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Trusts and Estates Law Section Newsletter

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In This Issue

- Electronic Discovery in Surrogate's Court Litigation
- Confusion Surrounding Joint Bank Accounts in New York
- How Estate Planning Attorneys Can Work With Financial Planners to Serve Clients
- Section News: My T&E Surrogate's Court Fellowship

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Table of Contents

Page

A Message from the Chair 4
Natalia Murphy

Editor's Message 5
Jaclene D'Agostino

Electronic Discovery in Surrogate's Court Litigation
Part II: Surrogate's Court Decisions 7
Angelo Grasso

Clients Benefit from Coordinating Advice—How Estate Planning Attorneys
Can Work Effectively With Financial Planners to Serve Clients 14
Elizabeth Forspan

The Confusion Surrounding Joint Bank Accounts in New York 18
Francine R.S. Lee and Elisa Shevlin Rizzo

Section News: My T&E Surrogate's Court Fellowship 23
Emma Pletenycky

Recent New York State Decisions 24
Ira M. Bloom and William P. LaPiana

Case Notes— New York State Surrogate's and Supreme Court Decisions 27
Ilene Sherwyn Cooper

Florida Update 33
David Pratt and Jonathan A. Galler

Section Committees and Chairs 35

Executive Committee District Representatives 37

Message from the Chair

I hope everyone had an enjoyable summer season with ample time for personal R&R as well as fun activities with family and friends.

Just a quick update on where things currently stand with our Section's proposals in the legislature. As previously reported, our proposal to amend EPTL 5-1.1-A(d)(1) was passed in both the Assembly and the Senate. Happily, another of our Section's proposals—a proposed bill to amend EPTL 11-1.7 to prohibit *inter vivos* trustees from having exoneration clauses for failure to exercise reasonable care, similar to the prohibition for testamentary trustees—has now been enacted as well. On June 12, the proposed bill passed the Senate, having previously passed the Assembly in March, and in August it was signed by Governor Cuomo.

The summer months are a relatively "slow news day" as far as most of our Section's activities go, but for our three Trusts and Estates Section Fellows Emma Pletenycky, Justine DeCarlo and Maren Eisenmesser, these past months were hopefully filled with opportunities for learning, enrichment and practical experience in trusts and estates law. Ms. Pletenycky interned for Surrogate Peter Kelly at the Queens County Surrogate's Court, Ms. DeCarlo interned for Surrogate Stacy Pettit at the Albany County Surrogate's Court, and Ms. Eisenmesser interned for Surrogate Margaret Reilly at the Nassau County Surrogate's Court. A sincere note of thanks is due to these esteemed Surrogates and their staffs for being so welcoming to our Fellows this past summer and we extend a hearty congratulations to our Fellows for a job well done and for such an auspicious start to their careers in trusts and estates law!

The start of fall heralded, of course, our Section's Fall Meeting, traditionally held at a beautiful venue in upstate New York. This year the Fall Meeting was held on October 18-19 at the lovely Sagamore Resort on Lake George. Co-chairs Carl T. Baker Esq., of Fitzgerald Morris Baker Firth, P.C., and Katie Lynagh, of Milbank Tweed Hadley & McCloy, LLP, put together a terrific program for us! They arranged a deep dive into the day-to-day real property issues faced by trusts and estates practitioners, hence the program title "Real Estate for Estate Attorneys: Handling Real Property Transfers in Estate Matters and Recognizing Estate Planning Issues in Real Property Transfers." Thank you to Carl and Katie and to our expert speakers for a most edifying program.

Natalia Murphy

Message from the Editor

In this edition of the *Newsletter* we have Part II of Angelo M. Grasso's well-received article regarding e-discovery concepts for the Surrogate's Court practitioner (if you missed Part I, it appeared in our winter 2017 issue).

Also included in this issue are Elizabeth Forespan's article about the benefits of estate planners coordinating with financial planners, and Francine R.S. Lee's and Elisa Shevlin Rizzo's article explaining the legal implications of joint accounts and the complexity of potential issues associated therewith.

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. Our next deadlines for submissions are December 7, 2018 and March 8, 2019.

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

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Jaclene D'Agostino

Electronic Discovery in Surrogate's Court Litigation

Part II: Surrogate's Court Decisions

By Angelo Grasso

This is the second article on electronic discovery and how it has been treated in Surrogate's Court litigation. The first article[1] gave a primer on the fundamentals of electronic discovery, analyzed key federal cases such as *Zubulake v. U.B.S. Warburg*[2] and *Montreal Pension Plan v. Bank of America Securities, LLC*,[3] and discussed critical concepts such as electronically stored information (ESI) and predictive coding. This article focuses on the few Surrogate's Court decisions that have dealt with electronic discovery issues, including cloning and non-party discovery.

In the matrimonial case *Schreiber v. Schreiber*,[4] Justice Delores Thomas aptly summed up the delicate balancing act trial courts frequently have to employ concerning electronic discovery:

> Electronic discovery may be crucial in the proper cases to determine and confirm the existence of vital information. In others, it may be a weapon of abuse which will further clog a system that is already in dire need of relief. The difficulty lies in the fact that a computer system or a hard drive is not a mere thing to produce and copy which a party has a right to have produced for inspection under CPLR 3120. They are qualitatively different from other objects because of the difficulty in apprehending all that they contain.[5]

While electronic discovery is litigated less frequently in Surrogate's Court than it is in Supreme Court, when it is litigated, similar issues have arisen. Surrogates have generally embraced a pragmatic, "brass tacks" approach by weighing the cost and burden of the electronic discovery sought against its relevance to the issues in the underlying litigation and privacy concerns.

How to Produce ESI: *In re Tamer*

Even if there is no dispute about what electronic discovery is being produced, a threshold issue is how to produce it. This was addressed by Surrogate Scarpino in the contested accounting proceeding *In re Tamer*.[6] The trustees in *Tamer* demanded a panoply of documents from the objectants, including "all letters, correspondence and memoranda from each objectant to any other party."[7] In response, the objectants produced over 6,000 documents on a CD-ROM and DVD, including hundreds of emails as native files.[8] The trustees objected, and asked the court to direct the objectants to produce paper copies of all documents.[9]

The court's analysis began by noting that ordinarily, a request for electronic discovery begets an electronic response:

> It is implicit that where a party seeks electronic discovery, the responding party will produce the information sought by some form of electronic means...In federal practice, the courts have held that the production of documents must be made in a reasonably usable form, such as pdf format—a familiar format for electronic files that is easily accessible on most computers, which has been held to be presumptively a reasonably useable form.[10]

The court then looked to CPLR 3122(c), which provides that documents are to be produced as kept in the regular course of business, and noted that CPLR 3122(c) and 3122(d) do not "limit delivery of a complete and accurate copy to a paper copy."[11] As such, the court held that a party may produce documents by electronic files.[12] However, the court required the producing party to provide an index identifying the documents produced in response to each demand and the electronic file in which the document has been stored —essentially, adopting CPLR 3122(c) in the context of electronic discovery and attempting to mitigate how voluminous e-discovery can be.[13]

Hard Drive Cloning

One of the most frequently litigated issues is "cloning" hard drives. Cloning is precisely what it sounds like: making an identical copy of a hard drive onto another storage device, while retaining all of the original drive's ESI, including its data, metadata,[14] settings, files, partitions, and boot records. In the everyday world, individuals frequently clone hard drives to create backups, perform a "reboot and restore," or to upgrade a hard drive while retaining original data and settings. Indeed, many law firms (perhaps unknowingly) clone their hard drives and servers daily or weekly when they perform a backup to avoid data loss.

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In litigation, drives are cloned to permit the litigants to use the cloned drive for discovery while the owner of the original drive can continue to use the machine or server.

The drawbacks of cloning are readily apparent. While cloning is relatively inexpensive and easy to perform, it will interrupt the owner's ability to use her computer or server. More problematically, cloning is a blunt instrument that ensures that all data on a particular hard drive is preserved. It does not perform a content-based analysis, meaning there is significant risk that privileged or confidential information will be inadvertently disclosed. This is particularly true if an attorney's hard drive or server is being cloned, unless he or she has a special practice and handles only one client.[15] Without taking the proper precautions, cloning an attorney's hard drive will result in a stranger receiving gigabytes of clients' ESI without their permission, creating ethical issues for the attorney.

One of the earliest state court cases to address cloning was the matrimonial action *Etzion v. Etzion*,[16] where the plaintiff brought an order to show cause to "impound, clone and inspect" various computer servers, drives, work stations and computers belonging to her husband.[17] The basis for her electronic fishing expedition was her claim that her spouse had engaged in years of fraudulent conduct, such as diverting millions of dollars from assets in which she had an interest.[18] Thus, she took a "preemptive strike" to prevent destruction of the records on the machines that would likely contain the damning information.[19] In a decision balancing the importance of full discovery with the need for privacy and confidentiality, the court required the defendant to present the hard drives to the plaintiff's expert for cloning. The cloned drives would then be turned over to a referee, who would examine the contents of the drives, and create hard copies of the relevant records in accordance with detailed guidelines set forth in the decision.[20]

While the court's solution in *Etzion* balanced the competing interests, it had an obvious drawback: it was expensive. The court declined to shift any of the cost of the electronic discovery to the defendant, holding that under the CPLR, the party seeking discovery generally incurs the costs of producing the material.[21] Here, that was at *least* $30,000 for the expert and attorney's fees, plus a portion of the referee's fee. Because a large amount of money at stake in *Etzion,* the cost potentially justified the expense. In most Surrogate's Court cases, a $30,000 cost for some discovery would be a significant impediment.

Non-Party Discovery: *In re Maura*

While *Etzion* concerned electronic discovery from a party, *In re Maura*[22] was one of the first Surrogate's Court cases to consider electronic discovery of a non-party. In *Maura*, decedent and his spouse executed a prenuptial agreement drafted by the same attorney, in which both renounced their spousal right of election.[23] The decedent's will did not provide for his spouse.[24] After the surviving spouse filed and served her notice of election, the estate fiduciaries commenced a proceeding to deny the widow her elective share.[25] The widow responded that the prenuptial agreement was the product of fraud, undue influence and deception, that she was not represented by counsel (even though she shared an attorney with her husband), and that the prenuptial agreement was altered or amended.[26]

After the attorney-drafter's three-day deposition, the widow served a subpoena *duces tecum* on both the attorney and the firm at which the attorney was "of counsel,"[27] demanding four types of ESI to ascertain whether any deletions, insertions or alterations were made to the prenuptial agreement:

- All existing and deleted records of the prenuptial agreement;
- Recreations of the attorney's and firm's billing records for estate planning and the prenuptial agreement;
- All other records concerning estate planning for the Decedent; and
- Sample copies of other prenuptial agreements prepared by the attorney.[28]

After both the attorney and the firm objected to the subpoena, the widow moved to compel.[29] As part of her motion to compel, the widow submitted a proposal from a computer expert as to how the electronic discovery would be conducted. The expert recommended taking the attorneys' hard drive, cloning it at the expert's office, downloading the necessary documents, placing them in a sealed envelope to be delivered to the court, and allowing the non-party attorney and firm to make any privilege objections within ten days.[30] While the widow was willing to bear the cost of the electronic discovery, she argued that if the non-party attorneys wanted their own expert to oversee the project, then that cost should be borne by them.[31]

Unsurprisingly, the non-parties opposed the motion, arguing the discovery sought was invasive, as cloning the hard drive would give the widow unfettered access to information and data well beyond the scope of the subpoena, including "the firm's personal and personnel information" and currently pending cases.[32] As a compromise, the non-parties proposed acquiring the requested information from the firm's backup tape.[33] Problematically, the non-parties conceded that the information on the tape would not be in retrievable form—meaning a forensic expert would be required, increasing the cost—and that this method would not provide information on changes or dele-

tions to the prenuptial agreement.[34] The non-party attorneys further demanded that in any event, the widow should bear all costs.[35]

The court denied all discovery concerning the firm's billing records relating to estate planning and the electronic version of the estate planning file, holding the information sought had no bearing on the validity of the prenuptial agreement, as the widow had the hard copy of the estate file and there was no allegation that she needed to determine whether those files had been altered or deleted.[36] It also rejected the widow's request for other clients' prenuptial agreements as privileged, unduly burdensome, and irrelevant to the widow's claim the subject prenuptial agreement was altered.[37] By contrast, the court found that the widow's request for access to the attorney's computer to copy all billing records relating to the prenuptial agreement and the existing and deleted records concerning the prenuptial agreement were "material and necessary," as they bore on the agreement's authenticity.[38]

The court then turned to the question of how to conduct that discovery and who should bear the cost, noting that New York courts frequently look to federal courts for guidance on electronic discovery, and that the federal rules in effect at the time provide protection for non-parties against onerous e-discovery.[39] While noting that cloning or system access should be allowed sparingly because it raises "inevitable conflicts," the court permitted cloning instead of using the tape back-up, as the latter, while less burdensome, "will not yield the deleted or altered information" that was the "gravamen" of the authenticity claim.[40] The court then set forth a detailed procedure for cloning, which included an expert of the law firm's selection, submitting a written proposal, the widow approving it in writing, how objections to specific records would be interposed, and the dissemination of the mined data.[41] The court allocated all of the cost to the party seeking discovery.[42]

Cloning Part Two: *In re Tilimbo* and *In re Catalano*

The limits of cloning were explored in *In re Tilimbo*[43] and *In re Catalano*.[44] *Tilimbo* concerned an action to set aside a deed under Article 15 of the Real Property Actions and Proceedings Law, which was transferred to the Surrogate's Court of Bronx County, where it proceeded concurrently with a will contest.[45] A key witness was the non-party attorney who drafted both the propounded will and purported deed. After the attorney-drafter's deposition, he was directed to search his computer (and other files) for other responsive documents and produce them, or provide an affirmation stating a diligent search had been conducted for responsive documents and none were found.[46] After doing so, the attorney provided an affirmation stating all he found were older estate planning documents, as he had lost most of his file.[47]

Given the paucity of the production, the petitioner moved for permission to clone the attorney's hard drive (at petitioner's own cost) for the limited purpose of enabling petitioner's computer forensic expert to search for documents related to Decedent, her will, and the disputed deed transfer.[48] The non-party attorney opposed, noting that he had already complied with the subpoena as he was deposed and conducted a diligent search of his computer.[49] The non-party attorney attempted to distinguish *In re Maura* by claiming petitioner's request was not limited to relevant documents.[50]

For precedence, the court looked to the First Department's decision in *Tener v. Cremer*,[51] which concerned a subpoena a plaintiff served upon non-party NYU Hospital seeking "the identity of all persons who accessed the Internet" on a specific date from a specific Internet Protocol (IP) address.[52] NYU objected, claiming it did not have the capability to retrieve the information sought.[53] On reply, the plaintiff submitted an affidavit from a computer expert setting forth a method by which the requested data could be retrieved.[54]

The *Tener* Court sided with the plaintiff, noting that the discovery of ESI has become "commonplace," and that courts have promulgated guidelines and rules to facilitate e-discovery, such as 22 N.Y.C.R.R. §202.12(c), Rule 45 of the Federal Rules of Civil Procedure, and the Commercial Division Rules of the Supreme Court of Nassau County ("Nassau Guidelines").[55] Upon reviewing all three methodologies, the First Department found that the Nassau Guidelines "provide a practical approach" as they require "a cost/benefit analysis involving how difficult and costly it would be to retrieve it."[56] The court further noted that when a non-party is involved, the CPLR required the requesting party to defray the non-party's reasonable production expenses, including the cost of disruption to the business operations of the non-party.[57]

Based on *Tener*, the *Tilimbo* Court began by noting that ESI such as raw computer data and electronic documents are discoverable under CPLR 3101(a), and that ESI is "discoverable even when a hard copy is provided."[58] The court then rejected the non-party's argument that he already produced hard copies of documents, as that does not preclude producing the ESI for the same documents.[59] Although the petitioner did not set forth the details of how the cloning would occur, the court found that based on the record, it appeared the process would only require access to the attorney's computer for a limited period of time, which should not cause an "unreasonable burden" upon the attorney.[60] Regardless, cognizant of the fact that the attorney was a solo practitioner, the court set forth a detailed method to ensure the non-party's disruption

was minimal, including requiring that a weekday cloning take less than four hours at a date and time of the attorney's choosing, or over a weekend, and placing strict guidelines on how the cloning should occur if the scope exceeds one computer and needed to be outside of the attorney's office.[61] As to privilege issues, the court directed that the forensic examiners may only examine the hard drives for documents related to the decedent, that all recovered documents were to be sent to the attorney's counsel, who would review for privilege, and in the event any documents are deemed privileged, would be sent to the Court for an in camera review.[62]

In re Catalano took a more restrictive view, holding that cloning was to be sparingly allowed only under certain circumstances. *Catalano* was a SCPA 2103 proceeding in the Surrogate's Court of Nassau County, where the issues were the assets and operations of several entities that owned and operated a supermarket in which the decedent's estate had an interest.[63] Upon a prior order, the respondents were directed to turnover to petitioner the computer taken from Decedent's home. When the respondents turned over the wrong computer and averred that they could not differentiate which was the correct computer, petitioner sought to clone all of decedent's computers.[64] In response, the respondent had the technical director for the company clone and produce the hard drives for all the cash registers at the stores, which were turned over to the petitioner.[65]

Since the petitioner had yet to review these documents, his motion to compel was denied with leave to renew. More critically, the court adopted the First Department's holding in *Melcher v. Apollo Med. Fund Mgt. LLC,*[66] and held that "in the absence of proof that a party intentionally destroyed or withheld evidence, the court should not direct the cloning of that party's hard drives."[67] That said, the court directed that the respondents " refrain from removing or altering any data contained within the hard drives of the computers... pending further order of this court,"[68] tacitly acknowledging that the possibility existed that this evidence would be produced at a later date.

"I Have a Guy": *In re Nunz*

A final case where cloning and electronic discovery were an issue was *In re Nunz*, a will contest in Erie County.[69] In *Nunz*, the Decedent was survived by his wife and six children from a prior marriage.[70] The propounded will left the entire residuary estate to the surviving spouse.[71] After SCPA 1404 examinations, objections to probate were filed by five of the children.[72]

As part of post-objection discovery, a subpoena *duces tecum* was served upon the attorney-drafter seeking production of his documents and notes concerning the preparation of the purported will.[73] After producing his handwritten notes, the attorney-drafter signed an affidavit stating that he had prepared the will using Microsoft Word, that he had deleted the digital file immediately after printing a copy of the will, and that any computer files related to preparation of the will that "were created and/or stored in electronic or digital format have been destroyed and no longer exist."[74] The objectants responded by serving another subpoena upon the attorney, now seeking the computer the attorney used in preparing the will.[75] With the subpoena came objectants' attorney's cover letter:

> All I am looking for in this subpoena is the Apple IMAC computer you told me about in connection with preparing Bill Nunz' will. While you informed me that you deleted the file, I have a guy who thinks he can restore the hard drive and retrieve almost all of it.
>
> I imagine that you have concerns over confidentiality for your other clients as their work is likely to be on that computer as well. I proposed that my computer tech guy can operate under a non-disclosure order. When he restores the hard drive, we can simply do a search for all files containing the word Nunz. You should be able to identify any that deal exclusively with [the surviving spouse]. The remaining files would then be relevant and ultimately, we may be able to locate the digital file used to create the will. We can do all of this at the courthouse or any other agreed upon location.[76]

The surviving spouse moved to quash the subpoena and for a protective order, also seeking an order barring objectant's attorney from any further contact with the attorney-drafter.[77]

The court began by revisiting the *Tener* Court's comment that deleting a file "usually only makes the data more difficult to access."[78] The court's subsequent analysis hinged on two sources: the Fourth Department's decision in *Irwin v. Onondaga Cty. Resource Recovery Agency*,[79] and the New York State Bar Association's E-Discovery Guidelines.[80] *Irwin* concerned a Freedom of Information Law (FOIL) request for certain electronically stored photographs and all "associated metadata."[81] *Irwin* broke down metadata into three categories:

- **Substantive metadata**, which is the "information created by the software used to create the document, reflecting editing changes or comments." This information is generally useful in showing how a docu-

ment was created and the history of proposed changes.[82]

- **System metadata**, which is "automatically generated information about the creation or revision of a document, such as the document's author, or the date and time of its creation or modification." System metadata is created by the computer and its operating system, and is not application specific. It is useful in proving a document's authenticity or who received it.[83]
- **Embedded metadata**, which is "data that is inputted into a file by its creators or users, but that cannot be seen in the document's display." Embedded metadata is frequently an issue in spreadsheets, as it can include formulas, hidden columns, fields or linked files, and can be used to explain the contents of cells.[84]

Irwin concluded by allowing the limited disclosure of system metadata related to the subject photographs, while expressly holding the decision was limited to the facts at issue, and reached no conclusion on whether "metadata of any nature is subject to disclosure under the CPLR."[85]

As to the State Bar's guidelines, the *Nunz* Court took particular notice of Guideline No. 9:

> Parties should carefully evaluate how to collect ESI because certain methods of collection may inadvertently alter, damage, or destroy ESI. In considering various methods of collecting ESI, parties should balance the costs of collection with the risk of altering, damaging or destroying ESI and the effect that may have on the lawsuit.[86]

Taking this into consideration, the court concluded that the objectants' counsel's letter, which merely speculated that his "guy" "should be able to" retrieve the desired document and metadata, was insufficient. Specifically, the court held that "given the potential for harm in the forensic examination process," it would not permit any e-discovery simply based on a letter by counsel.[87] Instead, the court directed objectants' counsel to obtain an affidavit from his computer expert setting forth, *inter alia*, the expert's qualifications, his opinion concerning the ability to retrieve the relevant ESI, the proposed method for retrieving the ESI, and how the expert would identify and protect ESI subject to the attorney-client privilege.[88] The court concluded by deferring determination of the motion until the affidavit was submitted, but directed the attorney to preserve the subject computer.[89]

Nunz II was issued by the court a year later after an evidentiary hearing was held on the issue.[90] After testimony by the forensic computer expert, the court concluded that there was "a proper basis...to order production" of the attorney-drafter's computer and permit a forensic analysis of the hard drive.[91] To preserve confidentiality, the court ordered that once the expert received the computer, the expert:

> Shall not communicate in any manner whatsoever with the [] objectants, or with their attorney, or with [the attorney-drafter] or with the attorney for this estate (except to return the computer), or with anyone except the three employees involved with the project, and [the expert] shall direct any and all communications, including any reports about its findings, directly and only to this Court by confidential correspondence only.[92]

Beyond ensuring confidentiality, the court struggled to issue a protocol for the expert to follow in conducting the search, while noting that the parties had made no attempt to resolve this issue, and that left to their own devices, it was unlikely the parties would come to a consensus.[93] As such, the court directed the parties to subsequently appear for a "protocol conference."[94] The court directed that at the conference, the parties provide written proposals for consideration, and strongly suggested the parties "reflect on the guidelines" set forth in *Tener* and by the Nassau County Commercial Division.[95]

Conclusion

As these cases demonstrate, the Surrogate's Court has been receptive to electronic discovery when the party seeking discovery has set forth a detailed protocol for how the electronic discovery will be conducted, so long as it takes into consideration privacy and privilege issues, and is willing to pay for it. A future article will discuss the practitioner's obligations in collecting and preserving electronic discovery, as well as ethical issues that arise in electronic discovery disputes.

Endnotes

1. Angelo M. Grasso, *Electronic Discovery in Surrogate's Court Litigation—Part I: An Introduction to Electronic Discovery Concepts*, NYSBA Trusts & Estates Law Section Newsletter, Winter 2017, Vol. 50, No. 4.
2. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003); 230 F.R.D. 290 (S.D.N.Y. 2003); 216 F.R.D. 280 (S.D.N.Y. 2003); 220 F.R.D. 212 (S.D.N.Y. 2003); 229 F.R.D. 422 (S.D.N.Y. 2004).
3. *Montreal Pension Plan v. Bank of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
4. 29 Misc. 3d 171, 904 N.Y.S.2d 886 (Sup. Ct., Kings Co. 2010).
5. 29 Misc. 3d at 177, 904 N.Y.S.2d at 891 (internal citations omitted).

6. 24 Misc. 3d 768, 877 N.Y.S.2d 874 (Sur. Ct., Westchester Co. 2009). *In re Tamer* is often cited as *In re O. Winston Link Revocable Trust*.
7. 24 Misc. 3d at 770, 877 N.Y.S.2d at 875. Erroneously, the trustees requested the production of documents in response to their demand for a bill of particulars, which the Court noted "is not a discovery device." Regardless, because the objectants produced documents, the court decided the motion to compel. *Id*.
8. *Id*.
9. *Id*.
10. 24 Misc. 3d at 770, 877 N.Y.S.2d at 876 (internal citations omitted).
11. *Id*.
12. 24 Misc. 3d at 771, 877 N.Y.S.2d at 876-77.
13. *See also Dartnell Enter. v. Hewlett Packard Co*., 33 Misc. 3d 1202(A), 938 N.Y.S.2d 226 at *3 (Sup. Ct., Monroe Co. 2011) ["where Plaintiff requests electronic discovery, such discovery should be produced in an electronic format"].
14. As a refresher, "metadata" is information embedded in a Native File that is ordinarily neither viewable nor printable, but is generated when a file is created, modified, deleted, sent, received and/or manipulated.
15. It is almost certainly fortunate for the Corleone family that Tom Hagen never had to conduct electronic discovery.
16. 7 Misc. 3d 940, 796 N.Y.S.2d 844 (Sup. Ct., Nassau Co. 2005).
17. 7 Misc. 3d at 941, 796 N.Y.S.2d at 844.
18. *Id*.
19. 7 Misc. 3d at 941-42, 796 N.Y.S.2d at 845.
20. 7 Misc. 3d at 945-46, 796 N.Y.S.2d at 847-48.
21. 7 Misc. 3d at 945, 796 N.Y.S.2d at 847, citing *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996); and *Rubin v. Alamo Rent–A–Car,* 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't 1993).
22. 17 Misc. 3d 237, 842 N.Y.S.2d 851 (Sur. Ct., Nassau Co. 2007).
23. 17 Misc. 3d at 238, 842 N.Y.S.2d at 853.
24. *Id*.
25. *Id*.
26. *Id*.
27. The surviving spouse first subpoenaed the attorney-drafter for various documents, including the estate plan for the Decedent and his first wife. This motion was largely denied as not being on sufficient notice. *In re Maura*, 2005 WL 6750997 (Sur. Ct., Nassau Co., Aug. 18, 2005).
28. 17 Misc. 3d at 241, 842 N.Y.S.2d at 855.
29. 17 Misc. 3d at 239, 842 N.Y.S.2d at 853.
30. 17 Misc. 3d at 242, 842 N.Y.S.2d at 855.
31. 17 Misc. 3d at 242, 842 N.Y.S.2d at 855-56.
32. 17 Misc. 3d at 243, 842 N.Y.S.2d at 856.
33. 17 Misc. 3d at 243-44, 842 N.Y.S.2d at 856.
34. *Id*.
35. 17 Misc. 3d at 244, 842 N.Y.S.2d at 856-57.
36. 17 Misc. 3d at 244-45, 842 N.Y.S.2d at 857.
37. 17 Misc. 3d at 245, 842 N.Y.S.2d at 857-58.
38. 17 Misc. 3d at 245, 842 N.Y.S.2d at 858.
39. 17 Misc. 3d at 245-46, 842 N.Y.S.2d at 858.
40. 17 Misc. 3d at 246-47, 842 N.Y.S.2d at 858.
41. 17 Misc. 3d at 247, 842 N.Y.S.2d at 859.
42. *Id*.
43. 36 Misc. 3d 1232(A), 959 N.Y.S.2d 92 (Sur. Ct., Bronx Co. 2012).
44. 2012 Slip Op. 30015(U) (Sur. Ct., Nassau Co. 2012).
45. 36 Misc. 3d 1232(A) at *2.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. 89 A.D.3d 75, 931 N.Y.S.2d 552 (1st Dep't 2011).
52. 89 A.D.3d 76, 931 N.Y.S.2d at 553. An IP address is a numerical label assigned to a device connected to a computer network that uses the internet to ensure that the data flows to and from the correct device. It is analogous to a post office address.
53. 89 A.D.3d at 77, 931 N.Y.S.2d at 553.
54. 89 A.D.3d at 77, 931 N.Y.S.2d at 553-54.
55. 89 A.D.3d at 78-79, 931 N.Y.S.2d at 554.
56. 89 A.D.3d at 78-79, 81, 931 N.Y.S.2d at 555-56.
57. 89 A.D.3d at 82, 931 N.Y.S.2d at 557.
58. *Tilimbo* at *3.
59. *Id*. at *4.
60. *Id*.
61. *Id*.
62. *Id*. at *5.
63. *Catalano* at *3.
64. As a fake olive branch, respondents first volunteered "to reimburse the estate for the value of the decedent's computer equipment that was not delivered to the petitioner or her counsel." Since petitioner was looking for the data on the computers, not the hardware, the court scoffed at this faux-offer and deemed it "disingenuous." *Id*.
65. *Id*. at *5-6.
66. 52 A.D.3d 244, 859 N.Y.S.2d 160 (1st Dep't 2008). *See also* Schreiber, *supra* ["outside of the matrimonial context, courts have been loathe to sanction an intrusive examination of an opponent's computer hard disk drive as a matter of course"].
67. *Catalano* at *6.
68. *Id*.
69. 53 Misc. 3d 483, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co. 2015) ("*Nunz* I"); 52 Misc. 36 1216(A), 43 N.Y.S.3d 768 (Sur. Ct., Erie Co. 2016) ("Nunz II").
70. *Nunz* I, 53 Misc. 3d at 484, 36 N.Y.S.3d at 347.
71. *Id*.
72. Several of the children had previously signed waivers and consents, which they were permitted to withdraw. 53 Misc. 3d at 484-85, 36 N.Y.S.3d at 347.
73. 53 Misc. 3d at 485, 36 N.Y.S.2d at 347-48.
74. 53 Misc. 3d at 485, 36 N.Y.S.2d at 348.
75. *Id*.
76. *Id*.
77. 53 Misc. 3d 485-85, 36 N.Y.S.2d 348.
78. 53 Misc. 3d 488, 36 N.Y.S.2d 350. Or as Rocco Lampone famously told Tom Hagen and Michael Corleone: "Difficult. Not impossible."
79. 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dep't 2010).

80. https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/ediscoveryFinalGuidelines_pdf.html.
81. 72 A.D.3d at 315, 895 N.Y.S.2d at 263-64.
82. 72 A.D.3d at 320-21, 895 N.Y.S.2d at 267.
83. 72 A.D.3d at 321, 895 N.Y.S.2d at 267.
84. *Id*.
85. 72 A.D.3d at 322, 895 N.Y.S.2d at 267.
86. https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/ Reports/ediscoveryFinalGuidelines_pdf.html; cited at Nunz I, 53 Misc. 3d at 491, 36 N.Y.S.3d at 352.
87. 53 Misc. 3d at 493, 36 N.Y.S.3d at 353.
88. 53 Misc. 3d at 493-94, 36 N.Y.S.3d at 353.
89. 53 Misc. 3d at 495, 36 N.Y.S.3d at 353.
90. *Nunz* II at *1.
91. *Id*. at *6.
92. *Id*. at *7.
93. *Id*.
94. *Id*. at *7.
95. *Id*.

Clients Benefit from Coordinating Advice—How Estate Planning Attorneys Can Work Effectively With Financial Planners to Serve Clients

By Elizabeth Forspan

Every client has a story. In order for both a financial planner and estate planning attorney to address the needs and wishes of clients, they need to understand the significance of that story and their part in it. Moreover, these professionals need to grasp and respect each other's role.

A good financial planner listens to the client, assesses her current situation, understands what she is trying to achieve and creates a detailed plan giving her a roadmap for meeting those goals.

An effective financial plan must be comprehensive in scope—addressing personal/financial goals, an investment policy statement guiding asset allocation, tax efficiency, insurance needs, estate planning and cash flow analysis to support all of these items.

Ideally, this thorough process will allow skilled financial professionals to identify potential issues and, while not overstepping into providing legal or tax advice, recommend consultation with attorneys and CPAs to assist the client in realizing his or her objectives.

Many younger professionals and business owners seek financial guidance prior to engaging in estate planning. A financial planner should determine how much risk one should assume in order to have a high probability of achieving their objectives. In addition, this analysis must address the enormous risk associated with a potential death or disability. A client must consider who will control his assets in the case he or she becomes disabled or in the further event he or she passes away. These issues, if unaddressed, will become big problems which will only be compounded if the client has minor children or family members with disabilities of their own. These are critical issues regarding which the financial planner and estate attorney must work together to help mitigate the potential risks of inaction and/or delay.

Essential components of every estate plan, regardless of client net worth, include a will, durable power of attorney, living will, and health care proxy. Other circumstances and family dynamics may warrant the use of trusts (for, among other reasons, asset protection, incapacity/elder care planning, estate tax mitigation and establishing "guidelines" in various circumstances). Planning for those with potentially taxable estates may include a wide array of strategies including gifting, annuity trusts, charitable trusts, life insurance trusts, personal residence trusts, installment sales, and promissory notes.

A simple last will and testament can be effective in conveying assets which are not held jointly, in trust, or which are not already subject to beneficiary designations. However, estate planners regularly utilize revocable living trusts for a variety of reasons, including but not limited to privacy concerns, avoiding probate upon the grantor's death, arranging management of property if the grantor becomes incapacitated, distributing property to multiple beneficiaries and in situations where real property is owned in more than one state and the grantor wished to avoid additional, or "ancillary" probate in such other states. Financial planners should always inquire as to whether clients have trusts. Moreover, a skilled financial planner will review the trust and confirm whether or not assets have been transferred to such trust.

Another document of paramount importance to financial institutions and planners is the power of attorney. The power of attorney, according to many planners and attorneys, is for most clients the single most important planning document. It allows someone else—an "attorney-in-fact" or "agent"—to handle one's financial affairs. The power of attorney may be limited to just a few types of financial transactions or it can authorize the agent to act in quite a broad scope. A durable power of attorney will remain in effect even upon the incapacity of the principal. There are certain clients who may decide to execute a "springing" power of attorney, which will become effective only if the principal becomes incapacitated. The execution of a power of attorney may avoid the painstaking, costly and emotional aspects of a court-ordered conservatorship/ guardianship.

While the estate planning attorney drafts these documents, reviews them with clients and oversees the execution of the documents, typically it is the financial planner who oversees the actual implementation and confirmation that such legal documents are associated with the clients' accounts. Moreover, it is the financial planner who will ensure that the trusts described

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above are funded or named as the beneficiaries of the clients' accounts.

Many people receive quality legal advice still manage to foil their estate plan by either failing to execute on that advice or not communicating the plans to their financial professional. There are many scenarios where the client pays a great deal in legal fees only to later learn that his or her trust, while executed and legally enforceable, was never funded with the intended assets. Although many attorneys may view this as beyond the scope of their responsibilities, they should ask the clients if they can follow up with their financial planners to confirm their understanding and implementation of the plans. This should include updating the types of accounts and reviewing beneficiaries for financial accounts, including retirement accounts, annuities and life insurance.

The more advanced estate-planning strategies with complicated acronyms like "GRATs," "ILITs," or "QPRTs" often require an attorney, financial planner, and tax professional to work together to implement the plans. It is hard, and in most cases impossible, for an attorney to create an effective estate plan without consulting with the client's financial planner and CPA.

A lack of communication, coordination, or even updating of a single document may result in myriad unfortunate circumstances. These may not be revealed until the death the patriarch and/or matriarch of the family, when it is too late to remedy the error.

Here are just a few such mistakes and the potential consequences.

Account Titling

Account titling can drastically interfere with an estate plan and no matter how well an attorney drafts estate planning documents, such documents will be useless if the assets are not titled to reflect the plan. For example, an individual may execute a will leaving everything to one of his two children. However, if that individual was the owner of a bank account that named both children as beneficiaries, then such account will vest in both of the children upon the individual's death, not the one child the individual originally intended.

Assuming a financial plan is being created prior to beginning the process of estate planning, the planner should always inquire as to how each account, asset and liability is titled and what the client's intentions are with respect to each and every one of their assets. If an advisor is well versed in estate planning, potential issues may become apparent and require action.

Another example of a problem that occurs all too often is the case where there is a married couple that jointly own assets such as their home, bank accounts and brokerage accounts. In this case, the will of the first spouse to die may designate that his children (perhaps from a previous marriage) are to inherit a percentage of these assets. In this instance, however, the property owned jointly by the married couple bypasses the terms of the will and, hence, the surviving spouse inherits all such assets in their entirety.

Another illustration of a very common scenario that often leads to problems is where a parent adds a child as a joint owner of a bank account or real estate. This may have been done by an elderly parent solely for the sake of convenience (so that the child will be able to access the funds to pay bills, etc.) but it can lead to many unintended consequences. First, the parent's other children or intended beneficiaries may be accidentally disinherited regardless of what a will or trust says. Second, this action may result in adverse tax consequences involving gifting and/or adjustment of cost basis upon death of the parent.

"Account titling can drastically interfere with an estate plan and no matter how well an attorney drafts estate planning documents, such documents will be useless if the assets are not titled to reflect the plan."

Finally, making a child or other trusted individual a joint owner of assets exposes those assets to the risk of misuse, theft and possible exposure to the creditors of the joint owner.

When a parent needs assistance with money, in many cases it is advisable for the parent to authorize his agent under his power of attorney to manage the financial affairs, rather than adding a child or someone else as a joint account holder, for reasons described above.

It is also very important for advisors to educate their clients regarding the risks of failing to properly retitle assets when a trust has been executed. If one creates a trust with the intention of transferring assets to such trust but fails to actually effectuate the transfer, the trust document may be completely ineffective. It will require some paperwork to retitle the account or to deed real property into the trust, but it is an essential part of the process to ensure that a client's wishes are followed upon incapacity or death.

Beneficiary Designations

Many types of assets and accounts are transferred upon the death of the owner to beneficiaries named on the policy or account. These include life insurance, annuities, IRAs and workplace retirement accounts. Jointly owned property also falls within the type of holdings that pass outside of the will, as non-probate assets.

When engaged in estate planning, the failure to coordinate beneficiary designations on otherwise non-probate assets can significantly impact or even undermine a client's intended disposition of assets. This can occur in various ways.

First, if one intends for beneficiaries of a trust to inherit certain assets, the grantor must retitle those assets in the name of said trust, as described above. Often a client has an estate planning attorney draft a trust specifying exactly how assets are to be transferred to intended beneficiaries upon death, but the client and/or the attorney fails to instruct the financial professional to retitle the assets in the name of the trust. This may very well result in unintended inheritors. In this case, if the assets are not retitled into the trust, the assets will either pass to the beneficiaries designated on the account (if any) or they will pass through the individual's will (if one exists). In the case where there is no will, no beneficiary designation and the assets have not been retitled in the name of the trust, then such assets will pass through the rules of intestacy (passing away without a will). Such rules vary from state to state.

Second, clients must understand that beneficiary designations on accounts will take precedence over any instruction contained in a will. This is because an asset which has a designated beneficiary will bypass the will and pass by operation of law to the beneficiary designated on the account.

Finally, financial planners tend to meet with their clients on a more regular and ongoing basis than estate attorneys. Many estate planning attorneys have very little contact with their clients once the estate planning documents have been finalized and signed. It is precisely for this reason that the financial advisor should be made aware of events that may warrant updating beneficiary designations. These triggering events may include divorce, remarriage, disability, birth or death of a child. Failure to make updates may result in accidental inheritance or accidental disinheritance (e.g., when child is born after setting beneficiary designations).

Life Insurance

Life insurance is an asset that passes to beneficiaries via a beneficiary designation (as mentioned above) but there are additional issues to consider.

The initial question involves ownership of the policy. If the owner and insured are the same person, the proceeds paid at death will be includable in that individual's taxable estate. This may result in unintended and adverse tax consequences. Typically, an irrevocable life insurance trust (ILIT) is established and the trust will own the policy. Everyone (client, estate attorney and financial professional) must be aware of such a trust to ensure the accuracy of the insurance application. Moreover, if a client is contemplating purchasing additional life insurance, it is advisable to have the ILIT be the initial owner of the policy, for important tax reasons.

Life insurance policies may also be transferred to an ILIT subsequent to purchasing a policy and that transaction involves several issues that are beyond the scope of this article.

Life insurance proceeds may be intended for a specific purpose—such as equalizing inheritance among heirs, buyout of an entity or liquidity to pay anticipated estate taxes. Ownership and beneficiary designations may be arranged to accomplish one or more of these goals.

Gifting and Swapping

One simple and effective technique used for minimizing estate taxes is gifting.

In 2018, an individual may gift $15,000 (or a couple may gift $30,000) or less annually to as many individuals as desired without imposition of any gift taxes for those giving or receiving such gifts. Gifts of $15,000 or less made to another individual will not require the filing of a gift tax return (Form 709).

For example, today, grandparents may elect to gift $30,000 to each of their three children and seven grandchildren. This would remove $300,000 from their estates. Additionally, on January 1, 2019, these grandparents may make another gift to the same individuals thereby removing another $300,000. This technique rapidly and effectively removed $600,000 and all future appreciation on this money from this couple's taxable estates. The timing of such gifts is important if year-end is approaching. Thus, coordination with the financial professional overseeing the assets is crucial.

Determining which assets to gift is important. If the cost basis associated with an asset is low, as compared to the fair market value, this may not be an ideal asset for gifting. Rather, the older generation should retain ownership of such assets so the cost basis will be "stepped-up" to fair market value upon the death of the owner. Keeping the asset in one's name until death will significantly minimize the amount of income/capital gains taxes the inheritor of the asset will have to pay after a subsequent sale. If lifetime gifting is

contemplated, it is generally better to gift assets which either have no basis issues (*i.e.*, cash) or assets that have not appreciated significantly (*i.e.*, high basis assets).

Another common technique that requires estate planning attorneys and financial professionals to work together involves use of a grantor retained annuity trust (GRAT). The attorney and advisor should work together to determine which assets are to be utilized for the GRAT. Also, if the assets transferred to the trust appreciate rapidly, the financial planner may arrange for immunization of the GRAT by swapping the appreciated assets for cash or other less volatile securities—thereby locking in appreciation for the trust beneficiaries.

Monitor and Update

As the expression goes, change is the only constant.

Financial planning and estate planning requires monitoring and periodic updates. Numerous circumstances may warrant updates including, but not limited to, life events, market conditions, legislative developments, shifting priorities and family dynamics.

The close coordination between and among clients, attorneys and financial planners can help to ensure that intentions are followed and legacies are preserved.

The Confusion Surrounding Joint Bank Accounts in New York[1]

By Francine R.S. Lee and Elisa Shevlin Rizzo

Introduction

Q: When is donative intent not required to make a gift?

A: When a joint bank account is established in New York.

The not-so-humorous punchline is that many individuals who open a joint bank account in New York are completely unaware of the legal and tax implications associated with these types of accounts. This is ironic given the fact that joint accounts are often to simplify matters, not to complicate them. It is irrelevant if the joint account is opened as a Will substitute to avoid probate or as a way of allowing for a loved one or other trusted individual to help the depositor with bill paying and asset management, as "whatever the depositor's reasons when he opens an account in joint form, in accordance with the statute regulating joint accounts and pursuant to the regulations of the bank, he initiates a chain of events that may culminate in litigation following the depositor's death to determine who is entitled to the funds."[2]

Courts are frequently called upon to resolve disputes long after a joint account has been opened. Some 40 years ago, the New York State Court of Appeals observed in *Kleinberg v. Heller* that "[l]iterally tens of thousands of our citizens are parties to joint savings accounts. Yet the law relating to it has been in a state of morass. . . "[3] Unfortunately, litigation concerning joint accounts continues to be common, and these issues continue unabated.

This article will provide practitioners with an overview of New York law relating to joint bank accounts in New York and some suggestions on how to alleviate some of the conflicts and confusion associated with joint accounts.

History of the Statute

The problems associated with joint bank accounts have their roots in the beginning of the last century, when, in 1907, New York was the first state to enact legislation authorizing the payment of the funds deposited into a joint account to the surviving co-owner.[4] Controversy and confusion quickly followed, as there were questions as to whether the survivor was entitled to the account or whether joint accounts were presumed to be for convenience only.[5] The law was amended in 1909 to provide that a joint tenancy was created when an account was opened in the name of the depositor and another in a form that would allow payment to either individual or to the survivor. Although a right of survivorship was presumed, the courts allowed the estate of the depositor to rebut this presumption by proving that the account was opened for convenience only and there was no intention to make a gift to the other individual. As a result, "[the] quest for simplicity and certainty [with regard to joint accounts] turned out to be elusive."[6] It is worth noting that the original impetus for the statute was not to provide clarity to the account holders, but to provide protection to the banks so as to allow for funds to be paid to the survivor of a joint account without liability.[7]

In 1990, the statute[8] became part of the New York Banking Law (NYBL), in part to remedy the problems caused by NYBL § 675 by providing for so-called "convenience accounts." Very generally, convenience accounts allow the depositor to retain ownership rights to the deposited funds while enabling the other account holder to act on behalf of the depositor. Despite the statutory authorization for convenience accounts, they do not appear to be widely available and have not solved the problems associated with traditional joint accounts.

Presumptions under NYBL § 675: Moiety and Survivorship

The Moiety Rule

The statute provides that when a deposit is made into a joint bank account in the name of the depositor and another person, each account holder is granted an

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immediate and unconditional one-half interest in the deposited funds.[9] In other words, the opening of an account in the names of two people, payable to either or the survivor of them, is *prima facie* evidence of an intention to create a joint tenancy.[10] "[E]ach joint tenant has the right as a joint owner of the bank account to withdraw a moiety (half) or less than a moiety for his own use and thus destroy the joint tenancy as to such withdrawals," even if all of the funds are contributed by one depositor and regardless of whether the funds are actually withdrawn. The burden of proof in rebutting this presumption is on the party who challenges the joint tenancy.[11]

The Survivorship Rule

The statute also creates a rebuttable presumption that a surviving joint account owner has a right of survivorship.[12] Indeed, making a deposit in the name of the depositor and another person, to be paid to either or the survivor of them, is *prima facie* evidence of the depositor's intention to "vest title to such deposit. . . and additions or accruals thereon, in such survivor."[13] While the presumption can be rebutted by clear and convincing evidence to the contrary, the burden of proof rests upon those who challenge the rights of the survivor.[14]

Issues

1. The question of intent

Donative intent is a fundamental element of a valid gift under basic property law principles. Of course, individuals may enter into transactions that have the appearance of a gift to accomplish another purpose; however, if donative intent is lacking, the "gift" will be unwound.[15] If we start with the presumption that many people establish joint accounts either as a Will substitute or for the convenience of the other account holder (e.g., to write checks on their behalf), it is safe to say that they lack the donative intent to make a present gift.

As the courts have observed, this is not a new problem. While present ownership is a principal incident of a joint tenancy, "[t]he average donor depositor. . . [does] not always or even usually…intend to transfer present ownership to any extent to his donee-depositor.[16] As the legislative history to the statute notes:

> Ninety percent of . . . people surveyed didn't know that the law presumes that a joint account is shared equally by both parties and either person named on the account can sue for half the money. Most people assume that the other person would only get the money when they died, or that no one had any claim to the account so long as they held the book. Both of these assumptions are wrong.[17]

The question of how to reconcile depositors' intent with the presumption of an immediate gift with right of survivorship was one reason for the adoption of the convenience account statute, NYBL § 678. The 1990 Law Revision Commission (the "Commission") was gravely concerned that "contrary to the presumptions of Section 675 of the Banking Law, such depositors normally do not intend to make a gift of one-half of the account to such other person and often do not intend such other person to keep the funds if the depositor dies first."[18] Particular attention was paid to the elderly and infirm, two groups which, in the eyes of the Commission, were most likely to be disadvantaged by the moiety and survivorship presumptions of the statute.[19] As a result, NYBL § 678 was enacted to enable a person to make a deposit in her own name and that of another person "for the convenience" of the depositor, without affecting the title to the funds deposited. The depositor is not considered to have made a gift to the other person and the other person does not have a right of survivorship in the account. Despite the adoption of NYBL § 678, convenience accounts are seldom used.[20] "Many banks are not aware of this kind of account and do not offer it as an option to customers. Instead, banks typically grant access to accounts by third parties through the use of joint accounts or a power of attorney instrument." [21]

2. The New York statute runs contrary to the law of most other jurisdictions

The Uniform Probate Code (UPC) provides that during the lifetime of the parties, an account belongs to the parties in proportion to the net contribution of each to the amount in the account.[22] At least 23 states have either adopted the UPC rule or adopted a similar rule to the one set forth in the UPC regarding joint accounts.[23] This presumption may be rebutted by clear and convincing evidence of a different intent of the depositor. The comments to the UPC make it clear that the drafters were guided by the intent of most depositors, which presumes that most depositors do not intend to make a present change of beneficial ownership upon the deposit of funds to a joint account.[24]

3. Inconsistency with federal tax law causes confusion and limits planning options

The presumption of an immediate gift is inconsistent with the federal tax laws as Treasury Regulation 25.2511-1(h)(4) specifically provides that the creation of a joint bank account between two parties only results in a completed gift upon the withdrawal of funds by the joint account owners.[25]

The presumption under the New York statute results in a grey area with regard to the federal tax laws governing qualified disclaimers. Very generally, under federal law, if a transferor may reclaim her own con-

tributions to a joint account without the consent of the other co-tenant, then that transfer is not a completed gift. As a result, a surviving joint account owner may make a qualified disclaimer within nine months of the other joint account owner's death.[26] The New York presumption of a one-half irrevocable, completed gift of all property at the creation of the account prevents the transferor from being able to "unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant." Therefore, the surviving joint tenant is prevented from making a qualified disclaimer of his or her one-half interest in the account. This result, for New York joint account holders, limits the options from an estate tax perspective and, as evidenced by the Treasury Regulations, is inconsistent with many other jurisdictions.

4. Tax Reporting and compliance

Our informal survey of colleagues has led us to believe that few people actually report the deposit of funds into a joint account as a taxable gift. While New York does not presently have a state gift tax, transfers that would qualify as taxable gifts and which exceed the annual federal gift tax exemption should be reported on a timely filed federal gift tax return. A federal gift tax return should be filed for the year in which the deposit into a joint account is made unless the completed gift of one-half of the deposit into the account qualifies as an annual exclusion gift for federal and New York state gift tax purposes (currently $15,000) or, subject to certain exceptions, for the federal and New York state marital deduction. In addition, if the presumed gift of one-half of the amount deposited is not covered by the federal annual exclusion or marital deduction, gift tax on the deposit will become due or a portion of the depositor's federal unified credit must be used. Last, although New York state repealed its gift tax in 2000, the presumed gift may still be included in the decedent's gross estate for New York state estate tax purposes if the depositor is a New York state resident and dies within three years of making the deposit.[27]

How should joint accounts subject to the New York statute that are opened by out-of-state residents be treated from a tax perspective? As a general rule, a bank account is deemed to be an intangible asset. From a tax perspective, intangible assets are generally subject to the taxation under the laws of the state in which the decedent or donor lives at the time of the transfer. If an out-of-state resident who lives in a state that has adopted the UPC approach opens a joint account with a New York financial institution, which law governs for tax purposes? Would the result change if the depositor lived in a state that imposes a state estate or gift tax on transfers of property made by state residents?

5. The presumption results in assets held in joint accounts as being subject to the claims of either joint account holder's creditors

Since the opening of a joint bank account under NYBL § 675 creates a gift of one-half of the interest of the funds deposited, absent contrary evidence of intent, one-half of the assets in a joint bank account are subject to the claims of the creditors of each account owner.[28] This might come as a surprise, if, for example, an elderly parent opens a joint account with an adult child for convenience and later learns that a judgment creditor of the child is now able to seize one-half of the account. It is important to note that the one-half limitation on the amount a judgment debtor can claim is an advantage of the New York moiety law. In other states, a judgment debtor may be entitled to the entire balance in the joint account.[29]

Recommendations

Practitioners can consider the following recommendations to help confirm that intent is accurately reflected when clients open a joint account:

1. Review the titling to all joint accounts as part of the estate planning process.
2. Determine whether any gift tax returns should have been filed.
3. For new accounts, advise clients of the presumption. If they do not intend to make an immediate gift to the other account holder, ask the financial institution about a convenience account. If a convenience account form is not available or offered, request that the account be titled in the name of the joint owners "for convenience only." Alternatively, consider advising clients to open an individual account and provide the third party with a power of attorney limited to that specific account.
4. Determine whether clients intend for the remaining funds to pass by survivorship. Pay attention to the signature card. Signature cards have often been used in litigation as proof of the depositor's intent to create (or not to create) a right of survivorship.

Conclusion

The presumption of moiety under New York law is inconsistent with most depositors' intent, runs contrary to the trend in most other states, and conflicts with federal tax law. The authors suggest that the current joint tenancy rule under NYBL § 675 should be reevaluated and that depositors should be made aware of the convenience account option. Doing so will effectuate most depositors' intent, create greater consistency as to the treatment of joint accounts across state lines, align New York State law with federal tax

law, and allow for post-mortem estate planning opportunities which are currently foreclosed to the surviving co-tenant.

Endnotes

1. The views expressed are those of the authors and do not necessarily reflect those of Ernst & Young LLP, any other member firm of the global Ernst & Young organization or the Northern Trust Company.
2. Donald Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, California Law Review, Vol. 41, Issue 4 (1954).
3. 38 N.Y. 2d 836 (1976).
4. N.Y. Laws 1907, c.247.
5. Kepner, *supra* n. 2 at 607, *citing Moore v. Fingar*, 131 A.D. 399, 115 N.Y.S. 1035 (1st Dep't 1909); *Hemmerick v. Union Dime Savings Inst.*, 205 N.Y. 366, 98 N.E. 499 (1912); *Bonnette v. Molloy*, 153 A.D. 73, 138 N.Y.S. 67 (1st Dep't 1912), *rev'd on other grounds*, 209 N.Y. 167, 102 N.E. 559 (1913).
6. *In re Kleinberg*, *supra* n.3 *citing* Kepner, *supra* n. 2, Donald Kepner, "Five More Years of the Joint Bank Account Muddle," 26 U of Chicago L. Rev. 376, and *Bricker (Krimer) v. Krimer*, 13 N.Y. 22 (1963).
7. Kepner, *supra* n. 2 at 605.
8. NYBL § 678 provides in pertinent part as follows:

   > When a deposit of cash, securities or other property has been made, or shares shall be issued in or with any banking organization or foreign banking corporation transacting business in this state, in an account established after the effective date of this section, in the name of a depositor and another person and in form to be paid or delivered to either "for the convenience" of the depositor, the making of such deposit or the issuance of such shares shall not affect the title to such deposit or shares and the depositor shall not be considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and, on the death of the depositor, the other person shall have no right of survivorship in the account.

9. NYBL § 675(a) provides in pertinent part as follows:

   > When a deposit. . .has been made. . .in or with any banking organization. . .in this state, in the name of such depositor. . .and another person and in form to be paid or delivered to either, or the survivor of them, such deposit. . .shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization. . . for all payments or deliveries made on account of such deposit. . .prior to the receipt by the banking organization. . .notice in writing signed by any one of such joint tenants, not to pay or deliver such deposit. . .and after receipt of any such notice, the banking organization or foreign banking corporation may require the receipt or acquittance of both such joint tenants for any further payments or delivery.

10. *Kleinberg*, *supra* n. 3. An individual who has deposited money in a joint bank account is "presumed to have conferred on the cotenant not only a mere expectancy, but rather a gift of a one-half interest in the deposited funds."*Rosenweig v. Friedland*, 84 A.D.3d 921 (2d Dep't 2011) *quoting In re Fayo*, 7 A.D. 3d. 796 (2d Dep't 2004)*; see also In re Bobeck*, 143 A.D.2d 90, 92 (2d Dep't 1988); *In re Covert*, 97 N.Y.2d 68, 75 (2011); *Adams v. Hickey*, 35 A.D. 3d. 328, 330 (2d Dep't 2006).
11. *Bricker*, *supra* n. 6; *Rosenweig*, *supra* n. 10.
12. NYBL § 675(b) provides:

    > The making of such deposit or the issuance of such shares in such form shall, in the absence of fraud or undue influence, be *prima facie* evidence, in any action or proceeding to which the banking organization, foreign banking corporation, surviving depositor or shareholder is a party, of the intention of both depositors or shareholders to create a joint tenancy and to vest title to such deposit or shares, and additional and accruals thereon, in such survivor. The burden of proof in refuting such *prima facie* evidence is upon the party or parties challenging the title of the survivor.

13. *Id.*
14. *Id.* A comprehensive discussion of the facts and circumstances that are considered in determining whether a surviving co-tenant has a right of survivorship in a particular account is beyond the scope of this article. However, the authors draw attention to Brian P. Corrigan, *Proving a Joint Account with Right of Survivorship or Totten Trust Account without the Benefit of a Signature Card*, NYSBA Journal (November/December 2015) and Jaclene D'Agostino, *Was It a Convenience Account?* Farrell Fritz New York Trusts & Estates Litigation Blog, www.nyestatelitigationblog.come/tags/banking-law-section675.
15. Harold C. Havighurst, *Gifts of Bank Deposits*, 14 N.C. Law Review 129 (1936).
16. *In re Filfiley*, 63 Misc. 2d 824, 313 N.Y.S.2d 793 (Sur. Ct, Kings Co. 1970), *aff'd,* 43 A.D.2d 981 (2d Dep't 1974).
17. *See* NYS Legis. Ann. 334 (1983).
18. NYBL § 678, Legislative History, 1990 Recommendations of the Law Revisions Commission.
19. *Id*. The Commission noted that "the elderly and the infirm, who find it necessary to put their bank accounts in joint form, are at the greatest disadvantage. They cannot put their funds in a joint bank account without being presumed to have lost the right to use one-half the amount they deposit and without being presumed to have conferred upon their co-depositors a survivorship interest in all funds remaining in the account upon their death." In looking at the advice of various commentators on the issue of moiety in the statute and case law, the Commission further stated: "it has been suggested that the solution to the problem is 'not to depart from but to abolish' the joint tenancy concept applied to joint bank accounts."
20. Representatives of several large banks whom the authors spoke with had no knowledge about convenience accounts and didn't believe these were offered at their institution. The lack of availability of convenience accounts is one reason why on July 17, 2017 New York Senator Serino introduced Bill Number S5810 to the New York Senate proposing to amend NYBL § 675. The proposed amendment would require banking institutions to offer a convenience account to anyone applying for a joint account and to provide the applicant with information which clarifies the legal relationships and consequences between the two types of accounts. There are several versions of this bill circulating in the New York Senate and Assembly, but none that have passed to date.

21. 1-2 Bender's New York Elder Law § 2.05 (2017).

22. UPC § 6-211(b).

23. *See e.g.*, Ala. Code §5-24-11; Alaska Stat. §13-33-211; Ariz. Rev. Stat. §14-6211; Cal Prob. Code §5301(a); Colo. Rev. Stat. § 15-15-211; Conn. Gen. Stat. Ann. § 36a-290; Fla. Stat. Ann. §655.78; Ga. Code. Ann. §7-1-812; Haw. Rev. Stat. §560:6-103; Idaho Code Ann. § 15-6-103(a); Ind. Code Ann. §32-4-1.5-3(a); Ky. Rev. Stat. Ann. § 391.310(1); Me. Rev. Stat. Ann. § 18-A-6-103(a); Minn. Stat. Ann. § 524.6-203; Mont. Code Ann. §72-6-211(2); N.J. Rev. Stat. §17:161-4(a); N.M. Stat. Ann. §45-6-211(A); N.C. Gen. Stat. Ann. § 54B-129; N.D. Cent. Code § 30-1-31-08(2); Or. Rev. Stat. § 708A.465(1); 20 Pa. Cons. Stat. Ann. § 6303(a); S.C. Code Ann. § 62-6-103(a); S.D. Codified Laws § 29A-6-103(1); Tenn. Code Ann. § 45-2-703; Tex. Prob. Code § 438(a); Utah Code Ann. § 75-6-103(1); VA Code Ann. § 6.2-606; Wash. Rev. Code Ann. § 30.22.090(2); Wis. Stat. Ann. § 705.03(1). For a thorough discussion of the rule in most other states, see Carolyn Satenberg, *Joint Bank Accounts in New York: Confusion, Discrimination, and the Need for Change*, Cardozo Pub. Law, Policy & Ethics J., Vol. 9:607 (2011).

24. *See* comments to UPC § 6-211(b) (amended 2006). The comments state that "This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them."

25. Treas. Reg. § 25.2511-1(h)(4) provides an illustrative example:

> If A creates a joint bank account for himself and B (or a similar type of ownership by which A can regain the entire fund without B's consent), there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A. . . .

26. Treas. Reg. § 25.2518-2 (C)(4)(iii) provides:

> In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under §25.2511–1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant.

27. Under current law, the estate of a New York State resident must file a New York State estate tax return if (i) the amount of the resident decedent's federal gross estate plus (ii) the amount of any includable gifts exceeds the New York State basic exclusion amount that is applicable at the time of the decedent's date of death. NY Tax L §971(a).

28. *See Velocity Invs. LLC v. Kawski*, 21 Misc. 3d 276, 864 N.Y.S.2d 734, 2008 N.Y. Misc. LEXIS 6575, 2008 NY Slip Op 28300 (City Court of Dunkirk, 2008).

29. In Connecticut, for example, since a bank is authorized to release the entire balance of a joint account to any owner, the courts have held that a third-party creditor has a right to execute against the entire balance of the joint account. *See Fleet Bank Conn., N.A. v. Carillo*, 240 Conn. 343, 691 A.2d 1068, 1997 Conn. LEXIS 78 (1997).

My T&E Surrogate's Court Fellowship

By Emma Pletenycky

My fellowship at the Queens County Surrogate's Court was an incredible experience. Working in the court this summer gave me the opportunity to see a different side of the "trust and estates world."

I was able to observe all courtroom proceedings and case conferences conducted by Surrogate Peter Kelly and the court attorney referees. Judge Kelly made me feel welcomed from the first day of the fellowship and regularly provided insight and feedback to my questions. Judge Kelly always made himself available to discuss pending matters with me. I was able to learn about each department within the Surrogate's Court, including the pro se help desk, and how to correctly file a petition and required supporting documents in each. Each court attorney referee took the time to explain the black letter law and court procedure to me.

Interacting with Judge Kelly, the court attorney referees, and the clerks on a daily basis expanded my knowledge of the field. I was introduced to many types of proceedings and the mechanics of estate litigation, and how it can vastly differ from estate planning. I drafted several decrees and guardianship orders. I also had the opportunity to observe two trials, where I was able to provide logistical support to the court attorney referees and conduct legal research on the topics at hand. I became especially familiar with the Surrogate's Court Procedure Act and the Estates Powers and Trust Law. Additionally, because

I spent much of my time in the courtroom and case conferences, I was able to meet members of the Bar and network with local trust and estates practitioners.

The greatest takeaway of the fellowship is the practical experience that I will use as I continue my career into the trust and estates world. I now have an understanding of what working in this field will be like and how much work it requires to be successful. I am thankful to The New York Bar Foundation for providing me with the opportunity.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

FIDUCIARIES

Withholding Information by Executor Invalidates Release by Beneficiary

Decedent's will, among other dispositions, created a trust for decedent's children and their descendants. One of decedent's children (objectant) was nominated co-trustee along with the executor. In June 2009, the nominated co-trustee signed a release based on an accounting showing the assets of the estate at the date of death values and that the trust would not be funded. The executor presented a revised accounting and a new release to the objectant in October 2009, which the objectant refused to sign. The executor then petitioned the Surrogate for judicial settlement of the final accounting. The objectant filed formal objections, and the executor moved for summary judgment alleging that the June 2009 release barred any objections. The Surrogate appointed a guardian ad litem to represent the objectant's infant grandchild, a potential beneficiary of the trust. After denying the summary judgment motion, the Surrogate held an evidentiary hearing on the validity of the June 2009 release and eventually upheld it and dismissed the objections.

The objectant and the guardian appealed and the Appellate Division reversed. The intermediate appellate court first disposed of the executor's contention that the guardian lacked standing to appeal because the ward was not aggrieved by the Surrogate's order upholding the June 2009 release. All the descendants of the decedent's children were interested in the estate only as beneficiaries of the trust and if the trust was not created there was no trustee to uphold their interests. The ward, therefore, was a party adversely affected by the Surrogate's order and the ward's *guardian ad litem* had standing. The court then agreed with the objectant and guardian that the Surrogate improperly shifted the burden to prove that the release was obtained by fraud by the executor on the objectant based on precedents that the accounting fiduciary had the burden of affirmatively demonstrating that the beneficiaries were made aware of the nature and legal effect of the release.

William P. LaPiana

Finally, the Appellate Division held that the executor did not meet that burden because first, the executor did not disclose the actual value of the estate's securities at the time of the accounting, and when they were finally distributed to the objectant in August 2009 they were worth "hundreds of thousands of dollars less" than the objectant expected based on the outdated information supplied by the executor in the June 2009 release. Second, the executor did not explain the effects of leaving the trust unfunded, an action which could lead to an action for breach of trust against the objectant as co-trustee and the executor.

Based on the foregoing, the Appellate Division reversed the Surrogate's order, vacated the determination that the June 2009 release is valid, and remitted for further proceedings.

***In re Alford*, 158 A.D.3d 1188, 71 N.Y.S.2d 240 (4th Dep't 2018)**

INTESTACY

Adult Adoption Ends Inheritance Rights of Adoptee's Sibling

Decedent, when age 41, was adopted in 1979 by her same-sex partner who was then age 57. When decedent died intestate in 2009, the decedent's biological brother petitioned for letters of administration claiming to be his sole distributee under EPTL 4-1.1(a)(5). The Public Administrator objected to his appointment on the ground that the brother was not decedent's distributee because the adoption effectively took the decedent out of the birth family based on Domestic Relations Law § 117. Thus, the Public Administrator was

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appointed as temporary administrator, as was a *guardian ad litem* to represent the interests of the decedent's distributees based on Domestic Relations Law § 117(1)(f), which provides that the distributees of an adopted child are determined in the same way as they would be for a birth child of the adopting parent.

The decedent's brother died in June of 2014 and his wife was appointed executor of his estate. In October of 2014, the Public Administrator petitioned for settlement of her account as temporary administrator of decedent's estate. The executor filed objections based on the contention that the brother was a distributee. Because no distributees of the decedent were found, the Public Administrator claimed that the funds be paid to the Commissioner of Finance of the City of New York.

The Surrogate dismissed the objections and the Appellate Division affirmed. Although the objectant argued that the decedent did not intend to "cut off" the biological family through the adoption because the purpose of the adoption was to create legal recognition of the relationship between decedent and the decedent's partner at a time when same-sex couples could not marry, as the Surrogate noted the decedent could have made provision for the biological family by executing a will. While the courts have at times not strictly applied the provisions of Domestic Relations Law § 117, the court distinguished those cases, among which are *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397 (1995), *In re A.J.J.*, 108 Misc. 2d 657, 438 N.Y.S.2d 444 (Sur. Ct, N.Y. Co. 1981), and *In re Evan*, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (Sur. Ct., N.Y. Co. 1992), as dealing with the rights and best interests of children which were not involved in this case.

***In re Cowell*, 158 A.D.3d 548, 71 N.Y.S.3d 450 (1st Dep't 2018)**

SPOUSAL RIGHTS

Departure from Marital Home as a Result of Order of Protection Is Abandonment

Under EPTL 5-1.2(a)(5), the spousal right of election (and other rights attached to being a surviving spouse) are forfeited if the surviving spouse abandoned the decedent and the abandonment continued until the death of the decedent. Under longstanding case law, the party seeking to impose forfeiture must show that the abandonment was unjustified and without the consent of the deceased spouse.

Decedent's spouse claimed the right of election and the co-executors of the deceased spouse's estate moved for summary judgment dismissing the surviving spouse's claim on the grounds of abandonment based on the following showing: the surviving spouse left the marital home seven years before the decedent's death, did not return, and the departure was not caused by the decedent's conduct, but in fact was the result of an order of protection obtained by the decedent based on acts of domestic violence. The Surrogate denied the motion, finding that there was a material issue of fact concerning whether the departure and the failure to return was without the decedent's consent.

On appeal by the co-executors the Appellate Division, First Department, reversed. It held that the surviving spouse failed to raise a triable issue of fact on the question of the decedent's consent, and that the surviving spouse's own affidavit and deposition testimony showed that he had determined not to return to the marital to home except to recover his personal property, even after the order of protection expired.

***In re Maull*, 161 A.D.3d 570, 76 N.Y.S.3d 164 (1st Dep't 2018)**

WILLS

Presumption of Revocation of Lost Will Not Overcome

The administrator of decedent's estate offered for probate a photocopy of decedent's will, alleging that the original had been lost or destroyed. Decedent's son moved for summary judgment resting on the presumption of revocation of a will that was in the decedent's possession and cannot be found after death. The Surrogate granted the motion and on appeal by the petitioner, the Appellate Division affirmed.

The strong presumption that a will known to be in the decedent's possession that cannot be located after the testator's death was destroyed by the testator with the intent to revoke provided a sufficient reason for the grant of the objectant's motion. The petitioner's own submission established the decedent's request to retain possession of the original will. The attorney who drafted the will had the will delivered to the decedent shortly after its execution. The petitioner failed to present evidence raising a question of fact whether the presumption could be overcome. The retention of a copy of the will by the decedent's attorney and the decedent's failure to tell the attorney that the decedent intended to revoke the will are not sufficient, nor are the hearsay accounts of decedent's statement regarding testamentary intentions. Although circumstantial evidence may suffice to rebut the presumption, petitioner did not present "facts and circumstances" showing that the will was fraudulently destroyed. Speculation and suspicion are not enough and therefore the petitioner failed to raise a triable issue of fact.

***In re Scollan*, 161 A.D.3d 1577, 75 N.Y.S.3d 771 (4th Dep't 2018)**

Contract to Make Testamentary Disposition Is Revocable Absent Contrary Language

In 2009 decedent and the property manager of eight properties owned by the decedent entered into an

agreement providing that the manager would manage the properties for 25 years after decedent's death and would retain all the "net proceeds" during that period. The decedent purported to revoke the agreement in 2011 by executing a document to that effect and in 2012, executed a will bequeathing the properties to the person nominated as executor. After decedent's death, the will was admitted to probate. The manager then began a proceeding under SCPA 2015 to compel the executor to turn over the properties in accord with the agreement. Both parties moved for summary judgment and the Surrogate granted the executor's cross motion to dismiss.

The Appellate Division affirmed on appeal. While the agreement between the decedent and the manager fulfilled the requirements for a contract to make a testamentary provision set forth in EPTL 13-2.1(a)(2), such an agreement is revocable unless the agreement clearly and unambiguously shows that the testator is by the agreement renouncing the right to dispose of the property that is the subject of the agreement by a subsequent will. Just as a will is revocable at any time before death, so is an agreement to make will, absent a clear manifestation of a contrary intent on the part of the testator. There is no language in the agreement showing that the testator intended it to be irrevocable and therefore granting the executor's motion to dismiss was proper.

***In re Attanasio*, 159 A.D.3d 1180, 72 N.Y.S.3d 206 (3d Dep't 2018)**

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

By Ilene Sherwyn Cooper

Acknowledgment

In *In re Koegel,* the Appellate Division, Second Department, affirmed an Order of the Surrogate's Court, Westchester County (Walsh, Acting Surrogate), which denied the motion by the decedent's surviving spouse to dismiss the executor's petition to invalidate her notice of election and for a declaration that she was not entitled to an elective share. In reaching this result, the court addressed the question left unanswered by the Court of Appeals in *Galetta v. Galetta*, 21 NY3d 186 (2013), and held that a defective acknowledgement of a prenuptial agreement could be remedied by extrinsic proof by the notary public who took a party's signature.

The record revealed that prior to their marriage, the decedent and his soon to be spouse entered a prenuptial agreement whereby they irrevocably waived and relinquished all rights to an elective or statutory share of the other's estate. Each of the parties signed the agreement, and their signatures were acknowledged by their respective attorneys as notaries. Neither acknowledgment, however, attested to whether the parties were known to the notaries at the time of signing.

Upon the decedent's death, his will, which made substantial bequests to his surviving spouse, was admitted to probate, and his son was appointed the executor of his estate. Within six months thereafter, the decedent's spouse filed a notice of election pursuant to EPTL 5-1.1-A. In response, the executor petitioned to invalidate the spouse's claim to an elective share alleging, *inter alia,* that she waived her right of election pursuant to the terms of the prenuptial agreement.

The surviving spouse filed objections, and thereafter, moved to dismiss the petition, contending that the prenuptial agreement was invalid and unenforceable pursuant to *Galetta v. Galetta*, because the acknowledgments omitted language expressly stating that the notaries knew the signers or had ascertained, through proof, that the signers were the persons described in the document. In opposition to the motion, the executor, *inter alia,* submitted affidavits of the attorneys who served as notaries to the agreement, in which they each confirmed that they took the acknowledgments that appeared on the document, and explained that because the parties were well known to each of them at the time they signed, identification as to who they were was unnecessary.

The Surrogate's Court denied the motion, and the surviving spouse appealed, arguing that the absence of the requisite language in the acknowledgments rendered the subject prenuptial agreement defective. In support of her position, she pointed to the opinions of the Court of Appeals in *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997) and the Second Department, in *D'Elia v. D'Elia*, 14 A.D.3d 477 (2d Dep't 2005), which she maintained stood for the proposition that a defective acknowledgment could not be cured at a later point in time. The executor opposed, contending that neither of the cases cited by the spouse held that a technical defect in a contemporaneous acknowledgment could not be cured. Further, he argued that unlike the circumstances *sub judice*, the notary in *Galetta* did not personally know the party whose acknowledgment he took, had no independent memory of witnessing his signature, and could not categorically swear that he took the requisite steps to identify him.

Upon due consideration, the court found that the circumstances underlying the opinions in *Matisoff* and *D'Elia* were distinguishable from those presented, since the agreements at issue in those matters were not acknowledged at all at the time of execution. Rather, the court determined that the opinion in *Galetta* was more instructive, and observed that the Court of Appeals withheld judgment as to whether a defective acknowledgment could be remedied, inasmuch as the proof submitted failed to do so. The Appellate Division noted that, in reaching this result, the Court of Appeals opined on the kind of detail that would have been adequate to effect a cure. Relying on this analysis, the Second Department found that the affidavits submitted by the notaries were sufficient to cure the defective acknowledgments at issue, and that as such, the Surrogate's Court properly declined to dismiss the petition.

***In re Koegel,* 160 A.D.3d 11 (2d Dep't 2017)**

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

Claims

In *In re Persing, Jr.*, the Surrogate's Court, Richmond County, was confronted with the issue of whether an accounting or a proceeding pursuant to SCPA 1809 was the best alternative to determine the validity of creditors' claims against the decedent's estate.

The decedent died, testate, on February 25, 2009. Following his death, his estate was embroiled in years of litigation, which ultimately resulted in a global settlement on November 14, 2017, and the admission of the decedent's Will to probate. Thereafter, the Respondents, creditors of the estate, sought a compulsory accounting in order to have their claims adjudicated. These claims consisted of personal loans allegedly made to the decedent amounting to $154,800. The executrix opposed the application, and instead filed a petition pursuant to SCPA 1809 requesting a determination of the validity of the claims.

In support of her position, the executrix maintained that as creditors, the Respondents were not entitled to a beneficial interest in the estate, and therefore, their claims could be determined without the time and expense of an accounting proceeding. Indeed, the Surrogate noted that in *In re Estate of Perry*, 123 Misc. 2d 273 (Sur. Ct., Nassau Co. 1984), the court refused to direct an accounting under similar circumstances, and instead relied on SCPA 1809(1) as a better alternative than the costly and time-consuming procedures involved in an accounting.

Thus, the court concluded that, while Respondents were entitled to an accounting, a proceeding pursuant to SCPA 1809(1) provided a more efficient means of determining the validity of their claims. Accordingly, the Respondents' request for an accounting was denied. Nevertheless, in order to safeguard Respondents' claims, the fiduciary was directed to post a bond in the sum of $160,000.

***In re Estate of Persing, Sr.,* N.Y.L.J., Aug. 17, 2018, p. 36 (Sur. Ct., Richmond Co.)**

Forfeiture

In *In re Berk,* the Surrogate's Court, Kings County, held, after trial, that by virtue of her wrongdoing, the decedent's surviving spouse had forfeited her right of election against his estate. Prior to this result, the *Berk* estate had been the subject of two opinions by the Appellate Division, Second Department. In the first, the Court reversed an order of the Surrogate's Court, Kings County (Johnson, S.) granting summary judgment to the petitioner, finding that there was an issue of fact as to whether the petitioner had forfeited her right of election by her alleged wrongdoing; that is, by marrying the decedent knowing that he was mentally incapable of consenting to a marriage for the purpose of obtaining pecuniary benefits from his estate. The court further ruled that the appellants' counterclaims alleging undue influence were improperly dismissed. In the second opinion, the court modified an order of the same court by (1) adding as an issue of fact to be tried the question of whether the petitioner, the decedent's surviving spouse, exercised undue influence upon the decedent to induce him to marry her for the purpose of obtaining pecuniary benefits from his estate, and (2) replacing so much of the order, as imposed the burden of proof on appellants, the executors of the estate, by clear and convincing evidence, with a provision that placed the burden of proof on appellants by a preponderance of the credible evidence.

At the trial of the matter that followed, the Surrogate's Court framed three issues to be heard, lodged principally in whether the decedent possessed the requisite mental capacity to marry the petitioner, or alternatively, whether the petitioner unduly influenced the decedent to marry her for her own pecuniary benefit.

On the issue of capacity, the court found the record replete with credible evidence that the decedent suffered from both physical and mental impairments, resulting in several hospitalizations, and manifested significant hearing loss and periods of confusion. Additionally, the court noted that on the day prior to his purported marriage to the petitioner, the decedent was unable to accurately complete the marriage license application, and made critical mistakes in the listing of his address, his place of birth, and his mother's maiden name. Further, the court noted that in a photograph taken on his wedding day, the decedent appeared dazed and confused.

The court opined that the standard of capacity for marriage is whether each party to the contract was able to understand the nature, effect, and consequences of his or her actions. Within this context, and based on the "plethora" of credible evidence presented, the court concluded that the decedent was incapable of understanding or consenting to his marriage to the petitioner, and that the petitioner was well aware of his incapacity at the time the marriage was entered. Indeed, in view of the fact that the petitioner was the decedent's primary caretaker, and had ample opportunity to observe him in his daily routine, as well as the fact that she had experience in the medical field, the court found "it impossible to believe that the petitioner did not know of the decedent's mental incapacity."

Moreover, after considering the indicia of undue influence, including the decedent's physical and mental condition, the secrecy in which the marriage was entered, the petitioner's control over the decedent's daily needs, and her direction over his lifetime affairs as evidenced by handwritten notes of the decedent that apparently petitioner had dictated, the court held that petitioner had the motive and opportunity to influence

the decedent's actions, and that she actually exercised undue influence over him in procuring their marriage.

Relying on the opinion by the Appellate Division, Second Department, in *Campbell v. Thomas*, 73 A.D.3d 103 (2d Dept 2010), the court observed that where a marriage has been wrongfully procured, the statutory right of election which would have emanated from such marriage will be forfeited. Accordingly, based on the record, the court denied petitioner's request for an elective share of the decedent's estate.

***In re Berk*, N.Y.L.J., July 2, 2018, p. 31 (Sur. Ct., Kings Co.)**

Surcharge

Before the Surrogate's Court, Albany County, in *In re Smith,* was a motion by the petitioner, the Public Administrator, as temporary administrator of the estate, for, *inter alia,* summary judgment finding that the respondent engaged in unlawful self-dealing.

The decedent died, testate, on May 19, 2003. The principal asset of his estate at death consisted of a 90 percent interest in a closely held company, Quailman Investors, Inc. ("Quailman Investors"). The remaining 10 percent interest was owned by the respondent. Pursuant to the pertinent provisions of his Will, the decedent directed that 70 percent of his interest in Quailman Investors be held, in trust, together with the remainder of his estate, for the benefit of a group of individuals, some of whom were minors. The remaining 20 percent of the decedent's interest in the company was bequeathed to the respondent (15 percent) and to another named individual (5 percent). Preliminary letters testamentary were issued to respondent, who served as preliminary executor of the estate until the Will was admitted to probate, at which time he received Letters Testamentary. Although respondent was also the nominated trustee of the trust created under the instrument, he never received letters of trusteeship.

Thereafter, in a proceeding instituted by the respondent to terminate the trust as uneconomical, the *guardian ad litem*, appointed by the court to represent the interests of the minor beneficiaries, revealed a corporate resolution of Quailman Investors, which had been adopted by the Board of Directors, and signed by the respondent, as Secretary. The corporate resolution authorized the respondent, without prior court approval, to pay himself the sum of $725,453, consisting of $435,000 in deferred compensation for the years 1973 through 2002, and a salary of $290,453 for the year 2003. In addition, the report of the *guardian ad litem* noted that the net value of real estate sales by the company from October 2003 through May 2004 amounted to approximately $960,181. Notably, at the time of each of these transactions, the respondent remained a minority shareholder of 10 percent of the company, and was acting as preliminary executor of the estate, through which he controlled the remaining 90 percent interest held by the decedent.

The respondent was subsequently removed as executor of the estate due to his failure to comply with numerous court orders directing him to account, and the Public Administrator was appointed temporary administrator cta in his place and stead. Upon his appointment, the Public Administrator requested information from the respondent pertinent to the valuation of Quailman Investors, and instituted a discovery proceeding against him seeking recovery of $960,184, *i.e.*, the alleged profits derived from the sale of assets by Quailman Investors, and subsequently paid by respondent to himself. After a series of motions and appeals, the Public Administrator moved for summary relief.

The court observed that one of the most sacred duties of a fiduciary is to avoid self-dealing. Once self-dealing is disclosed, the "no further inquiry rule" is triggered, which will result in the transaction being set aside regardless of its fairness. The court further noted that in cases where a fiduciary places himself in a position where his interest is in conflict with his duty of loyalty, the fiduciary may be surcharged.

Based on the foregoing, and the undisputed record reflecting the improper payments the respondent made to himself, without prior court authorization, at a time when he was serving as preliminary executor of the estate and was in full control of Quailman Investors, the court held that his conduct was an act of self-dealing in violation of his fiduciary duty of undivided loyalty to the estate beneficiaries. As such, the court set aside the payments, and directed the respondent to restore the sum of $725,453 to the estate.

In addition, the record revealed that the respondent, also without prior court approval, paid himself a personal claim he had against the estate. As in the case of self-dealing, when a fiduciary pays himself a claim without leave of court, he subjects himself to a surcharge which can include, among other things, costs, attorney's fees, and interest. Noting that attorney's fees may generally not be collected by a prevailing litigant in the absence of statute or agreement, or where the losing party has not acted maliciously or in bad faith, the court, nevertheless, found based on respondent's conduct, that an award of attorney's fees, to be paid by respondent personally, was warranted. Accordingly, the court scheduled a hearing to determine the surcharge and fees in connection with the improper payment of the claim.

***In re Smith*, N.Y.L.J., May 17, 2018, p. 28 (Sur. Ct., Albany Co.)**

Suspension of Letters

Before the Surrogate's Court, Kings County (Torres, S.), in *In re Allen*, was a motion of a co-trustee and beneficiary of the subject trust to suspend her co-trustee for failure to account. The petitioner had previously commenced two proceedings against her co-fiduciary; one, seeking his removal, which remained pending, and the second, to compel him to account. In response to the latter petition, the court issued a 45-day order directing that an accounting be filed. Although the order was served on the respondent/co-trustee, he failed to account in accordance with the court's directive, provoking the motion seeking his suspension. The assets of the trust estate were comprised of the decedent's residence, and an interest in a limited liability company, which owned a multiple-unit dwelling and income-producing property.

In support of her application, the petitioner maintained that the respondent had, *inter alia*, failed to open a separate trust account, and to file Federal or state income tax returns for the trust. Further, the petitioner alleged that the respondent's neglect of the real property held by the LLC caused it to sell for a price far less than two previous offers to purchase the parcel, which her co-fiduciary had rejected.

In opposition to the motion, the respondent filed a separate motion requesting an extension of time to file his account, claiming that he just received the bank statements in order to do so. Although the petitioner did not oppose the requested extension, she nevertheless requested that her co-trustee be suspended on the grounds that his failure to abide by the court's order was indicative of his ongoing breach of fiduciary duties and responsibilities.

The court opined that, pursuant to the provisions of SCPA 719(1), a trustee may be removed, without a hearing, when after having been ordered to account, he fails to do so within the time and manner directed by the court. On this basis, the court found that the respondent's noncompliance with its directive to account constituted grounds for his removal. Indeed, the court concluded that throughout the proceedings, the respondent had impeded the efficient administration of the trust estate, necessitating the court's intervention, most particularly with respect to the sale of the subject real property.

Accordingly, based on his failure to account as ordered, the court directed that the respondent be suspended as co-trustee pursuant to SCPA 719(1), pending the hearing and determination of the removal proceeding. Respondent's motion for an extension of time to file his account was granted.

***In re Allen,* N.Y.L.J., Mar. 8, 2018, p. 28 (Sur. Ct., Kings Co.)**

Suspension of Letters

Before the Surrogate's Court, Suffolk County, in *In re Estate of Pagliughi,* was a proceeding by the residuary beneficiaries of the decedent's estate ("petitioners") requesting, *inter alia*, that the executrix post a bond pursuant to SCPA 710(3) and (4), and return to New York all estate property that she removed from the State. The application was opposed by the executrix, who alleged that although she sold her home in New York and moved to Vermont, the will of the decedent dispensed with a bond "in any jurisdiction."

The court, nevertheless, found that it had the discretion, pursuant to the provisions of SCPA 710(3), to direct a fiduciary, who has become a non-domiciliary, to post a bond. To this extent, the actions of the fiduciary as they related to the administration of estate assets were relevant.

In this regard, the record revealed that the executrix had admittedly removed the decedent's gun collection from New York to Vermont, although she had since returned the assets to the State. The court found this conduct to be in clear violation of the provisions of SCPA 710(4), which forbid a fiduciary from removing estate property from the State without prior court approval and the posting of a bond. In view thereof, and the fiduciary's status as a non-domiciliary, the court directed that she post a bond in the sum of $132,000, and return any estate property to New York that she had removed from the jurisdiction.

Further, the court expressed concern about myriad other acts of misconduct committed by the executrix, which she admitted to be true, including her apparent conflict of interest in a Supreme Court action that she commenced for the decedent's wrongful death, and her commingling of estate and trust funds with her own. As such, the court, on its own motion, directed the parties to appear for a hearing regarding the fiduciary's suspension and removal.

***In re Estate of Pagliughi,* N.Y.L.J., Aug. 17, 2018, p. 38 (Sur. Ct., Suffolk Co.)**

Vacatur of Stipulation of Settlement

In *In re Brody,* the Surrogate's Court, Queens County, denied the objectant's motion, in a contested accounting proceeding, to, *inter alia,* vacate the stipulation of settlement between the parties resolving certain of the disputed issues. Notably, the stipulation was prepared and executed in court after extended negotiations among the parties, and expressly stated that counsel were authorized to enter the agreement on behalf of their respective clients.

In support of the application, the movant alleged that there was no meeting of the minds between the parties with respect to paragraph 4 of the agreement re-

garding distribution of the decedent's estate. In opposition to the motion, the executor contended that there was no basis in law or fact for vacating the stipulation.

In denying the motion, the court observed that stipulations of settlement will not lightly be disregarded, and the party seeking to do so has the burden of establishing good cause sufficient to invalidate a contract. Within this context, the court found that movant's claims essentially sought to invalidate the stipulation on the grounds of mutual mistake. To succeed on this basis, a party must establish by "proof of the highest order"[1] that the mistake existed at the time the stipulation was entered and that it was "so substantial that the stipulation failed to represent a true meeting of the minds."[2]

Upon review of the proof, the court concluded that the evidence failed to prima facie establish a mutual mistake at the time the agreement was entered. Moreover, the court held that even if a mutual mistake had been proven, it would not have been so substantial as to warrant vacatur of the entire agreement. Further, the court determined that there was no basis for nullifying the stipulation on the grounds of unilateral mistake, as there was no evidence of fraudulent misrepresentation, negligence, or the failure to exercise ordinary care in the making of the agreement.

Indeed, the court noted that movant's counsel was a seasoned trusts and estates practitioner, whose claims of being duped by opposing counsel were not remotely supported by the record, and were belied by the plain language of the agreement, which was discussed at length. In conclusion, the court found that the subject motion represented nothing more than "buyer's remorse" by the movant, but could serve as no basis for setting aside the stipulation.

***In re Brody*, N.Y.L.J., Apr. 19, 2018, p. 25 (Sur. Ct., Queens Co.)**

Endnotes

1. *True v. True*, 63 AD3d 1145 (2d Dep't 2009).
2. *Etzion v. Etzion*, 62 AD3d 646 (2d Dep't 2009).

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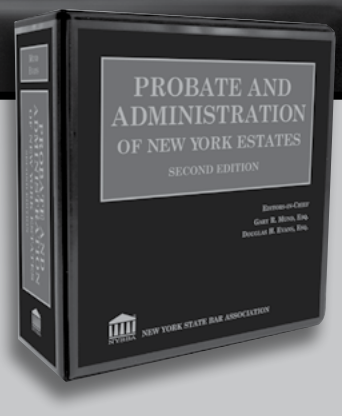

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Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Estate's Escheated Funds Must Be Returned

Mrs. Inez Eleanor Rigley died intestate in Florida. In 2007, the probate court ordered that, with no known beneficiaries, the assets of Mrs. Rigley's estate were to escheat to the State of Florida. Specifically, under section 732.107, Florida Statutes, the court ordered that Mrs. Rigley's real property was to be sold and the proceeds were to be paid to the Chief Financial Officer for deposit into the State School Fund. In 2013, an investigative agency named Choice Plus obtained two orders from the probate court. The first order found that 10 claimants, all of whom were in Sweden, were Mrs. Rigley's rightful beneficiaries. The second order required the State of Florida to release the funds in the claimants' favor. The statute provides that within 10 years, any person claiming to be entitled to the assets may reopen the estate administration to assert entitlement to the assets. However, the Department then spent the next *two years* litigating with Choice Plus over those orders. Eventually, the appellate court upheld the probate court's orders. The Department had argued that because escheated funds were discussed within the ambit of chapter 717, the procedure for having those escheated funds released is the same as for any other funds discussed in chapter 717. But the appellate court said the Department was wrong: "Putting oranges and apples into one large bowl does not make them all oranges." Chapter 717 gives the Department "a panoply of tools," said the appellate court, to determine the merits of a claim of ownership to unclaimed funds that come to the Department through various means. It does not make sense, though, to apply the panoply of tools to escheated funds because if potential beneficiaries come forward, those potential beneficiaries must have their rights determined by the probate court.

***Choice Plus, LLC v. Dep't of Fin. Servs., et al.*, 2018 WL 1801906 (Fla. 1st DCA Apr. 17, 2018) (not yet final)**

Early Termination of Trust Is Reversed

In a case about dueling summary judgment motions, a Florida appellate court recently reversed the trial court's award of summary judgment in favor of Christopher Cosden, one of the co-trustees of the Yvonne S. Cosden Revocable Trust, and remanded the case to have summary judgment awarded in favor of Joseph Horgan, the other co-trustee. Cosden sought to terminate the trust upon his mother's death. Rather than allow the trust to provide income for his benefit

Jonathan A. Galler

over the course of his life, followed by a distribution of the remainder to three institutions, Cosden and the institutions agreed to terminate the trust and provide for all of the beneficiaries immediately. Their theory, which prevailed over that of the co-trustee in the trial court, was that the trust would only be a waste of assets, due to expenses, and that the purpose of the trust would be best fulfilled by termination. The appellate court, however, saw things differently. At the urging of Horgan, the co-trustee, the appellate court held that the trust's purpose was, at least in part, to provide for the settlor's son over the course of his life. The court held that there was no indication that the settlor was unaware of the expenses associated with trust administration nor that she was unaware of the risk of market fluctuations, as Cosden had argued. Therefore, the appellate court reversed the order of the trial court and instructed the trial court to grant summary judgment to Horgan.

***Horgan v. Cosden*, 2018 WL 2374443 (Fla. 2d DCA May 25, 2018) (not yet final)**

Beneficiary Designation Is Revoked Upon Divorce

Richard Brookes Hibbard died in 2016, a resident of Florida. Five years earlier, he had bought an annuity from Allianz Life Insurance Company and named his then-wife, Jeanne Hibbard, as the beneficiary. But in 2013, the Hibbards – who were still residing in New Hampshire at the time – were divorced. After his death, his ex-wife collected approximate $97,000 from Allianz. The estate filed suit against the ex-wife, in federal court in the Middle District of Florida, alleging that section 732.703, Florida Statutes, had automatically revoked the beneficiary designation at the time of divorce. The ex-wife brought two motions to dismiss the action. First, she argued that the probate exception

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prevented the federal court from hearing the case. The motion was denied. Although the jurisdiction of the federal courts does not extend to administering an estate or probating a will, the court held that it does have jurisdiction over cases between an estate and claimants so long as the court does not interfere with the probate proceedings or assume general control of the property in the custody of state court. Second, the ex-wife argued that section 732.703 did not apply. The statute provides that a beneficiary designation is void as of the time of divorce if the designation was made prior to the divorce. The statute also provides that it does not apply if the governing instrument is governed by the laws of another state. The ex-wife argued that the statute was inapplicable because the couple's divorce decree was a New Hampshire document, but the court held that the governing instrument was the Allianz contract, which was a Florida document. Accordingly, this motion was denied as well.

***Estate of Richard Brookes Hibbard v. Hibbard, et al.*, 2018 WL 2445690 (M.D. Fla. May 31, 2018) (not yet final)**

Personal Representative's Standing to Challenge POD Account Designations

Michael Pevarnek, as personal representative of the estate of Sally Ann Cochran, sued Lacey and Samantha Marshall, the decedent's granddaughters, in state court. He alleged that the Marshalls unlawfully converted the decedent's assets by modifying designations so that the decedent's account would be payable on death to them. Pevarnek secured a temporary injunction while he investigated further, freezing the account such that the financial institution would be unable to distribute the money.

The Marshalls remanded the case to federal court, and Pevarnek tried, but failed twice, to remand it. At a subsequent hearing before the magistrate judge, the Marshalls argued that Pevarnek lacked standing to challenge the beneficiary designation of the "pay on death" account because it was not an asset of the estate—the prior designation was apparently also "pay on death." The court held, however, that the personal representative did have standing and that he was the proper party. Under section 733.607(1), Florida Statutes, the personal representative not only has a duty to protect and preserve the estate, but he or she may also maintain an action to recover possession of property or to determine the title to it.

***Pevarnek v. Marshall*, 2018 WL 2688784 (M.D. Fla. Apr. 19, 2018) (not yet final)**

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