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'Continuous Treatment' Doctrine Applied to the Estate Planner

By **Bruce M. DiCicco**

Legal doctrines are often utilized by tribunals to support a position or desired finding that does not fit within the established general rules of law. Doctrines usually derive from repeated common law holdings eventually giving rise to doctrinal status but they are often gradually expanded beyond their original pronouncements while still bearing the original moniker. The doctrine of "continuous treatment" might be argued by some as being one such legal doctrine when utilized in connection with estate and trust matters.

'Continuous Treatment'

The doctrine of continuous treatment is most commonly known in connection with medical malpractice actions.[1] As one recent author put it in discussing the perceived restrictive New York statute of limitations for medical malpractice actions "In light of the antediluvian nature of our current statute [CPLR 214-a], the exception for continuous treatment has taken on a pivotal role in many malpractice cases. Indeed, it may well be the subject of more Appellate Division decisions than any other issue in medical malpractice."[2]

The continuous treatment doctrine operates to toll the running of the statute of limitations while there is continuing treatment for the injury about which it is alleged there was malpractice since the treatment giving rise to the injury may often occur over an extended period of time. As pointed out in the above-cited article, there are three elements in order to invoke the doctrine:

(1) That the patient continued to seek, and obtained, an actual course of treatment from the defendant during the relevant time;
(2) The course of treatment provided by the defendant was for the same conditions or complaints underlying the malpractice claim; and
(3) That defendant's treatment of the patient was continuous.[3]

The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and the patient should not be required to question the skill or treatment in the midst of the care, since the commencement of litigation during ongoing treatment of the illness or injury necessarily interrupts the course of treatment itself much to the detriment of the patient.[4]

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Other Applications

It may come as a surprise to some to learn that this doctrine has been applied to areas outside of medical malpractice. Indeed, in *Greene v. Greene,*[5] our high Court was faced with a case involving a female college sophomore who had received treatment for mental illness. While a patient, she was approached by a family lawyer to sign a trust agreement, that she then sought to and did successfully overturn. The attorneys whom she hired to achieve the desired result (and with whom she was no doubt very pleased) then drafted a new trust agreement in which they designated her, along with a lawyer from the present law firm, to act as her co-trustee.

The lawyer/co-trustee was authorized by the new trust instrument to make investments up to $100,000 without the other co-trustee's consent (you know where this is headed). The young lady again became a plaintiff when she sought to rescind the second trust agreement citing abuse by her second counsel (after all, she won the first time!). The second trust was signed in 1969, but the action to set aside was not brought until 1977, more than six years after the signing. The defendant law firm pleaded a statute of limitations defense.[6]

The Court noted that notwithstanding the fact that the medical malpractice continuous treatment doctrine is controlled by statutory enactment, other types of professional dereliction, not just negligence cases, were still governed by judicial authority which was left intact following the codification of the continuous treatment doctrine for malpractice actions in CPLR 214-a. The Court held that the continuous treatment doctrine was applicable to claims for equitable relief.[7]

The defendant law firm in *Greene*, supra, argued that there was no continuous representation because the creation of the trust and its management were discrete acts. They contended further that even if the attorney improperly induced the young lady (the plaintiff) to execute the second trust, his act was complete and his subsequent acts in administering the trust did not serve as a continuing inducement or as an attempt to correct any impropriety that may have occurred in its creation. In short, there was no continuous representation (treatment) by the defendants once the trust was drafted and signed.

It was, however, conceded that the defendants performed legal services on behalf of the plaintiff as they continued to act as her attorney in all legal matters relating to the trust administration. Significantly, the plaintiff alleged and the Court specifically pointed out in the decision, that the actions of the defendant attorneys were an integrated plan proposed by the defendants as a solu-

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tion to the concerns of the plaintiff over the proper investment of her funds. The Court then held that various activities of the defendants on behalf of the plaintiff could be seen as part of a course of continuous representation concerning the same or related problem.

Now in *Estate of Elizabeth H. Dalton*,[8] the Suffolk County Surrogate's court has once again applied the continuing treatment doctrine to a trusts and estates case. In *Dalton*, the testator executed four documents on Dec. 18, 2000: (1) an irrevocable trust, (2) a revocable trust, (3) a real estate deed transferring property to the irrevocable trust, and (4) a last will and testament. The documents had the effect of leaving the estate of the aged testator to three of her six children. One of the three beneficiary children was a Massachusetts lawyer who drafted the documents for his mother. Neither of the other two beneficiaries were lawyers. The lawyer son acted as trustee of the revocable trust but not of the irrevocable trust. Two of the children who were cut out sought to invalidate all four documents by an action brought on April 15, 2007, which was more than six years after the creation of the documents in December of 2000.

There was no serious limitations issue as to the revocable trust as the court cited to the well known rule that the limitation period for a revocable trust begins to run only from the date of death of the grantor. In this case, the grantor died on July 8, 2002 so the 2007 action by the two dissatisfied children was timely.[9] The will was not being offered for probate (presumably because there were no probate assets) so like the revocable trust, it too had little practical significance for the parties. This left just the irrevocable trust and the deed as documents to which the limitations period may have run and it was the irrevocable trust that indeed contained the valuable assets of the grantor.

As to the irrevocable trust the court found that although the document stated the instrument was not capable of amendment, it also provided that the beneficiaries were to be designated on a schedule attached to the trust. The trust did not provide for how the "schedule" could be changed so the court concluded that it could have been changed at any time by the grantor thus making the trust a revocable or ambulatory instrument rather than an irrevocable instrument. It seems clear, and the court held, that challenges to such a "revocable" trust would then be subject to the aforementioned limitations period and with the same result. The court was left, however, with the deed that was recorded on a date not specifically disclosed in the opinion but which was presumably more than 6 years before the action was instituted in 2007.

As to the statute of limitations applicable to challenging recorded deeds, the court noted the rule most lawyers would analyze correctly if asked, viz.,

> If the deed puts the world on notice of its contents and property ownership denoted therein then it follows that the recordation of that deed would have to commence the running of the statute of limitations for causes of actions seeking to invalidate it.[10]

This is where the doctrine of continuous treatment was applied to the analysis by the court. First, the court stated that the holding in *Greene*, supra, was that "the statute of limitations does not begin to run until the plaintiff became aware of the alleged breach of fiduciary duty." While this statement may be technically true, one can see from the above explanation that the *Greene* Court more precisely found that the statute of limitations does not begin to run until such time due to the continuous representation that was part of an integrated plan proposed by the defendant attorneys created as the sole solution to the proper investment of the funds of the plaintiff. The court in *Dalton*, supra, then went on to hold,

> If the attorney/client relationship with [the lawyer son] continued until the decedent's death, the cause of action accrued on decedent's death, and this action would, therefore be timely.

The Court in 'Greene' held that notwithstanding the fact that the medical malpractice continuous treatment doctrine is controlled by statutory enactment, the continuous treatment doctrine was applicable to claims for equitable relief.

The court cited to the record pointing out that the lawyer son acted as attorney for his mother, continued to have estate planning discussions with his mother after the execution of the documents, and that he represented his mother as a trustee of the revocable trust through the date of her death.[11]

Conclusion

It would thus appear from the decision that in Suffolk County, New York "discussions" about estate planning and service as a fiduciary satisfy the "integrated plan" concept set forth in *Greene* and the conceptual underpinnings of the third prong of the continuous treatment doctrine so conveniently enunciated in *Gomez v. Katz*, supra footnote 3.[12] The opinion may also be read to announce that where there is an ongoing fiduciary relationship with the transferor of real property in connection with estate planning, the continuous treatment doctrine tolls the commencement of the statute of limitations for the rescission of a deed created as part of the overall estate plan until the termination of such relationship (in most cases upon the death of the transferor) notwithstanding the existence of a recorded instrument more than six years prior to the date of the action.[13]

1. The New York statute of limitations for medical, dental or podiatric malpractice is contained in CPLR 214-a and provides in part that the action must be commenced within two years and six months of the act or of last treatment when there is continuous treatment of the same illness, injury or condition which gave rise to the said act, omission or failure condition.

2. "Fresh Perspectives and Analysis on Continuous Treatment Doctrine," NYLJ 6/2/09, page 3, col. 1, Thomas A. Moore and Matthew Gaier.

3. *Gomez v. Katz*, 61 AD3d 108, 874 NYS2d 161, 164 (2d Dept. 2009).

4. *Gomez v. Katz*, supra at164.

5. 56 NY2d 86, 451 NYS2d 46 (1982).

6. In an action for rescission the relevant statute of limitations is CPLR 213(1).

7. *Greene v. Greene*, supra at 94.

8. NYLJ2/2/09page47,Col.4SurrogateCzygier.

9. The revocable trust also contained no valuable assets so it was of little practical significance.

10. *Murray v. Medina*, NYLJ, Nov. 19, 2001, page 33, col. 4, aff'd 306 AD2d 452.

11. As discussed above, the revocable trust was not a document for which the statute of limitations mattered since the timing of the petition was within six years from the date of death.

12. A routine Shepards search reveals that the *Greene* case has been cited hundreds of times with many indicating that the holding was not followed or was distinguishable.

13. There were other significant reasons to reach the result in this case such as equitable estoppel arising from the deliberate concealment of the four estate planning documents until they were compelled by court order on March 17, 2006.