

Trusts and Estates Law Section Newsletter

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of the New York State Bar Association

A Message from the Section Chair

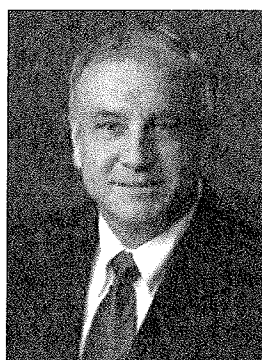
Our Legislative Process

Some of the most significant work our Section accomplishes is the improvement of the laws governing New York Trusts and Estates practice. Identifying a problem, drafting a solution, presenting it and obtaining approval—in the form of a new piece of legislation—is a key part of what we do.

But it ain't easy.

Drafting new legislation takes work, attention to detail and steady effort. Getting it enacted is a whole other story. It is a time-consuming, long-term process requiring patience and diligence. Let me explain by way of a real example.

Our Estate and Trust Administration Committee identified problems with the law regarding legacies



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that are not timely paid. The right of a beneficiary to interest on a delayed legacy was unclear and the process to obtain interest uncertain. The Committee drafted proposed legislation and brought it to the Executive Committee (EC) of our Section. The EC discussed the proposal, recommended changes and sent it back to the committee for further work (Note: I am actually making this up. I do not recall in any detail the conversations at the EC regarding this particular legislative proposal since it first came up for discussion in 2008 and became affirmative legislation in 2011. However, this is the normal process whenever a committee presents proposed legislation. And "discussed" may be a bit mild for a descriptor.)

Eventually, the Committee's refined proposal was presented, voted on and approved for affirmative legislation. The proposed legislation amends EPTL 11-1.5, EPTL 11-A-2.1, and SCPA 2102 to: (1) confirm that interest will be owed to a beneficiary if the legacy is not paid within 7 months of the fiduciary's receipt

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Florida Update

By David Pratt and Jonathan Galler



David Pratt

Legislative Update

Florida has enacted new legislation addressing a variety of trust and probate issues. Summarized below are some notable changes in the law.

Trust Accountings:

Florida law provides that the trustee of an irrevocable trust must provide a trust accounting to each qualified beneficiary annually. Florida

Statutes § 736.0813 was revised to clarify that a trustee who provides accountings more frequently, such as on a monthly or quarterly basis, need not provide a second accounting covering the same period at the end of the annual period.

Unclaimed Property and Trustees: Revised Florida Statutes §§ 717.112 and 717.101(24) and new Florida Statutes § 717.1125 address unclaimed property held by trustees being administered pursuant to the Florida Trust Code. The legislation shortens the time period that a trustee must hold the property before seeking to deliver the unclaimed funds to the state from a period of five years to a period of two years.

Non-Resident Jurisdiction in Trust Litigation: New Florida Statutes § 736.0202(2) specifies eight actions of a trustee, trust beneficiary, or other person, whether or not a citizen or resident of Florida, that will subject the person to personal jurisdiction in Florida. Among those actions are: accepting trusteeship of a trust having its principal place of administration in Florida or moving the principal place of administration of a trust to Florida; serving as trustee of a trust having its principal place of administration in Florida or created by a settlor who was a resident of Florida at the time of creation of the trust; and accepting compensation or a distribution from a trust having its principal place of administration in Florida. In addition, new Florida Statutes § 736.0205 provides for service of process by commercial delivery service, or by any form of mail, requiring a signed receipt when a court action seeks only in rem or quasi in rem relief.

Elimination of Requirement to File Florida Estate Tax Return: The Florida Constitution effectively prohibits a Florida estate tax, but, until recently, Florida Statutes § 198.13 nevertheless required that any estate of a decedent dying after December 31, 2012 would



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have to file a tax return with the Florida Department of Revenue. See *Senate Bill 492—Florida Analysis and Fiscal Impact*. The statute has been revised to eliminate the requirement that an estate file a tax return with the Florida Department of Revenue even for a decedent dying after December 31, 2012. The legislation was made effective, retroactively, as of January 1, 2013.

Case Law Update

New York Creditor's Claim Against Ancillary Estate in Florida

A nursing home that was owed payment from the decedent filed a complaint against the personal representative of the decedent's estate in New York before the estate was opened. The personal representative did not open the estate until a few years later, at which point the nursing home filed a claim against the New York domiciliary estate. Later that year, the personal representative opened an ancillary estate in Florida to administer the disposition of the decedent's Florida home, and the nursing home filed a claim against the ancillary estate as well. The nursing home petitioned for an accounting of the ancillary estate and to transfer the ancillary estate's assets to the New York domiciliary estate. The trial court dismissed the petition on grounds that the claim against the ancillary estate was untimely under Florida's two-year non-claims statute. Fla. Stat. § 733.710. The appellate court reversed, holding that although the claim against the ancillary estate was time-barred, it was not up to the Florida trial court to determine whether the claim against the domiciliary estate was time-barred. For that reason, the assets were to be transferred to the New York domiciliary estate for the New York court to adjudicate the claim. For the same reason, the nursing home was deemed an interested party with the right to compel an accounting of the ancillary estate.

Staum v. Rubano, 2013 WL 4081055 (Fla. 4th DCA August 14, 2013) (not yet final).

Will Contest—Standing

Petitioner filed a petition to revoke the probate of the 2009 will of the decedent. Petitioner alleged that the decedent's 1983 will was the decedent's only valid

will. Florida's probate code provides that a petition to revoke probate of a will may be commenced by any interested person, including a beneficiary under a prior will. Fla. Stat. § 733.109. However, a petitioner is not deemed to be an interested person for purposes of standing to revoke probate if the decedent's previous and presumptively valid will does not include the petitioner as a beneficiary of the estate. It is, therefore, the burden of the petitioner to establish that a previous will that excludes the petitioner as a beneficiary is also invalid. In this case, the trial court dismissed the petition to revoke probate for lack of standing because the petitioner was not named as a beneficiary in the decedent's previous three wills. The appellate court reversed, holding that petitioner had sufficiently alleged that *all* wills executed after the 1983 will, in which she was named as a beneficiary, were invalid on grounds of undue influence, incapacity and insane delusion.

Gordon v. Kleinman, 2013 WL 4081027 (Fla. 4th DCA August 14, 2013) (not yet final).

Enforceability of Trust Provision Regarding Waiver of Elective Share

Upon the death of her husband, petitioner filed a declaratory judgment action challenging the enforceability of a provision in the decedent's trust. The trust provided that if petitioner makes a valid disclaimer of all of her interest in the QTIP trust created under a separate provision of the trust and also makes a valid waiver of her right to elect the elective share in the decedent's estate, she would instead receive \$5 million outright and free of trust. Petitioner contended that this provision of the trust constituted an unlawful penalty clause by penalizing her to the tune of \$5 million for taking her elective share. The trial and appellate courts both disagreed with petitioner. Florida law invalidates trust provisions that purport to penalize an interested person for contesting the trust instrument or for commencing other proceedings relating to a trust. Fla. Stat. § 736.1108. However, the courts held that the provision at issue was enforceable. Unlike a "no contest" clause, which undermines the strong public policy interest in allowing courts to determine a trust instrument's validity, the provision here did not undermine the purpose of the legal right forfeited (i.e., the elective share) be-

cause it simply provided an optional alternative devise to the beneficiary.

Dinkins v. Dinkins, 2013 WL 3834371 (Fla. 5th DCA July 26, 2013) (not yet final).

Undue Influence

Two of the decedent's daughters filed a lawsuit against their sister, who was named the personal representative of their mother's estate. Among other claims, petitioners contended that the personal representative had unduly influenced their mother to take certain financial accounts out of her estate by making them "pay on death" accounts or joint accounts with right of survivorship. The trial court agreed, but the appellate court reversed, concluding that there was insufficient evidence to support an inference of undue influence. In Florida, undue influence is presumed when a person with a confidential relationship with the testator was active in procuring the devise and is a substantial beneficiary thereof. The appellate court concluded that petitioners could not demonstrate that the personal representative was active in procuring the devise. Perhaps most interestingly, though, the appellate court also noted that "evidence merely that a parent and an adult child had a close relationship and that the younger person often assisted the parent with tasks is not enough to show undue influence. Where communications and assistance are consistent with a 'dutiful' adult child towards an aging parent, there is no presumption of undue influence."

Estate of Kester v. Rocco, 117 So. 3d 1196 (Fla. 1st DCA 2013).

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TRUSTS AND ESTATES LAW SECTION

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