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Probate & Fiduciary Litigation Newsletter - June 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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Did Trustee's Approval of Madoff and Other Investments Constitute 'Reckless Indifference'?

Greenberg v. Greenberg, 100 Mass. App. Ct. 1131 (April 4, 2022)

Did a trustee act with "reckless indifference" sufficient to establish breach of both fiduciary duty and the explicit terms of a trust? That was the question in *Greenberg v. Greenberg*, 100 Mass. App. Ct. 1131 (April 4, 2022), which involved claims between coexecutrices of the estate of Agnes E. Kull ("Kull"), who had been a trustee of the Mimi Greenberg Revocable Trust (the "Trust"), and two beneficiaries of the Trust.

The settlor established the Trust in 1973. The Trust's purposes included enabling the settlor's husband, Nathan Greenberg ("Nathan"), and its beneficiaries to maintain the standard of living they had enjoyed during the settlor's lifetime. Nathan was an original trustee of the Trust, which was designed to have three trustees. Kull was appointed as a successor trustee in 1980, and served in that capacity along with Nathan through the time of the actions at issue. No successor trustee was appointed after one trustee resigned in 2005, and Nathan and Kull served together. The Trust allowed for broad discretion by the trustees in their investment-making decisions, limiting their liability where actions had been taken "in good faith" or constituted "honest errors of judgment." However, the Trust explicitly prohibited Nathan from making distributions to himself. Nathan did make distributions to himself; and investments by the trust in the now-notorious Bernard Madoff "fund," and other high-risk investments, incurred losses.

The trustees brought a claim against the beneficiaries for a declaratory judgment, and the beneficiaries counterclaimed for breach of fiduciary duty and other relief. Kull and Nathan both died during the action, after which the executrices of their estates were substituted as parties. After a non-jury trial, judgment was entered against them for breaches of fiduciary duty for improper trust distributions and imprudent investments. An appeal was taken.

The Massachusetts Court of Appeals affirmed the trial judge's conclusion as to the impropriety of the distributions to Nathan, noting that the record available supported "the judge's findings that

Kull essentially rubber-stamped Nathan's substantial distributions to himself and the beneficiaries." The court noted that the distributions "enriched" Nathan, rather than merely sustaining the standard of living he had enjoyed during the settlor's lifetime—a violation of the express terms of the Trust.

However, the Court reversed the trial court's finding that Kull had acted with reckless indifference for approving two of three investments Nathan made into what turned out to be "criminal enterprises" backed by Madoff, Howard Waxenberg and KL Financial Group. The trial court had only found Kull liable as to Waxenberg and KL, because they "exposed the assets of the Trust to high risk," whereas the Madoff investment had "achieved a return consistent with that of a reasonably prudent investment." The Appeals Court vacated that finding, reasoning that all three of the investments appeared "high risk, high reward" at the time they were made, an approach permitted by the terms of the trust and providing no basis to distinguish between them. Moreover, the Court noted that neither Kull nor other investors could have predicted the criminality of the enterprises at the time the investments were made.

***Takeaway*:** Trustees should note the *Greenberg* decision's lesson that perfect decision-making is not required of a trustee, provided the trust instrument allows investment discretion and decisions are reasonable based on information available at the time. However, more than "rubber-stamping" is needed to satisfy fiduciary duties and if certain distributions are prohibited, that one trustee permits them does not exonerate the other trustee.

What Kind of Conduct Triggers an In Terrorem or "No Contest" Clause?

Matter of Neva M. Strom Irrevocable Trust III, 203 A.D.3d 1255 (3rd Dep't March 3, 2022) and *Matter of Adams*, 204 A.D.3d 993 (2nd Dep't April 27, 2022)

It is not uncommon for a will or a trust instrument to contain what's referred to as an in terrorem or "no contest" clause: a clause providing that, if a beneficiary of the will or trust instrument challenges the terms of that instrument, he or she forfeits any disposition thereunder. But what kind of conduct by a beneficiary triggers such a clause? Two recent cases from New York's Appellate Division are instructive.

In Matter of Neva M. Strom Irrevocable Trust III, 203 A.D.3d 1255 (3rd Dep't March 3, 2022), the Appellate Division considered an appeal from an order of Surrogate's Court granting the trustee's motion for an order determining that respondent, one of the deceased grantor's two daughters, had violated an in terrorem clause in the trust instrument. Shortly before her death, the grantor had transferred her house into the trust, and the proceeds of the sale of the house were deposited into the trust. In the probate proceeding for the grantor's will, the respondent daughter (who presumably came out better if the house were in the grantor's estate rather than the trust) challenged the transfer of the house to the trust and took extensive discovery as to the transfer and the sale of the house, including "depositions of numerous individuals involved in the sale of the house, which had no connection to the probate of a will."

The court noted that despite the presence of an in terrorem clause in an instrument, New York EPTL 3-3.5 provides that certain conduct by a beneficiary will not result in forfeiture—"specifically, as relevant here, '[t]he preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding." The court also noted that the in terrorem clause referenced these statutes, specifically stated that any challenging conduct going beyond them would result in forfeiture, and used the phrase "directly or indirectly." The court concluded that respondent's conduct in the probate proceeding "constituted, at minimum, indirectly taking part in a proceeding seeking to impair or invalidate the terms of the trust," and upheld the order finding that respondent "forfeited any disposition to her under the trust."

In contrast, in *Matter of Adams*, 204 A.D.3d 993 (2nd Dep't April 27, 2022), the Appellate Division found no forfeiture – but the respondent proceeded much more cautiously in that case. Decedent had devised his residence to his wife, who was also executor under the will. Respondent was one of decedent's two children (who presumably saw a possible ground to challenge the will). Her attorney filed a motion for leave to take SCPA 1404 discovery, including a deposition of the executor-wife, and for a ruling that such discovery would not trigger the in terrorem clause in the will and result in forfeiture. Surrogate's Court granted the motion, and the Appellate Division affirmed, stating: "In terrorem clauses, while valid and enforceable, are not favored by the courts and will be strictly construed." Noting the provisions of EPTL 3.3-5 and SCPA 1404 discussed above, the court concluded: "The petitioner was the nominated executor under the will and falls within this category of persons who may be deposed without fear of triggering an in terrorem clause."

***Takeaway*:** In New York, certain discovery in a will or related trust dispute is permitted by statute without fear of triggering an in terrorem clause. However, care must be taken not to go further and risk forfeiture. The cautious approach of the respondent's attorney in *Adams*, seeking a no-forfeiture ruling in advance, is also worth noting.