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Trusts and Estates Law Section Newsletter

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Chair's Message—Finale

Ronald J. Weiss

A year goes quickly. As you read this, my tenure as Chair of our Section will have come to an end. I think it has been a good year; it certainly has been an enjoyable one. In my "Message from the Incoming Chair" one year ago, I outlined four parts to my agenda for the coming year. The first part was to facilitate amendments of the GOL to clarify some of its Powers of Attorney provisions. Through the hard (and good) work of a special committee chaired by Bob Freedman, our Section recently approved a series of "technical" amendments to the Powers of Attorney, amendments largely first proposed (but unacted upon) by the Law Revision Commission in early 2012. While some members of our Section and members of other Sections would like to see more sweeping changes in this area, progress can sometimes be better made in smaller steps; and sometimes it is better to accomplish some good than to make a point

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A Message from the Incoming Chair

Marion Hancock Fish

To add to Ron's message, let me say that he is far too humble. The Chair's work can be truly daunting. There is a constant flow of communication, day and night. For example, last February and March, draft memos related to the New York tax law changes were flying fast and furiously. Ron kept right up to date providing salient edits as well as valuable strategic guidance.

We are so appreciative of all of Ron's efforts throughout the year and even more grateful that Ron has agreed to continue helping on the Powers of Attorney and New York estate tax legislative work.

Though my year is just beginning, I already have many to thank for their support, interest and enthusiasm. Carl Baker has agreed to chair our Spring 2015 Program at the Kiawah Island Golf Resort near Charleston, South Carolina, April 23-26, 2015. The Pro-

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that accomplishes only the making of that point. In my view, this is one those times.

The second part on my agenda was to encourage implementation of the Section's other legislative goals, including changes to New York's estate tax. Here, while we accomplished much, we still have more to accomplish. In the accomplished column, the Section's bills streamlining the law on interest payable on a delayed legacy and correcting the SCPA's erroneous reference to the Surrogate's Court jurisdiction over UTMA accounts were both signed into law. Also signed into law was important legislation our Section supported establishing and clarifying the rights of posthumously conceived children—those conceived after the death of their genetic parent.

In the to be accomplished column, Susan Baer and Sharon Klein of the Section's Tax Committee and I have had several productive meetings with officials in Albany in which we proposed four changes to New York's estate tax: (1) to soften (if not eliminate) the "cliff"; (2) to reduce the "clawback" period for gifts from three years to one year; (3) to allow portability; and (4) to allow a separate New York QTIP election where the only reason to file a federal estate tax return is to elect portability. We will be continuing these efforts as the Legislature continues its current session.

Three other legislative initiatives undertaken by our Section are also progressing. One of those initiatives is a proposal that would allow the custodian of an UTMA account to transfer the assets in that account to an IRC section 2503(c) trust for the benefit of the beneficiary of the UTMA account. My thanks to Jill Beier and Darcy Katris for their work on this proposal. I also want to thank Jill and Darcy and members of their Estate Planning and Trust Administration Committee for their extraordinary work, along with members of a companion committee of the City Bar, on a proposal concerning digital assets. Both of these proposals were presented to and approved by the Bar Association's House of Delegates at the Annual Meeting in January.

The third initiative, approved at the Section's Executive Committee meeting in January, is a proposal by the Life Insurance and Employee Benefits Committee, chaired by Albert Feuer, to amend EPTL 7-3.1 and CPLR 5205 to provide that a beneficiary of a trust shall not be considered the creator of a trust solely by reason of a waiver, release or lapse of a crummey power of withdrawal. This will be presented to the Bar Association's House of Delegates at its meeting at the end of March.

In addition, as evidenced by the presentation of Professors Bill LaPiana and Ira Bloom at our Section's Annual Meeting program, the third part of my agenda—to support the work of the Uniform Trust Code Committee in modernizing New York law—also continues. Stay tuned.

On the CLE front, the final part of my agenda, our Section continued its long and proud tradition of presenting a varied (and well attended) suite of programs. A not small part of that tradition belongs to the work of Frank Streng, who after an extended term as Chair of our Section's CLE Committee stepped down from that post in January. My thanks to Frank for his years of tireless service and my welcome to Sylvia Di Pietro who will be taking Frank's place as Chair of that CLE Committee.

One does not become the Chair of a Section based on one's efforts alone. I thank my family and Skadden, Arps for their support in saying "yes" when I was asked to take the job as an officer of the Section and for their support over the last year. I would also be remiss if I did not thank the Bar Association's staff, especially our long-standing Section Liaison, Lisa Bataille, for their work in making my job doable. I wish our incoming Chair, Marion Hancock Fish, a good and successful year. See you all in April at Kiawah Island.

Ronald J. Weiss

A Message from the Incoming Chair

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gram will include two half-day continuing legal education segments centered on planning and administration issues for families. We will feature a Surrogate's Panel on Saturday morning moderated by the Hon. Ava S. Raphael from Onondaga County. Chairperson-Elect Meg Gaynor has agreed to chair the golf outing, so don't forget to bring your clubs. And as always, James Kaplan will provide a fascinating civil war history lesson during an outing to Fort Sumter.

As we move into 2015 I invite you to contact me with Section matters that are on your mind. I am truly looking forward to continuing the good work of the TELS Executive Committee and of the Section.

Marion Hancock Fish

Editor's Message

Happy Spring to all of our readers! In this edition of our *Newsletter*, we are pleased to have an article from C. Raymond Radigan and Jennifer Hillman that clarifies the relationship between health care proxies and living wills, an article by Robert M. Harper analyzing the applicability of the attorney-client privilege in the context of contested trust proceedings, and an overview of kinship proceedings from Gary E. Bashian.

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. The deadline for submissions for our next edition is June 8, 2015.

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The Interplay of the Health Care Proxy and the Living Will*

By C. Raymond Radigan and Jennifer F. Hillman

More than a century ago, the United States Supreme Court held that an individual's right to privacy includes the right to make medical decisions affecting his or her body. This right exists even if the decisions result in death.[1] As stated by Judge Benjamin Cardozo "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[2]

Yet, an individual's right to make medical decisions becomes more complicated when the patient is comatose. What if the agent under a health care proxy refuses to comply with the principal's stated wishes in a living will? What if the language of the living will is too general or too specific? What if there is no health care proxy or living will? This article looks at the history of this issue and how it is addressed today.

Early Cases

One of the earliest cases to widely publicize this issue was a 1976 New Jersey case.[3] Karen Ann Quinlan, then 21 years old, was in a "chronic persistent vegetative state" with no cognitive function.[4] The court held if "there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn."[5] More importantly, the Court held that removing Karen from life-support would not lead to civil or criminal liability for her guardian, her physicians or the hospital where she was receiving care.[6] Since *Quinlan*, several New York cases have addressed the removal of feeding and hydration tubes from comatose patients, as well as removal from a respirator.

Significantly, in 1988, the New York Court of Appeals addressed the issue in *Matter of Westchester County Med. Ctr. (O'Connor)*.[7] Mary O'Connor, then 77 years old, was receiving intravenous nutrition over the objection of her two daughters.[8] The medical facility where O'Connor was receiving treatment sought authorization from the court to insert a nasogastric feeding tube to continue providing life-sustaining treatment. The request was denied by the Westchester County Supreme Court and the Second Department.[9] The Court of Appeals reversed and found a lack of clear and convincing evidence that O'Connor would have refused artificial nutrition under her present circumstances.[10] The heightened standard requires proof "the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented."[11]

The Court of Appeals further detailed several factors to consider including: (i) the persistence of the individual's statements; (ii) the seriousness with which those statements were made; and (iii) any inferences that could be drawn from the surrounding circumstances.[12] The Court of Appeals otherwise concluded that a "living will" could be sufficient to meet the clear and convincing standard. An executed living will suggests the author was serious about the stated beliefs. A living will also "ensures that the court is not being asked to make a life-or-death decision based upon casual remarks" by the patient throughout their life.[13]

However, even with a properly executed living will, a compelling State interest could override the patient's wishes and right to determine what happens to his or her body.[14] The common-law right to refuse medical treatment is not absolute and could, in some cases, yield to a compelling State interest.[15] These State interests could include: "(1) the preservation of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) maintaining the ethical integrity of the medical profession."[16]

Each of these potential State interests was reviewed in the case of Daniel Delio.[17] Delio had suffered severe and irreversible brain damage. He relied upon two artificial devices for nutrition and hydration.[18] Delio did not have a living will, but family, friends and colleagues offered substantial testimony of statements by Delio over the years on this issue.[19] The Second Department determined that the "inescapable conclusion" was that Delio, under the present circumstances, would have refused artificial nutrition and hydration.[20]

The Second Department further addressed what, if any, interest the State had in the decision to end life-sustaining treatments to Delio. Ultimately, the court found that any potential interest of the State did not overcome Delio's right to refuse medical treatment (under the facts of that case). The Second Department stated that a person in a permanent vegetative coma essentially "has no health and, in the true sense, no life, for the State to protect."[21] The Second Department also found that suicide requires a specific intent to die which is generally not present in patients who refuse artificial life-sustaining treatment.[22] The Second Department also found that the protection of innocent third parties, particularly minor children, had no relevancy in the case because Delio was an adult.[23] Accordingly, at least in the case of comatose patients in a chronic vegetative state, courts will authorize termination of respirators,[24] the removal of feeding and hydration tubes[25] and the enforcement of "Do Not Resuscitate" orders[26] provided the requisite proof is found.

Health Care Proxy vs. Living Will

New York Public Health Law 2981 authorizes any competent adult (the "principal") to appoint a health care agent. The form empowers the agent to make health care decisions for the principal if the principal becomes incompetent.

The agent's decisions must be consistent with the known wishes of the principal.[27] If the principal's wishes are not reasonably known or cannot reasonably be determined, the agent may act in accordance with the principal's best interests.[28] However, if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have ***any*** authority to make decisions regarding these measures.[29]

Conversely, a living will is a written directive to family, physicians and hospitals that states whether life-prolonging treatment should be administered in the event the person becomes incompetent.

The drawback of a living will is that it is written in advance of the time when treatment decisions must be made. The directive was made in a vacuum and cannot represent an informed decision under the present circumstances. If a living will is drafted in specific language, it cannot provide guidance in unanticipated circumstances. If the living will is written in general language, then its terms may be too ambiguous and vague to apply to any particular treatment. The value of a living will is solely to provide evidence of a patient's wishes in the abstract.

New York has not enacted legislation recognizing the validity of living wills. Thus, a living will is only enforceable in New York on a case-by-case basis where it can be offered as clear and convincing evidence of the incompetent patient's intent.

The health care proxy and living will complement each other and should be executed simultaneously. If the individual becomes incompetent, the agent will be able to confer with physicians regarding the type of treatment involved and the accompanying risks and benefits. Thus, the agent will be able to make the same type of informed decision that the patient would have made if competent.

But a health care proxy alone may not address all scenarios. If the agent does not know the patient's wishes concerning life-sustaining treatments, he or she is not authorized to make any decisions regarding those measures.[30] The living will is a statement of the patient's wishes to assist the agent, and may give the agent authority to act (depending upon the language of the document, and the circumstances of the patient's medical condition). Practitioners may want to also state in their health care proxy forms that the principal has discussed his or her wishes with the agent (and ensure that this is actually done).

What Happens If the Health Care Agent Does Not Comply With the Living Will?

As discussed above, the health care agent is the only person with legal authority to end life-sustaining treatment on an incompetent person's behalf. However, the agent has the power to make health care decisions on behalf of the principal only to the extent the decisions are consistent with the known wishes of the principal.[31]

NY Public Health Law 2992 authorizes special proceedings to determine the validity of a health care proxy, or removal of an agent. One ground for removal may be noncompliance with NY Public Health Law 2982, including the statutory requirement that the agent's decisions are consistent with the known wishes of the principal. Thus, the failure of the agent to comply with the Decedent's wishes, particularly those stated in a living will, could lead to their removal as agent.

What Happens if There Is No Living Will or Health Care Proxy?

NY Public Health Law 2989 specifically states that the failure to appoint a health care agent does not create any presumptions about the patient's health care wishes. But if there is no agent appointed, no one has legal authority to end life-sustaining treatment on the incompetent patient's behalf. Clear and convincing evidence of the specific, express wishes of the incompetent person will be the sole legal basis for discontinuing treatment. A living will may be sufficient proof of the patient's wishes, provided the language utilized in the document fits the circumstances of the patient's condition.

Family members could seek the authority to end life-sustaining measures based upon this document or other evidence of the patient's wishes.

What if the Principal's Competent, but Cannot Physically Sign Either Document?

A competent, but physically disabled, client poses additional issues for any estate practitioner. Pursuant to NY Public Health Law 2981, the health care proxy may be signed and dated by a third party on behalf of the principal, provided it is done at the principal's direction and in the principal's presence, and in the presence of two adult witnesses who shall sign the proxy.

These same procedures may not be effective for a living will, however, because the living will is not statutory. Despite this lack of statutory authority, there could be a corollary between the procedures for execution of a will and the procedures for execution of a living will. For example, EPTL 3-2.1(a)(1) states that a will can be executed by a third-party's signature, provided the third party is acting at the direction of the testator. If a testator who is physically unable to sign his or her name requires assistance, he or she may even have a third-party hold his or her hand and guide—provided it is at their direction.[32] It was even found that the testator placing a fingerprint on the signature was sufficient for due execution.

Of course, each of these scenarios is ripe for a probate contest based upon undue influence and should be well-documented. However, they may provide guidance for the court and practitioners when a competent client is unable to physically sign the document.

Conclusion

A health care proxy and living will are complementary documents. Their execution is intended to ensure a patient's wishes are complied with should they become incompetent. The interplay between the two documents necessitates that both are executed.

Endnotes

1. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891).
2. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129 (1914).
3. *Matter of Quinlan*, 70 N.J. 10, cert. den., 429 U.S. 922 (1976).
4. *Id.* at 24.
5. *Id.* at 54.
6. *Id.* at 671.
7. 72 N.Y.2d 517 (1988).
8. *Id.*
9. *Id.*
10. *Id.* at 534.
11. *Id.* at 531.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Matter of Delio v. Westchester Co. Medical Center*, 129 A.D.2d 1, 23 (2d Dept 1987).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 6.
21. *Id.* at 23 (*quoting Matter of Eichner*, 73 A.D.2d 431, 465 (1980)).
22. *Id.* at 24.
23. *Id.* at 25.
24. *See, e.g., Matter of Eichner, supra*.
25. *Matter of Delio, supra*.
26. *New York Public Health Law* §§ 2960 et seq.
27. NY Public Health Law § 2982.
28. NY Public Health Law § 2982.
29. NY Public Health Law § 2982(2).
30. NY Public Health Law § 2982.
31. NY Public Health Law § 2982(2).
32. *Matter of Kearney*, 69 A.D. 481, 74 N.Y.S. 1045 (2d Dep't 1902); *see also Matter of Morris*, 208 A.D.2d 733, 617 N.Y.S.2d 513 (2d Dep't 1994). In *Matter of Albert*, N.Y.L.J., April 23, 2013, at 25 (Sur. Ct. Kings Co.),

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A special thank you to Jennifer Choi whose research paper was the basis for this article. Ms. Choi is a recent graduate of St. John's University School of Law.

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**Citations 30 and 32 have been extracted from the text and incorporated into the endnotes in this version of this article.*

The Application of the Attorney-Client Privilege in Revocable Trust Contests

By Robert M. Harper

With the passage of time, revocable trusts have gained increased prevalence in estate planning and, thus, also have been the subject of more contests. While the application of the attorney-client privilege to communications between the attorney-draftsperson of a testamentary instrument and the testator in will contests is the subject of a statutory exception, there is no statutory guidance governing whether a similar exception applies with respect to communications between the attorney-draftsperson of a revocable trust and the settlor in revocable trust contests. In the absence of such statutory guidance, courts have been left with little authority on which to decide whether—and to what extent—such an exception to the attorney-client privilege should apply in revocable trust contests. This article addresses that issue.

The Attorney-Client Privilege

As codified in Rule 4503 of the New York Civil Practice Law and Rules (CPLR), the attorney-client privilege provides that "an attorney…shall not disclose" confidential communications between the attorney and a client "arising as an incident of the attorney's professional employment," absent a waiver of the privilege by the client.[1] The attorney-client privilege—which is the oldest among the common-law evidentiary privileges—facilitates open communication between an attorney and client, ensuring that the client (a) fully confides in his or her attorney; and (b) is secure in the knowledge that the confidences the client shares with his or her attorney during the representation will remain private.[2]

The privilege survives the death of a client, such that the client's attorney has a duty to maintain the confidentiality of privileged communications even after the client's demise.[3] Insofar as the fiduciary of a deceased client's estate stands in the client's shoes, the fiduciary may waive the attorney-client privilege on behalf of the deceased client's estate.[4]

Moreover, to the extent that the attorney-client privilege shields relevant information from disclosure, tension exists between the public policies favoring liberal discovery and withholding relevant evidence under the privilege.[5] This is because the withholding of relevant information under the attorney-client privilege "hampers the truth-finding process," which "is at the heart of our judicial system."[6] Consequently, Surrogate's Courts have recognized that the attorney-client privilege "is to be strictly construed in keeping with its purpose."[7]

Mindful of the foregoing principles, there are exceptions to the attorney-client privilege, which govern in proceedings concerning the validity of testamentary instruments and revocable trusts. The exceptions are discussed below.

The Application of the Attorney-Client Privilege in Proceedings Concerning the Probate, Validity, and Construction of Testamentary Instruments

In addressing the attorney-client privilege, the New York Legislature enacted CPLR 4503(b), which contains a statutory exception to the privilege.[8] The exception provides that, in a proceeding concerning the probate, validity, or construction of a will, "an attorney…shall be required to disclose information as to the preparation, execution or revocation of any Will or other relevant instrument…."[9] That is, except to the extent that disclosure of a privileged communication "would tend to disgrace the memory of the decedent."[10]

When the statutory exception applies, an "attorney may testify [and disclose documentation] concerning the preparation of a will or other relevant documents[,] even if the will or documents are not those actually filed for probate and contested."[11] As such, in *Matter of Soluri*, the Surrogate's Court held that CPLR 4503(b) authorized an attorney—who (a) prepared advance directives, but not a will, for the testator (because the testator told the attorney that she did not want a will); and (b) spoke with the testator in the weeks leading up to the preparation and execution of the propounded will that another attorney drafted—to testify as to the privileged communications the non-drafting attorney had with the testator.[12] The court explained that the non-drafting attorney's testimony fell within the statutory exception to the attorney-client privilege.[13]

Of course, the statutory exception to the attorney-client privilege is a "narrow one."[14] It generally does not apply in proceedings other than those that concern the probate, validity, or construction of a testamentary instrument, such as discovery proceedings, kinship proceedings, and proceedings to determine the validity of a claim against a decedent's estate.[15]

The statutory exception also does not authorize a blanket waiver of the attorney-client privilege with respect to any and all confidential communications

between an attorney and a client.[16] For example, in *Matter of Delano*, the objectants in a probate proceeding appealed from a decree admitting a testamentary instrument to probate, claiming that the Surrogate's Court committed reversible error by excluding from evidence—on privilege grounds—the testimony of an attorney who did not draft the propounded instrument, but was prepared to testify as to the intentions the testator expressed to the attorney years after the testator executed the propounded instrument.[17] The objectants asserted that the attorney's testimony fell within the statutory exception set forth in CPLR 4503(b), but neither the Surrogate's Court nor the Appellate Division credited that argument.[18]

Nevertheless, even in those circumstances where the statutory exception codified in CPLR 4503(b) does not apply, courts have recognized the following non-statutory exception to the attorney-client privilege: in a probate proceeding, communications between a testator and an attorney who provided estate-planning services to the testator, but which did not concern the instrument offered for probate, should not be shielded from discovery "in controversies between [the testator's] heirs at law, devisees, legatees or next of kin…."[19] The underlying rationale is that the testator "would expect the confidentiality of such communications to be lifted in the interests of resolving disputes over" the testator's estate plan.[20] Thus, in *Matter of Bronner*, the Surrogate's Court directed an attorney—who merely consulted with the testator shortly before the testator retained another attorney to prepare her will—to testify as to his privileged communications with the testator, despite that the testimony fell outside of CPLR 4503(b).[21]

While the exceptions to the attorney-client privilege that apply in proceedings concerning the probate, validity, and construction of wills are well settled, the same cannot be said for the application of the attorney-client privilege in contests concerning revocable trusts. The evolving body of case law concerning revocable trusts and its impact on the attorney-client privilege is discussed below.

The Exception to the Attorney-Client Privilege in Revocable Trust Contests

As revocable trusts have become increasingly popular as estate-planning devices, so too have disputes as to the validity of such instruments. With the increased prevalence of revocable trust contests, issues attendant to the attorney-client privilege's application have arisen in such disputes.

In contrast to disputes concerning the probate, validity, or construction of wills, there is no statutory exception to the attorney-client privilege that explicitly applies to revocable trust contests. However, it has been argued, in at least one case, that the statutory exception to the attorney-client privilege codified in CPLR 4503(b) should be extended to revocable trusts because revocable trusts function as wills and carry with them many of the same rights and remedies as wills do.[22] Indeed, much like testamentary instruments, revocable trusts "are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature."[23]

Describing that argument as "persuasive," the Surrogate's Court that considered it found that the court need not decide whether the statutory exception to the attorney-client privilege set forth in CPLR 4503(b) governs in revocable trust contests. The court reasoned that the attorney-client privilege "does not apply in a dispute between parties as to an interest in property which [the parties] claim through the same decedent."[24] Consequently, the court directed the attorney-draftsperson of an alleged amendment to a revocable trust to testify as to the privileged communications he purportedly had with the settlor.[25]

There being no statutory guidance and only one reported case concerning the application of the attorney-client privilege in revocable trust contests, it remains to be seen how the Surrogate's Courts other than the one discussed above will address this issue. However, it is highly unlikely that, in revocable trust contests, the courts would allow attorneys who prepare revocable trusts to shield from discovery the confidential communications they have with settlors concerning the trusts.

Conclusion

The law governing revocable trusts is evolving; and, as it relates to the attorney-client privilege and its application in revocable trust contests, that is equally true. To the extent that disputes concerning the validity of revocable trusts become more common, so too will questions concerning the application of the attorney-client privilege and any exceptions thereto. It will be interesting to see how the Surrogate's Courts resolve these privilege issues.

Endnotes

1. CPLR 4503; *Matter of Colby*, 187 Misc. 2d 695, 696-97, 723 N.Y.S.2d 631 (Sur. Ct., N.Y Co. 2001).
2. *Matter of Bronner*, 7 Misc. 3d 1023(A), at *2-3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
3. *Mayorga v. Tate*, 302 A.D.2d 11, 11-12, 752 N.Y.S.2d 353 (2d Dep't 2002).
4. *See id.*
5. *Colby*, 187 Misc. 3d at 696-97.
6. *See id.*
7. *See id.* at 697.

8. CPLR 4503(b).
9. *See id.*
10. *See id.* With respect to material that is subject to the attorney-client privilege, there is a dearth of reported case law concerning the disclosure of privileged material that would tend to disgrace the testator's memory. *Cf. Matter of Roll*, N.Y.L.J., Apr. 4, 1994, p. 22, col. 1 (Sur. Ct., Bronx Co.) (directing an *in camera* review to determine whether the requested documents would disgrace the testator's memory). However, courts have provided more guidance as to the discovery of material that would tend to disgrace a testator's memory in analyzing CPLR 4504(c), which addresses physician-patient confidentiality and mirrors CPLR 4503(b), as it relates to disgracing the testator's memory. *Cf. Matter of Stern*, N.Y.L.J., Nov. 24, 2014, p. 24 (Sur. Ct., N.Y. Co.) (addressing CPLR 4504).
11. *Matter of Soluri*, 40 Misc. 3d 1207(A), at *1-5, 975 N.Y.S.2d 712 (Sur. Ct., Nassau Co. 2013).
12. *See id.*
13. *See id.*
14. *Matter of Bronner*, 7 Misc. 3d 1023(A), at *3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
15. *Matter of Trotta*, 99 Misc. 2d 278, 281, 416 N.Y.S.2d 179 (Sur. Ct., Bronx Co. 1979).
16. *Matter of Trump*, N.Y.L.J., Apr. 7, 2000, p. 30, col 1 (Sur. Ct., Queens Co.).
17. *Matter of Delano*, 38 A.D.2d 769, 327 N.Y.S.2d 908 (3d Dep't 1972).
18. *See id.*
19. *Bronner*, 7 Misc.3d 1023(A), at *3-4.
20. *See id.*
21. *See id.*
22. *Matter of Leddy*, 43 Misc. 3d 1214(A), at *1, 988 N.Y.S.2d 523 (Sur. Ct., Nassau Co. 2014). Based upon *Leddy*, the Trusts and Estates Law Section's Legislation and Governmental Relations Committee has proposed amending CPLR 4503(b) to extend the statutory exception to the attorney-client privilege to proceedings concerning the validity and construction of revocable trust instruments.
23. *Matter of Davidson*, 177 Misc. 2d 928, 930, 677 N.Y.S.2d 729 (Sur. Ct., N.Y. Co. 1998); *Matter of Tisdale*, 171 Misc. 2d 716, 721, 655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997).
24. *Leddy*, 43 Misc. 3d 1214(A), at *1.
25. *See id.*

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Kinship Proceedings 101

By Gary E. Bashian

"Happiness is having a large, loving, caring, close-knit family in another city."

— George Burns

Kinship proceedings remain a vital and important part of Surrogate's Court practice as they continue to be the means by which unknown and potential heirs are discovered, confirmed, or in some instances disqualified, as distributees of a decedent's estate.

As one might imagine, a Surrogate's Court kinship proceeding is the mechanism by which a potential distributee establishes his or her relationship and filiation with a decedent, with the ultimate hope of receiving an inheritance from the decedent's estate.

Most commonly associated with intestate estates, the ultimate goal of any kinship proceeding is to determine which, if any, of a decedent's living heirs have a right to inherit pursuant to the rules of intestate distribution as governed by EPTL 4-1.1.

In order for an alleged distributee to establish his or her right to inherit, or as is more often the case, an appointed Guardian ad Litem on the distributee's behalf, three elements must be proven: 1) that they shared a familial relationship with the decedent through common ancestors; 2) that there are no other living distributees in the familial line who are "closer," *i.e.*, higher on the family tree, to the decedent than the alleged distributee; and 3) that there are no other alleged distributees with an equal or greater right to the decedent's property than they themselves (commonly referred to as "closing the class"). Importantly, this analysis is based on a snapshot of the decedent's family tree at the time of death, *i.e.*, the living members of the decedent's family at the moment of his or her death.

Procedurally, kinship proceedings arise in the context of probate, administration, accounting, and withdrawal proceedings. In the case of probate and administration proceedings, the proof required to establish kinship can take on a number of different forms. In the event that the claim is a single statutory distributee, a detailed family tree with supporting testimony or an affidavit of a disinterested party detailing the family structure and history will suffice;[1] whereas if an allegation is made that there are no known distributees, "due diligence" must also be established through sworn testimony that there has been a legitimate and good faith effort to locate unknown heirs and that none were found[2] (the degree of "diligence" required of course being circumscribed by the size of the estate,[3] *i.e.*, the greater the assets, the greater the due diligence required).

In the context of accounting proceedings, which are almost always undertaken by the Public Administrator in the final accounting, all that is needed is an allegation that there is known kinship with a party, or that the Public Administrator wishes to turn assets over to the State pursuant to SCPA 2222, putting the burden on a distributee to respond and challenge the allegation/turnover. Lastly, in the context of withdrawal proceedings brought by distributees who seek to claim funds that are in the possession of the State, the same proof is required as in probate or administration proceedings, *i.e.*, a family tree, Affidavit of Due Diligence, etc.

In terms of evidence, there are a variety of rebuttable presumptions regarding kinship that govern establishing the family line, some of which are afforded greater weight than others. Foremost is an individual's name, a common surname being evidence of a family relation, but one that is afforded little to no weight in the grand scheme of things. Alternatively, alleged distributees born of a married woman are presumed legitimate, this presumption only being refuted upon an objectant's showing of clear and convincing evidence to the contrary. Similarly, a marriage certificate serves as presumptive evidence of a valid marriage, which can again only be overcome by the presentation of clear and convincing evidence—with a further rebuttable presumption of a valid second marriage extending to a male decedent. Finally, so long as there has been a search conducted with due diligence, if the whereabouts of an alleged distributee are unknown for a period of three years, he or she will be presumed deceased without issue—provided of course that he or she, or his or her heirs, do not surface.[4]

As one should expect, the "Dead Man's Statute"[5] will preclude any individual with a pecuniary interest in the estate from testifying about conversations he or she had with the decedent, effectively prohibiting testimony about a familial relationship with the decedent.

A last, but certainly critical point which all Surrogate's Court practitioners must be aware of when dealing with a kinship matter, is that the search for heirs is by no means an open ended-fishing expedition free to trawl until any blood relative can be found. EPTL 4-1.1 sets forth the terms of intestate distribution generally, but EPTL 4-1.1(a)(7)[6] specifically limits the depth of investigation, cutting off inquiry at the level of first cousins once removed. Indeed, by statute the search for distributees must end at the first cousin branch of the family tree, even in cases where other blood relatives are known.[7] At this first cousin level, the decedent's estate will pass to any member of the class on either

the maternal or paternal side, even where a first cousin once removed may be known, but his or her parent has already passed away, *i.e.*, a first cousin once removed has no right to a decedent's estate where any first cousin survives.

Though not familiar to all practitioners, those who spend enough time in the Surrogate's Court will be involved in a kinship proceeding at one time or another. While this article is only intended as a general outline of what such a proceeding might entail, it nevertheless provides the basics necessary to get started, and with a little luck and a detailed family tree, may help you prevail in the interests of your client.

Endnotes

1. 22 NYCRR 207.16(c).
2. *See* 22 NYCRR 207.16(d).
3. *See Matter of Whelan*, 93 A.D.2d 891, 461 N.Y.S.2d 398 (2d Dep't 1983).
4. *See* SCPA 2225.
5. CPLR 4519.
6. A portion of the Statute enacted in 1992 .
7. *See* EPTL 4-1.1 (a)(6); (a)(7).

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Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

DISTRIBUTEES

Slayer Cannot Inherit Victim's Property Through Estate of Third Person

Daughter's husband killed her mother and eventually pled guilty to manslaughter in the first degree. Daughter was the sole beneficiary of mother's will. She died intestate some 14 months after her mother and 10 months before husband's guilty plea. Husband was her sole distributee. Daughter's sister objected to the accounting of mother's executor, arguing that husband should not receive any of his victim's property through daughter's estate. The Surrogate upheld the objection in part, holding that husband had forfeited any claim to Mother's assets and ordered daughter's administrator to continue to hold funds received from mother's estate pending resolution of any appeal of his conviction by husband. Daughter's administrator appealed and the Appellate Division affirmed.

The unanimous panel held that under the principle that the wrongdoer could not be allowed to profit from his wrong, citing both *Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889) and their opinion in *Campbell v. Thomas*, 73 A.D.3d 103, 897 N.Y.S.2d 480 (2d Dep't 2010) (widow forfeited her right of election where the marriage had been voided for lack of capacity) forfeiture by husband was the correct result. In this case as in *Campbell* "there is a clear causal link between the wrongdoing and the benefits sought…." The court declined to speculate on whether a longer period of time between the slaying and the event that gives rise to the slayer's benefit would require a different result, stating that here "no speculation is required" to see the clear causal connection required for forfeiture, although the court did state that even if daughter had made a will benefiting husband "to the extent that her property was inherited from the decedent, the *Riggs* doctrine would apply to prevent [Husband] from benefitting from his own wrongdoing." *Matter of Edwards*, 121 A.D.3d 336, 991 N.Y.S.2d 431 (2d Dep't 2014).

William P. LaPiana

TRUSTS

Terminated Trust Must Be Distributed to Income Beneficiary and Remaindermen

Testamentary trust was terminated as uneconomical under EPTL 7-1.19, which states that on termination the trust property must be distributed to "effectuate the intention of the creator." The will stated that were any trust terminated as uneconomical the trust property would be distributed to the "income beneficiary or beneficiaries" at the time of termination. The trust was to terminate at the death of the sole income beneficiary, at which time the remaining trust property would be distributed to the testator's grandchildren, per stirpes. The will also provided that the income beneficiary had no right to receive trust principal nor could the trustee distribute trust principal to or for the income beneficiary or to her estate. The Surrogate ordered the trust property distributed to the income beneficiary. The grandchildren appealed and a divided Appellate Division reversed.

The court construed the language of the will as evidencing a "dominant purpose" to benefit both the income beneficiary and the grandchildren and also applied the principle that if a will is capable of two interpretations, the one adopted should prefer the testator's blood relations. The court therefore remanded for a determination of the distribution that the will best effectuate the testator's intent. Two dissenting justices found no conflict between the trust terms and the will's provision for distribution on termination and would have affirmed the Surrogate. *Matter of Wagner*, 120 A.D.3d 919, 991 N.Y.S.2d 235 (4th Dep't 2014).

WILLS

Failure to Produce Second Witness Leads to Directed Verdict That Testator Lacked Capacity

Decedent's will disposed of her estate to two of her five children. The three omitted children objected to probate on grounds of lack of capacity. The jury gave a verdict for the proponents. The objectants moved for a directed verdict denying probate, and their motion

was granted by the Surrogate. The proponents called only one of the two attesting witnesses to testify at the trial and did not make an application to dispense with the testimony of the second witness under SCPA 1405, thereby failing to establish a prima facie case "for a valid will." The opinion went on to state that even if dispensation had been sought and granted, the will would not have been admitted because the witness who did testify recalled none of the circumstances of the execution ceremony and both the testimony of the attorney draftsperson and the estate planning questionnaire filled out by the decedent and admitted into evidence raised grave doubts that the will expressed the decedent's intent. *Matter of Hedberg*, 45 Misc. 3d 651, 991 N.Y.S.2d 863 (Sur. Ct., Kings Co. 2014).

No Contest Clause Not Violated by Seeking Admission of Will Where Nominated Executors Do Not Act

Decedent executed a will in 2006 naming his son Neil as executor and sole beneficiary of his estate. In early 2011 decedent learned he had lung cancer and contacted an attorney to discuss revising his will. Five days before his death in May 2011 he executed a new will naming his other son Frank as executor and dividing his estate, the principal asset of which was a farm used as a refuge for rescued horses, among two friends, Stack and Adrian, and his brother Charles. Neil submitted the 2006 will for probate and, after Frank allegedly refused to offer the 2011 will, Stack and Adrian did so, asking for letters of administration c.t.a. Frank subsequently sought admission to probate of the 2011 will and Neil filed objections alleging lack of due execution, lack of testamentary capacity, fraud, and undue influence on the part of Stack and Adrian. Frank also sought a determination that Stack and Adrian had violated the no contest clause in the will. Surrogate's court granted summary judgment dismissing the objections and Neil appealed.

The Appellate Division affirmed, agreeing with the Surrogate that there was no evidence of lack of capacity in spite of testator's weakened condition, that the evidence was insufficient to establish the alleged confidential relationship between the decedent and Stack or Charles's wife, Deborah, and that any legal presumption that the decedent's decision to make Charles a beneficiary of the will was the product of undue influence is outweighed by the family relationship between them (citing, among other cases, *Matter of Walther*, 6 N.Y.2d 49, 188 N.Y.S.2d 168, 159 N.E.2d 665 [1959]). The burden of proving undue influence thus remained with Neil, who was unable to produce any evidence of the actual exercise of undue influence. Finally, the court proceeded to construe the no contest clause even though the 2011 will had not yet been admitted to probate. With the dismissal of the other objections and the will to be remitted on remand, in the interest of judicial economy the court considered Neil's allegation that Stack and Adrian violated the no contest clause, requiring forfeiture by any beneficiary instituting any proceeding to prevent any provision of the will from being carried out, by petitioning for admission of the 2011 will and seeking letters of administration c.t.a., thus attempting to oust the nominated executor. The court refused to read the words of the no contest clause literally because rather than attempting to frustrate the decedent's intent, Stark and Adrian brought the proceeding to make sure that the provisions of the 2011 will were carried out in spite of the nominated executor's inaction. One justice dissented on this point, finding no need to read the no contest clause other than literally but finding that remand should be necessary to determine if Stark and Adrian had "probable cause" for their actions, a position rejected by the majority as having no basis in New York law. *Matter of Prevratil*, 121 A.D.3d 137, 990 N.Y.S.2d 697 (3d Dep't 2014).

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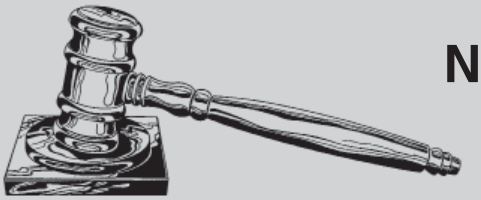

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Construction

In *In re Borowiak,* the court found that the decedent's Will failed to make provision for the disposition of his estate and, therefore, directed that it pass pursuant to the laws of intestacy.

The decedent died survived by his wife and an adult daughter. Following the admission of his Will to probate, his wife, who was the executor thereof, petitioned the court for a construction that would leave his entire estate to her. The record revealed that the instrument, which had not been drafted by an attorney, simply nominated the decedent's wife to be the executor of his estate and directed that in the event of any "accidents, Health Failures or otherwise," he not be resuscitated. The decedent's wife maintained that because the Will had not been prepared by an attorney, her nomination as executor should be construed to entitle her to his whole estate.

The court denied the application, finding that a reading of the Will in its entirety did not justify the result requested by the petitioner. Specifically, the court noted that the decedent's Will contained only two substantive provisions; the nomination of his wife to serve as the executor of his estate, and the direction that he not be resuscitated. To this extent, the court found the instrument to be a hybrid between a testamentary document, operative upon the decedent's death, and a living will, operative during his lifetime. By contrast, the court observed that a Will is defined as a written instrument that nominates a fiduciary or makes provision for the administration of the decedent's estate, and is designed only to take effect upon death. Within this context, the court concluded that it was possible for a Will to be intended for the sole purpose of nominating an executor.

Accordingly, the court rejected the construction posited by the decedent's wife, found that the decedent's Will consisted only of the paragraph which nominated his wife as the executor of his estate, and directed that the estate be distributed pursuant to the laws of intestacy.

In re Borowiak, 2014 N.Y. Slip Op. 50444 (Sur. Ct., Erie Co.).

Construction

In a miscellaneous proceeding, the executor petitioned for a construction of Article Third of the decedent's Will to permit distribution of the estate to the decedent's three stepdaughters, one of whom was the petitioner. Objections to the application were filed by the executor of the estate of the decedent's postdeceased father, who claimed that, pursuant to the unambiguous terms of the decedent's Will, distribution of her estate passed to her next of kin.

Article Second and Article Third of the decedent's Will bequeathed her residuary estate to her husband (the father of her stepdaughters), and directed that, in the event he predeceased the decedent, her residuary estate was to be distributed to her "living issue, per stirpes." In Article Sixth of the instrument, the decedent nominated her husband as the executor of her estate, and her "daughter," the petitioner, as the successor executor.

In support of her application, the petitioner alleged that the decedent's use of the term "issue" in Article Third of the Will, coupled with her use of the term "daughter" to refer to her in Article Sixth, created a latent ambiguity regarding the identity of her contingent beneficiaries, particularly in view of the fact that the decedent neither adopted her stepdaughters, nor had any biological children of her own. As a result, the petitioner asserted that extrinsic evidence could be referred to in order to ascertain the decedent's intent.

On the other hand, the objectant maintained that the use of the term "issue" in the Will was unambiguous, and required no construction, since the term was defined by statute to mean the natural or adopted descendants of a decedent. As a result, the objectant argued that the decedent's estate passed in accordance with the laws of intestacy. Further, the objectant alleged that the result urged by the petitioner would operate to create a gift by implication, a theory rarely invoked in construction proceedings. Alternatively, the objectant claimed that if the court found the Will to be ambiguous, a presumption existed in favor of a construction that would result in a distribution of the estate to the decedent's next of kin rather than to strangers.

The court opined that a latent ambiguity arises when the language employed in a will, though on its

face susceptible of a single interpretation, requires reference to some extrinsic fact or circumstance for interpretation. Applying this principle to the subject Will, the court found that the decedent's use of the term "daughter" in reference to the petitioner, and her use of the term "issue" in Article Third, while not ostensibly in conflict, created a latent ambiguity in the instrument, requiring consideration of extrinsic facts to clarify the decedent's intent, since she had no biological children, and that the petitioner and her siblings were actually her stepchildren.

Upon review of the external evidence, the court found no indication that the decedent had any intention other than the complete disposition of her estate by Will. Indeed, the court concluded that the evidence demonstrated that the decedent and her husband created a coherent and unified estate plan designed to benefit the surviving members of the family in the event of their deaths. The intent of the decedent to include her stepdaughters as part of her testamentary plan was apparent in the attorney-drafter's notes as well as in the reciprocal provisions of their Wills.

The court rejected the objectant's claims that the estate should pass by intestacy, since the use of the term "issue" in its strictest sense did not include the decedent's stepdaughters. Rather, the court held that the presumption in favor of a technical or statutory meaning may be overcome where it "appears…from extraneous facts…that the testator used the words in their popular or common sense."[1] The court opined that the process of interpretation should not be so rigid, and should not be limited by "undue and obstructive requirements that would confine the court's investigation to a mere reading of the language before it." The court found equally unpersuasive the objectant's contentions that blood relatives should be favored over strangers in the construction of testamentary language. Indeed, the court noted that nothing in the extrinsic evidence supported a finding that the decedent intended to exclude her stepdaughters from her estate plan.

Accordingly, the court granted the petitioner's application for construction, and directed that the decedent's estate be distributed to her three stepdaughters.

In re Sponholz, N.Y.L.J., June 16, 2014, p. 28 (Sur. Ct., Kings Co.).

Due Execution

In *In re Sanger,* the Surrogate's Court, Nassau County, had occasion to examine the presumption of due execution accorded an attorney-supervised will execution. Before the court was a contested probate proceeding, in which the petitioner, the decedent's surviving spouse and primary legatee of his estate, moved for summary judgment dismissing the objections alleging lack of due execution, lack of testamentary capacity, undue influence and fraud.

The execution of the propounded instrument was supervised by an attorney. In addition, an attestation clause preceded the signatures of the witnesses, and a self-proving affidavit was affixed to the end of the document. In pertinent part, the court noted that there is an inference of due execution when the execution of a will is supervised by an attorney.

The objectants nevertheless maintained that because the attorney who supervised the execution of the propounded will was not admitted to practice law in New York at the time the Will was signed, the inference of due execution did not arise. The record reflected that counsel had over 30 years of legal experience, and his practice primarily focused on trusts and estates and related tax issues. At the time the propounded Will was executed, he was associated with a New York City law firm, and worked with attorneys at the firm on the Will and other estate-related documents. Paralegals at the firm were witnesses to the execution of the instrument.

Based on the foregoing, the court found that the petitioner was entitled to an inference of due execution. In reaching this result, the court relied on the opinions in *Matter of Kindberg*,[2] and *Matter of Cottrel*,[3] in which the Court of Appeals indicated that the presumption of due execution is based upon an attorney's years of experience and knowledge of the statutory requirements, and not upon whether the attorney is admitted to practice law in the state of New York. In view thereof, together with the unchallenged sworn statements and testimony of the attorney draftsman and the attesting witnesses regarding compliance with the requirements of EPTL 3-2.1, the court granted summary judgment to the petitioner on the issue of due execution, and dismissed this objection to probate.

In re Sanger, N.Y.L.J., July 21, 2014, p. 27 (Sur. Ct., Nassau Co.).

Due Execution

In *In re Buchting,* the Appellate Division affirmed the Surrogate Court's decree granting summary judgment to the petitioner on the issue of due execution, despite the fact that each of the attesting witnesses, during the course of their SCPA 1404 examinations, invoked their constitutional privilege against self-incrimination and refused to testify. The court held that the refusal of the witnesses to testify was akin to their failure to recall the events surrounding the will's execution, which did not create a negative inference regarding the validity of the instrument. Therefore, probate of the instrument was not precluded, provided there was sufficient other evidence to establish a prima facie case of due execution. To this extent, the court noted that the supervising attorney testified in

detail about the execution of the will, and described a ceremony that satisfied the statutory requirements. The court concluded that this testimony, in combination with the presumption of due execution accorded to an attorney-supervised will, and the fact that the respondents failed to proffer any affirmative proof to the contrary, was sufficient to sustain the due execution of the instrument.

In re Buchting, 111 A.D.3d 1114, 975 N.Y.S.2d 794 (3d Dep't 2013).

Injunction

In *In re Raffe*, a contested accounting proceeding, the Surrogate's Court, Nassau County, denied an application by the beneficiaries of the trust for an order restraining the trustee from transferring, loaning or otherwise using any assets of the trust without court approval. The principal asset of the trust was the decedent's home heating oil business. It appeared that the business had been operating at a loss for years, and the trustee had opted to make substantial loans to the business using trust funds, in order to keep the entity alive. As of the closing date of the accounting, there were loans outstanding of approximately $5.3 million.

The court opined that to establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood of probability of success on the merits; (2) irreparable harm in the absence of an injunction; and (3) a balance of the equities in the movant's favor. Within this context, the movants claimed that the trustee breached his fiduciary duty to the trust by permitting the continued losses to the business, and causing the trust to make loans without any reasonable expectation of repayment. The trustee opposed the application, claiming that his loans were authorized by the Will, and were consistent with the prudent investor rule and with the ongoing efforts to sell the company.

The court concluded that the movants had not made a sufficient showing of irreparable harm to warrant the relief requested. Specifically, the court noted that the objections filed by the movants requested that the trustee be surcharged for losses to the trust estate caused by his alleged breaches of fiduciary duty. Further, the court noted that the movants' inordinate delay in seeking injunctive relief was antithetical to a finding of irreparable harm. Indeed, the court noted that further weakening any such claim was the fact that the motion had not been made by order to show cause with a request for a temporary restraining order.

In re Raffe, N.Y.L.J., Mar. 21, 2014, p. 31 (Sur. Ct., Nassau Co.).

Standing

In *In re Castellucci Trust,* the court denied the co-trustees' motion to dismiss the proceeding, finding that the petitioner had standing to compel an accounting with respect to an irrevocable trust that had been created by her father. The pertinent terms of the instrument provided for the Settlor's issue during his lifetime, and upon his death, granted the Settlor's spouse a power to appoint, by an instrument in writing, or by Will, the principal and/or income of the trust to or for the benefit of any one or more members of a group consisting of the Settlor's children or such children's issue. To the extent the power was not effectively exercised, the terms of the trust further directed that, upon the death of the Settlor's spouse, the principal and any undistributed income of the trust be equally divided among the settlor's children.

Prior to the return date of citation, the decedent's spouse delivered to her co-trustee an irrevocable exercise of her power of appointment, which excluded the petitioner and her issue from the class of permissible trust beneficiaries, and directed that upon her death, all of the assets subject to the power be distributed to her other two children. On this basis, the co-trustees moved to dismiss the proceeding, claiming that because the petitioner no longer had any interest in the trust she lacked standing to compel an accounting.

The court disagreed and held that as a person with a present, albeit permissive, interest in the trust during the lifetime of the Settlor, as well as a future interest, upon the Settlor's death, the petitioner had standing to compel an accounting. Although the Settlor's spouse purported to extinguish the future interest of the petitioner in the trust estate, the court declined to determine the validity of the exercise of the power of appointment at such an early stage of the proceeding, and found, nevertheless, that the petitioner had standing as a permissive beneficiary during the Settlor's lifetime.

In re Castellucci Trust, N.Y.L.J., July 21, 2014, p. 28 (Sur. Ct., Westchester Co.).

Summary Judgment

Before the court in *In re Thompson* was a motion and cross-motion for summary judgment requesting the construction of the decedent's Will. The petitioner, the decedent's niece, and executor of her estate, sought a construction that would result in a gift to her by implication of the decedent's entire residuary estate. The decedent's sister opposed the application, and requested a determination that the residuary estate be distributed, in equal shares, to her and the petitioner, as the decedent's sole intestate distributees.

The record revealed that the decedent executed her Will simultaneously with her husband, who pre-

deceased her. Both instruments were identical and provided that their respective estates would pass to the survivor of them, and nominated the petitioner as executor. Further, in the event that the decedent and her husband perished in a common disaster, the instruments provided that their estates would pass to their niece. Nevertheless, despite the provision for a common disaster, the decedent's Will failed to make any provision for the distribution of her estate under the circumstances presented; that is, in the event that her husband predeceased her.

The court opined that the intent of the testator must be the overriding consideration in determining the import of a Will, and must be gleaned from a sympathetic reading of the instrument in its entirety, based upon the facts and circumstances under which the provisions of the Will were framed. Further, the court noted that there is a strong presumption against intestacy, particularly where the disposition of the decedent's residuary estate is in issue.

With the foregoing in mind, the court concluded that where the express language of a Will reveals an intention or purpose of the testator, that intention or purpose is to be respected even if it results in the disposition of property by implication rather than by explicit language in the instrument. Thus, the court observed, when the entire Will unquestionably reveals an intent to provide for the complete disposition of a decedent's estate, but the decedent inadvertently neglected to foresee every contingency, the presumption against intestacy may be applied, and a gift by implication found. On the other hand, the court recognized that a gift by implication will not be found unless the dominant purpose of the decedent's dispositive plan is clear.

Accordingly, based upon a review of the record, the court found conflicting issues of fact as to the intent of the decedent regarding the disposition of her estate, and denied the motion and cross-motion for summary judgment.

In re Thompson, N.Y.L.J., Jan. 15, 2014, p. 26, col. 4 (Sur. Ct., Richmond Co.).

Summary Judgment

In *In re Demaio,* the court granted the proponent's motion for summary judgment. In doing so, the court addressed, *inter alia*, the objectant's contentions that the propounded Will was not duly executed. The court accorded no significance to the claim that the attorney-draftsman did not read the attestation clause aloud to the testator, finding that an attestation clause is a formal, non-material and non-dispositive provision of a Will which is not necessary to the validity of the instrument. With respect to the objectant's claim that the testator did not read or write the English language, had a significant defect in sight at the time the Will was executed, and that the Will was never read to the testator prior to its execution, the court opined that there is no necessity under the law that the instrument be read to the testator in front of the attesting witnesses, but where an issue exists as to the decedent's ability to read the instrument offered for probate, petitioner must offer more than the factum of the Will. That is, there must be additional evidence and satisfactory proof of some kind that the testator knew and understood the contents of the Will as his own. To this extent, the court noted that the Will may be read to the testator before it is signed, or it may be shown that the contents were made known to him without a formal reading, provided it appear, on the whole, that the instrument as drawn up and executed constituted the testator's testamentary plan.

Turning to the record, the court found persuasive the testimony of the supervising attorney, who stated that he carefully reviewed the dispositive provisions of the Will with the testator, that the testator made two corrections to the draft instrument, and that despite his inability to read English, the testator could speak and understand English, and ran a successful business, which acquired and operated several commercial properties up to the time of his death. The court found that the objectants offered no evidence to refute the proponent's proof that the propounded instrument accurately reflected the testator's testamentary wishes.

In re Demaio, N.Y.L.J., May 2, 2014, p. 33, col. 2 (Sur. Ct., Queens Co.).

Suspension of Fiduciary

In *In re Cassini,* the court suspended the letters testamentary issued to the decedent's surviving spouse, pending a hearing on the issue of her removal. In pertinent part, the court found that the fiduciary had ignored the provisions of the Surrogate's Court Procedure Act respecting the payment of her personal claim, failed to adhere to the decedent's testamentary wishes for the funding of a supplemental needs trust, and repeatedly failed to satisfy the testamentary bequest of the petitioner pursuant to the terms of the decedent's Will.

In re Cassini, N.Y.L.J., Apr. 17, 2014, p. 29, col. 6 (Sur. Ct., Nassau Co.).

Endnotes

1. *Lawton v. Corlies*, 127 N.Y. 100, 105 (1891).
2. 207 N.Y. 220, 228 (1912).
3. 95 N.Y. 329, 330 (1884).

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Florida Update

By David Pratt and Jonathan Galler

David Pratt

DECISIONS OF INTEREST

Joint Deposit and Pay-On-Death Accounts

In this case recently decided by the First District Court of Appeal, a dispute arose as to whether the decedent's joint deposit accounts and pay-on-death accounts were assets of the estate under Florida law. Based on the recommendation of the magistrate, who conducted an evidentiary hearing, the trial court held that the funds in the joint accounts and POD accounts were assets of the estate to be distributed in accordance with the decedent's will. Noting an important distinction between joint accounts and POD accounts, the appellate court agreed with the trial court only as to the former. Section 655.79, Florida Statutes, governs joint deposit accounts. It provides that all rights to "a deposit account in the names of two or more persons" are presumed to vest in the surviving person or persons. The presumption may be overcome in several ways, including by "clear and convincing proof of contrary intent." By contrast, section 655.82 governs POD accounts. It provides that the sums on deposit in a POD account "belong to the surviving beneficiary or beneficiaries." No rebuttable presumption applies to POD accounts. Here, the magistrate found clear and convincing evidence that the decedent did not intend for the sums in her accounts to pass outside of her estate. The appellate court held that as to the joint accounts, the evidence sufficed to rebut the statutory presumption, but, as to the POD accounts, the evidence of intent was irrelevant and the funds were not an estate asset.

Brown v. Brown, 2014 WL 4435974 (Fla. 1st DCA Sept. 10, 2014) (not yet final).

Personal Jurisdiction Necessary to Surcharge Fiduciary

The Fourth District Court of Appeal recently addressed the often tricky issue of personal jurisdiction in probate litigation. The question was whether a Florida court must obtain personal jurisdiction over a fiduciary, in his or her *individual* capacity, before requiring that the fiduciary personally refund any fiduciary compensation or attorneys' fees paid from the assets of the estate or trust. Florida's Probate Code and Trust Code both provide that a beneficiary may petition the court

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for review of compensation paid from assets of the estate or trust. *See* Fla. Stat. §§ 733.6175 and 736.0206. Those statutes also provide that the court may order the refund of any excessive or unreasonable compensation. In this case, the beneficiaries sought a review of compensation and an order requiring the fiduciary to personally refund any excessive compensation. The fiduciary moved to dismiss the refund claim because the beneficiaries had never obtained personal jurisdiction over the fiduciary in her individual capacity through the service of "Formal Notice" (the typical mechanism for obtaining personal jurisdiction under the Florida Probate Rules). The trial court denied the motion. The appellate court, however, reversed, holding that seeking to compel a refund is similar to a surcharge action, for which the court must establish personal jurisdiction over the defendant before imposing such a remedy.

Kozinski v. Stabenow, 2014 WL 5611595 (Fla. 4th DCA Nov. 5, 2014) (not yet final).

Application of Laches to Petition to Compel an Accounting

Florida's Trust Code provides that the trustee of an irrevocable trust must provide an annual trust accounting to each qualified beneficiary. *See* Fla. Stat. § 736.08135. In the latest appellate decision in this ongoing litigation concerning four family trusts, the Fourth District Court of Appeal addressed the application of the defense of laches to an accounting action. Laches is an affirmative defense that is similar to a statute of limitations except that it applies to equitable actions, rather than actions for monetary damages. Although it has common law roots, Florida has also enacted "statutory laches." *See* Fla. Stat. § 95.11(6). Reversing the trial court's final judgment, the appellate court held that the defense of laches bars a beneficiary from seeking to compel an accounting for more than the four-year period before the action was filed. The court based its holding, in part, on the comparable four-year statute of limitations applicable to an action for damages based on a breach of trust.

Corya v. Sanders, 2014 WL 5617045 (Fla. 4th DCA Nov. 5, 2014) (not yet final).

Waiving Homestead Rights Through Execution of Warranty Deed

Florida law imposes restrictions on a decedent's ability to devise homestead property if he or she is survived by a spouse or minor children. For example, if the decedent is survived by a spouse and has only adult children, he or she may devise homestead property but only outright to his or her spouse. Fla. Stat. § 732.4015. In a recently decided case, the decedent and his wife executed a warranty deed conveying real property from themselves, as tenants by the entireties, to themselves, as tenants in common. The decedent then transferred his 50% undivided interest in the property to a Qualified Personal Residence Trust, which was to continue for a term ending on the earlier of five years from the date of its creation or the date of the decedent's death. The decedent died prior to the expiration of the five-year term and was survived by his spouse and adult children. Upon his death, the 50% interest reverted to his estate and was disposed of pursuant to his testamentary instruments, which did *not* provide for an outright devise to his surviving spouse. The decedent's adult son challenged the disposition. The Fourth District Court of Appeal held that although the disposition was a devise of homestead property (because it was made by the decedent and not by the QPRT), the devise was permitted because the warranty deed executed by the spouse constituted an enforceable waiver of homestead rights under section 732.702, Florida Statutes. To find waiver, the appellate court relied on the broad language in the warranty deed providing, *inter alia*, that the decedent and his spouse each "grants, bargains, sells, aliens, remises, releases, conveys and confirms" the property.

Stone v. Stone, 2014 WL 5834826 (Fla. 4th DCA Nov. 12, 2014) (not yet final).

Third Party Collateral Attack on Foreign Divorce Decree

In 1956, Gordon P. Kelley created an irrevocable trust. It provided for the creation of separate trusts for his children, each of whom was also granted a limited power to appoint a beneficiary for the trust principal. The appointed beneficiary, however, had to be Gordon's lawful descendants or their spouses, the child's spouse, or certain charitable organizations. Absent a valid appointment, the principal would be distributed to the child's descendants *per stirpes*. Gordon's son, Gordon Jr., exercised his power of appointment for the benefit of his second wife, effectively disinheriting his own son, Gordon III. Gordon III challenged the exercise of the power of appointment on the grounds that his father's divorce from his first wife was invalid, thereby also invalidating his second marriage, and, thus, making his second "wife" an improper recipient under the terms of the limited power of appointment. Gordon III's argument turned on the fact that his father's divorce had been improperly obtained in Nevada when neither his father nor the first wife had satisfied Nevada's residency requirements at the time of the divorce. The trial court denied the challenge, and the appellate court affirmed, holding, *inter alia*, that the full faith and credit clause of the federal Constitution barred a collateral attack on the Nevada divorce by Gordon III in Florida. Distinguishing its holding from a case relied upon by Gordon IIII, in which a Mexican divorce was successfully collaterally attacked, the court noted that the principle of full faith and credit has no application with respect to divorce decrees entered in foreign nations.

Kelley v. Kelley, 147 So.3d 597 (Fla. 4th DCA 2014).

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