goulston&storrs

Probate & Fiduciary Litigation Newsletter - November 2023

November 1, 2023

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.

Voluntary Personal Representative Is a "Prior Appointment" For Purposes of the Limitation Period for Commencing Formal Probate

In The Matter of the Estate of Patricia Ann Slavin, 492 Mass. 551 (2023)

Does the position of voluntary personal representative under G. L. c. 190B, § 3-1201 constitute a "prior appointment," which operates to exempt an estate from the requirement contained in G. L. c. 190B, § 3-108 that probate, testacy, and appointment proceedings be filed within three years of a decedent's death? The Massachusetts Supreme Judicial Court answered this question in the affirmative *In The Matter of the Estate of Patricia Ann Slavin*, 492 Mass. 551 (2023).

This case arose out of the murder of Patricia Slavin in May 2016 in circumstances allegedly giving rise to claims for wrongful death. A few months after her death, the decedent's daughter (petitioner) filed a voluntary administration statement in the Probate and Family Court pursuant to § 3-1201 and thereafter became the voluntary personal representative of her mother's estate. The petitioner's status as voluntary personal representative allowed her to administer her mother's small estate without initiating probate proceedings.

More than three years later, the petitioner—having realized her position as voluntary personal representative did not grant her authority to pursue a wrongful death claim—filed a petition for formal probate in the Probate and Family Court seeking court appointment as personal representative. The petitioner argued that the three-year statute of limitations governing probate proceedings was inapplicable because it excepts otherwise untimely filings for estates in which there has been a "prior appointment." The Probate and Family Court dismissed the petition as untimely, finding that her position as voluntary personal representative did not qualify as a "prior appointment" under the statute. The judge's decision relied on a procedural guide published by an administrative office of the Probate and Family Court which provided that the authority of a voluntary personal representative does not result in an official appointment by the court.

The SJC granted the petitioner's application for direct appellate review and held that both the plain language of G. L. c. 190B, §§ 3-108 and 3-1201 and the purpose of the MUPC support the

conclusion that the position of voluntary personal representative is indeed a "prior appointment." The SJC reversed the judgment of dismissal and remanded for further proceedings.

First, the SJC concluded that the plain language of § 3-1201 constitutes an "appointment" given that the register of probate may "issue a certificate of appointment to [a] voluntary personal representative"—language that the SJC refused to consider as mere surplusage. This language plainly contradicted the administrative guide the Probate and Family Court judge relied on. The SJC also considered the plain language of § 3-108, which does not limit the type of "prior appointment" that qualifies for an exception from the statute of limitations.

Second, the SJC held that this conclusion was consistent with the purpose of the ultimate time limit. Section 3-108 is intended to establish a basic limitation period within which it may be determined whether a decedent left a will and to commence administration of an estate. Where a voluntary personal representative has been named, the determination of whether a will exists has been made, and administration of the estate has commenced.

Finally, the SJC held that this interpretation was consistent with the legislature's goal of "flexible and efficient administration" of estates in that it incentivizes people to continue to utilize voluntary administration for smaller estates without fear that they could not increase their authority beyond three years.

Takeaway: Voluntary administration can be used for administration of smaller estates without risk that the three-year limitation period for commencing formal probate proceedings will bar future probate, testacy, or appointment proceedings, if necessary.

Conformed Copy of Will Not Admitted to Probate

In Matter of Estate of Slezak, 218 A.D.3d 946 (3rd Dep't July 13, 2023)

Where a conformed copy of a will was located where the decedent said his will could be found, no potential heir contested the validity of the will and testimony established that the will was not revoked, should the conformed copy of the will be admitted to probate? In Matter of Estate of Slezak, 218 A.D.3d 946 (3rd Dep't July 13, 2023), New York's Appellate Division, Third Department, answered that question in the negative, indicating how difficult it can be to probate a copy of a will rather than the original

In *Slezak*, testimony established that the decedent told a witness that his will was in a lockbox under his bed, and that he had left everything to a certain beneficiary. When the lockbox was opened, there was a conformed copy of the will, with the decedent's and the witnesses' signatures indicated with "s/[names]." The will left everything to the beneficiary indicated by the testimony. No potential heir contested the validity of the conformed copy. Nonetheless, the Surrogate denied probate and the Appellate Division affirmed.

New York SPCA § 1407 and Third Department case law provide that "A lost or destroyed will may be admitted to probate only if [1] It is established that the will has not been revoked, and [2] Execution of the will is proved in the manner required for the probate of an existing will, and [3] All of the provisions of the will are clearly and distinctly proved by each of at least two credible

witnesses or by a copy or draft of the will proved to be true and complete." The Surrogate found that petitioner had established the first two elements, but had fallen short on the third. The Appellate Division agreed that "petitioner failed to show that the conformed copy of decedent's will was 'true and complete,'" stating that "[a]lthough petitioner tendered a conformed copy of decedent's will, there was no other proof from the hearing confirming that the conformed copy was identical to decedent's original will."

Takeaway: *Slezak* reinforces the importance of being sure that the original version of a will is available. While there appears to have been no contest to the validity of the conformed copy of the will, the courts followed the statute strictly and denied probate when one of the statutory elements for admitting the conformed copy was lacking.

Beneficiary Has a Right to an Accounting Despite the Trustee's Return of Funds

Kaylie v. Kaylie, 2023 WL 6395345 (1st Dep't October 3, 2023)

Can the beneficiary of a trust require a trustee to provide an accounting despite the trustee's return to the trust of the funds said to have been diverted? In *Kaylie v. Kaylie*, 2023 WL 6395345 (1st Dep't October 3, 2023), New York's Appellate Division, First Department, answered that question in the affirmative, reversing the trial court's determination that no accounting was necessary under the circumstances.

In *Kaylie*, a beneficiary of a family trust commenced an Article 77 proceeding in Supreme Court upon learning that trust bank accounts unexpectedly had zero balances. In response, the trustee argued, among other things, that the trust "irrefutably has been made whole by the restoration of those funds, thus obviating any purported need on the part of [the beneficiary] for an accounting of those funds." The trustee also argued that she had been removed as trustee since the dispute arose, limiting her access to the bank records of the trust. The trial court agreed, holding that since the beneficiary had not "show[n] misappropriation of funds" and the trustee no longer held that position, "the intrusion of an [accounting] is not warranted…."

The Appellate Division disagreed and reversed, in a decision reaffirming the principle that a beneficiary "is entitled to a judicial accounting by reason of the fiduciary relationship between" the beneficiary and the trustee. The court stated: "The fact that respondent has returned the trust's funds with interest does not affect petitioner's right to an accounting."

Takeaway*:* The *Kaylie* decision confirms the primacy of a beneficiary's right to an accounting from the trustee of a trust, even where the trustee has a "no harm, no foul" argument based on the return of funds to a trust and the trustee's departure as trustee.

are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.