SURROGATE'S COURT OF THE STATE OF NEW YORK - MONROE COUNTY

In the Matter of the Estate of **MURIEL H. ALBRIGHT**, Deceased.	))))))	**Decision & Order** File No.: 2008 - 2825

Chad M. Hummel, Esq., Panzarella & Coia, Rochester, New York, Attorneys for the Estate / Petitioner.

Melvin Bressler, Esq., Bressler & Kunze, Rochester, New York, Attorneys for Respondents Ervina Malin and Taylor Malin..

FACTS

Decedent died November 13, 2008, survived by her son, daughter, and grandson. In her Last Will and Testament, dated October 26, 2008, the Decedent left her entire estate to her son, Michael Albright (hereinafter "Executor" or "Petitioner"), and nominated him Executor. Preliminary Letters Testamentary were issued to Petitioner by a Decree of this Court on December 15, 2008. At the initial Court return date of January 22, 2009, Decedent's daughter, Ervina Malin, appeared to object to the probate of the Will and request a hearing pursuant to SCPA 1404. Prior to the hearing however, the parties settled their dispute, which primarily centered on ownership of the Decedent's 2006 Jeep Liberty.

The dispute arose because Decedent made no specific mention of the vehicle in her Will, but had begun to complete the paperwork in order to transfer the vehicle to her grandson. The title to the vehicle, and DMV Form DTF-802, "Statement of Transaction - Sale or Gift of Motor Vehicle" had been partially completed and named Taylor Malin as the recipient of the vehicle. Additionally, this paperwork was accompanied by a note signed by Decedent on October 11, 2008 stating, "This vehicle is to be turned over to Taylor when I no longer need it."

Primarily through written correspondence between the parties' respective attorneys, a settlement was reached wherein the sum of $20,000.00 was to be paid to Ervina Malin, and the vehicle was to be transferred to Taylor Malin

Pursuant to their settlement, Ervina Malin signed a general release and the parties executed a Stipulation of Discontinuance dated May 15, 2009. Thereafter, this Court directed the parties to both submit proposed Orders reflecting the agreed upon settlement terms. Counsel for the Respondents, James G. Vazzana, Esq., submitted a proposed Order, but neither the estate attorney, Karen R. McClosky, Esq., nor her retained counsel, Samuel A. Dispenza, Esq., submitted a proposed Order, despite repeated requests from the Court to do so. On October 6, 2009, the Court, relying on all the papers, correspondence, and evidence then before it, entered an Order directing the immediate transfer of the 2006 Jeep Liberty to the Decedent's grandson, Taylor Malin, and specifying that any party failing to abide by the terms of the Order within ten days would be subject to possible sanction.

On November 12, 2009, the Estate filed a timely Notice of Appeal from the October 6, 2009 Order. However, no stay from the October 6, 2009 Order was requested, and no undertaking or bond was posted pursuant to CPLR 5519(a)(4). On or about July 19, 2010, the Estate, through its newly retained counsel, Chad M. Hummel, Esq., submitted the proposed contents of the Record on Appeal to the Respondents' appellate counsel, Melvin Bressler, Esq. Mr. Bressler communicated his opposition to the proposed Record on Appeal, requesting that four additional documents be included. On August 16, 2010, the Estate filed an Order to Show Cause seeking the immediate approval of the Record as originally proposed. Mr. Bressler, on behalf of the Respondents, filed an Affirmation opposing the motion and requesting that four additional documents be included: a letter dated March 24, 2009 from attorney Samuel Dispenza to James Vazzana showing that Mr. Dispenza had been retained as counsel for Karen McCloskey, who was then the attorney of record for the Estate; a letter

dated April 27, 2009 from Mr. Dispenza to Mr. Vazzana discussing the proposed settlement, a letter dated April 27, 2009 from Mr. Vazzana to Mr. Dispenza confirming the settlement agreement, and a letter dated May 1, 2009 from Mr. Dispenza to Mr. Vazzana discussing the filing of the papers necessary to finalize the settlement.

In its Affirmation in support, the Estate advances the position that the letters are not suitable for inclusion due to being unsworn, not the subject of any evidentiary proceedings, and inadmissable hearsay. The Respondents allege that without the inclusion of the four letters demonstrating the settlement between the parties, the Appellate Court will lack information concerning the basis of the Surrogate's decision and will grant the appeal and merely remand the matter back to the Surrogate's Court for the re-establishment of the Record. Additionally, the Respondents advance the argument that there is a legal basis for the inclusion of the letters in the Record under a recognized exception to the general CPLR 5526 rule governing records on appeal.

OPINION

Pursuant to CPLR 5526, the record on appeal from a final judgment shall consist of only pleadings, exhibits, and orders and opinions in the case. However, there is a narrow, but often cited exception to this statutory standard allowing for, "the consideration, on appeal, of reliable documents, the existence and accuracy of which are not disputed." *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177, 178 (2d Dep't 1989); *see also*, *Crawford v. Merrill Lynch, Pierce, Fenner & Smith*, 35 N.Y.2d 291, 298-299, 361 N.Y.S.2d 140 (1974). In *Crawford*, the Court of Appeals specifically stated that part of its rational in deviating from the 'general rule' was to avoid remanding, which would only "...prolong the appeal and accomplish little else." 35 N.Y.2d *at* 299.

The general rule is intended to secure inclusion in the record those documents upon which the lower court relied, so the appellate court may fully determine whether the lower court's decision was legally correct. *See*, *In re Brady's Estate*, 1935, 155 Misc. 242, 280 N.Y.S. 887 (Surr. Ct. Kings Co. 1935, *affirmed* 246 A.D. 619, 284 N.Y.S. 374 (2d Dep't 1935). In order to do this, "the record on appeal must contain all of the relevant papers that were before the trial court. Where a record on appeal does not contain documents submitted to the trial court and the absence of those documents renders meaningful appellate review impossible, dismissal of the appeal is an appropriate disposition." *Mergl v. Mergl,* 19 A.D.3d 1146, 1147, 796 N.Y.S.2d 823, 824 (4th Dep't 2005); *citing Singh v. Getty Petroleum Corp*., 275 A.D.2d 740, 740, 713 N.Y.S.2d 490 (2d Dep't 2000).

The authenticity of the four letters at issue is not in dispute. They were written and signed by the attorneys in the case, and perhaps most importantly, were relied upon by the Surrogate's Court in the issuance of the October, 2009 Order. The language of the Order itself states that the Court based its determination on "correspondence between the parties of which the Court has been made aware." *See*, Order, *In re Albright* (October 6, 2009)(No. 2008-2825). Due to the failure of Estate's counsel to submit the repeatedly requested proposed Order reflecting the agreed upon settlement, the Court had no choice but to rely upon the correspondence between the parties' attorneys, copies of which were sent to the Court. The correspondence clearly demonstrated that a settlement had been reached.

The exclusion of the four disputed letters would only prolong the appeal, further diminishing the value of the vehicle at issue which has been languishing in the Estate's control, in derivation of a valid Court Order, for over a year. Accordingly, it is hereby:

ORDERED, ADJUDGED and DECREED that the Record on Appeal shall be settled as proposed by the Estate, with the addition of the following: (1) Letter dated March 24, 2009 from Dispenza to Vazzana; (2) Letter dated April 27. 2009 from Dispenza to Vazzana; (3) Letter dated April 27, 2009 from Vazzana to Dispenza and McCloskey; (4) Letter dated May 1, 2009 from Dispenza to Vazzana; and it is further

ORDERED, ADJUDGED and DECREED that pursuant to the previously issued Order, the Estate of Muriel H. Albright shall transfer the cash value of the 2006 Jeep Liberty at the time of the Decedent's death to Taylor Malin, with interest at the prevailing rate, said amount to be surcharged against the Executor Michael W. Albright; and it is further

ORDERED, ADJUDGED and DECREED, that the reasonable attorney fees and expenses incurred by the Respondents for the maintenance of the instant motion shall also be surcharged to and paid by Executor Michael W. Albright, said fees to be set by the Surrogate in a separate Order upon review of an Affirmation of Services to be submitted by Respondents' counsel and appellate counsel within fifteen days of the date of this Decision and Order.

November 30, 2010

Edmund A. Calvaruso

Hon. Edmund A. Calvaruso, Surrogate

ENTER: