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Trusts and Estates Law Section Newsletter

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Chair's Message

Ilene Sherwyn Cooper

As I sit and write this message, it is hard to believe that I am completing my term as Chair of the Section. It seems like yesterday that my term began. These past twelve months have certainly flown by, providing wonderful opportunities to work with new and long-standing members, pursue legislative goals, and develop initiatives for our membership. It has also offered new venues for Section meetings and outstanding CLE programs.

The Fall program in Saratoga, New York, entitled "Getting to the Finish Line: Current Issues in Administering Estate Assets," was chaired by Kathryn Grant-Madigan and Natalia Murphy. Kate and Natalia, together with the panel of speakers, did a terrific job developing a program that addressed such topics as Digital Assets, Retirement Benefits During Estate Administration, Ethical Pitfalls When Representing Multiple Fiduciaries and Strategies for Mounting a Successful Challenge to a Hobby Loss Audit. And, let's not forget the "Honeymoon is Over Horserace." The event was also highlighted by a wonderful cocktail reception and dinner at the National Museum of Racing, where delicious food, wines and entertainment were offered amidst thoroughbred racing history.

Our January meeting also proved to be terrific. Chaired by Linda Wank, Esq. of Frankfurt Kunit Klein & Selz, P.C., the CLE program was entitled "Dying for Fame: Exploiting the Rights of Publicity in the Age of Celebrity." The program was followed by a luncheon highlighted by a very respected and accomplished keynote speaker, the Honorable A. Gail Prudenti, Chief Administrative Judge of the Courts of New York State.

Since the writing of my last article, our Section has, under the able leadership of Professor Ira Bloom, been working diligently reviewing the legislative proposal

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for a Uniform Trust Code in New York. Judge Radigan and John J. Barnosky, Esq. are spearheading our EPTL-SCPA Advisory Committee.

In addition, efforts are being made by Judge Radigan, David Goldfarb, Esq., Gary Mund, Esq., and Lisa Bataille to develop a blog on our Section's website for the recognition of otherwise unreported Surrogate's decisions.

Finally, as a result of the hard work of Jennifer Hillman, Esq., and her colleagues, Joseph T. LaFerlita, Esq. and Peter Kelly, Esq., our proposed amendment to EPTL § 5-1.2, following the decisions in *Campbell v. Thomas* and *Matter of Berk*, has been approved by the Executive Committee of the New York State Bar Association and is now a part of our Section's legislative agenda for the year 2013.

In closing, it has been a great year for me, and I hope for all of you as well. Thank you to my fellow officers, Section members, and the Association staff, particularly, Lisa Bataille and Kathy Heider, for making my term so special.

Ilene Sherwyn Cooper

Editor's Message

This quarter, we are pleased to publish a *Newsletter* comprised of a variety of articles and columns authored by a mixture of well-respected trusts and estates practitioners, and law students who are just beginning to explore the field. We hope that the publications from our student authors in particular will encourage participation by student members of our Section, and are optimistic that our future newsletters will continue to feature such submissions.

As always, the editorial board is soliciting submissions for our next *Newsletter*, to be published this Summer. We look forward to receiving your articles, columns, case reports and opinion pieces. The submission deadlines for this year are as follows: March 15, 2013; June 14, 2013; and September 6, 2013.

Jaclene D'Agostino

Guideposts in Addressing Claims in a Potentially Insolvent Estate

By Frank T. Santoro

When addressing claims in a potentially insolvent estate, it is important to remember that the fiduciary owes a duty to beneficiaries and creditors alike, and that the successful administration of such an estate will require a thorough understanding of SCPA Article 18.

Marshaling the assets of the estate, paying administration expenses, paying the obligations of the decedent, and paying taxes are fundamental duties of a fiduciary. An executor is obligated to determine the nature and extent of the assets of the estate and to determine whether estate assets are sufficient to satisfy administration expenses and claims against the estate. Where the assets of the estate are illiquid, the fiduciary must carefully address the estate's cash requirements and liquidate assets in a prudent manner as required to pay debts, administration expenses, and taxes. Where an illiquid estate is insolvent, creditors may be keenly interested in determinations made by the fiduciary in liquidating assets.

Addressing whether to allow a claim or defend a claim requires a good faith approach that objectively weighs the validity of the claim. A fiduciary has a duty to contest all claims except valid, legal obligations, but shouldn't improperly resist a valid claim. An executor's duty in addressing claims has been described by the Nassau County Surrogate's Court as follows:

> Among the duties of an executor is an important one of ascertaining what debts there are. It needs emphasis that a representative of an estate is the fiduciary of its creditors as well as legatees and distributees. As this court has on occasion remarked: A fiduciary must be just (in paying legitimate debts) before being generous (to beneficiaries). There is no room in fiduciary administration for the representative who seeks to wear down creditors to a point where they will take less than they are legally entitled to. In substance, a fiduciary is not obligated to defend against a valid claim nor is it his duty to compel a creditor to accept less than he is legally due. It is only those claims which are of doubtful legality that a representative has a duty to defend against. Finally there is a duty placed upon this court to control the conduct of fiduciaries, discourage vexatious litigation and protect the estate from unnecessary costs and expenses attending the assertion and settlement of claims.[1]

When analyzing a claim in good faith, all procedural and substantive defenses must be considered. In this regard, it is important to note that the presentation of a notice of claim stops a statute of limitations from running under SCPA § 1808.[2] The question of when the cause of action accrues depends on the nature of the underlying claim and when the underlying claim arose.

Where the act which gives rise to the cause of action against the estate happens after the death of the person who would be liable, the cause of action cannot accrue until the appointment of a legal representative of the estate. This is because a cause of action cannot exist unless there is a person in being against whom an action can be brought. Where a cause of action against a decedent already exists at the time of the decedent's death, CPLR § 210(b) tolls the statute of limitations the moment the decedent dies, and the statute resumes running automatically eighteen months thereafter. The effect of the statute is to add eighteen months to the applicable statute of limitations.[3]

Where a claim is allowed, SCPA § 1807 provides that any party adversely affected by the allowance of a claim may object to the allowance of the claim in a judicial accounting proceeding. If the court disallows the claim and the claim has already been paid, the court may order the claimant to refund the estate or surcharge the fiduciary.[4] Where a claim is rejected, it will be adjudicated in a proceeding to determine the validity of a claim under SCPA § 1809, in an accounting proceeding, or in another court of competent jurisdiction.[5]

Pursuant to SCPA § 1813, a fiduciary may seek the court's advance approval of a proposed settlement of a claim on notice to all parties affected by the settlement. The inquiry on a fiduciary's application seeking court approval of a compromise is whether the proposed settlement is in the estate's best interest. Whether a proposed settlement is in the best interests of an estate involves a consideration of numerous factors, including "the relative merit of the parties' positions (as qualified by the knowledge that litigation is never risk-free) and the value of achieving peace for the combatants sooner rather than later."[6]

Critically, potentially insolvent estates that contain illiquid assets may be administered for a longer period of time than other, relatively uncomplicated estates.

Years can pass in the mire of exhaustive litigation of claims and in marketing and selling assets such as closely held businesses. The time horizon for winding up an estate is an important factor that must be weighed in the exercise of prudent administration,[7] but that time horizon may not be predictable with a potentially insolvent or illiquid estate. It is difficult to predict just how swiftly a litigated matter will be adjudicated or resolved. Where an estate remains open for an extended period, determinations made in the estate administration will be scrutinized by all those interested. The frustration engendered by the passage of years from the death of a loved one (or unloved one) and payment of a legacy or claim can result in enhanced scrutiny.

In a potentially insolvent estate, the fiduciary cannot make the mistake of making distributions or paying allowed claims where there may be insufficient assets to pay all claims and potential claims—in the case of insolvency, the priority scheme of SCPA § 1811 controls. At the same time, the fiduciary must be mindful of potential interest accruing on allowed claims and legacies and should not unduly delay distributions and satisfaction of valid debts.[8] The fiduciary must also be mindful of the statutory order of abatement of estate assets (or the order determined by the will) in satisfying debts and administration expenses.[9] As always, the fiduciary must be careful to avoid self-dealing—Article 18 specifically addresses claims by fiduciaries against estates.[10]

Endnotes

1. *Estate of Hollinger*, 93 Misc. 2d 926, 403 N.Y.S.2d 857 (Sur. Ct., Nassau Co. 1978) (*citations* omitted); *see also Estate of Smith*, 5 Misc. 3d 1015A, 798 N.Y.S.2d 707 (Sur. Ct., Nassau Co. 2004).
2. SCPA § 1808(6); *Matter of Feinberg*, 18 N.Y.2d 499, 277 N.Y.S.2d 249 (1966).
3. *See* 2B Carmody-Wait 2d §§ 13:377, 13:378.
4. *See Matter of Witherill*, 8 Misc. 3d 1012(A), 2005 NY Slip Op. 51062(U) (Sur. Ct., Madison Co.).
5. The claim may be adjudicated in the estate accounting proceeding, in a proceeding pursuant to SCPA § 1809, or in another court of competent jurisdiction. However, if the claimant wishes to have the claim adjudicated in another forum, this must be done within 60 days of the rejection of the claim or the Surrogate's Court becomes the only venue where the matter can be adjudicated under SCPA § 1810.
6. *See Matter of Lazarus*, N.Y.L.J. March 19, 1998, p. 29, col. 3 (Sur. Ct., N.Y. Co.); *Matter of Rappaport*, 102 Misc. 2d 910, 424 N.Y.S.2d 675 (Sur. Ct., Nassau Co. 1980); *Estate of Shubert*, 110 Misc. 2d 635, 442 N.Y.S.2d 703 (Sur Ct, N.Y. Co. 1981).
7. *Matter of Kopec*, 25 Misc. 3d 901, 885 N.Y.S.2d 401 (Sur. Ct., Monroe Co. 2009); *see also Estate of Buck*, 184 Misc. 29, 51 N.Y.S.2d 294 (Sur. Ct., Westchester Co. 1944) wherein the court stated that "a distinction must also be made between the duties of an executor or administrator and those of a trustee. An executor or administrator is under a duty to distribute the assets of the estate or their proceeds after the payment of debts, taxes and funeral and administration expenses. However, it is not entirely correct to say that during the period reasonably required for administration an executor, as such, has no authority to make investments."
8. SCPA § 2102(7); EPTL § 11-1.5 (d), (e); *see Estate of White*, N.Y.L.J., Dec. 28, 2004, p. 2, col. 3 (Sur. Ct., Richmond Co.); *see also Matter of Kasenetz*, 196 Misc. 2d 318, 765 N.Y.S.2d 216 (Sur. Ct., Nassau Co. 2003) addressing interest payable on elective share.
9. EPTL § 13-1.3.
10. SCPA § 1805 requires that a fiduciary with a claim against the estate seek approval to pay himself.

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Trust Protector Powers: Tax Implications of the Fiduciary-Duty Issue

By Mitchell M. Gans

Much has been written recently about the use of trust protectors.[1] Broadly defined, a trust protector is a person appointed by the settlor to direct the actions of the trustee with respect to specified functions. For example, the settlor might provide in the trust instrument that the trustee must follow the directions of a trust protector regarding investments. The treatment of trust protectors and trustees who follow directions provided by the trust protector is the subject of statutes in some states[2] and may be addressed in case law in other states.[3] The Uniform Trust Code deals with what it calls "directed trusts" in section 808.[4]

A critical question about the treatment of trust protectors is whether the protector is subject to a fiduciary duty. Under some statutes, it is clear that the settlor can in the trust instrument negate any such fiduciary duty.[5] The commentary under section 808 of the Uniform Trust Code makes clear that the settlor can negate the protector's fiduciary duty[6]—an approach that is consistent with the overall structure of the Code.[7] On the other hand, in some states a protector is in effect treated as a co-trustee whose fiduciary duty cannot be waived by the settlor.[8] This fiduciary-duty question, obviously a matter of state law, can have important tax implications.

Consider two examples. First, assume the settlor wants to create a trust that will be treated as a so-called grantor trust for tax purposes, appreciating that transactions between the settlor and the trust will be ignored for tax purposes.[9] Many settlors have created such trusts by inserting a provision in the instrument giving the settlor a substitution power, i.e., a power to convey assets to the trust in exchange for trust assets of equal value. Under section 675 of the Internal Revenue Code, the existence of such a power is sufficient to confer grantor-trust status on the trust provided that the settlor's substitution power is held in a non-fiduciary capacity. To the extent that such a substitution power is treated as a trust-protector power that is fiduciary in nature, the trust is not a grantor trust, and the tax advantages sought by the settlor are unavailable. Thus, in a state where a protector is subject to a fiduciary duty that cannot be waived in the instrument, this kind of planning is not feasible. It may be appropriate, therefore, for states that impose a non-waivable fiduciary duty on protectors to consider creating a specific exception for this kind of planning.

Consider as a second example an amendment power. It has become somewhat common for settlors to grant the right in the instrument to a third party to amend the trust's substantive and / or administrative provisions.[10] The amendment power makes irrevocable trusts more flexible, permitting alterations from time to time where necessary to accomplish tax or other advantages.[11] Where such an amendment power is used to enhance the interest of one beneficiary and to concomitantly diminish the interest of another beneficiary, the question arises whether a taxable gift is made by the beneficiary whose interest is diminished. If the beneficiary's interest were diminished by a third party's exercise of a power of appointment, it clearly would not be treated as a taxable gift. But if the third party is a trust protector subject to a fiduciary duty under state law—as distinguished from the donee of a power of appointment, who is not subject to such a duty—the IRS could well argue that a taxable gift is made by the diminished beneficiary when he or she consents to the amendment or otherwise acquiesces to its implementation.[12] This, of course, raises several issues: whether states that are inclined to make a trust protector's power subject to a fiduciary duty should create an exception for amendment powers; whether settlors who want to create such amendment powers should locate their trust in a state that permits the waiver of the protector's fiduciary duty; whether this will result in another iteration of competition among the states to provide a settlor-friendly environment;[13] and whether settlors can accomplish their objective by drafting the amendment power as a power of appointment instead of a trust-protector power.[14]

In sum, trust-protector provisions are becoming increasingly common. The fiduciary-duty issue is likely to become an important one as a matter of state law. The resolution of this issue will, in turn, implicate important tax considerations. States considering trust-protector legislation will need to consider the fiduciary-duty issue from both the tax and non-tax perspectives.

Endnotes

1. *See, e.g.*, Richard C. Ausness, The Role of Trust Protectors in American Trust Law, 45 Real Prop. Tr. & Est. L.J. 319 (2010); Gregory S. Alexander, Trust Protectors: Who Will Watch the Watchmen?, 27 Cardozo L. Rev. 2807 (2006), discussing the role of a trust protector; Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761 (2006) (same).
2. *See, e.g.*, Alaska Stat. § 13.36.370(a) (2008); Del. Code Ann. tit. 12, § 3313 (2007 & Supp. 2008).
3. *See, e.g.*, *Matter of Rubin*, 143 Misc.2d 303, 540 N.Y.S.2d 944 (Sur. Ct., Nassau Co. 1989), *aff'd*, 540 N.Y.S.2d 944 (2d Dep't 1989).
4. *See also* Restatement of Trusts (Third), section 64.

5. *See* n.2, *supra*.

6. The commentary provides: "…settlors could provide that the holder of the power is not to be held to the standards of a fiduciary."

7. Section 105 of the Uniform Trust Code provides that, subject to certain exceptions specified in the section, all of the Code's provisions are default rules that can be modified or displaced by the settlor. Because there is no cross-reference in section 105 to section 808, the indication in the text of section 808 that a protector is presumptively a fiduciary must be understood as a mere default rule.

8. *See Matter of Rubin*, *supra*.

9. Much in estate planning depends upon the status of a trust as a grantor trust. If, for example, a settlor sells an appreciated asset to a grantor trust, no gain is recognized for tax purposes, whereas such a sale to a non-grantor trust would result in gain recognition. *See* Rev. Rul. 85-13, 1985-1 C.B. 184, indicating that no gain is recognized on a sale by a settlor to a grantor trust; *see also* Rev. Rul. 2004-64, 2004-2 C.B. 7, providing additional tax advantages for settlors who create grantor trusts.

10. *See* Edward C. Halbach, Jr., Uniform Acts, Restatements, and Trends in American Law at Century's End, 88 CAL L. REV. 1877 (2000), discussing and anticipating the widespread use of amendment powers.

11. If the settlor retained the amendment power, it would likely result in inclusion of the trust's assets in the grantor's estate for tax purposes under sections 2036 or 2038 of the Internal Revenue Code.

12. *See* PLR 9811044 and PLR 200339021; cf. 201033025; *but see Estate of Hazelton v. Commissioner*, 29 T.C. 637 (1957).

13. *See* Max M. Schanzenbach and Robert H. Sitkoff, Perpetuities Or Taxes? Explaining the Rise of the Perpetual Trust, 27 CARDOZO L. REV. 2465 (2006), discussing the location of trust in states that permit a perpetual duration in order to accomplish tax advantages; Mitchell M. Gans, Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance? 48 EMORY L.J. 871 (1999), indicating that problematic outcomes under the tax law occur where the tax law overemphasizes state law.

14. *Cf.* John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105 (2004), suggesting that the distinction between a power of appointment and a provision exonerating a fiduciary duty can be justified on a truth-in-labeling ground, i.e., that a settlor who creates a power of appointment must fully appreciate the wide scope of discretion conferred on the donee of the power.

Proposal to Amend EPTL § 2-1.7(a)

By Rebecca T. Goldberg

"[R]ights should not be held in abeyance indefinitely on account of the absence of a person or persons of whom no trace can be found, or because of the remote possibility of additional distributees."[1] It is this principle that provides the foundation for EPTL § 2-1.7, the statute governing the time period within which a missing person will be presumed dead for purposes of estate administration.

Currently, EPTL § 2-1.7(a) states:

> A person who is absent for a continuous period of *three years*, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed, in any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death or the administration of his or her estate, to have died *three years after the date such unexplained absence commenced*, or on such earlier date as clear and convincing evidence establishes is the most probable date of death.[2]

Prior to this law, the presumption of death arose after five years.[3] The New York State Legislature reduced the time period to three years based upon the theory that "[t]he missing person could easily contact his or her family if alive and if he or she desired to do so...."[4]

In very recent years, all information about missing persons has been entered into governmental databases. Through FOIA requests, the author obtained data on missing persons to review the relevancy of the three-year waiting period in New York. Review of the data suggests there would be little negative impact if the New York State Legislature were to reduce the waiting period from three years to two years.

At the present time, approximately 3,700 people in the United States have been considered missing for more than three years.[5] The population of New York State constitutes 6.3% of the population of the United States, so we can approximate that the number of people missing from New York State within this statistic is 233.[6]

In Nassau County and New York City, there are approximately 10-12 cases filed under EPTL § 2-1.7(a) per year.[7] Similar data for the remainder of New York State is difficult to obtain, but considering that the population of Nassau County and New York City is about half the population of the State,[8] a reasonable estimate of filings under EPTL § 2-1.7(a) would be about 22 per year.[9] In view of this estimate and the approximately 233 New York State residents considered missing for more than three years, the percentage of proceedings instituted to distribute estates under EPTL § 2-1.7(a) constitutes less than 10% of the filings made on behalf of New York State residents who are missing for more than three years.[10]

Since 2009, 237 people in the United States who were missing for more than two years returned in less than three years.[11] Therefore, the number of people missing for more than two years and returned alive in less than three years in the United States has been approximately 79 people per year. Multiplying this annual number by the proportion of New York State residents to United States residents yields an annual approximation of five people in New York expected to return alive in more than two years but less than three years.[12] These five people constitute the estimated population of New York State residents who might be adversely affected by shortening the time period within which the presumption of death arises pursuant to EPTL § 2-1.7(a), from three years to two years.

Because filings under EPTL § 2-1.7(a) comprise less than 10% of those that can be made on behalf of New York State residents who are missing for more than three years, less than one case in every two years will be instituted with respect to a person who will return alive in less than three years but more than two years.[13] Accordingly, less than one person every two years would be adversely affected by amending the statute to reduce the waiting period as proposed.

The author contends that although the demographics of the population who appear after two years is unavailable through FOIA requests from government computer databases, the foregoing estimate as to the number of individuals who would be adversely affected by the proposed amendment is rather conservative.

In sum, the author concludes that amending EPTL § 2-1.7(a) to shorten the period for family members waiting to institute a proceeding under that section would not adversely affect a significant number of people who return alive, and would have the beneficial effect of expediting closure for families, and allowing the missing person's property and estate assets to be distributed.

Endnotes

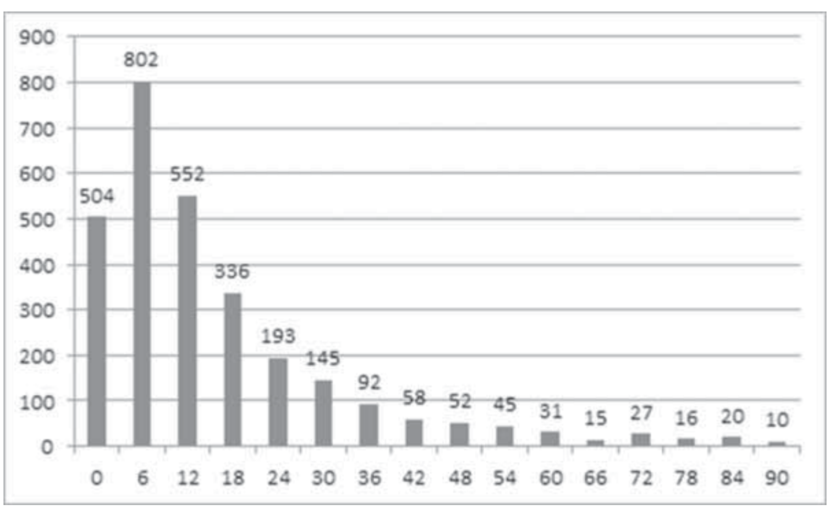
1. *In re Layh's Estate*, 55 Misc.2d 92, 284 N.Y.S.2d 511 (Sur. Ct., Nassau Co. 1967).
2. EPTL § 2-1.7 (McKinney 2012) (emphasis added). No presumption of death from absence will be indulged except on satisfactory proof of thorough search for absentee in places and among individuals likely to know. *In re Katz's Estate*, 135 Misc. 861, 239 N.Y.S. 722 (Sur. Ct., Kings Co. 1930). Hon. C. Raymond Radigan describes the duration of a diligent search as far less than two years.
3. Turano, McKinney Practice Commentary, SCPA § 911 (2000), referencing Guardianship and Beneficiary Rights of Estate Property—Repeal and Amendment of Certain Provisions, Pub. L., ch. 514, § 63 (1993), "EPTL 2-1.7, which formerly required five years' absence for a judicial declaration of death, has reduced the time period to three years."
4. Turano, McKinney Practice Commentary, SCPA § 911 (2000), citing Second Report of the EPTL-SCPA Legislative Advisory Committee, 22-23 and Appendix 9G (1993).
5. E-mails from Connie Weeks Marstiller, NCIC Investigative and Operational Group, Criminal Justice Information Services Division, Federal Bureau of Investigation, to author (Nov. 13, 2012, 15:53 EST; Nov. 16, 2012, 7:41 EST) (on file with Rebecca T. Goldberg).
6. *Population, 2011 Estimate*, United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Nov. 16, 2012).
7. Former Nassau County Surrogate, Hon. C. Raymond Radigan, suggests that this is the approximate number. The New York State Unified Court System, LexisNexis, and Westlaw do not have computer databases with the New York State Surrogate's Courts' filings according to statute.
8. 1,344,436 people live in Nassau County, and 8,244,910 people live in New York City. *Population, 2011 Estimate from the U.S. Census Bureau*, <www.google.com/publicdata> (last visited Nov. 16, 2012). 19,465,197 people live in New York State. *Population, 2011 Estimate*, United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Nov. 16, 2012). Therefore, the population of Nassau County and New York City represent 49.26% of the population of New York State.
9. Because of the lack of computerization of filings data in New York State Courts, this approximation is the best the author can reach, other than browsing each paper file in each courthouse by hand.
10. 22 is 9.44% of 233.
11. E-mail from Dorothy A. Lee, Paralegal Specialist, Office of Justice Programs, Office of the General Counsel, U.S. Department of Justice, to author (Nov. 9, 2012, 8:18 EST) (on file with Rebecca T. Goldberg).
12. 6.3% of 79 is 4.977.
13. 9.44% (the percentage of potential EPTL § 2-1.7(a) filings that are actually brought) of 4.977 people (the number of missing people in New York who return home in more than two years but less than three years) is 46.98%, or roughly 47%. Therefore, one may approximate that only 47% of EPTL § 2-1.7(a) filings are brought in New York each year. Because doubling 47% of one filing still does not reach 100% of a filing, less than one filing every two years will be brought in a New York State Surrogate's Court for a person who will return alive in less than three years but more than two years.

Rebecca T. Goldberg is a third-year law student. She developed this article while she was a student in Judge C. Raymond Radigan's Fall 2012 Estate Administration course at St. John's University School of Law. She graduated *cum laude* from Dartmouth College in 2010. She is a member of the Trusts and Estates Law Section.

Appendix

Number of People Missing in the United States for How Long in Months

(General data since 1965)



Current Problems in the Area of Self-Dealing and Conflict of Interest Transactions: An Analysis of the Role of the "No Further Inquiry Rule" in Modern Trust Law

By Rosemary Harnisher

Introduction

A trust is a fiduciary relationship with respect to property, subjecting the trustee to "equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."[1] The trustee's role is to comply with the terms of the trust and fulfill the trust's objectives as set forth in the trust agreement. The "trustee must act in the interest of all the beneficiaries of the trust while simultaneously carrying out the intent of the settlor."[2]

Because trustees are given such a high degree of control over trust assets, the relationship between the beneficiary and the trustee is not an ordinary business relationship.[3] Rather, the relationship between the trustee and the beneficiary is an intimate relationship, wherein the beneficiary must place a great amount of confidence in the trustee.[4]

Due to the unique nature of the trustee-beneficiary relationship, trustees are bound by several duties, including the duty to be prudent, the duty of impartiality, the duty to identify and collect property, the duty to protect property, the duty to furnish information, and the duty to carry out the purpose of the trust.[5] However, perhaps the most important duty that a trustee must adhere to is the duty of loyalty.

Duty of Loyalty

Since trustees are the legal owners of the trust property, the duty of loyalty prevents the trustee from taking advantage of legal ownership to use the trust property for his or her own benefit.[6] According to the New York State Court of Appeals, the standard of loyalty is "unbending and inveterate."[7] In *Meinhard v. Salmon*, Chief Judge Cardozo stated:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.[8]

The duty of loyalty has been held to require that trustees administer the trust solely in the interest of the beneficiary.[9] Therefore, a trustee is not permitted to create or occupy a position in which he has interests to serve other than the interest of the trust.[10] Participation in a transaction that benefits oneself instead of another who is owed a fiduciary duty is known as self-dealing.[11]

In attempting to address the problem of self-dealing, a bright-line prohibition has evolved in trust law.[12] Accordingly, a trustee is able to personally benefit from a transaction involving trust property only if he or she obtains authorization to do so from the court or from the beneficiaries.[13]

Because trustees are required to administer the trust solely in the interest of the beneficiary, the rule has become known as the sole interest rule. The sole interest rule prohibits the trustee from placing himself in a position where his personal interest conflicts with the interests of the beneficiary. This rule applies to cases in which the trust "incurred no loss" or in which "actual benefit accrued to the trust" from a transaction with a conflicted trustee.[14]

"No Further Inquiry Rule"

The presumption of invalidity under the sole interest rule has come to be known in trust law as the "no further inquiry rule."[15] As previously discussed, trustees are held to have breached the duty of loyalty simply by a demonstration that they had a personal interest in the transaction, regardless of whether there was damage to the trust. This rule has been the subject of debate among legal scholars.

The "no further inquiry rule" developed in response to the courts' desire to convey its serious disapproval of trustees' breaches of loyalty.[16] The origins of the "no further inquiry rule" in New York are discussed in detail in *In re Kilmer*.[17] In *Kilmer*, the executors of an estate needed to sell a portion of the estate's real property assets in order to pay estate taxes. The executors had the property appraised and then proceeded to market the property; however, they received very low offers. One of the co-executors believed that he could broker a deal for a higher price from F.W. Woolworth Company, but the other co-executors were hesitant to turn down any offer, even if it was low. The executors finally agreed to allow their co-executor to negotiate with Woolworth if the co-executor agreed to purchase the property for the amount of the low offer in the event the deal fell through. The deal with Woolworth did not come to fruition, so the co-executor bought the real property for the initial low offer, as promised.

Several years later, some of the estate beneficiaries sought to void the transaction, and the Surrogate's Court held in their favor. Upon review, the Surrogate acknowledged that he had "no doubt" that the transaction had been free of "any ulterior motive on the part of any of the executors."[18] Nonetheless, the court opined that "upholding…this sale would be a very bad precedent. It might well practically provide a blueprint to be followed by some fiduciary of a character less reputable than" these executors.[19]

In reviewing *Kilmer* and the cases cited therein,[20] it is clear that the policy was against permitting any insertion, under any circumstances, of a trustee's own private interest into the management of the estate. The *Kilmer* court found that the idea of self-dealing was so dangerous that it should never be permitted, unless the beneficiaries freely consented to the transaction or there was prior judicial approval. The court found that even in a case where there may be some persuasive special circumstances, the idea of self-dealing was simply too dangerous.

Scholarly Debate

While the "no further inquiry rule" has been deeply entrenched in trust law's history, there has been some debate regarding its place in modern trust law. Arguments have been advanced calling for its elimination, while others have argued that it still serves a valuable role.

Professor John Langbein's Perspective

John Langbein, the Sterling Professor of Law and Legal History at Yale Law School, favored the elimination of the "no further inquiry rule" in his article, "Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?"[21] He contends that a transaction undertaken in the best interest of the beneficiaries best serves the purpose of the duty of loyalty, even if the trustee also derives some benefit.[22] If the trustee is able to prove that the transaction was prudently undertaken in the best interest of the beneficiaries, the transaction should be upheld.[23] In these situations, Mr. Langbein contends that an "inquiry into the merits is better than 'no further inquiry.'"[24]

He further argues that trust law standards of loyalty should be more like the standards of loyalty that apply to corporate fiduciaries. Under corporate law standards, fiduciaries are protected from liability for self-dealing if the fiduciary can prove that the transaction was fair to the corporation.[25]

The article notes that the no further inquiry rule is a remnant from a time when "grievous shortcomings in the fact-finding processes of the equity courts placed a premium on rules that avoided fact-finding."[26] In modern times, however, the courts are equipped with effective fact-finding procedures in addition to improvements in the standards, practices, and technology of trust recordkeeping.[27] Therefore, a trustee in breach of the duty of loyalty can no longer easily conceal wrongdoing. It is Mr. Langbein's contention that the trustee must act in the beneficiary's best interest, but not necessarily in the beneficiary's sole interest.[28]

The policy behind the duty of loyalty is the idea that any opportunity for the trustee to personally benefit from the trust is potentially harmful to the beneficiaries. According to Bogert in his treatise, the danger is that a trustee "placed under temptation" will allow selfishness to prevail over the duty to benefit the beneficiaries.[29] To Mr. Langbein, the problem with this view of conflicts of interest is that it fails to take into account the fact that conflicts of interest are not inevitably harmful and that a blanket prohibition of all such conflicts can work more harm than good.[30]

He goes on to explain how the law is moving away from court supervision over wealth transfers in general, even when there is a conflict of interest, because of the tremendous transaction costs. Mr. Langbein states that "if all businesses were required to operate under the protection of court supervision, as, for example, is the norm in bankruptcy proceedings, some frauds and mismanagement would be prevented, but at such excessive cost that no such regime has ever been attempted."[31]

One of the exceptions to the "no further inquiry rule" is prior judicial approval of conflicted transaction. Mr. Langbein points out that the standard that the court uses to evaluate these conflicts is whether the transaction is in the best interest of the beneficiary.[32] The problem with utilizing the judicial approval procedure, according to Mr. Langbein, is that it causes publicity, delay, and expense. Often, the nature of the particular transaction is time sensitive so that judicial approval proves to be impracticable.[33] Additionally, the expense of judicial approval may discourage a trustee from using this device, especially for transactions involving smaller values.

Mr. Langbein also asserts that changing the sole interest rule would be easy to accomplish. It would be a matter of simply changing the presumption of invalidity that presently attaches to a conflicted transaction from conclusive to rebuttable. He argues,

> What is wrong with the duty as presently formulated in the sole interest rule is that it emphasizes a particular

> enforcement technique (avoiding all conflict or overlap of interest between trustee and trust property), as opposed to the underlying purpose that the technique is meant to serve, which is to maximize the beneficiary's best interest.[34]

Professor Melanie Leslie's Response

Melanie Leslie, a professor at Cardozo Law School, is a vocal opponent to Mr. Langbein. In her article, "In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein,"[35] Ms. Leslie asserts that utilizing the best interest standard would be problematic because a trustee whose self-dealing actually harmed the beneficiaries could escape liability as long as the trustee could establish that he or she reasonably believed that the deal would prove to be in the beneficiaries' best interests.[36]

Among other arguments, Ms. Leslie argues that trustees of private trusts face fewer incentives to act in the financial interest of trust beneficiaries than other parties who face conflicts of interest. Typically, trust beneficiaries do not actively monitor trust behavior; they have fewer opportunities to sever the trust relationship; and market considerations play a more limited role in disciplining trustee behavior than they do in the case of the corporate fiduciary.[37]

Ms. Leslie asserts that the "no further inquiry rule" compensates for the lack of market forces by reducing monitoring costs and imposing extremely harsh penalties so that the threat of liability supplies the pressure that external forces do not.[38] Moreover, the very reason why settlors establish trusts in the first place is that these beneficiaries are believed to be incapable of managing large sums of money on their own.[39] This may be due to the fact that the beneficiary is a minor or that the beneficiary lacks financial sophistication.[40] Therefore, these beneficiaries are often unable to understand whether a trustee is acting in the trust's best interest and do not know when to object to a trustee's actions.

Ms. Leslie asserts that the "no further inquiry rule" with its bright-line prohibition and advance approval requirement, compensates for the unique vulnerability of trust beneficiaries. She further asserts that "the more opposition the proposal raises, the less likely the beneficiaries will be harmed if the opportunity is missed."[41]

Finally, Ms. Leslie argues that the best interest defense would increase beneficiaries' monitoring costs and would allow a large number of self-dealing transactions to go undetected. She believes that Mr. Langbein's proposal would serve to eliminate the few disincentives that trustees face with respect to self-dealing.[42] Ms. Leslie warns that the best interest defense removes the stigma attached to self-dealing. This will lead trustees "to increasingly push the boundaries, rationalize self-dealing behavior, or simply be less than vigilant in ensuring that the self-dealing transaction is the best option."[43]

A Fact-Specific Analysis

Adding to this debate is the very fact-specific nature of many of these types of transactions. The "no further inquiry rule" is solely to be utilized in cases where there is explicit self-dealing by the fiduciary. However, the distinction between self-dealing and a conflict of interest is not always easily distinguishable.

For example, in *Matter of Rothko*,[44] the executors of the estate of the famed artist entered into several improper contracts to sell various paintings. After a trial, two of the co-executors were found liable of such conflicts of interest that essentially amounted to self-dealing—even though they did not benefit directly from the sale of the paintings. The Surrogate applied the "no further inquiry rule," but also made additional findings that the underlying transactions were not fair and were not in the best interests of the estate. The Appellate Division affirmed the Surrogate's Court with one minor modification, and made some additional comments.

In seeking a reversal, the appellants argued that the "no further inquiry rule" was improperly utilized because it only applies to cases concerning self-dealing, and not in a case of a conflict of interest where there is no self-dealing alleged. In affirming the lower court decisions, the Court of Appeals rejected this argument and found that the court had not relied solely upon the "no further inquiry rule," but also considered and determined that the contracts were neither fair nor in the best interests of the estate.[45]

Rothko highlights the blurry line between conflict of interest and self-dealing. A conflict of interest is found when a fiduciary finds himself or herself in a dual role. A trustee may not place himself in a position where his or her own interests conflict, or possibly conflict, with the interests of the trust or its beneficiaries. Self-dealing by a trustee is one type of a conflict of interest. As such, a trustee is prohibited from profiting personally at the expense of the trust, or letting his personal interests in a transaction supersede those of the trust.

A Practical Approach

The desire for a "no further inquiry" standard was fueled by a desire for an effective punitive measure against any self-dealing by fiduciaries. However, it seems that the strict nature of the "no further inquiry rule" has not provided the appropriate level of deterrence. Even though the standard for the fiduciary duty of loyalty has been strict since the creation of trust law, there continue to be problems with fiduciary misconduct. Moreover, even in the context of this attempt at strict liability, there is still necessary fact-finding that must occur. Inevitably, because of the very nature of these types of cases, any proceeding arguing that a fiduciary's actions were self-dealing will also argue that a conflict of interest occurred.

When a trustee does engage in self-dealing, the beneficiaries are entitled to choose among a variety of remedies including rescinding the transaction, damages and / or lost profits or appreciation damages.[46] Other than rescinding the transaction, each of the other remedies assumes that there were actually damages. If the transaction was indeed in the "best interest" of the trust or estate, there may not actually be calculable damages. Regardless, the blurred roles in the *Rothko* case further illustrate that an inquiry into the best interests may need to be undertaken in any proceeding where self-dealing is alleged, despite the strict nature of the "no further inquiry rule."

Avoiding Liability

Allegations of self-dealing by a fiduciary are quite serious and, if found liable, the remedies are also quite severe.

In some instances, self-dealing is authorized by the language of the governing instrument. However, even the broadest exoneration provision will not provide unfettered exoneration for a self-dealing fiduciary. For example, in *O'Hayer v. de St. Aubin*,[47] the settlor, in appointing his son a trustee, clearly wanted his son to retain the fullest control over the operation and continuation of the family corporations. The settlor expressly stated that the general rule prohibiting self-dealing and individual profit by the trustee should not apply; and it was his "express wish and desire that my said son and myself shall benefit and profit from our trusteeships hereunder by the control of the majority of the stock of said corporations herein effectuated."[48]

Notwithstanding this broad language, the court still noted that a trustee is liable if he "commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust."[49] Moreover, any exoneration clause will be strictly construed.[50] Thus, an exoneration clause may not protect a self-dealing fiduciary.

A fiduciary can also avoid liability if he or she receives prior judicial approval of an interested transaction, upon a full and complete disclosure of all relevant information by the fiduciary and where it is shown that it is for the benefit of the trust or estate.[51] Self-dealing can also be authorized by beneficiary consent; however, the level of full and complete disclosure may come into dispute later. The best practice is to fully apprise the beneficiaries, receive their consent, and then seek court approval of the deal.

Conclusion

As detailed above, when reviewing the actions of an alleged self-dealing fiduciary, it may be more practical for the court to inquire into the best interests of the beneficiaries, rather than rely solely upon the strict liability of the "no further inquiry rule." This approach allows the court to look at the totality of the circumstances and the actions by the fiduciary.

Endnotes

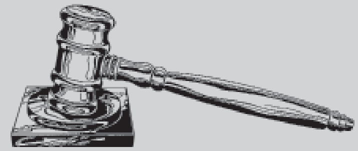
1. Restatement (Second) of Trusts § 2 (1959).
2. *Id.*
3. Rob Atkinson, *Obedience As the Foundation of Fiduciary Duty*, 34 J. Corp. L. 43, 45 (2008).
4. *Id.*
5. Alfred M. Falk, *Pity the Poor Trustee: Dealing with the Hazards of Trusteeship for Nonprofessional Trustees*, 14 Prob. & Prop. 6, December 2000, at 6.
6. Legal Information Institute at Cornell Law School, *Fiduciary Duties of Trustees*, *available at* http://topics.law.cornell.edu/wex/fiduciary_duties_of_trustees.
7. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928).
8. *Id.*
9. John Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest*?, 114 Yale L.J. 929 (2005).
10. *Sankel v. Spector*, 33 A.D.3d 167, 171, 819 N.Y.S.2d 520 (1st Dep't 2006).
11. Black's Law Dictionary (9th ed. 2009).
12. Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 Cardozo L. Rev. 2713, 2722-23 (2006).
13. *Id.* at 2723.
14. Langbein, *supra* at 931.
15. *Id.*
16. Charles Bryan Baron, Esq., *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property*?, 72 St. John's L. Rev. 43, 53-54 (1998).
17. 187 Misc. 121, 61 N.Y.S.2d 51 (Sur. Ct., Broome Co. 1946).
18. *Id.*
19. *Id.* at 59.
20. *See e.g.*, *Wendt v. Fischer*, 243 N.Y. 439, 154 N.E. 303 (1926); *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928); *In re Fulton's Will*, 253 A.D. 494, 2 N.Y.S.2d 917 (3d Dep't 1938).
21. John Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest*?, 114 Yale L.J. 929 (2005).
22. *Id.* at 932.
23. *Id.* at 944.
24. *Id.* at 932.
25. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 545 (2005).
26. *Id.* at 932.
27. *Id.*

28. *Id.*
29. *Id.* at 938.
30. *Id.* at 989.
31. *Id.* at 942.
32. *Id.*
33. *Id.* at 965.
34. *Id.* at 982.
35. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541 (2005).
36. *Id.* at 549.
37. *Id.* at 554–555.
38. *Id.*
39. *Id.*
40. *Id.* at 556.
41. *Id.* at 553.
42. *Id.* at 564.
43. *Id.* at 566.
44. 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977).
45. *Id.* at 319.
46. *See, e.g.*, *Matter of Rothko*, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Sur. Ct., N.Y. Co. 1975); *Matter of Witherall*, 37 A.D.3d 879, 881, 828 N.Y.S.2d 722 (3d Dep't 2007).
47. 30 A.D.2d 419, 293 N.Y.S.2d 147 (2d Dep't 1968).
48. *Id.* at 424–425.
49. *Id.* at 424.
50. *Id.*
51. *Matter of Scarborough Properties*, 25 N.Y.2d 553, 307 N.Y.S.2d 641 (1969).

Rosemary Harnisher authored this article while a student at St. John's University School of Law. It served as a basis for Hon. C. Raymond Radigan's article dealing with the "No Further Inquiry Rule" that appeared in the *New York Law Journal* on November 15, 2011, and was revised by Ms. Harnisher for inclusion in the *Trusts and Estates Law Section Newsletter* under Judge Radigan's supervision. Ms. Harnisher was admitted to practice in 2011, and is currently an associate attorney with Berwitz & DiTata LLP, a Garden City law firm concentrating in elder law, estate planning, trust and estate administration and litigation. Rosemary is a member of the Bar Associations of New York State, Nassau, Queens and Westchester Counties and is admitted to practice law in New York and New Jersey.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

DOCUMENTS

Prenuptial Agreement Not Necessarily Void for Improper Acknowledgment

Plaintiff in divorce action moved for summary judgment determining that the parties' prenuptial agreement is void because not properly acknowledged as required by Domestic Relations Law § 236(B)(3). The court agreed that the certificate of acknowledgment is insufficient. It does not conform to the requirements of Real Property Law § 303 because it fails to state that the person taking the acknowledgment "knows or has satisfactory evidence" that the person making the acknowledgment is the person who executed the instrument. The trial court denied the motion and the Appellate Division affirmed, holding the affidavit of the notary who took the acknowledgment raised a triable issue of fact whether the parties did indeed properly acknowledge the instrument. Two justices dissented, stating that they do not believe a defect in an acknowledgment can be cured. *Galetta v. Galetta*, 96 A.D.3d 1565, 947 N.Y.S.2d 260 (4th Dep't 2012).

ELECTIVE SHARE

Reliance on Statements of Attorney for Executor Excuses Late Filing of Notice of Election

After decedent's death his estranged wife filed a notice of election and served the notice on the nominated executor of decedent's will who then declined to serve. The notice was returned to the spouse by both the nominated executor and the court. Letters of administration were then granted to decedent's son. Negotiations between the attorney for the surviving spouse and the attorney for the principal beneficiary of the will were successful and the parties agreed on the amount of the elective share. Despite assurances that payment would be forthcoming, none was ever made and the principal beneficiary then opposed the claim to the elective share on the grounds that notice had not been filed within six months of the grant of letters and not more than two years after death (EPTL § 5-1.1-A(d)(1)). The attorney for the surviving spouse submitted a detailed affidavit stating that the notice of election had not been re-filed because of the repeated promises by

William P. LaPiana

the former attorney for the principal beneficiary that payment of the agreed upon amount was imminent. The Surrogate allowed the surviving spouse to file her election and the Appellate Division affirmed, agreeing with the Surrogate that the behavior of the principal beneficiary and her attorney worked an equitable estoppel, although the appellate court disagreed with the Surrogate's determination that the surviving spouse did not need to show that the other party intended to "lull her into inactivity." Nevertheless, the court determined that record supported a finding of the requisite intent. *Matter of Gray*, 96 A.D.3d 1584, 946 N.Y.S.2d 765 (4th Dep't 2012).

EXEMPT PROPERTY

Prenuptial Agreement Sufficient to Waive Right to Exempt Property

Decedent and his surviving spouse had entered into a prenuptial agreement. The agreement did not expressly mention the right to exempt property under EPTL § 5-3.1 and the surviving spouse began a proceeding to compel the decedent's executor to deliver the exempt property to her. The Surrogate granted the executor's motion for summary judgment, finding that the language of the agreement, especially language waiving any statutory right or interest either party may have as surviving spouse and allowing each party to dispose of his or her property as if the other spouse had not survived, was sufficient to waive any right to exempt property. *Matter of Marrone,* 36 Misc. 3d 225, 944 N.Y.S.2d 835 (Sur. Ct., Queens Co. 2012).

MARRIAGE

Reply to "No Fault" Divorce Action by Decedent Does Not Necessarily Preclude Finding That Surviving Spouse Abandoned Decedent

Husband left the marital residence and then commenced a "no fault" default proceeding under Domestic Relations Law § 170(7). Wife answered, admitting that the marriage was "irretrievably broken," requesting a divorce on that ground but asking that the court award her maintenance, direct equitable distribution of the marital property and direct husband to contribute to the payment of the marital debts. In accord with the statute, the court could not grant the divorce until these ancillary issues were resolved. Wife died before the divorce became final and husband filed a petition for letters of administration, stating that he was the only interested party and the letters were duly granted.

Wife's mother then began a proceeding to revoke husband's letters on the grounds that he had abandoned the decedent and husband moved to dismiss. The Surrogate denied the motion, holding that the wife's admission that the marriage was broken is not justification for his leaving the marital residence. To hold otherwise would contradict the very basis of the no fault divorce statute, which is that neither party need be found to be at fault for the breakup of the marriage. The Surrogate then modified the husband's letters, requiring him to post bond, not make distributions, and to return any distributed assets to the estate pending a resolution of the question of abandonment. *Matter of Perricelli*, 36 Misc. 3d 418, 945 N.Y.S.2d 498 (Sur. Ct., Westchester Co. 2012).

POWER OF ATTORNEY

Agent Who Is Alter Ego of Principal May Act for Principal in Revoking a Trust Under EPTL § 7-1.9

Father created an irrevocable insurance trust for the benefit of his three adult children. The creator's brother was trustee and the trust also named a successor trustee. On April 20, 2010, nine years after creation of the trust, the creator executed a statutory short-form power of attorney naming his daughter as his agent. The power of attorney granted the agent all of the authority in GOL §§ 5-1502A through 5-1502N and also granted authority to create and fund a GRAT or other "estate planning trust" and to "designate the trustee, income beneficiary and remainder beneficiary of any trust." The principal also executed a statutory gift rider giving the agent authority to establish and fund revocable and irrevocable trusts, to transfer assets to a trust, make gifts, and "act as grantor and trustee." Using the authority granted by the power of attorney, on May 19, 2010 the agent executed an amendment to the trust removing the trustee and the successor trustee, designating the creator's grandson, who is also the agent's son, as trustee; a successor trustee was also named. The creator's three adult children, the only beneficiaries, properly consented to the amendment, all of which was sufficient under EPTL § 7-1.9 to amend the trust. The creator died 15 days later.

The trustee named by the amendment and the agent filed a petition for an accounting and sought removal of the original trustee. The original trustee responded, denying the validity of the amendment and the Supreme Court agreed (*see Perosi v. LeGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 [Sup. Ct., Richmond Co. 2011]). According to the court, the power to revoke or amend a trust under EPTL § 7-1.9(a) is personal to the creator of the trust and therefore cannot be exercised by an agent unless the power of attorney expressly gives the agent authority to exercise the power. In addition, the court stated that the statutory short-from power of attorney does not grant authority to amend existing estate planning devices but rather grants only "forward-looking authority" to create new trusts and other estate planning arrangements.

The Appellate Division reversed and held the amendment valid. Although the authority granted by the power of attorney did not specifically authorize the agent to amend the trust, the agent did have the authority to do so as the "alter ego" of the principal by virtue of the grant of authority under GOL § 5-1502N, which grants authority to deal with "all other matters" aside from those acts which require the principal's personal performance. Concluding that a power to amend a trust under EPTL § 7-1.9(a) is not a power that cannot be exercised by an agent by its nature, the agent properly exercised the power given the creator of the trust under EPTL § 7-1.9(a). *Perosi v. LiGreci*, 98 A.D.3d 230, 948 N.Y.S.2d 629 (2d Dep't 2012).

SLAYERS

Slayer-Husband Disqualified from Inheriting Estate of Wife Who Was the Beneficiary of Victim

Husband pleaded guilty to first-degree manslaughter for causing the death of his mother-in-law. The slayer's wife was the sole beneficiary of the will of the victim. Thirteen months after the slaying and eight months before the entry of the guilty plea, the wife took her own life. Her husband is her sole distributee. In a comprehensive and thoughtful opinion, the Surrogate determined that the slayer was disqualified from inheriting the estate of his wife, the assets of which had been inherited from the victim. The opinion reviews the scant case law and rests mainly on the equitable principle, enunciated in *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), that a slayer cannot profit from his or her wrongdoing. The Surrogate did note that had more time elapsed between the two deaths the matter might be resolved differently, but that possibility should not prevent the application of a well-settled principle where the funds can be clearly and easily traced. *Matter of Gleason*, 36 Misc. 3d 486, 947 N.Y.S.2d 761 (Sur. Ct., Suffolk Co. 2012).

TRUSTS

Although Revocable Trust Was Subject to the Prudent Investor Rule, Individual Trustee Having Investment Skills Who Initiated Virtually All Investment Could Not Recover Damages from Corporate Trustee Which Breached Its Investment Duties

A revocable trust was created in 1975, naming the settlor, his father and a bank, which later became HSBC Bank USA (Bank), as trustees. In July 2006 when the settlor and the Bank were the only trustees, the Bank petitioned to resign and to settle an Intermediate Account. Settlor-trustee raised numerous amended objections, which the Surrogate sustained based on the Bank's failure to comply with its procedures before making various investments and distributions. Because the settlor was not a person with special investment skills, the Bank was held solely liable.

Although the Appellate Division rejected the Bank's contention that the Prudent Investor Act did not apply to revocable trusts, it dismissed the objections on the merits based on the co-fiduciary liability rule, which ordinarily makes all co-trustees jointly liable for trust breaches of joint obligations. The Appellate Division specifically rejected the Surrogate's holding that the co-fiduciary rule does not apply when one of the trustees has special investment expertise. Indeed, the court found that the objectant had specialized investment skills and had actually brought all but one of the disputed investments to the Bank's attention, which the trustees later jointly agreed upon. Under these circumstances, it would have been inequitable to allow the objectant to recover damages from the Bank. *Matter of HSBC Bank USA, N.A.*, 96 A.D.3d 1655, 947 N.Y.S.2d 288 (4th Dep't 2012).

Concentrated Positions Did Not Violate Trustee's Investment Duty but Failure to Sell Did Result in Violations

In 1957 father created an irrevocable trust for the issue of his Son. Father was a founder of F.W. Woolworth Company and on the board of Marine Midland Bank. Father funded the trust with shares of stock in both corporations. Marine Midland was sole trustee (and its successor, HSBC Bank USA, N.A., currently is trustee). The trust terms allow the trustee to invest "without regard to diversification or to limitations or restrictions of any kind." The trust terms also allow the trustee to "advise with counsel," a term that the appellate court concluded was not limited to legal counsel.

In 2006 the trustee petitioned for settlement of its intermediate account through November 18, 2004, and the adult income beneficiaries and the *guardian ad litem* ("GAL") for the minor remainder beneficiaries filed objections. After trial, the Surrogate sustained several objections to the account. The Appellate Division reversed all but one.

The appellate court sustained the objection based on failure to sell the Woolworth stock but modified the Surrogate's order by finding that the sale should have occurred not when Woolworth was removed from the list of securities that the trustee deemed acceptable as trust investments, but at the earlier date when the stock ceased to pay dividend. The purpose of the trust was to pay income to son's children and Woolworth stock had been the largest source of trust income.

The court found that the GAL had failed to carry the burden of proof on the objection that the trustee had abdicated its role by relying on Son for investment advice. The court found that the trust term "protecting" the trustee for actions "taken, suffered or omitted" through good faith reliance on advice of counsel was effective; it does not violate EPTL § 11-1.7 because that section does not apply to lifetime trusts, and in any event, the trust terms are not the sort of exoneration prohibited by the statute. In addition, Son "was a knowledgeable and savvy investor" and the trustee therefore acted "prudently and in good faith" by consulting with him.

The court also found that the terms of the trust clearly authorized the trustee to hold its own corporate stock and reversed the Surrogate's sustaining an objection to retaining the stock. The court distinguished between lack of diversification and overweight positions in individual stocks, finding that overweight positions are not necessarily imprudent, and that such positions did not cause the trust to sustain a financial loss.

Finally, the court held that the Surrogate's award of damages was improper because it did not follow the formula established by the Court of Appeals in *Matter of Janes*, 90 N.Y.2d 41, 681 N.E.2d 332, 659 N.Y.S.2d 165 (1997), by failing to compound annually the interest earned on dividends, and failing to take capital gains taxes into account. *Matter of HSBC Bank USA, N.A.*, 98 A.D.3d 300, 947 N.Y.S.2d 292 (4th Dep't 2012).

WILLS

Avoiding Summary Judgment Against Claim of Undue Influence Requires Substantial Evidence

Decedent's children objected to probate of a will that benefitted their stepmother. The Surrogate granted summary judgment on the objections to the proponent and admitted the will to probate. The Appellate Division affirmed. The court noted that the Surrogate found the terms of the will to be at least as attributable to dissension within the family as to undue influence by the wife, and cited *Matter of Walther,* 6 N.Y.2d 49, 188

N.Y.S.2d 168, 159 N.E.2d 665 (1959), for the proposition that summary judgment is appropriate where the evidence equally supports a finding of no undue influence. The children argued that the application of *Walther* is limited to post-trial determinations. The court dismissed that argument, asserting that sufficiency of evidence is a matter of law, whether the question is raised before or after trial, and that the objectants were required "to adduce substantial evidence of undue influence" to show a likelihood of success at trial, not merely "equivocal evidence" which would "normally" be sufficient to withstand a motion for summary judgment. *Matter of Aoki*, 99 A.D.3d 253, 948 N.Y.S.2d 597 (1st Dep't 2012).

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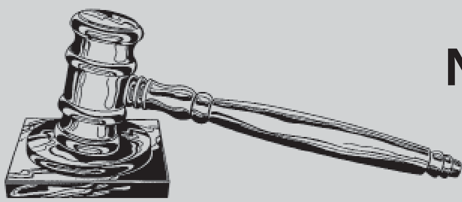
Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).



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

By Ilene Sherwyn Cooper

Attorneys' Fees

Before the Surrogate's Court, Suffolk County, in *In re Adams,* was a contested accounting in which the parties settled their differences and agreed, *inter alia,* to submit the issue of whether respondent's attorney's fees should be an expense of the estate.

The court noted that generally, a party is not entitled to recover attorneys fees from an opposing party as the same are considered incidents of litigation. Nevertheless, an exception to the general rule exists when it is demonstrated that the services performed by counsel benefited the estate as a whole, not merely the objectant. To prevail, the objectant must establish the benefit inuring to the estate by clear and convincing evidence.

The record revealed that the parties were engaged in settlement discussions prior to the commencement of the litigation. As such, the court concluded that while the litigation may have propelled those discussions to fruition, it did not benefit the estate as a whole. Specifically, the court found that estate was not enlarged in any significant way, but rather, it diminished the estate by the legal fees incurred in the defense of the action. While the court noted that fees could be awarded in a proper case where a matter is settled prior to trial, there had been no factual showing of any wrongdoing or conversion of assets by the fiduciary.

In re Adams, N.Y.L.J., Nov. 27, 2012, p. 35 (Sur. Ct., Suffolk Co.).

Disclosure

In *In re Cugini,* the objectant in a contested probate proceeding filed a motion to compel the examination of two non-party witnesses, one of whom was a physician. The objectant maintained that the physician examined the decedent in connection with an Article 81 guardianship proceeding, and therefore had information regarding her competency. The court held that generally the test for disclosure is whether the information sought is material and necessary. When disclosure is sought from a non-party witness, the party seeking disclosure must either satisfy the requirements of CPLR §§ 3101(a)(3) or (4), regarding, *inter alia,* the availability of the witness and a showing of special circumstances, respectively. The court noted that although a showing of special circumstances is no longer a prerequisite for the examination of non-parties in the Second Department, they should still be considered in making a determination. To this extent, the court found, in view of the objection as to the testamentary capacity of the decedent, that the examination of the physician was material and necessary to the proceeding. Further, the court found that the evidence to be gleaned from the witness was not available from any other source. Finally, the court noted that the physician had been named as an expert witness by the petitioner. The court opined that while the examination of an expert witness is not generally permissible, when that witness is also a factual witness with personal knowledge relevant to the proceeding, the examination of the witness is authorized. Accordingly, the motion to depose the witness was granted.

In re Cugini, N.Y.L.J., Aug. 20, 2012, p. 19 (Sur. Ct., Richmond Co.).

HIPAA Authorizations

In *In re Bellante,* the court directed the petitioner to execute HIPAA authorizations so that the objectant could obtain the medical records of the decedent. At issue in the contested accounting before the court was the validity of a transfer made by the decedent of her home prior to her death. The objectant maintained that the decedent's mental incapacity and physical limitations made her incapable of executing the deed to the premises, and caused her to be subject to undue influence perpetrated by the petitioner and her brother in connection with the transfer. The court held that in the case where a patient is deceased, a physician shall be required to disclose records either in the absence of objection by a party to the litigation, or when the privilege has been waived. A waiver can be obtained from a personal representative, or any party in interest to the litigation were the court deems the interest of the personal representative to be adverse to those of the decedent's estate. (CPLR § 4504[c][2]). In this context the court held that inasmuch as the capacity of the decedent at the time of the subject transfer was an issue of fact to be determined at trial, the medical records of the deceased were material and necessary to the pending litigation. Moreover, given the allegations that the petitioner was a party to the undue influence perpetrated upon the decedent, the court found that her interests were adverse to the estate. Accordingly, the court held that the physician-patient privilege could be waived by the objectant and that she was entitled to the records in issue.

In re Bellante, N.Y.L.J., July 19, 2012, p. 29 (Sur. Ct., Suffolk Co.).

Power of Attorney

In *In re Conrad*, the court granted partial summary judgment in favor of the estate in a proceeding to recover property that had been transferred pursuant to a power of attorney. The power of attorney granted the agent the power to conduct, amongst other things, banking transactions, real estate transactions, and gift transactions not exceeding the sum of $11,000 per year.

In support of the motion, petitioner alleged that the respondent, in breach of her fiduciary duty as the decedent's attorney-in-fact, misused the decedent's funds for her own benefit. Further, petitioner alleged that the respondent caused the decedent's pension checks to be deposited into her own accounts, and opened a joint account in her name and the decedent's, using the decedent's funds to do so, and without the decedent's consent.

In opposition to the motion, the respondent maintained that her expenditure of funds as attorney-in-fact were at the decedent's request, and were for the benefit of the decedent. Specifically, the respondent maintained that, as compared to the petitioner, she stood in a close relationship with the decedent, and acted as her caretaker during the last years of her life. Further, respondent argued that her use of funds for her own benefit was authorized by the decedent, as was her opening of the joint account with use of the decedent's funds. Additionally, respondent maintained that she used the decedent's pension funds for the decedent, or to reimburse herself for expenses she incurred on the decedent's behalf.

The court opined that gifts and pre-death transfers pursuant to a power of attorney carry with them a presumption of impropriety and self-dealing that can only be overcome by a clear showing that they were intended by the principal and were made in the principal's best interests. The court found that the only proof offered by the respondent to support her position was her own affidavit. The court held that while such proof is admissible to defeat summary judgment, because it was the only proof offered by the respondent in support of her position, and petitioner alleged that she would object to its admission at trial pursuant to CPLR § 4519, summary judgment in petitioner's favor was warranted.

In re Conrad, N.Y.L.J., July 19, 2012, p. 29 (Sur. Ct., Suffolk Co.).

Sale of Specifically Devised Realty

In *In re Marino*, the disposition of a specifically devised parcel of property was at issue. The decedent died, testate, survived by a spouse, who post-deceased her, and four children, two sons and two daughters. One of her daughters was named the executrix of her estate. Pursuant to the terms of her will, the decedent devised and bequeathed her real property to her four children in equal shares, subject to a life estate in favor of her spouse. The will further provided that in the event the property was to be sold after the spouse's death, or with his consent during his lifetime, her daughter, the executrix, was to have the first right to purchase the premises at the then fair market value. On the date the will was executed, the decedent's spouse executed a deed transferring title to the subject property to the decedent subject to a life estate in himself.

The will of the decedent's spouse devised and bequeathed his entire estate to his four children equally. Further, prior to his death, he executed a renunciation and disclaimer of his right, title and interest in the decedent's estate, including his life estate, although that instrument was never filed with the court.

Following the death of the decedent's spouse, and in accordance with the provisions of the decedent's will, her daughter sought court authorization, pursuant to SCPA §§ 1902 and 2107, to purchase the property, as well as authorization to manage the property in the interim. The application was opposed by the executrix's sister and one of her two brothers, who sought the petitioner's removal, and raised issues regarding the construction of the clause in the decedent's will governing the disposition of the property. Following the filing of an answer, the executrix moved for summary judgment.

On the issue of relief pursuant to SCPA § 2107, the court noted that the provision is available under circumstances in which the fiduciary is faced with uncertainty over the propriety of selling estate property, or extraordinary circumstances. Within this context, the court held that it would entertain the application inasmuch as the executrix was confronted with an apparent self-dealing transaction directed by the terms of the decedent's will.

The court further held that the reserved life estate of the decedent's spouse gave him the right to enjoy and possess the realty during his lifetime only, and upon his death, the property, pursuant to the decedent's will, was specifically devised to the decedent's four children. Hence, upon admission of the decedent's will to probate, title to the property vested in the decedent's children as tenants in common dating back to the moment of her death. As a consequence, an executor does not have the power to manage or dispose of such realty without court approval, and only under those circumstances set forth in SCPA § 1902. To this extent, the court noted that the provisions of SCPA § 1901 grant the surrogate the authority to approve a disposition of the decedent's realty for any of the purposes set forth in SCPA § 1902, including the payment and distribution of shares in an estate, and for any other purpose the court deems necessary (SCPA § 1902(6) and (7)).

While the court recognized that a sale of specifically devised real property could be construed as a matter between living persons beyond the scope of its jurisdiction, and more properly the subject of a partition action, it nevertheless concluded that such a determination would render the provisions of SCPA § 1902 meaningless, and undermine the expansive view of the court's jurisdiction provided by the Court of Appeals in *Matter of Piccione*, 57 N.Y.2d 278, 457 N.Y.S.2d 669 (1982). Rather, the court opined that courts have liberally granted applications to sell real property pursuant to SCPA § 1902 (6) and (7) when there is sufficient nexus between the relief requested and the administration of the decedent's estate.

Within this context, the court considered the fact that the decedent's will clearly provided for the executrix to have the first option to purchase the property whenever the property was to be sold. Although the will did not address whether the executrix had a unilateral right to demand a sale of the property, the fact of the matter was that the four children could not co-exist on the premises as tenants in common. Under those circumstances, the court concluded that the proposed sale was inextricably intertwined with the administration of the decedent's estate, and was the only practical way of insuring that the decedent's intent to benefit her children from the asset. Accordingly, the application by the executor was granted.

In re Marino, N.Y.L.J., Aug. 24, 2012, p. 22 (Sur. Ct., Bronx Co.).

Sealing of Court Records

Before the court in *In re Rappa* was an ex parte application for an order confirming the confidentiality condition of a Release and Stipulation to Dismiss, and sealing the records of the estate, including any proceeding to compromise the cause of action for the decedent's wrongful death.

In support of the application, the petitioners asserted that the cause of action for wrongful death had been resolved, and that the confidentiality provisions of the release agreement were a "vital component" of the settlement.

The court opined that the sealing of court records can only be ordered upon a showing of good cause. Such a determination must be assessed against the backdrop of the broad presumption that the public is entitled to access to judicial proceedings and court records. Accordingly, because confidentiality is the exception and not the rule, a party seeking an order to seal bears the burden of demonstrating compelling circumstances which justify restricting the public's right to open court proceedings.

Considered within this context, the court found no basis for sealing the court record. The court found that the petitioners had not demonstrated that a failure to seal the court record would inhibit the resolution of concurrently pending or related proceedings, nor had petitioners shown that the parties' reliance on the confidentiality of the file had induced changes of their position, and was essential to the settlement. Although petitioners maintained that certain aspects of the terms of settlement could disclose some unspecified strategic path to defendants in future actions, the court found this claim insufficient to sustain sealing of the record. Therefore, the petitioners' application was denied.

In re Rappa, N.Y.L.J., Oct. 23, 2012, p. 23 (Sur. Ct., Kings Co.).

Summary Judgment

In *In re Feinberg,* the court granted summary judgment to the petitioner and dismissed the objections to probate. On the issue of due execution, the petitioner submitted a copy of the will, which contained an attestation clause and self-proving affidavit, as well as transcripts of the SCPA § 1404 examinations of the attesting witnesses and the attorney who supervised the execution of the instrument. Based on these submissions, the court found that petitioner had established a prima facie case of due execution and testamentary capacity. In opposition to the motion, the objectant alleged that an issue of fact existed on the issue of due execution inasmuch as the attesting witnesses had failed to recall the will signing. However, these witnesses, who were either employed by or had been employed by the attorney draftsman, both testified that there was a standard procedure utilized in the office for the execution of a will, which complied with the requirements of EPTL § 3-2.1. The court held that the inability of the witnesses to recall the will execution ceremony was insufficient to overcome the presumption of due execution that arose from an attorney-supervised will execution ceremony, or the existence of a self-proving affidavit.

The court rejected the objectants' claim that the presumption of due execution did not apply because the draftsman was associated with the petitioner. Rather, the court found that the drafting attorney had more than a ten-year professional relationship with the decedent prior to the execution of the propounded will, and that the decedent, together with his wife, had selected counsel. Indeed, it appeared that although the attorney knew the petitioner, and at times spoke with him on the phone, he had never met him in person prior to the execution of the will, or acted to any extent under his direction.

The court also held that the existence of staple holes in the instrument did not undermine its due execution. Specifically, it appeared that there were additional staple holes in the pages of the will that were obscured by the will's cover sheet. Neither the attorney who supervised the execution of the will nor the attesting witnesses had an explanation for the staple holes. Nevertheless, the court opined that the mere removal of staples or re-fastening of a will does not render the will invalid if the language of the pages is coherent and connected. To this extent, the court found that the propounded will mirrored the provisions of the will of the decedent's wife, that the pages were numbered serially, and each page was initialed. Furthermore, the evidence revealed that the will was executed in the presence of the decedent's attorney and the attesting witnesses, and was kept in the office of the attorney until it was offered for probate.

On the issue of testamentary capacity, the court held that the testimony and affirmation of the attorney-draftsman, together with the testimony and affidavit of the attesting witnesses, established a prima facie case of testamentary capacity. The record revealed that at the time of executing his will, the decedent was actively engaged in running a business and maintaining rental property, and that he and his wife came to counsel with a testamentary plan in mind that they discussed with counsel over a several month period. Further, multiple drafts of the instrument were sent to the decedent for review, and the instrument was read and discussed prior to its execution. Further, no medical evidence was submitted suggesting that the decedent's faculties were impaired at the time the instrument was executed.

Nevertheless, the objectant maintained that the decedent was not fully knowledgeable of his assets, to the extent he had mistaken his ownership interest in two corporations, and the attorney had not discussed the value of his assets with him. The court found these claims unavailing, holding that the decedent need only have a general, rather than a precise, knowledge of his assets.

Finally, the court found the record devoid of proof that the will was the product of fraud and/or undue influence.

In re Feinberg, 2012 NY Slip Op. 51904U (Sur. Ct., Queens Co.).

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Florida Update

By David Pratt and Jonathan Galler

David Pratt

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LEGISLATIVE UPDATE

Post-Divorce Automatic Nullification Statute for Beneficiary-Designated Non-Probate Assets

Florida has enacted a new statute that automatically voids the designation of a former spouse as the beneficiary of a non-probate asset that would otherwise be transferred or paid to the spouse pursuant to such designation upon the death of the decedent. Fla. Stat. § 732.703. Existing statutes already void the designation of a former spouse as the beneficiary of a will or revocable trust. Fla. Stat. §§ 732.507(2) and 736.1105. The new statute applies only if the decedent's marriage was terminated before the decedent's death *and* the designation was made before the marriage was terminated. Among the non-probate assets covered by the statute are life insurance policies, employee benefit plans, IRAs and payable-on-death accounts. The statute does not apply under certain specifically enumerated circumstances, including, but not limited to, when such a provision is contrary to federal law or the governing instrument (i.e., if the decedent intended the former spouse to remain a beneficiary). Notably, the statute also does not apply to an asset or joint account held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner. In the event of an improper distribution to a former spouse, the statute establishes a form of "payor immunity," meaning that the secondary beneficiary has a cause of action against only the improper recipient. The statute applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

CASE LAW UPDATE

Removal of Trustee Requires Notice

Florida law provides that the court may remove a trustee on *the court's own initiative* if "due to the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries." Fla. Stat. § 736.0706. Trustees, therefore, have plenty of incentive to stay on the court's good side. In this case, the trustee clearly failed to do so. The trustee violated a number of court orders and did not provide timely discovery responses. As a sanction, the trial court removed the trustee. The appellate court, however, reversed, holding that "a factual finding must be made by the trial court" as to the trustee's ineptitude to administer the trust. Such a finding requires an evidentiary hearing, notice to the trustee, and an opportunity for the trustee to be heard. Because the trustee was never provided with notice that removal would be a possible sanction, the removal constituted reversible error.

Kountze v. Kountze, 93 So. 3d 1164 (Fla. 2d DCA 2012).

Determination of Joint Versus Separate Property

Peter Connell and his wife, Fana, executed an antenuptial agreement. Pursuant to that agreement, any property acquired jointly during the marriage was to become the joint property of the parties, and, upon the death of one party, the other was to receive the entire interest in the joint property. During the year before his death at the age of ninety-five, Peter purchased a gold and diamond Rolex men's watch and a three-carat diamond men's ring. The jewelry was purchased in part with funds from a checking account that was held by Peter and Fana as a joint tenancy with rights of survivorship. Peter wore the jewelry every day until he was hospitalized, at which time he asked his wife to hold onto the jewelry for safekeeping. After his death, Fana contended that the jewelry was purchased as a joint asset because, among other things, it was purchased with funds from the joint account. On that basis, the trial court ruled that, under the antenuptial agreement, the jewelry was the sole property of Fana, not the estate. The appellate court reversed, holding that the jewelry was Peter's alone because it lacked the element of "unity of possession" necessary to qualify it as a joint asset. The appellate court also rejected the argument that the jewelry was a joint asset by virtue of how it was purchased because when the parties' funds left the joint checking account to make the purchase, the funds themselves lost their joint character as well.

Connell v. Connell, 93 So. 3d 1140 (Fla. 2d DCA 2012).

Homestead: Protection From Forced Sale

The term homestead is used in connection with three different concepts in Florida's constitution:

(1) taxation; (2) exemption from forced sale; and (3) descent and devise. What constitutes a "homestead" for one purpose may not constitute a "homestead" for another purpose. Florida's Second District Court of Appeal recently addressed the issue of whether a condominium that is subject to a long-term leasehold may qualify as a homestead for purposes of protection from a forced sale to pay the creditors of the deceased owner. The decedent had owned the remaining term on a 100-year lease agreement from 1976, and the decedent's personal representative petitioned the court to determine whether the condominium qualified as a homestead. The trial court determined that it did not qualify because it was a leasehold and not a fee simple interest in land. The appellate court reversed, holding that to qualify for homestead protection from forced sale, the test is whether the debtor intended to make the property his homestead, as well as the debtor's actual use of the property as his primary residence. By contrast, the "fee simple" test invoked by the trial court applies to the very different homestead concept of "descent and devise." The appellate court noted, however, that its holding differs from at least one of its sister appellate courts.

Geraci v. Sunstar EMS, 9 So. 3d 384 (Fla. 2d DCA 2012).

Loss of Creditor Exempt Status for Life Insurance Proceeds

Florida law generally exempts life insurance proceeds from the claims of the insured's creditors. Fla. Sta. § 222.13(1). The proceeds can remain exempt even when made payable to a trust rather than directly to a natural person. Fla. Sta. § 733.808(4). However, life insurance proceeds made payable to a trust "shall be held and disposed of by the trustee in accordance with the terms of the trust as they appear in writing on the date of the death of the insured." Fla. Stat. § 733.808(1). Thus, the terms of the trust can effectively override the statutory exemption, thereby subjecting life insurance proceeds to the insured's creditors. In this case, the trial court held that the terms of the trust did just that, directing that the proceeds be used to pay the expenses and obligations of the estate, presumably because the settlor did not anticipate his estate's deep financial troubles. The appellate court agreed that the proceeds had lost their creditor exempt status, holding that Florida law "makes an exemption from the decedent insured's creditors available for life insurance policy proceeds but does not require the policy owner to take advantage of the exemption." The trial court also denied the trustee's attempt to reform the language of the trust, pursuant to s. 736.0415, to remove the waiver of the exemptions. The appellate court affirmed the denial of that petition as well, concluding that "[r]eformation is not available to modify the terms of a trust to effectuate what the settlor would have done differently had the settlor foreseen a change of circumstances that occurred after the instruments were executed."

Morey v. Everbank, 93 So. 3d 482 (Fla. 1st DCA 2012).

Effect of Temporary Guardianship Upon Capacity to Create a Trust

The children of Karim Saadeh petitioned to have Karim determined incapacitated and to institute a guardianship. The children appear to have been concerned that Karim would give his substantial assets to a woman he met following his wife's death. The trial court appointed a temporary emergency guardian over Karim and delegated to that guardian all of Karim's legal rights except his right to vote. During the pendency of the emergency guardianship, the guardian's lawyer and Karim's court-appointed lawyer proposed a settlement to the court, in the form of an agreed order, whereby Karim was to execute, among other things, a trust agreement naming his children as co-trustees and beneficiaries, and whereby the guardian was to seek leave of court for her discharge. Karim did execute a trust agreement, and the court dismissed the guardianship. Nevertheless, further proceedings took place and Karim was ultimately determined not to be incapacitated. Karim subsequently sought to revoke the trust agreement on the ground that, at the time he executed the trust agreement and purported to have reached a settlement to resolve the guardianship, his legal rights to do so had been removed. The trial court agreed and ruled that (i) a guardianship proceeding cannot be settled, dismissed or resolved until fully determined (as was ultimately done here); and (ii) the new trust agreement was void *ab initio*. The appellate court affirmed, noting that s. 736.0402(1)(a), Fla. Stat., provides that "[a] trust is created only if: (a) the settlor has capacity to create a trust." The appellate court also suggested that Karim did not have the legal power during the emergency guardianship to retain his own counsel in addition to, or in lieu of, his court-appointed counsel.

Jasser v. Saadeh, 97 So. 3d 241 (Fla. 4th DCA July 18, 2012).

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