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Keeping Current - Probate [notes]

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KEEPING CURRENT PROBATE

CASES

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

CHARITABLE TRUSTS: Trustee of donor's pour-over trust has standing to sue donee. A faculty member established a lifetime trust and entered into a gift agreement with the University of Michigan containing terms for a gift to be funded at his death from the trust. After his death, the trustee, who also served as the testator's personal representative, distributed property to the University in satisfaction of the gift, but two years later he filed suit alleging that the University had violated the gift terms. The trial court granted summary judgment for the University on the grounds that plaintiff lacked standing to exercise the settlor's right to enforce the terms of a charitable trust. The appellate court reversed, holding that Michigan statutes gave the trustee power to enforce the terms of the trust. In addition, the court ruled that if the distribution created a charitable trust, the same result followed under the statute governing the enforcement of charitable trusts. Mich. Comp. Laws § 700.7405 (based on U.T.C. § 405) grants standing to a settlor, a named beneficiary, the Attorney General, "among others"—the trustee of a trust making a gift to charity is one of the "others." *Le Gassick, Trustee v. University of Michigan Regents,* No. 344971, 2019 WL 6138539 (Mich. Ct. App. Nov. 19, 2019).

CHILDREN: The term "children" does not include stepchildren. The second article of a testator's will stated the name of her spouse, that there were "no children from this marriage," that she was "previously married" and listed the names of the three children of that marriage, that her husband was "previously married" and listed the names of the two children of that marriage, and further stated that all references in the will to "my children" shall refer "not only to my children named above but also to any child or children hereafter born to or adopted by me." The sixth article gave the residuary estate to "my children" should the husband predecease the testator, which did occur. The personal representative petitioned the probate court for instructions on whether to include the testator's stepchildren in the gift to "my children." The court entered a judgment excluding the stepchildren, and the appellate court affirmed. The court held that the language of the second article could not reasonably be construed to include the stepchildren in the gift to "my children." Three judges dissented on the grounds that the language of the second article was ambiguous. *In re Estate of Todd,* 455 P.3d 560 (Or. Ct. App. 2019).

DECANTING: Beneficiary's attempt to decant trust violates a no-contest provision. The primary beneficiary of a lifetime trust that became irrevocable at the settlor's death brought an action seeking damages for malpractice from the attorneys who drafted the trust and for breach of fiduciary duty by one of the attorneys who was a trustee. The beneficiary also requested judicial approval of a proposed trust to be funded by decanting the existing trust. The trustee counterclaimed for a declaratory judgment that the beneficiary had violated the trust's no-contest clause. The trial court granted the defendants' summary judgment motion because there was no evidence of damages from the alleged malpractice or breach of fiduciary duty and ruled that the beneficiary had violated the no-contest clause. The supreme court affirmed. The beneficiary's proposed decanted trust omitted existing trust terms governing appointment of a corporate trustee. The request to change the trust terms by "decanting" was an attempt "to void, nullify, or set aside" a trust provision, actions for which the no-contest clause expressly required forfeiture. *Gowdy v. Cook,* 455 P.3d 1201 (Wyo. 2020).

NO-CONTEST CLAUSES: Disciplinary complaint against trustees' lawyer does not trigger forfeiture. The beneficiaries of an inter vivos trust brought a disciplinary complaint against the trustees' lawyer. The trustees began an action in state trial court to invoke the trust's no-contest clause against the beneficiaries, alleging their complaint against the lawyer was an objection to action taken in good faith by the trustees and therefore triggered forfeiture of the beneficiaries' interests. The trustees also alleged that they were entitled to indemnification for their expenses, including attorney fees under a settlement agreement between the beneficiaries and the trustees. The trial court granted summary judgment to the beneficiaries, and the appellate court affirmed. The no-contest clause is not violated because complaints to the disciplinary authority are absolutely

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privileged. Moreover, the disciplinary proceeding does not involve the trustees. Because the trustees are not parties to the disciplinary proceeding, the indemnification provision of the settlement agreement is not applicable. In addition, the indemnification provision cannot apply to an action, like this one, brought by the trustees against the beneficiaries. *In re Eleanor McCarthy Lenahan Trust*, 836 S.E.2d 793 (S.C. Ct. App. 2019).

POWERS OF ATTORNEY: Language does not authorize agent to make gifts. A son who was seriously injured gave his mother a durable power of attorney authorizing her "to sell and convey" any and all of his property. Shortly before the son died, the mother made gifts of most of his property to herself, her other son, and her daughter. The trial court held that the gifts were authorized, but the Supreme Court of Virginia reversed and remanded. Under a Virginia statute, a power of attorney must expressly authorize an agent to make gifts of the principal's property, Va. Code § 64.2-1622(A)(2), but if the power of attorney grants the agent authority to do all acts the principal may do, the agent has authority to make gifts in accordance with the principal's history of making lifetime gifts. *Id.* § 64.2-1622(H). In determining whether gifts made by an agent are in accord with the principal's history of making gifts, the court must compare factual similarities between prior lifetime gifts and those made by the agent, considering the purpose, nature, frequency, amount, and identities of the recipients of the gifts made and those proposed by the agent. The court cautioned, however, that this list of factors is not exclusive. *Davis v. Davis*, 835 S.E.2d 888 (Va. 2019).

STANDING OF REMOVED TRUST BENEFICIARY: Beneficiary removed by amendment to trust has standing to challenge amendment. A settlor of a revocable trust made amendments to and restatements of the trust terms that eliminated the share of one of her daughters. After the settlor's death when the trust became irrevocable, the daughter petitioned to set aside those amendments and restatements, alleging they were the product of incompetence, undue influence, or fraud. The trial court dismissed the petition because the child was no longer a beneficiary of the trust, and the appellate court affirmed, relying on statutes giving a trust beneficiary standing to petition a court concerning the affairs of a trust, Cal. Prob. Code § 17200, and defining "beneficiary" as a person who has any present or future interest in the trust, vested or contingent. *Id.* § 24(c); *Barefoot v. Jennings*, 237 Cal. Rptr. 3d 750 (Ct. App. 2018). The Supreme Court of California granted the daughter's petition for review and reversed on both the statutory scheme governing trusts and policy grounds, finding that the lower courts' reading of the statute would insulate individuals who were alleged to have improperly manipulated the settlor from possible liability. *Barefoot v. Jennings*, 257 Cal. Rptr. 3d 629 (2020).

TRUST AMENDMENT: Will provision does not alter testator's revocable trust. The final codicil to a testator's will, executed the day before he died, devised real property to his wife, which was already held by his revocable trust. Under the trust terms, the trust continues after the testator's death for the benefit of his minor child, who is not the child of the surviving wife. The probate court and the appellate court held that the codicil did not amend the trust terms. Tenn. Code § 35-15-602(c), identical to U.T.C. § 602(c), requires that amendments substantially comply with the terms of the trust if the settlor makes the method of amending the trust exclusive. The revocable trust instrument stated that amendments "shall" be made by a written instrument signed by the settlor and trustee, who was the testator, and therefore created an exclusive method of amendment. Because the testator did not sign the will as "trustee," the codicil did not comply with the trust terms. In addition, the codicil did not refer to a trust. Finally, the codicil did not supply clear and convincing evidence of intent to amend the trust because the real property was not probate property. *In re Estate of Hunter*, No. M2019-00084-COA-R3-CV, 2019 WL 5960649 (Tenn. Ct. App. Nov. 13, 2019).

TRUST MODIFICATION: Modification of trust terms may be sought during winding-up period. A trust holding farmland terminated at the death of the parents of the remainder beneficiaries, who were three brothers and one sister. The brothers brought multiple actions seeking modification and termination of the trust without naming their sister as a party. The trial court allowed distribution of the land to the beneficiaries subdivided into separate parcels, rather than as tenants in common as required by the trust terms. The appellate court reversed and remanded, holding that changing the distribution of the land required a modification of the trust and that the modification was possible. The court held that the modification and termination sections of the Nebraska Code, Neb. Rev. Stat. §§ 30-3837 to 30-3842, which are identical to U.T.C. §§ 410-417, contain nothing that prevents trustees or beneficiaries from seeking modification, termination, or reformation during the winding-up period, the time between the termination of the trust according to its terms and the final distribution of all property. But the court ruled that all the qualified beneficiaries must be parties. In addition, the court held that the statutory provisions governing distributions of trust property in kind do not displace the trust terms requiring distribution in tenancy in common. *In re Trust Created by Augustin*, 935 N.W.2d 493 (Neb. Ct. App. 2019).

TAX CASES, RULINGS, AND REGULATIONS

CHARITABLE DEDUCTION: Extension granted to take charitable deduction in previous tax year. A

trust made charitable deductions in Tax Year 2, intending to have the contributions treated as paid during Tax Year 1 as allowed by I.R.C. § 642(c). But the trust's tax advisor failed to file the trust's income tax return for Year 2 with the section 642(c) election. A private letter ruling granted the trust an extension to file the election to claim the deduction for Year 1, concluding that the trustee met the regulatory requirements that it acted reasonably and in good faith. P.L.R. 202001015.

FOREIGN TRUST: Taxpayer who is both owner and beneficiary of foreign trust is assessed 5 percent penalty, not 35 percent penalty, for late filing of the Annual Return to Report Transactions. In preparing for a divorce, a taxpayer established an overseas trust of which he was both the sole owner and the beneficiary. Upon conclusion of the divorce proceedings, he terminated the trust and transferred the assets back to his US bank accounts. For the final year of the trust, the taxpayer was late in filing the Form 3520, an annual report for disclosing distributions from a foreign trust. Form 3520 has different requirements for trust owners and trust beneficiaries. The statute provides for a 5 percent penalty for trust owners, I.R.C. § 6048, and a 35 percent penalty for trust beneficiaries, I.R.C. § 6677. After the taxpayer filed the form, the IRS assessed a penalty of 35 percent of the distributions from the trust during that tax year. This amounted to 35 percent of the trust assets because he had transferred 100 percent of the trust's funds to domestic accounts. The district court held that these are not separate penalties that apply independently, and, when the sole trust owner is also the sole beneficiary, the government can apply the 5 percent penalty only for trust owners. The government does not have discretion to choose between the two penalties. *Wilson v. United States*, 124 A.F.T.R.2d 2019-6693 (E.D.N.Y. 2019).

QUALFIED SUBCHAPTER S TRUST: Corporation allowed to maintain S-corporation status even though trustee did not file election. Six trusts were qualified shareholders of the corporation during the decedent's life. The qualified subchapter S trust (QSST) elections were inadvertently not made, however, for five of the trusts after the death of decedent. The other trust continued as an administrative trust and was treated as part of the decedent's estate for federal tax purposes. This allowed the trust to remain an eligible shareholder throughout the time it held stock. After the decedent's death, three other trusts received shares of the corporation but did not file the appropriate elections. The private letter ruling found the termination of the election was inadvertent and allowed the corporation to continue as an S-corporation, provided that the trusts file a QSST election within 120 days. P.L.R. 202004004.

LITERATURE

ARBITRATION CLAUSES. W. Cameron McCulloch and Michelle Rosenblatt "examine whether, how, and when it makes sense to include arbitration clauses in estate planning documents" in *Drafting & Enforcing Arbitration Clauses in Wills, Trusts & Settlement Agreements*, 12 Est. Plan. & Comm. Prop. L.J. 103 (2019).

CRYPTOCURRENCY. The Journal of Taxation discusses the latest tax implications of cryptocurrency in *New Cryptocurrency Tax Guidance Addresses Some Open Questions, Leaves Others Unanswered*, 132 J. Tax'n 25 (2020).

DIGITAL ASSET VALUATION. Stevie D. Conlon, Anna Vayser, and Robert Schwaba explain the critical importance of valuing digital assets for federal income, estate, and gift tax purposes in *Valuation of Cryptocurrencies and ICO Tokens for Tax Purposes*, 12 Est. Plan. & Comm. Prop. L.J. 25 (2019).

DIMINISHED CAPACITY. Matt G. Lueders discusses the legal, ethical, and practical consequences of working with a client whose capacity is in question in *How to Not Lose Your Mind When Your Client is Losing His: Operating in the Gray Zone of Diminished Capacity*, 12 Est. Plan. & Comm. Prop. L.J. 53 (2019).

DOMESTIC ASSET PROTECTION TRUSTS. In his Comment, *In Texas We Trust: The Need to Bring Domestic Asset Protection Trusts to Texas*, 12 Est. Plan. & Comm. Prop. L.J. 163 (2019), Jake Stribling outlines the tremendous benefits that would inure to Texas and its citizens were the legislature to enact legislation authorizing domestic asset protection trusts.

ELECTRONIC WILLS. In her Note, *Life, Death, and Revival of Electronic Wills Legislation in 2016 through 2019*, 67 Drake L. Rev. 983 (2019), Nicole Krueger analyzes the electronic wills legislation proposed from 2016 to 2019, discusses the concerns raised by the legislation, and identifies technological advances that may alleviate many of those concerns.

ILLINOIS—RESIDENCY. Richard A. Sugar discusses how to rethink "income and estate taxes for snowbirds, transplants, and trustees" in *When Is a Person or Trust an Illinois Resident*, 107 Ill. B.J. 32 (Dec. 2019).

ILLINOIS—TRUST CODE. In *The New Illinois Trust Code: Practical Pointers*, Ill. B.J. 26 (Dec. 2019), Daniel P. Felix summarizes key provisions of the new Illinois Trust Code that became effective in January 2020 and offers "practical reminders" for trustees.

ISRAEL—INHERITANCE LAW. In *How the Law "Keeps the Money in the Family": Lessons at the Intersection of Elder Care and Inheritance Disputes in Israel*, 45 Law & Soc. Inquiry 81 (2020), Shiri Regev-Messalem reveals how

inheritance law supports and enhances class reproduction through the institution of the family.

KNEELING AND ESTATE PLANNING. Married professional athletes who live in community property states and who protest by kneeling during games may not understand the potential impact on the distribution of community property if their marriage ends by death or divorce. Taylor Calvert explains these consequences in her Comment, *You Are Kneeling, But I Am Not: Intentional Detrimental Conduct in an Employment Setting and Its Effect on the Distribution of Community Property*, 12 Est. Plan. & Comm. Prop. L.J. 137 (2019).

MEDICAID PLANNING. Evan Farr asserts that Medicaid planning is no different from income tax planning and estate planning from moral and ethical standpoints in *The Morality of Medicaid Planning*, Prac. Est. Plan., 66 Prac. Law. 10 (2020).

NO-CONTEST CLAUSES. Alexis A. Golling-Sledge presents a critique of the permitted disinheritance of children in the name of testamentary freedom. She contends in *Testamentary Freedom vs. the Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices*, 12 Wash. U. Juris. Rev. 143 (2019), that forced heirship can respect the natural right of children to inherit and leave room for testamentary freedom.

SCOTTISH LAW. In *Scottish Law on Intestacy and Probate: Borrowing From the United States and Canada to Bring Scottish Law Out of Flux*, 12 Est. Plan. & Comm. Prop. L.J. 1 (2019), Zia Akhtar considers "the rules of intestacy and the grounds upon which legal reform is being proposed to amend the law in Scotland."

TECHNOLOGY ENTREPRENEURS. In *Estate Planning for Technology Entrepreneurs*, Prac. Law J. 27 (Dec. 2019/Jan. 2020), Jennifer Birchfield Goode explains how estate planning attorneys who advise "tech entrepreneurs must navigate the complex challenges presented by these clients' varied portfolios of unique assets to identify the best strategies for transferring wealth in a tax-efficient manner while also protecting the clients' long-term business goals."

TENNESSEE—RULE AGAINST PERPETUITIES. In *Is Tennessee's Rule Against Perpetuities Unconstitutional?*, 55 Tenn. B.J. 29 (2019), David W. Holbrook concludes the common law Rule is too often unjust and modern amendments have proven useful.

TRUST TAXATION. In her article, *Magical Thinking and Trusts*, 50 Seton Hall L. Rev. 289 (2019), Bridget J. Crawford contends the Supreme Court reached the correct decision as a matter of law in *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213 (2019).

UNIFORM TRUST CODE. The entire Fall 2019 issue of the ACTEC Law Journal is devoted to reviewing the Uniform Trust Code with thirteen short articles. Twenty years have elapsed since its original approval by the Uniform Law Commission (National Conference of Commissioners on Uniform State Law).

VIRGINIA—RECENT DEVELOPMENTS. J. William Gray, Jr. and Katherine E. Ramsey present a 2019 survey of Virginia law in *Wills, Trusts, and Estates*, 54 U. Rich. L. Rev. 183 (2019).

LEGISLATION

NEW JERSEY establishes an end-of-life care public awareness campaign. 2019 N.J. Sess. Law Serv. Ch. 315.

NEW YORK approves the Uniform Partition of Heirs Property Act. 2019 Sess. Law News of N.Y. Ch. 596.

NEW YORK enacts the Uniform Voidable Transactions Act. 2019 Sess. Law News of N.Y. Ch. 580.

NEW YORK updates its laws governing anatomical gifts. 2019 Sess. Laws of N.Y. Ch. 742.

VIRGIN ISLANDS permits transfer-on-death beneficiary designations for motor vehicles. 2019 V.I. Laws Act 8250. ■