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TRUSTS AND ESTATES UPDATE

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A Wintry Mix

As the year 2005 drew to a close, and the cold, dark days of winter, with its combination of sun, clouds, snow, sleet and rain set in, the Surrogate's Courts throughout the metropolitan area also found themselves confronted with a mixture of concerns addressed to such issues as disqualification of counsel, revocation of letters, recovery of assets and the attorney-client privilege.

Disqualification of Counsel

In a contested proceeding by the Article 17-A coguardian, mother of the incapacitated child, to revoke the letters of coguardianship issued to the child's father, the respondent moved to disqualify petitioner's counsel, on the grounds that he had represented him and the petitioner in the original guardianship proceeding, and therefore had a conflict of interest.

Petitioner's counsel opposed the application contending that he had a long-standing relationship with the petitioner for over 20 years, and that during that time he never had any business dealing with the respondent. Moreover, insofar as his representation during the original guardianship proceeding was concerned, counsel stated the respondent only served as an "accommodation party" in the proceeding and as such was not his principal client.

The court gave the opinion that a party seeking disqualification of counsel under Disciplinary Rules (DR) 5-108(a)(1) and 22 New York Codes, Rules and Regulations (NYCRR) 1200.27(a)(1) must prove:

- (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel;
- (2) that the matters involved in both representations are substantially related; and
- (3) that the interests of the present client and [the] former client are materially adverse.

Applying this criteria to the facts of the revocation proceeding, the court concluded that the respondent had established the necessary elements to disqualify petitioner's counsel.

Accordingly, the respondent's application was granted.

In re Estate of Larizza, New York Law Journal, Nov. 17, 2005, p. 34 (Surrogate's Ct., Westchester Co.) (Surrogate Scarpino)

Recovery of Assets

• *Recovery of Assets From Home Health Care Aide Awarded.* In a proceeding pursuant to Surrogate's Court Procedure Act (SCPA) 2103, the fiduciaries and the residuary beneficiary of the companion estates of husband and wife, sought a turnover of almost \$1 million allegedly converted by the decedent's home health care aide. The respondent claimed

that the monies in issue were either: (1) used for the decedents' benefit; (2) gifts; and/or (3) salary.

The principal issue before the court was whether the asset transfers in issue were procured by the undue influence of the respondent. At the trial, the testimony revealed that the decedents' declining health and social isolation caused them to be wholly dependent on the respondent. Witnesses recalled that the couple suffered from poor memory, lethargy, repetitiveness in their conversation, which was often abbreviated, and periods of withdrawal. Some testified that they transformed from being well-groomed and coiffed, to slovenly and fetid.

Based on this record, the court concluded that by 1996, the couple lacked the capacity to handle or even monitor their financial affairs. Under such circumstances, any transactions between them and their caregiver were subject to strict scrutiny, with the burden upon the caregiver to prove the absence of an abuse of confidence or influence.

Upon consideration of the proof, the court held that the respondent had failed to sustain her burden of establishing that the transfers of assets between the decedents and the respondent were voluntary and were either the result of gifts or the couples' increased expenses or changes in recordkeeping.

With regard to respondent's claim that a portion of the funds constituted salary, the court found, on the basis of quantum meruit, that the respondent was entitled to compensation based on four hours of work a day, seven days a week, at the rate of \$7 per hour.

Accordingly, the court found that respondent had converted approximately \$956,000 from the decedents' estates and awarded that sum to the petitioner,

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together with interest at the statutory rate.

In re Estate of Fischer, NYLJ, Dec. 8, 2005, p. 31 (Surrogate's Court, N.Y. Co.) (Surrogate Preminger)

Suspension of Letters

• *Suspension of Letters Ordered During Pendency of Removal Proceeding.* In *In re Estate of Liebert*, the court recognized the propriety of suspending a trustee's letters pending the hearing on revocation where the circumstances demonstrated the immediate need for the appointment of an independent fiduciary.

Before the court was an application by an elderly income beneficiary of the residuary trust created under the decedent's will for revocation of her cotrustee's letters of trusteeship, and for disqualification of the cotrustee's mother as successor trustee, on the grounds, inter alia, that he had failed to distribute to her the accrued income from the trust since the decedent's date of death, as well as the principal thereof in accordance with the power granted to her under the terms of the decedent's will. The record revealed that the petitioner was 96 years of age and the primary object of the decedent's bounty, and that while the decedent's estate was almost \$1 million, the petitioner had not received any distributions therefrom until she commenced the proceeding.

In concluding that the respondent cotrustee's letters should be suspended and that an independent fiduciary should be appointed to serve, despite the provisions in the decedent's will as to a successor, the court expressed serious concerns regarding the respondent cotrustee's inherent conflict of interest as a remainderman of the trust, saying that it might color his judgment to deal impartially with the income beneficiary as evidenced by the respondent's propensity to litigate questionable positions that, in theory, preserved the trust remainder at the income beneficiary's expense.

In view thereof, the court said that the income beneficiary, given her age and poor health, could not afford to contend with further delays and disputes with the respondent, and that, as such, an independent fiduciary should be appointed pending the hearing as to revocation. Accordingly, the court, in its discretion, suspended the letters of trusteeship issued to respondent pending a hearing on his fitness to serve (see SCPA 711, 713, 719). In addition, the court refused to appoint the first successor

trustee named in the will, who was the respondent's mother, as his successor, based, inter alia, upon her behavior in the courtroom. Instead the second alternate successor trustee named in the will was appointed during the pendency of the proceeding.

In re Estate of Liebert, NYLJ, Nov. 18, 2005, p. 30 (Surrogate's Court, N.Y. Co.) (Surrogate Roth)

Attorney-Client Privilege

In a contested discovery proceeding to recover a parcel of real property as an estate asset, the respondent moved for summary judgment.

In support of the motion, the respondent submitted her own affidavit, the deed effectuating the transfer, and the deposition of the attorney who represented the decedent with regard to the conveyance. Respondent stated that she and the decedent had lived together for six years, and that during that time he conveyed the real property to himself and to her as "joint tenants" for "valuable consideration." The deed was subsequently recorded.

The attorney-draftsperson of the deed testified that the decedent had approached her about placing the respondent's name on the deed and that she had fully explained to him the implications of a joint tenancy. Thereafter, the attorney stated that she prepared a deed in accordance with the decedent's instructions and that he came to the office and executed it.

In opposition to the motion, the petitioner submitted the affidavits of the decedent's former wife and of his daughter, who stated that the decedent had told them prior to his death that he owned the property and that he was not happy with the respondent. Petitioner also cited excerpts from the attorney's deposition transcript, and maintained that the respondent could not waive the attorney-client privilege and offer communications that the decedent had with his attorney against the decedent's estate.

In regard to the estate's claim of privilege, the court said that a waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue or where the invasion of the privilege is required to determine the validity of the client's claim or defense, or application of the privilege would deprive an adversary of vital information.

Based upon the foregoing, the court held

that the petitioner could not simultaneously challenge the deed and yet seek to withhold the pivotal communications made between the decedent and his attorney on the subject. Under such circumstances, the court said that the privilege was impliedly waived by the estate as such communications were central to the issue at hand.

Accordingly, considering the testimony of the attorney and upon all the other evidence presented, the court held that the petitioner failed to raise any issue of fact as to the validity of the deed, and that respondent was entitled to summary judgment dismissing the proceeding.

In re Estate of Puckett, NYLJ, Oct. 13, 2005, p. 20 (Surrogate's Court, Nassau Co.) (Surrogate Riordan)

Pending Legislation

• *Family Health Care Decisions Act.* Pending before the Legislature is an act to amend the public health law in relation to establishing procedures for making medical treatment decisions on behalf of persons who lack the capacity to decide about treatment for themselves. This act, known as the Family Health Care Decisions Act, would enable family members and other persons close to the patient to decide about treatment for incapacitated persons who have not signed a health care proxy or left specific oral or written treatment instructions. No order of priority is proposed by the legislation as to the class of people who have decision-making authority for the patient, once incapacity of the patient to decide for himself or herself is determined. In the event of a dispute between family members as to a course of treatment, the hospital or nursing home where the patient is located is authorized to mediate the controversy. In cases where the decision-maker makes a decision as to life-sustaining treatment and the patient's attending physician objects, the physician must comply with the instructions given until such time, if at all, the hospital's or nursing home's ethics review committee reverses the decision or the patient is moved to another facility.

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