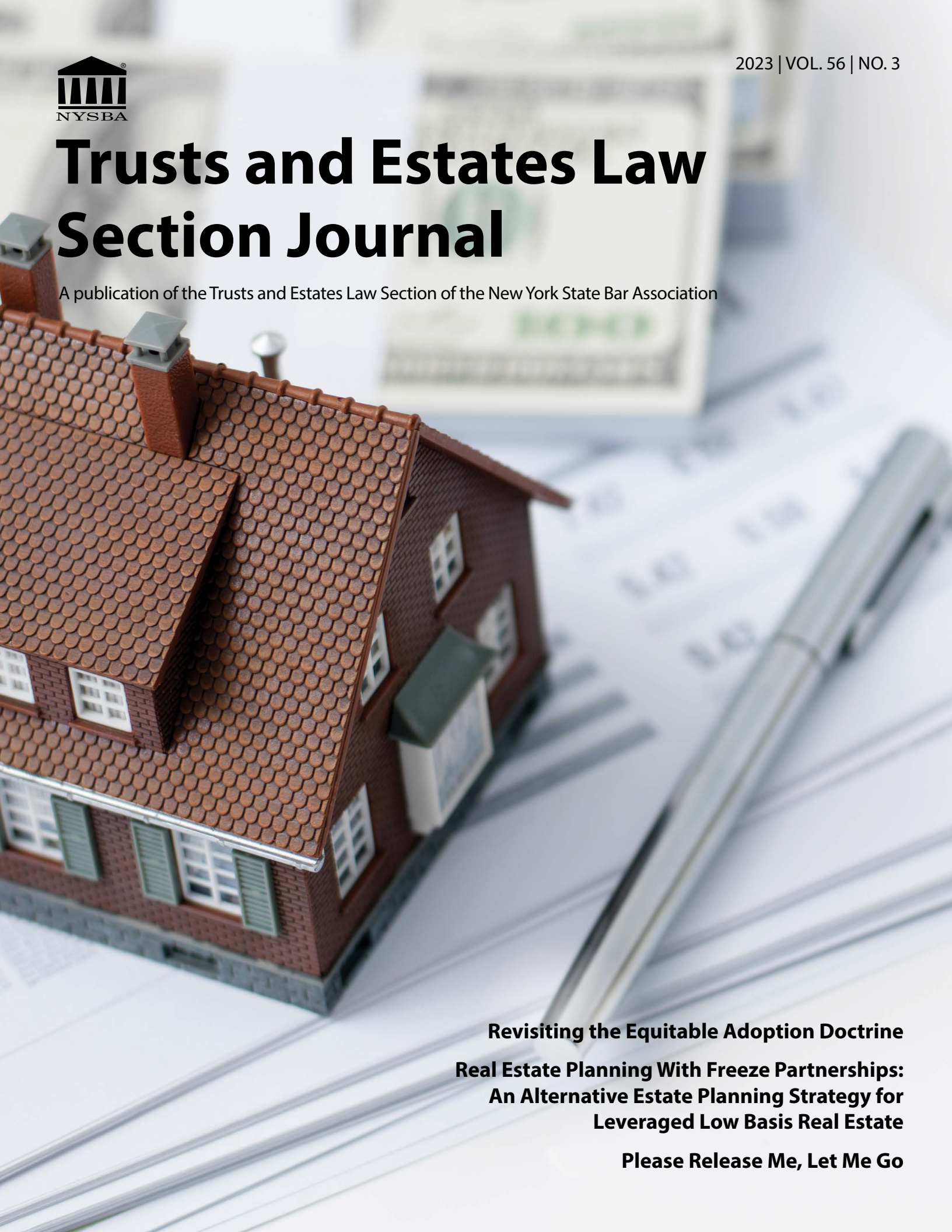
2023 | VOL. 56 | NO. 3

NYSBA

Trusts and Estates Law Section Journal

A publication of the Trusts and Estates Law Section of the New York State Bar Association



Revisiting the Equitable Adoption Doctrine

Real Estate Planning With Freeze Partnerships: An Alternative Estate Planning Strategy for Leveraged Low Basis Real Estate

Please Release Me, Let Me Go

Please Release Me, Let Me Go

By Lori A. Sullivan and Lisa Fenech

You have been named executor of the estate of your dear friend. With the assistance of your attorney, you have marshalled the decedent's assets, filed the estate tax returns, survived an estate tax audit, paid the estate taxes, paid the decedent's debts and claims, and made partial distributions. You now see an end in sight to your fiduciary duties. After years of administering the estate, you can hear the lyrics to that catchy tune, "Please Release Me, Let Me Go," playing over and over again in your head. Your attorney has advised you that there is only one thing left to do to make those lyrics a reality and that is to account to the beneficiaries and be released. Sounds simple, but to really cross that finish line and never look back, an executor must either obtain a decree from the court after judicially accounting or choose to account informally by a receipt and release agreement, making sure the release is valid and enforceable.

An executor may settle his or her account either informally by a receipt and release agreement or formally by a judicial accounting. In both types of settlements, the idea is to provide the beneficiary with complete and accurate information in order for the beneficiary to determine whether he or she should consent and accept the fiduciary's account. It is well-settled that a fiduciary has a duty, whether accounting informally or formally, "to make complete disclosure of all relevant data pertaining to an estate"[1] and to render a full and accurate account of his or her proceedings as a fiduciary.[2] A formal judicial accounting is settled by a decree where the court approves the accounting and disclosures accompanying it.

Often, in order to save the time and expense of judicial accounting, a fiduciary will choose to settle his or her account informally. "[A] fiduciary may settle his accounts by an informal accounting out of court, and such an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree."[3] In fact, courts encourage fiduciaries to informally settle their accounts to dispense with the expense and delay inherent in judicial accountings and, therefore, are reluctant to disturb the finality of such agreements.[4] "It is well established that the law favors the execution of settlements and once a party has signed a receipt and release, he is bound by its terms."[5] If the fiduciary gives full disclosure of his or her account to the beneficiaries, the beneficiaries must object at that time or be barred from doing so.[6]

A beneficiary who has signed a receipt and release may at some later point in time try to challenge the validity of

the executed receipt and release. When the validity of an executed receipt and release is at issue, the initial burden is on the fiduciary to establish that the beneficiary was dealt with fairly when obtaining the receipt and release[7] and that the beneficiary was "aware of the nature and legal effect of the transaction in all its particulars."[8] Generally, this burden is met by submitting the informal account on which the receipt and release was based.[9] The account and the supporting documents together presumptively establish the validity of the receipt and release. A beneficiary who thereafter challenges the validity of a receipt and release has the burden of proving that the receipt and release was procured by either fraud, coercion, bad faith, or misrepresentation.[10] Moreover, a court, in determining whether to set aside a receipt and release, will also consider whether a beneficiary has been "sleeping on his rights" and thereafter attacks a release.[11] Similarly, a beneficiary also cannot claim that he was owed "an affirmative duty to detail an open state of facts as to which [he] was content to waive inquiry."[12] A receipt and release supported by an accounting in a "fairly comprehensive and written form" will be enforceable.[13]

In *Matter of Schoenewerg*,[14] the Court of Appeals reversed the decision of the Appellate Division, First Department, and upheld the Surrogate's determination that the claim at issue was barred by a release executed by the trust remainderman. In *Schoenewerg*, the trustee provided the remainderman with an accounting covering the trust's 15-year existence along with a release. The remainderman executed the release. Three years after executing the release, the remainderman commenced a proceeding seeking to surcharge the trustee for a mortgage investment he claimed was an "unlawful mishandling of the trust."[15] The Surrogate's Court held that the claim was barred by the release; however, the Appellate Division reversed the Surrogate's determination. The Court of Appeals ultimately affirmed the Surrogate's determination holding that the accounting trustee owed no affirmative duty to "detail an open state of facts to which [the remainderman] was content to waive inquiry."[16]

The Appellate Division, Third Department, in *Matter of Lifgren*,[17] upheld the Surrogate's determination that a release was valid since the record established full disclosure by the trustees. The beneficiaries in *Matter of Lifgren* challenged a receipt and release they had executed with respect to the settlement of the account of the trustees of a QTIP trust created under the decedent's will. The QTIP trust was initially funded with stock and the decedent's son wanted to purchase the stock at a discounted rate. The trustees advised the beneficiaries of the sale before it occurred and none of the beneficiaries objected. The beneficiaries were provided with an informal accounting and receipt and release, which they signed. In a later proceeding three years thereafter, the beneficiaries challenged the sale of the stock to the decedent's son. The trustees argued that the beneficiaries had executed receipts and releases and, therefore, were barred from challenging the sale. The beneficiaries claimed that the receipts and releases were not binding because the trustees failed to disclose material facts surrounding the discounted sale of the stock; however, the court found the beneficiaries' argument unavailing as the circumstances surrounding the sale of the stock had been fully disclosed.

Similarly, in *Matter of Spacek*[18] a residuary beneficiary moved to vacate a waiver and release she had previously executed alleging that the executor had misled her in the execution of the release and concealed information from her. Specifically, the beneficiary alleged that the executor had not revealed that the executor was the surviving joint tenant on an account with the decedent that had a date of death balance of $375,000. The beneficiary claimed that although she executed the receipt and release, she immediately called the executor's counsel and attempted to rescind the agreement. The executor argued that the receipt and release was valid and enforceable because there was no failure to disclose. The executor's counsel had sent all of the beneficiaries a letter enclosing a memorandum, a proposed agreement settling the account, and financial records for the estate consisting of the Form ET-90, the estate checking account ledger, consolidated and monthly statements, and a closing statement. The court held that although the executor did not explicitly mention the joint account in the documents provided, neither had she hidden the existence of the account. Importantly, the court noted that the beneficiary was an adult under no disability and that she never made any further inquiry regarding the materials sent to her.

Moreover, in *Matter of Blodgett*,[19] the Surrogate's Court of New York County declined to set aside a receipt and release executed by a trust beneficiary. The beneficiary specifically sought to surcharge the trustees for an investment made in the form of a mortgage participation. The court noted that the correspondence between the beneficiary and the corporate trustee clearly showed the beneficiary's "familiarity as to his rights."[20] The beneficiary had, in fact, requested, in writing, a statement of the investments held in the trust. He was given the information he requested and was offered the ability to investigate further if he desired which he declined to do. The court held that, under such circumstances, the beneficiary was bound by the terms of the release. Although the court did acknowledge that there were some errors in the account, it found that these errors "did not constitute a misinterpretation or a material suppression of facts which could in any way affect the liability of the trustees in making the original mortgage investment . . ."[21]

If a beneficiary was to seek to invalidate a receipt and release on the basis of fraud, he or she must show "a misin-

terpretation known to be false and made for the purpose of inducing a party to rely on it, justifiable reliance and damages."[22] Afterthoughts are insufficient to invalidate a release;[23] the beneficiary must provide proof of the misrepresentation at the time the release was entered into. "To hold a release forever hostage to legal afterthoughts basically vitiates the nature of the release . . ."[24] In *Matter of Ruth Bromer and Zvi Levy Family Sprinkling Trust*,[25] the court stated the beneficiary alleging fraud in connection with the execution of the release must "provide clear and convincing proof of a knowing misrepresentation by the trustee on which [the beneficiary] acted to her detriment. Fraud is often described as requiring a showing of the following elements: a representation of falsity, scienter, justifiable reliance, and injury."[26] Therefore, full disclosure with a receipt and release is a further protection against possible claims of fraud or misrepresentation by a beneficiary.

An executor may also make partial distributions during the administration of the estate and it is equally as important to obtain a receipt and release and provide full disclosure with respect to each such partial distribution. A beneficiary who receives the benefit of an early distribution by signing a receipt and release cannot avail himself or herself of a second opportunity to question the executor's actions for the period covered by the receipt and release. It is also important to remember that an executor will often keep a reserve for additional expenses or fees after distributing most of the estate. The failure to fully disclose the transactions and have the beneficiaries sign a receipt and release for the reserve may unfortunately subject the fiduciary to having to judicially account for the period from the prior receipt and release to the date of the distribution of the reserve.[27]

Thus, the not so simple response to our executor's plea of "please release me, let me go" is sure, so long as you fully disclose your transactions to the beneficiaries of the estate, deal with them fairly, do not misrepresent any material facts, and obtain a release for the entire period of your tenure, including through the end distribution of any reserve.

Endnotes

1 *Matter of Rappoport*, 96 N.Y.S.2d 741 (Sur. Ct., Kings Co. 1950); *see also Matter of Grove*, NYLJ, Aug. 27, 1991, p. 26, col. 3 (Sur. Ct., New York Co.).

2 *See Matter of Donner*, 82 N.Y.2d 574 (1993); *Matter of Gunther*, NYLJ, January 11, 2002, p. 22, col. 2 (Sur Ct. Westchester Co.).

3 *Matter of Kahn*, 144 N.Y.S.2d 253, 254 (Sur. Ct., Westchester Co.1995), *affd*, 2A.D.2d 893 (2d Dep't 1996).

4 *Matter of Amuso*, 13 Misc. 2d 686 (Sur. Ct., Nassau Co. 1958).

5 *Matter of Torres*, NYLJ, June 30, 1998, p. 27, col. 5 (Sur. Ct., New York Co.); *see also Matter of Voislawsky*, 135 Misc. 877 (Sur. Ct., New York Co. 1924); *Matter of Leyden*, NYLJ, March 2, 1993, p. 30, col. 6 (Sur. Ct., Nassau Co.); *Matter of Gutwirth*, NYLJ, May 5, 1995, p. 30, col. 2 (Sur. Ct., New York Co.).

6 *Matter of Hunter*, 4 N.Y.3d 260, 267 (2005).

7 *Matter of Amuso,* 13 Misc. 2d 686 (Sur. Ct., Nassau Co. 1958).

8 *Birnbaum v. Birnbaum*, 177 A.D.2d 409, 416 (4th Dep't 1990).

9 *Matter of Leyden*, NYLJ, March 2, 1993, p. 30, col. 6 (Sur. Ct., Nassau Co.).

10 *Matter of Amuso,* 13 Misc. 2d 686 (Sur. Ct., Nassau Co. 1958).

11 *Id.*

12 *Matter of Schoenewerg*, 277 N.Y. 424 (1938).

13 *Matter of Amuso*, 13 Misc. 2d 686 (Sur. Ct., Nassau Co. 1958).

14 *Matter of Schoenewerg*, 277 N.Y. 424 (1938).

15 *Id.*

16 *Id.*

17 *Matter of Lifgren,* 36 A.D.3d 1042 (3d Dep't 2007).

18 *Matter of Spacek*, 45 Misc. 3d 1210 (A) (Sur. Ct., Nassau Co. 2014).

19 *Matter of Blodgett*, 171 Misc. 596 (Sur. Ct., New York Co. 1939).

20 *Id.* at 597.

21 *Id.* at 598.

22 *Kuncman v. Amer. Portfolio*, 25 Misc. 3d 1218 (A) (Sup. Ct., Nassau Co. 2009).

23 *Tajan v. Pavia Harcourt*, 257 A.D.2d 2999 (1st Dep't 1999), appeal dismissed, 94 N.Y.2d 837 (1999).

24 *Id.* at 306.

25 *Matter of Ruth Bronner and Zvi Levy Family Sprinkling Trust*, 2016 N.Y. Misc. Lexis 151 (Sur. Ct., New York Co. 2016).

26 *Id.*

27 *Matter of Yang,* NYLJ, Mar. 8, 2017, p.21, col. 5 (Sur Ct., N.Y. Co.).

Lori A. Sullivan is a partner in the Trusts & Estates Litigation and Trusts & Estates Practice Groups of Meltzer, Lippe, Goldstein & Breitsone, LLP. Ms. Sullivan practices in the areas of estate litigation, estate planning and estate administration, including contested probate proceedings, contested accounting proceedings, discovery proceedings, inter vivos trust litigation and will construction proceedings.

Lisa Fenech is an associate in the Trusts & Estates Litigation and Mental Health, Guardianship & Elder Law Litigation Practice Groups of Meltzer, Lippe, Goldstein & Breitstone, LLP. Ms. Fenech practices in the areas of complex estate and trust litigation, probate, estate administration, and complex elder law litigation.