

THE DAILY RECORD

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EstatePLANNING

A quick look at a number of recent estate cases

In the last few months, New York courts have opined on some unusual topics related to estate planning and estate administration. The following is a sampling of recent decisions:

Exercise of joint limited power of appointment

A husband and wife created a joint irrevocable trust and retained a limited power of appointment, which could only be exercised jointly. The husband died, and his wife exercised power of appointment to leave remainder to the "evil child." The Appellate Division, Second Department held that "jointly" means "jointly," *Whitehouse v. Gahn* (May 10).

Separated surviving spouse's right to pension benefits

An executor brought an action against GE to compel payment of benefits to estate. The U.S. District Court for Northern District of New York dismissed on grounds that, when there is no designated beneficiary, the surviving spouse is the default beneficiary. The executor then brought an action in state court. The Third Department held that the separation agreement foregoing pension benefits is binding and the benefits should be paid to the estate, *Hess v. Wojeik-Hess* (July 21).

Separation agreement requiring testamentary disposition – effect of subsequent revocable trust

An agreement required a will that treated a first child no less favorably than any after-born child. Thereafter, the decedent created a revocable trust. The first part provided for the first child and was funded with the decedent's residuary estate. The sub-trust consisted of life insurance and IRA proceeds paid directly to the trust for the second child. The First Department held that both trusts must be of equal value, *Matter of Wenzel v. Atlantic Trust Co.* (June 16).

Query: Would the result be the same if the decedent had created two separate trusts or if he had created a revocable trust that would only pass to his second child?

SCPA 17-A Guardianship

The Third Department held that guardians appointed under SCPA

Article 17-A are not entitled to compensation. The surrogate had awarded compensation on theory that the power to do so was implied in the statute, *Matter of Jonathan EE v. Barreiro* (July 7).

Attorney's Contingent Fee

The surrogate approved payment of former attorney's fee under an agreement which provided for a \$5,000 retainer and a contingency fee that ultimately amounted to \$585,000. The case was settled four weeks after the agreement was signed. The surrogate approved the former attorney's motion to dismiss the action without a hearing. The Second Department remanded and stated that the surrogate's court is required to consider the reasonableness of the fee, *Matter of Talbot* (May 10).

Spousal Refusal – Medicaid

A husband is cared for in a nursing home, and the wife executed a spousal refusal and then established a trust. DSS sued the trustee for reimbursement of nursing home expenses. The Third Department held that the DSS action was barred by the six-year statute of limitations for actions based upon an implied contract. The trust was funded more than six years before the action was brought. The court also held that SSL s.104 creates a 10-year reimbursement look-back period against a recipient who is later discovered to hold property, not a 10-year statute of limitations, *Christopher v. Tomeck* (March 3).

After known children

The Second Department held that after "known" children are not to be treated the same as "after-born" children. The plaintiffs were born prior to execution of the decedent's will, but acknowledged by the decedent thereafter. The court held that it is a legislative decision if both classes are to be treated the same, *Matter of Gilmore* (June 14).

Full faith and credit

This was a petition for ancillary administration based on a claim that the domiciliary estate's fiduciary committed fraud in selling



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decedent's New York real property for less than fair market value. The Second Department held that full faith and credit must be given to the Florida decision because the plaintiff failed to challenge the jurisdiction of the Florida Probate Court and the Florida court denied petitioner's motion to reopen the estate, *Matter of Bennett* (May 31).

Query: Does the purchaser of the New York real estate have marketable title?

Joint will – reaffirmed by divorce settlement

A husband and wife executed a joint will leaving all assets to the survivor thereof. They divorce after 50 years of marriage. The joint will is reaffirmed in the divorce settlement and applies to property over which each party has “a right of disposal.” The wife transfers a condo to an irrevocable trust. The

wife and son were trustees. The wife also executed a new will and then dies.

The Second Department held that the wife's status as trustee of an irrevocable trust is “a right of disposal” so the condo passes to the husband. The court noted that the wife could have given the condo to her son or sold it and given the proceeds to the son, either of which would have prevented title passing to the husband, *Matter of Murray* (April 19).

Query: Why does anyone have a joint will?

David C. Pettig, principal with Pettig Torres PC, has been practicing trust and estate law for more than 30 years. He can be contacted at dcpettig@pettig.com or (585) 586-1430. If you have similar experiences or if you have suggestions for other articles, please forward them to info@pettig.com. A special “thank you” goes to Amy Boyd (UB Law class of 2012).