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SURROGATE'S PRACTICE AND PROCEEDINGS

Assuring the Case You Thought Was Settled, Stays Settled

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Although the authors are without statistical evidence to support our view, we believe that those of us who have practiced for a few years in our surrogate's courts would agree that most estate and trust disputes are resolved by way of settlement. Our surrogates and their law departments are particularly adept at fostering compromises -- even in the most bitter of family disputes.

This article will explore some of the nuts and bolts issues involved in making sure that the case that you thought you settled, stays settled.

In the Surrogate's Court, as in other courts, '[T]here has never been any question about the agreements made between the heirs or next of kin and the representatives of an estate after the death of a testator regarding settlements and compromises. These have always been held to be good, when made in good faith, and not against public policy.' Matter of Cook, 244 NY 63, 69 (1926). 'Agreements of compromise in estates made in the absence of bad faith, imposition, fraud or collusion, have consistently received the approval and ratification of our courts and have been given vigorous support by them. (Citations omitted.)' Matter of O'Keefe, 167 Misc. 148, 149, 3 N.Y.S.2d 739, 740 (Sur. Ct. New York Co. 1938).

Courts Favor Settlements

We start with the basic principle: Stipulations of settlement are strongly favored by the courts. The cases hold that there are strong public policy considerations favoring stipulations of settlement. Denburg v. Parker Chapin Flattau & Klimpl, 82 NY2d 375, 604 N.Y.S.2d 900 (1993); Matter of Galasso, 35 NY2d 319, 361 N.Y.S.2d 871 (1974). So strong is this policy that a settlement agreement will be enforced even where public policy bars enforcement of the underlying claim. See, Denburg v. Parker Chapin Flattau & Klimpl, supra. Indeed, the attitude of the courts is that: 'Parties by their stipulations may in many ways

make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce *** (A)ll such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced' Matter of New York, Lackawanna & Western R.R. Co., 98 NY 447, 453 (1885); Nishman v. De Marco, 76 AD2d 360, 430 N.Y.S.2d 339 (2d Dept. 1980).

As we all remember from civil procedure, for a stipulation to be binding and enforceable, one of three conditions must be met: the agreement must be (a) made between counsel, in open court, (b) in writing and subscribed by the party or his attorney of record, or (c) reduced to the form of an order and entered. CPLR 2104. As one can well imagine, each of these requirements has given rise to some litigation. For example, where a later disputed settlement was never transcribed or entered into any court record, 'the personal notes of the Surrogate' relating to the purported agreement, do not satisfy the 'open court' requirement of CPLR 2104. Matter of Janis, 210 AD2d 101, 620 N.Y.S.2d 342 (1st Dept. 1994). Similarly, in Collazzo v. New York City Health & Hospitals Corp., 103 AD2d 789, 477 N.Y.S.2d 662 (2d Dept. 1984), the court refused to enforce an oral settlement that was negotiated and agreed to by counsel at a pretrial settlement conference in a judge's chambers, but nowhere reduced to a writing or entered in the court's minute book

Open court means a judicial proceeding -- a court convened to do judicial business. Matter of Dolgin Eldert Corp., 31 NY2d 1, 334 N.Y.S.2d 833 (1972). Most cases hold that the presence of both a judge and court stenographer are required. In this day of electronic recording of proceedings, one would assume that the taped record of proceedings will satisfy the requirement that a stenographer be present. The rationale for a record of the settlement is to assure that there is 'irrefutable proof of the agreement.' Gonyea v. Avis Rent A Car System, Inc., 82 AD2d 1011, 1012, 442 N.Y.S.2d 177, 178 (3d Dept. 1981).

Literal Terms of CPLR 2104

What if the judge is not present but her law clerk is? In Kushner v. Mollin, 535 NYS2d 41, 144 A.D.2d 649 (2d Dept. 1988), the plaintiff entered into a stipulation of settlement with the defendants in court, but outside of the judge's presence; the terms of the settlement agreement were read into the record, but were never reduced to a writing subscribed by the parties, nor was the settlement put in the form of a judicial order. The Second Department held that the stipulation was not enforceable because it was not made in 'open court.'

Is the subscription requirement of CPLR 2104 satisfied where attorney A prepares the stipulation, proffers it to attorney B without signing it, and B then signs the stipulation and returns it to A? The Second Department held that it was in Stefaniw v. Cerrone, 130 AD2d 483, 515 N.Y.S.2d 66 (2d Dept. 1987). However, in Klein v. Mount Sinai Hosp., 61 NY2d 865, 474 N.Y.S.2d 462 (1984), the court refused to enforce a stipulation that was changed by attorney B, then signed by him and returned to attorney A who refused to sign the modified stipulation.

In addition to the potential pitfalls entailed if one does comply with the literal terms of CPLR 2104, there lurks an even more problematic issue in this area -- the authority of an attorney to settle a matter on behalf of a client. An attorney, as an agent of the client, has authority to manage the litigation on the client's behalf, However, she cannot compromise or settle a litigation without the authorization of the client. Spisto v. Thompson, 39 AD2d 598, 331 N.Y.S.2d 818 (2d Dept. 1972); Leslie v. Van Vranken, 24 AD2d 658, 261 N.Y.S.2d 103 (3d Dep't 1965).

If only the law was this clear: in Hallock v. State of New York, 64 NY2d 224, 485 N.Y.S.2d 510 (1984), the Court of Appeals held that an attorney who lacks actual authority to settle, may still bind the client to a settlement, if the attorney has been cloaked with apparent authority. In Hallock, an 'open court' stipulation of settlement made by counsel was enforced, even though the client had previously rejected the very same terms. The client had authorized the attorney to enter into settlement talks, but told the lawyer to 'negotiate a better deal.' The attorney did not; he appeared at a final pretrial conference and accepted the proposal that the client had rejected. Held: The client was bound to the settlement and was relegated to relief against the former attorney for any damages which the attorney's conduct may have caused.

The Court of Appeals found that because the applicable court rule governing pretrial conferences mandated that only attorneys authorized to make binding stipulations or accompanied by a person empowered to act on behalf of the party were permitted to attend the conference, that this was an implied representation to the defendants that counsel had authority to enter into a binding settlement.

That court rule is currently found in 22 N.Y.C.R.R. 202.26 (e) [FN1] which by its terms only applies to actions pending in the Supreme Court and the County Court. Attorneys venturing into the Surrogate's Court should be aware that the Uniform Rules for the Surrogate's Courts, 22 N.Y.C.R.R. 207.01 et. seq. contains no similar rule.

'Matter of Lagin'

The extent of an attorney's authority to settle a dispute was the issue in Matter of Lagin, 9 Misc3d 1113 (A), 808 N.Y.S.2d 920 (Sur. Ct. Nassau Co. 2005) ('Lagin 1'); NYLJ, April 12, 2006, p. 20, col. 3 ('Lagin 2'). Following the taking of SCPA 2211 examinations in a contested accounting proceeding, settlement negotiations between counsel and their respective clients, including discussions at several court conferences then ensued. Ultimately, a stipulation of settlement was prepared and executed by counsel and the court was advised that the matter was settled. Four days later, one of the respondents notified the court that her attorney was not authorized to settle the case and an application was made to vacate the stipulation. In Lagin 1 Surrogate John B. Riordan directed a hearing to resolve the factual issue of whether respondents' counsel had such authority, because in a reply submission, respondents' counsel averred that he believed he was given such authority by his client, who denied that she did.

Lagin 2 recounts that at the evidentiary hearing the only two witnesses were respondent and her counsel. It was uncontroverted that counsel kept his client fully informed of the status of the negotiations and that the attorney had advised the client that the only way she could pursue a particular claim was to settle the accounting and remove the trustee and the client responded that the attorney should 'do whatever you need to do' to 'make it happen.' Although the client testified that by those words she certainly didn't intend to authorize him to settle the proceeding, the surrogate found that counsel's belief that he was so authorized was reasonable and correct. In determining whether an agent (i.e., the attorney) was given actual authority, the surrogate held that it is not the intention of the principal that controls, but it is the manifestation of the authority given by the principal. Hence, the client's instruction that counsel should do what he needed to do, provided a reasonable basis for counsel to conclude that he had the requisite authority. The application to vacate the stipulation was denied.

Does including an express representation in the stipulation that the attorneys have their respective clients' authority to settle alter the result? The answer was no in Matter of Berkley, NYLJ, July 21, 2005, p. 28, col. 2 (Sur. Ct. New York Co.) where Surrogate Eve Preminger held that if the attorney lacked the actual or apparent authority to settle the matter then the agreement never came into existence.

Written Confirmation

The authors cannot emphasize strongly enough the need to have written confirmation that your client has agreed to the terms of a proposed settlement. There is no reason why a client should not be a signatory to a stipulation of settlement. If for some logistical reason that is not possible, the careful practitioner should insist on receiving a written acknowledgment from the client that he or she has reviewed the terms of the stipulation and has consented to them. In this day of instant communication, promptly receiving such a consent should not be a problem. Otherwise, you may become the defendant in an action by your former client for any damages which your conduct in settling the matter without authority may have caused. Hallock v. State of New York, supra.

Notwithstanding the strong public policy favoring settlements, there is one kind of proceeding in the Surrogate's Court that cannot always be resolved by stipulation. That is a proceeding pursuant to SCPA §1420 for the construction of a will. Because of their unique nature, construction proceedings are not 'settleable' in the sense that the parties are generally free to chart their own procedural course and they usually require a determination on the merits. See, generally, Ordover and Gibbs, 'Correcting Mistakes in Wills and Trusts,' NYLJ, Aug. 6, 1998, p. 1, col. 1. However, some courts have held that a stipulation settling a construction proceeding may be approved by the surrogate where it (1) resolves a genuine controversy among the family, and (2) is in keeping with the testator's overall intent. Matter of Beckley, 63 AD2d 855, 405 N.Y.S.2d 861 (4th Dep't 1978); Matter of Kornblith, (Sur. Ct. New York Co.), NYLJ, March 18, 1994, p. 22, col. 5.

Ascertaining Intent

This issue was addressed by Surrogate Lee L. Holzman in Matter of Stern, NYLJ, Aug. 7, 1998, p. 23, col. 4, where he wrote:

Because the paramount and only basic rule of a construction proceeding is to ascertain and give effect to the testator's intent (Matter of Carmer, 71 NY2d 781,785; Matter of Fabbri, 2 NY2d 236), a construction proceeding is not susceptible to compromise in the same manner as other proceedings (Matter of Korkus, NYLJ, Dec. 13, 1983, p. 10, col. 5). Even where no opposition is interposed, it is incumbent upon the court to make an independent determination as to the meaning of the instrument (Matter of Beckley, 63 AD2d 855; Matter of Sheehan, 195 Misc. 964; Matter of Israelite's Estate, 155 Misc. 259). If the testatrix's intent is clear from the instrument or, if the instrument is ambiguous and such intent can be ascertained with the aid of extrinsic evidence, the court must see that the intent is carried out regardless of any agreement among the parties.

The surrogate noted that where the decedent's intent cannot be gleaned from within the will with any degree of certainty and the use of extrinsic evidence may reasonably result in more than one outcome, the court can and should approve an arm's length agreement between litigants that does not do violence to the decedent's intent.

However, in Matter of Fiscus, 45 AD2d 235, 357 N.Y.S.2d 285 (4th Dept. 1974), the Fourth Department rejected a settlement of a will construction proceeding that had been approved by the surrogate, those beneficially interested and the attorney general, but was opposed by the fiduciary, finding that (a) there was no bona fide controversy with doubt as to the eventual result, and (b) the proposed settlement represented a substantial departure from the clear intent of the decedent.

Although many practitioners seek to have the surrogate approve their settlement, the SCPA only mandates judicial approval when the interests of a person under a disability [FN2] or not yet in being may be affected by a proposed compromise. SCPA §2106. A separate SCPA §2106 proceeding will not be required where a proceeding is already pending. The filing of a supplemental petition is all that is required. SCPA §2106, subd. 5. Since by definition, the interests of a person under a disability may be affected in an SCPA §2106 proceeding, the appointment of a guardian ad litem will be required, unless the person under a disability already has a guardian appointed for him or her. SCPA §§402, 403. [FN3]

In an SCPA §2106 proceeding the court's inquiry is limited to two matters: first whether the proposed agreement fairly reflects the decedent's intent, in so far as it alters the disposition of his or her property; and second whether the agreement protects the interests of the person(s) under a disability. Matter of Jeffries, 155 Misc. 464, 279 N.Y.S. 924 (Sur. Ct. Kings Co. 1935); Matter of Sidman, 154 Misc. 675, 278 N.Y.S. 43 (Sur. Ct. Kings Co. 1935).

In situations where judicial approval is not required, 'stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced.' Matter of New York, Lackawanna & Western R.R. Co., 98 NY 447, 453 (1885). However, where approval under SCPA §2106 is required, approval can be refused where there is no merit to the underlying objections and no basis for a bona fide contest. Matter of Wadsworth, 142 Misc. 717, 256 N.Y.S. 348 (Sur. Ct. Jefferson Co.), aff'd, 236 App. Div. 712, 258 N.Y.S. 982 (4th Dept. 1932). Similarly, judicial approval has been denied where no bona fide controversy or contest exists. Matter of Mayer, 21 NYS2d 460, (Sur. Ct. Westchester Co. 1940), aff'd, 261 App. Div. 982, 27 N.Y.S.2d 433 (2d Dept. 1941).

Conclusion

A final thought. Perhaps the OCA Advisory Committee, the Surrogate's Association and appropriate bar association committees should take up the issue of amending the Uniform Rules for the Surrogate's Courts to include a rule requiring that court conferences be attended by attorneys authorized to make binding stipulations or accompanied by a person empowered to act on behalf of the party represented.

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FN1. Subdivision (e) pertinently provides:

Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations or accompanied by a person empowered to act on behalf of the party represented will be permitted to appear at a pretrial conference. ***.

FN2. SCPA §103, subd. 40 defines a person under disability as: 'Any person who is (a) an infant, (b) an incompetent, (c) an incapacitated person, (d) unknown or whose whereabouts are unknown or (e) confined as a prisoner who fails to appear under circumstances which the court finds are due to confinement in a penal institution.'

FN3. SCPA §403, subd. 3 specifies the narrow circumstances where the appointment of a guardian ad litem will not be required.

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