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ESTATE AND TRUST LITIGATION DIGEST

Summary of 2010 New Jersey
Estate and Trust Litigation
Published and Unpublished Opinions

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This matter involved an appeal of the lower court's enforcement of a hand written settlement agreement which was signed by the beneficiaries of the estate after engaging in mediation. The lower court also awarded legal fees for the necessity of bringing an enforcement action.

The settlement involved a payment by the executor beneficiary to the other beneficiary for having conveyed real estate to himself without providing an equal amount to the other beneficiary.

At mediation, counsel for the executor drafted a settlement agreement to commemorate the settlement which was signed by all parties. However, the executor refused to sign a typed version of the agreement. He also contested the settlement.

His sister filed a motion to enforce the settlement. The executor continued to deny that he had agreed to the settlement, and his attorneys sent a letter to the court stating that they could not represent him in good faith, and also had a conflict as they had lent the executor monies over the years to fund the litigation. The attorneys for the executor then withdrew from the case.

The lower court granted the motion and upheld the settlement. On appeal, the executor claimed that the settlement should be set aside as he was duressed into the settlement through threats of criminal prosecution and inasmuch as his attorney had a conflict of interest. These claims were rejected.

There were no compelling circumstances, despite the conflict of interest. The lower court's decision was therefore upheld on appeal.

Accounting – Failure to Account

In the Matter of the Estate of Francesco Racamato, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-2202-09T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Passaic County. Before Judges Wefing, Payne and Baxter.

Decedent died in 2003, leaving a will devising his personal property and his residuary estate to his children in equal shares. The named executor was appointed by the surrogate.. In trying to administer the estate, in 2004, the executrix provided an informal accounting to the beneficiaries together with a refunding bond and release. One of the beneficiaries, a daughter of the Decedent who was estranged from the family for many years never responded to the 2004 accounting.

In 2007, this beneficiary sent a letter to the executrix asking for all back-up documentation. At some point, distributions of personal property and cash were made to Decedent's children, despite failing to receive a sign-off by Decedent's estranged daughter.

In 2008, this beneficiary filed a complaint requesting a formal accounting and the appointment of a substitute administrator of the estate to administer property in Italy. The trial court dismissed the action finding that it was time barred by Rule 4:85-1, not having been filed within 4 months of the probate of the will. The appellate court reversed, finding that Rule 4:85-1 is inapplicable to claims challenging the administration of an estate. There is no statute of limitations in filing a complaint seeking an accounting. Also, the action is not barred by laches. The key factors in deciding whether to apply the doctrine of laches are the length of the delay, the reasons for the delay, and changing conditions of either or both parties during the delay. The estranged daughter had been adverse to the estate since inception as she had refused to sign the refunding bond and release or to loan the estate monies, like the other beneficiaries. The fact that the other beneficiaries were forced to spend down their legacies on legal fees was not sufficient grounds to apply laches under the circumstances. The lower court's decision was therefore reversed, requiring the Executrix to file a formal accounting.

Attorneys' Fees – Sanctions for Bringing Frivolous Litigation

Estate of Claudia L. Cohen, et al. v. Cohen, 2010 N.J. Super. Unpub. ____ (Docket No.: BER-C-134-08) (Chan. Div. 2010). Before Judge Koblitz.

This opinion by the trial court involves the question of sanctions against the estate for engaging in frivolous litigation by filing and prosecuting an amended complaint with the frivolous allegation that defendant-father made an enforceable promise after 1978 to leave Decedent-daughter as much as her brother under his will. As a deterrent to discourage the estate from repeating the objectionable litigation strategy, an amount of $1.9 million in reasonable counsel fees and costs was awarded against the estate

Although an allowance of fees for bringing frivolous litigation is rare, and only when there is a clear showing of bad faith, the Court felt it warranted in this case in light of the previous ruling by the Court denying the claim. The court also cited the fact that estate assets were used to litigate the frivolous claim to the detriment of the beneficiary and was extremely destructive to the relationships between the beneficiary and her family.

Disinterment – Decedent's Wishes Given Consideration

Hiller v. Washington Cemetery, et al., 2010 N.J. Super. Unpub. LEXIS 299 (Docket No.: A-2510-08T1) (App. Div. 2010). Before Judges Lisa and Coburn.

The Appellate Division upheld the lower court's holding allowing for the body of Decedent to be exhumed from the grave site where he was buried for the purpose of having him cremated based on Decedent's expressed written intentions.

Decedent was buried by his brother, an Orthodox Jew, the morning after his death, despite Decedent's clear written intentions to be cremated. A law suit was filed by Decedent's girlfriend seeking to have his body disinterred and cremated. Decedent had expressed his intentions in a letter and in a written will.

Under Marino v. Marino, the court may consider the Decedent's wishes in dealing with the issue of disinterment. Here, the Decedent's intentions were clear and the court was entitled to strike the balance in favor of Decedent's clear preference. Decedent's girlfriend was given authorization to have the body exhumed and the Decedent's body cremated. Decedent's brother was also ordered to pay for the costs of exhuming the body and the cremation.

Divorce – Estate's Claim for Diversion of Marital Assets

Kay v. Kay, 200 N.J. 551 (2010).

This appeal was taken from the lower court's dismissal of the underlying divorce action between Decedent and his spouse. The estate claimed that the divorce action should continue to determine the rights to certain property which they claim were diverted by the Decedent's spouse during their marriage, for ultimate disposition under his will.

In upholding the Appellate Division, the New Jersey Supreme Court held that a trial court must consider the equitable claims raised by the estate of a deceased spouse who, during the divorce litigation, was attempting to pursue a claim that the surviving spouse had diverted marital assets. Permitting the estate the opportunity to pursue its claim for relief in the underlying divorce action after the Decedent's death would promote equity and fair dealing between spouses.

The estate may continue the divorce action for the limited purpose of proving that marital assets were diverted by the surviving spouse, because equity demands that the innocent spouse have a forum to recover those assets in equitable distribution for payment to the deceased spouse's rightful heirs and to prevent unjust enrichment.

Estate Administration – Collection of Judgment Against Debtor's Inheritance

In the Matter of the Estate of Norton D. Smith, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-4137-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Graves and Sabatino.

The appeal arises out of a judgment creditor's attempt to collect a debt from debtor, by attaching sums due debtor from Decedent's estate as beneficiary.

Judgment was entered against debtor for failure to pay rent. Decedent's son was appointed as administrator of the estate, sold Decedent's residence and made partial distributions. Creditor sued the estate for the distribution made to debtor. The probate court dismissed the action taking the estate's Answer on its face that debtor was owed nothing from the estate. Creditor appealed, claiming that the court should allow discovery on whether debtor in fact is owed monies as beneficiary of the estate, in light of the court's ability to allow creditor to levy on the beneficiary's share in certain situations.

The appellate court reversed, finding questions of fact over whether debtor was owed any monies from the estate as beneficiary. If so, creditor had the ability to attach the monies due debtor from the estate.

Estate Administration – Distributions

In the Matter of the Estate of Frank Leonard, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-6403-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Sussex County. Before Judges Gilroy and Simonelli.

This appeal arises out of a dispute between Decedent's second wife and his children from a prior marriage pertaining to the second wife's handling of the Decedent's residence, which was held in trust, and the failure to distribute personal property which was owned by Decedent's first wife to his children pursuant to his will.

Decedent's first wife predeceased him. They had seven children. Decedent then married his second wife, Elizabeth. In his Will, he directed that his residence in Branchville, New Jersey be shared by Elizabeth and his children, and he devised his first wife's personal property to his children.

Elizabeth refused to probate the will. After an action was filed by Decedent's children, the court compelled her to probate the will. Decedent's children also sought access to the residence to remove their mother's personal property, and to compel sale of the residence as Elizabeth refused to allow for equal access to the premises. Elizabeth claimed she was entitled to exclusive use of the property during her life.

Applying equity, the court carved out a monthly window when Elizabeth had exclusive rights to the property.

The court also denied the children's request for a turnover of their mother's personal property based on laches and the entire controversy doctrine. The appellate court reversed in part, finding that Elizabeth did not object to the children's rights to the personal property and would not be harmed by the turnover of the items to Decedent's children.

Estate Administration – Forced Insolvency

In the Matter of the Estate of David B. Madden, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-5673-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Sussex County. Before Judges Carchman, Lihotz and Ashrafi.

Plaintiff alleged that Decedent engaged in a series of fraudulent transactions with his wife which resulted in an insolvent estate, depriving plaintiff of the ability to collect on a judgment he had against Decedent. The trial court found that plaintiff failed to sustain his burden of proof, which was upheld on appeal.

Plaintiff and Decedent were friends and engaged in business transactions with each other. Decedent borrowed money from plaintiff in 2003 for an investment in an insurance company, which was evidenced by a note. Decedent ran the insurance company until his death. In 2000, Decedent was diagnosed with prostate cancer and established an estate plan by placing sufficient assets in his wife's name to take care of the credit shelter trust provisions under their wills. Decedent held real estate as joint tenants which he ultimately distributed to his wife before his death. Decedent died on November 12, 2003 and his wife was appointed as executrix.

Decedent also had an interest in two leases, which are the subject of the appeal. Decedent subleased the premises to Boston Chicken, in which Decedent received approximately $40,000 per year in excess to the lease payments due the landlord. The lease was transferred by Decedent to his wife. Also, the insurance company filed for bankruptcy after Decedent's death. Plaintiff filed suit against the estate seeking to undo certain pre-death transfers of Decedent.

The court ruled that the actions of Decedent and defendant did not amount to a fraud to avoid a creditor, merely actions to protect their family through proper estate planning. Decedent was permitted to assign the sublease to defendant, and plaintiff failed to prove that the pre-death transfers were an intention by the Decedent to avoid payment on the note, as Decedent still held shares in the insurance company which he intended to sell to satisfy the note. Also, there was still value in the insurance company which the parties agreed was intended to fund the buy-out of the note.

Estate Administration – Forced Sale to Pay Expenses

In the Matter of the Estate of Anthony J. Napoleon, deceased, 2010 N.J. Super. Unpub. ____ (Docket Nos.: A-0919-09T2 and A-1087-09T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County. Before Judges Axelrad, Fisher and Espinosa.

This appeal was taken from the lower court's order compelling the sale of a condominium owned by the estate to provide the illiquid estate with necessary funds to address various obligations. It was consolidated with an appeal from the prior co-administrator from the lower court's order imposing sanctions for violation of the court's oral proclamation imposing unspecified restraints on estate distributions. The appellate division upheld the order compelling the sale of the condominium but overturned the order imposing sanctions, finding lack of adequate specificity in the court's attempt to impose restraints on distributions.

Estate Administration – Legal Malpractice Claim Not Barred by the Entire Controversy Doctrine

Higgins and Calcaterra v. Thurber and Thurber Cappell, LLC, 413 N.J. Super. 1 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Law Division, Morris County. Before Judges Axelrad, Fisher and Sapp-Peterson.

This case involved a claim of malpractice filed by the beneficiaries of the estate against the attorneys for the executor of the estate.

The attorney and firm were hired by the executor to set aside certain questionable transfers of NY Mercantile Exchange Seats owned by the Decedent which were transferred to his daughter prior to his death. An initial hourly retainer was signed, and, when the estate could not pay, the retainer was modified to a contingency arrangement.

At trial, the court ruled that certain Mercantile Exchange seats should be transferred back to the estate. An appeal was taken. Prior to disposition of the appeal, another suit was filed seeking to have the executor removed due to misconduct and to hold the guardian ad litem liable for misconduct. The Court denied the request and ordered a formal accounting. The executor filed a complaint seeking to have his accounting approved. While the formal accounting was pending, another suit was filed seeking damages against the executor for breach of fiduciary duty and claiming that the attorneys for the estate committed malpractice. Exceptions were filed in the accounting action which were highly critical of the services rendered by defendant-attorneys. The defendant-attorneys intervened in the accounting action and the court ultimately dismissed the claims against them without prejudice.

The within complaint was then filed by beneficiaries of the estate against defendant-attorneys claiming legal malpractice, breach of contract, breach of covenant of good faith and fair dealing and excessive fees. The defendant attorneys moved to dismiss the action based on the entire controversy doctrine and the statute of limitations, and the court agreed.

On appeal, the court rejected the application of the entire controversy doctrine to bar the malpractice claim, despite the numerous law suits over a 13 year period, as it was not clear from the record that the beneficiaries were given a full and fair opportunity to prosecute their claim in the formal accounting action. The matter was remanded on this issue and the issue of the application of the 6 year statute of limitations as it was unclear when the limitation period began.

Estate Administration – Surety Bond

Wisnewski v. Travelers Casualty and Surety Company, et al., 2010 U.S. App. LEXIS 15468 (3rd Cir. 2010). On appeal from the United States District Court for the District of New Jersey.

The lower court dismissed plaintiff's complaint which sought payment from the executor's surety company based on the entire controversy doctrine. The Appellate Court agreed, holding that plaintiff's underlying claims against the surety company involved issues already litigated and disposed of by the Superior Court of New Jersey, Chancery Division, probate part. In addition, the Executors underlying account was approved by the Court in this intestacy action, and plaintiff had signed a refunding bond and release. The Executor and the surety bond were discharged by order of the probate court. The within matter seeking to reopen claims regarding the disposition of Decedent's assets was therefore barred by the entire controversy doctrine.

Estate Taxes – NJ - Refund

In the Matter of Nathaniel Pallone, 2010 N.J. Super. Unpub. ____ (Docket No.: A-0968-09T3) (App. Div. 2010). On appeal from a Final Decision of the Department of the Treasury, Division of Pensions and Benefits. Before Judges Cuff and Simonelli.

This appeal concerns the life insurance benefit payable on the death of a member of the faculty at Rutgers University. Upon Decedent's death, the death benefit was paid to Decedent's first wife, who was the designated beneficiary. Decedent's second wife argued that the death benefit should have been paid to her pursuant to a Change of Beneficiary Form which was signed by the Decedent prior to his death and filed with the Division of Pensions several days after his death.

The form submitted by Decedent's second wife named her as primary beneficiary, and had "white-out" over the contingent beneficiary portion of the form. Due to the white-out, the form was rejected by Division personnel. There were also inconsistencies in the underlying facts presented by counsel for Decedent's second wife. Based on the foregoing, the appellate court found that the Division properly rejected the change, authorizing payment to Decedent's first wife.

Estate Taxes – NJ - Refund

Estate of Frank J. Ehringer v. Director, Division of Taxation, 990 A.2d 678, 2010 N.J. Super. LEXIS 41 (App. Div. 2010). On appeal from the Tax Court of New Jersey. Before Judges Reisner, Yannotti and Chambers.

This matter involved an appeal of a decision by the Division of Taxation to deny a claim for refund by the estate which was made over three years after payment and beyond the statue of limitations of N.J.S.A. 54:38-3?

Factually, the Division extended the time to file the estate's tax returns for four months. Although the estate timely paid the anticipated estate taxes, it was unable to file a return as it was involved in ongoing litigation. The taxpayer estate notified the Division of the litigation in writing of this issue.

Two years later, the estate tax return was prepared and filed. A Notice of Assessment was issued detailing a refund due the estate, which was paid. Two years later, the estate received a final closing letter from the IRS on the filing of its federal estate tax return, detailing a further reduction in the gross estate due to ongoing litigation costs incurred by the estate.

Upon receiving the IRS closing letter, the estate sought a refund from the Division of Taxation. The claim for refund was denied as it was made more than 3 years after the State of New Jersey issued its Notice of Assessment.

The taxpayer appealed and the Division's analysis was upheld by the Tax Court, and affirmed on appeal. The Court held that although the statute of limitations for refund claims may be equitably tolled based on factors outside of the estate's control, the within facts were not sufficient to toll the statute.

Estate Taxes – NJ Inheritance Taxes - Request for Refund

Estate of Alvina Taylor v. Director, Division of Taxation, 2010 N.J. Tax. LEXIS 2 (Tax Ct. 2010). Before the New Jersey Tax Court, Judge Narayanan.

Taxpayer appeals the decision by the Division of Taxation denying a refund claim of inheritance taxes that was made more than 3 years after payment of the tax proper.

Decedent died on 11/30/02. The NJ inheritance tax return was due on 7/31/03. On 8/7/03 a $75,000 estimated payment of inheritance taxes was made by the estate. This payment was accompanied by Form IT-EP. On 12/3/03, an additional estimated inheritance tax payment of $75,000 was made. This was also accompanied by Form IT-EP.

In 2004, the Division sent notices requesting the filing of a return. Having received none, the Division made an arbitrary assessment of $300,000 on 8/6/04. The estate did not appeal the arbitrary assessment.

The estate filed the return on 8/19/08, over 5 years after it was due, reporting a total tax due of $109,092, with a balance due of $49,873, which was paid with the return. No evidence was provided that extensions were sought to file the return beyond 7/31/03.

On 1/1/09, the Division issued a Notice of Assessment with respect to the return, accepting the return as filed and indicating a refund due of $90,411. ($199,873 (total tax paid) less (108,062) (amount reported as due)). The Division refunded an amount of $49,873 but denied refunding the balance ($40,538.10), because the application for refund involving that amount was made more than 3 years from the date the tax was paid.

The estate argued that the statute does not apply to estimated payments. The court disagreed, and upheld the Division's denial of the refund request as an application must be made within 3 years of payment of the tax. In refusing to apply an equitable tolling of the statute, the Court noted that the estate gave no indication that any refund would be requested.

Evidence – Trustworthy Statements by Deceased Declarant

Estate of Nick Hanges v. Metropolitan Property & Casualty Insurance Company, 2010 N.J. Super. Unpub. ____ (Docket No.: A-62-09) (App. Div. 2010). New Jersey Supreme Court.

This matter involved the lower court's exclusion of statements made by the Decedent to the police concerning the cause of his automobile accident on summary judgment. On appeal, the appellate court concluded that the statement to the police was admissible under N.J.R.E. 804(b)(6) (Trustworthy Statements by Deceased Declarants).

After an accident, Decedent stated that he was cut off by a "phantom vehicle", a blue corvette, forcing him to crash. He was transported to the hospital where he made the same statement. He was discharged and an accident claim was made, with no mention that Decedent was cut off. A few months later Decedent committed suicide.

The issue was whether Decedent's statement was admissible as an exception to the hearsay rule. NJRE 804(b)(6) codifies an exception to the hearsay rule in civil proceedings admitting "a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy."

The trial court concluded that the statement by the Decedent was inadmissible because it was an attempt to shift responsibility for the accident to a "phantom vehicle." The Decedent had much to gain by the statement and had no duty to be truthful.

The Appellate Division held that the statement was admissible as there was nothing in the record to indicate that the statement was not made in good faith or that it was otherwise lacking in reliability or untrustworthiness. The Supreme Court agreed.

Executor – Breach of Fiduciary Duty

Conforti v. Faccone, 2010 N.J. Super. Unpub. ____ (Docket No.: A-0017-09T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Union County. Before Judges Reisner and Yannotti.

This matter arises out a dispute between the families of two children of the Decedent who were her residuary beneficiaries. In 1994, Decedent deeded her house to her two children, Rita and Peter, reserving a life estate. In 2002, Decedent executed a will leaving her entire estate to a revocable trust, with her two children as the residuary beneficiaries. Decedent added assets to the trust during her life. In 2004, just prior to her death, Decedent resigned her duties as trustee of the revocable trust. Her daughter, Rita, then became the trustee. Soon after her appointment, approximately $133,000 was withdrawn from the trust. The Decedent then passed away later that year.

After Decedent's death, Rita failed to distribute the trust assets and did not sell the house. Instead, she and her husband sought to buy the house at a reduced rate from her brother, Peter, who refused. Although the house was not in the trust, and remained vacant, Rita withdrew substantial amounts from the trust to maintain the property, and also paid her husband and sons for cleaning and maintaining the house. In 2006, Peter filed suit seeking an accounting. Rita then made some distributions to grandchildren of the Decedent pursuant to the terms of the trust but refused to list the house for sale or to distribute Peter's share of the trust. The house was finally sold in 2008, but the funds were held in escrow.

The trial court concluded that Rita unreasonably delayed the sale of the house and that the expenses to her husband and children for maintaining the house were overinflated. The court ordered reimbursement of 50% of those expenses, and surcharged Rita for the failure to distribute stock, which lost value. The court also awarded commissions and refused to award any attorneys' fees as both parties sued for their own benefit. The court's decision was upheld on appeal.

Guardianship – Appointment of Guardian

In the Matter of Edwin O. Gilbert, an alleged incapacitated person, 2010 N.J. Super. Unpub. _____ (Docket No.: A-1119-09T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County.

The trial court appointed Stephen Gilbert as permanent guardian over his father, Dr. Edwin Gilbert. Ellen Heine, appellant, a joint tenant with Dr. Gilbert in certain real property, objected to the appointment.

Dr. Gilbert suffered as stroke resulting in his inability to use language, making him incoherent. Appellant befriended Dr. Gilbert and his wife and eventually moved in with them. Appellant objected to the appointment of Dr. Gilbert's son, questioning his motives. Because of questions raised in the complaint pertaining to some financial transactions made by appellant on

Dr. Gilbert's behalf, the court restrained her from presenting any financial documents to Dr. Gilbert for signature. The court appointed a local attorney as Dr. Gilbert's attorney who reported back to the Court as to Dr. Gilbert's personal and financial status. There were questions raised as to the use of the rents of the property owned jointly between appellant and Dr. Gilbert, and the state of Dr. Gilbert's house and affairs.

Based on this report, the court appointed Dr. Gilbert's son as permanent guardian, finding Dr. Gilbert incapacitated and citing the fact that Dr. Gilbert's family supported the appointment.

The lower court's appointment was affirmed, citing the fact that Dr. Gilbert's son acted as temporary guardian for 8 months without issue. The lower court was also not required to appoint a guardian ad litem in the matter, as Dr. Gilbert was represented by counsel.

Guardianship – Control of Visitation Rights

In the Matter of the Estate of Ann F. McNierny, an Adjudicated Incapacitated Person, 2010 N.J. Super. Unpub. LEXIS 2307 (Docket No.: BER-P-89-10) (Ch. Div. 2010). Before Judge Koblitz, Superior Court of New Jersey, Chancery Division, Bergen County.

In this matter, the Court held that the court appointed guardian had the authority to control the visitation rights of an incapacited person?

Ann McNierny ("Ann") was adjudicated an incapacitated person on 12/4/06, and 2 of her 5 children were appointed as co-guardians. In 2008, Ann was admitted to an assisted living facility. A son, Patrick, would often visit Ann at the facility. These visits became a problem, as Ann became upset every time that Patrick would visit. In order to keep these issues to a minimum, the co-guardians set out a supervised visitation schedule for Patrick's visits with Ann. Patrick totally disregarded this visitation schedule. As a result, the co-guardians asked the facility to deny Patrick access to Ann. Patrick filed a complaint with the Office of the Ombudsman for Institutionalized Elderly. The investigator found out that Ann welcomed visits from Patrick and that his visits were not disruptive. The investigator further concluded that the co-guardians lacked authority to deny Patrick access to Ann.

The co-guardians filed a Complaint in Chancery Court, claiming that they had the requisite authority to control the visitation rights of Ann.

A general guardian has the right to exercise all rights and powers of the incapacitated person except as limited by the judgment. N.J.S.A. 3B:12-24.1; N.J.S.A. 3B:12-48. There were no limitations placed on the co-guardians in the judgment. The co-guardians had the authority to make decisions on behalf of their ward, but must defer to the ward's preferences if not contrary to the ward's best interest. This right of self-determination must be balanced by the court against the ward's best interests.

The Court held that, as a general proposition, guardians have the authority to exercise their discretion in denying visitation rights. The Court also found that the Office of the

Ombudsman for Institutionalized Elderly unreasonably interfered with that authority. In the event a party is aggrieved by their decision, he or she has the right to seek redress in Chancery Court.

Guardianship – Legal Malpractice

Holvenstot v. Nussbaum, 2010 N.J. Super. Unpub. ____ (Docket No.: A-2987-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Law Division, Burlington County. Before Judges Grall and Alvarez.

Plaintiff appeals from the trial court's order granting summary judgment for defendant law firm denying plaintiff's claims of legal malpractice and misrepresentation.

Plaintiff claimed that he was given false information in opposition to a guardianship action that plaintiff filed back in 1993, when Decedent was declared competent. Plaintiff also claimed that defendant law firm committed malpractice in allowing Decedent to cut plaintiff out of her will.

Decedent lived with plaintiff and his family from September 1992 through May 1993. She then stayed with her daughter, who brought plaintiff to defendant law firm in May 1993 to make another will, leaving her estate in equal shares to her four children. In June of 1993, plaintiff brought a guardianship action seeking to declare Decedent incompetent. Defendant law firm provided a certification of Decedent's competence. In July of 1993, Decedent executed a hand written will cutting plaintiff out as beneficiary. There is no evidence that defendant law firm had anything to do with this handwritten will. On September 13, 1993, the court found Decedent competent and dismissed plaintiff's guardianship action. On September 30, 1993, defendant law firm prepared a will for Decedent which she executed, cutting plaintiff out as beneficiary. Decedent also signed a codicil in May of 1995 affirming the terms of the September 30th, 1993 Will.

The court found that plaintiff failed to produce any competent evidence supporting his claims and summary judgment was therefore granted, which was upheld on appeal.

Guardianship – Special Medical Guardian

In the Matter of J.M., For Appointment of a Special Medical Guardian, 2010 N.J. Super. Unpub. ____ (Docket No.: BER-P-036-10) (Ch. Div. 2010). Before Judge Koblitz, Superior Court of New Jersey, Chancery Division, Bergen County.

This case is similar to other emergent medical applications where the Chancery Court must make an immediate life or death decision regarding whether or not to limit an individual's right of self-determination.

This action was filed by Valley Hospital seeking the appointment of a special medical guardian on behalf of J.M. The Complaint asserted that J.M. was critically ill and lacked the mental capacity to consent to medical treatment. An affidavit from the treating physician certified that treatment was necessary to save J.M.'s life. There were also two (2) affidavits from separate psychiatrists at the hospital certifying that J.M. lacked capacity to make decisions regarding her medical care. A social worker certified that J.M. had no immediate family other than a 17 year old son, and there was no health care directive or proxy.

J.M. was generally aware of her medical condition and refused dialysis. Counsel was appointed for J.M., and submitted a comprehensive report for the Court, recommending the appointment of a special medical guardian for J.M. A second attorney was appointed to advocate for J.M.'s wishes.

Within 24 hours of filing the Order to Show Cause, a plenary hearing was held.

The Court recognized J.M.'s right to refuse medical treatment. She accepted other treatment but refused dialysis, claiming that God would save her. Although she has a Constitutional right to refuse treatment, she was unable to comprehend that refusing dialysis would lead to certain death. The Court therefore appointed a special medical guardian on her behalf, and dialysis was successfully administered.

Incapacitated Individual – Withholding Treatment

Betancourt v. Trinitas Hospital, 2010 N.J. Super. Unpub. ____ (Docket No.: A-3849-08T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Union County. Before Judges Carchman, Parrillo and Ashrafi.

This decision is a good case study on the standards of review for withholding treatment to an incapacitated individual without an advance directive.

Ruben Betancourt underwent surgery at Trinitas hospital to remove a tumor. While recovering, the ventilation tube became dislodged, placing him in a permanent vegetative state. Ruben did not have an advanced directive. The hospital, over the objection of the family, placed a Do Not Resuscitate ("DNR) order in his file. Ruben's daughter filed a Complaint in the Chancery Division seeking a restraining order, which was granted. A hearing occurred 2 weeks later, and plaintiff was appointed as her father's guardian to make life or death decisions. The lower court held that such decisions should be made by a surrogate who could take Ruben's value systems into account when determining what medical treatment was appropriate. The hospital appealed. During the appeal, Ruben passed away. The Appellate Division dismissed the appeal as moot, finding that the decision was not a matter of substantial public importance.

Insolvent Estate – Priority of Claims in Foreclosure Action

Investors Savings Bank v. Gloria and Steven Sitzman, as Administrator of the state of Peter Sitzman, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-183-08T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Sussex County. Before Judges Grall and Messano.

Decedent passed away owning real estate encumbered by a mortgage. The Decedent's parents were appointed as co-administrators of the estate. The Decedent's only asset was a residence worth $210,000, with a mortgage lien of $262,000. On Decedent's death, a foreclosure action was filed by the bank seeking the return of Decedent's real estate. The co-administrators filed an action in surrogate's court seeking to declare the estate insolvent, and to allow for them to sell the Decedent's residence and pay funeral bills and administration expenses out of the proceeds of sale before turning the remainder over to the bank. The bank filed summary judgment. Denying the co-administrators' request, the court ruled that the priority scheme of N.J.S.A. 3B:22-2 did not apply because the residence was not an asset of the estate, only Decedent's equity in light of the mortgage was an asset of the estate. Since the value of the mortgage was well in excess of the value of the property, the bank's summary judgment request seeking to consolidate the matter with the foreclosure matter was granted. This decision was upheld on appeal.

Inter Vivos Gifts – Gift by Power of Attorney

Wolpin v. Wolpin, 2010 N.J. Super. Unpub. LEXIS 608 (Docket No.: A-1399-08T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County. Before Judges Rodriguez, Reisner and Chambers.

In this matter, the court set aside a Deed transfer made by Decedent's wife to herself by power of attorney. The court held that Decedent's second wife lacked the requisite authority to convey the condominium to herself as the power of attorney did not contain any language authorizing a transfer of Decedent's assets to herself. Under NJ common law in effect at the time, one holding a power of attorney could not give away the assets of a principal unless the power of attorney contained very clear language permitting such action. (Note: this was subsequently codified in N.J.S. 46:2B-8.13a).

This litigation is between Decedent's second wife and the children of his first wife over the right to proceeds of sale of a condominium owned by the Decedent.

In 1984, Decedent purchased a condominium in Long Branch, New Jersey for $206,800. At the time, he was married to his second wife. At the time of purchase, Decedent gave his two sons a mortgage in the amount of $180,000 on the condominium. This did not represent any underlying debt owed to the sons. One son testified that Decedent wanted the mortgage to act as a gift to his children and grandchildren at his death. The mortgage was recorded and remained of record at Decedent's death.

In 1987, Decedent prepared and executed a Deed granting the condominium to his sons together with use of a cabana, retaining a life estate for himself and providing that the conveyance did not merge with any mortgage. He gave the original Deed to his sons, telling them not to act on it unless he was terminally ill. The Deed was never recorded.

Thereafter, in 1988, Decedent executed a number of wills leaving the condominium to his second wife. He executed another will leaving her a life estate in the condominium, stating that the prior will was the product of undue influence exerted over him by his wife. He executed a third will leaving his wife the minimum required by law.

In 1994, as a result of a fall, Decedent gave his wife power of attorney. She immediately had a Deed prepared conveying the condominium to herself. Thereafter, Decedent executed a series of wills prepared by his wife's attorney ratifying the Deed to his wife.

In 1995, Decedent wrote a letter stating that his wife was liquidating his assets and giving them to her daughter, but he needed her, and that any wills after 1995 were the product of undue influence. In 1997, Decedent conveyed the cabana to his wife.

In 2006, after Decedent's death, his wife sold the condominium. She then learned of the recorded mortgage and commenced a declaratory judgment action seeking to invalidate the mortgage. Decedent's sons counterclaimed, seeking to enforce the 1984 mortgage and 1987 deed.

The trial court found that the 1984 mortgage was a valid inter vivos gift, as donative intent was not in dispute, and Decedent recorded the mortgage himself.

The trial court also held that the 1987 deed was not a valid inter vivos gift as Decedent's failure to record same was evidence of his lack of donative intent and evidence of his failure to relinquish dominion and control. Also, Decedent told his sons to hold the Deed until he became terminally ill.

The trial court upheld the 1994 Deed transfer. The appellate court reversed, as same was executed by Decedent's second wife pursuant to a power of attorney. The power of attorney did not give her the right to convey the property to herself, and therefore should be set aside. The appellate court also found that the trial court's reliance on subsequent wills which were likely the product of undue influence was misplaced, as no determination of there validity had ever been made.

Inter Vivos Gifts – Tax Apportionment

In the Matter of the Estate of Sheldon Sommers, a/k/a Sheldon Charles Sommers, deceased, 2010 N.J. Super. Unpub. _____ (Docket No.: A-3417-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Rodriguez, Reisner and Yannotti.

This appeal involves a dispute between Decedent's second wife and his nieces over Decedent's art collection. Decedent divorced his wife in 1999. With the advice of tax counsel, Decedent gifted his art work to his nieces. An arbitration proceeding in Indiana, where Decedent resided at the time confirmed that Decedent made an irrevocable transfer of the art work to a limited liability company, and thereafter, made a valid gift of the shares in the LLC to his nieces. These transfers occurred in late 2001 and early 2002. At the time the gifts were made to his nieces, they were the primary beneficiaries of Decedent's estate plan.

A few months later, Decedent reconciled with his second wife and they remarried in June of 2002. He also made a new Will naming his second wife as Executrix. Decedent then sued his nieces for a return of the art work. After he died a few months later, the estate continued the suit in Indiana, which it lost.

Suit was then brought in New Jersey for payment of estate taxes on the gift.

The suit in NJ did not allege undue influence and fraud, the issue which they lost in Indiana. Instead, they requested payment of $500,000 in estate taxes due to the transfer.

The lower court held that these issues were already litigated in Indiana, and were res judicata. The court also found that the Decedent intended that the gift would be fee and clear of any estate taxes. The complaint was then dismissed, without prejudice, as the IRS determined that the art work was not part of the gross estate and there should therefore be no apportionment.

Inter Vivos Transactions – Convenience Account

In the Matter of the Estate of Pasquale Suraci, deceased, (Docket No.: BER-P-284-09) (App. Div. 2010). Superior Court of New Jersey, Chancery Division, Bergen County. Before Judge Doyne.

This matter involved the trial court's denial of partial summary judgment seeking to set aside the transfer of a joint account held between Decedent and his daughter as a convenience account.

The Court denied the motion for partial summary judgment in light of the fact that the Multi-Party Deposit Account Act (N.J.S.A. 16:16 I-5), cited by defendant, does not apply to brokerage accounts.

This case provides a good survey and explanation of the applicable law in seeking to set aside an inter-vivos transfer as a convenience account or as the product of undue influence.

Inter Vivos Transactions - Incapacity

In the Matter of Ferne Marie Banford, an alleged mentally incapacitated person, 2010 N.J. Super. Unpub. ____ (Docket No.: A-4853-08T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County.

This matter involved an appeal of the lower court's decision declaring Ferne Marie Banford incapacitated and granting her son guardianship over her person and property. Her daughter appealed, claiming that her mother was not physically disabled and that she was able to care for her mother in her home rather than the assisted living facility where she resided. The lower court's decision was affirmed on appeal.

In making a decision as to the appointment of guardian, the lower court noted that the incapacitated person had given her son power of attorney over 10 years ago and that he acted responsibly with the care of his mother, while the actions of appellant daughter were questionable. Once a finding of incapacity is made, which was not questioned in this case, the lower court had broad discretion on the choice of guardian. Finding that the lower court chose a guardian who was favored under the statute and who acted as caregiver for many years, the appellate division held that the court properly exercised its discretion and affirmed its decision.

Inter Vivos Transactions - Undue Influence

In re Estate of Jewell B. Sykes, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-1109-09T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Gloucester County.

Decedent entered into two (2) separate leases with a company owned by her son which permitted the construction of two (2) separate cell towers on her farm. Decedent's daughter filed suit against the estate claiming that these leases were the product of undue influence and as to the second lease, Decedent lacked capacity to enter into same. After trial, the lower Court rejected the claims of Decedent's daughter. She then appealed.

In determining whether undue influence was involved, Decedent's daughter was required to show a confidential relationship. The mere existence of family ties does not create a confidential relationship, rather, the test involves measuring whether the relations between the parties are of such a character as to render it reasonably certain that one party occupied a dominant position over the other and that they therefore did not deal on terms of equality. Here, the Decedent's daughter merely cited the familial relationship, which was not enough to meet her burden of proof.

A confidential relationship exists where the "relations between the parties are of such a character of trust and confidence as to render it reasonably certain that one party occupied a dominant position over the other and that consequently they did not deal on terms and conditions of equality." Plaintiff failed to provide sufficient evidence of a confidential relationship to warrant further scrutiny of the transactions at issue.

In addition, Decedent did not relinquish dominion and control over the property as she continued to receive rent from her son under the terms of the lease. The appellate court therefore affirmed the trial court's order. As to the issue of competence to enter into the second lease, the court relied on the testimony of various attorneys who met the Decedent around the time that the second lease was created, finding her competent to execute estate planning documents. This part of the trial court's findings was also upheld.

Inter Vivos Transfers – Gift vs. Loan

Estate of Claudia L. Cohen, et al. v. Cohen, 2010 N.J. Super. Unpub. ____ (Docket No.: BER-C-134-08) (Chan. Div. 2010). Before Judge Koblitz.

This matter involved the trial court's opinion on a counterclaim filed by defendant against the estate seeking the return of $10.0 million which defendant claimed was a loan and not a gift. The estate answered claiming that it was a gift and therefore part of Decedent's estate. The court disagreed, finding the transaction was a loan.

Defendant desired to increase his daughter's annual income, but did not want to pay gift tax. The transaction involved lending his daughter $10.0 million of municipal bonds and charging the AFR on the loan, or 1.5% in interest. The difference between the AFR of 1.5% and 5%, the rate of the municipal bonds, would be income to defendant's daughter.

In making the transfer of the bonds, not all of the bonds were transferred timely. Defendant's daughter also signed a Note. The estate argues that because not all of the bonds were timely transferred, that the transaction was a gift not a loan. The court found this was a mere oversight and in light of the fact that defendant's daughter was compensated for the untimely transfer through payment of back-interest, the failure to immediately transfer all of the bonds was not fatal.

The estate also argued that defendant did not ask for the loan to be paid back until 8 weeks after his daughter died, never demanded interest payment, did not properly reflect the loan on his tax returns, and the fact that his daughter commented to friends that defendant would not require her to pay the money back. The court found that defendant's promise to forgive the debt was conditional on predeceasing his daughter, and was of a testamentary nature required to be written in a will.

The estate bears the burden of proof to show, by clear and convincing evidence, (i) donative intent, (ii) delivery of the subject matter of the gift, and (iii) donor's relinquishment of

control of the subject matter of the gift. The court found donative intent lacking and the estate must repay the loan to defendant.

Inter Vivos Transfers - Undue Influence

In re Estate of Philomena Vicinio, 2010 N.J. Super. Unpub. ____ (Docket No.: A-4775-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County.

In this matter, the Appellate Court upheld the trial court's decision removing Decedent's son as Executor and voiding the inter vivos transfers to him from the Decedent as the produce to undue influence, finding adequate grounds for the trial court's decision.

After the death of her husband of 53 years, Decedent's health began to deteriorate. On April 7, 2003, Decedent executed a Will leaving everything equally to her two (2) children. Shortly thereafter, she met with another attorney who suggested that assets should be transferred to her children for asset protection purposes. While Decedent was living with her son, she transferred her liquid assets to him. She then transferred her real estate to him, to the exclusion of her daughter.

The trial court found that during the period that the transfers occurred, that Decedent was under the exclusive control of her son, and that he exerted undue influence over her, and no credible testimony was introduced to rebut the finding of undue influence. The trial court found that the Decedent' son secreted the transfers made to him by the Decedent from her attorney. The trial court also noted that Decedent's Last Will and Testament clearly defined her intentions to leave her entire estate equally between her two (2) children. This finding was bolstered by the evidence presented that Decedent loved both of her children equally, and that her long standing estate plan was to treat them equally. The inter vivos transfers were voided and the court directed Decedent's son to transfer the assets back to the Estate.

Inter Vivos Gift – Pension Beneficiary Designation

Isko v. Jados, 2010 N.J. Super. Unpub. (Docket No. A-4206-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Law Division, Morris County. Before Judges Skillman, Fuentes and Simonelli.

While married, husband named his wife as surviving annuitant on a joint survivor annuity. After they divorced, husband tried to remove his ex-wife as an annuitant. The court found that the designation was irrevocable, and should have been dealt with in the underlying divorce action. Husband was barred from changing the beneficiary of the excess benefit plan received from his employer, and this result could not be changed through litigation. A valid inter vivos gift was found, irregardless of the pre-nuptial agreement.

Inter Vivos Transfers – Ademption By Satisfaction

In the Matter of the Estate of Louis S. Grant, Sr., deceased, 2010 N.J. Super. Unpub. _____ (Docket No.: A-0078-09T2; A-0079-09T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hunterdon County. Before Judges Rodriguez and LeWinn.

This matter involved consolidated appeals in a will contest between Decedent's son and his two (2) daughters. Litigation between the parties involved claims of undue influence, removal of the executor and return of monies to the Estate received by Decedent's son.

The matter was tried before the trial court and findings of fact were made. Separate appeals were taken pertaining to monies transferred to Decedent's son prior to his death involving Decedent's business. In his Will, Decedent devised his business to his son in recognition of the work he had performed over the years. Prior to his death, Decedent liquidated the business and transferred the proceeds to his son. The son claimed that this transfer was an ademption by satisfaction, and the Court agreed, finding that Decedent's intent as to the disposition of the business was clear, and Decedent's son had always maintained that the transfer was in satisfaction of the devise set forth in Decedent's Will.

The Appellate Court remanded to the trial court for further findings on the disposition of a partnership which was set up by the Decedent during his lifetime and contained the real estate in which the business was located. When the partnership was established, the Decedent's son signed the requisite assignments, but the daughters refused to do so. The matter was therefore remanded for a finding on Decedent's intentions as to the disposition of the partnership.

Legal Fees – Will Contest

In re Estate of Richard Newberry, 2010 N.J. Super. Unpub. LEXIS 642 (Docket No. A-1332-08T1) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County. Before Judges Rodriguez and Reisner.

Plaintiff sought review of the Court's award of legal fees from the Estate, despite having been given the right to object to the fees in a prior action.

The Court found that the failure of the plaintiff beneficiary to object to the request for fees and costs of suit, and the consent to entry of an order awarding such fees, barred the plaintiff beneficiary from seeking further review of the matter.

Initially, Decedent's accountant sought probate of an unsigned copy of a Will prepared on Decedent's behalf. The Court originally probated the Will, despite the fact that it was unsigned. Cousins of the Decedent filed a complaint objecting to the probate and after reconsidering its determination, the Court changed its prior ruling and refused admission of the Will to probate. An application was made by the Decedent's accountant and her attorney for fees, and the Court awarded same with the Consent of all interested parties. An accounting was

subsequently approved by counsel for the plaintiff beneficiary detailing these fees. Plaintiff beneficiary failed to object, failed to file an appeal or a motion for reconsideration. Several months later, plaintiff beneficiary filed a complaint seeking relief against Decedent's accountant for wrongdoing and to disallow her fees. The Court dismissed the action as time barred as the claims were not raised in the initial probate action. The Appellate Court affirmed.

Legal Fees – Sanctions for Frivolous Litigation

In the Matter of the Estate of Andrell Cyrano "Billy" Adams, deceased, 2010 N.J. Super. Unpub. _____ (Docket No. A-5764-08T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Law Division, Bergen County. Before Judges Skillman, Gilroy and Simonelli.

This appeal involves the propriety of the trial court's order directing the law firm for the Decedent's ex-wife to pay Rule. 1:4-8 counsel fee sanctions for filing a frivolous motion.

The underlying matter arises out of questions over the appointment of a friend of the family as administratrix of Decedent's estate. Decedent died intestate survived by his ex-wife and 4 children, two of which were from different relationships. On application of some of Decedent's children, the friend of the family was appointed as administratrix. The law firm later filed suit seeking to have Decedent's ex-wife appointed as administratrix claiming negligence by her prior attorneys. The court concluded that there was a conflict in appointing Decedent's ex-wife, who still owed the estate money under the judgment of divorce, and that the existing administratrix was properly fulfilling her duties, and denied the motion. The court denied the application for sanctions against the law firm, stating that if Decedent's ex-wife failed to cooperate with the estate, it would be viewed in a different light. The law firm then filed a motion for reconsideration on behalf of the daughter of Decedent's ex-wife, and sanctions under Rule 1:4-8 were imposed.

On appeal, the court reversed, finding that the law firm filed the reconsideration motion in good faith, as the law firm believed the court failed to address the issue of whether there were grounds to vacate the original appointment under Rule 4:50-1(f) before considering a replacement. The law firm reasonably inferred that the denial of their motion was based on the conflict of interest between the Decedent's ex-wife and the estate. The required safe harbor notice requesting the law firm to withdraw the motion was also never sent.

Legal Malpractice – Statute of Limitations

Pasqua v. Masone, 2010 N.J. Super. Unpub. _____ (Docket No. A-3617-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Law Division, Essex County. Before Judges Rodriguez, Yannotti and Chambers.

A legal malpractice case was filed by Vincent Pasqua ("Vincent") against Michael Masone, Esq. ("Masone") seeking damages for preparing a Will, Trust and Power of Attorney on behalf of his mother, Madeline Pasqua ("Madeline"), for conflict of interest and failure to

investigate Decedent's health issues. Masone had been contacted by his stock broker, Andrew Pasqua ("Andrew"), Vincent's brother, to file a tort claim on behalf of Madeline, and then to prepare estate planning documents on her behalf. As a result, there was a change in disposition which increased Andrew's share of the Estate. On January 8, 1999, Madeline filed a Complaint against Andrew alleging breach of fiduciary duty and conversion. Madeline died on June 10, 1999.

On November 8, 1999, Andrew filed a Complaint seeking to admit the Will prepared by Masone to probate. Vincent filed objections. On January 24, 2002, Masone was deposed. The litigation culminated in a trial before Judge Weeks, who rendered a decision on February 9, 2006, setting aside the Will and Trust prepared by Masone and appointing Vincent as the administrator.

On February 5, 2008, Vincent sued Masone on behalf of the estate for legal malpractice. Masone moved for summary judgment arguing that the action was barred by the 6 year statute of limitations. The trial court agreed and the matter was dismissed, finding that the malpractice action accrued the latest at Masone's deposition on January 24, 2002, finding that the knowledge required under the discovery rule either existed or should have existed after the deposition. By that date, Vincent had actual injury and knowledge of fault. The trial court's decision was upheld on appeal.

Life Insurance – Beneficiary Designation (Divorce)

In re Estate of Paul Brown, deceased, 2010 N.J. Super. Unpub. LEXIS 681 (Docket No. A-5069-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Gloucester County. Before Judges Lisa and Baxter.

This matter involved the court's apportionment of the proceeds of a life insurance policy among the Decedent's children and his third wife based on the terms of a Property Settlement Agreement ("PSA") which was upheld on appeal.

This appeal involved a dispute over the right to certain life insurance proceeds on Decedent's life between Decedent's third and final wife and Decedent's children from his first marriage. Decedent entered into a PSA requiring him to maintain life insurance for his 2 minor children. Over the years, Decedent increased the policy amounts payable by his employer, each time, deleting the names of his sons as beneficiaries, in violation of the PSA, and naming his third wife as beneficiary. The increases were done on 3 separate occasions, only the last of which was done while Decedent was married to his third wife. Recognizing that Decedent had violated the PSA, the court was required to equitably apportion the proceeds.

The court concluded that the most equitable distribution was one that recognized both Decedent's obligations under the PSA and Decedent's desire to provide financial security for his third wife. Upon balancing the equities, the court determined that Decedent's children should receive an amount up to the second increase, before Decedent met his third wife, with the remainder being distributed to his third wife.

The appellate court upheld the lower court's decision, and also held that the matter was properly adjudicated on summary judgment as a matter of law, without the necessity of a plenary hearing.

Life Insurance – Beneficiary Designation (Divorce)

Provident Life & Casualty Insurance Company v. The Estate of Consuela Howard, et al., 2010 U.S. Dist. LEXIS 95153 (Docket No. 06-4482) (U.S.D.C. 2010).

The Estate filed a motion seeking summary judgment declaring the proceeds of life insurance on the Decedent's life, which named the Decedent's husband, as estate property in light of husband's conviction of the murder of Decedent. The Court granted the motion based on N.J.S.A. 3B:7-1.1(a), wherein an individual forfeits all benefits of the estate if found to be responsible for the intentional killing of the Decedent. The court also remanded the matter to the Chancery Division on the issue of whether a constructive trust should be established for the minor children of the Decedent until they reach 21 years of age.

Life Insurance – Beneficiary Designation (Divorce)

American General Life Insurance Company v. Mi Ja Jae, et al., 2010 U.S. Dist. LEXIS 75857 (U.S.D.C. 2010).

This matter involved a dispute over the proceeds of a life insurance policy on Decedent's life. Decedent purchased the policy and named his then fiancée as primary beneficiary, with his brother and sister as contingent beneficiary. Decedent broke off his relationship with his fiancée, and married someone else. Decedent made hand written changes to the beneficiary designation prior to his death naming his wife as beneficiary, but failed to send a copy of a new beneficiary designation form to the insurance company. The Court granted summary judgment directing the life insurance payable to the beneficiaries contained on the original form in the insurance company's possession, thereby disregarding the handwritten change by the Decedent.

Palimony Claims – Lack of Jurisdiction

In re Estate of Robert M. Figlio, deceased, 2010 N.J. Super. Unpub. LEXIS 665 (Docket No. A-3545-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Salem County. Before Judges Baxter and Alvarez.

This matter involved an appeal of the lower court's dismissal of a potential palimony claim against the Estate which was overturned on appeal as the plaintiff was not named as an interested party or give notice of the underlying probate complaint.

Decedent and his wife were married in 1968. After Decedent's demise in March of 2008, Decedent's wife filed an Order to Show Cause and Complaint to probate a holographic Will allegedly signed by the Decedent in 1972 which left his wife his entire estate. Decedent's wife did not name Plaintiff, who allegedly had a marital type relationship with Decedent, as an interested party. Prior to the return date, Plaintiff sent a letter to counsel for the Estate regarding her potential palimony claim against the Estate. This letter was sent to the Court by counsel for the Estate. Plaintiff also filed a Certification with the Court detailing her relationship with the Decedent. Although counsel and the Court were aware of the claim, Plaintiff was never served with a copy of the Complaint, and therefore no responsive pleadings were filed. After a hearing, the trial Court dismissed Plaintiff's potential palimony claim and admitted the holographic Will to probate.

On appeal, the appellate court held that since Plaintiff was not named as an interested party, and was not served with the underlying probate Complaint, her rights could not be adjudicated as the Court lacked jurisdiction over her claim. Even if the Probate Part had the authority to decide such a claim, Plaintiff presented sufficient facts to survive the motion for dismissal of her palimony claim. The order dismissing the matter was reversed, and Plaintiff authorized to assert a palimony claim in the Family Part for proper adjudication.

Probable Intent – Imposition of Trusts on Intestate Estate

In the Matter of the Trusts to be Established in the Matter of the Estate of Margaret A. Flood, Deceased, 417 N.J. Super 378 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County.

The Court considered whether the doctrine of probable intent applied to a person's intestate estate where the Decedent had engaged in certain estate planning prior to her death without executing a formal Will.

Decedent, Margaret Flood, had 4 children, 2 of which were disabled and received governmental assistance and Medicaid. Decedent first considered estate planning after her husband's death in 2004. According to testimony presented to the trial court, Decedent was concerned about protecting the inheritance of her disabled daughters and their obligation to reimburse the government for disability payments. She did not consult an attorney until March of 2008. These plans were delayed due to the illness of one of her children and Decedent's own injuries. Decedent died on May of 2008 without having executed a Will. The administrator of the Estate filed a Complaint seeking authorization to establish special needs trusts for the Decedent's 2 disabled children.

The trial Court held that the doctrine of probable intent may extend to give effect to Decedent's intention to establish special needs trusts for her disabled children.

The Appellate Division disagreed, reversing the trial court's decision and ordering the disposition of the Decedent's estate in accordance with intestacy. The doctrine of probable

intent is a will construction statute, but it cannot be used to write a will that the testator did not write.

Removal of Personal Representative

In the Matter of the Estate of Howard C. Hope, Sr., deceased, 2010 N.J. Super. Unpub. LEXIS 329 (Docket No.: A-2988-08T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Camden County. Before Judges Cuff, Payne and C.L. Miniman.

Plaintiffs appealed the lower court's denial of their application to have the court appointed Administrator CTA of the Estate removed.

Decedent died testate. In his Will, he named a son as executor and devised to him all of his personal property. The remainder of his estate was to pass in equal shares to his four children.

In July of 2003, one of the children filed an application to have his brother – executor removed for failure to distribute real estate owned by the estate. This application was granted and the court appointed an Administrator CTA to act on behalf of the estate.

Another application was filed requiring the Administrator CTA to distribute real estate owned by the estate in kind to the beneficiaries. The court ordered the Administrator CTA to sell the property and an appeal was taken. The appellate court upheld the court's decision to have the property sold as it was impracticable to distribute same in kind. The Administrator CTA proceeded on a contract of sale which was objected to by the Plaintiffs.

Plaintiffs filed a motion seeking to remove the Administrator CTA, which was denied. The court found that the Plaintiffs had unclean hands and had notice of the contract for many years, and applied the doctrine of laches The court's determination was upheld. The Administrator CTA did not abuse his discretion, acted in good faith and kept the Plaintiffs adequately informed of the Contract of Sale and the property..

Taxation –Homestead Rebate

Estate of Olive M. Hornich v. New Jersey Division of Taxation, 2010 N.J. Super. Unpub. (Docket No. A-1350-08T1) (App. Div. 2010). On appeal from the Tax Court of New Jersey. Before Judges Wefing, Messano and LeWinn.

The Estate appealed the Division of Taxation's denial of the Homestead Rebate. The homestead rebate is sought for 2005. Decedent died in February of 2006 owning a home in Piscataway, New Jersey.

A homestead rebate application was mailed by the Division to Decedent's last known address. Decedent's executor was appointed in March of 2006 and claimed to have called the

Division on 3 separate occasions to file the application by phone. The Division had no record of any application having been filed, and denied the rebate for 2005. The tax court agreed; and its decision was upheld on appeal. There is no evidence that the Division did not comply with its procedures.

Trusts – Undue Influence

In re the Joseph Buscavage and Helen A. Buscavage Living Trust, 2010 N.J. Super. Unpub. ____ (Docket No.: A-6041-08T3 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Somerset County.

This case involved allegations of undue influence pertaining to changes to Decedent's revocable trust agreement.

Joseph and Helen executed a revocable living trust in 1998 naming various beneficiaries. They had no children and Helen predeceased Joseph. After Helen died, Joseph made 2 unchallenged amendments to the trust in 2001 and 2003, amending the percentage distribution to various nieces and nephews. In 2007, Joseph made additional amendments with a new attorney. The 2007 amendment eliminated certain beneficiaries and is at the center of this appeal.

Joseph's niece, Helen, contacted a new attorney and brought Joseph to a meeting to discuss his intentions to amend the disposition of his assets under the trust. The attorney went to the hospital to have Joseph sign the amendment. He had surgery the same day he signed the amendment. Five months later, Joseph signed another amendment to the trust further increasing the disposition of his estate to his niece, Helen, and cutting out one of his sisters. This Amendment was signed in the presence of Helen at Joseph's home, who was notably sick but "mentally fine", according to the attorney draftsman. Joseph also changed the beneficiaries of some CDs.

Joseph died a few months later on 9/11/07 at the age of 82.

The beneficiaries receiving a reduced interest due to the amendments challenged the validity of same based on undue influence and conflict of interest of the attorney draftsman who also represented Helen who benefited from the change in disposition.

The trial court found that appellants failed to establish that Joseph lacked testamentary capacity, that there was the presence of undue influence, or a conflict of interest by the attorney draftsman which compromised his representation of Joseph. Appellants claim the trial court erred by focusing on testamentary capacity, which was not raised in their complaint, instead of performing an analysis of the case based on undue influence.

Although the trial court denied a motion to dismiss as it found the presence of a confidential relationship and suspicious circumstances, it failed to reference same in its opinion. Nor did it mention its finding of suspicious circumstances, a key element to undue influence.

The lower court also failed to make a finding whether the prior relationship with Helen created a conflict of interest.

The matter was remanded for further findings of fact on the issue of undue influence.

Trusts – When is an Inter Vivos Trust subject to equitable distribution?

Tannen v. Tannen, 2010 N.J. Super. Unpub. ____ (Docket Nos.: A-4185-07T1 & A-4211-07T1 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County.

In litigation over equitable distribution, alimony and child support, the trial court ordered plaintiff husband to join as third party defendants four separate inter vivos trusts in which the defendant wife or the couples' children were beneficiaries. The trusts requested dismissal of the third party complaint based on lack of standing and other grounds.

The trusts sought to exclude income from the trusts as an asset for alimony and child support purposes, which was denied. The trial court considered the income generated by the trusts as income for computation of alimony. The court also reasoned that it had the authority to compel a distribution of income when the trustees were being unreasonable in refusing to make distributions..

On appeal, the crucial issue became whether defendant wife's beneficial interest in the trust was an asset held by her, whether she had control of the income generated by the trust, or the ability to tap into the income. This required the court to analyze the terms of the trust and the probable intent of the settler of the trust by looking at the four corners of the document.

The language of the large trust for defendant wife limited distributions to health, maintenance and support, and specifically stated that distributions could not be compelled by defendant wife. It also had a spendthrift clause. The Appellate Court held that the trust was a discretionary trust not an asset of defendant wife for computation of alimony.

Will Contest –Attorneys' Fees

In the Matter of the Probate of the Alleged Will of Gabriela Sipko, deceased, 2010 N.J. Super. Unpub. LEXIS 480 (Docket No.: A-3622-08T1 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Civil Part, Bergen County. Before Judges Carchman and Parillo.

The Appellate Court upheld the lower court's award of legal fees against the Estate to a successful contestant in a Will contest. The decision to award attorneys' fees and the quantum of the reward, rests within the discretion of the trial judge. In this matter, the trial court did not abuse its discretion.

Decedent created a pour-over Will and trust held for the benefit of her husband, with the remainder distributed in equal shares to her 2 children. Thereafter, Decedent executed a codicil to her Will which excluded her one son, Robert, from sharing in her estate and trust. This codicil was witnessed by only one witness, and then notarized. Robert contested the codicil claiming it did not meet the statutory requirements and was the product of undue influence.

The lower court found that the notary in fact did not act as a witness. Therefore, the codicil did not meet the statutory requirement for two witnesses, and granted Robert's motion to set aside the codicil.

Thereafter, Robert moved for counsel fees pursuant to R. 4:49-2(a)(3). The court reduced Robert's request by 20%, and awarded him $113,358.40 in legal fees. An appeal as to this award was taken.

The appellate court upheld the lower court's award, highlighting that court's finding that this is a case that should not have been brought in light of the failure to comply with the statute governing the signing of wills. Instead, it was brought in light of the family dysfunction. Robert does not have the financial means to fund the litigation and it is significant that he prevailed in the suit.

As to the quantum of fees, the trial court's determination is given great deference. The lower court considered the work performed as set forth in the attorneys' affidavit of services, and decided to reduce the fee by 20% in light of ancillary corporate work performed on the file. Based on the lower court's findings of fact, the award of fees was upheld.

Will Contest – Probable Intent

In the Matter of the Estate of Francis Marie Ackerson Yetter, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-0971-09T3) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Sussex County. Before Judges R. B. Coleman and C. L. Miniman.

This appeal involves the court's interpretation of a provision in Decedent's will under the probable intent doctrine. The trial court took the literal meaning of the devise to Decedent's great-grandchildren refusing to extend the gift to after born great-grandchildren, while the appellate court disagreed, extending the doctrine of probable intent based on the surrounding circumstances.

Decedent died on June 20, 2007 leaving a Last Will and Testament dated July 9, 2001. In the Will, Decedent specifically devised her Bank of New York stock worth $500,000 in equal shares to her great-grandchildren, naming them in the devise. After the Will was prepared and before Decedent died, 2 additional great grandchildren were born. Decedent did not change the terms of her will before her death.

A complain was filed by a guardian ad litem which was supported by all interested parties, claiming that the probable intent doctrine should control, requesting the court to declare the devise as a class gift. The trial court, relying on the literal meaning of the devise, "to great grandchild A and B", refused to declare it as a class gift. On appeal, the appellate court disagreed, finding that the trial court failed to give adequate consideration to the rule of probable intent, despite the lack of any ambiguity in the devise.

The appellate court cited the fact that the great-grandchildren named in the will were treated equally, there was no evidence that the Decedent did not otherwise wish to treat all great-grandchildren equally, the fact that Decedent unintentionally failed to revise the will and the fact that all interested parties were in agreement. The court was satisfied that there was sufficient indicia from the circumstances and the overall testamentary scheme of the will that Decedent did not intend to omit after-born great-grandchildren from the bequest.

Will Contest – Time Barred by R. 4:85-1

In the Matter of the Estate of Thomas Antonelli, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-2502-09T2) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hudson County. Before Judges Reisner and Alvarez.

In this matter, the Court affirmed the lower court's dismissal of a complaint filed by Decedent's daughter seeking to set aside his probated Will as untimely under R. 4:85-1.

Plaintiff, a daughter of the Decedent, who lived in Pennsylvania, claimed that she met the requirements of R.4:85-2 which permits late filings where there is good cause for the delay and the absence of prejudice to the parties.

Decedent died on December 18, 2008. His will dated November 27, 2007 was admitted to probate on January 15, 2009 and plaintiff did not retain counsel until April 2009. It is undisputed that Decedent signed a prior will leaving a portion of Decedent's estate to plaintiff, while the November 2007 will left everything to defendant.

R. 4:85-1 requires an out-of-state litigant to file a complaint contesting the will within 6 months of receiving notice. A filing was therefore required by July 15, 2009, but not filed until August 14, 2009. Counsel for plaintiff certified that the reason for delay was due to family circumstances and visits from his family. The lower court found that this was a mere oversight by counsel and not "good cause" to extend the period to file the complaint. The appellate court affirmed, finding no substantial reason that afforded a legal excuse for the default. Mere oversight is generally not a sufficient basis for an extension of time.

Will Contest – Time Barred by R. 4:85-1

In the Matter of the Estate of Oliver T. Robinson, deceased, 2010 N.J. Super. Unpub. ____ (Docket No.: A-0353-09T1) (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County. Before Judges Wefing, Baxter and Koblitz.

Plaintiff appealed the court's denial of his application to set aside Decedent's will based on the claim that plaintiff did not receive adequate notice as the biological son of the Decedent.

Plaintiff claimed to be the biological son of the Decedent and sought to set aside Decedent's will, which left Decedent's estate to his mother and siblings. Plaintiff's complaint was filed 4 years after Decedent's death. The court dismissed the complaint after a paternity suit was tried and the court found that plaintiff failed to provide proof of paternity. Neither the Decedent nor his siblings ever acknowledged plaintiff as Decedent's biological son. In addition, prior to the conclusion of the paternity suit, plaintiff was given the ability to exhume Decedent's body to perform a DNA test, which he failed to do. The court also failed to find "good cause" to extend the limitations period under Rule 4:85-1 as plaintiff's complaint was filed 4 years after he found out that Decedent had passed. The trial court's dismissal of the complaint was affirmed.

Will Contest and Inter Vivos Transfers – Undue Influence – Standard of Review

In the Matter of the Estate of Harriet Alexandra Sydlar, deceased, 2010 N.J. Super. Unpub. (Docket No.: A-1467-09T2 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hudson County. Before Judges Cuff, Sapp-Peterson and Simonelli.

This case involved an appeal from a trial court's order dismissing the Complaint filed by Decedent's daughters seeking to set aside Decedent's Will and certain inter vivos transfers which they claimed were the product of undue influence exerted over the Decedent by her grand-daughter. The Will and transfers in question were executed just prior to the Decedent's demise. Plaintiffs established a confidential relationship and suspicious circumstances and were therefore entitled to the presumption of undue influence, thereby shifting the burden of proof to Defendant to establish that the Will and transfers were the product of Decedent's free will. The trial court did not find Defendants' testimony credible and, relying on what seemed to be a preponderance of the evidence standard, issued a judgment in favor of the Plaintiff.

On appeal, the Defendants claim that the court should have been guided by a clear and convincing evidence standard and also that the court erred in misapplying the standard to the facts. The trial court seemed to apply a preponderance of the evidence standard to both the questions pertaining to the Will as well as the inter vivos transfers. In inter vivos transfer cases involving undue influence, the court should apply a standard of clear and convincing evidence. The matter was therefore remanded to the trial court for a determination of whether the evidence is clear and convincing as to the inter vivos transfers.

Will Contest – Undue Influence

In the Matter of the Estate of Lucille Sand, deceased, 2010 N.J. Super. Unpub. (Docket No.: A-1856-08T1 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Union County. Before Judges Baxter and Koblitz.

This matter involved an appeal from the trial court's dismissal of plaintiff's caveat and admission of Decedent's will to probate over claims of undue influence, fraud, lack of testamentary capacity and forgery.

Decedent died in 2008 leaving a Last Will and Testament dated December 4, 2002, and a codicil dated in 2005, wherein she specifically bequeathed $25,000 to her daughter, Sandra, with the remainder of her estate distributed in equal shares to her other three daughters. The will included an in terrorem clause as well. Sandra was estranged from Decedent for many years and the application for probate filed by the executors, two of Decedent's children, sought probate of Decedent's will. It was supported by separate affidavits of Decedent's estate planning attorneys who certified that Decedent was of sound mind and was not subject to undue influence when they discussed with her the terms of her will and codicil and her intentions to leave only a small bequest to Sandra. In opposition to probate, Sandra merely opined that decedent would not have treated her and her siblings differently, there was no other evidence produced. There was also no evidence of lack of capacity. Not having met her burden of proof by clear and convincing evidence, the court granted summary judgment, which was upheld on appeal.

Will Contest – Undue Influence - Attorneys' Fees

In the Matter of the Estate of Maria Krasheninnkoff, deceased, 2010 N.J. Super. Unpub. LEXIS 195 (Docket No.: A-4220-08T32 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County. Before Judges Alvarez and Coburn.

The Appellate Court overturned the lower court's award of legal fees to an unsuccessful contestant in a Will contest.

Plaintiff originally brought suit against Defendant requiring him to vacate the Decedent's premises which were owned jointly with Plaintiff. Defendant refused to vacate. After several motion hearings, Plaintiff discovered that Defendant had obtained letters testamentary from the Ocean County Surrogate falsely claiming to be a relative of the Decedent. The matters were consolidated and a few days prior to trial, Defendant fired his counsel and appeared pro se.

The lower court found that Defendant had engaged in undue influence and set aside the will in which Defendant relied. The court probated the earlier will in which Plaintiff was the beneficiary. Defendant was eventually removed from the Decedent's premises by the Ocean County Sheriff.

Defendant's attorney filed an application for fees, which was opposed by Plaintiff's counsel, but this opposition was never received by the court. A copy of the order awarding the

fees was not served on Plaintiff's counsel. Only after inquiring about the motion did Plaintiff's attorney discover that it was granted. The application for reconsideration was denied.

Plaintiff appealed the award of fees claiming that the court erred as Defendant was found to have committed undue influence, and also failed to pay the ongoing carrying charges of Decedent's premises while he lived there.

The appellate court reversed the award of fees, finding that where the wrongful conduct of one party triggers otherwise unnecessary litigation, no allowance of counsel fees will be made to the wrongdoer.

Will Contest –Writing Intended as a Will

In the Matter of the Probate of the Alleged Will and Codicil of Macool, Deceased, 416 N.J. Super. 298 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County.

In this case, the Appellate Division affirmed the trial court's order declining to admit a will which was not reviewed by Decedent prior to her death, even though the proposed Will contained a majority of the provisions requested by the Decedent.

Decedent had several step-children, which she raised with her husband, and was also quite fond of her niece. Her attorney had previously prepared Wills for her in 1996 and a codicil in 2007. After her husband died, Decedent visited her attorney requesting that a new Will be prepared on her behalf. She gave the attorney a hand-written note that identified the name and addresses of beneficiaries, along with a list of specific bequests. The Decedent did not sign her notes.

After discussing her notes and intentions with the Decedent, the attorney dictated the entire will while she was in his office. Either that afternoon or the next morning, the attorney's secretary typed up a draft Will.

After discussing her Will with her attorney, the Decedent left his office with the intentions of having lunch nearby. According to her attorney, Decedent planned on setting up an appointment to review the Will after the attorney had reviewed it. Decedent passed away one hour after leaving the office, without having reviewed the terms of the draft Will.

Decedent's niece, a beneficiary under the draft Will, filed an action seeking its probate as a writing intended as a Will under NJSA §3B:3-3.

Although the draft Will contained a majority of the provisions discussed with the Decedent, the Decedent never reviewed the terms of the draft Will. The trial court found insufficient evidence to conclude that the Decedent intended the draft to act as her Will.

The trial court went on to conclude that NJSA §3B:3-3 required that a writing bear the signature of the testator in order to be admitted to probate. The Appellate Court disagreed.

The Appellate Court held that in order for a writing intended as a Will to be admitted to probate under NJSA §3B:3-3, the proponent of the writing must prove, "by clear and convincing evidence, that: (1) the Decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the Decedent's final testamentary wishes." The Court also held that that a writing intended as a will need not be signed by the testator in order to be admitted to probate.

Will Contest –Writing Intended as a Will

In re Estate of Albertha Blackwell, 2010 N.J. Super. Unpub. ____ (Docket No.: A-4816-08T3 (App. Div. 2010). On appeal from the Superior Court of New Jersey, Chancery Division, Essex County.

An appeal was filed seeking to set aside trial court's order admitting Decedent's Last Will and Testament to probate for failure to meet the statutory requirements.

The Will consisted of six (6) pages. Decedent signed the first five (5) pages and affixed her signature before the witnesses on the fifth page. The witnesses also signed the fifth and sixth page. Decedent failed to sign the side of page six (6), as she did with the other pages, and also failed to sign the attestation clause on the sixth page. The trial court on the return date of the Order to Show Cause, and without holding a plenary hearing, found that the Will was not self-proved, but was still a valid Will as it was signed by the Decedent, and also witnessed.

The Appellate Court found that a will may be admitted to probate under circumstances where it does not literally comply with the statutory attestation requirements if there was substantial compliance. The matter was remanded to the trial court for a plenary hearing on whether the proponent of the Will can establish by clear and convincing evidence that there was substantial compliance with the formalities required by N.J.S.A. 3B:3-2, that (i) the Will is in writing, (ii) signed by the testator, and (iii) signed by two (2) witnesses.

Citation to Unpublished Cases**:**

Until now, lawyers have been unable to cite an unpublished opinion in court papers on condition that they provide the court and opposing counsel with copies of that opinion and "of all other relevant unpublished opinions known to counsel including those adverse to the position of the client."

Under revised R. 1:36-3, only "contrary" unpublished opinions known to counsel need be provided.

R. 1:36-3. Unpublished Opinions

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.