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Keeping Current - Probate [notes]

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KEEPING CURRENT PROBATE

CASES

AMBIGUITY: Purported devise of property not owned by the testator creates latent ambiguity. Spouse conveyed a joint one-half interest in farm property to the other spouse and their child, Andy. After the spouses divorced, one spouse conveyed the one-half interest in the farm that the spouse had retained to a revocable trust. The beneficiaries of the revocable trust were the spouse's children, but the ex-spouse was not a beneficiary. The spouse died and then the ex-spouse died with a will that purported to give "my one-fourth share" of what is described as the spouse's "irrevocable trust" to Andy for life, then to another child for life. Andy began a construction action, and the trial court found that ex-spouse intended to give her interest in the spouse's revocable trust to Andy for life. On appeal, the Georgia intermediate appellate court in *Luke v. Luke*, 846 S.E.2d 216 (Ga. Ct. App. 2020), reversed, holding that the devise to Andy created a latent ambiguity because ex-spouse had no interest in the trust (the court agreed with the trial court that the reference to the non-existent irrevocable trust was a scrivener's error in referring to the revocable trust) and remanded for the consideration of parol evidence of the testator's intent.

PAY ON DEATH ACCOUNT: POD account subject to paying debt under loan agreement. The decedent had pledged a POD account as collateral for a loan. Under the terms of the loan agreement, the beneficiary and the decedent's personal representative had no right to any of the funds in the account until the debt was "paid in full." After the decedent's death, the decedent's spouse was appointed as the personal representative and paid off the loan with the funds in the POD account. The POD beneficiary sued, and the trial court found that the personal representative acted reasonably because the estate did not have the funds to pay off the loan nor did she breach any fiduciary duty to the beneficiary. On appeal, the Colorado intermediate appellate court in *In re Estate of Treviño*, 474 P.3d 223 (Colo. App. 2020), reversed. The court held that the personal representative's authority over the account extended only to the amount necessary to pay off the loan after applying the estate's liquid assets to pay off the debt. When the entire debt was paid from the account, the personal representative violated the duties to exercise powers in a neutral manner and the best interests of all beneficiaries and interested persons. The court remanded for a decision on whether the personal representative should be surcharged in the amount of the estate's liquid assets.

PREMARITAL WILL: Nonprobate property arrangements do not prevent the operation of premarital will statute. In 2001, the decedent executed a will leaving all of the decedent's estate to Watkins, whom the decedent later married and survived. Under the will, the estate was given to the decedent's siblings if Watkins did not survive. At death, the decedent was married to Dailey, who survived. The decedent had no issue. After their marriage, the decedent made Dailey the beneficiary of the decedent's pension and IRA and a joint holder of the decedent's checking account. All three assets passed to Dailey at the decedent's death. The decedent's siblings offered the 2001 will for probate, and Dailey objected, asserting that under West Virginia's premarital will statute, W. Va. Code § 42-3-7 (identical to UPC § 2-301), she was entitled to 100 percent of the estate as her intestate share. After a hearing, the county commission admitted the will to probate. On appeal by Dailey, the circuit court found that the statute applied and reversed. The siblings appealed to the Supreme Court of Appeals which affirmed in *Yost v. Yost*, No. 19-0605, 2020 WL 5269835 (W.Va. Sept. 4, 2020). The court held that Dailey's unrebutted testimony that the decedent intended Dailey to have all of the decedent's property, including the marital home, meant that the nonprobate transfers were not intended to be in lieu of testamentary provisions for the surviving spouse.

PRO SE: Personal representative may proceed pro se when there are no other beneficiaries. In *Wilbur v. Tunnell*, 151 N.E.3d 908 (Mass. App. Ct. 2020), the Massachusetts intermediate appellate court held that the personal representative of an estate who is not an attorney, but who is the sole beneficiary, may represent the estate pro se so long as there are no creditors other than those involved in the litigation. In this situation, the litigation is the personal representative's own suit and its resolution will not affect anyone who is not a party.

REVOCATION: Relationship by affinity does not necessarily end on divorce. Arizona's revocation on divorce statute, Ariz. Rev. Stat. § 14-2508 (identical to UPC § 2-804), revokes all provisions for an ex-spouse and the ex-spouse's relatives, including a nomination as fiduciary, in a wide variety of instruments and nonprobate arrangements created by a divorced person, including a will and a revocable trust. A "relative" of the ex-spouse is defined as a person related to the ex-spouse "by blood, adoption, or

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affinity" and who after the dissolution of marriage is not related to the divorced person "by blood, adoption, or affinity." In *Matter of Estate of Podgorski*, 471 P.3d 693 (Ariz. Ct. App.), the Arizona intermediate appellate court held that a relationship of "affinity" between the relatives of the ex-spouse and the divorced person is established by the nature of the personal relationship between the relatives and the divorced person. Therefore, a relationship of affinity does not necessarily end when the marriage ends.

SPOUSAL RIGHTS: Change of IRA beneficiary is a fraud of a spouse's rights. Missouri law gives a surviving spouse a right of election against the will of the deceased spouse. Mo. Rev. Stat. § 474.160. The law includes in the property to which the elective share applies any gift made by the deceased spouse "in fraud of the marital rights" of the surviving spouse. In *Carmack v. Carmack*, 603 S.W.3d 900 (Mo. Ct. App. 2020), the intermediate Missouri appeals court affirmed the trial court's judgment that the deceased spouse's replacement of the surviving spouse as beneficiary of the decedent's IRA with the decedent's siblings was a fraud of the surviving spouse's marital rights. The court held that the statute applies to the beneficiary designation because it is concerned only with intent and purpose to deprive the spouse of an interest in property. In the absence of a beneficiary designation in the property, the IRA would have been part of the decedent's estate in which the surviving spouse has an interest. The court also held that both direct and circumstantial evidence established the decedent's intent: the decedent's statements that the change in beneficiaries was made to qualify the surviving spouse for Medicaid, the lack of consideration for the transfer, the control the decedent retained, the large size of the transfer compared to the total estate, and the lack of disclosure to the surviving spouse.

TRUST JURISDICTION: Personal jurisdiction over non-resident trustees held to be proper. In 2005, two settlors in California created a revocable trust in which they were trustees. The settlors were residents of California, the trust terms made California law the governing law of the trust, and the trust property consisted principally of California real estate. In 2016, one settlor-trustee died, and the surviving settlor-trustee moved to Idaho. The surviving settlor-trustee then began a program of selling the trust property and reinvesting the proceeds in Idaho real estate and deposit accounts in Idaho and registered the trust in Idaho. Also, the surviving settlor amended the trust to remove one of the settlors' children as beneficiary. That child sued in California, seeking an accounting and removal of the trustees (the surviving settlor and two other children). The trial court granted the trustees' motion to dismiss for lack of personal jurisdiction, and on appeal, the California intermediate appellate court reversed in *Buskirk v. Buskirk*, 267 Cal.Rptr.3d 655 (Ct. App. 2020). The court held that the requirements for "case-linked jurisdiction" were met: the defendants availed themselves of the jurisdiction by creating the trust in California and by engaging in land transactions there, the matter involved real estate transactions in California, and the defendants were not able to show that an exercise of jurisdiction would be unreasonable, especially because the settlor-trustee brought four lawsuits in California since moving to Idaho.

TRUSTS: Power of appointment effective on the execution of will and no-contest clause in trust held to be valid. In *Ferguson v. Ferguson*, 473 P.3d 363 (Idaho 2020), the Supreme Court of Idaho ruled on two novel questions raised by a mother's exercise of a testamentary power of appointment, making her child a beneficiary of the trust that granted her the power of appointment. First, the court agreed with the district court that the child became a beneficiary of the trust when his mother executed the will that exercised the power of appointment. Second, the court held as a matter of first impression that a no-contest clause in a trust is enforceable subject to various common law limitations. One limitation forbids enforcement that interferes with the proper administration of the trust such as in this case when it would prevent the beneficiary from obtaining records to which a beneficiary is entitled under Idaho Code § 15-7-303(b).

TAX CASES, RULINGS, AND REGULATIONS

IRS SUMMONS: Trustee required to respond to IRS summons. As part of an investigation regarding the use of offshore bank accounts to conceal taxable income, the IRS issued two summons—one against the taxpayer in his personal capacity and one in his capacity as trustee. The taxpayer controlled several trusts, including one with a foreign financial account. The taxpayer objected to the summons in both capacities, claiming a Fifth Amendment privilege. In a case of first impression, the Second Circuit in *United States v. Fridman*, 974 F.3d 163 (2d Cir. 2020), held that the collective entity doctrine applied and a traditional domestic trust could not use the Fifth Amendment to avoid responding to a document request. The court also ordered that the taxpayer individually produce the documents, concluding that the foregone conclusion doctrine applied. The court noted that the government established with reasonable particularity its knowledge of the existence of the documents, the taxpayer's possession or control, and the authenticity of the documents. The government provided evidence of the account holders, account numbers, and location by country of accounts, and it sought customary documents such as statements.

LITERATURE

ADVANCE DIRECTIVES: In their book, *Getting Started with Advance Directives*, Michael A. Kirtland and Donna Jackson consider issues and problems with advance directives, COVID-19, religious-based directives, aid in dying, and POLST programs and provide a survey of advance directives law for all 50 states and the District of Columbia.

BENEFICIARY DEFECTIVE INHERITOR'S TRUSTS: In their article, *BDIT 2701: Avoiding Section 2701 by Selling Carried Interest Directly to Beneficiary Defective Inheritor's Trust*, 47 Est. Plan. 04 (2020), Joe Higgins and Angelo F. Tiesi offer a new solution to accomplish the objective of transferring a private equity fund principal's carried interest to a beneficiary

defective inheritor's trust without having to transfer a vertical slice.

CHARITABLE GIFTS: In *American Charitable Bequest Transfers Across the Centuries: Empirical Findings and Implications for Policy and Practice*, 12 Est. Plan. & Comm. Prop. L.J. 235 (2020), Russell N. James III "comprehensively reviews and summarizes results from past empirical analyses of charitable estate transfers using U.S. tax and probate records" and explains their implications for practice.

CHOICE OF LAW: Mary LaFrance argues that determining the best choice of law principle for right of publicity claims, and persuading courts to adopt this principle, will enhance predictability for potential plaintiffs and defendants in the foreseeable future in *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 Cardozo Arts & Ent. L.J. 1 (2019).

COMMON-LAW MARRIAGE: Avery Rios discusses community property and common law systems and how the tremendous increase of unmarried millennial couples cohabitating has brought an increase of issues when these couples seek recovery in property interests through the judicial system, in her Comment, *Divorce Destroys the Community: An Examination of the "Texas Method" Community Property Principles Upon Divorce and its Effects on Informal Marriage*, 12 Est. Plan. & Comm. Prop. L.J. 437 (2020).

CROSS-BORDER INHERITANCE: Eva Saulnier's Note, *Disinheriting Your Children: A "Non" "Non" in France; an Accepted Use of a Testamentary Freedom in America*, 52 Case W. Res. J. Int'l L. 669 (2020), examines cross-border inheritance through the lens of a current multinational inheritance battle. Ms. Saulnier proposes a different approach where a set of model laws would be agreed upon for cases that would qualify under the Multinational Family definition. Such a solution would further a more equal and fair system.

CRYPTOCURRENCY TAXATION: A discussion of the IRS's latest attempt to clarify the tax treatment of cryptocurrencies is led by Roger W. Dorsey, Kyleen Prewett, and Gaurav Kumar in *IRS Issues New Guidance on Tax Treatment of Cryptocurrencies*, 47 Est. Plan. 27 (2020).

ELDER FINANCIAL ABUSE: 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. Mr. Chen proposes a substituted-judgment defense to permit those departures from strict fiduciary law that the incapable individual would have authorized if he were mentally capable.

ELDER FINANCIAL EXPLOITATION: Jesse R. Morton and Scott Rosenbaum illustrate how financial institutions fail to uphold the legal obligations imposed on the industry in their article, *An Analysis of Elder Financial Exploitation: Financial Institutions Shirking Their Legal Obligations to Prevent, Detect, and Report This "Hidden" Crime*, 27 Elder L.J. 261 (2019). They also provide recommendations on how to better prevent, detect, and report elder financial exploitation.

ELDER PHYSICAL ABUSE: In her Comment, *Florida Needs to Protect Grandma & Grandpa*, 32 St. Thomas L. Rev. 31 (2019), Jessica A. Alvarez argues that Florida should amend its law to allow nursing home residents and their family member to conduct electronic monitoring. Ms. Alvarez writes that doing so would ensure that the elderly population living in these nursing homes are protected and their loved ones can keep an eye on them from afar.

ELECTRONIC WILLS: In his article, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. Rev. 827 (2020), Adam J. Hirsch addresses the law and public policy of electronic wills and proposes a new approach: to bar electronic wills in general but to permit them for estate plans made under emergency conditions.

FAMILY OFFICE EXPENSES: Robert Daily explains that "[i]mplementing a family office structure may create adverse income tax and gift tax consequences that may negate any income tax benefit from deducting investment expenses of the family office" in *Deducting Family Office Investment Expenses After* Lender, 45 ACTEC L.J. 179 (2020).

FUNERAL PLANNING: An inconsistent patchwork of state statutes has complicated and frustrated the fundamental common law right to choose your burial place or to be cremated. In her article, *You Can't Always Get What You Want: Inconsistent State Statutes Frustrate Decedent Control Over Funeral Planning*, 55 Real Prop. Tr. & Est. L.J. 147 (2020), Tanya D. Marsh examines these problems and provides a comprehensive appendix listing and summarizing each state's "personal preference" and "designated agent" laws as an aid to practitioners.

FUNERAL PLANNING FRAUD: In his Note, *Giving up the Ghost: How the Funeral Rule and State Licensing Boards Are Failing to Protect Consumers from Underhanded Undertakers*, 27 Elder L.J. 423 (2019), Adam Gottschalk details why and how funeral providers continue to use unfair and deceptive practices despite strong protective language in federal and state law and recommends solutions to solve this dire problem.

GIFTS IN CONTEMPLATION OF DEATH: Stephanie J. Willbanks "proposes that Congress repeal the three-year inclusion rule for gifts of retained interests and further integrate the estate and gift taxes by making the gift tax tax-inclusive" in *Gifts in Contemplation of Death: Why Can't Section 2035 Simply Die?*, 45 ACTEC L.J. 143 (2020).

GROUNDWATER RIGHTS: In his Comment, *Preserving Groundwater Rights for Your Beneficiaries in the Face of the Texas Water Crisis with the Private Water Trust*, 12 Est. Plan. & Comm. Prop. L.J. 309 (2020), Cal Dunagan "outlines a brief history of water trusts in the United States and [provides] guidance for estate planners interested in creating private groundwater trusts for their clients."

ILLINOIS—COVID-19: Richard Hirschtritt explores "the unique post-death tax

planning opportunities for the estates of Illinois taxpayers who have died within six months before the onset of the COVID-19 outbreak" in *COVID-19, Death, and Taxes*, Ill. B.J., Sept. 2020, at 34.

IMPACTFUL GIVING: In *The First Rule of Impactful Giving: Give the Right Asset*, 47 Est. Plan. 34 (2020), Ryan Boland argues that donors may often realize a sizable increase in the amount that they can give, and therefore the impact they have, by simply donating the best asset at the right time.

INHERITANCE FORGERY: Reid Kress Weisbord and David Horton offer a fresh look at inheritance-related forgery using reported cases, empirical research, grand jury investigations, and media stories. They reveal that courts routinely adjudicate credible claims that wills, deeds, and life insurance beneficiary designations are illegitimate. Their article, *Inheritance Forgery*, 69 Duke L.J. 855 (2020), outlines reforms needed to modernize succession while remaining sensitive to the risks of forgery.

LIFE INSURANCE: In *Why Billionaires Acquire Life Insurance*, 47 Est. Plan. 15 (2020), Richard L. Hartmann explains the reasons why billionaires acquire life insurance. The article finds billionaires will use the insurance plans to both offensively preserve their wealth multigenerationally and defensively to protect the assets they want to preserve long term in bad economic times.

NON-MARITAL COUPLES: In *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79 (2020), Raymond C. O'Brien discusses how intimate nonmarital cohabitants should be treated by taking into consideration "the ascendency of privacy, liberty, and self-determination."

PERPETUAL TRUSTS: Robert H. Freilich, in *Eliminating Perpetual Trusts Is a Critical Step towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. Rev. 65 (2019), argues that the growing problem of inequality of income and disparity of wealth in America has been exacerbated in substantial part by the federal government's incentivizing a new form of "perpetual trust." The trusts will, through "dead hand control," extend enormous wealth to unknown generations and accumulate income and capital without distribution to the economy for as long as 1,000 years or even for perpetuity.

PERSONA RIGHTS: In his Comment, *Bringing the Dead Back to Life: Preparing the Estate for a Post-Mortem Acting Role*, 12 Est. Plan. & Comm. Prop. L.J. 349 (2020), Ben Laney reviews the legal history of persona rights, explains the science and ethics of bringing dead actors back to life, and then provides "the reader with direction as to how an individual might prepare or prevent their likeness from one day returning to the silver screen."

PRISONERS: Zayne Saadi advocates for providing a framework for prisoners to have access to estate planning services in her Comment, *Born Sinners Versus Born Winners: The Need for Estate Planning Inside Texas Prisons*, 12 Est. Plan. & Comm. Prop. L.J. 471 (2020).

RETIREMENT: David A. Pratt reviews the US private retirement system, evaluates the extent to which it is successful, and makes recommendations for reform concerning access to coverage, level of contributions, investment returns and fees, insufficient accumulations, portability, leakage, drawdown of benefits, and employer involvement in *Too Big to Fail? The U.S. Retirement System in 2019*, 27 Elder L.J. 327 (2019).

REVOCABLE TRUSTS: Richard C. Ausness provides a discussion of the rights of remainder beneficiaries to a revocable trust both before and after the settlor's death in *A "Mere Expectancy"? What Rights Do Beneficiaries of a Revocable Trust Have Prior to the Death of the Settlor?*, 32 Quinnipiac Prob. L.J. 376 (2019).

STANDBY GUARDIANSHIP: Joshua S. Rubenstein provides a detailed analysis of existing legislation authorizing standby guardianships in *Standby Guardianship Legislation Summer 2019*, 12 Est. Plan. & Comm. Prop. L.J. 287 (2020).

TRUST BENEFITS: In his article, *Trusts in Wealth Preservation—Not Only for the Super Rich*, 47 Est. Plan. 8 (2020), Louis A. Silverman discusses the use of trusts for clients with young children, children with financial issues, children who have divorce history, and dysfunctional family members.

TRUSTEES: In *Inside the Mind of a Trustee: The Importance of Understanding a Trustee's Perspective*, 12 Est. Plan. & Comm. Prop. L.J. 185 (2020), Katherine C. Akinc explains that understanding the role of a trustee will allow attorneys to better advise clients and prepare trusts.

WILLS: In her article *Wills Speak*, 85 Brook. L. Rev. 647, Katheleen Guzman explains that a will not only is effective at the time of death as a conveyance but also speaks while the testator is alive. This may give rise to beneficiaries having "standing to challenge some conduct, or reject the rejection of revival, or sue to protect an expectancy."

LEGISLATION

DELAWARE updates the provisions governing statutory trusts. 2020 Del. Laws Ch. 264.

HAWAII enhances the law determining when abuse of a corpse occurs. 2020 Haw. Laws Act 43.

NEBRASKA adopts the Uniform Trust Decanting Act. 2020 Neb. Laws L.B. 808.

NEBRASKA enacts the Uniform Wills Recognition Act. Neb. Laws L.B. 966.

NEBRASKA passes the Advance Mental Health Care Directives Act. Neb. Laws L.B. 247.

UTAH is the first state to enact Uniform Electronic Wills Act including the language authorizing remote witnessing. 2020 Utah Laws 6th Sp. Sess. Ch. 1.

VERMONT enacts the Enhanced Life Estate Deed Act. 2020 Vt. Laws No. 145. ■