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Keeping Current - Probate [notes]

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KEEPING CURRENT PROBATE

CASES

DECANTING: Trustees are not entitled to fees and costs of defending decantings held to be improper. Trust beneficiaries sued to void co-trustees' series of decantings of the trust and to remove the co-trustees. The former trustees moved for payment from the trust of fees and costs personally incurred in defending the decantings, and the successor trustees moved for reimbursement by the former trustees of costs the trust already paid. The circuit court denied the former trustees' motion and granted the motion of the successor trustees. The New Hampshire Supreme Court affirmed in *Hodges v. Johnson*, No. 2019-0319, 2020 WL 5648573 (N.H. May 12, 2020), finding that the former trustees should have sought advice from independent counsel rather than relying on the attorney for the settlor, whose wishes were served by the decantings, and that the record supported the finding that they had not acted in good faith.

DISCRETION: A trustee who is also a beneficiary cannot exercise discretion to exclusively benefit oneself. A parent's will created a trust for the benefit of the parent's five children and named one of them as trustee. The trust terms gave the trustee "uncontrolled discretion" to distribute income and principal for the benefit of the beneficiaries. The trustee eventually distributed all of the trust property to the trustee. The other four beneficiaries sued and lost. The trial court held that the trustee had acted within the trust's grant of discretion. The Kansas intermediate appellate court reversed in *Roenne v. Miller,* 475 P.3d 708 (Kan. Ct. App. 2020), holding that the trustee's actions violated the duties of loyalty and impartiality and remanded for a determination of damages.

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.

SELF-SETTLED TRUSTS: A settlor's creditor may reach assets of a self-settled trust after the settlor's death. Presented with a certified question from the United States Court of Appeals for the First Circuit, the Massachusetts Supreme Judicial Court held in *De Prins v. Michaeles,* 154 N.E.3d 921 (Mass. 2020), that the creditor of the settlor of a self-settled irrevocable trust of which the settlor is a beneficiary can reach the assets of the trust after the settlor's death whether or not the trust terms include a spendthrift provision. The court concluded that because Mass. Gen. Laws ch. 203E, § 505(a)(2), allows the creditor of the settlor to reach the assets of a self-settled trust to the extent those assets may be distributed to the settlor but says nothing about whether the creditor may reach those assets after the settlor's death, the common law controls giving the creditor after death access.

SLAYER STATUTE: Slayer's nonprobate property passing to innocent family members cannot be subject of a constructive trust for victim's successors. Gloria Dorris and Russell Dorris had divorced, and both of the ex-spouses had children from prior relationships. Nineteen years after the divorce, Russell murdered Gloria and then took his own life. Russell had non-probate assets that passed to his children. Gloria's estate and her children sought to impose a constructive trust over the non-probate assets on the theory that Russell could have used those assets during his life and that they should be available to satisfy any judgment against Russell's estate. The circuit court dismissed the estate's action. The intermediate Kentucky appellate court affirmed in *Bewley v. Heady,* 610 S.W.3d 352 (Ky. Ct. App. 2020), because Russell's children had not committed any wrong, were not enriched at the expense of Russell's estate, and Russell had not acquired the property as the result of wrongdoing. Gloria's death did not affect the ownership or passing of the non-probate assets.

TRUST LITIGATION: Trustee must remain neutral in litigation over the identity of beneficiaries. After the trust's creation, the settlor removed beneficiaries by amendments. Following the settlor's death, the former beneficiaries filed claims against the trust, alleging that the amendments were invalid. The trustee made payments to the beneficiaries under the last-executed amendment. The beneficiaries then filed a motion to direct the trustee to pay the costs of defending the trust. The former beneficiaries asked the court to freeze distributions. The trial court granted the motion to pay and denied the motion to freeze. The North Carolina intermediate appellate court reversed in *Wing v. Goldman Sachs Tr. Co., N.A.,* 851 S.E.2d 398 (N.C. Ct. App. 2020), holding as a matter of first impression that because the controversy was not over the validity of the trust but the identity of the beneficiaries, the trustee was required to remain

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neutral and could not make distributions to the purported beneficiaries.

UNDUE INFLUENCE: A finding of undue influence partially invalidates will. Litigation over the decedent's will resulted in a finding of undue influence by the spouse and the decedent's child by that spouse, which caused the devise of the decedent's ranch to the spouse. The will further provided that if the spouse did not survive the decedent, the ranch would be devised in equal shares to the child and two children of the decedent's prior marriage. The trial court struck the portions of the will devising the ranch to the spouse and the child, so that the entire ranch passed to the children of the prior marriage. On appeal, the child accepted the finding of undue influence but contended that the ranch should therefore pass in intestacy. The Supreme Court of North Dakota affirmed the trial court's decision in *Matter of Estate of Grenz*, 948 N.W.2d 320 (N.D. 2020). The court held that the doctrine of partial invalidity is part of the common law of the state, that it is not supplanted by the state's version of the Uniform Probate Code because the code is silent on the question, and that the doctrine was properly applied to prevent the spouse and child from benefitting from their wrong.

TAX CASES, RULINGS, AND REGULATIONS

ESTATE TAX: Court orders sale of property to satisfy estate and gift tax liabilities. In *United States v. Widtfeldt*, 824 Fed. Appx. 444 (8th Cir. 2020), the Eighth Circuit upheld the district court's summary judgment that a beneficiary who received a gift from his mother was personally liable at her death for unpaid estate and gift tax in addition to an order to sell the property.

ESTATE TAX: State may tax QTIP created by non-domiciliary for benefit of domiciliary decedent. A Massachusetts domiciliary decedent was the beneficiary of a QTIP trust created by the will of the decedent's spouse who died when both spouses were domiciled in New York. The Massachusetts tax authorities included the value of the QTIP trust in the decedent's gross estate, and the appellate tax board upheld that determination. The estate appealed to the Supreme Judicial Court, which affirmed in *Shaffer v. Comm'r. of Revenue*, 148 N.E.3d 1197 (Mass. 2020). The court held that the Massachusetts statute levying the estate tax in the amount of the old IRC § 2011 state death tax credit imposes the tax by reference to the federal gross estate, which includes the QTIP trust. The court held that due process was satisfied because, under precedent and the statutory framework creating the QTIP regime, a transfer of the property of the QTIP trust occurred at the decedent's death.

PORTABILITY: Estate receives extension of 120 days to make portability election to allow decedent's surviving spouse to take into account decedent's deceased spouse's unused exclusion amount. The decedent's estate did not file and was not required to file an estate tax return. A spouse survived the decedent, however, and there was an unused portion of the decedent's applicable exclusion amount. The portability election for that unused portion must be elected on a timely filed estate tax return. Based on the information, affidavits, and representations submitted by the estate, the Commissioner in PLR 202046006 used its discretionary authority to grant an extension to make a portability election, as it concluded the estate acted reasonably and in good faith.

QUALIFIED SUBCHAPTER S TRUSTS: Corporation is to be treated as continuing as an S corporation even though S corporation status terminated. A corporation owned by five trusts elected to be an S corporation. All five trusts qualified as QSST trusts under IRC § 1361(d)(3), but the income beneficiary of the trusts failed to make the election to treat the trusts as a QSST. The corporation claimed the failure to file the elections was inadvertent and not motivated by tax avoidance. The corporation further claimed that the trusts reported their share of income or loss consistent with treatment as a QSST. Under PLR 202046002, the qualifying trusts were allowed to file a QSST election and have it effective as of the date the corporation's S corporation election terminated.

TRANSFEREE LIABILITY: Both an executor and his estate are liable as a transferee and fiduciary for the estate tax when he made an estate insolvent by distributing assets before paying estate tax. The decedent was the sole beneficiary of his sister's $2.6 million estate, consisting of an annuity, her residence, stocks, and securities. In his capacity as co-executor, he distributed property even though the estate owed estate tax. He used the distributions to run his business, make gifts to his daughter, and buy and develop other property. Before he died, the decedent tried to resolve the estate tax liability and enter into an installment agreement with the IRS. He made payments before his death, and his daughter made several on her father's behalf. The daughter, as executor of the decedent's estate, listed the federal estate tax debt as a liability on the decedent's state estate tax return. The decedent's daughter eventually distributed the estate assets to herself. The court in the *United States v. Estate of Kelley*, 3:17-cv-965-BRM-DEA, 2020 WL 6194040 (Oct. 22, 2020, D. N.J.), held that, as a fiduciary, the decedent had constructive knowledge of the estate tax debt of his sister's estate when he distributed the assets, leaving it insolvent. Similarly, the court held that the transferee's daughter was liable as a fiduciary because she knew of the decedent's transferee tax liability and distributed the assets of his estate to herself, which rendered that estate insolvent.

LITERATURE

COUPLES: In her article, *Twenty-First Century Trusts and Ethics: Estate Planning for Couples*, 53 Creighton L. Rev.

683 (2020), Carla Spivack questions whether the members of a couple may be assumed to be non-adverse in an estate planning context, given the economic inequality between sexes and between primary caregivers and primary wage-earners in today's American family.

DO-IT-YOURSELF WILLS: Are holographic or self-drafted wills a good alternative to an attorney-drafted will? By analyzing 1,133 recently-probated estates from Alameda and San Francisco Counties in California, David Horton concludes in *Do-It-Yourself Wills*, 53 UC Davis L. Rev. 2357 (2020), that (1) it is unclear whether people who create their own wills are less wealthy than those who hire lawyers, (2) there is some evidence that DIY devices are particularly useful for testators who fall gravely ill, and (3) even controlling for the effect of other variables, DIY wills are correlated with a statistically significant increase in the odds of litigation.

ELECTIVE SHARE: Naomi Cahn provides an empirical assessment of the current rationales for the elective share. She suggests revisions to existing elective share approaches that reflect both differing theories of what values marriage should represent and the changing demography of marriage and remarriage in *What's Wrong about the Elective Share "Right"?*, 53 UC Davis L. Rev. 2087 (2020).

ELECTRONIC WILLS: In her Note, *Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent*, 20 Nev. L.J. 339 (2019), Paige Hall explores the shortcomings of the harmless error approach, compares Nevada's new e-will laws to the recently approved Uniform Electronic Wills Act (UEWA), and concludes that, although Nevada should amend some aspects of its legislation to follow the UEWA, certain provisions of the UEWA should similarly mirror Nevada law.

ESTATE PLANNING: In their article, *The Estate Planning Tsunami of 2020*, 47 Est. Plan. 4 (Nov. 2020), Jonathan G. Blattmachr and Carlyn S. McCaffrey describe the principal planning techniques that are currently available, including those that have been the target of proposed reform for more than a decade, the risks individuals may face when they implement these techniques, and ways to reduce these risks.

FIDUCIARIES: In his article, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 Notre Dame J.L. Ethics & Pub. Pol'y 307 (2020), Ben Chen argues that orthodox fiduciary law is too strict on most guardians and agents who manage property for the elderly and proposes a substituted-judgment defense to permit departures from strict fiduciary law that the individual would have authorized if mentally capable.

GEORGIA—UPDATE: Mary F. Radford describes selected cases and significant legislation from the period of June 1, 2018, through May 31, 2019, that pertain to Georgia fiduciary law and estate planning in *Wills, Trusts, Guardianships, and Fiduciary Administration*, 71 Mercer L. Rev. 327 (2019).

IN TERROREM CLAUSES: Evan J. Shaheen identifies some of the broad principles on which many *in terrorem* clauses rely, describes some of the potential problems, and poses potential solutions in *In Terrorem Clauses: Broad, Narrow, or Both?*, 95 Notre Dame L. Rev. 1763 (2020).

INTESTACY: Danaya C. Wright explores what happens to the family home, usually the intestate's most valuable asset, finding that lower-value homes are significantly more likely to be sold below fair market value or lost to foreclosure or tax sale, leaving the heirs less able to leverage their inheritances into building their own wealth in *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 UC Davis L. Rev. 2603 (2020).

INTESTACY: In *How Should Non-Probate Transfers Matter in Intestacy?*, 53 UC Davis L. Rev. 2207 (2020), Mary Louise Fellows and Gary E. Spitko argue that as American family structures have become more heterogeneous, status-based intestacy statutes have become less suited to promoting donative intent. They address issues such as (1) a too-narrow definition of family, (2) a strict application of rules that fails to examine whether a decedent and a statutorily-determined heir had a true familial relationship, and (3) an exclusive focus on family that fails to recognize meaningful but nonfamilial relationships, such as those with caregivers and neighbors.

NEW YORK—LEGAL CITATIONS: Bridget J. Crawford demonstrates through data that the probate court located in the most densely populated county in the United States cites fewer authorities than almost any other court (of any level) for which data is available. In *What Probate Courts Cite: Lessons from the New York County Surrogate's Court 2017-2018*, 53 UC Davis L. Rev. 2125 (2020), she explores the possible reasons for this low rate of citation and suggests that by increasing its engagement with a range of authorities, the court could increase public confidence in the judiciary.

PENNSYLVANIA—INTESTACY: In her article, *"Grandfamilies" Amid the Opioid Crisis: An Increasing Reason to Update Pennsylvania's Outdated Intestacy Laws*, 58 Duq. L. Rev. 202 (2020), Joanne L. Parise discusses the increase in families where grandparents are having to step in and raise their grandchildren and suggests that Pennsylvania update its intestacy laws to better serve its grandfamilies.

POLYAMOROUS ESTATE PLANNING: Carrie A. Harrington contends that we live in a world in which the traditional definition of "relationship" rarely describes what truly exists. In *Polyamorous Relationships and Planning for Multiple Partner Families*, 66 No. 5 Prac. Law. 22 (Oct. 2020), she explains how planning for polyamorous

relationships presents both typical and unique legal, tax, and psychological challenges that warrant special consideration.

POSTMORTEM DEFAMATION: In a novel reform proposal, Reid Kress Weisbord argues that the courts should extend defamation liability to disparaging statements about dead people, contending that modern political discourse has become so detached from the truth and callous about death that it is difficult to envision a moral obligation to protect postmortem reputational interests. In *Postmortem Defamation in a Society Without Truth for the Living*, 71 Rutgers U.L. Rev. 667 (2019), he concludes that to protect decedents against reputational harm, the law must first restore commitments to truth-telling and respect the solemnity of death.

RETIREMENT ASSETS: In his article, *The SECURE Act and Other Recent Developments in Estate Planning for Retirement Assets*, 66 No. 5 Prac. Law. 39 (Oct. 2020), Bob Kirkland recommends that in the current tax law environment, especially with the enactment of the SECURE Act, planners should spend a much larger amount of planning time addressing clients' retirement benefits.

TESTAMENTARY FREEDOM: Alexis A. Golling-Sledge presents a critique of the concept of permitted disinheritance of children in the name of testamentary freedom in *Testamentary Freedom vs. the Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices*, 12 Wash. U. Juris. Rev. 143 (2019). She argues that through forced heirship, as recognized in other modern nations, the United States can respect the natural right of children to inherit and leave room for testamentary freedom.

WIDOWHOOD EFFECT: Alysa A. DiRusso argues that both the default rules of simultaneous death and related legal doctrines ought to take into account well-established multidisciplinary research on both the causes and the timing of deaths of spouses in her article, *Using Empirical Data on the Widowhood Effect to Optimize Simultaneous Death Law and Drafting*, 53 UC Davis L. Rev. 2173 (2020).

LEGISLATION

CALIFORNIA allows a decedent's legal guardian to bring a civil action for wrongful death if the decedent's parents could bring such an action but are now deceased. 2020 Cal. Legis. Serv. Ch. 51.

VERMONT enacts Older Vermonters Act to provide additional legal protections for individuals 60 years old or older. 2020 Vt. Laws No. 156. ■