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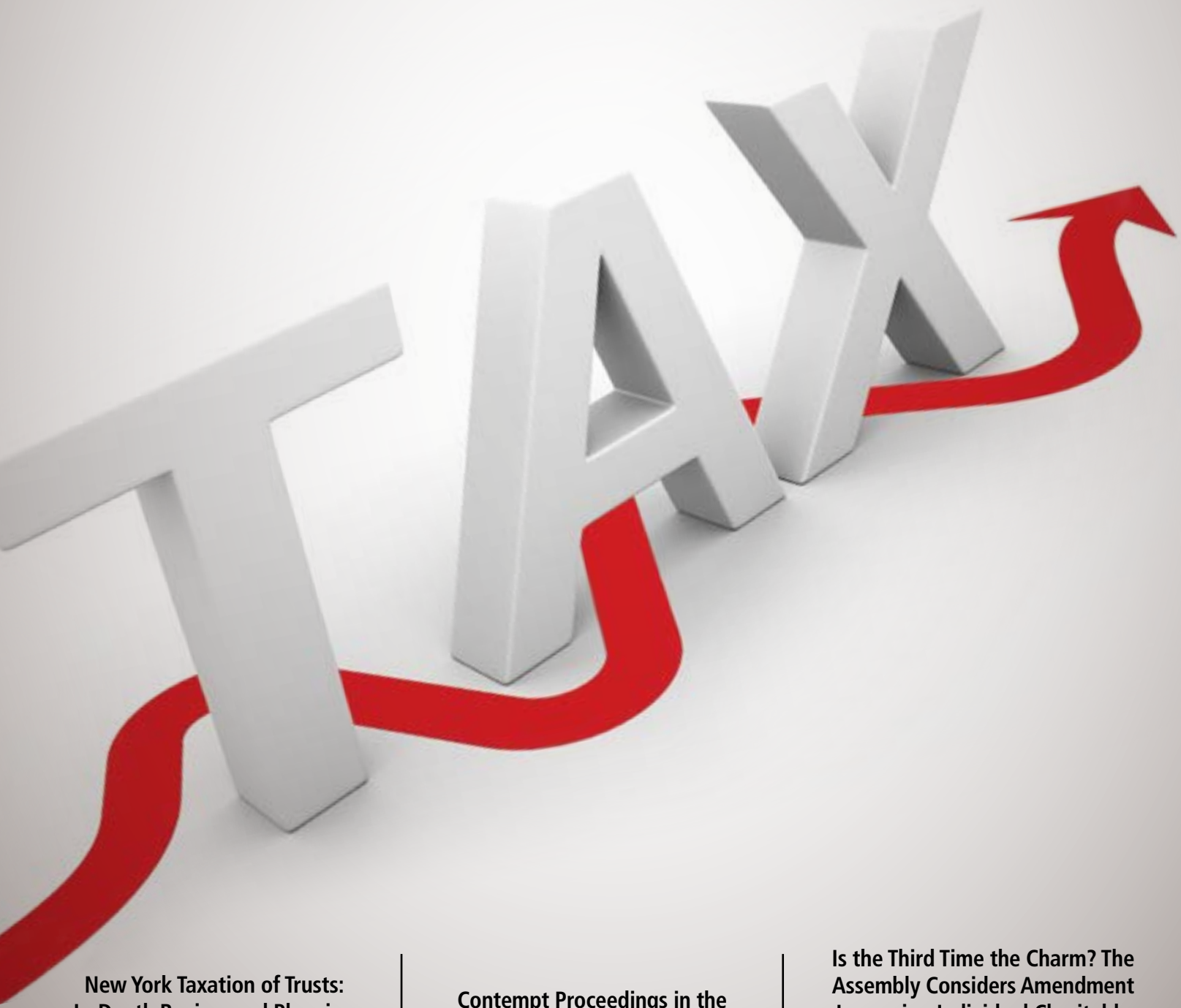

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The *Journal* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Nicholas G. Moneta (nicholas.moneta@rivkin.com) in Microsoft Word. Please include biographical information.

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TRUSTS AND ESTATES LAW SECTION JOURNAL

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Message From the Section Chair

By Jennifer F. Hillman

Jennifer F. Hillman

As I write this column, I have just finished my last executive committee virtual meeting as Chair. In my first column as incoming Chair of the Section, I wished us all brighter days in 2021. While not quite the year (or the brighter days) that I imagined, this year has been rewarding all the same. I have truly enjoyed the discussions, the successes and the challenges.

Our Fall Meeting entitled "Til Death (Or Divorce) Do Us Part: Intersection of Trusts and Estates, Family and Matrimonial Law" was well-received and well-attended. Co-chairs Tara Pleat and Lois Bladykas put together a fantastic program reviewing pre-nuptial agreements, divorce settlements and the right of election, issues faced by divorcing parents who have children with special needs and a view from the bench with several judges who handle both surrogate's court and matrimonial matters. I hope that we can continue to learn from each other on issues where our practices overlap.

Looking forward to the Annual Meeting, Co-chairs Deborah Kearns and Angelo Grasso are crafting a program around gifting, including planning and litigation aspects. While the Annual Meeting program will not be in person, I encourage you all to take advantage of the in-person NYSBA events as an opportunity to get together with colleagues.

I am pleased to report that several legislative initiatives of the Section were approved by the NYSBA Executive Committee this fall including proposals which would authorize the remote witnessing of wills and remote notarization of estate planning documents (which were an outgrowth of a joint task force with the Elder Law and Special Needs Section), as well as a proposal which seeks to harmonize certain debtor and creditor laws. Several years ago, the Section began work on a New York Trust Code to codify New York common law related to trusts. This extensive project continues to be a Section legislative priority, as we continue to work with the legislature to promote its enactment.

The Section otherwise remains very active in advancing legislative priorities important to our area of law. Our various committees work tirelessly on issues such as lost trusts, amendments to the right of election statute, posthumous annulments and the right of election, trustee commissions on charitable trusts, as well as creditor's rights and Crummey powers (to name just a few). Thank you to all of our committee members for their hard work and dedication.

It was an honor to serve as Chair this year, along with my fellow officers Laurence Keiser, Chairperson-Elect, Michael Schwartz, Secretary, and Patricia Shevy, Treasurer. I look forward to us all meeting together again in person.

Message From the Editor

By Nicholas G. Moneta

Nicholas G. Moneta

In this issue, Catherine Eberl provides a helpful explanation of the taxation of New York trusts; Gary B. Freidman presents the first part of his two-part series, which discusses the utility of contempt proceedings in the Surrogate's Court and the differences between civil and criminal contempt proceedings; and Raymond C. Radigan and Kassandra Polanco address proposed legislation that would increase the commissions of an individual charitable trustee and allow such commission to be derived from both the income and principal of a wholly charitable trust. Our recurrent columnists, Paul S. Forster, Ilene S. Cooper, David Pratt, and Hayley Sukienik, offer their summaries of a wide array of recent court decisions affecting our practice area.

Many thanks to those who have contributed to this volume and to all those who worked on each volume this year.

We continue to urge Section members to participate in our publication. CLE credits may be obtained. Please consider submitting an article for publication in the *Journal*. We look forward to reading your work in 2022!

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

New York Taxation of Trusts: In-Depth Review and Planning Opportunities

By Catherine B. Eberl

Across the 50 states, there are numerous, varying regimes for the state income taxation of trusts. States consider factors such as where the trust is administered, where the trustees are domiciled, and where the trust creator lived when assets were contributed to the trust. And, a handful of states have decided to not tax trusts at all.

New York is one of the states that focuses on the domicile of the trust creator in determining whether a trust is a resident trust for income tax purposes. New York will treat a trust as a resident trust if property was transferred to the trust by:

(1) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable;[1]

(2) a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable;[2] or

(3) the will of a decedent who at his death was domiciled in this state.[3]

Any trust that is not a resident trust is instead categorized as a nonresident trust.[4]

New York will tax a resident trust on all of its income, wherever earned. There may be, but not always, an offsetting credit for taxes paid to another state. By contrast, a nonresident trust must only pay New York income tax on income that is sourced to New York State.[5]

So long as a trust is taxed as a grantor trust for federal income tax purposes, the resident/nonresident dichotomy does not apply. Such a grantor trust is ignored for state level income taxes purposes, and all income will be reported on the trust creator's personal return. Once the trust ceases to be a grantor trust, then it will be taxed as either a resident trust or nonresident trust.

Resident Trusts and Partial Resident Trusts

The first threshold question in determining whether a trust is a resident trust is to determine the domicile of the trust creator. Domicile is deemed to be the place that an "individual intends to be such individual's permanent home—the place to which such individual intends to return whenever such individual may be absent."[6] Even if a taxpayer has not spent one day in New York in the last two years, the taxpayers could still arguably be a New York domiciliary if they have not made another place their home, and taken up domicile there.[7]

The governing law of the trust is not determinative. If a New York domiciliary creates and funds an irrevocable Delaware trust, the trust is still deemed to be a New York resident trust.

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Notably, the test does not look at when the trust was created, but when property was transferred to the trust. This can result in trusts that are treated as partially resident and partially nonresident if multiple transfers have occurred.[8] For instance, a trust creator may form and fund a trust while domiciled in New York, and every year thereafter continue to make additional annual exclusion gifts to the trust. Ten years later, the trust creator moves to Florida, becomes a Florida domiciliary, and continues to make gifts to the trust. The gifts made after the change of domicile are deemed to be made to a nonresident trust; this is the case even if the trust is still governed by New York law. This partial resident, partial nonresident trust scenario may also exist when multiple individuals make gifts to the same trust. If a New York grandmother forms and funds a trust, and an Ohio uncle also decides to make contributions to the trust, only the portion of the trust attributable to the New York grandmother will be deemed to be a New York resident trust.

Only the portion of the trust's income attributable to the resident portion of the trust must be reported to New York and will be subject to New York income tax.[9] New York has not issued any rules or instructions on how to report a trust that is both resident and nonresident, leaving the trustee to come up with a defensible apportionment method on his or her own.

To avoid this complex income tax reporting, a trust creator who is making annual gifts to a trust may want to consider creating and funding a new trust upon a change of domicile. Or, if possible, the trustee can sever an existing trust into two trusts, one which will own the New York resident trust assets, and one which will own the assets contributed after the change of domicile. Further, in many cases, it is wise to discourage multiple donors from different states from making gifts to the same trust, as this can lead to a trust that is resident and nonresident in New York, and potentially even partially resident in another state.

Exempt Resident Trusts

Once a trust is a resident trust, it is always a resident trust. Individuals born in New York may at any time choose to move to another state, relinquishing their New York domiciliary status and removing themselves from the taxing jurisdiction of the state. A New York resident trust, on the other hand, can never shed its resident trust status.

However, in any year that a resident trust meets the so-called "three prong test," the trust will not be subject to New York income tax in that year. To meet the requirements of the three prong test:

(1) all of the trustees must be domiciled in a state other than New York;

(2) the entire corpus of the trust, including real and tangible property, must be located outside the state of New York; and

(3) all income and gains of the trust must be derived from or connected with sources outside the state of New York, determined as if the trust were a nonresident trust.[10]

Trusts that meet this test are often referred to as "exempt resident trusts." As long as a trust continues to qualify as an exempt resident trust, New York will not be able to tax the trust.[11]

First Prong: No New York Trustees

On its face, the first prong of the test looks simple enough—in order to be an exempt resident trust, all of the trustees must be domiciled outside New York State. However, care must be taken when applying this test to trusts in which decision-making authority is not solely vested in the trustees, such as directed trusts.

In a 2004 Advisory Opinion,[12] which is commonly referred to as the "Rockefeller opinion" because it was requested for a Rockefeller family trust, the Department of Taxation and Finance took the position that certain trust advisors may be deemed to be *de facto* co-trustees. In that case, the trust agreement provided for an advisory committee, which had the power to direct the trustee with respect to trust distributions and investments. The department held that because the committee had a "controlling power" over the performance of some part or all of the "trustee's functions and duties," the advisors would be considered to be co-trustees of the trust for purposes of this prong of the test.

Under the test articulated in the Rockefeller opinion, only advisors that have been given the ability to control the trustee's functions and duties, or that have been directly given the authority to exercise trustee-like functions, should be deemed to be co-trustees. Distribution decisions and management of trust investments are core trustee activities, and the department will most likely view advisors who can control these decisions as co-trustees. On the other hand, it seems that a trust protector who has a limited role, such as receiving trust account statements on behalf of the beneficiaries, and who has no power to actually control the trustee, should not be considered a co-trustee.

While the Advisory Opinion is not binding law, it is a clear indication of the position that the department will take on audit when reviewing whether a resident trust has met the first prong of the test. Taxpayers who are looking to qualify a trust as exempt resident, and who are looking to avoid a fight with the department, should consider removing not only the New York domiciled trustees, but also the trust advisors who are domiciled in New York.

Second Prong: No New York Assets

To meet the second prong of the test, all of the trust assets must be located outside of New York. A trust planning to meet the three prong test must divest itself of any tangible property—such as real property, cars, or artwork—located in New York. All intangible property is deemed to be located at the domicile of the trustee.[13] As such, if the trustee is domiciled outside of New York, meeting the first prong of the test, then all intangible property will be deemed to be located outside of New York State as well. This is true even if the trust owns a savings account at a New York bank, or if the trust owns shares of stock in a corporation formed under New York State law; these assets will be deemed to be outside of New York if the trustee is domiciled outside of New York.

Third Prong: No New York Source Income

The third and final prong of the test requires that all income and gains of the trust be derived from sources outside of New York, determined as if the trust were a nonresident trust. New York source income of a nonresident trust includes income, gains, losses or deductions from:

(1) real property and tangible personal property located in the state;

(2) services performed in the state;

(3) a trade, profession, occupation, or business carried on in the state;

(4) a partner's or shareholder's share of New York source partnership or New York S-corporation gain or income;

(5) "any gain from the sale, transfer, or other disposition of shares of stock in a cooperative housing corporation in connection with the grant or transfer of a proprietary leasehold, when the real property comprising the units of the cooperative housing corporation is located in New York State;" and

(6) income received related to a trade, profession, occupation, or business previously carried on in the state.[14]

The department takes the position that even one penny of New York source income will cause the trust to fail the third prong, making the trust taxable in New York for that year. This is true even if the trust had $10,000,000 of income in a given year, and only $1 of that income was attributable to New York sources. In that case, the full $10,000,000 will be subject to New York income tax.

When analyzing this last prong, a question often arises with respect to trusts that have New York income and New York loss, which result in a net loss. If the trust has $5 of New York source income, and $10,000 of New York loss, does the loss cancel out the income? The statute provides that "all income and gains . . . must be derived from sources outside of New York."[15] There is no authority directly on point, and in these situations, the trustee must assess its own fact pattern and comfort level in determining how to report a trust that has New York income that is completely offset by New York losses.

As this authority makes clear, a trustee seeking to meet the three-prong test must carefully review the trust's asset holdings to assess the potential that the assets will produce New York source income. Significantly, income from intangible assets, including interest, dividends, or gains from the sale or exchange of property, is not sourced to New York unless such income derives from property employed in a business carried on in New York.[16] As a result, if a trust's only assets are shares in C corporations, ETFs, and mutual funds, for purposes of applying the third prong, the trust will not have New York source income as the only income earned by the trust is attributable to intangible assets. But if the trust's brokerage account holds publicly traded partnerships (PTP), the trustee should investigate as to whether the PTP has New York activities that may result in New York K-1 income being carried out to the trust. Similarly, trustees of trusts that own investments in S corporations, LLCs, and partnerships should be aware of whether these business entities have New York source income that will pass through to the trust.

The sourcing of income from New York municipal bonds has recently become a bit uncertain. In an Advisory Opinion issued in 2020, the department alluded that income that a trust received from New York tax exempt bonds would be deemed to be New York source income.[17] This author disagrees with the department's apparent position, which directly contradicts New York statutory authority providing that income from intangible assets, including interest income, will not be sourced to New York unless such income is attributable to property employed in a business carried on in New York.[18] Nevertheless, given the department's recent authority, a cautious trustee looking to avoid a fight may decide to avoid investing in New York municipal bonds.

In situations where a trust owns assets that do, or may, throw off New York source income, the trustee should consider the feasibility of severing the trust into two trusts, isolating the assets that produce New York source income into one trust, so that at least the second trust can meet the three prong test.

Mid-Year Changes

The department has specifically acknowledged that a trust can shift from resident taxable to exempt resident mid-year.[19] In a 2010 Advisory Opinion, the department ruled on a trust that started the year with two trustees—one who was a New York domiciliary, and one who was a New York non-domiciliary. On August 1, the

New York domiciliary trustee died. The trust did not have any New York assets or New York source income. The department held that as of Aug. 2, the trust met the three-prong test, and was not taxable in New York from Aug. 2 to the end of the year.

Reporting Requirements

A New York resident trust must file a New York income tax return even if the trust meets the three-prong test.[20] In such case, the trustee files a return showing no tax due, and must attach Form IT-205-C, which certifies that the trust meets the three prong test.[21] The failure to file the return in New York could result in a $150-a-month penalty, but not to exceed $1,500 a year.[22]

Accumulation Distribution Regime

In many cases, it is easy enough to meet the three-prong test and remove a resident trust from the reach of New York taxation. The three-prong test is rooted in New York constitutional law,[23] and therefore cannot easily be modified by the legislature. Apparently frustrated by the perceived loss of revenue from exempt resident trusts, the legislature took a sideways attack at the three-prong test in 2014, when it enacted the accumulation distribution regime.[24]

If a New York exempt resident trust accumulates income year over year, when it ultimately makes a distribution of income to a New York resident, the resident may be taxed both on current year income carried out from the trust on a K-1, and potentially on the prior year undistributed income as well.[25] Instead of reinventing the wheel, New York simply borrowed from the Internal Revenue Code, providing that the amount that will be added to the New York resident's gross income must be calculated under the federal accumulation distribution regime, as if such regime still applied to domestic trusts.[26] The nuances of calculating the amount of the deemed accumulation distribution are beyond of the scope of the article, but several noteworthy provisions of the calculation should be mentioned here. First, the regime only applies to income accumulated in the trust after Jan. 1, 2014. Second, with respect to an individual beneficiary, the regime only applies to income that was accumulated after the beneficiary turned 18, and after the beneficiary became a New York resident. Finally, the regime applies to ordinary income only, and not capital gains.

Conclusion

Once a trust is a New York resident trust, it will always remain a New York resident trust. But with careful planning and analysis, in many instances it is possible for the trust to qualify as an exempt resident trust that will not have to pay New York income taxes. The application of the three-prong test is a snapshot, applied on a year-by-year basis. Even if a trust fails the three-prong test in one year, the trustee can attempt to rearrange the trust's affairs to meet the test in the subsequent year (or even mid-way through the taxable year), so that the trust is free from New York taxation.

Endnotes

1 N.Y. Tax Law § 605(b)(3)(C)(i).

2 *Id.* § 605(b)(3)(C)(ii).

3 *Id.* § 605(b)(3)(B).

4 *Id.* § 605(b)(4)(B).

5 *Id.* § 633.

6 N.Y. Comp. Codes R. & Regs. tit. 20 § 105.20(d)(1) (N.Y.C.R.R.).

7 *Id.* § 105.20(d)(2).

8 *See* N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-11(4)I.

9 If the trust has New York source income, the nonresident portion of the trust will have to pay tax on the New York source income.

10 N.Y. Tax Law § 605(b)(3)(D).

11 *See, e.g.*, N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-10(4)I; N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-94(7)I.

12 N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-04(7)I.

13 N.Y. Tax Law § 605 (b)(3)(D)(ii); *see also* N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-94(7)I.

14 N.Y. Tax Law § 605(b)(3)(D)(i)(III) (stating that for purposes of the three-prong test income must be sourced as if The trust were a nonresident trust); N.Y. Tax Law § 631(b)(2) (setting forth sourcing rules for nonresident trusts); *see also* N.Y. Tax Bull. TB-IT-615.

15 N.Y. Tax Law § 605(b)(3)(D).

16 *Id.* § 605(b)(3)(D)(i)(III); *id.* § 631(b)(2); *see also* N.Y. Tax Bull. TB-IT-615.

17 N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-20(2)I.

18 N.Y. Tax Law § 605(b)(3)(D); N.Y. Tax Law § 631(b)(2).

19 N.Y. Dep't of Taxation & Finance Advisory Op. No. TSB-A-10(4)I.

20 N.Y. Dep't of Taxation & Finance Technical Memorandum No. TSB-M-10(5)I.

21 *Id.; see also* N.Y. Tax Law § 658(f)(2).

22 N.Y. Tax Law § 685 (h)(2).

23 *See Mercantile-Safe Deposit & Tr. Co. v. Murphy*, 15 N.Y.2d 579 (1964).

24 2014 N.Y. Laws ch. 59, pt. I, § 1.

25 N.Y. Tax Law § 612(a)(40).

26 *Id.*

Contempt Proceedings in the Surrogate's Court

By Gary B. Freidman

This article is being presented in two parts. The first part will focus on the utility of contempt proceedings and the differences between civil contempt and criminal contempt proceedings. The second part will focus on the practice and procedure in the Surrogate's Court.

A contempt adjudication (or the threat of one) is a powerful weapon in enforcing Surrogate's Court orders and decrees.[1] Many orders issued by the Surrogate's Courts direct the performance of an act, rather than simply the granting or denying of a motion. For example, a court may issue an order:

- directing a fiduciary to account under Surrogate's Court Procedure Act (SCPA) 2206;
- directing a respondent to attend and be examined in an SCPA 2103 discovery proceeding;
- directing the return of property to the estate after the turnover phase of an SCPA 2103 proceeding is completed;
- granting relief against a fiduciary in one of the SCPA 2102 "miscellaneous proceedings";
- directing delivery of property following a reverse-discovery proceeding;
- restraining a fiduciary or party from taking certain actions;
- "so-ordering" a settlement agreement; or
- directing payment or distribution in an accounting proceeding.

What makes a Surrogate's Court contempt power so unique is that even a Surrogate's Court decree directing the payment of money can, in certain circumstances, be enforced through a contempt application.

I. What Is a Contempt?

Contempt is conduct that defies the authority or dignity of a court. Because the contempt power involves a person's liberty it is not to be lightly entertained.[2]

A contempt can be either civil or criminal in nature. The purpose of a civil contempt proceeding is to vindicate the rights of a party to a litigation who has been prejudiced, injured, or harmed by a contemnor's failure to obey a court order. Accordingly, civil contempt fines must be remedial in nature, and awards formulated not to punish an offender but solely to compensate the injured party or to coerce compliance with the court's mandate or both.[3]

In contrast, a criminal contempt involves an offense against judicial authority, and it is utilized to protect the integrity of the judicial process and to compel respect for its mandates. The aim is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory.[4]

The line between civil and criminal contempt is not always easy to draw, and the same conduct may constitute both. For example, in *Bing v. Sun Wei Ass'n, Inc.*,[5] the plaintiffs were held in both civil and criminal contempt because during their court-ordered depositions they impeded defendants' right to disclosure and demonstrated a total disregard for the judicial system and its mandates.

II. Acts Punishable as a Civil Contempt—In General

Since civil contempt has as its aim the vindication of a litigant's private right, it must be shown that the litigant's rights have been harmed by the contemnor's neglect or failure to obey a court order. Absent harm, there is no basis for punishing a party for civil contempt. Willfulness or intentional conduct on the part of the alleged contemnor need not be shown. In cases involving a violation of a court order, regardless of the contemnor's motive, civil contempt is established when disobedience

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of the court's order defeats, impairs, impedes, or prejudices the rights or remedies of a party.

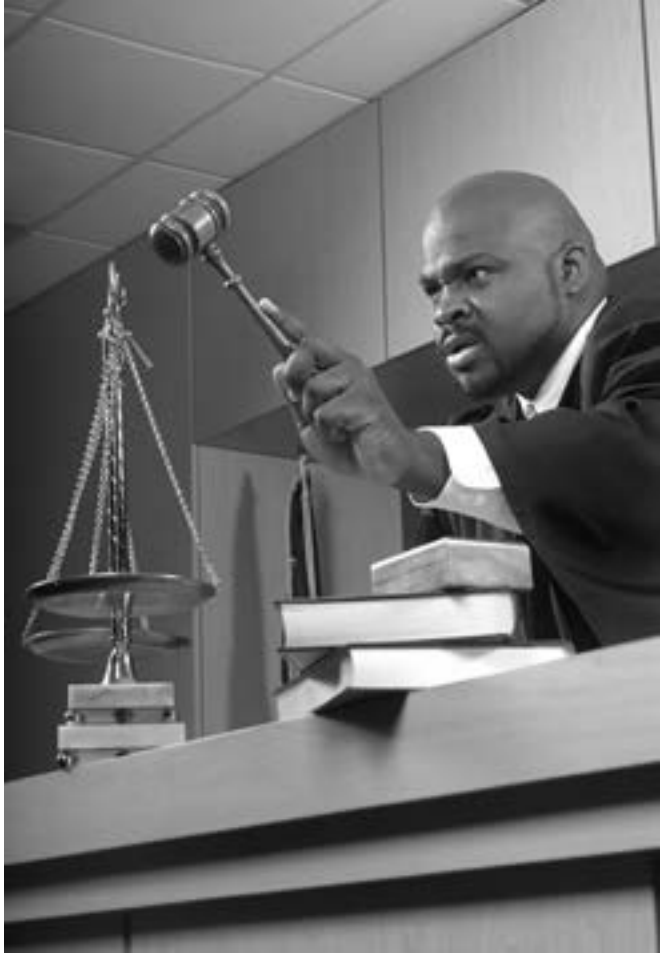
III. Acts Punishable as a Criminal Contempt—In General

The power of a judge to punish for a criminal contempt is set forth in Judiciary Law (JL) 750. Penal Law (PL) 215.50 and 215.51 define the crimes of Criminal Contempt in the First Degree and Criminal Contempt in the Second Degree. The JL and PL provisions use substantially the same language to define criminal contempt. The elements of each are the same and both require that the acts be proven beyond a reasonable doubt. They diverge, however, in procedure. A violation of the PL provision is an offense, and the proceeding must be commenced by the filing of an accusatory instrument. A proceeding under PL 215.50 and 215.51 is a criminal action. Thus, a finding of criminal contempt under the PL results in a criminal conviction, whereas a finding of criminal contempt under the JL does not.[6] Since a PL contempt is a criminal matter, unlike a criminal contempt adjudication under the JL, once a criminal contempt goes to indictment and prosecution, purging of the contempt is generally not permissible.

IV. Contempt Applications in the Surrogate's Court

The litigation in the *Estate of Frances E. Francis* is a textbook example of the use of contempt proceedings in the Surrogate's Court. At age 98 and in failing health, Ms. Francis gave a general power of attorney to Donald Maloney, the tenant who resided in the ground floor apartment of Ms. Francis's two-family home in Westchester County. Using the power of attorney, Maloney added himself and his mother to several of Ms. Francis's bank accounts and signed, both as landlord and tenant, a "lifetime tenancy agreement" giving himself and his mother a lifetime tenancy and right of survivorship. These actions essentially stripped Mrs. Francis of all of her assets. She died two years later at age 100.

The administrator of Mrs. Francis's estate commenced an SCPA 2103 proceeding and secured an order requiring Maloney to attend and be examined concerning the transfers made pursuant to the power of attorney. At first, Maloney refused to appear, and the administrator brought a petition by order to show cause to hold him in contempt for his failure to comply with the order to attend and be examined. Maloney's motion to dismiss was denied and he was restrained from disposing of any of the assets transferred by him using the power of attorney. The Surrogate then found that Maloney refused to comply with a lawful order to attend and be examined, to the prejudice of the petitioner and held him in contempt of court (a civil contempt). He was granted leave to purge by appearing for an oral examination at a date fixed by the court, but upon proof of his failure to comply, a warrant of commitment was to issue to the sheriff of any county where Maloney could be found directing that he be returned before the Surrogate.[7]



Maloney appeared for examination and ultimately the Surrogate granted the administrator's motion for summary judgment, voiding the transfers made and the lifetime tenancy agreement entered into pursuant to the power of attorney and directing him to account for his acts as attorney-in-fact.[8] A decree so directing was entered on April 17, 2008. No appeal was perfected.

Maloney failed to turn over the wrongfully transferred assets and file an accounting. Following a hearing, the Surrogate determined that prior to the improper transfers, Ms. Francis had assets totaling $637,161 and Maloney was surcharged for that amount plus interest. A decree was entered and served on his counsel and on Maloney, personally. Not surprisingly, no payments were made by Maloney. Another contempt proceeding followed. Maloney filed an answer asserting that he did not willfully disobey the decree as he did not have the money to pay the judgment. A hearing was held at which evidence of Maloney's failure to pay was adduced. Maloney testified that he no longer had any of the assets that he transferred to himself and his mother and that he had no other assets from which to pay the judgment. The court found that (a) Maloney failed to offer any proof, other than his own testimony, that he was without funds to pay the decree (query how someone proves their lack of assets other than through tes-

timony—always hard to prove a negative)[9] and (b) he violated the court's 2005 restraint against transferring assets. Accordingly, the Surrogate held that Maloney's conduct was calculated to impair, impede, and prejudice the decedent's estate and that it was his own conduct that rendered him unable to pay. Maloney was adjudged to be in contempt of the court's decree, and he was given leave to purge himself of contempt by paying to the estate the amount due with interest within ten days of service of the court's order. Upon his failure to comply, a warrant of commitment was to issue.[10]

When Maloney failed to pay, a warrant of commitment issued in July 2010 pursuant to which he was incarcerated. He was thereafter periodically brought before the Surrogate,[11] but his incarceration was continued. Twice in 2011 and again in February 2012, the Appellate Division, Second Department, denied Maloney's writs of habeas corpus. Ultimately, on June 13, 2012, the Surrogate signed an Order of Release. In total, Maloney was incarcerated for 22 months from August 9, 2010, to June 13, 2012. Although the real estate was eventually returned to the estate, no funds were ever recovered.

Endnotes

1 Unless specifically noted otherwise, any reference to orders also includes decrees.

2 *See Bank Leumi Tr. Co. of New York v. Taylor-Cishahayo*, 147 Misc. 2d 685 (N.Y. City Civ. Ct. 1990).

3 *See State of New York v. Unique Ideas*, 44 N.Y.2d 345 (1978).

4 *See King v. Barnes*, 113 N.Y. 476 (1889).

5 205 A.D.2d 355, 613 N.Y.S.2d 371 (1st Dep't 1994).

6 Pursuant to PL § 215.54, being held in criminal contempt under the JL does not bar a subsequent criminal prosecution under the PL. This section pertinently provides: "Adjudication for criminal contempt under subdivision A of section seven hundred fifty of the judiciary law shall not bar a prosecution for the crime of criminal contempt under section 215.50 based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant, shall take the previous punishment into consideration." Similarly, JL § 776 provides: "A person, punished as prescribed in this article, may, notwithstanding, be indicted for the same misconduct, if it is an indictable offense; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment."

7 *In re Francis*, N.Y.L.J., Nov. 20, 2005, p. 4, col. 4 (Sur. Ct., Westchester Co.).

8 *In re Francis*, N.Y.L.J., March 14, 2008, p. 39, col. 3 (Sur. Ct., Westchester Co.).

9 Under SCPA § 602, an order directing a fiduciary to pay a person interested in a trust or estate is "presumptive evidence" that there are sufficient assets in his hands to satisfy the sum directed to be paid.

10 *In re Francis*, N.Y.L.J., July 13, 2010, p. 27, col. 5 (Sur. Ct., Westchester Co.).

11 Under JL § 774 when a contemnor is incarcerated, the sheriff is directed to bring the contemnor before the court at no more than 90 day intervals for a determination whether the contemnor should be discharged.

Is the Third Time the Charm? The Assembly Considers Amendment Increasing Individual Charitable Trustee Commission in 2021 Legislative Session

By Raymond Radigan and Kassandra Polanco

Over three legislative sessions, various New York state legislators have introduced legislation seeking to increase the commission of individual trustees of wholly charitable trusts. Assembly Bill A7800 (the Proposed Legislation) was introduced in the 2021-2022 Legislative session and currently sits in the Assembly for review. On May 21, 2021 it was referred to the Judiciary Committee for review. If enacted, the Proposed Legislation would increase the commission of an individual charitable trustee, and allow such commission to be derived from both the income and principal of a wholly charitable trust. Thus, this amendment would compensate individual trustees of wholly charitable trusts in the same manner as individual trustees of non-charitable trusts, subject to a percentage reduction as set forth below.

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As the law stands currently, the Surrogate's Court Procedure Act (the SCPA) provides default provisions when a trust, wholly charitable or non-charitable, fails to specify how to calculate a trustee's commission. Pursuant to SCPA 2308(5)(a), which applies to trusts of persons dying on or before Aug. 31, 1956, individual trustees of wholly charitable trusts are entitled to commission equal to 6% of the trust's annual income. Likewise, SCPA 2309(5)(a), which applies to trusts of persons dying after Aug. 31, 1956, sets an annual commission of 6% of income for individual trustees of wholly charitable trusts. In contrast, trustees of non-charitable trusts are entitled to compensation on a sliding scale based on the amount of trust principal, irrespective of the trust's annual income. For example, if a non-charitable trust has $1,000,000 of assets, the trustee's commission would be $6,500, regardless of the annual income. Sponsor's Mem., 2017-18 Senate Bill S676B. However, if the same $1,000,000 of assets was held in a wholly charitable trust, and generated $1,000 of annual income, the trustee would only be entitled to $600 as their annual commission. *Id.*

The Proposed Legislation would amend the statute to calculate annual commissions of individual trustees of wholly charitable trusts based on the principal value of the trust, rather than income collected. 2021-22 Assembly Bill A7800. Adoption of the Proposed Legislation would mean that individual trustees of charitable and non-charitable trusts would be compensated in the same manner, subject to a 20% reduction for charitable trusts with a principal value up to $20,000,000, and a 50% reduction for charitable trusts with a principal value exceeding $20,000,000. The annual commission would likewise be payable 1/3 from income, and 2/3 from principal of the charitable trust. *Id.*

The Proposed Legislation is the third in a series of amendments the Legislature has attempted to pass to increase individual charitable trustee commission. While it has passed in the Senate this session, it has not yet passed the Assembly. If the Legislature returns to session before the end of this calendar year, the Assembly may have time to consider the Proposed Legislation. However, if it is not considered this session, it will have

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to be reintroduced next session and gain approval from the Senate once more. In an earlier version of the Proposed Legislation, introduced in the 2017-18 legislative session as Senate Bill S676B, Sen. Andrew J. Lanza of Staten Island advocated for the Bill and asserted that the proposed changes are meant to curtail the "unwarranted discrepancy" established between the commissions of trustees of charitable versus non-charitable trusts. Sponsor's Mem., 2017-18 Senate Bill S676B.

Whether an individual is a trustee of a charitable or non-charitable trust, both are required to commit time and energy into making decisions that best fit the purpose of the trust. As Senator Lanza highlights in the memorandum to Assembly Bill S676B, not only are individual trustees of charitable trusts held accountable to the charity itself, but they must also answer to the Internal Revenue Service and the Charities Bureau of the New York Attorney General's Office. Sponsor's Mem., 2017-18 Senate Bill S676B. In that same memorandum to Assembly Bill S676B, Senator Lanza posits that increasing the commission paid out to individual charitable trustees, who currently rely solely on income-based commission, would decrease a potential conflict of interest. Sponsor's Mem., 2017-18 Senate Bill S676B. In theory, by authorizing payment of commission out of income only, a trustee may prioritize annual increases in trust income, whether it is in the best interest of the charitable trust or not. Arguably, the trustee's duty to administer the trust truthfully and faithfully could be influenced by their personal interest in being compensated for their service. The Proposed Legislation furthers the legislative intent of decreasing a potential conflict of interest not only by increasing the commission of an individual charitable trustee, but also by using a portion of both the principal and income as a source for annual commissions.

The Legislature's concern about a trustee's potential conflict of interest is well-placed. Often, the most newsworthy stories surrounding charitable trusts are those where a trustee, or other fiduciary, takes advantage of the power they receive under an instrument. Though not a New York case, the *He Depu* case serves as an unfortunate example of what can go wrong when a charitable trustee abuses their power, or does not act in the best interest of the trust and its beneficiaries. The case has an involved history, but at its core concerned the Laogai Research Foundation (LRF) and the Yahoo! Human Rights Fund (YHRF). In *He Depu*, the plaintiffs are a group of beneficiaries of the LRF who claim that various trustees and other fiduciaries improperly depleted the charitable trust's funds. *He Depu v. Oath Holdings*, No. CV 17-635 (RDM), 2021 WL 1110845 (D.D.C. March 22, 2021). Yahoo! funded the LRF as part of a settlement agreement in 2007. Chinese political dissenters sued Yahoo! after the company disclosed their personal information to the Chinese government, directly resulting in their imprisonment. Hongda "Harry" Wu, who had also been imprisoned as a result of his public political dissent toward the Chinese government, represented the plaintiffs' interest in the settlement. Pursuant to the terms of the settlement, Yahoo! would fund the LRF with $3,200,000 to be held in trust for each plaintiff, and additionally provide $17,300,000 to establish the YHRF. *Id.* The monies provided were to be used, inter alia, to provide humanitarian and legal assistance to Chinese political dissenters who have been imprisoned for expressing their views through Yahoo! or another medium. *Id.* Ultimately, Yahoo! deferred to Wu when it came to funding the YHRF through the LRF. Wu yielded immense power over the YRFH and was also the executive director of the LRF. In 2015, it was discovered that the LRF had spent $14,000,000 of the YHRF, with only approximately 8% of those funds going to political dissenters for whom the LRF was established to support. Wu positioned himself to be in a decision-making position every step of the way when it came to the funding of and disbursements coming from the LRF, signaling a clear conflict of interest. Wu used the funds to pay his salary, purchase real estate, pay for his various legal expenses and to "fund" another non-profit. *Id.* During this time, the trustees of the LRF, Yahoo! employees, were either complacent or in the dark about the manner by which funds were disbursed. This case illustrates how a failure in oversight by trustees of a charitable trust can lead to disaster, with the beneficiaries suffering the brunt of the trustees' misdoings. This case has a litany of factors at play outside of the charitable trust arena, but it does highlight the importance of careful and considerate drafting when it comes to ensuring a charitable trust's purpose is fulfilled and protected.

While it is unclear whether the Proposed Legislation will be approved and adopted, practitioners should keep it in their peripheral vision. Practitioners should advise their clients that as the law stands, the SCPA does not allow any flexibility when it comes to statutory commission for individual trustees of charitable trusts. This potential change may leave current individual charitable trustees hanging in abeyance, but the Proposed Legislation does not change the fact that clients may choose the manner in which individual charitable trustees are compensated by drafting explicit provisions into the trust. Once fully informed, clients can decide to either allow the statutory scheme to determine commission, or draft specific provision that provide additional or less compensation to their trustees. Lastly, practitioners should highlight the importance of considering potential conflicts of interest to their clients, especially within the governing body of the trust, to ensure that the trust's purpose is fulfilled.

State of Estates

By Paul S. Forster

It is not clear whether this will reach our readers during or after the holiday season, but as our timely (or possibly belated) gift, we present some interesting cases involving the apparent adoption of incorporation by reference by the Second Department of a paper writing external to the will not executed with statutory formalities; the passage by intestacy of an award granted after death, despite the existence of a will, because the funds were "acquired" by the estate after the decedent's death; the existence of a right of sepulcher claim for improperly "dealing" with a decedent's body, even though there was no deprivation of immediate possession; a right of sepulcher claim arising from the New York City Medical Examiner ignoring the appointment of an agent to control the disposition of remains in statutory form and releasing the body to decedent's family; the standing of a co-fiduciary to object to the account of the other fiduciary; the inability of the Surrogate's Court to revisit the allocation of the proceeds of an action as between personal injuries and conscious pain and suffering, and wrongful death already determined by the trial (Supreme) Court; a refusal to entertain a proceeding seeking advice and direction; funds in a trust for the benefit of an incapacitated person being used to satisfy a Medicaid lien because the trustee failed to comply with a Court Order directing him to set up a Supplemental Needs Trust; the right of the remainderman of an irrevocable *inter vivos* trust to compel an accounting; the refusal of the Appellate Division to consider a challenge to the accuracy of a specific sentence contained in a Surrogate's Court Order since "no appeal lies from dicta" and a Notice of Appearance by a successor attorney without a proper substitution being a nullity.

Second Department Apparently Adopts Incorporation by Reference of a Paper Writing External to the Will Not Executed with Statutory Formalities

The decedent's son was appointed Administrator c.t.a. As pertinent here, the decedent's apparent significant other, Meryl, petitioned to compel an accounting, asserting that she had a valid claim to, *inter alia*, certain personal items belonging to the decedent, which were listed on an exhibit to a "Property Agreement" executed by Meryl and the decedent, and referenced in the decedent's will. The Administrator cross-petitioned to determine the validity of Meryl's claim. The Administrator also separately petitioned for the turnover to the estate of the disputed assets. The Administrator moved for summary judgment on his cross petition and separate petition, and Meryl cross-moved for summary judgment on her petition. The Surrogate's Court granted Meryl's cross motion for summary judgment on her petition and denied the motions of the Administrator for summary judgment on the Administrator's cross petition and separate petition. The Administrator appealed.

HOLDING: The Surrogate was affirmed. The Appellate Division found that the property agreement clearly provided that Meryl, as the surviving party, should have the use of the decedent's personal items until her subsequent death. The Appellate Division concluded further that the personal items were "tangible personal property" within the meaning of the decedent's will, which expressly required the personal representative of the estate to comply with the dispositive directions contained in any writing signed and dated by the decedent which made "specific disposition of items of tangible personal property." The Appellate Division agreed with Meryl that the property agreement, which was signed and dated by the decedent and contained specific dispositive directions with respect to the personal items listed therein, fell within the ambit of the provisions of the will, and held that the estate had, in opposition, failed to raise a triable issue of fact. *Matter of Hart (Brown)*, 194 A.D.3d 933 (2d Dep't 2021).

The concept that giving effect to the property agreement as formulated in the decision constituted incorporation by reference was not mentioned in the decision and apparently was not raised by the parties or explained away. If viewed as not giving a present interest but as intending to pass an interest upon death through the will without adhering to the Statute of Wills, the dispositions in the property agreement, under traditional notions would be invalid. However, if viewed as giving a present life estate in the subject personal property as of the date of the making of the agreement (without resorting to being incorporated into the will's terms), it would not seem to be in violation of present notions to give effect to the dispositions set forth in the property agreement.

An Award of Funds "Acquired" by the Estate After the Decedent's Death Passed by Intestacy, Despite the Existence of a Will

The decedent's spouse, William, was one of the hostages who was held captive in Iran for 444 days between 1979 and 1981. In 2015, Congress enacted the Justice for United States Victims of State Sponsored Terrorism Act

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(Act), which awarded monetary compensation to former Iranian hostages and their family members. Under the Act, the decedent was entitled to $600,000. Under the Act, if a person entitled to compensation was deceased, payment from the fund was to be made to the personal representative of the estate of that person. The decedent died testate in September 2004. In her will, the decedent devised the residuary of her estate to her stepson, Steven. The decedent's sole intestate distributee was her brother, Fred. Fred died intestate in 2018. Petitioner, the administrator of Fred's estate, sought declaratory relief and named as interested parties the executrix of the decedent's estate and Steven. Petitioner asserted that the award under the Act to the decedent's estate was not property that the decedent was entitled to dispose of at the time of her death, and thus, such property was not subject to the will and must be distributed by the laws of intestacy. Petitioner sought a declaration that the payments were after-acquired assets that passed to Fred's estate by intestacy. Respondent argued that the payments should be distributed under the residuary clause of decedent's will. The Surrogate's Court agreed with the respondent and dismissed the petition. Fred's administrator appealed.

HOLDING: The Surrogate was reversed. The Appellate Division opined that EPTL 3-3.1 provides that unless the will provides otherwise, a disposition by the testatrix of all her property passes all of the property she was entitled to dispose of at the time of her death. The Appellate Division noted that under the common law: (i) a testamentary disposition of personal property relates to any personal property held by the decedent at the time of the death of the testator and (ii) a testamentary devise of real property relates to any real property held at the time of the execution of the decedent's will. So, real property acquired after the making of the will, but before the testarix's death, did not pass under the will. The Appellate Division added that the common-law rule was changed by Section 14 of the former Decedent Estate Law, which was carried forward under EPTL 3-3.1., to provide that a testamentary disposition of all of a decedent's property passed all of the property she was entitled to dispose of at the time of her death. Regarding property acquired by an estate after the death of the testatrix, the Appellate Division held that that New York law did not permit a testator to dispose by will of property that she did not own at the time of her death. In the view of the Appellate Division, this rule is grounded in the testator's lack of capacity to devise property he or she does not own at the time of death. According to the Appellate Division, it is well settled that a proponent of a will must establish that the testator possessed testamentary capacity, considering the following factors:

(1) whether the testatrix understood the nature and consequences of executing a will;

(2) whether the testatrix knew the nature and extent of the property she was disposing of; and

(3) whether the testatrix knew those who would be considered the natural objects of her bounty and her relations with them.

The Appellate Division held that the decedent did not have the testamentary capacity to dispose of assets she did not own at the time of her death because she could not have known the nature and extent of such assets at that time. Consequently, the Appellate Division concluded that, under EPTL 3-3.1 and the general law of testamentary capacity, a testatrix may not dispose by will of property that is not owned by her at the time of her death. Accordingly, the Appellate Division reversed the Surrogate, granted judgment in favor of the brother (Fred's) estate, and declared that the payments made to decedent's estate under the Act be distributed pursuant to the laws of intestacy to Fred's estate. *In re Keough*, 196 A.D.3d 160 (3d Dep't 2021).

This decision ignores the context of the origin of the predecessor statute to EPTL 3-3.1, which was to change the common-law rule that a testamentary disposition of all of the decedent's property only included real property owned as of the date of the making of the will. It is clear that the statutory change was designed to include in testamentary dispositions real estate acquired after the date of the execution of the will, not to exclude property or rights acquired after death. It long has been the common law in New York that an interpretation that will result in intestacy as to any part of an estate is to be avoided if possible.[1] The presumption is against intestacy. It defies common sense that EPTL 3-3.1 requires that a will be interpreted as not disposing of property falling into the estate after death, and a legislative solution clarifying the point clearly is called for. Even a parsing of the existing statutory language supports this interpretation. The statute says, "a disposition by the testator of all of his property passes all of the property he was *entitled* to dispose of at the time of his death" [emphasis added]. It does not say "only the property he owned" at the time of his death, and a testator clearly is "entitled" to dispose of by will property and rights which might come into his estate after death. In the meantime, in light of this decision, it respectfully is suggested that additional language be appended to the standard will language to make it clear that it is intended that its dispositive provisions apply to any rights and property to which the estate may come to be entitled after the testatrix' death.

A Right of Sepulcher Claim Exists for Improperly 'Dealing' With a Decedent's Body Even if There Is No Deprivation of Immediate Possession

Plaintiff sued for violation of his right of sepulcher, claiming that the defendant improperly dealt with the body of his father. Plaintiff described viewing the body in a closet-like room where supplies were kept. Plaintiff

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testified that his father's hands and feet were bound, his stomach had become bloated, he was dirty and unshaven, and a tube was placed down his throat. The decedent's longtime companion further testified that the area where the body was kept seemed like a garbage dump. The defendant moved for summary judgment dismissing the claim, which was denied.

HOLDING: The Supreme Court was affirmed. The Appellate Division stated that the principle is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body. In the view of the Appellate Division, the right of sepulcher protects the legal right of the next of kin to find solace and comfort in the ritual of burial. The Appellate Division found factual issues in the record as to whether defendant improperly dealt with the decedent's body. The Appellate Division held that this alleged mishandling and presentation of the body was sufficient to raise a factual issue requiring resolution at trial. The Appellate Division stated further that recovery under the common-law right of sepulcher was not limited only to instances where the next of kin was denied immediate possession of the decedent's body but may be awarded where the defendant improperly deals with the decedent's body.

The Appellate Division opined that the right of sepulcher safeguards the surviving next of kin's right to find solace and comfort in the ritual of burial, adding that burial rituals involve more than simply placing a body in its final resting place. The Appellate Division held that the fact that plaintiff ultimately took custody of his father's body in a timely fashion did not assuage the harm caused by defendant's having allegedly improperly dealt with it. *Almeyda v. Concourse Rehab. & Nursing Ctr., Inc.*, 195 A.D.3d 437 (1st Dep't 2021).

A Right of Sepulcher Claim Arises From the New York City Medical Examiner Ignoring the Appointment of an Agent to Control Disposition of Remains in Statutory Form and Releasing the Body to Decedent's Family

Plaintiff commenced an action against defendants, City of New York, Office of the Chief Medical Examiner ("ME"), and various ME employees for *inter alia* loss of sepulcher, stemming from the city's alleged failure to comply with decedent's desire for plaintiff to control the disposition of the decedent's remains. The decedent, a transgender Muslim man, wished, upon his death, to avoid any bodily alterations such as autopsy or preservation, as well as misgendering or reference to the decedent's "deadname." The decedent, whose family rejected and denied his transgender and Muslim identities, did not want his family to have any access to or control over his body after death. To effectuate these wishes, on November 6, 2018, the decedent executed a Department of Health DOH-5211 "Appointment of Agent to Control Disposition of Remains" form designating plaintiff, the decedent's partner, to control the disposition of the decedent's body after death and setting forth one special directive: The decedent's "wish . . . to be cremated."

The decedent passed away on November 26, 2018. That day, plaintiff's counsel provided the 5211 to the hospital and, upon transfer of the decedent's body to the ME later that day, by fax to the ME's legal department, which did not dispute the receipt or validity of the 5211. Plaintiff began scheduling the decedent's cremation for the first days of December 2018. The ME performed an autopsy on November 28, 2018. On or about November 30, 2018, plaintiff became aware that the ME had released the decedent's body to the decedent's biological family and the biological family's chosen funeral home. Plaintiff learned from a Facebook post that the decedent's biological family had scheduled a Christian funeral service, with a public viewing, for December 2, 2018, and that the invitation referred to the decedent by his deadname and with incorrect pronouns. At or about the same time that plaintiff learned what had happened, plaintiff, eight months pregnant with twins at the time, began to experience contractions and had to be taken to the hospital by ambulance. Plaintiff lost the pregnancy.

After plaintiff's counsel contacted the ME, the ME arranged to transport the decedent's body from the family's funeral home to an ME morgue. Having re-secured the remains, the ME nevertheless placed a "hold" on the decedent's body. From November 30, 2018, to December 11, 2018, plaintiff's counsel repeatedly contacted the individual defendants, who insisted that plaintiff had to obtain the biological family's consent before the decedent's remains could be released and discouraged litigation. On December 11, 2018, plaintiff filed an OSC in Supreme Court. The parties appeared on December 18, 2018 and resolved the order to show cause by stipulation which granted plaintiff control over the decedent's remains and directed the ME to release his remains to a funeral home of plaintiff's choosing. The decedent was cremated on December 26, 2018. Plaintiff subsequently commenced the action, alleging in sum and substance that despite taking every necessary procedural step to effectuate his wishes, the decedent's wish to entrust his remains to his chosen family, rather than to his biological family, was not respected as it would have been had the decedent been cisgender. The city moved to dismiss for failure to state a cause of action, and plaintiff opposed.

HOLDING: The city's motion was denied as to the right of sepulcher action. The court opined that the com-

mon-law right of sepulcher affords the deceased's next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial, and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body. The court added that to establish a cause of action for interference with the right of sepulcher, a plaintiff must establish that:

(1) plaintiff is the decedent's next of kin;

(2) plaintiff had a right to possession of the remains;

(3) defendant interfered with plaintiff's right to immediate possession of the decedent's body;

(4) the interference was unauthorized;

(5) plaintiff was aware of the interference; and

(6) the interference caused plaintiff mental anguish, which is generally presumed.

In an extensive and erudite decision, the court rejected all of the city's arguments and found that under the facts described the plaintiff had set forth a cause of action for violation of her right to sepulcher. *Stanley v. City of New York*, 71 Misc. 3d 171 (Sup. Ct., New York County, Dec. 23, 2020) (Ramseur, J.).

A Co-Fiduciary Has Standing to Object to the Account of the Other Fiduciary

Petitioner moved to dismiss the objections filed to his accounting by his co-executor. The objecting co-executor also was a beneficiary of the estate of his mother who was the post-deceased residuary beneficiary of the within estate. According to petitioner, the objectant could not establish a financial interest in the within estate and would not benefit if any of the objections were successful, and therefore lacked standing to assert objections. Objectant argued that his standing derived from his status both as a co-executor and also separately as a beneficiary of his mother's estate. The fiduciary of the estate did not file objections to the within accounting.

HOLDING: The Surrogate denied the motion to dismiss. In the court's view, standing requires that the party bringing the claim has an injury in fact or a stake in the matter before the court. The court added that a party has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. The court opined that the existence of an injury in fact, an actual legal stake in the matter being adjudicated, ensures that the party seeking review has some concrete interest in prosecuting the action that casts the dispute in a form traditionally capable of judicial resolution. The court acknowledged that in the realm of estate litigation, and particularly in accounting proceedings, the law generally is that a person who has no pecuniary interest in an estate lacks standing to object to an executor's final account. Consequently, the court held that objectant's status as a beneficiary of his mother's estate did not suffice in this regard, as the only party with the capacity and standing to object on behalf of that estate was the fiduciary thereof. However, the court ruled that objectant's status as a co-executor of the within estate bestowed upon him both the capacity and the standing to raise objections to the account of his co-fiduciary. The court added that objectant's authority and interest in doing so derived from his own fiduciary responsibilities. The court noted that an executor is a fiduciary who owes a duty of undivided loyalty to the decedent and has a duty to preserve the assets the decedent entrusted to him. The court concluded that an executor who knows that his co-executor is committing breaches of trust and not only fails to exert efforts directed toward prevention but accedes to them is legally accountable. Accordingly, the motion to dismiss the objections was denied. In a bit of a turnabout, the court further stated that objectant should be mindful that this precedent equally was applicable to objectant's own conduct as co-executor. The court pointed out that his actions also were subject to scrutiny by the court and all interested parties, including the within petitioner. The court noted that the objections before the court raised the distinct possibility that objectant himself had been derelict in his duties by virtue of inaction on his part, and delegation of his fiduciary responsibilities entirely to his co-executor. *Matter of Rapaport*, NYLJ 8/13/21 (Sur. Ct., Queens Co., Surr. Kelly)

Surrogate's Court Unable to Revisit the Allocation of the Proceeds of an Action as Between Personal Injuries and Conscious Pain and Suffering, and Wrongful Death Already Determined by the Trial (Supreme) Court

Decedent died intestate survived by his wife and six children, five of whom were then under age 21. Letters of limited administration were issued to petitioner to prosecute a cause of action. The Supreme Court issued an order of adequacy pursuant to EPTL 5-4.6(a) approving the settlement of actions brought in Supreme Court and United States District Court, Northern District of New York, against various defendants, and allocated the proceeds 100% to wrongful death. The Supreme Court's order provided that the entirety of the settlement be attributed to wrongful death damages due to the fact that the decedent experienced the alleged fatal pulmonary embolism at issue during surgery, while he was unconscious, and never regained consciousness thereafter. The Supreme Court's order did not determine the amounts payable to decedent's distributees, instead directing commencement of a proceeding in the Albany County Surrogate's Court for allocation and distribution of the net proceeds of the settlement. Petitioner thereafter commenced the within proceeding in the Surrogate's Court to authorize distribution of settlement proceeds. Respondent Albany County Department of Social Services (DSS) appeared and objected, arguing that there should be an allocation to decedent's personal injuries and con-

scious pain and suffering that would be payable to the estate and thereby subject to its claim for a $72,129.60 Medicaid lien. No objections to the relief requested in the petition were filed by any of the other interested parties. DSS argues that Supreme Court did not have jurisdiction to determine the wrongful death allocation of the portion of the combined settlement of the action, which occurred in federal court, but argued that the Surrogate's Court did have jurisdiction, notwithstanding Supreme Court's grant of general original jurisdiction by the New York Constitution. DSS further contended that Supreme Court did not properly consider the facts in making its allocation. Petitioner argued that Supreme Court did have jurisdiction to determine the allocation to wrongful death and did so on the clear facts of the case. Petitioner also pointed out that, although the underlying action against the state and federal defendants was for both personal injury and wrongful death, petitioner was unable to uncover any facts to support the personal injury claim. Petitioner moved for summary judgment dismissing the objections of DSS. The *guardians ad litem* appointed on behalf of the infants appeared, did not object to the petition, and supported petitioner's motion to dismiss the claim of DSS.

HOLDING: The Surrogate dismissed the DSS claim. The court stated that the Surrogate's Court has concurrent jurisdiction with Supreme Court over all matters relating to decedents and their estates, including compromise and distribution of proceeds of a decedent's personal injury and wrongful death actions.

The Court pointed out that although the Surrogate's Court is the primary forum for proceedings involving estates and intestacies, the Supreme Court's inviolate authority to hear and resolve all causes in law and equity unquestionably extends to such matters as well. The court ruled that the Supreme Court had fully determined the question of allocation between personal injury and wrongful death in the underlying action against all defendants, including the federal court defendants, and that it therefore was clear that the Surrogate's Court did not have jurisdiction to modify the order issued by Supreme Court. The court stated further that any change to the 100% allocation to wrongful death had to be sought by motion to Supreme Court. The court noted that the DSS had failed to take advantage of an opportunity to move for relief in Supreme Court and stated that even if DSS had availed itself of the opportunity to move for reconsideration in Supreme Court, the facts of the underlying action supported Supreme Court's determination that the entire settlement be allocated to wrongful death. Consequently, the objections of DSS were dismissed. *Matter of McMillan-Hoyte (Hoyte)*, 71 Misc. 3d 1042 (Sur. Ct., Albany Co. Apr. 7, 2021) (Pettit, S.)

Court Refuses to Entertain a Proceeding Seeking Advice and Direction

The executors sought advice and direction pursuant to SCPA 2107 with respect to the sale of various real and intangible personal property of the estate. The executors stated that they had received offers to purchase each of the assets and that they wished to accept such offers. The executors indicated that, based upon potential estate tax liabilities and other concerns, the sale of the assets listed in their petition for the prices proposed might leave an insufficient amount in the estate to satisfy fully all the bequests in decedent's will. They asked that the court approve all such sales.

HOLDING: The Surrogate declined to entertain the executors' SCPA 2107 petition. The court opined that the administration of a decedent's estate requires the exercise of judgment and discretion, and that the Surrogate has power to review that discretion, but not to substitute her own discretion for the discretion of those upon whom the duty has been cast of settling the affairs of the

estate. The court added that the exercise of discretion by the executors is limited by their absolute duty of impartiality to the beneficiaries of the estate, and that the executors must act in the best interests of the estate as a whole. The court stated further that EPTL 11-1.1 gives administrators broad powers and accordingly proceedings under SCPA 2107 for advice and direction should be exercised only in extraordinary situations. The court noted that, provided estate fiduciaries exercised good business judgment, their decisions are effectively immune to subsequent challenge, and that only if the fiduciaries could be shown to have acted negligently, and with an absence of diligence and prudence that an ordinary person would exercise in his own affairs is a surcharge possible. The court concluded that because a review of the executors' petition disclosed no extraordinary circumstances which would warrant the invocation of SCPA 2107 and a review of the potential estate asset sales, it would not be proper to entertain the petition on the merits, and the court, therefore, declined to do so. *In re McGuire*, N.Y.L.J. 9/7/21 (Surr. Ct., Erie Co., Surr. Mosey).

Funds in a Trust for the Benefit of an Incapacitated Person Directed To Be Used To Satisfy a Medicaid Lien Because the Trustee Failed To Comply With a Court Order Directing Him To Set Up a Supplemental Needs Trust

In the course of the termination of a Mental Hygiene Law Article 81 guardianship by reason of the death of the incapacitated person, Andrew, the Supreme Court directed that the assets in a trust established for the benefit of Andrew be used to satisfy a Medicaid lien. The will of Andrew's deceased brother, Peter, appointed petitioner as executor, and directed that petitioner place the remaining property in Peter's estate into a general benefit trust for Andrew's benefit, support, maintenance, health and education. Peter's will appointed petitioner trustee and bequeathed the remainder of the trust upon Andrew's death to Petitioner. Petitioner admitted that he failed to turn over trust assets to Andrew's guardians for use during Andrew's lifetime, and also admitted that he did not comply with a court order directing him to set up a special needs trust (SNT) pursuant to EPTL 7-1.12, in order to permit the trust assets to be used to enhance Andrew's quality of life without rendering him ineligible for public assistance or cause a reduction in those benefits. Upon Andrew's death, respondent New York City Human Resources Administration sought to impose a Medicaid lien on the funds that remained in the trust. Petitioner argued that Peter intended to create a SNT rather than a general benefit trust and the remaining trust assets should pass to him as the remainderman. Petitioner appealed.

HOLDING: The Appellate Division affirmed. The Appellate Division stated that courts are generally hesitant to reform a testamentary instrument unless the reformation effectuates the testator's intent. The Appellate Division found that the Supreme Court properly concluded that nothing in Peter's will indicated an intention to create a SNT. Accordingly, the Appellate Division ruled that the trust assets could be used to satisfy the Medicaid lien. *In re Dousmanis (Pierucci)*, 190 A.D.3d 548 (2d Dep't 2021).

Remainderman of an Irrevocable *Inter Vivos* Trust Has the Right To Compel an Accounting

The plaintiff and the defendant were sisters. Their parents, as grantors, and the defendant, as trustee, established an *inter vivos* trust of which the plaintiff was a remainderman. The plaintiff, in her capacity as a remainderman under the trust, commenced an action against the defendant, individually and in her capacity as trustee of the trust, *inter alia*, for an accounting of the trust and related relief. The defendant moved to dismiss the complaint for lack of standing. The Supreme Court denied the defendant's motion and the defendant appealed.

HOLDING: The Supreme Court was affirmed. The Appellate Division ruled that contrary to the defendant's contention, the plaintiff had standing in her capacity as a remainderman to seek an accounting and related relief with regard to the trust, since the trust was irrevocable, and thus, the plaintiff had a pecuniary interest therein. The Appellate Division acknowledged that the grantor of an irrevocable *inter vivos* trust may properly relieve the trustee from accountability to the remainderman during the grantor's lifetime but found that the subject trust did not expressly do so. Accordingly, the Appellate Division held that the Supreme Court properly had denied the defendant's motion to dismiss the complaint for lack of standing. *Friedrich v. Klaristenfeld*, 195 A.D.3d 597 (2d Dep't 2021).

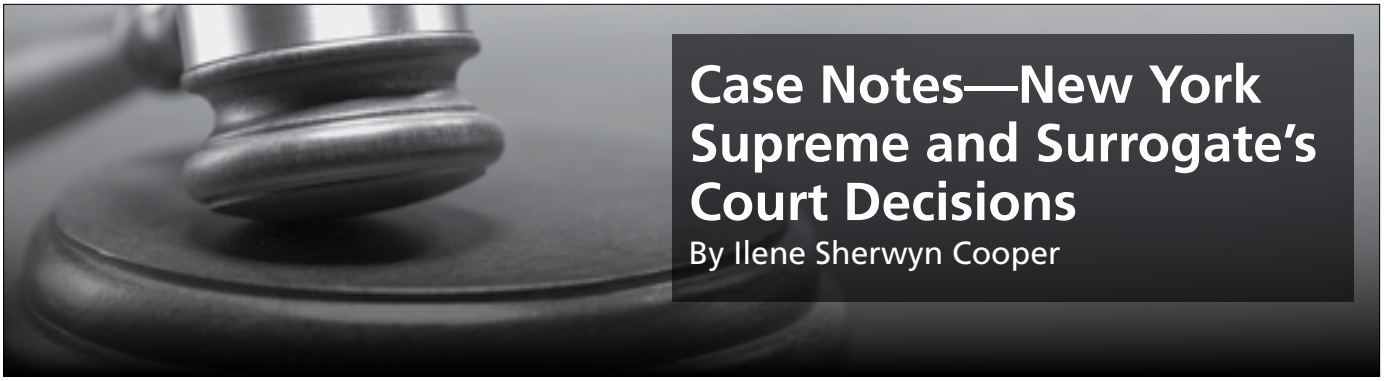
Brief Briefs

To the extent that the appellant challenged the accuracy of a specific sentence contained in the Surrogate's Court Order, the Appellate Division did not consider the contention since "no appeal lies from dicta." *In re Apostolidis*, 193 A.D.3d 1038 (2d Dep't 2021).

A Notice of Appearance by a successor attorney without a proper substitution is a nullity. *U.S. Bank N.A. v. Nakash*, 195 A.D.3d 651 (2d Dep't 2021).

Endnote

1 *In re Hayes*, 263 N.Y. 219 (1934); *In re Bieley*, 91 N.Y.2d 520 (1998).



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

By Ilene Sherwyn Cooper

Attorney's Fees

In *In re Cooper,* the Appellate Division, Second Department, modified an order of the Surrogate's Court, Nassau County, which awarded legal fees to present and former counsel for plaintiff in a proceeding to compromise a cause of action for the decedent's wrongful death.

The record revealed that the petitioner, an attorney, was hired by the respondent/law firm pursuant to an employment agreement that specified that the petitioner was to receive a 40% forwarding fee on cases that he referred to the respondent. In April, 2012, the petitioner referred respondent an action to recover damages for wrongful death and conscious pain and suffering. Approximately two years later, the petitioner terminated the respondent's employment. The petitioner took the wrongful death action with him, and continued to represent the estate of the decedent through settlement of the matter.

Thereafter, the petitioner commenced a proceeding in Surrogate's Court to compromise and settle the action and to apportion the net contingency fee between himself and the respondent. After a hearing, the Surrogate's Court awarded 50% of the fee to each of the petitioner and the respondent, resulting in an appeal by the petitioner.

The court held that the Surrogate's Court improvidently exercised its discretion when it awarded an equal fee to the petitioner and the respondent. The Court found that the petitioner performed significant work in securing the ultimate award, and that while the employment agreement between petitioner and respondent addressed compensation during petitioner's term of employment, it failed to contemplate any arrangement in the event that petitioner was terminated or left voluntarily. To this extent, the court noted that where the dispute is between attorneys, "'the discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case.'"[1] Where an election is not made or sought at the time of the discharge, the presumption should be that a contingency fee has been chosen.[2]

Within this context, considering the amount of time spent by the attorneys on the case, the nature of the work performed, and the relative contributions of counsel, the court modified the order appealed from so as to award 80% of the net contingency fee to the petitioner, and 20% thereof to the respondent.

***In re Cooper,* 2021 N.Y. App. Div. LEXIS 4138 (2d Dep't 2021).**

Commissions

Before the Surrogate's Court, Queens County, in *In re Terranova,* was a motion for partial summary judgment determining that the commissions payable to the co-trustees were limited by the terms of a settlement agreement to an amount other than the statutory rate. The fiduciaries argued that the agreement was ambiguous, and unclear as to whether the limitation applied only to annual commissions, or to all statutory commissions. As described by the court, the settlement agreement in issue was the result of countless hours of negotiations, court conferences, and revisions among counsel.

The court observed that a settlement agreement is subject to the ordinary rules of contract construction. To that extent, the threshold issue is the clarity of the language. Where a written agreement is complete, clear, and unambiguous on its face it must be enforced so as to give effect to the meaning of its terms and the reasonable expectations of the parties. Those expectations must be gleaned within the four corners of the contract without looking to extrinsic evidence to create ambiguities.

Within this context, and upon close examination of the agreement, and the circumstances under which it was created, the court rejected the fiduciaries' contentions that the agreement was ambiguous. Indeed, the court found it ironic that an instrument that was the result of exhaustive negotiations between sophisticated counsel, and so meticulously drawn, was now being

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branded as inferior and ambiguous by some of the very parties involved in its creation.

Thus, turning to the language of the instrument, and the provision in dispute, the court found it persuasive that it opened with the words: "In lieu of trustee's commissions pursuant to Section 2309 of the SCPA," noting that the statute encompasses both principal and annual commissions, and finding that no basis existed for concluding or inferring that the parties intended to draw a distinction or exception between the two.

Accordingly, the motion for partial summary judgment was granted.

***In re Terranova*, N.Y.L.J., June 4, 2021, at p. 17 (Sur. Ct., Queens Co.).**

Compulsory Accounting

After two nieces/distributees of the decedent had executed receipts and releases and waivers, based on an informal accounting, and received a distribution from the estate, they petitioned to compel the administrator to file a formal accounting. Objections were filed by the administrator, annexed to which was the original notarized receipt, release, waiver and refunding agreements from all the distributees, including the nieces. At a conference of the matter, the court advised the parties that it would deem the filed papers a motion for summary judgment.

The court noted that the informal account was provided to the nieces who had the opportunity to consult an attorney and accountant before they individually executed the notarized receipt, release, waiver and refunding agreement and received their distributions. Moreover, the court found the nieces had failed to claim or demonstrate bad faith, fraud or duress on behalf of the administrator in obtaining the notarized receipt, release, waiver and refunding agreement that would warrant the court to direct a judicial accounting.

Accordingly, the motion for summary judgment was granted, and the petition was dismissed.

***In re Advani*, NYLJ, Aug. 9, 2021, at p. 17 (Sur. Ct., Bronx Co.).**

Document Demand

Before the Surrogate's Court, New York County, in *In re Hoppenstein* was a contested accounting proceeding with respect to a 2005 trust (the "2005 trust" or "trust"). The objectants in the proceeding were a child of the grantor and her five children, who were discretionary income and principal beneficiaries of the trust. The objections, in pertinent part, alleged that in July 2008, the trustee impermissibly and imprudently loaned approximately $985,000 from the 2005 trust to himself, as trustee of a different trust. The loan became uncollectible and worthless.

Notices for discovery and inspection were served by the objectants on the trustees of three trusts that succeeded to the assets of the 2005 trust, as well as on the personal representative of the original trustee of the 2005 trust, who died in 2019. In response to the notices, the trustees moved for a protective order and for sanctions.

The court noted that in 2011, the trustee of the trust, relying on the provisions of the trust agreement and the provisions of the decanting statute, EPTL 10-6.6, distributed all of the trust assets to three new trusts created by the grantor in the same year. The new trusts were for the benefit of the objectant's three siblings and their respective descendants, but omitted the objectant and her children. Thereafter, the trustees of the 2011 trusts transferred all the assets of the trusts to three similar trusts created by the grantor, which also excluded the objectant and her children.

Following the filing of objections, the trustees of the 2011 and 2013 trusts moved for summary judgment dismissing same on the grounds that the objectants had no standing because the 2011 transfers had eliminated their interest in the 2005 trust. In a decision rendered in July, 2019, the court denied the motion, finding that there were triable issues of fact as to whether the 2011 transfers were made in violation of the trustee's duty of impartiality to the beneficiaries, or for an improper motive. The court held that the objectants had standing to argue in favor of their standing, and directed the objectants to amend their discovery demands to limit them to the bona fides of the 2011 transfers.

Despite the foregoing, the objectants served extensive new discovery demands that exceeded the scope of the court's July, 2019 ruling. In a decision addressed to this issue, which was affirmed on appeal, the court denied objectant's motion to compel compliance with their new deposition and documents demands, and granted the cross-motions of the trustees to the extent they sought a protective order.

Nevertheless, following these rulings, the objectants again served extensive discovery demands on the trustees, which again became the subject of motion for a protective order by the trustees. In that regard, the court noted that only one of the demands made by the objectants sought information about the trustee's motive for the 2011 transfers. Accordingly, the court denied the trustees' motion with respect to that demand, and otherwise granted the motion. Further, pursuant to the Rules of the Chief Administrative Judge, and in view of what the court characterized as the repeated repudiation by objectants' counsel of its orders, the court granted the trustees' request for sanctions, in an amount to be determined upon further submissions.

***In re Hoppenstein,* N.Y.L.J., Aug. 12, 2021, at 18 (Sur. Ct., N.Y. Co.).**

Letters of Temporary Administration

In *In re Brooks,* the Surrogate's Court, New York County, addressed competing applications for letters of temporary administration and letters of administration. The decedent was survived by his third wife, and three children from his two prior marriages, one of whom was an infant. His two adult daughters from his first marriage and his former second spouse petitioned for letters of temporary administration and letters of administration. The application was opposed by his surviving spouse, who cross-petitioned for her appointment as administrator.

The threshold issue before the court was whether the terms of a prenuptial agreement between the decedent and his third wife precluded her appointment as administrator of his estate.

The agreement specifically provided that each party waived the right to serve as executor or administrator of the other's estate, and that each party waived the right to letters of administration in the estate of the other party. Nevertheless, the spouse claimed that the agreement was void and unenforceable, that it was unconscionable, and that it had been orally cancelled. In addition, the spouse claimed that the decedent's former spouse was ineligible to serve.

The court opined that a prenuptial agreement is given the same presumption of legality as any other contract, and thus, is considered valid and enforceable unless the party challenging it meets the very high burden of demonstrating that it should be set aside. The court observed that no argument had been made that the subject agreement was invalid on its face. Moreover, as to the claim that it was orally canceled, the court noted that the terms of the agreement specifically stated that any modification or waiver of any provision thereof was required to be by a writing signed and acknowledged by the parties. Finally, the court found it significant that at the time the subject agreement was signed, the parties were represented by counsel, and each had expressly acknowledged that the agreement was read and understood. Therefore, the court held that for purposes of the appointment of a temporary administrator, the validity of the prenuptial agreement was presumed.

As to the appointment of the decedent's former wife as co-administrator, the court found the spouse's arguments to be without basis. In this regard, the court held that while the divorce settlement between the petitioning former spouse and the decedent precluded her from serving as fiduciary of his estate, it did not bar her from serving in that capacity as guardian of the property of their infant daughter.

Because of the anticipated litigation regarding the validity of the postnuptial agreement, and the assets of the financial obligations of the estate, the appointment of a temporary administrator was required. Accordingly, the application by the petitioners to serve as co-temporary administrators of the estate was granted.

***In re Brooks*, 2021 NYLJ LEXIS 515 (Sur. Ct., N.Y. Co.).**

Self-Dealing

In *In re Bartolini*, the Surrogate's Court, Albany County, granted respondent's cross-motion for summary judgment based on the fiduciaries breach of fiduciary duty and self-dealing.

The decedent died, intestate, survived by his sister, who was the respondent, and a distributee of one-half of his estate, and two nieces and a nephew, who were the co-administrators of his estate, and each entitled to a one-sixth share thereof. Approximately one year after the fiduciaries' appointment, they filed a petition for the judicial settlement of their account. Respondent filed objections alleging, *inter alia,* breach of fiduciary duty and self-dealing based on the fiduciaries' mishandling of the decedent's Fidelity IRA account.

The record revealed that the decedent's estate was the default beneficiary of a Fidelity IRA account. In an alleged effort to save income taxes, the fiduciaries transferred this account to an inherited IRA account for the estate. The value of the IRA at the time exceeded $1,000,000. Several months thereafter, the fiduciaries transferred one-half the value of the estate's IRA, in kind, into new tax-deferred inherited IRAs for themselves, as beneficiaries. The remaining one-half representing the respondent's share was liquidated, paid to the estate, and ultimately subjected to a withholding tax due to respondent's foreign residence. The respondent was never aware of the different treatment accorded her interest in the IRA until the fiduciaries accounted.

Following the filing of objections by respondent, petitioners moved for summary judgment settling their account, and respondent cross-moved for, inter alia, damages and legal fees. After considering the arguments raised, the court found that petitioners breached their fiduciary duty by not giving respondent the same opportunity to transfer her one-half share of the Fidelity IRA to an inherited IRA as they did for themselves. Specifically, the court found that a fiduciary has a duty of loyalty to all beneficiaries and must discharge his or her duty impartially. Furthermore, a fiduciary has a duty to "'minimize the over-all tax burden on the estate and it's beneficiaries.'"[3]

In view thereof, summary judgment dismissing respondent's objection as it related to the mishandling of decedent's Fidelity IRA was denied, and respondent's

cross-motion for summary judgment on the mishandling of the Fidelity IRA was granted. The court directed that a hearing be held for the purpose of determining the damages sustained by the respondent as a result of the fiduciaries' misconduct.

***In re Bartolini*, 2021 NYLJ LEXIS 607 (Sur. Ct., Albany Co.).**

Statute of Limitations/*Lis Pendens*

In *In re Decker,* the Surrogate's Court, Orange County, was confronted with a contested application by one of the decedent's three sons, as beneficiary of an inter vivos trust, to compel the trustee thereof to account.

The record reflected that the decedent died, testate, on June 3, 2003. Pursuant to the pertinent provisions of his Last Will and Testament (the "will"), the decedent directed that the residue of his estate be added to the assets of a revocable living trust of which he was the grantor and one of his sons, Walter Jr., was the trustee. Upon admission of the will to probate, Walter, Jr. was also appointed the executor of the decedent's estate.

Thereafter, pursuant to an agreement for the settlement of the estate and trust, Walter Jr., as executor and trustee, and his two brothers, one of whom was the petitioner in the pending proceeding, agreed to certain distributions of estate/trust assets. More specifically, pursuant to the terms of that agreement, the petitioner acknowledged the prior receipt of a distribution in the amount of $150,000, plus an additional final distribution of $210,000, which funds were to be held for his benefit pursuant to the terms of the revocable trust. Additionally, in December 2007, the petitioner executed a receipt and release in which he, *inter alia,* discharged Walter Jr. from all liability with respect to matters relating to or derived from the administration of the decedent's estate and settlement of his account. As recited in the agreement, an accounting was provided to the signatories for the period commencing with the decedent's date of death through June 30, 2007.

The compulsory accounting proceeding instituted by the petitioner on September 16, 2019, sought an order compeling Walter Jr., as trustee of the trust, to account for his stewardship. Objections were filed by the trustee who argued that the application was barred by the six-year statute of limitations set forth in CPLR 213, inasmuch as the last distribution from the trust was in or about 2009, that the petitioner was aware that the final distribution of the trust was in 2009, and that the trust had no other assets or transactions since that time.

The court opined that the six-year statute of limitations on enforcement of a trustee's obligations begins to run from the time the trustee repudiates his or her stewardship, and the beneficiary has notice of such repudiation. Within this context, the court held that none of the allegations made by the trustee in support of his objections established a repudiation sufficient to commence the running of the statute of limitations. Thus, a question of fact existed as to this issue, requiring a hearing.

By separate application, the petitioner subsequently requested that the court file a notice of pendency on two parcels of real property that were presumably owned by the estate of the decedent. The court observed that a notice of pendency or *lis pendens*, is a provisional remedy available to litigants in an action or proceeding in which the judgment demanded would affect the title to, or the possession or use of real property. In view thereof, the court held that neither the compulsory accounting proceeding, nor the subject matter of the funds held in trust for the petitioner, involved an interest in real property, or the type of claim which could serve as the basis for a notice of pendency. Accordingly, petitioner's application was denied.

***In re Decker*, 71 Misc.3d 1216(A) (Sur. Ct., Orange Co.).**

Summary Judgment

In *In re Kosmos Family Trust,* the Surrogate's Court, Albany County, *inter alia,* denied respondent's motion for summary judgment dismissing the petition seeking a determination that certain amendments to a family trust were void on the grounds of undue influence and fraud. The court granted respondent's motion to the extent that it sought dismissal of the petition seeking a declaration that the subject trust was void on the grounds of lack of capacity.

The record reflected that the decedent died a resident of California survived by two children, and two grandchildren, who were the petitioners in the underlying proceeding. The decedent's third child suffered from Down's Syndrome, and predeceased her while a resident of a group home located in Albany County. The respondent in the proceeding was formerly employed in the group home in which the decedent's daughter had resided.

The subject trust had been created by the decedent and her husband in 1994. Following the death of her husband in 2013, the decedent executed three amendments to the instrument. Through each of these amendments, dispositions to the decedent's grandsons and two friends decreased, such that by the third amendment the decedent's entire estate passed to the respondent. The trust contained a choice of law provision, which directed that California law be applied in determining the validity of the trust and the construction of its beneficial dispositions, regardless of the residence of the trustee.

Following the decedent's death, her grandchildren instituted a proceeding seeking to invalidate the second and third amendments to the trust instrument, and re-

spondent moved for summary judgment dismissing the petition on the grounds, *inter alia*, that no material issue of fact existed as to the validity of the trust and the capacity of the decedent to execute the instrument.

Applying the substantive law of California, the court found that the evidence failed to support the petitioners' claim that the decedent lacked the requisite mental capacity to execute the trust amendments, and dismissed the petition to this extent.

With respect to the issue of undue influence, the court noted while undue influence is rarely shown by direct evidence, under California law the existence of certain circumstances could result in a presumption of undue influence or alternatively, warrant a conclusion that undue influence was exercised. These circumstances included:

(1) the extent of the respondent's interest under the subject trust;

(2) the respondent's involvement in the procurement of the instrument;

(3) whether the respondent stood in a confidential relationship with the trust settlor;

(4) whether the instrument was natural in its provisions; and

(5) the physical and mental health of the settlor.

Within this context, the court found, based on the numerous affidavits submitted by the petitioners in support of their claim, that material issues of fact existed as to whether the second and third amendments to the trust were procured by undue influence. Additionally, noting that the petitioners' claims of undue influence and fraud relied on the same factual basis, the court concluded that material issues of fact existed as to this issue as well.

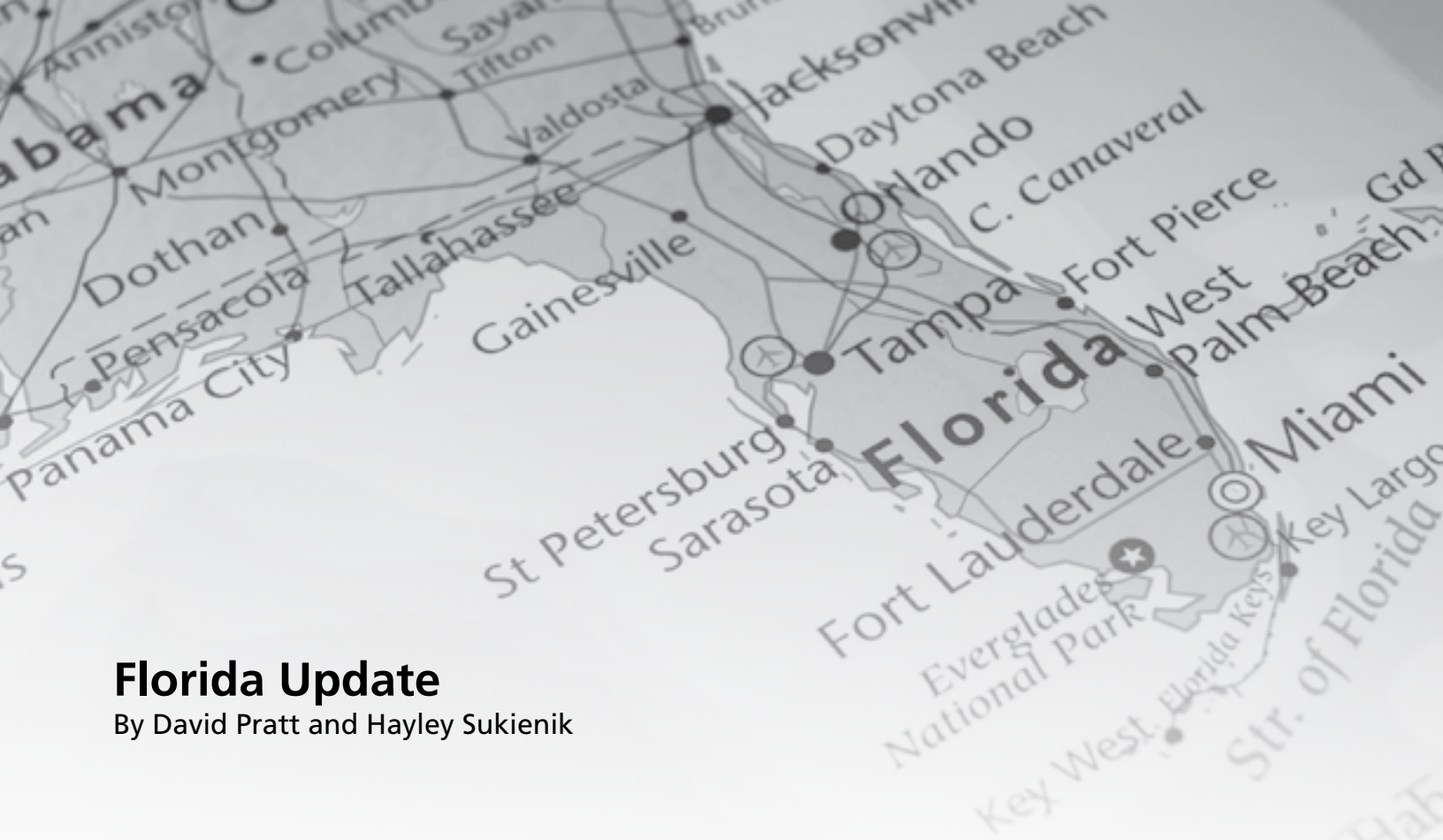
***In re Kosmo Family Trust*, 72 Misc.3d 1214(A) (Sur. Ct., Albany Co. 2021).**

Endnotes

1 *In re Cohen v. Grainger, Tesoriero & Bell*, 81 N.Y.2d 655, 658 (1993).

2 *Id.*

3 *In re Rappaport*, 121 Misc.2d 447, 450 (1983).



Florida Update

By David Pratt and Hayley Sukienik

DECISIONS OF INTEREST

Interpreting the Settlor's Intent—Children Are Intended Beneficiaries in Dispute Over Trust Language

The Third District Court of Appeal affirmed a December 2019 final judgment that a beneficiary's children were intended beneficiaries of the trust and that reformation of the trust was not supported by evidence. The facts are as below:

Brian Giller ("Brian") and his siblings, Anita Grossman ("Anita") and Ira Giller ("Ira"), had been involved in litigation over the administration of the estate of their father, Norman Giller, for seven years. While he was alive, Norman Giller created seven trusts to hold beneficial interests in various real estate holdings and other family assets. Pursuant to the terms of the trusts, Brian, Anita, and Ira were each allocated one-third of the assets and accumulated income. Anita and Ira received their one-third shares outright, and Brian elected to place his one-third share in a separate sub-trust due to his financial difficulties and in order to protect his share from creditors. Brian and his two now adult children, Jamie and Jason ("issue"), are equal beneficiaries of all but the sub-trust to the Giller Family Trust, of which Brian is the primary beneficiary and his children are the remaindermen. Norman appointed Anita as trustee of the seven trusts, with Brian's approval. Brian borrowed money from one of the family businesses and agreed to repay the loan, with Norman's approval, however, it soon became obvious that Brian would never repay the loan.

In 2005, Brian began to request distributions from the sub-trusts. Anita would make a needs assessment, and then she would issue modest checks to Brian. In 2008, when Anita's husband became ill, she stopped conducting any needs assessments before issuing checks to Brian. After Norman's death in 2009, Brian requested all the accumulated income in the sub-trusts. The attorney who drafted the trusts advised Anita that if she was to distribute all the income to Brian, she would be in breach of her fiduciary duties as trustee because Brian was not the sole beneficiary of six of the seven sub-trusts. Brian then

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demanded all of the income-generating assets as well as the accumulated income, and Anita refused his demand. Subsequently, the board of the Giller family company sued Brian to recover the loan balance.

In 2011, Brian filed a 15-count complaint, among which he argued for Anita's removal as trustee, breach of trust, and disputed Anita's interpretation of certain trust language that includes his children as beneficiaries, claiming that the language shows the intent to benefit him solely. The trial court disagreed, finding the trust language unambiguous, found no conflict of interest, and no breach of trust by Anita. On appeal, Brian argued that the trial court should have found the language ambiguous and required extrinsic evidence regarding the settlor's intent. He claimed that the trial court should have reformed the language to conform to his interpretation that the sub-trusts were solely for his benefit, excluding his children.

The Appellate Court considered the plain language of the sub-trusts, six of the seven which contain a dispositive provision providing that the "Trustee may distribute to or for the benefit of such beneficiary, or his issue . . . so much of the net income of such beneficiary's separate trust as the Trustee, in the Trustee's discretion, deems necessary . . . ." The court found that the phrase "for the benefit of" does not render the sub-trusts ambiguous as a matter of law with respect to the inclusion of Brian's issue as beneficiaries.

In Florida, the polestar of trust or will interpretation is the settlor's intent.[1] In order for the court to reform the trust, there must be clear and convincing evidence that the trust, as written, does not reflect said intent. Here, the court concluded that "the sub-trust language clearly sets forth Norman Giller's intent to include Brian's children," and, as such, any reformation to eliminate Brian's children would not be in line with the settlor's intent, namely to create and oversee the sub-trusts to protect Brian's share of the trust from creditors. The court also affirmed the trial court's conclusion that Anita did not breach her fiduciary duties as trustee and upheld the award of trustee's attorney's fees from trust assets for the breach of trust claim, pursuant to Florida Statutes 736.0802(10)(b).

***Giller v. Grossman*, No. 3D19-2514, 2021 WL 3889320 (Fla. Dist. Ct. App. Sept. 1, 2021).**

Court Upholds Validity of Prenuptial Agreement Signed Hours Before Parties are to be Married

Arlene Williams-Paris ("wife") appeals a probate court order determining that she waived her inheritance rights as a spouse by signing a prenuptial agreement (the "agreement"). The facts are as follows:

Wife and Calvin Paris (the "decedent") lived together in the decedent's home for five years before they were to be married, and continued to live together after the wedding. One year before the marriage, decedent expressed to wife that he wanted to enter into a prenuptial agreement to which wife responded that she "did not want to pay" to enter into such an agreement, and, according to wife, the issue was not mentioned again until the couple's wedding day. In June 2015, decedent suggested that the couple get married the following month at his family's home in Martha's Vineyard, and wife agreed to make the arrangements. Wife was 58 years old, and decedent was 83 years old when they were married, and both had previous marriages.

Decedent woke wife up at 7 a.m. on their wedding day and demanded that she find a prenuptial agreement online and sign it. Wife was decedent's fifth marriage and decedent stated that he refused to marry wife unless she signed the agreement. Wife stated that she felt pressure to sign, being that the family and wedding guests had already arrived, and wife reluctantly followed decedent's instructions to search for and fill out a legal form online. Decedent supplied most of the information for the online form, including their financial information. Decedent then drove both himself and wife to a notary where they signed the agreement in the notary's presence.

Decedent passed away intestate four years later, still married to wife. Wife served a petition on decedent's children in the probate court to invalidate the agreement, declare the residence they lived in together to be decedent's homestead subject to her election to take a one-half interest, and award wife her intestate and elective share of the estate. Wife argued that the agreement was invalid based on fraud, duress, coercion and misrepresentation. She also argued that the agreement contained unfair or unreasonable provisions. She petitioned for rescission based on unilateral mistake. The children moved for summary judgment, which the probate court granted, dismissing wife's petition that there was any coercion or duress, based on the reasoning that wife knew what she was signing, as verified by the notary's affidavit. The probate court determined that Florida law governed the agreement and, thus, rejected wife's argument that the decedent did not make a full disclosure of his finances, as Florida law does not require full disclosure of financial assets for agreements, contracts or waivers executed before marriage.[2] However, the probate court denied summary judgment on the unilateral mistake issue, ruling that material facts disputed remained as to whether wife believed that the agreement was to apply only in the event of divorce, and not death.

On appeal, wife argued that Massachusetts law should apply (which requires full financial disclosure to ensure a prenuptial agreement's validity), citing the choice of law rule, *lex loci contractus*, because the agreement was signed in Massachusetts. The rule "specifies that the law of the jurisdiction where the contract was

executed should control."[3] The court upheld the probate court's ruling that Florida law applies to the agreement, relying on Florida Supreme Court holdings in which public policy controlled over choice of law. "The public policy exception to *lex loci contractus* "requires both a Florida citizen in need of protection and a paramount Florida public policy."[4] As well, the court applied the significant relationship test to conclude that Florida law should apply to determine the agreement's validity because wife had no connection to Massachusetts, other than the fact that the agreement was signed there. Finally, because the decedent's homestead was a key issue to which both wife and the children stood to benefit, the court held that a Florida citizen's right to homestead protection was of paramount importance to allow for a departure from the choice of law rule.

Wife argued that the agreement specifically excluded the decedent's homestead pursuant to paragraph 2 of the agreement, which states that the residence in question "shall not be affected by this Agreement." Paragraph 2 also provides that expenses and maintenance of the residence shall be paid by the decedent. However, the children argue that wife waived her interest in the homestead in paragraph 10, which provides as follow:

> Each party agrees that if he or she survives the death of the other, such party will make no claim to any part of the real or personal property of the other. In consideration of such promise . . . each party knowingly, intelligently, and voluntarily waives and relinquishes any right of . . . homestead, inheritance, descent, distributive share, or other statutory legal right . . . the parties agree that it is their mutual intent that neither shall have or acquire any right, title, or claim in and to the real or personal property of the other by virtue of the marriage. The estate of either party . . . shall descend to or vest in his or her heirs at law, legatees, or devisees, as may be prescribed by his or her Last Will and Testament, as though no marriage had taken place between them.

The court agreed with wife's argument that paragraph 2, which specifically referred to the residence by address, unambiguously exempts it from the agreement. Further, the court was not persuaded by the children's argument that paragraph 2 was only to apply while the decedent was alive. "When interpreting a contract, a court should give effect to the plain and ordinary meaning of its terms."[5] The court is not to "rewrite the contract under the guise of judicial construction." The court held that the children's interpretation of paragraph 2 would render the words "shall not be affected by this Agreement," "totally superfluous" and meaningless, while wife's interpretation would not. The court therefore reversed and remanded to the probate court on the issue of whether wife had waived all spousal interest in the decedent's homestead property pursuant to the agreement.

***Williams-Paris v. Joseph*, 4D20-1760 (Fla. Dist. Ct. App. Sep. 1, 2021).**

Endnotes

1 *Arellano v. Bisson*, 847 So. 2d 998 (Fla. 3d DCA 2003); *Phillips v. Estate of Holzmann*, 740 So. 2d 1, 2 (Fla. 3d DCA 1998).

2 Fla. Stat. § 732.702(2).

3 *Sturiano v. Brooks*, 523 So. 2d 1126, 1129 (Fla. 1988).

4 *State Farm Mut. Auto Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006).

5 *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So. 2d 827, 829 (Fla. 4th DCA 2004).

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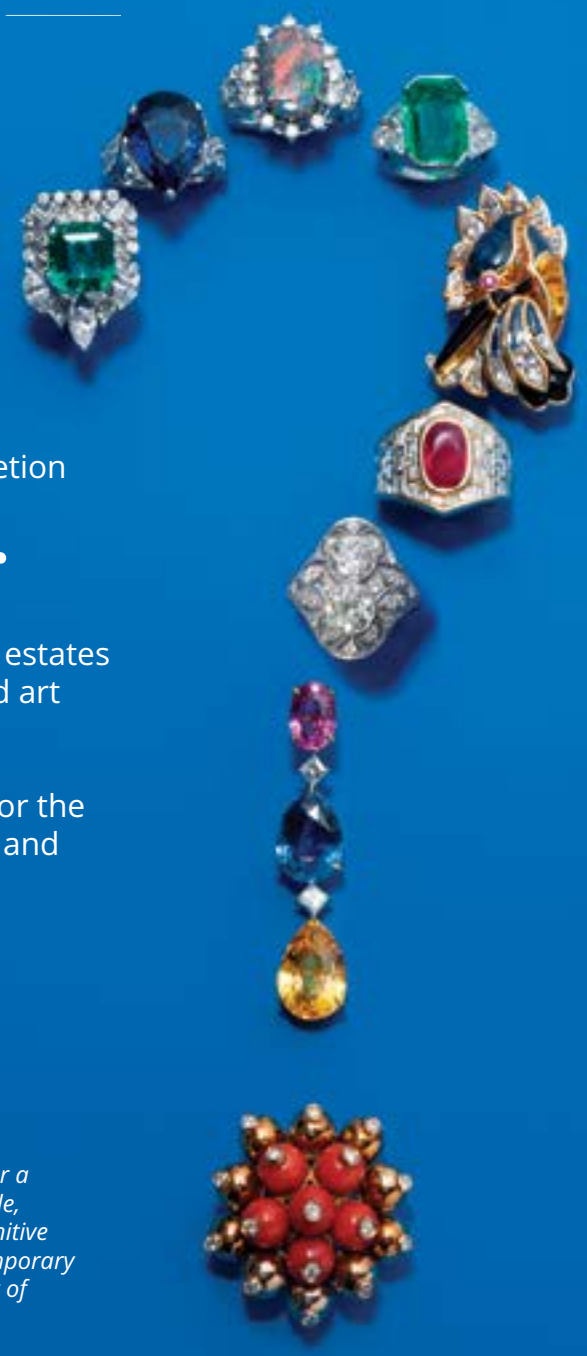

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