

## TRUSTS AND ESTATES

## Expert Analysis

# Spring Happenings In Trusts and Estates

The spring season saw multiple decisions of interest to the trusts and estates practitioner. Addressed to such issues as breach of fiduciary duty, powers of attorney, and gifts, these opinions are discussed in this month's article.

**Fiduciary Held Liable for Failing To Invest Estate Funds.** In *In re Maloy*, 2022 NY Slip Op 22100 (Sur. Ct. Monroe County), the three contingent remainder beneficiaries of a trust created under their mother's will, instituted a proceeding seeking to hold the executor of the estate liable for breach of fiduciary duty for allowing the estate funds to remain uninvested in an account that should have been turned over to the trustee of the trust.

The petition requested damages equal to what the account would have earned had it been invested plus statutory interest. The executor filed an answer with affirmative defenses claiming among other things that he had dementia at the time he was appointed which worsened, and as

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such he could not function as executor. Petitioners moved for summary judgment granting them the relief requested in the petition, and dismissing the affirmative defenses.

The court opined that fiduciaries may not permit funds in their possession to lie fallow if they are not required for the payment of claims or for distribution within a reasonably short time.

In finding that the petitioners established their entitlement to judgment as a matter of law, the court opined that fiduciaries may not permit funds in their possession to lie fallow if they are not required for the payment of claims or for distribution within a reasonably short time. To this extent, the record reflected that the executor

created an estate account, into which he deposited the sale proceeds of the decedent's marital residence.

Further, a 2015 decree settling the executor's account directed that he pay the assets in the account to the trustee of the residuary trusts, which he failed to do until December 2020. Indeed, it appeared that in November 2020, the executor filed an affidavit with the court seeking to reopen the estate on the grounds that "he had just learned" that the funds in the estate account were never transferred to the subject trusts.

In opposition to the motion, the executor submitted an attorney's affirmation, attached to which was an unsworn e-mail from a physician who stated that he had seen the executor in 2014 and "felt that he had exhibited mild cognitive deficits at that time." Although the court noted that this statement was inadmissible, it held that even if it was to be considered, it would be inadequate to exonerate the executor from liability.

The court held that the assertions by the executor's son that his father forgot about the account due to advancing Alzheimer's to be equally

unavailing. The court opined that even if these statements were accepted as true, there was no authority for the proposition that an executor's diminishment of mental capacity after his appointment as fiduciary absolves his mishandling of estate assets.

Finally, the court rejected the executor's defense based on a clause in the decedent's will that seemingly exculpated him from liability for any losses or depreciation resulting from the retention of assets, finding that the clause was void as against public policy.

Accordingly, summary judgment was granted in the petitioners' favor and a hearing was scheduled for submissions on the issue of damages.

**Fourth Department Considers Authority of Agent Under Power of Attorney.** Before the Appellate Division, Fourth Department, in *In re Maika*, 2022 NY Slip Op 03589, was an appeal from an order of the Supreme Court, Onondaga County, which denied the motion of the respondents for summary judgment dismissing the petition and granted the petition setting aside a deed conveying real property to the respondents.

The underlying proceeding was instituted by the administrator of the decedent's estate, pursuant to SCPA 2103, seeking to recover the decedent's home that was alleged to have been improperly transferred by the respondents, as attorneys-in-fact, to themselves, as joint tenants.

The respondents were two of the decedent's 12 children, and were

her primary caregivers in the years preceding her death in July 2017. In February 2010, the decedent executed a power of attorney authorizing five of his children to act on his behalf in connection with various transactions, including real estate transactions, but only if a majority of the appointed agents agreed to the transaction. The power of attorney did not authorize major gift giving.

In March 2017, three of the decedent's children, as attorneys-in-fact,

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The court opined that when a payment or gift is made by check, the payee is authorized to deposit the check to complete the transfer of funds. The moneys are not "delivered" and payment is not deemed complete until the payee's bank credits it to the payee's account. Death of the payor terminates the payee's authority to collect the funds deposited.

conveyed the decedent's home to themselves as joint tenants, with decedent retaining a life estate in the property. Following the decedent's death, the administrator of the decedent's estate instituted a proceeding to recover the premises as an asset of the estate.

The respondents moved for summary judgment dismissing the petition, arguing that the transfer was intended to compensate them for their continued care of the decedent, which

they claimed allowed the decedent to remain in his home in accordance with his expressed wishes. In addition, respondents submitted affidavits from their two siblings, who had also been appointed attorneys-in-fact, wherein they each supported the contentions of the respondents, and consented to the transfer, despite acknowledging that it would diminish their own share of the decedent's estate.

The Supreme Court rejected the respondents' arguments, and sua sponte granted the petition, concluding that the services performed were presumably gratuitous in nature, and that the transfer was an improper gift.

The Appellate Division reversed, finding that the respondents rebutted the presumption, and established as a matter of law that the transfer of property was not a gift. Further, the court found that the respondents had demonstrated that there was an agreement with the decedent that they would be compensated, and that they acted within the authority delegated to them to transfer the real property for the decedent's benefit.

**Contested Accounting Results in Executor's Removal, Surcharge, and Denial of Commissions.** Before the Surrogate's Court, Ulster County, in *In re Oakley*, 2022 NY Slip Op 30557(U), was a contested accounting proceeding in which two of the decedent's six children filed objections to the accounting of their brother, the executor of the estate. After a hearing of the matter, the court rendered a decision in which it removed and

surcharged the executor and denied him commissions.

In principal part, the objectants charged the executor with self-dealing in transferring \$95,000 from the decedent's bank accounts in the final hours of his life to his personal account, and in utilizing and occupying the real property of the estate for his residence and his son's business, without compensation to the estate.

Additionally, the objectants alleged, *inter alia*, that the executor was negligent in his administration of the estate, as evidenced by his multi-year delays in marshalling assets, filing income tax returns, depositing dividend checks, paying real estate taxes, insuring the estate's real property and liquidating the decedent's stock.

With respect to the \$95,000 transfer, the executor maintained that the funds were a gift to him by his father. The record reflected that the alleged gift was accomplished by means of two checks, one for \$45,000, and the second for \$50,000, drawn on the decedent's accounts, and deposited into a joint account between the decedent and the executor.

The record further revealed that the check for \$45,000 was not credited to the account until five days after the decedent's death, and that the check for \$50,000 was deposited on the date of the decedent's death, but was not credited until sometime thereafter, although the exact date was not entirely clear.

The court opined that when a payment or gift is made by check, the pay-

ee is authorized to deposit the check to complete the transfer of funds. The moneys are not "delivered" and payment is not deemed complete until the payee's bank credits it to the payee's account. Death of the payor terminates the payee's authority to collect the funds deposited. Thus, a gift by check is complete only if the check has been deposited and credited to the payee/donee's account during the lifetime of the payor/donor.

Based on the foregoing, the court held that neither the \$45,000 check nor the \$50,000 check constituted a completed gift as of the decedent's death, and directed the return of the proceeds to the estate. The court further observed that even if the subject checks had been deposited and credited timely, the executor had failed to satisfy his burden of proving that the decedent intended to make a gift to him of the funds.

Rather, the court noted that the executor offered no details as to the manner, place or time his father purportedly expressed his desire to make the gifts, and that the transactions in issue were accomplished with only minimal involvement by the decedent. Given these deficiencies, the court concluded that the checks were written on the executor's, rather than the decedent's, initiative.

With respect to the estate realty, the court acknowledged that as a tenant in common with the other beneficiaries, the executor enjoyed the right to use and occupy the premises without payment of rent because he did not

exclude his co-tenants from the exercise of similar rights. Nevertheless, the court held that the executor's use of estate funds to satisfy his own housing expenses, without subsidizing the housing expenses of his co-tenants/beneficiaries, constituted self-dealing for which the executor would be liable.

Further, the court found that the executor was grossly negligent and violated his basic fiduciary duties as a result of his misplacing quarterly dividend checks, his three-year delay in depositing those checks into an estate account, his similar delay in paying for homeowner's insurance on the estate realty, his failure to timely file any individual or estate tax returns for the estate, and his failure to timely recover life insurance benefits payable to the estate.

In view of the foregoing, and the executor's many concessions on the record and undisputed facts regarding his stewardship, the court concluded that the executor's conduct warranted his removal, without a hearing, and the denial of commissions. Additionally, the court ordered that the objectants' legal fees be paid by the estate pursuant to SCPA 2110.