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TRUSTS AND ESTATES

Appellate Case Addresses a Host of Probate Issues

NJ reiterates the right to choose how to dispose of one's property at death

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A Buddhist priest living in a remote part of Maine unexpectedly learns that his estranged father, a devoted Catholic, died a millionaire and left his fortune to a British University. Believing that his father lacked capacity and was subjected to undue influence by university officials, the priest, who has not seen his father in years, seeks to invalidate his father's will.

That scenario is the backdrop of *In the Matter of the Estate of Kevin B. Malone*, No. A-6147-12T2, Superior Court of New Jersey (App. Div., Nov. 6, 2014), a recent unpublished decision that considered a host of probate issues, such as standing, will contest expenses and mistake in the inducement, some of which had not been addressed by a New Jersey court in many decades, if at all. The case merits further attention.

In *Malone*, the decedent father, Kevin B. Malone, was a World War II veteran from Great Britain. Due to his wartime service, Kevin could not pursue a college education. He came to the United States and became a commercial photographer. In the last decade of his life, after his wife's death, Kevin gave (or sought to give) almost his entire fortune (several millions of dollars), first to Oxford University and, later, to the University of Nottingham. His intent was to establish a scholarship fund for underprivileged students so they could have the educational opportunities he was denied. Kevin's philanthropic bequest was the subject of a BBC television report.

The decedent's only child, Kevin C. Malone, lived a far different life from his father. The son, also known as the Venerable Kobutsu Malone, Reverend Malone or simply Kobutsu, renounced his Catholic faith and, after living in Haight-Ashbury during the 1960s, became a Buddhist priest. Unlike his father who served in WW II, Kobutsu was a conscientious objector during the Vietnam War. Kobutsu became an advocate for numerous progressive causes, counseled death-row inmates, and wrote a leading book on prison chaplaincy issues for Zen practitioners. Kobutsu also claimed, years later, in a letter published on the Internet, that he was the victim of abuse at his Catholic high school, a revelation that Kobutsu asserted led to his father's decision to effectively exclude him from the will.

Kobutsu and his father were estranged for most of their lives. When Kevin died in 2011, Kobutsu

had not seen his father in 10 years nor had he attempted to communicate with him after 2004. Kobutsu did not telephone or visit his father when he was hospitalized, and he did not attend his father's funeral. Kevin's last five wills, executed between 2002 and 2008, reflected their strained relationship: Kevin bequeathed only \$5,000 to Kobutsu in each will. Prior to making those wills, Kevin told his son that he was not going to receive an inheritance.

The Litigation

After Kevin's death, the named executrix and successor executor, two of Kevin's neighbors, renounced their appointments. Kobutsu then filed a caveat in Bergen County Surrogate's Court challenging the final will executed on Aug. 15, 2008. Although millions of dollars were at stake, no one was administering the estate.

The Friends of the University of Nottingham of America (FUN), a United States-based entity that provides financial support for scholarships and other approved programs at Nottingham, was the residuary beneficiary of the final will and stood to receive millions of dollars. Thus, Adrian Dawes, a FUN board member, Nottingham alumnus, and an experienced asset manager for high-net-worth individuals and institutions, filed a verified complaint with the Superior Court of New Jersey, seeking probate of the final will and his appointment as the administrator, C.T.A. Dawes agreed to serve without compensation. Kobutsu asserted a counterclaim, claiming that his father lacked testamentary capacity when he executed the final will, and that the final will was the product of undue influence.

Over Kobutsu's objections, the Hon. Robert P. Contillo, P.J. Ch., appointed Dawes as the temporary administrator. Thereafter, Kobutsu, who was acting *pro se*, claimed to be destitute, and filed a motion for will contest expenses pursuant to N.J.S.A. 3B:3-30. That statute, which is rarely utilized, permits the spouse or children of the decedent to petition the court to have the estate advance them funds to prosecute a will contest. Judge Contillo denied Kobutsu's application because, among other reasons, Kobutsu had not demonstrated that his case had any merit.

Judge Contillo also rejected Kobutsu's assertion that he should be permitted to amend his counterclaim to pursue a claim of "mistake in the inducement." Specifically, Kobutsu claimed that his father only changed his will due to Kobutsu's allegations that he had been abused at his Catholic high school. According to Kobutsu, because his father, a devoted Catholic, could not believe that the alleged abuse occurred, it was a "mistake" to exclude him from the final will. Judge Contillo concluded that the "mistake" claim should not be permitted because such a claim would interfere with a testator's well-recognized right to leave his assets to whomever he wished, even if they disfavored his child. Dawes then moved for summary judgment, which Judge Contillo granted. Kobutsu appealed.

Standing

On appeal, Kobutsu's primary argument was that Dawes, the temporary administrator, lacked standing because he did not have a *personal* interest or stake in the litigation. The Appellate Division, noting that no one was then administering the final will, rejected Kobutsu's contentions pursuant to N.J.S.A. 3B:10-15. That statute, which has not been addressed by a published case in over half a century, provides that any "fit person" may fill the office vacated by the executor and serve as administrator.

Once a substitute administrator is appointed, he or she has standing to represent the estate and is obligated to: (1) seek to have the will admitted to probate; and (2) defend it in litigation. *Malone* at 11. Because Dawes was "fit" to administer the estate, he was justified in defending the final will from Kobutsu's challenge.

Will Contest Expenses

Kobutsu next argued that Judge Contillo should have granted him will contest expenses pursuant to N.J.S.A. 3B:3-30, based on his financial need without reference to the merits of his argument. That statute, which has not been substantively addressed in a published case in over 60 years, provides that a court may order a fiduciary controlling the estate to pay a widow, widower or child of the decedent income out of the estate or the corpus to mount a will challenge.

Relying on *In re Thropp's Will*, 12 N.J. Super. 444 (Cty. Ct. 1951), the Appellate Division rejected Kobutsu's position that his need for litigation fees to prosecute his case should be the sole criterion in determining an award of will contest expenses. *Malone* at 13. Rather, as set forth in *Thropp's Will*, the burden is on the petitioner to prove the following: (1) reasonable grounds for contesting the will; (2) the petitioner would gain if the contested will were set aside; and (3) the petitioner is in need of funds to support himself and to challenge the will. *Thropp's Will* at 446. The Appellate Division noted that the court should focus on whether the petitioner would receive the same bequest under a prior will, which was the case for Kobutsu.

Further, although the Appellate Division did not address this issue, another reason supported the denial of Kobutsu's application. Awarding will contest fees under the statute, where *both* financial need and demonstrated merit are not shown, would lead to groundless litigation that would punish the rightful heirs. See *In re Estate of Phillips*, 138 N.J. Eq. 96, 97 (Prerog. Ct. 1946), *aff'd*, 139 N.J. Eq. 57 (E. & A. 1948). That is because parties, knowing the estate is paying the tab, could litigate a case without any risk. This would result in beneficiaries, including children and charities, being denied their rightful inheritance, as the legal expenses would be deducted from their share.

Mistake in the Inducement

Kobutsu claimed that Judge Contillo erred in denying his request to add his claim of "mistake in the inducement." That claim may exist "when a testator is influenced to execute a will based on an inaccurate belief as to an essential fact, such as the death of a beneficiary who is, in fact, alive." *Malone* at 16.

Rejecting Kobutsu's claim, the Appellate Division reiterated that a court is not entitled to "pass upon either the wisdom or fairness of a will's provisions so long as it is validly executed and is not illegal or offensive to public policy." *Id.* at 17. Kobutsu's father's motives for excluding him as a principal beneficiary, even if improper, did not invalidate a will. Of course, Kobutsu's claim was not helped by his sworn statement that his father told him that he would not receive an inheritance.

Both Judge Contillo's and the Appellate Division's decisions in *Malone* provide fresh insight into the areas of standing, will contest expenses and mistake in the inducement. And, the case re-emphasizes the right of a parent to leave their child, absent a finding of undue influence or lack of testamentary capacity, whatever they choose, large or small, fair or unfair. The parent may leave their only child nothing and give millions to far away universities. To allow otherwise would elevate a judge's view of what is "right" over a person's ability to dispose of his property at death, a principle

New Jersey courts have never accepted. ■

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