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Disclosure

In *In re Cugini*, the objectant in a contested probate proceeding filed a motion to compel the examination of two non-party witnesses, a physician. The objectant maintained that the physician examined the decedent in connection with an Article 81 guardianship proceeding and therefore, had information regarding her competency. The court held that generally the test for disclosure is whether the information sought is material and necessary. When disclosure is sought from a non-party witness, the party seeking disclosure must either satisfy the requirements of CPLR 3101(a)(3) and (4), regarding, *inter alia*, the availability of the witness and a showing of special circumstances, respectively. The court noted that although a showing of special circumstances is no longer a prerequisite for the examination of non-parties in the Second Department, they should still be considered in making a determination. To this extent, the court found, in view of the objection as to the testamentary capacity of the decedent, that the examination of the physician was material and necessary to the proceeding. Further, the court found that the evidence to be gleaned from the witness was not available from any other source. Finally, the court noted that the physician had been named as an expert witness by the petitioner. The court opined that while the examination of an expert witness is not generally permissible, when that witness is also a factual witness with personal knowledge relevant to the proceeding, the examina-

tion of the witness is authorized. Accordingly, the motion to depose the witness was granted.

***In re Cugini*, NYLJ, Aug. 20, 2012, at 19 (Sur. Ct. Richmond County)**

Sealing of court records

Before the court in *In re Rappa*, NYLJ, Oct. 23, 2012, at 23 (Sur. Ct. Kings County), was an ex parte application for an order confirming the confidentiality condition of a Release and Stipulation to Dismiss, and sealing the records of the estate, including any proceeding to compromise the cause of action for the decedent's wrongful death.

In support of the application, the petitioners asserted that the cause of action for wrongful death had been resolved, and that the confidentiality provisions of the release agreement were a "vital component" of the settlement.

The court opined that the sealing of court records can only be ordered upon a showing of good cause. Such a determination must be assessed against the backdrop of the broad presumption that the public is entitled to access to judicial proceedings and court records. Accordingly, because confidentiality is the exception and not the rule, a party seeking an order to seal bears the burden of demonstrating compelling circumstances which justify restricting the public's right to open court proceedings.

Considered within this context, the court found no basis for sealing the court record. The court found that the petitioners had not demonstrated that a failure to seal the court record would inhibit the resolution of concurrently pending or related

proceedings, nor had petitioners shown that the parties' reliance on the confidentiality of the file had induced changes of their position, and was essential to the settlement. Although petitioners maintained that certain aspects of the terms of settlement could disclose some unspecified strategic path to defendants in future actions, the court found this claim insufficient to sustain sealing of the record. Therefore, the petitioners' application was denied.

***In re Rappa*, NYLJ, Oct. 23, 2012, at 23 (Sur. Ct. Kings County)**

HIPAA authorizations

In *In re Bellante*, the court directed the petitioner to execute HIPAA authorizations so that the objectant could obtain the medical records of the decedent. At issue in the contested accounting before the court was the validity of a transfer made by the decedent of her home prior to her death. The objectant maintained that the decedent's mental incapacity and physical limitations made her incapable of executing the deed to the premises, and caused her to be subject to undue influence perpetrated by the petitioner and her brother in connection with the transfer. The court held that in the case where a patient is deceased, a physician shall be required to disclose records either in the absence of objection by a party to the litigation, or when the privilege has been waived. A waiver can be affected by a personal representative, or by any party in interest to the litigation were the court deems the interest of the personal representative to be adverse to those of the decedent's estate. (CPLR 4504(c) (2)). In this context the court held that inasmuch as the



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capacity of the decedent at the time of the subject transfer was an issue of fact to be determined at trial, the medical records of the deceased were material and necessary to the pending litigation. Moreover, given the allegations that the petitioner was a party to the undue influence perpetrated upon the decedent, the court found that her interests were adverse to the estate. Accordingly, the court held that the physician-patient privilege could be waived by the objectant and that she was entitled to the records in issue.

***In re Bellante*, NYLJ, July 19, 2012, at 29 (Sur. Ct. Suffolk County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is Chair of the New York State Bar Association Trusts and Estates Law Section, and a member of the Board of Directors and a past-president of the Suffolk County Bar Association.