august, 2016

Probate Litigation Update

The law relating to trusts and estates is constantly evolving. To keep you updated, this newsletter reports on recent notable court decisions from Connecticut, Florida, Massachusetts, New Jersey, and New York. We hope you find it helpful.

Court of Appeal of Florida Holds That if There Is Clear and Convincing Evidence of Settlor's Intent, a Will Can Revoke a Trust Even if the Trust Is Not Mentioned By Name

In a case of first impression, *Bernal v. Marin*, Docket No. 3D15-171, 2016 Fla. App. Lexis 9229 (Fla. Dist. Ct. App. 3d Dist. June 15, 2016), the Court of Appeal of Florida, Third District, held that a will can revoke a trust if there is clear and convincing evidence of the settlor's intent.

In 2004, while she was a resident of Florida, decedent Renee Maria Zintgraff executed a revocable trust leaving money to a cousin and the remainder to various charities in the state. In the trust document, Zintgraff specifically reserved her right to revoke the trust during her lifetime but did not provide for a method of doing so. It was the only trust she created.

Four years later, in 2008, Zintgraff met with an attorney who drafted a new will, devising all of Zintgraff's tangible personal property and residuary estate to Oscar F. Bernal, a friend. The new will read "I, RENEE MARIA ZINTGRAFF, a resident of Miami-Dade County, Florida, and a citizen of the United States, declare this to be my Last Will and Testament, revoking all other wills, trust, and codicils previously made by me."

After Zintgraff died, the trust's successor trustee filed a complaint seeking a declaratory judgment that the alleged revocation of the trust in the 2008 will was ineffectual and that the trust remained valid. The trial court ruled for the trustee, holding that the 2008 will did not specifically name or expressly refer to the trust and, therefore, could not have revoked the trust. The Court of Appeal reversed and remanded.

Fla. Stat. § 736.0602 lists the means by which a revocable trust can be revoked or amended:

> (a) By substantial compliance with a method provided in the terms of the trust; or
> (b) If the terms of the trust do not provide a method, by:
> 1. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
> 2. Any other method manifesting clear and convincing evidence of the settlor's intent.

The trust did not provide a method by which it could be revoked, and the 2008 will did not expressly refer to the trust or specifically devise the property that had been held in the trust. Accordingly, the court asked whether Bernal could rely on subsection (b)2 of the statute to revoke the trust by "[a]ny other method manifesting clear and convincing evidence of the settlor's intent." The Court of Appeal held he could.

Citing several Florida Supreme Court rulings, the court first noted that a settlor has the absolute right to terminate a revocable trust and distribute the trust property in any way he or she wishes. Next, the court looked to the plain language of the statute and held that Fla. Stat. §736.0602(3)(b)2 allows the proponent to prove the settlor's intent with clear and convincing

evidence, including extrinsic evidence. The Court of Appeal reversed and remanded to the trial court for further proceedings consistent with its opinion.

Is Trust Without Current Living Beneficiaries Void? New York Surrogate Court Says No

In *In re J. Steven DeHimer Irrevocable Trust*, 2016 N.Y. Misc. Lexis 2309, 2016 N.Y. Slip Op. 50971(U) (N.Y. Sur. Ct. June 9, 2016), plaintiffs, each a grantor of a trust, sought to have their respective *inter vivos* irrevocable trusts voided. Relying upon the general rule that a trust must have a defined beneficiary, the grantors contended that their irrevocable trusts were void because no current or remainder beneficiary of the trusts existed or will ever exist. The Surrogate's Court, Oneida County, denied the grantors' request.

The irrevocable trusts, as drafted, required the trustees to manage the trusts "for the benefit of the Grantor's *then living issue*." The grantors, Steven DeHimer and Lorie DeHimer, argued that they did not have any living children and did not plan ever to have or adopt children.

In denying the grantors' request, the court relied upon *Demund v. LaPoint*, 647 N.Y.S.2d 662 (N.Y. Sup. Ct. 1996), which held that the final determination as to whether a party is survived by issue cannot be made until the time of that party's death. In addition, NY EPTL §9-1.3(e) presumes that males can have children at any age over 14 and females can have children between the ages of 12 and 55. At the time the matter was heard, Steven DeHimer was a male over the age of 14 and Lorie DeHimer was a 50-year-old female. Although both parties stated they had no intention to adopt, adoption also remained a possibility until the grantors' deaths.

After determining that the grantors were both still theoretically capable of having children at some future date, the court turned to the question of whether the trusts could be enforced in the absence of any present living children. In its assessment, the court looked to whether there was any party that could compel an accounting of the trust, if necessary, to ensure that the trustees were doing an adequate job.

Pursuant to SCPA §2205(b), a "person interested" has standing to petition for a compulsory accounting. The court found that "person interested," as used in SCPA §2205(b), includes contingent remainder beneficiaries. The trusts provided for a contingent remainder beneficiary, The Sears Family Foundation, to receive the trust assets if no descendant of the grantors is living at the time either grantor dies. Accordingly, the court held that The Sears Family Foundation would qualify as an interested party and would have standing to compel an accounting.

Appeals Court of Massachusetts Holds Trust Is Countable as Personal Asset for Medicaid Eligibility, Despite Reformation

In *Needham v. Director of the Off. of Medicaid*, No. 14-P-182, 2015 Mass. App. Lexis 169 (Mass. App. Ct. Oct. 20, 2015), the Appeals Court of Massachusetts held that Massachusetts' Medicaid program, MassHealth, was not required to recognize a trust reformation that was intended to render the assets of a trust non-countable for purposes of Medicaid eligibility.

The plaintiff, who resided in a nursing home, applied for long-term care benefits from MassHealth. At an administrative hearing, MassHealth determined that plaintiff was not eligible for Medicaid because he had more than $2,000 in countable assets. In concluding that the plaintiff was ineligible, MassHealth counted the assets of an irrevocable trust valued at $412,400, for which the plaintiff was the sole settlor.

In order to attain Medicaid eligibility, the plaintiff asked the Probate and Family Court to approve a stipulation between plaintiff and his children, the co-trustees, to reform the irrevocable trust. The reformation would change the provisions that previously rendered him ineligible, thus making the trust's assets non-countable to MassHealth. The Probate and Family Court entered the stipulation and then referred the case back to the MassHealth administrative hearing. The MassHealth Administrator

ruled that the assets at issue remained countable because the stipulated reformation was a disqualifying transfer of assets made within a statutory 60-month look-back period for the purpose of attaining Medicaid benefits.

The plaintiff appealed MassHealth's decision to the Superior Court, which reversed Mass Health. The Superior Court held that MassHealth was bound by the stipulation approved and entered by the Probate and Family Court, which reformed the trust and rendered it non-countable for Medicaid purposes. MassHealth appealed.

The Appeals Court reversed the Superior Court. It found that the Probate and Family Court's reformation of the trust had no bearing on the interpretation and application of federal and state laws governing financial eligibility for Medicaid benefits.

The Appeals Court emphasized that, having chosen to participate in the Federal Medicaid program, Massachusetts is required to "provide those benefits in a manner consistent with Federal Medicaid requirements." Federal law "requires that individuals of means who apply for long-term care benefits, and transfer assets for less than fair market value within the sixty-month look–back period, face a period of ineligibility." In light of that federal law, the court held that MassHealth correctly determined that the court-ordered reformation violated the look-back-period and that the trust's assets were countable for purposes of determining Medicaid eligibility.

For Purposes of Determining Medicaid Eligibility, Funds Held by Court for Benefit of Minor Become Countable Assets When Transferred to Minor's Guardians

In *In re Solivan*, No. A-4828-13T1, 2015 N.J. Super. Unpub. Lexis 2406 (App. Div. Oct. 21, 2015), the Appellate Division of the Superior Court of New Jersey held that the New Jersey Division of Medical Assistance and Health Services (DMAHS) could recoup Medicaid benefits that had been provided to Tracy Solivan for approximately 10 years prior to her death because a settlement fund for her benefit rendered her ineligible for Medicaid.

Ms. Solivan had suffered injuries at birth, which resulted in severe disabilities. Her parents alleged that her injuries were caused by negligent hospital employees, and they sued the owner of the hospital in 1979. The case settled, and the settlement funds ($172,400) were placed in an account for Ms. Solivan by the Hudson Country Surrogate. Pursuant to the settlement agreement, the funds were to be held by the Hudson County Surrogate, and Ms. Solivan's guardians could not use the funds in the account without a court order.

When Ms. Solivan turned 18, her mother was named as her guardian. In September 2002, the Hudson County Surrogate named a co-guardian for Ms. Solivan, and also ordered that the funds held in the court account be transferred to another account for administration by the co-guardians. The court did not place any restrictions on the use of those funds. From 2002 to 2012, Ms. Solivan received Medicaid benefits paid through DMAHS. She also had received benefits from the Division of Developmental Disabilities (DDD).

At the time of Ms. Solivan's death in 2012, the settlement account had grown to $600,000. After she died, her co-guardians filed an order to show cause and a verified complaint to issue a final guardianship accounting, and asking to be named co-administrators of the estate.

DMAHS and DDD filed liens against the estate's assets, claiming that the decedent became financially ineligible to receive benefits when the settlement funds were released to her co-guardians in 2002. The trial court agreed. The estate appealed, arguing that the settlement funds did not qualify as "available resources" because the court retained control over the money.

The co-guardians relied on *Essex County of Welfare v. O.J.*, 128 N.J. 632 (1992), which held that settlement funds are not "available" when a court retains control over them. The co-guardians argued that the surrogate court retained control over the decedent's person and property pursuant to N.J.S.A. 3B:12-36, which states that if a guardian has been appointed, "the court shall have authority over the ward's person and all matters relating thereto."

The Appellate Division disagreed, noting that the surrogate court "does not retain overarching power to manage the assets of a ward after the assets are placed in a guardian's care," and that guardians are generally "free to exercise their discretion without the need to seek prior court approval. . . ." The Appellate Division found that the decedent's settlement funds were unconditionally released to the co-guardians in 2002, and that the surrogate court order transferring the funds to the guardians expressly stated that the funds could be used "in the exercise of the guardian's reasonable discretion . . . without court order." Because the surrogate court no longer maintained control over the settlement funds, which totaled more than $2,000, those funds made the decedent financially ineligible to receive state Medicaid benefits.

Proper Pleading Is Paramount: New York Appeals Court Dismisses Complaint Where Plaintiff Sued a Dead Person

Successful litigation requires proper pleading. As Abraham Lincoln once wrote, "[i]n law it is good policy to never *plead* what you *need* not, lest you oblige yourself to *prove* what you *can* not."

A variation of this cautionary statement is sometimes true as well. By failing to plead what you must, you can lose the opportunity to prove what you may. This was the case in *Krysa v. Estate of Qyra*, where the Supreme Court of New York, Appellate Division, Second Department dismissed a complaint by a plaintiff whose pleading was defective. 136 A.D.3d 760 (N.Y. App. Div. 2d Dep't 2016).

Following a car accident, the plaintiff sued the driver to recover damages for alleged injuries connected to the incident. However, the driver had died prior to the commencement of the lawsuit. Unfortunately for the plaintiff, case law bars lawsuits against a deceased person and instead requires that an action name as defendant the personal representative of the decedent's estate. The plaintiff unsuccessfully attempted to amend the void complaint to name the decedent's *estate,* rather than the personal representative of the estate, as the defendant. The plaintiff in *Kyrsa* never "properly commenced an action against the decedent's personal representative" and missed the window in which the claim could have been filed properly. As a result, the court dismissed her claim.

The moral: Proper pleading matters.

Connecticut Superior Court Sustains Appeal of Probate Court Decrees, Which Were Found to Have Prejudiced Substantial Rights of Appellant

The Connecticut General Statutes bind probate courts to the "rules of evidence applicable to civil matters" in superior court when conducting hearings for civil commitment and appointment of a conservator. Civil commitments also require a minimum of two signed certificates from impartial physicians, including one practicing psychiatrist. As a result of a 2014 amendment to the Connecticut General Statutes, these certificates must be admitted into evidence. Additionally, the reports of non-treating physicians are inadmissible under the statute. Finally, to order the appointment of a conservator, testimony at a probate court hearing must be under "oath or affirmation."

In *Kron v. Appeal from Probate*, FSTCV155014341S, 2016 Conn. Super. Lexis 540 (Conn. Super. Ct. Mar. 9, 2016), appellant Joseph Kron challenged three decrees by the Stamford Probate Court ordering Kron's civil commitment, the appointment of a conservator for Kron's estate, and the authorization of "psychiatric medication treatment for a non-consenting patient." Kron appealed the probate decisions to the Stamford Superior Court, arguing that the decrees for commitment and appointment of a conservator prejudiced his substantial rights, because the probate court relied on "hearsay allegations and unreliable evidence."

The Stamford Superior Court sustained Kron's appeal due to evidentiary mistakes by the probate court. Although the probate court had the requisite number of certificates to order civil commitment, neither was accepted into evidence. Furthermore, the reports were not written by Kron's treating physicians, so the court found that it was "questionable as to whether they could

be legally considered." The psychiatrist's testimony was also problematic because he did not give his testimony under oath. The court concluded that the probate court's decree ordering civil commitment "could not have been based on any admissible evidence," and that in its decree appointing a conservator, the probate court had "not only failed to adhere to rules of evidence applicable to civil cases . . . [but also] ignored the express statutory directive that the testimony of witnesses be given under oath."

As a result of these evidentiary errors, the Stamford Superior Court concluded that the probate court did not comply with the Connecticut General Statutes, and it sustained Kron's appeal.

New York Appellate Division Holds That Value of Real Property for Estate Tax Purposes Is the Same Whether Property Bequeathed as Life Estate or Fee Simple

In *In re Cleary*, No. 2014-06316, 2016 N.Y. App. Div. Lexis 4259 (2d Dep't June 8, 2016), the Appellate Division of the Supreme Court of New York held that the value of a decedent's interest in real property is the same for estate tax purposes whether the decedent willed the property to the beneficiary as a life estate or in fee simple.

The decedent's estate included a condominium and a cooperative apartment, appraised at $600,000 and $350,000, respectively. The decedent willed life estates in those properties to his longtime companion. The executor valued the properties at only $480,000 and $280,000, respectively, on the estate tax return because the decedent had willed life estates rather than fee simple interests. The New York State Department of Taxation and Finance rejected this devaluation and issued a tax deficiency notice. In response, the executor petitioned the Surrogate's Court for relief. The Surrogate's Court denied the petition, and the executor appealed.

On appeal, the court affirmed the Surrogate's Court, holding that the value of real property for estate tax purposes is determined by its fair market value at the time of decedent's death and that the fact that the condominium and cooperative apartment were transferred as life estates rather than in fee simple should not be taken into account on the estate tax return. Clarifying further, the court noted that an "estate tax is a tax on the privilege of passing property, not a tax on the privilege of receiving property."

New Jersey Appellate Division Provides a Reminder of the Very Low Threshold for Testamentary Capacity

In *In re Estate of Weste,* 2016 N.J. Super. Unpub. Lexis 1450 (App. Div. June 24, 2016), the Appellate Division of the Superior Court of New Jersey recently provided a reminder of the very low threshold for testamentary capacity.

The decedent executed her will when she was 74 and, according to some medical professionals and family members, in a fragile mental state. In the year leading up to the execution of the will, the decedent's family reported that she had issues remembering some of their names and identifying them. One month after the will was executed, members of the decedent's family had her admitted to a hospital for a psychiatric evaluation. The doctor diagnosed her at that time with dementia and stated that she "appears confused, and disoriented. . . . Her insight and judgment are poor. She is unable to take care of herself." Shortly thereafter, her family admitted her to a nursing home.

Despite the diagnosis the decedent received a month after executing the will, the trial court found that she had testamentary capacity at the time she executed the will. The Appellate Division affirmed the trial court's determination that the evidence at trial did not clearly and convincingly show that the decedent lacked testamentary capacity. In doing so, the court noted that testamentary capacity must be tested as of the date of execution of the will, that the law requires only a very low degree of mental capacity to execute a will, that the burden of demonstrating incapacity rests on the shoulders of the party challenging the will, and that the burden must be satisfied through clear and convincing evidence.

Given that the decedent was living on her own and caring for herself at the time the will was executed, the decedent had made her own appointment to see her attorney and make the will, and the decedent's attorney, who had extensive experience, did not question her capacity, the Appellate Division found that the trial court's determination of capacity was supported by the evidence.

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