October 7, 2015

# Trust & Estate Litigation Update

**Courts Hold That Divorce Results in Presumptive Revocation of Testamentary Dispositions to Former Spouse, but What About Relatives of a Former Spouse?**

Statutes in New York, New Jersey, Connecticut, and Massachusetts provide that a will can be revoked if the testator executes a subsequent will, or if the testator, or someone in the testator's presence and at the testator's direction, performs a revocatory act on the will.

Legislation in those four states has also addressed the impact of divorce on wills and trusts. In all of these states, unless the testator has expressly provided otherwise, divorce serves to revoke a property disposition to a former spouse, a power of appointment in favor of a former spouse, and the appointment of a former spouse as a fiduciary. The relevant statutes in New Jersey and Massachusetts also treat divorce as having revoked any disposition made to a former spouse's relatives. The statutes in New York and Connecticut do not go this far.

In *In re Lewis*, 2015 N.Y. Lexis 1292; 2015 NY Slip Op 04674 (N.Y. June 4, 2015), the New York Court of Appeals recently considered whether a will naming the decedent's ex-husband's father as alternate executor and beneficiary was revoked.

Decedent died in March 2010, three years after divorcing her husband. Pursuant to the laws of intestacy, decedent's property was to pass to her family. However, decedent's ex-husband's father filed a petition in the Jefferson County Surrogate's Court to probate a 1996 will executed by decedent. The 1996 will bequeathed all of decedent's property to her ex-husband. Decedent's ex-husband's father was also named in the 1996 will as an alternate executor and beneficiary. EPTL 5-1.4 disqualified the ex-husband from serving as executor and from taking under the will. The ex-husband's father, however, was not similarly precluded under New York law.

During the probate proceedings, the decedent's ex-husband testified that the will was executed in quadruplicate, with each document meant to possess the force of an original. The wills were stored at the couple's Texas home, their New York home (where the decedent resided after the divorce), decedent's ex-husband's parents' home, and a safe deposit box. Decedent's friend testified that decedent intended to execute a new will in 2007 after her divorce and that she had seen and discussed with the decedent what she thought was a 2007 will with a provision revoking all prior wills and codicils. However, after a post-mortem search of the decedent's residence and possessions, no such will was found. Because the alleged 2007 will was never found and the decedent's friend did not witness the execution of the alleged 2007 will, the Surrogate's Court concluded it was bound by the 1996 will and admitted the will to probate. The Appellate Division affirmed and the Court of Appeals granted leave to appeal.

The Court of Appeals reversed and remanded, holding that the decedent's parents' claim that the 1996 will was revoked by

the 2007 will was properly rejected but that the failure of their claim did not mean that the 1996 will was proved. The Court concluded that whether the 1996 will had been revoked by other means, such as by the act of the testator with revocatory intent, was a question that needed to be answered before the 1996 will was admitted to probate. The Court noted that a presumption arises that a will has been revoked by destruction if the will cannot be found posthumously. The presumption "stands in the place of positive proof" and must be rebutted by the will's proponent. In this case, the presumption was strong as a result of the fact that the 1996 will left all of decedent's property to her ex-husband, and the 1996 will was not found in decedent's New York home where it was known to be kept at one time. In light of the presumption of revocation, the Court was "left with a will admitted to probate upon a record sufficient only to disprove it." The Court held that the Surrogate should have insisted on the presentation of all duplicate original wills to compare the duplicates and make a determination about their import. Accordingly, the Court remanded the case to the Surrogate's Court to hear and weigh evidence as to the duplicate wills and allow petitioner an opportunity to rebut the presumption of revocation.

**Massachusetts Appeals Court Rules That Interest in Irrevocable Trust with Ascertainable Standard Is a Marital Asset Subject to Division upon Divorce**

On August 27, 2015, the Massachusetts Appeals Court held in *Pfannenstiehl v. Pfannenstiehl*, Nos. 13-P-906, 13-P-686, & 13-P-1385, 2015 Mass App. LEXIS 123, that a husband's interest in an irrevocable trust with an ascertainable standard is a "vested beneficial interest subject to inclusion in the marital estate."

At issue in the case is an irrevocable trust established by the husband's father for the benefit of the husband and his siblings, as well as their children. The trust contains an ascertainable standard, which obligates the trustees to make distributions of income and principal "to provide for the comfortable support, health, maintenance, welfare and education of [the beneficiaries]." The trust also contains a spendthrift clause, which prohibits the assignment or attachment of trust assets to creditors of any beneficiary.

After an eight-day trial, the trial court held that the husband's interest in the trust constituted marital property pursuant to G.L. c. 208, § 34. The trial court based its ruling on its determination that the husband's interest was "presently enforceable" and that the parties had relied on the distributions from the trust to sustain their lifestyle during their marriage. On appeal, the husband contended that he did not have a "present, enforceable right" because the trustees could refuse (and indeed had refused) to make distributions to him pursuant to the trust's ascertainable standard. He also argued that the existence of a spendthrift clause rendered his interest in the trust assets incapable of division as marital property.

The Appeals Court, in a 3-2 decision, affirmed the trial court's decision that the husband's interest in the trust constituted marital property subject to division upon divorce. Specifically, the Appeals Court held that the trust's ascertainable standard gave the husband a "present enforceable right to distributions from the 2004 trust" because the trustees of the trust "were obligated to, and actually did, distribute the trust assets to the beneficiaries, including the husband, for such things as comfortable support, health, maintenance, welfare, and education." In reaching this conclusion, the Appeals Court weighed heavily the parties' reliance on the trust distributions, emphasizing that the distributions "were woven into the fabric of the marriage" and "were integral to the family unit." While the Appeals Court held (as it has in the past) that the presence of a spendthrift provision does not preclude inclusion of a trust interest in the marital estate, the Court did not hold that trustees of

an irrevocable trust can be ordered to make distributions directly to the non-beneficiary divorcing spouse.

The Appeals Court's decision is significant because it holds that an interest in a trust with an ascertainable standard - where there is a history of distributions woven into the fabric of the marriage - is a vested, presently enforceable interest and, therefore, properly included in a marital estate for purposes of equitable division of property in divorce proceedings. While the implications of the decision are not yet clear, Massachusetts trusts and estates practitioners should be mindful of this ruling in drafting estate plans and should consider whether to amend revocable trusts to include fully discretionary standards of distribution for clients concerned about divorce protection.

*Day Pitney LLP and Looney & Grossman LLP represented the wife on appeal. Jillian B. Hirsch of Day Pitney argued the appeal.*

**In Terrorem Clause Rejected in Connecticut Case Notwithstanding General Rule**

An in terrorem clause is a provision in a will or trust that a beneficiary who contests the validity of the will or trust forfeits his or her inheritance. Although in terrorem clauses are generally considered valid in Connecticut, they have been disfavored by some courts and may not be enforced where, for example, there is evidence that the testator or grantor did not fully understand the ramifications of the clause. Other courts have declined to enforce in terrorem clauses against beneficiaries who had a reasonable and good faith basis for challenging the validity of the will or trust.

In *Stewart v. Ciccaglione*, 2015 Conn. Super. Lexis 413 (Conn. Super. Ct. Feb. 26, 2015), the court refused to enforce the in terrorem clause at issue because the court found that there was a reasonable and good faith basis for challenging the validity of the trust. The court further held that the in terrorem clause was void because the evidence established that the decedent did not have full knowledge, understanding and comprehension of the clause.

**Courts Have Rejected Claims to an Enforceable Right in the Expectancy of an Inheritance**

In *Gong v. Jeong*, Docket No. BER-C-96-14, 2015 N.J. Super. Unpub. Lexis 427 (Ch. Div. Mar. 3, 2015), a New Jersey Chancery Court reaffirmed the principle that there is no "enforceable right in the expectancy of an inheritance" under New Jersey law. In *Gong*, plaintiff sued to void the transfer of a commercial property that plaintiff claimed his father had promised to bequeath to him. Plaintiff's father died without leaving a will or any other writing indicating his intention to leave the property to the plaintiff. The Court dismissed plaintiff's claims, finding that the property passed to plaintiff's mother as a matter of law upon plaintiff's father's death.

Likewise, in *Roy v. McInerney*, HHDCV146049411S, 2015 Conn. Super. Lexis 699 (Conn. Super. Mar. 30, 2015) a Connecticut Superior Court dismissed claims based upon an alleged oral promise, without consideration, to convey property

in the future.

In 1955, Anthony and Sara Tordonato purchased real property in Old Saybrook, CT. In 1967, the Tordonatos conveyed the property to their daughter, Janet, and her husband. In 1971, Janet signed a letter promising her sister, Concetta, that if she sold the property while Concetta was alive, one-half of the proceeds would be paid to Concetta, but if she sold the property after Concetta died, then one-half of the proceeds would go to Concetta's living children in equal shares. Concetta died in 2008 and was survived by her five children. In 2013, Janet conveyed the property to her daughter, Karen, who then conveyed the property to her brother, John.

Concetta's children filed suit, alleging that John and Karen repudiated the promise. The Court dismissed the Complaint, finding, among other things, that the letter signed by Janet constituted an unenforceable promise to make a gift in the future because it was not supported by consideration.

**Connecticut Superior Court Holds That a Subsequent Will Does Not Modify a Prior Trust**

In *Lackman v. McAnulty*, 2015 Conn. Super. Lexis 1270, No. LLICV-146010910S, (Conn. Super. May 26, 2015), the court considered whether a parcel of land should pass through an inter vivos trust or by means of a will. In 2001, the decedent purported to transfer the property to a revocable trust. Approximately ten years later, the decedent executed a will in which he purported to bequeath a one-third interest in the property to each of the plaintiffs. The will did not identify or otherwise refer to the trust. Decedent died in January 2013, and the executrix took the position that the property was not probate property but instead was an asset of the trust that passed to the trust beneficiaries. The court held that the will did not constitute an effective revocation of the trust and, therefore, that the property was an asset of the trust and not the estate.

Noting that the Connecticut appellate courts had not addressed the issue, the court sided with the majority of courts in other jurisdictions and held that a subsequent will cannot modify a revocable trust. The court reasoned that a revocable trust can only be revoked by the settlor during his lifetime. It is, therefore, impossible for a will to revoke or modify a trust because it does not take effect until the settlor dies.

**Reformation of a Trust Instrument Rejected as a Remedy for Failing to Complete an Estate Plan**

In *In re Lesanto*, 12-P-1111, 2015 Mass. App. Unpub. Lexis 318 (Ma. App. Ct. Apr. 21, 2015), the court held that failure of the testator to execute a new will intended to pour property over to an executed, new trust, was ineffective to fulfill the testator's intent to disinherit his children after a family dispute.

The testator's attorney had drafted a new will and a trust document that purported to revoke all prior trusts. The second trust,

which expressly revoked all prior trusts, was intended to work with the new will to effectuate the testator's intent of disinheriting his children. In October 2010, the testator executed the new trust agreement at his attorney's office but was not able to execute the new will because there were no witnesses available. He planned to come back later but was admitted to the hospital the next day and never left the hospital until his death a few weeks later. At the time, Massachusetts G.L. c. 203, 3B did not permit a devise or bequest in a will to a trust that was not in existence on the date of execution of the will. As a result, after his death, the testator's children claimed that the residuary bequest in the testator's will lapsed because the first trust was revoked and the second trust could not be utilized. Seizing upon the testator's obvious intent, and to avoid a result that seemed contrary to that intent, the probate court reformed the second trust so that it merely amended (rather than revoked) the first trust.

The Court of Appeals reversed the decision, stating that, while intent must be considered and utilized to construe testamentary documents, it cannot be used to supply missing terms. The court found that the testator's intention was not simply to create the second trust to amend the first but also to execute a new will. Therefore, the court held that the pour-over provision from the first will lapsed for want of beneficiary, and the residuary was to pass by intestacy.

**A New York Court Holds That a Will Barring a Person From Inheriting Under the Will Also Bars That Person From Sharing in any Disposition That Lapses Into Intestacy**

In *In re Grutzner*, 2015 N.Y. Misc. Lexis 744 (N.Y. Sur. Ct. Mar. 17, 2015), decedent, Dorothy Grutzner ("Dorothy"), executed a last will and testament in which she explicitly disinherited her son and granted her daughter a life estate in her home. Pursuant to the terms of Dorothy's will, if Dorothy's daughter pre-deceased Dorothy, Dorothy's home and the residue of Dorothy's estate were to pass to a trust. Dorothy's daughter predeceased her, and the trust referenced in Dorothy's will could not be located. The administrator argued that in the absence of the trust, the residuary, including Dorothy's home, should pass via intestacy to Dorothy's descendants, excluding Dorothy's son, who was unambiguously disinherited under Dorothy's will. Dorothy's son argued that he should inherit under Dorothy's will because Dorothy did not intend to disinherit him totally in the event Dorothy's daughter passed away first.

The Surrogate's Court agreed with the administrator. The court noted that language in a will explicitly barring a person from inheriting under the will also bars that person from sharing in any disposition that lapses into intestacy, stating: "[a] decedent's intentions are ascertained as of the date the will was executed, not a subsequent date, and a court cannot change the will to carry out what it assumes the testator would have wanted had she envisioned the state of events at her death."

**Courts Holds That It Has Discretion to Modify the Written Terms of an Insurance Policy Under Certain Circumstances**

In *Estate of Patricia Quinn v. Michael F. Quinn*, Docket No. A-0855-13T3, 2015 N.J. Super. Unpub. Lexis 913 (N.J. App. Div. Apr. 22, 2015), the Appellate Division of the New Jersey Superior Court held that the trial court should have exercised its discretion to declare decedent's widow the beneficiary of decedent's life insurance policy despite the fact that the policy named decedent's ex-wife as the beneficiary.

Plaintiff, Patricia Quinn, and decedent, Michael Quinn, divorced in 1970. After their divorce, the parties were involved in post-judgment litigation for over 40 years. In 2011, the parties reached a settlement agreement in which Michael agreed to pay approximately $12,500 to Patricia and another $4,000 to her legal counsel. As security for the settlement payments, Michael amended his life insurance policy by changing the beneficiary designation from his current wife, Marita Quinn, to his former wife, Patricia. The policy was to be held by Patricia's attorneys, but the parties had agreed that once the settlement amount was paid to Patricia and her attorneys, the policy would be released back to Michael. On December 2, 2012, Michael passed away before making the required payments to Patricia's attorneys.

Shortly after Michael's death, the insurance company issued Patricia a check for $234,705.74. Marita disputed the payment from the insurance company and argued that Patricia was not entitled to the entire amount. The Appellate Division held that the judge in the lower court had discretion to award the policy funds to Marita, finding that Michael intended for the funds to benefit Marita. The court explained that the "insurance-beneficiary" designation did not control under the circumstances, stating that "[a] beneficiary designation must yield to the provisions of a separation agreement expressing an intent contrary to the policy provision."

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