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# Trusts and Estates Law Section Newsletter

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of the New York State Bar Association


## In This Issue

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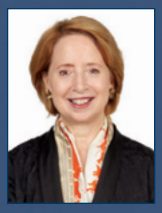

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# Message from the Chair

*Just an old sweet song keeps Georgia on my mind.* We recently concluded our Section's successful Spring Meeting held at the beautiful Sea Island Resort at Sea Island, Georgia, and I think we can all better appreciate that lyric sung by the legendary Ray Charles!

Kudos to program chair Michael S. Schwartz for putting together a wonderful program for the meeting and to Ilene Cooper and Darcy Katris for doing a terrific job with the sponsorships. Among the practical topics covered by our line-up of dynamic speakers were popular estate freeze techniques, estate planning with directed trusts and dynasty trusts outside of New York, creative strategies on modifying existing trusts, and estate planning for art collectors. Also, in an engaging and forward-looking talk, Jennifer A. Beckage discussed the ethical responsibility of trusts and estates practitioners to keep up with evolving technologies, and the many potential risks and pitfalls that accompany the use of these technologies, including data security and privacy concerns.

We were privileged, too, to be joined by Surrogate Stephen W. Cass of Chautauqua County, Surrogate John M. Czygier of Suffolk County, and Surrogate Peter J. Kelly of Queens County. During a panel discussion moderated by Joseph La Ferlita, the Surrogates looked at issues affecting judicial reformation of tax clauses—a topic especially relevant today with changes in the federal tax landscape. And Sharon Stern Gerstman, President of the NYSBA, kindly took to the podium and remarked upon our Section's legislative activities this year. We are currently propounding 13 legislative proposals for consideration by the New York State Legislature and our proposal to amend EPTL 5-1.1-A(d)(1) has been passed in both the Assembly and the Senate. We have high hopes that it will become law this year and are gratified that we are gaining legislative traction on some of the other proposals, as well.

In other encouraging news, our Section had a trio of well-attended member events over the past few months. On March 13, Ian W. MacLean, First District Representative, hosted the Third Annual Winter Reception at Salvation Taco, a Mexican eatery in mid-town New York City; it was a sold-out event with several local Surrogate judges in attendance. Then, on April 9, our Section's Diversity Committee, jointly with the Elder Law and Special Needs Section's Diversity Committee, held a networking event at Winnie's Jazz Bar in New York City. And, on June 7, Ami S. Longstreet, our Fifth District Representative, hosted a Judiciary Appreciation and Networking Reception to honor the Supreme Court Justices and Surrogate Court Judges of the Fifth and Sixth Judicial Districts, a joint event with the Torts, Insurance, and Compensation Law Section. Thank you to all who helped organize these events, as well as to those who were in attendance.

*I'm in a New York state of mind.* With a nod to the Piano Man for that lyric, I'm happy to report that we are gearing up for our Section's 2018 Fall Meeting to be held at the Sagamore Resort in Bolton Landing, New York, on October 18-19, 2018. Co-Chairs Carl T. Baker of FitzGerald Morris Baker Firth, P.C., and Katie Lynagh of Milbank, Tweed, Hadley & McCloy LLP promise to entertain and edify us with a line-up of speakers focusing on estate planning outside of purely tax considerations. Please mark your calendars, *take a holiday from the neighborhood*, and join us at the lovely Sagamore come this fall.

If you'll indulge me, I'll sign off with a lyric from a Gershwin song apropos of our current season. S*ummertime and the livin is easy.* While that may be just a case of wishful thinking (it usually is, at least for me), my hope is that it rings a little bit true for all of you these next few months. Enjoy the summer and I look forward to reconvening in the fall!

**Natalia Murphy**

# Message from the Editor

In this edition of our *Newsletter*, Peter B. Skelos, Lesli P. Hiller, and Robert M. Harper provide an overview of New York's recently enacted digital asset legislation and case law thereunder; David A. Weintraub sets forth his analysis of FINRA's new Rule 4512 and its potential effects; and Brian P. Corrigan examines the interplay between the claims of a decedent's first spouse under a separation agreement, and the elective share to which his or her surviving spouse is entitled.

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. The deadline for submissions for our next edition is September 7, 2018. Please feel free to contact me directly with any questions about potential articles.

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# The Digital Footprint After Death: Who Wears the Shoes?

By Peter B. Skelos, Lesli P. Hiller and Robert M. Harper

Email, Facebook, LinkedIn, Twitter, Instagram, Snapchat, Tumbler, online banking, online shopping, and other forms of electronic communications, comprise our digital footprint. They are seemingly ubiquitous and omnipresent in the life of our business, social, and personal affairs. But, on death, who has the right of access to a decedent's digital footprint? More importantly, what is the scope of that access? Can a fiduciary figuratively step into the decedent's shoes and gain full access to the decedent's digital assets and electronic communications?

The digital world has been hurtling through space at the speed of light. The law, however, until recently, has been moving like the Pony Express and is quite a few steps behind when it comes to addressing access to a decedent's digital assets. This article addresses New York's recently enacted digital asset legislation, Article 13-A of the Estates, Powers and Trusts Law (hereinafter "Article 13-A"), as well as the decision in *Matter of Serrano*, 56 Misc 3d 497 (Sur Ct, New York County, 2017). which appears to be the first reported case in New York to examine the nature and extent of a fiduciary's access to the "digital assets" and "electronic communications" of a decedent. See generally EPTL § 13-A-1 for the statutory definitions of the quoted terms referenced in this article.

In 2016, the New York Legislature, following the lead of 19 other states, enacted its version of the Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act (the "Act"). The Legislature recognized the urgency of placing the administration of the digital assets of a "user" on a par with a fiduciary's ability to manage a decedent's more traditional tangible assets (Assembly Sponsor's Mem, Bill Jacket, L 2016, ch 354). The reach of Article 13-A is not limited to requests by an executor or administrator to gain access to the digital assets of a decedent but also extends to requests by the fiduciary of an incapacitated person, an agent acting pursuant to a power of attorney and a trustee, regardless of whether the appointment was before, on or after the effective date of the legislation. The statute does not apply to digital communications used by employee in the ordinary course of employment (EPTL § 13-A-1-2.1 (c)).

Prior to the enactment of the various state versions of the Act, "custodians" or "electronic communication services" relying on the "terms-of-service agreement" and the federal Stored Communications Act (18 U.S.C. § 2701), successfully thwarted efforts by fiduciaries and family members who sought access to a decedent's digital assets. The Stored Communications Act generally precludes an electronic communication service from knowingly divulging the contents of certain electronic communications to persons other than the intended recipients of the communications (18 U.S.C. § 2702), and criminalizes intentional unauthorized access to certain electronic communications (18 U.S.C. § 2701). In addition, the Stored Communications Act distinguishes between content and non-content based communications, authorizing an electronic communications service to disclose certain non-content-oriented information to parties other than the user of a particular account (18 U.S.C. § 2702).

Article 13-A seeks to balance the tension that may exist between (a) the well-settled notion that the fiduciary of a decedent's estate stands in the user's shoes after death, and (b) the public policy that favors respecting the user's privacy upon death.

Under Article 13-A, access to digital assets and electronic communications is user-directed (EPTL § 13-A-2.2). That is, Article 13-A permits the user the benefit of self-direction and provides a hierarchy for the instruments by which the user may express the user's intent regarding disclosure to others. A user may direct, by means of an "online tool," the custodian to disclose or not to disclose some or all of the user's digital assets, including the "content of electronic communications," to designated recipients (EPTL § 13-A-2.2(a)). The directive contained in the online tool overrides any communication to the contrary in a will or an inter vivos instrument (*Id.*). In the absence of any such online directive, the user may direct disclosure by means of a will or inter vivos instrument (EPTL § 13-A-2.2(b)). That directive may address "some or all of the user's digital assets, including the content of electronic communications sent or received by the user" (*Id.*). Any such directive by means of an online tool, will or inter vivos instrument overrides contrary provisions in the

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terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service (EPTL § 13-A-2.2(c)). Thus, the online tool has the highest rank, followed by a will or inter vivos directive, and the terms-of-service agreement is most subordinate.

As to the custodian's obligation to disclose, Article 13-A makes a critical distinction between disclosure of digital assets and disclosure of the content of electronic communications. A custodian's obligation to disclose the digital assets of a deceased user, first involves an inquiry as to whether the user made a directive *prohibiting* disclosure (EPTL § 13-A-3.2). On the other hand, a custodian's obligation to disclose the content of electronic communications of a deceased user first involves an inquiry as to whether the user made an *affirmative* directive to disclose the content (EPTL § 13-A-3.1). This distinction was central to Surrogate Mella's well-reasoned opinion in *Matter of Serrano*.

other record evidencing the user's consent to disclosure of the content of user's electronic communications" (EPTL § 13-A-3.1(a-d)). Again, the custodian may, prior to disclosure, request certain additional enumerated identifying and linking information (EPTL § 13-A-3.1(e)(1-2)). However, recognizing the primacy of the user's affirmative directive, the statute does not permit a custodian to demand a statement of reasonable necessity of disclosure for the administration of the estate. Nevertheless, the recalcitrant custodian has the option to seek a judicial determination that (i) the deceased user "had a specific account with the custodian," (ii) "disclosure of the content of electronic communications . . . would not violate [the federal Stored Communications Act (18 U.S.C. § 2701, et seq), or other applicable law," (iii) "unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications", or (iv) "disclosure of the content of electronic

*"As to the custodian's obligation to disclose, Article 13-A makes a critical distinction between disclosure of digital assets and disclosure of the content of electronic communications."*

Except where a user has prohibited disclosure of digital assets before death, or a court orders otherwise, the custodian of digital assets has a statutory obligation to disclose to the fiduciary "a 'catalogue of electronic communications' (EPTL § 13-A-1(d)) sent or received by a deceased user and digital assets, other than the content of the electronic communications" upon receipt by the custodian of a written request for disclosure, a copy of the death certificate and a certified copy of the instrument appointing the fiduciary as such (EPTL § 13-A-3.2 (a-c)). The custodian may, prior to disclosure, request certain enumerated identifying and linking information as well as an affidavit from the fiduciary attesting to the reasonable necessity of the digital assets for the administration of the estate (EPTL § 13-A-3.2(d)(1-3)). Disclosure is mandated by the statute upon compliance with the foregoing conditions. However, a custodian may seek further protection from claims of violation of privacy by taking the additional step of seeking a court order directing disclosure (EPTL § 13-A-3.2(d)(4)(A-B)).

With respect to the "content of electronic communications," Article 13-A provides that the custodian's obligation to disclosure is founded upon an affirmative directive by the user followed by the fiduciary's written request for such disclosure, a copy of the death certificate, a certified copy of the letters appointing the fiduciary and "unless the user provided direction using an online tool, a copy of the user's will, trust or communications of the user is reasonably necessary for administration of the estate" (EPTL § 13-A-3.1(e)(3)(A-D)). The statute thereby, again, recognizes the primacy of the custodian's contractual obligation created by the user's directive by means of an online tool**.**

In *Serrano*, 56 Misc. 3d 497, Surrogate Mella addressed the extent to which the fiduciary of a decedent's estate has a statutory right under Article 13-A to access the decedent's Google "email, contacts and electronic calendar" (*Matter of Serrano*, 56 Misc. 3d 497 [Sur Ct, New York County, 2017]). The fiduciary argued that he needed such access in order to inform the decedent's friends of the decedent's passing and to "close [the decedent's] unfinished business" (*Id.*). Google responded to the fiduciary's application by requesting "a court order specifying that . . . disclosure of the content [of the requested electronic information] would not violate any applicable laws, including but not limited to the Electronic Communications Privacy Act and any state equivalent" (*Id.*).

The recited facts do not state whether the decedent directed disclosure of digital content to the fiduciary of his estate. Since *Serrano* involved a small estate administration, we assume there was no will. We also assume that there was no online directive or some other instrument directing disclosure of content. Thus, as to content disclosure, the statutory scheme (EPTL § 13-A-3.1) does not precisely cover these facts. Relying upon the distinction between disclosure of digital assets and

disclosure of the content of electronic communications under Article 13-A, Surrogate Mella concluded that the fiduciary was entitled to disclosure of the contacts and calendar information associated with the decedent's Google email account, but not the content of the emails attached to that account (*Id.*). This is because, under Article 13-A, Google has a statutory obligation to disclose the non-content material associated with the decedent's Google email account to the fiduciary of the decedent's estate in the absence of a prohibition (EPTL § 13-A-3.2). However, in the absence of an affirmative directive by the decedent, Google had no statutory obligation to disclose the content-based material associated with the decedent's Google email account (EPTL § 13-A-3.1).

Under these circumstances, the fiduciary had burden to justify disclosure of the content of the decedent's email account by showing that the content disclosure was reasonably necessary to the administration of the decedent's estate (EPTL § 13-A-3.1(e)(3)(D)). The fiduciary failed to make that showing as to disclosure of the content. The Surrogate denied the fiduciary's application for access to the content of the decedent's Google account, without prejudice to a future application on notice to Google.

Absent from the *Serrano* opinion is a determination whether disclosure of the content of the decedent's electronic communications would violate the applicable federal and state laws, despite the fact that Google requested such a finding. However, because the fiduciary failed to meet the necessity element, the Surrogate apparently did not need to not address that question (EPTL § 13-A-3.1(e)(3)(D)).

Until recently, New York law struggled to keep pace with the development of digital assets and the associated privacy and inheritance rights. Fortunately, Article 13-A represents a significant step forward in resolving some of the inherent tension between those rights. Yet, many questions remain unanswered, left only to arguments of counsel for fiduciaries, custodians and electronic communication services and ultimately the Surrogate's Courts as they come to interpret Article 13-A going forward.

# FINRA Interference with Estate Planning

By David A. Weintraub

Financial exploitation of the elderly is rampant in the United States. The elderly are routinely exploited by those close to them, such as family and friends, caregivers, financial advisors, as well as by scammers trying to sell them products they do not need. These products include elaborate home security systems and other home improvements.

An example of a new type of elder abuse is that which will be the byproduct of the Financial Industry Regulatory Authority's (FINRA) well intended rules designed to curb financial exploitation. Effective February 2018, FINRA Rule 4512 requires registered representatives to make reasonable efforts to obtain the name of and contact information for a "trusted contact person" (TCP) upon the opening of a retail account, or when updating account information for a retail account. Pursuant to the Rule, "the member is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney…." The TCP is intended to be a resource for the FINRA member in administering the customer's account, protecting assets and responding to possible financial exploitation. Unfortunately, this Rule will serve to alert nefarious third parties that Aunt Betty or Uncle Bernie had significantly more assets than relatives may have believed. But for Rule 4512, certain people (the putative "villains") will be alerted to assets they did not know existed. Opportunity and motive to steal have been created by this new Rule. The Rule may also interfere with pre-existing estate plans.

Because FINRA Rule 4512 does not require the customer to identify the TCP, how should we as lawyers advise our clients? Do we tell them to refuse to identify TCPs? Do we encourage clients to identify TCPs, and if so, do we do it in writing? Should we explain to our clients the pros and cons of designating TCPs? Do we incorporate the TCP concept in estate planning documents? Do we revise Durable Powers of Attorney to address issues that will arise from a potentially conflicting TCP? Do we provide copies of Durable Powers of Attorney to financial advisors? Do we routinely write to financial advisors to find out if our clients have already designated a TCP? If our clients have designated a TCP, is the TCP consistent with the client's choice of Estate Executor or trustee? Do we want to put into place mechanisms that prevent financial advisors from changing TCPs without attorney involvement?

One simple precaution that all estate planning lawyers should take is to revise their intake form. Assuming your intake form already asks clients to identify the brokerage firms where they have assets, the next question is to ask the client to identify their "trusted contacted person." Regardless of whether the client knows whether they designated a TCP, or who they think they designated, a letter should be sent to the financial advisor asking them to send a letter to the lawyer identifying the TCP. Once the TCP's identity is confirmed, the lawyer should confirm with the client that they are aware of this person's role. There will be numerous instances where between the date the client identified the TCP, and the date you as the lawyer confirm the TCP with the client, that the client's relationship with the TCP will have changed. You may also learn that the client identified a TCP who is different from a previously designated Estate Executor or power of attorney. If there is a conflict between the TCP and others, that conflict needs to be resolved.

Assuming you and your client are satisfied with the client's choice of TCP, what next? The prudent course would be to get the client's permission to ask the financial advisor to notify you, in writing, if the client changes their TCP. You want this information for several reasons. First, if there is a change in TCP, should the Estate Executor or others also be changed? Second, a change of TCP may be an indication of potential exploitation. If the caregiver, the next-door neighbor, or the financial advisor's brother-in-law becomes the new TCP, you have cause for concern. If the financial advisor fails to provide you with this requested information, and exploitation occurs, there will be a stronger argument supporting the financial advisor's liability for a third party's exploitation.

It is clear that FINRA Rule 4512 creates a plethora of issues for the elder law or estate planning attorney to consider. At a minimum, best effort should be directed toward incorporating the TCP concept into your intake documents. It is in your client's best interest that you have this information.

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**David Weintraub's** securities litigation practice primarily consists of representing investors who have been victims of stockbroker misconduct. David is the Co-Chair of the Florida Bar Elder Law Section's Abuse, Neglect and Exploitation Committee. David's website is www.stockbrokerlitigation.com.

# "Till Death [and Divorce] Do Us Part":

## *The Surviving Spouse's Right of Election vs. A Former Spouse's Rights in the Decedent's Estate under a Separation Agreement*

By Brian P. Corrigan

Spousal separation agreements sometimes provide for one party to make a provision in his or her will for the benefit of a soon-to-be former spouse and/or children of their marriage. What if that party dies without fulfilling that contractual commitment? It is well-settled that a valid contract between spouses that provides for the distribution of one's estate to the other, or their children, may be enforced against the deceased spouse's estate.[1]

Assume that same party not only failed to fulfill the contractual commitment but remarried and died survived by that later spouse. The former spouse, and perhaps the children of that marriage (as third-party beneficiaries), will enforce their contractual claim against the estate. What if decedent's later/surviving spouse files a right of election under EPTL 5-1.1-A? Which claim against the decedent's estate has priority?

The surviving spouse will argue the provisions of EPTL 5-1.1-A and the related public policies against disinheriting a spouse and in favor of providing financial support to a spouse afford priority. The surviving spouse will further contend that provisions of a contract to which he or she was not a party cannot possibly impinge on his or her statutory rights.

In response, the former spouse will refer to the written and duly executed/acknowledged separation agreement and the statutory provisions of EPTL 13-2.1(a)(2) and DRL 236(B)(3), which expressly permit such a contractual commitment by the decedent.[2] The former spouse will further argue that the elective share is based upon the "net estate," an amount computed *after* deducting all debts and claims which take priority over gratuitous transfers, including the right of election. Thus, as the claim under the separation agreement was extant not only when the decedent died but also at the time of the decedent's marriage to the surviving spouse, the decedent's assets were effectively encumbered before any elective share rights were created.

To provide further context for this estate administration issue, we roll the clock back to the creation of the settlement agreement. In their settlement negotiations, Spouse A and Spouse B recognize that Spouse B would be entitled to no less than $5,000/month in maintenance from Spouse A, but Spouse A's sole source of income, and only asset of significant value, is A's interests in a business. Instead of selling the business and losing the steady income stream, the parties agree that A will pay B only $2,000 month for the rest of B's life and, further, A must make a will bequeathing the business interests to B.

If Spouse A remarried and died survived by a spouse who asserts an elective share against A's estate, is Spouse B, as a matter of law, any more or less a creditor/claimant as to the $2,000/month than the agreement to receive the business interests in A's Will?

In construing such a separation agreement, Spouse B will likely be found to be a "contract creditor" as to the monthly payment, but a "contract legatee" as to the business interests. This article examines the case law drawing the distinction between a "contract creditor" and a "contract legatee" and how the former has a claim superior to the surviving spouse's elective share, whereas the latter does not. Spouse B will surely regard such a result as unjust, having agreed to a lower monthly payment in turn for the provision to receive the business interests on Spouse A's death.

### The Distinction Between a Contract Creditor and a Contract Legatee

In *In re Dunham*,[3] the decedent's surviving spouse's election was found to be superior to the interests of a prior spouse as a legatee under his will, even though the legacy was made pursuant to the terms of the decedent's separation agreement with his prior spouse.

The separation agreement provided that the "husband also agrees to make and execute a will, simultaneous with the execution of this agreement, under which he shall devise and bequeath all of the stock which he may own in [the corporations] at this time to the wife, to be hers absolutely."[4] The separation agreement further provided that decedent would pay his ex-wife $200 per week until her death or remarriage. The decedent remarried and his will stated:

> Third: In compliance with a certain separation agreement dated August 9, 1967 between myself and my former wife, Mary J. Dunham, * * * I hereby give, devise and bequeath to said Mary J. Dunham, all of the stock which I might own at the time of my

> death, in [the corporations], to be hers absolutely.[5]

Thus, the terms of the decedent's will were consistent with the contractual obligations he undertook in divorcing his prior spouse. However, the principal asset of the decedent's estate was the stock in one of the corporations that was subject to the foregoing bequest required by the separation agreement. This fact led the decedent's surviving wife to file for her elective share.

The Surrogate found the decedent, by his will, clearly satisfied his contractual obligations under the separation agreement, but noted New York public policy that a person who is obligated to support his spouse during his lifetime should not, by his will, be permitted to disinherit her is expressed in the right of election statute. The Surrogate held:

> A contract to make a will and a will, when made, is encumbered by this policy of the State and the right of an individual to either contract to make a will or to make a will is thereby limited and restricted. The decedent did not make a present conveyance or transfer of the shares of stock. He made an agreement to make a will and consequently it is the finding of this Court that the Court reads the words "at this time" in paragraph 6 of the separation agreement as necessarily referring back to the words "stock which he may own." No intention to make a present transfer may be found in that document.
>
> *The distinction between an agreement to make a will and contracting a debt is obvious. In this case the [first wife] with respect to the shares is a contract legatee. With respect to the weekly payment of $200 she is a creditor of the estate.* This court adheres to the stricter view that EPTL 5-1.1 limits the power of a married person to bind himself by contract to devise or bequeath property by will in a manner that would deprive the surviving spouse of her statutory rights. (*Matter of Erstein's Estate*, 205 Misc. 924, 129 N.Y.S.2d 316; *Matter of Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S.2d 107; *Matter of Lewis*, 4 Misc.2d 937, 123 N.Y.S.2d 859) The rights of the legatee are consequently subordinate to the election filed by the widow of the decedent herein.[6]

Based upon her life expectancy, the first wife's claim (arising from the $200/week provision) was valued at $138,894. The court noted that some amount of the shares of the corporations would have to be sold by the executor to satisfy decedent's substantial debts, including the $138,894 due to his first wife.

Thus, although the specific legacy of the shares to the first wife, as provided by the separation agreement, was frustrated by the surviving wife's elective share, the alimony owing to the first wife was regarded as a valid debt which took priority over the surviving spouse's elective share. The Surrogate reached this decision by drawing a distinction between a "contract creditor" and a "contract legatee."

In *Hoyt's Estate*[7] the separation agreement provided, *inter alia*, that (a) the husband would pay his wife $200,000 annually which would terminate upon the death of either party and (b) that the husband would create a trust in his will of at least $1.5 million with income to wife, and on her death or remarriage, principal to their children in equal shares. The husband remarried and executed a will containing such a provision. At his death, however, his net estate amounted to about $490,000. His surviving spouse filed an election against the will.

*"If Spouse A remarried and died survived by a spouse who asserts an elective share against A's estate, is Spouse B, as a matter of law, any more or less a creditor/claimant as to the $2,000/month than the agreement to receive the business interests in A's Will?"*

The estate of decedent's first wife and his children from that marriage filed a creditor's claim based upon the separation agreement which they claimed had priority over the surviving spouse's election. The surviving spouse alleged her elective share had priority over that claim.

Citing *In re Tanenbaum*,[8] the court found the prior spouse and children of that marriage did not become creditors of the estate under the provisions of the separation agreement and that their rights are accordingly not superior to those of the surviving spouse. Quoting *Tanenbaum*, and referring to the separation agreement, the Surrogate wrote:

> The engagement was not a contract to convey property. It was a promise to make a testamentary disposition. The difference has significance. [cite omitted] *The breach of this obligation to make a testamentary provision would not constitute the wife a true creditor*; it would merely give rise to a right in equity to enforce the obligation of the husband.[9]

The Surrogate noted in *Tanenbaum*, as in the case at bar, the payments of fixed annual amounts provided under the separation agreement to the ex-spouse did not continue for her lifetime, but, instead, terminated on the decedent's death. This led the court to hold that:

> … the claimants are not creditors under paragraph seventh of the separation agreement, but that the agreement merely created an enforcible [sic] obligation to make a testamentary provision for the benefit of the first wife of the testator and his children after her death. The testator performed that agreement. He undertook to do no more. The status of the claimants is therefore that of legatees or beneficiaries under the will. As such legatees or beneficiaries they take subject to the operation of the statutes relating to testamentary dispositions, including the right of the surviving widow to take her intestate share under Section 18 of the Decedent Estate Law. Their rights are also subordinate to all *true creditors* of the estate. The widow of the testator is therefore entitled to a one-third share of the net estate. The respective interests of the claimants as legatees or beneficiaries must be satisfied out of the balance.[10]

The court drew a distinction between that part of the separation agreement as provided for a present and continuing payment of fixed sums and that part of the agreement which was a promise to make a testamentary disposition. The latter provision did not make the claimants "true creditors" of the estate such that it created a debt reducing the amount of the elective share. However, as to that amount of the annual payments that the testator was obligated to make up until his death, the court held: "As to this amount, when established, [such claimant] is a *true creditor* of the estate."[11]

*In re Lewis' Will*[12] involved a separation agreement in which the decedent agreed to provide his wife (a) $6,000 annually and (b) maintain certain provisions in his will for the benefit of his wife and children. Decedent remarried and, after he died, his surviving wife contended that her right of election interest was superior to the claims of the decedent's wife and/or the children of that marriage arising under the separation agreement.

In analyzing who had the superior claim, the Surrogate drew the following distinction between the $6,000 payment, on the one hand, and the provision to make a bequest on the other:

> Clearly the right of election is subject and subordinate to any claim of the former wife as a creditor of decedent. It follows, therefore, that as to the amounts required to satisfy the payments of $6,000 annually to be made to the former wife of decedent, she is a creditor of decedent, and the rights of the surviving spouse to elect to take against the will are subordinate to this indebtedness. … Since the right of election of the surviving spouse under § 18 of the Decedent Estate Law extends to a share of only the *net estate* such right of election would embrace only the balance of assets remaining after deducting the amount required to satisfy the indebtedness due the former wife under the separation agreement.
>
> However, by the provisions of the settlement agreement to the effect that the will was to remain unchanged, the former wife of decedent and his children are legatees and not creditors of testator, and the rights of the surviving spouse are paramount to the rights of the widow and children of the former marriage, under the 1927 will. The dis-

*"The Surrogate noted in* Tanenbaum*, as in the case at bar, the payments of fixed annual amounts provided under the separation agreement to the ex-spouse did not continue for her lifetime, but, instead, terminated on the decedent's death."*

> tinction is one between a direction to make a gift or conveyance and a promise to make a testamentary provision. The breach of an agreement to make a testamentary provision would not constitute the wife a creditor but would create an equitable right to enforce the obligation of the deceased husband. In this respect the former wife and the children of said marriage are regarded as legatees and not as creditors, and their rights are subordinate to the right of election of the surviving spouse.[13]

The court identified the manner to compute the present value of the former spouse's interest in receiving the annual $6,000 payment. The value of that claim would constitute a valid debt of the estate which would receive priority and, thereby, allow for the net estate to be computed for purposes of identifying the surviving spouse's elective share.

*In re Erstein's Estate*[14] also placed the contractual interests of decedent's prior spouse and children from that marriage arising from a separation agreement against the right of election claim made by decedent's surviving wife. The separation agreement at issue noted the husband's financial situation did not allow him to contribute any fixed sum to his wife. The agreement provided that he would contribute reasonably towards her support and maintenance when his financial condition improved and, further, that he would make a Will establishing a trust for the benefit of his wife and children of that marriage.

The husband later remarried and died leaving a will satisfying the provisions of the separation agreement. His surviving spouse elected against the will and argued that her claim is not impaired or defeated by the separation agreement between the decedent and his former spouse. The guardian for the infant remaindermen of the testamentary trust argued that the right of election could attach only to property which the testator could dispose of freely. Given that his entire estate was subject to disposition under a prior contract, his surviving spouse had no rights superior to those of his first wife or the issue of that marriage.

The court dismissed the guardian's argument and held that the rights of the decedent's first wife and children were subordinate to the rights of his surviving wife to elect against the will. The court stated:

> The distinction between a contract legatee and a creditor or a lienor may be sometimes difficult to bring into sharp focus. However, the difference between a covenant to bequeath and an actual conveyance or perfected lien is too clear to be misunderstood. A creditor may make such agreement with his debtor as he chooses but whenever the settlement agreement touches upon a bequest or devise by either of them, both parties must recognize that, just as the power to make a will is subject to conditions and restrictions, so, too, is a contract to make a will…. The widow may waive her rights in the manner prescribed by the statute, but the husband is powerless to lift the restriction without her concurrence. No third-party agreement can bestow upon him authority which the State withheld from him.[15]

Thus, had the prior spouse in *Erstein* agreed, instead of the testamentary provision, to a present and continuing payment by the decedent, even if he lacked the ability to pay, she would have been a "true creditor" of the estate as to the arrears and future payments and, therefore, entitled to priority over the surviving spouse's election.

## Conclusion

As the foregoing cases establish, the threshold inquiry in determining priority between a separation agreement claim and the elective share is whether the separation agreement created a certain debt for the decedent to meet from the time of the parties' divorce or, instead, involved an agreement to make a will to meet maintenance obligations or otherwise.[16]

The risk presented in having one party's contractual expectations frustrated by the other party's subsequent remarriage may be reduced by imposing, if not a present transfer of assets in the separation agreement, a present indebtedness on the part of the obligated spouse. Further, if the negotiations involve some benefit to a party (or the parties' children) upon the death of the other party, having the obligated party obtain life insurance to satisfy that benefit will provide more protection against an elective share claim than an agreement to make a testamentary disposition. Life insurance is not a testamentary substitute that is included in computing a surviving spouse's elective share interest.[17]

*Fell v. Fell*[18] reveals an interesting attempt to avoid having the elective share upset the provisions of the separation agreement. The parties agreed that each had the right to use certain specified property during his or her lifetime which would ultimately be bequeathed to their children. To safeguard the children's interest, the parties further agreed to obtain the waiver of the right of election from any subsequent spouse. The husband remarried without obtaining the waiver from his new wife, which led his ex-wife to move to compel compliance. The trial court directed the husband to obtain the

waiver. On appeal the husband argued that provision of the separation agreement should not have been enforced because it violated public policy. The Appellate Division rejected the argument and affirmed.

The *Fell* decision presents more questions than answers. What if the husband's new wife refused to sign waiver of the right of election? She was not a party to the separation agreement and already married to the husband at the time of the court's decision. *Erstein*, *supra*, supports the new wife's rights in this regard ("The widow may waive her rights in the manner prescribed by the statute, *but the husband is powerless to lift the restriction without her concurrence*. No third-party agreement can bestow upon him authority which the State withheld from him."[19]) If the children sued for breach of contract, could they establish damages during their father's lifetime? His new wife may predecease him or that marriage may end in divorce rendering the right of election issue moot.

## Endnotes

1. *In re Bruan*, 35 Misc. 3d 345, 938 N.Y.S.2d 762 (Sur. Ct., Westchester Co. 2012). Insofar as it affects a decedent's estate, any question as to the interpretation and enforcement of an agreement settling a matrimonial action in Supreme Court is clearly within the subject matter jurisdiction of the Surrogate's Court. *In re Garofalo*, 141 A.D.2d 899, 528 N.Y.S.2d 939 (3d Dep't 1988).
2. EPTL 13-2.1(a)(2) recognizes the validity of "a contract to make a testamentary provision of any kind" and DRL § 236(B)(3) recognizes the validity of "a contract to make a testamentary provision of any kind" as between parties before or during their marriage.
3. 63 Misc. 2d 1029, 314 N.Y.S.2d 29 (Sur. Ct., Greene Co. 1970), *aff'd*, 36 A.D.2d 467, 320 N.Y.S.2d 951 (3d Dep't 1971).
4. *Id*. at 1030.
5. *Id*.
6. 63 Misc. 2d at 1034 to 1035 (emphasis added).
7. 174 Misc. 512, 21 N.Y.S.2d 107 (Sur. Ct., N.Y. Co. 1940).
8. 258 A.D. 285, 16 N.Y.S.2d 207 (2d Dep't 1939), *appeal and reargument denied*, 258 A.D. 1054, 17 N.Y.S.2d 1021 (2d Dep't 1940).
9. 174 Misc. at 515 (emphasis added).
10. *Id*. at 516 (emphasis added).
11. *Id*. (emphasis added).
12. 4 Misc. 2d 937, 123 N.Y.S.2d 859 (Sur. Ct., Westchester Co. 1953).
13. 4 Misc. 2 at 939-940 (emphasis in original; all internal citations removed).
14. 205 Misc. 924, 129 N.Y.S.2d 316 (Sur. Ct., N.Y. Co. 1954).
15. *Id*. at 931-932.
16. *See also Estate of Raninga*, NYLJ, Jan. 18, 2008, p. 38, col. 6 (Sur. Ct., Kings Co.) ("In this case, the decedent and his former spouse contracted to create certain alimony and child support rights which became the decedent's debts to meet from the time of the parties' divorce. … Clearly, the decedent did not contract to make a will giving the spouse a legacy to meet alimony obligations, the core fact that under the case law defeats the surviving spouse's arguments [that she has priority over the former spouse's separation agreement claims].")
17. *Estate of Boyd*, 161 Misc. 2d 191, 196, 613 N.Y.S.2d 330 (Sur. Ct., Nassau Co. 1994); *Estate of Green*, 18 Misc. 3d 1116(A), 2008 N.Y. Slip Op. 50100(U) (Sur. Ct., Bronx Co. 2008). Annuities, however, are not insurance and are testamentary substitutes against which the surviving spouse may elect. *See In re Zupa*, 48 A.D.3d 1036, 850 N.Y.S.2d 311 (4th Dep't 2008).
18. 213 A.D.2d 374, 623 N.Y.S.2d 315 (2d Dep't 1995).
19. 205 Misc. 924 at 932 (emphasis added).

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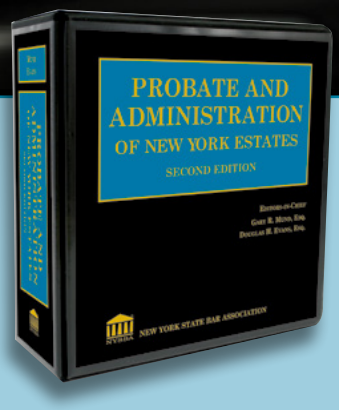


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# Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

## ANCILLARY PROBATE

### Administrator Appointed Under "Small Estate" Procedures May Not Petition for Ancillary Probate in New York

Decedent, a domiciliary of Maryland, died intestate. A child of the decedent petitioned for and was granted letters of administration for a "small estate" because the value of the probate estate was less than the limit of $50,000, which governs such proceedings under Maryland statute. The administrator then petitioned for ancillary letters in New York on grounds that the decedent owned real and personal property in New York, valued respectively at $120,000 and $62,000.

The Surrogate denied the petition because under SCPA 1601 an ancillary proceeding is predicated on "actual administration" in the domiciliary jurisdiction and a small estate proceeding does not meet the statutory requirement. Although the decedent's personal property in New York does not require administration, its value exceeds the limits of the Maryland statute and therefore the administrator has no authority over that property. The Surrogate dismissed the petition without prejudice to filing a new petition for full administration. *Estate of Dillon*, 58 Misc. 3d 428, 66 N.Y.S.3d 112 (Sur. Ct., Broome Co. 2017).

## ELECTIVE SHARE

### Waiver Valid Despite Erroneous Reference to Statute

Decedent and surviving spouse executed mutual waivers of the right of election. After decedent's death, surviving spouse filed a notice of election. The executor of decedent's estate began a proceeding seeking a determination that the surviving spouse was not entitled to the elective share because of the waiver. Surrogate's Court determined that that surviving spouse had validly waived the surviving spouse's elective share rights and surviving spouse appealed.

William P. LaPiana

The Appellate Division affirmed. The court turned aside appellant's claim that the wavier was ineffective because it referenced EPTL 5-1.1, rather than EPTL 5-1.1-A, the statute in effect at the time of the execution of the waiver. The court noted that there is nothing in the statute (EPTL 5-1.1-A(e)(2)) that requires any particular form of waiver or a reference to the statute. In addition, there is no evidence that appellant was aware of any distinction between the old and new statutes. In sum, there was "substantial compliance" with the requirements of the waiver statute.

The court also turned aside the appellant's attempt to show the "fact-based, particularized inequality" that *In re Greif*, 92 N.Y.2d 341, 346, 680 N.Y.S.2d 894, 703 N.E.2d 752 (1998) requires to shift the burden of proving fraud or overreaching. The appellant's testimony on this point was contradicted by that of the attorney who drew the decedent's will and the waiver, and the Surrogate's Court appears to have found the attorney's testimony credible. In addition, although the appellant contends that she did not have separate legal representation and that she did not receive full disclosure of the decedent's assets, the court notes that under the law, neither factor, individually or in combination, will invalidate a waiver of elective share rights. *In re Strout*, 155 A.D.3d 1135, 63 N.Y.S.3d 609 (3d Dep't 2017).

## ESTATE ADMINISTRATION

### The 60-Day Rule Does Not Apply Where Creditor's Demand Was Made Before Appointment of Fiduciary

Decedent provided a personal guarantee of a line of credit taken out by the corporation of which decedent was president. Eleven months after decedent's

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death and one month before the appointment of a fiduciary for the estate, the lender sent a notice of default to the estate of the decedent. The lender then began a proceeding in Supreme Court asking for a default judgment against the corporation and for summary judgment against the estate. The court granted the motion for summary judgment in the sum of $23,200.

The fiduciary appealed on the ground, first, that discovery should have been granted before the entry of judgment. The Appellate Division held the motion set forth a prima facie showing that the lender was entitled to judgment on the guarantee; the estate failed to raise a triable issue of fact and also failed to demonstrate that discovery might lead to relevant evidence.

The fiduciary also argued that under SCPA 1810 the Supreme Court lacked jurisdiction because under the statute, a claimant whose claim is rejected or deemed rejected by the estate must begin a proceeding with 60 days of the rejection, and under SCPA 1803, if the proceeding is not commenced within the 60-day period, the claimant must proceed in Surrogate's Court. While the argument was raised for the first time on appeal, a challenge based on lack of subject matter jurisdiction may be raised at any time.

In this case, however, the creditor's demand was made before the appointment of the estate fiduciary and therefore the 60-day limitation was inapplicable. *VNB New York v. Y.M. Intercontinental Gem Corp.*, 154 A.D.3d 903, 63 N.Y.S.3d 414 (2d Dep't 2017).

## WILLS

### Distributee Who Executed a Waiver and Consent to the Prior Probate of a Will May Not Seek to Vacate Later Probate Decree

Testator died in 1980 and the testator's will executed in 1976 was admitted to probate. In connection with the probate proceeding a child of the decedent executed a wavier and consent. Twenty-nine years later a grandchild of the testator moved to vacate the probate decree on the grounds that some of the testator's distributees were not named in the probate petition. The Surrogate granted the motion in 2010 and amended probate petitions were then filed in 2013 and 2014. The testator's child then objected to probate on the grounds of lack of capacity and undue influence. The Surrogate granted a motion to dismiss those objections and the child-objectant appealed.

The Appellate Division affirmed the dismissal. First, because the objectant never moved to vacate the waiver and consent in the original probate proceeding or even asserted grounds for doing so, the objectant was bound by the earlier wavier and consent and barred from objecting to probate. Second, having waited almost 34 years to assert objection to probate, the objectant was responsible for the prejudices resulting from that delay, including the death or incapacity of witnesses whose testimony would be relevant on the question of the testator's capacity and the existence of undue influence. Under these circumstances, the doctrine of laches barred the child from raising objections. *In re Schnall*, 154 A.D.3d 951, 63 N.Y.S.3d 459 (2d Dep't 2017).

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

By Ilene Sherwyn Cooper

## Discovery Demands

Before the Surrogate's Court, Suffolk County, in *In re Dutton*, was a contested accounting proceeding, in which the objectant moved to compel responses to certain discovery demands, and the petitioner cross-moved for an order dismissing the objections.

In pertinent part, the petitioner claimed that because the objectant had failed to take issue with every action taken by him as executor, he ratified all such actions, and therefore lost his standing to object to the accounting. The court found this argument unavailing, concluding that the cases cited by petitioner were unavailing and actually supported the opposite result. Additionally, the court concluded that petitioner's motion for summary judgment was premature given the outstanding discovery in the proceeding.

With respect to the objectant's motion to compel discovery, the court held that because objectant had failed to specify the deficiencies in the documents that petitioner had produced, it was satisfied that the demands had been properly complied with. Further, the court held that objectant's demands for pre-death documents, including but not limited to, copies of the decedent's wills and codicils, health care proxies, and powers of attorney, were irrelevant to the accounting proceeding, especially since the distribution of the decedent's estate was the same as in intestacy. Additionally, the court found that petitioner's refusal to provide documentation related to pre-death transfers by the decedent, his personal financial records and tax returns, and the assets of the estate beneficiaries, was proper. Finally, the court held that objectant's discovery demands regarding non-probate assets were overbroad and improper.

***In re Dutton*, N.Y.L.J., Jan. 26, 2018, p.37 (Sur. Ct., Suffolk Co.).**

## Document Production

Before the Surrogate's Court, Suffolk County, in *In re Esposito,* was a contested probate proceeding in which the objectants moved to compel the petitioner to produce responsive documents to several categories of demands made in their First Demand for Discovery and Inspection. More specifically, those categories included requests for: 1) documents relating to the assets of the decedent, the value of those assets, and financial transactions; (2) estate tax documents; and (3) the attorney-draftsman's files.

After considering the arguments of the parties, the court determined that documents containing information as to the proponent's knowledge of the decedent's assets prior to the will execution, the value of the decedent's estate, whether the decedent divested himself of assets prior to death, and any financial records of the decedent or the proponent which might reveal information of this nature were discoverable. Indeed, the court noted that when a claim of undue influence is asserted, discovery as to transactions between the decedent and the person charged with undue influence is appropriate.

Further, the court found that demands for documents within the foregoing categories, which fell within the three-year/two-year period, were not overly broad, and subject to discovery to the extent they were in the proponent's possession, custody or control.

As to the requested estate tax documents, the court held that "they were generally relevant in any proceeding where the assets and value of the estate are at issue." This was particularly the case in the proceeding *sub judice*, where virtually no information was forthcoming regarding the decedent's bank accounts, business ventures, and assets.

Finally, although the court found the attorney-draftsman's files to be relevant, given proponent's futile efforts to obtain the files, the court held that objectants could subpoena the records, and denied the motion to the extent it sought an order compelling the proponent to do so.

***In re Esposito*, N.Y.L.J., Jan. 22, 2018, p.28 (Sur. Ct., Suffolk Co.).**

## Elective Share

In *In re Baig,* the Surrogate's Court, Kings County, was confronted with a proceeding by the decedent's

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surviving spouse to determine the validity and effect of her notice of election, and for an order directing the New York City Employees Retirement System (NYCERS) to pay to her, in satisfaction thereof, one-third of the decedent's death benefit. The decedent died without assets, and the only testamentary substitute subject to the elective share was the NYCERS death benefit. NYCERS objected to the application and cross-claimed against the decedent's father, who had received the entire death benefit as the designated beneficiary. The petitioner and NYCERS each moved for summary judgment, and the decedent's father opposed to the extent the motions sought relief against him.

In granting the petitioner's motion, the court found that petitioner had timely filed her notice of election within the statutory constraints of EPTL 5-1.1-A(d)(1), and that, as such, she was entitled to one-third the value of the subject death benefit. Moreover, the court held that NYCERS was responsible for paying petitioner her elective share amount, concluding that it "knowingly and wrongfully" deprived her of the proceeds. Specifically, the court found the undisputed record demonstrated that, though petitioner repeatedly requested information regarding the death benefit and indicated her desire to NYCERS to assert a claim to the proceeds, NYCERS had provided her with "confounding and contradictory" instructions, limited her to baseless deadlines for the assertion of her rights, and paid out the entire benefit, despite its knowledge of petitioner's claim.

Though NYCERS claimed it was absolved of liability pursuant to the provisions of EPTL 5-1.1-A(b)(4),[1] the court rejected its defense, opining that principles of equity and fairness would not condone its reliance on the statute, when its wholesale disregard of and indifference to the petitioner's statutory right impeded the very purpose for which the statute was created.

Further, the court denied, without prejudice, NYCERS' cross-claims for contribution and unjust enrichment against the decedent's father, finding that the matter was a dispute between living persons over which it lacked subject matter jurisdiction.

***In re Baig*, N.Y.L.J., Jan. 16, 2018, p.18, col. 6 (Sur. Ct., Kings Co.).**

## Examination of Additional Witness Pursuant to SCPA 1404

Before the Surrogate's Court, Nassau County in *In re Biondo,* was a probate proceeding in which the respondent sought the examination of an attorney who purportedly assisted the attorney draftsperson in the preparation of the propounded will. Prior to making the motion, the respondent had engaged in the examination of the attorney draftsperson and the two attesting witnesses to the instrument.

The decedent died survived by two sons, one of whom was the proponent of the will, and the other, who was the respondent. In pertinent part, the instrument contained an *in terrorem* clause directing the forfeiture of the bequests thereunder in the event a beneficiary opposed or contested its validity.

In support of his motion, the respondent attached excerpts from the SCPA 1404 transcripts of the draftsperson, who stated, *inter alia,* that another attorney in his firm had been involved in the drafting of the Will, had prepared multiple memorandums and e-mails regarding the decedent's estate plan, and went over proposed changes to the instrument with her. In view thereof, the respondent, citing SCPA 1404(4), argued that the attorney had information of substantial importance or relevance to his decision to file objections to probate. Further, relying on the provisions of SCPA 1404(6), the respondent maintained that the attorney was a person with whom the testator communicated regarding the provisions of her will.

The court noted that, pursuant to SCPA 1404(4), where a will contains an *in terrorem* or no contest clause, any party to the proceeding may, upon application to the court based upon special circumstances, examine any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections. Further, the court observed that SCPA 1404(6) additionally provides, *inter alia,* that "if more than one person shall have been involved in the preparation of the will, the term 'person who prepared the will' shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator."

With the foregoing in mind, the court concluded that the attorney whose examination was sought was intimately involved in discussions pertaining to the decedent's estate plan, and changes thereto, and thus could have information of substantial importance to the respondent's decision to file objections. Accordingly, respondent's motion was granted.

***In re Biondo*, N.Y.L.J., Dec. 11, 2017, p.31 (Sur. Ct., Nassau Co.).**

## Gift by Attorney-in-Fact

In *In re Argondizza,* the Surrogate's Court, New York County, was confronted with competing motions for summary judgment addressed to the issue of whether the decedent's surviving spouse breached his fiduciary duty to the decedent when he, as agent under a power of attorney, transferred to himself the decedent's one-half interest in a cooperative apartment that he and the decedent had owned as tenants in common. The petitioners in the underlying turnover

proceeding were the decedent's two children from a prior marriage, and Limited Administrators of her estate.

The record revealed that the decedent and her spouse owned the apartment as tenants in common until the year before she died. For several years beforehand, the decedent's health was failing, causing her to execute a power of attorney naming her spouse as her agent. In particular, the power was intended to enable her husband to take care of her affairs in anticipation of her long-term medical needs, including the preservation of her assets from exposure to liens and encumbrances. Consistent with the plan, the decedent and respondent wrote a joint letter to the managing agent of the coop directing the transfer of the stock certificate for the apartment from both of their names to the respondent's name alone. In furtherance thereof, the respondent, acting as the decedent's attorney-in-fact, transferred the decedent's interest to himself.

Based on the foregoing, the court opined that a presumption of breach of fiduciary duty arises when it is shown that the agent, using his authority pursuant to a power of attorney, transfers assets of the principal to himself. This presumption may be rebutted by a showing that the principal intended for the transfer to take place, or, under certain circumstances, that the transfer was in the best interests of the principal.

*"The court opined that a presumption of breach of fiduciary duty arises when it is shown that the agent, using his authority pursuant to a power of attorney, transfers assets of the principal to himself."*

Within the foregoing context, the court found that the evidence in the record was sufficient to establish a prima facie case of breach of fiduciary duty. Nevertheless, respondent maintained that the gift-giving authority granted to him in the power of attorney executed by the decedent, in combination with the joint letter to the managing agent of the coop, and the deposition testimony of the decedent's treating physician, in which he testified, *inter alia,* that the decedent told him about her decision to transfer her interest in the apartment to the respondent and that she wanted him to have it, was sufficient to refute any claimed wrongdoing. To this extent, the respondent further alleged that the transfer was typical of the Medicaid planning that takes place when one spouse requires long term care, and was, indeed, in her best interest.

In view of these assertions, the court concluded that the respondent had successfully rebutted the presumption that he violated his fiduciary duties in making the subject transfer. The court further found that the petitioners' attempt to create an issue of fact, by alleging that the decedent lacked capacity to direct the transfer of her interest in the apartment, and, alternatively, that the transfer was the result of fraud by the respondent, was unavailing. Notably, the court held that entries in the decedent's medical records indicating some dementia were insufficient to raise an issue as to the decedent's capacity in light of the testimony of two disinterested physicians, one of whom was the decedent's physician, that there was nothing about her mental condition that interfered with her ability to enter the transaction. The court held that the allegations of fraud were unsupported by the record.

***In re Argondizza,* N.Y.L.J., Oct. 19, 2017, p.27, col. 2 (Sur. Ct., N.Y. Co.).**

### Motion to Strike and for a Protective Order

Before the Surrogate's Court, Richmond County in *In re Asch,* was a contested discovery proceeding between the decedent's two daughters, both of whom were co-executors of the decedent's estate, and shared his residuary estate equally.

Following the admission of the decedent's Will to probate, one of the executors (the petitioner) commenced a proceeding, pursuant to SCPA 2103, against the other executor (the respondent) for the purpose of discovering information pertaining to the change in title of several bank accounts from the decedent's name alone to the decedent's name jointly with the respondent. During the course of that proceeding, the petitioner moved, *inter alia,* for an order striking the respondent's answer, precluding her from offering any documentary evidence at trial, and for sanctions. The respondent opposed the motion and cross-moved for a protective order as to all improper questions posed to her during the course of her examination.

The record revealed that since the inception of the litigation, the parties had been immersed in motion practice, and disputes regarding the course of discovery, involving, *inter alia,* deposition dates and dates for the production of documents. Assessed in this context, the court noted that there was no clear directive to respondent to provide responses to the petitioner's discovery demands until a date much later than petitioner had contemplated. Moreover, the court found that respondent's withholding of discovery pending its decision on a motion and cross-motion for summary judgment did not constitute a "willful" failure

to disclose as contemplated by the provisions of CPLR 3126. Accordingly, petitioner's motion to strike and for an order of preclusion was denied.

With respect to the issue of sanctions, petitioner claimed, *inter alia,* that respondent's counsel engaged in excessive speaking objections and directed his client not to answer at least 200 questions during the course of her deposition, all of which severely hampered her examination. In response, respondent cross-moved for a protective order that would effectively strike the questions that she was directed not to answer or that were found improper by her counsel. Concluding that it would be error to unconditionally direct respondent to answer all questions asked of her during her deposition, the court held that a more balanced approach would be to rule on the propriety of the questions posed on a question-by-question basis, and that such questions should be submitted for review in the form of a motion. Accordingly, the motion for sanctions and the cross-motion were denied.

***In re Asch*, N.Y.L.J., Nov. 21, 2017, p.29, col. 1 (Sur. Ct., Richmond Co.).**

*"The court noted that while the proponent has the burden of proving testamentary capacity, one need not have a perfect mind or memory to make a Will."*

## Release

In *In re Alford,* the Appellate Division, Fourth Department, reversed an Order of the Surrogate's Court, Erie County (Howe, S.), which determined that a release signed by a beneficiary was valid, and constituted a defense to his objections to the executor's final accounting.

The subject release was executed by the objectant in June 2009, in connection with an initial accounting by the executor, and purported, *inter alia*, to relieve the executor from liability "for all matters relating to or derived from the administration of the estate." Additionally, the instrument consented to the entry of a decree settling the executor's account, and fully discharged him for his stewardship. Notably, several months later, the objectant refused to sign a second release, when the executor presented him with a revised account.

The executor subsequently filed his final accounting with the court, together with a petition for his judicial discharge. Soon thereafter, he passed away, and successors were appointed to finalize the proceeding. Objections to the accounting were filed, and the successor fiduciaries moved for summary judgment dismissing same, alleging that the release that was signed by the objectant in June 2009, barred his claims. The objectant opposed the motion, contending that the release was invalid. The Surrogate's Court denied the motion and conducted an evidentiary hearing. At the conclusion of the hearing, the court determined that the release was valid, and the objectant, together with the guardian-ad-litem appointed to represent the interests of an infant beneficiary, appealed.

The Appellate Division held that the Surrogate erred in shifting the burden to the appellants to prove that the release was procured by fraud, and in determining that the release was valid. To the contrary, quoting from *Birnbaum v. Birnbaum*, 117 A.D.2d 409, 503 N.Y.S.2d 451 (4th Dep't 1986), the court opined that the burden rested with the fiduciary to prove that there was full disclosure to the beneficiary of the facts of the situation, as well as his or her legal rights. To this extent, the court noted that at the time the objectant had executed the release in June 2009, the executor had failed to disclose to him the actual value of the securities held by the estate that were to be utilized to fund a testamentary trust, of which the objectant was a co-trustee, and he and his descendants were beneficiaries.

Moreover, the court found that the executor had failed to disclose the legal ramifications of his plan to distribute the assets of the estate outright, rather than to fund the trust in accordance with the decedent's will, inasmuch as such proposal could have led to claims against the objectant for breach of fiduciary duty, of which he had not been informed in advance of signing the release.

***In re Alford*, 158 A.D.3d 1188, 78 N.Y.S.3d 240 (4th Dep't 2018).**

## Summary Judgment

Before the Surrogate's Court, Sullivan County, in *In re Cirnigliaro,* was a contested probate proceeding, in which the objectants moved for summary judgment on the issue of whether the decedent possessed the requisite testamentary capacity to execute the propounded will on September 4, 2013.

In support of their motion, the objectants alleged that the decedent had been suffering from dementia

since 2011, and that a home health care aide and nurse practitioner assigned to his care found him confused. Several months before he signed his will, he was evaluated by a registered nurse, who found that he had a history of wandering and falls and required assistance with his daily activities. Other nurses and aides who cared for him during this period concurred, and one observed that he regularly became enraged and made physical threats against her.

In opposition, the petitioner argued, *inter alia*, that the objectants had not presented any medical evidence of the decedent's purported dementia, that they had no personal knowledge of any of his alleged mental deficits, as they had very little if any contact with him, and that he was capable of conducting his business and financial affairs at or about the time the will was executed. Moreover, the petitioner pointed to the fact that the attorney who drafted and supervised the execution of the will had no knowledge of the decedent's supposed dementia.

The court noted that while the proponent has the burden of proving testamentary capacity, one need not have a perfect mind or memory to make a will. Moreover, a diagnosis of senility or dementia is not inconsistent with testamentary capacity.

Within this context, the court found that while the objectants had demonstrated that the decedent had multiple health problems at the time he executed his will, and may have suffered from dementia, they had not produced any credible medical evidence indicating that he lacked testamentary capacity.

Accordingly, the court found that questions of fact existed as to whether the decedent was lucid and rational at the time the propounded instrument was signed, and denied objectants' motion for summary judgment.

***In re Cirnigliaro*, 2017 N.Y. Slip Op. 51931(U) (Sur. Ct., Sullivan Co.).**

## Endnote

1. EPTL 5-1.1-A(b)(4) provides, in pertinent part, that "[a] corporation or other person paying or transferring any funds or property described in clause (G) [addressing death benefits] of subparagraph one of this paragraph to a person otherwise entitled thereto shall be held harmless and free of liability from making such payment or transfer, in any action or proceeding which involves such funds or property."

# Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

## DECISIONS OF INTEREST

### Fiduciary Lawyer-Client Privilege

The Florida Supreme Court adopted section 90.5021, Fla. Stat.—Florida's fiduciary lawyer-client privilege—to the extent it is procedural and held that the decision is retroactive to the Florida legislature's enactment of the statute in 2011. The statute provides for application of the lawyer-client privilege even when that client is a fiduciary, such as a trustee, personal representative or executor, or guardian. This fiduciary lawyer-client privilege was enacted as part of Florida's evidence code. The evidence code, however, is a creature of both substantive law and procedural law. While substantive law is governed by the Florida legislature, procedural law is governed by the Florida Supreme Court. Therefore, after evidence statutes are enacted by the legislature, it is standard practice for the Florida Supreme Court to review those statutes. In 2014, when the Florida Supreme Court reviewed the fiduciary lawyer-client privilege, it declined to adopt it, and it questioned the need for the privilege, without stating more. Therefore, the Florida Bar's Probate Rules Committee and the Code and Rules of Evidence Committee petitioned for the court to reconsider its decision. The court did so and, reversing its prior opinion, adopted the fiduciary lawyer-client privilege. Practitioners can now be comfortable, once again, in relying on the privilege in representing and communicating with fiduciaries.

*In re Amendments to Florida Evidence Code*, 234 So. 3d 565 (Fla. 2018).

### Answer as "Functional Equivalent" of Caveat

William Crescenzo appealed from an order admitting a will to probate. He argued that although he served an answer to the petition for administration, the court admitted the will to probate without hearing his answer and affirmative defenses, in which he alleged undue influence and fraud. The appellee, on the other hand, argued that the trial court had not been under an obligation to hear Mr. Crescenzo's objection to administration unless he had filed a caveat and, because he had not, his only remedy now was to file a petition to revoke the administration. The appellate court agreed with appellant and reversed, finding that Mr. Crescenzo's answer had served as the "functional equivalent" of a caveat in this case. A caveat is a document filed by an interested person providing that a court may not admit a will to probate without serving that interested person with formal notice and providing an opportunity to participate in the proceedings. The appellate court held that "any differences between the pleading Mr. Crescenzo filed and the caveat contemplated by rule 5.260 [of the Florida Probate Rules] were matters of form that had no effect on the substance of the proceedings." The case is a fair warning, though, to those who wish to object to administration of a will: file a caveat, in addition to an answer, before the will is admitted to probate.

Jonathan A. Galler

*Crescenzo v. Simpson*, 2018 WL 1219709 (Fla. 2d DCA Mar. 9, 2018) (not yet final)

### Summary Judgment Reversal

Pauline Tyler had six children. Upon her death, one of her daughters—Brenda Prewitt—sued another of her daughters—Shirley Kimmons—who was acting as Ms. Tyler's successor trustee. The suit was for breach of fiduciary duty. Specifically, Ms. Prewitt was suing under section 736.0801 ("the trustee shall administer the trust in good faith, in accordance with its terms ….") and section 736.0811 ("A trustee shall take reasonable steps to enforce the claims of a trust …."), Fla. Stat. The suit was subsequently dismissed by the trial court on summary judgment, but the appellate court reversed as to three of the counts because the record evidence precluded the granting of summary judgment. The appellate court held that there were disputed issues of fact regarding whether the trustee had failed to distribute funds as provided for by the trust documents; to seek a return of money wrongly retained; and to return money that was misappropriated.

*Prewitt v. Kimmons*, 2018 WL 791395 (Fla. 5th DCA Feb. 9, 2018) (not yet final).

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### Dependent Relative Revocation

The doctrine of "dependent relative revocation" means that if a testator makes a new will revoking a former one, and the new will is later invalidated, then the old will may be re-established on the ground that the revocation of it was dependent on the validity of the new one. This doctrine became relevant when Ann Boren challenged two trusts executed by Elaine Mullins. The trustee of the challenged trusts alleged that Ms. Boren lacked standing under the doctrine because Ms. Boren would have to show that she was a beneficiary under one of six prior versions of the trust and would also have to make the same showing even to receive a copy of the current trust documents. After she requested the prior trusts in discovery, and the trustee objected, the trial court ordered that they be produced for an *in camera* inspection. The trial court reviewed the trusts and denied the request for production without further explanation. The appellate court quashed the ruling with instructions that the trial court had to either permit the discovery sought or make a finding of good cause as to why the trust documents must be protected from production.

*Boren v. Rogers*, 2018 WL 663727 (Fla. 5th DCA Feb. 2, 2018) (not yet final).

### Order of Discharge

The co-personal representatives of the estate of Lillian Unanue filed a final accounting and petition for discharge of personal representatives on November 17, 2016, and the trial court entered an order of discharge on December 5, 2016. However, two beneficiaries of the estate filed an objection to the final accounting and petition for discharge on December 5, 2016. The appellate court reversed the order of discharge to allow for further proceedings because Florida Probate Rule 5.400(b) provides that an objection must be filed within 30 days from the date of service of the petition for discharge. The trial court had improperly shortened the beneficiaries' time to object. Although the petition for discharge did not have a date of service on it, the appellate court held that it would have been served at or around the same time as it had been electronically filed with the court.

*Unanue v. Johnson*, 2017 WL 6598835 (Fla. 2d DCA Dec. 27, 2017).

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## Publication of Articles

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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# TRUSTS AND ESTATES LAW SECTION NEWSLETTER

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# T&E Section Member Sharon L. Klein honored by UJA-Federation of NY

Sharon L. Klein, president of Wilmington Trust's Tri-State Region, was honored by UJA-Federation of New York's Trust & Estates Group for her professional and philanthropic achievements at its annual event in New York City June 7.

The event supported UJA-Federation's mission of caring for individuals in need in the U.S. and abroad. Working with a network of hundreds of nonprofits, UJA-Federation extends it reach from New York to Israel to nearly 70 other countries around the world, touching 4.5 million people each year.

For more information, visit www.ujafedny.org.

As president of Wilmington Trust's Tri-State Region, which includes Greater New York, Connecticut, Long Island, and Northern New Jersey markets, Klein oversees all wealth management services throughout the region. She leads teams of professionals who provide planning, trust, investment management, family governance and education, family office, and private banking services.

"We're proud to recognize Sharon's outstanding contributions to the Trusts & Estates community and to support UJA-Federation's commitment to helping those in need," said Christopher Mone, president of U.S. Markets for Wilmington Trust's Wealth Advisory division.

Klein has more than two decades of experience in the wealth management industry. She earned a Master of Laws from Boalt Hall School of Law at the University of California, Berkeley, and received a Bachelor of Arts and a Bachelor of Laws from the University of New South Wales, Australia. She is a recognized industry-wide as a speaker and author, frequently featured and quoted in the *New York Times, Wall Street Journal, New York Law Journal* and other publications.

Klein is a past Chair of the Trusts and Estates Law Section Taxation Committee of the New York State Bar Association and a past Chair of the Trusts, Estates and Surrogate's Court Committee for the New York City Bar Association. She is a Fellow of the American College of Trust and Estate Counsel, and a member of the New York Bankers Association Trust & Investment Division Executive Committee, among other affiliations.

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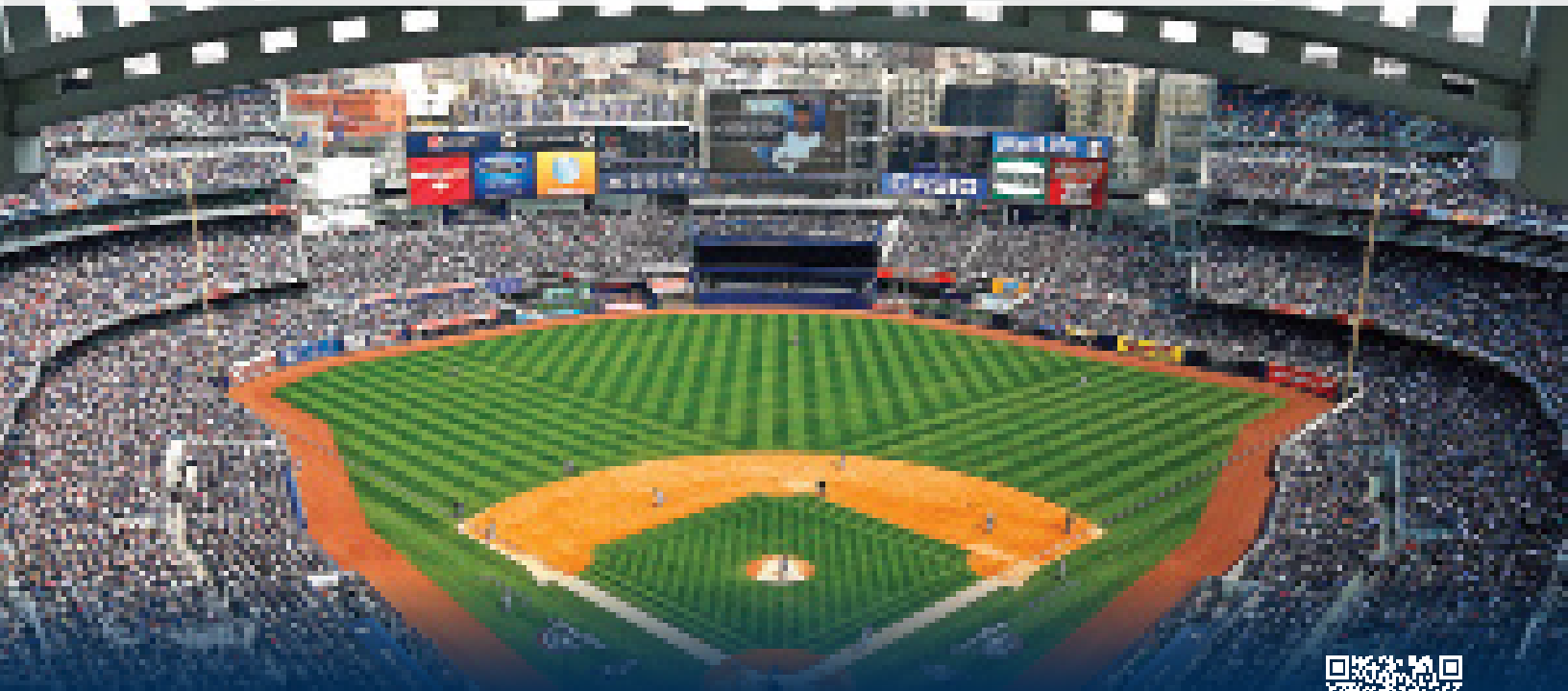

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