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Trusts and Estates Law Section Journal

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

In This Issue

- Common Law Decanting Is Alive and Well
- New Tax Law, Same Old Tricks: The "1014 Trust"
- Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding

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Message from the Outgoing Chair

The start of the new year heralds new leadership for our Section. On January 16, at the Section's Annual Meeting at the New York Hilton Midtown in New York City, Robert M. Harper of Farrell Fritz, P.C., took the helm as our new Chair. Congratulations and clear sailing, Rob! Similarly, please join me in congratulating: Jill Choate Beier of Beier & Associates, PLLC, who is our new Chair-elect; Jennifer F. Hillman of Ruskin Moscou Faltischeck, P.C., who is our new Secretary; Laurence Keiser of Stern Keiser & Panke, who is our new Treasurer; as well as all of our new District Representatives, At Large, Committee Chairs and Vice-Chairs. Without their leadership and dedication, our Section would be incalculably poorer and I am so very pleased to have this opportunity on behalf of all our members to wish them well and thank them for all of the excellent work they do.

Speaking of our recently concluded Annual Meeting, it was a real pleasure to see so many of you there—our Section's attendance was nearly 500 registrants! Chaired by Carl Merino of Day Pitney LLP, the CLE program this year centered on key issues impacting estate planning of cross-border clients. The Honorable John M. Czygier, Jr. was the keynote speaker at the meeting luncheon and delivered his remarks with his trademark wit and usual aplomb. Just prior to his remarks, I had the honor to bestow the Russell A. Taylor Award upon Judge Czygier. Not awarded since 2014, this recognition is bestowed upon a member who has served our Section with steadfast dedication and who has significantly contributed to the excellence of the probate bar, a description which, of course, fits Judge Czygier to a T. It was a pleasure, too, to recognize Lisa Bataille, our Section's representative in the NYSBA, with an award thanking her for her unfailing loyalty and support throughout her many years of service to our Section.

On the legislative front, I am delighted to report that we achieved passage of two legislative proposals that our Section had advocated for in 2018. Congratulations to Lois Bladykas, who drafted and advocated for a proposal to amend EPTL 5-1.1-A(d)(1) to clarify the notification provisions of filed spousal election in the absence of a court-appointed fiduciary. And congratulations to Ilene Cooper and Rob Harper, who originated and championed a proposal to amend EPTL 11-1.7 to prohibit *inter vivos* trustees from having exoneration clauses for failure to exercise reasonable care, similar to the prohibition for testamentary trustees. Also, heaps of thanks are due to Georgiana Slade and Katie Lynagh, Chair and Vice-Chair of the Section's Legislation Committee, Jill Beier; Chair-elect of the Section, and Kevin Kerwin, NYSBA legislative liaison, for their advocacy and work with the legislature and Governor's staff to ensure legislative victory for our Section's proposals. The past year was a busy one for our Committees and 2019 is shaping up to be the same, with well over a dozen legislative proposals being advocated by our Section.

Finally, it has been my pleasure and privilege to serve as Chair of our wonderful Section this past year. Here's to a productive and happy year ahead for all our members. Excelsior!

Natalia Murphy

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Message from the Incoming Chair

With the holiday season (as wonderful as it was) now in the past, and the new year (with all of the promise that it brings) upon us, the officers of our Section and I wish you the very best for 2019. We hope that you enjoy a year of health, happiness, and personal and professional growth, and that our Section contributes to making 2019 a success for you.

Apropos of our recent Annual Meeting, I would like to thank my predecessor, Natalia Murphy, for her excellent service as Chair of our Section in 2018. Natalia provided thoughtful, focused leadership to our Section, and set a wonderful example for the Section members with whom she worked closely and tirelessly. Thank you, Natalia, and congratulations on a job well-done!

In addition, I would like to congratulate Hon. John M. Czygier, Jr. for receiving the Chair's Award at the Annual Meeting. Having practiced before Surrogate Czygier for ten years, I can personally attest to the excellent job that he did as the Surrogate of Suffolk County, running a user-friendly court that has a wonderful staff and a fine reputation. I can also attest to the fact that Surrogate Czygier is a dedicated member of our Section who is active on our Executive Committee and has been for many years. We appreciate Surrogate Czygier's contributions to our Section and salute him for his excellent tenure as a judge.

Before concluding, I would like to update you on the many exciting plans that the officers and I have for 2019. We anticipate that the next year will be a busy one for our Section.

Angelo Grasso, Brian Corrigan, and I have planned an exciting Spring Meeting, which will take place at the Ritz-Carlton in Naples, Florida from May 16-19, 2019. The 2019 Spring Meeting will address trust-related topics and feature the following speakers: Natalia Murphy (socially responsible prudent investing for trustees); Elisa Rizzo (minimizing trustee risk); Michael Schwartz and Amy Beller (Florida trust issues about which the New York practitioner should be aware); Hon. Vincent W. Versaci, Gary Freidman and Frank Santoro (successfully litigating trust contests); Hon. Theresa Whelan and Eric Penzer (ethics); Toni Ann Kruse (state income taxation for trustees, which is a hot topic and will be considered by the United States Supreme Court later this year); Hon. Acea Mosey (resolving litigation through trusts); and Surrogate Czygier, Hon. Peter Kelly, Hon. Margaret Reilly, and Hon. Stacy Pettit (Breakfast with the Surrogates).

The Section's officers and I are pleased to share that, with the assistance of Michael Schwartz and Lois Bladykas, the Section has established its Rising Star Fellowship Program. We are delighted to welcome Sarah Pickering as the Section's inaugural Rising Star Fellow.

Later this year, our Section will host cocktail parties in Manhattan, the Capital District, and Long Island. The first of those events will take place on March 12, 2019, at Al Pastor in Manhattan. We hope to see you there!

Last but certainly not least (under the wonderful leadership of Georgiana Slade, the chair of the Section's Legislation and Governmental Relations Committee), our Section will continue to advocate for new legislation, including but not limited to the enactment of a New York Trust Code and a directed trust proposal (which Professor Ira Bloom has spearheaded). Hopefully, we will be able to report legislative successes to you as the year proceeds.

Thank you for your involvement in our Section. I look forward to updating you on our Section's successes as 2019 ensues. If I can help make your experience as a Section member even the slightest bit better, please do not hesitate to contact me.

Robert M. Harper

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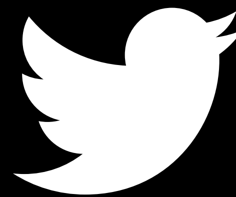

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Message from the Editor

Welcome to NYSBA's *Trusts and Estates Law Section Journal*! Those of you who are longtime readers of our *Newsletter* may have noticed this subtle but significant change on the cover. It is the consensus among members of the Executive Committee that the new title more accurately depicts the academic nature of this publication. We hope you like it as much as we do.

In this issue, David A. Bamdad explains how the First Department recently clarified a portion of the decanting statute that had remained uncertain for decades, and Anthony J. Enea explains common banking and real property issues as they arise in the context of Article 81 proceedings. Also featured is an article by Andrew S. Katzenberg in which he provides an overview of the tax benefits in the estate planning technique known as the "1014 Trust."

We continue to urge Section members to participate in our *Journal*. CLE credits may be obtained. The deadline for submissions for our next edition is June 3, 2019.

The editorial board of the *Trusts and Estates Law Section Newsletter* is:

- **Jaclene D'Agostino**, jdagostino@farrellfritz.com, Editor-in-Chief
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Common Law Decanting Is Alive and Well

By David A. Bamdad

I. Introduction

For 25 years after the enactment of Estates, Powers & Trusts Law 10-6.6 (EPTL), commonly referred to as New York's decanting statute, no New York court had interpreted subparagraph (k) thereof. EPTL 10-6.6(k) provides that the remainder of EPTL 10-6.6 does not abridge a trustee's right to appoint trust assets under the common law or the terms of the governing instrument.[1] The lack of case law concerning subparagraph (k) resulted in uncertainty as to whether every decanting has to comply with the requirements of the decanting statute, the terms of the trust, or the common law. This uncertainty posed problems for trust and estate practitioners. However, after a quarter of a century, New York courts have weighed in. In *Davidovich v. Hoppenstein*, the Appellate Division, First Department affirmed two New York County Surrogate's Court's decisions[2] holding that a trustee need not comply with the notice requirements of EPTL 10-6.6 if the trust instrument grants the trustee the absolute discretion to distribute assets in further trust for the benefit of one or more beneficiaries.[3] This article will discuss the decanting statute, the *Hoppenstein* decisions, and the ramifications thereof.

II. The Decanting Statute

New York's decanting statute finds its origins in a donee's power of appointment. Judge Preminger explained that

> The legal premise underlying [EPTL 10-6.6] is that a trustee with an absolute power to invade principal is analogous to a donee of a special power of appointment. A donee of a special power, unless the donor indicated otherwise, may exercise the power in further trust. It follows that a trustee with an absolute power to invade ought to be able to exercise that power in further trust.[4]

Accordingly, pursuant to EPTL 10-6.6(b), a trustee who has absolute discretion to distribute trust principal may appoint part or all of the trust principal in further trust for the benefit of one or more of the invaded trust's beneficiaries, provided the trustee complies with the stringent requirements of subparagraph (j) of the statute. Subparagraph (j) requires a written and acknowledged instrument evidencing the appointment and specifying the extent of the assets being distributed.[5] It also requires the trustee to provide copies of that instrument, the invaded trust and the appointed trust to the beneficiaries at least 30 days prior to the appointment.[6] However, EPTL 10-6.6(k) provides that nothing contained in EPTL 10-6.6 shall "be construed to 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. . . ."[7] Although subparagraph (k) of the Section appears to retain a trustee's authority to decant under common law and the terms of the trust without complying with subparagraph (j)'s stringent notice requirements, until recently, no New York court ever upheld a decanting pursuant to that section.

> "Davidovich v. Hoppenstein *is the first case to test the limits of EPTL 10-6.6(k) and address whether that section should be interpreted according to its plain language or in some other limited manner."*

III. *Davidovich v. Hoppenstein*

Davidovich v. Hoppenstein is the first case to test the limits of EPTL 10-6.6(k) and address whether that section should be interpreted according to its plain language or in some other limited manner. In *Hoppenstein*, the grantor of the trust created an irrevocable life insurance trust primarily for the benefit of his issue. The trust was the owner of a $10,000,000 life insurance policy on the life of the grantor. After years of discord between the grantor and one of his children, the independent trustee of the trust distributed the life insurance policy to another trust which excluded that child and her issue as beneficiaries. The trustee did so pursuant to his authority under the trust instrument to distribute any or all of the trust's principal and income to one or more of the grantor's children, to the exclusion of the others, as the trustee determined in his sole discretion. The trust also included a provision permitting the trustee to make any distribution to a trust for the benefit of one of more of the trust's beneficiaries.

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Furthermore, the trust only required the independent trustee to advise the beneficiaries that he intended to make a distribution of principal 45 days prior to the distribution. The trust did not require a written and acknowledged instrument evidencing the distribution, nor did it require the trustee to notify the beneficiaries of the extent of the principal being distributed or to provide them with copies of the invaded or appointed trusts.

Years later, after the death of the grantor, the disinherited daughter and her children challenged the distribution, arguing, among other things, that the distribution was void because the trustee did not comply with the requirements of EPTL 10-6.6(j). The independent trustee countered that, pursuant to subparagraph (k), he did not have to comply with the statutory requirements of EPTL 10-6.6 because he was permitted to make the distribution pursuant to the terms of the trust instrument itself and under common law. The Surrogate's Court agreed with the trustee and upheld the trustee's distribution of the life insurance policy.[8] In dismissing the objectants' reliance on EPTL 10-6.6(j), Surrogate Mella explained that the trustee's failure to comply with subparagraph (j) was immaterial because the trustee did not rely on the decanting statute to make the distribution.[9] Instead, the trustee relied on his power to make discretionary distributions of principal under the trust instrument.[10] Therefore, "[t]he procedure for decanting outlined in EPTL 10-6.6 has no bearing on this case."[11]

The First Department, in affirming the Surrogate's Court's decisions, also confirmed the trustee's authority to make the distribution under common law. The court explained:

> Under common law, a trustee with an absolute power to invade principal was able to exercise that power by appointing in further trust unless the creator of the trust indicated otherwise. The trustees of the Reuben Hoppenstein 2004 Insurance Trust (2004 Trust) had the absolute power to invade principal, as evidenced by Article 2(c) of the 2004 trust instrument. Article 9(f) gave the trustees the power to create further trusts. Thus, the transfer of the life insurance policy at issue from the 2004 Trust to the Hoppenstein 2012 Insurance Trust was valid.[12]

Therefore, *Hoppenstein* confirms that EPTL 10-6.6(k) is to be interpreted according to its plain language and that the requirements of the decanting statute are irrelevant to distributions of principal and/or income made pursuant to the express terms of the trust or under common law.

IV. Ramifications and Future Considerations

The *Hoppenstein* decisions provide clarity to practitioners who had been proceeding without guidance as to the interpretation of EPTL 10-6.6(k). Specifically, the decisions make clear that the decanting statute does not override the express terms of a trust and is to be interpreted as a supplement to any authority to distribute principal in a trust agreement or under common law.

> *"While some may interpret the* Hoppenstein *decisions as swallowing the decanting statute and rendering it obsolete, it seems clear that the decanting statute was merely a codification of the common law, intended to enhance the circumstances under which trustees can appoint assets in further trust, as opposed to limiting it."*

Furthermore, although the trust at the heart of the *Hoppenstein* case contained a notice provision and the explicit authority to distribute in further trust, neither the Surrogate's Court nor the Appellate Division relied upon the presence of those provisions in their holdings. Specifically, the Surrogate's Court held that EPTL 10-6.6 had no bearing on the case because the trustee relied upon his absolute power to make discretionary distributions, without reference to either of the other provisions.[13] Moreover, the First Department explained that, under common law, a trustee with absolute power to invade principal could do so in further trust, "unless the creator of the trust indicated otherwise," thus indicating that a provision explicitly authorizing such a distribution was not required, so long as the trust did not include explicit language prohibiting such a distribution.[14] The First Department also made no reference to the notice provisions in the trust at issue, which would tend to prove that the lack of such language would not prevent a trustee from decanting outside of the statute.

This interpretation also makes sense in light of the limiting language of subparagraph (j), which contains the notice requirements. Subparagraph (j) states that the notice requirements set forth therein are only ap-

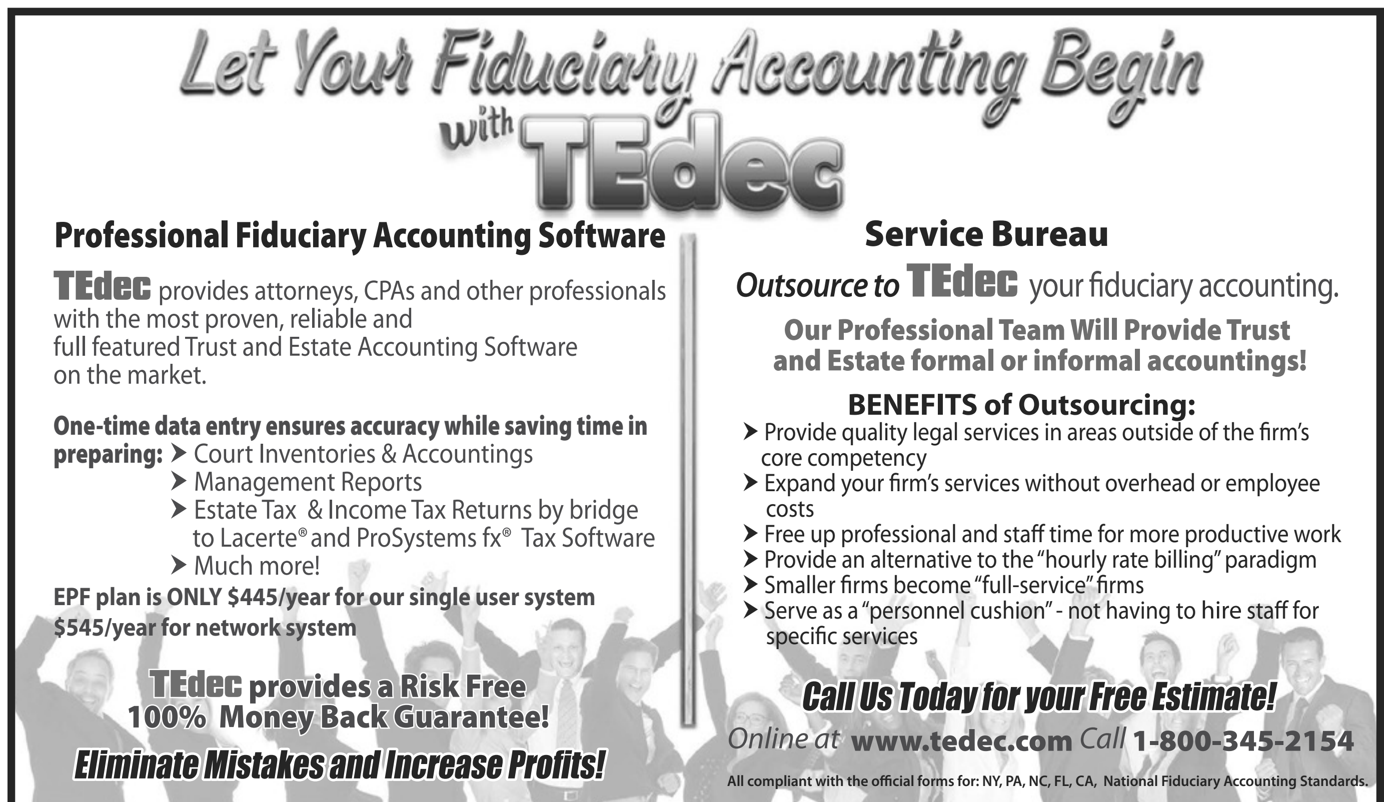
plicable to "[t]he exercise of the power to appoint . . . under paragraph (b) or (c)" of the decanting statute. Had the legislature intended that the notice requirements apply to all decantings, there would have been no reason to include such limiting language.

V. Conclusion

After 25 years, New York courts have finally weighed in on EPTL 10-6.6(k). *Hoppenstein* has shed light on an area of trust and estate practice that had been cloaked in uncertainty for decades, now allowing practitioners to confidently rely on this provision of the statute. While some may interpret the *Hoppenstein* decisions as swallowing the decanting statute and rendering it obsolete, it seems clear that the decanting statute was merely a codification of the common law, intended to enhance the circumstances under which trustees can appoint assets in further trust, as opposed to limiting it. This appears to be the legislature's intent based on the language contained in the statute and New York's preference to defer to the intention of the grantor. To hold otherwise, where a trustee is granted absolute discretion to make distributions, would limit the trustee's authority in a manner not contemplated by the grantor.

Endnotes

1. EPTL 10-6.6(k).
2. The Surrogate's Court issued two decisions dated March 31, 2017 and October 10, 2017, upholding the decanting at issue. *See In re Hoppenstein*, No. 2015-2918/A, 2017 WL 1969401, at *9 (Sur. Ct., N.Y Co., Mar. 31, 2017); *see also In re Hoppenstein*, No. 2015-2918/A, 2017 WL 4551644 (Sur. Ct., N.Y. Co., Oct. 10, 2017). The March 2017 decision granted the trustees summary judgment on their accounting and the October 2017 decision granted the objectants reargument on the summary judgment decision, but adhered to the original decision. *See id.* The objectants in the accounting proceeding appealed from both decisions, as well as the decree that subsumed the decisions. *See Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (1st Dep't 2018). This article addresses both of the Surrogate's Court decisions and the Appellate Division, First Department's decision entered on June 14, 2018.
3. *Davidovich*, 162 A.D.3d 512.
4. *In re Mayer*, 176 Misc. 2d 562, 564, 672 N.Y.S.2d 998 (Sur. Ct., N.Y. Co. 1998) (internal citations omitted).
5. EPTL 10-6.6(j).
6. *Id.*
7. *Id.* 10-6.6(k).
8. *In re Hoppenstein*, No. 2015-2918/A, 2017 WL 1969401, at *9 (Sur. Ct., N.Y. Co., Mar. 31, 2017) (decision granting summary judgment); *In re Hoppenstein*, No. 2015-2918/A, 2017 WL 4551644 (Sur. Ct., N.Y. Co., Oct. 10, 2017) (decision on reargument, adhering to prior decision).
9. *In re Hoppenstein*, 2017 WL 1969401, at *3.
10. *Id.*
11. *Id.* at *4.
12. *Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (1st Dep't 2018) (internal quotations and citations omitted).
13. *In re Hoppenstein*, 2017 WL 1969401, at *4.
14. *Davidovich*, 162 A.D.3d 512, 512.



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Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding

By Anthony J. Enea

In most Article 81 Guardianship Proceedings the assets of the alleged incapacitated person (AIP), specifically title to said assets, are not the primary focus. Generally, the physical and mental incapacities of the AIP and the need for the appointment of an appropriate guardian of the person and property for the AIP are the center of attention. However, the attorney for the petitioner should carefully and thoroughly review all of the assets owned by the AIP and pay specific attention to how title to said assets is held and whether or not said assets are titled jointly with others and/or have named beneficiaries. The failure to do so may detrimentally impact the AIP as well as the individuals he or she intends to receive those assets.

Additionally, a thorough review of the AIP's assets is critical in formulating the relief to be requested in the petition with respect to how title of the AIP's assets is to be held once a guardian(s) is appointed, and with respect to the potential transfer of the AIP's assets for long term care (Medicaid) and estate planning purposes.

The following is an example of the information and documents regarding the AIP's assets that should be gathered by the attorney before filing the petition:

(a) Copies of all deeds for real property owned by the AIP with the approximate present fair market value of said property. The attorney should pay particular attention to whether the real property is held jointly with a third party (family/non-family), whether said joint ownership is with rights of survivorship or as a tenancy in common, the percentage of ownership interest, and whether the property is owned in the name of a corporation or some other legal entity. It may be necessary to obtain the specifics as to any corporation or other entity, such as copies of documents relevant to the formation of the entity and stock certificates and/or other documents establishing the ownership interest of the AIP and/or others;

(b) Copies of all recent account statements for all bank accounts and investment accounts stating the current value of the accounts. Again, particular attention should be paid as to whether the joint accounts are accounts which bestow rights upon the joint tenants during the life of the AIP (joint with rights of survivorship) or upon the death of a joint tenant, "in trust for" accounts, "for convenience only" accounts, "transfer on death" and/or "payable on death" accounts;

(c) Copies of all recent account statements for any IRAs, 401(k)s, 403(b), annuities (whether they be qualified or non-qualified accounts) with copies of all beneficiary designations for said accounts. Remember, if the aforestated IRA and/or 401(k) does not have a named beneficiary upon the death of the account holder then the beneficiary will be his or her estate, thus necessitating the probate of his or her Last Will and Testament or the filing of an administration proceeding. It should also be ascertained whether or not the AIP is receiving the "minimum required distributions" from any of the aforestated retirement accounts;

(d) Copies of all life insurance policies owned by the AIP with proof of beneficiary designation for said policies. It is also important to determine if the policies have any cash value;

(e) Copies of all trust agreements executed by the AIP and documentary evidence (deeds/account statements) evidencing whether said trust(s) have been funded with the AIP's assets or the assets of any third parties;

(f) Copies of any copyrights, trademarks and licensing agreements owned by the AIP;

(g) Copies of any mortgages and/or promissory notes due to the AIP with all amortization schedules. If there exists the possibility of recorded mortgages and/or UCC financing statements, it may be advisable to obtain copies of same.

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(h) Obtain information as to the AIP's annual income. For example, obtain copies of any W-2s, social security statements and any pension statements if appropriate. If the AIP is receiving any government benefits such as supplement security income (SSI), social security disability insurance (SSDI), or Medicaid, obtain the appropriate documentary proof. In order to ascertain the amount of interest and/or dividend income the AIP is receiving, it may be necessary to review the most recent income tax returns filed by the AIP, if available, and/or obtain copies of 1099's relevant to same.

Once the attorney has gathered the aforestated, the next step is to thoroughly analyze the information and documentary proof to ascertain what impact the assets and title to said assets will have upon the guardianship proceeding and the ultimate relief requested in the petition.

In order to make this analysis pre-petition, it is imperative that the petitioner's attorney have a solid understanding of the relevant laws and legal principles with respect to the ownership of real and personal property and, particularly, the impact of the joint ownership thereof.

Common Law Rules for Ownership of Property and Their Codification

The joint ownership of both real and personal property has been recognized for centuries as a valid legal doctrine. At common law, three forms of joint ownership were recognized:

(a) tenancy in common wherein the owner has a divisible fractional share with no right of survivorship in the other tenants' interest;

(b) tenancy by the entirety (applicable to husband and wife and ownership of real property only, wherein each owns an undivided interest with a right of survivorship, but without the right to unilaterally sever or partition their interests); and

(c) joint tenancy (the joint tenants have an undivided interest which can be unilaterally severed or destroyed) and whereby the tenants have a right of survivorship.

These three common law forms of ownership have been codified in Section 6-2.2 of the New York Estates, Powers and Trusts Law (EPTL).[1] With respect to the authorization of conveyances of an interest in real property by one or more persons, the relevant statutory provisions are found in Section 240-b of the New York Real Property Law (RPL).[2] As to the severance of an interest(s) in jointly held real property the relevant statutory authority is found in Section 240-c of the RPL.[3]

Relevant Statutory Provisions for Jointly Titled Bank and Brokerage Accounts

It is important to note that the right to receive assets by operation of law in a joint account upon the death of the joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by Section 678 of the New York Banking Law.[4] Section 678 provides that accounts held "for the convenience" shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half of the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.[5]

In order for Section 678 of the Banking Law to apply, the words "for the convenience" or similarly "for convenience only" must appear in the title of the account.[6] If they do not appear, then the presumptions created by Section 675 of the Banking Law will be applied.[7]

Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy. Under Section 675 of the Banking Law, three rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an un-

"Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy."

divided one-half of the money deposited; (ii) that there has been an irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in the entire joint account upon the death of the other joint tenant.[8]

Section 675(b) of the Banking Law provides that the burden of proof is upon the person challenging the presumption of a joint tenancy.[9]

With respect to securities accounts or brokerage accounts in joint names, the Transfer-on-Death Security Registration Act and EPTL Sections 13-4.1 through 13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have.[10] The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended the EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL Sections 13-4.1 through 13-4.12.[11]

Under EPTL 13-4.2, a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. The creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account; however, evidence of its creation is the usage of the phrases "transfer on death" and "payable on death" or their abbreviations TOD or POD.[11] Under EPTL Section 13-4.4, evidence of the establishment of the account is the account opening documentation that indicates whether the beneficiary is to take ownership at the death of the other owner(s).[12]

The Pitfalls of Jointly Titled "In Trust For" or Other Accounts Where Property Passes by Operation of Law

The manner in which one holds title to property at the time the commencement of a guardianship proceeding, and at the time of the AIP's demise, will have a critical and significant impact upon the relief sought in the guardianship proceeding. With the exception of property (real and/or personal) held jointly as tenants in common, all other jointly held property, "in trust for" accounts, "transfer on death" accounts, IRAs, 401(k)s and life insurance policies which have a named beneficiary (other than one's estate) are accounts that pass by operation of law and are non-probate assets. Thus, they are assets that are not controlled by one's Last Will and Testament. While for many individuals (those with relatively small estates), jointly titled property or having property passing by operation of law may be advisable, for many others it can have disastrous and unforeseen consequences if not properly addressed prior to death, and particularly in the guardianship petition.

Because the ownership of real and personal property jointly with another or in a manner that it will pass by operation of law upon the death of a joint tenant is very common, it is important that said joint accounts be specifically identified in the guardianship petition and the impact upon both the AIP and any joint tenant or account/property recipient upon the death of the AIP be specifically addressed.

It requires the attorney to undertake an assessment and review of how and why the joint account(s) was created and is entitled to notice of the relief being sought, and his or her right to be heard in the guardianship proceeding. The survivorship rights of a joint tenants(s) cannot and should not be terminated or modified in a guardianship proceeding without the joint tenant being given notice of the proposed change and the opportunity to be heard. To accomplish this, it is necessary that the petitioner undertake a thorough investigation of the account(s) in issue and specifically delineate what is being proposed with respect to the joint account(s).

Identifying the Joint Accounts in the Petition

Section 81.08 of the New York Mental Hygiene Law (MHL) specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person (AIP) in the petition for the appointment of a guardian. It is incumbent upon the petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his or her name alone or holds jointly with others and/or is the beneficiary of, and to disclose same in the guardianship petition.[13]

In doing so with respect to any bank or brokerage accounts, the petitioner should specifically identify any jointly held bank or brokerage account(s), and whether or not said joint account(s) are joint accounts entitled to the presumptions of Section 675 of the Banking Law, or are "for the convenience" accounts under Section 678 of the Banking Law, or "transfer on death" accounts with respect to any brokerage account pursuant to the Transfer-on-Death Security Registration Act and EPTL 13-4.1 through 13-4.12. The petition should specifically identify any person who has an interest in the account, the extent of his or her interest, and whether or not he or she has a right of survivorship in the account.[14]

In most cases this is not problematic if the joint account holder is the spouse of the AIP, and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the petitioner should obtain copies of the account signa-

ture cards and any other bank or financial institution records which may describe whether the account is a joint account with rights of survivorship that is entitled to the presumptions of Section 675 of the Banking Law, a "transfer on death" account under EPTL 13-4.1 through 13-4.12, or merely a "for the convenience" account under Section 678.16 of the Banking Law.

Specifically Delineate Your Proposal as to Any Joint Account(s) or Jointly Held Real Property in the Guardianship Petition

The guardianship petition should contain a clear and concise description of the relief sought by the petitioner with respect to any joint bank or brokerage account(s) or real property. For example, if a transfer of the title of the joint account or real property from the AIP to the other named joint account holder or to a third party (not a joint tenant) is being sought, it is necessary that same be specifically requested in the petition and notice be given to the party or possible beneficiary under a will, trust or presumptive distributee whose interest in said account(s) or property may be impacted by the transfer. The petition should also specifically identify the account by its account number, name of bank or brokerage firm, as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the guardian, or whether an apportionment of the account or outright transfer to the other named account holder or any other party is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the petition, and the petitioner's proposal with respect thereto.[15]

If the potential exists that the AIP may need Medicaid (nursing home and/or home care services) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility), the court will usually approve a transfer of the AIP's interest in said account(s) to the other named title holder without any apportionment to the AIP.[16] This is also true if no objection to the proposed transfer is made by any other interested party to the guardianship proceeding and the AIP's testamentary scheme as reflected in his or her Last Will or Trust is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether the child, family member or friend contributed any of the funds in the joint account(s), and whether the proposed transfer will create the five-year look-back period for nursing home Medicaid purposes (or does it qualify as an exempt transfer to a spouse, blind or disabled child). There will also be the issue of whether the other interested parties to the guardianship will consent to the transfer, if the account is to be apportioned by and between the account holders, how title to each apportioned account will be held, and what impact the apportionment will have on the survivorship interest of each joint tenant. The protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be held "in trust for" the incapacitated person? This could be problematic if the incapacitated person is a candidate for Medicaid benefits, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event, it would be appropriate to title the account of the non-incapacitated party "in trust for" the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder, it may be necessary that the account marshaled by the guardianship be titled "X as Guardian of the property of Y in trust for Z" so as to protect Z's survivorship interest.

Clearly, the title of the assets held at the commencement of the guardianship proceeding and how they will be titled once a guardian has been appointed are important issues that need to be thoroughly analyzed and reviewed pre-petition by the attorney and the client.

Endnotes

1. EPTL 6-2.2.
2. RPL § 240-b.
3. RPL § 240-c.
4. Banking Law § 678.
5. *Id.*
6. *Id.*
7. Banking Law § 675.
8. *Id.*
9. *Id.*
10. EPTL 13-4.1-13.4.12.
11. *Id.*, EPTL 13-4.2, 13-4.5.
12. EPTL 13-4.4.
13. MHL § 81.08.
14. Banking Law §§ 675, 678; EPTL 13-4.1, 13-4.12.
15. MHL §§ 81.07 [d], 81.21 [c].
16. New York Social Services Law § 366.

New Tax Law, Same Old Tricks: The “1014 Trust”

By Andrew S. Katzenberg

The Tax Cuts and Jobs Act was enacted on December 22, 2017 and has temporarily doubled each individual’s federal lifetime transfer tax exemption to $11.18 million[1] (or $22.36 million for married couples) beginning in 2018. Most Americans’ estates (even those we consider rich) fall well below this new federal exemption, leaving much of it unused. However, this disparity (between the exemption and the value of the estate) opens the door to a multi-generational planning technique known as a “1014 Trust,” or a “Step-Up in Basis Trust.” A 1014 Trust allows younger generations to eliminate capital gains at the death of a grandparent (or parent) by including the appreciated assets in the grandparent’s (or parent’s) estate without incurring any estate tax through the utilization of the grandparent’s (or parent’s) unused exemption.

> *“The structure of a 1014 Trust is very specific but can be designed for maximum flexibility and permits some alterations based on the client’s wishes.”*

The premise of the technique is designed around Section 1014.[2] When an individual dies, his assets receive a step-up in basis to their fair market value (FMV). This eliminates any built-in capital gains, currently taxed at 23.8 percent,[3] plus any state and local taxes. For example, for residents of New York City, the combined federal and state capital gains tax rate could be as high as 36.496 percent. The 1014 Trust is designed to be included as an asset of the grandparent’s estate in order to receive the step-up, effectively eliminating any capital gain exposure.

The structure of a 1014 Trust is very specific but can be designed for maximum flexibility and permits some alterations based on the client’s wishes. The following is the typical 1014 Trust structure. The grantor of a 1014 Trust is a child or grandchild who funds the trust with low-basis assets. The trustees can be the grantor’s spouse along with an independent person (*i.e.*, a non-beneficiary) such as a sibling of the grantor. The current beneficiaries are the grantor’s grandparent (or parent, depending on the parent’s age), the grantor’s spouse and the grantor’s descendants. The trust will terminate upon the grandparent’s (or parent’s) death. The remaindermen will be persons other than the grantor, such as the grantor’s spouse and descendants.

The grantor’s grandparent is given a power to appoint the assets of the trust to the creditors of the grandparent’s estate.[4] This is a general power of appointment, which causes the assets of the trust to be includable in the grandparent’s estate for estate tax purposes. Therefore, at the grandparent’s death, the assets of the trust will receive a step-up in basis to their FMV. Because of the grandparent’s unused exemption, the increase in value to grandparent’s estate from the inclusion of the trust assets will not result in an estate tax.[5] Though it is expected that the grandparent would not exercise this general power, it is specifically limited to the creditors of the estate to limit the grandparent’s ability to change the ultimate disposition of the trust assets determined by the grantor.[6] Additionally, the general power could be exercisable only with the consent of a non-adverse party.[7] The grantor’s grandparent could also be given a special power of appointment to appoint the trust assets to a group of persons that includes the grantor. The reason this is so important is if the grantor wants to regain control of the assets after the step-up in basis, there needs to be a method to get the assets back to him.[8] The other methods to get the assets back are through the grantor’s spouse or children (discussed further below).

One might wonder why the grantor would not just be the remainderman of the trust. Wouldn’t this avoid the need for the special power and any risk possibly associated with it? However, if the grantor is the remainderman, then the grantor would have a reversionary interest in the trust. If the reversion is greater than 5 percent (which it would likely be based on the grandparent’s age), the gift to the trust will not be considered complete and therefore the assets would not be entitled to a step-up in basis, negating the entire technique. On a positive note, the exclusion of the grantor as a remainderman also avoids the requirement of the one-year holding period to receive the step-up under Section 1014(e). Under Section 1014(e), if the grantor gives an asset away but it is returned to the grantor at the death of the recipient within one year, the step-up does not apply. So, think of it as a blessing in disguise for the unwitting.

Andrew S. Katzenberg is Senior Counsel at Kleinberg Kaplan, Wolff & Cohen, P.C., where he practices in estate planning and administration. Reproduced with permission from Daily Tax Report, 226 DTR 7, 11/23/2018, Copyright 2018 by The Bureau of National Affairs, Inc. (800-372-1033) http://bna.com.

> *"With the historically high federal exemption, the 1014 Trust could be attractive for clients who want to shelter themselves from some capital gains tax exposure."*

The trust termination can be based on various triggering events depending on the client's wishes. The simplest technique would be for the trust to terminate at the death of the grandparent. This obviously guarantees the step-up in basis. However, depending on the size of the grandparent's estate, this could also result in estate tax exposure. Because the increase in the exemption sunsets at the end of 2025 and reverts back to $5 million (indexed for inflation), one should either limit the size of the trust or cause the trust to terminate before 2026. Either approach would avoid any adverse estate tax issues, but the latter might not achieve the basis step-up.

In addition to the grantor's grandparent, the grantor's spouse and descendants can be current beneficiaries. This may provide the grantor with access to the trust property through his spouse during the trust term. Distributions could be made to the spouse who then could make gifts of those distributions to the grantor. Because the grantor's spouse is entitled to an unlimited marital deduction, the transfers to the grantor are gift tax free.[9] Additionally, the grantor can use the trust funds for his children in place of the grantor using his remaining personal funds for their benefit (*e.g.*, school, extra-curricular activities, vacations, etc.). This method essentially has the same effect as removing the assets dollar for dollar from the trust back into the hands of the grantor.

If the special power of appointment is exercised in favor of the grantor, then upon the termination of the trust, the assets could pass either outright or in further trust for the benefit of the grantor. Obviously, the former is the simpler approach but wastes the grantor's transfer tax exemption.[10] If the assets passed to a further trust, they would be exempt from estate tax not only on the grantor's death but also on future generations' deaths.[11] Additionally, a further trust could provide the grantor with creditor protection over assets that otherwise would be subject to creditor claims.

The remaindermen of the trust are the spouse and descendants of the grantor. This serves as a backstop if the grandparent does not exercise the limited power appointment in favor of the grantor. The net result would be almost the same as giving a gift to a spousal lifetime access trust (SLAT). The grantor would have used the same amount of his exemption to fund a SLAT as he did for the 1014 Trust. The grantor would have removed the same assets from his taxable estate to grow estate tax free. The grantor would have continued to have access to the funds through his spouse. But, the assets of a 1014 Trust (compared to a SLAT) would have no trapped-in capital gains through the grandparent's date of death.

With the historically high federal exemption, the 1014 Trust could be attractive for clients who want to shelter themselves from some capital gains tax exposure. Similar to a GRAT where the results are either positive or neutral, the 1014 Trust has little downside. Because each 1014 Trust can be tailored to the specific needs of the client, clients big and small can similarly benefit from this technique.

Endnotes

1. This amount is adjusted for inflation each year currently using the chained consumer price index. The exemption amount is expected to be $11.4 million in 2019.
2. All references to Sections shall mean Sections under the U.S. Internal Revenue Code of 1986, as amended.
3. This is the highest federal capital gains rate. Capital gains rate can be 0 percent, 15 percent or 20 percent. There is also a 3.8 percent Medicare surtax, which might apply.
4. The power of appointment can be to the creditors of the grandparent, the grandparent's estate and/or the creditors of the grandparent's estate.
5. Alternatively, if the grandparent (or parent) did not have exemption available, the assets could be sold to the trust for a note. The assets would receive a step-up in basis after the grandparent's (parent's) death and then would be used to pay off the note. There are additional issues related to this technique, which are beyond the scope of this article.
6. If the power allowed an appointment to the grandparent's estate, the grandparent would be able to redirect the distribution of the assets through the grandparent's estate plan rather than the terms of the trust.
7. The appointment power would remain a general power as long as "a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent" is not the person whose consent is required. Section 2041(b)(1)(C)(ii) and Treas. Reg. § 20.2041-3(c)(2).
8. This power should be used cautiously. If it is exercised simultaneously or in close proximity to the creation of the trust, it is arguable that a step-transaction occurred. In that event, the multiple steps of the transaction would be collapsed, which would mean the grantor gave the assets to himself, and the assets would not be entitled to the step-up in basis.
9. The unlimited marital deduction does not apply to a non-U.S. spouse.
10. This assumes the grantor has a taxable estate. If the grantor's estate is below the federal exemption and inclusion of the assets of the 1014 Trust would not cause the grantor's estate to exceed the federal exemption, there is no actual squandering of the grantor's federal exemption.
11. Assuming that the generation-skipping transfer (GST) exemption would also be applied at the grandparent's death.

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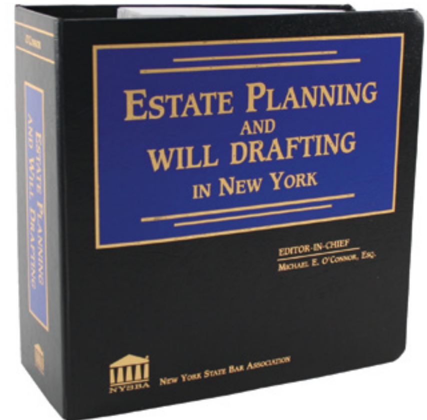

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The Trusts and Estates Law Section is pleased to announce that Sarah Pickering, Esq., (center) an associate at Holland & Knight LLP in New York City, has been selected as the Section's 2019 Rising Star Fellow. The Fellowship is a one-year appointment. Ms. Pickering will be a member of the Estate and Trust Administration Committee, will write an article for the 2019 Spring edition of the Section's *Journal*, and will have the opportunity to speak or co-speak at a Section event or seminar. In addition, Ms. Pickering will work with a Committee mentor and attend Executive Committee meetings throughout the year. The Section is excited to welcome Ms. Pickering and looks forward to working with her throughout the year. Stay tuned for more information about applications for the 2020 Rising Star Fellowship later this year.

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Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

POWERS OF APPOINTMENT

Testamentary Exercise of Special Power of Appointment to Donee's Estate Valid as Expression of Testator's Intent

Mother created both lifetime and testamentary trusts and gave her child broad testamentary limited powers of appointment; that is, the donee could appoint to anyone except the donee's creditors, the donee's estate, or creditors of the estate. Under the terms of the trusts the takers in default of both powers are mother's descendants living at child's death. Child's will exercised both powers of appointment by specific reference but purported to direct the trustees of the trusts to pay the trusts' property to child's executor to be added to child's residuary estate. The residue is given to a charitable foundation to be formed by the executor and named for the testator, and if the funds are insufficient the residuary estate is to be distributed to charities selected by the executor.

The executor petitioned the Surrogate's Court to find either by construction or reformation of the will that the powers of appointment were validly exercised. The Surrogate found that the testator validly exercised the powers because it is clear from the language of the will that the testator's intent was to appoint the appointive property to charity and the language directing the trustees to pay the property to the executor who would then "add" the appointive property to the residuary estate was simply a "maladroit" way of directing the executor to give the appointive property to the residuary beneficiaries "as supplements" to the benefits to be received from the residuary estate. It makes no sense to find that the testator had deliberately exercised the powers improperly, a finding reinforced by the specific reference to the powers in the will. *In re Bruce*, 2017 WL 2080963, 2017 N.Y. Misc. LEXIS 1749 (Sur. Ct., N.Y. Co.).

William P. LaPiana

On appeal, the Appellate Division affirmed. The court found that the Surrogate properly gave effect to the testator's intent to give the appointive property to charity. The court disposed of the argument that the Surrogate had improperly considered extrinsic evidence in construing an unambiguous will, reiterating the Surrogate's statement that the court was not considering extrinsic evidence but rather was concerning with the testator's intent as manifest in the will. *In re Bruce*, 161 A.D.3d 712, 79 N.Y.S.3d 10 (1st Dep't 2018).

TRUSTS

Trustees Validly Exercised Authority to Make Discretionary Principal Distributions to Distribute Trust Property to a New Trust

Settlor created an irrevocable life insurance trust for the benefit of settlor's descendants. The trust terms included a grant of Crummey powers to the beneficiaries. The trust terms also gave the trustees authority to distribute principal, including all of the principal of the trust, to the settlor's descendants in any amount and to the exclusion of one or more of the beneficiaries, either outright or in trust.

After a falling out between the settlor and one of the settlor's children, the settlor exercised a right reserved at the creation of the trust to exclude beneficiaries from the exercise of the Crummey power by so excluding the child and the child's descendants. Four years later, the independent co-trustee distributed the life insurance policy held in trust to a new trust, the beneficiaries of which did not include the settlor's descendant excluded four years before from the exercise of the Crummey powers. The trustee gave notice to the beneficiaries of the distribution to the new trust as required by the terms of the old trust.

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. **William P. LaPiana** is Associate Dean for Academic Affairs and Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).

The settlor died three years after the creation of the new trust. The trustees sought settlement of their account as trustees of the original trust, and the beneficiaries excluded from the new trust objected, seeking to void the distribution of the life insurance policy to the new trust. The Surrogate dismissed the objections and the Appellate Division affirmed.

Both the Surrogate and the Appellate Division viewed the trustee's action as the proper exercise of the power to invade principal in accord with the terms of the trust, and both opinions expressly stated that the rules of EPTL 10-6.6 are not relevant, citing paragraph (k) of EPTL 10-6.6, which states that the statute does not abridge any common law right of a trustee to distribute trust property to a new trust. *Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (1st Dep't 2018).

Invalid Purpose Trust Void but Purported Remainder Accelerated

Decedent's will purported to give the estate to trustees to use trust income to "continue and expand" the website devoted to the genealogy of the decedent's family created by the decedent. The terms of the will specifically disinherit the decedent's heirs. The trust is to terminate when the perpetuities period expires, and at the time the trust property is to be distributed to a genealogical library which is a not-for-profit entity. The decedent's surviving sibling sought a construction of the will holding the trust invalid, with the result that the estate passed by intestacy.

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All the parties agreed that the trust terms create an invalid trust—there was no named beneficiary and the purpose of the trust was not charitable. Because the trust income was to be used to support the research into the genealogy of a single family, the trust does not provide a benefit to the public. As a result, the trust was not charitable in nature and was therefore outside of the scope of EPTL 8-1.1(f).

The Surrogate agreed that the trust was invalid because it lacked a beneficiary and was not a charitable trust valid under New York statute (EPTL 8-1.8), but held that the trust property should pass to the charity because of the presumption against intestacy, especially where the will, as here, expressly disinherited the decedent's heirs, and because so doing will preserve the decedent's "overall testamentary plan." *In re Dawe*, 60 Misc. 3d 949, 81 N.Y.S.3d 727 (Sur. Ct., Madison Co. 2018).

WILLS

Property Held as Joint Tenants by Decedent and Executor Not Property of Estate

Testator purchased property in Florida and took title to property in the name of testator and Catherine, one of testator's children, as joint tenants with right of survivorship. Catherine was also nominated executor of testator's will.

The will was admitted to probate and Catherine qualified as executor. Eventually Catherine sought settlement of her executor's account. The account showed that the Florida real property had been included in the property of the estate and that expenses associated with it had been paid by the estate. Catherine then sold the property for less than its appraised value. The testator's other child objected to the account on the grounds that the property passed to Catherine by operation of law on the testator's death and moved for summary judgment determining that the property was not an estate asset. If the property was not estate property, of course, paying expenses with estate funds was improper. Surrogate's Court denied the motion and the objectant appealed.

The Appellate Division reversed. Under EPTL 3-5.1(b)(1), Florida law governs the disposition of the property, and under Florida law the deed unambiguously created a joint tenancy with right of survivorship between the testator and Catherine. On the testator's death Catherine became the sole owner of the property in her personal capacity. The objectant was therefore entitled to summary judgment as a matter of law. Catherine failed to raise a triable issue of fact as the court noted that the deed was "clear and unambiguous" and parol evidence of alleged contrary intent was not admissible. *In re Santangelo*, 161 A.D.3d 1173, 77 N.Y.S.3d 487 (2d Dep't 2018).

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

By Ilene Sherwyn Cooper

Deposition of Non-Party Witness

In a contested probate proceeding, the court denied a motion by the objectants for an order compelling the deposition of a non-party witness domiciled out of state. In support of the motion, the objectants claimed that the witness' testimony was critical, as he allegedly drove the decedent to the attorney-draftsperson's office, possessed a power of attorney, and diverted decedent's assets. The court observed that a subpoena is valid only where the court has jurisdiction over the subpoenaed party. Inasmuch as the witness was neither a party nor a New York domiciliary, the court held that it lacked *in personam* jurisdiction over him absent his consent. The court rejected objectants argument that the witness' commencement of a proceeding for revocation of letters of administration constituted an appearance in the probate proceeding, finding that the proceedings involved different subject matter and parties. Nevertheless, the court held that the objectants were not without recourse, and could seek an open commission to depose the witness if they chose.

***In re John,* N.Y.L.J., Oct. 18, 2018, p. 43 (Sur. Ct., Suffolk Co.)**

Discovery of Documents

In *In re Eckert,* the objectants sought to compel the petitioner to produce the estate planning documents of the decedent's surviving spouse. In support of their request, they claimed that the estate plans of the decedent and his spouse were created at the same time and were part of an overall testamentary scheme orchestrated by the petitioner. Objectants requested not only the will and trust created by the spouse, but the estate planning file of the attorney-draftsperson concerning the preparation of such instruments, including, but not limited to notes, correspondence, time entries, and drafts. Objectants alleged that the production of these documents was critical to demonstrating that the attorney-draftsperson was unaware of the incapacity of the decedent's spouse at the time he prepared her will, and thus, the potential incapacity of the decedent and the petitioner's exertion of undue influence. The petitioner and the *guardian ad litem* objected to the demand, contending that the law prohibits the production of the will of a living person.

Contrary to the petitioner's contentions, the court opined that the law does not absolutely prohibit disclosure of a living person's testamentary instruments. To this extent, the court found that neither the will nor trust of the decedent's spouse fell under the protection of the attorney-client privilege. Nevertheless, the court expressed its keen awareness of the privacy attendant to these documents and concluded that absent a strong showing of necessity their disclosure would not be required. Within this context, the court held that the objectants had not made the requisite showing to warrant disclosure of the subject documents.

Moreover, the court denied objectants' request for production of the attorney-draftsperson's notes. The court noted that communications between an attorney and a living client relating to the preparation, contents and execution of a testamentary instrument that were not made in the presence of a stranger, or with the intent that they be disclosed, are privileged. Further, if two persons consult an attorney for their mutual benefit and are present during these discussions, the privilege is not waived in litigation between them and a third party. On the other hand, the privilege may not be invoked should litigation arise between the parties and their descendants. Inasmuch as the underlying proceeding for the probate of the decedent's will did not involve litigation between the decedent and his spouse, or between representatives of the decedent's estate and his spouse, the court found the attorney-client privilege should apply to prohibit production.

***In re Eckert,* N.Y.L.J., July 11, 2018, p. 34 (Sur. Ct., Queens Co.)**

Eviction

In *In re Kulukundis*, the New York County Surrogate's Court granted the executors' SCPA 2103 application, directed respondent to vacate a cooperative apartment at The Pierre Hotel in which the estate had an interest, and ordered the respondent, the decedent's surviving spouse, to provide the executors reasonable access to the premises on 48 hours' notice.

Ilene S. Cooper, Farrell Fritz, P.C., Uniondale, New York.

The record revealed that the subject apartment was held by a closely held corporation that was 100 percent owned by the decedent's estate. The apartment had not been specifically bequeathed, though respondent was residing in it, and as such, it had been maintained since the decedent's death by the executors. The petitioners had allegedly commenced the turnover proceeding in order to fulfill obligations under a contract they had entered into for its sale.

The respondent objected to the petition, claiming that the contract of sale was invalid, that she had never consented to the sale of the apartment, that there was no economic need to sell the premises because the estate could easily afford to continue to maintain it, and that the size of her elective share would likely require that she receive the apartment or the proceeds of its sale.

The court rejected each of respondent's contentions holding, in the first instance, that the issue as to the validity of the contract was not at issue. Moreover, the court opined that the executors had a duty to marshal the estate assets and prevent waste, and were not required to seek prospective approval of their administration from a person interested. The remedy for any breach of fiduciary duty would be addressed in an accounting. Finally, the court noted that the elective share of the estate claimed by the respondent was a pecuniary amount, and thus did not entitle her to ownership or use of a specific asset.

***In re Kulukundis*, N.Y.L.J., June 15, 2018, p. 19 (Sur. Ct., N.Y. Co.)**

Gifts

Before the Surrogate's Court, Suffolk County, in *In re Pietropinto* was an application by the executor of the decedent's estate pursuant to SCPA 2103 seeking an inquiry and return of estate assets.

Pursuant to the provisions of the decedent's will and codicil thereto, the decedent devised and bequeathed her estate equally among her four children. However, in her codicil she noted that she had gifted her real property in Brooklyn to three of her children, with the intent of equalizing the interest of all four children in her estate, since she had previously made lifetime gifts to her fourth child, the respondent, and the respondent's family.

The subject proceeding by the executor sought information pertaining to any personal property that the decedent had an interest in at the time of her death, as well any other estate assets. The respondent opposed the application, contending that the decedent had made lifetime gifts to her children of all of her jewelry and personal property and that all such assets had been distributed according to her wishes. In reply, the executor claimed that he was entitled to engage in an inquiry as to the status of estate assets.

The court noted that during the inquisitorial phase of a discovery proceeding pursuant to SCPA 2103, all that was required was a showing that a respondent possessed or had information with regard to estate assets, provided that the proceeding was not being utilized for purposes of obtaining evidence for use in another matter. Although the court indicated that it was unclear why the executor singled out only the respondent as the subject of her inquiry, it observed that the pleadings fell within the ambit of the statute as an information gathering device for an estate fiduciary. Within this context, the court opined that while the decedent may have indeed made lifetime gifts of all of her assets, this defense raised by the respondent was not sufficient to derail the executor's request for her examination, particularly since a failure to conduct such an inquiry could subject her to a claim of breach of fiduciary duty.

Accordingly, the respondent was directed to appear for an examination pursuant to SCPA 2103.

***In re Pietropinto*, N.Y.L.J., Oct. 18, 2018, p. 44 (Sur. Ct., Suffolk Co.)**

Note of Issue

In *In re Modell*, a contested accounting proceeding, the court denied a motion to vacate a note of issue filed nine days after the discovery cut-off date. The movant did not seek to extend the discovery deadline or otherwise claim that discovery remained outstanding prior to the expiration of the discovery period. Yet, in support of his motion, he claimed, *inter alia*, that he had not obtained all the discovery to which he was entitled. Nevertheless, the court found that movant's claims were untimely, and that his informal demands to his adversary for further discovery were insufficient to preserve his interests. Moreover, the court noted that the movant had sought summary judgment with respect to one of the issues in the proceeding for which he simultaneously claimed additional discovery was needed. The court opined that while it had the discretion to vacate a note of issue when discovery was not complete, it found that under the circumstances the movant's conduct evinced an indifference to the discovery deadlines that would not be tolerated.

***In re Modell*, N.Y.L.J., June 22, 2018, p. 22 (Sur. Ct., N.Y. Co.)**

Objections to Probate

Before the Surrogate's Court, New York County, in *In re Stylianou* was a contested probate proceeding in which the petitioner moved to dismiss the objections filed by the decedent's four nieces. The decedent died

with a modestly sized estate and was survived by her sister, and ten nieces and nephews, who were children of three predeceased siblings. Pursuant to the pertinent provisions of the propounded instrument, she bequeathed her entire estate in equal shares per stirpes to her four siblings.

The objections to probate, filed *pro se* by the children of the decedent's predeceased sister, Maria, were grounded in fraud, duress, and undue influence. More specifically, the objectants alleged that the decedent and her surviving sister converted funds from their late mother, which funds became a part of the decedent's estate and were disposed of by her will. Hence, they reasoned that the will was fraudulent, and was procured by coercion, duress, and undue influence.

In support of her motion to dismiss, the petitioner argued, *inter alia*¸ that the objectants' allegations of misconduct were not relevant to the validity of the propounded will. In opposition, the objectants simply expanded on their claims, but provided no further details regarding the admissibility of the will to probate.

Upon review of the instrument, the court concluded that it was satisfied that the propounded will had been duly executed and that the decedent possessed the requisite testamentary capacity on the date of its execution. In reaching this result, the court noted that the instrument contained an attestation clause, and an SCPA 1406 affidavit annexed, in which the witnesses attested that the decedent was of sound mind, memory, and understanding.

With regard to the petitioner's motion to dismiss, the Court noted that an objection to probate based on fraud requires a showing that a knowingly false statement caused the decedent to execute a will significantly different from the will she would have executed had the statement not been made. Moreover, the court observed that any allegations of fraud must satisfy the requirements of CPLR 3016(b), requiring that the circumstances of the alleged fraud be particularized. Assessed within this context, the court held that the objections were devoid of any allegations giving rise to a claim of fraud.

The court further concluded that objectants' claims of undue influence and duress were equally deficient. Specifically, the court remarked that a claim of undue influence requires a showing that a relationship of trust was abused, causing the decedent to execute a will that was not of her own free volition. By contrast, a claim of duress requires a showing that the propounded instrument resulted from the imposition of physical force or threats. As in the case of fraud, the court noted that a claim of undue influence had to be stated in detail. As such, the court concluded that the objectants had failed to satisfy the essential requirements of pleading the claim by identifying the person or persons who unduly influenced or coerced the decedent, much less the circumstances under which the influence was exercised.

Accordingly, petitioner's motion to dismiss was granted.

***In re Stylianou*, N.Y.L.J., Dec. 12, 2018, p. 27 (Sur. Ct., N.Y. Co.)**

Revocation

Before the Surrogate's Court, New York County, in *In re Kalt* was an uncontested proceeding pursuant to SCPA 1407 for probate of a photocopy of the decedent's purported will. The proponent, who was the decedent's son, was the nominated executor under the instrument, and he and his brother were the sole beneficiaries of the decedent's estate.

The record revealed that the decedent died with an estate valued at approximately $12 to $16 million. According to an affirmation filed by the lawyer who supervised the execution of the will, the decedent had told her that he had arranged with the proponent to pick up the instrument from her office and arrange for its safekeeping. The proponent confirmed that he retrieved the instrument from counsel's office several days later, and placed it in a safe deposit box owned by him and the decedent at a savings bank. However, thereafter, it appeared that a burglary took place at the bank where the will was maintained, which involved a breach of the safe deposit boxes at the site. Following the burglary, the will could not be found.

The court recognized the general rule that when an original will last in the possession of the testator cannot be found after death, it is presumed to have been revoked by the testator with the intention of doing so. Nevertheless, the court acknowledged that this presumption can be rebutted under appropriate circumstances demonstrating that the testator had no intention to revoke the instrument.

In view of the foregoing, the court found the evidence inconsistent with any intention by the testator to revoke his will, and held that the presumption of revocation had been rebutted. Moreover, based on the record, the court admitted the will to probate as a lost will, pursuant to SCPA 1407.

***In re Kalt*, N.Y.L.J., May 1, 2018, p. 18 (Sur. Ct., N.Y. Co.)**

Statute of Limitations

Before the Surrogate's Court, Kings County (Torres, S.) in *In re Estate of Eisdorfer* were motions made by four of the decedent's children to dismiss the petitions of the decedent's grandchildren ("petitioners") seeking to compel the executors and testamentary trustees of the estate to account.

The decedent died on May 26, 1984, survived by his spouse and five children. Upon admission of his will to probate, letters testamentary and letters of trusteeship were issued to the decedent's spouse, a rabbi, and one of his five children. Pursuant to the pertinent provisions of the instrument, the decedent created a residuary trust for the benefit of his spouse during her lifetime and, upon her death, directed that the principal thereof be transferred and paid over to his then lawful issue, per stirpes.

Notwithstanding the foregoing provisions, over a two-year period commencing after death but prior to the will's probate, the decedent's spouse and his five children agreed not to fund the subject trust. Instead, they entered into eight separate agreements ("Agav Suder" agreements) governing the distribution of the decedent's personal and real property. Each agreement was executed in accordance with the Torah Law/Halakhah, and in the presence of the rabbi/co-fiduciary. After these agreements were finalized, the executors and trustees did not retain control of any of the decedent's assets, and the residuary trust was never funded. Thirty-three years later, the subject petitions were filed by children of the decedent's post-deceased son, Samuel, seeking to compel two of the three fiduciaries to account. At the time the petitions were filed, the decedent's spouse was deceased.

The fiduciaries moved to dismiss the petitions, arguing that the Agav Suder agreements precluded the petitioners from compelling an account. In addition, they maintained that the proceedings were barred by the statute of limitations and the doctrine of laches. More specifically, the fiduciaries claimed that the Agav Suder agreements constituted a repudiation of trust sufficient to trigger the running of the statute of limitations long before the proceedings were commenced. Moreover, the fiduciaries maintained that given the passage of time, and the destruction of the estate and trust records by their attorney, the proceedings were barred by the doctrine of laches.

In opposition, the petitioners argued that the Agav Suder agreements, of which they had no knowledge, did not constitute a repudiation by the fiduciaries of their duties, and did not deprive them of their right to compel an accounting. Moreover, they maintained that since the class of beneficiaries of the residuary trust did not close until the death of the decedent's spouse, the agreement was not binding as to them. Further, the petitioners claimed that their father could not have virtually represented their interests under the circumstances.

The court observed that when dismissal is sought on the basis of the statute of limitations, the respondent bears the burden of establishing prima facie the time within which to sue has expired. To this extent, the fiduciaries contended that the agreements were entered into and observed for over 33 years, and that the decedent's will and estate tax return were a matter of public record since 1984. The petitioners, on the other hand, argued that they did not first become aware of the decedent's will or the trust for their benefit until 2016.

Given this backdrop, the court found that the fiduciaries' relinquishment of control over the decedent's property to the decedent's spouse and children constituted a repudiation of trust sufficient to trigger the statute of limitations over 30 years prior to the commencement of the proceedings. Indeed, the court concluded that the fiduciaries affirmatively negotiated eight agreements whereby they abdicated their stewardship with respect to the assets of the estate and trust to all of the persons who would be entitled to a distribution at that time. The record failed to indicate that the petitioners were even alive when the agreements were entered. Moreover, the court questioned why petitioners never inquired as to their possible interest in the decedent's estate when they were able to do so upon the death of their father over 14 years ago, or why decades had passed without any investigation ever being undertaken on their part concerning the estate. Finally, the court rejected the notion that knowledge of the contents of the public record pertaining to the estate and its status should not be imputed to them.

Further, the court found that as a result of the inordinate delay in instituting the proceedings, the lack of any knowledge by the fiduciaries that there was dissatisfaction with the distributions made pursuant to the agreements, the absence of any records with which accountings could be prepared, and the death of important witnesses to the agreements, not the least of which was the petitioners' father, the proceedings were also barred by the doctrine of laches.

Accordingly, the proceedings for a compulsory accounting were dismissed.

***In re Eisdorfer*, N.Y.L.J., July 6, 2018, p. 25 (Sur. Ct., Kings Co.)**

Summary Judgment

In *In re Owens,* the court granted summary judgment in proponent's favor. The proponent of the will was the decedent's former partner and sole beneficiary of her estate; the objectant to probate was the decedent's father and sole distributee. The record revealed that the proponent and the decedent lived together until 2003, when the proponent moved out of their home. The nature of their relationship after that time was undisputed.

The objectant had divorced the decedent's mother before her death in 2007. The propounded will specifi-

cally disinherited him, and instead made the decedent's maternal aunt contingent beneficiary of the estate in the event the proponent failed to survive the decedent.

On the issue of testamentary capacity, the court opined that the level of capacity to execute a will is less than to execute a contract and other legal documents. Moreover, the law presumes that a testator had the requisite capacity to execute a testamentary document. Within this context, the court found that the record contained ample evidence of the decedent's capacity to execute the propounded instrument. Three witnesses executed a contemporaneous self-proving affidavit, and the attorney drafter testified that he had no reason to doubt the decedent's capacity to execute the will.

In support of his claim that the decedent lacked capacity, the objectant alleged that the decedent was a drug abuser and suffered from a chronic physical illness. Nevertheless, the court held that neither illness nor use of drugs or alcohol are inconsistent with testamentary capacity. To this extent, the court found that the objectant failed to offer any evidence indicating that the decedent's capacity at the time the will was executed was compromised by her purported medical condition or drug use. Similarly, the court found that the decedent's inability to manage her personal finances did not raise a genuine issue as to whether she had the minimal level of capacity needed to execute her will. Accordingly, the court dismissed the objection alleging lack of testamentary capacity.

With respect to the objections alleging lack of due execution and forgery, the court noted that where the execution of a will is supervised by an attorney, there is a presumption that the will was duly executed. Additionally, the court observed that an attestation clause and self-proving affidavit also serve to create a presumption of due execution. Further, the court found that the statement in the attestation clause that "the foregoing instrument was signed [by the testator]... in our presence..." constituted corroborating evidence that the instrument was not forged. In the face of proponent's prima facie case of due execution, the court found that objectant had failed to offer any evidence or even an expert opinion that the propounded instrument was forged. Moreover, although the objectant made much ado about the failed memory of two of the three attesting witnesses regarding the will execution, the court noted that the inability of the witnesses to recall the will execution did not preclude summary dismissal of an objection based on due execution. Accordingly, the objections based on lack of due execution and forgery were dismissed.

Further, the court found that the proponent succeeded in showing that the propounded instrument was "natural" in its provisions to the extent that it favored a person with whom the decedent had a close relationship prior to her death, and was not the product of undue influence. The court found that the objectant failed to refute this proof much less offer any detailed allegations or evidence supporting his claims to the contrary.

***In re Owens*, N.Y.L.J., Oct. 31, 2018, p. 27 (Sur. Ct., N.Y. Co.)**

Three-Year/Two-Year Rule

In *In re Eckert*, the petitioner's request for expansion of the three-year/two-year period was denied. The petitioner claimed that expansion of the rule was necessary in order to prove, through documents and records, years of animosity that existed between the decedent and the objectants, which eventuated in his testamentary plan depriving them of any interest in his estate. Although the court noted that special circumstances have been found where there are allegations of a scheme of fraud, a continuing course of conduct evidencing undue influence, or an *in terrorem* clause, it found petitioner's assertions insufficient to warrant disclosure beyond the three-year/two-year period.

***In re Eckert*, N.Y.L.J., July 11, 2018, p. 34 (Sur. Ct., Queens Co.)**

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Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Foreign Will

Appellant challenged a summary judgment entered by the probate court determining that the decedent's 2013 will revoked his 1986 will. The decedent was a native of Haiti. The 2013 will was prepared in accordance with Haitian law, which, according to Florida's Third District, authorizes a testator to dictate the will to a Haitian notary who then must reduce it to writing and read it back to the testator. The will is executed by the testator, the notary, and four witnesses. The notary then registers the will with the tax office and maintains the original in his or her office. Appellant argued that summary judgment was inappropriate because, she claimed, the decedent was not in Haiti the day the will was supposedly signed, and three of the four witnesses did not sign the will on that date either. The probate court found, however, and the appellate court affirmed, that based on the Haitian lawyer's and notary's affidavits, the will conformed to Haitian law. Because § 732.502(2), Florida Statutes, provides that Florida recognizes a will as valid (with a few exceptions) if it is valid in the country in which it was executed, the trial court was correct in finding the 2013 will to be valid.

***Rizk v. Rizk*, 2018 WL 6321228 (Fla. 3d DCA Dec. 4, 2018) (not yet final)**

Final Discharge

Appellant challenged a summary judgment entered by the trial court in favor of the former personal representative of the estate of appellant's father and the former personal representative's law firm. Appellant alleged that the defendants had committed embezzlement, gross negligence, and malpractice. Based, in large part, on section 733.901, Florida Statutes, the trial court found for the defendants, and the First District Court of Appeal affirmed. That section provides that the discharge of a personal representative—which had already taken place in this case—releases and bars any action against the personal representative. Appellant argued, however, that there is an exception to that statutory bar for cases where fraud and intentional misrepresentation are shown. Although the appellant was correct about that aspect of the law, the appellate court held that it did not apply where, as here, the record fails to support any concealment of any estate asset or distributions from the court or from Appellant. Further, Appellant had already made the claims during the probate proceedings themselves, undermining Appellant's argument that the concealment had just come to light.

Jonathan A. Galler

***Sims v. Barnard*, 2018 WL 5796936 (Fla. 1st DCA Nov. 6, 2018) (not yet final)**

Tortious Interference With an Expectancy

The federal district court granted defendants' motion for summary judgment where plaintiff alleged that defendants had committed forgery in furtherance of a racketeering scheme to unlawfully direct money from the estate to a cat rescue charity. Aside from numerous procedural defects in plaintiff's filing, the court also found no triable issue, particularly on plaintiff's claim for tortious interference with an expectancy. The court found that there was insufficient evidence to overcome the presumption that the will was valid and, because of this, the court found that plaintiff could not prove that an expectancy from the estate was ever promised to her.

***Ellis v. Warner*, 2018 WL 4846762 (S.D. Fla. Jan. 19, 2018)**

Petition for Community Property Interest Deemed a Claim

The decedent's wife appealed from a final order granting the decedent's daughter's motion to strike the wife's petition to determine and perfect her community property interest. Through the petition, the wife sought to confirm and effectuate her vested 50 percent community property interest in an investment asset acquired and titled in the decedent's name while the decedent and the wife were domiciled in Texas. Among other things, the trial court found that the petition was an untimely filed claim or, in the alternative, an untimely filed cause of action. The Fourth District Court of Appeal affirmed. The petition was filed well

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after the creditors' claims period and eight-and-a-half months after the two-year statute of repose. The trial court found that the petition was a "claim," under § 731.201(4), Florida Statutes, because the wife's community property interest was a liability of the decedent and subsequently his estate. And, even if it were just a cause of action and not a claim, it was filed after the statute of repose had run, and there were no exceptions that applied.

***Johnson v. Townsend*, 2018 WL 5291297 (Fla. 4th DCA Oct. 24, 2018) (not yet final)**

Notice Of Voluntary Dismissal

Petitioner sought a writ of prohibition from the appellate court to prevent the trial court from further acting without jurisdiction in a lawsuit involving an irrevocable trust he settled with his now deceased wife. The Second District Court of Appeal granted the writ. Petitioner had filed a notice of voluntary dismissal with the trial court, pursuant to the Florida Rules of Civil Procedure, following a judicial modification. That modification provided that the court would retain continuing jurisdiction to supervise the trust. Following petitioner's notice of voluntary dismissal, the successor trustee filed several motions with the court, rather than initiate a new lawsuit. However, said the appellate court, this was not proper because the action was closed. Trust actions are governed by the Rules of Civil Procedure, and when petitioner filed his voluntary dismissal, the court was divested, automatically, of jurisdiction. The fact that the court retained the discretion to continue supervision of the trust did not nullify the trust statute providing that the Florida Rules of Civil Procedure govern.

***Baden v. Baden*, 2018 WL 5932397 (Fla. 2d DCA Nov. 14, 2018) (not yet final)**

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