

## Trusts and Estates Law

## Expert Analysis

# Third-Party Miscellaneous Proceedings in Surrogate's Court

In the new movie “Woman in Gold” a Jewish World War II survivor sues the Austrian government for the return of artwork stolen from her family by the Nazis. The will of the woman who was depicted in the Gustav Klimt painting “Portrait of Adele Bloch-Bauer I” figured prominently in the real-life dispute. One of the main arguments of the Austrian government was that Adele Bloch-Bauer had bequeathed several of the paintings to the Austrian Galerie in her will before her death in 1925.<sup>1</sup>

Through the litigation, according to a news report on the film, it was found that the actual language of Bloch-Bauer’s will did not specifically bequeath the paintings to the museum—it actually contained a non-binding request. The paintings belonged to her husband Ferdinand (who had paid for them). Thus, the paintings were not Adele’s to give away, regardless of her expressed desire in her will. Ferdinand’s last will and testament bequeathed all of his possessions (including the paintings) to his nieces and nephews. In 1998 when the proceedings began, Maria Altmann, the petitioner in the proceeding, was the only surviving niece.

While the facts and intrigue surrounding the story of these Klimt paintings makes for a good story, the Surrogate’s Court is replete with precisely these types of tales—third-party replevin actions to determine the true ownership of property. This article explores two interesting third-party claims to property in *In re Flamenbaum*<sup>2</sup> and *Mirvish v. Mott*,<sup>3</sup> as well as the procedural devices used in both cases.

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### ‘In Re Flamenbaum’

In April 2003, Riven Flamenbaum<sup>4</sup> died a resident of Great Neck, N.Y.<sup>5</sup> In March 2006, Hannah Flamenbaum, Riven’s daughter and the executor of his estate, filed her accounting in the Nassau

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County Surrogate’s Court. Hannah’s brother, Israel, filed multiple objections to the accounting including an allegation that the executor failed to properly account for the decedent’s coin collection on schedule A of her accounting.

Israel claimed that his father possessed an item which was believed to be an ancient Assyrian amulet and was rightfully the property of a German museum. The museum alleged that the gold tablet was an artifact retrieved by a German archaeological team in the city of Ashur (now Qal’at Serouat, Iraq) at the beginning of the 20th century which had been missing from the museum since the end of the Second World War.

Subsequently, the museum filed a notice of appearance and a notice of claim with the court seeking the return of the gold tablet. The court decided to determine the validity and enforceability of the claim as a preliminary step in the accounting proceeding.

In response to the museum’s claim to the tablet, the executor raised several defenses, including, among others, the spoils of war doctrine, statute of limitations and burden of proof issues. These were all rejected by the court.

The executor’s final defense was that the museum’s claim was barred under the doctrine of laches because the museum took no action to report the tablet missing or to investigate the tablet’s whereabouts from the time it went missing in 1945. The estate pointed out that the museum never reported the tablet missing to foreign authorities; never listed the tablet on an international art registry; and took no action in 1954 after being notified that a New York dealer allegedly had possession of the tablet. The museum argued that its delay was reasonable in the aftermath of the Second World War considering the “political and financial restraints imposed by the museum’s geographical location in East Berlin” which shortly after the war became a Soviet satellite state.<sup>6</sup>

In essence, laches is an equitable defense that bars a claim because the victim waited too long to assert his rights and prejudiced the person in possession of the item. After extensive analysis, Surrogate John Riordan held that laches did act as a bar to the museum’s claim because the museum’s inaction allowed “diligent good-faith purchases” to occur over the course of more than 60 years without any notice of a blemish in the title.<sup>7</sup> In addition, the court found that Riven Flamenbaum’s death foreclosed the possibility of recovering Riven’s testimony as to how he obtained the tablet. Riordan found that these two factors taken together prejudiced the estate’s ability to defend the museum’s replevin action.

On appeal, the Second Department reassessed the doctrine of laches and reversed the surrogate’s finding that laches barred the museum’s claim.<sup>8</sup> The Second Department found that the estate did not demonstrate that the museum failed to exercise reasonable diligence to locate the tablet, and that the estate did not prove that the

museum's failure to report the tablet as missing to foreign authorities or to list it on an art registry prejudiced the estate's ability to defend against the museum's replevin claim. Further, the Second Department noted that there was no proof that the estate changed its position because of any delay or inaction by the museum, and that "the equities favor[ed] the return of the tablet to the museum over its retention by the estate."<sup>9</sup>

After presenting its own independent analysis, the Court of Appeals affirmed the Second Department's holding.<sup>10</sup> The Court of Appeals also reiterated its observation in *Solomon R. Guggenheim Found. v. Lubell*, that "to place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would ... encourage illicit trafficking in stolen art," and affirmed the return of the tablet to the museum.<sup>11</sup>

The tablet was returned to the museum in a ceremony at the Nassau County Surrogate's Court on Dec. 4, 2013.

#### 'Mirvish v. Mott'

*Mirvish v. Mott*<sup>12</sup> involved the estate of Yulla H. Lipchitz, the widow of Russian-born cubist sculptor Jacques Lipchitz.<sup>13</sup> Jacques Lipchitz died in 1973, and Yulla inherited numerous valuable works of art from his estate including "The Cry," a 1,100-pound bronze sculpture.<sup>14</sup> In the early 1980s, Yulla began a relationship with Biond Fury. Yulla and Fury lived together over the course of 17 years until Yulla's death on July 20, 2003. Throughout their relationship, Yulla made gifts to Fury, including her late husband's artworks. Yulla memorialized these gifts by giving Fury a picture of the artwork with a writing describing the piece and declaring it was a gift. After Yulla's death, Fury possessed a photograph of The Cry with a notation on the back stating, in relevant part, "I gave this sculpture...to my good friend Biond Fury..."<sup>15</sup>

After Yulla's death, Fury contacted Yulla's son Hanno Mott, the executor and a residuary beneficiary of one-third of Yulla's estate. Fury's attorney sent several letters to Mott's attorney demanding the delivery of The Cry to Fury. Fury then sold his interest in The Cry to David Mirvish, an art collector and gallery owner in Toronto, Canada. On Oct. 4, 2005, Mirvish's attorney notified Mott of the sale, and demanded that he inform Mirvish of the sculpture's location, allow Mirvish to take possession of the sculpture within 10 days of the letter, and pending the resolution of the matter make no sale or transfer of the piece. The attorney for Yulla's estate refused Mirvish's demands claiming that the estate was the true owner of the sculpture because there was no inter vivos gift

from Yulla to Fury. Mott's attorney also advised that the sculpture had been sold.<sup>16</sup>

In October 2005, Mott, as the executor of Yulla's estate, filed a petition with the New York County Surrogate's Court pursuant to SCPA §209(a) claiming that the estate "was the rightful owner of The Cry and had legitimately sold and passed title of The Cry."<sup>17</sup> SCPA §209(a) authorizes the Surrogate's Court to determine a decedent's interest in any property claimed to be available for distribution and to otherwise determine the rights of any persons claiming an interest as against the decedent, or as between themselves.

In response to Mott's petition, Mirvish filed a petition against Mott, individually and as executor of Yulla's estate asserting causes of action for conversion, replevin and the imposition of a constructive trust on the proceeds from the sale of the sculpture. Mirvish also sought an order pursuant to SCPA §2105 compelling delivery of the property or the proceeds from its sale, and an order pursuant to SCPA §2102 disclosing the sculpture's location.

In December 2008, Surrogate Renee Roth issued an order granting Mirvish's cross motion and denying Mott's motion for summary judgment finding that Yulla had made a valid inter vivos gift to Fury, because the wording of the deed of gift—"I gave"—utilized the past tense and indicated a transfer which had already occurred. The court also found that the photograph and the writing clearly identified The Cry, and the gift was consistent with the decedent's long pattern of gifting items to Fury.

The First Department reversed the New York County Surrogate's Court decision finding the claim was barred because Fury's testimony was the only evidence of the decedent's delivery of the gift to him, and such testimony was inadmissible under the Dead Man's Statute.<sup>18</sup>

The Court of Appeals granted Mirvish's leave to appeal and reversed the First Department, affirming Surrogate Roth's order and finding that Yulla's intent to make a present transfer of the sculpture was clear. The Court of Appeals rejected the other findings of the Surrogate's Court. Mirvish prevailed.

#### Different Paths to Same End

Both *Flamenbaum* and *Mirvish* involved parties who were seeking to retain or recover property in the possession of an estate. However, the parties used different procedural devices to obtain their requested relief and resolve the disputed ownership. The museum in *Flamenbaum* initiated its action by filing a notice of appearance in an already pending accounting proceeding, and filing a notice of claim pursuant to article 18 of the SCPA. This procedural device was also used in *Matter of*

*Thomas*,<sup>19</sup> wherein the ex-spouse of the decedent filed a claim seeking return of a gypsy wagon and related Native American items.

The executor in *Mirvish* anticipated the claimant's action, and acted first by initiating his own proceeding pursuant to SCPA §209 which provides the Surrogate's Court with the power to determine: (i) the decedent's interest in any property claimed to constitute a part of his or her gross estate; (ii) property available for distribution under the decedent's will or in intestacy or for payment of claims; (iii) the rights of any persons claiming an interest therein, as against the decedent, or as between themselves; and (iv) how to construe any instruments made by the decedent affecting such property.

The underlying substantive issues were the same—who rightfully owned the items—but the different procedural mechanisms utilized were determined by what party initiated the proceeding. In *Flamenbaum* and *Thomas*, the petitioner seeking the asset brought the action, whereas in *Mirvish* the executor asked the Surrogate to determine the decedent's interest in the sculpture.

#### Conclusion

The sculpture in *Mirvish*, the tablet in *Flamenbaum*, and the Klimt paintings all have a story to tell. But sometimes, the most interesting story involves the fight over who is the rightful owner. The procedural mechanics discussed herein provide the tools to bring that story to its end.

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1. Nina Totenberg, "After Nazi Plunder, A Quest To Bring Home 'The Woman In Gold,'" April 2, 2015 [www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home](http://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home).

2. *In re Flamenbaum*, 27 Misc.3d 1090 (Surr Ct Nassau Co. 2010) rev'd 95 AD2d 1318 (2d Dept. 2012) aff'd 22 NY3d 962 (2013).

3. *Mirvish v. Mott*, 75 AD3d 269 (1st Dept. 2010) rev'd 18 NY3d 510 (2012).

4. *In re Flamenbaum*, 27 Misc.3d 1090 (Surr Ct Nassau Co 2010) rev'd 95 AD2d 1318 (2d Dept. 2012) aff'd 22 NY3d 962 (2013).

5. *In re Flamenbaum*, 27 Misc.3d 1090, 1093 (Surr Ct. Nassau County 2010).

6. *Id.* at 1098.

7. *Id.* at 1100.

8. *In re Flamenbaum*, 95 AD3d 1318, 1320-1321 (2d Dept 2012).

9. *Id.* at 1320.

10. *In re Flamenbaum*, 22 NY2d 962 (2013).

11. 77 NY2d 311, 320 (1991).

12. *Mirvish v. Mott*, 75 AD3d 269 (1st Dept 2010) rev'd 18 NY3d 510 (2012).

13. *Mirvish v. Mott*, 75 AD3d at 271.

14. *Mirvish v. Mott*, 18 NY3d at 512.

15. *Id.* at 513.

16. *Id.* The sculpture was on loan for exhibition in France and allegedly sold. However, the sale may have been later rescinded.

17. *Id.*

18. *Id.* at 515.

19. *In re Thomas*, 28 Misc.3d 300 (Surr Ct. Broome County 2010), aff'd by *In re Estate of McLaughlin*, 78 AD3d 1204 (3d Dept. 2010).