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RECENT DEVELOPMENT

KARSENTY V. SCHOUKROUN: AN INTER VIVOS TRANSFER OF PROPERTY, WHERE THE DECEDENT RETAINED CONTROL DURING HIS LIFETIME, IS NOT PER SE VIOLATIVE OF A SURVIVING SPOUSE'S STATUTORY RIGHT TO A SHARE OF THE ESTATE.

By: Erin Day

The Court of Appeals of Maryland held that an *inter vivos* transfer may not be invalidated, for the purpose of determining a spouse's elective share, based solely on the fact that the decedent retained control of the property during his lifetime. *Karsenty v. Schoukroun*, 406 Md. 469, 959 A.2d 1147 (2008). Even where such transfers derogate a surviving spouse's statutory right to the decedent's net estate, the transfer is not *per se* fraud. *Id.* at 490, 959 A.2d 1159.

Gilles H. Schoukroun ("Gilles") died in October 2004. His estate planning arrangements were carried out in accordance with his will and a revocable trust. Gilles' will bequeathed his tangible personal property to his wife of four years, Kathleen Sexton ("Kathleen"). She was also the beneficiary of Gilles' life insurance proceeds totaling \$200,000. Gilles had a contractual obligation to maintain a life insurance policy naming his daughter from a previous marriage, Lauren, as the beneficiary but, Gilles failed to do so. Instead, Gilles named Lauren, as the beneficiary of the trust. He appointed himself as the trustee and Maryse Karsenty ("Maryse"), his sister, as the trustee upon his death, with Kathleen as the alternative trustee in the event that Maryse could not serve. The trust, valued at about \$422,000, included three financial accounts and two IRA transfer-on-death accounts.

In February 2005 Kathleen renounced Gilles' will and filed for a statutory share of the estate. Kathleen filed a complaint in the Circuit Court for Anne Arundel County, claiming that the trust constituted fraud in violation of her statutory right as the surviving spouse. The circuit court determined that the trust did not constitute fraud. Both parties appealed. The Court of Special Appeals of Maryland reversed the trial court's disposition as to Kathleen's fraud claim. The Court of

Appeals of Maryland granted Maryse's petition and Kathleen's conditional cross-petition for writs of certiorari.

The court first analyzed Maryland's elective share statute which provides surviving spouses with the option of either taking the property left to them pursuant to the decedent's will, or taking a one-third share of the decedent's "net estate." *Karsenty*, 406 Md. at 487, 959 A.2d at 1157 (citing MD. CODE ANN., EST. & TRUSTS § 3-203 (West 2008)). Looking at the "unambiguous" language of Section 3-203 of the Estates and Trusts Article of the Maryland Code ("Section 3-203"), the court determined that "net estate" includes only property to which the decedent retained an interest following his death. *Karsenty*, 406 Md. at 488, 959 A.2d at 1158 (citing 1 PAGE OF THE LAW OF WILLS § 16.10(2003)). The court concluded that the trust did not fall within the definition of "net estate" because Gilles' interest in the trust terminated at his death. *Karsenty*, 406 Md. at 488, 959 A.2d at 1158. Therefore, in accordance with Section 3-203, Kathleen was not entitled to a statutory share of the trust. *Id.* at 489, 959 A.2d at 1158.

Kathleen maintained that the value of the trust should be included as part of Gilles' net estate because the transfer to Lauren was invalid. *Id.* at 489, 959 A.2d at 1158-59. Kathleen argued that a *per se* rule had been established in Maryland, requiring that *inter vivos* transfers be pulled into the decedent's net estate when the decedent retained control of the property. *Id.* at 491, 959 A.2d at 1159 (citing *Knell v. Price*, 318 Md. 501, 569 A.2d 636 (1990)). The court decided that a decedent's control over property during life did not, in and of itself, constitute *per se* fraud. *Karsenty*, 406 Md. at 491, 959 A.2d at 1159-60. The decision to set aside such agreements should be done on a case-by-case basis, after considering all surrounding facts and circumstances. *Id.* at 491, 959 A.2d at 1160.

The court next analyzed the facts and circumstances to be considered in determining the validity of such transfers. *Id.* at 502, 959 A.2d at 1166. Historically, *inter vivos* transfers were invalidated when the court determined that the transfer was a "mere device or contrivance." *Id.* at 507, 959 A.2d at 1169 (citing *Hays v. Henry*, 1 Md. Chan. 337 (1851)). While that precise language has been abandoned, the standard remains the same. *Karsenty*, 406 Md. at 509, 959 A.2d at 1170. In a case involving a revocable deed of trust, the court refused to invalidate the trust as violative of spousal rights based on the determination that the transfer was "complete and bona fide." *Id.* at 509, 959 A.2d at 1170 (citing *Brown v. Fid. Trust Co.*, 126 Md.

175, 94 A. 523 (1915)). Here, although Gilles retained control over the trust during his life, a decedent's retained control alone does not discern a genuine *inter vivos* transfer from a fraud. *Karsenty*, 406 Md. at 501, 959 A.2d at 1165-66.

Admitting the difficulty in distinguishing a bona fide transfer from a "sham," the court listed three considerations to assist in the analysis. *Id.* at 514, 959 A.2d at 1173. First, is whether the decedent retained an interest in, or continued to enjoy, the transferred property. *Id.* Although such control does not, by itself, invalidate the transfer, it raises the question of good faith. *Id.* at 515, 959 A.2d at 1173 (citing *Mushaw v. Mushaw*, 188 Md. 511, 519, 39 A.2d 465, 468 (1944)). Second, judicial discretion should not be used to undo estate planning arrangements which are valid and legitimate. *Karsenty*, 406 Md. at 515, 959 A.2d at 1174. Third, the validity and legitimacy of such arrangements should be assessed after considering a number of relevant factors. *Id.* at 516, 959 A.2d at 1174.

The court analyzed several factors, but noted that the list expounded is not exhaustive. *Id.* at 525, 959 A.2d at 1180. First, is the extent of control retained by the decedent. *Id.* at 516, 959 A.2d at 1174. The court noted that in every case involving an invalidated *inter vivos* transfer, the decedent retained a "significant" amount of control. *Id.* The court should also consider whether the decedent actually exercised that retained control. *Id.* at 522, 959 A.2d at 1178. Excessive control or enjoyment of the property suggests that the decedent did not truly intend to part with ownership. *Id.* Here, the circuit court indicated that while Gilles retained control over the trust, he did not exercise that control or interfere with the trust. *Id.* at 523, 959 A.2d at 1179.

Furthermore, the motives of the decedent and the beneficiary of the *inter vivos* transfer should be considered. *Id.* at 517-19, 959 A.2d at 1175-76. The decedent's motives may indicate that the transfer "actually was intended to be complete and bona fide." *Id.* at 518, 959 A.2d at 1175. Also, in addition to possible collusion, future courts should consider whether the beneficiary's motives were to defraud the decedent or the surviving spouse. *Id.* at 519, 959 A.2d at 1176.

Another factor is the degree to which the surviving spouse is deprived of property that otherwise would have been included in the decedent's net estate. *Id.* at 20, 959 A.2d at 1176. The *inter vivos* transfer is more likely to be valid when the decedent leaves reasonable provisions for the surviving spouse. *Id.* at 520, 959 A.2d at 1177. Here, the circuit court determined that Gilles did not intend to defraud

Kathleen, rather, he intended to provide for both Lauren and Kathleen. *Id.* at 519, 959 A.2d at 1176. The court noted that although Lauren benefited more, Kathleen was by no means left destitute. *Id.* at 522, 959 A.2d at 1178.

A final factor is the familial relationship between the decedent and the beneficiary of the *inter vivos* transfer. *Id.* at 524, 959 A.2d at 1179. A transfer is more likely valid if made to support children from a previous marriage, especially when the surviving spouse and decedent were only recently married. *Id.* Not only did Gilles have a pre-existing obligation to provide for Lauren, but Gilles and Kathleen were only married a short time. *Id.* at 525, 959 A.2d at 1179.

Karsenty established the current standard for determining the validity of an *inter vivos* transfer that affects the statutory entitlements of a surviving spouse. An *inter vivos* transfer will not be set aside based solely on the decedents retained control of the transferred property, and careful planning can ensure the validity of such transfers. For example, the decedent should not exercise excessive control over the property during his lifetime. Additionally, the transfer will seem more bona fide where there is a legitimate purpose behind the transfer, as well as reasonable, alternative provisions for the surviving spouse. Maryland estate planners should be aware of this decision and the specific facts and circumstances that tend to illustrate a legitimate and bona fide *inter vivos* transfer of property.