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## Keeping Current - Probate [notes]

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# KEEPING CURRENT PROBATE

## CASES

### ALTERNATIVE DISPUTE RESOLUTION: Failure to appear at mediation precludes objection to result.

The trustee of the decedent's revocable trust brought a proceeding to determine the beneficiaries. The court ordered mediation and one of the possible beneficiaries sent a notice of mediation to all interested parties. Not all the parties participated. Those that did participate reached a settlement dividing the trust property among the decedent's heirs and the other participants. The non-participants objected to the court's approving the settlement. The court dismissed their objections, and, on appeal, a divided California intermediate appellate court affirmed in *Breslin v. Breslin*, 276 Cal. Rptr. 3d 913 (Ct. App. 2021), holding that all the possible beneficiaries had received notice of the mediation and that those who did not participate could not now object.

**ARBITRATION:** Trust terms did not allow the trustees to compel the beneficiaries to arbitrate. The trust terms granted the trustees authority to submit to arbitration all claims involving the trustees or the trust property. In a case brought under diversity jurisdiction, *Burgess v. Johnson*, 835 Fed. Appx. 330 (10th Cir. 2020), the Tenth Circuit affirmed the district court's holding that, under Oklahoma law, the trust provision does not give the trustee the authority to compel the beneficiaries to arbitrate an action they brought alleging that the trustees breached their fiduciary duties.

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### Keeping Current—Probate

offers a look at selected recent cases, tax rulings and regulations, literature, and legislation. The editors of *Probate & Property* welcome suggestions and contributions from readers.

### ATTORNEY-CLIENT PRIVILEGE:

**Fiduciary exception to attorney-client privilege sustained.** An equally divided Supreme Court of Pennsylvania let stand a Superior Court decision requiring a trustee to honor a discovery request from the beneficiaries for undated copies of invoices from law firms retained by the trustee in *In re Estate of McAleer*, 248 A.3d 416 (Pa. 2021). The opinions provide a thorough discussion of the history and current status of the fiduciary exception.

### POWER OF ATTORNEY: An agent lacked authority to bind the principal to arbitration related to health care.

The decedent's spouse was the decedent's duly appointed agent. The decedent lacked capacity at the time of admission to a nursing home, and the spouse signed the contract with the institution on the decedent's behalf and wrote the word "wife" on the line under the signature entitled "Legal Representative Capacity." After the decedent's death, the spouse brought a negligence action against the nursing home, which moved to compel arbitration as required by the contract. The trial court denied the institution's motion, holding that the spouse signed as "wife" and not as agent. In *Cambridge Place Group, LLC v. Mundy*, 617 S.W.3d 838 (Ky. Ct. App. 2021), the intermediate Kentucky appellate court affirmed, holding first that the spouse had no authority as the decedent's "wife" to bind the decedent

to the contract and second that even if the spouse had signed as an agent, the agent was without authority because the terms of the power of attorney expressly withheld authority to make health care decisions, and the agent, therefore, could not obligate the principal to an arbitration agreement related to health care.

### POWER OF ATTORNEY: Neither a general durable power of attorney nor a health care power of attorney gave the agent authority to bind the principal to arbitration.

The principal's child acting as an agent under a durable general power of attorney signed the contract for admission of the principal to an assisted living facility. The contract included an arbitration agreement. After the principal's death, the child became the personal representative and brought a wrongful death action against the facility. In *Arredondo v. SNH SE Ashley River Tenant, LLC*, 856 S.E.2d 550 (S.C. 2021), the Supreme Court of South Carolina held that provisions of the general power of attorney authorizing execution of instruments concerning all types of property—including choses in action and entering into agreements concerning transfers of property—did not authorize the execution of the arbitration agreement. In addition, executing the arbitration agreement was not necessary to carry out a health care decision and thus was not authorized under the grant of authority to do what is necessary to carry out such decisions. Finally, the grant of authority to the child under a health care power of attorney to pursue legal actions in the name of the principal did not authorize the agent to execute the arbitration agreement.

**PRETERMITTED CHILD:** A child not mentioned in a holographic will is pretermitted. Oklahoma's pretermitted heir statute, 84 Okla. Stat. tit. 84,



§ 132, gives a child or issue of a deceased child an intestate share when a testator fails to provide for that person unless it appears from the face of the will that the omission is intentional. In *Matter of the Estate of Chester*, No. 118,018, 2021 WL 1098208 (Okla. Mar. 23, 2021), the Supreme Court of Oklahoma held that a holographic will which gave the entire estate to a grandchild of the testator with no mention of the testator's child did not disinherit that child and that extrinsic evidence was not admissible because the will was not ambiguous.

**PRETERMITTED CHILD: Reference in will to a child and spouse of the testator's child is not a sufficient reference to the child to prevent application of pretermitted heir statute.**

New Hampshire's pretermitted heir statute, N.H. Rev. Stat. § 551:10, applies to every child or issue of a child of the testator not named or "referred to" in the will. In *In re Estate of Dow*, No. 2019-0752, 2021 WL 199619 (N.H. Jan. 20, 2021), the New Hampshire Supreme Court addressed a will giving the residuary estate to the spouse of the testator's child (described as "my daughter-in-law") and, if the spouse does not survive the testator, to the child's child. The will did not refer to the testator's child, who is therefore a pretermitted heir and entitled to the appropriate intestate share. The court also held that language in the will directing that the law of Massachusetts to govern the administration of the estate did not prevent the application of the New Hampshire statute because the testator was domiciled in New Hampshire and the estate consisted only of personal property.

**TRUST REFORMATION: Reformation of a special needs trust granted.**

A parent created a lifetime supplemental needs trust for a child. The trust terms were appropriate for a trust funded with the beneficiary's funds (a first-party trust) and therefore at termination required the trust to reimburse the state for expenditures made for the

beneficiary before making other distributions. At the parent's death, the parent's will poured over the residuary estate to the trust. After the beneficiary's death, the trustee filed a petition to reform the trust based on mistake. Because the trust was not funded with the beneficiary's funds, it was not a first-party trust but a third-party trust that need not reimburse the state. The probate court rejected the petition on the grounds that the payback provision was necessary to prevent disqualification of the parent from receiving Medicaid benefits for a period of time because of the transfer. The trustee appealed and the intermediate Massachusetts appellate court vacated and remanded in *Matter of Pecce Supplemental Needs Trust*, 167 N.E.3d 429 (Mass. App. Ct. 2021). The court held that reformation was proper to prevent the payback provision from applying to the estate property poured over to the trust. Otherwise, the transfer could not affect the parent's eligibility for benefits.

**TAX CASES, RULINGS, AND REGULATIONS**

**ESTATE TAX: Tax Court valued Michael Jackson's image and likeness as well as trusts holding his two music catalogs.** The IRS and Estate of Michael Jackson disagreed over the value of three intangible assets in the famous entertainer's estate: (1) Jackson's image and likeness; (2) his interest in New Horizon Trust II, which held an interest in Sony/ATV Music Publishing; and (3) his interest in New Horizon Trust III, which contained a music publishing catalog that owned copyrights to compositions by Jackson and others. In a lengthy opinion in *Estate of Michael J. Jackson v. Commissioner*, T.C. Memo 2021-048 (2021), the Tax Court described the vast ups and downs of the entertainer's personal and professional life which contributed to the difficulty in valuing the three assets and noted that when Jackson died, the value of each asset at issue was distressed. Even his image and likeness were not producing any noticeable income, and he had

not been able to contract for tour merchandise for an upcoming tour. Also, at the time of his death, his interest in the two trusts secured large loans with high-interest payments. Ultimately, at trial, the estate increased its valuation of the decedent's image and likeness from that on the estate tax return by looking not just at pre-death revenue, but also post-death rights and growth and decline rates using pre-death marketability and a potential post-death boom. Although the Tax Court valued the image and likeness higher than the estate, it rejected the amount sought by the IRS. The Tax Court also did not impose accuracy-related penalties and held that the estate's reliance on the original valuation was reasonable. Further, the Tax Court valued both trusts using the discounted cash flow method. It valued the New Horizon Trust II at zero after applying a discount for lack of control. The New Horizon Trust III was valued at \$107 million after determining the revenue stream and subtracting liabilities. As with the image and likeness valuations, the Tax Court did not impose accuracy-related penalties because the estate's reliance on the appraisal values was reasonable.

**EXTENSION OF ESTATE TAX: An executor cannot delegate his duty to timely seek an extension of the estate's return and payment deadlines to his or her attorney.** The executor's attorney advised the executor to file a Form 4768 extension for the Form 706 return given that the estate was illiquid and would have difficulty converting its large amount of real property to cash in time to pay the estate tax due. However, despite that advice, the attorney made a calendaring error and did not timely file the extension. Upon realizing her mistake, the attorney filed the estate's Form 706 but the IRS assessed penalties. The Court of Federal Claims in *Andrews v. United States*, 153 Fed. Cl. 665 (2021), held that the estate was not entitled to a refund of its late-filing penalty, late-paying penalty, and interest as the taxpayer's reliance on the attorney to file the extension did not constitute



reasonable cause for the late filing.

### **SPLIT-DOLLAR LIFE INSURANCE:**

**Split-dollar life insurance agreements served legitimate business purpose by ensuring family business would remain in family control and company management could smoothly pass to the next generation.** The decedent entered into an estate plan that included several split-dollar life insurance policies and agreements. The decedent and her husband greatly desired that the family trucking business remain in the family, but tensions among the next generations ran high. The split-dollar life insurance agreements included a restriction on the parties' right to unilaterally terminate the agreements and incentivized the next generation to stay with the business and keep the company under family control. The court in *Estate of Clara M. Morrisette v. Commissioner*, T.C. Memo 2021-060 T.C.M. (2021), held that the premiums paid on the policies and the cash surrender values were not includible in the gross estate as the transfers had a legitimate non-tax purpose and were bona fide sales for full and adequate consideration. The split-dollar rights were includible, however, in the gross estate.

## **LITERATURE**

### **CHARITABLE GIFTS OF PARTIAL REAL PROPERTY INTERESTS:**

In his article, *Charitable Gifts of Partial Interest in Real Estate – A Nondeductibility Rule with Surprisingly Wide Scope*, 48 Est. Plan. 45 (2021), Howard M. Zaritsky uses recent cases to demonstrate some of the instances in which an income tax deduction may be denied for a gift of what turns out to be a partial interest in the property.

### **CHARITABLE TAX DEDUCTIONS:**

In his article, *Navigating the Section 642(c) Minefield – Obtaining the Income Tax Charitable Deduction for Estates and Non-Grantor Trusts*, 48 Est. Plan. 4 (2021), Jeremiah W. Doyle IV presents a primer on I.R.C. § 642(c), applicable

case law, regulations, and private letter rulings to aid the practitioner in determining if a charitable deduction is allowable.

**DATA PRIVACY:** Kate C. Ashley's Note, *Data of the Dead: A Proposal for Protecting Posthumous Data Privacy*, 62 Wm. & Mary L. Rev. 649 (2020), focuses on the posthumous disposition of individuals' personal information that businesses collect, use, and sell and argues that data privacy rights should extend posthumously to fulfill the promise of data privacy legislation.

**DEATHBED TRANSFERS:** Beckett G. Cantley and Geoffrey C. Dietrich provide a thorough overview of deathbed transfers case law in *How Soon is Now: Estate of Moore and the Unraveling of Deathbed Estate Planning*, 34 Quinnipiac Prob. L.J. 141 (2021).

**DISCLAIMERS:** In his Note, *No Disclaimer for the Domestic Support Evader: Why Alimony and Child Support Obligor Should Be Barred from Their Right to Disclaim Inheritances*, 71 Rutgers U.L. Rev. 1097 (2020), Fabian N. Marriott argues for a revision to the UDPIA to include protections on a federal level for alimony or child support recipients. He also sets forth reasons why New Jersey needs to follow in the tracks of those states that have already adopted legislation specifically barring a disclaimer of inheritance when alimony and child support are owed.

### **ESTATE TAX AND NONRESIDENT ALIENS:**

Jay A. Soled, Leonard Goodman, and Glenn G. Fox argue that Congress should consider repealing I.R.C. § 2104(a) or, at the very least, significantly narrowing its application in *The Estate Tax Should Not Apply to Domestic Stock Owned by NRAs*, 34 Quinnipiac Prob. L.J. 167 (2021).

**FAMILY GOVERNANCE:** Thomas C. Rogerson examines the reasons wealth dissipates and how conscious choices in family governance can address and remedy those causes in *Back to the*

*Future: The Central Role of Family Governance in Today's Estate Planning (Part 1 of a Two-Part Series)*, 48 Est. Plan. 24 (2021).

### **INCOMPLETE NONGRANTOR TRUSTS:**

Grayson M.P. McCouch closely analyzes incomplete nongrantor trusts revealing gaps and contradictions that call into question the viability of the ING trust as a planning technique in *Adversity, Inconsistency, and the Incomplete Nongrantor Trust*, 39 Va. Tax Rev. 419 (2020).

**MARITAL TRUSTS:** In her article, *Trusting Marriage*, 10 UC Irvine L. Rev. 199 (2019), Allison Tait threads together multiple strands of scholarship to better understand how new trust forms are affecting wealth transfer between couples and within families, and what the proper regulation of these trusts should be.

**NARRATIVE WILLS:** Karen J. Sneddon advocates that wills should provide instructions for the disposition of property as a narrative, that is, as a story of the testator, in *Dead Men (and Women) Should Tell Tales: Narrative, Intent, and the Construction of Wills*, 46 ACTEC L.J. 239 (2021).

**NO CONTEST CLAUSES:** In their article, *Boilerplate No Contest Clauses*, 82 Law & Contemp. Probs. 69 (2019), David Horton and Reid Kress examine no contest clauses from a different angle, asking whether these provisions are a symptom of a larger pathology in estate planning, that is, a drafting norm in which attorneys rely too heavily on standardized terms without fully ascertaining the testator's informed preferences.

**PRIVATE FOUNDATIONS:** Zoey F. Orol analyzes *The Failures and the Future of Private Foundation Governance*, 46 ACTEC L.J. 185 (2021).

**SAME-SEX MARRIAGES:** Suzianne D. Painter-Thorne explains in *Fraying the Knot: Marital Property, Probate, and*



*Practical Problems with Tribal Marriage Bans*, 85 Brook. L. Rev. 471 (2020), that although most Americans are governed by federal and state laws, members of Native American tribes are subject to the laws of their tribe as well. When state, federal, and tribal laws diverge, as they do in tribes that prohibit same-sex marriage, these legal differences may implicate wide-ranging issues from child custody determinations to pension benefits and property rights.

#### TRANSMISSION DEMOGRAPHICS:

Danaya C. Write analyzes many of the differences between testate and intestate decedents and suggests areas of concern for law- and policy-makers, as well as practicing lawyers and financial planners in *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 UMKC L. Rev. 665 (2020).

**TRUST REFORM:** Bridget J. Crawford's article, *Magical Thinking and Trusts*, 50 Seton Hall L. Rev. 289 (2019), brings into focus two interrelated strains of magical thinking in the law of trusts: the one that gives rise to the existence of trusts in the first place; and the other that anticipates that courts will play a visible, if not active, role in minimizing the use of trusts by wealthy individuals. The author argues that shaking free of magical thinking clears the way for meaningful trust reform.

**UNIFORM PROBATE CODE:** The Uniform Law Commission approved substantial amendments to the Uniform Probate Code in 2019. Mary Louise Fellows and Thomas P. Gallanis, the principal drafters of these amendments, provide a detailed analysis in *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127 (2021).

#### LEGISLATION

**ALABAMA** enacts the Qualified Dispositions in Trust Act. 2021 Ala. Laws Act 2021-238.

**ARKANSAS** adopts the Uniform Fiduciary Income and Principal Act. 2021 Ark. Laws Act 1088.

**ARKANSAS** creates procedures to permit a person who is conceived and born after the decedent's death to inherit as if the child were born during the decedent's lifetime if specified conditions are satisfied. 2021 Ark. Laws Act 924.

**ARKANSAS** provides consumer protection for seniors from predatory practices. 2021 Ark. Laws Act 1015.

**COLORADO** enacts a method for the creation of supported decision-making agreements for adults with a disability that are less restrictive than guardianships. 2021 Colo. Legis. Serv. Ch. 61.

**COLORADO** passes "Pruitt's Law" to protect persons with disabilities from discrimination in receiving organ transplants. 2021 Colo. Legis. Serv. Ch. 99.

**INDIANA** authorizes counterpart wills. 2021 Ind. Legis. Serv. P.L. 185-2021.

**INDIANA** updates statutes governing electronic wills. 2021 Ind. Legis. Serv. P.L. 185-2021.

**KANSAS** adopts the Uniform Fiduciary Income and Principal Act. 2021 Kan. Laws Ch. 63.

**MONTANA** adopts the Uniform Directed Trust Act. 2021 Mont. Laws. Ch. 325.

**MONTANA** enacts the Uniform Trust Decanting Act. 2021 Mont. Laws Ch. 177.

**NEBRASKA** enacts the Uniform Foreign-Country Money Judgments Recognition Act. 2021 Neb. Laws L.B. 501.

**NEBRASKA** passes the Nebraska Protection of Vulnerable Adults from Financial Exploitation Act. 2021 Neb. Laws L.B. 297.

**NORTH DAKOTA** adopts the Revised Uniform Unclaimed Property Act. 2021 N.D. Laws S.B. 2048.

**OKLAHOMA** adopts the Uniform Power of Attorney Act. 2021 Okla. Sess. Law Serv. Ch. 332.

**OKLAHOMA** enacts the Oklahoma Decanting Act. 2021 Okla. Sess. Law Serv. Ch. 268.

**OKLAHOMA** passes "Everett's Law" to protect persons with disabilities from discrimination in receiving organ transplants. 2021 Okla. Sess. Law Serv. Ch. 87.

**UTAH** prevents individuals who commit specified felony offenses against a vulnerable adult from receiving virtually any probate or non-property because of the adult's death.

**WASHINGTON** adopts the Uniform Fiduciary Income and Principal Act. 2021 Wash. Legis. Serv. Ch. 140.

**WASHINGTON** enacts the Uniform Electronic Wills Act. 2021 Wash. Legis. Serv. Ch. 140.

**WASHINGTON** passes the Uniform Powers of Appointment Act. 2021 Wash. Legis. Serv. Ch. 140.

**WYOMING** protects persons with disabilities from discrimination in receiving organ transplants. 2021 Wyo. Laws Ch. 35. ■