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## TRUSTS AND ESTATES UPDATE

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### *A Gift in Time*

Over the course of time, wealth transfer through gift-giving has been an integral part of cultural growth and development. Equally, and perhaps logically true, it has played an important role in estate planning, charitable philanthropy and family relations. However, while the purpose of gifting is generally well-intended, there are sometimes aberrations resulting from the ill-begotten motives of those who apparently have more than just the charitable ends of the donor in mind. Indeed, these are the circumstances that often make gift-giving transactions the subject of judicial decisions and legal commentary. This month's article explores recent opinions addressed to the validity of gifts, and the criteria utilized by the courts in assessing whether a gratuitous transfer was intended by the donor.

#### Conveyance Voided

In an action commenced in Supreme Court, the executrix of the decedent's estate sought to recover assets, including but not limited to a parcel of real property, that was allegedly withheld, misused or conveyed by the decedent's son, in his capacity as the decedent's attorney-in-fact.

The defendant alleged that he had transferred the assets in question for estate planning purposes in order to preserve his mother's assets from Medicaid. He maintained that he merged the decedent's assets with his own for convenience, but that he utilized the monies and the income for his mother's benefit during her lifetime.

Nevertheless, after the decedent's death, the defendant retained the assets for himself. Moreover, he admitted that he transferred the realty in the exercise of his own judgment, and not with the knowledge or direction of his mother, who was suffering from Alzheimer's disease. Additionally, the defendant testified that he made the transfers to himself, despite his awareness that his mother's



will had equally divided her estate between her two children. Indeed, he admitted that when he had asked his mother to change her will she became upset with him.

The court opined that an attorney-in-fact has the duty to act in good faith towards his principal in accordance with principles of loyalty and fair dealing. Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property entrusted to his charge which is the subject of the agency relationship. In the event such a gift is made, a presumption of impropriety is created, which can only be rebutted with a clear showing that the principal intended to make the gift.

Based upon these principles, the court concluded that the defendant's explanation, that he merged his mother's assets with his own for convenience, was insufficient to rebut the presumption of impropriety. The court found that there was no necessity for the defendant to put his mother's assets in his own name in order to pay her expenses, when he could do so as her attorney-in-fact.

Moreover, the court held that there was nothing in the record, apart from the defendant's self-serving statements, which indicated that the decedent intended to make a gift of all of her property to the defendant, or that she was even competent at the time the transfers were made in order to make such a decision.

Consequently, the court determined that the defendant's conduct, in making the transfers of real and personal property to himself, amounted to a breach of duty and self-dealing in contravention to the decedent's desires, expressed in her will, that

her assets be divided equally between her children, and directed that the funds and property be restored to the plaintiff, estate.

*Musacchio v. Romagnoli*, New York Law Journal, June 16, 2006, p. 25 (Sup. Ct., Westchester County) (Justice Colabella)

#### Best Interest Requirement

In *Matter of Estate of Ferrara*, the Court of Appeals held that an agent acting under a statutory short form power of attorney with augmented gift-giving powers must make gifts pursuant to these powers in the principal's best interests.

The circumstances of the case revealed that the decedent, while a resident of Florida, executed a will and codicil that left his entire estate to The Salvation Army, and named his attorney as the executor. The decedent had no children, and his closest living relatives were his brother, and a sister and their respective children.

Several months after executing his will and codicil, the decedent was hospitalized. According to his nephew, the decedent informed him that he wanted to move to New York to be near his family, and requested that he obtain a power of attorney for his signature so that he could tend to his affairs. These Florida powers of attorney authorized the decedent's brother and nephew to tend to his financial affairs.

One month later, the decedent's nephew traveled with him to New York, and brought with him the contents of the decedent's safe deposit box. These contents did not contain the decedent's will, and according to the nephew, the decedent never mentioned a will to him. In New York, the decedent was admitted to an assisted living facility, where he signed and initialed a Durable Power of Attorney, New York statutory form, in favor of his brother and nephew. In particular part, this instrument authorized the agents to make gifts to the principal's spouse, children and more remote descendants not exceeding the sum of \$10,000. In addition, annexed to the form was a typed instrument which stated that the attorneys-in-fact therein named were authorized to make gifts without limitation in amount to themselves.

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According to the decedent's nephew, the purpose of this addendum was to authorize him to make unlimited gifts to himself in furtherance of the decedent's wishes to provide him with the entirety of his estate to do with as he pleased. There was no note or memorandum to memorialize these statements by the decedent, which had only once been made in the presence of the nephew's wife. Moreover, the power of attorney was notarized by an attorney with whom the nephew and his wife were acquainted. This attorney testified that she was only acting as a notary, and not as anyone's attorney, on the date the instrument was signed, and that while the decedent's nephew had explained the instrument to him, she never heard the word gift mentioned.

Several weeks after the power of attorney was executed, the decedent's son transferred approximately \$820,000 in assets to himself. Thereafter the decedent died. The Salvation Army subsequently commenced a discovery proceeding in the Surrogate's Court against the decedent's nephew and others, requesting a turnover of the decedent's assets. Upon the completion of discovery in the matter, the Surrogate dismissed the petition, finding that the decedent was competent to execute the power of attorney and that it had been properly signed and notarized.

Moreover, the Surrogate held that a change in the law after Jan. 1, 1997, eliminated the presumption of impropriety that attaches when an agent makes a gift to himself, and that as such, The Salvation Army had the burden of proving the invalidity of the subject transfers of funds from the decedent's nephew to himself. In reaching this result, the court further noted that while the law required an agent to demonstrate that gifts of \$10,000 or less were in the principal's best interest, no such requirement existed for gifts in excess of \$10,000. In view thereof, and based upon the record, the court concluded that The Salvation Army had failed to demonstrate the invalidity of the transfers. The Appellate Division affirmed.

The Court of Appeals reversed the order of the Appellate Division and found that whether the gift-giving power in a statutory short form power of attorney is limited to the authority spelled out in the form or augmented by additional language in conformity with the statute, the attorney-in-fact must act in the decedent's best interests when making gifts.

The Court predicated its result on both the legislative history of the statute, as well as the fiduciary duties imposed upon an attorney-in-fact, which require undivided loyalty and fair dealing.

Consequently, the Court concluded that the decedent's nephew clearly did not make gifts to himself that were in the decedent's best interests, i.e., for financial, estate or tax planning reasons of the principal. Rather, the evidence established that he only made the transfers in question in furtherance of the decedent's alleged desire to give him all of his assets to do with as he pleased. The term "best

interest" stated the Court does not include such "unqualified generosity" to the holder of the power especially where the gift transactions virtually impoverishes a donor whose estate plan contradicts any desire to benefit the recipient of the gift.

**Matter of Estate of Ferrara, NYLJ, June 30, 2006, p. 23 (N.Y. Ct. App.)**

## Claims of Undue Influence

In a contested proceeding for the appointment of an Article 81 guardian, the issue before the court was, inter alia, the validity of a conveyance of the AIP's home to her son, a cross-petitioner for guardianship, and his son's wife, subject to a life estate. The petitioner maintained that the conveyance took place at a time when the AIP lacked capacity, and that it was the product of undue influence.

The court held that while, in the ordinary case, the burden of proving undue influence is on the party asserting it, if a confidential relationship exists, the burden shifts to the beneficiary of the transaction to establish by clear and convincing evidence that the transaction was fair and freely made. Nevertheless, the existence of a close family relationship does not, in itself, create a presumption of undue influence, nor could such a presumption be found despite the AIP's dependence upon her son and his wife due to her declining health. Indeed, the court concluded that the proof established by clear and convincing evidence that the AIP had desired to give her home to her son, and that the subject conveyance was the result of gratitude for the care he had and would be continuing to provide for her, rather than undue influence.

As to the issue of the AIP's capacity at the time of the transfer, the court opined that persons suffering from a disease are not presumed to be wholly incompetent, but rather, are presumed competent until the contrary is shown. To this extent, the court found persuasive the testimony of the AIP's treating physician, who stated that the AIP was able to understand the nature of the transaction, despite her mental frailties, and that she was lucid at the time of the execution of the deed.

In contrast, the court accorded less weight to the testimony of the physician called by the petitioner, who had evaluated the AIP on a single occasion, eight months after the transfer. Further, the court found the testimony of the attorney who supervised the execution of the deed to be credible of the AIP's capacity at the time of the transfer.

Accordingly, based upon the record, the court held that notwithstanding the AIP's affliction with senility of the Alzheimer's type, the petitioner had failed to meet her burden of rebutting the presumption of competency or overcoming the proof of the AIP's lucidity at the time of the challenged transfer.

The validity of the contested conveyance was therefore sustained.

**Matter of Margaret S., NYLJ, July 14, 2006, p. 23 (Sup. Ct., Richmond County) (Justice Giacobbe)**

## Gift of Real Property

In *In re Estate of Hoffman*, the issue before the court was the validity of an inter vivos transfer of real property. The petitioner, executrix of the estate, maintained that the realty was conveyed by the decedent to one of her children with the intent that she hold it for the benefit of all the decedent's children. The respondent maintained that the property was conveyed to her unconditionally.

The record revealed that the decedent met with her attorney after the death of her husband in order to discuss the settlement of his estate as well as the disposition of her own assets. At that meeting, the decedent discussed her displeasure with all of her children, but for the respondent whom she stated was taking care of her. A subsequent meeting was scheduled, at which time counsel and the decedent explored the possibility of leaving the decedent's home to the respondent or anyone else.

Counsel testified that the decedent wanted to make sure that the respondent got her home, subject to a life estate. Thereafter, the requisite documents were executed, together with a power of attorney in favor of the petitioner and the respondent.

The court opined that the respondent had the burden of proving a valid gift of the subject realty, and that as a result of the confidential relationship between the parties, the transfer would be subject to strict judicial scrutiny. To that extent, the court noted that although complete divestiture of title is requisite to a valid gift, such divestiture will not be impacted even when the donor retains a life estate. Additionally, acceptance will be presumed where the gift is of value, and symbolic delivery can be found through the execution of a deed.

Within this context, and based upon the testimony at trial, the court held that the respondent had established the elements of a valid gift of the subject realty by clear and convincing evidence, and that the conveyance was not the product of fraud, duress, or undue influence. To the contrary, the evidence revealed that the decedent struggled for months over the best method to achieve her stated objective of transferring her home to the child she believed was spending the most time with her after her husband's death.

**In re Estate of Hoffman, NYLJ, July 31, 2006, p. 49 (Surrogate's Ct., Suffolk County) (Surr. Czygier)**