

TRUSTS AND ESTATES UPDATE

Appellate and Surrogate's Courts Weigh In on Trusts and Estates Practice

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In *Glassman v. Cohen*, the Appellate Division, Second Department affirmed an order of the Supreme Court, Kings County, which denied a petition and dismissed a proceeding for arbitration.

The petitioner alleged that he and the respondents were the children of the decedents, who died in the years 2003 and 2014, respectively. The petition requested that the respondents be compelled to arbitrate all disputes among them related to their deceased parents' estates, and more particularly, a trust created by their mother. An answer was filed by one of the respondents, who alleged that matters related to the distribution of an estate were not arbitrable. Annexed to the answer was a decree of the Surrogate's Court, Kings County, admitting the mother's will to probate, a compulsory accounting petition with respect to the estate, and a citation in that proceeding directing the petitioner to show cause why he should not be required to file an accounting with respect to the subject trust. In response to the foregoing, the Supreme Court denied the petition and dismissed the proceeding, and the petitioner appealed.

The court opined that some matters, because of competing concerns of public policy, statute, or decisional law, cannot be heard by an arbitrator. To this extent, the court noted that the New York State Constitution grants the Surrogate's Court jurisdiction over all matters



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relating to the affairs of a decedent, probate of wills, administration of estates, and actions and proceedings arising thereunder. The court observed that this jurisdiction is confirmed by the provisions of SCPA Section 201(3) and the Surrogate's Court Procedure Act, which applies to any trust created by the will of a domiciliary. (See SCPA Section 1501[1] [a]). Based on these principles, case law has established that the 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."

Within this context, the court found that the petitioner was clearly attempting to compel arbitration

of disputes related to the distribution of his late mother's estate, including the trust created by her will, in violation of public policy. Therefore, the court concluded that dismissal of the proceeding was proper.

Glassman v. Cohen, NYLJ, Feb. 17, 2023, p. 17, col. 2 (App. Div., 2d Dep't).

Appellate Division Orders Probate of Lost Will

In *Matter of McKenna*, the Appellate Division, Second Department, reversed an order of the Surrogate's Court, Westchester County, and granted the petition to admit the propounded instrument to probate as a lost will.

Before the Surrogate's Court was an uncontested proceeding for probate of an unsigned and undated copy of the purported will of the decedent pursuant to SCPA Section 1407, and the issuance of letters of administration cta to the petitioners. The petition

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was denied, and the petitioners moved, inter alia, to renew the application. The Surrogate's Court denied the motion, and the petitioners appealed.

The court opined that a lost or destroyed will may be admitted to probate if it is shown that the will has not been revoked, execution of the will is proved in the manner required for probate of an existing will, and "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." Although a presumption of revocation arises when a will last known to be in the possession of the testator cannot be found after death, that presumption can be rebutted, and the lost will can be admitted to probate, if the petitioner

establishes that the propounded instrument was not in the testator's possession during lifetime.

The court noted that the record before the Surrogate's Court consisted of, inter alia, an affirmation submitted by the attorney-draftsperson of the instrument, an affidavit of an attesting witness, and the unsigned copy of the decedent's will. Based upon these submissions, the court found that the petitioners had established that the will had never been in the testator's possession, that it had not been revoked, that it had been duly executed, and the provisions of the will.

Accordingly, probate pursuant to SCPA Section 1407 was granted.

Matter of McKenna, 2023 NY Slip Op 00664 (App. Div., 2d Dep't).

Proceeding to Recover Life Insurance Proceeds Dismissed

Before the Surrogate's Court, Monroe County, was a proceeding, pursuant to SCPA Sections 2101, 2103 and 2105, by one of the decedent's surviving sons on behalf of the estate to recover life insurance proceeds that had been paid to his stepmother. The proceeds had been paid in accordance with a beneficiary designation that had been changed through the use of an "electronic signature."

The petitioner alleged that the beneficiary designation did not reflect the decedent's true intention, as it was the product of undue influence or a mistake, and thus could be reformed by the court as a scrivener's error. The respondent/spouse moved to dismiss the petition on the grounds that it failed to state a claim upon which relief could be granted. Also at issue were questions of standing and the court's jurisdiction.

The decedent died survived by his spouse, and three adult sons from a prior marriage.

Pursuant to the pertinent provisions of his will, the decedent devised and bequeathed 50% of his

residuary estate to his spouse, and 50% in trust for the benefit of his sons. The decedent's spouse was nominated as executor. The day after executing his will, the decedent changed the beneficiary designation of his life insurance policy from the prior designation that named a predeceased individual, with his sons as contingent beneficiaries, to an equal division of the proceeds as between his wife and his estate. There was no indication that the decedent had wanted to change the beneficiary designation again prior to his death.

The court noted that although it was confronted with a motion to dismiss for failure to state a claim, intertwined with that issue was whether the petitioner had standing to initiate the proceeding and whether the court had jurisdiction over the subject matter. With that said, the court held that the petitioner lacked standing to seek relief pursuant to SCPA Section 2103 as he was not a fiduciary of the estate, and could not claim to be acting as such.

Equally unavailable to petitioner was relief pursuant to SCPA Section 2105 and SCPA Section 2101. The court observed while SCPA Section 2105 provided a mechanism for a person to reclaim property in the possession or control of a fiduciary, in the case before it, even if the petitioner succeeded in his suit, the proceeds of the policy would not inure to his direct benefit, but instead would flow into a testamentary trust for his benefit that was administered by an independent co-trustee, who represented his interests. Further, the court noted that the statute contemplated an action to recover property held by a fiduciary, when the decedent's spouse was holding the proceeds in her individual capacity.

Finally, while SCPA Section 2101 required that proceedings pursuant to Article 21 be commenced by a person interested, the petitioner was not a person interested as he was a beneficiary of a trust with

no direct claim to the insurance proceeds. Moreover, although not briefed, the court found it questionable as to whether it had jurisdiction over the proceeding, since a finding that the beneficiary designation was invalid could result in the prior designation taking effect, thereby making the matter a dispute between living persons; i.e., the decedent's spouse on the one hand, and his three sons on the other.

Accordingly, the court dismissed the proceeding for lack of standing, and "possibly" for lack of subject matter jurisdiction.

Moreover, the court opined that even if the petitioner had standing and it had subject matter jurisdiction, the proceeding would still have to be dismissed for failure to state a cause of action whether the claim was lodged in mistake or lack of intent, or alternatively undue influence. With regard to the former claim, the court observed that an insured has the right to designate the person who shall be the beneficiary of his/her insurance, and such person is entitled to the proceeds thereof in accordance with the intention of the insured as ascertained from the insurance contract itself. Mere intent to change a beneficiary designation would not serve as a basis for disregarding a previously executed valid designation, absent affirmative acts of the insured to effectuate the change. As such, the court held that the insurance company had the right to rely upon and strictly comply with the terms of its contract with the decedent in paying out the proceeds, irrespective of whether the beneficiary designation reflected the decedent's actual intent.

Finally, the court found nothing in the record that would substantiate the petitioner's claim of undue influence, or even create a question of fact if the matter were to be considered within the context of a motion for summary judgment.

In re Estate of Watts, NYLJ, Dec. 2, 2022, at p. 17 (Sur. Ct. Monroe County).