

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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RECENT COURT DECISIONS

BENEFICIARY OF TESTAMENTARY TRUST CAN NOT ATTACK TRUSTEE'S DIVERSIFICATION PLAN WHEN THE BENEFICIARY COULD HAVE PREVIOUSLY DONE SO BUT FAILED TO RAISE ISSUES AT EARLIER ACCOUNTINGS.

Where a fiduciary acted as an executor and as a testamentary trustee, and where that executor filed one or more accountings in those capacities, and where the chief beneficiary of the trust and the estate failed to raise an objection to the investment plan(s) of the fiduciary, the beneficiary may not at a later date seek to review the very same issues determined in a previous accounting filed. Under the doctrine of *res judicata*, once a matter is decided on the merits, the court, in the interest of judicial economy, will not again review the matter when ample opportunity to do so has been given in prior proceedings before the court. In the instant case, there were allegations of a lack of diversity of investments, and possibly a legitimate claim at that, but one can not sit back and fail to call into question the matter of lack of diversification without suffering consequences. *Matter of Hunter*, 4 NY 3d 260, 794 NYS 2d 286 (Ct. of Appeals, March 24, 2005).

SCPA 1750-b AUTHORIZING GUARDIAN TO END LIFE SUPPORT IS NOT TO BE APPLIED RETROACTIVELY WITHOUT A FURTHER DETERMINATION OF NEED

The Richmond County Surrogate was reversed by the 2nd Department on the issue of whether SCPA 1750-b should be applied retroactively so that guardians appointed prior to the effective date of the statute could indeed withhold or withdraw life support. The 2nd Department concluded that the statute requires that there be a determination by the Surrogate that the mentally retarded person lacks sufficient capacity to make such decisions. *Matter of M.B.*, 797 NYS 2d 510 (2nd Dept., June 13, 2005).

ORAL DECLINATION OF TRUSTEESHIP NOT BINDING

In a proceeding brought under CPLR Article 77 to determine the status of a co-trustee under an inter vivos trust, P claims that he became a successor trustee upon the settlor's death. The other co-trustee, the settlor's daughter, refused to acknowledge his status, claiming that at a dinner party 10 days after the settlor's death P orally declined the trusteeship. While neither an acceptance or rejection of a trusteeship established by an inter vivos trust is required to be in writing, P's informal declination was not binding where P had an immediate change of heart. Court is required to give effect to the settlor's intent unless the evidence strongly suggests the trustee's unwillingness to serve in that capacity. *Sankel v. Spector*, N.Y.L.J. page 18 (April 13, 2005).

A FATHER CANNOT MAINTAIN A CLAIM AGAINST HIS CHILDREN FOR BREACH OF CONTRACT

BY THEIR FAILURE TO TURN OVER TO HIM MONIES GIFTED TO THEM UNDER A COURT APPROVED GIFT GIVING PLAN FOR THEIR INCAPACITATED GRANDMOTHER

In 1998, co-guardians of an incapacitated elderly woman were authorized to make annual gifts to the IP's children and grandchildren in a manner consistent with the testamentary provisions of the IP's will. Her son-in-law commenced an action against his children claiming they orally contracted to turn over the monies they received under the gifting plan to him. The court ruled that since a gift giving plan is an ongoing distribution program that cannot be performed in a year, the purported oral contract is in violation of the Statute of Frauds. *Lipshie v. Lipshie*, N.Y.L.J., page 18 (May 5, 2005).

DAUGHTER ALLOWED TO REMAIN AS HEALTH CARE AGENT BUT WAS NOT ALLOWED TO MAKE DECISIONS REGARDING MOTHER'S NUTRITION AND HYDRATION

An incapacitated person's daughter refused to have a PEG inserted into her mother. Instead, she wanted her mother to continue to receive hydration and nutrition through a nasogastric tube, which are generally indicated for temporary use. The IP's sister sought to have the health care proxy voided and have herself appointed as guardian. At the hearing, the IP's sister claimed that the IP was becoming increasingly observant of her Judaism and would, therefore, want to opt for the optimal life-sustaining treatment so she could live as long as possible. The daughter withdrew her objection to the insertion of the PEG. The court denied the IP's sister's application to void the health care proxy because it did not find the daughter acted in bad faith. However, the court withdrew her authority to make decisions regarding hydration and nutrition. *Borenstein v. Simonson*, N.Y.L.J., April 12, 2005, p. 18, col. 1.

USE OF LIMITED PARTNERSHIP INCOME AND PROPERTY TO PAY PERSONAL EXPENSES OF LIMITED PARTNERS CONSTITUTED A RETAINED ESTATE INTEREST SUBJECT TO SECTION 2036 INCLUSION

In a May 10, 2005 Tax Court decision, a decedent and spouse transferred property to a limited partnership, the general partner of which was a revocable living trust controlled by the decedent. The decedent did not retain any substantial assets and could easily anticipate based on medical needs that the assets of both the trust and the partnership would need to be employed to satisfy his personal obligations and expenses. The use of the funds of the partnership and the trust to satisfy the obligations of the decedent constituted an implied agreement which in turn justified the inclusion of the assets of the partnership in the estate of the decedent under IRC Section 2036 as a retained interest. See *Estate of Korby v. Commissioner*, T.C. Memo 2005-102.

RETAINED INTERESTS IN A FAMILY LIMITED PARTNERSHIP CAUSE INCLUSION IN GROSS TAXABLE ESTATE UNDER SECTION 2036

IRC Section 2036 has a way of bringing back into a gross taxable estate a retained interest in property where the transferor retained some interest in the transferred property. That retained interest could be documented or based on an expectation or understanding. In one case which made its way to the 1st Circuit Court (decided May 26, 2005), the decedent transferred properties to family limited partnerships. The partnerships received income-producing real property. As decreed in a guardianship proceeding, the income generated was to be used for the support of the decedent and the balance was to be distributed to the other partners. Testimony established that there was an understanding that all income could be used for the decedent's support. Thus the partnerships' assets were included in the decedent's taxable estate. It is difficult to see why the estate thought it could win this case when the facts were clearly unfavorable. This and other decisions, however, may be used for the proposition that when deeding a residence from parent to child(ren) with an understanding that parent may continue to reside in the residence certainly gives rise to the expectation that the property will be includible in the gross taxable estate and thus entitled to a stepped-up basis. See *Estate of Abraham*, No. 04-1886 (1st Circuit., May 26,

2005).

IS A VALUE TO BE GIVEN TO A LIFE ESTATE UNDER RECENT SSI RULING?

In a recent decision issued by the Social Security Administration, an 81 year-old woman who was an SSI recipient moved from a residence in which she owned a life estate to an adult home. The issue was how and whether to value the life estate for purposes of determining whether the woman retained an asset having a value in excess of \$2,000 (which would make her ineligible for SSI). The administrative law judge concluded that the life estate had no value because it could not be liquidated in short order. The Social Security Appeals council vacated the ALJ decision suggesting that the basis for the exclusion of the life estate was not whether the life estate could be liquidated but rather whether the life estate constituted a home to which the SSI recipient could return. The ALJ obtained a Statement of Intent to Return Home and the matter was resolved. But what does this decision and approach mean if a Medicaid recipient owns a life estate in real property which is not a residence? Does that mean that a value must be assigned to it for Medicaid purposes? For NY Medicaid purposes, the Department of Health appears to follow the rule that life estates have no value-whether or not the real property constitutes a residence. Could this position change in the near future? (Note: this item was taken from another publication and the matter was privately ruled on at the SSA level).

THE NEW TRANSFER ON DEATH SECURITY REGISTRATION ACT

A new Part 4 has been added to Article 13 of the EPTL which has been named the "Transfer-on-Death Security Registration Act." The legislation deals with the registration of a security in "Beneficiary Form." Effective for security owners dying on or after January 1, 2007, it is possible for owners of securities or owners of security accounts (e.g., at brokerage houses) to designate a beneficiary upon the death of the owner provided that the issuing entity and the state laws under which it was created permit such a designation. The statute provides a great deal of registration flexibility.

The following are examples: (1) A (the owner) can designate B as beneficiary, (2) A1 and A2 can hold between themselves as joint tenants with right of survivorship, as tenants by the entirety, or as owners of community property in survivorship form. The registration form may provide the following language to effect the kind of registration: "Transfer on Death," "TOD," "Pay on Death," and "POD." The beneficiary designation has no legal effect until the owner's death, and the registration may be cancelled or changed by the owner(s) at any time before death.

Furthermore, a change in the registration may be effected by the owner's Will by a specific reference to the registration.

On the death of the sole owner or the last to die of multiple owners, ownership passes to the beneficiaries who survive all of the owners. Multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of the last of the owners to die, the security belongs to estate of the last owner.

The entity may establish rules of its own to effect transfers including the providing of proof of death and other matters. Under the statute there is the possibility the certificate of registration may provide that if a beneficiary predeceases the owner(s), the interests of the deceased beneficiary may pass to the beneficiary's lineal descendants per stirpes or by representation. The statute also provides examples of how the beneficiary form may be prepared including the use of abbreviations to effect ownership rights.

COMMITTEE DEVELOPMENTS

At the Executive Committee meeting held on April 28, 2005, then Chair Howard S. Krooks created three

committees. The first committee is chaired by Stephen Silverberg and Amy O'Connor and is investigating whether the Elder Law Section should support the passage of a living will statute in New York. The second committee is chaired by Mickey Haggerty and is following burial rights legislation recently proposed in the New York State legislature (A. 1238), which would amend the public health law to provide rights to domestic partners, spouses, parents, siblings, and court-appointed administrators to control the disposition of a decedent's remains in the absence of written directions provided by the decedent. The third committee is chaired by Robert Kruger and was formed to comment on proposed changes to the power of attorney forms that are being suggested by the Law Revision Commission.

The Compact Working Group (Howard S. Krooks and Vincent J. Russo, Co-chairs; Michal Amoruso, Howard Angione, Daniel Fish, Louis Pierro and Gail Holubinka), Working Group members are working continually to develop the Compact proposal contained in the Section's Long Term Care Reform Report (February 2005). A detailed review of this proposal will be sent to you in a special edition of the eNews in early September.

Upcoming Events

October 19-22, 2005 — Fall Meeting - Gideon Putnam Hotel, Saratoga Springs
January 24, 2006 — Annual Meeting - Marriott Marquis Hotel, New York City
August 2-5, 2006 — Summer Meeting - Sheraton Harborside Hotel, Portsmouth, N.H.
October 18-22, 2006 — Fall Meeting - Westchester Renaissance Hotel
August 1-5, 2007 — Summer Meeting - Stoweflake Resort & Conf. Center, Stowe, VT.
October 17-21, 2007 — Fall Meeting - Montauk Yacht Club, Montauk, NY

Please mark your calendars, and join us for informative, enjoyable events in fun locations.

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to Steven Rondos, raiarondos@aol.com or Dean Bress, dsbress@yahoo.com