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ESTATE AND TRUST LITIGATION DIGEST

Summary of 2009 New Jersey
Estate and Trust Litigation
Published and Unpublished Opinions and Selected Statutory Changes

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TABLE OF CONTENTS

Cases:

Accountings

In re Estate of Joseph Wisnewski, Sr., deceased, 2009 N.J. Super. Unpub. LEXIS 1334 (Docket No.: A-3074) (App. Div. 2009). Before Judges Fisher, C.L. Miniman and Baxter.

Issue: Was it proper for the lower Court to deny the plaintiff's motion for reconsideration seeking to reinstate a surety bond issued to the Executor?

Holding: Yes. The accounting was approved more than 16 years ago and plaintiff failed to provide a meritorious basis to reopen the probate litigation. Plaintiff was afforded the opportunity to present her claims at a plenary hearing several years ago which she did not attend, and the Court perceived no need to address her claims that could have been addressed more than a decade ago.

Annuities – Assets Passing by Operation of Law

Lincoln Benefit Life Company v. Linda Occhipinti, et al., 2009 N.J. Super. Unpub. LEXIS 535 (Docket No. A-2973-07T2) (App. Div. 2009). Before Judges Reisner and Sapp-Peterson.

Issue: Does a provision in Decedent's Will expressly disinheriting a child control the disposition of an annuity contract which by its terms is distributable to the "Decedent's surviving children"?

Holding: No. The terms of the annuity contract control, and the proceeds are distributable to each of the Decedent's surviving children, including the one child specifically disinherited under Decedent's Will. The annuity contract specifically provided that in the absence of a designated beneficiary, the annuitant's remainder passed to the Decedent's surviving children. The document falls outside of the Will and is a separate contract which controls the disposition of the annuity. The lower Court found that the contract was clear and unambiguous, and is therefore enforceable.

Beneficiary Liability – Environmental Clean-up

Pries v. Hugin, et al., 2009 N.J. Super. Unpub. LEXIS 2967 (Docket No.: A-4559-07T3) (App. Div. 2009). Before Judges R. B. Coleman and Simonelli.

Issue: Are the heirs of an estate liable to plaintiff as owners of the property from which raw sewage flowed onto the plaintiff's property?

Holding: No. The property in question is still owned by the Estate and therefore, the beneficiaries of the Estate owed no duty to the adjoining landowner for a broken sewer line causing plaintiff damage. The motion for summary judgment granted by the trial Court was therefore affirmed.

While the beneficiaries of an estate became the owners of the property at Decedent's death pursuant to the terms of the Will, title remain vested in the Estate until a Deed transfer is made. The Executrix has the right pursuant to statute to possess and control the property, not the beneficiaries. The duty to plaintiff, if any, is owed by the Executrix of the Estate, who manages and controls the property in question pursuant to N.J.S.A. 3B:10-29, not the beneficiaries.

Business Succession Planning - Buy-out of Decedent's Interest

Reutter v. Michael E. Dalsey, D.O., Reutter-Dalsey Associates, P.A., et al., 2009 N.J. Super. Unpub. LEXIS 1577 (Docket No. A-2610-07T3) (App. Div. 2009). Before Judges Winkelstein, Fuentes and Gilroy.

Issue: Was the trial Court's grant of summary judgment proper in light of it's refusal to allow extrinsic evidence to construe the terms of the Shareholder's Agreement entered into by the Decedent governing the buy-out of his interest in a medical practice?

Holding: No. The trial Court erred by not allowing the parties to introduce extrinsic evidence as to their intentions when entering into the Shareholder's Agreement pertaining to the utilization of life insurance to fund the buy-out of Decedent's interest in the medical practice.

The trial Court refused to allow the plaintiff to introduce testimony of the attorney who drafted the Shareholders' Agreement and Deferred Compensation Agreement and the contemporaneous letter written by the attorney which emphasized the purpose behind the agreements. On appeal, the Court found that Defendant should be given sufficient opportunity to present relevant extrinsic evidence to assist the trier of fact in determining what the parties intended when they signed the agreements in question governing the buy-out of Decedent's shares in the medical practice.

Business Succession Planning - Life Insurance – Buy-Out

Banco Popular North America v. Pepe Sneakers, et al., 2009 N.J. Super. Unpub. LEXIS 2028 (Docket No. A-1717-07T1) (App. Div. 2009). Before Judges Fuentes, Gilroy and Chambers.

Issue: Is the Court's grant of summary judgment and denial of a constructive trust over a life insurance policy intended to fund the buy-out of the shares of Decedent's partner proper in light of the extrinsic evidence presented to the Court?

Holding: No. Two brothers, who were shareholders of a sneaker company, purchased individual life insurance policies on their own lives pursuant to the terms of a Shareholder Agreement entered into between them. The life insurance was required to be used as a buy-out of a deceased brother's share in the company. Instead of complying with the shareholders' agreement, each brother named their spouse as beneficiary and did not deposit the life insurance with the trustee, as provided for by the agreement. One brother died, and his life insurance was paid to his wife as designated beneficiary. The surviving brother stopped making payments

under a loan with Banco Popular. Suit was filed by Banco Popular seeking to recover the amount due on the promissory notes signed by the brothers. A cross-claim was filed by the surviving brother against the deceased brother's estate seeking to recover the proceeds of the life insurance policy. Motion for summary judgment requesting a constructive trust over the proceeds of the life insurance was denied as the lower Court found that the terms of the Shareholder's Agreement governing the life insurance was abandoned. The Appellate Court reversed and remanded the matter for further proceedings as the trial Court failed to properly consider the intentions of the parties as to the abandonment of the agreement between them.

Business Succession Planning - Transfer of Decedent's Interest in LLC - Operating Agreements

Brick Professional, LLC, et al. v. Anthony Napoleon, Jr., 2009 N.J. Super. Unpub. LEXIS 3194 (Docket No.: A-1283-08T3) (App. Div. 2009). Before Judges Axelrad and Winkelstein.

Issue: Are the notice, election and valuation procedures set forth in an LLC's Operating Agreement unenforceable as contrary to the LLC statute?

Holding: No; the terms of the Operating Agreement control the admission into the LLC upon the death of a member.

The terms of the Operating Agreement provided that upon the death of a member, his interest must first be offered to a named designee for a period of 30 days. If the designee does not act, the remaining members are compelled to buy out the deceased member's interest in the company.

The trial Court found that the election procedure set forth in the Operating Agreement violated the statute, and instead, what was intended under the agreement was to affect assignee status on the member's designee. The trial Court held that upon the death of the member, the member's designee became an "assignee" under the statute entitled to allocations and distributions in the company. The trial Court therefore rejected plaintiff's contention that the member's interest should be bought out at date of death.

On appeal, the Court held that members of an LLC can adopt election procedures that differ from the statutory scheme. The LLC statute governs only in the absence of an operating agreement. As a general matter, the terms of an operating agreement for which the members expressly bargained will be upheld. The matter was therefore remanded for a determination as to whether an election was made and if not, as to the appropriate valuation procedure to be engaged pursuant to the terms of the Operating Agreement.

Business Succession Planning - Valuation

W.R. Huff Asset Management Co., LLC, et al. v. The William Soroka 1989 Trust, et al., 2009 U.S. Dist. LEXIS 17940 (2009). Before Judge Hayden.

Issue: Is the interest of a member in a limited liability company terminated when, as part of his estate planning, he makes an invalid attempt to transfer his interest in the company to a trust containing a non-member beneficiary without first offering his interest to the rest of the membership, in violation of the Operating Agreement?

Holding: No. The attempted transfer was not effectuated and was therefore not in violation of the Operating Agreement.

Declaratory judgment was sought seeking to declare the attempted transfer by a member to his revocable trust as a violation of the Operating Agreement. A counterclaim sought payments through the end of the company's existence, which expired after 10 years.

The Operating Agreement, governed by Delaware law, gave the company a right of first refusal on the sale or transfer of shares before they could be offered to a third party. A trust was created by one of the members and a letter sent to the manager to transfer the member's interest to the trust. Pursuant to the terms of the Operating Agreement, this attempted transfer was void as it did not meet the requirements of the Operating Agreement. The Operating Agreement also did not give the company automatic redemption rights upon an attempted, but invalid transfer, it merely gave the company the right to override an attempted transfer to a non-member by purchasing for itself the interest to be transferred.

The Court therefore found that based on the terms of the Operating Agreement, and past practices, that the Decedent's estate is entitled to continue in the member's shoes and receive ongoing distributions until the end of the company's existence.

Disinterment

Marino v. Marino, 200 N.J. 315 (2009). Before the New Jersey Supreme Court.

Issue: Do the statutory provisions that authorize a surviving spouse with the authority to designate a place of interment, absent a contrary written declaration, also give the spouse the exclusive right to demand disinterment notwithstanding statutory language to the contrary?

Holding: No. There are clear differences between the provisions of the Cemetery Act (N.J.S.A. 45:27-1, et seq.) governing interment and disinterment. Under the statute, there is a strong preference against disinterment. Unlike the statutory provisions governing interment where the surviving spouse is given exclusive authority over where to bury Decedent's remains, the surviving spouse is not given the right to disinter alone, as it must be authorized by the spouse, adult children and the owner of the cemetery.

This matter involved a dispute between Decedent's surviving spouse and his adult children as to where the Decedent should be buried. Decedent did not place any preference in writing in his Will or otherwise. Upon Decedent's death, Decedent was buried by his adult children, and the surviving spouse was strong armed into acquiescing. She then brought suit seeking to disinter Decedent's body to a new burial site, where she claimed he wanted to be buried. After a hearing, the trial Court found that Decedent had a preference to be buried next to his father's remains, and not at the site advanced by his surviving spouse. In its decision, the trial Court upheld Decedent's wishes as it perceived them from the testimony presented at the hearing..

Under the Cemetery act, a Decedent's written expression of intent controls. In default, the right to control funeral and disposition of the remains shall be in the following order: (1) the surviving spouse, then (2) the majority of surviving adult children. Under the Cemetery Act, orally expressed wishes of the Decedent are no longer binding and the surviving spouse may select the burial site. The trial Court found that the children violated the statute as the surviving spouse was given preference.

On appeal to the Appellate Division, it was argued that the Decedent's orally expressed wishes as to the burial site should control. The Court found that the trial Court should not have considered the hearsay testimony as to Decedent's intentions as the statute controlled. The Appellate Division found that the statutory provisions governing interment and disinterment should be read *in para materia* (together), and the preferences of the surviving spouse should be given the greatest consideration.

The matter was appealed to the Supreme Court, which found that the statutory provisions governing interment and disinterment have a different regulatory scheme and cannot be read together. Although the surviving spouse is given the right to choose where her husband is interred, she did not have the exclusive right to disinter. The Court refused to move the body as the statute required the adult children to also authorize the disinterment. The Court also noted that the language of the disinterment statute expresses a preference against disinterment and the surviving spouse's wishes are not paramount, as they must be considered in light of the wishes of the Decedent and his adult children.

Divorce - Constructive Trust

Estate of Bernard Ritterman v. Cecile Ritterman, 2009 N.J. Super. Unpub. LEXIS 829 (Docket No.: A-3720-07T3) (App. Div. 2009). Before Judges Axelrad and Messano.

Issue: Should a constructive trust be imposed over monies received by Decedent's wife after Decedent's death in a sale of their marital home in light of the divorce proceedings between the parties which were ongoing at Decedent's death?

Holding: No. A divorce decree had yet to be entered and although negotiations were ongoing, the lower Court failed to find extraordinary circumstances to formalize the divorce between the parties. While negotiating a settlement, the wife signed a Deed in favor of her husband to the marital residence. The record is clear that there was no firm agreement respecting equitable

distribution of the marital home prior to husband's death. In fact, the Deed was held in escrow pending resolution of the final issues. The wife never received the buy-out of her share and the terms of a consent order were still being negotiated when the husband died. On behalf of his estate, the husband's two adult children sought ratification of the divorce, which was denied.

Entire Controversy Doctrine – Contested Administration

The Estate of Elyree Smiley and George Gibson v. Brenda McElnea, Esq., 2009 N.J. Super. Unpub. LEXIS 2729 (App. Div. 2009). Before Judges J.N. Harris and Newman.

Issue: Does the Entire Controversy Doctrine apply to bar a subsequent suit filed against a temporary administrator of the estate appointed during the pendency of a Will contest based on claims already adjudicated by the probate Court?

Holding: Yes. Plaintiff's suit questioning Defendant's handling of the administration of the Estate was properly dismissed through application of the Entire Controversy Doctrine. This was Plaintiff's fourth suit against the temporary administrator dealing with the same issues and was therefore properly dismissed.

Plaintiff claimed he was unable to litigate all issues in front of the probate Court in the prior proceedings, but he failed to file an appeal.

The Entire Controversy Doctrine requires litigants in a civil action to raise all affirmative claims arising from a single controversy that each party might have against another party, including counterclaims and cross-claims. The central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions. Although it is designed to promote efficiency, it cannot be used as an inequitable sword against a litigant.

All of the claims raised by Plaintiff in his new suit were well within the factual matrix that was litigated to conclusion in the prior suit. In addition, Plaintiff's pro se status does not allow for him to avoid the rules promulgated by the Supreme Court to guarantee an orderly process.

Estate Planning - Beneficiary Designation - Divorce

Hadfield v. Prudential Ins. Co., 408 N.J. Super. 48 (App. Div. 2009), *certif. denied*, -- N.J. – (N.J. Oct. 1, 2009). Before Judges Wefing, Parker and Lewinn.

Issue: Is a life insurance beneficiary designation naming Decedent's ex-wife as beneficiary voided pursuant to N.J.S.A. 3B:3-14?

Holding: Yes.

The parents of a Decedent filed suit seeking to void the beneficiary designation of Decedent's life insurance policy naming his ex-wife as beneficiary.

The provisions of N.J.S.A. 3B:3-14, although changed after Decedent's initial designation of his ex-wife as beneficiary, controlled the disposition of his life insurance policy. Under the statute, a divorce or annulment revokes any revocable dispositions made by a divorced individual to his former spouse in a "governing instrument", which includes a life insurance policy.

Affirming the trial Court, the Appellate Division held that the proceeds of the life insurance should pass as if the ex-wife predeceased the Decedent.

Estate Planning - Beneficiary Designation – ERISA

The Prudential Insurance Company of America v. Giacobbe, 2009 U.S. Dist. LEXIS 101202; 48 Employee Benefits Cas. (BNA) 2016 (U.S. Dist. Ct. 2009). Before Judge Thompson.

Issue: Is Decedent's wife the proper beneficiary of Decedent's group term life insurance policy as named beneficiary even though the Decedent submitted a change of beneficiary forms naming his parents and brother as beneficiaries to his employer, Prudential Insurance Company of America, who failed to process the change prior to Decedent's death due to missing information on the form?

Holding: Yes, Decedent's wife is the proper beneficiary. The change form submitted by Decedent was properly rejected, and the Court did not find that Decedent substantially complied with the requirements set out by Prudential to effectuate the change in beneficiary.

On March 6, 2007, Decedent submitted forms to change the beneficiary of his life insurance policy from his wife to his parents and brother. On March 21, 2007, the beneficiary change form was sent back by Prudential unprocessed as the form lacked the requisite social security numbers. Decedent died on March 22, 2007 without having responded to Prudential's letter.

Decedent's wife claimed that the change in beneficiary was governed by ERISA and required her consent to make a change. This was rejected as the plan was a welfare benefit plan which did not require consent, as opposed to a pension benefit plan, which does. A pension benefit plan provides retirement income whereas a welfare benefit plan provides benefits after the occurrence of a specific contingency.

The change form failed to meet Prudential's requirements for making such a change. Failure to administer the plan in accordance with the beneficiary rules established by Prudential would be a violation of ERISA. Defendants claimed that Decedent substantially complied with Prudential's requirements and the change should be enforced. If the insured substantially complied with the process required for a change of beneficiary (made every reasonable effort to effect the change in beneficiary), it may be enforced under New Jersey law. This is narrowly construed.

The Court held that Decedent failed to make every reasonable effort to comply with the change in beneficiary designation and his actions are therefore not sufficient to establish substantial compliance. He completed the forms himself and was in contact with the Defendants. He could have asked them for their social security numbers and placed them on the form, but failed to do so. Prudential properly rejected the change form and the Decedent's wife is therefore entitled to the life insurance proceeds.

Estate Planning - Malpractice

Joseph DeVino, Jr. v. Gerald R. Della Torre, Esq., 2009 N.J. Super. Unpub. LEXIS 256 (Docket No.: A-2569-07T2) (App. Div. 2009). Before Judges Fuentes and Chambers.

Issue: Was Decedent's child entitled to sue the scrivener of Decedent's estate plan after a full trial in probate Court and after reaching a settlement with his siblings on the distribution of Decedent's estate?

Holding: No. The matter was dismissed on summary judgment.

The scrivener prepared an estate plan for the Decedent whereby he left his residuary estate in equal shares to his 3 children. A Codicil was then executed disinheriting Plaintiff, Decedent's son. At Decedent's death, Plaintiff filed suit seeking to challenge his disinheritance. The matter was settled with plaintiff receiving $265,000. Plaintiff then filed suit against the scrivener of Decedent's estate plan for malpractice claiming that he received less than 1/3 of the Decedent's estate in settlement, and that the scrivener was liable for the remainder. The matter was dismissed on summary judgment by the trial Court which rendered a 23 page written opinion, and was affirmed on appeal. The Court held that Plaintiff failed to articulate a viable legal malpractice claim against the defendant - scrivener.

Estate Taxes – NJ – Request for Refund

Estate of Frank J. Ehringer v. Director, Division of Taxation, 24 N.J. Tax 599 (Tax Ct. 2009). Before Judge Patrick DeAlmeida, J.T.C.

Issue: Was the estate's request for a refund of estate taxes timely in light of the fact that it was not made until after the conclusion of a Will contest and after the expiration of the three year statute of limitations governing such requests?

Holding: No. The Court upheld the Division's ruling denying the refund request as it was made more than three years from the date that the tax was paid and no protective claim was made. N.J.A.C. 18:26-3.9(a).

Statutes of limitations in tax statutes are strictly construed in order to provide finality and predictability of revenue to state and local government, and this strict application of the limitations period applies to claims for the refund of tax.

In this matter, an estimated payment of New Jersey estate taxes was made nine months after the Decedent's death. A refund request was made after final federal audit of the federal estate tax return, which was over three years since the payment of New Jersey estate taxes. The Estate claimed that it could not determine with certainty the amount of the expenses that would be permitted by the IRS until after the conclusion of the Will contest and final audit by the IRS. The Court refused to set aside the Division's denial of the refund request based on these facts. Refund claims are frequently filed dependent on future events such as the result of future federal audits or the results of litigation. A protective claim should have been filed to toll the statute of limitations since the facts were still in flux. No protective claim was filed, and the three year statute of limitations had run. The Division therefore properly denied the refund request.

The refund request was made as the result of the conclusion of the federal estate tax audit on the Estate allowing additional expenses. However, it was not made within the three year statute of limitations and was therefore properly denied by the Division.

Estate Taxes – NJ - Retroactive Application

Estate of Stella Kosakowski v. Director, Division of Taxation, 2009 N.J. Super. Unpub. LEXIS 3003 (Docket No.: A-2400-08T2) (App. Div. 2009). Before Judges Parrillo and Lihotz.

Issue: Is the retroactive application of the New Jersey estate tax to Decedent's dying during the retroactivity period manifestly unjust?

Holding: No, the Tax Court's dismissal of Plaintiff's Complaint was upheld and the Court found that the imposition of New Jersey estate taxes based on a decoupling from federal law to Decedent's dying during the retroactivity period was proper.

Decedent died on 2/9/02 leaving her entire estate of approximately $1,750,000 to her husband, if then surviving, otherwise, to her daughter. Decedent's husband died 45 days after the Decedent. The executor of Decedent's husband's estate disclaimed $1,000,000 of Decedent's estate, and Decedent's daughter, the remainder beneficiary, disclaimed $1,000,000 in the same assets, thereby passing same to her children. An estate tax was paid to New Jersey on Decedent's Estate based on the newly enacted NJ estate tax statute which decoupled the federal exemption for measuring the taxable estate from the ever increasing federal exemption. The New Jersey decoupling statute was retroactively applied. Decedent died during the retroactivity period.

Two years later, a request for a refund was filed based on the Oberhand case. In Oberhand, which was upheld by the Supreme Court, the Tax Court found that plaintiff's reasonable reliance on the prior law when preparing her estate plan outweighed the public's interest in maintaining revenue from the retroactive application of amendments to the estate tax, such that application would be manifestly unjust.

In this matter, the Court upheld the retroactive application of the decoupling of the New Jersey estate tax from federal law to this estate, finding that Decedent did not engage in any estate planning that was controlled by the existing estate tax law, as was present in the Oberland case.

In this matter, the executor of Decedent's husband's estate had the knowledge of the existence of the New Jersey estate tax and instead of disclaiming an amount that actually triggered the tax, the executor could have engaged in tax planning, which did not occur. Retroactive application was therefore upheld.

Estate Taxes – NJ - Standing

Joanne LaBarbera,, an Aggrieved Person as beneficiary of the Santo LaBarbera QTIP Trust v. Director, Division of Taxation, 24 N.J. Tax 377 (Tax Ct. 2009). Before Judge Patrick DeAlmeida, J.T.C.

Issue: Does a residuary beneficiary of a Qualified Terminable Interest Property ("QTIP) Trust have standing to maintain a challenge against the Division of Taxation's estate tax assessment against the estate of her stepmother, the income beneficiary of the QTIP Trust, in light of the required reimbursement from the Trust to the stepmother's estate for payment of New Jersey estate taxes?

Holding: Yes, Plaintiff, as residuary beneficiary of the QTIP Trust has a sufficient stake in the outcome of this matter as a "person…liable for the payment of" a portion of the estate tax (N.J.S.A. 54:38-10a) to maintain a challenge against the Division of Taxation's estate tax assessment against the estate of her stepmother.

Guardianship – Appointment of Daughter in Lieu of Second Husband

In re Floretta Sutton-Logan, An Incapacitated Person, 2009 N.J. Super. Unpub. LEXIS 2335 (Docket No. A-5220-07T3) (App. Div. 2009). Before Judges Lihotz and Baxter.

Issue: Is the Court's appointment of the daughter of the Incapacities Person over her second husband proper?

Holding: Yes.

The Court first determined that domicile is properly laid in New Jersey, despite contacts in Virginia, and also that the incapacitated person's daughter was best suited to act as guardian based on the facts as presented.

"Jurisdiction over an incompetent person requires a determination of domicile." In re Seyse, 353 N.J. Super. 580, 803 A.2d 694 (App.. Div.). Unlike a residence, "[d]omicile is a place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." In re Michelsohn's Will, 136 N.J. Eq. 387, 390, 37 A.2d 118 (Prerog. Ct. 1944). Based on the trial Court's findings, the determination of domicile was affirmed.

Under N.J.S.A. 3B:12-25, there is a statutory preference in favor of family members in the appointment of special guardians. The trial Court is given discretion to appoint a guardian in the best interest of the incapacitated person. The statute does not provide a mandate that the first choice must be the incapacitated person's spouse, it merely provides a list of potential persons which must be given "first consideration" before the appointment of the Public Guardian is made. Therefore, both the incapacitated person's spouse and her daughter were properly considered.

In rendering it's decision, the trial Court was swayed by the fact that the incapacitated person's daughter was named as attorney in fact of her Power of Attorney and Advanced Directive, that the daughter was named as joint tenant on her bank account and the fact that the daughter had handled the incapacitated person's financial affairs since the death of her first husband. Deferring to the trial Court, the determination that the incapacitated person's best interests were served by the appointment of her daughter as guardian was affirmed.

Guardianship – Challenge to Declaration of Incapacity and Appointment of Guardian

In re Virginia Vignola-Cavallone, An Alleged Incapacitated Person, 2009 N.J. Super. Unpub. LEXIS 807 (Docket No.: A-5561-06T3) (App. Div. 2009). Before Judges Cuff, C.L. Miniman and King.

Issue: Was the declaration of incapacity and appointment of guardian proper?

Holding: Yes. The Court made a declaration of incapacity and appointed the daughter of the incapacitated person as guardian over her person and property, despite objections from her son. The Court did so by finding that the daughter lived in close proximity to her mother, had been primarily responsible for her mother's personal care for years, that she insisted that the funds derived from the sale of her mother's home be set aside for her mother's care, and that the daughter would not prevent her brother from seeing her mother and would involve him in health care decisions. On the contrary, the appellant son was headstrong and the Court feared that he would bar the daughter from seeing their mother. The Court also cited appellant's unorthodox money management and the fact that he viewed his interests and his mother's interests as synonymous. The appointment of the daughter as guardian of the person and property was therefore affirmed.

Guardianship – Restraining Order Against Son

In re Estate of Mary D. Freeman, 2009 N.J. Super. Unpub. LEXIS 3129 (Docket No.: A-3513-08T3) (App. Div. 2009). Before Judges Parrillo and Lihotz.

Issue: Was the probate Court's issuance of a restraining order preventing Defendant, a son of the incapacitated person, from visiting his mother between 7 am and 1 pm, Monday through Friday, proper in light of the Defendant's constant harassment of the home health aides hired to provide necessary care?

Holding: Yes, the restraining order was proper under the circumstances.

The probate Court issued a restraining order preventing Defendant, a son to the incapacitated person, from visiting her house between 7 am and 1 pm, Monday through Friday, to prevent Defendant from interfering with the care provided by her home health aides.

The restraining order was issued in response to a complaint filed by another son of the incapacitated person, who was appointed guardian, and was sent to prevent Defendant's continuing harassment of the home health care aides. Defendant was one of six children and the record was clear that he continuously harassed the home health aides hired by the guardian to care for their mother. The guardian sought restraints, which was granted pursuant to the probate Court's authority to handle guardianship matters and were properly based on the certifications and attachments submitted by the guardian of which he had personal knowledge and was competent to testify. The trial Court also denied Defendant's application to be appointed as co-guardian.

Inter Vivos Transfers Between Spouses – Donative Intent

Miller v. Miller, 2009 N.J. Super. Unpub. LEXIS 768 (Docket No.: A-2605-07T1) (App. Div. 2009). Before Judges Parrillo, Lihotz and Messano.

Issue: Are the inter vivos Deed transfers by a husband to his wife, from his individual name to them jointly, valid gifts subject to equitable distribution where the husband owned the properties in question prior to the marriage and the Deeds were made by husband to allegedly protect his assets from medical malpractice liability?

Holding: Yes, the Deed transfers were valid gifts and the assets were properly subject to equitable distribution.

Husband appealed from a final judgment of divorce equitably distributing the parties' jointly held primary and vacation homes, claiming they are immune assets owned exclusively by him. Husband, by way of a trust, owned the assets prior to marriage and claimed that he Deeded the assets from the trust to he and his wife, jointly, to avoid medical malpractice claims. The wife occupied the marital home for many years and contributed to the upkeep. At some point after the Deed transfer of the vacation home, it burnt down. It was rebuilt with insurance monies and marital assets, and the wife contributed to the building and upkeep of the residence. The parties did not dispute that husband individually owned the office property which he also received from his parents and was required to pay for, and that same was therefore not subject to equitable distribution.

Appellate review pertaining to the equitable distribution of marital assets is narrow. Assets owned individually prior to a marriage are immune from equitable distribution and the burden is on the husband to show that he owned the assets prior to the marriage and lacked the requisite donative intent to transfer same to his wife. The husband failed to meet this burden, (i) he failed to establish he owned the properties prior to the Deed transfer (they were owned by a trust), (ii)

the parties both contributed to the upkeep of the properties for over 23 years, (iii) the parties contributed marital assets to the upkeep of the properties, and (iv) legal title was received by the wife 5 years into the marriage.

Inter Vivos Transfers - Undue Influence - Standing

Estate of Claudia L. Cohen v. Cohen, 2009 N.J. Super. Unpub. LEXIS 2353 (Docket No.: BER-C-134-08) (Chan. Div. 2009). Before Judge Koblitz.

Issue: Does a beneficiary under a testator's Will, while the testator is alive and competent, have standing to contest certain inter vivos transfers made by the testator to his child on grounds of undue influence?

Holding: No. The testator who was found to be competent by the Court is the only one with standing to bring a challenge to the transactions at issue. The Court also found that the transfers of testator's business interests to his son which were questioned by plaintiff were entirely consistent with testator's estate plan.

A child possesses no interest whatever in the property of a parent when he is alive, just a mere hope to inherit. The right to inherit does not arise until the parent's death and entitles the child to take as heir or distributee nothing except the undevised property left by the deceased parent. A parent has the right to dispose of his property as he deems fit. The child therefore does not have standing to contest an inter vivos transfer while the parent is alive and competent.

The only person having a right to bring an action to unwind an inter vivos transfer claimed to be the product of undue influence are (i) the donor himself; (ii) the guardian of that donor so long as the donor is alive; or (iii) the executor or beneficiary of the donor's estate if the donor is deceased.

Intestacy – Void Second Marriage

In re Estate of Augustin Ngwe Mandeng, deceased, 2009 N.J. Super. Unpub. LEXIS 407 (Docket No. A-2143-07T3) (App. Div. 2009). Before Judges Reisner, Sapp-Peterson and Alvarez.

Issue: Is Decedent's spouse equitably estopped from challenging the validity of a Cameroonian divorce and second marriage under Heuer v. Heuer, 152 N.J. 226, 704 A.2d 913 (1998) in order to establish her intestate share of the estate of her husband who had allegedly remarried?

Holding: No, Decedent's spouse is not prevented from challenging the validity of the Cameroonian divorce and second marriage under Heuer as she was unaware of its existence. The lower Court also found that the Cameroonian divorce decree was a fraud based on evidence presented at a summary judgment motion hearing. The validity of the first marriage was

undisputed, making the second marriage null and void. Therefore, Decedent's first spouse was entitled to receive distribution of the Estate under the New Jersey intestacy statutes.

The Court also found that the elective share statute does not apply in situations where an individual dies without a will. Instead, the intestacy statute applies and the statute does not require Decedent's spouse to reside with him at the time of death in order to inherit. See N.J.S.A. 3B:5-3.

Irrevocable Trusts – Transfer of Assets to Trustee

Koste v. Turski, et al., 2009 N.J. Super. Unpub. LEXIS 2218 (Docket No.: A-1068-08T2) (App. Div. 2009). Before Judges Fisher and Gilroy.

Issue: Is it proper for the trustee of an irrevocable grantor trust which was established by the trustee pursuant to a general Power of Attorney given to her by the grantor, to transfer to herself by Deed real property out of the trust pursuant to the terms of the trust?

Holding: Yes. The trust was properly established pursuant to the power of attorney and that trust provided adequate authority for the transfer to be made.

Decedent's daughter, pursuant to a Power of Attorney, created an irrevocable grantor trust in the Decedent's name, with daughter as Trustee. Daughter had full discretion to distribute the principal and income of the trust to the daughter, and upon Decedent's death, to daughter outright, and in default, in equal shares to daughter's children. The Decedent conveyed real estate to the trust by Deed, reserving a life estate. A subsequent Deed was made by Decedent and daughter, as Trustee, conveying the property to daughter, individually. Suit was brought by a child of the daughter, after her death, seeking to void the transfer out of the trust to daughter, individually. Plaintiff argued that the daughter was the settlor of the trust and the trustee, and in violation of her duty to the residuary beneficiaries, liquidated the trust. The Court found that the daughter was not the grantor, she merely acted with authority under the Power of Attorney, and the terms of the trust gave her the authority to make the Deed transfer. Dismissal of the complaint was therefore affirmed.

Legal Fees - Administration

In re Probate of the Holographic Will of Robert Murray, deceased, 2009 N.J. Super. Unpub. LEXIS 1157 (Docket No. A-3775-07T1) (2009). Before Judges Carchman, R.B. Coleman and Simonelli.

Issue: Was the Court's grant of attorneys' fees to the temporary administrator's law firm an abuse of discretion?

Holding: No. The legal fee award to the temporary administrator was affirmed as the lower Court did not abuse its discretion.

This case involved a Will contest over a holographic Will. The Court appointed a New Jersey attorney as temporary administrator, and ordered the sale of Decedent's sole asset, a condominium, to pay down Decedent's debts. Numerous objections to the sale of the condominium and exceptions to the accounting were filed by the beneficiaries. The issue under appeal dealt solely with the award of legal fees to the temporary administrator by the Court.

The Court found that the estate required the temporary administrator's legal expertise due to the nature and complexity of the problems the estate faced, including the constant objections from the beneficiaries. The time spent and hourly rate were reasonable under the circumstances and the Court award was therefore affirmed on appeal.

Legal Fees – Will Contest

In re Estate of Richard Riley, 2009 N.J. Super. Unpub. LEXIS 2692 (Docket No.: A-1957-08T3) (App. Div. 2009). Before Judges Cuff and Waugh.

Issue: Was the award of legal fees to the unsuccessful proponents in a Will contest proper under the circumstances?

Holding: Yes, the award of fees was affirmed. Fee determinations by trial Courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion. In this matter, the probate Court awarded fees to the unsuccessful proponents of a codicil of Decedent, and an appeal was filed. After a review of the record, the Court concluded there was no abuse of discretion in awarding fees. The matter was remanded to determine who funded the litigation, the proponents or a third party, and to determine whether the attorney for the proponents had received the total amount of the Court's award of legal fees.

Removal of Executor

In re Estate of John H. Hnat, 2009 N.J. Super. Unpub. LEXIS 103 (A-4672-07T2) (App. Div. 2009). Before Judges Carchman and Simonelli.

Issue: Was the removal of the Executrix under a Will based on perceived hostility and friction between the parties proper in light of the lack of any evidentiary support?

Holding: No. In this matter, the trial Court failed to hold a plenary hearing before removal of the Executrix and the appointment of a third party administrator. There was no proof that any of the reasons for removal set forth in N.J.S.A. 3B:14-21 existed. There was no proof of fraud, gross carelessness, lack of good faith or proof that the Executrix's illness prevented her from properly administering the Estate. The Court removed the Executrix due to "assumed friction and hostility between the parties", which is not necessarily sufficient grounds for removal. Since there was no evidence of such hostility or friction between the parties, or any of the other factors enumerated above, the Court's removal of the Executrix was reversed.

Settlement – Funeral Expenses

In re Estate of Marilyn Varcadipane, deceased, 2009 N.J. Super. Unpub. LEXIS 572 (Docket No. A-5130-07T3) (App. Div. 2009). Before Judges Fisher and King.

Issue: Is an estate required to reimburse the funeral and burial expenses paid by a party to a settlement in light of the global settlement entered into between the parties which did not specifically mention such expenses?

Holding: The Court remanded the matter for further proceedings to determine whether the parties had entered into an agreement as to the reimbursement of these expenses as part of the global settlement between them.

The aggrieved party claimed that Decedent entered into an oral agreement with him whereby Decedent agreed to pay him for caring for her and for expending monies on her behalf. A global settlement was entered between the parties. Thereafter, an accounting was filed by the Executor of the Estate and a claim was made by the aggrieved party for payment of expenses which he made on Decedent's behalf both before and after her death. The Court held that the payments which were made before Decedent's death were covered by the global settlement and remanded to the trial Court to decide whether the funeral and burial expenses were also covered by the agreement.

In reviewing a settlement, the Court is required to "strain to give effect to the terms of a settlement wherever possible," and that "any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced." Dep't of Pub. Advocate v. N.J. Bd. Of Pub. Util., 206 N.J. Super. 523, 503 A.2d 331 (App. Div. 1985). Here, the aggrieved party claimed that Decedent orally promised him a portion of her estate in consideration of his payment of her living expenses and her care during her life. The matter was settled and the aggrieved party received 51% of the Estate. The trial Court therefore correctly concluded that any reimbursement for the living expenses of the Decedent was barred by the settlement agreement. However, the settlement agreement did not stipulate as to the responsibility for the payment of the funeral and burial expenses, which are customarily paid out of the estate. The matter was therefore remanded for further proceedings.

Spendthrift Trusts – Child Support

Lerman v. Lerman, et al., 2009 N.J. Super. Unpub. LEXIS 2093 (Docket No.: A-1953-07T3) (App. Div. 2009). Before Judges Winkelstein and Gilroy.

Issue: Did the trial Court have the authority to order the payment of child support arrearages owed by a beneficiary of a spendthrift trust established in Florida?

Holding: No; the spendthrift provisions set forth in the trust agreement giving the trustees absolute discretion as to how much income and principal is to be distributed to the beneficiary

prevents the Court from issuing an order requiring payment of child support owed by that beneficiary. The trust also provided for restriction on alienation and standard spendthrift provisions, and consisted of an account held in the State of Florida.

Factually, a judgment of divorce was entered and the beneficiary of the trust was ordered to pay alimony and child support. The beneficiary was eventually incarcerated, and a New Jersey Court issued a writ of execution to freeze all funds in the name of the beneficiary to secure the payment of child support arrearages. This included the account held by the spendthrift trust for his benefit. A restraining order was entered in Florida and the within appeal was filed.

A writ of execution may not be issued against the trust assets, it may only be issued against assets held in the beneficiary's individual name. The Court upheld the spendthrift provisions, holding that the right of a third party to levy on assets of a beneficiary of a spendthrift trust are limited to disbursements from the trust, and if disbursements are wholly within the trustees' discretion, the Court may not order the trustee to make such disbursements.

Trustee Compensation

Herder and Fine v. J.P. Morgan Chase Bank and The Francese Light Trust u/w/o Aaron Helwitz, 2009 N.J. Super. Unpub. LEXIS 1425 (Docket No.: A-2635-07T3) (App. Div. 2009). Before Judges Wefing, Parker and LeWinn.

Issue: Was the award of a termination commission and counsel fees to the trustee of a testamentary trust proper?

Holding: Yes. The compensation sought by the Trustee was proper and is provided by statute, and the award of counsel fees to be assessed against the trust for having to defend the action was also proper where no breach of any duty was found. The lower Court found that the trustee's handling of the trust after the death of the income beneficiary was proper and reasonable. There was also no evidence that the trustee enhanced its statutory fee in any way by its handling of the trust. Plaintiff withdrew their claim of trust mismanagement and their request for a formal accounting prior to trial. The trustee merely defended against the baseless opposition to the termination fee, and counsel fees to the trustee payable from the trust, which were affirmed on appeal.

Trusts – Jurisdiction – Prudent Investor Act

Edelman, et al. v. Merrill Lynch Bank and Trust Company (Cayman) Limited, et al., 2009 N.J. Super. Unpub. LEXIS 296 (Docket No.: A-4529-06T3) (App. Div. 2009). Before Judges Wefing, Yannotti and LeWinn.

Issue: Do the New Jersey Courts have jurisdiction over a trust established by an Argentinean resident which was signed in Florida and governed by the laws of the Cayman Islands where the trustee, Merrill Lynch Bank and Trust Company (Cayman) Limited did not have offices,

employees or assets in New Jersey, did not do business in New Jersey, but merely opened an asset management account in Investment, a New Jersey limited partnership, to invest trust assets?

Holding: The trial Court dismissed Plaintiff's complaint for lack of jurisdiction and forum non conveniens. On appeal, the matter was remanded to allow for discovery on the jurisdictional issues.

A Revocable Trust was established by an Argentinean resident under the laws of the Cayman Islands, who travelled to Florida to execute the documents. The trustee, Merrill Lynch (Cayman), has no offices, employees or assets in New Jersey, and is not registered to do business in New Jersey. The trust provided for income and principal distributions for the grantor, and at her death, for her son and his family. The Trust granted Merrill Lynch (Cayman) broad powers of investing and managing assets. Subsequent to establishing trust, grantor sent Merrill Lynch (Cayman) a letter memorandum expressing her intentions as to limiting distributions from the trust. In light of the memorandum, an advisory committee was established and the assets were conservatively invested. After Grantor's death, it was determined that grantor's child and his family would require less income, so more equities were purchased. The assets were reinvested in an asset management account with defendant Investment, a limited partnership in New Jersey, and a subsequent decline in value occurred. The committee issued a recommendation that more fixed income assets be purchased to avoid any further losses.

Eventually, plaintiffs filed suit seeking to recover the more than $1,000,000 loss in value under the NJ Prudent Investors Act. Merrill Lynch (Cayman)sought dismissal of the Complaint based on forum non conveniens, urging that New Jersey had no interest in having its Courts and judicial system resolve the dispute. Plaintiffs argued that by engaging Investment, where the investment decisions were made, Merrill Lynch (Cayman) had purposely availed itself of New Jersey.

In general, defendants must have sufficient contacts with New Jersey for jurisdiction to attach. The record demonstrates that Investment had a role in selecting investments. Due to the fact that the record is not sufficient to support the trial Court's dismissal as to the role Investment played in managing the trust assets, the matter was remanded for further proceedings and jurisdictional discovery.

The doctrine of forum non conveniens applies where there is a choice of 2 jurisdictions, and a trial in one jurisdiction over the other would serve the convenience of the parties and the ends of justice. Dismissal should be granted only when Plaintiff's choice of forum is demonstrably inappropriate. The Appellate Court held that dismissal on forum non conveniens grounds should not have been granted without jurisdictional discovery.

Trusts – Title Insurance Policy Voided by Transfer to Trust

Marie Carney-Dunphy v. Title Company of Jersey & Chicago Title Insurance Company, 2009 U.S. Dist. LEXIS 55418 (Docket No.: Civil No.: 07-3972 (JBS/AMD) (U.S.D.C. 2009). Before Judge Simandle.

Issue: Is a beneficiary of a trust fund established by her mother entitled to title insurance coverage on the real estate Deeded to the trust prior to the mother's death, in light of the subsequent transfer of the real estate into the beneficiary's individual name?

Holding: No; the beneficiary does not succeed to the grantor's rights in the title insurance policy.

Plaintiff, who received the real estate in question from a family trust established by her mother, did not succeed to her mother's rights in the property by operation of law, as that term was used in the title insurance policy, and therefore the policy does not provide coverage to plaintiff.

Mrs. Carney purchased a property in Avalon, New Jersey in her individual capacity, subject to riparian rights of the State of New Jersey and the United States. A title insurance policy was issued in Mrs. Carney's individual name prior to the purchase which excepted the riparian rights. The term "insured" in the policy included the name insured and all those who succeed to the interest of such insured by operation of law, as distinguished from purchase. Mrs. Carney applied for a riparian grant which was approved. However, the required payment was never made by Mrs. Carney.

Thereafter, Mrs. Carney created an irrevocable trust and transferred the real estate to the trust in 4 separate deeds over time. The trust was held for the benefit of one of Mrs. Carney's children, and Mrs. Carney relinquished all rights to the income or principal of the trust. The trustees did not obtain a new title insurance policy on the property at the time the transfers were made. Plaintiff and her brother, as beneficiary of the trust, entered into an agreement whereby plaintiff transferred her interest in a family business to her brother and he transferred his interest in the trust to the plaintiff. Plaintiff then folded up the trust and transferred the real estate to herself.

After obtaining the property, plaintiff attempted to prosecute the tidelands grant and satisfy New Jersey's claim against the property. She sought coverage from the issuer of the original title policy and she was refused coverage.

The Court held that plaintiff did not succeed to her mother's rights in the property by operation of law and is therefore not a named insured pursuant to the terms of the policy.

A property passing by operation of law passes automatically, such as an involuntary lifetime transfer. A voluntary lifetime transfer does not cause the property to pass by "operation of law". Plaintiff received the property through voluntary lifetime transfers, as opposed to inheritance or involuntary transfer, and therefore the property did not pass to her by operation of law. Her interest is therefore not covered by the title insurance policy issued to Mrs. Carney, and she was properly denied coverage.

In light of this decision, particular attention should be given to title insurance policies in drafting an estate plan where real estate is involved.

Will Contest by Attorney In Fact

Poku v. Transamerica Annuity Service Corporation, the Estate of Richard Peprah, et al., 2009 N.J. Super. Unpub. LEXIS 3152 (Docket No.: A-4014-08T2) (App. Div. 2009). Before Judges Lisa and Baxter.

Issue: Does Plaintiff, as attorney in fact for the Decedent during his life, have a right to a claim to all of Decedent's assets after his death in lieu of an Executor?

Holding: No. This matter is an appeal of the trial Court's grant of summary judgment in favor of the Defendants. Plaintiff brought an action challenging her son's Will and the transfer of the son's home to his wife.

Plaintiff framed the issue on appeal as follows: Plaintiff having Power of Attorney has the right to decide how to manage her son's assets and therefore should not be denied the right to claim all assets belonging to her son. On appeal, in support of her allegations of undue influence and lack of mental capacity, Plaintiff sought to introduce a medical report pertaining to Decedent's mental capacity at the time he drafted his Will and transferred his home to one of the Defendants. However, Plaintiff did not file the medical report in response to the motion for summary judgment, in fact, no opposition was filed. The trial Court's grant of summary judgment was therefore affirmed.

Will Contest – Denial of Probate – Holographic Will

In the Matter of the Probate of the Alleged Will of Mario Conti, deceased, 2009 N.J. Super. Unpub. (Docket No.: A-2638-07T3) (App. Div. 2009). Before Judges Wefing, Yannotti and LeWinn.

Issue: Are the handwritten notes of the Decedent entitled "Last Will and Testament", which were notarized in Pennsylvania, a valid holographic Will?

Holding: No. The trial Court refused probate as the document in question was not properly executed in accordance with the laws of Pennsylvania, where it was executed. While the appeal was pending, the administrator of the Estate discovered a prior Will of the Decedent which was properly executed and the matter was remanded for further proceedings.

Will Contest – Dismissal for Failure to Provide Discovery

In re Estate of Bernard Olcott, deceased, 2009 N.J. Super. Unpub. LEXIS 996 (Docket No.: A-0927-08T1) (App. Div. 2009). Before Judges Skillman and Grall.

Issue: Is it proper to grant summary judgment in favor of an estate where a contestant claims he did not receive notice of the probate of the Decedent's Will, then fails to provide requested discovery or to attend a plenary summary judgment hearing?

Holding: Yes. The contestant claims that the Decedent executed a subsequent Will after the Will that was probated. The contestant lived in the Bahamas and claimed that he did not receive notice of the probate of the Decedent's prior Will, despite testimony to the contrary. The contestant failed to respond to the estate's discovery requests, failed to file the new Will in the probate Court, and the Court found no support for contestant's position other than a conclusory statement that he was not provided with notice. Therefore, the contestant's claims are barred as being untimely.

Will Contest – Dismissal of Caveat

In re Estate of Donald Towbin, deceased, 2009 N.J. Super. Unpub. LEXIS 1746 (Docket No.: A-0161-08T3) (App. Div. 2009). Before Judges Sapp-Peterson and Alvarez.

Issue: Was the trial Court's dismissal of the caveat and admission of the Decedent's Will to probate proper in light of the parties ante-nuptial agreement wherein plaintiff waived her rights to the Decedent's estate?

Holding: Yes. Plaintiff waived her rights in the Decedent's estate by signing an ante-nuptial agreement after full disclosure. Plaintiff sought to set aside the ante-nuptial agreement but failed to offer clear and convincing evidence as to why it should be set aside. Generally, the grounds for challenging an ante-nuptial agreement include equitable considerations, such as unconscionability of the agreement, failure to disclose and similar concerns, none of which exist here. The Court did not find a genuine issue of material fact to allow the caveat to stand and the matter to proceed to discovery. Decedent provided for payment required by the ante-nuptial agreement in a trust established by him, and therefore plaintiff's counterclaim was dismissed, and the lower Court's decision affirmed on appeal.

Will Contest – Federal Jurisdiction

Frederic K. Berman, Executor of the Estate of Denise Berman, deceased v. Charles I. Berman and Matthew Wilt, 2009 U.S. Dist. LEXIS 48179 (Docket No.: Civil No. 07-2506 (JBS/AMD))(U.S.D.C. 2009). Before Judge Simandle.

Issue: Does the federal Court have jurisdiction to hear a dispute filed by an executor of a New Jersey estate seeking to recoup assets allegedly misappropriated by Decedent's brother prior to

Decedent's death after the matter was removed to federal Court by Defendant/counterclaimaint who sought to aside Decedent's Will as the product of undue influence and/or fraud?

Holding: No; the probate exception applies and the federal Court does not have jurisdiction to hear a Will contest. Jurisdiction is properly laid in the Superior Court of New Jersey.

Plaintiff, as executor of his sister's estate, sought to recover assets allegedly misappropriated from her estate before her death. Decedent was a beneficiary of her father's estate and due to health reasons, was unable to manage her affairs. Her brother, the defendant herein, managed Decedent's assets pursuant to an informal trust. Plaintiff brought suit in the Superior Court of New Jersey, Chancery Division, Probate Part, seeking to recover these assets and an accounting. Defendant timely removed the matter to federal Court and counterclaimed that the Decedent's Will naming Plaintiff as Executor was the product of undue influence and Decedent lacked testamentary capacity. Plaintiff filed a motion seeking to remand the matter to the probate Court, arguing that the district Court lacked subject matter jurisdiction.

The Supreme Court has long recognized a probate exception to otherwise proper federal jurisdiction. In the event that the probate exception applies, then the federal Court lacks jurisdiction. The probate exception is applicable only under three specific circumstances, when the federal Court is petitioned to (i) probate or annul a will, (ii) administer a decedent's estate, or (iii) assume in rem jurisdiction over property that is in the custody of the probate Court.

Because the Defendant seeks a declaration that Decedent's Will is void or unenforceable, the federal Court lacks jurisdiction to entertain the claim. The Court is also unable to exercise supplemental jurisdiction over the matter.

The matter was remanded to the Superior Court of New Jersey, Chancery Division, Probate Part for further proceedings.

Will Contest – Oral Agreement

Cohen v. Miller, et al., 2009 N.J. Super. Unpub. LEXIS 2627 (Docket No.: A-3721-07T1) (App. Div. 2009). Before Judges Fisher, Sapp-Peterson and Espinosa.

Issue: Is an oral agreement by the Decedent to split her assets between her 2 children enforceable?

Holding: No, N.J.S.A. 3B:1-4 precludes enforcement.

Decedent left a Will leaving her entire estate to her son. Over 5 years after receiving notice of probate, Plaintiff filed a complaint alleging that the Will should be set aside. The Court dismissed the complaint based on the time restraints contained in R. 4:85-1 governing Will contests.

Plaintiff also alleged that she entered into an oral agreement with her brother and the Decedent that the Decedent's assets would be split equally between the siblings at her death. The Court also dismissed this part of the complaint pursuant to N.J.S.A. 3B:1-4 as the alleged agreement was not in writing. The alleged agreement with her mother could not be enforced absent either a will provision expressing the contract's material provisions; a reference in the will to a contract and extrinsic evidence proving the terms of the contract; or a writing signed by the Decedent evidencing the contract. None of these requirements were met and the Complaint was therefore dismissed on summary judgment.

Will Contest – Probable Intent

In re Estate of Philomena Sica v. Ronald DeVito, Ralph DeVito and 10th Group, LLC, 2009 N.J. Super. Unpub. LEXIS 2062 (Docket No.: A-4951-06T1) (App. Div. 2009). Before Judges Carchman and Sabatino.

Issue: Is the Decedent's grandson entitled to share in Decedent's residuary estate pursuant to the terms of her Will which provided for a distribution of a predeceased child's share of the estate to his or her issue?

Holding: Yes.

Decedent had 9 children. Her Will left her residuary estate to her daughter, Geraldine, "until such time as she remarries. In the event of her marriage or upon her death said property is to be divided equally between my said children…""In the event of the death of any of the above mentioned children prior to my death and or prior to the marriage of my said daughter Geraldine Sica, the share of said deceased child is to be devised to his or her child or children."

Geraldine never remarried and at her death, only 1 child of the Decedent survived. Despite the fact that there were several surviving grandchildren and great-grandchildren, Decedent's only surviving child, Anna, when applying for Letters of Administration, named only herself and her children as heirs. Anna was appointed as Administratrix and conveyed Decedent's residence to herself as sole heir. Anna died leaving a Will which was probated by the Essex County Surrogate. Anna left her entire estate to her children, Ronald DeVito, Ralph DeVito and Mary Ann Campanella. As Executor of Anna's Estate, Ronald DeVito conveyed the residence to 10th Group, LLC, and a mortgage was taken out.

Decedent's grandchild brought suit challenging Anna's interpretation of Decedent's Will. The trial Court interpreted the Will to provide for a division of equal shares for the issue of each predeceased child of the Decedent. It did so by determining Decedent's probable intent. In interpreting a Will, the Court's aim is to ascertain the intent of the testator. Under the probable intent doctrine, NJ Courts construe Wills to ascertain and give effect to the probable intention of the testator. The doctrine has been used to clarify ambiguities in a Will In discerning the Decedent's probable intent, the Court could not accept that only "upon marriage" would all of the issue of a predeceased child of the Decedent share in the residuary estate. Decedent intended to provide for her daughter, Geraldine, and upon her death or marriage, then her estate

(consisting of a house), would be divided and distributed to Decedent's surviving children, per stirpes. There is no other evidence supporting Decedent's intention to divest the issue of a predeceased child in the event that Geraldine does not marry.

Will Contest - Undue Influence

In re Harry Sable, An Incapacitated Person, Michael Sable v. Barry Sable, 2009 N.J. Super. Unpub. LEXIS 334 (Docket No.: A-3743-06T2) (App. Div. 2009). Before Judges Stern, A. A. Rodriguez and Collester.

Issue #1: Is a non-treating expert psychiatrist's opinion admissible in an undue influence case?

Holding: Yes. Under the rules of evidence, an expert's opinion may be based upon facts or data of the type reasonably relied on by experts in that field. Bare conclusions unsupported by factual evidence are inadmissible as a net opinion. On appeal, it was argued that the expert relied on mini-mental exam scores to determine capacity that he ultimately agreed were inaccurate. In fact, the expert, in preparing his report, reviewed the Incapacitated Person's medical files and reports, performed his own examination of the Incapacitated Person, interviews with the treating physicians and his own observations. Based on the foregoing, the expert's opinion was not a net opinion and was properly considered by the lower Court.

Issue #2: Is it proper for a Court to consider the validity of a will while the testator is still living?

Holding: Yes. The case of In re Niles, 176 N.J. 282, 289-90, 823 A.2d 1 (2003), stands as authority for the proposition that when a live testator is adjudicated incompetent as of a particular date, any documents executed subsequent to that date may be invalidated.

This action was brought for an adjudication of incompetency and to invalidate all of the documents, including the Power of Attorney, Advanced Directive and Will, which were executed after a certain date. The same proofs to invalidate the Power of Attorney would apply to invalidating the Will and there is no need for separate trial. The Court upheld the lower Court's findings of incapacity and the setting aside of all estate planning documents signed after the date of said incapacity.

Issue #3: What is the burden of proof to rebut a presumption of undue influence where the testator and the alleged influencer were represented by the same attorney?

Holding: The presumption of undue influence must be rebutted by clear and convincing evidence, because the attorney who prepared the Will represented both the testator and the proponent of the new Will and because there was no proof that the attorney disclosed the conflict of interest to the testator. The normal "preponderance of the evidence" standard therefore did not apply.

Issue #4: Was the assessment of damages for breach of fiduciary duty proper?

Holding: Yes. The Court found that the defendant misappropriated monies of the testator, failed to properly manage his finances, took undocumented loans, failed to properly account for expenses paid on behalf of the testator, and expended monies of the estate to litigate the matter. If the exercise of power concerning the estate is improper, the fiduciary is liable to interested parties for damage or loss resulting from breach of his fiduciary duty. See N.J.S.A. 3B:14-35. Here, the lower Court's findings were upheld.

Issue #5: Is the assessment of counsel fees against an agent under a Power of Attorney who committed undue influence proper?

Holding: Yes. Relying on In re Niles, the award of counsel fees against the defendant was proper. Even though defendant was not an executor or trustee as was the case in Niles, he controlled the testator's estate under the Power of Attorney and he influenced the testator to change his estate plan to benefit himself. In Niles, the Court held that when an executor or trustee commits the pernicious tort of undue influence, it should result in an award of counsel fees and costs against said tortfeasor. In this matter, as in Niles, the award of attorneys fees was based on the rationale that the estate should be made whole when undue influence results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate. The award of attorneys fees against defendant was therefore upheld.

Selected Statutes

Bonds of Fiduciaries – Disabled Beneficiaries

In October of 2009, a statute was enacted requiring bonds to be posted by trustees and guardians named in a Will over trusts established for the benefit of developmentally disabled persons. The statute specifically exempts from this requirement family members and certain non-profit organizations.

The statute reads as follows:

"**N.J.S.A. 3B:15-1. Bonds of fiduciaries; exceptions.**

The Court or surrogate appointing a fiduciary in any of the instances enumerated below shall secure faithful performance of the duties of his office by requiring the fiduciary thereby authorized to act to furnish bond to the Superior Court in a sum and with proper conditions and sureties, having due regard to the value of the estate in his charge and the extent of his authority, as the Court shall approve:

a. When an appointment is made upon failure of the will, or other instrument creating or continuing a fiduciary relationship, to name a fiduciary;

b. When a person is appointed in the place of the person named as fiduciary in the will, or other instrument creating or continuing the fiduciary relationship;

c. When the office to which the person is appointed is any form of administration, except (1) administration ad litem which may be granted with or without bond; or (2) administration granted to a surviving spouse where the decedent's entire estate is payable to the surviving spouse;

d. When the office to which the person is appointed is any form of guardianship of a minor or incapacitated person, except as otherwise provided in N.J.S.3B:12-16 or N.J.S.3B:12-33 with respect to a guardian appointed by will;

e. When letters are granted to a nonresident executor, except in cases where the will provides that no security shall be required of the person named as executor therein;

f. When an additional or substituted fiduciary is appointed;

g. When an appointment is made under chapter 26 of this title, of a fiduciary for the estate or property, or any part thereof, of an absentee;

h. When a fiduciary moves from the State, the Court may require him to give such security as it may determine; or

i. (1) When an appointment is made, regardless of any direction in a last will and testament relieving a personal representative, testamentary guardian or testamentary trustee or their successors from giving bond, that person shall, before receiving letters or exercising any authority or control over the property, provide bond to secure performance of his duties with respect to property to which a developmentally disabled person as defined in section 3 of P.L.1985, c.145 (C.30:6D-25) is, or shall be entitled, if:

(a) the testator has identified that a devisee or beneficiary of property of the decedent's estate is such a developmentally disabled person; or

(b) the person seeking appointment has actual knowledge that a devisee or beneficiary of property of the decedent's estate is such a developmentally disabled person.

(2) No bond shall be required pursuant to paragraph (1) of this subsection if:

(a) the Court has appointed another person as guardian of the person or guardian of the estate for the developmentally disabled person;

(b) the person seeking the appointment is a family member within the third degree of consanguinity of the developmentally disabled person; or

(c) the total value of the real and personal assets of the estate or trust does not exceed $25,000.

(3) A personal representative, testamentary guardian or testamentary trustee who is required to provide bond pursuant to paragraph (1) of this subsection shall file with the Superior Court an initial inventory and a final accounting of the estate in his charge containing a true account of all assets of the estate. Such person shall file an interim accounting every five years, or a lesser period of time if so ordered by the Superior Court, in the case of an extended estate or trust administration. A copy of the accountings shall be served on the Public Advocate. The Public Advocate, on behalf of the developmentally disabled person or that person's estate, may file exceptions and objections to interim or final accountings and may initiate an action to compel the person to file an accounting of the trust or estate.

(4) A personal representative, testamentary guardian or testamentary trustee who is required to provide bond pursuant to paragraph (1) of this subsection may make application to the Court to waive the bond or reduce the amount of bond for good cause shown, including the need to preserve assets of the estate.

This subsection shall not apply to qualified financial institutions pursuant to

section 30 of P.L.1948, c.67 (C.17:9A-30) or to non-profit community trusts organized pursuant to P.L.1985, c.424 (C.3B:11-19 et seq.).

Nothing contained in this section shall be construed to require a bond in any case where it is specifically provided by law that a bond need not be required."

Intestacy – Loss of Parental Rights

In March of 2009, the legislature enacted the following statute which cuts off a parents' rights to inherit from a child under intestacy if they abused, abandoned, neglected or endangered the welfare of such child.

The statute is as follows:

"**N.J.S.A. 3B:5-14.1. "Minor" defined; loss of right to intestate succession by parent, certain circumstances.**

a. As used in this section, "minor" means a person under the age of 18 years.

b. A parent of a decedent shall lose all right to intestate succession in any part of the decedent's estate and all right to administer the estate of the decedent if:

(1) The parent refused to acknowledge the decedent or abandoned the decedent when the decedent was a minor by willfully forsaking the decedent, failing to care for and keep the control and custody of the decedent so that the decedent was exposed to physical or moral risk without proper and sufficient protection, or failing to care for and keep the control and custody of the decedent so that the decedent was in the care, custody and control of the State at the time of death;

(2) The parent was convicted of committing any of the following crimes against the decedent:

(a) N.J.S.2C:14-2, Sexual Assault;

(b) N.J.S.2C:14-3, Criminal Sexual Contact;

(c) N.J.S.2C:24-4, Endangering Welfare of Children;

(3) The parent was convicted of an attempt or conspiracy to murder the decedent; or

(4) The parent abused or neglected the decedent, as defined in subsection c. of section 1 of P.L.1974, c.119 (C.9:6-8.21), and the abuse or neglect contributed to the decedent's death.

c. If a parent is disqualified from taking a distributive share in the estate of a decedent under this section, the estate shall be distributed as though the parent predeceased the decedent."

Statute of Frauds – Palimony Agreement

The Statute of Frauds prevents an action seeking the enforcement of certain agreements and/or promises unless same are in writing and signed by the person making such agreement or promise.

In March of 2009, an addition to the Statute of Frauds was amended making palimony agreements enforceable only when a couple enters into a written agreement with each other after consulting separate counsel. According to the legislative history, the statute was meant to overturn the New Jersey Supreme Court decisions in Devaney v. L'Esperance, 195 N.J. 247 (2008) (cohabitation is not a necessary element in every palimony claim) and In re Estate of Roccamonte, 174 N.J. 381, 395 (2002) (establishing a palimony claim against a decedent's estate).

The statute is as follows:

"25:1-5 Promises or agreements not binding unless in writing.

25:1-5. Promises or agreements not binding unless in writing. No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

. . . .

h. A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties."