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Trusts and Estates Law Section Newsletter

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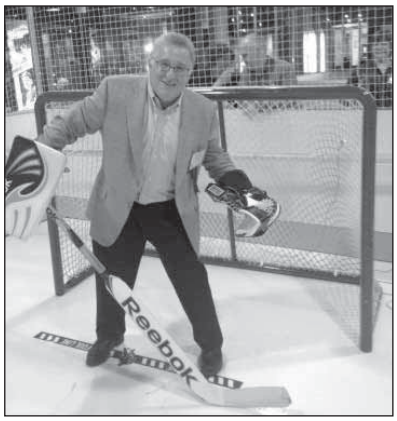
of the New York State Bar Association

A Message from the Chair

Coming to the mid-point in my year as Chair of the Section is a good time to reflect on what the Section has accomplished and what tasks lie ahead. First the accomplishments.



Ronald J. Weiss

With thanks to the hard work of program chairs Victoria D'Angelo and Charlie Scott, and the indefatigable Ilene Cooper as course book editor, we had a great program at the Four Season's Hotel in Toronto. Not surprisingly, hearing that our illustrious group was at the Hotel, even the Brooklyn Nets basketball team joined us at the Four Seasons. While the social highlight of the program was Saturday night's trip to the Hockey Hall of Fame, sadly, as the photos in this issue attest to, it is the only time this year that New Yorkers will have the opportunity to pose with the Stanley Cup. (The Rangers will be back next year!)

On the legislative front, we had a good year. Several of the bills that we either proposed or supported have passed both the Assembly and the Senate and, as I write this, are awaiting the signature of the Governor. These are: (i) interest on delayed legacies (A.01185/S.04952); (ii) a technical correction to the decanting statute (S.7244/A.9757); (iii) correction of an erroneous cross reference in SCPA § 1724 relating to UTMA accounts (A.09055/S.07137); (iv) the removal of the requirement of court approval for a personal representative's renunciation of property to which the decedent became entitled to but did not receive before death (S.07144A.09355A); (v) heir-

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NYSBA

Florida Update

By David Pratt and Jonathan Galler

David Pratt

CASE LAW UPDATE

Do After-Acquired Assets Pass by Intestacy in Absence of a Residuary Clause?

Yes. The Florida Supreme Court recently reviewed a case involving the use of a commercially available "E-Z Legal Form" for the preparation of a will. Because the will at issue contained no residuary clause, the Court had to determine the proper disposition of property that was acquired after the execution of the will. The Court held that the after-acquired property passes pursuant to Florida's intestacy statute and not to the sole remaining named beneficiary of several specific bequests under the will. The opinion affirmed the holding of Florida's First District Court of Appeal, which had certified the issue to the Supreme Court as a question of great public importance. The First District's initial holding was that Florida's statutory presumption against partial intestacy mandated that the after-acquired property pass to the remaining named beneficiary; however, upon rehearing, the First District withdrew its own opinion and held that the decedent's intent supersedes the presumption against partial intestacy. The Supreme Court agreed with the appellate court's latter opinion, and in a particularly interesting concurring opinion, one of the justices used the facts of the case "to highlight a cautionary tale of the potential dangers of utilizing pre-printed forms and drafting a will without legal assistance."

Aldrich v. Basile, 136 So.3d 530 (Fla. 2014).

Does a Guardian Have Right to Access Ward's Joint Brokerage Account?

Yes. Florida's Fourth District Court of Appeal recently held that the guardian of the property of a ward may be granted access by the court to a ward's joint brokerage account, not only during the ward's lifetime but also upon the ward's death for purposes of satisfying certain expenses related to the guardianship. The account at issue was titled in the name of the ward and his wife as a joint tenancy with right of survivorship. The wife, who had commenced divorce proceedings, objected to the use of the account by the guardian of the property without her authorization. Guided in large part by (a) the "overwhelming" public policy of guardianship law to protect the ward, (b) the broad powers granted to a guardian under Florida's Guardianship Code, and (c) the equitable powers of the probate court, the Fourth District held that the probate court was permitted to authorize the guardian of the property to access the joint account where necessary to pay authorized expenses, including the guardian's own compensation and the guardian's attorney fees. Further, the court held that even though *ownership* of the joint account passed to the wife upon the ward's death, the guardian retains *possession* of the account for the purpose of performing and paying for its statutory post-death obligations. The appellate court concluded its opinion with the suggestion that the legislature consider amending the Guardianship Code to bring additional clarity to this issue.

Jonathan Galler

Romano v. Olshen, 2014 WL 940700 (Fla. 4th DCA Mar. 12, 2014) (not yet final).

Is Adjudication of Paternity Akin to an "Adoption" Under Pretermitted Child Statute?

No. The elements for the determination of a pretermitted child under Florida law are codified in section 732.302, Fla. Stat. The statute is triggered only when the child (1) was omitted from the will; (2) was born or adopted after the making of the will; and (3) did not receive a part of the testator's property equivalent to a child's part by way of advancement. When these elements are met, such a child receives a share of the estate equal to that which the child would have received if the testator had died intestate, unless it appears from the will that the omission was intentional or the testator had at least one child when the will was executed and the testator devised substantially all the estate to the other parent of the pretermitted child and that other child survived the testator and is entitled to take under the will. Florida's Third District Court of Appeal recently reversed a trial court's determination of pretermitted status. The appellate court held that the child at issue was not omitted from the will because she stood to inherit under a class gift made for the decedent's "children." The court also held that the child was not deemed "born or adopted after making the will" even though the adjudication of the testator's paternity took

place after the execution of the will. The court reasoned that adoption is the act of creating a parent-child relationship, whereas an adjudication of paternity is merely an acknowledgment of an existing relationship.

Estate of Maher v. Iglikova, 2014 WL 1386660 (Fla. 3d DCA Apr. 9, 2014) (not yet final).

Does Successor Personal Representative Have Standing to Sue Predecessor's Attorney?

Yes. Florida is one of a handful of jurisdictions in which it is clear that the *personal representative* of the estate is the lawyer's client, not the estate itself or its beneficiaries. *See* Comment to Rule Regulating the Florida Bar 4-1.7. That was an important principle underlying a case of first impression recently decided by Florida's Second District Court of Appeal. The issue in that case was whether a successor personal representative had standing to sue its predecessor's attorney for malpractice in connection with the administration of the estate. The defendant-attorney, having served as counsel to the original personal representative, argued that the successor personal representative lacked privity with him and could not sue for malpractice. The appellate court, however, expressly opted not to address the issue of privity and, instead, held that the successor personal representative had standing because the powers and duties granted to an original personal representative flow to the successor, under section 733.614, Fla. Stat. On that basis, the Court concluded that the successor personal representative could assert a legal malpractice claim on behalf of the estate as part of its general obligation to pursue all valuable assets and claims of the estate.

Bookman v. Davidson, 136 So.3d 1276 (Fla. 1st DCA 2014).

Are the Decedent's Ashes "Property" of the Estate?

No. In yet another case of first impression, Florida's Fourth District Court of Appeal recently addressed the question of whether a decedent's ashes are deemed "property" of the estate and, thus, subject to the judicial remedy of partition. The decedent, Scott Wilson, was killed in a car accident by billionaire polo mogul, John Goodman, who was charged with manslaughter. Goodman garnered his own attention in the trusts and estates world when he adopted his adult girlfriend, making her a beneficiary of an irrevocable trust created for his children. That adoption was vacated on appeal. The latest appellate opinion arising from this tragic death concerned a trusts and estates matter of a different sort. It centered around a dispute between Wilson's divorced parents, who are the co-personal representatives of his estate, over the disposition of their son's ashes. Wilson's father ultimately petitioned for partition, contending that the ashes are "property" of the estate. The trial and appellate courts disagreed, with the latter reaching as far back as 19th century English law for guidance on the issue, holding that human remains are not property of the estate. Although the appellate court did not address how the dispute over the ashes should be resolved, the trial court had earlier suggested that it may appoint a curator or other temporary administrator to dispose of the ashes as it sees fit.

Wilson v. Wilson, 2014 WL 2101226 (Fla. 4th DCA May 21, 2014) (not yet final).

David Pratt is a Co-Chair of Proskauer's Personal Planning Department and the Managing Partner of the Boca Raton office. His practice is dedicated exclusively to the areas of estate planning, trusts, and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan Galler is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation Department and are admitted to practice in Florida and New York.