

A Shiny New Tool For The Toolbox:

**Utilizing Delaware’s new statute allowing for broad trust modifications
while the trustor is living**

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As those of us working in the estate and wealth planning field are well aware, the ability to modify an irrevocable trust is critical for many reasons. Whether the goal is to deal with unanticipated circumstances, correct errors, improve the efficiency of a trust’s administration, or take advantage of Delaware’s sophisticated trust laws, having several “tools” available for trust modification (and, in particular, tools that do not require judicial intervention) can allow for some of even the most challenging trust issues to be resolved, while also helping to maintain Delaware’s place as a favored jurisdiction for new and existing trusts.

This summer, Delaware added another powerful tool to its existing trust modification toolbox via the enactment of new Section 3342 of the Delaware Code, entitled “Modification of Trust by Consent While Trustor is Living” (and hereinafter referred to as the “Nonjudicial Modification Statute”). The inspiration for the Nonjudicial Modification Statute can be found in Section 411 of the Uniform Trust Code (the “UTC”), which generally provides mechanisms for the modification or termination of irrevocable trusts with or without the involvement of the trustor. Delaware’s enactment of the Nonjudicial Modification Statute continues the trend of the past several years of adopting select provisions of the UTC and tailoring such provisions to fit within Delaware’s overall statutory system.

Analyzing the Statutory Provisions

The core of the Nonjudicial Modification Statute is found in paragraph (a), which reads as follows:

“(a) Notwithstanding any provision of law or a trust’s governing instrument limiting or prohibiting amendment of the trust, an irrevocable trust may be modified to include any provision that could have been included in the governing instrument of a trust created upon the date of the modification *by written consent or written non-objection of the trustor, all*

then serving fiduciaries and all beneficiaries even if the modification violates a material purpose of the trust.”¹

As indicated by this provision (and by the title of the statute), the consent or non-objection of the trustor of the trust is required, along with the consent or non-objection of all “fiduciaries” and “beneficiaries.” Therefore, the Nonjudicial Modification Statute can only be used to modify a trust when the trustor is living and, presumably, has the capacity to provide written consent or non-objection to the modification on the trustor’s own behalf. What if the trustor is incapacitated? While Section 411(a) of the UTC specifically includes the ability of a guardian, conservator or attorney-in-fact to act on behalf of the trustor, the Nonjudicial Modification Statute currently does not. This is an issue likely to be resolved as the statute is further refined over time.

The fiduciaries who need to take part in the modification will include all of the Trustees, any advisers or protectors pursuant to 12 Del. C. § 3313, and any designated representatives pursuant to 12 Del. C. § 3339. As a practical point, it is important to remember that any party with the powers of an adviser or designated representative as set forth in their respective statutory sections is automatically deemed to be a fiduciary unless the trust’s governing instrument specifically provides that such party shall not serve in a fiduciary capacity. However, although not required, out of an abundance of caution and for the sake of completeness, we suggest that any powerholder, whether or not a fiduciary, should be a party to an agreement modifying a trust pursuant to the Nonjudicial Modification Statute.

The term “beneficiaries” is not defined in paragraph (a) of the statute, which naturally begs the question: do beneficiaries with very remote or contingent interests need to be a party to an agreement modifying a trust under the new statute? The statute only states that “all beneficiaries” shall consent or not object, which strongly suggests that even the most remote beneficiaries must take part in the modification. On its face, this requirement would seem to be exceedingly difficult to meet. Thankfully, paragraph (c) of the statute (discussed further below) contemplates the use of Delaware’s virtual representation statute, 12 Del. C. § 3547, in order to bind the beneficial interests of those more remote than the presumptive remainder beneficiaries of the trust. Therefore, as a general rule of thumb, the Nonjudicial Modification Statute will require the participation of all beneficiaries with a current interest in the trust and the presumptive remainder beneficiaries (i.e., generally those whose interests would vest if the current interests terminated). Absent a material conflict of interest, any minor, unborn or unascertainable beneficiaries, and any contingent remainder beneficiaries, may be virtually represented by the trust’s adult current beneficiaries and presumptive remainder beneficiaries.

It is important to be aware of situations where there may be a material conflict between classes of beneficiaries, especially given the potentially sweeping modifications that are possible under the Nonjudicial Modification Statute. For example, if the proposed trust modification is going to directly alter the beneficial interest of a contingent remainder beneficiary, then it may

not be proper for a presumptive remainder beneficiary to represent such contingent remainder beneficiary. If the Nonjudicial Modification Statute is being used to modify a trust's dispositive provisions, practitioners and trust professionals should very closely analyze whether virtual representation is proper.

The last portion of paragraph (a) of the statute is likely the most important, as it allows a trust to be modified even if the modification "violates a material purpose of the trust" (which is in direct contrast to Delaware's nonjudicial settlement agreement statute, which provides that such an agreement is only valid to the extent it does not violate a material purpose of the trust).² When viewed in conjunction with the language in paragraph (a) which provides that the modification may include the addition of "any provisions that could have been included in the governing instrument of a trust created upon the date of modification," it is clear that the statute can be used to make substantial changes to the administrative structure of the trust. This would include, for example, the addition of provisions making a trust a directed trust as to investment and/or distribution decisions in accordance with 12 Del. C. § 3313, which can be especially useful for trusts that are migrating to Delaware from jurisdictions that do not allow for directed trusts.

Beyond administrative changes to a trust, by its terms the Nonjudicial Modification Statute would allow for changes to a trust's dispositive provisions, including but not limited to the addition or removal of trust beneficiaries, changing the standard for the distribution of income or principal, extending the duration of the trust, and altering the interests of remainder and contingent remainder beneficiaries. In fact, a trust could, theoretically, be entirely amended and restated pursuant to the statute, with the trust being effectively rewritten to reflect how the trustor would have structured the trust if allowed a "do-over," which is a desire that many trust professionals have likely heard more than once from their clients and customers. When dealing with modifications to dispositive provisions, however, it is always critical to keep in mind potential tax consequences. For example, if the trust is exempt from the generation-skipping transfer tax, in most cases you will want to avoid changes that could be deemed to shift beneficial interests to lower generations or that delay the vesting of a beneficial interest. Just because the parties can modify a trust in a certain manner under the Nonjudicial Modification Statute doesn't necessarily mean that they should.

The expansive nature of the statute is also reflected in the ability to modify a trust even if the trust's governing instrument includes a provision "limiting or prohibiting amendment of the trust." Most recent trusts are likely to have a provision specifically prohibiting the trustor from amending or modifying the trust in order to avoid estate tax inclusion and possibly subjecting the trust assets to claims of the trustor's creditors. Older trusts may include a provision that disallows any modifications to the trust unless approved by a court of competent jurisdiction. Regardless of such trust provisions, the Nonjudicial Modification Statute may still be employed to modify a trust, again underscoring the significant power of the statute.

Paragraph (b) of the statute provides as follows:

“(b) No fiduciary shall have a duty to consent to any proposed modification nor, absent willful misconduct, any liability to any person having an interest in the trust for failure to consent to any proposed modification.”³

This provision ensures that a fiduciary will not have to contend with the risk of potential liability for refusing to take part in a trust modification under the statute. Trust beneficiaries or fiduciaries who are aware of the expansive modifications allowed under the Nonjudicial Modification Statute may seek to pressure the Delaware trustee to agree to modify the trust in a manner that provides a relative benefit to such beneficiaries or other fiduciaries. This provision allows the Delaware trustee to make an independent decision without the fear of potential liability for not acceding to the demands of the trust’s other interested parties.

Paragraph (c) provides a mechanism for a judicial review of a modification under the Nonjudicial Modification Statute:

“(c) Any interested person, including the trustor, may bring a proceeding in the Court of Chancery to interpret, apply, enforce, or determine the validity of a modification adopted under this section, including but not limited to determining whether the representation as provided in § 3547 of this title was adequate; provided, however, that any such person may waive the right to contest the modification.”⁴

This closely tracks a similar provision in Delaware’s nonjudicial settlement agreement statute.⁵ This provision adds an extra feature that allows an interested person to waive the right to contest the modification. Also, as previously noted, the reference in paragraph (c) to Section 3547 of Title 12 indicates that virtual representation may be used where appropriate to bind minor, unborn, unascertainable, or contingent remainder beneficiaries.

Finally, paragraph (d) covers the availability of the statute:

“(d) This section shall be available to any trust that is administered under the law of this State.”⁶

Therefore, as long Delaware law governs the administration of a trust, such trust can be modified pursuant to the statute. When coupled with Delaware’s statutes which, in most cases, apply Delaware law to the administration of a trust that has a Delaware corporate trustee,⁷ the Nonjudicial Modification Statute provides a useful mechanism to modify trusts that are migrating from another jurisdiction to Delaware in order to take advantage of some aspect of Delaware trust law.

Comparison to Other Methods of Modifying Trusts

How does the Nonjudicial Modification Statute compare to the other established nonjudicial methods for modifying trusts under Delaware law, namely decanting⁸, merger⁹ and nonjudicial settlement agreements?¹⁰ All of these methods have their advantages and disadvantages, and trust professionals will always need to keep in mind the unique facts of each matter before choosing which method to employ. However, there are some general pros and cons to consider that are likely relevant for most matters.

For example, compared to merger or decanting, one advantage of the Nonjudicial Modification Statute is that the process does not involve distributing or merging the existing trust into a “new” trust. Issues such as whether the “new” trust should obtain a separate EIN or if the termination of the existing trust will result in any income tax consequences are therefore avoided - the existing trust is simply modified and will continue on. As a practical matter, this approach is likely to be more efficient and cost-effective than a merger or a decanting. In addition, regardless of the method employed, a trustee will likely seek to be released and indemnified from any liability associated with its exercise of discretion to take part in the modification process. In a decanting or merger, this is typically accomplished by a separate Consent, Release and Indemnity Agreement signed by the trustee and the beneficiaries. Under the Nonjudicial Modification Statute, the release and indemnification language could be incorporated into the same agreement that sets forth the trust modifications.

On the other hand, if the trustor is deceased or otherwise refuses to be involved, the Nonjudicial Modification Statute is obviously not an option, while merger and decanting do not in any way require that the trustor be living or involved in the process. Likewise, a nonjudicial settlement agreement could be used even if the trustor is deceased, although any modification would be subject to that statute’s “material purpose” requirement. Additionally, in certain situations it may be desirable to not obtain the affirmative consent or non-objection of one or more beneficiaries, or to simply provide notice of a trust modification to such parties. For example, if a beneficiary agrees to the modification of a dispositive provision that reduces or eliminates such beneficiary’s interest in the trust, the beneficiary could be deemed to have made a gift. In such situations, decanting or merger would provide more flexibility because neither method requires the consent or non-objection of the trust beneficiaries.

Conclusion

Delaware’s new Nonjudicial Modification Statute provides the interested parties to a trust the broad power to modify the administrative and dispositive provisions of the trust, even to the extent of fully restating the trust. Provided there is a living trustor who will consent or not object to the modifications, the Nonjudicial Modification Statute may be the best tool available to trust professionals in order to complete the job.

¹ 12 Del. C. § 3342(a) (emphasis added).

² See 12 Del. C. § 3338(c).

³ 12 Del. C. § 3342(b).

⁴ 12 Del. C. § 3342(c).

⁵ See 12 Del. C. § 3338€

⁶ 12 Del. C. § 3342(d).

⁷ See 12 Del. C. §§ 3332(b), 3340.

⁸ 12 Del. C. § 3528.

⁹ 12 Del. C. § 3325(29).

¹⁰ 12 Del. C. § 3338.

Master LeGrow Reduces Fee Reimbursement to be Allowed to Petitioners After Their Unsuccessful Challenge to Validity of Decedent's Last Will and Testament

DELAWARE FIDUCIARY LITIGATION BLOG

Posted November 2, 2015

Related Areas of Practice:

Fiduciary Litigation

IMO the Last Will & Testament of Wilma B. Kittila, deceased C.A. No. 2084-ML (October 9, 2015)

In this opinion, Master LeGrow only partially approved the amounts sought in the non-prevailing party's fee petition. Writing about this same case in earlier blog posts, we addressed: (1) the judgment against the Petitioners regarding Wilma B. Kittila's last will and testament (see <http://www.gfmlaw.com/blog/master-refuses-invalidate-will-even-though-no-coherent-definitive-explanation-claimed-familial>) and (2) the Master's general decision to grant the Petitioners' motion for an award of attorneys' fees and costs, without yet approving any specific amount (see <http://www.gfmlaw.com/blog/master-grants-petitioners'-motion-award-attorneys'-fees-and-costs-following-rejection>).

Due to the inability of the parties to successfully negotiate the amount of fees to be paid by the estate to the Petitioners for their unsuccessful challenge to the validity of Wilma's last will and testament, the Petitioners filed a fee petition and accompanying affidavit of fees. Represented within the affidavit is a total amount of \$224,565.46 in attorneys' fees and costs incurred by the Petitioners' from their challenge to the validity of Wilma's 2009 Will and 2004 Will (excluding fees incurred before the Petitioners' hired their current counsel). In its supplemental brief to the Court, the estate opposed the Petitioners' request to be compensated the total amount and argued the requested amount is disproportionate to the total value of the estate (\$351,330.27 after deducting the estate's attorneys' fees and costs incurred defending the Petitioners' challenges).

Upon recognizing an award of the amount requested by the Petitioners would reduce Wilma's estate "to approximately half its original size, thereby defeating the testator's intent," and that the additional deduction of the estate's attorneys' fees and costs incurred in defending the action "would leave approximately one quarter of the estate for Wilma's designated beneficiaries," the Master recommended that the court "order the estate to pay Petitioners' attorneys' fees and costs in the amount of \$88,032.65" (20 percent of the value of Wilma's estate at the time of Wilma's death). The Master reasoned that the recommended amount "fairly balances the competing

interests at stake” previously identified in this case by the Master, specifically "the probable cause and exceptional circumstances necessary for the Court to award attorneys’ fees to an unsuccessful will contestant, and the importance of ensuring that an award of attorneys’ fees does not eviscerate the testator’s intent.”

Master Holds that a Donee of a Testamentary Limited Power of Appointment May Not Remove the Appointee's Standing by Contracting to Exercise that Power During Her Life

DELAWARE FIDUCIARY LITIGATION BLOG

Posted November 4, 2015

Related Areas of Practice:

Fiduciary Litigation

IMO: The Estate of James Vincent Tigani, Jr., deceased, and the J. Vincent Tigani Jr., a/k/a James Vincent Tigani, Jr. Revocable Trust, U/A dtd, April 10, 1995 C.A. No. 7339-ML (September 30, 2015)

In a recent draft report, Master LeGrow addressed the standing of a vested beneficiary subject to divestiture and the required capacity to execute a will exercising a power of appointment. In resolving the standing issue, the Master addressed two novel questions of law: (1) whether a contract to exercise a testamentary power of appointment is valid, thereby stripping the appointee/beneficiary of standing to challenge the trustee at the time the contract is executed (rather than at the donee's death), and (2) whether that same contract also acted as a release of the donee's power of appointment, likewise stripping the appointee/beneficiary of standing to challenge the trustee at the time the contract is executed.

In this case, a son tried to remove his mother as the executrix of his father's estate and also as the trustee of his father's trust. The mother settled the estate successfully during the litigation. The facts reveal the deterioration of a parent-child relationship over a period of a few years amid several uncomfortable, and often angry verbal exchanges between the two parties. Many years before his death, the decedent (who was the grantor of the estate and trust at issue) executed a pour-over will ("the Will") and revocable trust ("the Trust"). The decedent designated his son, the Petitioner, and his other two children, as residual beneficiaries of his "substantial estate." However, the Petitioner's residual interest was subjected to a limited testamentary power of appointment ("the Power of Appointment") granted to the Respondent (Petitioner's mother and also the decedent's widow).

The relationship between the Petitioner and his parents was a rather complicated one. Prior to the decedent's death, he and the Petitioner were not on good terms, and the decedent and his wife (the Respondent) were considering disinheriting him. However, the decedent died, never disinheriting him. After the decedent's death, the Petitioner and Respondent's relationship quickly fell apart. Immediately following the decedent's death, Petitioner demanded information

from Respondent regarding his father's estate. Failing to reconcile, Petitioner filed a lawsuit against his mother alleging that she was delusional and unfit to be trustee.

In response to the lawsuit and the allegations regarding her competency, Respondent executed a codicil intended to exercise the Power of Appointment, which included instructions to the executor/executrix of her estate to remove the Petitioner as a beneficiary of the Trust created by the decedent's last will and testament.

The Master explained that this case "became side-tracked by issues of standing and testamentary capacity," specifically whether the Respondent's revisions to her last will and testament divested the Petitioner of standing to maintain the action and, if so, whether the Respondent "had the requisite capacity to execute" the revisions made following the decedent's death.

Respondent argued that the contract to exercise her testamentary power of appointment was presently enforceable, and thus stripped Petitioner of his status as a beneficiary. She further argued that the contract also acted a release of the Power of Appointment, which also stripped Petitioner's status as a beneficiary.

With regards to whether a "contract to appoint" is valid in Delaware or not, the Master concluded that Delaware law does not recognize a "contract to exercise a power of appointment" as a presently-enforceable agreement. She stated that there is no Delaware caselaw on point and thus had to rely on the Restatement and other secondary sources for guidance. According to the Master, those sources "indicate that contracts to exercise a testamentary power of appointment are not valid, with limited exceptions." According to the Master, a donor who extends to a donee a testamentary power of appointment "essentially requires the donee to wait and see and take into account later developing facts before exercising the power." In this case, the Master determined, the Respondent attempted to take control of the power before the donor intended for her to obtain the authority to do so. Additionally, the Master decided the Petitioner's contract to appoint was invalid because it "confers a benefit on a donee when the donee is not a permissible appointee."

With regard to whether the contract to exercise the Power of Appointment also acted as a release of the power to appoint Petitioner, the Master stated that even if the contract did act as a release, the release did not change his status as default beneficiary. In other words, if in the event the Respondent failed to/chose not to exercise her power of appointment at all, Petitioner would still take a third of the Trust assets as a default beneficiary, and the release of her power to appoint him could not change that fact. Furthermore, the Master reasoned that "most courts in

other jurisdictions have concluded that a taker in default has an interest in the property that is the subject of the power of appointment and has standing to compel an accounting from a trustee.” Consequently, the Master held that because the Respondent failed to identify “any reason why Delaware should deviate from this majority rule,” and due to the risk that the adoption of the minority rule could allow the Respondent to insulate herself “from any form of judicial review of her actions as trustee,” her attempt to divest the Petitioner as a taker in default of the Power of Appointment did act as a “release” of the Power of Appointment over the Trust, but it did not alter the Petitioner’s position as a taker in default of the Power of Appointment.

Because the release did not alter Petitioner’s position as a taker in default and the power to exercise the Power of Appointment could only be exercised at her death, the Mast herd that the Petitioner was still a vested beneficiary subject to divestiture, and thus still had standing because he is a “beneficiary” as defined by *12 Del. C. § 3327*. The Master wrote that the “statute’s use of the general term beneficiary, without any language restricting the class of beneficiary to whom it refers, fairly encompasses” the Petitioner.

Regarding the Respondent’s capacity, the Master concluded that the Petitioner maintained the requisite capacity to make changes to her estate planning documents in the immediate aftermath of her husband’s death. The Master, mostly relying on a comparison between the consistencies of the Petitioner’s expert witnesses’ testimony with the inconsistency of the Respondent’s expert witness, concluded that the Respondent’s claim did not satisfy the two-part test established by the Court in *Tracy v. Prudential Life Insurance Co. of America*, which requires: (1) A testator to have an insane delusion; and (2) for the testator to change the beneficiaries of the estate because of that delusional belief. On the Respondent’s capacity, the Master concluded, clearly the Respondent “misunderstood the Petitioner on a number of occasions” but that those misunderstandings and the resulting prejudice didn’t constitute insane delusions. The Master, relying on the lack of consistent evidence or testimony provided by the Petitioner, determined that the Respondent obviously dislikes the Petitioner, and that it “is plain that she has ample reason to be angry with him, and he with her,” but that “[n]one of that rises to a level that permits this Court to substitute its judgment for that of a testator.”

Note: This law firm represents the Respondent in this case

Delaware Adopts Statute Allowing Pre-Mortem Will Validation

DELAWARE FIDUCIARY LITIGATION BLOG

Posted January 21, 2016

Related Areas of Practice:

Trusts and Estate Planning

In August of 2015, Delaware adopted 12 Del.C. § 1311. In so doing, Delaware joined Ohio, Alaska, Arkansas, New Hampshire, Nevada, North Carolina, and North Dakota as one of only a few states that offer testators the option of pre-mortem will validation. Pre-mortem will validation gives testators the ability to compel any will contests during the testator's lifetime.

The new law provides that a testator must satisfy a notice requirement in order to successfully pre-validate their will. To do so, a testator must notify in writing any person named in the will as a beneficiary, any person with a future interest in the testator's property if the testator were to die intestate, and any other person the testator wishes to be barred from challenging the validity of the testator's will. That notice must explain that any contest to the will's validity must be made within 120 days after the beneficiary's receipt of notice (unless the testator dies before such 120-day period has elapsed). The notice must include a copy of the testator's will. If a testator puts a beneficiary or interested party on notice of pre-validation and that person fails to challenge the will's validity within the requisite 120-day period, then that notified person is barred from later contesting the will's validity.

Court of Chancery Denies Motion to Stay First-Filed Delaware Trust Action in Favor of Later-Filed Florida Estate and Trust Action Which Encompasses Many of the Same Issues as the Delaware Action

DELAWARE FIDUCIARY LITIGATION BLOG

Posted January 28, 2016

Related Areas of Practice:

Fiduciary Litigation

IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust C.A. No. 10991-VCN (January 21, 2016)

This case was filed on May 5, 2015 by the Trust Protector of the Ronald J. Mount 2012 Irrevocable Dynasty Trust (the “Dynasty Trust”). It seeks a determination regarding the validity of the trust and instructions regarding its proper administration. The larger dispute relates to the Settlor’s son’s contention that three individuals close to the Settlor (including the Settlor’s new wife, his daughter, and the newly appointed Trust Protector of the Dynasty Trust) exercised undue influence over the Settlor in the final stages of his life in order to obtain greater control over his substantial assets. The Dynasty Trust, established in 2012, included the Settlor’s son as a lifetime beneficiary. The son alleges that when the Settlor’s health deteriorated, the Settlor’s caregiver (who eventually became his new wife), daughter, and the newly appointed Trust Protector of the Dynasty Trust, acted as “allies” in an effort to gain control over the Dynasty Trust.

On May 12, 2015, the Settlor’s new wife, the Settlor’s daughter, and the Trust Protector sought probate in Florida of the Settlor’s will as amended by two codicils. On June 1, 2015, the Settlor’s son challenged the will on grounds of undue influence and sought probate of an earlier will. He also petitioned for annulment of the Settlor’s marriage to his new wife, challenged the Settlor’s revocable trust on grounds of undue influence, and sought the removal of the new wife, the Settlor’s daughter, and the Trust Protector as fiduciaries for the Settlor’s estate and various trusts.

On July 10, 2015, the Settlor’s son filed his answer and counterclaims in Delaware. In those counterclaims, he repeated many of the allegations that he raised in the Florida matter.

The Delaware Court of Chancery acknowledged that substantial pieces of the wide-ranging litigation between the parties are based in Florida “where substantial discovery has occurred and the proceedings appear to be progressing.”

Perhaps it is notable that neither the Dynasty Trust nor its trustee is a party in the Florida action.

The Settlor's son moved to stay the action filed in Delaware in favor of the Florida proceedings, arguing that a stay is a "matter committed to the exercise of the Court's discretion." The Trust Protector maintained that the son must demonstrate that litigating the case in Delaware would cause "overwhelming hardship" in order to overcome the Trust Protector's choice of Delaware as the forum to litigate the issues concerning the Dynasty Trust.

The Vice Chancellor first analyzed the stay motion under the first-filed rule. The Vice Chancellor noted that that rule generally instructs a court to respect a plaintiff's choice of forum unless the defendant can demonstrate that litigating in the forum subjects the moving party "to overwhelming hardship and inconvenience." That is high standard to overcome and, here, the Court found that the Settlor's son failed to meet the burden.

The Vice Chancellor then analyzed the factors that could possibly warrant a stay under the *forum non conveniens* doctrine. After going through those factors, the Vice Chancellor concluded that a stay was not appropriate under that doctrine either and he denied the motion.

The Vice Chancellor did, however, recognize that coordination with the Florida case made a lot of sense and he instructed the parties not to needlessly duplicate efforts. Specifically, the Vice Chancellor added a footnote saying, "Coordination of discovery between the Delaware action and the Florida action should be accomplished by the parties and their counsel. The Court will become involved in coordinating discovery, if necessary."

Note: This firm represents the trustee of the Dynasty Trust in this matter.

Court of Chancery Clarifies What is a Valid Debt Claim Against an Estate

DELAWARE FIDUCIARY LITIGATION BLOG

Posted February 2, 2016

Related Areas of Practice:

Trusts and Estate Planning

In re: Estate of Bennie Farren, C.A. No. 8714-MA & McGlaughlin v. Farren, C.A. No. 9385-MA (January 19, 2016)

In this case, the Delaware Court of Chancery declined to accept the Petitioner's argument that, for a claim to be valid as a just debt against an estate it must be brought against the estate in the form of a final judgment. We addressed a previous recommendation by the court related to this decedent's estate (the "Estate") in a recent blog post. To access our earlier blog post for more detailed information about the facts of the case, please go to: <http://www.gfmlaw.com/blog/master-recommends-removal-executor>

The disputed claim (the "Arrearage Claim") was brought against the Estate by the Executor's mother (the Decedent's ex-wife), which she filed based on a child support order entered by a Florida court in 1986 (modified in 1987) totaling \$228,459.47, including \$24,300 in missed payments plus compound interest on the amounts due. The Executor, the claimant's son, accepted the Arrearage Claim as a valid debt of the Estate but his decision to do so meant that the Estate's debts exceeded its liquid assets. The excess debt led the Executor to file a petition to sell the Decedent's former residence to compensate for the Estate's debt. However, the Decedent, in his will, left a life estate in the residence to the Petitioner (the Decedent's live-in companion at the time of his death). The Court recognized that if the Executor's petition were granted the Petitioner "will not be able to continue living in [the Decedent's] former residence," and "[a]t the age of 77, she would have to leave the place she has called home for nineteen years."

The Petitioner objected to the Executor's petition to sell the former residence and moved to prevent the Estate from accepting the Arrearage Claim as a just debt. Additionally, she sought to remove the Executor as executor of the Estate. She argued that by accepting his own mother's claim against the Estate, the Executor "breached the fiduciary duties he owes to the Estate and its beneficiaries." The Petitioner contended that, first, the Florida child support order needed to be registered with the Delaware Family Court to determine the amount of arrearage. Only then could the Arrearage Claim be brought against the Estate as a just debt. Since "the deadline for filing claims against the Estate has passed," according to the Petitioner, the Decedent's ex-wife's

claim would be invalid because of the ex-wife's failure to file the claim against the Estate in time.

On the validity of the debt, the court held that, under Delaware law, “[t]here is no requirement that a claim be based on a judgment or any other court document.” And regardless, the court wrote, “the Florida orders constituted a final judgment entitled to full faith and credit under the United States Constitution.” Although the claimant “had the option to register the orders with the Family Court and have that court calculate the amount due under the orders, she was not required to follow that course as a prerequisite to asserting a claim against the Estate.” In fact, the Arrearage Claim “complied with the statutory requirements for presentation” under both state and federal law. The court noted that an executor “must recognize the effect of a foreign judgment,” therefore, the Executor correctly “accepted the claim based on the Child Support Order and the arrearage affidavit” that were submitted to him by his mother.

The court declined to agree with the Petitioner that the Delaware Court of Chancery “lacks jurisdiction to address any disputes relating to the claim because exclusive jurisdiction over child support orders lies with the Family Court.” Although the claimant “had the option of registering the orders with the Family Court, she did not have to take that route.” The court, pointing to the various grants of authority of jurisdiction between the Court of Chancery and the Family Court, held that this is “an area where this court and the Family Court can and should cooperatively exercise concurrent jurisdiction.” Accordingly, the court determined, “if the party subject to the support order is alive, this court logically should defer to the Family Court.” But “[o]nce a support obligor is dead. . . the ability to grant relief falls” to the Court of Chancery.

The court granted summary judgment, in part, and determined that the Arrearage Claim was a valid claim. But the court determined that calculating the amount of interest due on the arrearage required additional proceedings. With regard to the Executor's petition to sell the property, the court declined to authorize the sale and reasoned that, based on the circumstances, “a more equitable alternative to an immediate sale may be available.” Lastly, the court held that “issues of fact preclude granting summary judgment” on the Petitioner's motion to remove the Executor as executor of the Estate. Based on the evidence presented, the court found that there exists “a dispute of fact for trial regarding whether [the Executor] administered the Estate in good faith.”

Master Finds That Settlor Must Expressly Invoke His Testamentary Power of Appointment in His Will in Order to Have Exercised it

DELAWARE FIDUCIARY LITIGATION BLOG

Posted February 2, 2016

Related Areas of Practice:

Trusts and Estate Planning

IMO: Raymond L. Hammond Irrevocable Trust Agreement and PNC Bank Delaware Trust Company, as Trustee, Dated October 5, 2007. C.A. No. 10463-ML (January 28, 2016)

This dispute concerned a power of appointment (the “Power of Appointment”) included within an agreement (the “Trust Agreement”) in Raymond Hammond’s (“Raymond”) qualified disposition trust (the “Trust”). In the Trust Agreement, Raymond reserved for himself a special testamentary power of appointment, to be exercised provided that he specifically referenced the Trust in his last will and testament (the “Will”). According to the Trust Agreement, if Raymond died without exercising the Power of Appointment and without a spouse, the trust assets were to pass to a residuary trust for the benefit of four individuals, including Kyle Kozak (“Kyle”). The disagreement between the parties was whether Raymond, who failed to specifically reference the Trust in the Will, effectively exercised the Power of Appointment.

Before Raymond died, he and his wife, Lisa, divorced. However, they maintained a close relationship. Upon separating in 2010, they entered into an agreement regarding their marital property rights and obligations. The separation agreement, entered by the New Jersey Superior Court, stated that Lisa “shall remain, for her lifetime, the irrevocable beneficiary of [Raymond’s] [T]rust with PNC and shall remain the beneficiary even after the divorce.” In 2012, Raymond executed the Will and named Lisa as the executor and sole heir of his estate. However, the Will failed to specifically reference the Power of Appointment included within the Trust Agreement.

Following Raymond’s death in 2014, Lisa sought an order from the New Jersey court that issued the divorce decree to declare her to be the Trust’s sole beneficiary. In response, PNC (the trustee of the Trust) filed this Petition for Instructions in its attempt to determine whether Lisa is a beneficiary of the Trust. Both Lisa and Kyle answered the Petition, and Kyle filed a motion for judgment on the pleadings.

Lisa, in her motion, conceded that Raymond never complied with the “technical terms” of the Power of Appointment, but she argued that, under *Carlisle v. Delaware Trust Co.*, despite the Trust Agreement’s unambiguous terms, the court may, and must, consider extrinsic evidence to

make a determination that Raymond intended to exercise the Power of Appointment. Kyle, in his motion, argued that the court should interpret the Trust “according to the settlor’s intent at the time the [T]rust was created,” and that, because the Power of Appointment wasn’t properly exercised, the court should not consider Lisa’s arguments about Raymond’s intent and whether it changed after he created the Trust. Additionally, Kyle argued “that any evidence of Raymond’s intent during or after the divorce is immaterial because,” regardless of Raymond’s intent, the court lacks the power to modify the Will.

Noting the absence of any “real dispute” between the parties regarding Raymond’s intent when he settled the Trust, Master LeGrow concluded that the Trust Agreement was unambiguous. The Master wrote that Lisa’s argument, that Raymond intended for her “to continue as beneficiary of the Trust during her lifetime despite the divorce,” failed for two reasons: (1) She failed to point to any part of the Trust that was ambiguous so her extrinsic evidence of Raymond’s intent after creating the Trust was immaterial and; (2) Raymond’s intent at any time other than when he created the Trust was irrelevant since “[a] settlor’s intent at the time a trust is established is the controlling inquiry,” and because “an intent developed after creating a trust is irrelevant for purposes of construing the trust.”

The Master decided that Raymond failed to effectively exercise the Power of Appointment due to the formality (that he must specifically refer to the Trust in the Will) that he included in the Trust Agreement. Although Delaware law requires only that a donee’s “intention to execute the power” be “apparent and clear,” the Master pointed to a settlor’s ability to create a power of appointment which includes strict “formalities” that “the donee must observe in order to execute the power.” According to the Master, formalities “replace the judicial inquiry into whether the donee’s intent to execute the power was apparent and clear.” Therefore, the Master rejected Lisa’s argument that the court may, and must, consider extrinsic evidence of Raymond’s intent after the creation of the Trust because “where a power contains such formalities, judicial inquiry into a donee’s intent is not necessary because observance of the formalities is conclusive, and exclusive, proof of intent.”

The Master concluded that the court lacks the power to reform a will and recommended that the court grant Kyle’s motion for judgment on the pleadings.

Master Recommends That Court Recognize Resulting Trust Instead Of Jointly Titled Bank Account

DELAWARE FIDUCIARY LITIGATION BLOG

Posted February 25, 2016

Related Areas of Practice:

Trusts and Estate Planning, Fiduciary Litigation

IMO the Estate of James L. Simmons, Sr.; Simmons v. DeRamus, et al. C.A. No. 9965-ML (February 11, 2016)

In this final report, the primary issue presented to Master LeGrow was whether a jointly titled bank account, originally included in an inventory of an estate's assets, should be treated as a "convenience account" or as a true joint tenancy with a right of survivorship.

In 1976, the decedent established the bank account in question. At the time, the decedent asked his son, James (the executor of his estate), to sign paperwork related to the account. From thereon, James was listed as an account holder with the decedent. Over the next thirty years, they never spoke about the account again. Thirteen years after the creation of the account, the decedent established his will leaving his estate in equal shares to all of his children.

When the decedent died, James, as the executor of the estate, failed to realize the potential significance of the jointly held account. He listed it as an estate asset on an inventory filed *pro se* and distributed the assets of the estate in accordance with the decedent's will. However, a dispute arose amongst the beneficiaries which led James to hire counsel who discovered that the account was jointly titled in James's name. James filed this action seeking repayment of the funds paid to the beneficiaries from the jointly titled account. The beneficiaries filed a counterclaim alleging that James failed to properly administer the estate, including the remaining funds in the bank account.

Relying on the Delaware Supreme Court's decision in *Walsh v. Bailey*, the Master determined that the account agreement unambiguously provided that the joint account would be treated as a survivorship account (the account agreement included language that "any joint account established with us is a joint tenancy with right of survivorship"). Therefore, according to the Master, no extrinsic evidence could be looked to for the purpose of evaluating the decedent's intention in creating the account.

However, the Master held that *Walsh* did not bar equitable claims to the funds, so the Court could use its equitable powers to impose a resulting trust in such circumstances where: (1) the depositor created a joint account for purposes of convenience; (2) the depositor subsequently

executed a will; and (3) the will would be nearly meaningless if the joint held property did not constitute part of the estate. The Master found that the facts of this case met this test. She noted that the bank account constituted a majority share of the estate's total value, and that the decedent intended to distribute his estate evenly amongst his several children. Also, the Master considered the fact that James himself initially failed to realize that the account was not part of the estate's assets, having included it in the original inventory.

Consequently, based on the case precedent and the facts before her, the Master recommended that James be recognized as the trustee of a resulting trust for the account, and, after accounting for the remaining expenses of the estate, that he should be required to distribute the assets of the account to the decedent's intended beneficiaries.

Master Adopts Draft Report on Issues Regarding Standing, Exercising Testamentary Powers of Appointment, and Insane Delusions and Clarifies the Mootness Doctrine with regard to Capacity Challenges

DELAWARE FIDUCIARY LITIGATION BLOG

Posted March 29, 2016

Related Areas of Practice:

Fiduciary Litigation

IMO Vincent J. Tigani, Jr. Estate CA #7339-ML (February 12, 2016)

On September 30, 2015, former-Master LeGrow issued a Draft Report addressing whether a donee's exercise of a testamentary limited power of appointment to disinherit the petitioner could divest the petitioner, a vested beneficiary subject to divestiture, of standing to remove the donee as trustee of the trust. The Draft Report also addressed whether the donee lacked capacity to exercise the power of appointment to disinherit the petitioner. The Master's Draft Report unequivocally found that the donee had the requisite capacity to exercise the power of appointment, but found that the power of appointment to disinherit the petitioner would not be effective until the donee's death, thereby preventing the donee from divesting the petitioner of standing.

The petitioner took exceptions to a number of the Master's rulings in the Draft Report, namely that the Master erred in finding that the donee had capacity and that the Master's ruling on capacity was mooted by a finding that the exercising of the power of appointment could not divest petitioner of standing because it would not be effective until the donee's death. In his exceptions, the petitioner also sought a ruling that the donee was now forever barred from exercising the power of appointment because the Master had found in the Draft Report that her exercise was a fraud on the power and that she irrevocably spent that power. The petitioner further sought a ruling that the donee waived any argument that she "released" her power to appoint petitioner as a beneficiary because the donee did not raise that argument until the post-trial reply brief.

On February 12, 2016, the Master issued her Final Report, adopting the entire Draft Report. However, the Master issued a supplemental letter to clarify and expand upon petitioner's issues raised in his exceptions briefing. In that letter, the Master held that the petitioner had not properly raised the issue of whether the donee "spent" her power of appointment and was thereby barred from re-exercising it below and, thus, refused to rule on that issue. The Master

further clarified that her rulings on whether the power was “exclusionary” or “non-exclusionary” and whether the donee had the requisite capacity were not moot because they fell within the recognized exceptions to the mootness doctrine. That is, the Master held that these issues are likely to recur and that this Court may resolve them when it did. With regards to the donee’s capacity, the Court further pointed out that the allegations raised by petitioner as to why she lacked capacity to exercise the power of appointment were the same allegations raised by him his complaint to remove her as trustee, and that these questions of the donee’s alleged delusional behavior would have to be resolved at some point in this case.

In response to the petitioner’s mootness challenges, the donee argued that the Court could hear the capacity challenges under Delaware’s newly enacted pre-mortem validation statute for powers of appointments. Petitioner argued that because the donee did not properly follow the statute’s procedures, the Court could not hear the capacity challenge at this time. The Court, however, pointed out the irony in this argument because it was the petitioner who brought the capacity challenge. Specifically, the Master stated that “that statute simply operates to bar a capacity challenge where a testator provides notice and no challenge is brought within the statutory period. That does not mean that a party who affirmatively challenges a testator’s capacity, and loses that challenge, may later claim prejudice because the notice procedures for pre-mortem will validation were not observed.” This interpretation of the statute is one of first impression in Delaware.

And finally, the Court found that the donee had not waived her argument that she released her power to appoint petitioner as a beneficiary. In doing so, the Court noted that it is the Court’s preference to decide issues on the merits rather than on technicalities and that the standing issue crystallized over the course of the briefing and oral argument so that donee should not be prejudiced from raising the release argument in her reply brief.

Note: This firm represented the Respondent-donee in this matter.

Delaware Court of Chancery Finds that Real Property Deeds Need not Include the Phrase “and not as Tenants in Common” to Create a Joint Tenancies as Long as the Intent to Create a Joint Tenancy is Unambiguous

DELAWARE FIDUCIARY LITIGATION BLOG

Posted April 1, 2016

Related Areas of Practice:

Fiduciary Litigation

David L. Banks v. Mackie H. Banks and the Estate of Russell V. Banks, C.A. No. 10934-VCG

This case involved fifteen parcels of real property (the “Properties”) that were owned by the Petitioner David L. Banks and his brother Russell V. Banks. Russell died testate in July of 2012. Russell’s estate claimed that the Properties were owned as tenants in common despite an apparent intention to record them as joint tenancies with a right of survivorship. David brought suit against the estate and the executrix and asserted that because Russell had died he (David) is the sole owner of the Properties as the Properties had been unambiguously titled as joint tenancies with a right of survivorship. The parties moved for cross judgment on the pleadings.

The deeds for each of the Properties read that Russell and David took the Properties “as joint tenants with right of survivorship.” The estate argued that that language was not sufficient to create a joint tenancy with a right of survivorship under 25 Del. C. § 701. Section 701 provides that no estate in joint tenancy is created “unless the premises . . . are expressly granted, devised or conveyed . . . , to be held as joint tenants and not as tenants in common.” The executrix and the estate argued that because the deeds did not also say “and not as tenants in common” a joint tenancy had not been created.

After recounting the history of Section 701 and the general switch in preference to tenancies in the common that had occurred in the early 1800s, the Court concluded that the policy of Section 701 is served as long as the intent to create a joint tenancy is unambiguous. In short, the Court found that the phrase “and not as tenants in common” need not be included to create a joint tenancy as long as the deed is unambiguous. Here, the Court found that the language in the deeds conveying the Properties to Russell and David as “joint tenants with right of survivorship” was unambiguous. Consequently, the Court granted David’s motion for judgment on the pleadings and found that David and Russell had owned the Properties as joint tenants with a right of survivorship and not as tenants in common.

Note: This law firm represents David Banks in this matter.

Master Adopts Draft Report on Issue of Partly Missing Will, Explains Burden Shifting When Page of a Will is Lost or Missing

DELAWARE FIDUCIARY LITIGATION BLOG

Posted April 12, 2016

Related Areas of Practice:

Fiduciary Litigation

In the Matter of the Last Will and Testament Of Edward B. Sandstrom, Deceased, C.A. No. 8948-MA

Recently, in a case arising out of the unexplained disappearance of the first page of a will, Master Ayvazian dismissed several exceptions taken to her earlier draft report in which she concluded that the Petitioners had shown by a preponderance of the evidence that (1) a valid will was executed by the decedent; (2) the terms of the missing page; and (3) the missing page was unintentionally lost or destroyed and the decedent did not alter his testamentary intent prior to his death.

In this case, the first page of the Testator's will ("the correct page") was unintentionally lost or destroyed shortly after the Testator, while hospitalized, signed an amended version of his last will and testament ("the Will"). With a different first page ("the incorrect page") attached to the front of the Will, the document was admitted to probate by the Testator's son shortly after the Testator's death. Exactly what happened to the correct first page of the Will remains unclear. However, due to the scrivener's error, the incorrect first page of the Will created an ambiguity as to whether the Testator intended to devise his property in Lewes, Delaware to the Respondent (his son) or to the Petitioners (a close family friend and her husband).

In her draft report, Master Ayvazian recommended that the Court revoke the probate of the Will and admit to probate a copy of the corrected first page as the first page of the Testator's last will and testament. The Master's decision was based largely on the extrinsic evidence introduced at trial, specifically, the affidavit and the testimony of the attorney who drafted the Will.

The Respondent took exception to the Master's draft report and submitted arguments that an affidavit and the trial testimony of the attorney who created the Will should have been excluded from the record for violating the attorney-client privilege. Additionally, the Respondent argued that the Petitioners failed to establish the necessary *prima facie* case to overcome the common law presumption of *animo revocandi* where: (1) the terms of the missing first page cannot be demonstrated because only the Testator and the attorney (who, according to the Respondent, was

restricted by the attorney-client privilege from disclosing information) had knowledge of its terms; and (2) there was no evidence of any search for the missing first page.

The Master concluded that the Respondent waived his right to object to the attorney's testimony and affidavit by failing to assert the attorney-client privilege before or during trial. Regardless, the Master wrote that the Respondent's argument was "without merit because under Delaware Rule of Evidence 502(d)(2), there is no attorney-client privilege where both parties are claiming through the same deceased client." According to the Master, "Delaware courts, along with most other state courts, allow a decedent's attorney to testify to communications concerning the drafting of a will."

Additionally, the Respondent argued that the Petitioners were required to prove that they had searched for the original correct first page of the Will, and that they failed to do so. He argued the Petitioners' "failure to conduct a search of the hospital dooms their efforts to prove a missing will." However, according to the Master, because the Will was in the Respondent's possession during the two days between the execution of the Will and the delivery of the Will by the Respondent to a third party with the incorrect first page attached, the burden shifted to Respondent to demonstrate that the missing corrected first page was destroyed by the Testator or at his direction. The Master found that the Respondent failed to overcome the burden because he presented no evidence that the Will with the corrected first page was ever returned to the Testator and destroyed by the Testator or that the corrected first page was destroyed at the Testator's direction.

Lastly, the Respondent argued the Petitioners failed to adequately plead a missing will theory. The Master decided the Respondent's argument was "too late," and that he, in accordance with Rule 15(b), had impliedly consented early on to the trial of these issues.

Based on her findings, the Master dismissed all of the Respondent's exceptions to the draft report and adopted her draft report as her final report on the matter.

Master Rejects Undue Influence and Fraud Claims Brought by a Decedent's Nephew

DELAWARE FIDUCIARY LITIGATION BLOG

Posted June 16, 2016

Related Areas of Practice:

Fiduciary Litigation

John Haldeman v. Marjorie Lee Worrell, and The Estate of Marjorie L. Tyson, by and through its Executrix Marjorie L. Worrell CA No 8282-MA (June 16, 2016)

The Decedent in this case was a kindly elderly woman without any children of her own. During the last years of her life, various extended family members provided different types of assistance to her.

At one point, the Decedent deeded to Nephew a one-half interest in joint tenancy in a Lewes Beach house that the Decedent had long owned. That transfer to Nephew was not challenged in this case. But Nephew accused his cousin (decedent's niece ("Niece")) of fraud, misrepresentation, and having unduly influenced the Decedent toward the end of her life to transfer Decedent's half-interest in the Lewes Beach house to Niece, thereby severing the joint tenancy with the right of survivorship that Nephew previously had enjoyed, and to also change her will. Nephew claims that the Lewes Beach house should be his alone because he had an oral contract with the Decedent to leave him 100% of the house in exchange for his help in paying her bills.

Niece, in turn, accused Nephew of breaching his fiduciary duty to Decedent, and demanded an accounting of Nephew's handling of the Decedent's finances and the return of funds and personal property belonging to their aunt. A trial in this matter was held over four days. After a lengthy recounting of the testimony and an analysis thereof, the Master recommended that the Court deny Nephew's request for rescission of the the will and assignment of lease, and grant Niece's request for an accounting and the return of certain property.

Master Recommends Denial of Trust Company's Interim Fee Motion

DELAWARE FIDUCIARY LITIGATION BLOG

Posted July 13, 2016

Related Areas of Practice:

Fiduciary Litigation

First State Fiduciaries LLC v. Morgan Stanley Smith Barney LLC and Margaret E. Day and Morgan Stanley Smith Barney, LLC v. First State Fiduciaries, LLC & Margaret E. Day C.A. No. 9472-MA (July 11, 2016)

The factual background of this matter is complicated and unique, but the keys facts are that the Movant, a trust company, was named as trustee of a trust by one of the factions in this dispute. The naming of the trustee and the creation of the trust itself are both being challenged by the other faction. No direct claims have been made against the Movant, and the Movant only became a party because it was named as a third party defendant by the faction opposing its naming as trustee and arguing that the trust was void *ab initio*. Ultimately, a Connecticut trial court ruled that the trust was void *ab initio*. That decision is on appeal. Movant's position was that it was named as a necessary party by the faction opposing the interim fee motion, and that its fees should be paid from the interpleaded assets as a result. While willing to take and manage the trust assets, the Movant was never afforded the opportunity to do so. The faction opposing the motion argued that the Movant was not entitled to its fees because, among other reasons, the Connecticut appeal is still pending, the appointment of the Movant as trustee may not be valid, and because the trust was declared void *ab initio*.

The Master explained that "generally, an award of attorney's fees out of the trust corpus is proper where the attorney's services are necessary for the proper administration of the trust or where the legal services create a benefit to the trust." But here, the Master found that as Movant has never had control over the trust corpus, it cannot be said that the legal fees incurred by Movant were necessary for the proper administration of the trust. The Master then recommended that the motion be denied without prejudice and stated that it may be renewed after the stay of this Delaware case (which was entered in order to allow the Connecticut proceedings to first conclude) is lifted.

Note: This firm represents the Movant in this matter.

Even If Your Heart Is In the Right Place, a Will Can Still Be Invalidated Due To Your Undue Influence

DELAWARE FIDUCIARY LITIGATION BLOG

Posted July 25, 2016

Related Areas of Practice:

Fiduciary Litigation

IMO Dougherty, Francis J. Sr. Estate C.A. No. 9496-JL (July 22, 2016)

This case concerns the estate of Francis Dougherty, Sr. and whether his daughter, Patricia unduly influenced him. Francis's surviving wife, Elizabeth, contested that Patricia did.

Francis had a long relationship with Elizabeth. The two lived together in a modest home in Wilmington, Delaware. The evidence at trial demonstrated that Francis did not have the greatest relationship with his wife and that Elizabeth frequently verbally harassed him. Francis also showed signs of early dementia but others testified that his mental condition was normal for his age. This story, however, begins to take shape by the events on March 28, 2011.

On that day, Francis began vomiting, became incoherent, and was unable to walk. At some point Patricia came to the house and 911 was called. Despite Elizabeth's testimony to contrary, the Court found the living conditions in their house were deplorable. The house was filled with clutter to a point that made it difficult to navigate throughout the house. Neither the sink in kitchen nor the shower in the bathroom worked, and sewage had been seeping into the house through one of bathrooms. They did not even have a working refrigerator. On the morning he collapsed, Francis was eating a bowl of cereal in the bathroom. Patricia blamed the conditions on her mother, Elizabeth, who appeared to be suffering from her own mental infirmities.

After the March 28, 2011 incident, Patricia took over the responsibility for caring for her father and her mother. They both moved in with Patricia who was retired and living by herself. Her relationship with her father was fairly strong before 2011, but her relationship with her mother was one of dislike and mistrust.

In 2012, Francis executed a power of attorney, appointing Patricia as his attorney-in-fact, which allowed her to formally access and control the bulk of Francis and Elizabeth's finances. But even before the power of attorney, Patricia made most of the financial decisions. She even held a joint bank account with just her father, which she routinely used to pay for her personal expenses.

Patricia also worked to rehabilitate Francis and Elizabeth's properties that they owned, including bringing their Wilmington home back up to code. In order to fully accomplish these goals, Elizabeth eventually signed a power of attorney appointing Patricia as Elizabeth's attorney-in-fact.

In September 2012, Francis attended a volunteer estate planning event hosted by Delaware Volunteer Legal Services. It was Francis's idea to attend, and prior to it he filled an information sheet that identified Elizabeth as Francis's spouse and identified all seven of his children. And when asked which if any of his children he wished to disinherit, he only chose two children. However when Patricia took him to the event, he told the volunteer attorney drafting his will that he wanted to leave his estate to just Patricia and his other daughter Frannie, excluding Elizabeth and his other five children. Elizabeth was not even aware that they went to this event.

The attorney drafting Francis's will found Francis to have capacity. He was not aware that he had been previously diagnosed with dementia and testified that he appeared fine. He also stated the Francis made no mention of Elizabeth and thought that he said his wife was deceased. Along with estate, Francis also named Patricia as sole beneficiary of his life insurance policy. The attorney testified that had he known more about his back story, he would not have drafted the will that day.

At trial, Elizabeth's expert testified that Francis lacked capacity at the time of the will signing event. He likewise concluded that he was a susceptible testator because he was dependent on Patricia.

Francis died on November 7, 2013, and on December 4, 2013, Patricia filed a will with the Register of Wills. Until the will was filed with the Register of Wills, neither Elizabeth nor Francis's other children were aware of it. In December 2013, Patricia covertly undertook "estate planning" for Elizabeth because she realized at that point that Francis's will was ineffective in devising the real property to her—the real estate passed directly to Elizabeth. Patricia retained counsel, who drafted an irrevocable trust on Elizabeth's behalf, naming Patricia as trustee and Patricia and Frannie as residuary beneficiaries (the "Trust"). Patricia intended to transfer all the real estate to the Trust. Upon Elizabeth's death, the properties were to pass to Patricia and Frannie in equal shares. The Trust never became effective because Elizabeth revoked the power of attorney before the properties were transferred to the Trust.

Elizabeth filed this action on May 23, 2014, seeking review of the will. The Court found that Patricia unduly influenced Francis to make the will and to designate her as beneficiary of his life insurance policy. The Court reiterated the standard for undue influence in Delaware. The Court

explained that “the degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own. It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will.” The Court stated that “unfair persuasion is the ‘hallmark’ of undue influence.”

Patricia argued that Elizabeth had not met her burden of proof, pointing out that she merely stepped forward as a concerned child to assist her parents, and that no ill-motive can be suggested by her assistance. She also pointed out that the volunteer attorney met with Francis both in her presence and alone and that Francis’s statements did not change when she left earshot. Patricia also relied on testimony that Francis wanted to divorce Elizabeth and wanted Patricia to be the beneficiary of his life insurance. And finally, she argued that several people testified to Francis’s sharp mental state, suggesting he was not a susceptible testator.

The Court disagreed and found that Elizabeth established each of the five elements of undue influence. Ironically, the Court found this because of Patricia’s argument that she stepped in to save her father from her mother. That is, Patricia portrayed her role in her father’s life as the loving daughter who rescued her father from the horrible living conditions of her mother and father’s house and saved him from her mother’s control. The Court reasoned that by doing that, Francis became susceptible to Patricia’s influence. Coupled this with the fact that Patricia covertly drafted a will disinheriting her mother and all her siblings but for one, the Court found that Francis was unduly influenced.

Because Trust Wasn't Injured by Alleged Failure to Clarify Easement Right of Real Property that the Trust did not own, the Master Recommends that the Trust's Claims Related to that Easement be Dismissed

DELAWARE FIDUCIARY LITIGATION BLOG

Posted August 2, 2016

Related Areas of Practice:

Fiduciary Litigation

William V. Ehrlich, Jr., Trustee of the William V. Ehrlich Trust U/W/D May 5, 1977, as Amended v. Jeffrey Ehrlich and Vinn, LLC C.A. No. 11364-MA (July 25, 2016)

The trustee of a Trust distributed real property to a beneficiary. Before the property was distributed, the trustee asked the beneficiary to execute a confirmatory easement in order to clarify an easement held by a neighboring property and to provide notice to subsequent buyers. No confirmatory easement was ever executed despite numerous attempts by the parties' attorneys to address the issue. According to the Petition, the Trustee, in his capacity as trustee, made the final distribution of the Trust on December 5, 2013, conveying the property at issue to the beneficiary free and clear of trust with the belief and understanding that the beneficiary would address the easement issue after the property was distributed to him. However, the beneficiary refused to engage in any further discussions.

Among other things, the Trustee sought: (1) a declaration that beneficiary's parcel remains subject to the easement; and (2) the return of the real property to the Trust so that the trustee could distribute a corrected deed for the parcel reflecting the easement. The beneficiary moved to dismiss.

The Master concluded that the Trust lacked standing to bring the claims. The Master concluded that the owner of the neighboring property has the legally protected interest at issue and, thus, the claims are its to bring, if it so chooses. In making an allowance for the owner of the neighboring parcel to file the claims, the Master explained that "Court of Chancery Rule 17 provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for the substitution of such party." The Master recommended an allowance of 90 days for that to happen in this case.

Delaware District Court Determines that an Accounting Cannot be a Freestanding Claim Under Delaware Law

DELAWARE FIDUCIARY LITIGATION BLOG

Posted August 16, 2016

Related Areas of Practice:

Fiduciary Litigation

Mario Alberto Lopez Garza, The Executor of the Estate of Hans Jorg Schneider Sauter v. Citigroup, Inc. C.A. No. 15-537-SLR (June 29, 2016)

Mario Alberto Lopez Garza, the executor of a Mexican estate, the Estate of Hans Jorg Schneider Souter (the “Estate”), initiated probate proceedings in Mexico claiming that Banco Nacional de Mexico, S.A. integrante del Grupo Financiero Banamex (“Banamex”) in Mexico, a wholly-owned, indirect subsidiary of Citigroup, Inc. (“Citigroup”), was holding the Estate’s funds. This Mexican probate action was stayed upon Banamex’s initiation of proceedings to determine the authority of the probate judge. After that, the executor sued Banamex and Citigroup, in the United States District Court for the Southern District of New York on behalf of the Estate. After the court denied the Estate’s motion for leave to file a second amended complaint on the basis of futility, the Estate voluntarily dismissed the New York action. Subsequently, in an effort to access information as to the funds purportedly belonging to the Estate, the executor brought suit against Citigroup in the United States District Court for the District of Delaware, seeking an accounting. Citigroup filed a motion for judgment on the pleadings.

Citigroup argued, and the Court found, that the executor had not substantively alleged that the Estate was entitled to an accounting and, thus, failed to state a claim. Delaware courts have routinely ruled that an accounting is not so much a cause of action as it is a form of equitable relief. While Mr. Garza contended that Delaware case law allows an accounting to be a stand-alone claim, the court found that his case law was not on point. The court concluded that Delaware allows claims for accounting only when they arise out of contractual or fiduciary relationships between the parties. Mr. Garza then suggested that either New York or Mexico law would apply; however the Court found that New York law also holds that “a fiduciary relationship must be alleged to sustain a freestanding claim of an accounting.” The Court declined to address the application of Mexican law, as Mr. Garza did not cite one that would allow the Estate to seek an accounting from Citigroup in the United States.

Master Sings Ademption Song; Holds That Specifically Devised Property Sold During the Decedent's Lifetime Reflects the Intention to Revoke that Devise

DELAWARE FIDUCIARY LITIGATION BLOG

Posted August 17, 2016

Related Areas of Practice:

Trusts and Estate Planning, Fiduciary Litigation, Estate Administration

IMO Edward J. Burke Estate C.A. No. 10768-MA (August 10, 2016)

This case involves a stepson who sued his stepmother, the attorney-in-fact of her late husband and the executrix of his estate, for breaches of fiduciary duties owed to her dead husband. The stepson alleged that the stepmom improperly took the proceeds from the sale of a property that was specifically gifted to him and his siblings in his father's will and that she took money from a joint bank account that was created while she was his attorney-in-fact. The stepmom moved for summary judgment, arguing that, while the property was a specific gift to his children, her husband sold that property during his lifetime and, thus, that gift had lapsed. She further argued that adding her name to her husband's accounts had no effect on the stepson because even if she had not added her name to the accounts, she would have inherited that money under the residuary clause in the will.

Master Ayvazian ruled in favor of the stepmother on all counts. She concluded that the specific devise of the property had failed because it was sold during the husband's lifetime and that ademption had occurred (i.e. when a specific gift of real or personal property in a will is no longer available for delivery to a named beneficiary or beneficiaries because the testator lost or conveyed it prior to his death). Even if the proceeds from the sale of the property could be traced to a specific bank account, the Master held that cash is not considered a substitute for real property. She held that, under Delaware law, the father knew that the will contained a specific devise of the property and that when he sold that property, that sale reflected the father's intent to revoke the devise. With regards to the stepmom adding her name to the bank accounts, the Master held that it made no difference because the stepson was not entitled to any of the assets from the accounts.