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Trusts and Estates Law Section Newsletter

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

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Message from the Chair

This year's Fall meeting was held in Buffalo, New York on September 14-15. Robert Harper, the Section's Treasurer, and Holly A. Beecher, the Eighth District Representative, were the co-chairs. Thursday afternoon's CLE was focused on digital assets and various planning aspects for closely held businesses. The CLE program on Friday focused on contested accountings. Thank you to all of our speakers for a very informative and successful meeting.

And as with any meeting of our Section, there was a social event held at the Frank Lloyd Wright's Darwin Martin House Complex, which included tours of the Complex. It was a privilege for me to host the Fall meeting in my city and be able to showcase one of Buffalo's many fabulous sites.

Looking ahead to the next several months, we hope to continue the legislative successes made in the last session. The proposal which provides that adjustments under the Power to Adjust between principal and income shall be deemed to be a re-characterization for the purpose the payment of commissions, passed in both the Assembly and Senate, and it will be considered by the Governor before the end of the year.

The application for the 2018 Trusts and Estates Law Section Fellowship has been sent to several law schools. Please encourage law students that you know to consider applying.

Sharon Wick

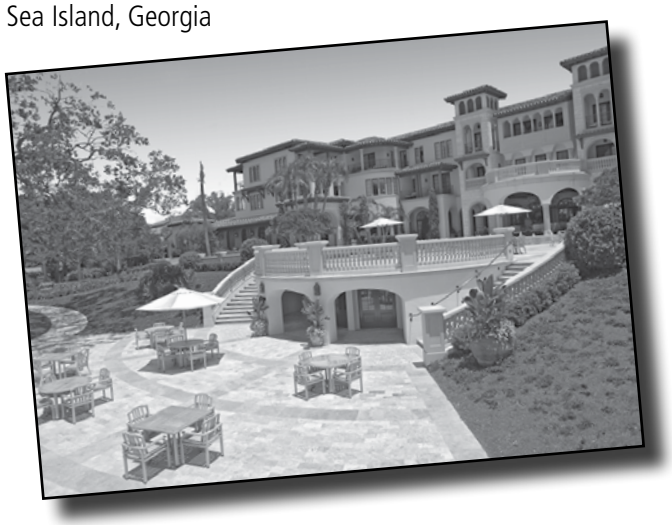
SAVE THE DATES!

Trusts & Estates Law Section Spring Meeting

May 3-6, 2018

The Cloisters and the Inn at Sea Island

Sea Island, Georgia



At left, the Lower Blank Banks Terrace; above, the Cloisers front entrance; and below, an aerial view of the resort's Seaside Golf course.

Visit www.nysba.org/trussp18 for more information.

Message from the Editor

This edition of our *Newsletter* includes an article by H. Wayne Judge discussing the potential benefits of implementing ante-mortem probate in New York, and an article by Anthony J. Enea explaining relevant distinctions between UTMA accounts and trusts for minors. Also included in this edition is Brad Dillon's and Michael S. Schwartz' analysis of trust decanting in light of a recent decision of the New York County Surrogate's Court, and Amy Altman's article highlighting the importance of discussions with clients about their funeral and burial plans.

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. The deadline for submissions for our next edition is December 8, 2017.

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Missed the Spring Meeting in New Orleans? See pictures on page 35.

Ante-Mortem Probate

By H. Wayne Judge

At least four states have adopted statutes that permit the probate of a will during the lifetime of the testator: Ohio, North Dakota, Arkansas and Alaska.[1] Our increasingly large aging population, prone to onset of dementia and Alzheimer's syndrome, could benefit from the option of being able to have their wills admitted to binding probate before they lose testamentary capacity. The common sense provisions of these statutes would also seem to appeal to that small group of very wealthy celebrities whose substantial assets, unique lifestyles, and confusing domestic lives may lead to prolonged, expensive contested probate proceedings.

Some suggest that we already have the equivalent of lifetime probate in the form of the revocable trust. Some claim that a will can also be made incontestable by adding an "in terrorem" clause.

A recent article by Laine R. Fastman[2] reminds us that the revocable trust is not bulletproof. Fastman observes that once the courts recognized the revocable trust "actually functions as a will since it is an ambulatory instrument that speaks at death to determine disposition of the Settlor's property," any dispute concerning a revocable trust will be heard. Such trust disputes have concerned a summary judgment motion brought alleging that the trust was defective because it was contained in a loose-leaf binder, unfastened; whether the grantor has the requisite mental capacity to execute the document; a construction proceeding; and a grant of limited letters to challenge the revocable trust. The litigant in these disputes has the same right to a jury trial when objecting to a revocable trust as he or she would have a right in objecting to a will. Surrogate's Court Procedure Act (SCPA) 207 and 1501 specifically recognize the Surrogate's Court authority over lifetime trusts.

"In terrorem" and "no contest" clauses are enforceable with some exceptions in New York,[3] but the testator and the disinherited beneficiaries must await the death of the decedent to find out how those clauses will turn out. Furthermore, a totally disinherited heir is unaffected by such clauses.

Unlike the "in terrorem" clause and the revocable trust, ante-mortem probate permits issues of proper execution, undue influence, testamentary capacity and testamentary intent to be finally judicially determined and binding upon intestate takers and testamentary beneficiaries alike during the lifetime of the testator. All issues surrounding the document can be resolved during the lifetime of the testator. A will judicially admitted to probate during the testator's lifetime is no longer subject to attack.

Post-Mortem Disposition of Property—The Last Will

Arguably the right of ownership and control ceases at death. Dead people do not "own" anything. Why should the wishes of a deceased person receive any recognition whatsoever? If the dead own nothing, interested intestate parties own something less than nothing:

> That fact should be emphasized; one's ownership or **having** necessarily comes to an end with death. What would then happen but for a power of disposition resting somewhere, where it could and ordinarily would be exercised so as to preserve and help on the social instinct which seeks to draw men together in the State? The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man having property enough to excite a scramble. To prevent such a catastrophe the absolute owner has "title" or authority to make a will, as the one most likely to act in accord with the social instinct; and in event of his failure to act, the State exercises the authority.[4]

The "right" to take by intestacy is also simply another useful legal fiction granted by society (the state) "to preserve and help on the social instinct which seeks to draw men together in the state" and to avoid a "scramble."

The Anglo-American origins of the right to dispose of property by will after death are found in the "Statute of Wills,"[5] which authorized devises of real estate and prescribed that they be in writing, and the "Statute of Frauds,"[6] which applied to both testaments of personalty and wills of realty.

All states have adopted procedural rules that relate to proving the authenticity of a will. The Uniform Probate Code has been adopted, at least in part, by eighteen (18) states, in some cases with significant modifications.[7] Alaska and North Dakota have adopted the Uniform Probate Code but has added ante-mortem probate procedures. New York has not adopted the

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Uniform Probate Code and has no ante-mortem probate procedures.

Probate simply refers to official proof. In New York, executors petition the Surrogate's Court for admission of the will to probate. In most cases, the petition is accompanied by the original will, death certificate and waivers of citation (notice) signed by all those parties who would take by intestacy (if no will existed). In the vast majority of cases, the will is then admitted to probate and letters testamentary are issued to the named executor. The executor can then administer the estate.

Problems arise, however, when the authenticity of the will is called into question—the will contest. The basis of a will contest is generally (1) lack of proper execution, (2) undue influence, and (3) lack of testamentary capacity. Obscure language in the will may also require judicial determination of the testator's true intent.

Lack of proper execution can normally be resolved quickly. In most litigated cases, however, the adjudication of the issues of undue influence, lack of testamentary capacity and matters involving the intent of the testator take on substantial proof problems for all parties after the testator's death.

The testator is now dead; his estate is substantial; a will is produced that requires his estate be transferred to one or more persons according to its terms. But is this will the most recent? Are there others? Was the testator under duress at the time he wrote the will? Was he competent to make such promises? Was undue influence brought to bear, or was a fraud perpetrated? His oldest daughter was his only caregiver in his final years and he left her everything and ignored the other four siblings. Why was the decedent on medication? Did he act "normal"? Why was she so generous to one person?

Is this an appropriate time to psychoanalyze the maker of the will? Will the professional "experts" disagree on all of these issues? Will those parties capable of overturning the will succeed in carrying out the testator's intent or their own selfish objectives? The evidence required to resolve these issues must be circumstantial. Crucial direct evidence is unavailable because of the death of the maker of the will. The very worst time to marshal this kind of evidence is after the death of the person who signed the will.

Ante-Mortem Probate—A Better Process?

The absence, or the presence, of testamentary capacity is certainly produced more reliably during the lifetime of the testator. What better proof of undue influence than the testator himself, on the witness stand, responding to questions about his actual motives in making his estate plan. There would be no doubt about the intentions of the testator if he declared, in open court, that the document offered for probate was, in fact, his last will and testament.

Indeed, pre-trial discovery and the evidence adduced during the direct and cross-examination of the testator himself would be reliable proof, far superior to the hazy opinion evidence to which we are limited under our present system. Yet, at the present time it is not possible to offer a will for probate in New York during the testator's lifetime. Viewed objectively, it would almost seem that the law has made a gruesome sport out of what could be a very simple and straightforward legal procedure in appropriate circumstances.

"The basis of a will contest is generally (1) lack of proper execution, (2) undue influence, and (3) lack of testamentary capacity."

Not very much of our existing law or procedure would require change to offer the option of lifetime probate. The judicial impact of such a change would not, I predict, impact adversely on the operation of the courts. It would not add to the caseload and, indeed, it might very well reduce the number of will contests.

There are several reasons why there would be few contested ante-mortem probate proceedings. First, the prospect of a legal contest process in some cases would probably not be advisable. If the testator arguably could be shaken into demonstrating lack of capacity on cross examination that considered risk would mitigate against an ante-mortem probate proceeding and none would occur. Second, the prospect of an objectant having to face a testator in such a proceeding would discourage objectants. It is much easier, emotionally, for an objectant to claim lack of capacity or undue influence after the testator's death since they are no longer required to face the decedent with a claim that he/she lacked the mental wherewithal to make a valid will.

Arguments have been published against ante-mortem probate but those arguments lack merit.[8] There are risks every time a client enters a courtroom. It is the duty of legal counsel to make the client aware

of the risks and evaluate the various options in any estate plan.

Existing Ante-Mortem Probate Procedures

The statutes in those states that have adopted these procedures essentially provide that the validity of a will is established in a declaratory judgment proceeding on notice to all those parties named in the will and all those who would take by intestacy on the date the proceeding is commenced. After the validity of the will is established by a judicial decree, the will is filed in the probate court with the decree that established its validity. The probated will can be revoked by the testator by either removing the filed will from the files of the probate court or by making a new will that revokes the filed will. The will would not "speak" of course nor will letters issue until the death of the testator.

The Arkansas Code is typical of such statutes. It provides:

(a) Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the circuit court of the appropriate county of this state for a declaratory judgment establishing the validity of the will.

(b) All beneficiaries named in the will and all the testator's existing intestate successors shall be named parties to the action.

(c) For the purpose of this subchapter, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.

(d) Service of process shall be as in other declaratory judgment actions.[9]

Another section provides:

(a) If the court finds that the will was properly executed, that the testator had the requisite testamentary capacity and freedom from undue influence at the time of execution, and that the will is otherwise valid, it shall declare the will valid and order it placed on file with the court.

(b) A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.[10]

Conclusion

Ante-mortem probate could be an important tool for estate planners to consider even if it will rarely be used. It is difficult to understand why any professional would not want to have this additional option in his or her estate planning tool box. It is certainly not appropriate for every client. It would impose no burden on the court system. New York should seriously consider adopting an ante-mortem probate option in its statutory probate scheme.

Endnotes

1. North Dakota Uniform Probate Code, Chapter 30.1-08.1; 2016 Ohio Revised Code, Chapter 2107, Wills Section 2107.081; 2015 Arkansas Code Title 28, Subchapter 2 Ante-Mortem Probate Act of 1979 Section 28-40-202 and Alaska Title 13, Decedents Estates, Chapter 13.12, Section 13.12.530.
2. See Laine R. Fastman, *The Revocable Trust Revisited*, NYSBA Trust and Estates Law Section Newsletter, Spring 2017, page 8.
3. EPTL 3-3.5 and SCPA 1404.
4. Melville M. Bigelow, *Theory of Post-Mortem Disposition: Rise of the English Will*, 9 Harv. L. Rev. 74 (1897).
5. 32 Henvii Ch I, see Am. Jur. 2d Desk Book Document 111, 112.
6. 29 Car II Ch. 3, see Am. Jur. 2d Desk Book Document 116.
7. The Uniform Probate Code, http://www.uniformlaws.org/Acts.aspx?title=Probate%20Code.
8. In his article entitled *10 Arguments Against Pre-Death Probate and Will Contests*, Trust Advisor, February 23, 2017, Le Clair Ryan argues:
    1. It creates litigation where there would have been no will contest anyway.
    2. The testator is forced to see disgruntled heirs which would not happen if he were dead.
    3. The testator could change his will later and thereby waste legal fees in this proceeding.
    4. An ante-mortem proceeding would be difficult to "settle."
    5. The testator may get second thoughts about his will during the proceeding.
    6. The legal fees incurred in the proceeding could exhaust all assets of the estate.
    7. The testator will undergo the stress of the proceeding and discovery.
    8. The testator's privacy will be invaded.
    9. The declaratory judgment process will place a burden on the courts.
    10. Facts that arise after the will is admitted to ante-mortem probate may not be presented when the will is admitted in this proceeding.
9. AR Code § 28-40-202 (2015).
10. AR Code § 28-40-203 (2015).

To UTMA or Not to UTMA?

By Anthony J. Enea

Whenever a child is born many parents and grandparents begin the process of planning for that child's education and other needs. Whether it be the child's birthday, baptism, bar/bat mitzvah, communion or confirmation, these events present the opportunity to gift to the minor child. However, the issue that inevitably arises is whether a custodial account should be utilized to hold the monies gifted to the minor child.

Prior to January 1, 1997, parents and grandparents in New York could utilize an account governed by the Uniform Gift to Minors Act (UGMA). An UGMA account was a custodial account where a parent or grandparent could irrevocably gift for the benefit of a minor child (under the age of 18).[1]

On January 1, 1997, UGMA was repealed in New York by the enactment of the Uniform Transfers to Minors Act (UTMA). UTMA also allowed any parent or grandparent to establish custodial accounts for a minor child (in New York, the age of Majority for all UTMA accounts is 21 years of age, unless, the donor/transferor specifically stipulates to age eighteen (18) as the age of majority).[2] In addition to parents and grandparents, any other adult may also make the transfer to a minor child and any adult or bank/trust company may act as the custodian of the account.[3]

The title of the account in substance must state "John Smith (*name of Custodian*) as custodian for David Smith (*the minor*) under the New York Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians in the event the first nominated custodian dies or is unable to serve.[4]

Once a gift is made to an UTMA account the account is irrevocable.[5] The funds deposited to the account cannot be returned to the donor/transferor who transferred the monies or assets (stocks, bonds, etc...). However, the Custodian may utilize the funds in the account for the use and benefit of the minor in any amount the Custodian considers advisable without court order and without any regard to the duty or ability of the Custodian personally, or any other person to support the minor, and without regard to the minor's property and income.[6] During the time the custodial account is in existence the Custodian shall collect, hold, manage, invest and re-invest the custodial property in accordance with the standard of care that would be observed by a prudent person dealing with the property of another. The Custodian must at all times keep the custodial property separate and distinct from all other property.

The use of a custodial account also results in the income tax liability on any interest and dividends being taxed to the child who, in most cases, is in a lower tax bracket then the custodian parent and/or grandparent.

The minor child has no access or control over the property/monies in the custodial account until he or she reaches the age of 21 years.[7] Once the minor reaches the age of 21 the monies/assets in the custodial account must be turned over to the child. It is the minor child turning 21 years of age that resulted in the phrase "UTMA Regret" being coined. Sadly, all too often a significant number of 21-year-olds do not have the maturity or financial acumen to take control over and manage a significant amount of money. In addition, there are many potential problems that arise during a child's life that are unforeseen at the time the funds are gifted to an UTMA Account. For example, the child may be diagnosed with a developmental and/or learning disability or the child may have troubles with the law and/or develop a drug and/or alcohol addiction. If these types of circumstances arise, the funds gifted to the minor will still become available to the minor at age 21, and may hinder either state or federal aid that would otherwise be available to a disabled individual or, unfortunately, will allow for available funds to further a drug or alcohol addiction. Even if the child does not have a serious developmental disability and/or addiction, the mere fact that he or she could be financially irresponsible and squander the money and assets in the UTMA account is a possibility.

It is, in my opinion, the unforeseen and unpredictable nature of life that makes an UTMA account a poor choice for most parents and/or grandparents. While a parent and/or grandparent can always encourage a child or grandchild not to take the money at age 21 and to instead transfer the funds to a Trust account for the child's benefit, this is not always an available back-up plan, especially where the 21-year-old does not wish to transfer the assets to a trust. The trust would be for the child's benefit with his or her parents as the trustees and would provide for the trust to terminate at an agreed upon age, other than 21. This trust would allow the funds to continue to be available for the child's benefit, but eliminates the heightened risk of financial irresponsibility if the funds were to stay in the child's name alone. While I have seen several children with large UTMA accounts agree to transfer their funds to a trust, whether or not a child or grandchild will agree

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is a significant risk posed by an UTMA account. The temptation may be too great for some children.

A much more prudent option that will eliminate the uncertainty as to how responsible a 21-year-old will be is to create a trust for one's minor children and/or grandchildren that holds the monies one would otherwise gift to an UTMA account. The trust could have as many beneficiaries as the creator/grantor desires and could have provisions as to the use of the trust principal and/or income for the benefit of the child and/or grandchild that is fashioned in accordance with the wishes of the grantor/creator of the trust. Most importantly, the trust can continue until the child and/or grandchild attains a specified age, or for the life of the child and/or grandchild.

The trust can also provide that if the child/grandchild is a person with special needs and/or developmentally or physically disabled, that his or her share of the trust principal and income be held in a Special Needs or Supplemental Needs Trust for his or her benefit.[8] This would allow the child and/or grandchild with special needs to receive any federal and/or state benefits he or she is entitled to (i.e., Medicaid, Supplemental Social Security Income) without the trust principal and/or income affecting his or her eligibility for the aforementioned benefits.[9]

An additional advantage of the trust is creditor protection benefits for the trust beneficiary during the period of time the trust is in existence because the beneficiary does not have access and/or control over the trust assets. The trust will also prevent the beneficiary with financial problems and/or a substance abuse issue from squandering the monies intended for his or her education and future. Additionally, the beneficiary who may experience marital problems and/or divorce will also be protected by the use of a trust.

The grantors/creators of the trust can still take advantage of the "personal exclusion" for gift tax purposes by gifting $14,000 or less per year for each beneficiary (a husband and wife can gift up to $28,000 per year, per beneficiary) without having any gift tax consequences and without utilizing any portion of their lifetime estate and gift tax credit of $5,490,000 per person.[10] If the trust utilized is irrevocable, the trust income and/or dividends will be taxed to the beneficiary of the trust whose income tax rate should be lower than the Grantor/Creator of the Trust.

In conclusion, the use of a trust for the benefit of a child or grandchild, although more expensive than opening an UTMA account, has significant advantages and protections that are not available when one utilizes an UTMA account. In my opinion, the answer to the question "to UTMA or Not to UTMA?" is to not UTMA.

Endnotes

1. N.Y. Estates, Powers & Trusts Law 7-4.1 [Repealed].
2. EPTL 7-6.2; EPTL 7-6.21.
3. EPTL 7-6.3.
4. EPTL 7-6.3(a).
5. EPTL 7-6.11(3)(b).
6. EPTL 7-6.14.
7. EPTL 7-6.20.
8. EPTL 7-1.12.
9. EPTL 7-1.12(b)(2).
10. IRS-2016-139; Revenue Procedure 2016-55.

Who Needs a Decanting Statute?

By Brad Dillon and Michael S. Schwartz

In *In re Hoppenstein*,[1] the New York County Surrogate's Court dealt a potentially devastating blow to the necessity and relevance of New York Estates, Powers and Trusts Law (EPTL) 10-6.6 (the "NY Decanting Statute") for trust decantings. In that case, the trustees of an irrevocable trust relied on their broad discretionary distribution authority in the trust instrument itself, as opposed to the NY Decanting Statute, to transfer trust assets from one trust to another. By confirming the validity of the transfer to the new trust, the court allowed the trustees to effectively remove a trust beneficiary without having to follow the specific statutory requirements of the NY Decanting Statute.

The decision in *Hoppenstein* opens the door for practitioners and trustees to completely avoid the requirements of the NY Decanting Statute so long as the governing trust instrument has sufficiently broad discretionary distribution language. While this may be beneficial for facilitating trust decantings and providing the flexibility to effectively make changes to an irrevocable trust that may not otherwise have been possible, it also potentially undermines some of the protections that the requirements of the NY Decanting Statute were meant to provide.

This article engages in a brief review of the history of trust decanting, including the NY Decanting Statute, and analyzes the impact that *Hoppenstein* may have on trust decantings in New York.

A Brief History of Decanting

A trust decanting involves the distribution by a trustee of the assets from one trust to another, potentially allowing a trustee to effectively modify an irrevocable trust by contributing the assets to a new trust with different terms. For example, decanting can be used to change the situs of a trust, remove beneficiaries, extend the duration of the trust, change fiduciaries or modify other administrative provisions.

The original support for the decanting power stemmed from the trustee's discretionary ability to distribute trust assets to or for the benefit of a beneficiary. If the trustee could make such distributions for the benefit of a beneficiary, then the trustee should also be able to instead exercise that authority by distributing assets in trust for the beneficiary. This decanting right is recognized in the common law of several jurisdictions,[2] and many of those states have in turn codified this common law right. In fact, New York led this charge in 1992 when it adopted its decanting statute, which has been refined by several amendments since that time. However, many of these state decanting statutes, including the New York statute, provide that they are not intended to abridge any decanting powers that the trustee may have under common law or the governing instrument.

Prior to *Hoppenstein*, no New York case had addressed either the common law right to decant or the right to decant pursuant to the terms of a trust's governing instrument, though several cases in other jurisdictions have analyzed the extent of a trustee's common law power to decant. For example, in *Phipps v. Palm Beach Trust Co.*, the Supreme Court of Florida held that a trustee with the unfettered discretion to distribute trust principal can exercise that power by appointing assets in further trust.[3] Similarly, in *In re Spencer's Estate*, the Iowa Supreme Court allowed a trustee who had the discretion to grant the trust beneficiaries a life estate over the trust property to establish a new trust for the benefit of those beneficiaries.[4] Finally, in *Wiedenmayer v. Johnson*, a New Jersey court rejected a challenge to distributions by a trustee to new trusts that the beneficiaries of the original trust set up as a condition of the distribution.[5]

New York's Decanting Statute

New York was the first state to adopt legislation specifically authorizing trust decanting with the enactment of EPTL 10-6.6 in 1992. As initially codified, the statute authorized the transfer of assets from one trust to another where a trustee had unlimited discretion to make principal distributions. New York has continued to be at the forefront of trust decanting legislation, as the NY Decanting Statute has been amended multiple times since its initial enactment. Some of these changes involved mere technical amendments,[6] but others have had a more significant impact. One such change involved an expansion of the scope of the NY Decanting Statute, which allows a trust decanting even if the trustee's distribution power is limited, so long as the distribution standard is retained in the new trust and certain other requirements are met.[7]

Importantly, like many other state decanting laws, the NY Decanting Statute explicitly provides that it is not intended to curtail a trustee's ability to effectuate a trust decanting via common law or pursuant to the

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terms of the trust's governing instrument. In particular, EPTL 10-6.6(k) provides that the NY Decanting Statute will not "abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law."[8] It is this potentially very broad "exception" to the NY Decanting Statute that was at the heart of the recent *Hoppenstein* decision.

In re Hoppenstein

In *Hoppenstein*, the trustees relied on their discretionary powers under the trust instrument to distribute a life insurance policy on the settlor's life to a new trust that was identical to the prior trust in all respects other than that it excluded an estranged daughter and her four children as beneficiaries. The original trust authorized the trustees "to pay such sums out of the principal of the trust (even to the extent of the whole thereof) to the Settlor's descendants, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees, in their absolute discretion, shall determine."[9] The trust instrument required only that the trustees give notice to the settlor's descendants within 45 days of the intended distribution. The original trust also explicitly provided that distributions to beneficiaries could be made "by payment to a trust for his or her benefit."[10]

The daughter and her four children sought to void the trustees' distribution of the policy to the new trust, claiming, among other things, that the transfer did not comply with the provisions of the NY Decanting Statute. The New York County Surrogate's Court summarily dismissed their argument and granted summary judgment in favor of the trustees, noting that the trustees did not rely on the NY Decanting Statute to decant the policy but rather on their power to make discretionary distributions of principal under the terms of the trust instrument.[11] The court's decision cited EPTL 10-6.6(k) in affirming the trustees' rights to decant under the terms of the trust instrument rather than under the EPTL.[12]

An Exception That Swallows the Rule?

Hoppenstein appears to be the first case in New York to confirm the exception contained in EPTL 10-6.6(k), which allows trustees to decant based on the provisions of the trust instrument or common law, instead of having to follow the NY Decanting Statute. While the Surrogate's Court did not provide details of its reasoning, *Hoppenstein* should provide comfort to practitioners who may have previously been hesitant to rely on this statutory exception.

In fact, based on *Hoppenstein*, mere discretion over principal distributions alone engenders the power to decant. While the trust instrument in *Hoppenstein* specifically authorized distributions to be made to new trusts for the benefit of the beneficiaries, there is no indication in the court's decision that this provision impacted the result. Rather, in allowing the decanting and the effective removal of certain trust beneficiaries by way of the decanting, the decision only relies on the trustee's discretionary authority to make distributions of trust principal "to the Settlor's descendants, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of the others."[13] Thus, under the reasoning of *Hoppenstein*, trustees should be able to rely on simple discretion to make principal distributions, even when the trust instrument does not otherwise specifically allow distributions to be made "for the benefit" of the beneficiaries or "in further trust" for the beneficiaries.

"EPTL 10-6.6(c) allows a trustee with a limited invasion power (such as a power to invade principal limited by an ascertainable standard) to decant to an appointed trust when certain requirements are met."

While the court in *Hoppenstein* appears to have explicitly allowed a decanting by a trustee with unlimited discretion over principal, it is not clear whether the case would extend to trustees with a lesser standard of discretion. EPTL 10-6.6(c) allows a trustee with a limited invasion power (such as a power to invade principal limited by an ascertainable standard) to decant to an appointed trust when certain requirements are met.[14] The Surrogate's Court in *Hoppenstein* relied exclusively on the trustee's discretionary authority over principal in finding a power to decant. If that discretion is limited, a power to decant under the terms of the trust instrument may not be as absolute as where discretion is unlimited. The court noted, however, that the EPTL does not abridge the right of a trustee to decant under the terms of the governing instrument of a trust. Presumably, then, a trustee with limited discretionary authority could still exercise a power to decant, provided that the governing instrument specifically allowed such an exercise. The governing instrument would likely have to be more explicit in this allowance.

The Surrogate's Court did not circumscribe a trustee's authority to decant when the trustee has unlimited discretion over distributions. This opens an unlimited number of possibilities for changing the dis-

positive terms of an appointed trust in ways that may not be allowable under the NY Decanting Statute. For example, a trustee might be able to rely on her broad discretionary authority over distributions to decant a trust's assets to a new trust that expands the class of beneficiaries. Although it is far from certain that this would be permissible, the ability to add beneficiaries via decanting could be beneficial in a situation where a settlor has a major unexpected life change (such as a marriage or birth of a child) after the initial creation of the trust. Conversely, allowing a trustee to add beneficiaries that the settlor did not initially name could yield unanticipated and undesired results.

A non-statutory decanting could perhaps also be used to achieve other objectives, such as elevating remainderpersons to present beneficiaries, prolonging the perpetuities period, altering the provisions regarding trustee compensation, or providing for other substantially different dispositive provisions. It could also, for example, sidestep the notice requirements under the NY Decanting Statute, limiting the chances of a disgruntled beneficiary challenging the decanting. While such a far reaching power could provide flexibility to make much needed changes to an irrevocable trust that may not otherwise have been possible or practical, taken to its extreme, such a power could also undermine the safeguards that the requirements of the NY Decanting Statute provide.

Similarly, certain considerations that a trustee must take into account under the NY Decanting Statute may not explicitly apply to a decanting under a trust instrument or common law. For example, the requirements under EPTL 10-6.6(h) and (o) that a trustee may only exercise her decanting powers if a prudent person would consider it in the best interest of the objects of the exercise of the power and if she has considered the tax implications of the decanting may not explicitly apply to decantings based on common law or the terms of the governing instrument.

Of course, even if a trust instrument which provides unfettered distribution discretion does not include limitations on the trustee's decanting power, the trustee still would be bound by her overriding fiduciary duties. For example, a trustee who exercises her discretionary distribution authority to transfer trust assets into a trust that enriches the trustee's interests may have breached her fiduciary duties, depending on the specific facts of the situation. Similarly, even in the absence of the applicability of EPTL 10-6.6(h) and (o), a trustee must still be mindful of the tax consequences of a trust decanting, which are largely unsettled at this time. While a detailed discussion of the potential tax implications of a decanting is beyond the scope of this article, a trustee must analyze and balance those potential tax consequences with the objectives that the trustee is seeking to achieve.

Unfortunately, because the *Hoppenstein* trustees decanted to a trust that excluded beneficiaries under the invaded trust—a power that is explicitly permitted under the NY Decanting Statute[15]—practitioners may have to wait and see what associated duties and restrictions apply to decantings and how far they can take the Surrogate Court's reasoning in substantially altering the dispositive terms of an invaded trust. Similarly, the Surrogate's Court does not address the breadth and scope of a trustee's power to decant under New York common law—a power which had not previously been confirmed by a New York court. This too will necessitate further guidance.

Conclusion

The recent *Hoppenstein* decision could have a major impact on decanting New York trusts in the future, as it seems to lessen the importance and relevance of the NY Decanting Statute. It is likely to be used by practitioners and trustees to side-step the requirements and restrictions of the NY Decanting Statute, at least in situations where trustees have unlimited discretion to make principal distributions. However, there is still a substantial amount of uncertainty as to how far the *Hoppenstein* decision can (or should) be extended. Until further guidance is issued, prudent practitioners may still wish to include explicit decanting language in the trust instrument itself, and also comply with the NY Decanting Statute to the extent possible.

Endnotes

1. *In re Hoppenstein*, 2015-2918/A, NYLJ 1202784244139, at *1 (Sur. Ct., N.Y. Co., decided March 31, 2017).
2. *See, e.g.*, Restatement Third, Property: Wills and Other Donative Transfers § 19.14 (2011); *Phipps v. Palm Beach Trust Co.*, 142 Fla. 782 (1940); *In re Spencer's Estate*, 232 N.W.2d 491 (Iowa 1975); *Wiedenmayer v. Johnson*, 106 N.J. Super. 161 (App. Div. 1969), *judgment aff'd*, 55 N.J. 81 (1969).
3. *Phipps*, 142 Fla. 782 (1940).
4. *In re Spencer's Estate*, 232 N.W.2d 491 (Iowa 1975).
5. *Wiedenmayer*, 106 N.J. Super. 161 (App. Div. 1969), *judgment aff'd*, 55 N.J. 81 (1969).
6. *See, e.g.*, Memorandum in Support of New York A7061, at (2).
7. New York's Estates, Powers and Trusts Law (EPTL) 10-6.6(c).
8. EPTL 10-6.6(k).
9. *Hoppenstein*, at 3.
10. *Hoppenstein*, note 3.
11. *Id.* at 6.
12. *Id*.
13. *Hoppenstein*, at 3.
14. The appointed trust must have the same current, successor, and remainder beneficiaries as the invaded trust. In addition, the appointed trust must maintain the same income distribution, principal invasion and power of appointment provisions as the invaded trust. EPTL 10-6.6(c).
15. EPTL 10-6.6(b) provides that "the successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries)."

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Preventing Morbid Litigation: Ask Clients About Their Funeral Arrangements

By Amy F. Altman

As estate planners, we're accustomed to asking our clients for personal information, such as their finances and family dynamics, to obtain a good grasp of their estate-planning goals. Without such questions and forthright answers, a planner would be at a loss in terms of how to appropriately plan for his or her clients. The result of this dialogue is the foundation of any well-thought-out estate plan. One of a planner's ultimate objectives is to create a plan that works under any set of circumstances, from natural disaster to unborn children. However, how often are we as planners asking our clients about their funeral arrangements? Practitioners should always ask clients a simple series of questions, such as: (1) who they want to be in charge of their final disposition, (2) whether they prefer burial over cremation, and (3) where they wish to be buried or interred. Practitioners may be reluctant to ask such questions possibly because the questions raise the issue of the client's mortality. The same may be said about the client's willingness to answer.

For some, this topic may be overwhelming, morbid and an issue they would rather avoid. Not surprisingly, some clients may reason that the individual nominated as executor will also be responsible for the disposition of their remains. In some jurisdictions, the nominated executor may not be the one to control the disposition of remains. Further, the funeral home may not wait for the nominated executor to be appointed. Depending on your state, this may take several weeks to months. If the answers aren't clear when creating the estate plan, then on the client's death, her heirs will have no choice but to rely on state law as a default. These uncertainties can create disputes among family members if they don't all agree about who should be in control of the disposition or regarding the funeral arrangements themselves. This situation leaves a family to deal with litigation during what may be a very difficult loss of a loved one.

Litigation Risk

Thus, it's no surprise that litigation continues to arise when critical questions regarding disposition of remains aren't asked or clarified. Many of these cases raise two crucial questions: First, who's the individual designated by the client, now the decedent, to have the authority to dispose of her remains? Second, how did the decedent want her remains disposed of? Occasionally, a third question arises of where the client wanted to be buried or where she wanted her ashes interred or scattered. No estate planner wants to see his client's heirs endure litigation based on an estate plan that didn't take the simple precaution of clarifying the ultimate disposition.

History of Burial Rights

It may be surprising to learn that there's no right of property in a dead body.[1] In 1753, Sir William Blackstone opined that:

> Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.[2]

This view stems back to the English common law in which churches held the right of sepulcher (sometimes spelled "sepulchre") and the responsibility of burying the dead.[3] In the United States, the national consciousness with respect to burial rights was born out of the Civil War, when there was no system in place for identifying soldiers killed in battle, and families waited for months to obtain information, much less bury the dead.[4] After the war, volunteers who reported deaths to the families advocated for more efficient ways to relay this information to families.[5]

In modern times, some states have declared that a quasi-property right vests in the nearest relatives of the deceased for the purposes of burial or other lawful disposition of the body.[6] Thus, the quasi-property right exists for the limited purpose of determining custody of the body for burial. This right is sometimes called "the right of sepulcher." The right simply encompasses the power to ensure that the corpse is handled properly and laid to rest.[7] This right doesn't have an economic value per se; however, if breached, the heirs may have a right of action for damages. The right to dispose of the body and prevent it from any defacement clearly isn't property that would be included in the estate, and therefore, it's not within the control of the executor under common law.[8] In many jurisdictions within the United States, courts have ruled that "the right to

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possession of a body for the purpose of burial belongs to the surviving spouse" or, in the absence of such a spouse, "the next of kin."[9] Thus, if the decedent leaves no direction on the disposition of her remains, and there's no surviving spouse, the right of burial of a dead body rests with the next of kin in the order of their relation to the decedent.[10] If the right of proper burial is breached, the next of kin may have an action for the breach of that right.[11]

State Statutes

Many states have revised their statutes to allow for the designation in a separate form of an agent to authorize funeral arrangements, or in certain states, incorporated this information into the state's health care proxy (HCP) or power of attorney (POA). The form is called the "Designation of Agent for Final Disposition" or "Authorization of Final Disposition Form." Generally, the written instrument provides for: (1) designation of an individual who will have the right to control the disposition of a deceased person; and (2) the client's preferences for burial versus cremation or any special instructions to give guidance to the person appointed. A funeral home will be obligated to follow the instructions provided. The use of this form or a provision under an HCP or POA will entitle the individual named to make all decisions regarding disposition (unless specific instructions were delineated on the form, such as burial versus cremation). Every jurisdiction has its own laws regarding disposition of remains, which you should review. "Designating an Agent," p. 18, lists each jurisdiction's statute regarding disposition of remains and the relevant website where one can find the disposition of remains form.

Morbid Litigation

A recent case that occurred in New York demonstrates the caustic vitriol that can emerge when burial wishes aren't properly and clearly documented. In *Lipiner v. Plaza Jewish Community Chapel*, the decedent's sister brought an action against the decedent's children to disinter the decedent from her grave in Queens, N.Y.[12] She argued that the decedent should have been buried in Jerusalem, Israel, in a plot that the decedent purchased.[13] In this case, because the decedent didn't sign a disposition of remains form, the court analyzed New York's statute, New York's Public Health Law Section 4201, which prioritizes persons authorized to control a decedent's remains. Under the statute, the decedent's children had priority over the decedent's sister. However, the court in an interim decision decided that the sister had standing to question whether the decedent's wishes were followed. The court ordered an evidentiary hearing, where two home health aides testified that the decedent wanted to be buried in Israel and not in Queens next to her "bastard" ex-husband. The court found the son's decision to ignore the fact that his mother had a plot in Israel "inexcusable" and ruled that the decedent's remains be disinterred and moved to Israel for burial. The entire case may have been avoided had the decedent signed a disposition of remains form designating her sister as her agent and/or clearly expressing her desire to be buried in Israel as opposed to Queens.

Celebrity cases are similarly instructive. The death of Vicki Lynn Marshall, also known as Anna Nicole Smith, brought furious litigation over the question of who had the right of sepulcher, her mother or the guardian for her sole surviving heir, her infant daughter, Dannielynn.[14] Anna's mother wanted her body buried in Texas. The court of appeals in Florida ruled against her mother and left the right to bury Anna's body to the guardian for Dannielynn. Finally, after a 3-week battle, Anna's body was buried in the Bahamas, next to her 20-year-old son who'd died five months earlier.

The death of Boston Red Sox player Ted Williams also resulted in an interesting lawsuit among his surviving children. Ted's son proffered a handwritten note on a napkin indicating that a family pact had been signed by Ted stating that he wanted to be cryopreserved, while his will clearly requested cremation.[15] Ted's daughter, Bobby-Jo, filed suit to have him cremated as per Ted's instructions in his will. Eventually she gave up this fight because the cost of litigation would have been too burdensome for her family.[16]

When Mickey Rooney died, his conservator filed a motion to halt Rooney's son and wife from moving Rooney's body against his express wishes.[17] His wife wanted him buried in a plot they purchased together years earlier, with the intention that they be buried next to one another.[18] The conservator and his estate attorneys disagreed since Rooney was separated from his wife and didn't ultimately wish to be buried next to her.[19] Instead, they said Rooney wanted either a military or Hollywood burial.[20] The parties ultimately agreed to bury him at Hollywood Forever cemetery.[21]

In the heart-wrenching case of *Wilson v. Wilson*, a divorced couple sought the partition of the cremated remains of their 23-year-old son who died in a car accident. [22] The Florida District Court of Appeal's decision had to analyze whether the remains were considered "property" similar to the analysis of the burial of a body under Florida law. The court ruled against partition, honoring Florida precedent in a similar case:

> It is a sorrowful matter to have relatives disputing in court over the remains of the deceased. In this case in particular, there is no solution that will bring peace to all parties. We express our sympathies to both sides in their

Continued on page 18

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> loss, which must be magnified by these proceedings. Cases such as this require the most sensitive exercise of the equitable powers of the trial courts. We are confident that the experienced trial judge exercised his power with due regard for the serious and emotional issues presented.[23]

Cases like *Lipiner* and *Wilson*, as well as celebrity cases, underscore the need to have the discussion with your client regardless of her age regarding her preferences. If permitted by state law, your client should consider completing a disposition of remains form (in whatever form that's allowable under the particular jurisdiction's laws), together with advanced directives that comprise a good estate plan, such as an HCP, living will and POA. This will create clarity with respect to the sensitive issues surrounding burial and likely stem the tide of litigation during a family's most difficult hour of grief.

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Endnotes

1. 22A Am.Jur.2d, "Dead Bodies," Section 5, "Property rights in body—Quasi property rights" (2016).
2. Sir William Blackstone, *Commentaries on the Laws of England in Four Books 429 (1893),* http://oll.libertyfund.org/title/2140.
3. *Melfi v. Mount Sinai Hospital*, 877 N.Y.S.2d 300 (1st Dep't 2009).
4. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 Rutgers L. Rev. 45 (2005).
5. *Ibid*.
6. *Arkansas Bd. Of Embalmers and Funeral Directors v. Reddick*, 233 S.W.3d 639 (2006); *Evanstone Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377 (Texas 2012).
7. *Bauer v. North Fulton Medical Center, Inc.*, 527 S.E.2d 240 (1999).
8. *Seals v. H. & F, Inc.*, 301 S.W.3d 237 (Tenn. 2010); *McRae v. Booth*, 938 So.2d 432 (Ala. Civ. App. 2006).
9. *Cottingham v. McKee*, 821 So.2d 169 (Ala. 2001).
10. *Fischer's Estate v. Fischer*, 117 N.E.2d 855 (1st Dist. 1954); *Shipley v. City of New York*, 908 N.Y.S.2d 425 (2d Dep't 2010).
11. *Riley v. St. Louis County of Mo.*, 153 F.3d 627 (8th Cir. 1998).
12. *Lipiner v. Plaza Jewish Community Chapel*, 156059/16, NYLJ 1202768492953, at *1 (Sup., N.Y., Sept. 16, 2016).
13. *Ibid*.
14. *Arthur v. Milstein*, 949 So.2d 1163, 1165 (Fla. 4th DCA 2007).
15. Brian L. Josias, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 Notre Dame L. Rev. 1141, 1180 (2004).
16. *Ibid*.
17. Victoria Kim, *Rooney Family Ends Dispute, Agrees to Bury Actor at Hollywood Forever*, LA Times (April 10, 2014), http://articles.latimes.com/2014/apr/10/local/la-me-ln-mickey-rooney-burial-20140410.
18. *Ibid*.
19. *Ibid*.
20. *Ibid*.
21. *Ibid*.
22. *Wilson v. Wilson*, 138 So.3d 1176 (Fla. 4th DCA 2014).
23. *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 954 (Fla. 4th DCA 2005) ("a dead body is not properly viewable as property or assets").

Designating an Agent

An overview of state laws

Jurisdiction	Designated Agent?	Law	Website
Alabama	Yes	AL §34-13-11	www.fsb.alabama.gov/pdfs/June2015Forms/AuthorizingAgentAffidavit.pdf
Alaska	Yes	AK §13.75.030 (2013)	http://law.justia.com/codes/alaska/2013/title-13/chapter-13.75/ section-13.75.030/
Arizona	Yes	AZ §36-3221	www.azleg.gov/ars/36/03224.htm
Arkansas	Yes	A.C.A §20-17-102	www.arkansas.gov/fdemb/pdf/Cremation_Final_Disposition_Rights_ Form.pdf
California	Yes	CHSC §7100	www.cfb.ca.gov/enforcement/1705form.pdf (cremation)
Colorado	Yes	CRS §15-19-104	http://coloradoadvancedirectives.com/wp-content/uploads/2014/07/Colorado-Declaration-Disposition-of-Last-Remains.pdf

Connecticut	Yes	C.G.S. §45a-318	http://law.justia.com/codes/connecticut/2011/title45a/chap802b/ Sec45a-318.html
District of Columbia	Yes	D.C. Code §3-413	https://beta.code.dccouncil.us/dc/council/code/sections/3-413.html
Delaware	Yes	12 Del. Code Ann. §264 (right to dispose of remains); 24 Del Code Ann. §3121 (cremation)	http://delcode.delaware.gov/title12/c002/sc03/index.shtml
Florida	Yes	F.S.A. §497.005(43)	www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL =0400-0499/0497/0497.html
Georgia	Yes	GA Code Title 31, Chapter 36	www.negrc.org/user_files/1316786486_GEORGIA%20ADVANCE%20DIRECTIVE %20FOR%20HEALTH%20CARE10.pdf
Hawaii	Yes	Senate Bill 341	www.qeepr.com/blog/wp-content/uploads/2014/02/2013-hawaii-designated-agent.pdf
Idaho	Yes	Idaho Statutes §54-1142	https://legislature.idaho.gov/statutesrules/idstat/Title54/T54CH11/SECT54-1142/
Illinois	Yes	755 ILCS §65/1	www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2737&ChapterID=60
Indiana	Yes	Indiana Code §29-2-19-9	http://codes.findlaw.com/in/title-29-probate/in-code-sect-29-2-19-9.html
Iowa	Yes	Final Disposition Act, §144C	www.pdffiller.com/61049654-RSRAlFeD8_aQ2Qum3S7fF9nkhF2MU-Iowa- Disposition-Agent-Form-funerals-Various-Fillable-Forms
Kansas	Yes	Kansas Statutes §65-1734	www.kansaslegalservices.org/sites/kansaslegalservices.org/files/ DURABLE%20POWER%20OF%20ATTORNEY%20FOR%20HEALTH%20CARE%20DECISIONS%20GENERAL%20STATEMENT%20OF%20AUTHORITY%20GRANTED_1.pdf
Kentucky	Yes	K.R.S. Chapter 367	www.funerals.org/wp-content/uploads/2016/08/2016-4-5-Kentucky-Designated-Agent-Form.pdf
Louisiana	Yes	L.R.S. §37:876(A)	http://law.justia.com/codes/louisiana/2011/rs/title37/rs37-876 A representative to carry out final wishes may be designated in a separate document signed by a notary
Maine	Yes	Title 22, §2843-A, no. 2	www.themha.org/policy-advocacy/Issues/End-of-Life-Care/advdirectives form.aspx
Maryland	Yes	Annotated Code, MD §5-408.1	www.marylandattorneygeneral.gov/Health%20Policy%20Documents/adirective.pdf

Massachusetts	No	Mass. Reg. CMR §239, 3:09	www.mass.gov/ocabr/licensee/dpl-boards/em/regulations/rules-and-regs/239-cmr-300.html#3.09
Michigan	No	MCL §700.3206	www.legislature.mi.gov/(S(qvfapgl4wpcsdowhu30fxvbj))/mileg.aspx?page=GetObject&objectname=mcl-700-3206
Minnesota	Yes	Minn. Statutes §149A.80	www.revisor.mn.gov/statutes/?id=149A.80
Mississippi	No	MS Code §73-11-58 (2013)	http://law.justia.com/codes/mississippi/2013/title-73/chapter-11/state-board-of-funeral-service/section-73-11-58
Missouri	Yes	Mo. Statutes §194.119	www.moga.mo.gov/mostatutes/stathtml/19400001191.HTML http://parkmort.com/FrStRtOfSepl.pdf
Montana	Yes	MCA §37-19-904	http://leg.mt.gov/bills/mca/37/19/37-19-904.htm
Nebraska	Yes	NE REV ST §38-1425	http://codes.findlaw.com/ne/chapter-38-health-occupations-and-professions/ne-rev-st-sect-38-1425.html
Nevada	Yes	NRS §451.024	www.leg.state.nv.us/nrs/nrs-451.html#NRS451Sec024
New Hampshire	Yes	NH §209-17	http://law.justia.com/codes/new-hampshire/2013/title-xxvi/chapter-290/section-290-17
New Mexico	Yes	NM Statutes §24-12A-1 (authorization of cremation); §45-3-701(b) (designation of agent)	www.qeepr.com/blog/wp-content/uploads/2014/02/New-Mexico-Cremation-Authorization-2010.pdf
New Jersey	Yes	NJ Statute §45:27-22	http://law.justia.com/codes/new-jersey/2013/title-45/section-45-27-22
New York	Yes	NY §4201 Public Health Law	www.health.ny.gov/forms/doh-5211.pdf
North Carolina	Yes	NCGS §32A-15 through 32A-27	www.aarp.org/content/dam/aarp/relationships/caregiving/2011_01/ad/NorthCarolina.pdf
North Dakota	No	ND Code Chapter 23-06	www.legis.nd.gov/cencode/t23c06.pdf
Oklahoma	Yes		https://funerals.org/wp-content/uploads/2017/01/Oklahoma-Designated-Agent-Form.pdf
Ohio	Yes	Ohio Code §2108.70	www.ohiobar.org/ForLawyers/MemberResources/Documents/Ohio-Appointment-of-Representative-for-Disposition-of-Bodily-Remains.pdf
Oregon	Yes	ORS §97.130	www.oregon.gov/mortcem/compliance_issues_related/cremation authorization.doc

Pennsylvania	Yes	PA Statute §20-3-305	www.legis.state.pa.us/WU01/LI/LI/CT/PDF/20/20.PDF
Rhode Island	Yes	RI Statute §5-33.3-4	http://webserver.rilin.state.ri.us/Statutes/TITLE5/5-33.3/5-33.3-4.HTM
South Carolina	Yes	SC Statute §32-8-320	www.scstatehouse.gov/code/t32c008.php
Tennessee	Yes	TN Statute §34-6-204(b)(3)	www.lawserver.com/law/state/tennessee/tn-code/tennessee_code_34-6-204
Texas	Yes	Health and Safety Code, §711.002	http://fcant.org/pdf/texasforms/appoint_agent_control_disposition_remains_v20101009.pdf
Utah	Yes	Utah Statute §58-9-601	https://le.utah.gov/xcode/Title58/Chapter9/C58-9-P6_1800010118000101.pdf
Vermont	Yes	VT Statute §18-231	http://legislature.vermont.gov/statutes/chapter/18/231
Virginia	Yes	Code of Virginia, §54.1-2825	https://vacode.org/2016/54.1/III/28/5/54.1-2825/
Washington	Yes	RCW §68.50.160	http://apps.leg.wa.gov/rcw/default.aspx?cite=68.50.160
West Virginia	Yes	WV Code §30-6-22a	www.legis.state.wv.us/wvcode/ChapterEntire.cfm?chap=30&art=6&section=22A
Wisconsin	Yes	Wis. Stat Chapter 154.30	www.dhs.wisconsin.gov/forms/f0/f00086.pdf
Wyoming	Yes	WY Statute §2-17-101	http://law.justia.com/codes/wyoming/2012/title2/chapter17/section2-17-101

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Ira M. Bloom

FIDUCIARIES

Exculpation from Bonding Requirement Cannot Be Ignored by Court

Decedent's will created a trust for her son. The executor began a proceeding to reform the will so that the trust qualified as a supplemental needs trust. The Surrogate's Court apparently ordered the creation of the supplemental needs trust through a trust declaration and required the trustees to obtain a bond in the amount of $200,000. The trust declaration also required annual accountings. On appeal the First Department reversed and reformed the will to include the necessary supplemental needs trust language. The court also held that because the will expressly stated that no trustee or executor shall be required to furnish any bond the Surrogate could not require otherwise. The appellate court also stated that there was no authority to require the trustees of the supplemental needs trust to account annually because there was no indication in the will that the decedent wanted annual accountings for the trust she created for her son. *In re Feuerstein*, 147 A.D.3d 688, 48 N.Y.S.3d 356 (1st Dep't 2017).

Facts Sufficient to Withstand Dismissal of Petition to Remove Executor on Grounds of Dishonesty

Letters testamentary were duly granted to the decedent's son, who was nominated executor of the decedent's will. Decedent's surviving spouse then filed a petition under SCPA 711 to remove the executor on the ground of dishonesty. The executor moved to dismiss the petition and the Surrogate denied the motion. The executor appealed, and the Appellate Division affirmed. The court stated that the petitioner's allegations—that the executor had filed false tax returns for the estate, refused to pay the petitioner mortgage proceeds to which the petitioner was entitled, and impeded sale of personal property by the petitioner even though the property had been allocated to petitioner on the estate's tax returns—were sufficient to justify removal were the allegations proved. The Surrogate therefore was correct to deny the motion to dismiss the petition. *In re Coons*, 149 A.D.3d 731, 51 N.Y.S.3d 575 (2d Dep't 2017).

William P. LaPiana

TRUSTS

Trustee Properly Exercised Discretion to Make Distributions

Trust terms gave the trustee the power to invade principal for the grantor in the trustee's discretion and without necessarily taking into account the grantor's "independent income." In addition, the trust terms expressly directed the trustee to distribute to the grantor so much of the trust principal as the trustee in the trustee's discretion deemed advisable to maintain the grantor in comfort and good health and for any of the grantor's emergency needs.

The trustee sought judicial settlement of an accounting showing principal distributions to the grantor; other beneficiaries filed objections to those distributions which the Surrogate dismissed. The objectants appealed and the Appellate Division affirmed. The court held that the trustee made a prima facie showing that the trustee had acted in good faith, honestly, and with a proper motive which is all that is required to preclude judicial interference with a decision to exercise discretion. The trustee explained that the grantor was an "unsuccessful artist" and needed the funds for basic living expenses. In addition, the grantor was under an obligation to pay alimony ordered by a French court and that failure to do so would result in a sentence of up to two years' of imprisonment and a fine of $15,000. Distributions for these purposes were for the maintenance of the grantor in comfort and good health and for emergency needs, complying with the

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trust terms granting the discretion. *In re Goodman*, 149 A.D.3d 649, 52 N.Y.S.3d 363 (1st Dep't 2017).

WILLS

Unambiguous Terms Preclude Resort to Extrinsic Evidence

Decedent's will contained a formula provision pecuniary bequest to decedent's children, two of whom were born of decedent's marriage to decedent's surviving spouse and two of whom were the children of a prior marriage. The will nominated the surviving spouse as executor who petitioned for judicial settlement of the account. The decedent's children from the prior marriage objected, alleging that the executor had calculated the pecuniary disposition made to them in the will based on an erroneous interpretation of the language of the disposition. The Surrogate granted the executor's motion for summary judgment, finding that the language of the pecuniary bequest is not ambiguous and does not require the consideration of extrinsic evidence.

One of the children appealed, contending that the summary judgment motion should have been denied because there was no discovery and in particular that the objectants should have been given the opportunity to depose the person who drafted the will. The Appellate Division affirmed the Surrogate. Once the Surrogate properly determined that the language was not ambiguous and the decedent's intent could be found within the four corners of the will, admission of extrinsic evidence was inappropriate and the executor's motion was therefore not premature. *In re Chernik*, 150 A.D.3d 728, 53 N.Y.S.3d 360 (2d Dep't 2017).

Burden of Proof Is on Executor in Contest Between Beneficiaries and Executor Over Inclusion of Property in Estate

Decedents' children, beneficiaries of wills and trusts of both their deceased parents, brought a proceeding for a constructive trust over certain property which the executor and trustee, their sibling, claimed belonged to the executor and in which the decedents held no interest on death. The claim was based on a promise to share stock in a company founded by one of the decedents with the decedents' other children. The Surrogate's Court dismissed the claim on the ground that it was barred by the statute of limitations. In its 2015 decision in *In re Thomas*, 124 A.D.3d 1235, 1 N.Y.S.3d 598 (4th Dep't 2015), the Appellate Division held that the claim for a constructive trust was not timed barred because the alleged promise was breached only when decedents' died and petition was filed within a year of that event. The case was remitted to the Surrogate.

On remand, the Surrogate decided that the proceeding was in essence a miscellaneous proceeding to determine the ownership of the stock and denied that part of the petitioners' cross motion in limine seeking a determination that the executor had the burden of proof to establish the executor's ownership of the stock, and also determined that the petitioners had the burden of proving that that the stock had not been transferred by the decedents to the executor. The Surrogate directed a verdict in favor of the executor at the close of the petitioners' proof and they appealed.

The Appellate Division reversed and remanded. The court stated that where a fiduciary does not include an asset in the inventory of the estate because the fiduciary claims ownership of the asset, the fiduciary is asserting a personal claim and the burden of proof is on the fiduciary. To hold otherwise would allow the fiduciary to jeopardize the beneficiaries' interest by placing on them the all but impossible task of proving a negative. *In re Thomas*, 148 A.D.3d 1764, 51 N.Y.S.3d 760 (4th Dep't 2017).

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Attorney-in-Fact

In *In re Priestley,* the court was confronted, *inter alia*, with a petition to compel the administrator cta of the estate to account for her stewardship as the decedent's attorney-in-fact. The respondent moved to dismiss on various grounds, including the statute of limitations. In denying the motion, the court opined that a proceeding to compel an accounting by a fiduciary is governed by a six-year statute of limitations. However, CPLR 206(a)(1) provides a tolling provision that applies to claims in which a right grows out of the receipt or detention of money or property by a trustee, agent, attorney or other person acting in a fiduciary capacity. When a power of attorney is at issue, the statute commences to run on either of the following: (1) the death of the principal; (2) a judicial accounting by the fiduciary; or (3) open repudiation of trust by the fiduciary. In the latter regard, the law requires proof of a repudiation that is clear and made known to the beneficiaries. Based on the foregoing, the court held that the fiduciary relationship between the respondent and the decedent terminated on the decedent's date of death, September 9, 2010. Accordingly, inasmuch as the compulsory accounting proceeding was commenced on August 16, 2016, the court held that it was not time-barred.

***In re Priestley*, N.Y.L.J., Mar. 1, 2017, p.27, col. 2 (Sur. Ct., Westchester Co.).**

Denial of Probate

In *In re Friedman,* the court was confronted with two petitions requesting the admission to probate of a purported will of the decedent, dated April 5, 2011. The initial petition was filed by the nominated executor under the instrument and objections to probate were filed by the decedent's daughter. Thereafter, the daughter withdrew her objections to probate, and filed a cross-petition for probate requesting that she, and not the nominated executor, be appointed fiduciary.

Despite the absence of objections to probate, the court noted several deficiencies on the face of the instrument, as well as evidence in the record that created "serious" concerns regarding its execution and the decedent's testamentary capacity. More specifically, the court observed that the instrument arguably failed to dispose of any testamentary property, that the decedent's name was misspelled, and that while the instrument contained a detailed listing of over 30 stock holdings and accounts, a year before the execution date, the decedent had been found by an examining psychiatrist to have cognitive limitations and was unaware of his income.

In view thereof, and in accord with the provisions of SCPA 1408(1), the court scheduled a hearing in order to satisfy itself as to the genuineness of the propounded will and the validity of its execution. Petitioner, who was the only witness to testify, stated that the decedent drafted and typed the instrument, and later executed the document, without the supervision of an attorney, in the presence of two of petitioner's friends. No explanation was given regarding the discrepancies in the instrument, or to mitigate the court's concerns about the decedent's mental capacity. Moreover, no explanation was provided as to the reference in the instrument to a date and event that occurred after the date of its execution, and the existence of the pre-typed names and addresses of the witnesses, despite petitioner's contention that the decedent had never met them prior to the will being signed.

Accordingly, based on the foregoing, and the record as a whole, the court held that it was not satisfied that the will was valid, and denied the petition and cross-petition for its probate.

***In re Friedman,* N.Y.L.J., Mar. 13, 2017, p.22, col. 1 (Sur. Ct., N.Y. Co.).**

Duress

In *In re Young,* the Surrogate's Court, New York County, was confronted with a contested probate proceeding, in which the petitioner moved for summary judgment dismissing the objections to probate based on lack of testamentary capacity, undue influence, duress, fraud and revocation. The decedent died, survived by two sisters, one of whom was the petitioner and the other, the objectant, as well as four nieces and nephews. The decedent was an attorney, and the draftsman of the propounded instrument, which was one page in length. Pursuant to its terms, he left $1 million to a long-time

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friend, and the residuary estate to his nephew, the petitioner's son.

Despite the scope of objections raised to probate, the court noted that the gravamen of the objectant's challenge to the will related to the alleged conduct of the decedent's long-time friend, a legatee under the instrument, in procuring its execution and inhibiting its revocation. To this extent, the court found that the petitioner had met her initial burden of demonstrating that the instrument was a natural will, and importantly, that the decedent was in control of his life and continued to live independently for years after executing the instrument, even after being diagnosed with leukemia. Indeed, the record reflected that on the date of the will was signed, the decedent, alone, orchestrated its execution, and thereafter arranged for its safekeeping.

Nevertheless, the objectant maintained that the decedent's friend coerced him to leave her a substantial bequest under the instrument by threatening to implicate him in criminal conduct for which she was under federal investigation at the time the will was executed, and for which she was later convicted. Objectant further maintained that even after the conviction, the decedent's fear lingered, which prevented him from changing his will. In support of these contentions, the objectant offered the deposition testimony of the friend, her own affidavit, and the affidavit of the decedent's former girlfriend.

Despite the foregoing, the court noted that the decedent's friend could not have induced the bequest in her favor as alleged, inasmuch as the will was executed more than eight months *prior* to her arrest and criminal conviction, and there was no evidence indicating that she was aware that she was under investigation by the government beforehand. The court further found that objectant's affidavit was nothing more than conjecture and surmise, and that the affidavit of the decedent's former girlfriend was equally unpersuasive. Contrary to the facts in *In re Rosasco*,[1] a case relied on by the objectant, the court concluded that there was no proof that the decedent was under duress or being threatened in any way at the time he executed his will, other than, perhaps, that he had purportedly invested in his friend's business that later became the subject of a criminal investigation.

But even so, the court held this argument unavailing. Indeed, the court opined that even if the decedent might have feared changing his will as a result of a threat by his friend to implicate him in a crime—an act that his friend had *every legal right to do*—a threat to do something, or to refrain from doing something, does not per se amount to duress if the threat was "to do an act that the wrongdoer *had a right to do*."[2] Rather, "[a] donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a *wrongful* act that coerced the donor into making a donative transfer that the donor would not have otherwise made."[3]

Accordingly, the court dismissed the objections based on undue influence and duress, found the remaining objections without merit, and granted petitioner's motion for summary judgment.

***In re Young*, N.Y.L.J., Mar. 22, 2017, p.22, col. 5 (Sur. Ct., N.Y. Co.).**

Duress

In *In re Alini*, the court granted summary judgment in objectant's favor, and denied probate on the grounds that the propounded instrument had been procured by duress. The court observed that, traditionally, while an objection on the ground of duress is subsumed in an objection based on undue influence, duress is quite distinct from a claim of undue influence. In pertinent part, the court noted that while undue influence concerns wrongdoing of a covert and oftentimes undefinable nature, duress encompasses wrongdoing that is more overt, such as threats of force or harm.

Citing the definition of duress as discussed in *In re Rosasco*,[4] the court relied on the testimony of the drafting attorney to conclude that the propounded will was invalid. Significantly, counsel testified at his SCPA 1404 examination that, when asked, the decedent declared the instrument *not* to be her Last Will and Testament, and further stated that the decedent had said that "if she did not leave my office with a document to show her son, that there would be hell to pay, and she would eventually go see another—she would be taken to see another lawyer." In reference to the propounded will, the drafting attorney added: "It was truly for one purpose, to keep this lady, okay, from being harassed and continually argued with over it, and she said, clearly, that if she didn't go out with some sort of document to show him . . . she couldn't live in her home." The testimony was not refuted by the petitioner.

Based on the foregoing, the court found that the objectants had met their burden of proving that the propounded will was not the product of the decedent's free will and intention, but rather was the result of duress. Accordingly, probate of the instrument was denied.

***In re Alini*, N.Y.L.J., Mar. 31, 2017, p.47 (Sur. Ct., Richmond Co.).**

Joint Account

Before the court in *In re Feinberg* was a contested administrator's accounting in which the issue was whether a certain checking account in the name of the decedent and the petitioner, her daughter, should have been included as an asset of the estate subject to the claim of the objectant. Absent the inclusion of this asset, Schedule A of the petitioner's account indicated that there were no estate assets.

At a trial of the matter, the petitioner maintained that the subject account was a true joint account with rights of survivorship, and offered the signature card which contained the notation that the account was "joint, payable to either owner or the survivor." In view thereof, the court found that petitioner had met her burden as joint owner, and presumptively had a right to the proceeds of the whole account. As such, the burden shifted to the objectant to establish, by clear and convincing evidence, that the account had been created for convenience. However, the court found that the only evidence produced by objectant to support that theory was based on speculation and innuendo. Moreover, the court found objectant's claims as to the value of the estate's personalty, which had been listed as having no value, equally unavailing, noting that the decedent's landlord had taken possession of the decedent's apartment before the petitioner had been appointed fiduciary and had disposed of its contents.

Accordingly, the objections to petitioner's account were dismissed.

***In re Feinberg*, N.Y.L.J., Mar. 29, 2017, p.28, col. 6 (Sur. Ct., N.Y. Co.).**

Standing to File Objections

In a trustee's accounting proceeding, the court in *In re Inman,* held that the remaindermen lacked standing to object to the mandatory income distributions made by the fiduciary. In reaching this result, the court held that only a person who has a pecuniary interest in the fund that could be affected by the fiduciary's act or omission has standing to file objections.

***In re Inman*, N.Y.L.J., Nov. 28, 2016, p.30 (Sur. Ct., N.Y. Co.).**

Summary Judgment

In *In re Bellasalmo,* the court granted summary judgment in petitioner's favor, noting, in particular, that objectant had failed to establish, or to create a triable issue of fact, as to the issue of testamentary capacity. The court opined that the mental capacity to execute a will is less than that required of other legal documents, requiring only a lucid moment at the time of execution. As such, the court held that by virtue of the attestation clause and the self-proving affidavit, which expressly stated that the testator was of sound mind and understanding, and the submission of the 1404 transcripts which demonstrated, among other things, the attorney draftsperson's testimony that the testator was "sharp," "clear-minded" and "determined" at the time of the instrument's preparation and execution, the petitioner had satisfied her initial burden of establishing that the decedent had testamentary capacity when the propounded instrument was executed.

The court held that in view of this evidence, it did not need to rely on the decedent's medical records, but rather, the onus was upon the objectant to demonstrate a question of fact on the issue. To this extent, the objectant submitted an affidavit of her brother-in-law, who claimed to be a family nurse practitioner with extensive experience in dealing with the elderly. Based on this experience, and his observations of the decedent following the death of her husband, the affidavit concluded that the decedent had signs and symptoms of advancing dementia.

Nevertheless, the court noted that absent from the affidavit was any specificity as to the education and training of the objectant's brother-in-law, his level of experience at the time he observed the decedent, the kinds of behavior of the decedent that he considered in rendering his opinion, and what methodology he employed that led him to his conclusions. As such, the court concluded that his qualifications as an expert were questionable. Moreover, and more important, the affidavit did not establish that he had any contact with the decedent at or about the time of the execution of the propounded will. Accordingly, petitioner's motion as to the issue of testamentary capacity was granted. Similarly, summary relief was granted to the petitioner on the issues of fraud, mistake and duress, the court finding that objectant had offered little or no evidence to support her claims.

Finally, on the issue of undue influence, the objectant alleged that the decedent was isolated from friends and family, that the will was a radical departure from prior wills, that the petitioner was associated with the attorney draftsperson, and that the petitioner and her husband controlled the decedent's lifetime affairs. Nevertheless, the court found that the objectant's claims of isolation were belied by her admission that she and her sister, who was also an objectant, telephoned the decedent, but rarely visited her. Indeed, the court opined that the objectants were content to live out their lives with little or no contact with the decedent. As to the change in testamentary plan, the court found nothing unusual about the fact that the decedent chose to change her will after the death of her husband, and that her reasons for omitting her daughters, the objectants, from the instrument, and favoring the petitioner and her husband, was explained to the draftsperson. Further, the court found that the evidence supported the conclusion that the decedent controlled her own financial affairs, both before and after the propounded will was executed, and that there was nothing disparate about her relationship with the petitioner.

Finally, based on the evidence, the court concluded that objectant's claim that the petitioner was associated with the draftsperson was disingenuous, inasmuch as the record established that he was a family member, had drafted a prior will of the decedent, and was in

a close relationship with her independently of any involvement by the petitioner.

***In re Bellasalmo*, N.Y.L.J., Feb. 17, 2017, p.36, col. 4 (Sur. Ct., Queens Co.).**

Summary Judgment

In *In re Berdow,* the court denied objectant's motion for summary judgment and granted summary judgment in the petitioner's favor, finding that the proponent had established a prima facie case as to the validity of the propounded will, and that objectant had failed to raise a triable issue of fact as to the issues of due execution, testamentary capacity, undue influence, fraud and duress. Pursuant to the terms of his will, the decedent specifically made no provision for his family members, and instead, left his estate to his friends and a charity. The instrument was prepared and its execution was supervised by an attorney, who also served as an attesting witness, together with a superintendent of the building where decedent had resided, and who had known the decedent for years. The decedent was survived by his sister, who objected to probate.

Shortly before his death and the execution of his will, the decedent, who was suffering from prostate cancer that had metastasized to his bone and larynx, checked himself into the hospital for a tracheotomy. In an e-mail to three of his friends, he informed them of his impending hospitalization, and that he was bringing his computer with him. According to the testimony of the petitioner, while the decedent was in the hospital, he requested that petitioner find him a lawyer. Petitioner understood from this request that decedent wished to make a new will, and a he located a lawyer on the decedent's behalf. Thereafter, petitioner testified that he accompanied the decedent home from the hospital, and saw him every day until his death. Nevertheless, petitioner testified that he did not spend all day every day with the decedent.

Several days after the decedent's return home, the petitioner contacted the attorney-drafter, informing her that the decedent's condition was worsening, and that while he was cogent, his breathing was labored. A subsequent e-mail by the petitioner to the attorney conveyed to her instructions purportedly from the decedent to prepare a new will on his behalf, and set forth the dispositive provisions of that instrument, including a bequest to the petitioner. Petitioner testified that the decedent had conveyed these terms to him by writing them on a piece of paper, which he subsequently memorialized in an e-mail to counsel.

The following day, the attorney-drafter arrived at the decedent's apartment with her computer for purposes of discussing in greater detail the provisions of the will with him, drafting the instrument, and supervising its execution. Petitioner was also present in the apartment during this meeting, but excluded himself from the room at counsel's request. Also present was the nominated successor executor in the instrument, who had been his close friend for over 30 years. According to testimony, the decedent "was in perfect control" that day, and knew exactly what he wanted to include in his will. He also indicated that counsel was very methodical and thorough in her conversations with the decedent, all of which were in writing, given the decedent's difficulty speaking. The attorney confirmed that she reviewed the provisions of the will with the decedent, and more particularly, the fact that he wanted to exclude his sister from the instrument. She further testified that, once the instrument was drafted, she sent it to the decedent's e-mail address, whereupon it was retrieved and printed by the petitioner, and executed under counsel's supervision. Four days after the execution ceremony, the decedent had an appointment with his internist, who testified that while the decedent was very thin and weak, he observed no decline in his mental faculties.

Given this backdrop, the court concluded that although the decedent was mortally ill, and had been prescribed sedatives and pain-killing drugs, petitioner had established, as a matter of law, the decedent's capacity to execute the propounded will. Indeed, the court noted that even assuming that the decedent took the prescribed medications, evidence of drug use, in the absence of evidence of any actual impairment to decedent's testamentary capacity, is insufficient to defeat a motion for summary judgment.

Moreover, the court found that petitioner had also made a showing that the requirements for due execution had been complied with despite the failed memory of the witnesses to the will, and other discrepancies in their testimony, which the court found irrelevant to the issue. The court found objectant's claims of undue influence to be equally unavailing. Significantly, although the petitioner was involved in locating the attorney-drafter, and forwarded instructions for the terms of the propounded will to her, counsel testified that she reviewed the dispositive provisions of the instrument with the decedent in detail, and the decedent's handwritten notes to her memorialized his independent determination and intent that no part of his estate pass to his sister. Finally, the court found that the objections on the grounds of fraud and duress were without any cognizable basis.

***In re Berdow*, N.Y.L.J., Jan. 13, 2017, p.22, col. 3 (Sur. Ct., N.Y. Co.).**

Surcharge of Fiduciary

In *In re Colt,* the court exercised its authority to review *sua sponte* the fiduciary's commissions as executor and trustee.

Before the court were contested accountings of the fiduciary as executor of the decedent's estate and

successor trustee of a revocable trust created by the decedent in 2006. Following the dismissal of certain objections and the withdrawal of others, the court held a hearing on the remaining issue of the legal fees payable to the fiduciary's counsel. The record at the hearing revealed that much of the work performed by counsel related to conflicting claims to the assets of the estate and trust. More specifically, it appeared that in 2004, the decedent had executed a pour over will and revocable trust into which he transferred his condominium and brokerage account. Two years later, he executed the subject 2006 trust, as well as a new will, which, again, contained a direction that his residuary estate pour over into the trust. The 2004 trust and 2006 trust essentially had the same legatees, but the beneficiaries of the decedent's residuary estate differed.

Significantly, the draftsperson of both wills and trusts was the fiduciary, who was the decedent's estate planning attorney. Of equal note was the fiduciary's acknowledgment that the decedent intended his assets to pass pursuant to the 2006 trust, and his admission that he failed to have the decedent revoke the 2004 trust and fund the 2006 trust with the assets with which the 2006 trust had been funded. Although the controversy regarding the rightful owners of these assets was settled, the court found that the decedent's estate had a claim against the fiduciary for the legal fees incurred to resolve the trust issues that were created from his failure to properly advise the decedent. Indeed, regardless of whether the statute of limitations on any claim for malpractice had expired, or the fiduciary had been shielded from claims based upon the privity doctrine, the court concluded that the fiduciary's duty as executor required that he make the estate whole for the legal fees resulting from his negligence. His failure to fulfill this duty was exacerbated by his affirmative approval of the considerable legal fees incurred, which he apparently made no attempts to control.

In view thereof, the court held that the fiduciary had demonstrated a gross neglect of his duty and a substantial disregard of the rights of the beneficiaries warranting a denial of his commissions both as executor and trustee.

***In re Colt*, N.Y.L.J., Apr. 14, 2017, p.22, col. 2 (Sur. Ct., N.Y. Co.).**

Endnotes

1. 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819 (Sur. Ct., N.Y. Co. 2011).
2. *In re Young*, N.Y.L.J., Mar. 22, 2017, p.22, col. 5 (Sur. Ct., N.Y. Co.) (citing Restatement [Third] Property: Wills and Other Donative Transfers § 8.3) (emphasis supplied).
3. *Id.*, (citing Restatement [Third] Property: Wills and Other Donative Transfers § 8.3 [c]) (emphasis supplied).
4. 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819 (Sur. Ct., N.Y. Co. 2011). The court also referenced the decision in *In re Bellasalmo*, N.Y.L.J., Feb. 17, 2017, p.36, col. 4 (Sur. Ct., Queens Co.).

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

LEGISLATION OF INTEREST

Elective Share

The governor is expected to sign into law a bill that modifies several sections of the Florida Probate Code relating to the elective share. This bill expressly includes the decedent's protected homestead in the elective estate, and it values the homestead differently depending on the interest of the surviving spouse. In addition, current law authorizes an award of attorneys' fees only where an election is made or attempted in bad faith. The bill expands the types of actions in which fees may be granted, and an award of fees no longer must be predicated on bad faith. The bill also extends the time to move for an extension to choose the elective share, expands the application of interest penalties for late payment by those responsible to contribute to the elective share, and provides for saving trusts that would otherwise qualify as "elective share trusts" but for a particular deficiency.

DECISIONS OF INTEREST

Common Law Spouse Under Israeli Law Is Not Spouse Under Florida Law

Mali Ben Shushan and the late Yehezkel Cohen had been living together in Israel, and both had children from their earlier marriages. Upon Yehezkel's death, the probate court in Florida held that Mali was entitled to an intestate share of Yehezkel's Florida estate because the two, for all intents and purposes, were living as a married couple in Israel. Yehezkel's daughter, Diana, appealed, and the appellate court reversed. According to Diana, Yehezkel had never formally married Mali, which, in Israel, is a union exclusively formed under the auspices of a recognized religious authority. Rather, the two were common law spouses. Section 732.102, Florida Statutes, provides an intestate share of a Florida estate to a "surviving spouse." Although Mali and Yehezkel held themselves out as married, and although common law spouses have a broad array of rights under Israeli law, the relationship of marriage is unique. Florida will not recognize as a marital spouse what Israel refers to as a common law spouse, said the appellate court.

Cohen v. Shushan, 212 So. 3d 1113 (Fla. 2d DCA 2017).

Objection to Filing For Elective Share Granted

Michael Sudman's wife, Theresa, was appointed the personal representative of his estate upon his death.

Jonathan A. Galler

During the administration, Theresa filed an election to take the elective share of Michael's estate under section 732.201, Florida Statutes. However, the trustee of the decedent's trust filed an objection, alleging that Theresa had waived her right to take the elective share, under section 732.702(1), Florida Statutes, by signing a prenuptial agreement. The trustee served two requests for admissions on Theresa, asking her to admit that, in fact, she did execute a prenuptial agreement with Michael. Theresa never responded to them, and at a non-evidentiary hearing, the probate court deemed the requests "admitted" and granted the objection to Theresa's election. The appellate court agreed. In addition to other fatal flaws in Theresa's position on appeal, the appellate court noted that she filed an affidavit *after* the court entered its order granting the objection, in which she noted that they never entered into a prenuptial agreement. Too little, too late, said the appellate court.

Sudman v. O'Brien, 2017 WL 1829479 (Fla. 2d DCA May 5, 2017) (not yet final).

Lack of Direct, Financial and Immediate Interest in Contingent Trusts

In Florida, a party may attempt to set aside an adoption if the party did not receive notice of the adoption in advance and can show a direct, financial and immediate interest in the adoption. A showing of indirect, inconsequential or contingent interest is wholly inadequate. *See* Section 63.182(2)(a), Florida Statutes. In 2004, John Adam Edwards adopted Brindley Kuiper. In 2014, that adoption was challenged by John's biological son, Ryan Maxwell. Brindley—upon being adopted—and Ryan were beneficiaries of three irrevocable trusts created by John's great-grandparents to provide for their descendants. Therefore, the trial court held that Ryan had standing to challenge the adoption

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because his interest in the trusts was affected by the adoption. However, as the appellate court pointed out, their interest in the trusts was merely contingent. The trusts were managed at the sole discretion of the trustees, who determined if and when to distribute to the eligible beneficiaries. Because Ryan possessed no direct and immediate right to funds in the trust or control over trust-disbursement decisions, the appellate court held that he lacked standing to challenge the adoption.

Edwards v. Maxwell, 215 So. 3d 616 (Fla. 1st DCA 2017).

Reformation of Trust

The successor trustee of a trust created by the decedent petitioned for a declaratory judgment alleging that the trust's amendments were invalid because they were not signed by two witnesses, as required by Florida law. One of the beneficiaries, however, opposed and counterclaimed for reformation of the trust. If the trust were reformed to satisfy the intent of the settlor, she argued, the trustee would be required to transfer real property to her. The trial court denied the declaratory judgment and reformed the trust, but the appellate court disagreed. Section 736.0415, Florida Statutes, allows the court to reform "the terms of a trust" where the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law. Here, the mistake of law alleged was the failure to have the document signed by two witnesses. However, the appellate court held that reformation of the trust was inappropriate here because appellee did not seek to reform "the terms" of the trust but, rather, she sought to validate and enforce an invalid, unenforceable trust document.

Kelly v. Lindenau, 2017 WL 2180970 (Fla. 2d DCA May 17, 2017) (not yet final).

New Trusts and Estates Section Members Welcomed

Members who joined the Section between June 6, 2017 and August 10, 2017

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Publication of Articles

The Newsletter welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word. Please include biographical information.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

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Trusts and Estates Spring Meeting

J.W. Marriott | New Orleans

June 9, 2017

The Trusts and Estates Law Section held its 2017 Spring Meeting at the J.W. Marriott in New Orleans.

For more photos, visit www.nysba.org/trus.

The next Spring Meeting will be May 3-6, 2018 in Georgia.

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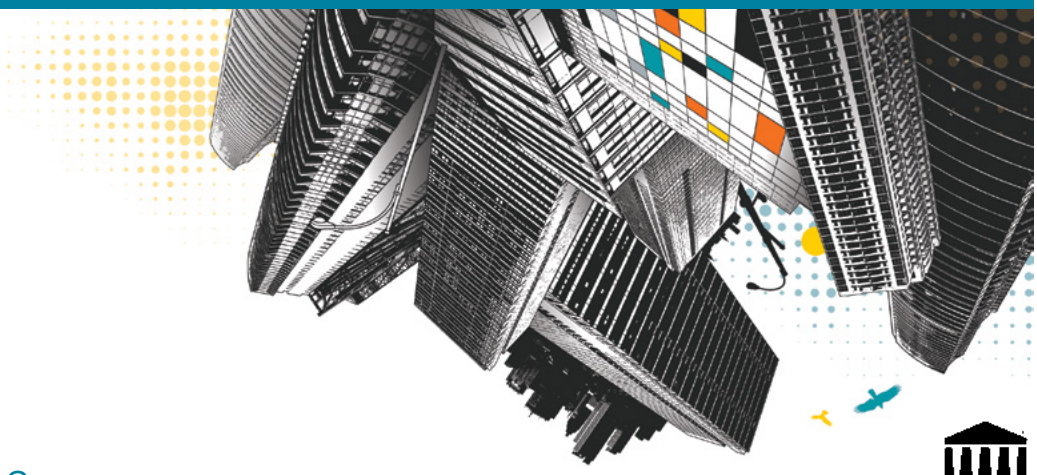

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