

TRUSTS AND ESTATES UPDATE

Expert Analysis

Appellate Courts Weigh In

Despite the many challenges that have been wrought on the court system over the past several months, decisions of interest continue to educate and instruct the estate practitioner. Indeed, while the pandemic has caused much in our lives to come to a grinding halt, opinions impacting the field of trusts and estates abound.

Appellate Division Examines Gift-Giving Under Power of Attorney. In *Goldberg v. Meyers*, 2020 NY Slip Op 01602 (2d Dept. 2020), the Appellate Division reversed an order granting summary judgment to the plaintiff in an action to rescind two deeds. The plaintiff and the defendant were, respectively, the son and daughter of the decedent. In 2006, the decedent executed a durable power of attorney in favor of her daughter for purposes of, inter alia, real estate transactions. Several years thereafter, the decedent's daughter, as attorney-in-fact, transferred her premises in Brooklyn to herself. Thirteen months later, the decedent died. Following the decedent's death, the decedent's daughter transferred the subject premises to herself and her husband as tenants by the entirety.

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An action was subsequently commenced by the decedent's son, as plaintiff, against his sister and her husband, as defendants, to rescind the deeds, and restore the property to the decedent's estate so that it could pass equally to him and his sister. The son moved for summary judgment, and the daughter and her husband cross-moved for judgment dismissing the complaint. The son's motion was granted, the deeds were rescinded as invalid, and an appeal was taken.

In reversing the order and judgment of the court, the Appellate Division observed that “[a]bsent a specific provision in the power of attorney authorizing gifts, an attorney-in-fact, in exercising his or her fiduciary responsibilities to the principal, may not make a gift to himself (or herself) or a third party of the money or property which is the subject of the agency relationship ... Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest chowing of intent

on the part of the principal to make a gift ... Further, gifts of the principal's assets must be in the best interest of the principal ...”

Within this context, the court found that while the plaintiff established his prima facie entitlement to summary judgment by demonstrating, inter alia, that the power of attorney did not contain a statutory gift rider, the affidavits submitted by the defendants in opposition to the motion raised triable issues of fact as to whether the transfer of the premises by the decedent to her daughter was intended by her to take place during her lifetime, and was for her benefit. Moreover, the court held that the defendants' submissions raised a triable issue of fact as to whether the plaintiff's complaint should be barred by the doctrine of laches due to his three year delay in commencing the action after the decedent's death, while the defendants continued to maintain the premises at their own expense.

Stipulation of Settlement Warrants Dismissal of Proceeding. Before the Appellate Division, Second Department in *In re Rothman*, 2020 App. Div. LEXIS 2745 (2d Dept. 2020), was an appeal from an order of the Surrogate's Court, Nassau County, dismissing a proceeding by the decedent's children seeking, inter alia, the removal of the fiduciary pursuant to SCPA 711, and denying a

motion by the children for summary judgment on the petition.

The decedent died survived by her husband and two children of her prior marriage. Several months after the admission of the decedent's will to probate and the issuance of letters testamentary to her husband, as executor, a stipulation of settlement pertaining to the estate's administration was entered between the executor and the decedent's children regarding distribution of various items of the decedent's personal property and certain provisions of her will. The stipulation further provided, in relevant part, that "no claim or action would be brought by any party for the purpose of invalidating or otherwise undermining the agreement", and that the decedent's children would not file any claim against the fiduciary (a physician) concerning the care of the decedent, and waived any claim for malpractice on behalf of the decedent or themselves as distributees of her estate.

Thereafter, the decedent's children instituted a proceeding for removal of the executor pursuant to SCPA 711. The executor moved to dismiss the proceeding pursuant to, inter alia, CPLR 3211(a)(5), and the decedent's children cross-moved for summary relief. The Surrogate's Court granted the motion to dismiss and denied the cross-motion, and the decedent's children appealed.

In affirming the Surrogate's order, the court found that pursuant to the terms of the stipulation, the appellants had agreed to refrain from asserting the very allegations they set forth in the petition as a basis for removal. Since the appellants had failed to proffer any grounds for setting aside the stipulation, such as fraud, collusion, mistake or accident, dismissal of the petition pursuant to CPLR 3211(a)(5) was warranted. For

the same reasons, the court agreed with the determination of the Surrogate's Court denying the appellant's cross-motion, concluding that they had failed to establish prima facie their entitlement to judgment as a matter of law granting their petition for removal.

Joint Representation and the Attorney-Client Privilege Examined. In *Feighan v. Feighan*, 2020 N.Y. App. Div. LEXIS 1223 (2d Dept. 2020), the Appellate Division modified an order of the Supreme Court, Dutchess County, to the extent it authorized the issuance of a subpoena to counsel for the plaintiff and the defendant demanding the production of a 2016 Revocable Trust

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executed by the defendant, and otherwise affirmed the order directing the production of counsel's complete file regarding a 2013 Revocable Trust.

The parties had retained counsel in 2013 in order to prepare certain estate planning documents for them, including the subject 2013 Revocable Trust created by the defendant. In 2016, prior to the commencement of a divorce action by the plaintiff against the defendant, the defendant executed a 2016 revocable trust with counsel, which was funded by assets previously held by his 2013 revocable trust. Thereafter, during the action for divorce, the Supreme Court granted

plaintiff's motion for the issuance of a subpoena to counsel for copies of his complete file pertaining to both the 2013 and 2016 trusts, and the defendant appealed.

In modifying the order of the Supreme Court, the Appellate Division iterated the general rule that when an attorney represents two or more parties with respect to the same matter, the attorney-client privilege may not be invoked to protect confidential communications concerning the joint matter in subsequent adverse proceedings between the clients. In view thereof, the court held that the estate planning documents of the parties, including the 2013 revocable trusts, constituted a joint representation with respect to the same matter, precluding the attorney-client privilege from being invoked with respect to confidential communications between them with regard to that trust.

On the other hand, the court found that, contrary to the Supreme Court's determination, the attorney-client privilege could be invoked to protect confidential communications concerning counsel's representation of the defendant in connection with the 2016 revocable trust. To this extent, the court noted that counsel's representation of the plaintiff ended in 2013, and the services provided to the defendant in 2016 did not constitute the same matter as the services provided to the parties in 2013.