

TRUSTS AND ESTATES UPDATE

Expert Analysis

Emerging Into Spring: Discovery Sanctions, Gifts, Breach of Duty

The second quarter of 2021 has seen a host of significant decisions from the Surrogate and Appellate courts addressed to fundamental issues affecting trusts and estates practice. This month's column will address some of these opinions, relating to such topics as discovery, assignments and gifts, and breach of fiduciary duty.

Appellate Division Affirms Discovery Sanctions

Pursuant to the pertinent provisions of CPLR 3126, if any party refuses to obey an order for disclosure, or willfully fails to disclose information that ought to have been disclosed pursuant to CPLR Article 31, the court may make such order with regard to the failure or refusal as are just. In *In re Mallon Revocable Trust*, N.Y.L.J., April 30, 2021 (App. Div. 2d Dep't), the Surrogate's Court,

By
Ilene
Sherwyn
Cooper



Suffolk County invoked the provisions of this statute when it granted objectants' motion in a contested accounting proceeding for sanctions against the petitioner. In April of this year, the Appellate Division affirmed the Surrogate Court's Order.

The record revealed that objectants had served petitioner with a notice for discovery and inspection, who responded to same, and thereafter continued to provide supplemental disclosure to objectants throughout the pendency of the matter. Nevertheless, objectants moved, inter alia, pursuant to CPLR 3126 to sanction the petitioner for allegedly concealing 85 cancelled checks from the trust's bank account, which were either written directly to the petitioner,

or entities that suggested that the petitioner was engaged in self-dealing. The Surrogate's Court determined that the petitioner's conduct was willful and deemed the issues related to the checks resolved in objectants' favor. The petitioner was surcharged in the amount of \$236,355, representing the total amount of the checks that the petitioner had failed to disclose. The petitioner appealed.

In affirming the Surrogate Court's order, the Appellate Division opined that to invoke the drastic remedy of preclusion, a court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious. Within this context, the court found that contrary to petitioner's contention, the willful and contumacious character of his conduct could properly be inferred from his failure to provide relevant discovery information pertaining to his own potential self-dealing, despite multiple opportunities to supplement his original discovery

response, without any adequate explanation.

Triable Issue of Fact on the Issue of Gift

Assignments, pursuant to EPTL 13-2.2, and the issue of gifts resulting from a failed assignment, are not often the subject of judicial opinion. Recently, however, the Appellate Division, First Department, had occasion to consider this issue in *In re Ingberman*, N.Y.L.J., May 6, 2021, at 19 (App. Div. 1st Dep't), an appeal from an Order of the Surrogate's Court, New York County, which granted objectant's motion for partial summary judgment, finding that the transfer by the decedent to petitioner of certain interests in LLCs failed as a valid lifetime gift.

The petitioner, and his late sister, objectant's wife, were co-executors of the estate of their mother, whose will provided for her residuary estate to be divided equally between her children. Included in the estate were interests in various LLCs which provided income to the estate. Petitioner claimed that prior to her death his sister had assigned her interests in the LLCs to him in a document, dated Aug. 31, 2009. The parties agreed that this document failed to comply with the requirements of EPTL 13-2.2(a). In view thereof, the objectant maintained that the assignment was ineffective, and, moreover,

did not qualify as a gift under common law principles.

The Appellate Division observed that in order to be the subject of a valid gift, the property in issue must be in existence and in the possession of the donor. Additionally, the donor must express an irrevocable intent to make a gift

In 'In re Tapper', the Surrogate's Court, Ulster County, surcharged the former co-executors, and the co-trustees of the testamentary trusts created under the decedent's will for breach of fiduciary duty.

to be operative at once, and the property must be delivered to the donee, so as to vest the donee with dominion and control over the subject matter.

Within this context, the court opined that while the August instrument purported to be an assignment of the LLC interests, there were triable issues of fact as to whether the petitioner's sister relinquished dominion and control over the property when she signed the document. More specifically, it appeared that title to the LLCs remained in the name of the estate of the petitioner's late mother, and that petitioner continued to divide the distributions from the LLCs equally between him and his sister for several years after she purportedly transferred

her interest in the LLCs to him, which she accepted without question. Moreover, petitioner did not inform the estate attorney about the assignment until months after his sister's death, and years after the assignment had been made.

Although the objectant contended that petitioner could not rely on conversations with his sister under CPLR 4519, the court held that such testimony could be used to defeat summary judgment if it is not the only evidence presented.

Accordingly, in view of the foregoing, the court reversed the Order of the Surrogate's Court, and denied objectant's motion.

Surcharge and Assessment Of Legal Fees for Breach of Fiduciary Duty

In *In re Tapper*, N.Y.L.J., at 29 (Sur. Ct. Ulster County), the Surrogate's Court, Ulster County, surcharged the former co-executors, and the co-trustees of the testamentary trusts created under the decedent's will for breach of fiduciary duty.

Pursuant to the pertinent provisions of the decedent's Will, his son and daughter were the primary beneficiaries of his estate, and the nominated executors thereunder. In addition, the will made provision for the decedent's daughter-in-law, and created separate trusts for the benefit of his son's two grandchildren. Although

the decedent nominated his son and two other persons to serve as co-trustees of the trusts, when the son refused to serve with them, it was agreed, upon the recommendation of a guardian ad litem, that the son's wife serve with him as co-trustee in their place and stead.

As described by the court, the estate, since its inception, had been mishandled, and subjected to years of delay attributable to various acts of misconduct by the fiduciaries. Most notably, proceedings in the estate included the removal of both co-executors, findings of improvident mismanagement of estate property, a protracted dispute regarding the appointment of the nominated co-trustees under the Will, and a failure by the decedent's daughter to abide with court orders to account. Ultimately, and only after the issuance of a civil order of contempt and arrest warrant, did the daughter account for her stewardship.

In the context of that proceeding, the court observed that the exoneration clause in the will exempting the executors and trustees from liability for conduct other than actual fraud was void as against public policy, pursuant to the provisions of EPTL 11-1.7, and could not relieve the fiduciaries from their duties of reasonable care and prudence. To that extent, the court observed that

the accounting revealed that 10 years prior to its filing, the former co-executors, and the decedent's daughter-in-law transferred the bulk of the estate's assets to themselves in amounts estimated to be their full distribution, without any distribution similarly being made at that, or any time, to the

Pursuant to the pertinent provisions of CPLR 3126, if any party refuses to obey an order for disclosure, or willfully fails to disclose information that ought to have been disclosed pursuant to CPLR Article 31, the court may make such order with regard to the failure or refusal as are just.

testamentary trusts created for the decedent's grandchildren. Further, there was no evidence that either of the trustees established bank accounts for the said trusts, engaged in any analysis as to how the trust funds were to be invested, or sought a distribution from the estate in order to fund the trusts.

Based on the foregoing, the court found that the fiduciaries' willful indifference to their duties and responsibilities was detrimental to the interests of the trust beneficiaries, and as such, directed that they be surcharged at the rate of 9% per annum on the amount of the delayed distribution due to the trusts, commencing on

the date the distributions to the fiduciaries were completed, and ending with the appointment and relinquishment of estate assets to the administrator CTA.

Further, citing the provisions of SCPA 2110(2), and the Court of Appeals decision in *Matter of Hyde*, 15 N.Y.3d 179 (2010), the court directed that the fees of the guardians ad litem in the proceeding, and counsel for the administrator CTA in pursuing the application of contempt against the decedent's daughter, be borne by her, individually, finding that it would be inequitable to charge the testamentary trusts with these expenses.

Finally, the court ordered that the co-trustees post a bond, and thereafter, file with the court quarterly reports of their activities relative to the accounts established for the trusts.