New York Law Journal
Volume 237

Wednesday, April 18, 2007

SURROGATE'S PRACTICE AND PROCEEDINGS

Trust Contests -- The Developing Law

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Lifetime revocable and irrevocable trusts are often promoted as a means to avoid a will contest. Post-death litigation over the validity of lifetime trusts belies such theory.

With the increase in such litigation, we find a corresponding body of case law creating a procedure for trust contests. To date, efforts by a legislative advisory committee and bar groups to create statutory procedures for trust contests have been unsuccessful.

Thus, it is timely to consider the who, when, where and how of trust contests.

Who Commences the Proceeding

A probate proceeding is usually commenced by the nominated executor in the Surrogate's Court of the county where the decedent was domiciled. Those persons adversely affected by the propounded will (e.g., the distributees and legatees with a greater interest under a prior will on file with the court) are given notice of the proceeding in the form of a citation. The respondents are entitled to file objections to the propounded will. Upon filing objections, issue is joined and a will contest ensues.

With respect to a lifetime trust, after the grantor's death any person adversely affected may initiate a proceeding to determine its validity. [FN1] In Matter of Davidson, Surrogate Renee R. Roth identifies those persons who may commence a proceeding to set aside a trust as a distributee, an executor, and an administrator to whom limited letters issued pursuant to SCPA 702(9). The $64,0000 question is how does a potentially interested person learn of the existence of an adverse interest?

Following the grantor's death, a trustee is not required to give notice to any person as to the existence of a lifetime trust. In fact, there is no requirement in New York that a presumptive beneficiary under a lifetime trust be given notice at any time of his or her interest in the trust. As a general rule, after the grantor's death, the trustee does not need court authority to continue to act. Assuming all of the grantor's assets are held in the trust, the trustee is unlikely to need any form of relief from a court.

If following the grantor's death neither a probate, nor an administration proceeding is filed, then it is time for the interested person to start asking questions. While there is no established procedure for those affected persons to receive notice, in most cases they will know of the grantor's death. One option is for the interested person to seek to compel a presumed lifetime trustee to supply information concerning the decedent's estate pursuant to SCPA 2102 (1). The authors have yet to see a decision where a party used SCPA 2102 for this purpose, but cannot think of any reason why it would not apply.

The situation is made easier where a grantor failed to transfer all assets to the lifetime trust and there exists a pourover will to facilitate the transfer of the testamentary assets. Under such circumstances a probate proceeding is likely to be filed. The Surrogate's Court will require a petitioner to file a copy of the trust (or a summary of its terms) in order to identify the necessary parties to the probate proceeding. Notice of probate must be given to the trustee under the lifetime trust who is named in the will. The persons adversely affected by the pourover will may include those affected by the lifetime trust, thus entitling them to receive citation.

Where the person adversely affected is aware of the existence of a lifetime trust, then Davidson suggests that the next step is to seek limited letters of administration under SCPA 702 (9) which provides that '[l]etters may be granted limiting and restricting the powers and rights of the holder thereof:.... To commence and maintain any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such proceeding.' Following the issuance of limited letters the administrator may commence a proceeding related to the trust.

Davidson does not require that an interested person seek limited letters in order to acquire standing (a distributee may also seek such relief). An advantage to obtaining limited letters is to provide the interested person with clear authority to commence a proceeding.

When to Commence the Proceeding

A proceeding to set aside a lifetime trust may be commenced during or after the grantor's life. The adverse interest of a distributee or person named under a will is likely to arise only after the grantor's death. Whether the statute of limitations may operate to bar a distributee or person adversely affected remains an open issue.

The few cases which consider the statute of limitations as it relates to a lifetime trust focus on the period in which an interested person must seek to compel an accounting. [FN2] In Davidson, Surrogate Roth suggests that with regard to the validity of a revocable trust the six-year statute of limitations would begin to run against a distributee or person adversely affected by the lifetime trust at the grantor's death. Generally revocable and irrevocable trusts are treated differently so we cannot impute such reasoning to an irrevocable trust.

What if the grantor or lifetime trustee is able to establish that the distributee or person adversely affected had actual knowledge of the existence of the trust during the grantor's life? Could laches operate as a defense against a proceeding to set aside the trust asserted more than six years after the trust was created? There are no cases on point. Undoubtedly the issue will come before a court.

Where to Commence the Proceeding

The Surrogate's Court and Supreme Court have concurrent jurisdiction over lifetime trusts and any matter involving a decedent's estate. SCPA 1509 provides that 'the Surrogate having jurisdiction over a lifetime trust shall have power over the lifetime trust and its trustee as a justice of the supreme court having jurisdiction over the trust would have.'

It appears then that the parties have a choice of forum. Before rushing to either court to file a proceeding to set aside a trust, read the trust instrument as it may direct the forum for any dispute, or it may contain an arbitration clause. As we recently saw in Matter of Ismailoff, [FN3] the court may be required to make a preliminary determination as to the validity and scope of an arbitration clause before the substance of the dispute is addressed.

Absent a forum provision in the trust, most estate practitioners would argue in favor of proceeding in the Surrogate's Court, which is better equipped to handle such matters. Where the grantor has died, consider the general rule that where a matter affects a decedent's estate the Supreme Court will usually refrain from hearing it and defer to the Surrogate's Court. [FN4] Opting to commence a proceeding in Supreme Court may result in an unnecessary battle over the forum, delay the proceedings and add to the expense of inevitable litigation.

Commencing a Trust Contest

The court in Davidson notes that there is no road map which provides the method by which a trust contest may be commenced or the procedure to follow once a proceeding has been filed. An interested person may file a miscellaneous proceeding to set aside the lifetime trust or commence a discovery proceeding under SCPA 2103. The choice may be dictated by information already known to the interested person.

In some cases it may be most efficient to proceed first with discovery under SCPA 2103 to obtain information from the trustee about the instrument and trust assets. For example, assume the grantor held a brokerage account where she named a beneficiary and later transferred the account to the lifetime trust. After conducting preliminary discovery, the person previously designated as the beneficiary may wish to proceed to seek to set aside the transfer of the account as opposed to engaging in a battle over the validity of the trust. In such scenario, the only necessary party to the proceeding would be the trustee. Another advantage to proceeding first with discovery under SCPA 2103 is to identify the necessary parties to a later trust contest.

Where the relief sought is to set aside the trust, the necessary parties are the same as those required to be served with citation in a will contest. Any person who may be adversely affected by the relief sought is a necessary party (Matter of Davidson; Matter of Ricardino [FN5]), which includes 'all persons who are beneficially interested in the trust.' [FN6]

In Ricardino, decedent's will and two codicils (which merely changed the executors) were offered for probate. Under the instruments, decedent disposed of his estate to a lifetime trust and nominated Citibank NA and an individual as executors. During his lifetime the grantor amended the trust twice. Neither petitioner in the probate proceeding or in the proceeding to set aside the trust served all of the persons adversely affected by the trust amendments. The court directed that the petitioner seeking to set aside the trust serve process upon those persons whose interest was greater under the earlier trust instruments.

Bear in mind that the issue of personal jurisdiction in Ricardino arose in the context of a motion for summary judgment, rather late in the proceeding to start afresh with new parties. To avoid such a result, practitioners should scrutinize any will, codicil, trust or amendment thereto to ensure that all persons interested are made a party to the trust contest at the outset.

Trial and Burden of Proof

In 2003, SCPA 502 was amended to provide a party to a contested proceeding over the validity of a revocable lifetime trust the right to a trial by jury. The rationale was that there is little that differentiates a revocable trust from a will. A distinction remains with respect to an irrevocable trust. As in a will contest (and all Surrogate's Court proceedings that are triable by a jury) the demand for a jury must be made in the petition or objections.

Unlike a probate contest, the party seeking to set aside a trust bears the burden of proof on all issues. [FN7] Notwithstanding certain parallels to wills (i.e., the existence of statutory requirements to execute a trust) the trustee does not have any burden after the decedent's death to establish the validity of the trust. Nor does the trustee have a duty to demonstrate that the grantor was competent when the trust was executed.

There are four elements to a valid trust, it must have: 1) a designated beneficiary; 2) a designated trustee; 3) a fund or identifiable property; and 4) actual delivery of the fund to the trustee. [FN8] As with wills, courts favor the enforcement of trusts and may cure certain defects, such as appointing a trustee where the grantor failed to do so. [FN9] Failure to fund the trust may be fatal. [FN10]

The standard of capacity to execute an irrevocable trust has been held to be the same as that required to execute a contract. [FN11] Whether the standard is or should be the same to execute a revocable trust is not clear from the decisions. In Matter of Arnoff, the court considered the distinction between an irrevocable and revocable trust and noted that the public policy which underlies the standard of capacity to execute a will (i.e., to facilitate the distribution of assets after death) should be the same for a revocable trust where the grantor's assets are transferred at death.

Given these uncertainties, it makes it difficult to prepare for a trial as to the validity of a trust. In those proceedings where a party has the right to a jury (will contests and contested discovery proceedings), estate litigators have traditionally looked to the Pattern Jury Instructions for guidance as to which party has the burden of proof on what issue and the relevant standard applied (i.e., by a preponderance of the evidence versus by clear and convincing evidence). There are no parallel jury instructions for a trust contest. The authors suggest that the creation of jury instructions for trust contests could alleviate some of the practice issues that currently plague trust contests.

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FN1. Matter of Davidson, 177 Misc2d 928 (Sur Ct NY Co 1998).

FN2. See, Matter of Bialor, NYLJ, Aug. 23, 1993 (Sur Ct, Nassau Co) which held that the statute of limitations is six years from a trustee's repudiation of the trust; Matter of Trubitz, NYLJ, April 26, 1993 (New York County, Surrogate Roth).

FN3. NYLJ, Feb. 20, 2007 (decisions of interest).

FN4. See, Adhers v. Adhers, 176 AD2d 230 (2d Dept. 1991); McGee-Ross v. Cook, 194 Misc.2d 510 (Sup 2002).

FN5. NYLJ, Feb. 5, 1998, at 30, col 5 (Surrogate's Court, Nassau County).

FN6. O'Leary v. Grant, 155 Misc 98 (Sup Ct, NY Co 1935).

FN7. Matter of Arnoff, 171 Misc2d 172, 653 NYS2d 844 (Sur Ct NY Co 1996).

FN8. Matter of Fontanella, 33 AD2d 29 (3d Dept 1969); Roderick v. Hunt, NYLJ, April 12, 2002, p 21, col 5 (Sur Ct Queens Co).

FN9. Matter of Gold, NYLJ, Aug. 16, 2002, p 20, col 2 (Sur Ct Kings Co).

FN10. Matter of Hird, NYLJ, Oct. 2, 2003, p 29. col 1 (Sur Ct Suffolk Co).

FN11. Matter of ACN, 133 Misc2d 1043 [Sur Ct NY Co 1986]; See also, Matter of Edson, NYLJ, July 14, 1997, p 31, col 1 (Sur Ct Suffolk Co); Matter of Aronoff, 171 Misc2d 172 (Sur Ct, NY Co 1996).

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