

TRUSTS AND ESTATES UPDATE

Expert Analysis

Closing Comments At the Close of the Year

As the year comes to a close, and we begin to resume life as we once knew it, we take note of some of the significant decisions that were rendered in the final months of 2021.

Vacatur of Court Order Affirmed by Third Department

Although the Surrogate's Court often considers motions to vacate a default in pleading, it has the inherent authority to vacate its own judgments or orders for sufficient cause. This authority was the basis for the Appellate Division's decision in *In re Braunstein*, 194 A.D.3d 1165 (3d Dep't 2021), in which the court affirmed an order of the Surrogate's Court, Chemung County granting respondent's motion to vacate a prior order.

Before the Surrogate's Court was an accounting proceeding by the petitioner as executor of the decedent's estate. The petitioner was

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also trustee of certain trusts created under the decedent's will, which had not yet been funded because the estate had not been judicially settled. After a court conference, the court entered an order setting a deadline for the respondent, the decedent's daughter and beneficiary of one of the testamentary trusts, to file objections or request examinations pursuant to SCPA 2211. Respondent failed to take any action by the deadline; but two months thereafter, requested an SCPA 2211 examination of the petitioner. Although the court accepted the reasons offered by the respondent for her untimeliness, it denied the respondent's request for the examination due to respondent's failure to submit an affidavit of merit. Over one year later, the respondent filed a motion to

reconsider and vacate the court's order denying her relief, which was granted. The petitioner appealed.

Initially, the Appellate Division observed that while the Surrogate's Court and the parties treated respondent's motion as one to vacate a default, the order issued by the court was not granted on default, and none of the grounds relevant to a motion to vacate a default were present. Nevertheless, the court opined that a court has the inherent power to vacate its own judgments for sufficient reason and in the interests of substantial justice. Only where there has been a clear abuse of discretion will a decision to vacate a prior order be reversed.

Within this context, the court recognized that the Surrogate's Court had expressly acknowledged its broad equity power to vacate its own orders, had noted the numerous attorneys who had represented the respondent, that her delay was not willful, the preference to have matters determined on the merits, particularly where there are allegations regarding breach of fiduciary duty and self-dealing, and the lack of prejudice to the petitioner. In view

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thereof, the court held that the Surrogate's Court properly exercised its discretionary authority in granting respondent's motion.

Denial of Probate Affirmed By Second Department

In *In re Falkowsky*, 197 A.D.3d 1300 (2d Dep't 2021), the Appellate Division, Second Department affirmed a decree of the Surrogate's Court, Westchester County, which, after a nonjury trial, denied probate of the propounded will on the grounds of lack of testamentary capacity and undue influence.

The decedent died on Jan. 14, 2015, while at White Plains Hospital Center, where he had been hospitalized since Dec. 1, 2014. On Dec. 15, 2014, he executed a purported will in which he bequeathed \$20,000 to each of his two sons, and disposed of his residuary estate in equal shares to charity and to his sister, whom he named as executor.

Following the decedent's death, his sister petitioned for probate of the will, and objections were filed by one of the decedent's sons. The record, at the nonjury trial of the matter, in pertinent part, revealed that the decedent had been supporting one of his two sons for years. This son, who had not objected to probate resided in New Jersey with a wife and two children, one of whom had special needs. The objectant was also married with two children, and although domiciled in New Mexico since 2006, resided in Ireland from January 2014 through September 2015 on a work assignment.

The decedent resided in a cooperative apartment in Brooklyn until he suffered a fall on Aug. 31, 2014. He was admitted to the hospital, and thereafter, was transferred to a nursing and rehabilitation facility, and then a senior residence home in White Plains, close to the petitioner's home. At the time of his admission to the residence, the nursing home records indicated that he

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was totally dependent on the staff for many activities of daily living. When admitted to the senior residence, the decedent reported to his daughter that his assets amounted to approximately \$200,000.

The petitioner contacted her attorney for purposes of her preparing a power of attorney and health care proxy on the decedent's behalf. In addition, the petitioner requested her attorney to ask the decedent about preparing a will, however, according to counsel's testimony, during the course of such conversation, which took place in the petitioner's presence, the decedent appeared to be uncomfortable speaking in the petitioner's

presence, and was not sure what he wanted to do with his assets. Thereafter, counsel wrote to the decedent requesting that he contact her to arrange an appointment to consider his will, but no call was made.

Shortly thereafter, the decedent was admitted to White Plains Hospital, at which time he was noted as "chronically ill." He subsequently required intubation. Although the petitioner's recollection of the events that followed differed from that of counsel, according to counsel, petitioner began making frantic calls to her indicating that the decedent needed a will and that it was imperative for him to have one.

Ultimately, while the decedent was on a ventilator and then a venti mask in the ICU, counsel accompanied the petitioner to the hospital. After the petitioner spoke with the decedent alone, counsel spoke with the decedent outside the petitioner's presence regarding his assets and the disposition of his estate. Counsel testified that the decedent mentioned some of his assets and the values thereof, but had incomplete information as to some, and entirely omitted others. Indeed, the record ultimately revealed that while the decedent mentioned to his daughter that his assets amounted to \$200,000, and he reported to counsel that his total assets were valued at \$1.5 million, in fact, his assets, including nonprobate property consisting of an annuity, which he never recalled, totaled \$2.6 million. Moreover, it appeared that a day after the decedent signed his will, the petitioner withdrew the funds from two accounts that had

been held in trust by the decedent for his two sons, and wrote checks to herself from the decedent's account.

On the day that counsel came to the hospital to discuss the decedent's will with him, the medical records indicated that he was critically ill, his speech was slurred, and he suffered from a right lateral gaze palsy. Though counsel suggested to the decedent that he leave his sons \$100,000 to \$200,000 in the instrument to avoid a will contest, he agreed to leave each son \$20,000. The day before the will was signed, the decedent reportedly exhibited, inter alia, an inability to follow instructions, disorientation, confusion, impulsive behavior, and it was suggested that he may have suffered a stroke. The decedent's condition remained the same on the date the will was signed, although in the afternoon hours of that day, he appeared awake and alert. Further, while a nurse advised that the decedent could not sign anything that day, he nevertheless signed his will in the presence of counsel's partner and her paralegal.

After the trial, the Surrogate's Court determined, inter alia, that the petitioner had failed to establish that the decedent had the requisite capacity to execute a will, and that the instrument was the product of undue influence by the petitioner. The petitioner appealed.

On the issue of testamentary capacity, the Appellate Division majority found that the record failed to demonstrate that the decedent knew the nature and extent of the property he was disposing of, and

that such deficit required denial of probate. Further, the court noted that while physical infirmity, and chronic, progressive senile dementia is not necessarily inconsistent with testamentary capacity, in the case before it, just four hours prior to the execution of the will, the decedent exhibited an inability to follow instructions, disorientation, confusion, impulsive behavior and was on an intubator and unable to speak.

In 'In re Advani', N.Y.L.J., Aug. 9, 2021, at 17 (Sur. Ct. Bronx County), the Surrogate's Court, Bronx County, granted summary judgment dismissing the petitions for a compulsory accounting on the basis of releases signed by the petitioners.

Accordingly, the court affirmed the Surrogate Court's determination as to the decedent's lack of testamentary capacity.

Petitions for a Compulsory Accounting Dismissed

In In re Advani, N.Y.L.J., Aug. 9, 2021, at 17 (Sur. Ct. Bronx County), the Surrogate's Court, Bronx County, granted summary judgment dismissing the petitions for a compulsory accounting on the basis of releases signed by the petitioners. The petitioners, who were two nieces/distributees of the decedent, had instituted the proceeding after having executed receipts and releases and waivers, based on an informal accounting, and received a distribution from the estate. Objections

were filed by the administrator, annexed to which was the original notarized receipt, release, waiver and refunding agreements from all the distributees, including the nieces. At a conference of the matter, the court advised the parties that it would deem the filed papers a motion for summary judgment.

The court noted that the informal account was provided to the nieces who had the opportunity to consult an attorney and accountant before they individually executed the notarized receipt, release, waiver and refunding agreement and received their distributions. Moreover, the court found the nieces had failed to claim or demonstrate bad faith, fraud or duress on behalf of the administrator in obtaining the notarized receipt, release, waiver and refunding agreement which would warrant the court to direct a judicial accounting.

Accordingly, the motion for summary judgment was granted, and the petition was dismissed.