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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Philip L. Burke

A few months ago those of you who are Fellows of the American College of Trust and Estate Counsel ("ACTEC"), and who are also signed up for the ACTEC "list serve," received a flurry of a dozen or so e-mails from all over the country concerning the search for qualified Trusts and Estates attorneys with, generally, three to seven years of experience.

Is the fact that there appears to be a dearth of qualified Trusts and Estates attorneys with this range of experience a harbinger of things to come, or just a "blip" on the radar screen in response to changes in the marketplace? Members of this Section's Executive Committee have heard stories about some law schools reducing or eliminating courses pertaining to Trust and Estate practice, that some law firms look at Trusts and Estates practice as a "throwaway" for their large corporate clients, and that fewer and fewer law school graduates are expressing an interest in this line of work. As is often the case, even if these stories prove to be unsupported, the mere fact that they are circulating, coupled with the apparently unsuccessful search for qualified T&E practitioners, should give us all pause to consider what is happening to this area of the law.

Having practiced in this area of law for over 25 years I find this trend both disturbing and surprising. One would think that as a result of the "Baby Boomers" aging out, the relatively recent (and future?) changes in the estate tax laws, the significant changes in long-term care planning and other considerations, this area of law would be attracting more, not fewer, participants.

For example, according to the United States Census Bureau (www.census.gov), as of July 1, 2005 there were an estimated 78.2 million Baby Boomers (those born between 1946 and 1960) and, in *each day* of 2006 more than 7,900 Baby Boomers turned 60 years of age.

Also, according to the AARP Public Policy Institute, estimates of the amounts to be inherited over the next 60 years range between $7 trillion and $41 trillion (yes, that's *trillion*—quite a range, to say the least!).

These statistics would lead one to believe that there should be a glut of Trusts and Estates attorneys rather than a shortage. The Executive Committee of

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this Section has discussed this issue and debated what should be done to try and support Trusts and Estates practice among younger attorneys. While some steps are being taken (encouraging law students to attend Trusts and Estates programs, giving program discounts to younger attorneys, etc.) there may be more that can be done in the future. The Executive Committee has appointed a committee, to be chaired by Professor Ira Bloom from Albany Law School, to look into this issue further.

We should all be aware of these concerns and, to the extent possible, support Trusts and Estates practice within our firms, with younger attorneys in the community, in the Court System, with our law schools and in any other way that would be beneficial to this area of practice. If any Section member has other thoughts or ideas on this issue, I invite your comments.

* * *

By the time you receive this newsletter, the Binghamton program on "Real Estate Considerations and Estate Planning and Administration" will have been presented. I would like to take this opportunity to thank Beth Westfall, our Sixth District Representative, for putting together a terrific program. Several practitioners have commented that a program focusing primarily on those real estate issues that we all face is long overdue.

Also, by the time this newsletter comes out we will have had the opportunity to meet with our Representatives in the State Legislature to discuss the Section's legislative initiatives. As indicated in my previous message, there are five items on our legislative agenda that have been approved by the State Bar for submission to the Legislature. Hopefully, our elective Representatives will recognize the relevance and importance of these items and lend their support.

Best wishes to all for a happy (and warm!) Spring.

Philip L. Burke

Modern Inheritance Develops in China

By Hao Wang, Michael W. Galligan and Jeffrey B. Kolodny

In the past few years, China, one of the world's oldest civilizations, has begun to enter the field of modern inheritance and estate planning. That step could naturally not be too far behind China's entry into the modern market economy and its attendant set of rights to own property and dispose of property without collective intervention.

As the Chinese economy has begun to mature, China has begun to address the questions of how to transfer property from one generation to the next and how to treat such transfers from a tax perspective. In 1985, China adopted a law on succession of property, and in 2001, it adopted a law of trusts. While China has now adopted a sophisticated system of income, business and related taxes, so far it has not elected to impose a formal gift tax, estate tax or inheritance tax.

Globalization, the rapid ascent of the Chinese economy, and recent changes in Chinese law and policy regarding foreign investment have caused a tremendous influx of U.S. investment in China. The purpose of this article is to describe some basic features of contemporary Chinese law that are relevant to estate planning and to discuss some basic planning considerations primarily for U.S. persons who may acquire or inherit property in China.

Property Ownership

As a general matter, individuals can acquire and own property in China, profit from the sale of such property and transfer property to their heirs. Individuals are permitted to own personal property such as lawfully earned income, housing and savings in much the same manner that anyone in the United States can. Individuals can also own buildings.

Ownership of land is somewhat more complicated as the transition to a mode of ownership like the common law "fee" is not yet complete. Theoretically, all land continues to belong to the state or collective organizations. The Chinese government has created a market in land by creating a system of usage rights in specified properties that can be acquired by private owners and investors. An individual can acquire "usage rights" in land from the government for various periods, depending upon how the land will be used. For example, a usage right to land dedicated to residential purposes usually has a term of 70 years.

These usage rights can be sold in the private market. At the end of the usage period, the owner will have the right to renew the usage agreement by application to the proper government authority and the payment of a fee. The application is supposed to be routinely approved unless the land is needed to be reclaimed for the public interest. China is now considering proposals to extend the durations of usage rights or even establish a more Western-style system of title and ownership.

China embraces the concept of community property. Unless a husband and wife agree to the contrary, property acquired during a marriage is joint property. A husband and wife enjoy equal rights to possession and management of marital property. On the death of the first spouse, that spouse's half of the marital property will pass by the decedent's will or the Chinese Succession Law, and the surviving spouse will continue to own his or her half of such property.

Principles of Inheritance

China has enacted legislation that provides for testate and intestate succession and procedures for the making of wills. The Chinese system of administering inheritance rights is, in many ways, similar to that of European and other civil law countries. A notary handles most of the administrative aspects related to the transfer of inherited property. There is no probate or surrogate's court, per se; inheritance disputes are supposed to be resolved in the court that has jurisdiction over the disputed property or the court that has jurisdiction over the place where the decedent was domiciled at the time of death.

However, there is a somewhat surprising inconsistency in the law for testate as distinguished from intestate succession: At least theoretically, China now permits "freedom of testation" with virtually as much liberality as most U.S. jurisdictions. However, not unlike many common law jurisdictions outside the United States, China tempers the freedom to dispose of property by will by allowing family members who can demonstrate a special reason to benefit from a decedent's property to obtain a court order varying the terms of the decedent's will to provide for a disposition in their favor.

The intestate Succession Law of China provides that the decedent's spouse, children and parents inherit equal shares of the decedent's property. If none of these individuals survives the decedent, the decedent's brothers, sisters and grandparents will inherit the decedent's property. Successors with the same degree of kinship to the decedent (e.g., siblings, first cousins, etc.) generally enjoy equal shares or sub-shares of the estate. However, Chinese intestate succession rules introduce considerations of need and relative affluence that significantly qualify these rules of inheritance. For example, Chinese courts may adjust an heir's share of a decedent's estate based on the heir's economic situation and how the heir cared for the decedent. In a provision that may bring a wry smile to a U.S. probate litigator—but also reflects China's deep respect for family cohesion—the Chinese Succession Law encourages heirs to adjust and settle their respective shares peaceably.

Under the Chinese law of inheritance the dispositive provisions of a will take precedence over the Succession Law. Chinese wills can take several forms: written, holographic, notarial, using a sound recording, and in emergencies, oral. Each type of will has its own set of legal formalities. The law of intestate succession will apply and govern the disposition of property in several situations, including when a decedent does not leave a will, if a portion of a will is invalid, or if a will does not dispose of all of a testator's property.

Trusts and Taxes

In 2001, China joined the growing trend of Asian jurisdictions, such as Japan and Korea, that have adopted the institution of the trust into their internal law, notwithstanding the civil law influence on much of their legal systems. The Trust Law of China imposes legal duties on fiduciaries and confers legal rights on beneficiaries, much as we are accustomed to in the United States. Individuals as well as corporations may serve as trustees of Chinese trusts.

However, reservations have been expressed because it is not clear how the distinction between title to property in a fiduciary capacity and title to property in the individual capacity of a trustee can be publicly recorded or recognized. Also, regulations regarding the taxation of trusts have not yet been promulgated. It should be noted that the main catalyst for the 2001 trust legislation was the need to provide a legal vehicle for capital investments. Nonetheless, the Chinese banking authorities are considering regulations that may provide more guidance as to how and when a trust company (regulated as a financial institution in China) can serve as trustee for estate planning purposes as distinguished from capital investment purposes.

As already mentioned, China does not impose an estate tax, an inheritance tax or a gift tax on residents or non-residents of China. The government considered imposing a tax based on the German gift and inheritance tax but elected not to proceed, for fear of causing adverse consequences for China's economic growth.

The Chinese income tax applies to Chinese residents and foreigners. China imposes an individual income tax on the worldwide income of individuals who are domiciled in China and generally on non-domiciliaries who have resided in China for one year or more. Individuals who are not domiciled in China and who have not resided in China for one year or more are subject to tax on their China source income. Actively earned income is taxed at progressive rates ranging from 5 percent to 45 percent, and passive income (including gains on the sale of real and intangible property) is generally taxed at a flat rate of 20 percent.

The United States and the People's Republic of China are parties to a bilateral income tax treaty, which entered into force on Nov. 21, 1986. The treaty allows China to tax capital gains on sales of most forms of Chinese property owned by U.S. residents, but U.S. residents may be able to claim a credit against their U.S. income taxes for the tax paid to China.

China also imposes a business tax, which is derived from various business activities. In general, the business tax is imposed on gross receipts and business tax rates range from between 3 percent and 20 percent. Sales of real property and immovable property are generally subject to business tax at the rate of 5 percent.

Foreign Ownership

Individuals who are neither residents nor citizens of China may, in principle, own property in China. However, two important categories of property are subject to important restrictions: shares of Chinese companies and Chinese real estate.

The stock of Chinese corporations is typically divided between "A" shares and "B" shares. The distinction concerns who is entitled to own the shares. "A" shares can only be purchased by Chinese persons and certain non-Chinese large institutional investors. "B" shares, which are shares in Chinese companies traded in certain exchanges, mainly in Shanghai and Shenzhen, may be purchased and sold by Chinese and foreign individuals and institutions. Non-Chinese investors, however, can invest in "A" shares indirectly through funds created by non-Chinese institutional investors and through Chinese companies funded with capital in China.

Non-Chinese individuals who have worked or studied in China for at least one year, Chinese branches or offices of non-Chinese companies and residents of Hong Kong, Macau and Taiwan may acquire homes in China for residential purposes. Non-Chinese institutions and individuals may invest in Chinese real estate for rental or other investment purposes after obtaining approval from, and registering with, the relevant Chinese authorities, as long as these businesses and individuals are adequately capitalized.

Enterprises acquiring Chinese real estate for investment purposes must have at least one million RMB of registered capital ($1 currently equals approximately 7.8 RMB). Local governments often require additional registered capital. For example, a non-Chinese enterprise acquiring real estate for investment purposes in Beijing must have registered capital of at least 10 million RMB.

Planning

Theoretically, under Chinese law, the disposition of intangible assets such as Chinese bank accounts and securities of Chinese companies owned by a decedent domiciled in New York should be governed by New York law and the disposition of real property in China owned by a New York resident should be governed by Chinese law. However, the courts of China do not have extensive experience with conflicts of law rules in the inheritance arena. Even more importantly, there are no guidelines as to how a will executed outside of China or admitted to original probate in a jurisdiction like New York could be recognized or given effect in China. Therefore, even though non-Chinese persons who own property in China, in theory, do not need to worry about planning to minimize Chinese estate duties, there are still good reasons to engage in proper planning to avoid unexpected delays in the transfer of property and proceedings before courts or government agencies for whom complex inheritance issues are relatively novel.

U.S. persons acquiring property in China should consider acquiring their investments through an appropriate vehicle, such as a company or a trust. While there are currently no formal restrictions on the nationality or residence of a trustee of a Chinese trust, trusts established under the China Trust Law as estate planning vehicles or will substitutes are untested. It is also possible that the same restrictions on ownership of Chinese real property and "A" shares of Chinese companies by non-Chinese persons would be attributed to a non-Chinese trustee of a Chinese trust. In addition, the tax status of Chinese trusts remains unclear. Ownership of assets such as Chinese real property through a Chinese company may avoid the complications of transferring ownership of the real property upon the death of the deceased shareholder, but issues could still arise about the transfer of the shares themselves.

In 2003 China and Hong Kong entered into an arrangement which provides tax, trade and investment benefits for Hong Kong companies investing in China. As a result, there may be advantages for U.S. investors to invest in China through Hong Kong trusts and companies. Hong Kong is essentially a common law jurisdiction and has a long tradition of dealing with common law trusts, wills and inheritance concepts.

Hong Kong recently abolished its inheritance tax and maintains a very favorable income tax environment for non-Chinese persons. Dividends paid from a Chinese company to a Hong Kong company and ultimately to a U.S. shareholder should not be subject to withholding tax in either China or Hong Kong. Profits from the sale of stock of a Chinese company owned by a Hong Kong company should not be subject to tax in Hong Kong, but may be subject to tax in China.

In considering a Hong Kong structure to own property in China, a U.S. tax resident should take into account the special U.S. tax regimes designed to discourage U.S. taxpayers from using foreign companies to defer U.S. tax on certain forms of income. In considering the possible application of the anti-deferral regimes under U.S. tax law such as the rules under Subpart F of the Internal Revenue Code regarding "controlled foreign corporations" and the rules regarding "passive foreign investment companies," it is important to keep in mind that Hong Kong is not considered part of China for U.S. income tax purposes. In some cases, use of a Hong Kong entity that could be disregarded or not treated as a corporation for U.S. income tax purposes may be appropriate.

While this article has focused on U.S. persons owning property in China, Chinese individuals with interests in the United States should generally plan for ownership of U.S. assets like other non-U.S. citizens who are not domiciled in the United States. Since there are currently no gift, inheritance or estate taxes in China, it would be unfortunate if a Chinese individual did not properly structure the acquisition of U.S. property and unwittingly became subject to U.S. transfer taxes for which there would be no offsetting credit for Chinese tax purposes.

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New Attorney Advertising Regulations: Commentary and Observations

By Carl T. Baker and Michael D. Dezik

Preamble

When initially volunteering to produce an article for this newsletter on the topic of the new Disciplinary Rules regarding lawyer advertising, the authors anticipated a rather simple synopsis of some of the unresolved issues of the new rules as raised by others—just a recasting of some vagaries of the rules that will need to be finessed or addressed. However, as the process of producing the article proceeded, and more thoughtful attention was given to the regulation of legal advertising, and the new rules in particular, things changed. A point of view developed. It was not intentional or premeditated, it just happened.

I. Introduction

By now, most New York attorneys should be aware that new Advertising Regulations are in place in New York State. At the very least, the detailed readers of this publication are aware as the most recent issue (Spring 2007 / Vol. 40 / No. 1/ at page 22) provided the following documents:

- Press Release of our Association's President, Mark H. Alcott, announcing the changes to the governing Code of Professional Responsibility;
- A synopsis of the changes; and
- A redlined version of the modified Code provisions.

For years, our profession has struggled with the concept and application of advertising to the practice of law. In the old days, it was simple—no advertising allowed.

> "(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf." Disciplinary Rule 2-101 (B), incorporated in Rule 29 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat., p. 26 (Supp. 1976)

But, complicating these simple, state-enforced, disciplinary rules protecting attorney professionalism is the Constitution of the United States—most notably, the "pesky" First Amendment to the Constitution which protects free speech. And if there is anything that demands the respect of lawyers, it is the law, and most especially our Constitutional law.

Consequently, ever since *Bates et al. v. State Bar of Arizona* (433 U.S. 350 (1977)) overturned the above-quoted Disciplinary Rule, lawyer advertising has evolved (if a loaded word that projects continual improvement is appropriate to describe the process). From the *Bates* case in 1977, we now find that in the relative quiet of our homes, enjoying the gentle warmth and glow of modern HDTV, we are routinely subjected to franchised attorney advertisements featuring "Heavy Hitters" carrying baseball bats and fouling our professional dignity.

II. The New Rules—Constitutional?

So what is an Administrative Court System to do? Regulate. And while the goals of protecting "consumers from inappropriate, misleading, or overly aggressive advertisements" may be noble, accomplishing this in a clear, constitutionally valid manner may be impossible.

The new rules begin logically enough with a definition of "advertisement," and so begin the problems. An advertisement is defined as a communication "the primary purpose of which" is to get the attorney hired. Query: You are asked by a local business journal (perhaps one your firm actually advertises in) to write an article for publication on the use of revocable, living trusts for estate distribution purposes. You are almost too busy to afford the time, but would like the exposure that this will bring you. At the moment you consider that factor (the exposure and presentation of yourself as an expert in the area), have you ventured onto the field of impermissible primary purpose? And if that is where you are, then your article is an advertisement and must be labeled as such, and the failure to do so is a violation of the new rules. And if disciplinary proceedings ensue, will it simply be enough for you to argue that it was an educational piece, aimed at the general public, and the appearance of your name, firm name and address at the end of the article was merely appropriate crediting for your authorship?

With advertisement defined, the new rules proceed to define impermissible advertising. The creations of commercial vignettes, the use of actors and actresses, the use of fictitious names, and the use of nicknames (think "Heavy Hitters") are all banned. Essentially, the commercials that make us cringe and fear watching TV with civilians will be never more.

But is that right? While it may make us a bit prouder, or at least less embarrassed, as a profession to have this form of self-promotion eliminated, are we acting correctly? Do we have a right, a duty, to protect the public from matters of taste? Can we "protect consumers from inappropriate, misleading, or overly aggressive advertisements"? And when does an advertisement go from being "aggressive" to overly so? Aren't these ultimately pejorative terms? Can we reasonably, sensibly and legally limit, control, and regulate what is essentially a form of creative, free speech?

Some would say no. In fact they are asking the courts to say no.

(. . . we will now pause to let the reader reflect for a moment on who might be bringing such a suit . . .

. . . if you have been paying attention, you should know the answer, or at least half of the answer . . . advertising and the Constitution create such interesting bedfellows.)

According to John Cather in the *New York Law Journal* on February 5, 2007: "A high-volume, heavy-advertising New York personal injury law firm and a Washington, D.C. advocacy group are apparently the first to challenge the new attorney advertising restrictions. . . ." The law firm of Alexander & Catalano is apparently—and there should be no surprise in this—the "heavy-hitters" franchise of the Syracuse-Rochester area of the state. According to Cather's article, the law firm is concerned that it has lost its slogan, and the name recognition that the slogan has helped to create, along with "its splashy TV ads, which in the past have depicted its lawyers as towering giants leaping onto rooftops and running to the client's house." (It's hard to think of a more reassuring picture to help the public appreciate the complexities and consequences of legal representation than that of a giant lawyer running across rooftops, possibly carrying a baseball bat. . . .)

As for the strange bedfellows, joining the law firm in this proceeding is Public Citizen, Inc., which according to its web page:

> is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts.
>
> We fight for openness and democratic accountability in government, for the right of consumers to seek redress in the courts; for clean, safe and sustainable energy sources; for social and economic justice in trade policies; for strong health, safety and environmental protections; and for safe, effective and affordable prescription drugs and health care.

Hard to argue with that. What could be their concern with the new rules? The case description at their website states in part: "Public Citizen's complaint contends that the rules allow for arbitrary and discriminatory enforcement, prohibit both noncommercial and commercial speech that is protected by the First Amendment, and ultimately harm consumers by denying them access to information about their legal rights and available legal services." (To track the status of this case, a link with copies of the filings in support and opposition, can be found at: http://www.citizen.org/litigation/forms/cases/CaseDetails.cfm?cID=358.)

Public Citizen's press release completes the line-up of their concerns in more detail:

> WASHINGTON, D.C. – New rules governing lawyer advertising set to go into effect in New York violate free speech and would impose anti-consumer restrictions on lawyers' advertising and Internet communications, according to a lawsuit filed today by Public Citizen and a New York law firm.
>
> * * *
>
> The lawsuit contends that the rules' broad language unconstitutionally prohibits truthful communication of information about legal services to New York consumers. There is also no exception for solicitation of potential clients for pro bono representation, and thus the rules would apply to brochures and other materials released by nonprofit legal groups that provide no-fee legal services on civil justice issues.
>
> According to the lawsuit, a 30-day waiting period in the rules on communications to individuals and their families who have been involved in potential incidents of personal injury or wrongful death would prevent civil justice groups from adequately defending citizens' rights. For example, the waiting period would prevent nonprofit legal organizations from

> contacting individuals at political demonstrations who have been physically harmed by police officers to inform them about their rights and the availability of pro bono legal representation.
>
> "The right to engage in truthful legal advertising is not only a matter of free speech, but it also encourages competition in the marketplace for legal services," said Greg Beck, an attorney for Public Citizen. "It's also important for educating citizens about their rights and making it easier for consumers to find the appropriate legal representation."

So then, rules that are nominally meant to protect the public, while upholding the dignity of the profession, may be anti-competitive, harmful to consumers and possibly unconstitutional. If only those were the only problems.

Legislating dignity, defining content and limiting delivery is difficult, especially regarding a process that is creatively driven by competitive forces. Perhaps the best example of this is the plea of Richard Lippe, a senior partner with the Long Island law firm of Meltzer, Lippe, Goldstein & Breitstone, LLP (www.mlg.com). In a letter to Michael Colodner, Esq., counsel to the Office of Court Administration (OCA), Attorney Lippe takes issue with the new provisions which ban advertisements that "include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm . . ." and that "utilize depictions of fictionalized events or scenes. . . ." If the creative use of cartoons from the *New Yorker* magazine run afoul of this part of the new rules, then the Meltzer Lippe firm is in serious trouble. But should they be? As Attorney Lippe state's in his letter:

> we object to changes to rules that limit any one particular method of advertising, in this case the use of fictional situations and the portrayal of judges and court rooms ("Cartoons"). In doing so, the rule is impermissibly "broad" by prohibiting our firm's use of Cartoons as a method of advertising. It is our opinion that this rule is unconstitutional since it regulates a method of free speech rather than its content. Also by doing so, it handicaps a lawyer's ability to communicate to clients in a clear, professional and humorous manner.

Aside from the additional constitutional complaint, Meltzer Lippe is really most concerned with regulation of "style" in their marketing presentation. Since the new rules forbid "portrayals" and "depictions," seemingly the use of cartoons would be banned. But is the use of cartoons always inappropriate or demeaning to our profession? You be the judge. Check out the Meltzer Lippe website and how they have used these cartoons to present their firm to the general public. As Attorney Lippe goes on to explain, after stating that the firm's brochure uses *New Yorker* cartoons with permission:

> When we created this brochure, corresponding web site and ads, our goal was to separate our law firm from the competition by stating our values in a simple, clear and succinct manner and to do so with a professional sense of humor demonstrated by using the nationally renowned *New Yorker* cartoons. We believe we are the only law firm in New York State to use this type of creative advertising as part of a continuing marketing campaign.
>
> * * *
>
> We took a highly unique and creative approach to demonstrate our sensitivity to the legitimate concerns commonly held by "consumers" of legal services.
>
> * * *
>
> By choosing a strategy that is unique and highly creative, we are able to demonstrate, not just say, that we are an intelligent, highly creative and unique law firm that uses out-of-the box thinking.
>
> * * *
>
> With regard to the use of any Cartoons, we carefully scrutinize them to assure they are not misleading or demeaning to the profession.
>
> * * *
>
> We urge you to control ads that are misleading or demean the profession but not to regulate any particular method of communicating to consumers. . . .

(The letter in its entirety can be found at http://commonscold.typepad.com/commonscold/files/06_11_14_ml_letter_of_objection_to_rules_ver3.pdf)

An advertisement does not have as its purpose to draw attention to "the law" or "lawyers" in general, but to attract clients to a particular lawyer or law firm. Consequently, advertisements reflect upon the advertiser, rather than an industry, product, or even a profession, as a whole. Just because most of us would not care to portray ourselves as giant attorneys running across roof tops, it does not necessarily follow that we should attempt to ban that sort of portrayal in general.

III. Other Issues Raised

The new rules touch on almost all aspects and means of how a lawyer and law firm "present" to the public. In addition to the rules being less than clear in their application to all forms of public communications, they are potentially onerous as well. Nowhere is the difficulty in regulating this area more evident than in the attempt to deal with something the *Bates* case never considered and could not have anticipated—cyberspace.

After attempting to define advertising, the rules define "Computer-accessed communication." The definition is broad: "any communication . . . disseminated through the use of a computer or related electronic device. . . ." The definition specifically includes "web sites, weblogs, . . . electronic mail, . . . instant messaging" among other "internet presences." If you receive it or can get it over a computer, it could be attorney advertising material, and if it is then things start to get more complex—with labeling, filing and retention requirements.

Before proceeding, one more crucial definition from the new rules is necessary. DR 2-103 (22 N.Y.C.R.R. 1200.8) at subparagraph (b) adds a new definition of "solicitation." A solicitation is an "advertisement" (see definition of advertisement) that is "initiated by or on behalf of a lawyer of law firm" (query: "on behalf of"?) "that is directed to, or targeted at, a specific recipient or group of recipients" (maybe they just could have said "anybody") "the primary purpose of which" (ah, there are those words again) "is the retention of the lawyer or law firm, and a significant motive for which" (wiggle words?) "is pecuniary gain." If, whatever the lawyer or firm is doing is a "solicitation," then there is a duty to file the solicitation with the appropriate attorney disciplinary committee. Aside from the reassurance that may be taken in the potential difficulty of proving someone else's "primary purpose" and "significant motive," the good news is that a general law firm web site is specifically excepted from these provisions. However, less reassuring is the phrase "on behalf of" and what that may mean, which seems to raise the possibility of running afoul of the new rules without even knowing it. And will lack of knowledge or control be a defense in a disciplinary proceeding?

So how do these rules regarding advertisements, computer-assisted communications, and solicitations play out in the real world of practicing attorneys? In the January digital issue of *Law Technology News* (www.lawtechnologynews.com), the Editor, Monica Bay, gives the New York Bar a Bronx cheer for the new rules, commenting that they are "beyond ridiculous when it comes to blogs and cartoons. Get this: They are treating blogs as advertisements, and they want you to print out your blog and keep it for three years. Are they kidding?"

Unfortunately, the answer is no. No kidding. But relax, computer-accessed communications only need to be maintained for one year, not three! Ah, but what do you need to keep from the ephemeral world of cyberspace? Since a web site, while not a solicitation, is apparently defined as attorney advertising (DR 2-101 "(f) Every advertisement . . . shall be labeled "Attorney Advertising" on the first page, *or on the home page in the case of a web site*."—emphasis added), a copy of the contents of a web site must be preserved. But what do you preserve? Web sites are hardly static platforms. If you regularly update your web site, as every good marketing consultant would recommend, then you must also preserve the updates if they are, and here come some more wiggle words, a "major web site redesign, or a meaningful and extensive content change. . . ." Is it possible that attorneys could find room to argue over that definition?

And what of web logs, the increasingly ubiquitous "blogs" (or "blawgs" for us attorneys) where lawyers and law firms opine on issues near and dear to their hearts or practice areas? Clearly these are "computer-accessed communication" but are they also attorney advertising or, potentially worse yet and if narrow in scope, do they become a solicitation? According to Lynne Donaghy and John Hellerman in an article titled "Must-See TV Show Breeds Must-See Blawg" from the *Marketing the Law Firm* newsletter (April 11, 2007):

> Not to be left behind, the legal community is actively engaged in the ever-expanding blogoshpere. With more than 1,000 active legal blogs on the Web, firms and attorneys recognize the value of blogs as unique marketing and business development tools. However, for a blog to be beneficial, it must distinguish itself from the diluted market through creativity, consistency and a strategic media plan. (See: www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1176195848116.).

Their article goes on to describe how "Ford & Harrison, a national labor and employment law firm, was interested in a creative way to communicate with current and prospective clients about the difficult and complex legal issues facing employers in today's workplace. The firm has always been aggressive when it comes to marketing, and is constantly looking for ways to stand out." So what did that firm do? It created a blog entitled *That's What She Said* based on the TV show "The Office" (to see this blog go to www.hrheroblogs.com). The article goes on to indicate how the blog has been used and impacted the firm's marketing:

> As a result of the launch strategy, *That's What She Said* received coverage in all three areas of focus—from *The Wall Street Journal* to the Life section of *USA Today*. As expected, other blogs were the first to pick up on the story, either posting Ford & Harrison's news release or writing their own reviews.
>
> * * *
>
> As news about the blog spread and traffic increased to 12,000 hits a day, unexpected coverage of the blog followed, as was the case when *New York Magazine* called the blog "brilliant" in their popular "Approval Matrix."
>
> * * *
>
> For instance, the firm sent an announcement about the blog to many of its clients and contacts. A number of attorneys sent clients a copy of a large, front-page business feature story that appeared in several major Gannet newspapers.
>
> * * *
>
> The feedback was overwhelmingly positive—clients appreciated the firm's creativity and uniqueness, which reinforced why they had chosen Ford & Harrison in the first place. One client shared the blog with her CEO, who subsequently e-mailed it to all of the company's managers, encouraging them to visit the site every Friday. Several clients have asked about using the blog as a training tool for their HR executives.

Could a New York firm do this under the new rules? Certainly. All that is required is labeling the blog as "Attorney Advertising" (Query: If labeled as such, would the *Wall Street Journal*, *USA Today*, etc., run articles about a "legal ad"?). Oh, and since it might be difficult to argue that the blog does not meet the new definition of solicitation, a New York firm would need to file a copy of the blog "at the time of its dissemination" with the local disciplinary committee. Presumably, a blog which exists in a state of semi-permanence in cyberspace is disseminated when it is first created. Further, it would reasonably seem that every new blog posting is a new "dissemination," but what do you file? The entire blog every time a new posting is made, or just the new posting? Do these rules put New York lawyers and law firms on a higher plane, or do they curb their creativity and put them at a competitive disadvantage in the national marketplace?

Returning from cyberspace to more traditional attorney functions and activities, the new rules present still other issues and causes for concern. Our Section's Chair, Philip Burke, back when he was merely the Chair of his firm's Marketing Committee, wrote to the Office of Court Administration raising a number of questions regarding what were then the proposed rules. The following matters raised in his letter remain unsettled and uncomfortable under the new rules:

1. When an attorney is asked to speak on a particular Estate Planning topic for a local charity or other planning organization, is the talk itself an advertisement under the new rules? What about the materials produced for the seminar—do they need to be labeled as "Attorney Advertising" and if so, do they not lose some of their impact as planning information, as the implication to be derived from the label is that the materials are a "come on" for generating work? And if the presentation on behalf of a charity somehow escapes being an advertisement, does that all change if the seminar presentation is one sponsored by the law firm itself for the general public? And is the general public a "group of recipients" such that the seminar becomes a solicitation?

2. What of charitable contributions and sponsorships? Generally, in return for donations or sponsorships, not-for-profit entities post the name of the contributor as recognition for the support. For the lawyer or law firm contributor must we investigate motivation? Was the attorney or firm truly interested in the charity (and just happy to receive signage at the event or a "thank you" in the brochure) or was the "primary purpose" otherwise, requiring that "Attorney Advertising" be added to the acknowledgment? Who makes this call and how? Will it always be enough for the law firm to simply state that it was supporting the charity?

A further matter for contemplation are the record-keeping and filing requirements that the new rules impose. Who is going to be checking to see if a firm has kept all of its advertisements for the required three-year period? Who is going to see to it that the various cyber communication records have been properly maintained and that there does exist a copy of all "meaningful and extensive content change" to web sites, blawgs and the like? If attorneys err on the side of caution, do the various judicial departments have the room, filing space and staff to receive and store copies of all solicitations from all attorneys in their department? And if you are filing a required solicitation, should you request a receipt to protect yourself in case your filing is "misplaced" by your local judicial department? And just who is going to be reviewing and acting upon all of these filings?

IV. Summary

Whatever one may think of the new rules, it should be acknowledged that they have had an immediate and calming effect on over-the-top TV advertisements. The "heavy hitters" have taken to bunting. Alexander & Catalano, the firm mentioned above, has apparently pulled its ads pending the outcome of their lawsuit, and the "heavy hitter" franchise in the authors' market area now takes a "kinder, gentler" approach, proposing to use the law as a "tool" for the benefit of its clients (having given up their bats for the visual of pulling a law book from a tool chest).

As stated by our Association's then-President, Mark H. Alcott, the goals of protecting consumers from misleading and aggressive advertisements, of "more protection for the public and more dignity for the profession" are true, noble and worthy. It also bears noting that most all attorneys who have raised issues with the new rules have remarked on the need for and their support of appropriate regulation in this area. Attorney Lippe in his letter to the OCA states that his firm is "in favor of changes to attorney advertising rules that seek to prohibit ads that are misleading or demean the profession." Attorney Burke, on behalf of his firm states that "I share the concerns that many practitioners and consumers throughout New York State have with the quality and content of lawyer advertising. In this regard, I wholeheartedly approve of the need for further regulation in this area."

And while your authors completely concur with these objectives and sentiments, they have come to the conclusion that this is not an area that is merely difficult to regulate—that it may be constitutionally impermissible to regulate and, perhaps as importantly, impossible to appropriately regulate. While having raised a number of questions and concerns, the authors do not presuppose that they have come close to covering all of the issues and potential problems with the new rules. The more closely the rules were reviewed and considered, the more these questions appeared. Time, duty to other client matters, and a long-since-passed publishing deadline prevented a better analysis or the pursuit of other issues.

Free thought and speech are cornerstones of our society. To regulate these in an attempt to address matters of taste and decency puts them at risk—it's a cure arguably much worse than the disease. Initially, this article intended to take a different tone, one championing an end to the annoying, embarrassing, and demeaning advertisements that we periodically must bear. The larger truth is that the reflection of the profession does not begin or end with those few who would push the boundaries of what we may consider appropriate or decent. It rests in the day-to-day conduct of the individual attorney and the responsible and noble services of the many. It is backward thinking and the height of insecurity for an entire profession, out of a legitimate concern over the loud and obnoxious noise of a few, to stymie, smother and squelch the creativity and openness of the many.

And when that profession is ours, is "the law," to attempt to do this in a way that may be constitutionally suspect, by regulation that is burdensome, ill fitting, and nearly impossible to enforce, the insecurity becomes obscenity.

But, we have the new rules. They are "on the books" and in place.

So what is a practicing lawyer to do? How do you handle and respond and live with these new rules? That is a question we have not resolved and certainly would not venture to answer for others.

If these rules are truly about the demeaning of our profession and misleading the public, then we may simply continue to act as we always have, mindful of and responsive to our clients' needs, presenting our firm and selves to the public in a manner we can personally take pride in. If we fail to label something appropriately, to file a required piece of paper, or to keep a particular record, then we will certainly stand up for any harm that has come to the public or our profession for doing so, but if the only harm is to a regulatory bureaucracy, well . . .

Carl T. Baker is the managing partner of FitzGerald Morris Baker Firth PC, of Glens Falls, NY and head of the firm's Trusts and Estates Practice, and he has done other stuff. Michael D. Dezik is an Associate with FitzGerald Morris Baker Firth PC, still of Glens Falls, NY working in the Trusts and Estates Practice and he is just starting to do stuff.

(POSTSCRIPT—This may be Attorney Advertising but probably isn't; we really don't know. But in case it is, by simply asking the question have we labeled it appropriately?)

Dead Man's Statute: Use in Summary Judgment Motions

By Eric W. Penzer

A recent decision emanating from the Surrogate's Court, Nassau County,[1] reaffirms the well-established rule that evidence excludable under the Dead Man's Statute cannot be considered in support of a motion for summary judgment.

That rule, and its counterpart concerning evidence that may be considered in opposition to a summary judgment motion, are not widely understood by general practitioners.

Indeed, the Dead Man's Statute itself can be something of an enigma to those who do not encounter it regularly.

This article will explain the general rules applicable to motions for summary judgment as well as certain exceptions applied by the courts.

Background

Briefly explained, New York's "Dead Man's Statute" (CPLR 4519) makes testimony by an interested witness "concerning a personal transaction or communication between the witness and [a] deceased person or mentally ill person" excludable "[u]pon the trial of an action or the hearing upon the merits of a special proceeding[.]"[2] Such evidence is, however, freely discoverable, and may be the subject of testimony at an examination before trial. Indeed, unlike the rule in other states, in New York, eliciting such evidence during the discovery process does not act as a waiver of the statute.[3]

The Dead Man's Statute comes up frequently in litigation concerning trusts and estates. For example, to prevail in a discovery proceeding seeking the return of property to an estate, the recipient of an alleged "gift" from the decedent has the burden of establishing all the legal elements of a gift.[4] It is often necessary, therefore, to offer evidence of transactions and communications with the decedent.

As an interested person, however, the recipient of the alleged gift is incompetent to testify concerning such transactions or communications. To avoid exclusion under the Dead Man's Statute, such evidence generally must consist of testimony from disinterested witnesses. Similarly, beneficiaries under a will are usually incompetent to testify in support of the will or transactions or communications with the decedent.[5]

The question often arises, to what extent may evidence excludable under the Dead Man's Statute be used in support of or in opposition to a motion for summary judgment? On one hand, the New York statute only applies at trial. As "dictated by the very language" of the statute itself, the statute cannot be asserted—or waived, for that matter—until trial.[6] On the other hand, a motion for summary judgment is the procedural equivalent of a trial on the merits.[7]

The long-standing rule in New York is that "evidence excludable under the Dead Man's Statute should not be used to support summary judgment[.]"[8] That general rule was applied recently by the Nassau County Surrogate in *Matter of Penn*.[9] In that matter, a contested discovery proceeding, the executors of the decedent's estate contended that the respondent—the long-time friend, employee, and paramour of the decedent—was in possession of cash and a cooperative apartment purchased with funds belonging to the estate. After discovery, the respondent moved for summary judgment. Inasmuch as the respondent conceded that the decedent's funds were used to purchase the apartment, she had the burden of establishing all the elements of a gift.

In support of her motion, the respondent offered her own testimony that the decedent intended the apartment to be her sole property and that the decedent made a statement to that effect to a realtor. The court, however, applied the rule that evidence excludable under the Dead Man's Statute cannot be used in support of a summary judgment motion. Inasmuch as the respondent offered no other evidence of the communication with the decedent, such as testimony from the realtor to whom the decedent allegedly made the statement, the court denied the respondent's motion.

Summary Judgment Motion

The issue whether evidence excludable under the Dead Man's Statute may be considered in opposition to a motion for summary judgment has, historically, been the subject of controversy. Until 1972, there was a split of authority in the appellate divisions on the issue. The Appellate Division, First Department, held that such evidence could be utilized to defeat a summary judgment motion, while the Second and Third Departments took a "contrary though arguably distinguishable view."[10] The Court of Appeals, in *Phillips v. Joseph Kantor & Co.*,[11] laid the issue to rest, at least as a general matter. It held that "[e]vidence, otherwise relevant and competent upon a trial or hearing, but subject to exclusion on objection under the Dead Man's Statute, should not predetermine the result on summary judgment in anticipation of the objection."[12]

Such a rule was mandated, according to the Court, because of the inability to predict with certainty whether evidence otherwise excludable under the Dead Man's Statute might nonetheless be admissible at trial by virtue of a waiver of the statute. Such a waiver could be effectuated intentionally or by inadvertence, such as by "opening the door" to the admission of evidence otherwise excludable under the statute. As the Court noted,

> [t]he same New York language which prevents waiver of the statute during discovery proceedings, should also prevent the assertion of the rights under the statute prior to trial. A reason was stated below by Mr. Justice Kupferman in dissent: "[i]t is always possible that the incompetency will be waived at the trial, or the door opened, by design, or by inadvertence." Moreover, Wigmore makes a strong plea for voluntary waiver of the statute by responsible representatives of estates where justice so dictates (2 Wigmore, Evidence, § 578, at p. 698).[13]

While the Court's discussion in *Phillips* focused on the use of excludable evidence to oppose a motion for summary judgment, that discussion could well be regarded as mere dicta. This is because the Court was careful to note that "there is in this case some evidence free from exclusionary objections which suggests a palpable likelihood of establishing plaintiff's prima facie case, without use of the evidence excludable under the Dead Man's Statute."[14]

Door Left Open

The Court left the door open for granting summary judgment in a case where the only evidence offered in opposition to the motion would be subject to exclusion under the statute. It stated that, "[a]dmittedly, a trial would seem unnecessary if it were certain, in an absolute rather than a pragmatic sense of the term, that there would be no waiver of the statute and that all the proof would be excludable."[15] The case before it was not such a case, however, and in the Court's view, such a case would be rare indeed: "[t]his is not a case . . . where all the evidence might be excluded, nor does such a case occur often, if ever."[16]

On that issue, Chief Judge Stanley H. Fuld, in dissent, expressed his view that summary judgment was properly granted by Special Term because the plaintiff failed to offer "'an affidavit from any witness competent to testify at the trial as to the asserted oral statements made by the decedent."[17] The dissenting judge noted that courts have "consistently and, in [his] view, correctly decided"[18] that a motion for summary judgment is properly granted where "the record indicates that the only evidence which (the plaintiff) might introduce at trial would be incompetent and insufficient to defeat judgment for (the defendants)."[19] He noted that a party should not avoid summary judgment based on "the very farfetched claim that, at the trial, the witness' incompetency [may] be waived. . . or the door opened, by design, or by inadvertence."[20]

That the Court's holding in *Phillips* seemingly rested on the existence of nonexcludable evidence, mandating denial of the motion, at least some uncertainty exists concerning whether excludable evidence alone would suffice to justify the denial of a motion for summary judgment. Indeed, most published Appellate Division cases simply recite the general rule, i.e., that otherwise excludable evidence may be considered in opposition to a motion for summary judgment, but do not make clear whether any non-excludable evidence exists mandating denial of the motion.

Yet the Appellate Division, Third Department, has repeatedly held that summary judgment is appropriate where evidence excludable by the Dead Man's Statute "is proffered as the sole proof in support of the opposing party's claim[.]"[21] Likewise, the Surrogate's Courts have applied that rule. For example, in *Matter of Kacprzyk*,[22] the Suffolk County Surrogate's Court granted summary judgment seeking dismissal of a claimant's objections to the executrix's petition to determine the validity of the claim. According to the court, "the sole evidence preferred [by the claimant] is her own self-serving testimony of oral communications with the decedent, which is insufficient to withstand petitioner's motion for summary judgment."[23]

Conclusion

In any case involving a decedent, care must be taken by the practitioner early on in the discovery process to determine whether evidence necessary to establish a claim or defense is excludable under the Dead Man's Statute. This may require seeking out disinterested witnesses to establish material facts that could otherwise be established through testimony of the parties. Should dispositive motion practice ensue, familiarity with the rules stated above is essential to avoid unforeseen pitfalls.

Endnotes

1. *Matter of Penn*, 14 Misc. 3d 1203(A), 2006 WL 3690731, 2006 N.Y. Slip Op. 52394 (U) (Sur. Ct., Nassau County December 13, 2006).
2. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 313 (1972) (citation omitted).

3. *See id*. at 314.
4. *See Matter of Carroll*, 100 A.D.2d 337, 338 (2d Dep't 1984).
5. *See Matter of Sheehan's Will*, 51 A.D.2d 645 (1976).
6. *Phillips*, 31 N.Y.2d at 314.
7. *See Peerless Ins. Co. v. Allied Bldg. Products Corp.*, 15 A.D.3d 373 (2nd Dep't 2005).
8. *Id.* at 312.
9. 2006 WL 3690731.
10. See Phillips, 31 NY2d at 312 (citations omitted).
11. 31 N.Y.2d 307.
12. *Id*. at 310.
13. *Id.*
14. *Id.* at 309.
15. *Id.* at 314.
16. *Id.*
17. *Id.* at 316 (Fuld, C.J., dissenting).
18. *Id.*
19. *Id.* (quotation marks and citations omitted).
20. *Id.* (quotation marks and citation omitted).
21. *Marszal v. Anderson*, 9 A.D.3d 711, 713 (3d Dep't 2004), quoting *Mantella v. Mantella*, 268 A.D.2d 852, 853 (2000); *accord Matter of Estate of Lockwood*, 234 A.D.2d 782 (3d Dep't 1996).
22. July 12, 2002 N.Y.L.J. 23, col. 4 (Sur. Ct., Suffolk County).
23. *Id.; see also Matter of Casessa*, June 22, 2001 N.Y.L.J. 24, col. 1 (Sur. Ct., Kings County) ("In cases where the sole evidence preferred by the opposing interested party is the latter's self-serving testimony of oral communications with the decedent, courts have found such to be insufficient to withstand summary judgment").

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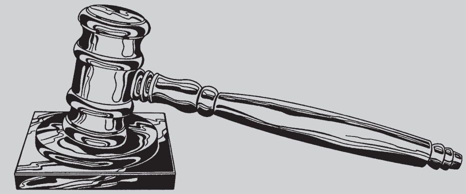
Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



JOINT ACCOUNTS

Closing of Accounts Will Support Action for Conversion

Plaintiff alleged that defendants closed bank accounts co-owned by decedent and plaintiff and placed the proceeds in accounts in trust for defendants. The Supreme Court dismissed the complaint and the Appellate Division reversed, holding that because the plaintiff received a gift of one-half of the deposited funds on the opening of the joint accounts, the complaint was sufficient to state a cause of action for conversion. *Adams v. Hickey*, 35 A.D.3d 828, 828 N.Y.S.2d 105 (2d Dep't 2006)

PROCEEDINGS

Accounting; Arbitration Agreement Binding on Trustee and Beneficiary

Trustee delegated his investment function pursuant to EPTL 11-2.3(c)(3). The agreement with the advisor included an arbitration clause. The advisor was impleaded by the trustee in an accounting proceeding and the advisor moved pursuant to CPLR 7503 for an order staying the accounting proceeding and compelling arbitration. The Surrogate granted the motion, holding that the Federal Arbitration Act (9 USC § 1 *et seq.*) and New York's policy in favor of arbitration required enforcement of the arbitration clause against both the trustee and the beneficiary whose rights against the advisor arose under the agreement. In addition, because the trustee has a conflict of interest the Surrogate stated that the court would entertain a petition for limited letters under SCPA 702 to allow the beneficiary to represent the trust in the arbitration proceeding. *In re Blumenkrantz*, 14 Misc. 3d 462, 824 N.Y.S.2d 884 (Sur. Ct., Nassau Co. 2006)

Probate; Attorney-in-fact May Sign Waiver for Incapacitated Distributee

Attorney-in-fact submitted a waiver and consent to probate of will on behalf of decedent's incapacitated daughter. Executed more than twenty years before commencement of the probate proceeding while the principal was competent, the power of attorney granted the attorney-in-fact authority to act in respect to estate transactions as defined in GOL section 5-1502G. The Surrogate held that the policy of the state to allow the liberal use of powers of attorney and the policy considerations embodied in Mental Health Law Article 81 justified allowing the attorney-in-fact to appear for the principal despite the provisions of SCPA 401, 402, and 403 that require the appointment of a guardian *ad litem* where there is no appearance by the conservator or committee of a person under a disability. The Surrogate further held that the power of attorney must be recorded as provided in EPTL 13-2.3(a) and that the attorney-in-fact must make the affidavit required by section 207.48 of the Uniform Rules. *In re Murray*, 14 Misc. 3d 591, 824 N.Y.S.2d 864 (Sur. Ct., Erie Co. 2006)

TRUSTS

Supplemental Needs Trusts; State Entitled to Reimbursement under Terms of Trust

Plaintiff obtained a favorable verdict in a medical malpractice action which was limited by a settlement agreement entered into during jury deliberations. Some of the settlement was allocated to the state in satisfaction of a Medicaid lien for services provided before the verdict. The remainder of the settlement was placed in a supplemental needs trust eighteen months after the verdict. After plaintiff's death the state recovered from the SNT the amount of Medicaid expenditures for the post-verdict period. Plaintiff's mother then sued for reimbursement of the amount paid to the state for the period from the verdict to the funding of the SNT on the grounds that federal law prohibits recovery for medical assistance correctly paid (42 U.S.C. § 1396p(b)(1)). The Supreme Court ordered reimbursement of the amount paid the state for the period between the verdict and the order allocating the settlement between the pre-verdict lien and the SNT, holding that the matter was *res judicata* because the state did not amend the pre-verdict lien or appeal the order allocating the settlement funds. The Appellate Division reversed, holding that *res judicata* was inapplicable because the trial court never ruled on the merits of a claim for post-verdict Medicaid expenditures and that the terms of the SNT dictated by statute require the trust to reimburse the state in an amount equal to the total medical assistance paid on behalf of the beneficiary. *In re Abraham XX*, 36 A.D.3d 1085, 827 N.Y.S.2d 769 (3d Dep't 2007)

WILLS

Construction; Language Creates Life Estate Without Power of Sale

Testator's will gave a "life estate" in real property to her spouse if he survived her, which he did, and directed that on his death or on testator's death if he did not survive that the property be sold. Testator then created a right of first refusal and a right of second refusal and if both rights were unexercised the property was to be sold and the proceeds distributed to the spouse if then living and if not to named persons "or their issue." In a 2004 decision, the Surrogate construed the will and held that the use of the term "life estate" in this professionally drafted will created a simple life estate without power of sale and that the language requiring distribution of the proceeds of sale to the spouse were stricken as ambiguous and contrary to testator's intent. *In re Houlihan*, 13 Misc. 3d 419, 824 N.Y.S.2d 554 (Sup. Ct., Franklin Co. 2004). In a 2006 decision that will not be officially reported, the Supreme Court granted the life tenant's petition to sell the property pursuant to RPAPL section 1604 on the grounds of expediency based on the excessive expenses involved in maintaining the property and testator's primary desire to benefit her spouse. *In re Houlihan*, 13 Misc. 3d 1205A, 824 N.Y.S.2d 574 (Sup. Ct., Franklin Co. 2006)

Construction; Ambiguity Requires Surrogate Court Proceeding

Decedent's will gives her husband a life estate in her house and directs that if husband does not survive decedent or remarries that the house shall be sold and the proceeds be disposed of as part of the residue which the will gives to husband. Husband remarried and the co-executors transferred the house to husband. Testator's daughter commenced an action in Supreme Court seeking a declaration of rights under the will. The court granted husband's motion to dismiss, holding that the will provided an absolute defense because it clearly provided that the house pass to husband through the residue. The Appellate Division reversed, finding that the will was ambiguous and that plaintiff should have an opportunity to establish decedent's intent and remitted the matter to Surrogate's Court. *Williams v. Williams*, 36 A.D.3d 693, 828 N.Y.S.2d 189 (2d Dep't 2007)

Revocation; Will Serves as Writing Indicating Intent to Revoke

Testator obliterated a paragraph of her will and dated and signed the will immediately following the paragraph. The signatures of two other persons, followed by their addresses and the same date as that written by testator, appear on the foot of the same page of the will. The Surrogate held that the will itself could serve as the writing indicating the intent to revoke required by EPTL 3-4.1(a)(1)(B) and ordered that the will be admitted to probate without the obliterated paragraph. *In re Litwack*, 13 Misc. 3d 1011, 827 N.Y.S.2d 582 (Sur. Ct., New York Co. 2006)

Undue Influence; Confidential Relationship Established

The Appellate Division reversed the decree admitting the will to probate and set aside the jury verdict on the issue of undue influence. Testator divided her estate between a niece and the niece's son, disinheriting a nephew and the children of a predeceased niece. The evidence showed that the grand-nephew was testator's accountant, assisted testator with her finances, and played an active role in selecting testator's attorney and in the preparation of the will. Under those circumstances it was an error for the Surrogate to decline to instruct the jury that there was an inference of undue influence. The matter was remitted to the Surrogate for a new trial on the undue influence issue. *In re Neenan*, 35 A.D.3d 1475, 827 N.Y.S.2d 164 (2d Dep't 2006)

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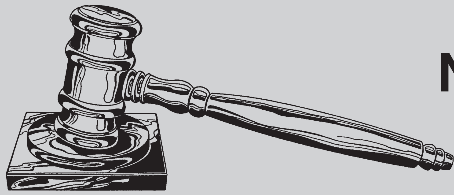
Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, DRAFTING NEW YORK WILLS (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Compromise Pursuant to SCPA 2106

In a contested probate proceeding, a motion was made for the court's approval of a stipulation of settlement. The motion was opposed by the nominated executor and the nominated alternate executor, who also received a small bequest. The court approved the settlement. In doing so, the court held that absent good cause, which had not been shown, the fiduciaries should not be permitted to frustrate the settlement of a probate contest arrived at by the beneficiaries. The court also rejected the objectants' argument that their share could not be diminished without their consent. The court pointed out that the objectants had received notice pursuant to SCPA 1411, and as such, had been informed that their share of the estate could be caused to contribute proportionately to a settlement. Inasmuch as the proposed settlement was in compliance with SCPA 1411(6), the court dismissed the objections.

Matter of Corbin, 13 Misc. 3d 1244(A), 2006 N.Y. Slip Op. 523333 (Sur. Ct., Nassau Co.).

Compulsory Accounting

The decedent's husband predeceased her. Pursuant to his will, he left his entire estate to his wife. His wife's niece was issued letters testamentary. Thereafter, she petitioned to be appointed guardian of the decedent's wife. The application was granted, and she, together with the decedent's cousin, was appointed co-guardian of the person and property.

Subsequently, the decedent's wife died. Her will left everything to her husband, or in the event he predeceased her, to her niece. The decedent's cousin filed objections to probate, and also instituted a proceeding to compel the decedent's niece to account as fiduciary of the estate of the decedent's predeceased husband. In this latter regard, the decedent's cousin claimed that an accounting was needed in order for her to fulfill her stewardship as co-guardian of the decedent's estate. An issue of her standing to seek an accounting was raised by the respondent/niece.

The court noted that an accounting may be sought by a person interested in an estate. A person interested is defined as anyone entitled, or allegedly entitled to share as a beneficiary. A beneficiary can include a contingent beneficiary. The court opined that while the petitioner might have an interest in the decedent's estate, in the event the propounded will was denied probate, the best interests of the estate dictated that her request for an accounting await the outcome of the probate proceeding. The court held that if the petitioner succeeds in her objections to probate, she would be a distributee of the decedent, and as such, would have an interest in an accounting in the estate of her predeceased husband.

The court rejected the petitioner's claim that she required an accounting in order to fulfill her duties as co-guardian, inasmuch as she was responsible only for assets under her control, and not assets that had not been collected. Moreover, even if there was malfeasance in connection with the estate of the decedent's predeceased husband, the petitioner would have no authority after the decedent's death to pursue any such claims on the decedent's behalf.

In re Estate of Gallagher, N.Y.L.J., December 26, 2006, p. 19 (Sur. Ct., Kings Co.).

Dead Man's Statute

The executors of the decedent's estate, who were his sons, instituted a discovery proceeding against his friend and paramour, alleging that she was in possession of cash and a cooperative apartment purchased in the respondent's name with funds belonging to the estate. Respondent moved for summary judgment dismissing the proceeding arguing documentary evidence supported that the apartment was hers. The respondent alleged that the decedent had intended the apartment to be hers and made such statement to a realtor on the premises. The court found no documentary evidence supportive of the respondent's claims either in the form of an affidavit from the realtor or deposition testimony.

Indeed, the only evidence supportive of respondent's contentions was her own testimony, which was barred by the Dead Man's Statute and unavailable to support a motion for summary judgment. Accordingly, the respondent's motion for summary relief was denied.

In re Estate of Robert Penn, Sr., N.Y.L.J., January 4, 2007, p. 24 (Sur. Ct., Nassau Co.).

Jurisdiction

Before the court was a proceeding to set aside a deed in which the Grantor, by exercising a power of appointment, transferred real property to an Inter Vivos Supplemental Needs Trust. The Trustee of the trust moved for an Order dismissing the petition on the grounds that the court lacked subject matter jurisdiction.

The court denied the motion, holding that pursuant to SCPA 207(1) the surrogate's court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state. Inasmuch as the subject asset of the trust was real property in New York State, and the trustee was a resident of New York State as well, and the provisions of SCPA 209(6) grants the court with the power to determine all matters relating to lifetime trusts, the court found that it had jurisdiction over the subject matter of the proceeding.

In re Petition by Harvey Greenberg to Revoke and Set Aside the Deed by Goldie Greenberg, N.Y.L.J., January 23, 2007, p. 31 (Sur. Ct., Queens Co.).

Letters of Administration

The decedent's daughter filed a petition for letters of administration. The decedent was survived by her husband and two adult children, the petitioner being one of them. In response to the daughter's petition, the decedent's husband filed a petition for temporary letters of administration and full letters. The daughter opposed the application claiming that her father was ineligible to serve on the grounds that he was deaf, resided in a nursing home, and was imprudent with finances. The decedent's husband denied these contentions.

The court held that SCPA 707 declares an individual ineligible to be appointed fiduciary of an estate if a "want of understanding" is shown, or such person is "otherwise unfit for the execution of the office." The court found that the decedent's daughter had failed to show that her father had evinced a want of understanding sufficient to deny his eligibility to serve as administrator, and that although the decedent's husband may have been careless with respect to financial matters, there was no support in the record to indicate that it was motivated by dishonesty or surreptitious intentions. Moreover, while the decedent's daughter had an antagonistic relationship with her father, the court held that "[t]heir hostility had not reached a pernicious level so as to render the decedent's husband unfit to serve.

Accordingly, the application of the decedent's husband to serve as administrator was granted on the condition that he post a bond pursuant to SCPA 701.

In re Estate of Cohen, N.Y.L.J., January 2, 2007, p. 24 (Sur. Ct., Dutchess Co.).

Right of Election

Before the court was a petition by the guardian *ad litem* for the decedent's spouse for authority to exercise a right of election on the spouse's behalf. The application was supported by an alleged attorney-in-fact for the spouse, and was opposed by the co-executors of the decedent's estate.

The guardian *ad litem* maintained that it would be in the best interests of the spouse to receive more of the decedent's estate outright, rather than less, in trust, as the decedent's will provided. On the other hand, the executors claimed that the spouse had substantial wealth in her own right, and thus would not benefit from the elective share. Moreover, they argued that the spouse would likely dispose of the property she received in favor of her niece, who was her only heir, rather than in favor of the decedent's issue. The court found this latter argument unpersuasive, opining that the decedent's spouse should not be deprived of the benefit of disposing of her assets as she chose.

The court found compelling the guardian *ad litem*'s report that the decedent's spouse was aware of the difference between outright and beneficial ownership, and "implored" him to do "everything within his power to make sure she receive[d] all property to which she [was] entitled." Similarly, her attorney-in-fact alleged that he had discussed the issue of the elective share with the decedent's spouse, and that she was emphatic that he do everything he could to obtain for her the maximum to which she was entitled from her husband's estate.

The court noted that the attorney-in-fact had attempted to file a notice of election on behalf of the spouse prior to the commencement of the proceeding by the guardian *ad litem*, but was met with opposition by one of the two co-executors of the decedent's estate who maintained that the power had been superseded by a durable power of attorney in his favor. While the court stated that an attorney-in-fact could exercise a right of election on behalf of his principal, it concluded that the issue was not the validity of the attorney-in-fact's notice of election, but instead, whether the guardian *ad litem* should be authorized to exercise the right of election on the spouse's behalf. Accordingly, within this context, given the spouse's clearly expressed desire to obtain her elective share, the guardian *ad litem*'s petition was granted.

In re Estate of Slade, N.Y.L.J., January 18, 2007, p. 31 (Sur. Ct., N.Y. Co.).

Stipulation of Settlement

In *In re Estate of Saviano,* the court was confronted with the issue of whether a stipulation of settlement could be vacated.

The record revealed that the decedent died, testate, survived by his ex-wife and four children. Pursuant to his will, he left his entire estate to his infant granddaughter. The principal asset of his estate was a one-half interest in a home that he owned as tenants in common with his ex-wife. Subsequent to the decedent's death, his ex-wife died with a will that left her one-half interest in the subject property in trust for the benefit of one of her sons, who was under a disability, and upon his death, to her three remaining children. The disabled child and his guardian-brother had been living in the property rent-free since the death of the ex-wife.

Prior to her death, the decedent's ex-wife filed a claim against his estate for, *inter alia,* unpaid maintenance, and for one-half of his share of the real estate taxes, mortgage payments, insurance and capital improvements on the subject premises. The claim was opposed by the executrix of the decedent's estate, who filed a counterclaim for one-half the fair rental value of the property, and the matter was ultimately set down for a hearing.

On the date of the hearing, the parties entered a stipulation settling all claims the parties had against each other. The parties were then allocuted on the record to insure that they had freely entered the stipulation and fully understood its terms. Thereafter, a decree was signed incorporating the terms of the stipulation.

Thereafter, the guardian *ad litem* for the infant granddaughter of the decedent's estate moved to hold the executors of the decedent's estate and the ex-wife's estate in contempt for failing to abide by the terms of the settlement. A second stipulation was placed on the record whereby the original agreement between the parties was reiterated, but with the proviso that it could be challenged within 60 days by the executrix of the decedent's estate. That motion was timely made and was opposed by the executor of the ex-wife's estate and the guardian *ad litem* for the grandchild.

In upholding the stipulation, the court first rejected the executrix's argument that the settlement gave her the unilateral right to void the earlier stipulation between the parties. The court held that such a construction would deprive the stipulation of any binding force, and was contrary to the terms of the agreement entered on the record. Further, the court held that the executrix's claim that the stipulation was void because the executor of the ex-wife's estate failed to furnish the check in accordance with its terms was unpersuasive, inasmuch as the check had indeed been furnished, albeit payable to the executrix personally, and had been deposited by her into her personal account instead of the estate account. The court opined that a party in breach of a duty under a contract cannot complain of breaches by the other side, especially where the other side had no knowledge or reason to know of his or her own breach.

Finally, as to the executrix's claim that the stipulation should be vacated because the consideration was grossly unfair, the court held that merely because the consideration was believed to be too low was not grounds for vacating an otherwise proper stipulation for which the ex-wife's estate gave up various claims as consideration.

Accordingly, the motion to vacate the stipulation was denied.

In re Estate of Saviano, N.Y.L.J., 1/29/07, p. 23 (Sur. Ct., Kings Co.).

Substituted Service

In a breach of contract action, the plaintiff moved for a default judgment against the defendant on the grounds that the defendant failed to appear or plead, pursuant to CPLR 3215(a).

The record revealed that the plaintiff purportedly served the defendant with a summons and complaint by nail and mail service pursuant to CPLR 308(4). The affidavit of the process server regarding his attempt at personal service revealed that he only attempted on one occasion to serve the defendant prior to effecting substituted service.

The court held that the nail and mail method of service could only be utilized where personal service cannot be made with due diligence. Based on the facts presented, the court concluded that the plaintiff had failed to meet the due diligence requirement imposed by the CPLR. One prior attempt at service, particularly where the process server has not made any effort to locate the defendant's place of business and to effectuate personal service there, will not suffice.

Moreover, the court found that the plaintiff's moving papers failed to provide the additional notice required under CPLR 3215(g)(3) before a default judgment could be obtained.

Accordingly, plaintiff's motion was denied.

Saitta v. Dichiara, N.Y.L.J., January 1, 2007, p. 25 (Sup. Ct., Suffolk Co.).

Summary Judgment

The preliminary executor of the decedent's will moved for summary judgment dismissing the objections to probate of the decedent's mother and sole distributee. The decedent had committed suicide by hanging. The objections to probate were based on lack of due execution, lack of testamentary capacity, lack of genuineness and undue influence.

The court found that the terms of the decedent's will suggested the decedent knew the approximate extent of his assets, and had an express reason for disinheriting his family. On the other hand, the court noted that two days before the execution of the will, the decedent's treating psychiatrist described him as suffering from major delusional depression at best and a probable paranoid psychosis. The court held that inasmuch as the doctor had not been deposed as yet, and his testimony was critical to the issue of capacity, summary judgment on the issue of capacity was premature.

On the issue of undue influence, the court found that the decedent had a confidential relationship with the principal beneficiary of his estate, who was his accountant and trusted financial advisor. Moreover, the record revealed that he arranged for the execution of the will in his apartment, and was present when it was executed. Further, the attesting witnesses to the instrument were the accountant's girlfriend and former girlfriend, and co-business venturers. The court found that the decedent lacked the benefit of independent counsel in connection with the instrument, at a time when he was debilitated by mental illness. Under such circumstances, the court held that the primary beneficiary had the opportunity to exercise undue influence, and whether in fact he did so could only be determined after trial.

Further, the court held that the issue as to the genuineness of the decedent's signature was a matter to be determined after trial, given the proof of decedent's signature submitted by the objectant. However, the court granted the petitioner's motion for summary relief on the issue of due execution, finding that the objectant's contentions were conclusory in nature and failed to overcome the evidence of due execution provided by the attestation clause.

In re Estate of Katz, N.Y.L.J., March 15, 2007, p. 28 (Sur. Ct., N.Y. Co.).

Tenancy by the Entirety

In an action regarding title to real property located in Queens, the Supreme Court was confronted with the issue of whether title to the property was in the decedent's name as tenant in common or as tenant by the entirety with his wife. The matter was assigned to a referee to hear and determine the matter.

The records in the Office of the Register of Queens County revealed that title to the subject property was in the name of the decedent and his wife. There was no evidence that the decedent ever divorced his wife or that the marriage between the parties was annulled or that the parties ever legally separated.

Approximately five weeks before his death, the decedent executed a will in which he devised the premises to his brother. Subsequent to the decedent's death, his brother died. Thereafter, the administrator cta of both the decedent's estate and the estate of his post-deceased brother brought suit seeking a determination that the premises was partly or wholly owned by the decedent at the time of his death. Specifically, the fiduciary claimed that the decedent was not married at the time the subject property was purchased, and that as such, he took title to the premises as tenant in common with his purported wife, and his 50 percent interest passed by his will to the heirs of his post-deceased brother.

The referee held that the fiduciary of the estates failed to sustain her burden of proof that the decedent was not married at the time the subject property was purchased, or that the marriage was subsequently severed or that the parties separated prior to the decedent's death. In particular, the referee rejected the evidence offered by the estates, and found the documentary evidence supporting the existence of the marriage to be persuasive. Significantly, the deed between the parties described title as being held in the names of the decedent and his wife, and the decedent's will made a bequest to this same woman whom he referred to as his wife. Furthermore, she was the informant on the decedent's death certificate, and described herself as the decedent's surviving widow.

With this evidence in mind, the referee opined that "[w]here persons live as husband and wife and are reputed as such, a presumption arises that they have been legally married and this presumption can only be rebutted by the most cogent and satisfactory evidence (citations omitted)." The referee concluded that such evidence had not been presented by the fiduciary, and thus concluded that the property passed on the decedent's death by operation of law to his surviving spouse.

Bethea-Rowlett v. Sanders, N.Y.L.J., February 7, 2007, p. 20 (Sup. Ct., Queens Co.).

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