

# Probate & Fiduciary Litigation Newsletter - May 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 Courts. Goulston & Storrs is the go-to firm in the Northeast for litigation involving [Probate and Fiduciary](#) matters.*

## **The Right To Alienate Marital Property**

*Bonilla v. Najera*, 102 Mass. App. Ct. 435 (2023)

Is a provision in a separation agreement that prohibits the sale or transfer of the couple's marital home without the parties' mutual consent an unenforceable restraint on alienation? The Massachusetts Appeals Court recently answered this question "yes" in *Bonilla v. Najera*, 102 Mass. App. Ct. 435 (2023).

In *Bonilla*, the petitioner appealed from a Probate and Family Court judgment dismissing his petition to partition the former marital home that he owns with his ex-wife. The Probate and Family Court dismissed his petition because the parties' separation agreement contained a provision that prohibited the sale or transfer of the marital home without the parties' mutual consent.

On appeal, the petitioner argued that the Probate and Family Court erred because the provision at issue is an unenforceable restraint on alienation. The Appeals Court agreed, finding the provision at issue to be "a clear restraint on alienation" because it "imposes a restraint in perpetuity, which is invalid on public policy grounds."

The Appeals Court further concluded that "the restraint on alienation imposed by the separation agreement is unreasonable and unenforceable" according to the factors set forth in the Massachusetts Supreme Judicial Court's decision in *Franklin v. Spadafora*, 388 Mass. 764 (1983) ("*Franklin*").

In *Franklin*, the Supreme Judicial Court held that "[t]he following factors, if found, tend to support a conclusion that the restraint is reasonable: '1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint; 2. the restraint is limited in duration; 3. the enforcement of the restraint accomplishes a worthwhile purpose; 4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained; 5. the number of persons to whom alienation is prohibited is small ....'" *Franklin*, 388 Mass. at 766-67, quoting Restatement of Property § 406 comment i (1944).

Applying these *Franklin* factors to the facts in *Bonilla*, the Appeals Court found that "while the first factor supports [appellee's] position that the restraint is reasonable -- as she has an interest in the

property -- the remaining factors lead to the opposite conclusion.” To be sure, the Appeals Court found that the restraint is unlimited in duration and hence unenforceable on public policy grounds. The Appeals Court also found that it had “no basis on which to conclude that enforcing the restraint would accomplish a worthwhile purpose” and that “[t]he next factor -- whether ‘the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained,’ is also unmet.” Finally, the Appeals Court found that “because the agreement prohibits any sale or transfer of the property without the parties’ mutual consent, there is an unlimited number of people affected by the restraint.”

In light of these findings, the Appeals Court concluded that “the restraint on alienation imposed by the separation agreement is unreasonable and unenforceable and that [petitioner] is therefore entitled to pursue his petition for partition.” Consistent with this conclusion, the Appeals Court reversed the judgment of dismissal entered by Probate and Family Court and remanded the matter for further proceedings.

## **Surrogate Denies Probate of Purported Will, Despite Lack of Objection, in View of Failure of Proof as to Execution**

*Matter of Estate of Miller*, 183 Misc.3d 297 (Sur. Erie February 27, 2023)

May a Surrogate deny probate of a purported will even where no party objects to the will? In *Matter of Estate of Miller*, 183 Misc.3d 297 (Sur. Erie February 27, 2023), the Surrogate answered that question in the affirmative, and denied probate to a purported will in view of her finding that the will’s due execution had not been proven.

Decedent died of cancer on July 25, 2020, survived by her father and brother. The day before she died, July 24, she purportedly executed a will which nominated a friend and co-worker, Olga, as executor of her estate – and left decedent’s entire estate to Olga. Olga offered the will for probate; decedent’s father initially objected, but withdrew that objection.

That did not satisfy the Surrogate. She noted that New York SCPA 1408 requires that “before admitting a will to probate the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution.” Citing case law, she added that the court “must be satisfied that the will was duly executed ... even if no interested party filed any objections to the validity of the will.” She further noted the requirement of New York EPTL 3-2.1 that the testator “declare to each of the attesting witnesses that the instrument to which [her] signature has been affixed is [her] will.”

Reviewing the testimony of the will’s witnesses at an evidentiary hearing, the Surrogate found that the purported will did not pass muster. The will was dated the day before the decedent died of cancer. The witnesses went to see her at the hospital that day (separately because of COVID restrictions). One witness testified that decedent was heavily medicated and fell asleep without telling him that the document was her will or signing it in his presence. While the decedent signed the document in the presence of the other witness, she did not state that it was her will or ask that

witness to witness her signature. The Surrogate noted that it was Olga, not the decedent, who asked both witnesses to witness the decedent's signature.

The Surrogate ruled that she "cannot conclude on the record before me that the July 24, 2020 document being offered for probate as decedent's Will was duly executed by her or that it was properly witnessed. There is no proof that decedent had read the document or that she knew what was in it, and thus it cannot stand as representing her testamentary wishes." The court directed that letters of administration issue to the County Public Administrator, as there was no other will besides the purported one that Olga had presented.

## **Arbitration Agreements Unenforceable with Respect to Trust and Estate Issues Before Surrogate's Court**

*Matter of Glassman v. Cohen*, 213 A.D.3d 850 (2nd Dep't February 15, 2023)

Public policy in New York favors enforcement of agreements to arbitrate disputes. Does that policy extend to agreements to arbitrate trust and estate issues normally heard in Surrogate's Court? In *Matter of Glassman v. Cohen*, 213 A.D.3d 850 (2<sup>nd</sup> Dep't February 15, 2023), New York's Appellate Division answered that question in the negative.

Petitioner, one of several children of the decedent parents, sought to compel arbitration of various issues pertaining to the estates of the parents, including as to a trust created by one of the parents. The respondent siblings had signed agreements to arbitrate such disputes. Nonetheless, the Appellate Division affirmed the ruling of the lower court that the trust and estate disputes were not arbitrable. The court stated: "Despite the general policy favoring the resolution of disputes by arbitration, some matters, because of competing considerations of public policy, cannot be heard by an arbitrator." Noting that "[t]he New York State Constitution grants the Surrogate's Court jurisdiction over 'all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto,'" and citing earlier New York precedent, the court held that "[t]he probate of a will and the distribution of an estate 'cannot be the subject of arbitration,' and 'any attempt to arbitrate such issue is against public policy.'"

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