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Expert Analysis

Mid-Year Developments: Fees, Duties and Commissions

By
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As we continue to open our courts and office doors, the Surrogate's and Appellate Courts throughout the state have been busy addressing a multitude of issues affecting trusts and estates practice. Opinions examining legal fees, breach of fiduciary duty, and statutory commissions are at the forefront of this month's column.

Second Department Examines Fee Arrangements

In *In re Cooper,* 2021 N.Y. App. Div. LEXIS 4138 (2d Dep't 2021), the Appellate Division, Second Department, modified an Order of the Surrogate's Court, Nassau County, which awarded legal fees to present and former counsel for plaintiff in a proceeding to compromise a cause of action for the decedent's wrongful death.

The record revealed that the petitioner, an attorney, was hired by the respondent/law firm pursuant to an employment agreement that specified that the petitioner was to receive a 40% forwarding fee on cases that he referred to the respondent. In April, 2012, the petitioner referred respondent an action to recover damages for wrongful death and conscious pain and suffering. Approximately two years later, the petitioner terminated the respondent's employment. The petitioner took the wrongful death action with him, and continued to represent the estate of the decedent through settlement of the matter.

Thereafter, the petitioner commenced a proceeding in Surrogate's Court to compromise and settle the action and to apportion the net contingency fee between himself and the respondent. After a hearing, the Surrogate's Court awarded 50% of the fee to each of the petitioner and the respondent, resulting in an appeal by the petitioner.

The court held that the Surrogate's Court improvidently exercised its discretion when it awarded an equal fee to the petitioner and the respondent. The court found that the petitioner performed significant work in securing the ultimate award, and that while the employment agreement between petitioner and respondent addressed compensation during petitioner's term of employment, it failed to contemplate any arrangement in the event that petitioner was terminated or left voluntarily. To this extent, the court noted that where the dispute is between attorneys, "'the discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case.'" *Matter of Cohen v. Grainger, Tesoriero & Bell*, 81 N.Y.2d 655, 658. Where an election is not made or sought at the time of the discharge, the presumption should be that a contingency fee has been chosen. Id.

Within this context, considering the amount of time spent by the attorneys on the case, the nature of the work performed, and the relative contributions of counsel, the Court modified the order appealed from so as to award 80% of the net contingency fee to the petitioner, and 20% thereof to the respondent.

Fiduciaries Found Liable for Self-Dealing

In *In re Bartolini*, 2021 NYLJ LEXIS 607 (Sur. Ct. Albany Cty.), the Surrogate's Court, Albany County, granted respondent's cross-motion for summary judgment based on the fiduciaries breach of fiduciary duty and self-dealing.

The decedent died, intestate, survived by his sister, who was the respondent, and a distributee

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of one-half of his estate, and two nieces and a nephew, who were the co-administrators of his estate, and each entitled to a one-sixth share thereof. Approximately one year after the fiduciaries' appointment, they filed a petition for the judicial settlement of their account. Respondent filed objections alleging, inter alia, breach of fiduciary duty and self-dealing based on the fiduciaries' mishandling of the decedent's Fidelity IRA account.

The record revealed that the decedent's estate was the default beneficiary of a Fidelity IRA account. In an alleged effort to save income taxes, the fiduciaries transferred this account to an inherited IRA account for the estate. The value of the IRA at the time exceeded $1,000,000. Several months thereafter, the fiduciaries transferred one-half the value of the estate's IRA, in kind, into new tax-deferred inherited IRAs for themselves, as beneficiaries. The remaining one-half representing the respondent's share was liquidated, paid to the estate, and ultimately subjected to a withholding tax due to respondent's foreign residence. The respondent was never aware of the different treatment accorded her interest in the IRA until the fiduciaries accounted.

Following the filing of objections by respondent, petitioners moved for summary judgment settling their account, and respondent cross-moved for, inter alia, damages and legal fees. After considering the arguments raised, the court found that petitioners breached their fiduciary duty by not giving respondent the same opportunity to transfer her one-half share of the Fidelity IRA to an inherited IRA as they did for themselves. Specifically, the court found that a fiduciary has a duty of loyalty to all beneficiaries and must discharge his or her duty impartially. Furthermore, a fiduciary has a duty to "'minimize the over-all tax burden on the estate and its beneficiaries.'" *Matter of Rappaport*, 121 Misc.2d 447, 450 (1983).

In view thereof, summary judgment dismissing respondent's objection as it related to the mishandling of decedent's Fidelity IRA was denied, and respondent's cross-motion for summary judgment on the mishandling of the Fidelity IRA was granted. The court directed that a hearing be held for the purpose of determining the damages sustained by the respondent as a result of the fiduciaries' misconduct.

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Stipulation Regarding Commissions Construed and Enforced

Before the Surrogate's Court, Queens County, in *In re Terranova*, N.Y.L.J., June 4, 2021, at p. 17 (Sur. Ct. Queens Cty.), was a motion for partial summary judgment determining that the commissions payable to the co-trustees were limited by the terms of a settlement agreement to an amount other than the statutory rate. The fiduciaries argued that the agreement was ambiguous, and unclear as to whether the limitation applied only to annual commissions, or to all statutory commissions. As described by the court, the settlement agreement in issue was the result of countless hours of negotiations, court conferences, and revisions among counsel.

The court observed that a settlement agreement is subject to the ordinary rules of contract construction. To that extent, the threshold issue is the clarity of the language. Where a written agreement is complete, clear and unambiguous on its face it must be enforced so as to give effect to the meaning of its terms and the reasonable expectations of the parties. Those expectations must be gleaned within the four corners of the contract without looking to extrinsic evidence to create ambiguities.

Within this context, and upon close examination of the agreement, and the circumstances under which it was created, the court rejected the fiduciaries' contentions that the agreement was ambiguous. Indeed, the court found it ironic that an instrument that was the result of exhaustive negotiations between sophisticated counsel, and so meticulously drawn, was now being branded as inferior and ambiguous by some of the very parties involved in its creation.

Thus turning to the language of the instrument, and the provision in dispute, the court found it persuasive that it opened with the words: "In lieu of trustee's commissions pursuant to Section 2309 of the SCPA," noting that the statute encompasses both principal and annual commissions, and finding that no basis existed for concluding or inferring that the parties intended to draw a distinction or exception between the two.

Accordingly, the motion for partial summary judgment was granted.