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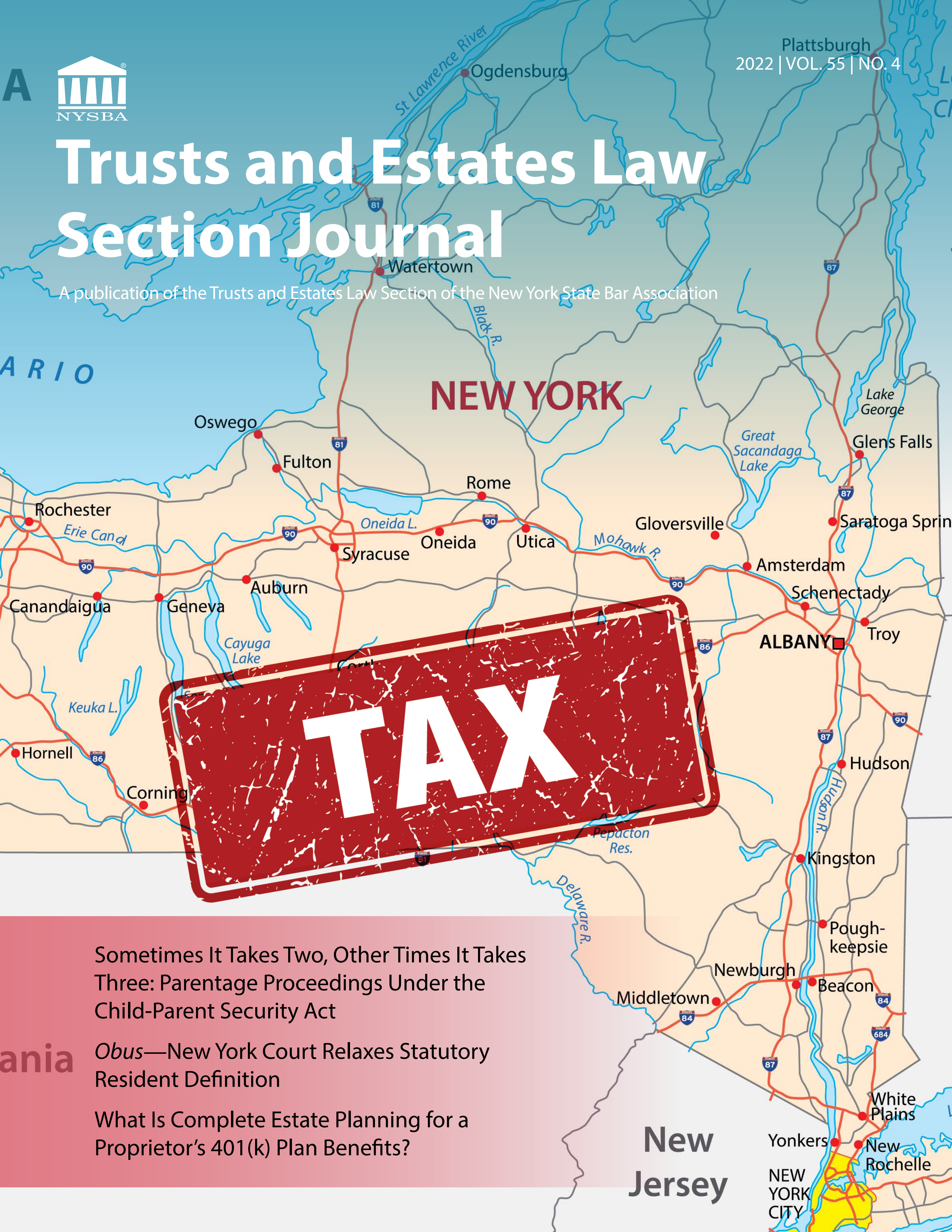

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Publication of Articles

The *Trusts and Estates Law Section 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.

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

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Message From the Section Chair

By Laurence Keiser

It's been a wonderful year and the days just flew by. We are headed into the holiday season, and in a short while we will be at the Annual Meeting of the New York State Bar Association at the New York Hilton. The first *live* Annual Meeting in three years. And it will be a great one.

Our Section's theme for the meeting is "Examining Precedent in Unprecedented Times." We will be dealing with new assets and new technologies (like NFTS and cryptocurrencies); applying our toolbox for fiduciaries and their counsel, planners and litigators, and we will discuss how new technologies are affecting existing practice.

It's hard to believe that my year will come to a close at the Annual Meeting. I have been blessed to have great officers and a great Executive Committee.

The officers were Tricia Shevy as secretary and Angelo Grasso as treasurer. Michael Schwartz provided great insight as chair-elect and we were lucky to have the wisdom and experience of Jen Hillman and Jill Beier, our two immediate past chairs. Jen and Jill bore the brunt of true disruptions due to the pandemic.

I know Michael will have a marvelous next year as he transitions into his role as chair. I was lucky to have this great board and Michael will be lucky as well. It will only get better as Tara Pleat of Wilcenski and Pleat of Clifton Park comes on as our new treasurer. Tara has already served as a valued member of the Executive Committee and as program chair for many of our meetings.

I thank the program chairs who served during this past year; Nicole Clouthier and Jin Soo Ro chaired the Spring Meeting, Joe LaFerlita chaired the Fall Meeting, Tara Pleat and Sarah Pickering chaired the Annual Meeting. They provided thoughtful and meaningful sessions.

The Fall Meeting in Boston was officially our first live meeting since before the pandemic. It was great on so many levels: great speakers and topics, great meetings and meals and social events. Fairmont Copley Plaza was a warm and welcoming venue. It should be noted that we had a full roster of sponsors and they loved it. Much thanks to Lisa Fenech.

At the Annual Meeting, Michael will host his first Executive Committee meeting as chair. His plans are set for a great Spring and Fall meeting. You will hear more about these plans in the coming weeks.

I thank the chairs and co-chairs of all our committees, notably of our Publication Committee, especially Nick Moneta, the chair of our newsletter. Every three months, our Section sends out timely and informative articles on cutting-edge issues. Personally, I am fascinated by the tax articles in the most recent issue. Thanks also to all our authors and editors.

It has been an interesting year for me. I have been challenged at every turn to do better, to increase the value of the Section to all our members. I hope you agree that we, as a Section, have risen to the occasion.

Finally, my special thanks to the New York State Bar Association staff, especially Kim Francis, our Section liaison, who has been wonderful to work with.

Laurence Keiser

Message From the Editor-in-Chief

By Nicholas G. Moneta

Nicholas G. Moneta

Readers, as I conclude my third year as editor-in-chief of the *Journal*, I also conclude my tenure serving in this role. It has been an honor to serve as your editor-in-chief and I look forward to remaining involved in our Section and working with our members for many years to come.

I am delighted to announce that Avigail Goldglancz will take over as editor-in-chief of the *Journal* next year. Avigail served as vice chair of the Newsletter and Publications Committee and as an associate editor of the *Journal* for the last three years. I have every confidence that Avigail will lead this *Journal* with the pride and enthusiasm it deserves. Please join me in congratulating Avigail!

More congratulations are in order. Lawrence Keiser has completed his term as chair of our Section and Michael Schwartz will be taking over in his place. Please also join me in congratulating them on their respective achievements.

In this volume, Deborah S. Kearns, Eva-Marie Cusack, Kera Reed and Meaghan T. Feenan, along with the assistance of Olivia Morri, a law student at Brooklyn Law School, provide a helpful overview of the Child Parent Security Act and how it creates a 21st-century approach to recognizing non-traditional family structures; Bruce D. Steiner addresses the implications of recent case *Obus v. Tax Appeals Tribunal*, which relaxed the definition of "statutory resident" for New York purposes; and Albert Feuer discusses what constitutes a complete estate plan for a proprietor's 401(k) plan benefits.

Thank you to all those who have contributed to the *Journal* these last three years. I would also like to thank each of my associate editors for their tireless work and dedication to this *Journal*.

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*.

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

Sometimes It Takes Two, Other Times It Takes Three: Parentage Proceedings Under the Child-Parent Security Act

By Deborah S. Kearns, Eva-Marie Cusack, Kera Reed, Meaghan T. Feenan and Olivia Morri

First introduced in 2012, the Legislature passed the Child-Parent Security Act (CPSA) into law on April 3, 2020.[1] This act, for the first time, legalized gestational surrogacy agreements in New York in which the surrogate has not contributed genetic material. Further, it delineated procedures for establishing parentage for children conceived either as a result of such agreements or through assisted reproduction.[2] The CPSA took effect on Feb. 15, 2021. With its passage, gestational surrogacy is no longer illegal in New York, and the significant legal challenges and inconsistent court rulings that intended parents faced when seeking to establish legal parental rights for their children are eliminated. Parentage proceedings under the CPSA differ from adoption in that if the CPSA requirements are met, the child is legally the child of the intended parents "by operation of law," which is then confirmed with a judgment of parentage.[3] Adoption, on the other hand, creates parental rights where they did not previously exist.[4]

For decades, surrogacy agreements were deemed void and unenforceable by New York State as contrary to public policy. If the surrogacy agreement provided for the surrogate to be compensated, the parties, their attorneys and any other entities involved in the arrangement were also subject to civil and potentially criminal penalties. Furthermore, intended parents were subject to outdated Domestic Relations Law § 73 from 1974, which was before the introduction of in-vitro fertilization. This legislation only covered sperm donation and only conferred parental rights on the intended parents if they were married when the child was conceived using donated sperm. The selective application of the 1974 law left intended parents and unmarried parents vulnerable to losing parentage over their children.

With respect to surrogacy arrangements, the CPSA only applies in cases where the surrogate's own egg is not used to conceive the child. Surrogacy arrangements where the surrogate is biologically related to the child remain unenforceable in New York and are prohibited if the surrogate is being compensated.[5]

New York State Law Pre-CPSA

A surrogacy matter pre-CPSA was the case study for the need for the CPSA and highlighted the unpredictability of the determination of parentage in such arrangements by various courts in the state (and even the same jurisdiction). The case involved a gestational surrogacy in which both the intended father and the intended mother were genetically related to the resulting child.[6]

Initially, the case was before the Queens County Family Court for an uncontested determination and order that the genetically related, intended parents were also the children's legal parents.[7] After the Queens County Family Court refused to enter the requested order, the intended parents petitioned the New York Supreme Court, Queens

County. Surprisingly (or, perhaps, unsurprisingly), the parties achieved opposite results in the two proceedings.

In *Andres A. v. Judith N.*, the family court was asked to enter an uncontested order declaring the genetically related intended mother in a surrogacy arrangement to be her children's legal mother.[8] Unfortunately, the court was faced with pre-CPSA Article 5 of the Family Court Act which, as the court specifically noted, "makes no provision for declarations of maternity."[9] The court refused to enter an order determining the maternity of the intended mother, stating:

> Although the court is not unsympathetic to the plight of the petitioner, Luz A., the court cannot legislate judicially what is not contained within the statute. Accordingly, for the aforementioned reasons petitioner, Luz A.'s petitions for a declaration of maternity . . . are dismissed for lack of subject matter jurisdiction. The court notes that petitioner Luz A. is not without a remedy since she may seek to adopt the two children.[10]

Two years later, the parties petitioned the New York Supreme Court, Queens County and the court was faced with the same case and circumstances in *Arredondo v. Nodelman*.[11] The petitioning intended parents were still seeking an uncontested order declaring that the genetically related, intended mother was the children's legal mother. With no analysis of its jurisdictional authority or limitations, the court simply held:

> The City does not oppose the petition insofar as it seeks to change the name of the mother listed on the children's birth records to Luz Arredondo. No papers have been received from any other party. This Court concludes that Luz Arredondo is the mother of the petitioner children. From the affidavits submitted there is no dispute that the children borne by respondent Nodelman resulted from the eggs of Luz Arredondo which were fertilized by the sperm of her husband Andres Arredondo, and not from the eggs of Nodelman or the sperm of her husband. Indeed, the results of the genetic testing reveal that Nodelman could not be the mother of the children, and that it is highly probable that the Arredondo's are the genetic parents of the children. Accordingly, the petition is granted. This Court declares that Luz Arredondo is the mother of the petitioner children and the respondent City is directed to issue new birth records for the children reflecting that fact.[12]

The *Arredondo* case clearly illustrated the unpredictability of the analysis of any particular surrogacy case in any particular court, including different courts in the same jurisdiction, with the same governing statutes pre-CPSA.

The Queens County Family Court carefully analyzed the statutory authority granting and governing its power to issue the requested relief and determined, in all probability, that it lacked the jurisdiction to issue the order. When the Queens County Supreme Court analyzed the same facts, it focused not on the law, but on the equity of the matter. It focused on the fact that the parties were all in agreement and that no one was contesting the issuance of the declaration and order. The Supreme Court dealt with the practicality of those circumstances. It was situationally efficient, what the parties wanted, and the Arredondos were raising the children.

The CPSA eliminates the unpredictability, time and expense faced by the family in *Arredonodo* by providing a statutory framework for more predictable legal outcomes for parents with children born via surrogate. If *Arredondo* had arisen today, there would have been a procedure to easily adjudicate it. The CPSA will function to ensure that fewer intended parents will have to litigate these matters, and that lower courts have easier cases to handle. Further, the CPSA provides an avenue for two intended parents, regardless of their gender or sexual orientation, to establish parentage for the children born via surrogate.

Another case that recognized non-genetic parentage in New York is *McDonald v. McDonald*. While the CPSA only recently codified gestational parentage into law in 2021, past court decisions have embraced it under certain circumstances, following the leads of other states. This further proved the need to solidify the increasingly popular common law into statutory law to eliminate uncertainty. In *McDonald v. McDonald*, the Second Department declared that a woman was the legal mother of twins she gestated but was not genetically related to. Ms. McDonald gave birth to twins through IVF, utilizing an egg from a donor and sperm from her husband, Mr. McDonald.[13] The court found that in an instance "where a woman gestates and gives birth to a child from the egg-donation of another woman with the intent to raise the child as her own, the birth mother is the natural mother . . . ," it is the mother's intent that is taken into account, given the increasing number of ways a child can be conceived and carried to term.[14] This line of reasoning, as upheld in *McDonald*, affirmed the necessity for New York's Legislature to bring the statutory laws for gestational surrogacy into congruency with modern medical advancements, as well as evolving family structures.

The court's decision in *Doe v. New York City Bd. of Health*[15] further demonstrates the efficiency of the CPSA. There, the genetic parents of newborn triplets, joined by the gestational surrogate and her husband, sought a pre-birth judgment that the genetic parents' names appear on the birth certificate.[16] This was not granted, as pre-birth surrogacy agreements were not recognized at that time.[17] Instead, the court granted a judgement post-birth that named the genetic parents on the birth certificate.[18] The court reasoned that although surrogacy agreements prior to the child's birth were not permitted, § 124 of the Domestic Relations Law did not restrict what type of parentage proceeding should be instituted following the birth of a child via surrogate.[19] Thus, the court had the discretion to bypass the traditional adoption process and instead order a post-birth judgment. This method of declaring parentage for genetic parents achieved an efficient, desirable outcome. Fortunately, the CPSA institutionalizes and improves upon this process by creating a streamlined mechanism for a parentage judgment for genetic parents set forth in pre-birth surrogacy agreements.

Parentage Proceedings Under the CPSA in General

The CPSA is contained in the newly created Article 5-C of the Family Court Act and sets forth the judicial procedure for establishing parentage.[20] This statute provides that parentage petitions can be brought in Supreme, Family or Surrogate's court, which may then exercise "exclusive continuing jurisdiction" until the child reaches 180 days old.[21] Disputes regarding parentage may be adjudicated in Family, Surrogate's or Supreme court; however, other disputes regarding surrogacy agreements may be adjudicated only in Supreme Court.[22]

A parentage proceeding may be brought by the child, a parent, a person claiming parentage, a social services agency, a person representing a decedent, minor or incapacitated person, or a "participant."[23] A participant is defined as the contributor of a gamete, intended parent, surrogate or the spouse of an intended parent or surrogate.[24] The proceeding may also be brought by someone seeking to be absolved of parental responsibility on the basis that they are a donor rather than an intended parent.[25] An intended parent conceiving with donor gametes who is single may also obtain a judgment of parentage declaring them the only legal parent of the child.[26] Pre-CPSA, a single intended parent conceiving with donor sperm had no legal mechanism by which they could obtain a court order terminating the potential rights of his or her donor.

A parentage proceeding must be brought by a verified petition in either Supreme Court, Family Court or Surrogate's Court and a parentage judgment may be made prior to the child's birth but will not take effect until the child is born.[27] Notice of a parentage order must be sent to the New York State Department of Health, or if the child was born in New York City, notice goes to the New York City Department of Health.[28] The records of a parentage proceeding must be kept sealed, but the parties and the child have the right to inspect and copy the record, and copies may be made available to the New York State Office of Temporary and Disability Assistance, a Title-IV-d child support agency in another state and local support collection units if necessary for the provision of child support services. [29]

The forms for parentage proceedings in Surrogate's Court can be found on the Surrogate's Court forms webpage.[30]

Surrogacy Parentage Proceedings

A parentage petition resulting from a surrogacy agreement may be brought any time after execution of the surrogacy agreement. Such petition may be commenced: (1) in any county where an intended parent resided any time after the surrogacy agreement was executed; (2) in the county where the child was born or resides; or (3) in the county where the surrogate resided any time after the surrogacy agreement was executed.[31]

The petition must be verified and must include: (1) a declaration that the person acting as surrogate or at least one of the intended parents has been a New York resident for at least six months at the time the surrogacy agreement was executed; (2) a certification from the attorney representing the person acting as surrogate that the requirements of Family Court Act Art. 5-C, Part 4 have been met; and (3) a statement from all parties to the surrogacy agreement that they knowingly and voluntarily entered into the surrogacy agreement and that the parties are jointly requesting the judgment of parentage.[32] If the attorneys' statements do not indicate full compliance, the court may enforce the agreement if it finds "substantial compliance," or may adjudicate parentage in accordance with the child's "best interests."[33]

A person may be eligible to act as a surrogate if: (1) she is at least 21 years of age; (2) she is a United States citizen or lawful permanent resident and, where at least one intended parent is not a resident of New York for six months, was a New York resident for at least six months; (3) she has not provided the egg used to conceive the resulting child; (4) she has completed a medical evaluation by a licensed health practitioner; (5) she has given informed consent after being informed of medical risks by a licensed health care practitioner; (6) she has been represented by independent legal counsel, along with her spouse, if applicable; (7) she has or will obtain comprehensive medical insurance; (8) that the intended parent(s) shall procure and pay for a life insurance policy for the surrogate that takes effect prior to taking medication or beginning any embryo transfers; and (9) any other criteria deemed appropriate by the Commissioner of Health.[34] The surrogate's spouse must also provide informed consent unless they have lived apart for three years or are living apart pursuant to a decree, judgment or separation agreement acknowledged in the manner of a deed.[35]

At least one intended parent in a surrogacy agreement must be a United States citizen or lawful permanent resident and a New York State resident for at least six months. Intended parents must be represented by independent legal counsel.[36] An intended parent may be a single adult or, if a couple, may be married or in an intimate relationship.[37] An intended parent may execute a surrogacy agreement without his or her spouse if they have lived apart for three years or if they are living separately pursuant to a decree, judgment or separation agreement acknowledged in the manner of a deed.[38] If the intended parents are providing compensation, the funds must be placed in escrow and the agreement must also delineate how medical expenses will be covered.[39]

The surrogacy agreement must include an acknowledgment that the surrogate has received a copy of the "Surrogate's Bill of Rights," and must provide that the surrogate has the right to: (i) make all health and welfare decisions regarding the pregnancy; (ii) utilize medical personnel of her choosing; (iii) be represented by independent legal counsel paid for by the intended parents and; (iv) to provide or be provided with comprehensive health and life insurance policies.[40] The agreement must also provide that the intended parent or parents must assume custody and responsibility for support of all children resulting from the pregnancy, responsibilities that are not assignable, and it must obligate them to execute a will prior to the embryo transfer delineating a guardian for all such children.[41] The agreement may be terminated on notice by the surrogate or the intended parent or parents prior to any pregnancy resulting from the embryo transfer.[42]

Assisted Reproduction Parentage Proceedings

A parentage petition resulting from a child conceived through assisted reproduction may be brought in court: (1) if the intended parent or child resides in New York state, in the county where the intended parent resides any time after pregnancy is achieved or in the county where the child was born or resides; or (2) if the intended parent and child do not reside in New York state, up to 90 days after the birth of the child in the county where the child was born,[43] the petition must be verified and include: (a) a statement that the intended parent has been a New York resident for a least six months or if an intended parent is not a New York resident, that the child was or will be born in New York within 90 days of filing; (b) a statement from the gestating parent that the gestating intended parent became pregnant as a result of assisted reproduction; (c) if the intended parent is non-gestating, a statement from both the gestating and non-gestating intended parent that the non-gestating parent consented to assisted reproduction pursuant to Family Court Act § 581-304; and (d) proof of donative intent.[44]

Donative intent may be demonstrated by a statement from the gamete storage facility or health care practitioner where the donor is anonymous. The statement must recite that such gametes or embryos were anonymously donated or had previously been released or by clear and convincing evidence that the gamete or embryo donor intended to donate or release such gametes or embryos to a gamete or embryo storage or health care practitioner.[45] Where the donor is known, the donor's intent may be demonstrated by a statement signed by the donor and gestating parent confirming that the donor "has no parental or proprietary interest in the gametes or embryos" or by providing the donor with at least 20 days' notice prior to the date set for the proceeding to determine the existence of donative intent.[46] Notice must be made by personal service or by registered or certified mail if personal service cannot be effected.[47] The court must find parentage of an intended parent if the allegations in the petition are determined by the court to be true.[48]

Amendments to the Estates, Powers and Trusts Law as a Result of the CPSA

Estates, Powers and Trusts Law (EPTL) 4-1.2 and 4-1.3 were amended as a result of the enactment of the CPSA. The amendments to these sections reflect a shift from proof of genetic paternity and allow a parent and child to establish "parenthood." Parenthood now includes a "non-gestating intended parent," as in a parent who has a contract with a surrogate to carry the child to be raised by the intended parent.[49]

EPTL 4-1.2 addresses rights of non-marital children to inherit from their parents and their parents right to inherit through them. The proofs of parenthood parallel those that would have been required under the original statute. These include (1) a signed acknowledgment of parentage by the intended parent; (2) an adjudication of parentage during the intended parent's lifetime; or (3) an adjudication by clear and convincing evidence based upon a genetic marker test or by the intended parent "openly and notoriously" acknowledging the child during his or her lifetime.[50]

EPTL 4-1.3 addresses inheritance by children conceived after the death of an intended parent. It was amended to eliminate the terms "genetic parent" and "genetic child" and instead uses "intended parent." To be considered a genetic child of an intended parent, express consent must be in a written instrument executed not more than seven years prior to the intended person's death and, if the assisted reproduction occurred after the intended parent's death, the child was in utero no later than 24 months after the death or was born no later than 33 months after the death.[51]

If the child was conceived using genetic material of the intended parent, it must further be established that: (1) the intended parent authorized a person to make decisions regarding the genetic material after death not more than seven years before the death of the intended parent; (2) that the person so authorized gave written notice to the intended parent's fiduciary that the intended parent's genetic material was available for the purpose of conceiving the intended parent's child and such notice was given via certified mail, return receipt requested, or by personal delivery within seven months from the date of issuance of letters testamentary or administration, or if no letters have been issued within four months of the intended parent's death, such notice shall be given to a distributee of the intended parent within seven months of death; and (3) the person so authorized to make decisions about the use of the intended parent's genetic material must record such authorization in the Surrogate Court granting letters, or if no letters have been granted, in the Surrogate Court having jurisdiction to grant letters within seven months of the intended person's death.[52]

If the formal requirements of EPTL 4-1.2 and 4-1.3 are met, the child may inherit in intestacy from the "intended parent," and be included in gifts to the intended parent's "issue" under a will.[53] If someone other than the intended parent makes a gift to "issue" of the intended parent, the child may be included in that class.[54] For purposes of the anti-lapse statute, the child is considered the intended parent's issue.[55] The possibility of a post-conceived child will not invalidate a bequest for perpetuities purposes.[56] The child is not included as an afterborn child under EPTL 5-3.2.[57]

Conclusion

The CPSA provided a necessary update to New York's body of law regarding gestational surrogacy and parentage of "intended parents." Under the CPSA, the process for parents seeking to establish a legal declaration of parentage of their children born through gestational surrogacy is now statutorily supported and attainable. Additionally, safeguards that ensure the rights concerning the health and well-being of the surrogate are also in place. The CPSA does not require a complete overhaul of Surrogate's Court proceedings; however, there are some important changes to note. First, Surrogate's Court has jurisdiction over parentage proceedings, but issues regarding surrogacy agreements are only within the jurisdiction of New York Supreme Court, and, second, children born via gestational surrogacy may inherit from their "intended parents," assuming the requirements of EPTL 4-1.3 are met. In all, the CPSA creates a 21st century approach to recognizing non-traditional family structures in light of the common practice of in-vitro fertilization and gestational surrogacy. This updated legislation recognized that families are made in different ways, and those families are entitled to a path of recognition.

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The authors would like to thank **Olivia Morri**, a 2L at Brooklyn Law School, for contributing to this article.

Endnotes

1 At the time of passage, New York was one of three states (the other two were Michigan and Louisiana) prohibiting commercial surrogacy.

2 *See* Laws of 2020, chapter 56, Part L (effective Feb. 15, 2021).

3 N.Y. Family Court Act §§ 581-406; 581-203 (FCA).

4 N.Y. Domestic Relations Law § 110 (DRL).

5 FCA §§ 581-401.

6 *See* generally *Andres A. v. Judith N.*, 591 N.Y.S.2d 946 (Fam. Ct., Queens Co. 1992).

7 *Id.*

8 *Id.*

9 *Id.* at 949.

10 *Id.* at 950.

11 622 N.Y.S.2d 181 (Sup. Ct., Queens Co. 1994).

12 *Id.* at 182.

13 *McDonald v. McDonald*, 196 A.D.2d 7, 12 (2d Dep't 2005).

14 *Id.* (quoting *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993)).

15 782 N.Y.S.2d 182 (N.Y. Sup. Ct., New York Co. 2004).
16 *Id.*
17 *Id.* at 183.
18 *Id.* at 185.
19 *Id.* at 184.
20 FCA §§ 581-101, 581-201(a).
21 *Id.* § 581-206.
22 *Id.* § 581-409.
23 *Id.* § 581-201(c).
24 *Id.* § 581-102 (o).
25 *Id.* § 581-202.
26 *Id.*
27 *Id.* § 581-201(b).
28 *Id.* §§ 581-202(g); 581-203(d).
29 *Id.* § 581-205.
30 *See* http://ww2.nycourts.gov/forms/surrogates/parentage.shtml.
31 FCA § 581-203(a).
32 *Id.* § 581-203(c).
33 *Id.* §§ 581-203(e); 581-407.
34 *Id.* § 581-402(a).
35 *Id.* § 581-403(a)(2).
36 *Id.* § 581-403(e).
37 *Id.* § 581-403(a)(2)(i).
38 *Id.* § 581-402(b).
39 *Id.* § 581-403(f), (g).
40 *Id.* §§ 581-403, 581-602, 581-603, 581-604.
41 *Id.*
42 *Id.* §§ 581-405, 581-607.
43 *Id.* § 581-202(a).
44 *Id.* § 581-202(c).
45 *Id.* § 581-202(d).
46 *Id.* § 581-202(d), (e).
47 *Id.* § 581-202(e).
48 *Id.* §§ 581-202(c), (g).
49 EPTL § 4-1.2(a)(1).
50 *Id.* § 4-1.2(a)(2)
51 *Id.* § 4-1.3(b)(2).
52 *Id.* § 4-1.3(c). There is a template for the written instrument set forth in EPTL § 4-1.3(d).
53 *Id.* § 4-1.3(b).
54 *Id.* § 4-1.3(g).
55 *Id.* § 3-3.3; *see Id.* § 4-1.3(h).
56 *Id.* § 4-1.3(i).
57 *Id.*

Obus—New York Court Relaxes Statutory Resident Definition

By Bruce D. Steiner

With a few exceptions, an individual who is domiciled in New York is taxed as a New York resident.[1] In addition, an individual who is not domiciled in New York but who maintains a permanent place of abode in this state and spends, in the aggregate, more than 183 days in New York is a statutory resident for that year.[2]

The regulations explain that:

> A permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore, a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode.[3]

The regulations further explain that "presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State."[4]

The language of the statute and regulations suggests that there need not be any connection between the taxpayer's presence in New York and his or her dwelling place in New York.

Thus, for example, in *In re Barker*,[5] the taxpayer lived in Connecticut and worked in Manhattan, but had a vacation home in the Hamptons where he stayed for about 20 days a year. In 2011, the Tax Appeals Tribunal held in favor of the Division of Taxation since the home was "permanent" (even though the taxpayer rarely used it).

The Court of Appeals opened a window to taxpayers in 2014 in *Gaied v. Tax Appeals Tribunal*.[6] Mr. Gaied lived in New Jersey, worked on Staten Island, and owned a three-family house in Staten Island. His parents lived in one apartment and unrelated tenants lived in the other two apartments. Mr. Gaied occasionally stayed with his parents. The Department of Taxation contended that the taxpayer need not actually dwell in a place of abode to maintain it. However, on appeal, the Court of Appeals held in favor of the taxpayer, saying that "the legislative history of the statute, to prevent tax evasion by New York residents, as well as the regulations, supports the view that in order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have a residential interest in the property."

However, the decision left open the question as to whether the place of abode had to be connected to the taxpayer's New York employment. That issue arose in *Obus v. Tax Appeals Tribunal*,[7] decided on June 30, 2022.

Nelson Obus and Eve Coulson lived in New Jersey. Mr. Obus is a partner and the chief investment officer at Wynnefield Capital in Manhattan, which manages several funds that invest in small cap U.S. value stocks.

In 2011, Mr. Obus purchased a five-bedroom home in Northville, in Fulton County in the Adirondacks, more than 200 miles from his office, for $290,000. The house has an attached apartment with a separate entrance that was rented to a tenant for $200 per month.

Mr. Obus used the vacation home two to three weeks a year for cross-country skiing and to attend the Saratoga Race Track. Ms. Coulson only used the home twice since it was purchased. Nevertheless, as in *Barker*, the taxpayers owned their vacation home and could have stayed there at their leisure.

The Department of Taxation determined that the taxpayers were subject to New York resident income tax. As a result, they were liable for additional New York income tax of $526,868 for 2012 and 2013, in addition to interest and penalties. The Tax Appeals Tribunal sustained the determination. However, the Third Department reversed and held that the taxpayers were not subject to tax as New York residents.

Mr. Obus was present in New York for more than 183 days since he worked in Manhattan so the issue is whether his vacation home constituted a "permanent place of abode."

The court in *Obus* said that a camp or cottage (which the regulations give as an example of a dwelling that is not a permanent place of abode) is just one example of circumstances where a dwelling will not constitute a permanent place of abode.

The court noted that the vacation home was not used for access to Mr. Obus' job in Manhattan, nor was it suitable for such purposes given that it was more than four hours away. Moreover, the taxpayers did not keep personal effects there, but instead brought personal items with them during visits.

This decision creates some uncertainty in the law.

At one end of the spectrum are taxpayers who live outside New York City, work in Manhattan, and have apartments in Manhattan where they stay regularly.

At the other end of the spectrum are taxpayers such as Mr. Obus who live outside New York, work in Manhattan, and have vacation homes far from their office where they stay only occasionally. Under *Obus*, they are not residents, at least if they don't keep personal effects there.

What about taxpayers like Mr. Barker who live outside New York City, work in Manhattan, and have vacation homes in the Hamptons or the Catskills that are far enough from Manhattan to preclude daily commuting? It remains to be seen how the courts will rule in those cases. Will it matter how often they stay there? How is 20 days different from a few days? Will it matter whether they keep personal effects there?

The court's comment about the legislative history of the statute may be helpful. In this regard, the court said that:

> The Court of Appeals has explained that the legislative intent underlying Tax Law § 605 is to discourage tax evasion by residents of this state (*see Matter of Gaied v New York State Tax Appeals Trib.*, 22 NY3d at 597; *Matter of Tamagni v Tax Appeals Trib. of State of N.Y.*, 91 NY2d 530, 535 [1998], *cert denied* 525 US 931 [1998]). Essentially, this statute "fulfils the significant function of taxing individuals who are really and for all intents and purposes residents of the state but have maintained a voting residence elsewhere and insist on paying taxes to [New York] as nonresidents."

If the key factor is whether taxpayers "are really and for all intents and purposes residents of the state but have maintained a voting residence elsewhere," then taxpayers like Mr. Barker shouldn't be considered residents.

What if the dwelling is near the taxpayer's office? If the purpose of the statute is to reach taxpayers who are "really and for all intents and purposes" residents, shouldn't the test be how often the taxpayer stays there? Why should it matter whether the dwelling is an apartment near the taxpayer's office or a house in the Hamptons, the Catskills or the Adirondacks?

On the other hand, as a practical matter, if the dwelling is an apartment near the taxpayer's office, the taxpayer is likely to stay there regularly. Otherwise, why would the taxpayer have acquired it? But there are often ways to show where the taxpayer stays. Cell phone records show the location of the nearest cell phone tower for each call. The location of the last call in the evening may show where the taxpayer spent the night.

Given the large amount of tax due for the two years involved, both Mr. Obus and Mr. Barker must have had substantial income from sources outside New York. Since they worked in New York, their income from their employment in New York would have been subject to tax in New York regardless of whether it was taxable as a New York resident. Perhaps some or all of Mr. Obus' income from was an allocation of investment income from Wynnefield Capital's funds.

This situation is most likely to occur in the case of commuters who live in other states, work in New York, and purchase vacation homes in New York.

It is of greatest concern to taxpayers whose home states have lower tax rates, and to taxpayers who cannot get a credit in one state for the tax payable to the other state.

The top income tax rate in New York is 10.9%. New York City also imposes an income tax, with a top rate of 3.876%.

The top income tax rate in neighboring states for 2022 is as follows:

Connecticut: 6.99%.

New Jersey: 10.75%.

Pennsylvania: 3.07%.

Rhode Island: 5.99%.

Vermont: 8.75%.

New York allows a credit for income taxes paid to another state on income earned in the other state. However, New York does not allow a credit for income taxes paid to another state on income not derived from sources in the other state. Accordingly, an individual taxable as a resident of both New York and another state may be subject to double taxation on intangible income unless the other state allows a credit for the New York tax on the intangible income.

Connecticut allows a credit (up to a pro rata share of the Connecticut tax) for the tax imposed on a resident by another state or a political subdivision on income derived from sources therein. However, that would generally not apply to intangible income.

New Jersey allows a credit (up to a pro rata share of the New Jersey tax) for the tax imposed for the taxable year by another state or political subdivision of such state. Eligibility for the credit is not limited to income derived from sources in the other state. (There is an exception for certain S corporation income, and New Jersey and Pennsylvania have a reciprocal agreement with respect to certain earned income).

Since Mr. Obus was a New Jersey resident, if he were to be considered a statutory resident of New York, he could have taken a credit for the New York tax on his intangible income against his New Jersey tax, up to a pro rata share of his New Jersey tax.

Taxpayers in New Jersey who are concerned that they might be taxable as statutory residents in New York should file protective refund claims in New Jersey. They must do so within three years of payment.[8]

Mr. Barker, on the other hand, could not take a credit for the New York tax on his intangible income against his Connecticut tax.

The Pennsylvania statute allows a resident a credit (up to a pro rata share of the Pennsylvania tax) for any income tax imposed by another state. Taxpayers in Pennsylvania who are concerned that they might be taxable as statutory residents in New York should file protective refund claims in Pennsylvania. They must do so within three years of payment.[9]

Rhode Island allows a credit (up to a pro rata share of the Rhode Island tax) for the tax imposed on a resident by another state on income derived from sources therein. If a taxpayer is taxed as a resident of both Rhode Island and another state, Rhode Island will reduce its tax proportionately if the other state does likewise.

Vermont allows a credit (up to a pro rata share of the Vermont tax) for any income tax imposed by another state on income earned in the other state. In the case of a domiciliary of another state who is a statutory resident of Vermont, intangible income is treated as earned in the state of domicile (thus allowing a Vermont statutory resident a credit for his or her domiciliary state's tax), but only if the other state allows a similar credit to Vermont domiciliaries.

A domiciliary of Connecticut, Rhode Island or Vermont who is a statutory resident of New York will thus be subject to double tax on his or her intangible income.

A domiciliary of New Jersey or Pennsylvania who is a statutory resident of New York will receive a credit in his or her home state. However, the New York tax rates are substantially higher than the Pennsylvania tax rates. Whether the New York or the New Jersey tax rates are higher depends on the particular case. The top New York state rate of 10.9% is higher than the top New Jersey tax rate of 10.75%. However, the 10.9% bracket in New York only applies to taxable income over $25 million, whereas the 10.75% bracket in New Jersey applies to taxable income over $1 million. There are also differences in the deductions, exemptions and credits. New York City has its own income tax, with a top rate of 3.876% on taxable income over $50,000 (single) or $90,000 (joint). Yonkers also has its own income tax, equal to 16.75% of the New York state income tax.

Whether someone who works in New York, spends more than 183 days in New York, and purchases a vacation home in New York is a New York resident will now depend on the facts of the particular case.

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Endnotes

1 N.Y. Tax Law § 605(b)(1)(A).

2 20 N.Y.C.C.R. § 105.20(e)(1).

3 *Id.* § 105.20(e)(1).

4 *Id.* § 105.20(c).

5 Tax Appeals Tribunal DTA No. 822324 (2011), https://www.dta.ny.gov/pdf/archive/Decisions/822324.ord2.pdf?_ga=1.192731757.613545193.1397480304.

6 22 N.Y.3d 592, 983 N.Y.S.2d 757, 6 N.E.3d 1117 (2014), https://scholar.google.com/scholar_case?case=14069091553359604541&q=gaied&hl=en&as_sdt=4,216.

7 2022 N.Y. Slip Op. 04206, https://scholar.google.com/scholar_case?case=15217129282099378309&q=matter+of+obus&hl=en&as_sdt=4,215 (3d Dept. Jun. 30, 2022).

8 N.J.A.C. § 18:26-10.10.

9 72 Pa. Cons. Stat. Ann. § 10003.1(a).

What Is Complete Estate Planning for a Proprietor's 401(k) Plan Benefits?

By Albert Feuer

Sole proprietors often sponsor 401(k) plans, which are funded in whole or in part by employees choosing to defer their compensation,[1] to access a very tax-advantaged savings vehicle under the Internal Revenue Code of 1986, as amended ("Code")[2] and the New York State Tax Law.[3]

A 401(k) plan may have one participant, the proprietor, such as a solo attorney with no employees, or multiple participants, the proprietor and the proprietor's employees. Estate planning for a proprietor's 401(k) plan benefits is often limited to preparing and filing beneficiary designations consistent with the disposition of the proprietor's overall estate plan.[4] This is often inadequate because the proprietor fails to authorize anyone to:

- determine plan beneficiaries and their benefit entitlements, such as those of the proprietor, and notify them of those entitlements, after the proprietor's death;
- make plan distributions, such as to the proprietor's beneficiaries, after the proprietor's death; or
- invest plan assets that no one is able to invest, such as those allocable to the proprietor's beneficiaries, until the plan administrator allocates or distributes those assets to such beneficiaries, after the proprietor's death.

Considerable time may pass before a personal representative of the proprietor's estate is appointed and the persons nominated by the personal representative assume the above authority in accord with the plan terms.[5] Such delay may adversely affect the value of the plan beneficiaries' benefits in the same way the delay of an appointment of a decedent's personal representative may jeopardize the interests of a decedent's testamentary beneficiaries in investments held in the decedent's name. Moreover, the delay may also place the proprietor's estate at risk for failing to prevent those losses and to assure that the plan terms are followed, such as meeting the tax-qualification requirements for timely minimum required distributions to those beneficiaries and other persons.[6]

Similar issues may arise with respect to 401(k) plans sponsored by one-person LLCs, LLPs, and professional and other corporations because no one is authorized to perform the aforesaid plan tasks. Again, such authorization may have to wait until a personal representative of the owner's estate is appointed, and the nominees of the personal representative assume the above authority in accord with the plan terms.

Three Distinct 401(k) Plan Roles

An enterprise that wishes to establish and maintain a 401(k) plan must generally have persons fill three distinct roles.

First, the enterprise will be the plan sponsor who chooses the plan terms and assures that those terms comply with the applicable tax provisions. A plan sponsor representative must execute the plan document. Most proprietor 401(k) plans are not individually designed, but pre-approved by the Internal Revenue Service.[7] Such plans usually consist of three distinct documents.[8] First, an adoption agreement, which sets forth the individual plan discretionary terms.[9] The plan sponsor and plan administrator must always execute the adoption agreement. Second, a trust agreement describing the trust/custodian terms and trustee/custodian, which is often executed by the plan sponsor and the plan trustee/custodian.[10] Third is the base plan document setting forth the non-discretionary plan terms in detail.[11] Pre-approved plans generally must be restated and amended every six years to comply with the applicable Code rules.[12] The most recent deadline for defined contribution plans, including, but not limited to 401(k) plans, was July 31, 2022.[13]

Second, the plan administrator must decide how to administer the plan, i.e., how does the plan obtain employer and employee contributions, how are benefit entitlements determined, the conditions under which benefits are distributed, and how to provide the appropriate notices to participants and beneficiaries, the Internal Revenue Service, and the U.S. Department of Labor. These are all fiduciary responsibilities. The administrator need not be the sole proprietor, but may be an employee of the proprietor such as an HR professional, or an unrelated third party.

Third, a plan fiduciary, often the plan trustee,[14] must decide how to invest plan assets, including which investment options are permissible. However, a fiduciary responsibility to choose and monitor these choices prudently remains. Moreover, investment authority may be given to plan participants and beneficiaries willing and able to exercise such authority in a timely fashion.[15] The plan trustee need not be the sole proprietor but may be an employee of the proprietor, such as an HR professional.

What Are the Elements of a Complete Estate Plan for a Proprietor's 401(k) Plan Benefits?

There are three elements of a complete estate plan for a proprietor's 401(k) plan benefits.[16]

First, the proprietor must designate a beneficiary or beneficiaries in accord with the plan terms. The plan administrator determines who the plan terms provide is the beneficiary(ies), which may differ from the person(s) named on the proprietor's last designation. The administrator is responsible for notifying the beneficiary(ies) of their status. Once notice of that determination is given to the designee(s), the designee(s) may decide how to invest those funds, if permitted under the plan terms, until the designee(s) is ready to request a plan distribution. The plan administrator may distribute the benefits after receiving a benefit/claim application from the beneficiary(ies) that complies with the plan terms.

Second, the proprietor must designate a plan administrator who will be in place following the proprietor's death so that the proprietor's beneficiary(ies) may quickly be notified, determined and receive any requested distributions. This may be done by having a plan administrator who is not the proprietor in place before and after the proprietor's death. If the proprietor wishes to be the plan administrator until the proprietor's death, simply nominating a successor plan administrator is not sufficient for the successor to have due authority. There must also be a procedure by which the successor may accept the designation, such as by executing a document in which the nominee agrees to accept the appointment and act in accordance with the express terms of the attached plan adoption agreement and the base document.

Third, the proprietor must designate a person, usually the plan trustee, who will be in place following the proprietor's death so that the proprietor's beneficiary(ies)' plan assets may be prudently invested between the time that the proprietor passes away, and the beneficiary(ies) are determined and are able to decide whether to invest or request the plan benefits, in whole or in part. This may be done by having a plan trustee who is not the proprietor in place before and after the proprietor's death. If the proprietor wishes to be the plan trustee until the proprietor's death, simply nominating a successor plan trustee is not sufficient for the successor to have due authority. There must also be a procedure by which the successor may accept the designation, such as by executing a document in which the nominee agrees to accept the appointment and act in accordance with the express terms of the attached trustee agreement.

How May the Proprietor of the 401(k) Plan Simplify the Estate Planning for Such Benefits?

First, the proprietor may choose a third party to be the plan administrator and the plan trustee, and designate a successor third party in case the initial one becomes unable to serve, as well as a procedure for the successor to accept those positions.[17] The proprietor's death would not affect the authority of the administrator or trustee, who

may be different third parties. This third-party approach is most practical with those plans that require the sponsor to choose a plan administrator and plan trustee if there are large numbers of employees for the proprietorship. Many proprietors, however, are unlikely to give up this authority during their life, even in those circumstances. Thus, as discussed above, they need to assure successors who are willing and able to assume the authority as soon as possible after the proprietor's death.

Second, the proprietor may make contributions to a plan funded solely with traditional IRAs, and avoid the need for any plan administrator or plan trustee, but be unable to make as large contributions as is permitted for a 401(k) plan.[18] This is the approach taken when a proprietor chooses to use a SIMPLE plan, which is essentially a 401(k) plan, with some employer contributions, funded solely with traditional individual retirement accounts or individual retirement annuities (IRAs) in which there are at most 100 employees.[19] In a SIMPLE plan, however, the proprietor's annual contributions/deferrals are limited to $14,000, except for those over age 50 who may contribute up to $17,000.[20] In a simplified employee plan (SEP)[21] the proprietor's contributions that are a percentage of compensation are limited to the minimum of 25% of the proprietor's earnings from the proprietorship, or $61,000.[22] For an IRA associated with a SIMPLE plan or a SEP, the proprietor has no administrative responsibilities other than choosing an IRA for each participant and making contributions on behalf of each participant to the selected IRA. The proprietor is generally responsible only for the investment of the proprietor's IRA assets. Any plan document responsibilities generally fall on the IRA trustee, custodian, or insurer, who may establish and maintain the plan with a Form 5305-SEP, which has not been revised since 2004.[23]

Third, a proprietor who wishes to use a 401(k) plan may choose one that is part of pooled employee plans and multiple employer organizations.[24] Investment choices are often limited to limit the fiduciary exposure of the providers.[25] Those plans trump the advantage of passing the administration and investment fiduciary responsibilities to third parties, but the employer remains responsible for monitoring the performance of those third parties.[26]

This approach may be a reasonable approach for a proprietor satisfied with the plan terms and investment choices of such a plan, the costs of participating in such a plan, and having the responsibility of monitoring the performance of these plan providers, including whether they keep proprietors informed by how they keep the plans compliant with the latest tax rules. The last task may not be easy for lay proprietors to do.

Fourth, a proprietor who wishes to use a 401(k) plan may choose one that is provided by many financial firms, such as mutual fund providers, provide plans at low or no cost that seem to offer a similar approach. The proprietor is asked to name a plan administrator and successor administrator, but the firm often takes on the plan administrator's responsibility of preparing IRS notices of plan distributions and may be willing to prepare annual plan tax returns for an additional fee. A party related to the financial firm will be the plan trustee but will take no investment responsibility other than to follow the instructions of participants, who may choose from among a very broad range of investments,[27] unlike the pooled employee plans that do take on this fiduciary responsibility.

There are two difficulties with this financial firm investment approach. The firms often have no standard set of documents by which the successor plan administrator may assume those responsibilities, but often have a vague reference to a procedure being acceptable to a party related to the financial firm, so it is still necessary to prepare the documents described above. The financial firm's interest in retaining the plan assets may encourage the firm to process any such documents very slowly. The firms also often have no procedure for what to do when a beneficiary is unable to exercise its responsibility, such as when the beneficiary has not yet been approved by the administrator, other than a vague reference to an option that the party related to the financial firm may find acceptable.

This may, again, be a reasonable approach for a proprietor satisfied with the plan terms but prepared to retain many of the plan administration responsibilities and the responsibility of monitoring the performance of these plan providers. It is important that the proprietor be fully cognizant of the plan administration responsibilities that the financial firm will not take on, such as the beneficiary determination, and the need for the proprietor to be timely apprised of the need to make any plan amendment and restatements. The last task may not be easy for lay proprietors to do.

Fifth, the proprietor may prepare a will that includes a provision explicitly giving the executor of the proprietor's estate the authority to appoint the plan administrator, and plan trustee, if needed, and to terminate the 401(k) plan. This will address the situation where either none of the successor administrators or none of the trustees named by the proprietor are available after the proprietor's death. This will eliminate any issue about the advisability of petitioning the court for such authority[28] on the basis that there are no fiduciary powers explicitly providing such authority.[29] A third party, such as a financial entity holding plan assets, may seek to compel the fiduciary to demonstrate such authority, which is easy to do at little cost if the probated will explicitly provides such authority.[30]

Similar Issues for Tax-Advantaged Employer Pension Plans Other Than 401(K) Plans by Entities Owned by a Single Individual

There are similar estate planning issues for any tax-advantaged employer pension plan for any enterprise owned by a single individual who is authorized to determine and notify beneficiaries, make benefit distributions, and invest plan assets after the death of an enterprise's sole owner. This is the case for defined contribution plans that rely in part or in whole on employer contributions, such as money purchase pension plans, profit-sharing plans, and for defined benefit plans for which there are no individual accounts. The only difference for the latter is that the investment responsibility applies to all the plan assets, even if the plan participants are not limited to the owner of the enterprise.

Conclusion

An individual who owns a professional or other enterprise that maintains a tax-advantaged plan, such as a 401(k) plan, and wishes to assure that the individual's beneficiary(ies) obtain plan benefits as soon as possible and that the plan operates prudently following the individual's death should generally prepare procedures so that following the death of the owner:

- there will, without any need for court intervention, be a person in place who is authorized to determine the plan beneficiary(ies) and benefit entitlements, give notifications of such determinations, and make plan distributions that the beneficiary(ies) may choose; and
- there will, without any need for court intervention, be a person in place who is authorized to make plan investment decisions until the owner's beneficiary(ies) are authorized to decide whether to withdraw or invest their plan benefits.

If this is not done, either by designating and arranging for persons to have the requisite authority as soon as possible after the proprietor's death, or dispensing with the need to appoint such persons, the delay in giving the individual's beneficiary(ies) access to their plan benefits may place those benefits at substantial risk and expose the individual's estate to fiduciary liability claims for failing to assure that the plan is administered in accord with its terms, and for failing to maintain the plan's qualification for favorable tax treatment. Will provisions confirming the authority of the executor to nominate such plan fiduciaries in the event such authority is needed may also be prudent.

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Endnotes

1 Section 401(k)(2) of the Internal Revenue Code of 1986, as amended ("Code").

2 *See generally* Patricia Shevy et al, ch. 8, I*ndividual Retirement Arrangements, Tax-Qualified Pension, Profit-Sharing, and Stock Bonus Plans, and 403(B) Plans—Tax, Estate, Retirement, Medicaid, Debtor/Creditor, and Domestic Relations Issues, Estate Planning and Will Drafting in New York* at 8-1-8-24 (Michael E. O'Connor ed., New York State Bar Ass'n 2022); Albert Feuer, *Would the Securing a Strong Retirement Act Secure More Retirement Equity?*, 50 Tax Mgmt. Comp. Plan. J. No. 6 (June 3, 2022), http://ssrn.com/abstract=4134720;Albert Feuer, *Qualified Retirement Plan and Deferred Compensation Plan Death Benefits, Distributions and Estate Planning*, TAXES 255, at 256-258 (May 1994) (discussing the income tax advantages associated with retirement savings vehicles, including but not limited to 401(k) plans).

3 N.Y. Tax Law § 607(a) generally conforms NY tax law to the Code.

4 Albert Feuer, *Life Insurance and Retirement Plan Benefits: Are Your Clients Achieving Their Intended Goals?,* 88 NYSBA J. 28 (Mar./Apr. 2016), http://ssrn.com/abstract=2753777.

5 The proprietor's personal representative is generally responsible for terminating the 401(k) plan and keeping plan terms consistent with the IRS requirements, so no designation is needed to identify the person authorized to perform these tasks. It is prudent, however, for proprietors who are responsible for such tasks during their life to leave instructions describing the professionals who can assist in such an endeavor, so their representatives can readily access those instructions.

6 For example, plans that fail to make the distributions required by Code § 401(a)(9) are not tax-qualified, and the plan participants and beneficiaries who fail to receive such RMDs are subject to a 50% penalty. Code § 4974. Although this penalty may be abated, Code § 4974(d), the violator may have to retain professional counsel to obtain such relief.

7 *Pre-Approved Retirement Plans*, Internal Revenue Service (Mar. 17, 2022), https://www.irs.gov/retirement-plans/preapproved-retirement-plans.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *See Pre-Approved Retirement Plans—Adopting Employer*, Internal Revenue Service (Apr. 27, 2022), https://www.irs.gov/retirement-plans/preapproved-retirement-plans-adopting-employer.

13 *Id.*

14 Plan custodians and some plan trustees do not take investment responsibilities other than following another party's instructions.

15 Code § 404(c). *See generally* Albert Feuer, *Ethics, Earnings, and ERISA: Ethical-Factor Investing of Savings and Retirement Benefits*, NYU Rev. Employee Benefits and Exec. Comp. 6-1 at 6-91-6-94 (2020), http://ssrn.com/abstract=3740364 (discussing the self-directed investing regulations and their implications).

16 This article does not discuss the plan sponsor tasks of maintaining or terminating a plan, which are separate and distinct from arranging for the distribution of the proprietor's plan benefits and do not need to be performed as quickly as those tasks.

17 It is advisable to have a procedure to provide for more than one successor administrator or trustee in case the initial designee and the initial successor are unable to serve.

18 For a more detailed discussion of the relative advantages and disadvantages of the three options, *see* Bob Sullivan & Benjamin Curry, *SEP IRA v. Solo 401(k): Which Should You Choose?*, Forbes (Dec. 20, 2021), https://www.forbes.com/advisor/retirement/sep-ira-vs-solo-401k/ and Mike Piper, *SEP v. SIMPLE v. Solo 401(k)*, Oblivious Investor (Jan. 1, 2021), https://obliviousinvestor.com/sep-vs-simple-vs-solo-401k/.

19 *See generally SIMPLE IRA Plan*, Internal Revenue Service (Jan. 3, 2022) https://www.irs.gov/retirement-plans/plan-sponsor/simple-ira-plan.

20 *Id.*

21 *See generally SEP Plan FAQs*, Internal Revenue Service (Sept. 19, 2022), https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-seps#establishing.

22 *Id.*

23 Form SEP-5305, Simplified Employee Pension—Individual Retirement Accounts Contribution Agreement, Internal Revenue Service (Dec. 2004), https://www.irs.gov/pub/irs-pdf/f5305sep.pdf.

24 *See, e.g.*, *The Pooled Employer Plan (PEP): 5 Big Benefits for Your Small Business*, Paychex (Sept. 1, 2021), https://www.paychex.com/articles/employee-benefits/pooled-employer-plan; Maureen J. Gorman et al., *Pooled Employer Plans—FAQs for US Employers*, Mayer Brown (Aug. 6, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/08/pooled-employer-plans-faqs-for-us-employers (describing the SECURE Act provisions with respect to pooled employee plans).

25 Lisa A. Tavares *et al.*, *Pros and Cons of Pooled Employer Plans*, Venable LLP (July 30, 2021), https://www.venable.com/insights/publications/2021/07/pros-and-cons-of-pooled-employer-plans (describing the pooled employee plans advantages and disadvantages).

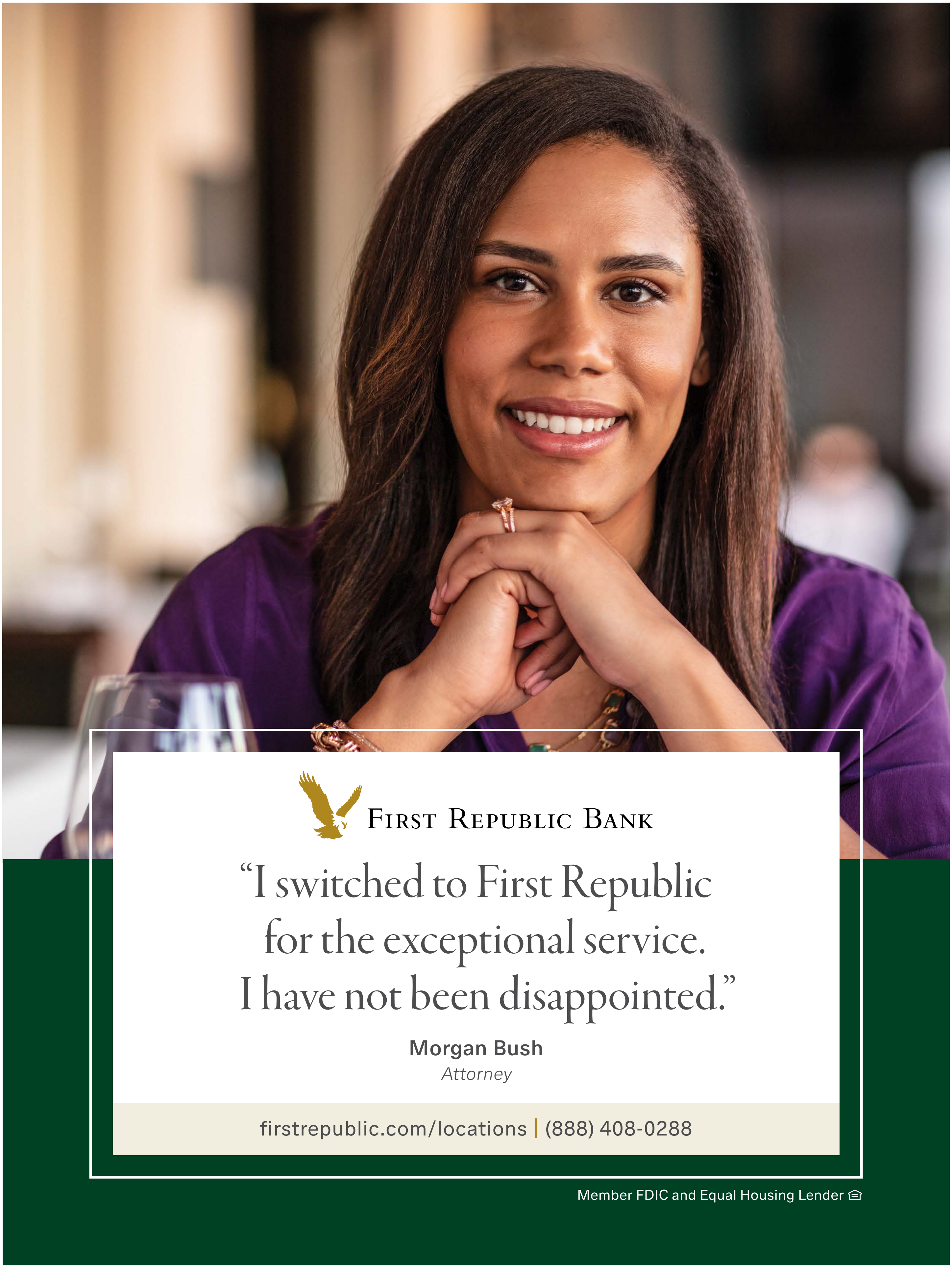
26 John L. Utz, *Multiple Employer Retirement Plans: A Petite Primer*, American Bar Ass'n, Section of Tax'n 23-24, 2019 Midyear Meeting (Jan. 2019), https://www.utzlattan.com/wp-content/uploads/2019/01/Multiple-Employer-Retirement-Plans-A-Petite-Primer.pdf (discussing multiple employer retirement plans prior to their expansion by the SECURE Act in December of 2019).

27 It is unclear if a broad set of investment choices satisfies the conditions needed to transfer any investment responsibility to plan participants and beneficiaries. *See, e.g.*, Advisory Council on Employee Welfare and Pension Benefit Plans, Report to the Honorable Martin Walsh, United States Secretary of Labor, *Understanding Brokerage Windows in Self-Directed Retirement Plans* (Dec. 2021), U.S. Dept. of Lab. https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf (discussing the significance of brokerage windows, in which virtually all allowable investments are permitted).

28 EPTL 11-1(c).

29 *Cf.* EPTL 11-1.1-1.11 and SCPA 2108 (providing for petitions to continue a business which suggest that a fiduciary is otherwise authorized to liquidate a business, which would include terminating the plan's pension plans).

30 *Cf.* Forums (Message Board), *Orphan Plan—How to appoint a new trustee*, BenefitsLink.com (last posting Aug. 23, 2022), https://benefitslink.com/boards/index.php?/topic/69560-orphan-plan-how-to-appoint-a-new-trustee/#comment-324840 (discussing how best to respond to a financial institution seeking a court order appointing the plan trustee before making any distribution of plan assets, which may have been better resolved with a court order confirming the authority of the executor to nominate a plan administrator).



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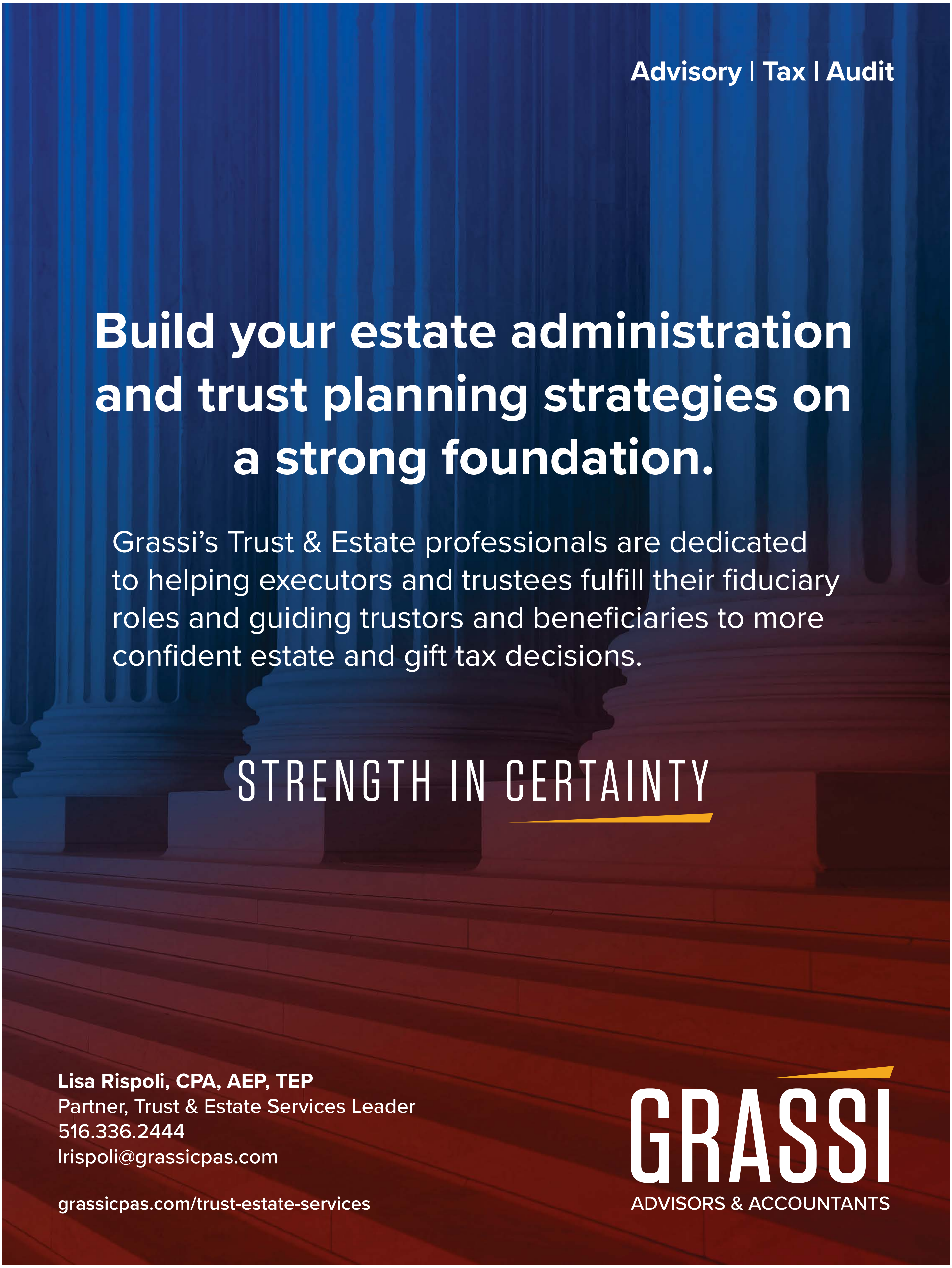

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State of Estates

By Paul S. Forster

As the winter winds blow, rattling the window panes, we hope that you will have the time in the wan seasonal light to enjoy some interesting cases involving the elements necessary to constitute a will; a claim of adverse possession by a tenant-in-common as against other tenants in common surviving summary judgment; the children of a decedent failing as claimants against his estate as third-party beneficiaries of the decedent's divorce settlement with their mother; the requirements for the recognition in New York of a "common law" marriage entered into in another state; the right of an executor named in a testamentary instrument filed in court prior in date to the will propounded to participate in SCPA 1404 examinations; and an oral acknowledgement of a debt by a decedent not being sufficient to revive an otherwise stale claim against his estate.

Also, the new DSUE procedures providing a simplified method for certain taxpayers to obtain an extension of time to make a "portability" election, where the estate was not otherwise required to file an estate tax return and had not done so; the ability of an administrator to collect an award from the U.S. Victims of State Sponsored Terrorism Fund arising out of the World Trade Center attack without the necessity of a Compromise Proceeding; and the applicability of the new provisions of Uniform Rules for Trial Courts (22 N.Y.C.R.R.) § 202.8-g (the requirement that a party who moves for summary judgment attach to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried) to motions for summary judgment in the Surrogate's Court.

We will also discuss the standing of beneficiaries of a trust into which estate funds were to be distributed to challenge the conduct of the estate fiduciary in an accounting proceeding; the lack of authority of the fiduciary of the estate of a partner to participate or interfere with the continuance or winding up of the partnership business by the surviving partner; the necessity of establishing incapacity at the time of the challenged transaction; and the authority of the Surrogate's Court to grant a protective order at the behest of a party to a proceeding, with regard to a subpoena directed to a non-party.

Elements Necessary To Constitute a Will

In an unopposed proceeding, the petitioners sought to have an instrument admitted to probate as decedent's Last Will and Testament and for the issuance of Letters of Administration c.t.a. The single-page instrument appeared to be self-drawn and contained the original signature of the decedent and that of two witnesses. The word "Instructions" appeared at the top of the page. Neither the terms "Will," nor "Testament" appeared on the document. The proffered instrument listed the decedent's assets and directed, *inter alia*, that the decedent's savings and checking accounts be divided evenly at his death among his granddaughters, who were the petitioners. Additionally, the decedent set forth his wishes regarding the disposition of his remains.

The Holding

The court opined that Estates, Powers and Trusts Law (EPTL) 1-2.19(a) provides that a will is an oral declaration or written instrument, made as prescribed by EPTL 3-2.1 or EPTL 3-2.2, to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, dispose of his body or any part thereof, exercises a power, appoints a fiduciary or makes any other provision for the administration of his estate, and which is revocable during his lifetime.

In the court's view, the mere fact that the instrument before the court was titled "Instructions" as opposed to "Last Will and Testament" was not determinative, nor was the instrument's failure to designate a fiduciary controlling, since statutory mechanisms exist to supply a fiduciary for an estate when an instrument fails in this regard. The court stated that essentially, and most importantly, the instrument must be testamentary in its character, which is entirely contingent upon its substance, not its form.

The court held that the instrument before it, containing directives to take effect upon decedent's death by its terms, plainly fell within the definition of a will as contemplated by the EPTL. Finding further that the instrument was duly executed in conformity with the requirements set forth in EPTL 3-2.1, and that the decedent was in all respects competent to make a will and free of restraint, the court admitted the instrument to probate as decedent's Last Will and Testament and issued Letters of Administration c.t.a. to the petitioners. *In re Kessler*, 2022 N.Y. Slip Op. 50314 (Surr. Ct., Queens Co. April 20, 2022) (Kelly, S.).

A Claim of Adverse Possession Asserted by a Tenant in Common as Against Other Tenants-in-Common Survives Summary Judgment

The plaintiff commenced an action seeking, *inter alia*, a judgment declaring that it was a tenant-in-common to an undivided 25% interest in a certain three-family dwelling located in Brooklyn and for partition of that property. Six additional persons were granted leave to intervene in the action as plaintiffs. The intervenors alleged that they were heirs-at-law and tenants-in-common to the property, with a cumulative 43.75% interest, and they also sought, *inter alia*, a partition of the property.

The defendant asserted a counterclaim seeking a determination that its predecessor in interest had acquired title to the property by adverse possession. The intervenors moved, *inter alia*, for summary judgment dismissing the defendant's counterclaim alleging adverse possession. The intervenors asserted that their common ancestor and predecessor in interest acquired title to the property in 1928, and that the property subsequently passed by operation of law to her heirs, among whom were the intervenors, and the predecessor in interest to the defendant, as tenants-in-common. The Supreme Court denied that branch of the intervenors' motion which was for summary judgment dismissing the defendant's adverse possession counterclaim, and the intervenors appealed.

The Holding

The Appellate Division stated that under the common law, tenants-in-common have long been afforded a measure of extra protection from adverse possession claims asserted by their co-tenants. The Appellate Division opined that in a tenancy-in-common, each co-tenant has an equal right to possess and enjoy all or any portion of the property as if the sole owner, and consequently, non-possessory co-tenants do not relinquish any of their rights as tenants-in-common when another co-tenant assumes exclusive possession of the property.

The Appellate Division summarized the rule as being that in New York, non-possessory co-tenants are protected by a common-law rule that presumes a co-tenant's possession is possession by and for the benefit of all other co-tenants, which common-law rule has been codified in RPAPL § 541. The Appellate Division noted, however, that the statute also limits the presumption by providing that it ceases after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his or her servant or by his or her tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his or her co-tenant.

The Appellate Division added that to establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period. The Appellate Division found that the intervenors had failed to demonstrate, *prima facie*, that the defendant's predecessor in interest did not acquire title to the property by adverse possession. The Appellate Division noted that it was not disputed that defendant's predecessor in interest inherited an interest in the property from her mother in 1983. The Appellate Division found that the intervenors' evidence demonstrated that it was their understanding that the interest in the property was shared with the entire family, but that the intervenors did not establish in their motion for summary judgment that, prior to her transfer of the property to the defendant, grantor was not in continuous, exclusive occupancy of the property for a period of 10 years such that the presumption of non-adverse possession had ceased, or that, thereafter, she was not in continuous, exclusive, hostile, and uninterrupted possession of the property for the relevant statutory period.

The Appellate Division ruled consequently that since the intervenors had failed to make a *prima facie* showing of entitlement to judgment as a matter of law, the Supreme Court properly denied that branch of their motion, which was for summary judgment dismissing the defendant's adverse possession counterclaim without regard to the sufficiency of the defendant's opposition papers. *169 MLS Realty Corp. v. One 69 Skill Corp.*, 197 A.D.3d 1079 (2d Dep't 2021).

Decedent's Children Fail as Claimants Against His Estate as Third-Party Beneficiaries of the Decedent's Divorce Settlement With Their Mother

The decedent's children sought to enforce against their father's estate the terms of a divorce settlement entered into between their parents, particularly the provision they claimed obligated their parents irrevocably to bequeath 100% of the value of their respective estates to them. It also required the divorcing parents to provide conformed copies of their wills to the other.

The decedent's will left the entire estate to the children's stepmother. Sometime after the decedent's will was admitted to probate, the children's mother sought a New York enhanced driver's license and needed to find her divorce papers to document her name change. In reading through the papers, she realized that the decedent's will did not comply with the terms of the divorce agreement and alerted the children accordingly. Shortly thereafter, the children initiated their proceedings.

Prior to the divorce, both parents had wills that left their respective estate to the other, and to the children if the other was deceased. Evidence was developed at a bench trial that the children's parents both had remarried, and both had thereafter made new wills, none of which complied with the divorce settlement. Neither ex-spouse provided the other with copies of their respective new wills. Among other things, the children's mother testified that she had no specific recollection of who asked to insert the language about the wills in the divorce agreement, except that she knew she had not requested it.

Moreover, she testified that she was of the understanding that the provision was intended to benefit the children only while they were minors, and that for that reason she said she waited until her children were no longer minors before changing her will. The children each testified that they had no knowledge of the contents of their parents' divorce decree prior to signing the waivers and consents to probate that were filed in connection with their father's will.

The Holding

In the court's view the children's theory of recovery rested on breach of contract, arguing that their father breached the terms of the divorce agreement when he executed the will, which was admitted to probate. As set forth by the court, the elements of a breach of contract claim are straightforward: (1) existence of a contract; (2) performance under the contract; (3) breach; and (4) resulting damages.

The court stated that as purported third-party beneficiaries of the divorce agreement, petitioners also had the burden of proving that the obligation in question was intended for their benefit. The court emphasized that a person not a party to the contract acquires the status of donee beneficiary and is entitled to enforcement of the contract, if and only if, the promise is *particularly exacted by the promisee* for the benefit of such third person. The court opined that given that the children alleged breach of contract against their father, they needed to establish that their mother procured this promise on their behalf.

The court stated that where a third-party beneficiary was permitted to enforce the terms of a separation agreement, the promisee specifically had negotiated the terms for the express purpose of benefiting the third party. In contrast, the court noted that the children's mother by her own admission neither initiated nor negotiated that portion of the divorce agreement providing for irrevocable wills, and in its view, equally as important, never abided by the provision herself, having executed two subsequent wills that did not name her children the sole beneficiaries of her estate.

The court further found it telling that the children's mother, not the decedent, was the first to change her will after the divorce, in that it suggested that she as purported promisee did not intend to confer upon the children the benefit they now sought to enforce against the decedent's estate. The court held that without such an intent on the part of the promise (their mother), the children could not prevail as third-party beneficiaries. The court added that, even assuming *arguendo* that the children's mother did act with the requisite intent when entering into the divorce agreement, the children's claim failed for lack of performance.

The court stated that not only did the children's mother fail to execute an irrevocable will as promised, but also was the first to execute a new will naming beneficiaries other than the children. The court pointed out that the children's mother now was unable to abide by the terms of the divorce agreement, since her ability to provide a conformed copy to decedent was foreclosed by his death. The court concluded that given that the parents each changed their wills without providing notice to the other, it could not help but think that neither parent was cognizant of this particular obligation under the divorce agreement.

Consequently, given that the decedent also never executed an irrevocable will as required by the divorce agreement, the court found the particular provision could not be enforced by the children due to lack of performance on the part of their parents. The court rejected the children's request for equitable relief, stating that children generally have no right of inheritance in New York, and that neither parent acted in a manner following their divorce to suggest they considered themselves bound by the divorce agreement to execute irrevocable wills favoring their children.

The court noted the right of a third person to recover upon a contract made by other parties for their benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case, and that each case is decided upon its particular facts. The court ruled that the facts in the case before it failed to sustain the children's petition—under either a legal or equitable theory—and as such, it was dismissed. *In re Pannella*, N.Y.L.J. Sept. 23, 2022, p. 17, c. 3 (Surr. Ct., Oneida Co.) (Gigliotti, S.).

The Requirements for the Recognition in New York of a 'Common Law' Marriage Purportedly Entered Into in Another State Not Met

Petitioner applied for Letters of Administration as the decedent's spouse based upon a claimed "common law" marriage purportedly entered into in Washington, D.C., which recognizes same. The application was opposed by the decedent's son, otherwise the decedent's sole distributee, who cross-petitioned for Letters of Administration.

Petitioner and the decedent had known each other since the mid-1970s. The decedent was the girlfriend of petitioner's close friend. Through the years, the petitioner and decedent remained acquainted and helped each other at various points in their lives in significant ways. The petitioner was twice married and twice divorced. The decedent helped to take care of petitioner's children at different points. The decedent was never married. Eventually, the petitioner and decedent entered a committed relationship. They travelled together, extensively. They also purchased a house together as tenants-in-common and lived there together for approximately 10 years up to the date of decedent's death. The decedent's obituary referred to petitioner as her beloved mate and excluded any reference to a husband or to being married at any point in time. The decedent did not hold herself out as married on any of her employment records, retirement records, insurance records, banking records/accounts or tax filings, nor did she hold any assets or property jointly with the petitioner.

The petitioner testified that he had traveled with the decedent to Washington, D.C., in or around May 2008, where petitioner and decedent had held themselves out to be husband and wife and had cohabitated by checking into a hotel in Washington, D.C. However, petitioner could not specifically recall their trips to Washington, D.C., where they stayed in Washington, D.C. or for how long they stayed. Other witnesses confirmed that petitioner and the decedent had traveled to Washington, D.C. quite often, and on one occasion "jumped the broom"[1] at an exhibit at the African American Museum in Washington, D.C., in 2017 or 2018, thus, "reaffirming" their relationship as man and wife.

However, the broom-jumping event appeared to be a spontaneous act during the museum visit, as there was no testimony suggesting that this was a pre-planned event or ceremony with any particular words or agreement being publicly exchanged. The witnesses did not observe any verbal agreement to marry between decedent and petitioner in Washington, D.C., and did not have any knowledge of one.

There was testimony by witnesses offered by petitioner that at various times petitioner and the decedent "presented themselves" as husband and wife. Decedent's mother and sisters testified to the contrary, going as far as to say petitioner was always referred to by the decedent as her boyfriend and never as her husband. When the petitioner was asked about any agreement he had with the decedent to be married, the petitioner replied that "[t]here were no specific words to making an agreement," and "[t]here was an understanding, a mutual agreement between [us] that we would be committed to each other defined in the essence of husband and wife," and "[i]t was a verbal agreement between [us], that we would be—consider ourselves husband and wife and do everything in our power to make each other happy and to again develop each other to the fullest of our capacity."

The Holding

The Surrogate denied the petition of the putative spouse and granted that of the son. The court stated that because the courts have regarded common-law marriage as a fruitful source of fraud and perjury, common-law marriages are to be tolerated but not encouraged. The court added that although New York no longer recognizes common-law marriages contracted in New York, a common-law marriage contracted in another state will be recognized as valid in New York, so long as that common-law marriage was valid in that other state.

As set forth by the court, the elements of common-law marriage in Washington, D.C. are (1) an express mutual agreement, which must be in words of the present tense to signify becoming married at the time of the exchange of words, (2) followed by cohabitation in Washington, D.C. The court stated that both elements must be proven by the proponent by a preponderance of the evidence. The court added that since ceremonial marriage is readily available and provides unequivocal proof that the parties are husband and wife, claims of common-law marriage should be closely scrutinized, especially where one of the purported spouses is deceased and the survivor is asserting such a claim to promote his financial interest.

The court noted that the agreement element has been closely examined and scrutinized, and that a party must submit proof of an agreement to enter into the legal relationship of marriage through an exchange of words in the present tense spoken with the specific purpose that the legal relationship of husband and wife be thereby created. The court found that the petitioner had failed to establish the element of express, mutual, and present tense agreement to signify becoming married at the time of the exchange of words.

The court added that no specific length of cohabitation in Washington, D.C. was established, which it found to be significant because short stays of a couple days or so had been held to be insufficient to satisfy the cohabitation element. The court rejected the claim that the act of "jumping the broom" reaffirmed the alleged marriage, because the original common-law marriage was not established in the first instance, and because there was no proof in the record from which to satisfy the express, mutual, and present tense agreement element at the time of the broom-jumping event.

Also, the court found significant that the petitioner and decedent's personal affairs over the time that they were together lacked important indicia that traditionally support a claim that a couple agreed to, and did, live their lives as husband and wife. The court noted that petitioner and decedent did not hold any assets, accounts, or real estate jointly, and that petitioner and decedent purchased their home as tenants-in-common in 2009 *after* the petitioner had claimed they were married under common law in 2008.

Consequently, the court found that while petitioner and the decedent had what appears to have been a loving and committed relationship, the evidence presented did not establish a valid common-law marriage under the law of Washington, D.C., and thus, no common-law marriage existed between the petitioner and decedent in New York. The petition of the putative husband for Letters of Administration was denied and that of the decedent's son was granted. *In re Rogers (Bell)*, Surr. Ct., Orange Co., Nov. 9, 2021 (Surr. McElduff, Jr.,).

An Executor Named in a Testamentary Instrument Filed in Court Prior in Date to the Will Propounded Has a Right To Participate in SCPA 1404 Examinations

In a contested probate proceeding seeking to probate an instrument and codicil dated June 12, 2013, the nominated executor moved to dismiss the notice of appearance filed by the attorney for the nominated successor executor named in a prior instrument dated September 28, 2010, which had been filed with the court.

The residuary beneficiaries of the 2010 instrument were three charities. It appeared that the estate assets were approximately $800,000. After the 2010 will was filed with the court, SCPA 1404 examinations were requested as to the propounded 2013 instrument. The attorney general and the three charities under the 2010 instrument all appeared.

In support of his motion to dismiss, petitioner averred, *inter alia*, that the successor executor under the 2010 instrument lacked standing because she was not a legatee or beneficiary under the propounded 2013 will and her notice of appearance was filed solely in her capacity as the nominated successor executor of the prior 2010 will. He maintained that, for her to participate in the proceedings, the court would have to first grant her standing for "good cause shown" therein pursuant to SCPA 1410. He argued that there was no showing of fraud, undue influence, or severe lack of capacity, which might afford a displaced fiduciary standing to object to a later instrument, and that an executor of a prior will has no standing to object to a later instrument after the attorney general and counsel for the charitable beneficiaries in the prior will appear in the probate proceeding.

Contending that the displaced nominated executor's interest in facilitating the charitable bequests was unnecessary given the notice of appearances by the attorney general and counsel for the three charitable beneficiaries and that the attorney general's authority to represent the charities is statutory and appears to obviate the need for a separate fiduciary.

The executor added that any contribution such displaced executor might make to the court's determination of the testator's intent was probably best made as a witness. In opposition, the displaced executor argued that she had the right to discovery because any party to the proceeding, before or after filing of objections to the probate of the will, may examine any or all of the attesting witnesses as well as the will drafter. As she was a party to the proceeding until the court said otherwise, the displaced fiduciary asserted that she had a right to examine the witnesses and the attorney draftsperson of the 2013 instrument. She averred that SCPA 1410 (requiring court permission allowing the displaced fiduciary to proceed) only applied to objections, which had not been filed, and which need not be filed until after the 1404s were conducted, at which time the testimony provided might indicate fraud.

She alleged that the petitioner took substantial sums from the decedent prior to his death, when he lacked capacity, which would undermine petitioner's credibility and would "go a long way" toward defeating the 2013 instrument. She added that her interest was not solely financial, given the fact the 2010 instrument gave the executor discretionary powers, including a provision that provided that all personal property was to be "sold or given away by the executor," affording her discretion to give away tangible personal property to whomever or wherever she chooses.

The 2010 instrument also granted the discretionary power to appoint a successor executor. She asserted that these factors enhanced the need for her to be involved to preserve the testator's intent which was separate from her own pecuniary interest.

The Holding

The court noted that SCPA 1404(4) provides, in part, that any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses as well as the will drafter. The court added that an executor named in an earlier will on file is a party. The court noted that SCPA 1410 provides that if the interest a person has in the estate is the statutory fiduciary's commissions she does not have standing to object to a will unless the court allows her to do so for good cause. The court added that good cause depends on the circumstances of each case and allowing the nominated fiduciary of a prior instrument to participate in 1404s allows the party to discover matters which may be the basis of objections and help the court determine whether she has good cause to object.

The court recognized that courts have utilized a SCPA 1410 analysis to determine whether a party could participate in 1404s and have found that the fiduciary lacked standing to participate in further hearings, but noted that those instances occurred when the propounded instrument was consistent with the prior instruments and distributed the estate assets in the same manner, showing that the sole interest of the executor only would be to obtain statutory commissions.

The court opined that a named executor had the duty to protect the instrument that nominated her by seeing that no alleged fraudulent will was admitted to probate without objections, thus frustrating the intention of the deceased as expressed in a proper will or codicil. The court noted that the nominated executor under the 2010 instrument stated that testimony from the 1404s might elicit evidence of possible fraud, which would give rise to good cause for objections by her. The court added that even when such facts have not been raised by a nominated executor, courts have found that such executor should be given the opportunity to examine the proponent, the attorney-draftsman, and the witnesses to determine whether there was, in fact, any basis for filing objections.

The court pointed out that the displaced fiduciary was given additional discretionary powers under the earlier instrument, including the right to give personal tangible property to individuals of her choice and to nominate a successor executor, demonstrating that her interest in the matter was not solely pecuniary or for purposes of receiving statutory commissions, but rather to ensure the intention of the decedent was upheld. The court noted that the attorney general and the charities had not sought to preclude the nominated successor executor of the 2010 instrument from participating in the proceedings concerning the 2013 instrument. Consequently, the court found no demonstrated reason to preclude the nominated successor executor of the 2010 instrument from participating in the 1404 examinations concerning the 2013 instrument, as the testamentary bequests in each instrument differed significantly and the nominated executor under the 2010 will was given discretionary powers that did not engender statutory commissions or other financial gains, and her stated intent to participate in the SCPA 1404 examinations was necessary to determine whether "good cause" existed for her to file objections to the 2013 instruments.

The court also held that the motion to strike the notice of appearance pursuant to SCPA 1410 was, at best, premature. The motion was denied without prejudice to renewal after the completion of the SCPA 1404 examinations concerning the 2013 instrument. *In re Nubile*, N.Y.L.J. Sept. 12, 2022, p. 17, c. 1 (Surr. Ct., Bronx Co., Surr. Malave-Gonzalez).

Oral Acknowledgement of a Debt by the Decedent Not Sufficient To Revive an Otherwise Stale Claim Against His Estate

The decedent and his sons formed a corporate entity together. In 2011, decedent removed funds from the corporation and later acknowledged in the course of a deposition in an unrelated matter that some of those funds belonged to his sons. Decedent died in 2018 without returning the funds. The decedent left his estate to his wife, who also was named as executor of the estate.

In 2019, the sons brought proceedings against the estate seeking to recover their respective shares of the funds that decedent had removed from the corporate entity. The petitioning sons stated claims for unjust enrichment and money had and received. Respondent executor raised various affirmative defenses, including that the claims were barred by the statute of limitations, and moved to dismiss the claims pursuant to CPLR 3211(a)(5) on that basis.

Surrogate's Court denied respondent's motions and dismissed the statute of limitations defenses. The surrogate determined that, while petitioners' claims were subject to a six-year statute of limitations, decedent had acknowledged in the sworn deposition testimony in 2014 that he owed petitioners the funds and that this oral acknowledgment restarted the running of the statute of limitations. The surrogate concluded that because the claims were filed within the statute of limitations, measured from decedent's acknowledgment in 2014, the claims were timely. Respondent appealed.

The Holding

The surrogate was reversed. The court opined that respondent had the initial burden of establishing that petitioners' claims were barred by the statute of limitations. The Appellate Division stated that the time within which an action must be commenced, except as otherwise expressly prescribed, is computed from the time the cause of action accrued to the time the claim is interposed.

The Appellate Division held that both the claims for unjust enrichment and for money had and received each were subject to a six-year statute of limitations, which started to run upon the occurrence of the wrongful act giving rise to a duty of restitution, when decedent removed the funds in 2011, and thus were time-barred by the time petitioners filed their claims in 2019. The Appellate Division noted that the tolling provision on which the surrogate relied was GOL § 17-101, which states that an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the CPLR.

The Appellate Division stated that petitioners had not alleged that they had a contract with decedent; rather, they had alleged claims sounding in quasi-contract, which was not a contract at all. Consequently, the Appellate Division found that GOL § 17-101, which applies only where there is "competent evidence of a new or existing contract," did not apply, and concluded that petitioners had failed to raise a question of fact in opposition to respondent's motions to dismiss and reversed. *In re Reich*, 2022 N.Y. Slip Op. 04446 (4th Dep't 2022).

Brief Briefs

1. The Internal Revenue Service has promulgated new DSUE procedures to provide a simplified method for certain taxpayers to obtain an extension of time to make a "portability" election, where the estate was not otherwise required to file an estate tax return and did not do so. Under the new procedure, the estate can obtain an extension by filing a complete and properly prepared Form 706 on or before the fifth anniversary of the decedent's date of death. The estate must state at the top of the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)." This new procedure to obtain an extension is not available to estates which either previously filed an estate tax return or were required to do so. *Rev. Proc. 2022-32* (26 CFR 601.201).

2. The decedent died intestate on Sept. 11, 2001, in the terrorist attack at the World Trade Center. The estate was granted an award from the U.S. Victims of State Sponsored Terrorism Fund in the amount of $41,839 in connection therewith. The estate brought a Compromise Proceeding, but the court held that the situation was more akin to the collection of a death benefit or insurance claim than recovery in a wrongful death matter, and that the administrator statutorily was empowered to collect the payment on its claim against the Terrorism Fund without judicial intervention, pursuant to EPTL 11-1.1[b][1] and [13], subject to the limitations set forth in the letters of administration. The court modified the letters of administration to the extent that the administrator was authorized to receive and distribute the funds awarded by the Terrorism Fund in the total sum of $41,839.67 in connection with the claim filed on behalf of the decedent. The remainder of the petition was denied as unnecessary and moot. *In re Waring,* N.Y.L.J. June 15, 2022, p. 17, c 2 (Sur. Ct., Queens Co., Surr. Kelly).

3. In a breach of fiduciary duty case, the court held that the new provisions of Uniform Rules for Trial Courts (22 N.Y.C.R.R.) § 202.8-g (the requirement that a party who moves for summary judgment attach to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried) applies to motions for summary judgment in the Surrogate's Court. It should be noted that on its face the rule only applies to the Supreme and county courts. The court also ruled that the beneficiaries of a trust into which estate funds were to be distributed had standing to challenge the conduct of the estate fiduciary in an accounting proceeding. This usually only is the case where an estate fiduciary is accounting solely to oneself and the beneficiaries are necessary parties to the proceeding pursuant to SCPA 2210(10), which circumstances did not appear. *In re Maloy*, 2022 N.Y. Slip Op. 22100 (Sur. Ct., Monroe Co., Surr. Ciaccio, April 6, 2022).

4. Pursuant to Partnership Law § 51(1), a partner is co-owner with his partners of specific partnership property holding as a tenant-in-partnership. On the death of a partner, his or her right in specific partnership property vests in the surviving partner or partners. The representative of a deceased partner is not entitled to participate in or interfere with the continuation of or winding up of partnership business by the surviving partner. *Abruzzi v. Bond Realty, Inc.*, 201 A.D.3d 680 (2d Dep't 2022).

5. Two children of the deceased disagreed as to the person authorized to dispose of the decedent's remains. The decedent's son asserted that the decedent lacked capacity in 2017 when she executed the document designating his sister as the agent to control the disposition of the remains. The son submitted evidence establishing that the decedent had been diagnosed with dementia in 2014. The Supreme Court denied the sister's motion for summary judgment to dismiss the complaint, finding issues of fact. The Appellate Division reversed. The Appellate Division stated that there is no presumption that a person suffering from dementia is wholly incompetent and that it must be demonstrated that, *because of the affliction*, the individual was incompetent at the time of the challenged transaction [emphasis in original]. The Appellate Division found that the son failed to set forth any evidence that the decedent was without capacity to execute the designating document in September 2017 and dismissed his petition. *In re Hurlbut,* 2022 N.Y. Slip Op. 04439 (4th Dep't 2022).

6. The Surrogate's Court has authority to grant a protective order at the behest of a party to a proceeding, with regard to a subpoena directed to a non-party. *In re Spalter*, N.Y.L.J. July 25, 2022 (Sur. Ct., New York Co., Surr. Mella).

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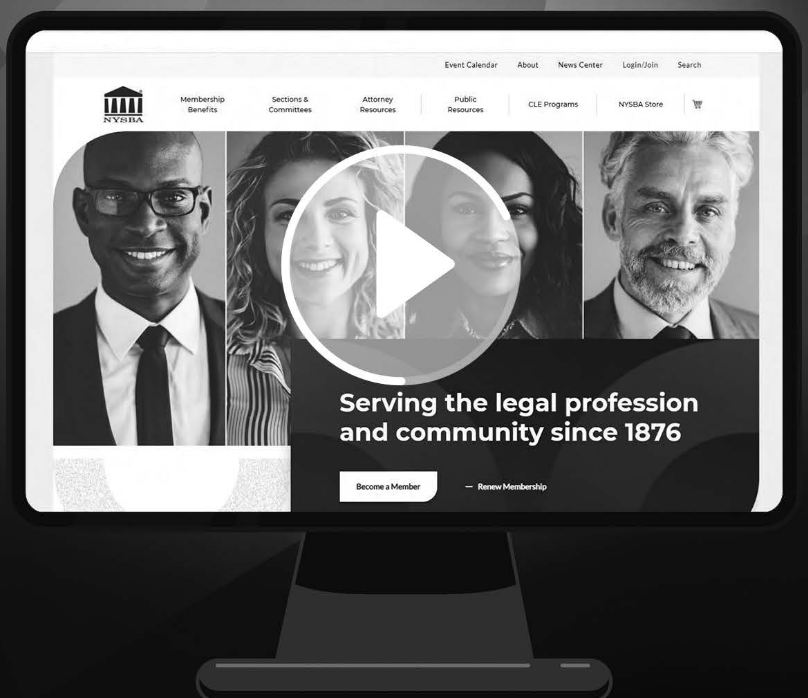

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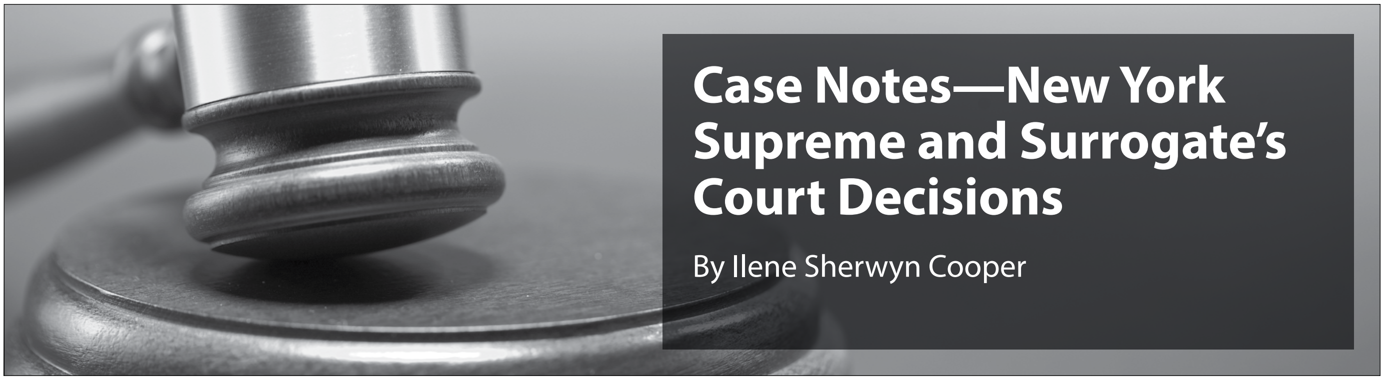

Case Notes—New York Supreme and Surrogate's Court Decisions

By Ilene Sherwyn Cooper

Attorney-in-Fact

In contested proceedings to judicially settle the accounts of the executor of the estate and attorney-in-fact for the decedent, the objectants moved for an order granting summary judgment against the fiduciary.

The record revealed that at the time of her death in 2015, the decedent was widowed and her only child predeceased her. In 2006, the decedent executed a power of attorney in favor of the petitioner. Pursuant to the instrument, the agent could "mak[e] gifts to [the decedent's] spouse, children and more remote descendants, and parents, not to exceed the aggregate $10,000 to each of such persons in any year." Typewritten on the preprinted form was language that stated that the power would only become effective upon the disability of the principal, and medical proof of her inability to care for herself or her financial affairs. One year after executing the power of attorney, the decedent executed her will, which, *inter alia,* left her residuary estate in equal shares to the petitioner, his wife, and the objectants, and nominated the petitioner as the executor.

Following the decedent's stroke and hospitalization in 2014, the petitioner testified that at a meeting with the decedent's attorney, in which the decedent's will and power of attorney were reviewed, he was informed by counsel that he could make gifts to himself and his family members, and that such gifts could be made up to the increased annual exclusion amount of $14,000 per annum. Subsequent thereto, the decedent was transferred from the hospital to a nursing home, at which time her physician wrote a letter indicating that she was no longer capable of managing her personal and financial affairs. Thereafter, the record reflected that the petitioner made payments to himself from the decedent's accounts, as well as made gifts to family members, and sold the decedent's IBM stock and deposited the proceeds of sale into a POA account, located at the United People's Bank where his wife was employed as a manager.

Further, it appeared that the petitioner utilized the funds in accounts that had been designated for the benefit of the objectants for such expenditures as the decedent's nursing home bills, and gifts to family members, and transferred the funds in another account in the decedent's name to an account in his name, from which he issued a check to pay off his mortgage. The petitioner acknowledged that to the extent the funds remained in this account, the objectants would have shared one-half of the balance remaining in the account on the decedent's death. The petitioner's wife testified that in addition to the mortgage, the funds in the account were utilized to pay some personal expenses, and that the decedent had insisted on gifting the monies to her and the petitioner while she was in the nursing home.

The objections to the estate accounting requested that the petitioner be surcharged approximately $500,000 as well as for all of his professional fees and commissions on the grounds that: (1) he engaged in self-dealing by unlawfully withdrawing that amount from the decedent's accounts for the benefit of himself and his family to the detriment of the objectants and (2) the professional fees were excessive, duplicative and improperly charged against the estate because of the petitioner's malfeasance. Objectants moved for summary judgment regarding these claims, and the petitioner opposed.

The court noted that the agent acting under a power of attorney has a fiduciary duty to act with the utmost good faith and undivided loyalty toward the principal, and this power is given to the agent with the intent that he will utilize it for the benefit of the principal. To this extent, an agent should be acting in the best interests of the principal and avoid conflicts of interest. Within the context of gift giving, the court observed that it has been interpreted to include the "minimization of income, estate, inheritance, generation-skipping transfer or gift taxes."[1]

In contrast, the court opined that the best interests of the principal does not include the unqualified right to make gifts to the agent especially where it virtually impoverishes the principal and undermines the principal's estate plan. The making of unauthorized gifts by an agent to himself or others carries a presumption of impropriety and self-dealing. That presumption can be rebutted by a showing of clear intent on the part of the principal to make the gift.

Based on the record, the court granted the objectants' motion, in part, finding that the petitioner had failed to establish that the decedent had specifically authorized him to make a gift in excess of the POA amount, or the elements of a valid gift outside the use of the power of attorney. In view thereof, the court found as a matter of law that the petitioner had engaged in self-dealing and ordered that he remit the sum of $298,000 to the estate. The amount and type of surcharge attributable to the petitioner's misconduct in this regard, as well as the issue of petitioner's entitlement to commissions, were reserved for the trial of the matter, which would encompass the balance of issues raised by the objections that were not determined summarily.

***In re Goldstein,* N.Y.L.J., Aug. 9, 2022, at p. 33 (Sur. Ct., Westchester Co.)**

Disqualification of Counsel Held Premature

In *In re Giordano,* the Surrogate's Court, Richmond County, was confronted with two motions for the disqualification of counsel. Following the death of the decedent, his daughter (the "petitioner") sought probate of his will and codicil, and the issuance to her of letters testamentary. Additionally, the petitioner requested preliminary letters testamentary due to the anticipated delay in probating the propounded instruments, which would impede the prompt sale of certain estate property. Despite opposition to the application by the decedent's spouse, the court issued preliminary letters to the petitioner limited to the sale of the subject property and the payment of closing costs and fees, and directed that the net proceeds of sale be held in escrow.

Thereafter, application was made by the decedent's spouse for Letters of Administration limited to the commencement of an action for the recovery of real and personal property, which was transferred and/or conveyed to the petitioner pursuant to a power of attorney executed by decedent. Opposition was submitted by the petitioner as well as another interested party, and the court enjoined the petitioner from conveying, transferring, and/or encumbering the real property pending the hearing and determination of the application.

In the interim, the decedent's spouse moved, *inter alia,* for an order compelling the petitioner to respond to discovery demands pursuant to SCPA 1404 and for the disqualification of petitioner's counsel on the grounds that they actively participated in the preparation and execution of the propounded instruments, and the documents relative to the disputed transfers to the decedent's daughter, and were therefore "likely to be a witness on significant issues of fact." The petitioner opposed the application, and cross-moved for an order, *inter alia,* denying the motion by the decedent's spouse, and disqualifying the firm and all of its "counsel" who were representing him on the grounds that they represented the decedent and his wife, and performed estate planning for the decedent. In reply, counsel for the decedent's spouse alleged, *inter alia,* that any services performed were for the decedent's wife, and that no legal services were performed concerning the decedent's estate and financial affairs.

The court opined that in determining whether a party's counsel should be disqualified during litigation, consideration must be given to the party's valued right to choose its own counsel and the fairness and effect in the particular factual setting of granting disqualification or continuing representation. In the case *sub judice,* the court found of particular significance the fact that the matter was at the pre-trial stage, noting that disqualification of attorneys because they may be witnesses at the trial does not require their disqualification prior to the trial.[2]

Accordingly, the court held that disqualification of petitioner's counsel at the SCPA 1404 stage of the proceeding was premature, and denied the cross-motion of the petitioner in its entirety.

***In re Giordano,* N.Y.L.J., Aug. 9, 2022, at p. 28 (Sur. Ct., Richmond Co.)**

Joint Bank Account

Before the Surrogate's Court, Monroe County, *In re Najjar* was a proceeding by two of the decedent's children to compel their sister to account as executor of the decedent's estate, and as trustee of an inter vivos trust created by the decedent in 1985. In addition, the petitioners asserted, *inter alia,* a cause of action for unjust enrichment, and requested a declaration as to the ownership of two joint bank accounts, a savings bank account and a checking account, and one account at a Federal Credit Union, as well as various items of personal property once owned by the decedent, which were in the possession of and claimed by the executor.

At the time of her death, the decedent held three accounts jointly titled in her name and the name of the executor. Each of the accounts were initially opened by the decedent in her name alone, and all deposits into the accounts were made by the decedent. One such account was a checking account, which was the decedent's primary checking account used to pay her bills. The decedent wrote the checks drafted against that account, though her daughter, the executor, under the decedent's direction, occasionally assisted the decedent in writing checks. The account was not used to pay the executor's bills. A second account at the same banking institution was initially opened by the decedent as a savings account, but then was converted to a money market account at the executor's direction. All deposits into that account were made by the decedent; the executor was not aware of any withdrawals from the account. With respect to the credit union account, the record reflected that the account was opened by the decedent and the executor pursuant to a member account agreement, which provided that deposits held in a joint account will become the property of each person as equal joint tenants with right of survivorship and not as tenants in common.

The money in all three accounts was disbursed according to the decedent's wishes. Moreover, the decedent left no written direction to pass the accounts to the executor upon her death. Additionally, the executor never asked the decedent to add her or place her on joint bank accounts, or to give her survivorship rights in the accounts or discussed her addition to the accounts.

The court acknowledged, based on a prior ruling by the Appellate Division, Fourth Department, that none of the signature cards with respect to the subject accounts contained the requisite statutory language to invoke the presumption of Banking Law § 675. As such, the burden was on the executor to establish by clear and convincing evidence that the decedent intended at the time a particular account was opened to create a joint tenancy with right of survivorship.

The court noted that evidence of intent to establish a joint account with a right of survivorship could include whether the decedent was the sole depositor of the joint account; whether the person claiming right of survivorship had withdrawn funds from the account; the testamentary plan or overall estate planning scheme; and whether a joint account with right of survivorship would represent a substantial deviation from a testamentary plan. Further, the court observed that weight is also to be given to whether the signature card, although not containing survivorship language on the face of the card, nonetheless references a separate document stating that rights of survivorship are created when obtaining a joint bank account, and whether testimony and other evidence establishes that the decedent read the provisions in the separate document *prior* to opening the account or that she was specifically informed by the bank officer that a joint tenancy with survivorship rights was being created. Finally, the court stated that a significant factor in determining whether a bank account is opened as a matter of convenience is the conduct and statements of the surviving joint tenant.

Based on the foregoing, the court concluded that all accounts but for the decedent's checking account were intended to be convenience accounts. The court found clear and convincing evidence that the decedent intended her checking account to be held as joint tenants with right of survivorship. Specifically, the court noted that the decedent was an intelligent woman who, as testified by the bank officer who opened the account, understood the meaning of a joint tenancy with rights of survivorship. Additionally, the court found it significant that the decedent had made multiple gifts to the executor over the years, even to the point of favoring the executor financially over her siblings. Finally, although not dispositive, the court observed that while the language on the signature card did not comport with the statutory requirements, it was substantially similar to the statutory language, and contained words such as "joint account" and "right of survivorship."

Regarding the household and personal effects in issue, the court opined that the claim of unjust enrichment hinged on whether a valid *inter vivos* gift had been made of those assets. Based on the record, the court concluded that the executor had failed to satisfy her burden of proving that such a gift had been made of any of the items in issue, but for a set of china, crystal and other household items found in her home, which had been itemized in a letter from the decedent to the executor in which she expressed her desire that she have them. To this extent, the court held that the term "household items" generally meant kitchen ware, bedding, or furniture, i.e., things that get used, not associated with the house, or displayed.

***In re Najjar,* 75 Misc. 3d 1225(A) (Sur. Ct., Monroe Co.)**

Prenuptial Agreement

In *In re Miller,* the preliminary executors of the estate moved, *inter alia,* to strike the notice of appearance filed by the decedent's spouse on the ground that she lacked standing to file objections to probate by virtue of a prenuptial agreement entered with the decedent.

In pertinent part, the terms of the agreement provided that the parties waived, released and relinquished any and all rights they had in the estate of the other upon death, or to act as executor or administrator, or to participate in the administration thereof, or to assert a right of election to take against any will or codicil of the other. Notably, the agreement acknowledged the specific intention of the parties that their respective estates were to be administered and distributed in all respects as though there was no surviving spouse.

Following the death of the decedent, the nominated executors of his estate offered his purported will and codicil for probate. The terms of these instruments bequeathed personalty to the decedent's spouse, as well as a home and cooperative apartment, both of which were held as husband and wife. On the return date of citation, counsel for the decedent's surviving spouse indicated his intention to file objections on her behalf, and to engage in SCPA 1404 examinations before doing so.

In response, the preliminary executors moved for a protective order to prevent the spouse from pursuing discovery, alleging that the prenuptial agreement prevented her from doing so. More specifically, the preliminary executors maintained, *inter alia,* that by the terms of the agreement the surviving spouse waived any pecuniary interest she had in the intestate estate of the decedent, and therefore was barred from engaging in SCPA 1404 discovery or filing objections to probate. In opposition, the decedent's spouse alleged, *inter alia,* that despite the terms of the agreement, she was nevertheless a beneficiary under the propounded instruments and an interested party with the right to conduct pre-objection discovery.

The court opined that a person who waives all interests in the estate of a decedent is essentially a stranger to the estate and may not seek to file objections to probate or inherit in intestacy. Moreover, the court observed that absent an interest in the estate, a person may not engage in SCPA 1404 examinations.

With respect to the spousal waivers contained in the agreement, the court noted that rights of inheritance in the property of a deceased spouse will not be denied unless the waiver is clearly expressed or clearly inferable from the circumstances. To this extent, the court found that since the agreement on its face was explicitly clear, that the surviving spouse was represented by counsel, and that the terms of the agreement expressly eliminated her right to share in the decedent's testate estate and in intestacy, she had no right to examine the draftsperson, the proponent or the witnesses to the propounded instrument. Accordingly, the preliminary executors' motion was granted.

***In re Miller,* N.Y.L.J., July 21, 2022, at p. 37 (Sur. Ct., Westchester Co.)**

Spousal Status Denied

Before the Surrogate's Court, New York County, in *In re Rosa,* was a contested proceeding for limited letters of administration in order to institute a cause of action for the wrongful death of the decedent. The petitioner was the decedent's mother. A cross-petition was filed by a person claiming to be the decedent's surviving spouse with priority to the petitioner. The petitioner moved to dismiss the cross-petition, claiming the decedent's marriage effectively ended in divorce before her death, and therefore she was not survived by a spouse.

In granting the motion to dismiss, the court noted that the marital relationship between the decedent and the cross-petitioner had been irretrievably broken for at least six months prior to the decedent's death, there were no children of the marriage and no unresolved economic issues, therefore fulfilling the requirements for a no-fault divorce. Since all the necessary paperwork for a judgment of divorce on default had been filed before the decedent's death, the court found that the entry of judgment was a ministerial act, and therefore the rights of the parties were determined as if a judgment of divorce had actually been entered before decedent's death.

***In re Rosa,* N.Y.L.J., Aug. 15, 2022, at p. 17 (Sur. Ct., N.Y. Co.)**

Transcript of Decree

Before the Surrogate's Court, Bronx County, in *In re Baker,* was a motion for an order declaring as moot an order enjoining the movant from transferring funds in a certain bank account, and a decree directing him to deliver the funds in that account to the administrator of the estate, as well as declaring that an execution issued to enforce the decree and a subsequent levy were void because they derived from a defective transcript of decree filed in the Bronx County clerk's office. Although the court denied the motion in its entirety, without prejudice, it vacated the transcript of decree, finding, based on its inherent authority to correct its own clerical errors, when doing so would not affect a substantial right of a party, that the remarks section should have noted that the movant's only obligation was to turn over funds in a certain bank account.

***In re Baker,* N.Y.L.J., Aug. 15, 2022, at p. 17 (Sur. Ct., Bronx Co.)**

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

Endnotes

1 *In re Ferrara,* 7 N.Y.3d 244, 252 (2006).

2 *See In re Giantasio,* 173 Misc.2d 100 (Sur. Ct., Bronx Co.).

Florida Update

By David Pratt, Farhaan Anjum, David A. Lappin and Hayley Sukienik

Decisions of Interest and Recent Updates in Law

Homestead Property Not Beyond Reach of Creditors Where Property Was Acquired With Funds Obtained Through Fraud

The Fourth District Court of Appeal in *Renda v. Price* reversed an order disallowing foreclosure on the equitable lien against Rose Renda's homestead property. The facts are as follows.

Joseph Price ("Price") was injured in a motor vehicle accident involving an employee of Reliable Towing and Storage, Inc. ("Reliable"). Following a lawsuit for damages, Price was awarded a judgment of $10 million. Giuseppe Renda owned and managed Reliable, and he subsequently died. His surviving spouse, Rose Renda ("Renda"), served as personal representative of his estate.

Prior to his death, Reliable held two life insurance policies on Giuseppe Renda, one valued at $450,000 from AIG and the other at $70,000 from Northwestern Mutual. During the course of litigation with Price, Reliable, through Giuseppe Renda, changed the beneficiary of the Northwestern Mutual life insurance policy to Renda and attempted to do so with the AIG insurance policy; however, Reliable was unable to complete the transfer forms properly prior to Giuseppe Renda's death. Furthermore, Reliable transferred ownership of four commercial real properties to four single-purpose limited liability companies.

Following Giuseppe Renda's death, the Northwestern Mutual life insurance policy paid out directly to Renda while the AIG life insurance policy paid out to Reliable. Renda transferred the payment from AIG to her personal bank account. Reliable, now under the direction of Renda, sold its assets to a third party and Renda used the proceeds from the life insurance policies and asset sale to purchase a new home that became her homestead property.

Price initiated proceedings to collect on his judgment against Reliable and the trial court entered final judgment voiding the transfer of the four commercial properties, ordered the sheriff to seize and auction those properties and imposed an equitable lien of $550,000 on the Renda homestead finding Renda's conduct met the badges of fraud. In spite of this, the trial court refused to permit foreclosure on the equitable lien while the home served as Renda's homestead.

On appeal, Price argued Florida law permits the foreclosure of an equitable lien on a homestead property in circumstances where fraud is involved. Renda argued an equitable lien could not be imposed on her homestead, claiming homestead properties are exempt from fraudulent transfer claims.

The court agreed with Price noting, "It is well-settled under Florida law that homestead protections 'cannot be employed as a shield and defense after fraudulently imposing on others' and that an equitable lien may be foreclosed against homestead property purchased with funds obtained through fraud. (*See Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein*, 619 So. 2d 267, 270 (Fla. 1993) (finding the trial court did not err in foreclosing on the equitable lien of $206,000 because it was imposed to prevent unjust enrichment).

As a result, the court reversed the lower court's order disallowing foreclosure on the equitable lien against Renda's homestead property and remanded for further proceedings.

***Renda v. Price*, 47 Fla. L. Weekly d1589 (Fla 4th DCA July 27, 2022)**

Appointment of Testator's Nominee as Personal Representative

The First District Court of Appeal in *Araguel v. Bryan* reversed an order denying the appointment of a personal representative who was believed to display an adverse interest to the estate. The facts are as follows.

Patrick J. Araguel, III ("Araguel") filed a petition for administration of the last will and testament of his mother (the "decedent"). Araguel requested Jerry D. Sanders ("Sanders") be appointed as the personal representative nominated in the decedent's will. The decedent's other son, Lesley L Bryan ("Bryan") filed an objection to Sanders' appointment as personal representative of the decedent's estate.

After a hearing on the objection, the trial court entered an order denying the appointment of Sanders as personal representative. The trial court found Sanders was qualified to serve as personal representative under the Florida Probate Code, but also determined there were substantial reasons to believe damage would occur to the estate if Sanders were appointed as personal representative of the decedent's estate. Specifically, the trial court found that Sanders would be a material witness regarding whether certain property was an estate asset and Sanders knew Araguel used an invalid durable power of attorney to oversee the decedent's affairs. Araguel subsequently appealed the trial court's decision.

The court noted Florida Statutes Section 733.301(1)(a) provides the personal representative nominated by the will has first preference of appointment. *See Werner v. Estate of McCloskey*, 943 So. 2d 1007 (Fla. 1st DCA 2006) ("Nothing in section 733.301(1)(a) purports to vest discretion in the trial courts to disregard the preference there specified, as long as the personal representative nominated by the decedent is statutorily qualified to serve . . . there is nothing in the relevant provisions of the Florida Probate Code that suggest that a person named in a decedent's will as personal representative need not be appointed if he or she has a conflict of interest with the estate.").

As a result of the above, the court held the trial court erred by not appointing Sanders as personal representative based on the trial court's perceived conflict of interest between Sanders and the estate because Sanders was statutorily qualified to serve. Furthermore, the court noted there was no evidence of an occurrence that would have changed decedent's mind on nominating Sanders as personal representative were she aware.

The court distinguished the trial court's decision by pointing out the cases relied upon by the trial court involved the appointment of personal representatives in intestate estates, rather than testate estates. The court pointed out the discretion available to the trial court in the appointment of a personal representative in an intestate estate is not available when reviewing the appointment of a personal representative named in a will. Therefore, the court reversed the trial court's ruling and remanded with directions that Sanders be appointed as the personal representative of the decedent's estate.

***Araguel v. Bryan*, 2022 WL 3441427 (Fla. 1st DCA Aug. 17, 2022)**

Slayer Statute

In *Pacific Life Insurance Co.*, a son murdered his father and was found not guilty by reason of insanity. The father had a life insurance policy naming his daughter and son as 50% beneficiaries of the policy.

After the death benefit claim was filed, the life insurance company filed an interpleader. Son failed to respond. Florida's slayer statute applies to life insurance policies under Florida Statutes § 732.802(3). The court entered a default judgement but also found that for the purposes of Florida's slayer statute, a conviction is unnecessary if the "greater weight of the evidence" shows that the killing was unlawful (citing Florida Statutes § 7302.802(5)). Furthermore, there is prior precedent holding that a killing can come into the realm of the slayer statute despite a finding of insanity.

***Pacific Life Insurance Co. v. Matthew A. Perez*, 2022 WL 2134959 (M.D. Fla. Jan. 31, 2022)**

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