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Trusts and Estates Law Section Journal

A publication of the Trusts and Estates Law Section of the New York State Bar Association

In This Issue

- Does a Living Will Truly Serve Its Creator?
- Beware of Abusing Article 81 Guardianships
- Gifts on Creation of Joint Accounts

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Message from the Chair

By Robert M. Harper

With my term as Chair of our Section nearly complete (at least as I write this message), I would like to take this opportunity to congratulate the officers who will guide our Section in 2020, and to thank several of the many Section members, among others, who contributed to making the past several months as rewarding as they were.

Robert M. Harper

First, I would like to congratulate Jill Choate Beier of Beier & Associates, PLLC for her selection as the incoming Chair of our Section. Having had the pleasure to work with Jill on Section matters for several years now (most especially during the past year), I have observed how she approaches each and every task with which she is charged in a thoughtful manner, and I know that she will be an excellent Chair. Congratulations and best of luck, Jill!

Second, I would like to congratulate Jennifer Hillman of Ruskin Moscou Faltischek, P.C., Laurence Keiser of Stern Keiser & Panken, LLP, and Michael Schwartz of Curtis, Mallet-Prevost, Colt & Mosle, LLP for their election as the Section's Chair-Elect, Secretary, and Treasurer, respectively. During my tenure as Chair, Jen, Larry, and Michael have provided invaluable assistance to me, and I am confident that they will continue to do so for Jill and the Section in 2020 and beyond.

Third, I would like to thank Patricia Shevy and Paul Duffy for their excellent work as program chairs of our Section's Annual Meeting (entitled "Trusts and Estates in the 21st Century"). Tricia and Paul organized a program concerning cutting-edge topics, including the administration of digital assets, cryptocurrency, litigation and electronic evidence, and digital security for attorneys. They also arranged for an impressive group of speakers—consisting of Jill Choate Beier, Sean Weissbart, Sarah (Katie) Lynagh, Sarah Brennan, Angelo Grasso, William Keniry, Justin Hearing, and Suzanne Brown Walsh—to present at the Annual Meeting. Thank you to Tricia, Paul, and the speakers for the hard work that they devoted to the Annual Meeting.

Fourth, I would be remiss if I did not thank our Section's staff liaison, Lisa Bataille, for her guidance and support in 2019. Over the past year (and for many years before that), Lisa has been an invaluable resource for me, and for the Section and its members more broadly. Thank you for all that you do, Lisa!

Fifth, I must express my sincere appreciation for my colleagues at Farrell Fritz, P.C. I am fortunate to work with an excellent group of trusts and estates attorneys, and appreciate the many ways in which they assisted me in 2019 (and well before that).

Thank you for your participation in our Section in 2019. It has been an honor and privilege to serve as Section Chair for the past year.

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Message from the Editor

By Jaclene D'Agostino

Jaclene D'Agostino

Happy New Year! Our first issue of 2020 addresses topics including the federal gift tax implications of creating joint accounts, Article 81 guardianships, and living wills. We hope you find it informative.

Thank you to those who have contributed to this issue. We continue to urge Section members to participate in our publication. CLE credits may be obtained. Our next deadlines for submissions are **March 3, 2020** for publication in the summer, and **June 2, 2010** for publication in the fall.

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

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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Gifts on Creation of Joint Accounts: The Devil Is in the Details©

By Bruce M. DiCicco

This article addresses the federal tax implications when New Yorkers create joint bank accounts and joint brokerage accounts.[1] Our focus will be on the federal gift tax issue with respect to the creation of such accounts and recent advice that federal gift tax returns should be filed in all cases when such accounts are first created by a depositor who furnishes all the funds while the other joint tenant furnishes none.[2] Particular attention will be given to the Internal Revenue Service's (IRS) requirement that a withdrawal from a joint account is required before a completed gift occurs. For purposes of this article, I will refer to the contributing joint tenant as "A" and the non-contributing joint tenant as "B," both of whom are U.S. citizens.

First, the basics. Internal Revenue Code (I.R.C.) § 2501(a) imposes a tax on the transfer of property by gift by an individual, resident or nonresident. Treasury Regulation § 25.2511–1(a) provides: "the gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible."

There is, however, an exemption from the gift tax for transfers between spouses. Creating an account with B, who is the spouse of A, does not result in any federal gift tax because gifts between spouses are not subject to the tax.[3] The same is true when A opens an account with his own money, or has an existing account, and simply adds his or her spouse as a joint owner on the account.[4]

If an account is created as a joint account, a presumption arises that joint ownership was intended. Much has been written and decided, however, about whether a particular account that is ostensibly created as a joint bank account is really intended as such. Typical claims that arise are whether a convenience account was intended, meaning an account established in joint ownership by A but where B was added only to provide a "convenience" to A. Typically B is added just so that B could write checks and pay bills for A. This is a common occurrence in this author's experience, frequently between elderly or infirm parents and their trusted children, for example. No actual joint account was intended in such situations.[5]

New York case law is replete with discussion of the presumption found in New York Banking Law § 675(b), namely, that accounts established in the name of A and B in form to be paid or delivered to either, or the survivor of them, are presumed to create a joint tenancy. The statute provides, and many courts have held, that when a joint account is created, there is *an immediate and unconditional* one-half interest in the deposited funds created for each account holder.[6] So, when A deposits $100 into an account with B, designating the account as joint, B accordingly has a present right to withdraw a one-half interest, or $50. B's one-half interest is referred to as the "moiety." It is key, however, to distinguish the right to withdraw from the right of survivorship because the latter is the right to take what is left in the account after the death of one of the joint tenants. This right is known as the "right of the joint tenancy."

In a true joint tenancy jurisdiction, the fact that A or B withdraws more than one-half of the account during their lifetimes does not prevent (or destroy) the right of joint tenancy (meaning the right to receive the remainder of the joint account) after the death of A or B. In other words, if B withdraws $65 and A dies, B still receives $45 by virtue of his right of survivorship and the excess withdrawal by B does not destroy the right of the joint tenant to receive the balance of the account. New York State, however, does not follow this rule and it is therefore said that New York is ***not*** a true joint tenancy state. In New York, a withdrawal by B in excess of his moiety terminates the joint tenancy and gives A the right to have $15 returned to his estate dependent on whether A consented to, or intended for, B to withdraw more than his moiety.[7] The rule in New York, therefore, can be expressed as follows: joint accounts are a joint tenancy but only as to the moiety. As to a withdrawal beyond A or B's moiety, a right to an accounting exists to determine whether, in our example, A intended to allow the excess withdrawal. Since the litigants in many of the cases involving this subject typically only seek recovery of the withdrawal in excess of the moiety, they also seem to indicate a completed "gift" as to the moiety.[8] Other cases more clearly so indicate.[9]

Treatises define a "gift" as:

> an irrevocable transfer by a donor, competent to make a gift, and clearly and unmistakably intending to divest him-

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> self of title, dominion, and control over the subject matter of the gift, to a donee capable of accepting a gift, or to someone acting as trustee or agent for the donee in accepting it.[10]

The definition, at first blush, seems to fit the conclusion that there is a gift on creation of a joint bank account in New York State as to the moiety.

Treas. Reg. § 25.2511-1(h)(4) provides, however (and here is the rub):

> If A creates a joint bank account for himself and B (or similar type of ownership by which A can **regain the entire fund without B's consent**), there is a gift to B when B **draws upon the account** for his own benefit, to the extent or as to the amount drawn **without any obligation** to account for part of the proceeds to A.[11]

The regulations require three things. In a joint account arrangement, either depositor may withdraw the entire fund without the consent of the other joint tenant by simply writing a check for the balance in the account. So, the requirement of regaining the entire fund is easily satisfied by the nature of the rights attached to such accounts. The third requirement seems to be met on creation of the joint account in New York, at least as to moiety for the non-contributing joint owner because there is no obligation to account from B to A and the joint tenancy is not destroyed as to the moiety. The second requirement is the one about which the IRS has taken a position.

IRS Revenue Ruling 69-148 states:

> For purposes of the Federal gift tax, the creation by *A* of a joint bank account for himself and *B*, or a similar type of ownership by which *A* can regain the entire fund without *B's* consent, does not constitute a completed transfer from *A* to *B* **until the latter draws upon the account for his own benefit** without any obligation to account for a part of the proceeds to *A*.[12]

A Chief General Counsel Memorandum,[13] which has not been changed, faced the issue of whether there was a gift on creation of a joint account and sought to clarify earlier advice[14] and fix what the Chief Counsel referred to as "the chaotic case law . . . ." The Chief Counsel announced:[15]

> While we continue to believe that there is an adequate legal basis for the view that federal gift tax liability arises on the creation of a bank account where a true joint tenancy is intended pursuant to state law, a uniform federal rule that **no gift occurs until withdrawal** is desirable from an administrative standpoint in light of the variations in local law and the factual difficulty in determining in any individual case whether a true joint tenancy has resulted, as the chaotic case law . . . on this subject amply demonstrates. Moreover, such a uniform rule is consistent with the view adopted in the decided cases which have involved this issue.[16]

Page 5 of the 2018 instructions to I.R.S. Form 709 explains:

> If you create a joint bank account for yourself and a donee (or a similar kind of ownership by which you can get back the entire fund without the donee's consent), you have made a gift to the donee **when the donee draws** on the account for his or her own benefit. The amount of the gift is the amount that the donee took out without any obligation to repay you.[17]

On the other hand, in *Estate of Buchholtz v. Commissioner,* the court held that gifts were made on creation of the joint accounts. In *Buchholtz*, there was a *withdrawal* of funds from joint bank accounts within three years prior to death. In finding that the gifted property was not includible in the estate of Mr. Buchholtz, the court had to have found that gifts on creation of the accounts occurred since otherwise the I.R.C. § 2035(b) presumption would have applied had the court not done so.[18] An Action on Decision announcement (AOD) supports this reading of *Buchholtz* as well, even though the court did not explicitly make clear that it was so holding.[19] The United States District Court for the Eastern District of Wisconsin has held that there was a gift on the creation of a joint brokerage account where the intent to establish the right of each joint tenant to one-half of the account was confirmed in writing a number of times with the custodian, Merrill Lynch, even though no withdrawals were made at the time the gift was found to have been made.[20] The court reviewed all the facts that tended to establish an intention to create a joint account in finding there was a completed gift on creation. Some also seize upon the legal statutory presumption found in New York Banking Law § 675 to bring order to the decisions and argue to the effect that accounts established as joint accounts are presumed to be joint accounts and therefore gifts are made on creation of the joint account as a result of the statutory presumption.

But New York Banking Law § 675 creates only a presumption and presumptions can be overcome.[21]

New York's Appellate Division has also held in any number of decisions that if no joint account was intend-

ed but rather the intent was to create a mere convenience account, it would result in no gift on creation.[22] This issue of intent was also raised in *Buchholtz*, where the IRS argued, among other things, that no intention to create a joint account existed because B testified that he would have returned the funds if requested to do so by A.

There is also federal case law holding that a withdrawal is necessary before a gift of a joint account can be completed where either A or B can withdraw the entire deposit.[23] The rationale in these cases is that where A retains the right to withdraw all the funds in a joint account by virtue of being a joint owner, no gift can be intended to B.

So there are a number of complications in concluding that there is a gift on creation in New York for federal gift tax purposes. First, the time at which the determination is made as to the intent of A and B about the nature of the account, namely, whether it is intended as joint or not, is a moving target.[24] The U.S. Tax Court has held that the time at which the intention of the parties to an alleged joint account is to be determined is not fixed. The court stated:

> We think that the most that can be distilled from more recent decisions (all of which held in favor of the taxpayer) is that, while the critical point in time will often be when a joint bank account is opened or deposits made therein, a general guideline to this effect should not be elevated into an absolute rule of law.[25]

Can one be sure when a court will apply the determination of intent? Will a court find it made at the date the accounts are first established or later when a depositor dies? Can subsequent events affect the intentions? There is no hard and fast rule**.**

Second, of course, is the IRS regulation presented above that must be enforced with its plain meaning. I.R.C. § 7805 gives the U.S. Secretary of the Treasury the power to create the necessary rules and regulations for enforcing the I.R.C.

Third is the oft-cited factor in determining whether a gift is intended, which is that A did not file gift tax returns on the creation of the joint account, indicating that no gift was intended.[26]

Would a better analysis be to rely on the Treasury Regulation until a withdrawal is made from the joint account by B? Does this approach have the benefit of not becoming embroiled in the factual determinations of intent of A or B as pointed out by the General Counsel? Would it be risky advice to A or B to file a gift tax return prior to withdrawals being made when the very time to determine whether a gift is intended is not fixed? Would one not want to accelerate the gift tax potential or use of the unified exemption amount? If one answers all these questions in the negative, only then should a gift tax return be filed on the creation of a joint account, A and B should each report one-half of the interest earned on each of their personal income tax returns, and the custodial bank should issue a Form 1099 one-half to each joint owner.

Fourth, to be considered last (but not least) is how your conclusions on the gift tax issue affect qualified disclaimers? If there is no completed gift on creation and no withdrawals, B should be able to disclaim the entire value of the account after the death of A.[27]

Endnotes

1. This discussion is not applicable to so-called "convenience accounts" established under New York Banking Law § 678.
2. Francine R.S. Lee & Elisa Shevlin Rizzo, *The Confusion Surrounding Joint Bank Accounts in New York*, N.Y. St. B. J., 51 Tr. & Est. L. Sec. Newsl. 3, at p. 20 (Fall 2018).
3. I.R.C. § 2523.
4. Jointly held assets also pass by operation of law to the surviving joint owner and are not controlled or affected by the terms of one's will. This may, in the minds of the lay person, drive the desire to create such accounts since doing so avoids the process by which a court determines that the document designated as will is in fact "decreed" to be one's will. That court process is known as "probate."
5. *See* Lee & Rizzo, *supra* note 2 for discussion of the presumption of New York Banking Law § 675 and the impact of donative intent.
6. *See* 41 Alb. L. Rev. 141 (1977).
7. *In re Kleinberg v. Heller*, 376 Misc. 2d 636 (Sur. Ct., Bronx Co. 1974), *rev'd sub nom*, 45 A.D.2d 514 (1st Dep't 1974), *rev'd*, 38 N.Y.2d 836, 844 (1976).
8. *See, e.g.*, *Estate of Jesse I. Friedman*, N.Y.L.J. Aug. 17, 1988 (Sur. Ct., N.Y. Co.) (Preminger, S.).
9. *See, e.g.*, *Bricker v. Krimer*, 13 N.Y.2d 22 (1963) (holding that there is no duty to account as to the moiety) (citing *In re Estate of Pinnock*, 83 Misc. 2d 233 (Sur. Ct., Bronx Co, 1975).
10. *See, e.g.*, Rabkin & Johnson, 4 Fed. Income, Gift and Est. Tax'n § 51.04.
11. Treas. Reg. § 25.2511-1(h)(4) (emphasis added).
12. Rev. Rul. 69-148, 1969-1 C.B. 226 (emphasis added) (citing Treas. Reg. § 25.2511-1(h)(4)).
13. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977). The Chief Counsel is an Assistant General Counsel of the Treasury Department, appointed by the President with the advice and consent of the Senate. *See* 31 U.S.C. § 301(f)(2). For most purposes, the Chief Counsel is subject to the supervision of the General Counsel of the Treasury Department, not the Commissioner of Internal Revenue. General Counsel's Memoranda are "legal memoranda from the Office of Chief Counsel to the Internal Revenue Service prepared in response to a formal request for legal advice from the Assistant Commissioner (Technical)." *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 669 (D. D.C. 1981) (internal citation omitted). They are "primarily prepared by attorneys in the Interpretative Division of the Office of Chief Counsel and usually addressed to the Office of the Assistant Commissioner (Technical) in connection with the review of proposed private letter rulings, proposed technical advice memoranda, and proposed revenue rulings of the IRS." *Id.*

14. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977) (revoking both IRS Gen. Couns. Mem. 35,088 (Oct. 20, 1972) and IRS Gen. Couns. Memo. 36,647 (March 23, 1976) to the contrary).

15. This is especially true where New York case law constantly uses the word “gift” to describe **rights** to joint funds which are the subject of the controversy but not necessarily the federal gift tax implications.

16. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977) (emphasis added); *see also* IRS Gen Couns. Mem. 37,590 (June 29, 1978). “If differences arise between the positions of the Office of Assistant Commissioner (Technical) and the Office of Chief Counsel, the differences are generally reconciled on an informal basis before the adoption of the revenue ruling, private letter ruling, or technical advice memorandum in question.” *Taxation with Representation Fund*, 646 F.2d at 669. “IRS personnel are instructed by section 4245.3(3) of the Internal Revenue Manual that GCMs should not be used as precedents in the disposition of other cases but may be used as a guide with other research material in formulating a district office position on an issue.” *Id.* (citing I.R.M. § 4245.3). “However, GCMs are frequently cited by staff attorneys in the Office of Chief Counsel in subsequent GCMs to insure consistency, avoid duplication of research, provide a reference source, and update earlier memorandums when a position on an issue is sustained, modified, or changed within the Office of Chief Counsel.” *Id.* (internal citation omitted). “GCMs are also considered by attorneys in the Interpretative Division and the Litigation Division to be of some precedent as a research item.” *Id.* Under the Treasury Regulations, General Counsel Memoranda, unfortunately, “do not establish precedent, and taxpayers cannot cite them as authority against the United States.” *Von Cos. v. United States*, 51 Fed. Cl. 1, 11 (Fed. Cl. 2001). “The authorities underlying such expressions of opinions where applicable to the facts of a particular case, however, may give rise to substantial authority for the taxpayer’s position.” James P. Holden, *New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230*, 4 Va. Tax Rev. 209 (1985) (citing 26 C.F.R. § 1.6661-3(b)(2)).

17. IRS Form 709, Instructions, p. 5 (2018) (emphasis added).

18. At the time of *Buccholtz*, I.R.C. § 2035 was not changed by the Tax Reform Act of 1976 as to I.R.C. § 2035(b), which required gifts made “in contemplation of death” and if made within three years of the date of death, such was presumed unless overcome.

19. *Estate of Buchholtz v. Comm’r*, T.C. Memo 1977-396 (Nov. 15, 1977), *action on dec.*, 1979-75 (Feb. 1, 1979); *Estate of Buchholtz v. Comm’r*, 70 T.C. 814 (1978), *action on dec.*, 1979-75 (Feb. 1, 1979).

20. *First Wis. Tr. Co. v. U.S.*, 553 F. Supp. 26 (E.D. Wis. 1982).

21. *In re Bobeck*, 531 N.Y.S.2d 340 (2d Dep’t 1988); *Wacikowski v. Wacikowski*, 93 A.D.2d 885, *lv. to app den*, 60 N.Y.2d 553 (1983); *Sherman v. Georgopoulos*, 84 A.D.2d 811 (2d Dep’t 1981); *Phillips v. Phillips*, 70 A.D.2d 30, 38 (2d Dep’t 1979).

22. *In re Friedman* 104 A.D.2d 366 (2d Dep’t 1984); *McGill v. Booth*, 94 A.D.2d 928 (3d Dep’t 1983); *In re Comarad*, 63 A.D.2d 837 (4th Dep’t 1978); *In re McMurdo*, 56 A.D.2d 602 (2d Dep’t 1977).

23. *See Wilson v. Comm’r*, 56 T.C. 579 (1971) (applying Idaho law); *see also Haneke v. U.S.*, 548 F.2d 1138 (4th Cir. 1976) (applying Maryland law).

24. *Estate of Buchholtz v. Comm’r*, T.C. Memo 1977-396 (Nov. 15, 1977).

25. *Id.*

26. *Wilson*, 56 T.C. at 579.

27. Philip A. Di Giorgio & Louis W. Pierro, *Post Mortem Planning Allows Fine Tuning of a Client’s Estate Plan*, 34 Est. Plan. Mag. 4, Apr. 2007, at pp. 31, 33; *see* Treas. Reg. § 25.2518-2(c)(5) (Example 12).

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Beware of Abusing Article 81 Guardianships

By Imaan Moughal and Penny Kassel

Guardianship for an Incapacitated Adult

An alleged incapacitated person, colloquially known as an AIP, is one who needs help caring for his or her personal and/or financial needs. Article 81 of New York's Mental Hygiene Law authorizes a person to be appointed Guardian by the Court on behalf of an AIP.[1] A guardian, often a relative, can be anyone concerned with the welfare of AIP and found suitable by the court to exercise the powers necessary to assist that person.[2]

The legislative purpose of the Article 81 is to promote public welfare by tailoring each guardianship to the individual needs of the AIP, taking into account his or her personal wishes, and when possible, giving the AIP "the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."[3]

Procedurally, once a guardianship petition is filed, the court appoints a Court Evaluator and conducts a hearing to determine whether a guardian should be appointed. The court evaluator is usually an attorney, physician, social worker, or representative of Mental Hygiene Legal Services who acts as the eyes and ears of the court, making an independent evaluation in determining whether the AIP is incapacitated and in need of the appointment of a guardian. At times, the court evaluator will recommend who should or who should not be appointed guardian. Ultimately the court will either deny the petition for some reason, or will declare the AIP to be an Incapacitated Person (now known as IP) in need of a guardian to provide for the personal and/or financial needs of the IP based on factors set forth in Article 81. If an AIP is able to consent to the appointment of a guardian, the court will denominate the AIP a person in need of a guardian (a "PING"). The court may designate a Guardian of the Person, giving the guardian authority to make personal decisions on behalf of the incapacitated person and/or a Guardian of the Property, which authorizes the guardian to manage the finances of the incapacitated person.

"The abuse or improper use of an Article 81 guardianship can result in ramifications for bringing forth a frivolous petition."

Abuse of Article 81

It is important to remember that the purpose of Article 81 is that the least restrictive form of intervention possible should be used. The abuse or improper use of an Article 81 guardianship can result in ramifications for bringing forth a frivolous petition.

The decision in *In re Bette Frankel*,[4] is illustrative. There, the Petitioner, who was the great-niece of the AIP, sought to become the guardian of the AIP, despite the existence of advanced directives, a power of attorney (POA) and health care proxy (HCP), in favor of the Respondent.

Both appointive documents were duly executed by the AIP at a time when she had mental capacity, and under the supervision of an independent attorney.[5]

The petitioner acknowledged that she was aware of the existence of the AIP's advanced directives and made no showing that they were obtained fraudulently, by undue duress or influence, or that they had been misused or abused.[6] Her sole objection was that she disagreed with the respondent's decisions as they related to the AIP's affairs.

Specifically, the petitioner sought to become the guardian because she, as a nurse practitioner, felt that she was better able to decide the AIP's plan of care than the respondent, who also happened to be the AIP's brother. She disagreed with the fact that that he had placed her in a skilled nursing facility. The petitioner felt that the AIP should return to her home.

While the mere existence of an advance directive does not automatically require dismissal of the petition

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for the appointment of a guardian as an alternative resource, the court must find the guardianship necessary to provide for the needs of the person. Section 81.29(d) of the MHL authorizes the court to modify, amend, or revoke an advance directive if the court finds the directive was obtained under certain factors that include, but are not limited to (i) executed at a time when the person lacked capacity, (ii) if the agent breached his fiduciary duty, or (iii) if the agent is not available, willing or able to fulfill their fiduciary duty.[7] In the *Frankel* case, the petitioner was unable to prove that the resources available to the AIP were invalid, improperly obtained or misused, or that the AIP's brother breached his fiduciary duty.[8]

In a similar case, *S.I. v. R.S.*, [9] the court found that there was no need for a guardian where the AIP had a valid health care proxy, and the petitioning parties failed to establish any ground upon which that AIP should be removed as an agent; nor had they established that the agent was acting in bad faith.

Stark differences exist between advance directives and guardianships. An advance directive, specifically a power of attorney, gives the principal the authority to determine whom he or she appoints as agent, and the level of authority that person has. In a guardianship, on the other hand, the court chooses the identity of the guardian and determines the extent of that guardian's powers. A guardianship proceeding is much more involved and exhaustive than an advance directive, requiring court and attorney involvement. Guardianships are also much more costly and time-consuming. As statute and case law make clear, guardianships should only be used as a last resort when less restrictive alternatives have been exhausted.

In determining a guardianship proceeding where advance directives are in place, a court must consider not only the availability of an agent's resources, but also his or her reliability. If an advance directive is being abused by an agent, the court has the authority to terminate it.[10]

Hence, in *Matter of Mitchell*,[11] the Appellate Division reversed a decision appointing a guardian for failure to consider sufficiency and reliability of available resources. The Court opined that the power of attorney and health care proxy should have been investigated before determining that a guardian was necessary.

In the *Frankel* matter, the court denied the guardianship petition, holding that the necessity of a guardian had not been demonstrated by clear and convincing evidence.[12] The court noted lesser restrictive alternatives, specifically the advance directives naming the AIP's brother as her HCP, were in place.[13] Petitioner did not challenge the sufficiency and reliability of the HCP, and testified only as to her belief that she was the more appropriate person to make the AIP's health care decisions.[14] The court explained that the petitioner's difference of opinion with the agent as to the AIP's best interests, and her desire to substitute her judgment for that of the appointed agent, is not a sufficient reason to vacate advance directives. Moreover, no evidence was presented that the agent had breached his fiduciary duty or that the advance directives were otherwise invalid.[15]

Of significance is that court also found that the proceeding did not confer any benefit on the AIP and, therefore, that her funds should not be used to pay its costs. Thus, the petitioner was directed to pay the fees of the court evaluator, counsel to the AIP, and legal fees of the cross-petitioner.[16] Indeed, it is established that courts may direct petitioners to pay such fees when there is no showing that the AIP benefited in any way from the guardianship proceeding.[17] This is designed, *inter alia*, to discourage frivolous guardianship petitions.

Conclusion

In sum, the appointment of a guardian is a drastic remedy that involves an invasion of the AIP's freedom and a judicial deprivation of their constitutional rights. Before petitioning for such relief, careful and serious consideration should be given to all the relevant facts.

Endnotes

1. N.Y. Mental Hygiene Law (MHL) § 81.02(a).
2. N.Y. MHL § 81.19(a)(1).
3. N.Y. MHL § 81.01.
4. Index No. 100259-18 (Sup. Ct., Kings Co. 2019) (Ruchelsman, J.).
5. *Id.*
6. *Id.*
7. N.Y. MHL § 81.29(d).
8. *Id.*
9. *S.I. v. R.S.*, 24 Misc. 3d 567, 877 N.Y.S. 2d 860 (Sup. Ct., Nassau Co. 2009).
10. N.Y. MHL § 81.29(d).
11. *In re Mitchell*, 124 A.D. 3d 1402, 1 N.Y.S. 3d 701 (4th Dep't 2015).
12. Index No. 100259-18 (Sup. Ct., Kings Co. 2019) (Ruchelsman, J.).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *In re Rocco*, 161 Misc. 2d 760, 615 N.Y.S. 2d 260 (Sup. Ct., Suffolk Co. 1994).

Freedom or Life: Does a Living Will Truly Serve Its Creator?

By Hon. C. Raymond Radigan and Jacob Gassner

I. Introduction

During the 20th century, medical science advanced to the point where it could enable doctors to extend life that under many circumstances had formerly been fatal.[1] Today, many of these treatments not only significantly extend life, but they even enable patients to remain attentive and active.[2] However, many of these patients are in a "persistent vegetative state," [3] awake, yet completely unaware.[4] Although such individuals may appear normal, they are unable to speak or respond to commands.[5] In such situations, relatives may, for various reasons, urge hospitals to remove the life prolonging technology.[6] Meanwhile, doctors may be reluctant to remove such equipment for religious reasons.[7] Additionally, courts have a vested interest as well in whether the life-saving technology for patients in persistent vegetative states may be removed.[8] In *Cruzan*, the Supreme Court of the United States held that a state could constitutionally require that an incompetent person's wishes regarding the withdrawal of life-sustaining medical treatment be proven by clear and convincing evidence.[9] The Court further found that a living will constitutes such evidence.[10]

A living will is a document in which one, in sound state of mind, writes what measures he does or does not want used to extend his life when he is dying.[11] The purpose of such a document is to make vital health care decisions at a time when one is still competent to make them.[12] That way, if one is struck with an unexpected disease or sustains a terrible injury that leaves him unable to communicate his wishes, he can feel reassured that his medical treatment preferences will be met.[13] As unanticipated accidents can occur to anyone at any age, experts feel it is imperative for one to make his wishes known.[14]

Today, all fifty states and the District of Colombia recognize living wills, in one way or another.[15] However, despite the advantages that a living will provides,[16] less than 30% of adults in the United States have executed a living will.[17] Moreover, of those living wills, many are simply ineffective. Considering that living wills are acknowledged in every jurisdiction in the United States[18] and that medical care providers are generally held to a strict duty to comply with their provisions,[19] it seems contradictory that one's stated wishes may not always be followed. This article will provide an overview of the situations where one's living will may not serve its maker, while analyzing various relevant state laws.

II. Living Wills: Ignored in What Circumstances?

A. Potentially Deadly Misinterpretations

Every state in the United States provides its citizens unique advance directive documents.[20] Similarly, each state has different requirements and laws that govern how an end-of-life medical care document need be executed.[21] However, in attempting to design a document that would ensure one could adequately convey his wishes to a potential life-saving doctor,[22] state legislatures have complicated the matter by suggesting vague terms.[23] For example, many states have decided that a living will should become effective when one's medical condition becomes terminal.[24] However, states disagree on the definition of the term "terminal condition."[25] Is a condition only terminal if it results in death without the use of life-sustaining procedures? Some states, like Connecticut and Alabama, specify that it is.[26] Or is it terminal if it will result in death whether life-sustaining procedures are used or not? Maryland's living will statute provides that it is.[27] What about conditions that are terminal but do not cause death for a number of years?[28] Moreover, the term "life-sustaining procedure" itself does not have a precise definition.[29] What treatments does it include?[30] How long must equipment sustain a patient for it to be considered "life-sustaining" equipment?[31]

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While certain states, including Connecticut, Maryland, Iowa, and Montana, provide statutory definitions for such terms,[32] the living will document itself does not provide any guidance on what these terms mean.[33] Yet, several jurisdictions, including Wisconsin, South Carolina, and Louisiana, require a physician to certify that a patient's condition is terminal before the living will can become effective.[34] Consequently, one physician may feel that a patient's condition is not terminal and may accordingly provide treatment, while another physician may say that treatment should be withheld pursuant to the living will because he views the patient's condition as terminal.[35] Sometimes, a doctor will simply refuse to act until the ambiguous term is clarified.[36] One need only imagine the disastrous consequences that such vague provisions in a living will can cause.

However, even if the terms of the living will are not vague, it may be misinterpreted. In 2016, Pennsylvania health care facilities reported that in 29 cases, patients were resuscitated against their wishes, and in two cases, patients were not resuscitated despite their wishes.[37] Additionally, a series of surveys by QuantiaMD, an online physician learning collaborative, found that nearly half of health professionals misunderstood living will provisions.[38] Furthermore, a study conducted by Dr. Ferdinando Mirarchi, medical director of the department of emergency medicine at the University of Pittsburgh Medical Center Hamot, established that only 43% of doctors that partook in the survey understood that a living will only applied to patients with terminal conditions.[39] Consequently, in light of such research, it is unsurprising that one's recorded wishes as to life-sustaining medical treatment may be ignored regardless of the clarity and specificity of those stated wishes.

B. The Pregnancy Problem

Although the Supreme Court approved of living will statutes,[40] the situation is more complicated when the patient is pregnant. Many states require physicians to ignore a patient's living will directives if the patient is pregnant.[41] These states have, in effect, determined that the state's interest in protecting the fetus outweighs the patient's right to determine whether to forego medical treatment.[42] Unsurprisingly, there has been opposition to such statutes.[43] Recently, four Idaho women sued the state on the basis that its law, the Medical Consent and Natural Death Act, that renders living wills invalid when a patient is pregnant,[44] is unconstitutional.[45] Moreover, the Con-

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necticut legislature recently amended its previous law that voided a patient's advance directive if she was pregnant.[46] Under its new law, women are permitted to indicate their preferences regarding life-sustaining medical treatment in their advance directives whether they are pregnant or not.[47] However, unless a patient's home state currently permits a physician to adhere to one's living will directives despite a known pregnancy, a patient's living will may be ineffective in such situations.[48]

III. Conclusion

In sum, there is a general duty for physicians to follow one's living will provisions.[49] However, there are several circumstances when physicians disregard, whether by mistake, choice, or legal obligation, one's living will terms. These situations can include an ambiguous or misinterpreted living will, as well as when a living will's creator is pregnant. However, each state's advance directive laws and requirements differ.[50] Therefore, it is highly recommended that one consult a competent attorney when considering executing a living will to ensure that it is drafted correctly and in accordance with the applicable state laws.[51]

Endnotes

1. *Should You Consider A Living Will?*, FindLaw, https://estate.findlaw.com/living-will/should-you-consider-a-living-will.html.
2. *Id*.
3. "Persistent vegetative state", as defined by Dr. Fred Plum, the creator of the term, describes a body which is functioning entirely in terms of its internal controls. It maintains temperature, heart-beat, pulmonary ventilation, digestive activity, reflex activity of muscles and nerves for low level conditioned responses. Generally, it is a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 n. 1 (1990).
4. Dilling, *Diagnostic Criteria for Persistent Vegetative State*, AMA J. of Ethics, https://journalofethics.ama-assn.org/article/diagnostic-criteria-persistent-vegetative-state/2007-05.
5. Nat'l Inst. of Neurological Disorders and Stroke, *Coma and Persistent Vegetative State*, Brainline, https://www.brainline.org/article/coma-and-persistent-vegetative-state.
6. In one case, daughters of one in a persistent vegetative state wished that their mother patient be allowed to die of thirst and starvation because living through a nasogastric tube was against their mother's wishes. *In re Westchester Cty. Med. Ctr.*, 72 N.Y.2d 517, 524 (1988). In another case, a loving mother wished to remove her daughter, who was in a persistent vegetative state, from life support because she had no hope of recovery and was subjected to numerous daily physical intrusions. *In re AB*, 768 N.Y.S.2d 256, 271 (2003). In another, a father wished for the respirator that was keeping his daughter in a persistent vegetative state alive to be disconnected. *In re Quinlan*, 70 N.J. 10, 18 (1976).
7. Kathrina Jeorgette Flores, *End-of-Life Care and the Physician-Assisted Suicide Debate*, Physicianspractice (July 1, 2016), http://www.physicianspractice.com/career/end-life-care-and-physician-assisted-suicide-debate.
8. The Supreme Court of the United States raised several relevant considerations that need be addressed in such cases. Namely, one's liberty interest in refusing medical treatment under the due process clause and the state's interest in the protection and preservation of human life. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-280 (1990). Additionally, courts are reluctant to remove life-sustaining technology because of the state's interest in preserving life. *In re Browning*, 543 So.2d 258, 266 (Fla. Dist. Ct. App. 1989); *Cruzan v. Harmon*, 760 S.W.2d 408, 420 (Mo. 1988).
9. *Cruzan*, 497 U.S. at 278-280.
10. *Id*. at 339.
11. *Saunders v. State*, 492 N.Y.S.2d 510, 511 (Sup. Ct. 1985).
12. Should You Consider A Living Will?, *supra* note 1.
13. *Saunders*, 492 N.Y.S.2d at 511. Another major benefit of a living will is that one's family will be spared the guilt and stress of trying to determine what the patient would want. Amir Khan, *Why You Need a Living Will—Even at Age 18*, U.S.News (Dec. 19, 2014), https://health.usnews.com/health-news/health-wellness/articles/2014/12/19/why-you-need-a-living-will-even-at-age-18.
14. *Id*.
15. *Frequently Asked Questions (FAQ) About The U.S. Living Will Registry*, https://www.uslivingwillregistry.com/faq.shtm (last visited Nov. 8, 2018). Additionally, most states honor another state's advance directives. *Id*.
16. *See supra* notes 12-14.
17. Kuldeep N. Yadav, *et al*., *Approximately One In Three US Adults Completes Any Type of Advance Directive For End-Of-Life Care*, HealthAffairs (July 2017), https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2017.0175.
18. *Frequently Asked Questions (FAQ) About The U.S. Living Will Registry*, *supra* note 15.
19. *Health Care Directives: Is There a Duty to Follow Them?*, FindLaw https://estate.findlaw.com/living-will/health-care-directives-is-there-a-duty-to-follow-them.html.
20. *State-by-State Advance Directive Forms*, Everplans, https://www.everplans.com/articles/state-by-state-advance-directive-forms. A living will is one type of an advance directive. National Institute on Aging, *The Difference Between An Advance Care Directive and a Living Will*, Agis, http://www.agis.com/document/455/the-difference-between-an-advance-care-directive-and-a-living-will.aspx.
21. *Living Wills: State Laws*, FindLaw, https://estate.findlaw.com/living-will/living-wills-state-laws.html. For example, Arkansas requires that two witnesses must be present at the time one executes his living will. Ark. Code Ann. § 20-17-202 (West 2017). Arizona, on the other hand, only requires one witness or a notary. Ariz. Rev. Stat. Ann. § 36-3262 (2018).
22. *Living Will: Advantages and Disadvantages of a Living Will*, Global-Wills.com, http://www.global-wills.com/articles/Living_Will/Living_wills_pros_cons.htm.
23. Susan J. Nanovic, *The Living Will: Preservation of the Right-To-Die Demands Clarity and Consistency*, 95 Dick. L. Rev. 209, 215 (1990).
24. The Connecticut legislature defines "terminal condition" as the "final stage of an incurable … medical condition, which without the administration of a life support system, will result in death within a relatively short time period." Conn. Gen. Stat. Ann. § 19a-570 (West 2018). The Maryland Code, however, writes that a "terminal condition" is a condition

which makes "death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." MD. CODE ANN., Health § 5-601-614 (West 2017). Alabama Elder Law explains that one is terminally ill when one's death is imminent or whose condition is hopeless unless he is supported through the use of life-sustaining procedures. ALA. CODE § 7:28 (2017). Louisiana defines a "terminal and irreversible condition" as a continual profound comatose state. LA. STAT. ANN. § 40:1151.1 (2015).

25. § 19a-570; § 5-601-614; § 7:28.
26. § 19a-570; § 7:28.
27. § 5-601-614.
28. Oklahoma's statutory advance directive form provides that a condition is terminal when it results in death within six months. OKLA. STAT. ANN. tit. 63, § 3101.4 (West 2018). However, not many state forms provide specific time constraints.
29. Life-sustaining treatment has been defined as any "medical procedures that would only prolong the process of dying or sustain a condition of permanent unconsciousness." *Life-Sustaining Treatment*, NOLO, https://www.nolo.com/dictionary/life-sustaining-treatment-term.html. Iowa defines a life-sustaining procedure as any medical procedure that utilizes a mechanical or artificial means to sustain a vital function, which when applied to the patient in a terminal condition, serves only to prolong the dying process. IOWA CODE ANN. § 144a.2 (West 2014). Montana, however, defines a life-sustaining procedure as meaning "cardiopulmonary resuscitation or a component of cardiopulmonary resuscitation." MONT. CODE ANN. § 50-10-101 (West 2017).
30. *Infra* note 31.
31. One dictionary provides that life-sustaining treatment need merely delay death for a short while. Life-Sustaining Treatment, *supra* note 29. Montana, however, is silent on how long life-sustaining treatment need postpone death. HEALTH § 50-10-101.
32. § 19a-570; § 5-601-614; §144A.2; § 50-10-101.
33. South Dakota's living will form includes such terms, but it does not provide what a "terminal condition" may include, nor what "life-sustaining procedures" may comprise. S.D. CODIFIED LAWS § 34-12D-3 (2018). Nor do the forms in Kentucky, Florida, Tennessee, and many others. KY. REV. STAT. ANN. § 311.625 (West 2013); FLA. STAT. ANN. § 765.303 (West 2018); TENN. CODE ANN. § 32-11-105 (West 2007).
34. WIS. STAT. ANN. § 154.03 (West 2008); S.C. CODE ANN. § 44-77-50 (2018); LA. STAT. ANN. § 40:1151.2 (2015).
35. FERDINANDO MIRARCHI, UNDERSTANDING YOUR LIVING WILL (2006).
36. Span, *supra* note 18.
37. *Id*.
38. Alicia Gallegos, *Clearing up confusion on advance directives*, American Medical News (Oct. 29, 2012), https://amednews.com/article/20121029/profession/310299941/4/.
39. Ferdinando Mirarchi, et al, *TRIAD III: nationwide assessment of living wills and do not resuscitate orders*, PUBMED.GOV (May 2012), https://www.ncbi.nlm.nih.gov/pubmed/22100496.
40. *Cruzan*, 497 U.S. at 339.
41. Pennsylvania, Iowa, Washington, Arkansas and Wisconsin are among such states. §5429; IOWA CODE ANN. § 144a.6 (West 2014); WASH. REV. CODE ANN. § 70.122.030 (West 2018); §20-17-206; WIS. STAT. ANN. § 154.03 (West 2008). New Hampshire and South Dakota require a physician to ignore a living will unless the life-sustaining treatment will not permit the continuing development and live birth of the fetus or will be physically harmful or prolong severe pain to the patient which cannot be alleviated by medication. N.H. REV. STAT. ANN. § 137-J:10 (2015). S.D. CODIFIED LAWS 59-7-2.8 (2018).
42. Molly C. Dyke, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. Rev. 867, 870 (1990).
43. Rebecca Boone, *Idaho sued over pregnancy exclusion in advance directive law*, AP NEWS (May 31, 2018), https://www.apnews.com/824dae6a669147cd88d53c0e690adf09.
44. IDAHO CODE ANN. §39-4510 (West 2012). Living will and durable power of attorney for health care.
45. https://www.apnews.com/824dae6a669147cd88d53c0e690adf09
46. Thaddeus Mason Pope, *Connecticut Now Honors Advance Directives Even When the Patient Is Pregnant*, MEDICAL FUTILITY BLOG (May 27, 2018), http://medicalfutility.blogspot.com/2018/05/connecticut-now-honors-advance.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MedicalFutilityBlog+%28Medical+Futility+Blog%29. In opposition to the previous law, Dr. Matthew Drago, a neonatologist and bioethicist at Yale University claimed that a pregnancy exception is medically unethical "because it forces doctors to ignore patients' stated wishes." The Associated Press, *Bill allowing living wills for pregnant women clears House*, AP NEWS (Apr. 24, 2018) https://apnews.com/1e65deea137d4d729a34ee29c7a88f32.
47. CONN. GEN. STAT. ANN. § 19a-575 (West 2018).
48. Health Care Directives: Is There a Duty to Follow Them?, *supra* note 21.
49. *Id*.
50. Living Wills: State Laws, *supra* note 23.
51. *Id*; *see also* Living Will: Advantages and Disadvantages of a Living Will, *supra* note 24.

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By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

TRUSTEES

Article 81 Guardianship Does Not Require Removal of Trustee

The surviving grantor and trustee of an irrevocable trust, Arline, executed a deed transferring real property to herself as beneficiary and then, together with Arline's Article 81 guardian, petitioned the Supreme Court pursuant to RPAPL for permission to sell the real property. The petition was opposed by the remainder beneficiaries, Arline's stepchildren, one of whom also petitioned pursuant to EPTL 7-2.6(a)(2) to remove Arline as trustee on the grounds that Arline "is a person unsuitable to execute the trust," because Arline is a person in need of a guardian. The Supreme Court granted the petition for permission to sell the real property, confirmed Arline's conveyance of property and the contract of sale and denied the stepchild's petition. On appeal the Appellate Division affirmed.

The stepchildren argued that Arline, as trustee, violated the terms of the trust by conveying the property to Arline, as beneficiary, because the conveyance is a gift to Arline and the trust terms require any gift of trust property, including gifts to the co-trustees as individuals, be made by both grantors "acting together." The court, however, focused on the terms giving the trustees "sole and absolute discretion" to make distributions of income or principal or both to either grantor or to the survivor. The trust was later amended by the grantors to provide that on the death of the first to die the survivor would become sole trustee. Arline was the survivor as her husband had previously died. The trust terms do not evidence any intent to require preservation of principal for eventual distribution to the remainder beneficiaries nor do the terms require the trustee to use their own assets before distributing trust property to themselves for their own benefit. The "undisputed, unambiguous terms of the trust instrument," therefore, authorize Arline's distribution of the real property. (Although Arline has discretion as trustee to make distributions to Arline, as beneficiary, a power which could not be exercised under EPTL 10-10.1, there is no mention of that provision in the opinion. The Supreme Court's approval of the conveyance can be assumed to have dealt with the issue.)

William P. LaPiana

Nor is removal of Arline, as trustee, required by the existence of the guardianship. The stepchildren did not demonstrate that Arline is incapacitated and one of the stepchildren actually initiated the guardianship proceeding, consented to the resulting order directing the guardian to give Arline the "greatest amount of independence and self-determination possible in light of her functional level," and made no objection at that time to Arline continuing as trustee. Without any evidence that Arline's condition had worsened since the order was entered, there were no grounds to remove Arline as trustee. *In re Arline J.*, 174 A.D.3d 604, 106 N.Y.S.3d 83 (2d Dep't 2019).

NO-CONTEST CLAUSES

Dispute Over Disposition of Proceeds of Sale of Estate Asset Does Not Violate No-Contest Clause

Decedent's will gave his surviving spouse a life estate in decedent's 50% share of a business, remainder to decedent's children. The will also nominated the surviving spouse as executor and gave the executor broad powers to manage decedent's share of the business and authority to "dispose" of the business and

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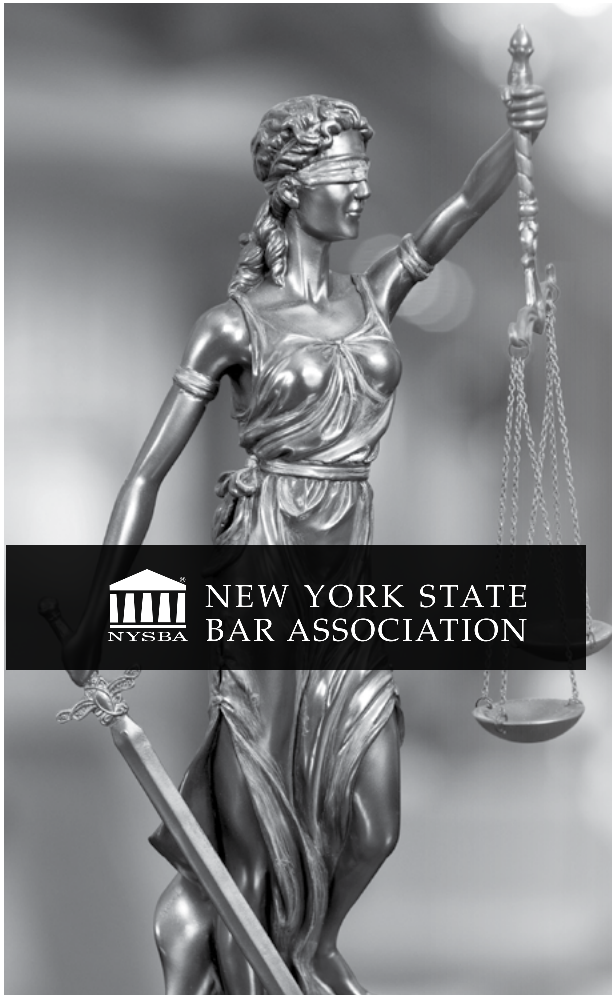
all of its assets "upon any terms which [the executor] deems advisable." The will also included a no-contest clause providing for the forfeiture of the interest of any beneficiary instituting "any proceedings to set aside, interfere with, or make null any provision" of the will or "in any manner, directly or indirectly" contesting probate.

The executor received letters and then entered into a contract to sell the entire business, the proceeds of the sale to be divided between the surviving spouse and the other owner of the business. The decedent's children then entered into a standstill agreement with the executor under which the executor agreed to hold the sale proceeds in a segregated bank account pending determination of the children's interest as remainder beneficiaries. The children eventually began an action in Supreme Court against the surviving spouse to recover damages for breach of fiduciary duty and to impose a constructive trust and for an accounting of the proceeds of the sale of the business.

The surviving spouse, as executor, then petitioned under SCPA 1420 for construction of the no-contest clause alleging that the will granted the executor "absolute and sole discretion" to dispose of any assets of the estate, and that by commencing the action in Supreme Court the children "interfered" with the executor's administration of the estate and therefore, had violated the no-contest clause. The Surrogate's Court found that the children had indeed interfered with executor's broad authority to dispose of estate property and had therefore violated the no-contest clause.

On appeal, the Appellate Division reversed. The children's Supreme Court action alleged that the executor had breached her fiduciary duty as executor by taking possession of all of the sale proceeds without any regard to the children's interest as remainder beneficiaries. That action does not involve the validity of the will or interfere with the executor's exercise of the discretion to dispose of estate assets granted in the will. The claim that the executor violated the standstill agreement also does not involve any challenge to the will. The children therefore did not violate the no-contest clause. *In re Sochurek*, 174 A.D.3d 908, 107 N.Y.S.3d 49 (2d Dep't 2019).



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

By Ilene Sherwyn Cooper

Commissions

Before the Surrogate's Court, New York County, in *In re Helmsley,* was a contested executors' accounting proceeding in which the petitioning fiduciaries requested the court fix their compensation in the total sum of $100 million, *i.e.*, $25 million per executor, plus $6,250,000 to the estate of the deceased executor. The Will of the decedent provided that the executors were not to receive statutory commissions, but rather reasonable compensation for services rendered. The value of the Decedent's estate at death was $5 billion. Statutory commissions would have exceeded $215 million. The Attorney General filed objections to the account alleging, *inter alia,* that the amount sought as reasonable compensation was excessive. The court observed that none of the objections claimed that the executors had acted improperly.

The record reflected that the court had previously approved an application by the executors for an advance payment of commissions in the sum of $4.5 million. Notably, although the Attorney General opposed the size of the request, the court granted the application subject to the filing of a bond by each fiduciary, reasoning that the advance was "modest when viewed against the mammoth and highly complex estate . . . ."

In support of their request, the executors argued that in determining reasonable compensation the court should be guided by the criteria utilized for the fixation of attorney's fees and the fees of corporate fiduciaries; to wit, the time spent, the value of the assets involved, the nature of the services rendered, the difficulty of the issues and the skills required to handle them, the benefits obtained, and the service provider's experience. The Attorney General argued that this approach was improper, and that a simple arithmetic formula based on the reasonable amount of time spent multiplied by an appropriate hourly rate was more appropriate. Toward this end, the Attorney General requested that the court appoint a neutral expert.

Although the Attorney General cited no authority for her approach, she contended that the equitable remedy of *quantum meruit* provided the basis. However, the court found the Attorney General's methodology was too narrow, and that New York courts often employed the multi-factor approach utilized in the fixation of legal fees when awarding compensation based on *quantum meruit*. Moreover, the court found that executorial services did not lend themselves to precise timekeeping or a precise hourly rate as the Attorney General's office subscribed.

Within this context, the court found the Attorney General's request for an expert to quantify the value of the executorial services performed after the fact was misguided, at best. Further, the court found the Attorney General's suggested guidelines for the expert were unworkable, and would prove to be a costly, time consuming, and unwieldy process.

Simply stated, in requesting that an expert be retained, the court found that the Attorney General ignored the plain fact that it was uniquely qualified to determine compensation to be paid from an estate or trust based on a reasonableness standard. In view thereof, after a thorough examination of the services performed, and the "impressive" results achieved, the court determined the reasonable compensation of the executors and the deceased executor in the full amounts requested.

***In re Helmsley,* N.Y.L.J., Aug. 20, 2019, p. 22 (Sur. Ct., N.Y. Co.).**

Interrogatories

Before the court in the pending probate proceeding was, *inter alia*, a contested motion by the decedent's spouse for authorization to conduct SCPA 1404 examinations by written interrogatories. The decedent's son opposed the motion.

The decedent died survived by a spouse, a son, and two daughters. The propounded instrument was undated, contained what appeared to be a self-proving affidavit, and named the spouse as the executor of the estate and its sole beneficiary. The signatures of the decedent and witnesses did not appear on the Will, but rather on the purported self-proving affidavit, which was notarized.

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In support of her application, the spouse contended that she could not afford to pay the expenses connected with in-person depositions for the out-of-state witnesses, as there were no liquid assets with which to satisfy those costs. Moreover, the spouse alleged that she was retired and of limited means to support herself. In opposition, the decedent's son alleged that the provisions of SCPA 1404 required that the spouse produce the witnesses for examination, and that he be afforded the ability to personally examine them at the estate's expense.

In denying the motion, the court observed that SCPA 1405(2) provides that, "where an attesting witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence the court may and shall upon the demand of any party require his testimony to be taken by commission." Accordingly, the court required that the SCPA 1404 examinations be conducted by personal appearance.

***In re Wood,* N.Y.L.J., Aug. 9, 2019, p. 34 (Sur. Ct., Bronx Co.).**

Jurisdiction, Tortious Interference, Statute of Limitations

In *In re Brown,* the New York County Surrogate's Court was confronted with questions related to jurisdiction, tortious interference with a prospective inheritance, fraud and fraudulent concealment, Judiciary Law § 487, undue influence, constructive trust, the statute of limitations, and injunctive relief. The opinion presents a comprehensive discussion of each of these issues; the more salient features are discussed below.

The miscellaneous proceeding before the court was commenced by Radio Drama Network ("Radio Drama" or "petitioner"), a charitable corporation established by the decedent, as Grantor. The petitioner requested, *inter alia*, 1) invalidation of specific portions of instruments amending a revocable trust; 2) imposition of a constructive trust for petitioner's benefit on the assets of a subsequently created charitable trust ("Charitable Trust"); and 3) removal of the decedent's long-time lawyer ("respondent") from his position as director of Radio Drama. Respondent moved to dismiss the petition pursuant to CPLR 3211 (a) (2), (5), and (7), and Radio Drama moved for a preliminary injunction suspending respondent from his position as director of the company and enjoining him as trustee of the Charitable Trust from making distributions from the trust in excess of the minimum amount set forth in the Internal Revenue Code.

The deceased grantor was a successful producer of radio programs who died on June 4, 2010 with an estate valued at approximately $850,000. Prior to his death, he created a Revocable Trust into which he transferred millions of dollars. The decedent was the sole trustee and primary beneficiary of the trust, and the petitioner received the bulk of the trust remainder.

In a first restatement of the Revocable Trust, the grantor provided that the respondent, as successor trustee of the trust, would be entitled to commissions in an amount which petitioner alleged resulted in his receipt of an additional $1.7 million in compensation. A further restatement eliminated petitioner as beneficiary of the trust, and named the Charitable Trust as Revocable Trust in its place. On the same date, the decedent executed a new Will in which he left his then relatively modest estate to petitioner. Respondent, or a member of his firm, drafted the trust amendments and Will, and was the sole executor and trustee of the Revocable and Charitable Trusts.

Based on the foregoing, petitioner alleged that respondent carried out a fraudulent scheme to divert virtually all of the Grantor's assets from Radio Drama to the Charitable Trust, over which respondent had complete control, as trustee, and to respondent, individually, through the increased commissions provided for. Toward this end, petitioner argued that respondent took undue advantage of and misled the decedent, who was elderly and hearing impaired at the time the instruments were prepared and executed.

Respondent's motion pursuant to CPLR 3211 (a) (2) sought dismissal of the proceeding on the grounds that the court lacked subject matter jurisdiction over petitioner's request that he be removed as a director of its Board of Directors based on an alleged breach of fiduciary duty. The court agreed, finding that, despite its expansive power, the claim was a dispute between living persons, with only a nominal relationship to the affairs of the decedent or the Revocable Trust. Indeed, the court found it significant that a recovery on this claim would only affect the corporation's internal governance, a matter in which neither the estate of the decedent nor the Revocable Trust had an interest. The fact that an estate and trust were part of the narrative underlying the claim did not alter the result.

Equally so, the court refused to find jurisdiction over the claim despite the fact that it had jurisdiction over the other claims asserted by petitioner. Although the court recognized the importance of avoiding fragmented litigation among the same parties, it noted that, unlike the proceeding *sub judice*, cases in which jurisdiction over multiple claims was found, even those concerning corporations and partnerships, involved prayers for relief that clearly affected an estate or trust. Accordingly, petitioner's breach of fiduciary duty claim was dismissed.

In support of his contention that petitioner failed to state a cause of action, respondent argued that dismissal was warranted because petitioner's claims essentially sought recovery for tortious interference with a prospective inheritance, a cause of action not recognized in New York. Nevertheless, the court opined that while respondent was correct to the extent an action

predicated on such a claim requested damages, where equitable relief was sought, such as the imposition of a constructive trust, as in the case before it, such a claim would lie. Accordingly, respondent's motion to dismiss on this ground was denied.

Further, the court found that petitioner had stated a claim for fraud and fraudulent concealment against the respondent. The court observed that underlying the claim for fraud were allegations that respondent had inserted "misleading revisions" into the amendments and restatement of trust in order to deceive the grantor into significantly increasing his commissions, and changing the remainder beneficiary. In light of these allegations, the court found that petitioner's contentions that respondent, as the grantor's lawyer, had a duty to disclose and failed to disclose the impact of these revisions stated a claim for fraud and fraudulent concealment. Similarly, the court concluded that petitioner had stated claims for undue influence, unjust enrichment, and the imposition of a constructive trust.

Finally, the court rejected respondent's motion to the extent that it sought dismissal of respondent's claims as time barred. While petitioner and respondent both acknowledged that a six-year statute of limitations applied, the court rejected respondent's contention that the statutory period began to run on the effective date of each of the trust amendments in issue. Rather, the court concluded that the statute of limitations with respect to claims concerning a revocable trust begins to run on the death of the grantor. Inasmuch as petitioner had commenced its proceeding within six years of the grantor's death, the court held that petitioner's claims were timely.

***In re Brown*, N.Y.L.J., July 23, 2019, p. 23 (Sur. Ct., N.Y. Co.).**

Pleading

In *In re Caridi*, the Surrogate's Court, New York County, dismissed the amended objections to an accounting on the grounds that they were vague and incomprehensible, and thus failed to give the fiduciary fair notice of the claims against him. In support of his motion to dismiss, the movant alleged that the amended objections did not single out any particular entry in the account or refer to any specific action of the trustee as imprudent or unreasonable. He argued that it was therefore impossible for him to respond to same. The court found that the amended objections contained allegations that were general and conclusory in nature, and failed to meet the requirements of pleading within the scope of SCPA 302; to wit, that a pleading be "sufficiently particular to give the court and parties notice of the claim, objection or defense."

***In re Caridi*, N.Y.L.J., July 19, 2019, p. 24 (Sur. Ct., N.Y. Co.).**

Removal of Preliminary Executor

In a contested probate proceeding, the decedent's spouse objected to the preliminary executor's request for an extension of his letters, and requested that the Public Administrator be appointed the temporary administrator of the estate in his place and stead. The record reflected that the preliminary executor and the objectants had been engaged in disputes and litigation for years prior to and following the decedent's death, and that the animus between the parties was so severe that it was disrupting the administration of the estate. The court noted that the testator's nomination of a fiduciary should only be nullified upon a showing that the statutory grounds for disqualification clearly exist, and that disharmony in itself would not constitute grounds for disqualification. Nevertheless, under the circumstances, and in an effort to move the estate forward, the court opined that the testator's wishes for the appointment of a fiduciary had to yield to a third party. Accordingly, the preliminary executor's request was denied, and the Public Administrator was appointed temporary administrator of the estate.

***In re Harris*, N.Y.L.J., July 2, 2019, p. 23 (Sur. Ct., Bronx Co.).**

Revocation of Wills

Before the Surrogate's Court, New York County, in *In re Mandel*, was a motion by the petitioners for summary judgment dismissing the objection to probate alleging that the propounded Will was revoked by an act of obliteration or cancellation of its dispositive provisions.

The decedent died with an estate of $5 million, with no spouse or children, but two sisters, who were her sole distributees. Her Will was offered for probate, by her stepson and brother-in-law, and her sisters filed objections thereto.

It was undisputed that at the time the decedent executed her Will, there were no handwritten markings on the document other than the signature of the decedent, the signatures and addresses of the attesting witnesses, and the date of the Will, which had been handwritten by the attorney-drafter. Pursuant to the pertinent provisions of the instrument, the decedent made specific cash bequests, created a trust for the decedent's pets, and devised and bequeathed the residue of her estate to her spouse, or alternatively, her stepson.

When the Will was offered for probate, interlineations appeared on nine of its 27 pages, and within seven of its 15 articles. More specifically, the lines were drawn through the name of the decedent's spouse, the name of the decedent's stepson, his wife and his children, and the names of the decedent's brother-in-law, and one of her sisters were handwritten in above or below the stricken language. In addition, lines were

drawn through the names of the trust remainderpersons, the names of beneficiaries of specific bequests, and the names of certain beneficiaries in certain subdivisions of the residuary clause.

By contrast, the bequest of tangible personal property was left untouched, as were the dispositions for the primary beneficiaries and ultimate contingent remainderpersons of the residuary estate, the decedent's signature, the attestation clause, and the signatures and addresses of the attesting witnesses.

The court opined that strict compliance with the provisions of the revocation statute, EPTL 3-4.1, is required before revocation will be found. To this extent, in order to effectuate a revocation by obliteration, there must be the concurrence of an act of revocation and an intent to revoke. The court observed that a sufficient act of obliteration under the statute required the markings on a will to affect the entire instrument, or a "vital part" thereof. Decisions have considered "vital" the signature of the testator, or of an attesting witness, as well as each and every dispositive provision of the will.

Within this context, the court held that the markings on the propounded instrument did not affect the entire will or a vital part thereof, as that phrase was interpreted by case law. The court rejected objectants' suggestion that the unmarked provisions of the Will were unimportant or irrelevant. Indeed, the court noted that the trust for the decedent's pets, and the names of the ultimate contingent remainderpersons of the estate, remained intact, and could not simply be disregarded.

Moreover, the court rejected objectants' proffer of extrinsic proof of the decedent's intent to revoke her Will, reasoning that an inquiry into a testator's actual intent to revoke cannot be made "unless and until" the court decides that the threshold issue of compliance with statutory formalities has been satisfied. Inasmuch as those formalities had not been satisfied, the issue of intent, or even a presumption of intent to revoke, could not be reached.

Accordingly, the petitioners' motion for summary judgment was granted, and the propounded will was admitted to probate.

***In re Mandel*, N.Y.L.J., Aug. 20, 2019, p. 23 (Sur. Ct., N.Y. Co.).**

Sale of Real Property

Before the Appellate Division, Second Department, in *In re Kahn*, was an appeal from an Order of the Surrogate's Court, Kings County, which denied a petition by the administrator of the decedent's estate to remove the restrictions on his letters of administration that prohibited him from selling real property owned by the decedent at death.

In support of his application to the Surrogate's Court, the administrator represented that the real property in issue was encumbered by an $870,000 mortgage, together with interest and penalties, and was in foreclosure. Further, he alleged that the fair market value of the premises was $325,000, and that it was in need of repairs that exceeded $130,000. Accordingly, the petitioner sought authorization to conduct a short sale of the property for the sum of $308,750.

The Surrogate's Court denied the petition, finding, *inter alia,* that the petitioner had not made an adequate showing that the proposed sale was in the best interests of the estate. Specifically, to this extent, the court noted that while the petitioner had submitted, *inter alia*, the lender's letter approving the proposed sale, an appraisal of the property, substantiation for the cost of repairs, and a waiver and consent executed by a distributee, he had failed to submit evidence establishing the existence of the mortgage or the sum owed, proof that the property was in foreclosure, or that there were no other distributees interested in the relief requested.

The Appellate Division affirmed, opining that in fulfilling its duty "to preserve and enhance, as far as possible, the assets of decedents' estates,"[1] a Surrogate should be guided by an estate's best interests. To this extent, the Court observed that a decedent's personal property is the primary source for the payment of the decedent's debts, and that land cannot be used as a source of funds unless the personalty has been exhausted. On the other hand, the primary source for payment of a mortgage debt is the mortgaged premises. Thus, to obtain court authorization to sell real property to satisfy a decedent's debts, including mortgage debts, a personal representative must demonstrate that the decedent's personal property is otherwise insufficient to do so.

In view of the foregoing, the Court concurred with the Surrogate's determination that, without other evidence, the petitioner's conclusory assertions regarding the extent of the decedent's personal property and debts, the existence and status of the mortgage, and the identity of potential distributees was insufficient to support the relief sought.

***In re Kahn*, N.Y.L.J., June 7, 2019, p. 25 (2d Dep't).**

Standing

Before the Surrogate's Court, Albany County, in *In re Wilke*, was a motion for standing to appear as a person adversely affected by the admission of the propounded Will to probate, and for permission to conduct SCPA 1404 examinations and file objections.

The record revealed that prior to his death the decedent filed a Will, dated May 20, 2016, with the Surrogate's Court for safekeeping. Pursuant to the terms of this instrument, he bequeathed his entire estate to the

movant, whom he described as his "caretaker, friend, and godson," and nominated him as the executor. On January 23, 2019, the decedent retrieved that instrument from the court.

Shortly thereafter, the decedent died from injuries suffered from an accident at his home. One week later, a Will, dated January 7, 2019, was filed with the court, which instrument made no provision for the movant. On the return date of citation, the movant appeared with a copy of the 2016 Will and requested permission to participate in the proceeding.

Although the 2016 Will had not been filed with the court, and thus the movant did not receive citation at the commencement of the proceeding, the court nevertheless observed that the movant could be entitled to participate pursuant to the provisions of SCPA 1410. To this extent, the movant argued that he had standing to appear as a person adversely affected by the propounded Will inasmuch as the 2016 Will left him the decedent's entire estate. Conversely, the movant argued that a determination that the 2019 Will was invalid would invalidate the clause revoking all prior wills, and thus revive the 2016 Will of which he was the sole beneficiary.

In opposition to the motion, the petitioner argued that the 2019 Will was valid, and that the 2016 instrument had been destroyed by the decedent when he removed it from safekeeping prior to his death.

Initially, the court noted that the provisions of the 2016 Will conferred standing upon the movant as a person adversely affected by the propounded instrument, and that the existence of only a copy thereof did not serve as an impediment to the movant's status. Indeed, the court observed that a copy of the Will could be admitted to probate pursuant to SCPA 1407, governing the probate of a lost will.

Further, although the petitioner claimed that the 2016 Will had been destroyed by the decedent, the court concluded that it would be premature to assess whether movant could rebut the presumption of revocation that arose as a result of the decedent's possession of the original instrument prior to death. Rather, the court held that the movant had presented sufficient facts surrounding the propounded Will to raise questions surrounding its validity. In view thereof, and its authority pursuant to SCPA 201(3), the court found that the movant had standing to appear as a party in the probate proceeding, to request SCPA 1404 examinations therein, and to file objections.

***In re Wilke,* N.Y.L.J., Aug. 6, 2019, p. 28 (Sur. Ct., Albany Co.).**

Endnote

1. *In re Jones,* 8 NY2d 24, 27, *citing In re Graves,* 197 Misc 555, 557 (Sur. Ct., Erie Co.).

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