

TRUSTS AND ESTATES UPDATE

Expert Analysis

Spring Kick Off: Important Opinions Impacting the Trusts and Estates Field

As the interminable winter has finally come to a close, and spring has thankfully begun to emerge, Surrogate and Appellate Courts have been immersed in significant issues affecting trusts and estates practice. The following decisions are a representative sampling of the many important opinions impacting the field.

Defective Acknowledgment May be Cured by Extrinsic Proof

In *Matter of Koegel*, 2018 NY Slip Op 00833 (2d Dep't 2018), the Appellate Division, Second Department, affirmed an order of the Surrogate's Court, Westchester County (Walsh, Acting Surrogate), which denied the motion by the decedent's surviving spouse to dismiss the executor's petition to invalidate her notice of election and for a declaration that she was not entitled to an elective share. In reaching this result, the

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court addressed the question left unanswered by the Court of Appeals in *Galetta v. Galetta*, 21 NY2d 186, and held that a defective acknowledgment of a prenuptial agreement could be remedied by extrinsic proof by the notary public who took a party's signature.

The record revealed that prior to their marriage, the decedent and his soon to be spouse entered a prenuptial agreement whereby they irrevocably waived and relinquished all rights to an elective or statutory share of the other's estate. Each of the parties signed the agreement, and their signatures were acknowledged by their respective attorneys as notaries. Neither acknowledgment, however, attested to whether the parties were known to the notaries at the time of signing.

Upon the decedent's death, his will, which made substantial

bequests to his surviving spouse, was admitted to probate, and his son was appointed the executor of his estate. Within six months thereafter, the decedent's spouse filed a notice of election pursuant to EPTL 5-1.1-A. In response, the executor petitioned to invalidate the spouse's claim to an elective share alleging, inter alia, that she waived her right of election pursuant to the terms of the prenuptial agreement.

The surviving spouse filed objections, and thereafter, moved to dismiss the petition, contending that the prenuptial agreement was invalid and unenforceable pursuant to *Galetta v. Galetta*, because the acknowledgments omitted language expressly stating that the notaries knew the signers or had ascertained through proof, that the signers were the persons described in the document. In opposition to the motion, the executor, inter alia, submitted affidavits of the attorneys who served as notaries to the agreement, in which they each confirmed that they took the acknowledgments that appeared on the document, and explained that because the

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parties were well known to each of them at the time they signed, identification as to who they were was unnecessary.

The Surrogate's Court denied the motion, and the surviving spouse appealed, arguing that the absence of the requisite language in the acknowledgments rendered the subject prenuptial agreement defective. In support of her position, she pointed to the opinions of the Court of Appeals in *Matisoff v. Dobi*, 90 NY2d 127, and the Second Department, in *D'Elia v. D'Elia*, 14 AD3d 477, which she maintained stood for the proposition that a defective acknowledgment could not be cured at a later point in time. The executor opposed, contending that neither of the cases cited by the spouse held that a technical defect in a contemporaneous acknowledgment could not be cured. Further, he argued that unlike the circumstances sub judice, the notary in *Galetta* did not personally know the party whose acknowledgment he took, had no independent memory of witnessing his signature, and could not categorically swear that he took the requisite steps to identify him.

Upon due consideration, the court found that the circumstances underlying the opinions in *Matisoff* and *D'Elia* were distinguishable from those presented, since the agreements at issue in those matters were not acknowledged at all at the time of execution. Rather, the court determined that the opinion in *Galetta* was more instructive, and observed that the Court of

Appeals withheld judgment as to whether a defective acknowledgment could be remedied, inasmuch as the proof submitted failed to do so. The Appellate Division noted that, in reaching this result, the Court of Appeals opined on the kind of detail that would have been adequate to effect a cure. Relying on this analysis, the Second Department found that the affidavits submitted by the notaries

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were sufficient to cure the defective acknowledgments at issue, and that as such, the Surrogate's Court properly declined to dismiss the petition.

Suspension Ordered Pending Removal

Before the Surrogate's Court, Kings County (Torres, S.), in *In re Allen*, N.Y.L.J., Mar. 8, 2018, at 28 (Sur. Ct. Kings County), was a motion of a co-trustee and beneficiary of the subject trust to suspend her co-trustee for failure to account. The petitioner had previously commenced two proceedings against her co-fiduciary; one, seeking his removal, which remained pending, and the

second, to compel him to account. In response to the latter petition, the court issued a 45-day order directing that an accounting be filed. Although the order was served on the respondent/co-trustee, he failed to account in accordance with the court's directive, provoking the motion seeking his suspension. The assets of the trust estate were comprised of the decedent's residence, and an interest in a limited liability company, which owned a multiple-unit dwelling and income producing property.

In support of her application, the petitioner maintained that the respondent had, inter alia, failed to open a separate trust account, and to file federal or state income tax returns for the trust. Further, the petitioner alleged that the respondent's neglect of the real property held by the LLC caused it to sell for a price far less than two previous offers to purchase the parcel, which her co-fiduciary had rejected.

In opposition to the motion, the respondent filed a separate motion requesting an extension of time to file his account, claiming that he just received the bank statements in order to do so. Although the petitioner did not oppose the requested extension, she nevertheless requested that her co-trustee be suspended on the grounds that his failure to abide by the court's order was indicative of his on-going breach of fiduciary duties and responsibilities.

The court opined that, pursuant to the provisions of SCPA 719(1), a trustee may be removed, without

a hearing, when after having been ordered to account, he fails to do so within the time and manner directed by the court. On this basis, the court found that the respondent's noncompliance with its directive to account constituted grounds for his removal. Indeed, the court concluded that throughout the proceedings, the respondent had impeded the efficient administration of the trust estate, necessitating the court's intervention, most particularly, with respect to the sale of the subject real property.

Accordingly, based on his failure to account as ordered, the court directed that the respondent be suspended as co-trustee, pursuant to SCPA 719(1), pending the hearing and determination of the removal proceeding. Respondent's motion for an extension of time to file his account was granted.

Motion to Vacate Stipulation Of Settlement Denied

In *In re Brody*, N.Y.L.J., Apr. 19, 2018, at 25 (Sur. Ct. Queens County), the Surrogate's Court, Queens County, denied the objectant's motion, in a contested accounting proceeding, to, inter alia, vacate the stipulation of settlement between the parties resolving certain of the disputed issues. Notably, the stipulation was prepared and executed in court after extended negotiations among the parties, and expressly stated that counsel were authorized to enter the agreement on behalf of their respective clients.

In support of the application, the movant alleged that there was no

meeting of the minds between the parties with respect to paragraph four of the agreement regarding distribution of the decedent's estate. In opposition to the motion, the executor contended that there was no basis in law or fact for vacating the stipulation.

In denying the motion, the court observed that stipulations of settlement will not lightly be disregarded, and the party seeking to do so has the burden of establishing good cause sufficient to invalidate a contract. Within this context, the court found that movant's claims essentially sought to invalidate the stipulation on the grounds of mutual mistake. To succeed on this basis, a party must establish by "proof of the highest order," as in *True v. True*, 63 Ad3d 1145 (2d Dep't 2009), that the mistake existed at the time the stipulation was entered and that it was "so substantial that the stipulation failed to represent a true meeting of the minds," as in *Etzion v. Etzion*, 62 AD3d 646 (2d Dep't 2009).

Upon review of the proof, the court concluded that the evidence failed to prima facie establish a mutual mistake at the time the agreement was entered. Moreover, the court held that even if a mutual mistake had been proven, it would not have been so substantial as to warrant vacatur of the entire agreement. Further, the court determined that there was no basis for nullifying the stipulation on the grounds of unilateral mistake, as there was no evidence of fraudulent

misrepresentation, negligence, or the failure to exercise ordinary care in the making of the agreement. Indeed, the court noted that movant's counsel was a seasoned trusts and estates practitioner, whose claims of being duped by opposing counsel were not remotely supported by the record, and were belied by the plain language of the agreement, which was discussed at length. In conclusion, the court found that the subject motion represented nothing more than "buyer's remorse" by the movant, but could serve as no basis for setting aside the stipulation.