appeals Court cited the general rule set forth in Section 105(b) of the MUTC, which provides that "[t]he terms of a trust shall prevail over any provision of [the MUTC]." While the Appeals Court acknowledged that there are exceptions to this general rule, "that is, there are provisions of the trust code that cannot be obviated by the trust instrument[,]" the Appeals Court declined to apply that exception to Section 706(b)(4). Why? As the Appeals Court explained, the specific language of Section 706(b)(4) states that it may only be invoked if removal is "not inconsistent with a material purpose of the trust." Accordingly, the Appeals Court held that "[i]f the trust provisions are construed as precluding removal under a basis such as § 706(b)(4), then such would be a material purpose of the trust, and § 706(b)(4) would not apply."

The Appeals Court then addressed whether the trust instrument at issue precludes removal of a trustee pursuant to Section 706(b)(4). Applying a de novo standard of review, the Appeals Court found that the subject trust “was ambiguous as to whether removal under § 706(b)(4) would constitute a ‘for cause’ or ‘without cause’ reason for removal[.]” In light of this ambiguity, the Appeals Court found that the Probate Court erred in dismissing the petitioner’s action for removal under Section 706(b)(4) and that an evidentiary hearing to resolve this ambiguity was required in the Probate Court.

The Appeals Court decision in *Kahn* is currently the subject of an application for further appellate review by the Supreme Judicial Court.

Spouse's Right of Election Defeated by Showing the Decedent Was Incapable of Consenting to Marriage

Matter of Berk, 209 A.D.3d 1014 (2nd Dep’t, October 26, 2022)

Under New York Estates, Powers & Trusts Law (EPTL) § 5-1.1-A, a surviving spouse has a right to elect against the will of a predeceasing spouse. The elective share is one-third of the net estate. However, as a recent decision of New York’s Appellate Division demonstrates, that right is not absolute. *Matter of Berk*, 209 A.D.3d 1014 (2nd Dep’t, October 26, 2022).

In 1997, petitioner Hua Wang was hired as the decedent’s live-in caretaker. On June 17, 2005, the petitioner, who was then 47 years old, and the decedent, who was then 99 years old, married in a ceremony at the New York City Clerk’s office. The decedent died on June 16, 2006. The decedent’s will was admitted to probate on October 30, 2006, and letters testamentary were issued to the co-executors of the decedent’s estate. The petitioner, who received no bequest under the decedent’s will, commenced this proceeding to determine the validity of her statutory election against the decedent’s estate.

After a 37-day nonjury trial, the Surrogate’s Court determined that, at the time of the marriage, the decedent was incapable of understanding the nature, effect, and consequences of the marriage to the petitioner or consenting to the marriage; and that the petitioner knew this and entered into the marriage to obtain the pecuniary benefits of said marriage at the expense of the decedent’s beneficiaries. Accordingly, the court determined that the petitioner had forfeited her right under the provisions of EPTL 5-1.1-A to take an elective share of the decedent’s estate.

The Appellate Division affirmed, finding that the executors had met their burden of proof as to the facts found by the Surrogate’s Court concerning decedent’s lack of capacity to consent to the marriage and petitioner’s pecuniary motive in marrying the decedent. The court held that a surviving spouse may forfeit the statutory right of election where such spouse “knowing that . . . a mentally incapacitated person [was] incapable of consenting to a marriage, . . . [deliberately took] unfair advantage of the incapacity by marrying [that person] for the purpose of obtaining pecuniary benefits that become available by virtue of being that person’s spouse, at the expense of [that person’s] intended beneficiaries.”

Promise to "Take Care of" Live-in Partner Does Not Create Claim Against Estate

Matter of Estate of Polisseni, 77 Misc.3d 203 (Sur. Ct. Monroe County, September 7, 2022)

Does a promise by one member of a couple living together and romantically involved to "take care of" the other member of the couple create a claim against the estate of the one making the promise? In *Matter of Estate of Polisseni*, 77 Misc.3d 203 (Sur. Ct. Monroe County, September 7, 2022), the Surrogate's Court answered that question in the negative.

In *Polisseni*, the claimant presented extensive evidence, including in the form of text messages from the decedent, that the two lived together starting in 2015, were romantically involved to the extent of planning marriage, and that he promised, among other things, that "I will always take care of you," including in his will. Claimant further presented evidence that, in reliance on these promises, in 2018 she gave up her job to move in with and take care of the decedent. Decedent died in 2020, leaving a will executed in 2012 that did not provide for claimant. Claimant asserted a claim against the estate in the amount of her computation of what she would have earned had she not given up her job to live with and take care of decedent.

On the executor's motion for summary judgment, the Surrogate's Court dismissed her claim. Citing Court of Appeals precedent, the court found that "The words to 'take care of', in the context of this record, are too vague to spell out a meaningful promise" and are 'legally insufficient to support a finding that there was a contract to compensate plaintiff during her lifetime.'" While claimant relied heavily on the couple's romantic and intimate relationship, the court found that actually worked against her claim. Noting that decedent did take care of the claimant while he was alive, the court again cited Court of Appeals precedent concerning the difficulty of determining, in the context of a romantic and intimate relationship, "what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid. ... As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do."

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