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## TRUSTS AND ESTATES UPDATE

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### *Lessons Learned From the 'Estate of Generosa Ammon'*

In the course of our careers as estate practitioners, only a handful of cases take us down that road that includes interesting "characters" and unique twists and turns in the legal maze. Indeed, while some estates provide us with memorable clients or, alternatively, complex problems or issues of first impression, few provide that rare combination of intrigue, novelty and complexity. In fact, when considering within this context the multitude of estates that have been discussed and published over the course of the past one and a half years, particularly in the experience of the undersigned, only one comes to mind, the *Estate of Generosa Ammon*.

With the court's several front-page decisions over the past 10 months, and the media blitz of Newsday and the New York Post since the death of Ted Ammon, the estate provides an instructional glimpse into the former world of the rich and infamous.

#### Facts

Generosa Ammon died on Aug. 22, 2003, survived by a spouse, Daniel Pelosi, and two infant children, Gregory and Alexa. Her estate, at death, was valued at approximately \$48 million and was derived, in significant part, from the estate of her former spouse, Ted. Ted Ammon was found murdered in his East Hampton home in October 2001.

Generosa's will dated July 2, 2003 and the codicil dated July 22, 2003, which have yet to be probated provided, in pertinent part, for preresiduary bequests and devises in excess of \$8 million and divided the residue of her estate between her children and the Ammon Foundation. The decedent nominated the attorney-draftsman of the instrument, Gerard Sweeney, and a second attorney, Michael Dowd, as the executors and trustees of her estate. Mr. Sweeney and Mr. Dowd were also named by the decedent as trustees of the Ammon Foundation.

The decedent made no provision in either



the propounded will or codicil for her husband, Daniel Pelosi, whom she had married three months after the death of her husband, Ted, and from whom she was separated at the time of her death. Indeed, although Generosa had generously provided, by way of testamentary and inter vivos gifts, for Daniel Pelosi at the inception of her marital relationship with him, over the ensuing 18 months until her death, her wills and codicils, which were eight in number, reduced what was initially an outright disposition to him of 100 percent of the estate, to an interest of one-third outright and one-third in trust, to zero.

On the date the propounded will was executed, the decedent executed a postnuptial agreement with Mr. Pelosi which essentially provided that he receive \$2 million and the parties' home in Center Moriches, N.Y., in consideration for which he waived his intestate and elective share of her estate and the right to contest her will. Nevertheless, the agreement did not disenfranchise Mr. Pelosi from any testamentary provisions made for his benefit under any of the decedent's prior wills.

Thus, the stage was set for a hotly contested proceeding following Generosa's death surrounding the validity of the postnuptial agreement.

In addition, battles waged over guardianship of the decedent's two children, between the court-appointed guardian of their person and property, Kathryn Mayne and the decedent's sister-in-law, Sandy Williams. Significantly, in anticipation of this litigation, the decedent, by codicil dated July 22, 2003 directed her executors to utilize all funds of her estate

necessary to ensure that Ms. Mayne remain as her children's guardian after her death.

Within this backdrop, litigation in the *Estate of Generosa Ammon* has been the rule rather than the exception, resulting in the following decisions of interest from the Surrogate of Suffolk County, Judge John M. Czygier.

#### Striking Affirmative Defenses

**The Decision/Order of March 9, 2004 Striking Affirmative Defenses and Denying Summary Judgment.** Within days following the decedent's death, a petition was filed requesting probate of the decedent's will and codicil, dated July 2, 2003 and July 22, 2003, respectively. The petition indicated that the decedent's surviving spouse, Mr. Pelosi, had no interest in her estate based upon the terms of the postnuptial agreement, dated July 2, 2003.

Shortly after the return date of citation, the respondent, Mr. Pelosi, filed an answer alleging that the postnuptial agreement was invalid on the basis of fraud, duress, coercion, fraudulent misrepresentation and the decedent's incapacity. The petitioners, Mr. Sweeney and Mr. Dowd, moved to dismiss the answer and for summary judgment declaring the validity of the postnuptial agreement. The respondent opposed the motion and moved to amend his answer pursuant to CPLR 3025(b) in order to avoid dismissal on the grounds that his answer lacked specificity.

The record revealed that the subject postnuptial agreement was negotiated over a period of five months prior to it being executed and that both the decedent and respondent were represented by separate counsel. Each party's signature on the document was witnessed and notarized. Moreover, the consideration required by the terms of the postnuptial agreement had been conveyed simultaneously with or shortly after its execution.

Respondent, however, alleged that he never knew or understood that by signing the agreement he was waiving any rights he might have had in the decedent's estate. Respondent also claimed that he was repeatedly advised by both petitioners that if he did not sign the agreement the executor of Mr. Ammon's estate would not make a distribution of funds to the

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decendent's estate, and his ability to hire effective counsel, in the event he was indicted for the death of Mr. Ammon, would be hampered. Indeed, during the course of the negotiations, it appeared that both the decedent and the respondent were the subject of a criminal investigation and that they were jointly represented by a legal team that included the petitioner, Mr. Dowd. Mr. Dowd, however, maintained and continues to maintain that his role throughout the criminal investigation and defense effort was always that of counsel for the decedent and at no time did he represent the respondent.

Based upon the foregoing, the court denied the petitioners' motion for summary relief, struck three of the six affirmative defenses contained in respondent's answer and granted respondent leave to amend his pleadings as to the claims of fraud and fraudulent representation by Mr. Dowd.

### Court's Holding

The decision of the court is instructive. As to respondent's claim of the decedent's incapacity on the date of the postnuptial agreement, the court said that contracts of a person of unsound mind, who has not been declared incompetent, are voidable at the election of the incompetent or his duly authorized representative. So, the court held that respondent had no standing to contest the postnuptial agreement on the basis of the decedent's capacity.

With regard to respondent's contentions that he did not understand the import of the agreement he signed, the court referred to the prevailing law, which assumes that one who is capable of reading, has read and understood the document he has executed. In this regard, the court also noted that circumstances in which a party has the opportunity to examine an agreement before signing it may preclude a later assertion that he was induced to execute the document by another's misstatements.

Insofar as respondent's claims of duress and coercion were concerned, the court said that representation of the parties by counsel of their choosing tends to negate an allegation of duress in the making of an agreement. Given the fact that respondent admitted that he had his own counsel for purposes of negotiating and executing the postnuptial agreement and that the alleged threats were purportedly related to the actions of third parties, that is, the executor of Mr. Ammon's estate, over which the petitioners had no control, the court determined that the respondent's answer failed to state a cause of action for duress and coercion.

However, with regard to respondent's claims of fraud and fraudulent representation, the court found differently. Noting that one of the elements for causes of action sounding in fraud is justifiable reliance, the court was troubled by respondent's contentions respecting the role of Mr. Dowd during the period in question.

Accordingly, the court authorized the parties to pursue discovery with regard to the limited issue of Mr. Dowd's representation of respondent as it related to the claims of fraud

with respect to the postnuptial agreement and granted the respondent leave to amend his pleadings to that extent.

**The Decision/Order of Sept. 3, 2004 Denying Respondent's Motion for a Stay and Denying Petitioners' Motion for Summary Judgment.** Following the court's decision and order of March 9, 2004, discovery was pursued and included the examination before trial of the respondent. Given the pendency of the criminal action against him at the time, the respondent asserted his privilege against self-incrimination as to essentially every question posed to him. As a result, petitioners renewed their motion for dismissal of respondent's answer and summary relief, and respondent moved for a stay of all discovery pending the outcome of the criminal proceeding, arguing that the criminal case against him prevented him from fully testifying in the civil matter in support of his position.

The court's decision denying both the petitioners' and the respondent's motion is significant for its analysis of the interplay between a party's right to assert his Fifth Amendment rights in the context of a civil proceeding in which he has the burden of proof.

The court recognized that a party in a civil action may invoke his Fifth Amendment privilege against self-incrimination where he reasonably believes that his testimony could be used against him in a criminal matter, but the assertion of this privilege does not relieve the party from "adducing proof in support of a burden which would otherwise have been his." As such, despite respondent's refusal to testify in support of his claims, the court found that he had a continuing obligation to move forward with his causes of action for fraud and misrepresentation.

Moreover, the court noted that while it had broad discretion to stay the civil proceeding pursuant to CPLR 2201, the exercise of such discretion required balancing the possibility of inconsistent adjudications, applications of proof and the potential waste of judicial resources against the interest of the court and the parties in the expeditious resolution of the civil proceeding.

Applying this criteria to the circumstances, the court determined that the outcome of the criminal proceeding against the respondent would not necessarily have a collateral estoppel effect on the pending civil proceeding or obviate the need for the court to determine the respondent's spousal rights. In addition, the court noted that despite attempts to do so, there was no way to determine when the criminal proceeding would conclude or when the appellate adjudication of the action, should it be resorted to, would be finalized.

So, the court directed the matter to proceed forward with the conclusion of discovery, holding that respondent should be afforded the opportunity to complete discovery and satisfy his burden of proof despite the absence of his own testimony. Summary judgment in petitioners' favor was, therefore, denied.

**The Decision/Order of March 10, 2004 in the Guardianship Proceeding.** During the

pendency of the foregoing litigation, the *Estate of Generosa Ammon*, and more particularly, the guardian of the person and property of the decedent's two children, found herself embroiled in court proceedings regarding her continuing role in that capacity.

The guardian, Kathryn ("Kaye") Mayne, had been appointed standby guardian of the infants during the decedent's lifetime and, upon her death, was issued letters of guardianship by the court. Additionally, Ms. Mayne had been named guardian of the person and property of the children in the decedent's will.

Subsequently, the children's paternal aunt and her husband petitioned for guardianship, seeking the revocation of Ms. Mayne's appointment.

The court's decision denying Ms. Mayne's motion to dismiss the petition is instructive for its examination of the effect of a parent's testamentary or lifetime selection of a guardian upon the court's duty to safeguard the best interests of the child.

Significantly, the court said that while a lifetime appointment of a child's guardian by the parent is not to be discounted, and that, in fact, the purpose of the provisions of the Surrogate's Court Procedure Act (SCPA) dealing with standby guardianship is to facilitate and insure that a parent's wishes for the guardianship of her child are fulfilled, that appointment does not vitiate the court's overriding responsibility to protect the welfare of the child and, perhaps, even to modify or revoke an appointment of a guardian where the circumstances warrant.

The court reasoned:

The court's concern ... for the welfare of children addressed to its care should always allow for consideration of any potential for a disruption in the child's well-being or a change in the circumstances rendering a prior appointment inappropriate. If the court is empowered to revoke the letters issued to a fiduciary (executor or administrator) where the proper showing is made under Article 7 of the SCPA at any time after his or her appointment, how much more appropriate is it to consider the application of a family member for guardianship of a minor child where both parents are deceased.

### Parent's Choice

Accordingly, the court set the matter down for a hearing. Nevertheless, the court held that a strong statutory presumption existed in favor of the parent's lifetime choice of guardian for her children and that the petitioners would have to overcome this presumption in order to prevail.

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