

TRUSTS AND ESTATES UPDATE

The Start of a New Year

As we enter the year 2023, we consider those opinions that rounded out and concluded the year 2022, as well as those that raised the curtain on the New Year. Of particular note was *Betz v. Blatt*, an opinion by the Appellate Division, Second Department, which serves as a cautionary tale to estate counsel. Also of interest was an opinion by the Appellate Division, Third Department, in *In re Estate of Ryan*, addressing the jurisdiction of the Supreme and Surrogate's Courts over estate matters, and a decision by the Surrogate's Court, New York County, addressing the scope of pre-objection discovery in a probate proceeding.

Legal Malpractice of Estate Attorney Affirmed on Appeal. In *Betz v. Blatt*, 2022 NY Slip Op 07430 (2d Dept. 2022), the Appellate Division, Second Department, affirmed a judgment of the Supreme Court, Westchester County, in the principal sum of

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\$1,856,699.36, against the defendant, Arnold Blatt (herein “defendant”), an attorney for the former executor of the estate, for legal malpractice.

The matter came before the court after a lengthy history of opinions and prior appeals addressing the various causes of action in the underlying complaint by the plaintiff, successor fiduciary of the decedent's estate, against the defendant, and two other law firms, alleging, inter alia, breach of fiduciary duty, fraud, violation of Judiciary Law §487, and legal malpractice.

As described in these opinions, it appears that the decedent died, testate, on May 13, 2004, with an estate of approximately \$2 million, consisting of real estate holdings, liquid assets and a 1962 Vintage Corvette.

Pursuant to the pertinent provisions of his will, the decedent's two daughters were the primary beneficiaries of his estate, and his brother was nominated the executor thereunder. Following a contested probate proceeding, the will was admitted to probate, and the decedent's brother was appointed fiduciary.

Thereafter, the executor filed his intermediate accounting with the court, after being compelled to do so by the beneficiaries, who filed objections alleging, inter alia, that it was incomplete and inaccurate. The Surrogate's Court agreed, and directed the executor to file an amended account.

The executor filed an addendum to his account, and objections and supplemental objections were filed, again alleging, inter alia, that the amended account was incomplete and inaccurate. Thereafter, one of the objectants moved for summary judgment granting her objections contending, among other things, that the executor had mismanaged the estate and engaged in self-dealing in breach of his fiduciary duty.

Ultimately, the Surrogate's Court surcharged the executor in excess of \$1,025,000 for his looting and mismanagement of the estate, revoked his letters testamentary, and appointed the decedent's daughter, Debra Betz, plaintiff in the ensuing action for malpractice, to succeed him as fiduciary. At the time of her appointment, the value of the estate had been reduced to approximately \$110,000, and the executor had fled the jurisdiction of the court.

Plaintiff, in her capacity as fiduciary, subsequently commenced the subject action for, inter alia, legal malpractice, and motion and appellate practice, as well as a non-jury trial with respect to the claims against the defendant ensued.

Notably, the claim for legal malpractice against the defendant involved services he allegedly performed in connection with the administration of the decedent's estate, commencing with the probate of the decedent's will, and ending in the summer of 2006, when he was fired after work had begun in connection with the estate accounting.

At trial, the defendant admitted his unfamiliarity with trusts and estates, that he was not competent to prepare an accounting, and that despite finding his client's conduct to be "shocking," he continued to disburse estate funds to him, including funds derived from the sale of the estate's primary asset.

In affirming the judgment of the Supreme Court, the Appellate Division noted that in the absence of privity, an attorney for an estate is generally not liable to the beneficiaries thereof for harm due to professional negligence in the absence of fraud, collusion, malicious acts, or other special circumstances.

Nevertheless, the court found, based upon the defendant's admissions at trial, and the evidence, that the defendant's failure to notify the Surrogate's Court or withdraw as counsel upon discovering the former executor's misconduct, combined with the fact that counsel fostered

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the former executor's breach of duty by continuing to disburse estate funds to him despite his knowledge that he was engaging in self-dealing and looting, constituted the type of "fraud, collusion, malicious acts or other special circumstances" for which an attorney may be held liable.

Additionally, the court found that the plaintiff had presented ample evidence establishing both her damages and the defendant's contribution to them.

Third Department Affirms Dismissal of Surrogate's Court

Proceeding Due to Pending Supreme Court Action. In *In re Ryan*, 2023 NY Slip Op 00011 (3d Dept. 2023), appeal was taken from an order of the Surrogate's Court, Albany County, which, inter alia, in a proceeding pursuant to SCPA 1809, denied petitioner's motion for summary judgment determining the validity of the claim against the decedent's estate.

The decedent died, intestate in 2019, and his father-in-law was appointed the administrator of his estate. Prior to his death, the decedent had formed a partnership known as Whitney and Ryan General Contracting. Following his death, Whitney filed a claim against his estate, alleging that the decedent had made unauthorized payments and withdrawals from the partnership in order to build a home for him and his wife, as well as a proceeding for a compulsory accounting alleging fraudulent conversion by the decedent and requesting that any sale of the residence be stayed, or in the alternative the proceeds held in escrow.

The court converted the proceeding to one pursuant to SCPA 1809 to determine the validity of a claim. Thereafter, the claimant died, and his widow was appointed the executor of his estate. In the interim, the decedent's administrator filed an accounting with respect to the decedent's estate.

The petitioner (executor of the claimant's estate) then commenced

an action in the Supreme Court against the decedent's administrator, his wife, and his estate alleging, inter alia, fraudulent conversion, conspiracy, and unjust enrichment, and requesting damages. Subsequently, the petitioner moved for summary judgment in the SCPA 1809 proceeding, which was opposed.

Without ruling on the merits, the Surrogate's Court denied the motion and sua sponte dismissed the SCPA 1809 proceeding on the ground that the same essential claims had been asserted in the Supreme Court and should be determined there.

Additionally, the court held that should the Supreme Court determine that petitioner was a creditor of the estate, the petitioner could return to the Surrogate's Court for a determination of the amount owed to her in the accounting proceeding, which had been stayed.

The Appellate Division affirmed, holding that while generally, when a dispute is brought in two courts, jurisdiction should continue to be exercised by the court that first issued process, it was also true that jurisdiction should remain with the forum where all rights of the parties could be adjudicated. Within this context, the court concluded that the Surrogate's Court had properly exercised its discretion in dismissing the SCPA 1809 proceeding, inasmuch as the claims that had been asserted in the Supreme Court not only were

against the decedent's estate, but also against living persons, over which the Surrogate's Court lacked jurisdiction.

In addition, the court noted that the same amount of damages was sought in both matters. Since complete relief could be obtained in the Supreme Court, the Appellate Division found that dismissal of the Surrogate's Court proceeding was proper.

Court Refuses To Expand Scope of Discovery in Probate Proceeding. In *In re Smidt*, 2023 NYLJ LEXIS 2 (Sur. Ct. New York County), the Surrogate's Court, New York County,

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application was made to expand the time period for discovery beyond the three year/two year rule set forth in Uniform Court Rule 207.27.

Specifically, movant sought to expand the time frame to include the period encompassing the decedent's execution of an inter vivos trust agreement for her lifetime benefit, dated ten years before the will's execution, in which the movant was named as a remainderperson, and an amendment of such trust dated six years after the

will's execution, in which he was removed as beneficiary.

The court noted that the three year/two year rule will be expanded where sufficient facts have been alleged to prove an ongoing scheme of fraud or undue influence upon the decedent, or where an in terrorem clause is present in the propounded will, or where prior testamentary instruments are sought. Within this context, the movant submitted documents that he claimed were indicative of undue influence perpetrated upon the decedent by his brother, who received the decedent's entire estate and was nominated executor.

Although movant alleged that the discovery sought would explain the discrepancies in the decedent's estate plan, the court held the record failed to demonstrate an ongoing pattern of undue influence that would warrant extending discovery so far remote from the execution date of the will. Accordingly, the motion was denied.