CasePrepPlus

January 13, 2016

An advance sheet service summarizing recent and significant New York appellate cases

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FIRST DEPARTMENT.

CIVIL PROCEDURE.

ALTHOUGH VACATUR OF A DEFAULT JUDGMENT WAS NOT AVAILABLE UNDER CPLR 5015, VACATUR WAS AVAILABLE UNDER CPLR 317.

The First Department, reversing Supreme Court, determined defendant's (the LLC's) motion to vacate a default judgment should have been granted. Although the LLC did not present a reasonable excuse for default, and therefore vacatur pursuant to CPLR 5015 was not available, the requirements for vacatur pursuant to CPLR 317 were met: "Although the LLC is not entitled to vacatur under CPLR 5015(a)(1), as it did not show a reasonable excuse for its default ... , it is entitled to vacatur under CPLR 317, as it moved to vacate within a year after it learned of the default and just five months after entry of the default order, it showed that it did not personally receive the summons and complaint in time to defend it, and it presented a meritorious defense to the action (*see* CPLR 317 ...). The affidavit the LLC submitted in support of its motion was sufficient to show a meritorious defense . . . — namely, that it is an out-of-possession landlord that bears no liability for the injuries that allegedly occurred in its tenant's bar due to the criminal acts of third parties ...". **Marte v 102-06 43 Ave., LLC, 2016 NY Slip Op 00061, 1st Dept 1-7-16**

CRIMINAL LAW.

JUDGE FAILED TO MAKE IT CLEAR THAT ACQUITTAL ON THE TOP COUNT (ATTEMPTED MURDER) BASED ON SELF-DEFENSE REQUIRED ACQUITTAL ON ANY LESSER COUNT STEMMING FROM THE SAME CONDUCT; NEW TRIAL ORDERED.

The First Department reversed defendant's conviction and ordered a new trial because the trial judge did not make it clear that if the jury found defendant acted in self-defense (justification defense) with respect to the top count (attempted murder) it could not consider a related lesser count: "The jury acquitted defendant of attempted murder in the second degree and assault in the first degree, but found him guilty of attempted first-degree assault, arising out of the stabbing of his cousin. Justification was a central issue at trial, and, because of the defect in the court's charge, it is impossible to discern whether acquittal of the top count was based on the jury's finding of justification in a manner that would mandate acquittal on the lesser count. Considered as a whole, the court did not adequately convey the principle that, if the jury found defendant not guilty of the top count of attempted murder in the second degree on the basis of justification, it should not consider any lesser counts to the extent based on the same conduct ...". **People v Colasuonno, 2016 NY Slip Op 00021, 1st Dept 1-5-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL'S FAILURE TO MOVE TO REOPEN SUPPRESSION HEARING BASED ON NEW EVIDENCE LEARNED AT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE.

The First Department, over an extensive dissent, determined defense counsel was ineffective for failing to move to reopen the suppression hearing. Defendant was convicted of burglary. A bag of tools was the subject of a suppression motion. At the suppression hearing, the police officer testified the bag was open at defendant's feet. The suppression court ruled the "burglar's tools" were properly seized under the "plain view" exception to the warrant requirement. At trial, the building superintendent who stopped the defendant testified the bag was in defendant's hand and closed when the police arrived. Based on that new information, defense counsel should have requested the reopening of the suppression hearing: "Under CPL 710.40(4), a suppression hearing may be reopened upon a showing that the defendant has discovered 'additional pertinent facts' that 'could not have [been] discovered with reasonable diligence before the determination of the motion.' Here, the additional facts were 'pertinent' because the superintendent's testimony, if credited, would have undermined the ruling that the tools were admissible because they were in plain view. This was not a minor or routine inconsistency; the superintendent's version was completely at odds with a plain view theory. Any issue of whose recollection was most reliable should have been presented to the hearing court." **People v Kindell, 2016 NY Slip Op 00027, 1st Dept 1-7-16**

INSURANCE LAW.

HERE DISCLAIMERS WERE UNNECESSARY BECAUSE THE ACTIVITY WHICH LED TO INJURY WAS NOT WITHIN THE OVERALL SCOPE OF THE POLICY-COVERAGE; HAD THE DISCLAIMERS BEEN BASED UPON AN EXCLUSION FROM COVERAGE, AS OPPOSED TO THE OVERALL SCOPE OF THE COVERAGE, THEY WOULD HAVE BEEN INVALID AS UNTIMELY.

The First Department determined the declarations page of defendant's insurance policy described what the policy covered, not exclusions from what otherwise would be covered. The distinction was crucial because the insurer was late in disclaiming coverage. If the disclaimers had been based upon an exclusion from coverage, the disclaimers would have been invalid as untimely. But because the disclaimers were based on the scope of the coverage of the policy, the disclaimers were unnecessary. Here it was deemed that injury from falling concrete during demolition of a chimney was outside the scope of the policy, which was limited to: (1) carpentry — interior; (2) dry wall or wallboard installation; (3) contractors — subcontracted work — in connection with construction, reconstruction, repair or erection of buildings; and (4) contractors — subcontracted work — in connection with construction, reconstruction, repair or erection of buildings, uninsured/underinsured: "Disclaimer pursuant to section 3420(d) [now § 3420(d)(2)] is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered ...". [internal quotation marks omitted]. **Black Bull Contr., LLC v Indian Harbor Ins. Co., 2016 NY Slip Op 00002, 1st Dept 1-5-16**

PERSONAL INJURY, MUNICIPAL LAW.

THEORIES OF LIABILITY NOT FAIRLY IMPLIED FROM THE NOTICE OF CLAIM CAN NOT BE INCLUDED IN SUPPLEMENTAL BILL OF PARTICULARS.

The First Department determined Supreme Court properly refused to allow the supplementing of a bill of particulars because the new theories of liability could not be implied from the notice of claim. This was a slip and fall case. The notice of claim alleged the fall was caused by liquid on a stair. The supplemental bill sought to allege the stair was defective and a building employee was not properly trained: "Contrary to plaintiff's contention, he may not rely on his testimony at his General Municipal Law § 50-H hearing to rectify any deficiencies in the notice of claim, because he never testified that there was an issue with the step itself and traditionally such testimony has only been permitted to clarify the location of an accident or the nature of injuries, [it] may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature of the claim' ... . Accordingly, the motion court properly struck the allegations from the supplemental bill of particulars, as new theories of liability that cannot be fairly implied from the notice of claim, and precluded plaintiff's expert from testifying with regard to them ...". **Lewis v New York City Hous. Auth., 2016 NY Slip Op 00040, 1st Dept 1-7-16**

THIRD DEPARTMENT

CRIMINAL LAW.

PEOPLE SHOULD HAVE INSTRUCTED THE GRAND JURY ON THE AGENCY DEFENSE IN THIS CRIMINAL SALE OF MARIJUANA CASE; INDICTMENT PROPERLY DISMISSED.

The Third Department determined County Court properly reinspected the grand jury minutes pursuant to a second motion by defense counsel and properly dismissed the indictment because the People failed to instruct the grand jury on an applicable defense. Because the first motion to inspect argued the evidence before the grand jury was insufficient, the law of the case doctrine did not prohibit the second motion, which argued the proceedings were defective. The defendant was charged with criminal sale of marijuana. However, the facts supported the theory the defendant was acting as an agent for the buyer: "[W]hile there is no requirement that the grand jury 'be charged with every potential defense suggested by the evidence' ... , the People 'must charge . . . those defenses that the evidence will reasonably support' ... . As this Court recently reiterated, '[u]nder the agency doctrine, a person who acts solely as the agent of a buyer in procuring drugs for the buyer is not guilty of selling the drug to the buyer, or of possessing it with intent to sell it to the buyer. Whether the defendant was a seller, or merely a purchaser doing a favor for a friend, is generally a factual question [to be resolved] . . . based upon [considerations of] factors such as the relationship between the buyer and the defendant, who initiated the transaction, whether the defendant had previously engaged in drug transfers and whether he or she profited from the sale' ...". **People v Gallo, 2016 NY Slip Op 00064, 3rd Dept 1-7-16**

CRIMINAL LAW.

COCAINE-POSSESSION OFFENSES CHARGED IN THE SUPERIOR COURT INFORMATION (SCI) WERE NOT LESSER INCLUDED OFFENSES OF THE COCAINE-POSSESSION OFFENSE CHARGED IN THE FELONY COMPLAINTS; SCI IS JURISDICTIONALLY DEFECTIVE.

The Third Department determined the superior court informations (SCIs) to which defendant pled guilty were jurisdictionally defective because neither SCI charged a lesser included offense of the offense charged in the original felony complaints. If it is possible, under any set of facts, to commit the greater offense but not the lesser, the lesser is not a lesser included offense. The offenses at issue here involved the possession of cocaine: "A crime is a lesser included offense of a charge of a higher degree only when in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the very same conduct, committing the lesser offense ... . To be guilty of the offense charged in the SCI, a defendant must attempt to knowingly and unlawfully possess cocaine that weighs [500] milligrams or more (Penal Law §§ 110.00, 220.06 [5]). The first felony complaint charged defendant with criminal possession of a controlled substance in the third degree, which requires proof of knowing, unlawful possession of substances containing narcotic drugs that have an aggregate weight of one-half ounce or more (Penal Law § 220.16 [12]). Considered in the abstract, it is possible to possess or attempt to possess one-half ounce of a mixture of cocaine and some other substance in which the proportion of cocaine is less than 500 milligrams. Thus, it is possible to commit criminal possession of a controlled substance in the third degree without also committing attempted criminal possession of a controlled substance in the fifth degree, and the offense charged in the SCI is not a lesser included offense of the crime charged in the first felony complaint. The second felony complaint charged defendant with criminal possession of a controlled substance in the fifth degree, which is committed when a person knowingly and unlawfully possesses a controlled substance with intent to sell it (Penal Law § 220.06 [1]). It is possible to possess cocaine with the intent to sell it while not concurrently possessing cocaine weighing more than 500 milligrams, or attempting to do so, as required to commit the crime charged in the SCI (see Penal Law §§ 110.00, 220.06 [5]). Thus, the crime charged in the SCI is not a lesser included offense of the crime charged in the second felony complaint ...". [internal quotation marks omitted] **People v Seals, 2016 NY Slip Op 00065, 3rd Dept 1-7-16**

CRIMINAL LAW.

COUNTY COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S APPLICATION FOR JUDICIAL DIVERSION TO A DRUG TREATMENT PROGRAM.

The Third Department, reversing County Court, determined defendant was eligible for judicial diversion to a drug treatment program. Defendant was stopped with four pounds of marijuana in his car. He demonstrated he was addicted to marijuana, that drug-dependence was a contributing factor re: his criminal behavior, and this was his first contact with the criminal justice system: "Inasmuch as '[t]he statute does not require that a defendant's . . . substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior' ... , but instead only requires it be a contributing factor, we find no basis for County Court's determination that the instant arrest — i.e., defendant's only involvement with the criminal justice system — was not contributed to by defendant's marihuana use." **People v Cora, 2016 NY Slip Op 00066, 3rd Dept 1-7-15**

CRIMINAL LAW, PAROLE.

DENIAL OF PAROLE WAS IRRATIONAL; PETITIONER'S PRISON RECORD WAS EXCEPTIONAL UNTIL HIS MEDICATION FOR TREATMENT OF SCHIZOPHRENIA WAS STOPPED.

The Third Department affirmed Supreme Court's annulment of the Board of Parole's denial of petitioner's request for release on parole. Petitioner's record in prison was exceptional except for a four-month period during which his medication to treat schizophrenia was stopped. Once medication resumed, petitioner once again functioned well: "Considering this factual background, we agree with Supreme Court that the Board's determination was irrational ... . Further, it was irrational to such a degree that it cannot withstand judicial scrutiny, despite the very limited scope of our review (see Executive Law § 259-i [5] ...). As petitioner argues, a fair review of this record compels the conclusion that the determination to remove him from all medication for his mental illness led to a psychotic breakdown that rendered him unable to comply with prison regulations during the period when the disciplinary infractions occurred. To withhold petitioner's necessary medications was apparently an error of medical judgment. However, for the Board to then rely upon petitioner's conduct during the psychotic crisis that was thus precipitated as a primary ground for denying his release is so inherently unfair and unreasonable that it meets the high standard of 'irrationality bordering on impropriety' warranting our intervention ... . To hold otherwise would, in effect, result in punishing petitioner with continued incarceration for the failure of prison officials to provide him with proper treatment for his mental illness — a result that we cannot sanction. Accordingly, we agree with Supreme Court that petitioner must be afforded a de novo hearing before the Board." **Matter of Hawthorne v Stanford, 2016 NY Slip Op 00083, 3rd Dept 1-7-16**

FAMILY LAW.

GRANDMOTHER DID NOT DEMONSTRATE EXTRAORDINARY CIRCUMSTANCES JUSTIFYING AWARD OF CUSTODY OF GRANDCHILD TO HER, ANALYTICAL PRINCIPLES EXPLAINED.

The Third Department determined grandmother did not meet her burden of demonstrating extraordinary circumstances justifying the award of custody of the child to her. Family Court's award of joint custody to mother and father was affirmed. Mother had relinquished custody to grandmother as an emergency measure (due to domestic abuse) but had continuously worked to regain custody. The court explained the relevant analytical principles: "It is well settled that, in the absence of extraordinary circumstances such as surrender, abandonment, persistent neglect, unfitness or an extended period of custody disruption, a parent has a claim of custody to his or her child superior to all others ... . Here, since no finding of extraordinary circumstances had previously been made, the grandmother bore 'the heavy burden of first establishing the existence of extraordinary circumstances to overcome the . . . parents' superior right of custody' ... . Only upon such a showing would Family Court proceed to address the issue of the child's best interests ... . Relevant here, 'a prolonged separation of the . . . parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of [a] grandparent' may constitute a disruption of custody sufficient to demonstrate extraordinary circumstances (Domestic Relations Law § 72 [2] [b] ...). 'An order placing a child in a nonparent's custody upon a parent's consent is neither a judicial finding nor an admission of extraordinary circumstances' ... . Moreover, if the parent spends the period of separation trying to regain custody of his or her child, that period would not necessarily support a finding of extraordinary circumstances ...". **Matter of Elizabeth SS. v Gracealee SS., 2016 NY Slip Op 00068, 3rd Dept 1-7-16**

FAMILY LAW.

FINAL ORDERS OF PROTECTION ISSUED ON THE COURT'S OWN MOTION WITHOUT FOLLOWING THE PROCEDURE REQUIRED BY FAMILY COURT ACT 154-c VACATED.

The Third Department determined Family Court did not follow the statutory procedure for issuing final orders of protection. Although a court may issue a temporary order of protection on its own motion without following the procedure, it may not do so for final orders: "Family Ct Act § 154-c (3) provides, in relevant part: 'No order of protection may direct any party to observe conditions of behavior unless: (i) the party requesting the order of protection has served and filed a petition or counter-claim in accordance with article four, five, six or eight of this act and, (ii) the court has made a finding on the record that such party is entitled to issuance of the order of protection which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order is issued has given knowing, intelligent and voluntary consent to its issuance' … . * * * Here, although there was an exchange of proposed terms for mutual orders of protection, the mother clearly indicated that she did not consent to the orders containing the terms that Family Court ultimately adopted on its own motion or admit any pertinent allegations set forth in the father's family offense petition ... . Nor did Family Court conduct an examination of the factual basis of the parties' family offense petitions or make a finding that the terms objected to by the mother were 'reasonably necessary' to protect the parties or their children ...". **Matter of Daniel W. v Kimberly W., 2016 NY Slip Op 00070, 3rd Dept 1-7-16**

FAMILY LAW.

DOCTRINE OF EQUITABLE ESTOPPEL DID NOT APPLY TO PETITIONER'S REQUEST FOR AN ORDER OF FILIATION, CRITERIA EXPLAINED.

The Third Department affirmed Family Court's finding that the doctrine of equitable estoppel did not apply to petitioner's application for an order of filiation. Equitable estoppel is triggered when the party seeking an order of filiation has acquiesced in the development of a parent-child relationship with another man. Here, although the child recognized some persons as "father figures," no parent-child relationship had developed with any single person: "The doctrine of equitable estoppel is a defense in a paternity proceeding which, among other applications, precludes a man . . . from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man ... . The party asserting application of the doctrine — here, the attorney for the children — has the initial burden of establishing a prima facie case to support that claim ... . Assuming that burden is met, the burden then shifts to the nonmoving party — here, petitioner — to establish that it would be in the best interests of the children to order the genetic marker test ... . [W]e agree with Family Court that application of the doctrine of equitable estoppel is not warranted here. Although the children's therapist testified on direct (and respondent testified on rebuttal) that the girls do not recognize petitioner as their father, [n]oticeably absent from the record is any indication that [another identified individual] played a significant role in raising, nuturing or caring for [respondent's children] ... . To the contrary, both the therapist and respondent acknowledged that the children identified a number of individuals as 'father figures' in their lives ... . Hence, establishing petitioner's paternity would not disrupt an existing parent-child relationship between the children and another individual ...". [internal quotation marks omitted] **Matter of Patrick A. v Rochelle B., 2016 NY Slip Op 00079, 3rd Dept 1-7-16**

FORECLOSURE.

FORECLOSURE OF A REVERSE MORTGAGE CAN BE BASED UPON HOMEOWNER'S FAILURE TO MAKE HAZARD INSURANCE PAYMENTS.

The Third Department determined summary judgment should not have been granted to defendant homeowner in a reverse-mortgage foreclosure action. Foreclosure proceedings were started because defendant did not make hazard insurance payments. Plaintiff bank made those payments on her behalf. The Third Department held that the relevant regulations allowed plaintiff bank to make the hazard insurance payments, but did not require it to do so. Foreclosure, therefore, can be based upon defendant's failure to make the payments. **Onewest Bank, FSB v Smith, 2016 NY Slip Op 00092, 3rd Dept 1-7-16**

PERSONAL INJURY.

CAUSES OF ACTION ALLEGING PROMOTERS OF A MUSIC FESTIVAL NEGLIGENTLY FAILED TO CURTAIL THE USE OF DRUGS AT THE FESTIVAL AND NEGLIGENTLY FAILED TO PROVIDE ADEQUATE EMERGENCY MEDICAL FACILITIES AT THE FESTIVAL PROPERLY SURVIVED MOTIONS TO DISMISS.

The Third Department determined plaintiff stated causes of action sounding in negligence against the promoters of a music festival, called Camp Bisco. Plaintiff's daughter, Bynum, ingested a harmful substance at the festival. The complaint alleged defendants failed to take adequate measures to prevent the use of drugs at the festival and failed to make sure there were adequate emergency medical facilities at the festival: "Mass gathering permittees, such as defendants, 'have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties' ... . 'The scope of that duty is defined according to the likelihood that such behavior will occur and endanger [attendees] based on past experience' ... . Accepting as true plaintiff's allegations that defendants knew or should have known of the widespread presence and use of illegal drugs at this annual festival, known as Camp Bisco, we find that plaintiff has adequately stated a cause of action for negligence based on defendants' alleged failure to exercise reasonable care in curtailing the use of illegal drugs on the festival grounds. As for plaintiff's separate cause of action for negligence based upon defendants' alleged failure to provide adequate onsite emergency medical services, defendants, as mass gathering permittees, had a clear duty to provide such services pursuant to the State Sanitary Code (*see* 10 NYCRR 7-4.3 [n]; 18.3 [b]; 18.4 [a]). According to plaintiff's allegations, defendants knew that Camp Bisco had increased in size every year and that, in 2011, over 26,000 people were in attendance. Plaintiff further asserts that, despite their apparent knowledge, defendants circumvented their duty to provide the proper level of medical services at the festival by misrepresenting to the relevant permitting authorities that the maximum attendance for the 2012 edition of Camp Bisco attended by Bynum would be just 12,000 people (*see* 10 NYCRR 18.4 [a] [1], [2]). Accepting plaintiff's further statement that defendants' provision of inadequate medical services was a proximate cause of Bynum's injuries, we find that these allegations state a cognizable theory of negligence as well ...". **Bynum v Keber, 2016 NY Slip Op 00093, 3rd Dept 1-7-16**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER DEFENDANT-CONTRACTOR LAUNCHED AN INSTRUMENT OF HARM AND WHETHER THERE WAS AN INTERVENING, SUPERSEDING CAUSE OF THE INJURY, CRITERIA FOR BOTH EXPLAINED.

The Third Department, reversing Supreme Court, determined defendant-contractor's motion for summary judgment should not have been granted. Defendant contracted with the NYS Department of Transportation (DOT) to do roadwork. Plaintiff alleged the roadwork caused the car in which he was a passenger to go airborne. The Third Department found that the alleged excessive speed attributed to the driver of the car was not unforeseeable as a matter of law. Therefore, there was a question of fact whether the speed was the superseding cause of the accident. The court explained the law re: tort liability to third persons arising from contract, and an intervening, superseding cause of injury. **Dunham v Ketco, Inc., 2016 NY Slip Op 00082, 3rd Dept 1-7-16**

PERSONAL INJURY, LABOR LAW, CIVIL PROCEDURE.

PLAINTIFF COMPELLED TO SUBMIT TO EXAMINATION BY DEFENDANT'S VOCATIONAL REHABILITATION EXPERT.

The Third Department, overruling its own precedent, determined plaintiff, in this Labor Law 200, 240(1) and 241(6) action, could properly be compelled to submit to an examination by defendant's vocational rehabilitation expert: "While we previously held that there is 'no statutory authority to compel the examination of an adverse party by a nonphysician vocational rehabilitation specialist' ... , the Court of Appeals has since confirmed that the mandate for broad disclosure is not necessarily limited by the more specific provision of the CPLR that allows a defendant to demand that a plaintiff submit to a physical or mental examination 'by a designated physician' (CPLR 3121 [a]) where his or her medical condition is at issue ... . Accordingly, the circumstances of a case may allow such a demand even in the absence of express statutory authority

... . We agree with the conclusion reached by the other Departments that such circumstances are not limited to those cases where a plaintiff has retained a vocational rehabilitation expert to establish damages, although, generally, such testing 'might well be unduly burdensome'... . ... [Plaintiff] placed his ability to work in controversy by claiming that, as a result of his injuries, he suffered loss of future wages and reduced earning capacity and by testifying at his examination before trial that his future career opportunities were limited ...". **Hayes v Bette & Cring, LLC, 2016 NY Slip Op 00090, 3rd Dept 1-7-16**

PERSONAL INJURY, MUNICIPAL LAW.

SUIT ALLEGING TOWN AND COUNTY NEGLIGENTLY ISSUED PERMITS FOR A FESTIVAL WITHOUT MAKING SURE EMERGENCY MEDICAL SERVICES WERE ADEQUATE DISMISSED ON GOVERNMENTAL-IMMUNITY GROUNDS.

The Third Department, reversing Supreme Court, determined the town's and county's motions for summary judgment should have been granted on governmental-immunity grounds. Plaintiff's daughter, Bynum, ingested a harmful substance at a music festival. Plaintiff sued the town and county alleging they negligently issued the permits for the festival without making sure there were adequate emergency medical services to accommodate the crowd. The Third Department held the town and county were immune from suit because the issuance of permits is a governmental function and plaintiff did not demonstrate a special relationship between Bynum and the town or county. **Bynum v Camp Bisco, LLC, 2016 NY Slip Op 00091, 3rd Dept 1-7-16**

TRUSTS AND ESTATES.

STATUTORY DOCTRINE OF EQUITABLE DEVIATION ALLOWED CHURCHES TO DEVIATE FROM THE TERMS OF CHARITABLE TRUSTS TO SEEK A LARGER RETURN ON INVESTMENTS.

The Third Department, reversing Surrogate's Court, determined petitioners, three churches which were beneficiaries of charitable trusts, were entitled to equitable deviation from the terms of the trusts. The trusts required the assets be held in insured bank accounts. Because bank accounts have generated low interest for many years, the churches sought to deviate from the terms of the trusts and make investments in accordance with the Prudent Investor Act (EPTL 11-2.3). The court explained the relevant law: "EPTL 8-1.1 (c) embodies New York's statutory articulation of cy pres and equitable deviation ... . Equitable deviation involves altering or amending an administrative provision, whereas cy pres effects a substantive change ... . Thus, equitable deviation may be appropriate where cy pres is not because an administrative change can be made without altering the purpose of the trust or changing its disposition provisions ... . Some cases addressing common-law equitable deviation required an unforeseen change in circumstances ... , whereas the statutory provision applicable to charitable trusts does not require the change to be unforeseen ... . The statute provides that whenever it appears to [Surrogate's Court] that circumstances have so changed since the execution of an instrument making a disposition for religious . . . purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application . . . make an order or decree directing that such disposition be administered and applied in such a manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein ...". [internal quotation marks omitted] **Matter of Chamberlin, 2016 NY Slip Op 00087, 3rd Dept 1-7-16**

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