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Trusts and Estates Law Section Newsletter

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A Message from the Chair

Ilene Sherwyn Cooper

By the time you read this article, summer will have long passed, but hopefully, the memories of our Spring program will continue to linger. From May 3-May 6, 2012, 300 attorneys, sponsors and their guests gathered in Washington, D.C., where they were educated and entertained in five-star venues.

The site of the Spring Meeting was the historic and very opulent Willard Intercontinental Hotel, located in the heart of Washington, D.C., one block from the White House. On May 3, our attendees were greeted by a welcome basket in their rooms, and received, upon registration, a tote bag and an umbrella.

Thursday evening's opening reception took place in the magnificent crystal room of the hotel where guests enjoyed cocktails, hors d'oeuvres, and conversation with colleagues. Most assuredly, however, the highlight of the reception was our honored guest, United States Supreme Court Justice Antonin Scalia, who mingled and kindly agreed to take photos with those in attendance, and then joined our program speakers for dinner at The Oval Room. Justice Scalia was truly gracious and generous to our Section with his time and participation in the evening.

For those who registered early, Friday morning offered a White House tour. Met by security at several checkpoints, our group of approximately 125 had the benefit of a self-directed viewing of various dining and meeting rooms in the White House. Information about each room, which was earmarked by its color and splendid décor, was provided by Secret Service personnel, who were well-educated about its historic significance. The visit was, indeed, memorable, and for some, even more so, thanks to a special viewing of the presidential pooch "Bo," who was observed trotting down the stairs and out the doors for his morning walk.

Inside

Friday afternoon began the first of our two-part CLE program on "The Anatomy of a Settlement: Considerations, Negotiations, Implications," chaired by John R. Morken, Esq. and Joseph T. La Ferlita, Esq. Thank you John and Joe for orchestrating a terrific program—educational, thought-provoking and engaging. And, my deep gratitude goes, as well, to the program's wonderful panelists and creative consultant, Hon. John M. Czygier, Gary B. Freidman, Mitchell M. Gans, Esq., Ann B. Lesk, Esq., Jerome L. Levine, Esq., Stephen F. Melore, Esq., Donald Novick, Esq., Marian C. Rice, Esq., and Mitchell J. Cooper, Esq., each of whom spent countless hours preparing for an outstanding two days of CLE.

Friday evening's cocktail reception and dinner took place at the spectacular Smithsonian Institution National Museum of Natural History. Three hundred were in attendance to enjoy the magic of the museum at night—empty of crowds, softly lit, with light music in the background. The Ocean Room and the Rotunda provided the perfect setting for sumptuous food and top-notch entertainment by The Capitol Steps. And, of course, many thanks to the Museum for donating a special viewing of the Hope Diamond and the gallery of gems and minerals to our Section.

On Saturday, early risers enjoyed our panel of Surrogates, Hon. Stephen W. Cass, Hon. Robert J. Gigante, Hon. Lee L. Holzman, and Hon. Anthony A. Scarpino, Jr., who provided their experience and expertise on "Ethical Dilemmas in Estate Practice." My sincere gratitude to Colleen Carew, Esq. for coordinating this program, together with Nancy Burner, Esq. and Michael P. Ryan, Esq. Following Saturday morning's CLE, our attendees had free time to explore Washington, D.C. Saturday evening marked the conclusion of the program on the Roof Top Terrace of The Hay Adams Hotel. With breathtaking views of the city, and most especially the White House, our guests were treated to the sounds of light jazz as they dined and enjoyed each other's company under the night's Super Moon. But for those on the terrace that evening, possibly the most exciting memory was watching Marine 1 land on the back lawn of the White House, while a decoy flew by. Wow! I could not have planned that if I tried!

Again, thank you all—the chairs, the panelists, the sponsors, the exhibitors, and, of course, Kathy Heider. The Spring Meeting would not have been possible without you!

As to other Section news, the Sixth Report has been completed and will be submitted to the Legislature shortly. In the interim, Professor Ira Bloom and his New York Uniform Trust Code Committee have begun their process of review and comment. The OCA Committee is currently working on technical amendments to the decanting statute, as well as the issue of commissions on charitable trusts, and our liaisons to the City Bar have informed us that it is also examining the Uniform Trust Code.

Kudos to our Section and, most especially, the chairs of our Diversity Committee for placing second in the Diversity Challenge spearheaded by Vincent Doyle, then-President of the New York State Bar Association, and a round of applause to our lobbyists, Ron Kennedy, Kevin Kerwin, our Legislation and Governmental Relations Committee, and our committee members, Ian MacLean, Natalia Murphy, Robert Harper and Joseph T. La Ferlita, for their significant efforts in proffering our legislation regarding interest on legacies on Lobby Day, and reporting on behalf of the Section with respect to various OCA bills presently being considered by the Legislature. Thank you, as well, to Lawrence Keiser, Natalia Murphy, and their respective committees for their tremendous efforts, with the Tax Section, in preparing a very comprehensive report on trust decanting, in response to a request for comments by the Treasury and I.R.S.

Finally, stay tuned for my next article for a recap our Diversity Committee's September mixer, the New York City cocktail reception hosted by our Law Students and New Members Committee, and our Fall Meeting in Saratoga.

Ilene Sherwyn Cooper

Editor's Message

As of December 2012, I have assumed the role as Editor in Chief of the *Trusts and Estates Law Section Newsletter*. Please submit all future article submissions to me by e-mail, with copies to Section Chair Carl T. Baker, Esq., and immediate past Section Chair Ilene S. Cooper, Esq.

I look forward to receiving your submissions, and continuing the production of an informative *Newsletter* for the Section.

Jaclene D'Agostino

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The Nature and Extent of a Testator's Property: What Degree of Awareness Is Required for Testamentary Capacity in New York?

By Jim D. Sarlis

How much awareness of the size and scope of their estates must testators have when making a Will? This issue was examined recently in a pair of interesting cases: *Matter of Joules*,[1] a Surrogate's Court case decided in July 2012, and *Matter of Walker*,[2] an Appellate Division case decided in January 2011. These cases and their precursors provide guidance regarding the factors considered by New York courts in evaluating this component of testamentary capacity.

I. Background: The Elements of Testamentary Capacity

"Testamentary capacity" refers to the degree of mental ability that a testator is legally required to have at the time of Will execution.[3] Although the threshold for such capacity is considered to be the lowest that exists in law,[4] still the required competence must be present in order to have a valid Will.

In the seminal case of *Matter of Kumstar*,[5] the New York Court of Appeals identified three elements that must exist[6] at the time of Will execution to meet the threshold of testamentary capacity: testators must understand the nature and consequences of executing a Will, recognize those considered the natural objects of their bounty, and be aware of the general nature and extent of their property.[7]

A. The Nature and Consequences of Executing a Will

In order to ensure that it is indeed the person's intention to create a Will (and, conversely, that it is *not* the person's intention to create some *other* kind of document, such as, for example, a contract, promissory note, or a present gift) the testator must understand that the document being signed is a Will and have a basic understanding of how a Will works. Thus, the testator should understand that, once the Will is executed with the relevant legal formalities, its terms will be binding (i.e., unless and until revoked) to take effect in transferring property at the testator's death.

B. The Natural Objects of the Testator's Bounty

Testators must be able to identify the so-called "natural objects of their bounty," meaning the people[8] who would be the expected recipients of their assets.[9] This is generally presumed to be the testator's closest relatives and loved ones. Therefore, when a testator cannot identify his or her nearest family and other loved ones, this would be one factor pointing to a possible lack of capacity. Certainly, if a person tries to leave property to, for example, fictional characters or famous deceased people, this would be a strong indication that the person lacks testamentary capacity.

C. The Nature and Extent of the Testator's Property

Testators with sound and disposing minds and memories are expected to know the "nature and extent" of their property. At one end of the spectrum are those testators who can create a fairly detailed and complete inventory of their assets, clearly possessing this component of testamentary capacity. At the other end of the spectrum are people who cannot identify their assets, or who try to bequeath property that they have never owned or do not currently own, clearly lacking this component of testamentary capacity. Between these two extremes lies the territory for which this article seeks to provide guidance.

II. Recent Cases and Their Antecedents Illustrate How New York Courts Evaluate the Factors Related to This Component of Testamentary Capacity

Needless to say, the mental acuity of testators runs the gamut, and we who deal with estate planning and elder law routinely encounter testators with impaired or diminished mental sharpness. The threshold question, therefore, is whether, as a matter of law, a person who has been diagnosed with dementia, adjudicated incompetent, has mental illness, or has a drug or alcohol addiction, can still make a Will. The answer is yes, so long as the factors supporting a finding of testamentary capacity are met.[10]

The next question is, therefore, while it is well-settled that testators need only have a general understanding of their assets,[11] what degree of awareness of the size and scope of their estates must testators have to satisfy this component of testamentary capacity? The recent *Joules* and *Walker* decisions, and the precedents upon which they are based, illustrate how New York courts weigh various factors that influence their determination of this issue.

A. The Testator Fails to List and Specifically Dispose of Significant Items of Property

The most recent case is a lower court case: *Matter of Joules*.[12] In that case, the testator had been hospitalized

for an "altered mental state" just 10 days before the Will execution and 17 days before his death. The objectants' allegation that the testator lacked the requisite knowledge of the nature and extent of his property centered on the fact that, in his conversation with the attorney-draftsperson regarding the testator's estate and assets, the testator failed to inform the attorney of his five classic cars and over 100 hockey jerseys, or provide any specific disposition of these items in his Will. The objectants alleged that these items comprised a significant portion of the testator's estate and that his failure to mention them indicates a lack of testamentary capacity. The court, however, disagreed, pointing out that the decedent did make a specific bequest of his house, then left everything else he owned to the residuary beneficiaries. Finding that this is not an unusual testamentary scheme, and there being no need for him to specifically itemize each item of personal property, the court concluded that "it is not necessary for a testator to review each item in his possession to establish the requisite knowledge of the nature and extent of his property."[13] The court held that no genuine issue of fact existed as to the decedent's testamentary capacity, and dismissed the objections.[14]

B. The Attorney and The Testator Do Not Discuss the Testator's Assets on the Day of the Will Execution

In *Matter of Walker*,[15] a recent Appellate Division case, the court dismissed objections alleging lack of testamentary capacity which focused on the fact that, on the day of the Will execution, the attorney-draftsperson did not discuss the testator's assets with the testator or ascertain the exact amount of property constituting the estate. The Surrogate's Court had found that this raised a question of fact concerning the testator's knowledge of her assets sufficient to deny summary judgment to the Will's proponent. Upon appeal, however, the Appellate Division reversed, focusing instead on fact that the attorney had discussed the testator's assets with her on prior occasions, including a few months earlier during the preparation of a power of attorney. At that time, the attorney was made aware that the testator's principal asset was an apartment in Brooklyn, and that, in addition, she had a modest amount of money in bank accounts. The court found the decedent's awareness of her assets in keeping with the general rule that "a decedent need only have a general, rather than a precise, knowledge of the assets in his or her estate."[16] Significantly, this is the first case in which the court held that discussion of the testator's assets on the day of Will execution is not a requirement to fulfill this element of testamentary capacity.

C. The Testator Has Been Taking Care of Property and Financial Affairs for a While Prior to the Execution of the Will

Another important factor taken into account in the *Walker* case, and one given great weight by the court, was the evidence provided by a personal home aide who cared for the testator from June 2008 until the time of her death one year later: she detailed how the decedent—while physically infirm—was at all times mentally sharp, engaged in a variety of daily activities, and managed her own financial affairs, including paying the bills and expenses for her Brooklyn property. The court found that "the fact that decedent handled her own financial affairs during the year preceding her death supports an inference that she apprehended the size of her estate."[17]

Similarly, in *Matter of Bush*,[18] the court determined that the testator knew the nature of his property (i.e., that it consisted of bank accounts and money on deposit at the Veterans' Administration) and, "[a]lthough there was some question as to whether he knew the precise size of his estate, the fact that he possessed his bankbooks and handled his own financial affairs until only a few weeks before his death support an inference that he apprehended the size of his estate. Inasmuch as the proof *does not permit any conflicting inferences*, the court should have directed a verdict in favor of proponent on the question of testamentary capacity."[19]

D. The Testator Lacks Awareness of the Size or Scope of the Assets, or Needs Repeated Prompting to Remember Them

Matter of Fish[20] involved a 62-year-old veteran who, in 1980, while a patient at Syracuse Veterans' Administration Hospital, executed a Will drawn at the hospital by an attorney who met the testator for the first time on the day of execution. It was witnessed by the wife of the testator's brother Roy and by a physician who was a medical resident at the hospital but had not treated the testator.

The testator suffered mental impairment as a result of combat duty, and a committee to handle his finances was appointed based upon incompetency for the last 40 years of his life. The estate of $107,000 was held in a fiduciary account by the testator's successor committee. The testator lived with his sister Lorena for 22 years until his death. The Will left 60% of the testator's estate to his sister Lorena and 22% to his brother Roy; the balance was divided equally among his other six brothers and sisters, who filed objections, having been left only small shares of his estate under the Will.

The Surrogate's Court denied probate of the testator's Will due to lack of testamentary capacity on the grounds that, at the time of Will execution, the testator was not aware of the nature, extent and condition of his property. Upon appeal, the Appellate Court agreed, stating: "While a testator need not have precise knowledge of the size of his estate,[21] the authorities clearly hold that a testator's lack of awareness of or ability to keep in mind without prompting the general nature and extent of one's real and personal property requires denial of probate."[22]

An indication that the decision in *Matter of Fish* was a "close call" is that it was not unanimous. The dissenting opinion,[23] among other things, contrasted *Fish* with *Matter of Delmar*,[24] another oft-cited case which examined the testator's knowledge of the nature and extent of her property. In *Delmar*, the testator's inability to grasp the extent of her property resulted in her failure to dispose of more than half of her vast estate in the death-bed Will at issue. The testator could not remember her testamentary scheme from her prior Will and she believed that she was disposing of her entire estate by the new, death-bed Will, despite the fact that her attorney was adamantly explaining to her that she was not providing for a significant portion of her estate. Both her attorney and a doctor who witnessed the conversation testified to these facts at the trial. Based on these factors, the *Delmar* court determined that the testator lacked the requisite knowledge of the nature and extent of her assets.

Interestingly, in *Matter of Flynn*,[25] a directed verdict in favor of capacity was found improper where the 84-year-old testator had a history of keeping huge balances in non-interest-bearing accounts even though he needed more income, thought leaving one person $600,000 more than another was just leaving "a little more," and failed to change his dispositions of jewelry after most of the jewelry listed had been stolen. Apparently, the court felt that these factors cast sufficient doubt on the testator's mental acuity on this component of testamentary capacity to require jury determination of the issue.

E. The Testator Has Not Paid Taxes or Bills and Otherwise Failed to Adequately Manage the Property or Finances

In *Matter of Slade*,[26] the Fourth Department held that the Will's proponents failed to establish that the testatrix knew the nature and extent of her property. In that case, the following factors existed: First, the testatrix believed her total assets amounted to only $10,000, when in fact her estate was valued at more than $650,000. In addition, her stockbroker testified that since 1977 she had been unable to transact any business and did not know what stocks and bonds she owned. Furthermore, in 1979 a conservator was appointed based upon evidence that her house was littered with more than $30,000 in cash and that she had not paid her income tax, property tax, or utility bills.

III. Summary: Guidelines for Evaluating Testators' Awareness of "The Nature and Extent" of Their Property

New York courts have analyzed a testator's capacity based on the unique circumstances of each case, and reviewed not only the three stated components of testamentary capacity, but other factors as well. While there have been some contradictory outcomes, based on the foregoing, the following guideposts can be gleaned: Testators need not have a perfect recollection or understanding of their property—that is certainly not the standard. Instead, testators need only have a basic and general appreciation of the property they own at the time of Will execution. The greater the accuracy and specificity, the better, of course. However, as we saw in *Matter of Joules*, the fact that a testator fails to list and specifically dispose of significant items of property is not fatal to a finding of testamentary capacity, so long as the overall testamentary scheme is not unusual or out of character.

Certain factors point to a possible lack of capacity, and those include where testators cannot remember their assets despite repeated prompting, have such a misconception of the size of their estates as to be off by hundreds of thousands of dollars and fail to dispose of a large share of their property, or have not paid taxes and other bills and otherwise failed to adequately manage their finances, as in the *Slade* and *Delmar* cases.

A factor weighed heavily in favor of a finding of capacity is when testators have been taking care of their property and finances for a period of time leading up to the Will execution, as we saw in the *Walker* and *Bush* cases.

As a final point, it is significant that New York does not require that the attorney and the testator discuss the testator's assets on the actual day of the Will execution. However, as we saw in *Matter of Walker*, a discussion in which the testator evidences an understanding of the general nature and extent of the assets must occur at some time proximate to the Will execution.

IV. Conclusion

It would be fair to say that, overall, New York courts have been relatively lenient in finding that testators have the requisite understanding of the nature and extent of their assets. This is in keeping with the public policy encouraging Will-making and reflected in the low threshold for testamentary capacity. The modest understanding required of testators when it comes to the nature and extent of their assets is, therefore, reasonable and generally protects testators and their families in extreme situations.

Endnotes

1. 2012 N.Y. Slip Op. 31780(U) (Sur. Ct., Monroe Co. 2012).
2. 80 A.D.3d 865, 914 N.Y.S.2d 379 (3d Dep't 2011).
3. The modern concept of testamentary capacity actually developed over centuries, and was tied to the evolution of various concepts (e.g., free will, self-determination, private property) in theology, economics, and psychology (see also note 10, *infra*). A detailed review of its history and development is presented in Reed, Thomas J., *The Stolen Birthright–An Examination of the Psychology of Testation and an Analysis of the Law of Testamentary Capacity–A Modest Proposal*, 1 W. New Eng. L. Rev. 429 (1979), http://digitalcommons.law.wne.edu/lawreview/vol1/iss3/1.
4. "Less mental acuity is required to execute a will than any other legal instrument." *Matter of Fish*, 134 A.D.2d 44, 48, 522 N.Y.S.2d 970 (3d Dep't 1987) (Harvey, J. dissenting) *citing Matter of Safer*, 19 A.D.2d 725, 726, 242 N.Y.S.2d 445 (2d Dep't 1963); *Matter of*

Coddington, 281 A.D. 143, 146, 118 N.Y.S.2d 525, 528 (3d Dep't 1952), *aff'd*, 307 N.Y. 181 (1954); *see also Matter of Seagrist*, 1 A.D. 615, 620, 37 N.Y.S. 496 (1st Dep't 1896), *aff'd without op*., 153 N.Y. 682 (1897) ("The same clearness of comprehension and ability of expression which is required to enable a man to enter into a contract need not exist to enable him to make a valid will.").

5. *Matter of Kumstar,* 66 N.Y.2d 691, 692, 496 N.Y.S.2d 414, 415, 487 N.E.2d 271, 272 (1985), quoting *Matter of Slade*, 106 A.D.2d 914, 915, 483 N.Y.S.2d 513 (4th Dep't 1984).

6. *Cf.* discussion of Justice Harvey's dissenting opinion in *Matter of Fish, infra* at note 23.

7. In addition, a fourth element for testamentary capacity is often mentioned in treatises and unofficial commentary, as well as required in jurisdictions other than New York: that the testator must be able to apply this to create a coherent plan for the disposition of this property at death. *See, e.g., Restatement (Third) of Property: Wills and Other Donative Transfers* § 8.1 (2003).

8. Although pets are often considered a member of the family, for Will purposes they are legally considered property. Therefore, the best way to leave a bequest for the benefit of a pet is to establish a testamentary trust that details and funds the living arrangements, care, veterinary attention, grooming, food and other essentials for the pet, and names a trustee to be in charge of it.

9. This consideration need not mirror the rules of intestacy. For example, a stepchild can be a person's closest loved one while not being a distributee. The key is the testator's ability to identify close family members.

10. The modern view of capacity rejects the idea that the entire mind functions in a monolithic manner; under that view, capacity is tied to mental health in an "all-or-nothing" manner, so that any mental illness or impairment necessitates a finding of lack of capacity. Instead, the current view is the more nuanced view that capacity can co-exist with mental illness or impairment. Under the latter view, the existence of a mental issue (e.g., mental illness, cognitive impairment, dementia, adjudication of incompetence, having a guardian, addiction) is just one factor to consider in the overall evaluation of capacity, and does not, ipso facto, lead to the conclusion of incapacity. *See* Shulman, K., et al. (for the International Psychogeriatric Association Task Force on Testamentary Capacity and Undue Influence), Contemporaneous assessment of testamentary capacity, International Psycho-geriatrics, 21:3 433-39 (2009). For example, courts have held that a diagnosis of dementia or Alzheimer's disease does not, in and of itself, create a triable issue of fact as to testamentary capacity, nor preclude a finding of testamentary capacity. *Matter of Tagliagambe*, 2011 WL 873502, 2011 N.Y. Slip Op. 50362(U) (Sur. Ct., Kings Co. 2011), *citing Matter of Waldron*, 240 A.D.2d 507, 659 N.Y.S.2d 690 (2d Dep't 1998), stating "[r]ather, it must be shown that because of the affliction, the person was incompetent at the time of the transaction"; *Matter of Friedman*, 26 A.D.3d 723, 809 N.Y.S.2d 667 (3d Dep't 2006). Similarly, even a person who has a long history of diminished capacity may still execute a Will during what is known as a "lucid interval"—i.e., a period of time during which the person was coherent and the threshold for testamentary capacity is met. *See, e.g., Matter of Williams*, 13 A.D.3d 954, 957, 787 N.Y.S.2d 444 (3d Dep't 2004), *citing Matter of Buchanan*, 245 A.D.2d 642, 644, 665 N.Y.S.2d 980 (3d Dep't 1997); *Matter of Beneway*, 272 A.D. 463, 467 468, 71 N.Y.S.2d 361 (3d Dep't 1947). Likewise, an "insane delusion"—a belief contrary to all rational objective evidence—does not prevent a person from making a Will; the delusion only invalidates any effected parts of the Will. *Matter of White*, 2 N.Y.2d 309, 160 N.Y.S.2d 841(1957), stating "[t]he holding of delusions does not in and of itself constitute testamentary incapacity. There may co exist delusion and a disposing mind"; *see also Matter of Heaton*, 224 N.Y. 22 (1918).

11. *See, e.g., Matter of Fish*, 134 A.D.2d 44, 46, 522 N.Y.S.2d 970, 972 (3d Dep't 1987); *Matter of Bush*, 85 A.D.2d 887, 888, 446 N.Y.S.2d 759, 761 (4th Dep't 1981).

12. 2012 N.Y. Slip Op. 31780(U) (Sur. Ct., Monroe Co. 2012).

13. *Id., citing Matter of Bush*, 85 A.D.2d 887, 888, 446 N.Y.S.2d 759, 761 (4th Dep't 1981); *Matter of Walker,* 80 A.D.3d 865, 867, 914 N.Y.S.2d 379, 382 (3d Dep't 2011).

14. *Cf. Matter of Flynn*, 71 A.D.2d 891, 419 N.Y.S.2d 634 (2d Dep't 1979), discussed at section II(D).

15. 80 A.D.3d 865, 914 N.Y.S.2d 379 (3d Dep't 2011).

16. *Id., citing Matter of Fish, supra.*

17. *Id., citing Matter of Bush*, 85 A.D.2d at 888, 446 N.Y.S.2d at 761; cf. *Matter of Slade*, 106 A.D.2d 914, 915, 483 N.Y.S.2d 513 (4th Dep't 1984).

18. 85 A.D.2d 887, 446 N.Y.S.2d 759 (4th Dep't 1981).

19. *Matter of Bush*, 85 A.D.2d at 888, 446 N.Y.S.2d at 761 (emphasis added).

20. *Matter of Fish*, 134 A.D.2d 44, 46, 522 N.Y.S.2d 970, 972 (3d Dep't 1987).

21. *Id., citing Matter of Bush, supra*.

22. *Id., citing Matter of Delmar*, 243 N.Y. 7, 14 15 (1926); *Matter of Slade*, 106 A.D.2d 914, 915, 483 N.Y.S.2d 513 (4th Dep't 1984); *Matter of Flynn*, 71 A.D.2d 891, 892, 419 N.Y.S.2d 634 (2d Dep't 1979).

23. In his dissenting opinion, Justice Harvey stated: "While a court must look to these factors when considering capacity (*Matter of Slade, supra*), they are 'but rough guides' and each case must be decided upon its particular facts and circumstances (2B Warren's Heaton, Surrogates' Courts § 186 c [1] [c], at 32 238 [6th ed]; s*ee, Matter of Horton*, 26 Misc. 2d 843, 203 N.Y.S.2d 978, *aff'd,* 13 A.D.2d 506, 214 N.Y.S.2d 653 [2d Dep't 1961]). These factors are not the exclusive criteria to be considered and the relative importance of the factors will vary according to the particular facts. Thus, the fact that a decedent's will was based upon a mistaken idea as to the extent of his property did not mandate that the will be denied probate (*see In re Jones' Will*, 85 N.Y.S. 294, 296 [Sur. Ct., N.Y. Co. 1986]; *see also Matter of Santamorina*, 213 NYS 2d 555 [Sur. Ct. Westchester Co. 1961]). Similarly, testamentary capacity was found and a will admitted to probate even where the decedent did not know the natural object of his bounty (*see Matter of Arnold*, 200 Misc. 909, 107 N.Y.S.2d 356 (Sur. Ct., N.Y. Co. 1951), *aff'd,* 282 A.D. 670, 122 N.Y.S.2d 804 [1st Dep't 1953])." *Matter of Fish*, 134 A.D.2d at 46, 522 N.Y.S.2d at 972 (Harvey, J., dissenting).

24. 243 N.Y. 7, 152 N.E. 448 (1926).

25. 71 A.D.2d 891, 419 N.Y.S.2d 634 (2d Dep't 1979).

26. 106 A.D.2d 914, 483 N.Y.S.2d 513 (4th Dep't 1984).

Jim D. Sarlis' office is in Rosedale. He is a graduate of Columbia University as well as Fordham University School of Law, where he was a member of the *Urban Law Journal*. He also studied taxation in the Master of Laws (LL.M.) program at New York University School of Law. Mr. Sarlis has been a guest lecturer at New York Law School on the subject of Will Drafting, and has taught Real Estate Law and Legal Writing in the ABA-governed paralegal program of the City University of New York. Mr. Sarlis is admitted to the New York State Bar, the Federal Courts for the Southern and Eastern Districts of New York, and the U.S. Tax Court.

Disclosure of Tax Returns in the Surrogate's Court

By Jennifer F. Hillman

The battle over disclosure of income tax returns and confidential financial records is a familiar one for many estate litigators. Maybe you have represented beneficiaries who insist upon the disclosure of a trustee's personal income tax returns because they know they'll find some "funny business." Other clients are certain that just the threat of this disclosure will force their adversary to cave to settlement demands. Or maybe there really is a genuine reason for the discovery demand. Whether it is legitimate or simply curiosity, the dueling motion to compel and application for a protective order are inevitable. Rarely will an adversary disclose an individual's financial records without at least a perfunctory objection to the discovery demand. This article reviews the standard for disclosure of income tax returns and other confidential financial information of individuals in the context of several recent Surrogate's Court decisions.

Basic Standard

CPLR 3101(a) directs full disclosure of all evidence material and necessary, which will "assist preparation for trial by sharpening the issues and reducing delay and prolixity."[1] While tax returns are deemed confidential under 26 U.S.C. 6103, this protection is intended to protect tax information from disclosure by government officials.[2] However, neither the Internal Revenue Code nor any regulations issues thereunder preclude a court from requiring disclosure of a tax return by the taxpayer in connection with civil litigation to which the taxpayer is a party.

Because the disclosure of tax returns and financial records is disfavored, the party seeking to obtain production of income tax returns must make a strong showing of necessity and an inability to obtain the information contained in the income tax return from any other source.[3] A party will not be required to produce an income tax return if the information may be obtained from any other source.[4]

Disclosure of a Fiduciary's Personal Financial Information

Matter of Herscher[5] is an interesting analysis of this standard. The trust at issue had been established by the parties' mother. The children shared equally in the trust's remainder, but Son objected that the distribution was improperly delayed. Son demanded disclosure of Daughter's tax returns to ensure that all trust assets were accounted for and there were no improper payments by the trustee. Daughter sought Son's tax returns based upon an informal contention by Son that he may have suffered damages due to her tax accounting for the trust, even though the claim was not part of Son's formal objections.

The New York County Surrogate's Court looked at each claim separately and determined that Daughter's personal income tax returns were discoverable because of the significant allegation (supported by documentary evidence) of fiduciary misconduct, including commingling of trust assets with the trustee's personal assets. Daughter's returns were initially provided for an in-camera review by the Court. However, since no formal objections placed Son's income tax returns at issue, Daughter failed to meet even a relevance standard, much less the higher standard needed for disclosure. A protective order was thus issued preventing disclosure of Son's returns.

In this regard, because the fiduciary owes a fiduciary duty to the beneficiaries of a trust or an estate, substantiated allegations of self-dealing or other acts that may be discovered through the disclosure of personal income tax returns may warrant disclosure. For example, in *Matter of Zirinsky*,[6] the fiduciary's attorneys had admitted that the fiduciary's returns contained some entries attributing unallocated expenses to his personal income and other returns for some years when no such attribution was made. The allegations, combined with some facts already revealed and uncontroverted, were deemed sufficient to meet the objectants' burden, allowing them to obtain the fiduciary's personal income tax returns.

Disclosure of a Beneficiary's Personal Financial Information

These scenarios take on a slightly different review in the context of a beneficiary. *Matter of McClusky*[7] involved allegations of imprudent investing by the trustee of a testamentary trust. The trustee requested objectants' personal investment portfolio to determine whether the objectants would have chosen to sell or retain the trust securities, had the trustee distributed the securities to them on an earlier date. Trustee hoped this would offset any damages resulting from his retention of the trust securities by showing the objectants would

not have sold the securities during that time period, even if they had been able to do so.

In denying the request, the Court found that the trustee's argument that an imprudent trustee can offset any losses resulting from his mistakes if he or she can show that the beneficiaries would have made the same mistakes, was positing false logic. Indeed, that rationale incorrectly implies that if the beneficiaries themselves failed to meet the investment standard set by the Prudent Investment Act, they are not entitled to recovery. To the contrary, it is the trustee who owes the fiduciary duty to the beneficiaries, regardless of what the beneficiaries may or may not have done.

Similarly, in *Matter of Winston*,[8] the trustee sought the beneficiary's tax returns to determine whether a distribution of principal was warranted. The Court closely reviewed the trust to determine whether it was the decedent's intent that any invasion of principal must be based upon petitioner's need for support and welfare. The Third Department found that because there was no stated requirement in the trust that invasion could only be for the beneficiary's support and welfare, decedent made clear his intent that petitioner's need should play no role in the invasion of principal of the testamentary trust. Thus, the trustee was not entitled to disclosure of the beneficiary's income tax returns.

The Fishing Expedition

As illustrated by these recent cases, confidential financial information of parties is protected from disclosure absent the necessary strong showing that the information is indispensable. The Court will not countenance a fishing expedition. For example, in *Matter of Sandin*,[9] the petitioner, a beneficiary under will of her deceased father, instituted proceeding against the executor to supply information under SCPA 2102 to trace certain bank accounts that were in the name of decedent either individually or jointly with another, which may have been transferred to the executor's personal account.

After reviewing the subpoena and the allegations raised in the discovery proceedings, the court found that the bank records relating to those accounts on which the decedent's name appeared, either alone or with another, were relevant and material to identifying possible estate assets. Nonetheless, it was held that the circumstances did not justify an order directing the bank to produce the executrix's own personal accounts, some of which may have nothing to do with the decedent's estate.[10]

Remedies

Rather than a protracted disclosure battle, counsel should consider alternatives, including stipulated facts or other less invasive disclosure. CPLR 3103 governs the subject of protective orders for disclosure abuses, and confers broad discretion upon a court to fashion appropriate remedies both where abuses are threatened, and where they have already occurred. This includes an order "denying, limiting, conditioning or regulating" the use of any disclosure device, with such order designed "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" to any person.[11]

In *Carvel*,[12] income tax returns were produced to the Court first to determine if any part should be subject to redaction for confidentiality. However, in *Zirinsky*,[13] the Court would not accept admissions by the fiduciary in lieu of the actual tax returns because of the alleged substantiated allegations.

Nevertheless, even if there is disclosure of tax returns, some redaction is allowable, and sometimes advisable.[14]

Endnotes

1. *Matter of Carvel*, 168 Misc. 2d 442, 642 N.Y.S.2d 1012 (Sur. Ct., Westchester Co. 1996).
2. *Id.*
3. *Abbene v. Griffin*, 208 A.D.2d 483, 616 N.Y.S.2d 1025 (2d Dep't 1994); *Cosentino v. Schwartz*, 155 A.D.2d 640, 548 N.Y.S.2d 242 (2d Dep't 1989).
4. *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 773 N.Y.S.2d 116 (2d Dep't 2004).
5. N.Y.L.J. Aug. 15, 2012, p. 22, col. 6 (Sur. Ct., N.Y. Co.) (Glen, J.).
6. 26 Misc. 3d 625, 889 N.Y.S.2d 423 (Sur. Ct., Nassau Co. 2009).
7. N.Y.L.J. Oct. 19, 2012 (Sur. Ct., Nassau Co.).
8. 205 A.D.2d 922, 613 N.Y.S.2d 461(3d Dep't 1994).
9. 134 Misc. 2d 968, 513 N.Y.S.2d 645 (Sur. Ct., Nassau Co. 1987).
10. *Id.*
11. N.Y. Civil Practice Law and Rules Section 3103; *see Estate of Carvel*, N.Y.L.J. April 15, 1998, p. 1, col. 6 (Sur Ct., Westchester Co.).
12. *Id.*
13. 26 Misc. 3d 625, 889 N.Y.S.2d 423 (Sur. Ct., Nassau Co. 2009).
14. *See Bibeau v. Cantiague Figure Skating Club*, 294 A.D.2d 525, 741 N.Y.S.2d 864 (2d Dep't 2002), finding the lower court erred in compelling plaintiff to furnish unredacted income tax returns containing her social security number.

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Vacating Probate Decrees

By Robert M. Harper

Vacatur of a probate decree is an extraordinary remedy that disrupts the orderly administration of estates. Given that public policy and judicial economy disfavor post-probate will contests and, more generally, inefficiency in the administration of estates,[1] courts have applied heightened standards in cases concerning vacatur of probate decrees, requiring parties seeking such relief to do much more than merely allege facts which might be sufficient to question a probated instrument's validity.[2] This article addresses the standards applied by the courts in granting and denying applications to vacate probate decrees. Practitioners should be mindful of these standards when counseling clients as to how best to make—or, for equal measure, oppose—a vacatur application.

Vacatur Without a Waiver and Consent

The standard that is most frequently applied by the courts is the one that governs when a party seeking vacatur has not previously executed a waiver consenting to the issuance of a decree admitting the propounded instrument to probate. Such a party must establish "a substantial basis for its contest and a reasonable probability of success" on the merits in order to prevail on a vacatur application.[3]

The Court of Appeals adopted this standard in 2008, in *American Committee for the Weizmann Institute v. Dunn*.[4] There, the decedent executed a will five days before she died, nominating her brother as executor and bequeathing her apartment to her niece (collectively, the "respondents").[5] After the decedent's death, her brother petitioned to have the will admitted to probate, which was granted by a decree of the Surrogate's Court.[6]

Several months later, the petitioner, a charitable organization, commenced a proceeding to vacate the decree, arguing, *inter alia*, that the respondents unduly influenced the decedent to execute the propounded instrument.[7] As support for its position, the petitioner alleged that the "decedent had long intended to make a sizeable donation to" the petitioner;[8] that the decedent and her husband executed reciprocal wills leaving their respective residuary estates to the petitioner;[9] and that the decedent subsequently pledged to donate her apartment to the petitioner.[10] In addition, the petitioner alleged that the decedent executed the probated will just a few weeks after being diagnosed with terminal gall bladder cancer and moving into her brother's home for care;[11] that, at the time, the decedent "was in a severely weakened condition"; and that the propounded instrument was "an unexplained departure" from the decedent's decades-long testamentary plan to benefit the petitioner.[12]

When the respondents moved to dismiss the petition, pursuant to CPLR 3211(a)(7), the Surrogate's Court granted the motion and the Appellate Division affirmed.[13] The Court of Appeals affirmed as well.[14] In doing so, the Court rejected the petitioner's argument that "a probate decree should be vacated…if a party's verified petition contains allegations that, if taken as true, would cause a reasonable person to be uncertain that the probated will was validly made."[15] As the Court explained: "Permitting vacatur of a probate decree based upon mere allegations…would be unduly disruptive and could encourage specious claims in the hope of securing unjustified settlements that would upset the legitimate expectations of a decedent's intended beneficiaries."[16]

In order to avoid such a result, the Court held that: "a probate decree should [only] be vacated…if [the] petitioner can demonstrate facts constituting a substantial basis for challenging the proffered will and a reasonable probability of success on the merits of its undue influence claim."[17] Applying that standard, the Court rejected the petitioner's argument that it had met its burden by "showing a dramatic departure from a longstanding testamentary plan by a testator who, at the time the challenged will was executed, was in a weakened condition and in the care of persons benefitting from that will."[18]

The Court noted that although the petitioner's documentary proof might have established her intent to benefit the petitioner at one time, it did not show that the decedent possessed that intent in the years before her death.[19] Additionally, the Surrogate's denial of vacatur—and the Appellate Division's affirmance—were further supported by "the fact that the challenged will left [the] decedent's co-op to her niece, a close relative whose father—decedent's brother and executor—opened his home to [the decedent] while she received hospice care for terminal cancer during her final days."[20] Accordingly, vacatur was not warranted.

Since *Weizmann Institute*, Surrogate's Courts have routinely applied the standard articulated by the Court of Appeals in deciding whether to vacate probate decrees. The Surrogates have done so in both granting and, more frequently, denying vacatur petitions.[21]

In re Efros is one example of a case in which vacatur was found to be warranted.[22] There, the decedent died in September 2005, at ninety-three years of age, survived by two nephews.[23] A will benefiting the nephews was admitted to probate by decree in February 2006.[24]

In August 2006, the decedent's friend and investment adviser (who was also a legatee of a small bequest under the probated instrument) learned that the decedent's testamentary plan had been substantially altered from her penultimate will, and that the decedent's longtime attorney had not supervised the execution of the probated will.[25] Additionally, the investment advisor recalled that the decedent had suffered a stroke in the months before she executed the probated instrument; that the decedent's nephews had assumed increased control over her finances after the stroke; and that the nephews had pressured the decedent to alter her will during that period.[26] The investment advisor's recollection was bolstered by recordings of daily conversations that he had with the decedent, which were made because he worked on an active trading floor.[27]

Based upon the foregoing, the investment adviser delivered transcripts of the recordings to JP Morgan Chase Bank, N.A. ("JP Morgan"), the corporate fiduciary that served as co-executor with the nephews.[28] JP Morgan moved to vacate the probate decree and for the removal of the nephews as co-executors.[29] Several of the charities which were treated more favorably in the decedent's prior will joined in the motion.[30]

Former New York County Surrogate Kristin Booth Glen granted JP Morgan's motion, finding the bank had presented a substantial basis for contesting the probated instrument (based upon undue influence) and a probability of success on the merits.[31] As support for her conclusions, Surrogate Glen found that the taped conversations provided "sufficient evidence of motive, opportunity and actual undue influence" being practiced upon the decedent. The Surrogate explained that "the facts presented…paint[ed] a picture of a 93 year old woman who believed she 'had no choice' but to change her will to accord with the unremitting demands of her closest family members."[32] Accordingly, based upon the particularly egregious facts of the case, vacatur was warranted.[33]

In sum, when the party seeking vacatur has not signed a waiver and consent to probate, that party must be prepared to present a substantial basis for contesting the probated instrument and a reasonable probability of success on the merits. The failure to do so likely will result in the denial of the party's prayer for relief.

Vacatur and Consents to Probate

In contrast to circumstances in which a party seeking vacatur has not consented to the admission of a testamentary instrument to probate, a party who has executed a waiver and consent to probate and subsequently seeks to vacate a probate decree must meet a more rigorous standard.[34] Specifically, such a party must show that his or her consent was obtained by fraud or overreaching; the consent "was the product of misrepresentation or misconduct"; or "newly discovered evidence, clerical error or other sufficient cause justifies the reopening of the decree."[35]

In re Coccia provides a helpful analysis. In *Coccia*, the movant signed a waiver and consent with respect to the admission of a will to probate.[36] After Kings County Surrogate Margarita Lopez-Torres issued a decree admitting the instrument to probate, the movant sought to have the decree vacated.[37] The movant alleged that he "did not appreciate or understand the significance of the waiver and consent" and that the decedent lacked capacity at the time that she executed the will.[38]

Neither the Surrogate nor the Second Department was persuaded by the movant's allegations.[39] The movant had failed to demonstrate the "substantial cause" necessary for vacatur for a variety of reasons, not the least of which was that the medical records upon which the movant relied in seeking vacatur were in his possession at the time that he signed the waiver and consent to probate.[40]

Thus, when a party seeking to vacate a probate decree has signed a waiver and consent to probate, the party must demonstrate that the waiver was a product of fraud or overreaching; resulted from a misrepresentation or misconduct; or should be excused by virtue of newly discovery evidence, clerical error, or other sufficient cause. Otherwise, the vacatur application likely will be denied.

Vacatur in the Interests of Justice

In those circumstances where the party seeking vacatur fails to meet the aforementioned standards for such relief, a Surrogate's Court may, nevertheless, vacate a probate decree in the interests of justice.[41] Although it is rarely granted, vacatur in the interests of justice may be warranted when "it appears that substantial justice will be served and injustice prevented" through vacatur.[42]

In re Blaukopf is illustrative.[43] There, the decedent's distributees moved for an order vacating the decree admitting the decedent's alleged will to probate; granting them the opportunity to examine the witnesses to the instrument's execution; and directing that probate objections be filed within a reasonable time.[44]

Former Nassau County Surrogate John B. Riordan granted the distributees' motion in the interests of justice, concluding that the proponent of the probated instrument "submitted false information to the court, and only when challenged did she change her sworn state-

ments"; the proponent amended the probate petition to omit information reflecting her status as the decedent's "live-in companion" to avoid the appearance of a confidential relationship; and the probated will differed substantially from the copy of a prior instrument that the distributees provided to the court.[45] In doing so, Surrogate Riordan opined that his "paramount concern [was] to admit only valid wills to probate" and that the proponent's apparent dishonesty was a cause for concern in that regard.[46]

On appeal, the Second Department affirmed, finding that the Surrogate's Court properly "exercised its inherent powers to 'vacate its own [decree] for sufficient reason and in the interests of substantial justice.'"[47] As the Appellate Division explained, "the fact that the petitioner filed a total of three different petitions for probate and letters testamentary wherein she made several conflicting statements" was sufficient to warrant vacatur.[48]

While vacatur in the interests of justice is not appropriate in most cases, a Surrogate's Court may grant it, in the exercise of its discretion, when the party that proffered the probated instrument to the court engaged in egregious conduct. Such egregious conduct certainly includes dishonesty that causes the Surrogate's Court to question the validity of a probated instrument.

Pre-Vacatur Disclosure

Recognizing the difficulty of meeting the standard for vacatur, litigants seeking such relief have requested pre-vacatur disclosure in an effort to improve their chances of success on the merits.[49] Despite those efforts, however, the Court of Appeals and Appellate Division have found that pre-vacatur discovery is impermissible.[50]

Notably, in *In re Kelsall*, the Third Department addressed this very issue.[51] There, the decedent's will was dated March 1994, although the self-proving witness affidavit was not executed until three years later, in May 1997.[52] Nonetheless, the instrument was admitted to probate in December 2008, without objection by the respondent.[53]

Shortly thereafter, the instrument's proponent, the nominated fiduciary and sole beneficiary, sought to invalidate a deed conveying real property previously owned by the decedent to the respondent.[54] As part of that litigation, the respondent's attorney examined the decedent's legal files and spoke with the witnesses to the will's execution.[55] The respondent's counsel's review of the decedent's legal files and conversations with the witnesses caused the respondent to question the will's validity.[56]

Given his questions, the respondent commenced a proceeding to vacate the decree admitting the will to probate, arguing that he should be permitted to file objections to probate and to obtain discovery concerning the circumstances of the will's execution.[57] The Surrogate's Court agreed, in part, issuing an order granting the respondent's request for discovery, pursuant to SCPA 1404, and reserving decision on vacatur, pending completion of disclosure.[58]

On appeal, the Third Department reversed, holding that "discovery cannot be permitted unless the decree of probate is set aside."[59] In making that determination, the Appellate Division opined: "While SCPA 1404… does not explicitly provide that a decree of probate must be vacated prior to allowing discovery, the statute has clearly been interpreted by the Court of Appeals as requiring such vacatur."[60]

Thus, as challenging as it may be, a party petitioning for vacatur of a probate decree must be prepared to carry its burden without the aid of discovery. This is because a Surrogate's Court is unlikely to permit discovery unless it concludes that vacatur is warranted.

Entitlement to an Evidentiary Hearing

The issue of whether a party seeking vacatur is entitled to an evidentiary hearing before the party's petition is dismissed is not necessarily settled. On the one hand, at least one commentator has opined that "[a]n application to vacate a decree should not be denied without first providing the petitioner with an opportunity to be heard at a hearing;"[61] on the other hand, case law suggests that a hearing is not required when the party seeking vacatur fails to show "some degree of probability that his [or her] claim is well founded, and that, if afforded an opportunity, he [or she would] be able to substantiate it."[62]

In re Loverme addresses this issue. In *Loverme*, the petitioner, the niece of the decedent's second wife, sought to vacate a decree admitting a will to probate, based upon allegations that the decedent executed it under the undue influence of his third wife (who was also the niece of his first wife).[63] Notably, the probated will, which the decedent executed two years after marrying his third wife, left the entirety of his estate to his third wife and disinherited the relatives for whom he provided in a prior instrument.[64]

Although the Surrogate's Court dismissed the vacatur petition without a hearing, the Second Department reversed.[65] In doing so, the Appellate Division referenced the "substantial basis" that the petitioner presented for contesting the probated instrument, including medical records and a missing person's report demonstrating that the decedent was afflicted with Alzheimer's Disease, suffering from memory loss and confusion, and operating under his third wife's undue influence at the time that he executed the instrument.[66] All of those factors, taken in conjunction with the fact that the decedent previously expressed an intention to

benefit members of his extended family with whom he was close, constituted a "substantial basis for contesting the…will" and necessitated an evidentiary hearing.[67]

Conversely, in *In re Leslie's Estate*, the Surrogate's Court denied an alleged distributee's motion to vacate a probate decree without holding a hearing on the matter. The First Department affirmed, finding that the circumstances did not warrant either a hearing or the taking of any evidence.[68] The Appellate Division reasoned that a hearing is not necessary absent a showing of "some degree of probability that [the claim of the party seeking vacatur] is well founded, and that, if afforded an opportunity, [the party would] be able to substantiate it."[69]

While a hearing may be warranted before dismissal in certain circumstances, such as the ones that existed in *Loverme*, a hearing is not necessarily always required. For a party seeking vacatur to ensure that he or she receives a hearing, the party should be prepared to make a showing of "some degree of probability that [his or her claim] is well founded, and that, if afforded an opportunity, [he or she will] be able to substantiate it."[70]

Standing, Vacatur, and Lost Wills

When the standing of a party seeking to vacate a decree admitting a will or codicil to probate is based upon that party's status as a legatee in a prior testamentary instrument and the original prior testamentary instrument cannot be located, the proponent of the probated will or codicil may move to dismiss the vacatur petition for want of standing. In certain circumstances, the proponent's efforts will prove successful.

In re Nappo is illustrative.[71] There, the decedent's stepson commenced a proceeding to vacate a decree admitting the decedent's 2008 will to probate.[72] Inasmuch as the stepson was not one of the decedent's distributees, his standing to seek vacatur of the probate decree rested upon his status as a legatee in the decedent's prior will, a 2007 will.[73] As the original 2007 will had been retained by the decedent and could not be located, the respondent, the executor under the 2008 will, argued that the stepson lacked standing to seek vacatur of the decree admitting the 2008 will to probate.[74]

In ruling for the respondent, Suffolk County Surrogate John M. Czygier, Jr. opined that, as the original 2007 will was last known to be in the decedent's possession and could not be located, the stepson would have to overcome the presumption that the instrument had been revoked.[75] Given that the likelihood of the stepson overcoming that presumption was "too remote to afford [him] standing," the Surrogate denied the stepson's petition for vacatur of the decree admitting the 2008 will to probate.[76]

Former New York County Surrogate Renee R. Roth reached a similar conclusion in *In re Stern*.[77] There, the beneficiaries under the decedent's 1981 will petitioned for vacatur of the decree admitting his 1993 will to probate.[78] Although Surrogate Roth found that the beneficiaries had established a substantial basis for contesting the validity of the 1993 will, she declined to vacate the decree admitting that instrument to probate.[79] Surrogate Roth reasoned that the beneficiaries had to prove that the 1981 will was a valid testamentary instrument and was not revoked, as the beneficiaries were not distributees of the decedent and could not locate the original 1981 will.[80] As a result, the Surrogate directed the parties to complete discovery concerning the validity of the 1981 will and to appear before her for a lost will hearing.[81]

While *Nappo* and *Stern* stand for the proposition that a lost will is not, in and of itself, sufficient to confer standing upon a party seeking to vacate a probate decree, several Surrogates have reached contrary conclusions on this issue.[82] In *In re Kramer*, Nassau County Surrogate Edward W. McCarty, III held that the beneficiaries under a lost will had standing to petition for vacatur of a decree admitting the decedent's last will and testament to probate.[83] However, Surrogate McCarty may have been influenced by the fact that both the prior will and the probated instrument were lost wills.[84]

A lost will may not be sufficient to confer standing upon a beneficiary whose status rests upon the lost instrument, even if the beneficiary presents facts and circumstances sufficient to warrant vacatur on the merits. To ensure that standing exists, a beneficiary under a prior will must either obtain the original instrument under which he or she benefits (and, of course, file the same with the Surrogate's Court) or be prepared to satisfy the requirements for having a lost will admitted to probate, especially as they relate to the presumption of revocation.

Laches as an Affirmative Defense

A party seeking to vacate a probate decree should petition for such relief as quickly as possible, as the failure to do so may give rise to laches. Laches is "defined as unreasonable delay resulting in prejudice to other parties."[85] It has been recognized as a basis for denying vacatur in cases involving delays of as little as eight months between the entry of a probate decree and the commencement of a vacatur proceeding.[86]

The First Department's decision in *In re Bryer* is instructive.[87] In *Bryer*, after the petitioner consented to the admission of his mother's will to probate, a decree issued admitting that instrument to probate.[88] Twelve years later, the petitioner sought to have the decree vacated, alleging that his father used "financial leverage" over him to obtain his consent.[89]

Neither the Surrogate's Court, nor the Appellate Division was persuaded by the petitioner's argu-

ments.[90] Former Surrogate Roth granted the respondent's motion for summary judgment, finding that the petitioner was guilty of gross laches.[91] In affirming the Surrogate's order, the First Department held that the petitioner had failed to present a valid excuse for his twelve-year delay in seeking to vacate the probate decree.[92]

In short, the failure to promptly commence a proceeding to vacate a probate decree may prove to be fatal to the petitioner's application. Indeed, in certain circumstances, such a failure may give rise to gross laches, thereby precluding vacatur.

Vacatur and *in Terrorem* Clauses

In terrorem provisions, which are more commonly known as "no contest" clauses, generally state that beneficiaries forfeit their interests in estates by contesting the validity of the governing wills and/or codicils.[93] While these provisions are strictly construed,[94] at least one Surrogate, former Surrogate Glen, has found (in the context of a construction proceeding) that petitioning to vacate a probate decree would trigger an *in terrorem* clause contained in the instrument admitted to probate.[95] Practitioners should be forewarned as to that possibility.

Nonetheless, there are limited circumstances in which the presence of an *in terrorem* clause in a probated instrument, when taken in conjunction with other factors, may militate in favor of vacatur. For evidence of this, counsel need not look any farther than Surrogate Czygier's decision in *In re King*.[96]

In *King*, the respondents' counsel appeared on the return date of citation to request S.C.P.A. § 1404 examinations.[97] After the examinations were scheduled, the propounded instrument's attorney-draftsperson died and the examinations were adjourned *sine die*.[98] Insofar as the respondents' attorney did not reschedule the examinations or even attend the next court appearance, a decree admitting the propounded instrument to probate issued.[99]

Several weeks later, after learning of the decree, the respondents moved for an order of vacatur, which the Surrogate granted.[100] As Surrogate Czygier explained, the probated will contained an *in terrorem* clause, which "[made] the ability to conduct 1404 examinations particularly valuable, since a potential objectant [can] conduct 1404 examinations without triggering the *in terrorem* clause."[101] Accordingly, given the circumstances of that case, "the competing interests evident in the courts' reluctance to vacate their own decrees when juxtaposed against the similar reluctance to enforce *in terrorem* clauses," allowed for vacatur of the probate decree.[102]

Practitioners should be mindful of the possibility that their clients will trigger *in terrorem* clauses by commencing vacatur proceedings. The failure to do so may have several unintended consequences, not the least of which is the forfeiture of a bequest under a will containing an *in terrorem* clause.

Conclusion

Given the courts' aversion to post-probate will contests and inefficiency in the administration of estates, parties seeking to vacate probate decrees are required to satisfy the heightened standards established for such relief. The failure to meet these rigorous standards articulated by the courts generally will prove fatal to a vacatur application, as courts are loathe to undo the decrees that they have issued admitting testamentary instruments to probate. In counseling clients as to how best to make or oppose a vacatur application, practitioners should be mindful of the heightened standards and the issues attendant thereto, especially those that are discussed in this article.

Endnotes

1. *In re Efros*, 19 Misc. 3d 1113(A), at *4, 859 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2008).
2. *In re Bobst*, 165 Misc. 2d 776, 782, 630 N.Y.S.2d 228 (Sur. Ct., N.Y. Co. 1995).
3. *Am. Comm. for the Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 94, 854 N.Y.S.2d 89 (2008); *In re Rizzuto*, 66 A.D.3d 1033, 886 N.Y.S.2d 819 (2d Dep't 2009).
4. *See Weizman Inst.*, 10 N.Y.3d at 94.
5. *See id.* at 86-87.
6. *See id.*
7. *See id.*
8. *See id.* at 87-88.
9. *See id.*
10. *See id.*
11. *See id.* at 89-90.
12. *See id.*
13. *See id.*
14. *See id.* at 89-91.
15. *See id.* at 94.
16. *See id.* at 96.
17. *See id.* at 94-97.
18. *See id.* at 97.
19. *See id.* at 97-98.
20. *See id.* at 98.
21. *In re Shanok*, N.Y.L.J., Oct. 12, 2010, p. 30, col. 6 (Sur. Ct., Queens Co.).
22. *In re Efros*, 19 Misc.3d 1113(A), at *1-5, 859 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2008).
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*

30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *In re Coccia*, 59 A.D.3d 716, 716-17, 874 N.Y.S.2d 224 (2d Dep't 2009).
35. *See id.* (citations omitted); *In re Ancona*, 17 A.D.3d 584, 584, 792 N.Y.S.2d 876 (2d Dep't 2005).
36. *See Coccia*, 59 A.D.3d at 716-17.
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *In re King*, N.Y.L.J, May 27, 2008, p. 46, col. 3 (Sur. Ct., Suffolk Co.); *Efros*, 19 Misc. 3d at *5.
42. *Efros*, 19 Misc. 3d at *5; *In re Musso*, 227 A.D.2d 404, 642 N.Y.S.2d 322 (2d Dep't 1996); *see also In re Macior's Will*, 52 N.Y.S.2d 389, 391 (Sur. Ct., Erie Co. 1945) (citations omitted) ("There should be finality and permanency to decrees of the Court and the same should not be vacated and set aside without careful consideration, but the Court should also be slow to say that an injustice may not be corrected. It has been stated that 'the right to reopen or modify in the interests of justice is not open to question.'").
43. *In re Blaukopf*, 23 Misc. 3d 1103(A), at *1-5, 881 N.Y.S.2d 361 (Sur. Ct., Nassau Co. 2009), *aff'd*, 73 A.D.3d 1040, 900 N.Y.S.2d 657 (2d Dep't 2010).
44. *See id.*
45. *See id.*
46. *See id.*
47. *See Blaukopf*, 73 A.D.3d at 1041.
48. *See id.*
49. *Am. Comm. for the Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 94-95, 854 N.Y.S.2d 89 (2008); *In re Kelsall*, 79 A.D.3d 1234, 1234-35, 911 N.Y.S.2d 702 (3d Dep't 2010).
50. *See id.*
51. *See Kelsall*, 79 A.D.3d 1234-35.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. Charles J. Groppe *et al.*, 2 Harris 5th *N.Y. Estates: Probate, Admin. & Litigation* § 21:107 (2011).
62. *In re Leslie's Estate*, 175 A.D. 108, 109-11, 161 N.Y.S. 790 (1st Dep't 1916) affirming the Surrogate's Court's refusal to take evidence upon the question of whether the probate decree should be vacated.
63. *In re Loverme*, 27 A.D.3d 747, 812 N.Y.S.2d 631 (2d Dep't 2006).
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *In re Leslie's Estate*, 175 A.D. 108, 109-11, 161 N.Y.S. 790 (1st Dep't 1916).
69. *See id.*
70. *See id.*
71. *In re Nappo*, N.Y.L.J., June 4, 2010, p. 42, col. 4 (Sur. Ct., Suffolk Co.).
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *In re Stern*, N.Y.L.J., July 20, 1994, p. 25, col. 5 (Sur. Ct., N.Y. Co.).
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *In re Shanok*, N.Y.L.J., Oct. 12, 2010, p. 30, col. 6 (Sur. Ct., Queens Co.) finding that the beneficiaries under a prior will had standing to seek vacatur, despite the fact that original prior instrument was lost.
83. *In re Kramer*, N.Y.L.J., June 17, 2011, p. 36 (Sur. Ct., Nassau Co.).
84. *See id.*
85. *In re Bobst*, 165 Misc.2d 776, 782, 630 N.Y.S.2d 228 (Sur. Ct., New York Co. 1995).
86. *In re Andrasko*, 13 Misc.3d 1245(A), at *1-3, 831 N.Y.S.2d 357 (Sur. Ct., Rockland Co. 2006).
87. *In re Bryer*, 72 A.D.3d 532, 532-33, 901 N.Y.S.2d 160 (1st Dep't 2010).
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. Robert M. Harper, "Triggering In Terrorem Clauses With Out-Of-State Will And Trust Contests," *available at:* http://www.nyestatelitigationblog.com/2009/09/articles/trusts-1/triggering-in-terrorem-clauses-with-outofstate-will-and-trust-contests/ (last viewed October 29, 2012).
94. *In re Ellis*, 252 A.D.2d 118, 127-28, 683 N.Y.S.2d 113 (2d Dep't 1998).
95. *In re Cohn*, N.Y.L.J., Mar. 11, 2009, p. 32, col. 5 (Sur. Ct., N.Y. Co.).
96. *In re King*, N.Y.L.J., May 27, 2008, p. 46, col. 5 (Sur. Ct., Suffolk Co.).
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.* (citation omitted).
102. *See id.*

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Practice Tip: Planning for a Substitute Parent

By Antonia J. Martinez

1. Standby Guardianship

Estate plans typically include a Last Will and Testament or Revocable Living Trust, Power of Attorney, and Health Care Proxy. Guardianship of children, however, usually contemplates only the death of the parent. Although incapacity is often not considered, it should be.

Standby Guardianship[1] designation is used where a parent becomes unable to care for his or her children because of a mental or physical disability. In that respect, Standby Guardianship is analogous to a Power of Attorney designation, which is meant to cover circumstances involving an individual who is alive but unable to manage his or her finances. Estate plans need to include a Designation of *Standby* Guardianship to take effect during a parent's lifetime.

Making a Standby Guardianship designation gives your client a choice. With such a designation, your client can express his or her preference for a child's substitute caretaker. Without such a designation, a court may designate a guardian without your client's input. A Standby Guardianship can be especially helpful to a single parent client with a long-term illness, and where there is no second parent to take over responsibilities.

Your client's choice is not the final word. That's because the designated Standby Guardian authority terminates in sixty days. After that time, the designated Standby Guardian must petition the court for permanent appointment. But courts will generally, in the absence of countervailing factors, defer to a parent's expression of preference of a child's guardian. Your client may also, and at any time, revoke the designation.

Provisions in a Standby Guardianship should include a Health Insurance Portability and Accountability Act of 1996 ("HIPAA") release to allow the designated guardian access to your client's medical records. Without such authorization, your client's physician may be unwilling to provide information to the designated guardian concerning your client's capacity or physical condition. Similarly, if your client lists a guardian and alternate guardian, prepare a HIPAA release for the designated guardian, so that the alternate has access to the designated guardian's medical records, in the event the designated guardian becomes incompetent.

Designations of Standby Guardianship demonstrate to your client that you have considered yet another life circumstance that will provide for your client's children, and may be particularly important to a single parent client.

Sample Designation of Standby Guardianship

I, Lucy Smith, hereby designate my sister, Susan Reynolds, residing at ABC Blvd., Forest Hills, New York, 11375 as standby guardian over my children, Michael Smith (DOB: 1/12/92) and Carla Smith (DOB: 9/18/95), in the event that my husband, Robert Smith, predeceases me or is otherwise unable to care for our children.

If Susan Reynolds is unable or unwilling to act in such capacity, I then designate my friend Beverly Franklin, residing at 22-13 Bay Avenue, Croton-on-Hudson, New York 10520.

The standby guardian's authority shall take effect if and when either my doctor concludes that: (1) I am mentally incapacitated, and thus unable to care for my children; or (2) I am physically unable to care for my children.

Notwithstanding any law to the contrary, my designated standby guardian shall have the power to serve as my personal representative and execute any and all authorization forms or other relevant documents necessary to release and obtain my medical records, and any other medical information. He or she may also receive such records and information that would otherwise be subject to and protected under the Health Insurance Portability and Accountability Act of 1996.

I am consenting in writing before at least two witnesses, to the standby guardian's authority taking effect. I also understand that my standby guardian's authority will end sixty days from its commencement, unless by that date he or she petitions the court for appointment as guardian.

I understand that I retain full parental rights, even after the commencement of the standby guardian's authority, and may revoke the standby guardianship at any time.

_____ _____

DATE LUCY SMITH

WITNESSED BY:

_____ _____

Signature Printed Name

_____ _____

Signature Printed Name

(ACKNOWLEDGMENT)

2. Designation of Person in Parental Relation

If your client is a single parent and will be hospitalized for a short duration, or is leaving the country for a short period, consider a Designation of Person in Parental Relation. Provisions of the General Obligations Law[2] enable a parent of a minor child, or otherwise legally incapacitated adult, to appoint a designee with a legal guardian's authority. This is called "Designation of Person in Parental Relation." Such designation permits the designated person to consent or withhold permission for school-related activities, as well as to consent for medical diagnosis and treatment.

Any adult can be so designated. To be effective the designation must:

- be dated;
- be in writing;
- name the parent;
- name the designee;
- list each minor or incapacitated person; and
- be signed by the parent.

A thirty-day designation requires only a valid parent's signature, while a designation allowing more than thirty days' authority must be notarized. A parent has the right to revoke the designation at any time, and termination of the designation occurs within six months of execution, or upon the death or incapacity of the designated person.

Because the designation terminates upon incapacity of the person designated, you should include HIPAA releases for designations that may be valid for up to six months. A HIPAA release by the primary designee permitting access to medical records by alternate designees should similarly be included.

Sample

I, Avery Wiseman, residing at 124 Croton Avenue, Ossining, New York 10562 (Tel. 914-862-7671) hereby designate *my brother, Jonathan L. Wiseman, residing at 4949 Jericho Lake, Croton-on-Hudson, New York, 10520 (Tel: 914-862-5050)* to make decisions concerning school related activities over my children, Michael Wiseman (DOB: 1/18/98) and Carol Wiseman (DOB: 5/15/99), during the time I am out of the country from March 15, 2007 through May 1, 2007. In the event Jonathan L. Wiseman is unable or otherwise unwilling to carry out his responsibilities, I then designate my neighbor and friend Robin Lakeland of 34 Roseland Drive, Ossining, New York 10562 as Alternate Designee.

My children's mother is deceased and there is no court order preventing me from designating an agent.

_____	_____
Date	Date
_____	_____
Signature of Parent	Signature of Designee
_____	_____
Printed Name	Printed Name
	_____
	Date
	_____
	Signature of Alternate Designee
	_____
	Printed Name

I, Jonathan L. Wiseman, authorize release of my Protected Health Information to Robin Lakeland, Alternate Designee, in the event of my incapacity. This release is limited to my designation as Person in Parental Relation.

_____
Jonathan L. Wiseman

_____
(ACKNOWLEDGMENT)

Endnotes

1. Standby guardianship is governed by Section 1726 of the Surrogate's Court Procedure Act. That Act has been in effect since 1992, and was created in response to the increasing number of diagnoses of AIDS.
2. General Obligations Law § 5-1551.

Antonia J. Martinez, Esq., devotes substantially all her professional time to Trusts & Estates and Elder Law matters. She is a member of the Executive Committee of the New York State Bar Association Elder Law Section and Vice Chair of its Communications Committee that summarizes recent court decisions for publication in the Elder Law Section E-News. She has been active in the Westchester County Bar Association, serving as both Co-Chair and Vice Chair of the Elder Law Committee. Ms. Martinez is a member of the National Academy of Elder Law Attorneys and speaker at Continuing Legal Education programs as well as community programs. Her articles in *The Elder Law Times*, Professional Planning for Wealth & Lifestyle Preservation are distributed to the general public. Antonia J. Martinez is a 1982 graduate of Harvard Law School.

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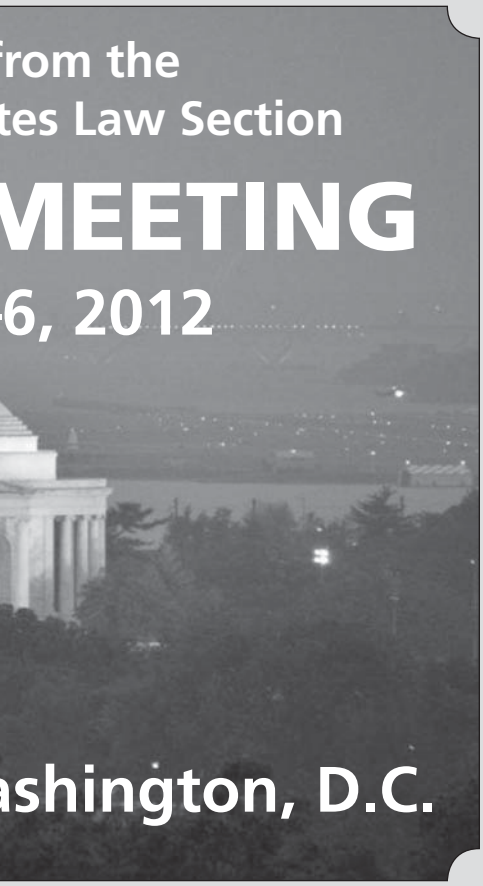
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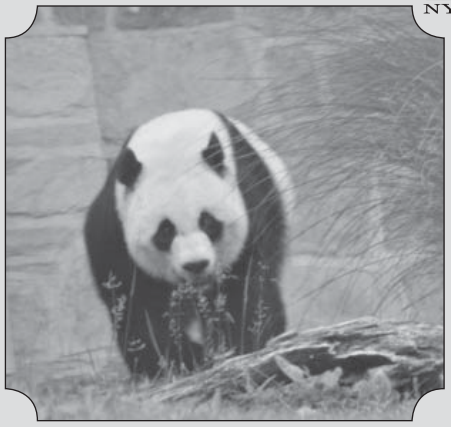


Why Being Classified Under "Observation" While in a Hospital Means Seniors Pay Thousands More

By Anthony J. Enea

Over the last 3 years Medicare patients in a hospital being classified as an "outpatient" under "observation" rather than being formally admitted as an "inpatient" has increased twenty-five (25%) percent, according to a recent study conducted by Brown University. Even without this recent study, the fact that this is occurring more frequently can readily be attested to by many elder law attorneys who are witnessing their clients having to personally pay for the costs of their rehabilitation in a skilled nursing care facility rather than said costs being paid for by Medicare.

Generally, it is not unusual for a hospital to classify a patient in its Emergency Department to be a patient under "observation" and not an "inpatient" that has been formally admitted. However, it appears that in order to avoid penalties being imposed by Medicare as a result of the re-admission of the patient, and to avoid costly audits by Medicare of their admission claims, hospitals are keeping Medicare patients in "observation" status rather than formally admitting them as an "inpatient." As a result of this, the Medicare patient's hospital stay is covered by Medicare Part B rather than Part A, which unfortunately results in the patient having more out-of-pocket costs.

This additional cost to the senior is significantly compounded if the senior needs to be discharged from the hospital to a skilled nursing facility and/or a rehabilitation facility. If the hospital patient has been classified as an "inpatient" while hospitalized and has spent three (3) nights in the hospital, then in that event upon his discharge from the hospital to a skilled nursing and/or rehabilitation facility his or her stay in said facility would be covered in full for the first 20 days, and from day 21 to day 100 Medicare in New York will pay for everything except $144.50 per day as long as skilled nursing and/or rehabilitation services are required by the patient. With the average cost of $369.00 per day in a skilled nursing and/or rehabilitative facility, it is obvious that the classification of the patient as being under "observation" can result in thousands of dollars of additional costs to a patient requiring skilled care and/or rehabilitative services upon his or her discharge from the hospital.

Medicare's pressure upon the hospitals to classify a patient as under "observation" stems predominantly from the fact that the reimbursement to the hospital for the patient in "observation" status is one-third of what it is for an "inpatient." Clearly, this is a significant financial consideration for both Medicare and the hospital. The pressure upon the hospital to make the determination that the patient is under "observation" is further complicated by the fact that if Medicare determines the hospital incorrectly classified the patient as an "inpatient" rather than under "observation" the hospital will be on the hook for the cost of the services it rendered to the Medicare patient. Clearly, the hospital is not in an enviable position. One could only surmise that this will become even more perilous for hospitals and seniors once the Patient Protection and Affordable Care Act ("Obamacare") is fully implemented.

Fortunately, there is federal litigation pending which was filed in November of 2011 by the Center for Medicare Advocacy and the National Senior Citizens Law Center to end these coverage methods. In the meantime, it is important that Medicare recipients be vigilant as to the status of their admission and with the help of their physicians insist that they be classified as an "inpatient." This is of particular importance if the senior will require skilled nursing and or rehabilitative services upon discharge.

Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York and is the Chair of the Elder Law Section of the New York State Bar Association.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

ADOPTEDS

Adopted Persons Barred by Precautionary Addendum from Taking as Issue of Adopting Parent May Take as Issue of Ancestor

In 1957, a mother created an irrevocable lifetime trust for her daughter for the daughter's life and on her death the trust was to be divided into separate trusts for each of the daughter's children. On the death of one of the children the trustee was to distribute the trust principal to the child's descendants and, if none, to the then living descendants of the daughter. The daughter died in 1988 followed in 2008 by her son who had adopted his wife's two adult children three years before his death. The son had been trustee of the trust for his benefit and his executors in their accounting proceeding moved for summary judgment determining that son's two adopted children were the remaindermen of the trust which terminated on his death. The Surrogate denied the motion and the Appellate Division affirmed.

The Surrogate was correct in holding that the precautionary addendum in former DRL 117 applied to the trust because it was created before the provision was repealed in 1964. Under that provision, the adopted children could not be sole remaindermen of the trust since this would cut off the rights of the contingent remaindermen, the daughter's other descendants. However, the son's adopted children could still take as descendants of the daughter, the son's mother, because they would then share the trust property with daughter's two surviving children (their adoptive aunt and uncle). The Appellate Division held that one-third of the trust property was properly distributed to each of the daughter's surviving children and one-sixth to each of the adopted children. *Matter of Boehner*, 94 A.D.3d 477, 941 N.Y.S.2d 155 (1st Dep't 2012).

DEAD BODIES

Failure to Perform Ministerial Action Gives Rise to Liability

In an action by decedent's children for violation of the right of sepulcher, the Appellate Division modified the Supreme Court's decree and granted summary judgment to the children on the issue of liability, holding that the action was timely. The statute of limitations begins to run only when the next of kin suffer mental anguish. That can occur only when they know of the defendant's actions. In addition, the court held that the City could not be shielded from its tortious action because the omitted act was ministerial and not discretionary since the defendant City had all of the necessary information to notify the next of kin but did not do so. Since no further factual development was necessary, the court modified the lower court's decree and granted the children's motion for summary judgment on the question of liability. *Tinney v. City of New York*, 94 A.D.3d 417, 941 N.Y.S.2d 571 (1st Dep't 2012).

William P. LaPiana

GIFTS

Writing on Picture of Monumental Sculpture Is Constructive Delivery

The Court of Appeals affirmed the Surrogate, reversed the Appellate Division, and held that the owner of a monumental sculpture made a completed gift of the object when she gave the donee a picture of the piece on the back of which she had written and signed a statement that she was giving the work to the donee. Such acts presumptively constituted delivery of the gift; intent and acceptance were also established by clear and convincing evidence. Because the executor of the donor's estate and the art dealer who had bought the piece from the donee had agreed that Surrogate's Court would decide ownership of the sculpture on the merits, the possible effect of the statute of limitations on the dealer's claim is irrelevant. *Mirvish v. Mott*, 18 N.Y.3d 510, 965 N.E.2d 906, 942 N.Y.S.2d 404 (2012).

No Gift Based on Letter Opened after Death

Decedent sent his son a letter and instructed his son not to open the letter until the decedent's death. Son complied and when he opened the letter after his father's death he found instructions to retitle certain United States Savings Bonds owned by decedent in the name of son and son's daughter. Attached to the letter was a form to be used to retitle the bonds. The letter bore the decedent's signature and that of his wife, son's stepmother, as "witness." Son brought an action against his stepmother for conversion of the bonds. The trial court granted the stepmother summary judgment

and son appealed. The Appellate Division affirmed, holding that the bonds were not the subject of an inter vivos gift because the decedent did not intend to transfer ownership of the bonds during his lifetime, nor was there actual delivery of the bonds. The terms of the letter indicated that it was not a transfer of present ownership and, because the letter was not executed with testamentary formalities, it could not be a will. *Greene v. Greene*, 92 A.D.3d 838, 938 N.Y.S.2d 629 (2d Dep't 2012).

TRUSTS

Failure to Execute Will Fulfilling Requirement of Prenuptial Agreement by Creating Trusts Held Grounds for Imposing Constructive Trust on Portion of Probate Estate

Prior to their marriage, decedent and his wife entered into a prenuptial agreement which, among other provisions, required decedent to create testamentary trusts for any children of the marriage. The trusts were to be funded with "an amount equal to Seventy Percent (70%) of the value of [decedent's] gross estate" and the terms of the trust or trusts were to be specified in the will. The prenuptial agreement stated that decedent's wife, father, and brother were to be trustees. The decedent died intestate and the administrators and guardians of the property of the decedent's two children petitioned the Surrogate's Court for the imposition of a constructive trust on the appropriate amount of the probate estate and to authorize the administrators and guardians of the property to transfer the funds to two identical trusts for the children.

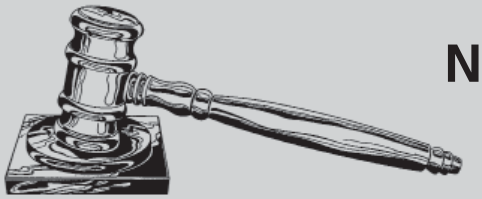
The court held that a constructive trust was the appropriate remedy for the decedent's breach of the prenuptial agreement and that it was proper to order the administrators to create the trusts. Surrogate Scarpino approved the terms proposed for the trusts except for provisions that would not be enforceable had decedent included them in a testamentary trust. Therefore, the proposed exoneration clause, the clause establishing a non-judicial procedure for resignation of the trustees, and the provisions allowing the trustees to remove property from the State of New York, relieving them of the duty to account and giving them the right to submit any dispute to arbitration were not approved. *Matter of Chantarasmi*, 35 Misc.3d 345, 938 N.Y.S.2d 762 (Sur. Ct., Westchester Co. 2012).

WILLS

Valuable Collections of Tangibles Do Not Pass Under Specific Bequest of All Tangible Personal Property

Decedent's will made a specific bequest of all tangibles expressly including "books" to his wife who was also named executor. On her intermediate accounting and on the estate tax return the executor allocated the decedent's multi-million dollar collection of rare books, prints, and other printed materials to her as part of the specific bequest of tangibles. The widow was also the beneficiary of two-thirds of the residuary estate and the decedent's son the beneficiary of the other one-third. The son objected to the intermediate accounting and the court sustained the objection, holding that the bequest of "books" did not unambiguously include the book collection, and that given evidence that the decedent intended to divide the bulk of his estate between his wife and his son, held that the collection passed under the residuary clause. *Matter of Gourary*, 34 Misc.3d 486, 932 N.Y.S.2d 881 (Sur. Ct., New York Co. 2011) (reported in the Spring 2012 newsletter). The Appellate Division affirmed the Surrogate on this issue. In addition, the Appellate Division affirmed the surcharges imposed on the executor for improperly keeping for herself the entire tax refund from her last joint return with the decedent and for the penalties associated with untimely filing of the estate tax returns and payment of the taxes due as well as the Surrogate's imposition of a 6 percent interest rate on the surcharges. *In re Gourary*, 94 A.D.3d 672, 943 N.Y.S.2d 80 (1st Dep't 2012).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is 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).



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

By Ilene Sherwyn Cooper

Advice and Direction

Before the court in *In re Boyer* was a proceeding, pursuant to SCPA 2107, by two of the three trustees of the trust created under the decedent's Will, for advice and direction regarding the listing for sale of the real property owned by the trust, and whether the beneficiary of the subject trust had the right to occupy the real property or alternatively be subject to eviction proceedings. The application was opposed by the trust beneficiary as well as the third trustee. Notably, one of the petitioning trustees was a remainderman of the trust, and the second petitioner was the spouse of a trust remainderman. The third trustee was the sister of the trust beneficiary.

The Will of the decedent granted the trustees all the powers granted to fiduciaries in EPTL 11-1.1, and also specifically granted them absolute discretion to sell all or any portion of any real or personal property of the estate or trust. The record also revealed that the subject real property consisted of a horse farm on approximately 67 acres of land. Prior to her death, the decedent owned a horse boarding business on the farm, on which the trust beneficiary resided and worked. The trust beneficiary continued to operate the horse boarding business and reside on the farm after the decedent's death.

In support of the application for advice and direction, and more specifically, for permission to liquidate the farm, the petitioners alleged that the business being operated on the farm did not generate sufficient income to cover the farm's expenses and that the funds contained in the trust for that purpose would be exhausted by 2013. In opposition to the application, the third trustee maintained that while she did not oppose the sale, she opposed the manner in which it was being handled. Additionally, she claimed that the trustees should be removed and disinterested trustees appointed, given each of their potential and actual conflicts of interest.

The court opined that trustees have broad powers to administer a trust, including the authority to take possession of trust property, unless specifically disposed of, and to sell same on such terms as the trustees conclude will be the most advantageous to those interested in the trust estate. In exercising this authority, trustees are charged with the duty of equal loyalty to all beneficiaries, whether income beneficiaries or remaindermen.

Although a fiduciary may petition the court for advice and direction concerning the administration of a trust, courts are generally loathe to substitute their judgment for those of the fiduciary. On the other hand, the court noted that the statute authorizes a fiduciary to petition for advice and direction concerning the propriety, price, manner and time of a sale "whenever the value of property of an estate is uncertain or dependent upon the time and manner of sale…" SCPA 2107(1).

On this basis, the petitioners maintained that advice and direction was warranted because they received three different opinions as to the farm's value from four different brokers, and because of their concern that the sale would be thwarted by the trust beneficiary. Nevertheless, the court held that the circumstances did not present a novel or complex valuation issue or an issue of uncertain valuation as contemplated by the statute, so as to justify its rendering advice and direction in connection with the sale of the farm. Rather, the determination of the appropriate sale price and terms of sale were matters to be determined by the trustees in accordance with their fiduciary duties and business judgment. Accordingly, the application for advice and direction pursuant to SCPA 2107(1) was denied.

The court also rejected petitioners' request for relief pursuant to SCPA 2107(2). Although the petitioners alleged that extraordinary circumstances existed by virtue of the conflict among the parties, the court found that the provisions of EPTL 10-10.7 authorized the majority of the trustees to act in relation to the issue of the property sale. Indeed, while the court expressed an appreciation for the difficult situation in which the trustees found themselves, it nevertheless concluded that the question presented was one of business judgment and not of law.

Finally, the court denied the application to remove the trustees, finding that the allegations were not severe enough to constitute serious misconduct or to demonstrate prima facie that the trustees were unfit to continue to serve.

In re Estate of Boyer, NYLJ, June 26, 2012, at 28 (Sur. Ct., Dutchess County).

Attorney's Fees

The decedent's daughter, the sole distributee, residuary beneficiary, and executor of his estate, instituted a proceeding to fix and determine the fees of her attorney. The record revealed that counsel was retained shortly after the decedent's death, by letter agreement, to "probate the estate." In addition, counsel agreed to prepare an inventory of estate assets, make required court appearances, marshal assets, obtain an ID number, and review assets for estate tax return purposes. The fee was set at 5% of the value of the gross taxable estate. Counsel billed the petitioner approximately $103,000 for legal services pursuant to the retainer, which petitioner paid, in small part, from her own funds, and from estate funds.

In support of the application, petitioner alleged that counsel took advantage of her in connection with their fee arrangement, and that the reasonable value of his services was not more than $10,000. Counsel moved to dismiss the petition, alleging that the estate had been fully administered and distributed, that counsel fees had been fully paid in accordance with the retainer, and that accordingly the court no longer had jurisdiction over the matter. Counsel further argued that because the petitioner executed the retainer in her individual capacity, the matter was a contractual dispute was between living persons, which the court had no power to address.

The court rejected counsel's argument holding that it had the authority to determine issues concerning attorney's fees involving an estate pursuant to the provisions of SCPA 2110. Although counsel argued that the provisions of the statute created a time limitation on the court's jurisdiction to "any time during the administration of the estate," the court concluded, based on a reading of the legislative history of the provision, that no such limitation was intended. Moreover, and in any event, the court held that it had the inherent authority to supervise the conduct of counsel and the legal fees charged for services rendered, as well as the jurisdiction to do so pursuant to the New York State Constitution.

Counsel additionally argued that because the petitioner individually retained and paid counsel, she was bound by the retainer and the court could not modify its terms. Again, the court disagreed. The court opined that when a retainer prescribes the legal fee to be paid, an attorney bears the burden of establishing that its terms were fairly presented and understood by the client, and that the fee is fair and reasonable. Thus, the court held that the existence of a retainer does not prohibit a review of legal fees, and an agreed-upon fee, even based on a percentage, may be disallowed if the amount of the fee is so large to become out of proportion to the value of the professional services rendered.

The court noted that on a motion to dismiss, the facts alleged in a petition must be accepted as true, and the petitioner must be afforded every possible favorable inference. Accordingly, the court concluded that an evidentiary trial was required concerning the facts and circumstances surrounding the retainer agreement and to determine whether it was fully known and understood by the petitioner, and was fair and reasonable.

In re Lohausen, NYLJ, July 20, 2012, at 38 (Sur. Ct., Queens County).

Gift

In *In re Urry*, the issue before the court was the validity of a purported "deed of gift" by the decedent's surviving spouse to a trust created for the decedent's son.

The decedent's Will left the bulk of her pre-residuary estate to her son from a prior marriage, and directed that the residue thereof be paid over to an inter vivos trust for his benefit. Six months after the decedent's death, her surviving spouse filed a petition for a right of election simultaneously with a "deed of gift" which purported to convey all of his right, title and interest in his elective share to the trust.

The decedent's son sought to enforce the gift; the decedent's spouse opposed maintaining that, because the deed had remained with his prior attorney, delivery of the purported gift was incomplete. The decedent's son responded by producing a copy of the deed, claiming that the original thereof had been given to him by the decedent's spouse, who asked that he make a copy thereof for his records and thereafter return the original to him.

Based on the record, there was no dispute that the decedent's spouse had retained the original deed of gift, and that he, at one time, intended to make a gift of his elective share to the trust created for the benefit of the decedent's son. In view thereof, the decedent's spouse moved for summary judgment.

The court opined that the donee of a purported gift bears the burden of proving each of the elements thereof by clear and convincing evidence. These elements include intent on the part of the donor to make a present transfer; either actual or constructive delivery of the gift to the donee; and acceptance by the donee. The court found that while the record established an intent to make the gift in question as well as acceptance by the donee, the element of delivery was missing. Specifically, the court concluded that even if a copy of the deed of gift had been given to the decedent's son, the spouse's insistence on retaining the original undercut

the claim that he relinquished dominion and control of the property, and that, as such, delivery was complete.

Nevertheless, the decedent's son argued that principles of estoppel precluded the decedent's spouse from claiming a failure of delivery. To this extent, the court noted that a case of equitable estoppel requires proof, by clear and convincing evidence, of three elements: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; and (3) in some instances, knowledge, actual or constructive, of the real facts. Within this context, the court concluded that the record was devoid of any facts to support a claim based on equitable estoppel.

Similarly, the court found that the petitioner had failed to sustain a claim based upon promissory estoppel. The court opined that the elements of a claim based on promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) injury sustained in reliance on the promise. Based on the record, and more particularly, the fact that the decedent's spouse had retained the original deed, and filed his right of election simultaneously with the "deed of gift," the court concluded that the alleged promise by the decedent's spouse was not unambiguous. Further, the court held that the decedent's spouse could not have reasonably foreseen any action or change in circumstances by the decedent's son in reliance on the alleged promise.

Accordingly, based on the foregoing, the court granted the application for summary judgment by the decedent's spouse, and dismissed the petition by the decedent's son.

In re Urry, NYLJ, Apr. 20, 2012, at 22 (Sur. Ct., New York County) (Surr. Anderson).

Jurisdiction

In a proceeding for the allocation and distribution of the proceeds of a wrongful death action, the Surrogate's Court, Queens County, in *In re Stokes*, scheduled a hearing on the grounds that the order of compromise issued by the Supreme Court, purportedly pursuant to EPTL 5-4.6, was not in compliance with the statute.

The court noted that the Supreme Court order allowed the payment of attorney's fees and disbursements without requiring that those funds remain in an interest-bearing escrow account pending the filing of a petition for allocation and distribution. Additionally, the court found that one of the distributees of the decedent was a person under a disability for whom a guardian ad litem should have been appointed. Further, the court determined that in the application before the Supreme Court, the petitioner had not served all the necessary parties interested in the decedent's estate.

The court opined that the foregoing problems and issues raised by the Supreme Court proceedings were not isolated incidents within the context of wrongful death compromises. Indeed, the court indicated that there appeared to be a consistent misunderstanding of the provisions of EPTL 5-4.6, as evidenced by compromise orders that are facially and procedurally noncomplaint with the statute. To this extent, while the court recognized the significant efforts of trial counsel in bringing a wrongful death action to fruition, it also found that the safeguards and procedural prerequisites of the statute were to be strictly adhered to by practitioners seeking relief in the Supreme Court. In like manner, it is the duty of the Surrogate's Court to insure compliance with the statute, especially when a person under a disability is interested in the proceeding.

Based on the jurisdictional deficiencies of the Supreme Court action, the fact that a guardian ad litem had not been appointed prior to entry of the Supreme Court order, and the fact that counsel in the Supreme Court had appeared in the Surrogate's Court as counsel for the fiduciary, the court directed that counsel return all attorneys' fees previously paid and to deposit same in escrow, and that the petitioner amend her petition and accounting to include all necessary parties.

In re Stokes, NYLJ, May 30, 2012, at 27 (Sur. Ct., Queens County).

Objections Stricken

In a contested probate proceeding, the petitioner and sole beneficiary under the propounded instrument moved to preclude the objectant, the guardian of the property of one of the decedent's infant grandchildren, from offering any evidence or testimony in the proceeding on the grounds that his bill of particulars was untimely and were not in compliance with the specificity requirements of UCR 207.23. In opposition to the application, the objectant relied on the likelihood of success of his objections, particularly on the grounds of lack of testamentary capacity, because the decedent was suffering from a terminal illness at the time the propounded Will was executed, and undue influence.

The court noted that the object of a demand for a bill of particulars is to amplify the pleadings so as to eliminate surprise at trial, and not to serve as a disclosure device. Towards this end, a party is not obligated to respond to particulars on any issue that the party does not have the burden of proof. The CPLR and the Uniform Rules authorize the court to fashion any remedy that is just for either a refusal to comply with a demand for a bill of particulars, or an unduly burdensome demand.

Within this context, the court struck objection #1 alleging that the propounded Will did not express the decedent's "true wishes and intent," on the grounds that it was not a cognizable independent objection. On the issue of testamentary capacity, the court conditionally granted the petitioner's motion, holding that the objection would be dismissed unless the objectant furnished the petitioner with information pertaining to the expert opinion and additional medical records he had obtained within 45 days of the date of the order to be entered.

With respect to the issue of undue influence, the objectant alleged that the purported Will of the decedent was procured by the proponent and his girlfriend. Specifically, the objectant maintained that the propounded Will was not natural in its provisions inasmuch as it devised her home to the proponent rather than her infant grandchild, who had lived there with the decedent, and whose mother had committed suicide one month prior to the Will execution ceremony. Moreover, the objectant claimed that the decedent was suffering from physical and mental distress due to her protracted battle with cancer at the time the Will was executed. Additionally, objectant alleged that the proponent arranged for the attorney-draftsman to meet the decedent, as well as for a $50,000 bequest to his girlfriend in the event he predeceased the decedent. Based on the foregoing, the court held that the objectant's responses were sufficient to avoid striking the objection on the issue of undue influence.

On the other hand, the court granted preclusion on the issue of fraud based on the objectant's admission that he was unaware of any specifics about any false statement that constituted the alleged fraud.

Additionally, the court granted preclusion as to objections #4 and #5, finding, in particular, that objection #4 did not support any objection independent of other valid objections, and that the time to file additional objections as requested by objection #5 had long expired.

In re Estate of Krzyck, NYLJ, June 15, 2012, at 23 (Sur. Ct., Bronx County).

Preliminary Letters

In a contested probate proceeding, the petitioner sought preliminary letters testamentary and the dismissal of objections filed by beneficiaries under the propounded instrument to her appointment.

The objectants alleged that the petitioner was unfit to serve as fiduciary on the grounds, inter alia, of dishonesty, substance abuse and hostility. By way of example, objectants asserted that petitioner removed property from a sailing vessel owned by the decedent and one of the objectants after death. Further, they maintained that petitioner directed a former employee of decedent's corporation to issue corporate checks to her, despite the fact that none of the checks represented corporate obligations.

Petitioner maintained that the allegations against her were false, malicious and unsupported by any admissible proof, and further, were not cognizable as a matter of law.

The court opined that the testator's selection of a fiduciary must be given great deference and that, as such, the court's discretion to refuse to grant letters is limited by statute. In exercising such discretion, there must be a clear showing of serious misconduct that endangers the safety of the estate. Nevertheless, the court noted that although disqualification is limited to the enumerated statutory grounds, SCPA 707(1)(e) permits disqualification based upon someone being "unfit" to serve. Pursuant to this section, the court is empowered to refuse letters to an individual who is not otherwise disqualified under the statute. Thus, where objections raise a bona fide issue of potential wrongdoing, the court can decline to appoint the named fiduciary on the grounds that the same renders her ineligible to serve.

Accordingly, based upon the circumstances, the court held there were sufficient factual issues, including the parties' credibility, to preclude granting preliminary letters to the named fiduciary. Moreover, the court noted that it did not appear that the appointment of a preliminary executor was warranted.

The application to dismiss the objections was, therefore, denied.

In re Ernst, NYLJ, July 19, 2012, at 30 (Sur. Ct., Suffolk County).

Revocation of Letters

In a proceeding for revocation of letters of co-trusteeship issued to the decedent's son, the petitioner, the decedent's spouse, moved for summary judgment.

The trust at issue was created pursuant to the terms of the decedent's Will for the benefit of his wife, during her lifetime, and upon her death, his three children. Upon admission of the Will to probate, letters of trusteeship issued to the petitioner and the decedent's children, who were the nominated trustees thereunder. The assets of the trust allegedly consisted, in part, of shares of stock of two corporations, of which the decedent's son was also a shareholder.

These corporations were the subject of two other related proceedings commenced by the petitioner; one for discovery pursuant to SCPA 2103, and the second for judicial dissolution of the entities.

In opposition to the petition for his removal, the decedent's son asserted eight counterclaims against the decedent's estate based upon breach of contract and unjust enrichment. In support of her motion for summary relief, the petitioner argued that by alleging these counterclaims, the respondent placed himself in a conflict of interest with the estate that required his disqualification as trustee as a matter of law.

The court opined that a conflict of interest in and of itself did not warrant removal of a fiduciary. Indeed, given the great deference accorded to the testator's selection of a fiduciary, only a finding of actual misconduct, as specified by the provisions of SCPA 707, would justify the removal of a fiduciary or a refusal to issue fiduciary letters.

Within this context, the court found that the petitioner had failed to establish a basis for summary relief. Specifically, the court held that the mere fact that the decedent's son had asserted claims against the estate and was thereby an estate creditor did not constitute grounds for his removal as a matter of law. In fact, the court noted that the provisions of SCPA 1805 were designed to enable a fiduciary with a claim against an estate to serve by requiring that court approval be obtained for payment of such claim.

Further, the court opined that the counterclaims asserted by the decedent's son did not create a de facto conflict of interest with the trust since they were asserted against the estate. To this extent, the court found it significant that the decedent's son was not a fiduciary of the estate, and, thus, was not in a position where he would be forced to make decisions regarding litigation strategy as a fiduciary of the estate that would conflict with the prosecution of his claims. The court found the petitioner's claims that the subject trust was impacted by these claims to be conclusory and belied by the record, which revealed that the trust had already been funded. As in the case of the estate, the court concluded that even if the claims of the decedent's son were against assets purportedly owned, in part, by the trust, it was not sufficient to warrant his removal as trustee on the basis of a conflict of interest.

Accordingly, summary judgment was denied.

In re Estate of Hersh, NYLJ, June 18, 2012, at 26 (Sur. Ct., Queens County).

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Florida Update

By David Pratt and Jonathan Galler

David Pratt

CASE LAW UPDATE

Oral Instructions Referenced in Written Wills

Florida law provides that a will must be in writing, and Florida courts will not recognize oral testamentary instructions. The Third District Court of Appeal recently faced the question of whether a written provision can constitute an invalid oral testamentary instruction. The will at issue provided for the disposition of the residuary estate to the decedent's friend "having full confidence that he will honor all requests made to him by me prior to my death as to friends whom I desire he benefit." The decedent's sole grandchild petitioned to set aside the will on grounds that the quoted language constituted an ineffective oral will and sought to have the estate property distributed in accordance with the law of intestate succession. The appellate court held that because the language was precatory, not mandatory, it did not constitute an oral will. The court illustrated the distinction, using an example from a case decided in another appellate district. That other case involved a will that devised property to an individual "to dispose of as she has been instructed to do so by me" and, thus, was deemed an invalid oral will.

Glenn v. Roberts, 95 So.3d 271 (Fla. 3d DCA June 20, 2012) (not yet final).

Jurisdiction Over Trust in Guardianship Proceedings

Instituting a guardianship will not automatically confer a court with jurisdiction over the ward's trust. In this case, Marcia Beekhuis filed a petition to determine the incapacity of her mother and for the appointment of a plenary guardian. The petition did not refer to her mother's trust, of which Beekhuis was a co-trustee. The probate court entered an Order Appointing Plenary Guardian of Person and Property and named Beekhuis' brother, Steven Morris, as the guardian. Morris ultimately obtained an *ex parte* order in the guardianship proceeding enjoining Beekhuis, as trustee, from selling their mother's home and directing Beekhuis to convey the property from the trust to the guardian. The Fourth District Court of Appeal reversed the order, concluding that it was error for the probate court to assert jurisdiction over the trust property and Beekhuis, as trustee, because the original pleadings never raised any claim over the trust or its property, and Beekhuis continually asserted that the court lacked jurisdiction over the trust and trustee.

Jonathan Galler

Beekhuis v. Morris, 89 So. 3d 1114 (Fla. 4th DCA 2012).

Limitations Period For Breach of Trust Actions

Under Florida common law, breach of trust actions were not subject to a statute of limitations defense. Florida's trust code, however, provides for specific limitations periods under certain conditions. In this case, the Third District Court of Appeal held that a breach of trust action was timely because none of those conditions was present. The current version of the statute provides for a four-year limitations period (i) for all matters adequately disclosed in a trust disclosure document, such as an accounting; or (ii) for all matters not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice of the availability of the trust records for examination and that any claims may be barred unless commenced within four years. Where neither condition is satisfied in its entirety, the four-year limitations period still applies, but the period commences only when the claimant has actual knowledge of the facts upon which the claim is based or upon the trustee's repudiation of the trust or adverse possession of trust assets. The current statute also provides for a six-month limitations period under certain conditions and for a variety of statutes of repose ranging from 10 to 40 years.

Taplin v. Taplin, 88 So. 3d 344 (Fla. 3d DCA 2012).

Establishing Lost or Destroyed Codicil

Florida law provides that any interested person may seek to establish a lost or destroyed will or codicil, but the specific content of the document must be proved by two disinterested witnesses or, if a correct copy is provided, by one disinterested witness. The Second District Court of Appeal recently addressed the questions of what constitutes a correct copy and who qualifies as a disinterested witness. In this case, two co-personal representatives sought to establish a lost codicil bequeathing $40,000 to create a pet trust. The trial court denied the petition to establish the lost codicil. The appellate court affirmed the ruling, but for different reasons than the ones articulated by the trial court. The appellate court disagreed with the trial court's conclusion that an unsigned electronic copy of

the codicil on the drafting attorney's computer could not constitute a "correct copy." It also disagreed with the trial court's conclusion that a personal representative cannot, as a matter of law, qualify both as an interested person, for purposes of standing to establish the lost codicil, and as a disinterested witness, for purposes of proving the contents of the codicil. But the appellate court did determine that the co-personal representatives in this particular case were not, in fact, disinterested witnesses because both stood to benefit personally from the establishment of the lost codicil.

Smith v. DeParry, 86 So. 3d 1228 (Fla. 2d DCA 2012).

No Surcharge Action Without Damages

A surcharge is a charge against a fiduciary to compensate a beneficiary for a breach of fiduciary duty. The elements of a cause of action for breach of fiduciary duty are (1) the existence of a duty; (2) breach of that duty; and (3) damages flowing from the breach. In this case, the beneficiary of a family trust brought a surcharge action against the co-trustees alleging that they improperly entered into a lease agreement that did not provide fair market value to the trust. The Fifth District Court of Appeal affirmed the trial court's conclusion, holding that because a surcharge compensates for a breach of fiduciary duty, there can be no surcharge absent proof of damages. The appellate court also determined that the trial court's finding that the co-trustees acted in the best interests of the trust was supported by competent, substantial evidence.

Miller v. Miller, 89 So. 3d 962 (Fla. 5th DCA 2012).

Voluntary Dismissal of Petition to Admit Codicil

Florida's rules of civil procedure permit a party to voluntarily dismiss any claim. If accepted by the trial court, such dismissal generally deprives the court of jurisdiction over the subject matter. In this case, the beneficiary of an estate filed a petition to admit a codicil that released him from certain financial obligations. Another beneficiary responded, alleging that the codicil was procured through undue influence. After six years of discovery, the respondent specially set a hearing on the petition to admit the codicil. Two weeks before the hearing, petitioner voluntarily dismissed his petition. Nevertheless, at the respondent's urging, the trial court did not cancel the hearing. The Third District Court of Appeal granted a petition to preclude the trial court from holding the hearing because the record was devoid of any suggestion that the trial court did not accept, or that the respondent had even attacked, the voluntary dismissal of the petition. The appellate court stated that its decision was without prejudice to the respondent's right to seek review of and relief for any misconduct that may have been committed in the procurement or prosecution of the alleged codicil.

Cutler v. Cutler, 84 So. 3d 1172 (Fla. 3d DCA 2012).

Co-Trustees Personally Liable for Beneficiary's Attorney's Fees

When awarding attorney's fees in an action for breach of fiduciary duty, section 736.1004, Florida Statutes, authorizes the court to direct payment from a party's interest in the trust or enter a judgment that may be satisfied from other property of the party. The Third District Court of Appeal recently affirmed a decision in which co-trustees were held personally liable under this statute for a beneficiary's attorney's fees. The beneficiary had prevailed at trial on her complaint to compel the co-trustees to make a distribution, and the trial court awarded her fees from the trust. The co-trustees, however, had paid their own attorney's fees out of the trust during the course of the litigation and, even after repaying those amounts, insufficient funds remained to cover the beneficiary's fees. The appellate court found no error in the trial court's decision to hold the co-trustees jointly and severally liable for the beneficiary's attorney's fees.

Jacobson v. Sklaire, 2012 WL 1414447 (Fla. 3d DCA Apr. 25, 2012) (not yet final).

Estate's Demand for Rent from Tenant in Common

Florida law provides that the right to fair rent from a tenant in common may be triggered under certain circumstances. In this case, a former husband and wife owned a residence as tenants in common, each with a 50% undivided interest, and the former wife maintained exclusive occupancy. Upon the former husband's death, his estate petitioned to compel the former wife for fair rental payments, including past-due rent, and the former wife petitioned for entitlement to a setoff for sums paid towards the mortgage, maintenance and taxes on the property. The Third District Court of Appeal held that the former wife's rejection of the estate's demand for rent, and the adversity of her claim of exclusive possession of the estate's property, were tantamount to an ouster, thereby triggering an immediate obligation for one-half of the rental value. Because her exclusive possession prior to the former husband's death was permissive, however, no rental payment was due for that period of time. Although the former wife's entitlement to any setoff would not be triggered until such time as the property is partitioned or sold, the appellate court held that, under the factual circumstances presented, the setoff amount must be determined in time to apply any appropriate reduction to the judgment regarding rental payments.

Joseph v. Joseph, 83 So. 3d 965 (Fla. 3d DCA 2012).

Counsel for Guardian's Entitlement to "Fees on Fees"

Under Florida law, court proceedings may be instituted to review or determine a fee of a guardian's attorney. As recently highlighted by the Second District

Court of Appeal, those proceedings are considered a part of the guardianship administration process. Accordingly, the fees incurred in the course of litigating a fee determination—sometimes referred to as "fees on fees"—may themselves be determined and paid from assets of the guardianship estate unless the court finds the requested compensation to be "substantially unreasonable." The case involved a petition for attorney's fees filed by the former attorney for a guardian. The trial court granted the petition, over the guardian's objection, but awarded a lesser fee amount than sought. The attorney then filed a second petition, this time for fees incurred in connection with the dispute over the first petition. The trial court denied the second petition, but the appellate court reversed, holding that entitlement to such fees is expressly authorized under section 744.108(8), Florida Statutes.

In re Guardianship of K.R.C., 83 So. 3d 932 (Fla. 2d DCA 2012).

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

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