

TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

2007 Cases to Greatly Affect Surrogate Practice

Continuing the prolific trend that characterized the year since its inception, courts have ended 2007 well, with opinions that will have a decisive impact on Surrogate's Court practice and procedure.

Guardian

• ***Appointment of Guardian Does Not Preclude a Finding of Testamentary Capacity.*** In a contested probate proceeding, the objectants moved for an order dismissing the probate petition, or, in the alternative, for partial summary judgment finding that the decedent lacked testamentary capacity when she executed the propounded will. The petitioner cross-moved for summary judgment dismissing the objections and granting probate.

The record revealed that two years prior to the execution of the propounded instrument, dated May 9, 1997, the decedent had a stroke, which caused her to suffer from sensory and expressive aphasia and memory changes. Shortly after she executed her will, the decedent's husband passed away. Because the decedent could not care for herself, a petition was filed by the person ultimately named as the executor in the propounded instrument requesting her appointment as guardian of the person and property of the decedent. The matter was contested



and set down for a hearing. Following the hearing, the court rendered an order and decision, dated Sept. 29, 1997, in which it found that the decedent had organic brain syndrome and dementia and was in need of a guardian. The court appointed the petitioner and one of the decedent's maternal cousins as guardians of her person and property and directed that she be placed in a medically assisted, supervised home.

Several years thereafter, the decedent died, and a petition was filed for probate of her will. Two of the decedent's maternal cousins, one of whom was her coguardian during life, filed objections alleging lack of testamentary capacity, fraud and undue influence. Upon the completion of discovery, the objectants moved to dismiss the probate petition on the grounds, inter alia, that the petitioner was judicially estopped from denying that the decedent lacked testamentary capacity when the will was executed. In the alternative, objectants moved for summary judgment on the grounds that the record before the court established that the decedent lacked testamentary capacity.

The court denied the objectants' motions. On the issue of judicial estoppel, the court

held that the theory of estoppel precludes a party from adopting a position directly contrary to or inconsistent with a position he or she assumed in a prior proceeding, whether in a deposition, prior pleading or testimony before the court. The court noted that the doctrine is applied in the exercise of the court's discretion based upon a variety of factors, including whether the inconsistency of positions is clear and unambiguous, and whether the court relied upon the position in the first proceeding in reaching its result.

Applying these criteria to the case, the court held that the petitioner's assertion that the decedent needed a guardian was not inconsistent with the assertion that she possessed testamentary capacity at the time she executed her will. The court found that testamentary capacity and incapacity under the Mental Hygiene Law were distinct, and that less mental capacity was required to execute a will than any other legal instrument. As such, the will of an incompetent may be admitted to probate if executed at a time when the decedent's mind was sufficiently clear so as to possess the requisite elements of testamentary capacity. The court therefore found that the petitioner's claim that the decedent needed a guardian was not predicated upon a position that she lacked testamentary capacity, and that the determination by the court that a guardian was needed for the decedent was not based upon any such finding.

Further, the court held that the record, including the allegations and testimony in the guardianship proceeding, and the medical records of the decedent, raised a question of fact as to whether the decedent possessed testamentary capacity on the date the propounded will was executed, and thus

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was a matter to be determined at trial.

***In re Estate of Gallagher*, NYLJ, Oct. 29, 2007, p. 19 (Surr. Ct., Kings County) (Surr. Torres).**

HIPAA

• *The Role of HIPAA in Ex Parte Communications With Treating Physicians.*

In related decisions, the New York State Court of Appeals was presented with the issue of whether an attorney may interview an adverse party's treating physician when the adverse party has affirmatively placed his or her medical condition in controversy. The Court held that the attorney may do so, provided that certain procedural requirements are adhered to.

In *Arons v. Jutkowitz*, the plaintiff husband and executor of his late wife's estate brought a medical malpractice and wrongful death action against several physicians, other medical professionals, and two hospitals. Once plaintiff filed a note of issue, one of the physician-defendants requested HIPAA-compliant medical authorizations so that his attorneys could interview decedent's treating physician. Plaintiff refused, prompting defendants to seek an order from the Supreme Court directing that the authorizations be provided.

The Supreme Court granted the defendants' motion, subject to certain conditions, reasoning that by commencing the medical malpractice action, plaintiff put his late wife's medical condition in issue, thus waiving her physician-patient privilege.

The Appellate Division, Second Department reversed, saying that although plaintiff had waived the physician-patient privilege, defendants were only entitled to those discovery devices authorized by the CPLR and the Uniform Rules for the New York State Trial Courts, which do not mention ex parte interviews, or mandate that plaintiffs execute authorizations authorizing them. Further, the court noted that while it had previously held that a treating physician's testimony obtained as a result of an ex parte interview could not be precluded at trial, HIPAA created a practical dilemma for defense counsel seeking to conduct such interviews inasmuch as physicians required HIPAA authorizations or a

court order before doing so. Finally, the court held that because the note of issue had been filed before the HIPAA regulations became effective, and that requests for discovery after the filing of a note of issue required a showing of unusual or unanticipated circumstances, it modified the Supreme Court order by denying defendants' motion with leave to renew. The Appellate Division subsequently granted defendants' motion for leave to appeal, asking whether its opinion and order were properly made.

In *Webb v. New York Methodist Hospital*, plaintiff brought a medical malpractice action, and, as in *Arons*, after the filing of a note of issue, defendants sought HIPAA-compliant authorizations for ex parte interviews with the plaintiff's treating physicians. When plaintiff refused to provide the authorizations, defendants moved in Supreme Court for an order compelling her to do so. The Supreme Court granted the application, and an appeal was taken to the Appellate Division, Second Department. The Appellate Division reversed, based upon its holding in *Arons*.

The opinion in *Kish v. Graham* was of similar import. There, plaintiff-administrator of his late wife's estate brought a medical malpractice suit, and after discovery was completed, defendants sought HIPAA-compliant authorizations to interview decedent's treating physicians. When plaintiff refused to provide the authorizations, the Supreme Court issued an order directing compliance, subject to certain conditions. Thereafter, the Appellate Division, Fourth Department, reversed, on the basis of *Arons*, and thereafter, granted defendants' motion for leave to appeal.

In addressing the issue presented, the Court first noted the importance of informal practices in litigation, particularly private interviews of fact witnesses. Recognizing that it had authorized such interviews within the context of corporate litigation, the Court said that it could see no reason why a non-party treating physician should be less available for an off-the-record interview than a corporate employee, especially where the physician-patient privilege was waived.

Moreover, the Court noted that while CPLR Article 31 and the Uniform Rules do

not expressly authorize informal interviews of treating physicians, they do not preclude such interviews. Nevertheless, in order to allay any dangers of overreaching in the interviewing process, the Court cautioned attorneys who approach a nonparty treating physician or other health professional to reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation.

Indeed, the Court noted that it is the common practice of trial attorneys in New York to interview an adverse party's treating physician ex parte, particularly in malpractice actions, although only after a note of issue is filed. However, the Court acknowledged that such practice and its underlying precedent had to be reconciled with the regulations and restrictions of HIPAA.

In considering the impact of HIPAA on ex parte interviews, the Court noted that while HIPAA permits uses and disclosures of health information, the "covered entity" is not required to act on an authorization it receives, even if valid. Similarly, the Court noted while HIPAA permits covered entities to use or disclose protected health information without authorization pursuant to a court or administrative order, or in response to a subpoena, discovery request or other lawful process, if the entity has received satisfactory assurances that the individual has been provided notice of the request, or has made reasonable efforts to secure a qualified protective order from a court or administrative tribunal, compliance by the health care professional cannot be mandated.

On the other hand, the Court recognized that the litigation exception to HIPAA was not intended to undermine current practice which precludes an individual who is a party to a proceeding and who puts his or her medical condition in issue from prevailing if he or she does not consent to the production of his or her health information. Moreover, the Court noted that while HIPAA will preempt state law, absent a specific exception, to the extent that it is in conflict with the Regulations, it concluded that there could be no conflict between New York law and HIPAA on the subject of ex parte interviews

of treating physicians because HIPAA does not address the subject.

Accordingly, on the basis of the foregoing, the Court found that HIPAA did not prevent the informal discovery at issue from going forward, but merely superimposed procedural prerequisites on the discovery process; to wit, a requirement that the attorney first obtain a valid HIPAA authorization or a court or administrative order; or, issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order. The Court therefore held that the defendants involved in the subject appeals had properly proceeded to obtain an interview of the plaintiffs' treating physicians. The Court found that the plaintiffs had waived the physician-patient privilege, and therefore there was no basis for their refusal to provide the authorizations and information sought. Again, however, the court reminded counsel that the treating physicians were free, despite an authorization or a HIPAA court order, to decide whether or not to cooperate with defense counsel.

Moreover, the Court held that it was improper for the trial courts in *Arons* and *Webb* to have directed that defense counsel provide their adversaries with all written statements and notations obtained from the physician during the private interviews, as well as any audio or video recordings or transcripts and interview memoranda or notes, inasmuch as these limitations were not required by HIPAA and inconsistent with judicial precedent.

The orders of the Appellate Division were therefore reversed, with costs, and the defendants' motions to compel plaintiffs to provide the subject authorizations granted in accordance with the parameters of the opinion.

***Arons v. Jutkowitz*, 2007 NY Slip Op 09309, Decided Nov. 27, 2007.**

'Estate of Barofsky'

• ***Summary Judgment Dismissing Objections to Probate Denied.*** In a contested probate proceeding, the proponent moved for summary judgment dismissing the objections filed by the decedent's nephews.

Extensive pretrial discovery revealed that the decedent was introduced to the draftsman by the proponent of the will. The draftsman prepared and supervised the execution of the propounded will and the penultimate will. The draftsman testified that the proponent was his "client contact" and that he had not communicated with the decedent directly regarding the will provisions. Significantly, while the draftsman testified that the proponent was present when the will of the 98-year-old testatrix was executed, the proponent testified that he was not.

The draftsman further testified that after the penultimate will was executed, he and the proponent revisited the instrument with the decedent, and began to discuss a new instrument with her that would alter her testamentary plan in favor of the proponent, his mother and aunt. The draftsman stated that he was concerned that he could be liable for malpractice in drafting the penultimate will, which left the decedent's sizable estate to her 88-year-old sister, and thus he suggested that the decedent change her estate plan. Although the decedent initially rejected the idea of redoing her will, the propounded will was ultimately drafted a little over three months after discussions began, and was executed by the decedent when she was in the hospital for a heart condition. The instrument increased the legacy to the proponent from \$500,000 to \$1.2 million. Several of the proponent's friends, who were attorneys, were present. These people were strangers to the decedent. The court found the testimony regarding execution unclear, most particularly as to whether the draftsman explained the provisions of the new will to the decedent.

The proponent and the objectants submitted affidavits in support of and against the motion for summary judgment. Evidence was conflicting as to the decedent's mental status and interactions with the family. The objectants' witnesses described the decedent as phobic and disoriented as to time, place and person. This was in part confirmed by the testimony of the draftsman, who, as a result of a conversation with the decedent, was under the misconception that the decedent had a daughter, when in fact she had no children.

Based upon the foregoing, the court denied the proponent's motion. On the issues of due execution and testamentary capacity, the court held that, despite the fact that the execution of the propounded will was supervised by an attorney, a question of fact existed as to whether the decedent knew the natural objects of her bounty, was aware that she was executing a will, and was made aware of the provisions of the instrument prior to its execution. The court held that the situation was especially questionable given the decedent's age, the fact that she executed the propounded will while lying in a hospital bed, and that she had no relationship with the draftsman.

With regard to the issue of undue influence, the court expressed concern over the fact that the draftsman apparently provoked the decedent to change her will, and that the proponent was the draftsman's "client contact." Thus, the court held that it was unclear whether the terms of the instrument were actually made known to the decedent and reflected her wishes.

Finally, on the issue of fraud, the court concluded that a question of fact existed as to whether the draftsman's concerns with his potential liability for malpractice was a pretext for his convincing the decedent to disinherit the primary beneficiary under the penultimate will in favor of the proponent.

***In re Estate of Barofsky*, NYLJ, Nov. 20, 2007, p. 34 (Surr. Court, New York County) (Surr. Roth).**