Receipts and End of the Road or Just

The discharge of an executor or trustee is the ultimate end-game of most, if not all, estate and trust administrations. Affording that kind of comfort level to the fiduciary can be accomplished in one of two ways, distinguished by whether the process is judicial or non-judicial. Although the judicial discharge has been the generally accepted route, given the time and expense incurred through this course many fiduciaries opt for an informal discharge by means of a receipt and release.[1]

Nevertheless, the fiduciary who thinks a receipt and release is the answer to all future claims for an accounting and liability may have a surprise in store. Though instinctively a release is thought to provide an absolute bar to litigation, the factual circumstances surrounding the procurement of the release, as well as its terms, often drive the result.

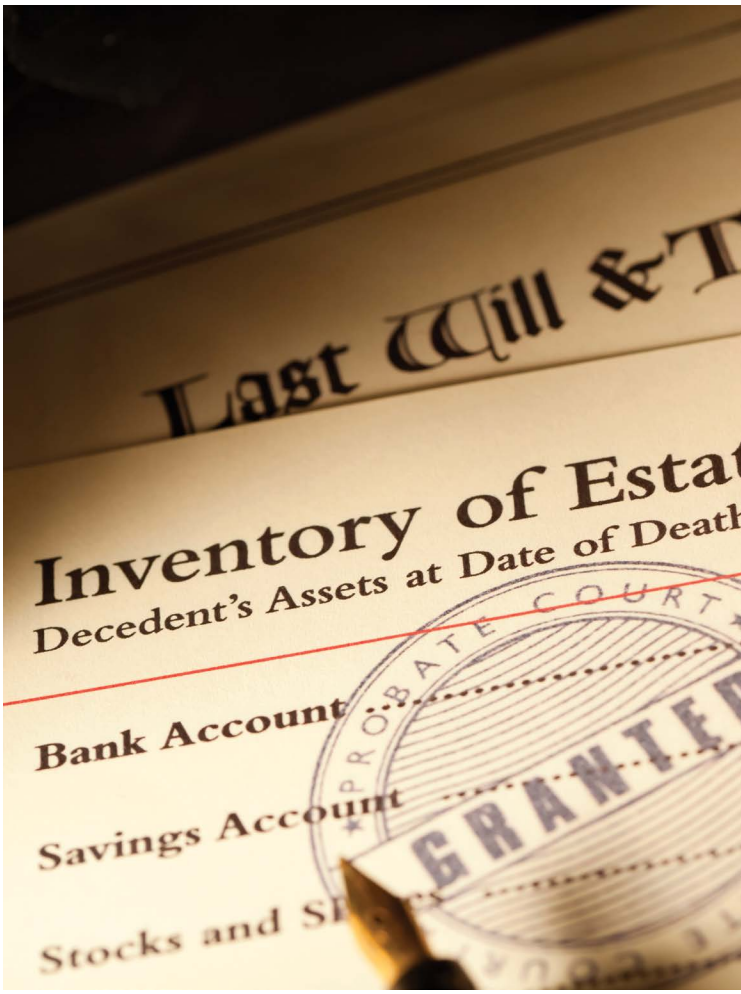
Recent opinions rendered by the Surrogate's Court and the Appellate Division have explored the issue of receipts and releases and have provided insight into just how far the instruments will go to "save the day." The lessons to be learned by the fiduciary and the beneficiary from these opinions are worthy of note.

IN RE BRONNER

The starting point for any discussion of recent opinions on receipts and releases is *In re Bronner.*[2] The decision is instructive to fiduciaries, who are of the mindset that a receipt and release is a complete defense to a compulsory accounting.

Before the Surrogate's Court were, *inter alia,* three contested compulsory accounting proceedings in which the respondent/trustee opposed the relief on the grounds that the petitioner/beneficiary had previously executed receipts and releases discharging him from liability. The petitioner moved for summary judgment, alleging, in part, that the releases were not fairly obtained due to allegedly inadequate disclosure and an explanation of the transaction by the trustee.

In denying the motion, and directing that a hearing be held, the court cautioned fiduciaries who seek to avail themselves of the protections afforded by a release, observing that because a transaction between a trustee



seeking a release from a beneficiary is, essentially, self-dealing, the law requires that there be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary, as well as adequate consideration paid.[3]

Moreover, the court noted:

> The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is *not sufficient* to insulate the release from a subsequent attack by the beneficiaries; the fiduciaries must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all of its particulars.[4]

By Ilene Sherwyn Cooper

Releases: a New Beginning?

Within this context, based on the allegations of the petitioner, and the lack of documentary evidence to the contrary, the court found that the petitioner had made a prima facie case that the releases in issue were not obtained fairly, and thus did not necessarily foreclose her right to the requested accountings.

In an attempt to resist summary judgment, the trustee alleged that although an informal account was not provided to the petitioner at the time the releases were executed, adequate and full disclosure was made to her by her husband and a trusted friend, who was the asset manager for the real property interests held by the trusts.[5] Additionally, documentary evidence submitted by the trustee suggested that the petitioner was intimately aware of the trust assets, and the transactions underlying the releases.

In view thereof, the court concluded that the trustee's evidence was sufficient to raise genuine questions of fact as to what was known or disclosed to the petitioner. The court opined that while a fiduciary acts at his or her peril in seeking a general release without an accounting, there is nothing in the law that mandates it as a necessary pre-condition to its validity.

> Of course, an accounting fiduciary may prepare an account when seeking a beneficiary's release, but nothing forbids a trustee from pursuing a time-and cost-effective route of forgoing an accounting, formal or informal, as requested or agreed-to by informed beneficiaries.[6]

Moreover, the court rejected the notion that only the trustee could make the requisite disclosure surrounding the procurement of a release to the beneficiary. Rather, the court held that the appropriateness of a disclosure must be determined in light of the circumstances, with the touchstone being fairness.

BIRNBAUM AND ITS PROGENY

In reaching its result, the court, in *Bronner*, took advice from the opinion in *Birnbaum v. Birnbaum,*[7] in which the Appellate Division, Fourth Department, concluded that the rules applicable to self-dealing transactions by a fiduciary were "equally applicable to the obtaining of a release by a fiduciary,"[8] and, thus, cast the burden on the fiduciary to prove the validity of the transaction:

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> When a fiduciary engages in self-dealing, there is inevitably a conflict of interest: as fiduciary he is bound to secure the greatest advantage for the beneficiaries; yet to do so might work to his personal advantage. Because of the conflict inherent in such transaction, it is voidable by the beneficiaries unless they have consented. Even then, it is voidable if the fiduciary fails to disclose material facts which he knew or should have known, if he used the influence of his position to induce the consent or if the transaction was not in all respects fair and reasonable . . . These rules are equally applicable to the obtaining of a release by the fiduciary.[9]

Subsequent to the Appellate Division's opinion in *Birnbaum*, Surrogate and Appellate courts followed its lead as evidenced by decisions reminding fiduciaries of the strictures by which they were to be guided when procuring a receipt and release from a beneficiary. At the same time, they forewarned beneficiaries that a receipt and release would not be lightly disregarded.

The decision in *In re Goldstick* is instructive.[10] Before the Appellate Division, First Department, were cross-appeals from an order issued in contested trust accounting proceedings in which the Surrogate's Court imposed surcharges against the trustees and removed them from office. The Appellate Division reversed many of the surcharges imposed, and remanded other issues for a further hearing. In pertinent part, the court relied, *inter alia,* on releases that had been executed by the objecting trust beneficiaries at the conclusion of the preceding estate administration.[11] Although the Surrogate's Court found these releases to be a nullity, the Appellate Division disagreed, concluding that they effectively barred the beneficiaries from challenging the executors' stewardship. In reaching this result, the court observed that the instruments were derived after the beneficiaries had been provided with full disclosure, an opportunity to obtain counsel, and diligent inquiry by counsel on the beneficiaries' behalf.

Notably, the Court found that these circumstances were "entirely distinguishable"[12] from those in *Birnbaum*, which had been relied on by the Surrogate's Court in disaffirming the releases. As the Court observed, "[h]ere there was complete disclosure coupled with expert advice and guidance." [13] The Court opined that to demand more would "go a long way toward rendering the device unavailing except in the most trivial situations, and would set at naught the long-standing policy of the law approving this expense-saving device in lieu of recourse to judicial intervention for finality in the settlement of fiduciary accounts (*In re Blodgett,* 171 Misc. 596)."[14]

As compared to *Birnbaum*, which established the parameters of fiduciary conduct in procuring a release, *Goldstick* made it clear that an informed beneficiary, acting with the assistance of counsel, would have little hope of later undermining its effectiveness. Since *Goldstick*, other decisions have followed, all with the same perspective.[15]

RECENT VIEWS OF THE SURROGATE'S AND APPELLATE COURTS

The year 2017 saw a surge of opinions addressed to receipts and releases, perhaps resulting from the vitality of the instruments as a means of achieving closure of an estate or trust without resort to the courts. These opinions continue to crystallize judicial thinking on the subject and, as such, provide valuable insight to the practitioner who is advising a client – be it a fiduciary or a beneficiary – of the wisdom of this approach.

The decision in *In re Ingraham* [16] provides instruction as to the nature and extent of the release that will absolve a fiduciary of the duty to account, but forewarning of the court's inherent authority to compel an accounting under appropriate circumstances.

Before the court was a petition by the successor trustee of two separate inter vivos trusts to compel two former trustees of the trusts to account. One of the trustees, who had been removed by the grantor, filed his accountings; the other trustee, who had resigned, objected to the petitions relying on language in the trust instruments, as well as releases executed by the grantor and the other trustee.

At the time the objectant/trustee resigned, the grantor executed instruments releasing her from any and all claims related to her role as trustee, with the exception of claims arising from fraud or willful misconduct. The release further acknowledged that the grantor desired to forgo a formal account, and that the grantor "ha[d] examined the acts and transactions of [the trustee] and . . . assent[ed] to such actions and transactions."[17] The accounting trustee signed a similar release in favor of the resigning trustee, and assented to any account (formal or informal) rendered by her.

The court held that the objectant's reliance on the releases to insulate her from her duty to account was misplaced, inasmuch as the instruments were not "full," having reserved the releasors' rights to seek relief for any fraud or willful misconduct. Further, the court rejected any claim by the objectant that the releases relieved her of her duty to account, a responsibility that was fundamental to any fiduciary relationship. Indeed, the court found that while the release executed by the grantor may have arguably consisted of a waiver of her right to an accounting, it did not constitute a clear and unambiguous waiver of an accounting by the other trustee and trust beneficiaries.

Additionally, the court held that the provisions of the trust instruments did not relate to the final accounting sought by the proceedings. Finally, the court observed that where a former trustee has failed to account within a reasonable time and full releases do not relieve her of

the duty to account, the court may *sua sponte* direct an accounting pursuant to SCPA 2205. Accordingly, the objectant was directed to account with respect to each of the subject trusts.

Utilizing the same principles as expressed by the court in Ingraham, the Surrogate's Court in In re Cozza18 took a different turn, and held that the subject release had been freely and fairly executed, and moreover, that an accounting would not be in the best interests of the estate.

The issue of the release was raised by the executor within the context of a motion for summary judgment dismissing a compulsory accounting proceeding instituted by an estate beneficiary.

Notably, the documentary evidence submitted in support of the motion indicated that the petitioner had executed a receipt, release, waiver and refunding agreement after receiving an informal account prepared by the estate accountant. The informal account was supported by annotated schedules and an acknowledgment by the petitioner that prior to signing the receipt and release she had been given the opportunity to consult an attorney, seek the advice of her own accountant, and to review and ask questions about the informal account.

In opposition to the motion, the petitioner claimed that she was caused to sign the release because she was in need of her inheritance. Nevertheless, she acknowledged that she contacted the attorney and accountant for the estate prior to signing the document, and had been represented by her own counsel.

The court concluded the petitioner was provided with detailed information regarding the informal account, and had freely signed the document after being given the opportunity to consult professionals of her own choosing. The court held that it would not be in the best interest of the estate, given its small size, to require the executor to undertake the expense of a formal accounting proceeding.

In In re Salz,[19] the Surrogate's Court concluded that the broad terms of a Receipt, Release and Indemnification Agreement barred the petitioner's claim in companion proceedings for an inquiry and turnover, pursuant to SCPA 2103.

The proceedings had been instituted against the decedent's surviving spouse by one of the decedent's sons from a prior marriage, who was a beneficiary under his will. Prior to the decedent's death, his spouse, who was his conservator, was the subject of a contested accounting proceeding, in which the propriety of her stewardship, as conservator, was questioned by the petitioner and his brother. They alleged that the decedent's spouse had failed to account for all of the artwork owned by their father. This litigation was resolved after the decedent's death, pursuant to the terms of a "Stipulation of Settlement and Discontinuance," providing, *inter alia,* for the decedent's spouse to be released "individually and in her capacity as Conservator, and in any other capacity . . . from any and all claims which they now or ever had"[20] upon her payment of a sum certain.

A year later, the co-executors of the decedent's estate, of which the decedent's spouse was one, accounted to the estate beneficiaries and the trustee of the trust created under the decedent's will. In connection therewith, the petitioner and his brother executed a receipt and release agreement that stated they had examined the executors' account, found it to be complete, and "released and forever discharged the Executors, individually and as executors, from any and all claims and causes of action, liabilities and obligations whatsoever . . . which each ever had, now has, or hereafter can, shall, or may have . . . by reason of any act or omission . . ."[21]

Thirty years later, the petitioner instituted the subject proceedings asserting, *inter alia,* that artwork was missing from the decedent's estate as a result of fraud and misconduct committed by the decedent's spouse.[22] The respondents moved to dismiss alleging, in pertinent part, that petitioner's claims had been released. In granting the motion, the court found, *inter alia*, that during the course of the co-executors' accounting, the petitioner, after having received and examined the account, and while represented by counsel, had released any claims and causes of action he had against the fiduciaries, in their representative capacity and individually. Citing *Serbin v. Rodman Principal Invs. LLC,*[23] the court held that the broad language of the release was sufficient to encompass any fraud claims.24 Further, the court concluded that petitioner's pleadings failed to identify a separate fraud from the subject matter of the release that could serve as a basis for a claim that the execution of the release was induced by fraud.25

The decision in *Salz* is one of the more egregious instances of a beneficiary having afterthoughts following the execution of a release. It serves as a cautionary tale to those beneficiaries who pay it short shrift, and forebodes dismissal of post-execution claims against the fiduciary when full disclosure to the beneficiary and an opportunity to retain counsel is apparent.

The opinion in *Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.*,[26] upon which the court in *Salz* also relied, provides an even stronger warning to a beneficiary, particularly, the "more sophisticated and well-counseled beneficiary."[27] In the face of arguments that the defendant's fiduciary status barred dismissal of plaintiff's claim for fraudulent inducement based on an earlier procured release, the First Department directed that the complaint be dismissed:

> [A] release that, by its terms, extinguishes liability on any and all claims arising in connection with spe-

> cific matters is deemed to encompass claims of fraud relating to those matters, even if the release does not specifically refer to fraud and was not granted in settlement of an actually asserted fraud claim . . . While [the defendant], as the holder of the majority interest . . . owed plaintiffs certain fiduciary duties, the foregoing principles apply (at least among sophisticated parties advised by counsel) even where the releasee is a fiduciary . . . If [the defendant's] fiduciary status alone sufficed to prevent it from obtaining the dismissal of this action based on the 2003 release, the implication would be that a fiduciary can never obtain a valid release without first making a full confession of its sins to the releasor, *regardless of the releasor's sophistication and the arm's length nature of the negotiations from which the release emerged.* This is not the law . . .[28]

In affirming the opinion of the First Department, the Court of Appeals amplified the Appellate Division's holding, opining:

> A sophisticated principal is able to release its fiduciary from claims – at least where, as here, the fiduciary relationship is no longer one of unquestioning trust – so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into . . .[29]

In *Pappas v. Tzolis,*[30] the Court of Appeals clarified the opinion in *Centro*, and observed:

> Where a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry . . . *The test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that should make reliance on the fiduciary unreasonable.*[31]

In *In re Boatwright,*[32] the Second Department added to the foregoing dictates by concluding that the respondent's "failure to consult with an attorney does not preclude enforcement of the release."[33]

The foregoing results are to be compared with the decision in *Birnbaum,*[34] where the court, due to the self-dealing nature of the transaction, placed the onus on the fiduciary to prove that the beneficiary was provided with full disclosure and an understanding of his or her legal rights. The distinction between the two lines of authority seems to be as pinpointed by the Court of Appeals in Pappas v. Tzolis,[35] i.e., whether the release was procured in the context of litigation and/or other adverse setting as between the parties that would alert the beneficiary that the fiduciary relationship "[was] no longer one of unquestioning trust,"[36] rather than in the normal course of settling an estate, in which a stricter standard of scrutiny is applied.

A release, however, may be invalidated for any of the traditional bases for setting aside written agreements, such as duress, fraud, undue influence or mutual mistake.

The latter approach is evidenced by two decisions rendered by the Second Department in In re Lee,[37] and *In re Spacek.*[38] In *In re Lee,* the court affirmed three decrees of the Surrogate's Court that granted the motions of the Bank of New York Mellon (BNY) and Merrill Lynch Trust Company ("Merrill Lynch") to dismiss the petitions for judicial accountings of two testamentary trusts and two inter vivos trusts that had been created by the decedent and his post-deceased spouse. The petitioners were beneficiaries of each of the trusts. Initially, BNY served as co-trustee of the trusts until it resigned and was succeeded by Merrill Lynch. Upon its resignation, the petitioners each executed a release in favor of BNY regarding its management of the trusts. Following the death of the decedents' son, and the succession by Merrill Lynch as trustee, all four trusts terminated, whereupon

the petitioners each executed releases in favor of Merrill Lynch releasing it from any claims based upon its stewardship.

Approximately four years later, the petitioners instituted proceedings to compel respondents, BNY and Merrill Lynch, to account. Motions to dismiss by the respondents were granted, and the petitioners appealed. Significantly, the Appellate Division held that the Surrogate's Court should not have dismissed the petitions against BNY on the basis of the releases, inasmuch as BNY failed to affirmatively demonstrate that all of the petitioners, who were not represented by counsel when the instruments were signed, were fully aware of the nature and legal effect of the releases at that time.[39]

With respect to Merrill Lynch, the court held that the Surrogate's Court had properly determined that the releases executed by the petitioners were valid, inasmuch as upon executing the instruments the petitioners confirmed receipt of an informal accounting, and discharged Merrill Lynch from all liability and any claim for a formal accounting upon the advice of counsel and after negotiations.

Several months after the decision in *In re Lee*, the Second Department followed suit in *In re Spacek*, when it sustained the validity of a release executed by a beneficiary within the context of an informal agreement discharging the fiduciary. Specifically, the court found that the fiduciary had satisfied her burden of demonstrating that the beneficiary was made fully aware of the transaction and particulars of the estate in advance of her signing the instrument. The court held: "[I]f a fiduciary gives full disclosure in [its] accounting, to which the beneficiaries are parties . . . they should have to object at that time or be barred from doing so after the settlement of the account . . ."[40]

CONCLUSION

Generally, a valid release constitutes a complete bar to an action or a claim that is the subject of the release. A release, however, may be invalidated for any of the traditional bases for setting aside written agreements, such as duress, fraud, undue influence or mutual mistake, with the burden on the party seeking to invalidate the release.

In a fiduciary setting, the foregoing principles often yield to the superseding duties of trust, loyalty, and good faith imposed on the relationship, when the circumstances so require. Indeed, as evidenced by the foregoing decisions rendered by both the Surrogate's Courts and the Appellate Division during the past year, and the precedent upon which these opinions relied, much depends on the context in which the release was executed, the sophistication of the parties, and the opportunity to retain counsel. Suffice it to say that the decisions make it clear that a release will not always serve to put litigation to rest, and may just be a new beginning.

1 Although a receipt and release may be utilized when a fiduciary requests a judicial discharge, as in the case where a beneficiary has received a partial or full satisfaction of his or her distributive share, it is more often found when a fiduciary seeks to be discharged informally.

2 2016 N.Y. Misc. LEXIS 151 (Sur. Ct. N.Y. Co. 2016).

3 *Id.* at *23, *Birnbaum v. Birnbaum,* 117 A.D.2d 409 (4th Dep't 1986).

4 *Id.* at *24.

5 Notably, the beneficiary was not represented by counsel at the time she signed the releases.

6 2016 N.Y. Misc. LEXIS 151, at *31(Sur. Ct., N.Y. Co. 2016).

7 117 A.D.2d 409 (4th Dep't 1986).

8 *Id.* at 415.

9 *Id.* (citations omitted).

10 177 A.D.2d 225 (1st Dep't 1992).

11 That administration, in which the trustees had served as co-executors, was apparently reopened by the Surrogate early in the trial of the trust accounting proceedings, albeit the matter had been closed by releases executed by the objectants 13 years earlier.

12 *Goldstick,* 177 A.D.2d at 233.

13 *Id.* Notably, while the disclosure in *Goldstick* took the form of a formal accounting, neither a formal nor informal accounting had been provided to the beneficiary in *Bronner*, yet, as stated *supra*, the court found the trustee's allegations and the record sufficient to create a question of fact as to whether full and adequate disclosure had been made.

14 *Id.*

15 *See, e.g.*, *In re Lifgren,* 36 A.D.3d 1042 (3d Dep't 2007); *In re Leo Grande,* 13 Misc. 3d 1070 (2006).

16 2017 N.Y.L.J. LEXIS 1516 (Sur. Ct., N.Y. Co. 2017).

17 *Id.* at *2.

18 2017 N.Y.L.J. LEXIS 2020 (Sur. Ct., Bronx Co. 2017).

19 2017 NY.L.J. LEXIS 2089 (Sur. Ct., N.Y. Co. 2017).

20 *Id.* at *2.

21 *Id.*

22 In the interim, the decedent's spouse died, resulting in the trustee of the inter vivos trust into which her estate passed on death being made a party to the proceedings.

23 87 A.D.3d 870, 871 (1st Dep't 2011).

24 *Salz, citing Serbin v. Rodman Principal Ins., LLC, supra.*, in which the Court, quoting *Centro Empresarial Cempresa, S.A. v. America Movil, S.A.B. de C.V.,* 76 A.D.3d 310, 318–19, *aff'd* 17 N.Y.3d 269 (2011), opined that the broad release language encompassed any fraud claim, even if it did not specifically refer to fraud, and was not granted in settlement of an actually asserted fraud claim.

25 *See Centro, id.*

26 76 A.D.3d 310, *aff'd,* 17 N.Y.3d 269 (2011).

27 *Id.* at 319.

28 *Id.* at 318–19 (emphasis supplied).

29 17 N.Y.3d at 278.

30 20 N.Y.3d 228 (2012).

31 *Id.* at 232–33 (emphasis supplied).

32 114 A.D.3d 856 (2d Dep't 2014).

33 *Id.* at 858; *see also Skluth v. United Merchants & Mfrs., Inc.*, 163 A.D.2d 104, 107 (1st Dep't 1990):

> The other factor deemed crucial by the Supreme Court, plaintiff's failure to consult with an attorney, also does not preclude enforcement of the release. The court properly found that plaintiff is an educated, experienced businessman with knowledge of release letters such as the one that he was asked to execute . . . There is, certainly, no requirement in the law that consultation with a lawyer must occur in order to render a contractual obligation enforceable . . . Although a party's representation by an attorney is some evidence of the knowledge and volition with which a particular contract was made . . . the absence of counsel is far less critical than the opportunity to consult counsel . . ..

34 117 A.D.2d 409 (4th Dep't 1986).

35 20 N.Y.3d 228 (2012).

36 *Id.* at 232.

37 153 A.D.3d 831 (2d Dep't 2017).

38 155 A.D.3d 747 (2d Dep't 2017).

39 Nevertheless, the court found that the Surrogate's Court had properly determined that the claims were time-barred.

40 *Spacek,* 155 A.D.3d at 748, quoting *In re Lifgren,* 36 A.D.3d at 1044.