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Trusts and Estates Law Section Newsletter

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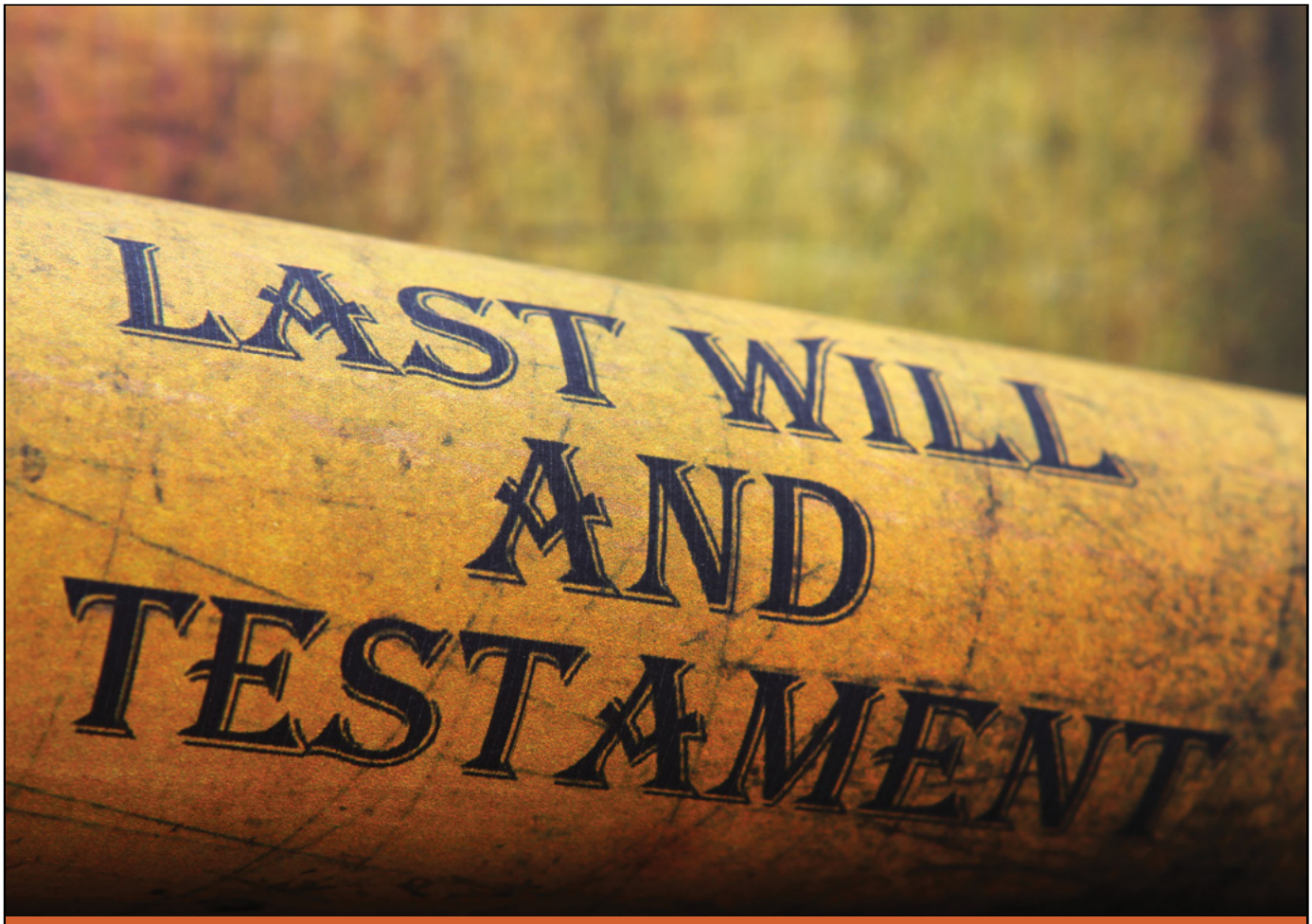

In This Issue

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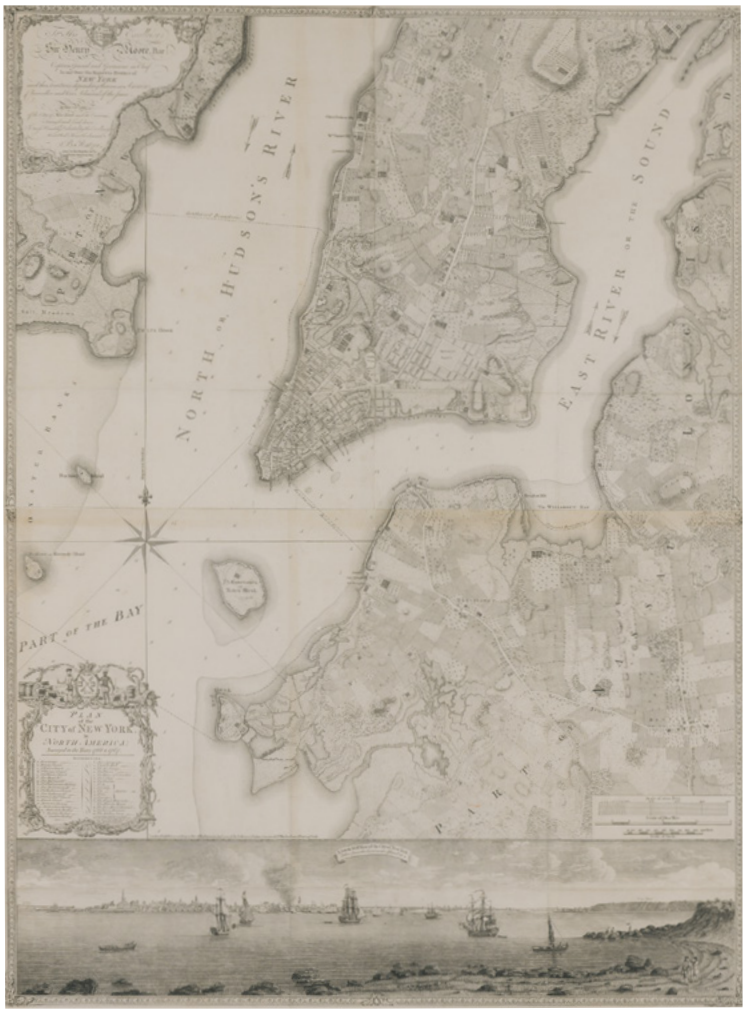

Bernard Ratzer, *Plan of the City of New York in North America.*
Estimate: $80,000-100,000. Estate of Leo Hershkowitz. Auction: Apr 25

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Message from the Chair

It's a privilege to serve as Chair and to have this forum to acknowledge and thank all of you who dedicate your time and talent to advance the goals of our Section. The Russian novelist Fyodor Dostoyevsky quipped that "man is a creature with two legs and no sense of gratitude"—but it's hard not to be grateful for, no less in awe of, the outstanding work being accomplished year in and year out by our Section. This year is shaping up, too, to be one of great industry and accomplishment by our many active members, for which we all can be thankful and in which we all can take immense pride.

During the current legislative season, our Section has submitted no less than a baker's dozen worth of proposals for consideration by the New York State Legislature. These proposals are being advocated by our Government Relations and Legislation Committee, chaired by Georgiana Slade, with the capable support of Kevin Kerwin, the NYSBA liaison to the legislature. Prominent among these is a proposed New York Trust Code, which represents the culmination of many years of tireless work by Professor Ira Bloom of Albany Law School and Professor William LaPiana of New York Law School, as well as untold scores of volunteers from our Section and the New York City Bar. In addition, the Legislature is presently considering proposed amendments to EPTL 5-1.1-A(d)(1), EPTL 5-1.2, EPTL 7-3.1 and CPLR 5205(c), EPTL 7-6.1 and 7-6.20, EPTL 8-1.8, EPTL 11-1.7, SCPA Sections 207 and 1501, SCPA 1001, SCPA 1310, and SCPA 2308. On January 25, 2018, the Executive Committee of the NYSBA approved a proposal on the interpretation of credit shelter bequests as advocated by Kevin Matz and a directed trust act proposal as advocated by Professor Bloom, thus adding two more proposals to the Section's 2018 legislative agenda.

But that's not all! At the Executive Committee this past March, the Executive Committee of our Section approved the report of the Debtor Protections for Pension and Profit-Sharing Plans Ad Hoc Committee. The Committee is chaired by Albert Feurer and its report addresses historic inconsistencies and inequities among the CPLR, EPTL, Debtor and Creditor Law, and Insurance Law dealing with the protections for benefits from retirement and savings plans. More specifically, the legislative proposal contained within the report seeks to harmonize New York statutes dealing with benefits from specified tax-qualified plans funded with trusts to be fully protected from creditors before, during, and after distribution unless subject to a support order, qualified domestic relations order or fraudulent conveyance set-aside. It is an absolute masterpiece of legal erudition and sincere thanks and admiration to Albert and his committee members for a job exceptionally well done. The proposal will be circulated to other Sections for comments and then submitted to a vote by the Executive Committee of the NYSBA. I look forward to it being approved and submitted to the legislature for enactment.

I would be remiss and confirm Dostoyevsky's dictum if I didn't mention the gratitude owed to Sharon Wick for her service as Chair last year. Sharon took the helm in her capable hands and steered a course for success for our Section in 2017—thank you, Sharon for all of your hard work on behalf of our Section and for your excellent leadership!

Lastly, fast approaching is our 2018 Spring Meeting to be held at the Cloister Hotel at the Sea Island Resort in Sea Island, Georgia from May 3 to May 6. Under the leadership of Michael Schwartz as program Chair, we will hear from a terrific lineup of speakers on will reformation, directed trusts, asset protection, planning for the art collector, and may other interesting estate planning topics. Sea Island and the surrounding Golden Isles of Georgia is a beautiful setting and the resort boasts Forbes five-star accommodations with exceptional dining opportunities, activities and amenities. Having the opportunity there to learn from excellent speakers while enjoying the company of our colleagues and friends will surely give us all one more thing to be grateful for.

Natalia Murphy

Save the Date

October 18-19, 2018:
Fall Meeting,
The Sagamore Resort,
Bolton Landing, New York

Message from the Editor

A reminder to all of our Section members—we are always seeking article submissions! If you have a topic in mind for an article but would like to discuss whether it would be of interest to the *Newsletter*, please do not hesitate to contact me. We strive to present a variety of topics, and embrace submissions on relevant subjects with which our Section members may otherwise be unfamiliar.

Case in point, this issue includes an article by Genan Zilkha on the laws of land transfers and intestacy in Thailand and the Philippines. Also in this issue, Paul Forster discusses *In re Koegel*, the most recent in the line of decisions on the issue of a defective acknowledgment on a waiver of a right of election, and C. Raymond Radigan provides an update on the proposed New York Trust Code and Article 17(A) proceedings.

The deadline for submissions for our next issue is June 8, 2018. The editorial board of the Trusts and Estates Law Section Newsletter is:

- **Jaclene D'Agostino**, jdagostino@farrellfritz.com, Editor in Chief;
- **Naftali T. Leshkowitz**, ntl@leshkowitzlaw.com, Associate Editor;
- **Sean R. Weissbart**, srw@mormc.com, Associate Editor;
- **Thomas V. Ficchi**, tficchi@cahill.com, Associate Editor; and
- **Shaina S. Kamen**, skamen@strook.com, Associate Editor.

Jaclene D'Agostino

Planning for Intestacy: Land Transfers to Non-Citizens in Thailand and the Philippines

By Genan F. Zilkha

I. Introduction

The Philippines[1] and Thailand[2] are frequently promoted as ideal retirement locations. The Philippines has an entire department dedicated to assisting retirees, including foreign nationals seeking to retire in the Philippines.[3] There is a specific visa—the Special Resident Retiree's Visa—that permits a foreign national to remain in the Philippines indefinitely.[4] Thailand has a similar visa that permits a foreigner, over the age of 50, to remain in Thailand for up to 10 years.[5] While these two countries vary in several ways, they both share one commonality. In both countries, foreigners can neither own nor acquire land. Both countries share a common exception—land can be transferred to a foreigner if the property is transferred through intestacy. This exception does not provide an absolute right for foreigners to acquire land. Instead there are ways for Filipino or Thai citizens to ensure that foreign relatives can receive the benefit of their property.

II. Ownership Restrictions in the Republic of the Philippines and the Kingdom of Thailand

A. Philippine Land Ownership Restrictions

Article XII of the 1987 Constitution of the Republic of the Philippines restricts foreign ownership of property in the Philippines. In particular, Article XII, Section 7 states that "[s]ave in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."[6] Citizens (and former citizens) of the Philippines can acquire and own property. Corporations and associations can acquire property if the corporation or association is at least 60 percent Filipino owned. Although foreigners may not acquire land, they may acquire shares in a condominium, so long as the condominium is at least 60 percent Filipino owned.[7] If a foreigner obtains property in contravention of the Philippine Constitution, the transfer will be void.[8] Similarly, if a married couple with a Filipino and foreign spouse purchases land, the foreign spouse maintains no rights in the property.[9] Although a foreigner cannot own land, a foreigner can own a house (or other property) on land, just as long as the foreigner does not own the land itself.[10]

B. Thailand Ownership Restrictions

Thailand similarly restricts the ability of foreigners to acquire and own property. Chapter 8 of the Land Code Promulgating Act, B.E. 2497 (LCCA) states that "[a]liens may acquire land by virtue of the provisions of a treaty giving the right to own immovable properties and subject to the provisions of this Code." However, there is currently no treaty in place that will permit aliens to acquire land.[11] The LCCA does carve out a narrow exception for foreigners who invest 40 million Thai baht (approximately $1,269,200) in Thailand, and who use the property solely for residential purposes.[12] Foreigners may also own up to 49 percent of the units of a condominium.[13] In Thailand, a foreigner who purchases property without authorization must dispose of it.[14] As in the Philippines, property purchased by a Thai spouse, who is married to a foreigner, will not become marital property. When purchasing the property, the Thai spouse must prove that the money used to purchase the property did not come from common funds.[15] In Thailand, as in the Philippines, a foreigner may purchase a house, so long as the foreigner has not purchased the land on which the house is built.[16]

While both the Philippines and Thailand place outright restrictions on the transfer of property from a citizen to a non-citizen, in both countries there exists one exception: inheritance through intestacy.

III. Intestacy in the Philippines and Thailand

A. Intestacy in the Philippines

The Philippine legal system is a mixed civil and common law system, based on a combination of Spanish civil law and American common law.[17] There is no divorce in the Philippines.[18] In this absence of divorce, couples seeking to end their marriages have two options: they can seek a legal separation or an annulment. A legal separation permits the spouses to divide their property and live separately.[19] It does not allow the spouses to remarry.[20] In addition, legal separation requires that one party be at fault in the separation.[21] To the contrary, a civil annulment permits the former spouses to remarry, but is significantly costlier because it requires a psychological evaluation that can cost thousands of dollars.[22]

There are no specific probate courts in the Philippines. Instead, all probate proceedings are handled by the trial courts.[23] Philippine intestacy is governed by Title IV, Chapter 3 of Republic Act. No. 386, the Civil Code of the Philippines.[24]

Under Philippine intestacy law, legitimate or adopted children inherit property equally. Grandchildren

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inherit by right of representation if their parents have predeceased. Shares belonging to an adopted child who predeceases his parent and has no descendant, will go the adopted child's relatives by consanguinity. Illegitimate children are entitled to half of legitimate children's entitlement. If a child predeceases his parents, his parents are entitled to inherit his entire estate equally. If there are no living parents, the estate is divided per capita among survivors of equal degrees. If there are no living legitimate descendants, the illegitimate descendants inherit the entire estate. Illegitimate children cannot inherit from legitimate children.

Upon the death of the decedent, the marital property is liquidated, and the surviving spouse gets one half of this property. The remaining half is divided among the statutory heirs (including the spouse). If the decedent has a surviving spouse but no surviving descendants, the entire estate goes to the surviving spouse. If the decedent has a surviving spouse and surviving legitimate children or their descendants, the surviving spouse and children, or their descendants, will share the estate equally. If the decedent has surviving illegitimate children and a surviving spouse, the spouse will get half of the estate and the surviving children will divide the second half of the estate. If the decedent has a surviving spouse and surviving parents, then the spouse takes one half of the estate, and the parents take the other half of the estate. If there is a surviving spouse and surviving siblings of the decedent, or their children, the surviving spouse is entitled to one half of the estate, and the surviving siblings, or their children, are entitled to the other half. If there is a surviving spouse, and surviving legitimate and illegitimate children, the surviving spouse will get the same share as the surviving legitimate children. While an annulment revokes the ability of either spouse to inherit via intestacy, where there is a legal separation, only the offending spouse, i.e., the spouse who caused the separation, is disqualified. The non-offending spouse can still inherit.[25]

B. Intestacy in Thailand

Thailand has a civil law system. Thai laws are influenced by laws from both civil and common law countries.[26] There is some common law influence as well. Thai Supreme Court decisions have persuasive authority over lower courts.[27] Unlike in the Philippines, divorce in Thailand is legal.[28]

Thai intestacy is governed by Book VI, Title II, of the Thailand Civil and Commercial Code (TCCC). Section 1629 of the TCCC sets out the order of intestacy. Under Thai Law, there are six classes of statutory heirs: (1) descendants (i.e., children and their issue); (2) parents; (3) brothers and sisters of full blood; (4) brothers and sisters of half-blood; (5) grandparents; (6) uncles and aunts. Pursuant to Section 1630 of the TCCC, "So long as there is any heir surviving or represented in a class as specified in Section 1629 of the TCCC, the heir of the lower class has no right at all to the estate of the deceased."

Although not listed in Section 1629, spouses are also considered statutory heirs. If a decedent has a surviving spouse, then the inheritance is not distributed according to class. Instead, under Section 1635, if there is a living spouse and surviving descendents of the decedent, the spouse inherits in the "same share as an heir in the degree of children." If there is a surviving spouse and surviving parents, then the spouse gets half of the estate and the surviving parent or parents gets the other half of the estate. If there is a surviving spouse and surviving sibling or siblings (these siblings must be "whole blood"), then the spouse gets half of the estate and the siblings get the other half. If there is a surviving spouse and surviving siblings, grandparents, uncles, or aunts, then the spouse gets two thirds of the estate, and the rest of the estate is divided among the survivors. If only the decedent's spouse survives, then the spouse inherits the entire estate. Illegitimate children who are legitimated, or adopted, inherit in the same way as a child who is legitimate at birth. Under Section 1622 of the TCCC, a Buddhist monk cannot inherit property as a statutory heir, and if a monk dies intestate, the property that the monk acquired while he was a monk will go to his monastery, while property acquired prior to the monkhood will go to his statutory heirs.

C. Intestate Disposition of Land

Despite some differences between Thai and Philippine intestacy law, under both Philippine and Thai law, a foreigner can inherit property, albeit only through intestacy. Under the Philippine Constitution, this is carved out in an exception under Article XII, Section 7 which permits the transfer of land to non-Filipinos by means of hereditary succession. In Thailand, Section 93 of the Act Promulgating the Land Code, B.E. 2497 (1954) permits the transfer of property to a non-Thai statutory heir.

In the Philippines, a foreign distributee may retain inherited property, but their ability to dispose of the land is limited. The foreign distributee is bound by Section 7, and therefore can deed the land to a Filipino citizen or transfer the land to a Filipino citizen through a will. Property can be transferred to another foreigner by means of hereditary succession only. In a particularly interesting case, *Republic v. Guzman*,[29] the Supreme Court of the Philippines held that the American wife of a former Filipino citizen, who, together with her American son, inherited certain property in the Philippines through intestacy, could not transfer her interest to her son through deeds of quitclaim because this was considered the transfer of property in the Philippines to a foreigner.

If a piece of property is wrongfully obtained by a foreigner, that foreigner cannot transfer the piece of property by hereditary succession.[30] Notwithstanding

the decision in *Guzman*, a foreigner distributee who inherits property can, in effect, transfer the property to a fellow distributee by repudiating the inheritance. In *Guzman*, the Supreme Court indicated that the surviving wife could have, in effect, transferred the inherited property to her son had she repudiated her inheritance. Under Article 1056 of the Civil Code of the Philippines, the "acceptance or repudiation of an inheritance, once made, is irrevocable, and cannot be impugned, except when it was made through any of the causes that vitiate consent, or when an unknown will appears." Since the wife had already accepted the inheritance she could not then repudiate it. Further, an heir has a limited amount of time in which to repudiate an inheritance. Pursuant to Article 1057 of the Civil Code of the Philippines, within 30 days of the court's issuance of an order for distribution of the estate, "the heirs, devisees and legatees shall signify to the court having jurisdiction whether they accept or repudiate the inheritance. If they do not do so within that time, they are deemed to have accepted the inheritance."

In Thailand, the heir may not retain ownership of the land without permission of the Minister of the Interior. The Minister of the Interior will not give permission to a foreigner to keep the property because, under Section 83 of the TCCC, a foreigner may only own property pursuant to a treaty, and there are currently no land ownership treaties in place. Therefore, under Section 94 of the TCCC, the foreign distributee must dispose of the land within one year. If the foreign distributee fails to sell the land within one year, the Director-General of the Land Department can sell the property and retain a percentage of the proceeds.[31]

IV. Property Transfer in the Philippines and Thailand

As discussed above, ownership and transfer restrictions in the Philippines and Thailand make it impossible for a Philippine or Thai national to transfer property while alive to a non-Filipino or non-Thai national. Similarly, a Philippine or Thai national cannot transfer property to an unrelated non-Philippine or non-Thai national at any point, because property can only be transferred to a foreigner by intestacy. Still, there are ways for a Thai or Philippine national to ensure that some interest in property is transferred to a non-Filipino or non-Thai national.

A. Property Transfer to Foreigners in the Philippines

As discussed by the Supreme Court in *Guzman*, if there is more than one heir to a property, and the ultimate goal is to transfer the property from one foreign distributee to another after the death of the decedent Philippine national, then heirs can repudiate their interest in the property and, by default, effect the transfer of the property. Repudiation cannot be agreed upon through contract prior to the decedent's death. Under Article 1347 of the Philippine Civil Code, "no contract may be entered into upon a future inheritance except in cases expressly authorized by law." Thus, while a distributee can repudiate his share of a future estate, this distributee cannot agree via contract to do so.

Property can be transferred to a corporation or association that is at least 60 percent Filipino owned. The remaining 40 percent can be held by a foreigner. This permits the foreigner to retain some interest over the property, although the foreigner will not have majority interest, and therefore will not control the corporation or association. If this is what the foreigner and Filipino decide to do, then they must be wary of the Anti-Dummy Law, Commonwealth Act No. 108 (1975), which prohibits using "proxy arrangement to accomplish a transaction not allow[ed] under Philippine law."[32] Under the Anti-Dummy Law, for example, a Filipino 60 percent owner cannot permit a non-Filipino 40 percent owner to exert control over a corporation. Violations of the Anti-Dummy Law are punishable with both civil and criminal penalties.

While a foreigner cannot own property, "the constitutional ban against foreigners applies only to ownership of Philippine land and not to the improvements built thereon."[33] Thus, if the Filipino landowner builds a house on the land, this house can be willed to the foreigner. If the house is owned exclusively by the foreigner, and the decedent did not leave a will, then, even if the property passes through intestacy to other statutory heirs, this would encumber the property and therefore provide some protection to the foreign heir.

While not common, trusts are another way for a Filipino citizen to ensure that a foreigner receives the benefit of property. Property can be placed into a trust for the benefit of the foreigner. In this situation, while the trust beneficiary can be a foreigner, the trustee must be Filipino.

One additional way to transfer property from a Filipino citizen to a foreigner statutory heir is to create a will that explicitly disinherits the remaining statutory heirs. This is not as simple as it might seem. Unlike in the United States, where an individual can generally disinherit a relative with an exception of a spouse in a will, in the Philippines certain heirs are deemed compulsory heirs. This means that these heirs cannot be disinherited without cause. Included among the compulsory heirs are parents, children, and spouse.[34] Article 887 of the Civil Code of the Philippines sets forth the grounds for disinheritance. These grounds include: "(6) Maltreatment of the testator by word or deed, by the child or descendant; (7) When a child or descendant leads a dishonorable or disgraceful life." Thus, an individual can only disinherit a compulsory heir, and ensure that property is transferred via intestacy to a foreign statutory heir, by demonstrating that there was a specified reason for disinheriting this compulsory heir. Therefore, disinheriting statutory heirs in a will should only be attempted as a last resort.

B. Property Transfer to Foreigners in Thailand

Since Thailand does not permit foreigners to retain ownership over land, even though a foreigner is entitled to inherit land through intestacy, a foreign distributee must dispose of the inherited property within one year. Therefore, unlike in the Philippines, it may not be worthwhile for a Thai property owner to disinherit his Thai statutory heirs to ensure that the property transfers via intestacy to his foreign spouse. Similarly, Section 1686 of the TCCC specifically prohibits the creation of a trust.[35] While forbidden by law, under Section 1687, property willed to a minor, or someone deemed incompetent, can be held in trust by a controller until the minor reaches the age of majority, or the incompetence ends.

As in the Philippines, it is possible for a foreigner to own part of a corporation that, in turn, owns the land. Section 97 of the LCCA permits a limited company or registered partnership that is no more than 49 percent owned by a foreigner to own land. Therefore, a Thai citizen and foreigner can own land, as long as the Thai citizen retains 51 percent ownership. This will allow the foreigner to retain some control over the land, albeit not a majority stake. A foreigner citizen who establishes a Thai limited company or registered partnership must be wary of violating Thai nominee prohibitions. Under Section 96 of the LCCA, when a Thai person "has acquired land as the owner in place of an alien or juristic person" then the Director-General can dispose of the land. Section 113 of the LCCA creates civil and criminal penalties for any Thai person who "acquires land as an agent of an alien or juristic person." Under Section 113, a Thai limited company cannot be established simply with the purpose of purchasing property for a foreigner. Therefore, if a Thai citizen and a foreigner decide to form a company to for the purpose of purchasing land for the non-Thai citizen, then the Thai citizen will also face penalties.[36]

Thailand has two legal mechanisms that have their basis in civil law, and that can provide protection to a non-Thai citizen: superficies and usufruct. The right of superficies, which is governed by Chapter VI of the TCCC, permits the separation of the house ownership and land ownership and grants the foreigner the ability to keep his building on the Thai property[37] for the remainder of the non-Thai citizen's life, or a period of up to 30 years.[38] If no time is specified, the superficies can be terminated by either party with reasonable notice.[39] The rights of superficies is a real property right, and can therefore be transferred to third parties, or through inheritance.[40] The Thai citizen who owns the property can sell the property, but the right of superficies will travel with the property.[41] Once the superficies ends, the property must be returned to its original state or, in the alternative, the property owner can purchase the improvements to the property. The right of superficies is not extinguished if the improvements to the property are destroyed.[42]

Unlike a right of superficies, a right of usufruct[43] does not separate the house ownership from the land ownership. Instead, a right of usufruct is a real property right that transfers the "possession, use and enjoyment of the property," and the "right of management of the property."[44] The person granted the usufruct right, the usufructuary, must take care of the property and,[45] at the termination of the usufruct term, return the property to the owner.[46] The usufruct can be created for a term of no more than 30 years (renewable once) or the life of the usufructuary.[47] If no term is specified, then it is for the life of the usufructuary. Upon the return, the usufructuary must replace anything he used, and provide compensation for destruction to the property. The usufructuary may transfer his rights in the property to a third party but may not transfer it via inheritance.[48] If the property is destroyed without compensation, the property owner does not need to restore the property.[49] If the property owner chooses not to restore the property, then the usufruct terminates. The owner has the right to object to "unlawful or unreasonable use of the property."[50] The usufruct ends when the usufructuary dies.[51]

While not estate planning tools in themselves, the right of usufruct and superficies provides a modicum of protection to a non-Thai citizen owner. The non-Thai citizen owner can, for example, purchase a house and reside on that house for the rest of his life. Similarly, a parent with non-Thai children can ensure that his child can remain in his house for the remainder of the child's life. Thai citizens with non-Thai spouses can ensure that the non-Thai spouse has a residence. A right of superficies also provides the holder of the right of superficies with the ability to receive compensation for improvements done to the land, although these improvements remain at the discretion of the landowner.

V. Conclusion

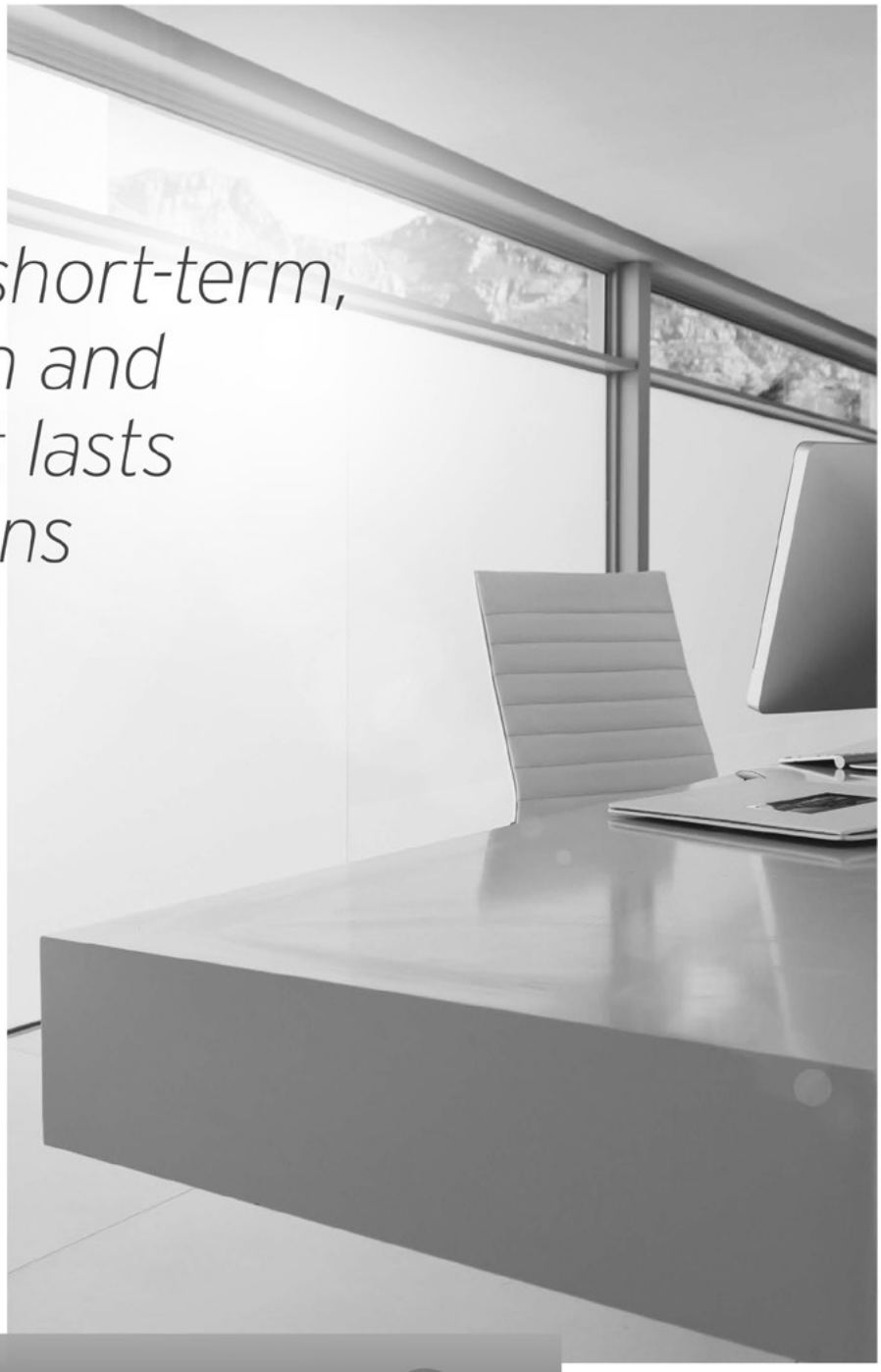
Although touted as a great place to retire, both the Philippines and Thailand make it impossible for foreigners to own property outright. A foreigner residing in either the Philippines or in Thailand can still, in limited situations, acquire property. A Thai or Philippine citizen can also take steps to ensure that a foreign relative's property rights are protected after the Thai or Philippine citizen dies.

Endnotes

1. Retiring to the Philippines, https://retiringtothephilippines.com (last visited Feb. 27, 2018).
2. Evan Tarver, *7 Reasons Why Americans Retire in Thailand*, Investopedia (Mar. 21, 2017), https://www.investopedia.com/articles/personal-finance/092415/7-reasons-why-americans-retire-thailand.asp.
3. Why Retire in the Philippines?, http://www.pra.gov.ph/main/why_retire?page=1 (last visited Feb. 27, 2018).
4. Special Resident Retiree's Visa, http://www.pra.gov.ph/main/retiree/active.
5. Teeranai Charuvastra, *10-year Visas Now Available: Thai Immigration*, Khaosod English (Aug. 16, 2017), http://www.

khaosodenglish.com/news/business/2017/08/16/10-year-visas-now-available-thai-immigration.

6. Const. (1987) Art. XII, Sec. 7 (Phil.).
7. Foreign equity in Condominium Corporation, SEC-OGC Opinion No. 08-27, Nov. 27, 2008, http://www.sec.gov.ph/wp-content/uploads/2015/11/08-27.pdf (last visited Feb. 28, 2018).
8. *See Fullido v. Grilli*, G. R. No. 215014, Feb. 29, 2016 (invaliding a lease from a Filipino to a foreigner for 50 years with the ability to renew for an additional 50 years where the intent was to "transfer the dominion of a land to a foreigner in violation of Section 7, Article XII of the 1987 Constitution," and thus determining that the lease "must be rightfully struck down as null and void for being repugnant to the fundamental law"); *see also* An Act to Ordain and Institute the Civil Code of the Philippines Rep. Act No. 386 (June 18, 1949), Ch. 1. (Civil Code of the Philippines) ("Article 5. Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity."), http://www.officialgazette.gov.ph/1949/06/18/republic-act-no-386 (last visited Feb. 28, 2018).
9. *See Matthews v. Taylor*, G.R. No. 164584, June 22, 2009 ("In light of the foregoing jurisprudence, we find and so hold that Benjamin has no right to nullify the Agreement of Lease between Joselyn and petitioner. Benjamin, being an alien, is absolutely prohibited from acquiring private and public lands in the Philippines."); *see also In Re Muller*, G.R. No. 149615 August 29, 2006.
10. *See Beumer vs. Amores,* G.R. No. 195670, Dec. 3, 2012 ("To be sure, the constitutional ban against foreigners applies only to ownership of Philippine land and not to the improvements built thereon, such as the two (2) houses standing on Lots 1 and 2142.").
11. Although there is a treaty in place between the U.S. and Thailand, this treaty permits Americans to own companies in Thailand, but explicitly prevents them from owning property. *See* Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America, https://2016.export.gov/thailand/treaty/index.asp.
12. Land Code Promulgating Act, B.E. 2497. As amended until Land Code Amendment Act (No.12), B.E. 2551 (2008) (LCCA), Section 96 bis.
13. LCCA Section 19/2 (bis). "Each condominium shall have aliens or corporate as indicated under Section 19 holding ownership in the units collectively not exceeding forty-nine percent (49%) of the spaces of the whole units in such particular condominium at the time of making the registration of such condominium in accordance with Section 6."
14. *See* LCCA Section 94 ("All the land which as foreigner has acquired unlawfully or without permission shall be disposed of by such foreigner within the time limit prescribed by the Director-General which shall not be less than one hundred eighty days nor more than one year. If the land is not disposed of within the time prescribed the Director-General shall have the power to dispose of it.").
15. *See Land Ownership and Thai Spouse*, Samuiforsale, https://www.samuiforsale.com/knowledge/land-ownership-and-thai-spouse.html (discussing Section 1471 and Section 1472 of the TCCC) (last visited Feb. 27, 2018).
16. *Overview Property Law Thailand*, Samuiforsale, https://www.samuiforsale.com/knowledge/overview-property-law-thailand.html (last visited Feb. 27, 2018).
17. Salvador T. Carlota, *The Three Most Important Features of the Philippine Legal System That Others Should Understand*, IALS Conference 1 (2007), http://www.ialsnet.org/meetings/enriching/carlota.pdf.
18. Tom Hundley and Ana P. Santos, *The Last Country in the World Where Divorce Is Illegal,* Foreign Pol'y (Jan. 19, 2015) http://foreignpolicy.com/2015/01/19/the-last-country-in-the-world-where-divorce-is-illegal-philippines-catholic-church.
19. Re: Proposed Rule on Legal Separation, A.M. No. 02-11-11-SC (March 4, 2003).
20. *Legal separation does not cut marriage bond*, Manila Times (May 21, 2015), http://www.manilatimes.net/legal-separation-does-not-cut-marriage-bond/185490.
21. The Family Code of the Philippines, Exec. Ord. No. 209, s. 1987, Art. 55 (July 6, 1987).
22. Gina Lumauig, *Annulled and void: After the love is gone*, Rappler (Feb. 14, 2012), https://www.rappler.com/move-ph/1503-annulled-and-void-after-the-love-is-gone.
23. An Act Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa, Blg. 129, Otherwise Known as the "Judiciary Reorganization Act Of 1980," Rep. Act No. 7691 (March 25, 1994).
24. Rep. Act No. 386 (1949), Arts. 987-1010.
25. Exec. Ord. No. 209, s. 1987, Art. 64(4).
26. Joe Leeds, *Introduction to the Legal System and Legal Research of the Kingdom of Thailand*, Globalex (Dec. 2008), http://www.nyulawglobal.org/globalex/Thailand.html.
27. *Id.*
28. TCCC, Book V, Title I, Part VI, Sec. 1501.
29. G.R. No. 132964, February 18, 2000.
30. *See Republic vs Register of Deeds of Roxas City*, G.R. No. 158230, July 16, 2008.
31. *Foreign land ownership by succession*, Samuiforsale, https://www.samuiforsale.com/knowledge/inheritance-laws-thailand.html#1 (last visited Feb. 27, 2018).
32. Robert Wolff, *The Philippine Anti-Dummy Law*, Dumagete Metro Post (Feb. 5, 2017) http://dumaguetemetropost.com/the-philippine-antidummy-law-p8430-641.htm
33. *Beumer vs. Amores*, G.R. No. 195670, Dec. 3, 2012.
34. Rep. Act No. 386 (1949), Art. 887.
35. Under TCCC, Sec. 1686, a "[t]rust created whether directly or indirectly by will or by any juristic act producing effect during lifetime or after death shall have no effect whatever." Thailand does have a law that permits the creation of trusts, the Trust for Transactions in Capital Market Act B.E. 2550 (2007), but this only permits the creation of trusts that relate to capital markets development.
36. TCCC, Sec. 1097 requires that a limited corporation have at least three directors.
37. *Id.* at Sec. 1410.
38. *Id.* at Sec. 1403. "The grant may be renewed for a period not exceeding thirty years from the time of renewal."
39. *Id.* at Sec. 1413.
40. *Id.* at Sec. 1411.
41. *Right of Superficies in Thailand*, Magna Carta Law Office, http://magnacarta.co.th/faq-section-2/right-of-superficies-in-thailand (last visited Feb. 27, 2018).
42. TCCC, Sec. 1415.
43. Right of usufruct also exists in the Philippines, where it is governed by Rep. Act No. 386 (1949), Arts. 562 to 612.
44. TCCA, Sec. 1417
45. *Id.* at Sec. 1421.
46. *Id.* at Sec. 1420.
47. *Id.* at Sec. 1418.
48. *Id.* at Sec. 1422.
49. *Id.* at Sec. 1419.
50. *Id.* at Sec. 1423.
51. *Id.* at Sec. 1418.



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Welcome what's next

Resuscitation of Defective Acknowledgements: The Second Department Comes to the Rescue and Permits the Use of Extrinsic Proof to Save a 30-Year-Old Pre-Nuptial Agreement Waiver of the Right of Election

By Paul S. Forster

Acknowledgements are an important part of Surrogate's Court practice.

Probate petitions, petitions for various forms of Letters of Administration, and all other petitions in the Surrogate's Court in connection with the appointment of fiduciaries, waivers and consents, renunciations, stipulations of settlement, receipts and releases, waivers of the right of election (EPTL 5-1.1-A), and family rights (EPTL 5-3.1), instruments of all stripes, and of course, deeds, all must be acknowledged.

Most important, for the purposes of this article, pre- and post-nuptial agreements must be acknowledged.

Acknowledgements taken within and without New York State must conform substantially with the forms found in Real Property Law §§ 309-a and 309-b, respectively.

In *Galetta v. Galetta*,[1] the Court of Appeals was faced with a pre-nuptial agreement in which the acknowledgement of the husband's signature failed to contain language to the effect that the notary public had confirmed the identity of the person executing the document or that the person was the individual described in the document, as required by Real Property Law §303. The specific phrase omitted was the well-known "to me known and known to me to be" boilerplate.

The Court of Appeals acknowledged that a compelling argument could be made that the door should be left open to curing a deficiency where, as in the case before it, the signatures on the prenuptial agreement were authentic, where there were no claims of fraud or duress, and where the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete. The Court of Appeals reasoned that the deficiency in the language of the acknowledgement may not have arisen from the failure of the notary public to engage in the formalities required when witnessing and acknowledging a signature, but merely from a typographical error as a result of which the certificate simply failed to reflect that fact.

However, in *Galetta*, the Court of Appeals did not reach whether a cure was possible, since it found that the proof of proper execution was insufficient. In his affidavit, the notary public did not state that he actually recalled having acknowledged the husband's signature, nor did he indicate that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and that he had been employed at a particular bank at that time which corroborated the husband's statement concerning the circumstances under which he executed the document. As for the procedures followed, the notary had no independent recollection but maintained that it was his custom and practice to ask and confirm that the person signing the document was the same person named in the document, and he was confident he had done so when witnessing the husband's signature. The Court of Appeals found the notary's averments to be too conclusory to be considered custom and practice evidence.

Now comes *Matter of Koegel*, [2] in which the Second Department took advantage of the opening left by the Court of Appeals in *Galetta*, *supra*, and permitted extrinsic evidence, 30 years after the fact, to validate what otherwise would have been defective acknowledgements.

The decedent William Koegel died in 2014. He was survived by his spouse, Irene Koegel, to whom he was married in 1984. Prior to the marriage, William and Irene executed a pre-nuptial agreement. Among other things, the parties comprehensively agreed to make no claims against the estate of the other. The parties' signatures were "acknowledged" by their respective attorneys. Neither acknowledgement attested to whether William or Irene was known to the respective notaries as required by Real Property Law § 303.

The decedent's Will was admitted to probate, and the decedent's son, John Koegel was appointed executor. Apparently unsatisfied with the substantial provisions made for her by William under his Will and in the form of non-testamentary assets, Irene filed a notice of the exercise of her right of election.

Paul S. Forster is a sole practitioner. He is Chair of the Estate Planning Committee of the Trusts and Estates Law Section. He also is Chair of the Brooklyn Bar Association's Decedent's Estates Section.

The executor, John, thereafter filed a petition to invalidate Irene's notice of election and for a declaration that she was not entitled to an elective share of the decedent's estate. John alleged that Irene was represented by counsel at the time she freely entered into the pre-nuptial agreement, pursuant to which she waived her right to assert an elective share against the decedent's estate. He also alleged that Irene was knowledgeable about the decedent's assets and had reasonable and sufficient time to make inquiries about his finances if she wished to do so prior to entering into the pre-nuptial agreement.

John asserted that Irene accepted the benefits of the pre-nuptial agreement during the marriage without ever raising questions about its validity or fairness. Thus, he claimed, she was barred by the doctrine of laches from contesting the terms of the pre-nuptial agreement. John also contended that Irene received substantial benefits from the decedent under his will as well as non-testamentary assets.

"Pre- and post-nuptial agreements must be acknowledged."

Irene admitted that she signed the agreement but denied that either her signature or the decedent's signature was duly acknowledged in accordance with applicable statutes. Irene asserted that the pre-nuptial agreement was defective, invalid, and unenforceable pursuant to *Galetta*, *supra*, because the acknowledgments omitted language expressly stating that the notaries knew the signers or had ascertained, through some sort of proof, that the signers were the persons described. Irene thereafter moved to dismiss the executor's petition to set aside her notice of election.

In his response, the executor noted that the two attorney notaries submitted affidavits stating that they respectively knew Irene and the William at the time that the agreement was executed and pointed out that Irene, in her answer and supporting affidavit, admitted that she signed the agreement and knew her attorney from his representation of her as the co-executor of her first husband's estate, and had retained him to represent her with respect to the prenuptial agreement. Each attorney stated that the parties did not have to provide any identification because each was known to them, respectively. William's notary was his law partner. The executor claimed that if there had been any technical defect with respect to the acknowledgments, the attorneys' affidavits cured the defects.

The Surrogate's Court denied Irene's motion to dismiss the executor's petition to set aside the notice of election, stating that it found that giving the executor every favorable inference, Irene had failed to sustain her burden of demonstrating that the facts as pleaded did not fit within any recognized legal theory. Irene appealed.

The Second Department held that the Surrogate's Court correctly had found that the Court of Appeals, in *Galetta*, *supra*, had left open the issue of whether a defective acknowledgment could be cured.

In the view of the Second Department, the situation before it was akin to the hypothetical described by the Court of Appeals in *Galetta*, *supra*, in that the notaries, William's law partner and Irene's attorney, actually recalled acknowledging the signatures at issue. The Second Department agreed with the Court of Appeals that in such a situation, the confirmation of the identity of the signer, through an affidavit, was sufficient to cure the defect in the language of the acknowledgement without having to explain how the identity was confirmed. The Second Department noted that in response to the assertion that the prenuptial agreement was invalid as improperly acknowledged, the attorneys' affidavits specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. Consequently, the Second Department held that the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement. Accordingly, the Second Department found that Surrogate's Court properly had denied Irene's motion to dismiss the petition and affirmed.

The case before the Second Department was on a motion on the pleadings, and it clearly affirmed the Surrogate's decision not to dismiss the executor's petition to invalidate the exercise of the right of election. However, although not stated specifically, the language of the decision by the Second Department would appear to have found that the executor had cured the defects in the acknowledgements and granted the executor summary judgment invalidating the exercise of the right of election.

Hopefully, clarification on this point will come from the Surrogate's Court in due course.

In any event, it is hoped that this analysis has shed some light on this complicated subject and be a cautionary tale as to the necessity of carefully examining "boilerplate" language.

Endnotes

1. 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013).
2. N.Y.L.J. Feb. 23, 2018, p. 31 (2d Dep't 2018); also available at 2018 WL 736117.

Proposed New York Trust Code

By Hon. C. Raymond Radigan

In 1990, the New York State Senate and Assembly by joint resolution created the Advisory Committee to the Legislature on the EPTL and SCPA for the purposes of bringing up to date the Bennett Commission's work that created the EPTL and SCPA.

The Committee submitted six reports. The First Report dealt with Articles 4 and 5 of EPTL (the Descent and Distribution Statute and Right of Election); the Second revised the SCPA; the Third proposed the Prudent Investor Rule; the Fourth dealt with revocable and irrevocable trusts; and the Fifth dealt with the Uniform Principal and Income Act. Substantial legislation was enacted implementing much of the recommendations set forth in Reports 1 to 5. As to the Sixth Report, after 22 years, the Committee wound down its work and submitted its final Report wherein it set forth existing New York statutory and case law dealing with testamentary and non-testamentary trusts. It reviewed and compared that with the Uniform Trust Code that was enacted by many states.

The Committee noted that there was no comprehensive statutory treatment of trusts within the EPTL and recommended that the Legislature consider enacting some type of a trust code for New York so that practitioners could find within one statute substantive practice, and some needed additional procedural provisions not covered under the SCPA law dealing with trusts. It advised the Legislature that it delivered its final report to many organizations such as the New York State Bar Association, the City Bar Association, New York Bankers Association, and other like organizations for the purposes of their reviewing the report and submitting comments to the Legislature.

In 2012, the Trusts and Estates Law Section of the New York State Bar Association and two City Bar Committees, the Trusts and Estates and Surrogate's Court Committee and the Estate and Gift Tax Committee, formed the New York Uniform Trust Code Legislative Advisory Group (hereinafter NYUTC-LAG) to review the Sixth Report. Prof. Ira Bloom of Albany Law School and Prof. William LaPiana of New York Law School served as reporters. During a review period of over 4 years, the NYUC-LAG determined that New York already had many of the provisions of the Uniform Trust Code either enacted by statute or followed by case law. However, review of all data available disclosed many areas of difference and room for improvements. An act was therefore proposed that would set forth substantive law for trusts in order for New York to have a centralized statutory code dealing with testamentary and *inter vivos* trusts. To the extent that SCPA does not set forth a practice and procedure dealing with trusts, the proposed code would also fill that gap similar to what was done under Article 5 of the EPTL concerning the right of election and wrongful death proceedings.

Ultimately, the NYUC-LAG determined that New York should have its own Trust Code rather than enact a modified revision of the Uniform Trust Code. (This route is similar to the Bennett Commission's decision not to have New York adopt the Uniform Probate Code but instead enact New York's own law regarding probate.) Professors Bloom and LaPiana prepared a final Report, which embodied the decisions made by the NYUC-LAG, including references to other provisions of the EPTL and SCPA to alert the practitioner to the other substantive and procedural statutory provisions dealing with trusts found in the EPTL and SCPA. These include the Prudent Investor Act under EPTL article 11, New York's Uniform Principal and Income Act under EPTL Article 11-A and SCPA Article 23 which deals with commissions.

In March of 2017, the Executive Committee of the Trusts and Estates Law Section of the New York State Bar Association unanimously approved the final Report submitted by the two Professors and recommended that New York adopt its own New York Trust Code to be enacted within the EPTL under new Article 7-A. In March of 2017, the President of the City Bar Association approved the final Report as affirmative legislation. In November of 2017, the Executive Committee of the New York State Bar Association and its House of Delegates will be asked to approve the recommended legislation.[1] A copy of the final report can be accessed at: www.nysba.org/LegislativeReportFebruary2017.

I hope that the proposed New York Trust Code recommendations will be submitted to the Legislature shortly and we would then have a concise and easy to understand New York Trust Code. In conjunction with the New York Trust Code, Professors Bloom and LaPiana and others are currently working on directed trust legislation, which will allow non-trustees as advisors, committees or protectors to direct trustees regarding such matters as investments and distributions.

C. Raymond Radigan is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.

Proposed Article 7-A deals with debtor protector trusts by continuing 7-3.1. The legislation will contain an exception for Crummey Powers. General creditor rights have always been found in the CPLR and continue unchanged. Article 7-A references the CPLR.

Update on Article 17(A) Proceedings

Previously I wrote articles regarding Article 17(A), which statute originally was requested by parents of Downs Syndrome children and organizations like AHRC. They noted the progress that Surrogate Bennett made in modernizing both the substantive and procedural laws dealing with surrogate's practice. They sought his and others aid to deal with a problem they had concerning guardianship of Downs Syndrome children. In the late 1960s they could either be the natural guardians of their children or seek guardianship under Article 17 during their child's minority. However, once those children reached majority, while the children then were physically mature, in most instances, they found the children to still maintain infant mentality and dreaded having to seek the appointment of committees for their children. Those proceedings were drastic, costly, resulting in the child being branded a lunatic and would lose their civil rights. They found their relief in new legislation that was enacted under a new Article 17(A) of the Surrogate's Court Procedure Act.

Since the enactment of Article 17(A), much has been learned about Downs Syndrome children and of those suffering other disabilities. More opportunities became open for such children giving them new means to participate in society on an active basis.

The Act was later broadened to include different individuals with different disabilities (SCPA Article 1750(a)). As a result and with other developments, Article 17(A) was found in certain instances not to be the route to be taken by certain individuals suffering learning disabilities. While the Act still could be a proper answer for the needs of some, it is believed the Act could be modernized to answer the concerns of those who raise constitutional questions regarding the Act and to provide in certain instances limitations on such guardianships. Where the statute would not be appropriate, guidance should be given regarding alternative means of protecting the interests of those not covered by the statute but suffer various other kinds of learning disabilities. Several suggestions have been submitted to the Legislature and members thereof have introduced several proposals. In a future article, we will bring you up to date concerning the progress of the proposed changes.

Endnote

1. Since November 2017, the proposed New York Trust Code has been revised, and those revisions are being reviewed.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

CONFLICT OF LAWS

California Statute Is a Statute of Limitations and Therefore Is Not Binding on a New York Court

As part of the settlement of the California action of divorce between the decedent and the decedent's spouse, the decedent promised to leave 25 percent of his net estate to the parties' child. The agreement embodying the promise stated it was to be construed and interpreted under California law and was incorporated by reference into the California divorce decree. The decedent's will did not include such disposition and the child prevailed in an action to determine the validity and enforceability of the claim to 25 percent of the decedent's net estate. The executor then brought a legal malpractice action against the executor's attorneys, alleging that their failure to advise the executor that the child's cause of action was barred by two California statutes constituted legal malpractice. The attorneys moved to dismiss the complaint; the Supreme Court granted the motion and on appeal by the executor the Appellate Division affirmed.

The appellate court affirmed the trial court's determination that the California statutes are statutes of limitation which are procedural and therefore do not prevail over the law of the forum. In addition, the classification of a statute as procedural or substantive is a matter for New York courts to decide, although the classification of the statute by the state that enacted it is instructive but not determinative.

The Appellate Division determined that the first California statute, requiring that an agreement by a decedent regarding a distribution from the decedent's estate be enforced within one year after the decedent's death, was a statute of limitations and not a statue of repose and was therefore procedural, a classification also made by the California courts. The statute did not apply to the New York action brought by the decedent's child and could not be the basis of a malpractice claim. The second California statute provides a ten-year statute of limitations for actions based upon judgments. The executor argued that the limitations period ran from the time of the decedent's divorce, an argument the appellate court found to be meritless. The decedent's child began the action to enforce the agreement within ten years of the decedent's death, and therefore even if the statute applied to the proceeding to enforce the claim, that proceeding was timely under the statute. *Nestor v. Putney Twombly Hall & Hirson, LLP*, 153 A.D.3d 840, 61 N.Y.S.3d 248 (2d Dep't 2017).

William P. LaPiana

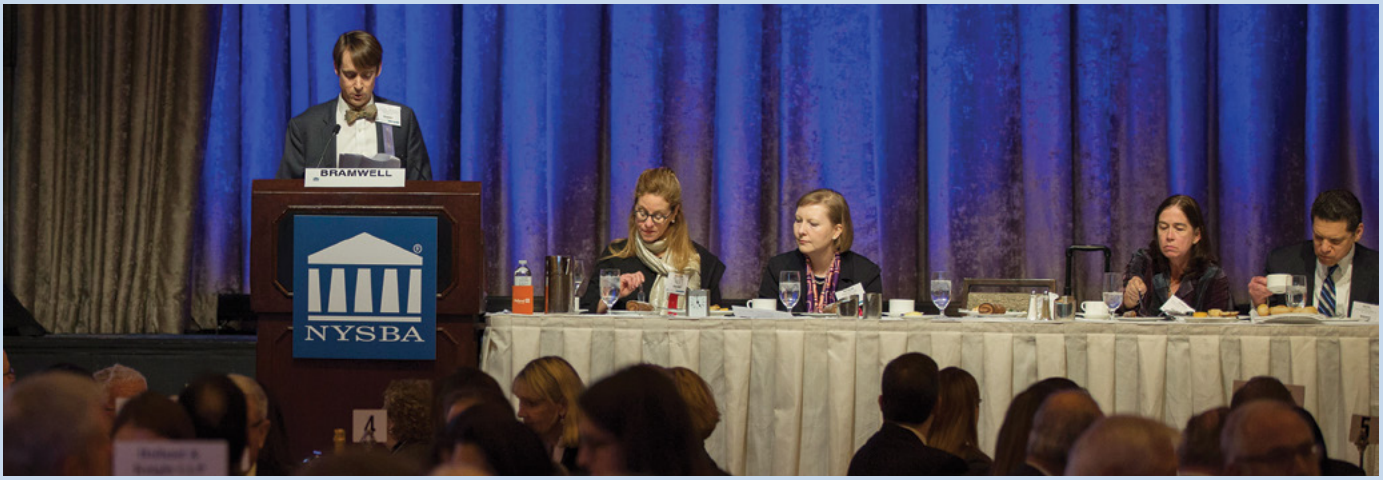
CY PRES

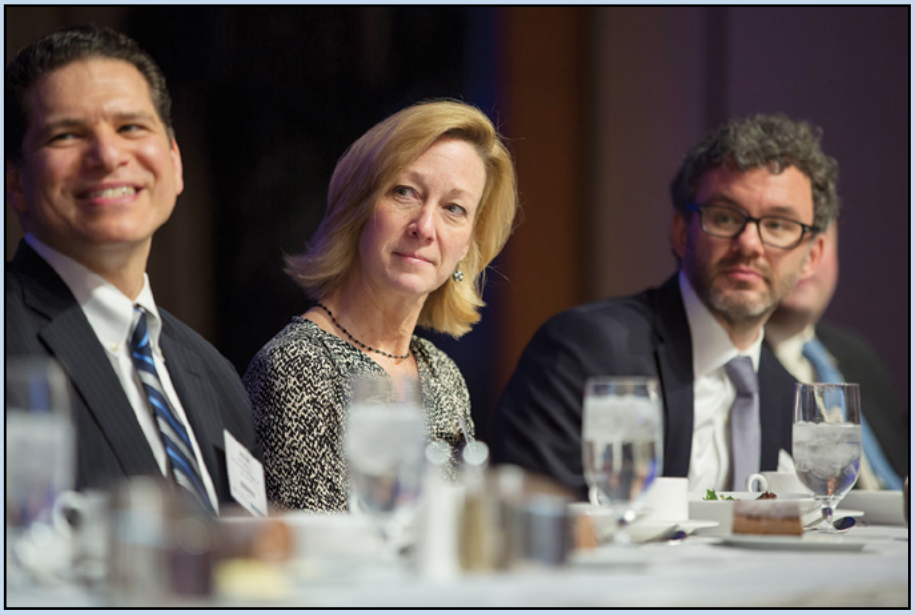
Lack of General Charitable Intent Prevents Application of Cy Pres

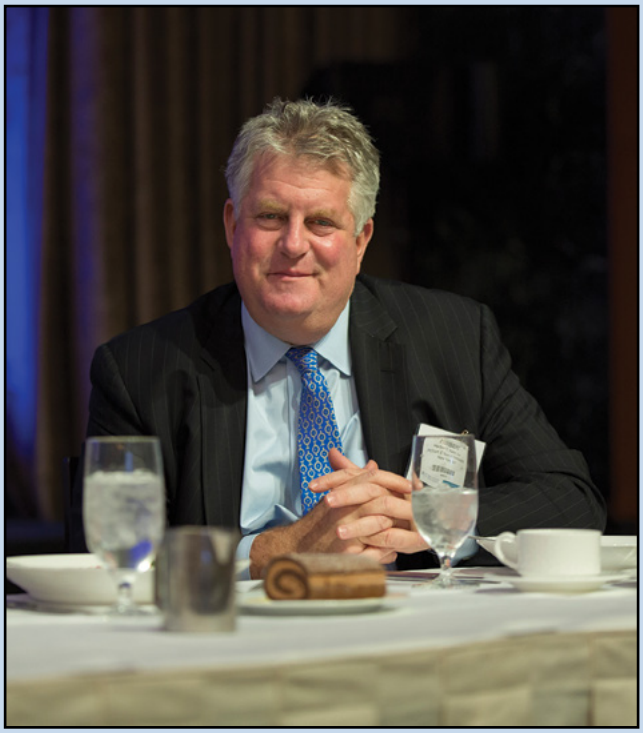
Decedent's revocable trust disposed of the trust property remaining after payment of debts and gifts to designated individuals and to three institutions, including St. Mary's Roman Catholic School, described in the trust agreement as "the school at" its street address. Four years before the decedent's death the school closed and its grounds sold to an unrelated entity. The trustee began a proceeding seeking permission to distribute the school's share of the trust property to the other two beneficiary organizations pursuant to EPTL 2-1.15. The parish that had run the school and the local Roman Catholic diocese answered the petition and argued that the school's share of the trust property should be distributed to them through application of cy pres, the parish's share to be devoted

Continued on page 21

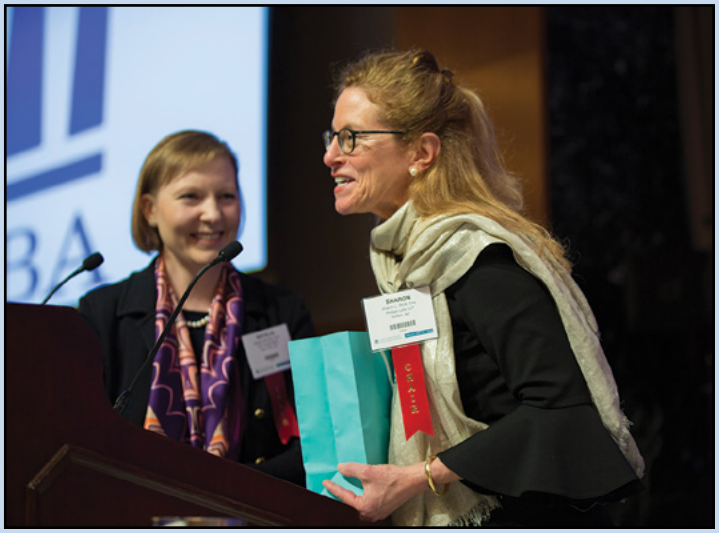
Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. **William P. LaPiana** is Associate Dean for Academic Affairs and Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, Drafting New York Wills and Related Documents (4th ed. Lexis Nexis).

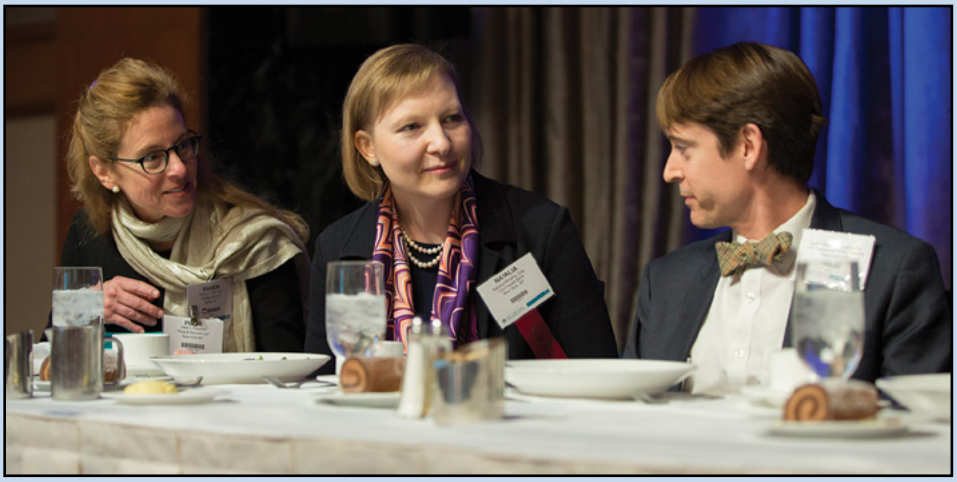






Top, Austin Whaley Bramwell speaks. Above left, Kevin Matz, Jill Choate Beier and David W. Foster listen to the speaker at the podium. Above right, Section Chair Natalia Murphy speaks. At left, Herbert E. Nass. Below right, former Section Chair Sharon L. Wick accepts a gift.





At left, former Section Chair Sharon L. Wick, Phillips Lytle LLP; current chair Natalia Murphy, Citi Private Bank, and Austin Whaley Bramwell, U.S. Department of the Treasury.

Below, a Section member enjoys the luncheon meeting.

At bottom, Mr. Bramwell speaks to the packed meeting room from the podium.

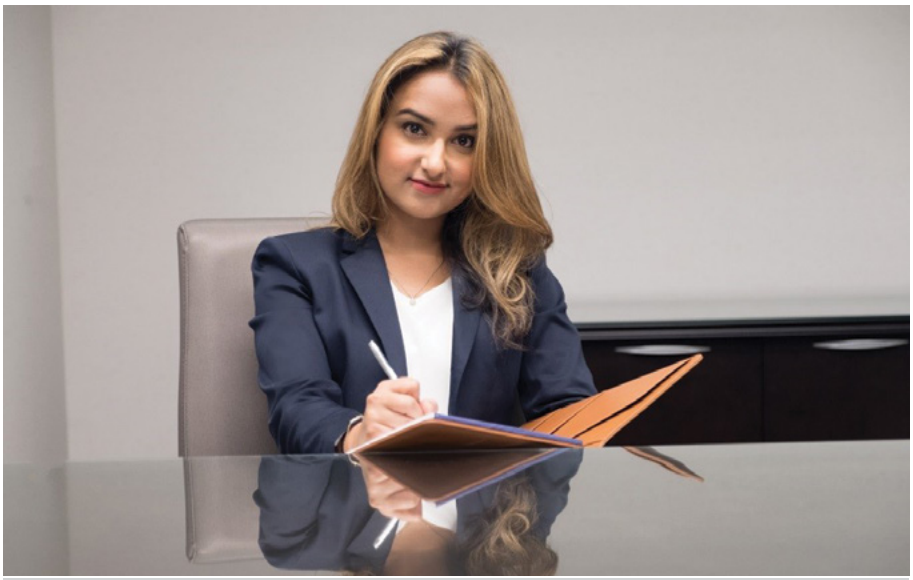
Trusts & Estates Law Section

2018 NYSBA Annual Meeting

The Trusts & Estates Law Section held a luncheon at the 2018 NYSBA Annual Meeting on Wednesday, January 24, 2018 at the New York Hilton Midtown in New York City.

Fellowships Offer Opportunities: An Interview with Imaan Moughal

Imaan Moughal, currently a Trusts and Estates Associate at Cullen & Dykman in Manhattan, was a recipient of the 2015 Trusts and Estates Law Section Fellowship. From law student to working as an attorney on an array of trusts and estates matters, Ms. Moughal shares her insight:



"My time as a judicial fellow was the most beneficial experience in preparing me to become an attorney." — Imaan Moughal

How did you get involved in this area of practice?

After taking a Wills, Trusts and Estates course taught by Professor Akilah Folami at Hofstra Law School, I knew that I wanted to pursue a career in this field of law. I then had the privilege of serving as a Surrogate's Scholar in the Chambers of Hon. Edward W. McCarty, III in Nassau County Surrogate's Court. During my 2L Summer, I received The New York Bar Foundation's Trusts and Estates Law Section Fellowship in the Chambers of the Honorable Peter J. Kelly, Queens County Surrogate, and subsequently had the honor of being hired by the judge after graduation as a judicial clerk.

What was your experience as a Fellow like?

When I was selected to be a New York Bar Foundation fellow in Judge Kelly's chambers, I was delighted at the chance to work for a Surrogate who genuinely wanted me to learn the ins and outs of Surrogate's practice. As a fellow, I shadowed the brilliant clerks in the Probate, Administration, Accounting, Guardianship, and Miscellaneous Departments. Among many other things, they taught me how to file a petition for probate, what an administration proceeding entails, how to create a family tree for a kinship proceeding, and how to review an annual accounting of a fiduciary. I learned how Judge Kelly handles the process calendar, sat in on conferences and hearings, and observed fascinating trials.

What opportunities did your fellowship grant you?

My time as a judicial fellow was the most beneficial experience in preparing me to become an attorney. The transition from fellow to full time judicial clerk after law school was challenging, as I was no longer observing, but rather conducting conferences between attorneys, helping pro se litigants navigate the complexities of Surrogate's Court and drafting complex judicial decisions for the court. My determination to practice in this field has been nurtured by the patience of mentors, including Judge Kelly and the court attorneys at Queens Surrogate's. The fellowship, resulting in my clerkship, was an insightful experience which would not have occurred had it not been for the New York Bar Foundation, for which I am grateful.

Where are you now?

Following my year as a Judicial Clerk with Judge Kelly's chambers, I was offered a position at Cullen & Dykman where I am now practicing, focusing primarily on estate litigation in Kings County Surrogate's Court.

What advice would you give a law student regarding fellowships?

Don't be afraid to pursue them! Have confidence in yourself and your abilities. I didn't know a single estate lawyer until I wanted to become one myself. Make the right connections and pave the way for your career using the mentorship of those who have done it before you. Do not be intimidated or nervous to seek advice and ultimately, be willing to work tirelessly for what you want!

Recent NYS Decisions

Continued from page 16

to its faith formation ministry and the diocese's share to be added to a scholarship fund. The Supreme Court declined to apply cy pres and granted the trustee's petition to distribute the trust property to the other two institutions.

On appeal by the parish and the diocese the Appellate Division affirmed, agreeing with the trial court that the trust did not express a general charitable intent. All the institutions to which the decedent made gifts are located in the City of Oneonta, a fact which taken with the wording of the gift to the school shows that the decedent wished to benefit local institutions and not religious education in general. In addition, the trust agreement says nothing about the decedent's Roman Catholic faith and makes no gifts to the parish that ran the school or to other Roman Catholic institutions. The court acknowledged that the situation might be different were there another parochial school in the Oneonta area, but under the circumstances of the case there is no way to carry out the decedent's charitable intent. One justice dissented, finding that the trust did evidence a general charitable intent. *In re Gurney*, 152 A.D.3d 1122, 59 N.Y.S.3d 587 (3d Dep't 2017).

EMPLOYMENT BENEFITS

Separation Agreements Sufficiently Waive Spousal Rights to QJSA

Decedent and decedent's spouse entered into a separation agreement in which the spouse waived "all right, title and interest" to any pension benefits the decedent had by reason of employment. The couple did not divorce at that time. The decedent then retired and began receiving a pension benefit as a qualified joint and survivor annuity (QJSA) and designated the spouse as beneficiary of the QJSA. The decedent and the spouse then entered into a second separation agreement under which the decedent agreed to pay the spouse $60,000 in exchange for all of the spouse's interest in the decedent's pension and bank accounts as well as waiving maintenance. The following year decedent and the spouse were divorced and the decree incorporated, but did not merge, both separation agreements. Decedent never changed the beneficiary designation on the pension benefit.

Decedent remarried after the divorce and died ten years later survived by the then-spouse. The ex-spouse began to collect the benefit under the QJSA and the surviving spouse as executor of the decedent's estate petitioned the Surrogate's Court for turnover of the pension benefit. The executor moved for summary judgment and the ex-spouse moved for summary judgment dismissing the petition. The Surrogate granted the executor's motion and denied the ex-spouse's motion. On appeal by the ex-spouse the Appellate Division affirmed.

The court relied on *Silber v. Silber*, 99 N.Y.2d 395, 757 N.Y.S.2d 227, 786 N.E.2d 227 (2003) where the Court of Appeals held that ERISA's anti-alienation provisions do not prevent a valid waiver of a beneficiary's interest in a qualified plan so long as the waiver is "explicit, voluntary, and made in good faith." In addition, a separation agreement incorporated but not merged into the divorce decree is a contract and subject to the principles of contract interpretation and construction. Under those principles, the ex-spouse's waivers contained in the separation agreements are sufficiently explicit to waive rights as designated beneficiary of the QJSA. *In re Christie*, 152 A.D.3d 765, 59 N.Y.S.3d 421 (2d Dep't 2017).

LIFE ESTATES

Development Rights Are Real Property but Proposed Sale Was Not Shown to Be Expedient

Life tenant and three of four remainder beneficiaries brought an action pursuant to RPAPL 1602 seeking permission to sell the development rights to the land. The fourth remainder beneficiary opposed the sale. The statute allows the owner of a possessory interest in real property in which there are both possessory and future interests to seek a court order directing that the "real property or a part therefore" may be mortgaged, leased or sold. The Supreme Court dismissed the action because it found that development rights are not real property and that the statute therefore does not apply.

The Appellate Division affirmed, but held that development rights are an interest in real property to which RPAPL 1602 applies because of the statutory definition of real property in General Construction Law § 40 and Court of Appeals precedents (*see Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 [1989]). Nevertheless, the Supreme Court correctly dismissed the action because the plaintiffs failed to show that the proposed sale was expedient. They offered no evidence of a proposed buyer for the development rights, of benefits that would be achieved by a sale, or a showing that the proposed sale was necessary to preserve the property as an asset. *Hahn v. Hagar*, 153 A.D.3d 105, 60 N.Y.S.3d 49 (2d Dep't 2017).

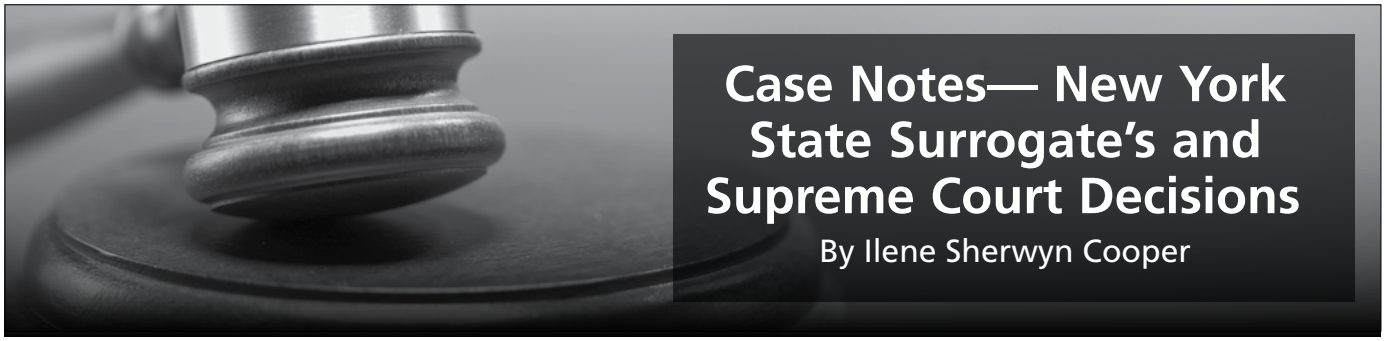
TRUSTEES

Challenge to Validity of Releases Barred by Statute of Limitations and Sufficiency of Releases

Trustee ceased to be trustee of two lifetime and two testamentary trusts in December 2001 and January 2002. At that time the beneficiaries executed releases in favor of the trustee regarding its management of the trusts. The trusts terminated in 2008, and in 2009 the beneficiaries executed releases in favor of the successor trustee. In December 2013, the beneficiaries commenced four proceedings seeking to compel judicial accountings by both trustees for their respective periods of trusteeship. The Surrogate dismissed the petitions, agreeing with the trustees that the statute of limitations barred the action against the original trustee and that the releases barred actions against both the original and successor trustees.

The Appellate Division affirmed the decrees dismissing the petitions. The Surrogate erred in dismissing the petitions against the original trustee on the grounds that the claims were barred by the releases. The original trustee did not "affirmatively demonstrate" that all of the petitioners who signed the releases were fully aware of effects of the releases. The court noted that the petitioners were not represented by counsel when the releases were executed. The Surrogate, however, correctly determined that the actions were barred by the six-year statute of limitations, which began to run when the successor trustee took office in December 2001 and January 2002. The statutory period therefore ran several years before the petitions were filed in 2013.

The action against the successor trustee was barred by the releases that were signed by the beneficiaries upon advice of counsel and after negotiations. Allegations that the successor trustee did not provide full disclosure and that the terms of the releases themselves were "improper" were "without merit." *In re Lee*, 153 A.D.3d 831, 61 N.Y.S.3d 555 (2d Dep't 2017).



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

By Ilene Sherwyn Cooper

Audio Recordings

In *Vrlaku v. Plaza Construction Corp.*, the court examined the admissibility of an audio digital recording of plaintiff's co-worker made by an employee of a firm, who was hired by the defendant's insurance carrier to investigate an accident for which the defendant was being sued. A copy of the recording was given to defense counsel and reduced to written questions by someone in defense counsel's office for use in cross-examination. Thereafter, at the trial of the matter, the investigator who made the recording was called to testify as a defense witness. He was asked to authenticate the recording and its contents. He explained that he recorded the conversation with a digital recorder and stored it on a memory card, which he then delivered to his firm, where the contents were stored on the firm's server. The audio recording was then copied from the firm's server onto a disc. Plaintiff objected to the disc prepared by the investigator being introduced into evidence.

The court noted that the admissibility of the digital recording was governed by the provisions of CPLR 4518 (Business Records) and 4539 (Reproductions of original), as well as State Technology Law §§ 302 and 306. In sum, these sections provide that in order for a recording or a transcript prepared from the recording to be admissible into evidence, the recording or transcript must be properly authenticated. The court found that because the investigator, a participant in and the maker of the digital recording, testified that the recording was a fair and accurate record of the conversation, the recording was presumably authenticated to a sufficient degree to be admissible. Nevertheless, the court observed that the inquiry did not stop there, as compliance with the provisions of CPLR 4539 and the State Technology Law was also required. In an attempt to achieve that compliance, the defendant provided a certification by the operations manager of the investigation firm stating that the disc was a complete copy of the recorded audio statement uploaded by its employee to its server, and maintained by the firm on its computer in digital format. The certification further asserted that the audio recording was copied from the server onto a disc by one of its specialists, and that the audio statement was "obtained, prepared and maintained in the regular course of business of the firm, and it was in the regular course of business of the firm to maintain the recorded audio statement."

Despite the foregoing, the court opined that the certification failed to comply with the dictates of the statutes, which required that the certification state whether the record keeping system of the firm permitted "additions, deletions or changes without leaving a record of such additions, deletions or changes," and address "the manner or method by which tampering or degradations of the reproduced record is prevented." Although the defendant questioned the applicability of CPLR 4539 to the subject digital recordings, relying upon the opinion of the Court of Appeals in *People v. Kangas*, 28 N.Y.3d 984, 41 N.Y.S.3d 189 (2016), the court found that the Court's interpretation of the statute was too narrow, and contradicted the provisions of the State Technology Law. Ultimately, however, in order to resolve the issue, the court relied on the provisions of CPLR 4518, which essentially eliminated the need to question the storage, maintenance and retrieval of the electronic record if the testimony of the participant in the conversation as to its accuracy was accepted as true. The court concluded that any problems with certification would go to the weight to be accorded the recording and not to its admissibility.

However, although the investigator testified that the recording was an accurate record of his conversation with plaintiff's co-worker, the court found the many discrepancies in the recording, including the fact that it did not reflect the complete conversation between the parties, and that it failed to indicate the date and time it was made, and contained an inexplicable clicking sound and period of silence, precluded its admission into evidence and its use for impeachment purposes.

Vrlaku v. Plaza Construction Corp., N.Y.L.J., Sept. 11, 2017, p. 28 (Sup. Ct., Richmond Co.).

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

Commissions and Surcharge

In *In re LiGreci*, the court also denied commissions to the former trustee, finding that he had failed to properly marshal the assets of the estate, and was unable to provide the bank statements reflective of the assets listed on Schedules A, C and H of his accounting. Further, although the court granted the former trustee his legal fees for services rendered during his stewardship, fees were denied thereafter on the grounds that he was not serving as trustee at the time. Finally, the court ordered the former trustee to pay the objectant's legal fees, noting that a trustee who unsuccessfully resists a removal proceeding may be compelled to pay costs personally.

In re LiGreci, N.Y.L.J., March 23, 2017, p. 30, col. 1 (Sur. Ct., Richmond Co.).

Motion to Strike

In *In re Dziubkowski*, the court conditionally granted the objectant's motion to strike, finding that the petitioner had provided largely unresponsive answers to movant's pre-objection discovery demands, and that the attorney-draftsman of the will was uncooperative during the course of his SCPA 1404 examination. The court noted that while it was unclear whether proponent was willfully refusing to provide the requested documents, it granted objectant's motion to the extent of directing proponent to produce the requested documents, or risk the striking of the probate petition upon a failure to comply.

In re Dziubkowski, N.Y.L.J., June 2, 2017, p. 42, col. 1 (Sur. Ct., Kings Co.).

Motion to Strike

In *In re Alston,* the court struck the objections by the decedent's common law spouse to the issuance of letters of administration to the decedent's son. The record revealed that the objectant had repeatedly failed to comply with stipulations and court orders directing discovery. Although the objectant claimed compliance, it appeared that her responses were unorganized, unindexed, and contained objections despite her agreement to respond without objections. The court found that objectant's responses were insufficient, failed to comply with CPLR requirements, and untimely.

In re Alston, N.Y.L.J., July 28, 2017, p. 38 (Sur. Ct., Kings Co.).

Receipt and Release

Before the Court in *In re Spacek,* was an appeal by a beneficiary of the decedent's estate from an Order of the Surrogate's Court, Nassau County (McCarty III, S.), which denied her motion to set aside a release she had signed discharging the executor.

The record revealed that the decedent's will had directed that his residuary estate be divided equally among six specified persons, including the executor and the appellant. Subsequent to the admission of the will to probate and the issuance of letters testamentary, the executor, through her attorney, sent an agreement, in lieu of a formal accounting and judicial settlement, to the estate beneficiaries. The agreement, amongst other things, released the executor from any claims relating to her acts as fiduciary. The estate's tax return and other financial documents were annexed to the agreement. Though the agreement was not signed by all of the estate beneficiaries, the appellant signed the document containing the release.

Thereafter, when the executor petitioned for the judicial settlement of her account, the appellant filed objections, and sought to set aside her release, claiming that she was not aware that the executor was the recipient of several joint bank accounts that had been established by the decedent, and thus was going to ultimately receive a larger share of the estate assets than the other residuary beneficiaries. The Surrogate's Court denied the motion and the objectant appealed.

In affirming the Order of the Surrogate's Court, the Appellate Division opined that while formal accountings of an estate are generally done in the context of a judicial proceeding, a fiduciary may also account informally and thereby obtain receipts and releases from all interested parties.[1] "Such an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree."[2] To that extent, if a fiduciary renders an informal accounting to the estate beneficiaries, and provides them with full disclosure, the beneficiaries must either object to the account and refuse an informal discharge of the fiduciary at that time, or be barred from doing so at a later date. On the other hand, where the validity of a release is challenged, "a fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all of its particulars."[3]

Within this context, the court found that the documents provided by the executor to the appellant, along with the release, made the beneficiaries aware of all the distributions that would be made from the estate. Moreover, the Court noted that the tax return, which was included in the documentation, revealed that the executor would receive a greater share of the estate as a result of the subject bank accounts she held jointly with the decedent.

Accordingly, based upon the foregoing, the court concluded that the Surrogate's Court correctly denied the appellant's motion to set aside the release.

In re Spacek, 155 A.D.3d 747, 64 N.Y.S.3d 65 (2d Dep't 2017).

Removal of Administrator

In *In re Walsh*, the court granted the fiduciary's motion to dismiss a proceeding to remove her as administrator. The fiduciary was the decedent's former spouse. The petitioner, the decedent's brother, sought her removal pursuant to the provisions of SCPA 711(4), claiming that she failed to list the cost of the decedent's funeral as a debt of the estate. In addition, petitioner claimed that the administrator had failed to inform the court of the terms of her separation agreement with the decedent, by which each party waived the right, *inter alia*, to serve as administrator or executor of the other's estate.

The court held that the administrator was appointed fiduciary by virtue of her status as guardian of the infant child of her marriage to the decedent, and not as a result of her relationship with the decedent. Thus, the court concluded that the fiduciary's appointment was not violative of the terms of her separation agreement with the decedent, which only addressed the rights of the parties based upon their spousal status, and her failure to inform the court of same did not constitute a false suggestion of a material fact warranting her removal

In re Walsh, N.Y.L.J., Aug. 29, 2017, p.31 (Sur. Ct., Albany Co.).

Subpoena

In *Warshaw v. Steven, Mendolow, Konigsberg, Wolf & Co.*, the court addressed standing of a party to move to quash a subpoena served on a non-party. Before the court was a securities action in which the defendant and the non-party both moved to quash the subpoena duces tecum served on the non-party, or alternatively, for a protective order. In the face of a challenge to the defendant's ability to bring the motion, the court held that a motion to quash may be made on behalf of a non-party witness, by the witness or his counsel, or by one of the party's or a party's lawyer.

Warshaw v. Steven, Mendolow, Konigsberg, Wolf & Co., 2012 NY Slip Op. 33759 (U) (Sup. Ct., N.Y. Co.).

Spoliation

In *Khatabi v. Bonura,* the court held that spoliation sanctions were not warranted, even assuming that defendants owed a duty to preserve the evidence, since plaintiff had failed to show a culpable state of mind on defendants' part, relevance of the destroyed or lost evidence, and that he was prejudiced by the loss or destruction.

Khatabi v. Bonura, 2017 U.S. Dist. LEXIS 61921 (S.D.N.Y., Apr. 21, 2017).

Status

Before the court in *In re Aquino* was a motion for summary judgment by the purported spouse of the decedent determining, *inter alia*, that she and the decedent were not divorced at the time of the decedent's death. The application was opposed by the decedent's son, who had petitioned the court for revocation of the spouse's appointment as administrator of the decedent's estate and sanctions. Significantly, in support of his petition, the son submitted a photocopy of a purported "Pronouncement of Divorce" from the Dominican Republic. Additionally, the son submitted two sworn statements from witnesses alleging that the decedent traveled to the Dominican Republic for the sole purpose of obtaining a divorce. The son also alleged that that the spouse was disqualified from serving as fiduciary due to her failure to include four distributees of the decedent and possible causes of action as an estate asset.

In support of her motion, the spouse submitted an affidavit that she and the decedent had been married for over 25 years and they never received a legal separation or divorce in any jurisdiction prior to the decedent's death. Additionally, the spouse submitted three statements from a Dominican Court, each of which contained an apostile, through which she questioned the validity of the divorce document filed by the son. Further, the spouse annexed the decedent's death certificate, in which the son, the informant, indicated that the decedent and the spouse were married on the date of his death. Finally, she alleged that the purported divorce decree was invalid on its face as it made no mention of service of a summons upon the spouse, and failed to indicate her domicile as New York.

In opposition to the motion, the decedent's son claimed that the death certificate submitted by the spouse was fraudulent, and annexed a copy of a certified judgment of divorce, together with an apostile and a translation, indicating that the decedent and his spouse were divorced. Further, the son maintained that the spouse's petition for letters of administration contained false statements.

The court opined that while courts of New York will generally accord recognition to judgments rendered in a foreign country under the doctrine of comity, a foreign divorce decree obtained on the ex parte petition of a spouse present but not domiciled in the foreign jurisdiction will not be recognized in New York where the other spouse does not appear and is not served with process. In view thereof, and more specifically, the affidavit of the spouse indicating that she had never traveled to the Dominican Republic, and was unaware of any divorce proceedings, the lack of proof that the spouse was served personally with process, and the son's own evidence indicating that the decedent traveled to the Dominican Republic solely to obtain a divorce, the court held that the decedent and his spouse were not divorced under the laws of New York at the time of the decedent's death, and granted summary judgment on this issue in the spouse's favor.

As to the issue of whether the petition for letters of administration contained false information, the court concluded that there were questions of fact as to the identity of the decedent's distributees, and whether the spouse breached her fiduciary duty in failing to include them as well as possible causes of action.

In re Aquino, N.Y.L.J., Sept. 11, 2017, p. 26 (Sur. Ct., Bronx Co.).

Summary Judgment

In *Accounting Proceeding The Schweiger Family 2013 Irrevocable Trust,* the court granted partial summary judgment to the objectants following SCPA 2211 examinations, based upon the petitioners' admitted distribution of trust funds to non-beneficiaries. The trustees of the trust were two of the decedent's daughters. The trust terms required that during the life of the settlor, the trustees, in their sole discretion, could pay the net income and/or principal of the trust to or for the benefit of the settlor's beneficiaries. The trust did not require equal principal distributions, but did state that any distributions made were to be considered as advancements in determining the beneficiary's share of the estate, unless waived in writing by the remaining beneficiaries. The trustees had no authority to invade principal for the benefit of the settlor or his spouse. Upon the death of the settlor, he was given the power to appoint the principal of the trust, which he did in favor of his children equally.

In support of their motion for summary judgment, the objectants alleged, *inter alia*, that the petitioners admitted making trust distributions to non-beneficiaries, including their children and the husband of one of the trustees, as well as other distributions to themselves and the settlor, in violation of the terms of the trust. In opposition to the motion, the petitioners alleged that the distributions from the trust were proper, that they were not properly advised by the attorney-draftsman of the instrument as to their duties as trustees, and that many of the payments/distributions in contention were made at the direction of the decedent/settlor.

The court found that the trustees breached their duty of undivided loyalty and placed themselves in a position of conflict with the other trust beneficiaries when they knowingly made distributions to individuals that were not beneficiaries. Moreover, the court concluded that the petitioners had failed to deduct the distributions to themselves as advancements against their respective shares of the estate as required by the trust instrument. Finally, the court found petitioners' argument that some of the distributions were made at the request of the decedent to be irrelevant.

In view of the foregoing, the court found sufficient evidence in the record to warrant denying commissions to the petitioners, and to surcharge them for their breach. More specifically, the court opined that the act of intentionally making distributions to individuals who were not beneficiaries was a basis in itself to deny commissions. Further, the petitioners admitted self-dealing in failing to set off distributions to themselves as advancements constituted a wholesale disregard of the trust terms, or gross negligence in failing to seek professional advice in understanding their duties and responsibilities.

Accounting Proceeding The Schweiger Family 2013 Irrevocable Trust, N.Y.L.J., Oct. 2, 2017, p. 33 (Sur. Ct., Suffolk Co.).

Summary Judgment

In *In re Brill,* the court granted partial summary judgment to the objectant, charity, the sole residuary beneficiary of the testamentary trust created under the decedent's will (as well as the Attorney General's Office, which joined in the motion) and surcharged the executor, on the grounds that the executor had failed to timely distribute the estate assets in a timely manner, and thus breached her fiduciary duty to minimize the yearly fiduciary income taxes of the estate and properly manage estate assets. Notably, the court found that the objectant's contention that there was a breach of fiduciary duty to minimize estate taxes due to the executor's failure to seek postmortem estate planning, *i.e.*, a reformation of the will, was based on a speculative assumption that a court would have approved the reformation.

Specifically, the court found that had the estate been timely distributed following the death of the income beneficiary of the trust, there would have been no need to file fiduciary income tax returns, and no fiduciary income taxes would have been payable since the only beneficiary of the estate at that point in time was a charity. The court rejected the executor's defense that she had relied on the advice of professionals, finding that she had abdicated all of her fiduciary functions to them without questioning their actions. She never asked them for advice, and indeed, counsel admittedly never provided advice to her.

In re Brill, N.Y.L.J., Aug. 17, 2017, p. 23, col. 2 (Sur. Ct., Bronx Co.).

Suspension of Letters

In *In re Linton,* the court suspended the preliminary letters testamentary issued to the nominated co-executor, upon application of a preliminary co-executor, who alleged that his co-fiduciary was engaged in self-dealing and fraudulent transactions at the estate's expense. The record revealed that the respondent was a 25 percent owner, officer, and employee of a corporation in which the estate was a creditor, and that he directed the company not to repay the indebtedness despite a demand by the petitioner. The court found that the respondent's conduct raised serious concerns regarding his impartiality, and unequivocally demonstrated that he placed the interests of the company above those of the estate.

In re Linton, N.Y.L.J., May 19, 2017, p. 36 (Sur. Ct., N.Y. Co.).

Suspension of Letters

During the course of a contested accounting proceeding, the court, in *In re Kemper*, issued an order immediately suspending the executor of the estate without a hearing. Significantly, the court noted that while it is generally not inclined to remove a fiduciary during the pendency of an accounting, it found "numerous and troubling" circumstances in the record demonstrating that the fiduciary failed to comprehend his duties.

Specifically, the court found that the executor had failed to indicate that he was a convicted felon at the time he claimed to be qualified to act as fiduciary. Although he had been issued a Certificate of Relief from Disabilities, the court held that it did not prevent a judicial authority from exercising its discretion to "suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege." The court opined that pursuant to SCPA 711(4), a court may remove or suspend a fiduciary based upon a false suggestion of a material fact, including misstatements made in good faith, or lodged in disingenuousness or lack of candor. In view thereof, the court concluded that the failure of the executor to advise the court of his felony conviction at the time he petitioned for his appointment fell within the scope of the statute.

In addition to the foregoing, the court found that actions taken during the administration of the estate resulted in the imposition of tax penalties and interest, the necessity to "claw back" distributions previously made, and most particularly egregious, distributions to one whose status as the decedent's common law spouse and entitlement to any share of the decedent's estate was in litigation. Accordingly, the court suspended the executor, and appointed co-temporary administrators cta of the estate to act in his place and stead.

In re Kemper, N.Y.L.J., Aug. 24, 2017, p. 26 (Sur. Ct., Suffolk Co.).

Waiver and Consent

In *In re Weiss*, the Surrogate's Court, New York County, was confronted with a motion by a paternal first cousin of the decedent to set aside his waiver and

consent to probate. The record revealed that the decedent died with a will that left his entire estate to a non-relative. His sole surviving heirs were two paternal first cousins, one of whom had signed the subject waiver and consent. The waiver form was sent to the movant by petitioner's counsel accompanied by a copy of the propounded instrument. Though he signed the document, he subsequently claimed that he did so without the advice of independent counsel, and without understanding its legal ramifications. He further claimed that had he known that he would be barred from conducting pretrial discovery upon executing the waiver, he never would have done so.

The court observed that a party seeking to set aside a waiver and consent must make a showing of good cause, that is, circumstances such as fraud, collusion, mistake or accident. Additionally, a party seeking such relief must demonstrate a reasonable probability of success on the merits, and that the parties can be returned to the status quo. Nevertheless, where a probate decree has not yet issued, a more relaxed standard may apply in order to avoid injustice.[4]

The court held that the fact that the movant did not seek legal guidance before signing the waiver did not, by itself, warrant setting it aside. Indeed, the court noted that a party is charged with knowledge of the contents of a waiver as well as its legal effects, and thus, a failure to understand or appreciate the significance of a waiver does not constitute sufficient cause to permit its withdrawal. Importantly, however, the record revealed that while proponent's counsel had no obligation to explain the waiver to the movant, he nevertheless included a letter to the movant, with the waiver form, clearly explaining its legal ramifications. Further, the court observed that the movant did not allege that he was suffering from a legal disability at the time the waiver was signed, or that it had been procured by fraud or misrepresentation.

Finally, despite allegations by the movant that, *inter alia*, a lawyer was not present when the will was executed, that the identity of the draftsperson was unknown, that the decedent suffered from physical and mental impairments as evidenced by his squalid living conditions, and that the decedent may have been unduly influenced by the sole beneficiary, the court concluded that these claims failed to demonstrate that the movant had potentially meritorious grounds for objecting to probate.

Accordingly, the court held that sufficient grounds had not been established to set aside the waiver, and the motion was denied.

In re Weiss, N.Y.L.J., July 13, 2017, p. 22, col. 3 (Sur. Ct., N.Y. Co.).

Endnotes

1. *See In re Lifgren,* 36 A.D.3d 1042, 1044, 827 N.Y.S.2d 753 (3d Dep't 2007), quoting *In re Hunter,* 4 NY3d 260, 267, n.3 (2005).
2. *Id.*
3. *See In re Lifgren*, *supra*, quoting *Birnbaum v. Birnbaum,* 117 A.D.2d 409, 416, 503 N.Y.S.2d 451 (4th Dep't 1986).
4. *See In re Frutiger,* 29 NY2d 143, 150, 324 N.Y.S.2d 36 (1971); *In re Morse,* N.Y.L.J., May 19, 1998, p.25, col. 5 (Sur. Ct., N.Y. Co.).

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Lack of Personal Jurisdiction

Appellant Jane Taylor sued her brother, Appellee James Moskow, in Florida state court for an accounting of a trust over which Moskow, at one point, was the trustee. Moskow removed the case to federal court, and the court dismissed the case twice for lack of personal jurisdiction. In the third and final iteration of the complaint, Taylor brought claims for an accounting and breach of fiduciary duty, and she attempted to join two defendants. The trial court denied her joinder and again dismissed the action. The appellate court affirmed. The appellate court held that the denial of her joinder was not an abuse of discretion because the joinder was made well after the court's scheduling order permitted joinder. The appellate court also held that the dismissal for lack of personal jurisdiction was appropriate for several reasons. Among them was the fact that it was not alleged that the defendant committed a tortious act within the state of Florida because the trust's situs was in Massachusetts when he was the trustee. Moreover, the mere fact that Moskow was also a defendant in the probate action, and asserted affirmative claims therein, did not give the Florida courts personal jurisdiction over him in another lawsuit altogether, such as this one.

Taylor v. Moskow, 2017 WL 4899742 (11th Cir. Oct. 31, 2017) (not yet final).

Notice of Summary Administration

Decedent's neighbor, Jo Ann Doll, petitioned for summary administration of decedent's estate. The petition indicated that Rosalie Wolf, a friend of the decedent, was a beneficiary of the estate, and the certificate of service showed that Wolf received a copy of the petition. In Florida, summary administration of an estate allows for a simplified probate when "the value of the entire estate subject to administration in this state, less the value of property exempt from claims of creditors, does not exceed $75,000 or that the decedent has been dead for more than 2 years." Section 735.201, Fla. Stat. The statutes also provide that "formal notice of the petition must be served on a beneficiary not joining the petition." Section 735.203(1), Fla. Stat. Wolf filed a civil action against Doll alleging, among other things, tortious interference with an expectancy. That claim, however, may only be brought as a collateral action if the claimant was precluded from

Jonathan A. Galler

asserting the claim in probate. Here, Wolf claimed that she was precluded from asserting the claim in probate by virtue of the fact that she had not received "formal notice" of the summary administration, which is a specific type and manner of service under the Florida Probate Rules (typically, by certified mail). The appellate court held that the trial court was required to resolve the issue of how Wolf was served, and then determine, based on that, whether she had been precluded from participation in the probate proceedings.

Wolf v. Doll, 2017 WL 5479672 (Fla. 4th DCA Nov. 15, 2017) (not yet final).

Delayed Discovery in Undue Influence Cases

Gloria and Louis Flanzer created an irrevocable philanthropic trust in 2005. Louis died in 2013, and Gloria died in 2015. Eight months after Gloria's death, Jan Flanzer, their daughter, brought an undue influence action. The action, which called for the revocation of the trust, alleged that the trustees had exerted pressure on the couple and exploited their confidential relationship with Gloria to eliminate Jan from her estate plan. The trial court dismissed the action because it was untimely. The appellate court, though, reversed. The Florida Trust Code provides that an action to contest the validity of a revocable trust may not be *commenced* until it becomes irrevocable. Section 736.0207(2), Fla. Stat. However, because the Code does not specify a limitations period in which to challenge a trust, the appellate court referred to chapter 95 of the Florida Statutes for the applicable statute of limitations. The court held that undue influence actions, which are a species of fraud, are subject to a four year statute of limitations and, more

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important, to the delayed discovery doctrine. This means that the time period commences when the claimant discovered, or should have discovered, with the exercise of due diligence, the fraud on which the action is based.

Flanzer v. Kaplan, 2017 WL 5759041 (Fla. 2d DCA Nov. 29, 2017) (not yet final).

Definition of "Interested Person"

Antonio Hernadez, Sr. appealed the probate court's order finding that he lacked standing to object to several court orders authorizing the payment of attorney's fees from his mother's guardianship estate, made to his brother Eusebio Hernandez, the ward's guardian. The issue here was whether appellant met the definition of an "interested person," which is an issue applicable to probate cases as well. The guardian brought a lawsuit against appellant for undue influence under a particularly egregious set of facts. It alleged that appellant failed to care for his mother while living in her house and allowed her to fall into a state of physical and mental decline. Appellant contended that because he was an active participant in the guardianship proceeding and filed a notice and request for copies, he was an "interested person" and was entitled to participate in the proceedings requesting fees. But the trial court and appellate court found that this was not enough. The court must consider the nature of the proceedings and, here, the trial court found that the fees were necessitated by appellant's own objections to the guardianship proceedings and, therefore, he should not have standing to participate. In a spirited dissent, though, the dissenting judge argued that the decision to preclude appellant's participation was premature because it had not yet been decided that his objections lacked any merit.

Hernandez v. Hernandez, 2017 WL 4619009 (Fla. 3d DCA Sept. 26, 2017) (not yet final).

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The Trusts and Estates Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

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The Newsletter welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word. Please include biographical information.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

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