

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 236—NO. 94

WEDNESDAY, NOVEMBER 15, 2006

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TRUSTS AND ESTATES UPDATE

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Judiciary, Legislature: New Advertising Rules for Lawyers

The past several months have seen opinions that have addressed significant issues to our practice, including the model disclosure form for attorney-fiduciaries, post-nuptial agreements, and depositions of counsel.

In addition, the Legislature and governor have been busy at work with bills that will have a decisive impact upon children and families, as well as the transfer of securities upon death.

These legislative changes, together with recent judicial developments in the field, are discussed below. A brief review will also follow regarding the new lawyer advertising rules and their import to the profession.

Model Form of Disclosure

In *In re Estate of Tackley*, the court was confronted with the construction of Surrogate's Court Procedure Act (SCPA) 2307-a regarding commissions to attorney-executors, and more specifically, whether the statute required that the form include language added to the statute as a result of an amendment in 2004.

The decedent died on March 1, 2006. The will, dated Feb. 4, 2006, nominated his friend and the attorney-draftsman of the instrument as executors.

In a separate instrument, signed and executed on the date the instrument was signed, the testator acknowledged that he had been apprised of the ramifications of appointing the executors. The attorney-fiduciary claimed that this disclosure was in full compliance with SCPA 2307-a, thereby entitling her to full commission. The decedent's friend, who was also named executor, claimed that



disclosure was incomplete, and that as a consequence, the draftsman-executor was only entitled to one-half statutory commissions.

The court noted that subdivision (1) of SCPA 2307-a sets forth the extent of the disclosure that must be made to the testator when the nominated attorney-executor is the draftsman of the instrument. The court also noted that subdivision (3) of the statute offers a Model Form to practitioners, which tracks the disclosures set forth in subdivision (1), and subdivision (4) of the statute provides that compliance will be found if the writing signed by the testator conforms or substantially conforms with the Model Form.

The issue before the court arose as a result of the fact that while the written instrument signed by the decedent contained the requisite disclosures set forth in subdivision (1), it did not comply with the Model Form, as amended in November 2004. Specifically, this amendment added language to the Model Form set forth in subdivision (3), such that by execution of the instrument the testator acknowledges that absent disclosure, an attorney who serves as an executor shall be entitled to one-half the commissions she would be entitled to receive. (SCPA 2307-a(3)(iii)). Significantly, this acknowledgment was not made a part of the required disclosure to the testator set forth in

subdivision (1). Nevertheless, the nonattorney executor argued that failure of the disclosure statement signed by the testator to contain this added language resulted in noncompliance with subdivision (4) of the statute, and grounds for denying full commissions to the attorney-draftsperson.

In order to resolve the issue, the court examined the legislative history of the statute, the court relied upon several factors that supported the construction advanced by the nonlawyer-executor: i.e., the statute's overall objective to level the playing field between lawyer and client in an area in which generally only the lawyer is familiar; and the import of the amendment as a means of enhancing the disclosure provided for by the statute. Based upon this analysis, the court concluded that the legislative purpose of the statute, and the changes to the Model Form, would be rendered meaningless were the language of the disclosure statement to omit the amendment effected in 2004.

Accordingly, the court held that the disclosure statement failed to comply with the provisions of SCPA 2307-a, and that compensation to the draftsman-executor would be limited to one-half statutory commissions.

In re Estate of Tackney, New York Law Journal, Oct. 10, 2006, p. 33 (Surr. Court, New York County) (Surr. Roth).

Post-Nuptial Pact, Lack of Acknowledgment

In a matrimonial action, the defendant husband moved for partial summary judgment declaring a post-nuptial agreement invalid for lack for a proper acknowledgment.

During the course of his deposition, the defendant admitted that he had signed the agreement before a notary. Further, in an affidavit, the notary stated that in his capacity

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as a notary public he had never signed any document without being shown photographic evidence satisfying him that the person signing the document was who he or she claimed to be. Further, he claimed he always asks the person signing the document whether he understands its contents and it is accurate. Moreover, upon review of the agreement, he provided an acknowledgment certificate, albeit after the fact.

In addressing the issue, the court turned to the decision in *Matisoff v. Dobi*, 90 NY2d 127 (1997), and noted that the Court of Appeals squarely held that a failure to satisfy the requirements for an acknowledgment as set forth in the Real Property Law is fatal to the validity of an agreement within the scope of Domestic Relations Law (DRL) 236(B)(3). Moreover, despite plaintiff's arguments to the contrary, the court found that the First Department has specifically refused to give effect to an acknowledgment signed after the commencement of a divorce action. Finally, while the court recognized that cases under the Estates Powers and Trusts Law (EPTL) have permitted proof of an acknowledgment through the testimony of the witness to the agreement, no such decisions existed in the matrimonial context.

Accordingly, the court held that the agreement was invalid and unenforceable under DRL 236(B)(3).

Kerner-Puritz v. Puritz, NYLJ, Sept. 25, 2006, p. 22 (Fam. Ct., New York County) (Justice Drager).

Deposing Opposing Counsel

In a proceeding seeking revocation of preliminary letters testamentary, the court was confronted, inter alia, with an application by the respondent to examine the petitioner's counsel, and counsel's cross-motion for a protective order. The respondent's motion was predicated upon two affidavits submitted by counsel, the substance of which she claims makes him a fact witness. In opposition, counsel contends that his submissions were predicated upon the record before the court, and not independent factual knowledge of the assertions made. Moreover, counsel contends that acceding to the respondent's request could result in his being called as a witness at the trial of the matter and cause him to be disqualified from any further representation of the petitioner.

The court said that, despite the provisions of CPLR 3101(a)(4), where the nonparty is opposing counsel, courts have made clear that their deposition should be had only in "rare and special circumstances" (*Giannicos v. Bellevue Hospital Med. Ctr.*, 7 Misc3d 403, 407), and

where it is established that the information sought is necessary. The court concluded that respondent had failed to make such a showing.

Specifically, the court found that the first affidavit by counsel simply was a vehicle to put before the court documentary evidence that supported the allegations in the petition and to describe in narrative form the contents of these documents. The second affidavit was a response to the affidavit in opposition submitted by the respondent. Neither affidavit claimed to be based upon personal knowledge of counsel, but instead, each was based upon the record, thus removing counsel as a fact witness subject to examination. As to respondent claims that without counsel's examination she would be forced to go to trial completely unaware of the facts in support of the proceeding, the court held that the petition was the operative pleading to be explored factually, and that ample discovery devices were available for that purpose.

Accordingly, respondent's application was denied, and counsel's cross-motion was granted.

In re Estate of Arrathoon, NYLJ, Oct. 2, 2006, p. 32 (Surr. Court, New York County) (Surr. Roth)

Legislative Developments

• **Chapter 285 (S.43), addition of new EPTL 4-1.4.**

This bill bars abusive parents from taking an intestate share of a deceased child's estate. Specifically, the new provision would disqualify a parent whose rights has been terminated pursuant to Social Services Law §384-b on the grounds of abuse. Further, in the event the Family Court protective proceeding is ongoing at the time of the child's death, the parent will be disqualified if he or she, during the period of suspended judgment, has failed to comply with the Family Court order to restore the parent-child relationship.

• **Chapter 249 (A.10721), amendment of EPTL 5-3.2.**

This bill adds a new paragraph to EPTL 5-3.2 to clarify that only a child born after the execution of a last will and testament and during the life of the testator, or a child in gestation at the time of the testator's death, who is born after the testator's death, can cause revocation of a last will to the extent provided in paragraph (a) of the section. The amendment would avoid the possibility that a child born many years after the death of the testator, without the testator's desire and knowledge, will claim a share of the estate pursuant to EPTL 5-3.2 to the detriment of the testator's children borne during the testator's lifetime.

• **Chapter 11 (A 9455-A), amendment to EPTL 13-4.12.**

This amendment establishes the transfer-on-death security registration act, and applies to registrations of securities in beneficiary form made before or after Jan. 1, 2006, by decedents dying on or after Jan. 1, 2006.

• **Chapter 76 (S.5917A), amendment to Public Health Law §4201.**

This bill creates a procedure, and contains a model form, by which an individual, before he or she dies, can designate a person to carry out the individual's wishes for the disposition of his or her remains. The statute provides an order of priority, and includes a domestic partner among the persons who shall have control of the decedent's remains. Practitioners should be aware that the law has some flaws, including an erroneous reference in subdivision 5, and another in paragraph (b) of subdivision 4, which the Trusts and Estates Law Section is working to address. Nevertheless, the amendment should prove beneficial in reducing or eliminating disputes concerning the disposition of a decedent's remains. The new law went into effect Aug. 2, 2006.

New Rules on Advertising

On June 15, 2006, the presiding justices of the Appellate Division announced proposed amendments to the Code of Professional Responsibility. The public comment period ends on Nov. 15, 2006; the proposed rules are scheduled to become effective on Jan. 15, 2007.

The proposals cover a wide range of activities currently engaged in by attorneys in connection with advertising and/or soliciting business. Included among the various reforms are:

- 1) a ban on pop-up Internet ads;
- 2) restriction on the use of testimonials from clients;
- 3) a requirement that certain communications be labeled as advertisements; and
- 4) a requirement that copies of advertisements or solicitations be filed with the appropriate disciplinary committee.

The proposed rules are posted at <http://www.courts.state.ny.us/rules/amendments.shtml>.