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TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

Supreme Court, Civil Court Opinions on Relevant Issues

While we, as trusts and estates practitioners, most often turn to Surrogate's Court opinions for useful instruction regarding the procedural and substantive aspects of our field, valuable practical tools can also be garnered from an examination of decisions rendered by other judicial tribunals.

Indeed, while the Surrogate's Court possesses the expertise and skill requisite to disposing of matters relative to a decedent's estate, within the past several months both the Supreme Court and Civil Court have considered and given opinions on issues relevant to Surrogate's Court practice.

This column is devoted to a review of those decisions.

Absence of Retainer

• ***Recovery of Fees Allowed Despite Absence of Retainer.*** In an action to recover for legal services rendered, the defendant moved for summary judgment dismissing the action, together with attorney's fees, costs and sanctions. The record revealed that plaintiff sued defendant for fees amounting to $4,000. Although plaintiff and defendant had not entered into a written retainer agreement or written letter of engagement for the services rendered, plaintiff alleged that he had informed defendant that his billing rate was $250 per hour, and that defendant had agreed to pay said sum for work performed. Defendant denied that he had made any such agreement.

In addressing the issue of plaintiff's entitlement to fees, the court considered the provisions of 22 New York Codes, Rules and Regulations (NYCRR) 1215.1, which require an attorney who undertakes to represent a client and who enters into an arrangement for, or who charges or collects a fee from a client to provide to the client a written letter of engagement or a written retainer agreement. Plaintiff conceded that he did not provide defendant with a written retainer agreement or written letter of engagement and offered no excuse for his noncompliance. In view thereof, the court held that plaintiff was not entitled to fees on a quantum meruit basis.

Nevertheless, citing the provisions of 22 NYCRR 1215.2, plaintiff argued that the circumstances fell within the exception to the rule requiring a retainer in that at the time he commenced performing services on the defendant's behalf, he did not anticipate that his fees would exceed $3,000. Despite these contentions, defendant persisted in his claims that he had never had a conversation with plaintiff regarding the payment of fees for legal services rendered.

Based upon the conflicting allegations, the court held that factual issues existed pertaining to such matters as to whether plaintiff and defendant had ever had a conversation regarding fees, and whether plaintiff's expectation that the fee to be charged would not exceed $3,000 was reasonable.

Accordingly, defendant's motion for summary relief, as well as for fees, costs and sanctions was denied.

Nadelman v. Goldman, **New York Law Journal, May 12, 2005, p. 19 (Civil Ct., N.Y. Co.) (Judge Oing)**

Post-Nuptial Agreement

Post-Nuptial Agreement Held Invalid Under New York Law. In a matrimonial action, defendant wife sought to enforce the terms of a postnuptial agreement she had entered with the plaintiff husband. The agreement was executed in the State of Florida, although the certificate of acknowledgment revealed that it was made before a New York notary. The plaintiff opposed the application claiming that the agreement was invalid and unenforceable on the grounds that it was not acknowledged or proved in a manner required to entitle a deed to be recorded.

Ilene Sherwyn Cooper *is a partner with Farrell Fritz in Uniondale, N.Y. In addition, she is the chairwoman of the New York State Bar Association's Committee on Estate and Trust Administration.*

In denying the defendant's application, the court relied upon the opinion by the Court of Appeals in *Matisoff v. Dobi*, 90 NY2d 127 (1997), which applied a bright-line rule requiring marital agreements to be acknowledged in the manner required to entitle a deed to be recorded, regardless of the circumstances.

Because the acknowledgment at issue was taken by a New York notary in the state of Florida, the court concluded that it could only be made before a notary qualified in the state of Florida, or a commissioner of deeds appointed in New York State to take acknowledgments outside the state. No evidence of compliance by the notary with these requirements was presented to the court. Absent such proof, the court held that a notary public qualified in New York State is only empowered to receive and certify acknowledgments within and throughout New York State. As such, the court held the acknowledgment by the New York notary in the state of Florida was ineffective.

Accordingly, because the subject agreement was never properly acknowledged, the court concluded that it was invalid and unenforceable. Significantly, the court reached this result despite proof that the parties had complied with the terms of the agreement for a period of eight years, concluding that the decision by the Court of Appeals in *Matisoff,* supra., required strict compliance. Additionally, the court rejected defendant's argument that the agreement was a binding stipulation enforceable pursuant to CPLR 2104, holding that it had been entered prior to the commencement of the action and not in settlement of an existing action.

***Kudrow v. Kudrow,* NYLJ, March 8, 2005, p. 20 (Supreme Ct., Kings Cty.) (Justice Krauss)**

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• ***Sanctions for Intentional Disclosure of Videotaped Deposition Ordered.*** In a case for wrongful discharge, defendants moved for a protective order and sanctions against plaintiff's counsel, on the grounds that they intentionally turned over to the media the videotape deposition of defendant's president and chief executive officer, with the intent of harassing and injuring defendants.

In granting defendants application, the court held that examinations before trial are not sittings of courts which are required to be open to the public. Instead, the court stated, depositions are private matters between the parties designed to assist them in their search for issues relevant to trial. Hence, the court found that, while the media may play an important role in disseminating information to the public, it is a role which must be limited during the pretrial stage of discovery. See Disciplinary Rules (DR) 7-107 establishing the parameters for attorneys relative to trial publicity. This was particularly so in the case sub judice, where the parties did not request that the media be present at the subject deposition.

The court said exercise of a statutory right of election is personal to a surviving spouse. When an elective share is sought by someone else, the service and recording of the notice must be authorized by the guardianship court.

Accordingly, the court ordered that all discovery and depositions held in the matter were to be confidential, and were not to be disseminated to the press or any other persons with the exception of the attorneys and the court.

With respect to the request for sanctions and costs, the court found that the actions taken by plaintiff's counsel were deliberate and calculated to harass the defendants, and were in violation of the provisions of DR 7-107. Plaintiff's counsel had admitted, with no justification, to soliciting and turning over the videotaped deposition to the media. In view thereof, the court ordered that plaintiff's counsel be sanctioned with the costs associated with the application, including but not limited to defendants' attorney's fees, and that they pay $7,500 to the Lawyer's Fund for Client Protection.

***Seaman v. Wyckoff Heights Medical Center Inc.*, NYLJ, April 12, 2005, p. 19 (Supreme Court, Nassau Cty.) (Justice Davis)**

Incapacitated Person

Guardian's Application to Elect on Behalf of Incapacitated Person Denied. At issue before the court was whether the guardian's application for authority to file a notice of election on behalf of the incapacitated person was rendered moot by reason of her death.

The record revealed that the guardian had served a notice of election upon the executors of the decedent's estate, but that the Surrogate's Court had rejected its filing without an order of the Supreme Court authorizing the guardian to exercise the right. Consequently, the guardian moved by order to show cause in the Supreme Court for said authority, however, one day before the order to show cause was signed, the incapacitated person died.

The court said that the exercise of a statutory right of election is personal to a surviving spouse. As such, where the exercise of an elective share is sought by someone other than the spouse, as, for example, in the case where a guardian seeks to do so on behalf of an incapacitated spouse, the service, filing and recording of the notice of election, must be accompanied by an authorization from the guardianship court.

Inasmuch as this authorization was not obtained prior to the death of the incapacitated spouse, the application by the guardian was denied.

***Matter of Rivera,* NYLJ, June 2, 2005, p. 18 (Supreme Court, New York Cty.) (Justice Suarez)**