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Keeping Current - Probate [notes]

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KEEPING CURRENT PROBATE

CASES

ELECTIVE SHARE: Marriage procured through undue influence does not allow elective share. A husband with residences in Maryland and Florida died in Florida. His daughter from a prior marriage offered his will for probate in Maryland, where he had lived for many years, and also petitioned for ancillary probate in Florida where he owned real property. His wife objected to the grant of probate on the ground that the decedent was domiciled in Florida at death and filed an election to take an elective share of his estate in the Maryland proceeding. The Maryland Orphan's Court found that the decedent was domiciled in Maryland and that the wife procured the marriage by undue influence. Therefore, the court barred her from taking the elective share under Fla. Stat. § 732.805(a)(a). The appellate court held that Florida statute did not apply because the decedent was not domiciled in Florida but barred the wife from taking an elective share by the doctrine of unclean hands based on procurement of marriage by undue influence. *In re Watkins*, 209 A.3d 135 (Md. Ct. Spec. App. 2019).

ELECTIVE SHARE: Surviving spouse may exercise elective share whether deceased spouse is testate or intestate. A husband claimed an elective share of his deceased wife's augmented estate. The wife and her daughter had owned real property as joint tenants with the right of survivorship. The daughter objected to the claim of elective share on the ground that her mother died intestate. North Dakota's elective share statute, N.D. Stat. § 30.1-05-01, is based on Uniform Probate Code § 2-202, both of which do not expressly address the relevance of the deceased spouse dying testate or intestate. The North Dakota Supreme Court held that the statute authorizes a surviving spouse to take an elective share in the deceased spouse's estate whether that estate is testate or intestate, a conclusion that rests on the language of the statute, the interpretation of similar statutes in other states, and the purpose of the statute to prevent disinheritance of a surviving spouse, which the court notes can be by a will as well as by the creation of nonprobate property. *In re Estate of Hall*, 931 N.W.2d 482 (N.D. 2019).

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

JURISDICTION: Long-arm statute does not give jurisdiction over foreign trustee to courts of state of beneficiary's residence. A trust established in New York and moved by the trustee to New Jersey for administration had beneficiaries residing in Florida. The beneficiaries sued the trustee in a Florida state court for failure to account, mismanagement of the trust investments, and comingling of the trust property. The Florida trial court denied the trustee's motion to dismiss for lack of personal jurisdiction, but the intermediate appellate court reversed, holding that the Florida long-arm statute, Fla. Stat. § 48.193, does not provide a basis for personal jurisdiction over the trustee because there were no allegations in the complaint of acts or misconduct by the trustee in Florida. Any alleged wrongdoing occurred either in New York or New Jersey. The court noted that a majority of the Florida intermediate appellate courts have held that an injury in Florida without more is insufficient to assert jurisdiction under the statute. *Kaminsky v. Hecht*, 272 So. 3d 786 (Fla. Dist. Ct. App. 2019).

NO-CONTEST CLAUSES: Clause is unenforceable when beneficiaries have probable cause for challenging will. A will included a no-contest clause requiring forfeiture of all gifts under the will by any beneficiary who "files any proceeding to contest this Will or any provision herein." One beneficiary (a child of the decedent) opposed probate of the will on the ground of undue influence, and three other beneficiaries (also children) aided and participated by meeting with the contestant and the contestant's lawyer and paying at least part of the lawyer's fees. All four beneficiaries, therefore, violated the no-contest clause and forfeited their gifts unless they were sheltered by the statutory exception when "probable cause exists for initiating proceedings." Neb. Rev. Stat. § 30-24,103. The trial court found that probable cause existed and the Nebraska Supreme Court. The court found that evidence of the testator's dependence on the primary beneficiary of the will (also a child of the decedent), the testator's poor health, and the primary beneficiary's hostility to the other children's questions about how the primary beneficiary dealt with decedent's finances, as well the advice the four children received from counsel on the probability of success, provided sufficient basis for the finding of probable

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cause. *In re Estate of Barger*, 931 N.W.2d 660 (Neb. 2019).

POWER OF APPOINTMENT: Testamentary exercise of power of appointment over trust property disposes of property even after trust terminates. Spouses created a trust for their benefit, with the trust property to be distributed pursuant to the will of the surviving spouse. After the husband died, the wife executed a will that disposed of the trust property by exercise of a power of appointment created in the trust. Three months later, litigation challenging the trust ended when the wife as sole beneficiary consented to a decision of the majority of her trustees to terminate the trust by distributing all of the trust property to the wife. But at the wife's death, the trust property had not been retitled. This raised the issue whether the trust property passed by the purported exercise of the power of appointment or by the residuary devise in the will. The trial court construed the will to dispose of the former trust property in accord with the exercise of the power of appointment. The Nebraska Supreme Court affirmed, upholding that the trial court's determination that the will was ambiguous and that extrinsic evidence was therefore admissible. The trial court also correctly concluded that the extrinsic evidence showed that the wife intended to distribute the former trust property as the will stated, whether the property was trust property or part of the probate estate. *In re Estate of Barger*, 931 N.W.2d 660 (Neb. 2019).

TRUSTEE REMOVAL: Removal of corporate trustee violates material purpose of trust. The beneficiaries of a testamentary trust filed a petition to remove the corporate trustee nominated in the will and replace it with the spouse of one of the beneficiaries, who is an attorney and who would serve without charging any fee. The petition stated that all the qualified beneficiaries consented to the modification, that the beneficiaries had completed their educations, which was the only purpose for which principal invasions were allowed, and that the bank's fees had exceeded the trust's income in recent years. The court may remove the trustee when removal "best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust." Neb. Rev. Stat. § 30-3862(b)(4) (identical to Uniform Trust Code § 706(b)(4)). The trial court denied the petition and the Nebraska Supreme Court affirmed. The court held that the testator's appointment of the corporate trustee was related to the testator's desire to keep the assets "together" as long as possible and to prevent family members from having control of those assets. The removal and replacement of that trustee, therefore, was "inconsistent with a material purpose of the trust." *In re Trust Created by Fenske*, 930 N.W.2d 43 (Neb. 2019).

TAX CASES, RULINGS, AND REGULATIONS

ESTATE TAX: Estate does not qualify for financial disability exception to statute of limitations. A decedent's estate owned publicly traded stock with a fair market value of $17.6 million, but six months after the decedent's death the stock's value was cut in half. One year later fraud involving the corporation surfaced. The estate filed a claim for refund of estate tax, alleging that because of fraud the value of the stock was zero on the valuation date. The district court held that fair market value of a gross estate item is determined on the date of the decedent's death or the alternative valuation date, which is six months after the decedent's death, with no exception for fraud or criminal actions that are unknown publicly. The estate also requested tolling of the statute of limitations for filing a claim for refund to the personal representative's financial disability. But the court held that an estate does not qualify for the financial disability tolling exception available for individuals under IRC § 6511(h). *Carter v. United States*, 124 A.F.T.R.2d 2019-5467 (N.D. Ala. 2019).

INCOME TAX REFUND: Financial disability exception to statute of limitations does not apply when taxpayer grants power of attorney. An estate's personal representative sought a refund of the decedent's personal income taxes on the basis that the decedent's financial disability tolled the statute of limitations. The First Circuit denied the estate's refund claim, holding that the decedent was not financially disabled because his son held a broad durable power of attorney to act on his behalf regarding his federal taxes. The son was "authorized to act" even though he did not act after a falling out with his father. The First Circuit affirmed the lower court's ruling that, under Pennsylvania law, the son had never renounced the power of attorney because he had not clearly and positively communicated the renunciation to his father, the principal. Moreover, the father had not revoked the power of attorney under state law. *Stauffer v. Commissioner*, 124 A.F.T.R.2d 2019-5909 (1st Cir. 2019).

FEDERAL TAX LIEN: Government may not foreclose entire property owned in part by taxpayer. In 2004, a taxpayer entered into a lease sale contract with his parents to purchase residential property where the taxpayer and his wife lived. His parents agreed to execute a warranty deed of the property to the taxpayer after his full payment of the monthly rents. However, the parents died intestate before completion of the rent payments, survived by the taxpayer and his sister. No probate was opened for the estates. The taxpayer continued to make the mortgage payments after his parents' deaths directly to the mortgage company and eventually paid off both the payments required under the lease sale contract and the mortgage. The government obtained a default judgment against the taxpayer for federal taxes and attempted to foreclose on the entirety of the property at issue, arguing that the lease sale contract trumps intestacy law. However, the district court denied the government's motion for summary judgment, holding that (1) Alabama's intestacy law controls the outcome of the case and (2) the taxpayer and his sister each held a one-half interest in the property. No evidence was presented that the

parents intended to convey the property to the taxpayer before he made all the payments promised in the lease sale contract. Further, the court held that the government had not presented enough evidence that a forced sale was reasonable when a non-liable third party (the sister) holds an interest in the land. *United States v. Dase*, 124 A.F.T.R.2d 2019-6026 (N.D. Ala. 2019).

S CORPORATION: S Corporation continues despite shareholder's failure to make electing small business trust election (ESBT) election. After the transfer of shares in an S Corporation to a trust, the trustee's inadvertent failure to make a timely ESBT election terminated the S corporation's election. The IRS ruled that the corporation would continue as an S Corporation so long as the trustees files the ESBT election. The corporation also needs to amend and file all relevant tax returns consistent with the relief in the letter. PLR 201937005.

VALUATION: Limited partnership that owns and manages timberlands is valued by income-based approach. A donor owned an S corporation that operated a lumber mill. He created a limited partnership to own and manage timberlands. The corporation was the general partner of the limited partnership and controlled and managed it. The entities shared headquarters, management, and many employees. The donor gave shares in the corporation and limited interests in the partnership to his children. The IRS rejected the donor's valuation of the gifts and determined a deficiency in gift tax, arguing that an asset-based approach should have been used to value the limited partnership. But the Tax Court determined that an income-based approach, similar to an operating company, is the appropriate method for valuation based on several factors. One consideration is that, as long as the corporation operates a sawmill, a sale of the timberlands is unlikely given the corporation's exclusive control over the partnership. Another consideration is the closely aligned and interdependent nature of the entities and the effect of their economic relationship on their valuations. The Tax Court also held that (1) the intercompany loans and the general partnership interest are properly treated as assets, (2) the value is properly discounted for lack of marketability, and (3) reducing the partnership's earnings based on tax consequences to the partners is proper. *Estate of Jones v. Commissioner*, T.C. Memo. 2019-101.

LITERATURE

DOMESTIC ASSET PROTECTION TRUSTS. Nora Hood's Note, *Domestic Asset Protection Trusts: A Debtor's Friend and Creditor's Foe*, 13 Brook. J. Corp. Fin. & Com. L. 443 (2019), examines use of DAPTs in the United States, including whether the recently amended Uniform Voidable Transaction Act treats a transfer to a DAPT as voidable per se. She also recommends an approach that is designed to prevent misuse of DAPTs to avoid liability.

ELDER CARE. Nina A. Kohn's article, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 Harv. C.R.-C.L. L. Rev. 211 (2019), assesses how courts treat intra-family agreements to pay for family members for elder care, revealing the assessment of little or no monetary value to elder care provided by family members, which is in sharp contrast to the cost of elder care on the open market.

ETHICS. Karen E. Boxx and Philip N. Jones examine judicial and ethical opinions regarding an attorney who represents a client who is both a fiduciary and a beneficiary of a trust or estate in *Janus as a Client: Ethical Obligations When Your Client Plays Two Roles in One Fiduciary Estate*, 44 ACTEC L.J. 223 (2019).

GENDER AND TRUST LAW. In *Engendering Trust*, 2019 Wis. L. Rev. 213, Deborah S. Gordon advocates an "engendered" approach to trust law that uses perspective, rhetoric, and "subtexts" to disrupt existing social patterns and myths, to unearth embedded assumptions in language, to notice when a particular vantage point is being used, and to appreciate "a perspective other than one's own."

ILLINOIS—TRUST CODE. In *A Trustworthy Effort*, 107 Ill. B.J. 12 (Aug. 2019), Pete Sherman reviews the new Illinois Trust Code, signed by the governor after nearly two decades of work. This legislation is similar to the Uniform Trust Code but has significant enhancements.

INHERITANCE LAW. Carla Spivack presents a first attempt to apply a critique of formal equality to inheritance law as a whole and to show how some of its default rules disadvantage already vulnerable groups across the board in her article *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 Wis. L. Rev. 191.

INTERGENERATIONAL PLANNING. R. Hugh Magill provides useful suggestions on how to deal with four generations—Traditionalists, Boomers, Gen Xers, and Millennials—in *Estate Planning and Trust Management for a Brave New World: It's All in the Family . . . What's a Family?*, 44 ACTEC L.J. 257 (2019).

NO-CONTEST CLAUSES. Karen J. Sneddon contends in *Voice, Strength, and No-Contest Clauses*, 2019 Wis. L. Rev. 239, that hollow language replicated in form no-contest clauses undermines the value of no-contest clauses. Rather than discouraging will contests, the language may actually encourage will contests.

PERSONALIZED INTESTACY. In her article, *Big Data and the Modern Family*, 2019 Wis. L. Rev. 349, Shelly Kreiczer-Levy explores the promise and drawbacks of personalized intestacy, then offers preliminary guidelines for adapting big data techniques to the relational aspects of inheritance.

POST-MORTEM ASSET DISPOSITION. Phyllis C. Taite's article, *Freedom of Disposition v. Duty of Support: What's a Child Worth?*, 2019 Wis. L. Rev. 325,

explores historical justifications for favoring freedom of disposition and provides a comparative analysis of how other countries deal with the duty to support families, specifically children, after death.

POWERS OF APPOINTMENT. Jessica A. Cohan and Blake N. Melton discuss several strategies to circumvent the Rule Against Perpetuities in *Using Powers of Appointment to Increase the Period Assets are Held in Trust*, 54 Real Prop., Tr., & Est. L.J. 1 (2019).

PRISONER'S RIGHT TO AID IN DYING. In her Comment, *Death with Dignity for the Seemingly Undignified: Denial of Aid in Dying in Prison*, 109 J. Crim. L. & Criminology 633 (2019), Kathleen S. Messinger seeks to answer the questions of who may choose to die on their own terms, in their own way, and, if we find that incarcerated individuals have a right to aid in dying, whether there are reasons or justifications for why we should not permit it.

PROBATE FUNDING. In his article, *Probate Funding and the Litigation Funding Debate*, 76 Wash. & Lee L. Rev. 261 (2019), Jeremy Kidd approaches the growing phenomenon of probate funding by third parties in a neutral fashion. He analyzes characteristics of funding transactions to gain greater insights into not only probate funding but also litigation funding and illuminates options for lawmakers to consider in the regulation of legal funding generally.

SAME-SEX MARRIAGE. Lee-ford Tritt explains how the construction approaches used by courts to navigate social and legal change in the context of the adoption of children provide useful analogies as today's courts are called upon to construe language that no longer presumptively excludes same-sex spouses in *The Stranger-to-the-Marriage Doctrine: Judicial Construction Issues Post-*Obergefell, 2019 Wis. L. Rev. 373.

SUBCHAPTER J. In *Subchapter J After Tax Reform: Ten Planning Considerations*, 54 Real Prop., Tr., & Est. L.J. 47 (2019), Raj A. Malviya and Brandon A.S. Ross discuss "the fundamental rules when navigating the lifecycle of a nongrantor trust" and recommend planning considerations "to create flexibility, help minimize taxes, and preserve more value for trust beneficiaries."

TESTACY AND WEALTH. An exploration of the possible effects of intestacy and testacy on wealth and property succession is presented by Danaya C. Wright in *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 Wis. L. Rev. 295, who analyzes 408 estates across a variety of categories, including wealth, age, race, sex, and marital status. She finds that these lines of inquiry support the claims by many economists that wealth gaps between men and women, white and black, and married and unmarried couples are growing and should be of great concern to lawmakers.

TRUSTS AND ESTATES. In *Dismantling the Trusts and Estates Canon*, 2019 Wis. L. Rev. 165, Naomi Cahn urges attorneys to step back and reflect on how new perspectives from gender, race, class, and sexual orientation have challenged existing trusts and estates canonical narratives on a number of different levels to show how the trusts and estates practice relates to economic inequality.

WILL FORMALITIES. In her article, *Wills Formalities in the Twenty-First Century*, 2019 Wis. L. Rev. 269, Bridget J. Crawford posits that the substantive standard of the harmless error rule—that the decedent intended a particular document to be the decedent's last will and testament—should be the only threshold to satisfy for admission of the document to probate. Widespread adoption of such an intent-based rule is preferable to one that is overly formalistic.

LEGISLATION

CALIFORNIA enacts the Unclaimed Life Insurance and Annuities Act. 2019 Cal. Legis. Serv. Ch. 286.

CALIFORNIA expands the scope of its Elder Abuse and Dependent Adult Civil Protection Act. 2019 Cal. Legis. Serv. Ch. 272.

ILLINOIS adopts the Uniform Partition of Heirs Property Act. 2019 Ill. Legis. Serv. P.A. 101-520.

ILLINOIS provides protections for living donors of anatomical gifts. 2019 Ill. Legis. Serv. P.A. 101-179.

NEW JERSEY strengthens the ability of a person to control the disposition of the person's remains. 2019 N.J. Sess. Law Serv. Ch. 187.

RHODE ISLAND adopts the Revised Uniform Fiduciary Access to Digital Assets Act. 2019 R.I. Laws Ch. 19-262.

RHODE ISLAND enacts the Senior Savings Protection Act. 2019 R.I. Laws Ch. 19-225.

RHODE ISLAND passes the Supported Decision-Making Act. 2019 R.I. Laws Ch. 19-113. ■