

Probate & Fiduciary Litigation Newsletter - May 2019

May 20, 2019

Protecting the Estate:

Disinherited Son Loses Bid in New York to Share in Father's Estate Based on Brother's Promise
Matter of Estate of Fogel, No. 2006-1234/B (Kings Sur. April 10, 2019)

A disinherited son tried to make a claim on the father's estate based on a promise by his brother to share the estate equally with him, but lost on the ground that his brother's promise was a "personal commitment" of the brother not cognizable in that probate proceeding.

In *Matter of Estate of Fogel*, No. 2006-1234/B (Kings Sur. April 10, 2019), the decedent (Abraham) had three children: Mordecai, Nussin and Kayla. Abraham left all of his estate to Mordecai. In a previous proceeding, Kayla had challenged that will and lost, in part based on Nussin's testimony in support of probate of Abraham's will. Now Nussin sought to place a constructive trust on half of the estate proceeds, asserting (with some proof) that Mordecai had promised to share it equally with him; and that he had been excluded from Abraham's will only because Abraham "did not wish to 'single out' Kayla as the only disinherited child." Surrogate Torres accepted these allegations as true for purposes of the executor's motion to dismiss Nussin's claim, but dismissed the claim nonetheless. She found Nussin was not within the categories of persons "entitled ... to share as a beneficiary in the estate" under the Surrogate's Court Procedure Act, and was judicially estopped from claiming that status because of Nussin's testimony in favor of probate of the Abraham's will (which excluded Nussin as well). That left Nussin as a general creditor of Mordecai, "with no standing to proceed against [Abraham's] estate."

The case is an example of Surrogate's Court in New York protecting the estate of a deceased against a claim that is collateral to the estate and made by someone (even a child of the deceased) not among the types of distributees expressly referred to in the Surrogate's Court Procedure Act.

Defining "Distribution"

A Right of Withdrawal and Spendthrift Provision Meet Pfannenstiehl
Levitan v. Rosen, Case No. 18-P-847 (Appeals Court, May 6, 2019)

In *Levitan v. Rosen*, Case No. 18-P-847 (Appeals Court, May 6, 2019), the Massachusetts Appeals Court was confronted with the recurring question of whether a spouse's beneficial interest in a discretionary trust should be included in the marital estate subject to equitable distribution upon divorce. Here, the wife was a beneficiary of a discretionary trust that had been settled by her father under Florida law. The trial court found that the wife's right to withdraw 5% of her share of the trust principal every year was a marital asset subject to equitable distribution, because the wife's

right of withdrawal was not governed by the trust's spendthrift provision, but the trial court excluded the remainder of the wife's share pursuant to the spendthrift provision. The Appeals Court vacated portions of the trial court's judgment and remanded for further proceedings.

Of particular note, the Appeals Court vacated the portion of the trial court's judgment that the right of withdrawal was not governed by the spendthrift provision. The trial court had concluded that the spendthrift provision does not apply to the wife's right of withdrawal because the spendthrift provision encompasses only a "payment or distribution," making no mention of a "withdrawal." The Appeals Court disagreed with this conclusion, finding that "any funds withdrawn pursuant to the right of withdrawal are 'distributions,' and accordingly are not excluded from the application of the spendthrift provision." In making this findings, the Appeals Court looked to the plain and unambiguous language of the trust instrument. The Appeals Court then explained that although the wife's right of withdrawal was governed by the spendthrift provision, it could nevertheless be included in the marital estate pursuant to *Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105 (2016), but assignable only to the wife because of the spendthrift provision, because the right of withdrawal is not a mere expectancy that is too remote for inclusion in the marital estate.

The Fiduciary Litigation Session Expands

On April 23, 2019, the Massachusetts Probate and Family Court issued Amended Standing Order 3-17, which relates to the Fiduciary Litigation Session of the Probate and Family Court. Under the Amended Standing Order, a second location of the FLS was opened for business in Marlborough, and the FLS is now accepting cases from all divisions of the Commonwealth. Previously the FLS was accepting cases only from the Essex, Middlesex, Norfolk, Plymouth, and Suffolk divisions. The Amended Standing Order also removed the requirement that represented parties attend initial scheduling conferences at the FLS, though their attendance is still encouraged.

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.

Disclaimer: This advisory should not be construed as legal advice or legal opinion on any specific facts of circumstances. The content are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.