Probate & Fiduciary Litigation Newsletter - June 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.

Ongoing Will Contest Precipitated by "Beneficiaries to be Named Later"

The New York Surrogate's Court was presented with an interesting problem in *In re Will of Katz, 2019 WL 1750684 (N.Y. Sur. April 16, 2019)*: the decedent died leaving an estate exceeding $10 million and having bequeathed her entire estate to her accountant as executor "to distribute to people and charities on a list to be provided to him by testator." The problem? In the court's words, "It is undisputed that such a list does not now exist, and there is no indication that it ever did." The Public Administrator (PA) of the County of New York, on behalf of unknown distributees, moved to dismiss the probate petition. The PA is an office of county government in New York which gets involved as a last resort when there is no one with higher authority to act, when those persons fail to act or are incapacitated, or cannot be found. Here, the PA essentially sought to step in for the accountant/executor in view of the facts that the estate was very large and the crucial list did not exist.

Surrogate Anderson denied the PA's motion and allowed the will to proceed to probate. She rejected the PA's contention "that the propounded instrument is not a testamentary instrument because it lacks a dispositive provision," citing New York EPTL § 1.2-19's definition of a will as (in relevant part) "a written instrument … to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of…, appoints a fiduciary or makes any other provision for the administration of his estate, and which is revocable during his lifetime." The court found that Ms. Katz's will met this standard even if its "lone dispositive provision is invalid." The court also granted the accountant-executor's motion to compel SCPA § 1404 examinations, presumably directed at developing information relevant to the decedent's intentions for the list that was never provided.

The first and most obvious lesson of the case is that if a dispositive provision in a will refers to a list, best to prepare that list contemporaneously with the will to avoid entirely the problem presented in *Katz*. The case also is interesting for the tension between the Surrogate and the PA as to how to proceed with the matter, with the court coming down in favor of upholding the decedent's appointment of the accountant as executor. We will be on the lookout for further proceedings in the case, as it will be interesting to see what develops from the § 1404 examinations.

THE TAKEAWAY: *The case shows that Surrogate's Court favors probating a will that contains any items demonstrating the testator's intent, even where a crucial item like the list of intended beneficiaries was missing****.***

Broad Discretion and Exculpation Clauses Will Not Always Protect a Trustee

In *Couture v. Zagami et al.*, 95 Mass. App. Ct. 1113 (2019), the Appeals Court considered a matter in which a woman sued her two brothers seeking her share of income produced by real estate held in a family trust and an LLC that was managed by the brothers. The Appeals Court affirmed the lower court's ruling that the brothers' management of the real estate amounted to a willful breach of their fiduciary duties to their sister (and the entities involved). The Court also upheld most of the damages award issued by the trial court, including an order that the brothers personally reimburse the trust for $35,000 in litigation expenses.

The brothers advanced numerous arguments on appeal, including among others, that the trial court erred in its interpretation of provisions governing distributions of income and that it erred by effectively reforming the trust through an order that future income distributions be made to the sister. The two brothers also challenged the refusal to enforce exculpatory clauses in the trust instrument and LLC agreements for their protection.

With respect to distributions, the Appeals Court read the trust instrument to require equal distributions of income to all three sibling beneficiaries in the absence of a "direction" from the majority in interest of the beneficiaries. The Court also interpreted the operative LLC agreement to require equal one-third distributions to the siblings. Upon review of the relevant documents, the Court held that notwithstanding the broad discretion afforded to the beneficiaries of the trust, there was no evidence of a direction by a majority in interest of the beneficiaries with respect to distributions, and thus the trust required equal distributions of income to all beneficiaries. While the decision does not specifically address whether the brothers could have made a valid direction resulting in distributions only to themselves, the Court did state that their exercise of broad discretion "was limited by their fiduciary duties as trustees and co-members [of the LLC]."

The Court next rejected the brothers' argument that an award of future payments to the sister amounted to a reformation of the applicable trust instrument and LLC agreement, ruling that the remedies ordered by the trial court were equitable in nature and were "permissible in light of [the sister's] equitable claims." In further support of its decision, the Court cited established Massachusetts law to emphasize that equitable remedies give flexibility to judges to achieve fairness and justice.

Finally, the Court found no error in the refusal to afford the brothers protections provided by indemnification clauses in the trust instrument and LLC agreement because each provision contained an exception for willful bad acts, and there was ample evidence of such conduct, including depositing funds into a personal account, failing to maintain accurate records, and fraudulently transferring property to an LLC in which the sister had no interest.

THE TAKEAWAY: *Broad discretion afforded to trustees must be exercised with caution and in a manner consistent with their fiduciary duties to all beneficiaries, particularly where trustees stand to benefit from actions taken in their fiduciary capacity.*

Does a Petition for Supervised Administration Trigger Forfeiture Under an In Terrorem Clause?

In *Matter of Estate of Connolly*, 95 Mass. App. Ct. 1113 (2019), the Appeals Court considered the interpretation of an in terrorem clause (no contest clause) and numerous other issues that will be of interest to attorneys who work on estate and trust administration matters, including consideration of whether legal fees amounting to a substantial portion of the overall value of the estate may be reasonable in the circumstances of a complex matter.

The Appeals Court upheld much of the lower court's decision in favor of the personal representative, which came after five days of trial that addressed a wide range of issues, including objections to accounts and a challenge to the personal representative's decision to file a separate equity action in Land Court to determine the ownership of real property. Notably, the Appeals Court affirmed the ruling that legal fees totaling approximately 25% of the value of the estate were reasonable in the circumstances given the complexity of the issues involved, the success achieved in the separate Land Court matter, the litigious nature of the probate proceedings, and the strong reputation of counsel who represented the personal representative.

With respect to the in terrorem clause, however, the Appeals Court reversed the lower court and reinstated a beneficiary's interest in the estate. At issue was whether a beneficiary's petition for supervised administration of the estate (in which she alleged waste of estate assets) triggered the in terrorem clause in the decedent's will. The clause provided that a beneficiary who contests the probate or validity of the will, or who prevents any provision thereof from being carried out, forfeits their interest in the estate.

The Appeals Court reversed the decision enforcing the clause and revoking the beneficiary's interest in the will because, the Court held, the petition did not "attack or challenge the validity of the will or any party of it" and instead was "merely [seeking] the court's supervision of the administration." The Court went on to note that had the petition been successful, the will still would have been carried out in accordance with its terms.

THE TAKEAWAY: *A determination of whether legal fees for the administration of an estate are reasonable does not turn on whether the fees amount to a substantial percentage of total estate assets, but instead requires a case-by-case analysis of numerous factors, including the complexity of the work involved and the actions of all parties throughout the administration process. Further, a petition for supervised administration did not violate the in terrorem (no contest) clause in a will because the petition did not challenge or attack the will in question.*

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.

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