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**Hamburger, Maxson, Yaffe, Knauer & McNally, LLP** **January 6, 2014**

Original Content

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## $100,000 Bequest to a Cat is Upheld

An Appeals Court in *Estate of Stafford v. Stafford* has recently affirmed the Surrogate who ruled that a woman was not under "undue influence" when she disinherited her three nephews in a new will and bequeathed $100,000 for the care of "Kissie Meouw Stafford," her cat. 111 A.D.3d 1216 (3d Dept. 2013).

According to the decision, the woman, Charlotte F. Stafford, died in 2010 and was survived by respondents – her three nephews and their children. Prior to her death, the decedent had a "keen interest in history and genealogy and served as the historian for the Town of Oxford in Chenango County." In 2001, the decedent had hired Vicky House to assist her with some typing. It was undisputed that the decedent and House became friends and, after the decedent suffered a fall 2004, House moved into decedent's home to care for her.

Over the years the decedent had executed a number of wills culminating in the last one in August 2007, which was the subject of the probate proceeding. In this last will, in addition to various charitable bequests, the decedent's property was to be distributed as follows: "her ancestral home and all real property, together with $300,000 to maintain such property, was to be held in trust for the benefit of the Town and to be used for historical preservation purposes; her 'historical books, records, memorabilia and genealogies' were to be given to House to be distributed between the Oxford Historical Society and the Oxford Town and/or Village Historian(s); and $100,000 was to be placed in a pet trust for the benefit of her cat, 'Kissie Meouw Stafford.' The pet trust would terminate upon Kissie's death – or 21 years following decedent's death – but, in the interim, House – in her capacity as Kissie's designated caretaker – was permitted to remain in decedent's residence rent-free. The remainder of the decedent's estate was to be given to the Oxford Memorial Library, and decedent's will 'intentionally ma[d]e no provision for [respondents].' A subsequent codicil to the will – the provisions of which [were] not at issue here – was executed in 2010."

When the petitioner, as the executor to decedent's estate, offered the August 2007 will for probate, the nephews, who were written out of the will, filed objections, contending that the will was the product of House's "undue influence." Upon the petitioner's motion for summary judgment dismissing the objections, the Court granted the motion and allowed the will and codicil to proceed to probate. The nephews appealed.

Citing common-law precedent, the Third Department of the Appellant Division held that in determining "[w]hether to dismiss the party's objections and admit the challenged will to probate is a matter committed to the sound discretion of the Surrogate's Court and, absent an abuse of that discretion, the court's decision will not be disturbed." The Appellate Division instructed that to "establish undue influence, respondents were required to demonstrate that decedent 'was actually constrained to act against [her] own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred.'" The influence asserted must rise to the level of "a moral coercion" and "[m]ere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact."

It held that even if House had a motive and opportunity to influence decedent's testamentary dispositions, the respondents failed to demonstrate that House actually exercised undue influence. "By all accounts, decedent was a very intelligent, private and strong-willed woman who 'ran her life the way she wanted to run it.'" The Appellate Division was impressed that both the attorney who drafted the August 2007 will (and the prior one which included the nephews as distributees), and the paralegal who witnessed the will signing, testified that they did not observe any evidence of undue influence with respect to the execution of the will and codicil.

The Appellate Division concluded that the Surrogate did not abuse his discretion in granting summary judgment dismissing respondents' objections, and Kissie Meouw Stafford may now inherit $100,000.

**Restaurant Which Pre-Dated Zoning Survives**

In *DPL & B v. Village of Goshen*, a State Supreme Court recently dismissed the Article 78 petition of a neighbor who complained about the Village of Goshen Zoning Board of Appeals' determination that the adjoining property may be used as a restaurant. 41 Misc.3d 1229(A) (Sup. Ct., Orange Cnty. 2013).

Generally, in New York municipalities have the power to "zone" property by statute. Zoning ordinances must be reasonable because by their nature they restrain the use of property that the owners could otherwise use as they wish.

Courts have held that a zoning regulation is legal or valid if it is reasonable and not arbitrary, and bears a reasonable and substantial relation to the public health, safety, comfort, morals, and general welfare, and if the means employed are reasonably necessary for the accomplishment of its purpose.

When zoning is established, however, the ordinance cannot eliminate structures already in existence. If, for example, a district is zoned residential, the corner deli becomes "a pre-existing nonconforming use." This business may remain even though it does not fit the predominant classification in the residential zoning district.

As long as the property having nonconforming use status does not change, its status is protected. Problems arise when changes occur. In general, substantial alterations in the nature of the business, new equipment that is not a replacement but is installed to expand the use of the property, or a new structure, amount to illegal expansion or extension. These types of actions will result in the loss of the nonconforming use status and the closing of the business.

If a nonconforming use structure is destroyed or partially destroyed by fire or similar occurrences, zoning ordinances generally provide that if it is destroyed beyond a certain percentage, it cannot be rebuilt.

Another tool to end nonconforming use situations is amortization, where the nonconforming use of a structure must cease within a zoning district at the end of the structure's estimated useful economic life – often applied in billboard situations.

If a business stops operating at the nonconforming use site, zoning ordinances generally classify this as a discontinuance and revoke the nonconforming use status. The owner of the business must intend to abandon the use. Discontinuance due to repairs, acts of war or nature, government controls, foreclosure, condemnation, or injunctions do not manifest intent to abandon the nonconforming use status if the situation is beyond the business owner's control.

Here the Goshen ZBA relied upon the Village's Code which provides as follows:

> *Any nonconforming use of buildings or open land ... may be continued indefinitely, but: Shall not be re-established if such use has been abandoned or has been changed to, or replaced by, a conforming use. Intent to resume a nonconforming use shall not confer the right to do so. Discontinuance of a nonconforming use for a period of one year or more shall create a rebuttable presumption of abandonment.*

The petitioning neighbor had argued that the restaurant had lost its pre-existing nonconforming use status through abandonment. The Court, in response, noted that "[l]ocal zoning boards have broad discretion and judicial review of their actions is limited to determining whether the action taken by the zoning board was illegal, arbitrary, or an abuse of discretion. A determination should be sustained upon judicial review if it was not illegal, has a rational basis and is not arbitrary and capricious." The Court concluded that, contrary to the petitioner's

contention, upon review of the record, the determination of the ZBA was not arbitrary and capricious since the ZBA found that the property had "long been utilized as a restaurant/eating dining establishment and that said use was before Zoning was adopted in the Village and was long protected as a pre-existing nonconforming use." Noting that the "zoning boards determination is entitled great deference and will not be overturned, as it was neither unreasonable nor irrational," the Court dismissed the petition.

**Penalty for Teacher is Termination**


Recently in *Montanez v. Department of Education of the City of N.Y.*, the Appellate Division, First Department, affirmed the Supreme Court's denial of a teacher's petition to vacate an arbitration award which terminated her employment. 110 A.D.3d 487 (1st Dept. 2013).

The public school teacher commenced a CPLR Article 75 proceeding to vacate an arbitration award in favor of the City Department of Education, which found her guilty of several charges of misconduct and terminated her employment. According to the charges, the teacher had fraudulently obtained a free New York City public school education for her son during the 2009-2010 school year, even though he was not a resident of New York City.

Disciplinary action taken pursuant to a "disciplinary arbitration procedure" (such as the one provided for teachers under Education Law Section 3020-a or by an arbitration provision of a collective bargaining agreement) is subject to review pursuant to Article 75 of the CPLR, but the grounds for review are limited.

It is well established law in New York that a penalty imposed by an administrative agency may not be set aside unless the "discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Pell v. Bd. of Educ.*, 24 N.Y.2d at 233, 356 N.Y.S.2d at 841 (1974). Based on this standard handed down by New York's highest court, the courts in New York generally give a high degree of deference to an agency's determination of the appropriate penalty to be imposed.

Here, the Appellate Division held that "[a]lthough petitioner has an unblemished record as a teacher and offered to resolve the dispute by making restitution, the penalty of termination is not shocking in light of her having used a fraudulent affidavit to obtain a free New York City education for her non-resident child."