



TRUSTS AND ESTATES UPDATE

BY ILENE SHERWYN COOPER

On Powers of Attorney, Exoneration Clauses, Sanctions

Powers of attorney, exoneration clauses, and accountability have been the subject of recent Surrogate's Court and appellate opinions, providing cautionary instruction to fiduciaries in the fulfillment of their role. In addition, the bench has rendered decisions warning counsel in regard to their ethical duties and sanctions, designed to curb abuses in the practice of law.

These opinions, together with others revisiting past themes of this column, are discussed this month.

Attorney-in-Fact

• **Deeds by Attorney-in-Fact Declared Invalid.** In a proceeding to set aside two deeds, appeal was taken from a decree of the Surrogate's Court, Kings County, which declared the subject transfers invalid.

The Appellate Division affirmed, holding that the gratuitous conveyances of the decedent's properties by the attorney-in-fact to her mother were in violation of her fiduciary duty, inasmuch as the power of attorney executed by the decedent did not authorize the attorney-in-fact to make gifts. Moreover, the court agreed with the findings of the surrogate that the evidence wholly failed to establish that the decedent intended to give the subject properties to the mother of the attorney-in-fact.

Matter of Culbreth, 48 AD3d 564 (2d Dept. 2008)

Exoneration Clauses

The past two months have seen decisions of first impression rendered by the surrogates of Westchester and New York counties addressed to the issue of exoneration clauses, and more particularly, the public policy which guides against their use.¹

Before the court in *Matter of Francis* was the issue of whether an exoneration clause in a power of attorney is enforceable.

The decedent died intestate survived by her nephew, who was appointed the administrator of her estate. Subsequently, the administrator instituted a discovery proceeding against the respondent.

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who was the decedent's attorney in fact, requesting a turnover of assets, that a tenancy agreement be set aside, and that the respondent be compelled to account.

The record revealed that the decedent's estate consisted of a two-family dwelling and that the respondent and his mother resided on the first floor of the premises since 1972. The record also demonstrated that 17 months prior to the decedent's death, respondent transferred all of the decedent's accounts to himself and his mother, acting as the decedent's attorney-in-fact. These accounts constituted the bulk of the decedent's liquid assets. Three months later, respondent prepared and executed on behalf of himself and as attorney-in-fact for the decedent a "Lifetime Tenancy Agreement," granting to himself and his mother a lifetime tenancy with joint right of survivorship to the two-family dwelling and its property. According to the agreement, the decedent was permitted to reside in the premises for her lifetime and was responsible for all bills, taxes, and expenses attendant to the property.

The subject power of attorney was drafted by the respondent and was given by him to the decedent to sign. The decedent was 98 years of age at the time. The document was three pages, the decedent's initials were inserted next to Item Q, which granted the agent all of the enumerated powers, and was followed by a broad power to make gifts, including to the attorney-in-fact, without liability.

After the completion of discovery, petitioner moved for summary judgment. The respondent opposed, maintaining that it was the petitioner's burden to establish that the decedent lacked

capacity, and that the transfer of assets was not for the decedent's benefit. Moreover, the respondent asserted that the broad grant of powers under the power of attorney, the exoneration clause, and the law in effect at the time of the transfers, was a complete defense to petitioner's claims. Additionally, the respondent maintained that the statute of limitations precluded recovery.

The court held that the proceeding was not time-barred, inasmuch as the claims asserted were for breach of fiduciary duty, and thus governed by a six-year statute of limitations. The court said that, while the period begins to run when the fiduciary has openly repudiated his obligations or renders his account, since the respondent had never accounted and did not repudiate his stewardship until after the commencement of the proceeding, it was timely.

With regard to the substance of the motion, the court reflected upon the abuse wrought by the attorney-in-fact upon the elderly decedent and held that the exoneration clause could serve as no basis for exculpating him from liability for his conduct. Relying upon the dictates of EPTL 11-1.7, the court concluded that the rationale for the provision, i.e., the fundamental duty of every fiduciary to act in good faith and with undivided loyalty, applied equally to powers of attorney, as it did to wills and trusts. Accordingly, the court held the exoneration provision, to the extent that it sought to relieve the attorney-in-fact from all liability, was void.

Moreover, the court rejected the respondent's argument based upon the broad gift-giving powers afforded under the power of attorney, finding that the opinion of the Court of Appeals in *Matter of Ferrara* undermined the ability of an attorney-in-fact to make unqualified gifts to the holder of the power, especially when such gifts virtually impoverished the donor. The court concluded that the respondent had failed to establish that the subject transfers were of any benefit to the decedent, or that the decedent intended to make gifts to him or his mother of the assets in issue.

Finally, the court held the exoneration provision void as against public policy insofar as it attempted to relieve the attorney-in-fact from the duty to account. The court held that the duty to account was fundamental to every fiduciary relationship, was absolute, and could not be waived by the principle

during his or her lifetime.

Accordingly, petitioner's motion for summary judgment to set aside the transfers and the tenancy agreement was granted, and the respondent was directed to file an account of his stewardship.

Matter of Francis, 2008 WL 586210 (Sur. Ct. Westchester County) (Surr. Scarpino)

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In *Matter of Shore*, the guardian ad litem for the beneficiary of an inter vivos trust requested that the trustee be removed for her failure to account as directed by the court. The trustee, an attorney who drafted the instrument naming herself as grantor and as trustee, opposed the application on the grounds that the terms of the instrument exempted her from her duty to account to anyone during the beneficiary's lifetime.

The court rejected the trustee's position, concluding that such language in an inter vivos trust instrument is unenforceable as against public policy, as expressed by the provisions of EPTL 11-1.7 and common law. The court found that accountability is an essential element of all fiduciary relationships that cannot be waived. Further, the court said that the provisions of EPTL 11-1.7 recognize that an attempt to render a fiduciary entirely unaccountable is inconsistent with the nature of a trust and void. These provisions, held the court, are equally as applicable to inter vivos trustees as they are to testamentary fiduciaries, particularly when there is no one in a position to protect the beneficiaries' interest during the existence of the trust.

The court declared untenable the trustee's argument that in drafting the trust to benefit her she was actually promoting the grantor's intentions, inasmuch as the trustee conceded that the trust was established in the first instance because the grantor was unable to protect his own interests. Indeed, the court said that the trustee's conduct in drafting a trust that made her unaccountable under any circumstances constituted a violation of professional ethics.

Accordingly, the court granted the petitioner's application for removal of the trustee.

In re Shore, 2008 NY Slip Op 28102 (Sur. Ct. New York County) (Surr. Roth)

Joint and Several Liability

In *Matter of Bloomingdale*, the petitioner appealed from portions of an order issued by the Surrogate's Court, Westchester County, which denied his motion for summary judgment dismissing certain objections against him insofar as they related to the diversification of investments.

The Appellate Division modified the order. The record revealed that the acts complained of, in part, occurred during the period in time in which the petitioner served as co-trustee with the two remainderpersons of the trust, each of whom was astute in business and was well aware of the highly concentrated investment portfolio of the trust estate upon assuming office. Under

these circumstances, and in view of the fact that no fraud or deceit was alleged, the court held that the cotrustees were obligated to familiarize themselves with the prudent investor rule and could not assert objections against the petitioner for the period of time during which they were cotrustees. In reaching this result, the court held, in pertinent part, that "[w]here a fiduciary has the means to know of a cofiduciary's acts, and has assented or acquiesced in them, the fiduciary is bound by those acts and jointly liable for them." (citing *Matter of Niles*, 113 NY 547; *Matter of McCormick*, 304 AD2d 759).

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However, as to the period of time preceding the remainderpersons' appointment, the Appellate Division held that the Surrogate's Court had properly determined that the petitioner failed to establish that remainderpersons had full knowledge of the facts and circumstances underlying the retention of certain assets, and consented to the investments, so as to estop them from objecting to the transactions.

Matter of Bloomingdale, 48 AD3d 559 (2d Dept. 2008)

Award of Sanctions Affirmed

In a contested probate proceeding, counsel for the proposed objectant appealed from so much of an order of the Surrogate's Court, Kings County as denied objectant's motion for leave to file objections to the decedent's will, and granted proponent's cross-motion to impose monetary sanctions upon them and for attorney's fees.

The court dismissed so much of the appeal as related to the objectant's motion to file objections on the grounds that the appellants were not aggrieved parties insofar as that issue was concerned.

In addition, citing the provisions of 22 NYCRR 130-1.1(c)(2), the court affirmed the surrogate's order awarding sanctions and attorney's fees to the proponent, finding that counsel's repetitive motions, on behalf of the proposed objectant, for a stay of the proceedings, were undertaken primarily to delay or prolong the resolution of the litigation.

Matter of Mancuso, 48 AD3d 570 (2d Dept. 2008)

Themes Revisited

Prior columns by the undersigned have examined the issues of same-sex marriage and eligibility of a named fiduciary. Recent decisions within the past

two months shed further light on these subjects.

1) Eligibility of Named Fiduciary Denied. In *In re Estate of Efros*, the court granted the motion of several charitable legatees under a prior will of the decedent to vacate the probate decree admitting a later will to probate.

Upon vacatur of the decree, the letters testamentary issued thereunder to the three named executors, a nephew, the spouse of a predeceased nephew, and JP Morgan, were revoked. As a consequence, the issue arose as to which of the nominees were eligible to receive preliminary letters testamentary.

The court said that preliminary letters testamentary may be denied to a named executor based upon bona fide allegations of undue influence or other wrongdoing. In view of the record presented, the court found the allegations against the decedent's nephew sufficient to deny his appointment, but insufficient to deny the issuance of preliminary letters to JP Morgan and the remaining named executor.

In re Estate of Efros, NYLJ, March 27, 2008, p. 24 (Sur. Ct., New York County) (Surr. Glen)

2) Ruling Denying Effect to Same-Sex Marriage Validly Entered in Foreign Jurisdiction Vacated. In *Matter of Funderburke*, the Appellate Division, Second Department vacated an opinion of the Supreme Court, Nassau County, which effectively denied recognition of a gay couple's Canadian marriage.

The underlying action involved a claim by a retired teacher for spousal health and insurance coverage from the school district on behalf of his partner, whom he had validly married in Canada. The district denied coverage and the teacher instituted suit against, inter alia, the district and the New York State Department of Civil Service claiming that coverage had been illegally denied. The Supreme Court granted motions by the defendants for summary judgment and the plaintiff-teacher appealed.

During the pendency of the appeal, the Department of Civil Service changed its policy regarding recognition of foreign same-sex marriages in order to allow for spousal health and insurance coverage to same-sex couples. Hence, the appeal was dismissed as academic.

In addition, the court, in the exercise of discretion, vacated the order appealed from, in order to avoid adverse legal consequences for the plaintiff, and confusion of the legal issues in this area of the law should the Supreme Court order erroneously be considered as precedent in future cases.

Matter of Funderburke, 49 AD3d 809 (2d Dept. 2008)

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1. These opinions were recently discussed by my colleagues, Gary B. Freidman and John J. Reddy Jr., in their column "Exoneration Clauses: Two Cautionary Tales," NYLJ, April 16, 2008, p. 3.