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TRUSTS AND ESTATES UPDATE

Expert Analysis

Mid-Year Review: Three Notable Surrogate's Court Decisions

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The past several months saw a continuum of opinions rendered by the Surrogate's Court addressed to issues affecting the practice of trusts and estates. This month's column examines three decisions of interest during this period.

Request for Lis Pendens Denied/ Hearing Scheduled On the Issue of Repudiation

In *In re Decker*, 71 Misc.3d 1216(A), the Surrogate's Court, Orange County, was confronted with a contested application by one of the decedent's three sons, as beneficiary of an inter vivos trust, to compel the trustee thereof to account.

The record reflected that the decedent died, testate, on June 3, 2003. Pursuant to the pertinent provisions of his Will, the decedent directed that the residue of his estate be added to the assets of a revocable living trust of which he was the grantor and one of his sons, Walter Jr., was the trustee. Upon admission of the Will to probate, Walter Jr. was also appointed the executor of the decedent's estate.

Thereafter, pursuant to an agreement for the settlement of the estate and trust, Walter Jr., as executor and trustee, and his two brothers, one of whom was the petitioner in the pending proceeding, agreed to certain distributions of estate/trust assets. More specifically, pursuant to the terms of that agreement, the petitioner acknowledged the prior receipt of a distribution in the amount of $150,000 plus an additional final distribution of $210,000, which funds were to be held for his benefit pursuant to the terms of the revocable trust. Additionally, in December 2007, the petitioner executed a Receipt and Release in which he, inter alia, discharged Walter Jr. from all liability with respect to matters relating to or derived from the administration of the decedent's estate and settlement of his account. As recited in the agreement, an accounting was provided to the signatories for the period commencing with the decedent's date of death through June 30, 2007.

The court opined that the six-year statute of limitations on enforcement of a trustee's obligations begins to run from the time the trustee repudiates his or her stewardship, and the beneficiary has notice of such repudiation.

The compulsory accounting proceeding instituted by the petitioner on Sept. 16, 2019, sought an order compelling Walter Jr., as trustee of the trust, to account for his stewardship. Objections were filed by the trustee who argued that the application was barred by the six-year statute of limitations set forth in CPLR 213, inasmuch as the last distribution from the trust was in or about 2009, that the petitioner was aware that the final distribution of the trust was in 2009, and that the trust had no other assets or transactions since that time.

The court opined that the six-year statute of limitations on enforcement of a trustee's obligations begins to run from the time the trustee repudiates his or her stewardship, and the beneficiary has notice of such repudiation. Within this context, the court held that none of the allegations made by the trustee in support of his objections established a repudiation sufficient to commence the running of the statute of limitations. Thus, a question of fact existed as to this issue, requiring a hearing.

By separate application, the petitioner subsequently requested that the court file a notice of pendency on two parcels of real property that were presumably owned by the estate of the decedent. The court observed that a notice of pendency or lis pendens, is a provisional remedy available to litigants in an action or proceeding in which the judgment demanded would affect the title to, or the possession or use of real property. In view thereof, the

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court held that neither the compulsory accounting proceeding, nor the subject matter of the funds held in trust for the petitioner, involved an interest in real property, or the type of claim which could serve as the basis for a notice of pendency. Accordingly, petitioner's application was denied.

Scope of Document Demand Limited/Sanctions Granted

Before the Surrogate's Court, New York County, in *In re Hoppenstein*, NYLJ, Aug. 12, 2021, at 18, was a contested accounting proceeding with respect to a 2005 trust (the 2005 Trust or Trust). The objectants in the proceeding were a child of the Grantor and her five children, who were discretionary income and principal beneficiaries of the subject Trust. The objections, in pertinent part, alleged that in July 2008, the trustee impermissibly and imprudently loaned approximately $985,000 from the 2005 Trust to himself, as trustee of a different trust. The loan became uncollectible and worthless.

Notices for Discovery and Inspection were served by the objectants on the trustees of three trusts that succeeded to the assets of the 2005 Trust, as well as on the personal representative of the original trustee of the 2005 Trust, who died in 2019. In response to the notices, the trustees moved for a protective order and for sanctions.

The court noted that in 2011, the trustee of the Trust, relying on the provisions of the Trust agreement and the provisions of the decanting statute, EPTL 10-6.6, distributed all of the Trust assets to three new trusts created by the Grantor in the same year. The new trusts were for the benefit of the objectant's three siblings and their respective descendants, but omitted the objectant and her children. Thereafter, the trustees of the 2011 trusts transferred all the assets of the trusts to three similar trusts created by the Grantor, which also excluded the objectant and her children.

Following the filing of objections, the trustees of the 2011 and 2013 trusts moved for summary judgment dismissing same on the grounds that the objectants had no standing because the 2011 transfers had eliminated their interest in the 2005 Trust. In a decision rendered in July 2019, the court denied the motion, finding that there were triable issues of fact as to whether the 2011 transfers were made in violation of the trustee's duty of impartiality to the beneficiaries, or for an improper motive. The court held that the objectants had standing to argue in favor of their standing, and directed the objectants to amend their discovery demands to limit them to the bona fides of the 2011 transfers.

> The court found the nieces had failed to claim or demonstrate bad faith, fraud or duress on behalf of the administrator in obtaining the notarized receipt, release, waiver and refunding agreement which would warrant the court to direct a judicial accounting.

Despite the foregoing, the objectants served extensive new discovery demands that exceeded the scope of the court's July, 2019 ruling. In a decision addressed to this issue, which was affirmed on appeal, the court denied objectant's motion to compel compliance with their new deposition and documents demands, and granted the cross-motions of the trustees to the extent they sought a protective order.

Nevertheless, following these rulings, the objectants again served extensive discovery demands on the trustees, which again became the subject of motion for a protective order by the trustees. In that regard, the court noted that only one of the demands made by the objectants sought information about the trustee's motive for the 2011 transfers. Accordingly, the court denied the trustees' motion with respect to that demand, and otherwise granted the motion. Further, pursuant to the Rules of the Chief Administrative Judge, and in view of what the court characterized as the repeated repudiation by objectants' counsel of its orders, the court granted the trustees' request for sanctions, in an amount to be determined upon further submissions.

Petition for Compulsory Accounting Dismissed

In *In re Advani,* NYLJ, Aug. 9, 2021, at p. 17 (Sur. Ct. Bronx County), after two nieces/distributees of the decedent had executed receipts and releases and waivers, based on an informal accounting, and received a distribution from the estate, they petitioned to compel the administrator to file a formal accounting. Objections were filed by the administrator, annexed to which was the original notarized receipt, release, waiver and refunding agreements from all the distributees, including the nieces. At a conference of the matter, the court advised the parties that it would deem the filed papers a motion for summary judgment.

The court noted that the informal account was provided to the nieces who had the opportunity to consult an attorney and accountant before they individually executed the notarized receipt, release, waiver and refunding agreement and received their distributions. Moreover, the court found the nieces had failed to claim or demonstrate bad faith, fraud or duress on behalf of the administrator in obtaining the notarized receipt, release, waiver and refunding agreement which would warrant the court to direct a judicial accounting.

Accordingly, the motion for summary judgment was granted, and the petition was dismissed.