

LITIGATION FOR THE ETHICAL ESTATE PLANNER: WHAT YOU WANT TO KNOW AND WHAT YOU NEED TO KNOW

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1. Estate litigation is still litigation.

Probate litigation has increased dramatically in the last decade. A number of theories exist to explain that growth. Most of those theories emanate from three main concepts: the splintering of the family unit in our society, which breeds discord among the beneficiaries of a particular estate or trust (e.g., children of a prior marriage who have been at odds for years with the decedent's surviving second spouse); the decreased respect for institutions, along with a more litigious mentality in society generally; and the increase in wealth in our country, and the passing of that wealth from one generation to another — *i.e.*, with more money at stake, more people are willing to assert a claim.

Although estate litigation is unique, it is still litigation. The practitioner must master the same skills that dominate any lawsuit. Generally, all of the rules of procedure and discovery apply -- e.g., one must use interrogatories, document production, and depositions.

As in many litigation contexts, expert discovery is also pivotal in estate litigation. For instance, experts may be needed as to issues surrounding damages, breach of fiduciary duty, incapacity or undue influence.

The point is that the attorney venturing into estate litigation must be mindful of the reality that litigation skills are still vital.

2. Those who venture into estate and trust litigation face challenges that raise crucial issues of ethics and malpractice.

Counsel should weigh the ramifications of becoming involved in estate and trust litigation before taking a step that could end up providing an unpleasant lesson in why today's litigation is increasingly the realm of specialists. From an ethical perspective, the attorney should have the requisite skill and knowledge before undertaking the representation. (Model Rule of Professional Conduct 1.1). From the malpractice perspective, the attorney cannot invoke a "dabbler" standard of care and must live up to the generally accepted standard of practice in the jurisdiction. Thus, no matter how one views the problem, the result is the same; insufficient knowledge and experience can lead to trouble.

To avoid unwanted difficulties, counsel should bear in mind that estate and trust litigation encompasses a wide variety of disputes, and thus an attorney who is competent in one may well

struggle in another. There is fiduciary litigation (e.g., disputes between beneficiaries and trustees over issues such as surcharges and removal); contest litigation (e.g., the setting aside of wills, trusts, deeds, multiple-party accounts, etc.); third-party litigation (e.g., constructive-trust actions against third-party transferees or litigation involving contracts to make a will); administrative litigation (e.g., proceedings to interpret an instrument); tax-related litigation; and conservatorship or guardianship litigation. Moreover, counsel can find themselves in a hybrid dispute that combines two or more of the foregoing or can end up in a cross-over dispute that requires expertise in another substantive area of the law, as can happen when the trust at issue owns a corporation. Even the most devoted of estate-and-trust litigators can find themselves being called upon to know corporate law, family law, elder law, and numerous other matters that can become entangled with an estate or trust dispute.

Thus, before deciding to accept the representation, counsel should take care to think about the nature of the dispute. This allows the practitioner to decide if he or she has sufficient knowledge and experience to spot the material issues, which is a critical step both in keeping one's self out of trouble and in seeing to it that the client receives competent representation. The material issues in a prudent-investor claim differ from those in a trust contest, which differ again from those in a constructive-trust proceeding (or maybe not, depending on the circumstances). The attorney who recognizes no such distinctions is in trouble and poses a threat to the client. Failing to spot material issues can be a breach of duty that will support a malpractice claim, and the first step in avoiding this mistake is to think about the nature of the case at hand.

3. Those who come to estate litigation from a planning or administration background are especially vulnerable to common mistakes.

4. Domicile can alter the forum for the litigation, or create a second forum.

Domicile is crucial in establishing subject matter jurisdiction in probate litigation. "Domicile is the place where one has a permanent establishment and true home." J. Story, *Conflict of Laws* § 41 (8th ed. 1883) ("That place where a man has his true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.") According to *Black's Law Dictionary*, a person may have more than one residence, but only one domicile. The requirements for a domicile of choice are: 1) physical presence within a state or territory, coupled with 2) the intention to make it a home. *Black's Law Dictionary* (8th ed. 2004).

Facts considered in determining domicile may include:

- recitations of residence in the will or related documents;
- confirmations of domicile in information decedent gave to others;
- where decedent was living at his death;
- the type of abode (permanent or temporary) at which decedent was living at his death;
- whether and where decedent owned a home;
- place of burial;
- where decedent was last employed or actively engaged in business;
- where decedent last voted;

- what address decedent used for tax purposes;
- where decedent had a driver's license;
- where he attended religious services, and whether he was a member of any such congregation or group;
- where decedent obtained medical treatment; and
- what address decedent used in conducting affairs (insurance applications, medical forms, etc.).

Generally, once domicile is established, it continues until replaced by a new domicile.

Jurisdictional disputes often arise regarding domicile. Although each person may have only one domicile, more than one jurisdiction may claim domicile. More than one state may claim domicile because neither the 14th Amendment nor the Full Faith and Credit Clause requires uniformity in the decisions of different states as to domicile. See Phyllis K. Fairbanks et al., *Multi-State Death Tax Problems of Estates and Trusts*, 21 REAL PROP. PROB. & TR. J. 527, 527-28 (1986). See also D.E. Evans, *Probate, in State Where Assets are Found, of Will of Nonresident Which Has Not Been Admitted to Probate in State of Domicile*, 20 A.L.R. 3d 1033, § 3 (1998).

One of the most prominent, and infamous, decisions in this domain is *In re Dorrance*, 115 N.J. Eq. 268 (Prerog. 1934). John T. Dorrance was a member of one of the wealthiest and most well-known families in New Jersey. He died in 1930. The state tax commissioner assessed an inheritance tax of almost \$17 million. The executors of the estate alleged that the assessment was invalid because Mr. Dorrance had not been domiciled in New Jersey at his death.

For several years before his death, Mr. Dorrance occupied two residences, one in New Jersey and one in Pennsylvania. Indeed, the New Jersey Prerogative Court acknowledged that the Pennsylvania courts had already upheld a \$17 million tax assessment in favor of Pennsylvania. The executors asserted that the ruling by the Pennsylvania courts — that Mr. Dorrance was domiciled in Pennsylvania at his death — was binding on the New Jersey courts. *Id.* at 272.

The New Jersey Prerogative Court disagreed. It reasoned that the courts of a sister state always have the power to inquire into the jurisdiction of the court which pronounced the judgment at issue. In turn, the New Jersey court held, if the sister state's court finds that the first court did not have jurisdiction, the judgment need not be accorded full faith and credit. *Id.*

After a review of the facts bearing on domicile, the New Jersey court concluded that Mr. Dorrance had remained a domiciliary of New Jersey at his death, and that the Pennsylvania courts had been incorrect in their contrary determination. Consequently, the Pennsylvania holding was not binding on the New Jersey court. Both states assessed taxes against the estate. *Id.*

Perhaps because of the long shadow of the *Dorrance* opinion, throughout the years the New Jersey courts continued to grapple with the domicile question. See also:

- *In re Michelsohn's Will*, 136 N.J. Eq. 387 (Prerog. 1944) (a change in residence for a special purpose — including taxation benefits, seasonal relocation, or health considerations — does not necessarily change the decedent's domicile, even where the decedent declared his residence to be in Florida rather than in New Jersey).
- *Lyon v. Glaser*, 60 N.J. 259 (1972) (decedent had sufficiently established her domicile in Maryland by the time of her death, so that her personalty was not taxable in New Jersey).
- *Cromwell v. Neeld*, 15 N.J. Super. 296 (App. Div. 1951) (decedent found to have been domiciled in New Jersey despite New York residence, where, *inter alia*, she recited New Jersey as her domicile in her will and filed tax returns as a New Jersey resident).
- *In re Matter of Unanue*, 255 N.J. Super. 362 (Law Div. 1991) (decedent had not changed domicile from New Jersey to Puerto Rico, since his confinement to Puerto Rico was due to ill health, was involuntary, and was not intended to be permanent).

A related issue arises as to the domicile of an incapacitated person. For instance, in *Matter of Jacobs*, 315 N.J. Super. 189 (Ch. Div. 1998), the court addressed whether a person alleged to be incapacitated could choose a new domicile, so that the court could determine whether a guardianship action should be brought in New Jersey. A dispute erupted between the children of the alleged incapacitated person, Mrs. Jacobs, with one child alleging that the mother was domiciled in New Jersey, and the other alleging that she was domiciled in Florida. *Id.* at 194.

The court explained that the domicile analysis was crucial because, to establish proper subject matter jurisdiction, the guardianship action needed to be commenced in the jurisdiction where the person is domiciled. *Id.* at 193. Likewise, the court noted, inconsistent findings could arise if a New Jersey court ruled on incapacity and then a Florida court made a different ruling. *Id.* at 198.

The court found that a person in need of a guardian might still have the capacity to choose domicile, but based on the evidence presented, Mrs. Jacobs herself was mentally incapable of choosing a new domicile. Therefore, she had never changed her domicile from Florida to New Jersey. *Id.*

Later, in *Matter of Marguerite Seyse*, 353 N.J. Super. 580 (App. Div. 2002), the trial court appointed two sisters, Oehler and Olson, along with Oehler's husband, as co-guardians of the person and property of the sisters' mother, who was adjudged mentally incapacitated to manage her affairs or govern herself. The sisters had a history of bitter disagreement and hostility. The Oehlers lived in New Jersey, but Olson was a Connecticut resident. *Id.* at 583.

In 1998, without the permission of the court or the consent of the co-guardians, Olson moved the mother from a New Jersey hospital and brought her to live with Olson in Connecticut. On cross-motions of the sisters, the trial judge in New Jersey then dissolved the co-guardianship and appointed Olson as the guardian of the person and Oehler as the guardian of the property. While the trial judge expressed concern as to Olson's conduct, he found that Olson was still

acting in the best interests of the mother, and found that the residential setting Olson offered was preferable to that planned by Oehler. *Id.* at 583-585.

The mother died in 1999, while still living with Olson in Connecticut. She left a 1987 will leaving \$5,000 to Olson and the rest of her estate to Oehler, and a 1997 will which treated Olson more favorably. A will contest ensued. Olson filed a caveat to the probate of any will in New Jersey, on the assertion that the mother was domiciled in Connecticut when she died and thus probate proceedings had to occur in Connecticut. Oehler argued that the mother's domicile could not change once she had been deemed incapacitated in 1994. *Id.* at 586.

The trial court found that the mother was domiciled in Connecticut at her death. The Appellate Division affirmed, setting aside earlier New Jersey authority to the contrary (*In re Collins*, 11 N.J. Misc. 233 (Surr. Ct. 1932)) on the reasoning that developments in the interim in the study of the human mind establish that a person may not be incapacitated for all purposes. As a result, the Appellate Division held that a guardian may act to change the domicile of a ward. *Id.* at 587.

5. Emotions often permeate estate litigation, and families can be torn apart. The cases can be like divorces.

6. The terms of the source document -- the Will or trust -- remain the touchstone of estate litigation.

7. Interim relief may be essential.

Interim relief is often crucial in estate litigation. For example, in a will contest, if the will has already been probated, one of the parties to the litigation may be in charge of the estate. He will want to remain in that position while the litigation is pending; his adversaries likely will want him removed. This decision is generally in the discretion of the court. If the administrator is removed, questions then arise as to who should administer the estate -- one of the parties, or an independent and neutral person.

Similarly, as to the assets at issue, the challenging party should assure that the status quo is maintained while the litigation is pending. Distributions from estates or trusts, or the dissipation of the decedent's assets, could render the case moot from an economic perspective.

8. Many issues are equitable and thus do not convey the right to jury trial.

Estate and trust litigation differs from many other types of civil litigation in that many of the issues are equitable, which eliminates the right to jury trial. For example, the remedies of a beneficiary against a trustee are primarily equitable. (Restatement of Trusts, Second, §197). Similarly, most proceedings before the probate court are resolved by the sitting judge.

But for the most part, the litigation process remains the same no matter what the end forum might be. The attorney who litigates in the field of estates and trusts must know the mechanics of the discovery process, motion practice, and the conducting of civil trials just as any other litigator must. Counsel should not let the daily administrative business of the probate court

lull them into thinking that all contested matters can be handled so easily; many find that when the dispute involves a substantial amount of money and takes on the look of civil litigation, even the most understanding of probate judges will expect the lawyer to act accordingly.

9. Deadlines matter -- and usually are short.

In probate litigation, deadlines are short... Let us re-phrase that for the estate planner that is venturing into estate litigation, *deadlines are short*... Let us re-phrase that for the litigator that is venturing into estate litigation, *deadlines are short*, VERY SHORT! Unlike the usual statutes of limitations periods that are measured in years, limitations periods in probate litigation are usually measured in *months*! Why, you ask? The fundamental premise of estate administration is to let the named executor proceed with the orderly administration of the estate, paying bills, selling assets and the like. If there was a long period for which the claim could be made the process of administration could be held up. Moreover, since few estates are contested, a long waiting period to see if there will be a claim would be problematic.

If you are planning a venture into estate/probate litigation, and even if you are not, it is very important to consider two very important things about the area. First, know your local rules. While the discussion below will illustrate the concerns in one state, New Jersey, your home state procedural guidelines will be very important in advising clients on this burgeoning area of the practice. Second, encourage early investigation into any claim or potential claim. Sometimes we estate attorneys receive phone calls where the close family member has received notice of the probate of the Will and they are still in a state of shock or dismay over the loss of a loved one. The aggrieved party may not have thought about the consequences of the potential Will, or they may not believe that another close relative may have done something inappropriate. Nevertheless, they are NOT given much time to make the claim – even though their nerves may still be raw from the emotional loss of the decedent.

In New Jersey, for example, the probate process proceeds in an “unsupervised” manner as follows: First, the Last Will is submitted for probate (acceptance) and the named executor is appointed by the court. (In fact, in New Jersey the letters of appointment are issued by a quasi judicial “Surrogate’s court” with little formality.) Second, the Executor (personal representative) is required to give notice of the appointment to all named heirs, or other potential takers (next of kin) before beginning the estate administration process. This “notice of probate” merely tells the others that he/she/it is taking control of the estate and that the Will that is being followed is available. The notice does not even have to give a copy of the Will, just notify the beneficiary or potential beneficiary that it is available. Thereafter, the executor is free to conduct the estate administration process in an expeditious manner.

In New Jersey, the court rules require that a contest to the appointment of the executor and acceptance of the Will be instituted in *just FOUR months*. See NJ Court Rule 4:85-1. This time can be extended to SIX months if the aggrieved party resides outside New Jersey, however, the complaint against the Will requires that the complainant make the case to the court on a short time line. Unlike the typical litigation matter where there will be years for the statute to run and additional reasons to “toll” the statute of limitations for a myriad of reasons, the objective of the estate process is to move as quickly as possible to allow the beneficiaries to receive their shares and more importantly, allow the responsible fiduciary an opportunity to administer the estate.

More importantly, in New Jersey, the time limitation is further compressed by the fact that the time period runs from acceptance of the Will (issuance of letters testamentary), and not notice to the beneficiary. To make matters worse, the notice isn't even required by the Rule for 60 days. Therefore, the time to react can be lessened to two months! While this may encourage some potential plaintiffs to file a caveat to any Will as an effort to slow down the process, not all factual settings will allow for that approach. A "caveat" is a form filed by a contestant that will require any proponent of a Will to take additional measures before the Will is accepted. Your client may have only just heard of the issue recently and may still, at the time for the complaint to be filed, have no idea of the undue influence and capacity issues surrounding the creation of the alleged Last Will of the decedent.

Even with a narrow time limitation, the exceptions to the general rule are also cramped. The Rule allows for an extension but only on convincing the court of "good cause" and "absence of prejudice" and then, only 30 days more is allowed! Court Rule 4:85-2. An extension of one year can be obtained, but don't count on it. Under the applicable court rule the extension is permitted only if there exists:

- (a) mistake, inadvertence, surprise, or excusable neglect;
- (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial;
- (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Another area where the limitations period is short is for the filing of an elective share claim as a surviving spouse. New Jersey has adopted the Uniform Probate Code concept of the "elective share" for the surviving spouse. Our statute requires the claim be made within six month of probate of the Will. N.J.S.A. § 3B:8-12. The UPC version is slightly more generous, granting the surviving spouse the later of six months from probate of the Will or nine months of death. See UPC 2-211. Granted there are opportunities to extend the time limitation, however, stating a case in that manner (requesting more time from the court) is certainly the way to start off on the proverbial "wrong foot."

In sum, effective representation of the client will almost always require prompt attention to meet strict guidelines. For the casual estate litigator, be careful, know your court rules and encourage the aggrieved family members that may be a client to act with a sense of urgency. This can be the hardest task of all, particularly when the client is still reeling from the death of a loved one.

10. Attorney fees and costs may be recoverable from the estate, or maybe even from the other parties.

The allowance of counsel fees usually rests in the sound discretion of the court. 34 C.J.S. *Executors and Administrators* § 809 (1998). While the court has discretion in this assessment, "Precedents afford but little guidance because each case must be judged on its own overall circumstances." *Estate of Bloomer*, 43 N.J. Super. 414, 417 (App. Div. 1957), *certif. denied*, 23

N.J. 667 (1957). The relevant factors include: the size of the trust, the skill exhibited, and the nature of the litigation. *Id.* at 417. *See, also, Gardner v. Baldi*, 24 N.J. Super. 228 (Ch. Div. 1952); *In the Matter of Reisdorf*, 80 N.J. 319 (1979).

While the general rule is that the parties must bear their own counsel fees, various exceptions exist. Two exceptions — related to a “fund in court” and a “probate action” — are common in estate litigation.

First, where the litigation involves a “fund in court,” such as an estate or trust, the courts are generally permitted to allow legal fees and costs out of the fund in court. “Fund in court” is a term “intended to embrace certain situations in which equitably allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs.” *Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 168 (1960). Such situations include where the litigation serves to protect the estate or to further the administration of a trust or estate — *i.e.*, to aid in creating, preserving, or protecting the fund. *Id.* at 169; *Sarner v. Sarner*, 38 N.J. 463, 467 (1962); *Shilowitz v. Shilowitz*, 115 N.J. Super. 165, 188 (Ch. Div. 1971), *modified on other grounds*, 119 N.J. Super. 311 (App. Div.), *certif. denied*, 62 N.J. 72 (1972). On the other hand, such a fee award is usually denied if the party seeking the award was merely advancing his own interests. *Bush v. Riker*, 77 N.J. Super. 243 (App. Div. 1962); *In re Estate of Silverman*, 94 N.J. Super. 189, 195 (App. Div. 1967).

The most common context in which such an award is made is where a fiduciary files an action that is in the best interests of the fund, or that protects or increases the fund for the persons who will benefit from the fund. Accordingly, allowances of counsel fees to a fiduciary are customarily made in an action by the fiduciary to settle his account, since in doing so the fiduciary is “protecting” the fund in court. *See, In re Estate of Thompson*, 136 N.J. Super. 412, 419 (Co. Ct. 1975). The fiduciary has a duty and right to employ counsel, when necessary, to protect the estate, and the “allowance of a counsel fee for services rendered in an estate is a proper matter to be considered on an accounting.” *In re Babcock’s Estate*, 112 N.J. Eq. 374, 375 (E. & A. 1933). *See also, McCormick v. Nat’l St. Bank of Newark*, 129 N.J. Eq. 365 (E. & A. 1941); *In re Bristle’s Estate*, 138 N.J. Eq. 476 (E. & A. 1946).

Second, in a “probate action,” most typically a will contest, even if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.

Although in the probate arena the award of counsel fees and costs from the estate or trust is the most common issue, increasingly the courts are considering awards against adverse parties. As with the award of fees from the fund in court, the parties’ conduct may also cause the court to impose one party’s counsel fees and costs upon the other party. *In re Niles*, 176 N.J. 282 (2003). In that decision, the Supreme Court created an exception to the so-called American Rule, which generally bars a prevailing party in litigation from recovering counsel fees from the losing party. The Supreme Court held that, where an executor or trustee enjoys substantial economic benefits from committing undue influence, that person may be required to pay the counsel fees of the parties establishing the undue influence.

In *Niles*, Serena Bono and her son Salvatore Bono were found to have unduly influenced Laura Niles. Serena Bono had become the sister-in-law of Laura Niles by marrying Laura's elderly brother. In 1992 and 1994, Laura Niles had created three inter vivos trusts, naming her financial advisor, Parkinson, as the trustee. The ultimate beneficiary was a Foundation created by Laura Niles. *Id.* at 288.

By 1997, Laura Niles was suffering from a variety of medical problems and obtaining daily in-home nursing care. Meanwhile, on May 21, 1997, she amended her will and modified her trust agreements to remove Parkinson as trustee and to name Salvatore Bono, Serena's son, as the executor of the will and as trustee under the three trusts. These changes resulted in dramatic economic benefits to the Bonos. The Bonos then embarked on a "looting spree" of Laura Niles' assets. *Id.* at 289.

In January 1998, Parkinson filed an action alleging that the Bonos had committed undue influence. The Foundation joined in the claims. The trial court bifurcated the case into two trials, one of which concluded on August 3, 1999, and the other of which ended on January 10, 2000. Laura Niles died shortly thereafter, on February 8, 2000. The trial court ruled that the Bonos had committed undue influence and awarded substantial compensatory damages and counsel fees against them. *Id.* at 291-292.

The Court focused on whether the Bonos should pay the counsel fees of the other parties. The Court first ruled that the Bonos needed to pay the fees incurred by third parties, such as the guardian ad litem appointed for Laura Niles. The Court reasoned that Salvatore Bono had committed a tort when he breached his fiduciary duty as Laurel Niles' trustee, and that the third parties had become involved in the litigation as a result of his tortious conduct.

The Court then turned to the counsel fees incurred by the Foundation and Parkinson, as the plaintiffs. The Court created an exception to the American Rule. The Court described undue influence as a "pernicious tort" and cited the need of making whole the victims of "perfidious behavior." *Id.* The Court explained that awarding the fees of the successful plaintiffs from the estate, as often occurs in probate litigation, would reduce the estate and penalize its beneficiaries, and that, to make the estate whole, the fees should be paid by the Bonos.

The Court expressly limited its holding to cases where an executor or trustee commits undue influence in the development or modification of estate documents, to create or expand that wrongdoer's own interest. The Court also noted that undue influence needs to be proven by clear and convincing evidence. *Id.* at 299-300.

In a subsequent decision, *In re Estate of Vayda*, 184 N.J. 115 (2005), the Court adhered to the American Rule and declined fee-shifting. In that case, during a will contest, the decedent's daughter had succeeded in having the executor, her brother and the decedent's son, removed. The trial court held that the will was not the product of undue influence, but still determined that the son had acted improperly and in bad faith in administering the estate. The trial court directed the son to pay the daughter's fees.

The Supreme Court concluded that the daughter would be limited to recovery of fees from the estate, with no recovery from the son personally. The Supreme Court declined "to

create yet another exception to the American Rule, one that would allow attorney fee shifting whenever a non-attorney executor is removed because of, among other things, breach of a fiduciary duty and bad faith against co-beneficiaries.” *Id.* at 123. The Court noted that “the claimed bad faith arose only after the will contest was filed.” *Id.* at 124. Moreover, the opinion indicated that, if the daughter had established that the will was the result of undue influence, then the son’s performance as executor would have been governed by *Niles*. *Id.* at 123 n.4.

11. Counsel must beware of no-contest clauses.

No-contest clauses pose a serious threat to the litigator who practices in the field of estate-and-trust litigation. Whenever the attorney files a pleading, that attorney must consider whether it runs afoul of a no-contest clause in the will or trust at issue. Some jurisdictions hold that a no-contest clause is unenforceable if the contestant acted with good faith and probable cause, while other jurisdictions take a stricter view and force the contestant to act at his or her own risk. (See 23 ALR4th 369). Regardless, the accidental triggering of a no-contest clause poses a serious risk of embarrassment to the attorney – and the threat of malpractice, to boot – and so counsel who litigate in this area must develop the habit of looking for these clauses and making sure that they do not accidentally violate them.

12. The drafting attorney may find herself as a witness.

An ethics rule of the model rules of professional ethics addresses this question directly. RPC 3.7 provides as follows:

Rule 3.7 Lawyer As Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

This issue arises frequently in the context of probate litigation. As an estate planner ages, there are more and more old files with Wills that have been prepared where the planner was counsel for the family. Now, after the client passes, he/she can be called on to defend the Will that had been drafted for the former client. The purpose of the rule quoted above is obvious and the first two exceptions are somewhat non controversial. The overarching goal is to prevent any possibility that the Court (tribunal) will be misled by the lawyer/witness from testifying.

The third exception, allowing testimony if there is “substantial hardship” is meant to protect the client- not the attorney and is to balance the rights of the estate with possible prejudice to the opposing counsel.

Under this model rule the “imputed disqualification” rule that prevents one member of a firm from disqualifying the entire firm does not apply. This issue will arise often in trusts and estates matters where the drafting attorney may be a necessary witness to issues in the contest such as competency or influence being exerted on the testator. MRPC 1.7 and 1.9 deal with conflicts of interest with a client or former client. This provision will prohibit testimony by an attorney as advocate that is in conflict with the attorney as witness.

13. Events preceding the Will -- such as prior Wills and pre-death transfers -- may be more significant than the events surrounding the Will.

Claims For Services Rendered

Claims for services rendered involve the assertion that the decedent should have provided for the claimant in the will, based on representations to do so or in compensation for the claimant’s services. The claim usually arises in one of two contexts: the provider of the service understood that that provider would be compensated at the decedent’s death (for instance, if the decedent did not have funds readily available to pay while he was alive); or the person providing the services expected to be a beneficiary under the will and, when that does not occur, the provider uses this claim as a means by which to become compensated, in lieu of a bequest.

At first blush, most practitioners and judges are skeptical about such claims, and view them as a device to circumvent the will. Nonetheless, the claims can be cognizable, and frequently raise intricate issues, such as: whether the services were intended by the parties to be the type for which compensation would be paid; the certainty of the terms of the compensation; the value of the services; and, especially, where the services were significant and provided over a relatively long period of time (such as caring for the decedent as he died), whether equitably the service provider should be compensated.

These claims for services rendered are governed by contract law. Part performance takes an agreement out of the statute of frauds and makes the agreement enforceable. *See, e.g., Klockner v. Green*, 54 N.J. 230, 236 (1969) (“Oral contracts which have been performed by one party are frequently enforced where to do otherwise would work an inequity on the party who has performed”). As with all contracts, including those in the probate context, the consideration must be “certain and defined, equal and fair, and sufficiently proven.” *Woll v. Dugas*, 104 N.J. Super. 586 (Ch. Div. 1969), *aff’d*, 112 N.J. Super. 366 (App. Div. 1970).

Such agreements are subject to close scrutiny, especially when a claim is asserted for the first time after the promisor’s death. *Scott v. Beola*, 111 N.J. Eq. 215 (Ch. 1932); *Naimo v. La Fianza*, 146 N.J. Super. 362, 367 (Ch. Div. 1976). The claimant bears the burden of showing that services sought to be compensated were not rendered gratuitously. *Frean v. Hudson*, 87 N.J.L. 244 (E. & A. 1915) (involving action brought by plaintiff against estate to recover compensation for services rendered). Further, an oral agreement by one to leave personalty or realty to another upon the former’s death is not enforceable unless established by clear and

convincing proof. *Gromek v. Gidzela*, 36 N.J. Super. 212, 218 (App. Div. 1955); *Ott v. Craghan*, 112 N.J. Eq. 586 (Ch. 1933). In short, under the Dead Man's Act and the case law, plaintiff must establish an oral agreement with the decedent by clear and convincing evidence. *N.J.S.A.* § 2A:81-2; *Czoch v. Freeman*, 317 N.J. Super. 273 (App. Div. 1999).

To be enforceable, a contract must be sufficiently definite in its terms that the performance to be rendered by each party can be reasonably ascertained. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 599 (1952); *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 474 (App. Div. 1978).

Contracts To Make A Will

A party may make a valid contract to bequeath property by will. *Van Duyne v. Vreeland*, 12 N.J. Eq. 142 (Ch. 1858) ; *White v. Risdon*, 140 N.J. Eq. 613 (Ch. 1947).

As of 1978, a contract to make a will must be established by one of three ways: 1) provisions of a will stating material provisions of the contract; 2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or 3) a writing signed by the decedent evidencing the contract. *N.J.S.A.* § 3B:1-4. See also, *In the Matter of the Estate of Cosman*, 193 N.J. Super. 664, 670 (App. Div. 1984).

Before 1978, the statute did not impose the standards of *N.J.S.A.* § 3B:1-4. Nevertheless, these earlier opinions still required that an oral agreement to make a will or bequeath property must pass "close scrutiny." *Yuritch v. Yuritch*, 139 N.J. Eq. 439, 444 (Ch. 1947). In fact, for a court to enforce such an agreement, the contract had to meet the following criteria: 1) clear proof of the contract; 2) mutuality; 3) it had to be definite and certain both in its terms and as to its subject matter; and 4) it had to appear clearly that that which is alleged to have been done in part performance was referable to, and consequent upon the contract alone, and done to carry it into effect. *Id.* See also, *Klockner v. Green*, 54 N.J. 230 (1969).

As with claims for services rendered, part performance impacts the analysis of contracts to make a will. Prior to the enactment of *N.J.S.A.* § 3B:1-4, the Chancery Division addressed the issue of part performance and the validity of a contract to make mutual reciprocal wills executed by a husband and wife. *Woll v. Dugas*, 104 N.J. Super. 586 (Ch. Div. 1969), *aff'd*, 112 N.J. Super. 366 (App. Div. 1970). In *Woll*, the court held that "[t]he performance of the first decedent's portion of the agreement, *i.e.*, bequeathing certain property to and the acceptance thereof by the second party, is deemed both sufficient consideration required to support such an agreement and sufficient part performance to take the contract out of the statute of frauds." *Woll*, 104 N.J. Super. at 599, *citing Minogue v. Lipman*, 25 N.J. Super. 376, 397 (Ch. Div.), *aff'd*, 28 N.J. Super. 330 (App. Div. 1953). The requisite consideration must be "certain and defined, equal and fair, and sufficiently proven." *Woll*, 104 N.J. Super. at 599, *quoting Tooker v. Vreeland*, 92 N.J. Eq. 340, 342 (Ch. Div. 1921), *aff'd sub nom., Tooker v. Maple*, 93 N.J. Eq. 224 (E. & A. 1921).

As to burden of proof, oral agreements for a devise at death are not generally enforceable unless established by clear and convincing proof. *Gromek v. Gidzela*, 36 N.J. Super. 212, 218 (App. Div. 1955); *Richards v. Richards*, 141 N.J. Eq. 579 (Ch. 1948). The plaintiff bears the

burden of showing that the alleged agreement was “mutual and definite and certain both with relation to its terms and subject matter.” *White v. Risdon*, 140 N.J. Eq. 613, 614 (Ch. 1947).

Parol agreements to bequeath by will “are subject to close scrutiny” and “are permitted to stand only when established by evidence that is cogent, clear and convincing, leaving no doubt with respect to their actual making and existence.” *Richards, supra*, 141 N.J. Eq. at 581. *See also, Appelget v. Van Hise*, 44 N.J. Super. 507, 523 (Ch. Div. 1957) (proof of agreement “involving disposition of property at death or by will, consisting of casual statements by a person since deceased, is scrutinized closely and will not be regarded as sufficient unless cogent, clear and convincing”). This high burden of proof is necessary “because such alleged compacts, particularly between relatives, are uniformly regarded with suspicion and consequently are exposed to the most critical and circumspect scrutiny.” *White, supra*, 140 N.J. Eq. at 614.

With respect to damages from the breach of a contract to make a will, the evidence must afford “a basis for estimating damages with some reasonable degree of certainty.” *Am. Sanitary Sales Co. v. State*, 178 N.J. Super. 429, 435 (App. Div. 1981), *quoting Paolicelli v. Wojciechowski*, 132 N.J. Super. 274, 278-79 (App. Div. 1975).

Palimony

The viability of palimony claims against estates was confirmed in *In re Estate of Roccamonte*, 174 N.J. 381 (2002). That case involved a decedent who, although married with two children, also maintained a relationship with plaintiff during the last 40 years of his life. In particular, plaintiff and decedent met in the 1950s and lived together intermittently until the mid-1960s. Plaintiff testified that she had moved to California in the mid-1960s but had received calls from decedent, promising her that if she came back to New Jersey, he would leave his wife and provide for plaintiff financially for the rest of her life; in response, plaintiff returned to New Jersey and divorced her husband. Plaintiff and decedent then cohabitated together from 1970 until his death in 1995; plaintiff’s daughter lived with them. Decedent never divorced his wife and continued, throughout this life, to support her and their children. *Id.* at 385-387.

Decedent was wealthy. In 1973, when the apartment decedent shared with plaintiff was converted to a co-op, he purchased the apartment and placed title in plaintiff’s name. Decedent paid for improvements to the apartment. He also provided plaintiff with cash as a weekly allowance, clothes, jewelry, and vacations. He paid the college tuition and medical expenses of plaintiff’s daughter. *Id.* at 386.

Decedent died intestate. Plaintiff did receive the proceeds of an insurance policy (\$18,000) and a Certificate of Deposit in her name (\$10,000). She also retained title to the apartment. However, plaintiff claimed that, while she was living with the decedent, “he repeatedly assured her . . . that she had no cause for worry as he would see to it that she was provided for during her life.” *Id.* at 387.

After decedent’s death, plaintiff filed a complaint setting forth two claims: a contract to make a will and unjust enrichment. She also sought a lump-sum support award. Initially, the trial court granted summary judgment against plaintiff and in favor of decedent’s estate. *See, In re Estate of Roccamonte*, 324 N.J. Super. 357 (App. Div. 1999). The Appellate Division then

held that the matter was not ripe for summary judgment, in view of various questions of fact, such as the decedent's intent. *Id.* at 364. The Appellate Division remanded the matter to the Probate Part. The trial court conducted a hearing, at the conclusion of which the court ruled against plaintiff and dismissed the complaint.

Plaintiff appealed. In its second decision, the Appellate Division concurred with the trial judge's determination that the evidence did not support a contract to make a will, and further found no basis to question the trial judge's discretionary evaluation that plaintiff had not met the standards for unjust enrichment or quantum merit. *In re Estate of Roccamonte*, 346 N.J. Super. 107, 117 (App. Div. 2001). However, the Appellate Division did differ with the trial judge's analysis regarding the "palimony" claim. After discussing the main precedent to date, *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979), and *Crowe v. De Gioia*, 90 N.J. 126 (1982), the Appellate Division found that the plaintiff could enforce a promise to provide support to her for life. *In re Estate of Roccamonte*, 346 N.J. Super. at 119-21. The Appellate Division further found that the claim remained viable against decedent's estate. Once again, the court remanded the matter to the Probate Part. The court directed the entry of judgment in favor of plaintiff and awarded damages, as determined by the trial court, based upon the prior record. *Id.* at 122. The Appellate Division noted that, as in *Kozlowski* and *Crowe*, the relationship between plaintiff and the decedent in *Roccamonte* was in the nature of a quasi-marriage. *Id.* at 119-121. In turn, the appellate judges focused on whether plaintiff had a viable "palimony" claim.

The New Jersey Supreme Court affirmed, holding that decedent and plaintiff had entered into a palimony contract, in which decedent promised plaintiff to support her for life, and the contract was enforceable against decedent's estate. *See, In re Roccamonte, supra*, 174 N.J. at 381. However, the Supreme Court modified the Appellate Division's ruling and remanded the case to the Family Part.

Paternity Claims

With advances in technology, an assortment of issues arises in the trust and estate field generally, including litigation related to paternity. *See generally* Michael K. Elliott, *Tales of Parenthood From the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47 (2004). *See e.g., In re Estate of Kolacy*, 332 N.J. Super. 593 (Ch. Div. 2000) (twins conceived by in vitro fertilization and born nearly 18 months after their father's death qualified as father's legal heirs under state intestate law). Such evolutions may vary well impose challenges to fiduciaries who must ascertain heirs and parties in interest.

Along these lines, the Supreme Court of New Jersey recently considered a claim for support and paternity by the mother of a child born out of wedlock. In *Fazilat v. Feldstein*, 180 N.J. 74 (2004), the mother of the child sued the father and his estate, seeking a declaration of paternity and an award of child support. She alleged that the father not only supported the child during his lifetime, but also wanted to provide support after his death. Upon death, however, the father's entire estate passed to his wife pursuant to the will.

After the estate was distributed and closed, the mother filed the claim on behalf of the child. The Supreme Court first confirmed that a court may order that support for minor children survive their father's death, and has the authority to enter orders against the parent's estate. *Id.* at

80-81. The Court explained that the more challenging question was whether that obligation could be enforced after the estate had been closed and fully distributed. In that regard, the Court found that a claim for child support against an estate would be subject to the provisions of the Probate Code, and the limitations in that Code rather than under the Parentage Act. Under the Probate Code, the Court determined that the child support claim was time barred. *Id.* at 82-87.

However, the Supreme Court found that the child was entitled to a judgment of paternity. The Court recognized that

[i]n addition to contributing to a child's mental well being, a declaration of paternity may entitle a child to social security, veteran's or pension benefits ... and inheritance rights. . . . The confirmation of one's lineage may also provide 'medical benefits' by allowing the child to learn of the potential diseases and abnormalities he or she may inherit from parents and their forbears. Therefore, an accurate determination of parentage not only establishes a child's legitimacy and rights, but also results in intangible psychological and emotional benefits.

Id. at 88 (citations omitted). To address the specific interests of the child, the Supreme Court remanded the paternity matter to the trial court.

Powers of Attorney

A power of attorney is an instrument in writing by which one person, as principal, appoints another as her agent and confers upon such agent the authority to act in the place of the principal for the avowed purposes set forth in the instrument. The ordinary power of attorney is merely an instrument in writing authorizing another to act as one's agent. *See, In re Will of Catelli*, 361 N.J. Super. 478 (App. Div. 2003); *In re Matter of Churik's Estate*, 165 N.J. Super. 1 (App. Div. 1978), *aff'd*, *Matter of Estate of Churik*, 78 N.J. 563 (1979); *Carey v. Thieme*, 2 N.J. Super. 458 (Ch. Div. 1949). *See generally*, *Tyrrell v. O'Connor*, 56 N.J. Eq. 448 (E. & A. 1897).

In the probate litigation context, powers of attorney most often arise in two basic contexts. First, disputes arise when the agent uses the power of attorney for an improper purpose or for his own benefit, such as for the transfer of the principal's assets to himself. *See* Forms 2A and 2B. The traditional rule is that, unless the power of attorney contains very clear language to the contrary, the power of attorney should not be construed as permitting the agent to give the principal's assets to himself or to others. *Manna v. Pirozzi*, 44 N.J. Super. 227 (App. Div. 1957). As of February 1, 2004, a similar rule was codified in *N.J.S.A.* § 46:2B-8.13(a). In such situations, the principal, or his representative or heir, may compel the agent to render an accounting of all financial transactions conducted by the agent. *N.J.S.A.* § 46:2B-8.13(b).

In *Manna v. Pirozzi*, the parties disputed ownership of 197 shares of stock in Asbestos Transportation Co., Inc. The stock was in the name of four relatives of decedent Giuseppe Pirozzi. The administrators of his estate also claimed ownership of the stock. *Id.* at 229.

In 1941, the decedent had transferred the shares into the name of his brother, Giovanni, as trustee for two of Giovanni's own sons. In 1949, Giovanni, as trustee, and under a power of

attorney, transferred the shares to his four sons personally. These four sons of Giovanni, the trustee, were the nephews of the decedent. In addition, because the decedent's brother, Giovanni, had married one of the daughters of the decedent (and the decedent was the brother of Giovanni), the four stockholders were both nephews and grandsons of the decedent. *Id.* at 229-230.

The administrators of the estate claimed that a power of attorney was misused in these transfers. The trial court had conducted a trial and taken testimony, as a result of which the trial court ruled in favor of the administrators of the estate. An appeal followed.

The focal point was whether the power of attorney in question authorized the transfer of the stock to the trustee. The appellate court explained that this issue was "largely a factual matter." *Id.* at 230. Nonetheless, that court affirmed the conclusion of the trial court. In doing so, the appellate court determined that the power of attorney "was not designed for the accomplishment of any donative purpose," and instead that the "tenor of the entire instrument indicates that it was a business document." *Id.* The court also found that defendants had not produced at trial any "satisfactory proof" as to why the decedent had been asked to sign the power of attorney, and similar such points. *Id.* at 231. The appellate court also relied heavily on evidence of the decedent's intent as had been presented at the trial. For instance, the court noted a letter written by the decedent, which served as evidence of his "state of mind." *Id.* at 232. In assessing such questions of intent, the court determined that full title had in fact remained in the decedent until his death, and that the trustee had no power to transfer the stocks in question to himself absent such intent in the power of attorney executed by decedent.

The second common dispute over the validity of the power of attorney concerns when the power of attorney is attacked, for incapacity, undue influence, duress, etc. *See* Form 2C. Such a dispute — usually the precursor to a will contest — can result in a "tug of war" in which one party has the principal revoke the power of attorney, to terminate the agent's power, and then arranges for the principal to execute a new power of attorney with a different agent. As a general rule, the principal has an absolute power to revoke an agency at any time, with or without reason, and thereby to terminate the authority of the agent representing him or her. *See*, 2A C.J.S. Agency § 95; *Dierksen v. Albert*, 106 N.J. Super. 220 (App. Div. 1969); *Kelly v. Brennan*, 55 N.J. Eq. 423 (Ch. 1897); *Shambaugh v. Wolk*, 302 N.J. Super. 380 (Ch. Div. 1996); *Earle's Adm'rs v. Earle*, 20 N.J.L. 347 (Sup. Ct. 1845). This analysis becomes complicated, of course, when the capacity or free will of the principal is in doubt.

Gifts

A "gift" is a transfer without consideration upon delivery of the subject matter of the gift. *Hill v. Warner, Berman & Spitz, P.A.*, 197 N.J. Super. 152, 164 (App. Div. 1984). *See also, In re Matter of Estate of Del Guercio*, 206 N.J. Super. 159 (Law Div. 1985).

An *inter vivos* gift creates an interest in the donee before the donor's death, provided that certain elements — each of which is discussed below in more detail — are met: first, a delivery effected before the donor's death; second, a donative intent; and, third, an acceptance by the donee. The courts often cite another element — that to make a gift the donor must strip himself of his entire ownership or dominion over the subject matter of the gift. *In re Dodge*, 50 N.J. 192

(1967); *Alburger v. Crane*, 5 N.J. 573 (1950); *Bendix v. Hudson County Nat'l Bank*, 142 N.J. Eq. 487 (E. & A. 1948); *Stiles v. Newschwander*, 140 N.J. Eq. 591 (E. & A. 1947); *Hudson City Sav. Bank v. Havemeyer*, 139 N.J. Eq. 435 (E. & A. 1947); *Rush v. Rush*, 138 N.J. Eq. 611 (E. & A. 1946); *Melosh v. Melosh*, 127 N.J. Eq. 261 (E. & A. 1940); *Peppler v. Roffe*, 122 N.J. Eq. 510 (E. & A. 1937); *Kirkpatrick v. Kirkpatrick*, 106 N.J. Eq. 391, 398 (Ch. 1930); *Meyers v. Meyers*, 99 N.J. Eq. 560 (Ch. 1926); *Swayze v. Huntington*, 82 N.J. Eq. 127 (Ch. 1913), *aff'd per curiam*, 83 N.J. Eq. 335 (E. & A. 1914); *Smith v. Burnet*, 35 N.J. Eq. 314 (E. & A. 1882). *See generally, Lebitz-Freeman v. Lebitz*, 353 N.J. Super. 432, 437 (App. Div. 2002). *See also, Pabst v. Haman*, 120 N.J. Eq. 451 (Ch. 1936) (where the administratrix of the estate filed a claim for an accounting for real and personal property allegedly held by the decedent's daughter as trustee, the daughter could not claim the property as a gift, where the decedent had exercised control over the property, collected and retained the income, and paid the taxes).

Where a controversy arises over an alleged gift, it may be litigated in an equitable action. *Fidelity Union Trust Co. v. Berenblum*, 91 N.J. Super. 551 (App. Div. 1966). The courts generally require that proof of each of the foregoing elements must be clear, cogent, and persuasive. *Czoch v. Freeman*, 317 N.J. Super. 273, 284 (App. Div. 1999), *certif. denied*, 161 N.J. 149 (1999), *citing Farris v. Farris Engineering Corp.*, 7 N.J. 487, 500-01 (1951). *See also, In re Dodge*, 50 N.J. 192, 216 (1967).

The burden of proving an *inter vivos* gift is on the party who asserts the claim. Where the claim of gift is based on oral testimony of a promise, statement, or act of a decedent, the proof must be clear and convincing. *Sadofsky v. Williams*, 60 N.J. 385, 395 (1972). *See also, Czoch v. Freeman*, 317 N.J. Super. 273 (App. Div. 1999); *Farris v. Farris Engineering Corp.*, 7 N.J. 487, 501 (1951); *Hirschmann v. Hirschmann*, 135 N.J. Eq. 23 (Ch. 1944), *aff'd per curiam*, 136 N.J. Eq. 230 (E. & A. 1945); *Kelly v. Kelly*, 134 N.J. Eq. 316 (Prerog. 1944); *Hanstein v. Kelly*, 131 N.J. Eq. 132 (Prerog. 1942); *Salmon v. Pittenger*, 122 N.J. Eq. 165 (Ch. 1937); *Sanderson v. Howell*, 14 N.J. Misc. 61 (Ch. 1936), *aff'd*, 121 N.J. Eq. 56 (E. & A. 1936); *Parker v. Colonial Bldg. Loan Ass'n*, 111 N.J. Eq. 49 (Ch. 1932); *N.J.S.A.* § 2A:81-2.

Significantly, if the party challenging the gift can show that the recipient and the transferor shared a "confidential relationship," the burden of proof can shift to the recipient to show that no undue influence occurred. *In re Dodge*, 50 N.J. 192, 216, 227 (1967); *Oachs v. Stanton*, 280 N.J. Super. 478 (App. Div. 1995). In general, the donee then has the burden to show by clear and convincing evidence not only that "no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood." *Id.* at 227, *quoting In re Fulper's Estate*, 99 N.J. Eq. 293, 302 (Prerog. 1926). This doctrine is a more stringent variation on the similar doctrine in will contests. The rationale is that persons are less likely to give away their assets voluntarily while they are still alive. Indeed, a gift which strips the donor of all of his assets will be presumed to be the product of undue influence. *Seylaz v. Bennett*, 5 N.J. 168, 173 (1950); *Petrucchio v. Petrucchio*, 205 N.J. Super. 577 (App. Div. 1985).

A presumption against the validity of a gift also arises as to a gift from a ward to his guardian, and the burden is on the guardian show a lack of undue influence. *Marte v. Oliveras*, 378 N.J. Super. 261 (App. Div. 2005).

Joint Accounts

In general, under *N.J.S.A.* § 17:16I-5, the funds in a joint account, on the death of one of the owners, belong to the surviving owner, unless there is clear and convincing evidence of a different intent at the creation of the account. The statute thus creates a presumption of survivorship. In contested cases, the dispute usually focuses on whether this presumption can be rebutted.

The creation of a joint account, with a right of survivorship, does not, by itself, constitute an *inter vivos* gift from the party depositing assets into the account to the other named party. *Lebitz-Freeman v. Lebitz*, 353 N.J. Super. 432, 436 (App. Div. 2002). Joint accounts with rights of survivorship are often created as a means of testamentary disposition, or a “poor man’s will.” *Sadofski v. Williams*, 60 N.J. 385, 395 (1972). Assets in accounts established for this purpose remain the sole property of the depositor during life. *Bauer v. Crummy*, 56 N.J. 400, 410 (1970). Joint accounts may also be set up for other purposes, such as the convenient management of the money in the event of the depositor’s death, *Taylor v. Coriell*, 66 N.J. Eq. 262 (Ch. 1904) (although a power of attorney is more appropriate for this purpose, *Sadofski, supra*, 60 N.J. at 400), or for the ability to withdraw in the event of illness or death. *Gordon v. Toler*, 83 N.J. Eq. 25 (Ch. 1914); *In re Behring’s Estate*, 80 N.J. Eq. 165 (Prerog. Ct. 1912).

Thus, the analysis focuses “on whether the depositor’s intent in creating the account was to make an *inter vivos* gift or solely to establish a vehicle for testamentary disposition.” *Lebitz, supra*, 353 N.J. Super. at 437. Even if the depositor did have the intent to make a testamentary disposition of the assets in the joint account, the depositor may countermand that instruction by will. *Bauer, supra*, 56 N.J. at 410-11.

The *inter vivos* analysis presents a problem with proof of delivery in the case of a joint account where the alleged gift is of intangible financial assets. *Lebitz, supra*, 353 N.J. Super. at 437, citing *Cziger v. Bernstein*, 33 N.J. Super. 404 (App. Div. 1954) (where the account was in money, possession of the means to make withdrawals sufficed as delivery). The analysis may also turn on whether the depositor ever relinquished control or dominion over the assets in the account. *Lebitz, supra*, at 438 (decedent took all proceeds from the assets and the court found lacking any proof that plaintiff ever had exerted any control over the assets).

In re Estate of Penna, 322 N.J. Super. 417 (App. Div. 1999), involved one daughter challenging another daughter’s survivorship rights in joint accounts held with their deceased mother. The joint accounts were treated as *inter vivos* gifts, effectuated at the time the accounts were created. *Id.* at 424. The appellate court stated that under the Act, the trial court should have looked solely at what the decedent intended when she created the joint accounts to determine the existence of undue influence. *Id.* at 428. An *inter vivos* gift analysis was applied.

In *Bronson v. Bronson*, 218 N.J. Super. 389 (App. Div. 1987), one brother challenged a second brother’s ownership in joint accounts with their deceased mother, and sought to set aside transfers under the mother’s will. The challenge, again, was on the grounds of undue influence. *Id.* The Appellate Division discussed the joint accounts as *inter vivos* transfers and distinguished them from cases involving will contests. *Id.* at 394. The court stated that the transfer of assets into joint names, coupled with a confidential relationship, placed the burden on the donee to

show that there was a gift and there was no undue influence. The donee could do so if he could show that the deceased mother understood that “all her assets would pass directly to defendant rather than in accordance with the estate plan contained in her will.” *Id.* Thus, the creation of her joint account was a “gift” made at the time of the transfer of the assets, if the donee could carry this burden. *Id.*

Life Insurance Beneficiary Designations

Under New Jersey law, the interest of the designated beneficiary in a life insurance policy has been held to be a vested property right, even where the right to change beneficiaries has been reserved by the insured. *Prudential Ins. Co. of America v. Douglas*, 110 F. Supp. 292, 294 (D. N.J. 1953); *see also, Raynor v. Raynor*, 319 N.J. Super. 591 (App. Div. 1999). As such, “[t]he beneficiary’s interest entitles him to the proceeds of the policy if he survives the insured, and he can only be divested of this right where there is a change of beneficiary accomplished as prescribed by contract.” *Prudential*, 110 F. Supp. at 294. Likewise, if the reservation of the right to change the beneficiary on the policy has not been made, then necessarily one cannot change the beneficiary as prescribed in the life insurance policy so as to divest the beneficiary of his interest. *See, Prudential, supra; Guardian Life Ins. Co. of America v. Mareczko*, 114 N.J. Eq. 369 (E. & A. 1933). However, even if this right does exist in the policy, a mere statement of intent to change the beneficiary on the policy of life insurance is insufficient to effect such a change. *DeCeglia v. Estate of Colletti*, 265 N.J. Super. 128, 132-33 (App. Div. 1993).

The traditional rule regarding change of beneficiary designations under a life insurance policy is that ‘. . . the interest of the designated beneficiary . . . is a vested property right, payable if he survives the insured, which can be divested only by a change of beneficiary in the mode and manner prescribed by the [policy]’.

Id., citing *Metropolitan Life Ins. Co. v. Woolf*, 138 N.J. Eq. 450, 454-55 (E. & A. 1946).

This logic is further supported if the beneficiary is specifically deemed “irrevocable” within the policy, and it is well settled that an “irrevocable beneficiary” cannot be divested of his right to the proceeds of an insurance policy by the insured without written consent of the beneficiary.

The New Jersey Supreme Court discussed these issues in *Tompkins v. Tompkins*, 132 N.J.L. 217 (Sup. Ct. 1944), in the context of the designation of an “irrevocable beneficiary” as an assignment of rights in a life insurance policy. The Court instructed:

An absolute assignment of an ordinary life insurance policy divests the insured of all right and title thereto, and vests his entire interest in the assignee An assignment of such a policy without the consent of the person named therein as beneficiary is ineffectual as to the latter’s beneficial interest, if there was no reservation of the right to change the beneficiary, for in such circumstances the designated beneficiary has a vested and absolute right to the proceeds of the insurance.

Id. at 221 (citations omitted).

Moreover, in *Haynes v. Metropolitan Life Insurance Company*, 166 N.J. Super. 308, 313 (App. Div. 1979), the Appellate Division held that a purported beneficiary did not have an interest in life insurance proceeds, and reasoned that the initial designation of the plaintiff beneficiary in this matter was simply not made “irrevocable” by written declaration to the insurer. *Id.* at 318. Moreover, there was no contention that the policy was issued pursuant to an oral agreement whereby the insured agreed to procure the policies of insurance and make the plaintiff the beneficiary in consideration of her promise to pay the premiums thereon, “thereby making the designation of beneficiary irrevocable notwithstanding the reservation of the right to change.” *Id.* The Appellate Division suggested that even if an insured reserves the right to change the policy, if a *contractual* agreement with respect to the policy has also been made, the beneficiary can still be held an “irrevocable” beneficiary.

See also, In re Marriage of O’Connell, 8 Cal. App. 4th 565 (6th Dist. 1992); *Myers v. Myers*, 408 A.2d 279 (Del. 1979) (“[A]s a general rule, an ‘irrevocable’ grant by contract of beneficial rights in an insurance policy removes the insured’s power to change the beneficiary, the power to make such change reserved in the policy itself notwithstanding; the power is generally deemed waived by the contract.” *Id.*, at 280.)

14. Alternative dispute resolution is likely to occur.

As in most litigation, the majority of estate-and-trust disputes settle before trial. If the case resolves at an early stage, the parties can save an enormous amount of time and expense, but emotional factors will often prevent the case from resolving when it otherwise should.

Settlement techniques such as mediation and ADR thus carry with them advantages and disadvantages. The major selling point is the client can save money by resolving the case in this fashion. The mediation forum can also let the parties develop “win-win” scenarios that would not be available to them if they proceeded to trial. But strong emotions – i.e., outright hostility – are a fact of life in this type of litigation, and they often render mediation a waste of time, at least in the absence of an attorney who exercises a good deal of “client control” or an impending trial date that forces the parties to face reality. Lack of information can be another factor that cuts against mediation. It is not unknown for a defalcating fiduciary to stonewall on discovery while insisting on mediation, with the hope that the mediator will pressure the beneficiary into settling while having no leverage to use against the fiduciary in the wrong. Thus, experienced counsel for beneficiaries may well refuse mediation until they have taken key depositions and obtained sufficient ammunition with which to threaten the fiduciary and exert a greater amount of leverage. These are factors that counsel should weigh in deciding whether and when to engage in the mediation process.

In many jurisdictions, however, the probate courts will order mediation, and thus counsel should understand that navigating the ADR process has become an essential part of the practice, even if one would prefer to avoid it.

There is no doubt, however, that the practitioner must know the essentials of settling a case, since that is the mechanism by which most cases resolve. This goes beyond knowing how

to measure the economic factors – i.e., who pays what to whom – which can be the only issue of interest in many types of civil litigation. In the estate-and-trust context, however, the practitioner may need to account for a host of other issues.

For example, the parties to the settlement must be certain to address the interests of any persons not participating in the settlement. If contingent interests or the interests of minors or incapacitated persons are implicated, the parties to the settlement should address those interests. See generally, *In re Cohen*, 335 N.J. Super. 13 (App. Div. 2000), *certif. denied*, 167 N.J. 632 (2000) (a pre-death settlement agreement revising the testamentary plan of an incompetent person was not enforceable under the circumstances). Another example can arise when the trustee sues a third party to enforce the trust's claim and wants the beneficiaries to consent to his settlement with the third party; the trustee will often want court approval for this settlement, since the trustee wants to prevent future attack from those who are not signing the agreement, i.e., the beneficiaries, who might try to surcharge the trustee later if they grow dissatisfied with the result.

Taxation is often an issue in settlement. The practitioner must carefully consider points such as: are all of the income taxes and death-related taxes satisfied? If not, does the settlement agreement identify the person or people who will be responsible for those taxes? Do the terms of the settlement create any tax concerns? Are any transfers occurring which implicate gift or transfer taxes? Will the settlement payment be treated as income to the recipient? These are common issues that exist when attempting to settle an estate or trust dispute.

Practitioners must also consider the releases given in the agreement. While it seems obvious that a settlement agreement should include a general release, the complexities of certain types of litigation might make this inadvisable, at least in the absence of informed client consent as to the risks. For example, if a successor trustee is suing a predecessor trustee and his co-conspirators for embezzlement and wants to settle with one of the co-conspirators, the successor trustee should make sure that the release is drafted in such a way that it will not inure to the benefit of the other wrongdoers. Furthermore, this type of settlement can be difficult when the missing money is unaccounted for; the settling co-conspirator who claims to be the “small fry” may in fact be the one holding all of the money, which could make a general release disastrous when all is said and done. In this instance, the successor trustee may want the agreement to include warranties and representations that would protect against this sort of risk.

These are just some of the many issues that can arise when settling litigation that takes place in the estate-and-trust context, and because the settlement process is voluntary and theoretically under the control of the attorney involved, mistakes made in these circumstances can easily become the subject of future malpractice claims.

A survey of the modern trends among sample states is helpful. The New Jersey *Rules of Court* allow a court to “refer any . . . probate action to mediation for an initial three hours, which shall include an organizational telephone conference, preparation by the mediator, and the first mediation session.” *R.* 1:40-6(a). That same *Rule* also provides that “the parties to an action may request an order of referral to mediation and may either select the mediator or request the court to designate a mediator from the court-approved roster.” *Id.*

The New Jersey *Rules* do not, however, expressly require mediation. That may very well change as the courts embrace ADR more fully. Accordingly, a survey of how other areas of the country handle this concept is useful.

Washington State has implemented statutes that require all estate and trust cases brought to court to proceed to mediation first. *Wash. Rev. Code Ann.* § 11.96A.280 (West 2000). The statute provides, “[J]udicial resolution of the matter . . . is available only by complying with the mediation and arbitration provisions of *R.C.W.A.* 11.96A.260 through 11.96A.320.” *Id.* In support of this measure, the Washington Legislature found that this “non-judicial procedure has resulted in substantial savings of public funds by removing those disputes from the court system.” *Id.* at 11.96A.260.

Hawaii has promulgated similar mediation rules. While not as restrictive as Washington’s law requiring mediation before litigation, the Hawaii Probate Rules allow any party to a probate, trust, or guardianship matter to opt for mediation. *Hi. St. Prob. Ex. A. Mediation Rule 1* (2002). However, should the court decide at any time to refer a case to mediation, the procedure becomes mandatory for the parties. *Id.* While Hawaii does grant the court the power to order mandatory mediation, it allows the court some discretion in whether or not to do so. *Hi. St. Prob. Rule 2.1.*

Further, within some states, certain counties have promulgated their own policies on probate mediation. For example, within California, Los Angeles and San Francisco counties have enacted their own rules of court regarding probate mediation. The Los Angeles County Court Rules require mediation for contested estates, trusts, conservatorship, and other matters, on the principle that these matters are uniquely appropriate for mediation. *Ca. R. Los Angeles Super. Ct. Rule 10.200* (2004). The Court Rules set up a detailed framework which begins after the first hearing in the matter. *Id.* at R. 10.201. San Francisco County has a voluntary mediation program for all civil matters, specifically including probate, guardianship, and conservatorship matters. *Ca. R. San Francisco Super. Ct. Rule 4.2* (2005).

In the third judicial district in Oregon, Marion Circuit, the rules state that “the Court may also refer matters to mediation on the motion of one party, or on the Court’s own motion.” *Marion County Local R. 12.175* (2005). Also, if all parties to a probate case request mediation, the court must refer the matter to mediation. *Id.*

In a number of the remaining states, courts have the option to order or recommend probate mediation. The legislation in these states tends to be more permissive and flexible. In Alaska, the presiding judge may appoint a standing master to conduct probate proceedings, including ordering mediation and other alternative dispute resolution. *Ak. R. Prob. Rule 2* (2005). In Michigan, Probate Court Rule 5.143 states that a court “may submit to mediation, case evaluation, or other alternative dispute resolution processes one or more requests for relief in any contested proceeding.” *M.C.R. 5.143* (2005).

Ultimately, therefore, litigators may see more frequent use of mediation because the settlor or testator required it. Certainly, each state will need to resolve whether such clauses are enforceable, especially when they require the parties to submit to a binding process. Given the increasing use of mediation and the courts’ predilection for alternative dispute resolution, the

likelihood is that such clauses will be enforced. In any event, mediation will become an increasingly strong undercurrent in estate litigation.

15. Taxes (with death) cannot be avoided -- and often drive the course of settlement.

Taxes (as with death) cannot be avoided. However, tax consequences can, and often will, drive the course of settlement discussions. The Honorable Learned Hand, former United States Appeals Court Judge, is reported to have said “There are two systems of taxation in our country: one for the informed and one for the uninformed.”

When instructing clients through the maze of the litigation process, it is important-if not essential-to keep them abreast of the tax issues and tax costs. Remember that in every settlement of an estate or trust litigation matter, there are at least three parties at the table - the plaintiff, the defendant and the tax authority! Often the litigators involved in the settlement of an estate or trust dispute will ignore the tax demands until it is too late.

Origin of the Claim Doctrine

The seminal case concerning tax settlements in the probate litigation arena is *Lyeth v. Hoey*, 305 U.S. 188 (1938). This is one of the important cases that set forth the principle of the “origin of the claim” doctrine. In *Lyeth v. Hoey*, the Court was confronted with the situation where the plaintiff/grandson of the decedent had made a claim against the estate to set aside the Will so that he could claim an inheritance by intestacy. The Internal Revenue Service argued that his receipt of a settlement award should be viewed as taxable income. The Supreme Court enunciated the “origin of the claim” theory and found that the receipt of the award by the grandson should be viewed based upon his legal rights in the estate (e.g., since it was an inheritance to be received, the tax character was an inheritance).

In considering the tax aspects of a settlement it is important to consider that the tax issues to be presented may involve not only the income tax upon receipt but also could involve estate, gift, generation skipping, employment or excise taxes. More importantly, counsel should consider the fact that state tax consequences may also have an important impact upon the overall tax costs. For example, in New Jersey, a inheritance tax regulation provides “if a transferee under a Will agrees that the estate, or any part of it is to be distributed otherwise as provided by the Will, then the tax is nevertheless computed in accordance with the terms of the Will admitted to probate” See *N.J.A.C.* 18:26-2.11. Also, the tax concepts may vary depending upon the residence of the testator, an issue which may be disputed as part of the litigation.

Pleadings-- Define Claim

Because of the “origin of the claim” doctrine which requires that tax issues must be based upon the facts presented, consideration to taxes must be made when the pleadings are drafted. For example, in one case, a child sued his father’s estate on the basis that the father had promised to compensate him for services if he worked on the decedent’s ranch. The court followed the Internal Revenue Services position that the claim was for services rendered and therefore, settlement proceeds were to be considered income to the beneficiary. See *Mariani v. Commissioner*, 54 T.C. 135 (1970).

When fashioning the litigation, care should be given to the structure of the tax claims presented. However, recall that in the context of property rights, the IRS is not bound by findings of a Court unless the state's highest Court has ruled exactly on that matter. See *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

While counsel should be cognizant of fashioning the litigation settlement to produce the best tax result, care should also be given to the possibility that a beneficiary has received an interest in the estate which is "materially different" than the underlying claim. The often cited "Cottage Savings Doctrine", *Cottage Savings Assn. v. Commissioner*, 499 U.S. 554 (1991), holds that where a taxpayer receives an interest in litigation which is "materially different" than the interest previously held, the transfer and receipt could be construed as "exchange" to result in gain or loss. See Treas. Reg. 1.1001-1(a). In *Cottage Savings*, a financial institution exchanged participation interests in one group of mortgages for another institution's participation interests in a different group of mortgages. The United States Supreme Court determined that the properties are different so long as the possessors enjoy legal entitlements that are different in kind or extent. Whether or not a transfer in settlement of an estate could be construed as "materially different" particularly in the context of contested litigation, is suspect. However, counsel should be cognizant of the issue when addressing the settlement.

Deduction Issues

There are a variety of areas in which the issues to be resolved in the litigation will set forth a deductible item for tax purposes. Those disputes can involve claims against the estate that may be deductible under I.R.C. §2053, expenses, indebtedness and taxes, I.R.C. §2055, transfers for public charitable and religious use and, I.R.C. §2056, bequests to surviving spouse. The IRS proposed newly revised regulations under I.R.C. §2053 in April, 2007. These regulations take a much more limited view of items which may be deducted to arrive at the federal taxable estate. These regulations have not yet been adopted as final but should be considered if the tax aspects of the settlement of a matter will be material. Second, counsel should also consider the state tax issues which may arise in settlement which may differ from federal tax consequences.

Expenses and Claims

Estate taxes are assessed only on the "net" estate after payment of claims. I.R.C. §2053 allows for a deduction for claims that are "allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered". The existing regulations limit the deduction to an amount not in excess of that allowed by local law and Treas. Reg. 20.2053-1 grants a deduction where a court has passed on the settlement. It provides:

The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed... It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may

be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an interest adverse to the claimant.

The new proposed regulation revised the rule for payment of an estimated deduction from allowing the deduction when known with “reasonable certainty” to a denial of the deduction until paid. *See* Treas. Reg. 20.2053-1(b)(3) and Prop. Reg. 20:2053-1(b)(1). The proposed regulations limit deductions under consent decrees to the situation where the court has passed on the merit. Moreover, the new regulation contains a new limitation on deductibility for settlement on these situations where

- The settlement resolves a bona fide issue in an active and genuine contest;
- The settlement is the product of arm’s length negotiations by parties having adverse interests with respect to the claim;
- The settlement is within the range of reasonable outcomes under applicable state law governing the issues resolved by the settlement.

While a complete discussion concerning the newly proposed regulations would be beyond the scope of this outline, counsel should be aware that, if finalized, there will be a heightened need to work with tax counsel before a deduction can be achieved. This new rule could require the filing of a family protective claim for refund before the statutory time limits have expired even though counsel may feel that the disclosure may hinder efforts to resolve the dispute.

Under the proposed regulation, a duty will be imposed upon the executor to notify the IRS and pay extra tax if the deduction has been allowed before it is paid.

Another provision of the proposed regulation is Treas. Reg. 20.2053-4(b), which deals with claims by family members and creates a rebuttable presumption that the claims are “not legitimate and bona fide and therefore are not deductible”. Of course, anyone who has been involved in this type of case knows the absurdity of this presumption – many family members *hate* each other by the conclusion of the estate litigation!

Charity and Spousal Claims

When litigation involves settlement of a dispute between a surviving spouse or a charity, a client should consider the applicability or non-applicability of the marital or charitable deduction. Under IRS Treasury Regulation 20.2056(c)-2(d)(2) a controversy will be respected under certain circumstances. The regulation provides specifically as follows:

If as a result of a controversy involving the decedent’s will, or involving any bequest or devise thereunder, his surviving spouse assigns or surrenders a property interest in settlement of the controversy, the interest so assigned or surrendered is not

considered as having passed from the decedent to his surviving spouse.

If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having passed from the decedent to his surviving spouse only if the assignment or surrender as a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversarial proceeding following a genuine and active contest. However, such a decree will be accepted only to the extent that the court passed upon the facts upon which deductibility of the property interest depends. If the assignment or surrender was pursuant to a decree rendered by consent, or pursuant to an agreement not to contest the will or not to probate the will, it will not necessarily be accepted as a bona fide evaluation of the rights of the spouse.

One case where additional planning should have been done to minimize the tax burden is *Depaoli v. Commissioner*, T.C. Memo 1993-577. This case involved a will settlement between a surviving spouse and a son/beneficiary. The IRS disputed the substance of the agreement and found that the surviving spouse had no claims upon which her rights could be enforced. Thus, not only was the marital deduction disallowed—the son was treated as having made a taxable gift to the spouse! While this case was reversed on appeal on procedural grounds, caution is warranted so that the potential for the “gift” argument remains. See 62 F.3d 1259 (10th Cir. 1995).

For charitable deduction purposes, property assigned or surrendered to a charity as a result of legally enforceable rights can qualify for the charitable deduction. See Treasury Regulation §20.2055-2(d). One seminal case in the area of settlement of charitable bequests is *Ahmanson Foundation v. United States*, 674 F.2d 761(9th Cir. 1981). This case disallowed a charitable deduction when the amount to be received was subject to a minority or marketability discount. Moreover, counsel should be cognizant of the provisions for “Qualified Reformation” of a charitable bequest in order to convert a known deductible interest into one which would qualify for charitable deductions. See I.R.C. §2055(e)(3); I.R.C. §2522(c)(4) and I.R.C. §170(f)(7).

16. The attorney-client privilege may not apply -- or may be lost.

A host of attorney-client privilege issues arise in estate and trust lawsuits. Although lawyers are accustomed to thinking of the attorney-client privilege as an absolute protection from inquiry into communications between the lawyer and the client, there are, in fact, significant exceptions. For example, many states will not apply that privilege with respect to communications between the lawyer and the client regarding estate planning when a will or trust is being contested.

Estate planners must be aware of these privilege issues because the concepts can be contrary to our general notions of being able to maintain in strict confidence communications with clients. In jurisdictions that negate the attorney-client privilege when a will or trust is contested, the estate planner's file is discoverable, and the estate planner will be deposed concerning oral communications with the deceased client.

To generally establish the privilege, the following four factors must exist: the communications must originate in the confidence that they will not be disclosed; the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; the relationship must be one which in the opinion of the community ought to be fostered; and the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. Sherwin P. Simmons, *Who Is the Client?: Ethical Considerations*, SC06 ALI-ABA 769, 772 (1997), quoting 8 *Wigmore on Evidence* § 2285, at 527.

In will contests, the issue as to the privilege which existed while the testator was alive — *i.e.*, the privilege between the testator and her estate planning attorney — is settled in New Jersey. The attorney-client privilege dissolves where that estate plan is being litigated. *N.J.R.E.* 504(2)(b); *N.J.S.A.* § 2A:84A-20.

Upon execution of a will, a testator may intend for the contents of the will to be kept in confidence with the attorney only during the testator's lifetime. *Balazinski v. Lebid*, 65 N.J. Super. 483, 494 (App. Div. 1961) (finding conversations with attorney who prepared will admissible). "A testator reasonably intends that any secrecy as to the will's contents at the time of execution and before his death must yield to public disclosure upon probate, after he has died." *Id.* In *In re Estate of Crook*, 87 N.J. Super. 210, 213 (Cty. 1965), where discovery was sought from an attorney who prepared a will, the court stated that

[a] communication by a client to an attorney who drafted his will, and transactions leading to its execution, are not privileged after the client's death in a suit between the testator's heirs, devisees or other parties who claim under him, but may be invoked against claimants adverse to the interest of the client, his estate or his successors.

The distinction drawn in *Crook* between interested claims and claims adverse to the interest of the client was later questioned in *Ervesun v. Bank of N.Y.*, 99 N.J. Super. 162, 171-72 (App. Div. 1968), which stated that any claim asserted is in a sense adverse to the interest of a deceased client or his estate, but "it can hardly be argued under Rule 26(2)(b) [the relevant exception to the attorney-client privilege] that in every case where a person . . . makes a claim against an executor or an estate the attorney-client privilege may be invoked." Refusing to rule on the validity of the distinction, the *Ervesun* court declared that "[i]n the case of estates it appears to be designed to abrogate the privilege in any such controversy where all the parties assert interests in the estate concerned, whether such interests arise by virtue of testate or intestate succession or by *inter vivos* transaction." *Id.* at 172. In support of its holding, the court noted that there are special considerations as to wills. *See, id.* at 169 ("the rationale of this curtailment of the privilege in testamentary cases is that the apprehension of disclosure after

death would in no material degree deter the client from making a full statement of his case to his attorney”). Recognizing that the attorney-client privilege could lead to the exclusion of relevant evidence, the court held that communications between attorneys and the decedent fall within the exception to the privilege. *See, id.* at 168-70.

Finally, in a more recent case, the court expressed doubt over whether an attorney, who is questioned regarding a will change or use of *inter vivos* trust, could invoke the attorney-client privilege. *See, Matter of Unanue*, 255 N.J. Super. 362, 386 (Law Div. 1991). *See also, Gould, Larson, Bennett, Wells and McDonnell v. Panico*, 273 Conn. 315 (Conn. 2005) (in will contest, attorney who met with client and discussed estate plan could not be compelled to disclose confidential communications since the attorney did not draft a will for the client).

Who is the Client?

When representing a fiduciary, the lawyer must initially determine to whom she owes her loyalty. *See, e.g., Peter Rice, Attorney-Client Privilege in the U.S.* § 4:45 (2d ed. Mar. 2003) (“the most common question that has arisen has been who is the client the trust entity, the trustees or individuals who act for the entity, or the beneficiaries or individuals for whom the entities were created?”); Sherwin P. Simmons et al., *Confidentiality Issues Between Fiduciaries and Their Legal Advisors*, SH059 ALI-ABA 535 (2003) (discussing with respect to attorney-fiduciary privilege, “who is the client?”); Jack A. Falk, Jr., *The Fiduciary’s Lawyer-Client Privilege, Does it Protect Communications from Discovery by a Beneficiary?*, 77 Mar. FLA. B.J. 18 (March 2003) (reviewing various jurisdictions’ approaches to parties subject to attorney-client privilege); John T. Rogers, Jr., *Who’s the Client? Ethics for Trust and Estate Counsel*, SJ036 ALI-ABA 255 (2003) (discussing ethical implications of representation of fiduciary and purview of attorney client relationship); Steven M. Fast, et al., *The Fiduciary Sticky Wicket — Counseling Fiduciaries on Dealing with Receipts and Releases; Requests for Resignation; Conflicts of Interest with Co-Fiduciaries; and Discharge from Tax Liabilities*, SC84 ALI-ABA 91 (1999) (asking “is it really the trustee that you represent or is it the trust itself or possibly the trust’s beneficiaries?”); Peter R. Brown, *Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration*, SC85 ALI-ABA 149, 152 (1998) (“threshold issue is always to whom does the lawyer owe his or her loyalty?”).

Defining the Scope of Attorney-Client Relationship

Attorneys may be able to define the attorney-client relationship themselves with a tailored retention letter. In *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003), *certif. denied*, 177 N.J. 223 (2003), the Appellate Division held that an attorney is ethically permitted under *N.J.R.P.C.* 1.2(c), with the consent of the client after consultation, to limit the scope of his representation with a single, specifically tailored form of a retainer agreement. *See also, Kamaratos v. Palias*, 360 N.J. Super. 76, 85 (App. Div. 2003), *citing Lerner, supra*; Melvin Hirshman, *Tips from Bar Counsel-Agreements with Your Client*, 36-DEC MD. B.J. 58 (Nov./Dec. 2003), *citing Md. R.P.C.* 2(c) and *Lerner*.

Majority Rule: Fiduciary Only as Client

“[U]nless the lawyer elects to represent the estate or trust as an entity, and there is a written agreement to this effect with the fiduciary,” the majority rule is that “the lawyer’s only client is the fiduciary.” Brown, *Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration, supra*, at 152.

Wills

In *Goldberg v. Frye*, 266 Cal. Rptr. 483, 488 (Cal. Ct. App. 1990), the California Court of Appeals announced that “it is well established that the attorney for the administrator of an estate represents the administrator, and not the estate.” Although the attorney performs services that may benefit legatees, the attorney “has no contractual privity with the beneficiaries of the estate.” *Id.*

In *Grievance Committee, Wyoming State Bar v. Riner*, 765 P.2d 925, 927 (Wyo. 1988), the Supreme Court of Wyoming disagreed with an attorney’s contention that he represented the estate and not the personal representative. The court concluded that the personal representative of the estate and the attorney “entered into an attorney-client relationship when she engaged [him] to assist her in performing her duties as a personal representative of the . . . estate.”

In *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987), the court stated: “in absence of fraud, collusion or malice, an attorney may [not] be held liable in a malpractice action by a purported beneficiary of a will where privity is lacking.”

In *In re Estate of Wagner*, 386 N.W.2d 448, 450 (Neb. 1986), the court ruled “[w]hen an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate.”

Trusts

Trust counsel are agents hired by a trustee, so that trust counsel also owe their duty of loyalty to the fiduciary (the trustee).

In *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996), the Supreme Court of Texas held that under Texas law, a trustee who hires an attorney to assist in administering a trust is the actual client of the lawyer, and the trust beneficiaries are not the clients. The court noted it “would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee’s attorney, is the real client.” *Id.*

In *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994), the Supreme Judicial Court of Massachusetts refused to impute an attorney-client relationship between the attorneys of trustees, who also happened to be beneficiaries under the trust, and plaintiff-beneficiaries of the testamentary trust. The Court reasoned that “[s]hould we decide that a trustee’s attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney’s task of advising the trustee.” *Id.* at 545-46. In so declining to recognize an attorney-client relationship between trust beneficiaries and trustee’s attorney, the court was careful to distinguish between third party beneficiaries of the contract

between the testator and the attorney drafting the will, and the contract between the trustee and the trustee's attorney. In the latter circumstance, the trust beneficiaries are only incidental beneficiaries of the contract. The plaintiff trust beneficiaries failed to cite authority for finding an attorney-client relationship between the trust beneficiaries and the attorney for the trustee of the trust. *Id.*

Minority View — Beneficiary of Estate or Trust as Client

The minority view is that, although there is no direct attorney-client relationship, the lawyer may still owe some duties to the beneficiaries. Brown, *Clarifying the Role of the Attorney, Executor, and Trustee in Estate and Trust Administration, supra*, at 152. Some states even treat the beneficiaries of an estate as joint clients of the lawyer for the fiduciary. For examples of the minority view, see *Steinway v. Bolden*, 460 N.W.2d 306, 307 (Mich. Ct. App. 1990); *Elam v. Hyatt Legal Servs.*, 541 N.E.2d 616, 618 (Ohio 1989); *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976).

The Erosion of the Privilege

The following cases epitomize how, in recent history, the trend appears to be leaning toward the erosion of the privilege.

Moeller v. Superior Court, 16 Cal. 4th 1124 (Cal. 1997)

The Supreme Court of California ruled in this case that a successor trustee is the holder of the attorney-client privilege over communications between a former trustee and his trust administration counsel. This decision also addresses cases in this area around the country.

A corporate fiduciary handled the trust at issue for a number of years, including while litigation and related issues were addressed concerning toxic contamination to real property owned by the trust. One of the beneficiaries, Mr. Moeller, became the successor trustee in place of the corporate fiduciary, and sued his predecessor for various losses, including alleged mishandling of the contaminated property and related litigation. Mr. Moeller sought communications and other documents exchanged between the former trustee and its counsel, but the former trustee refused to produce such documents, claiming the attorney-client privilege. *Id.* at 1128.

The Supreme Court of California ruled that Mr. Moeller was entitled to all such communications because the privilege belonged to the "office" of trustee, and not to a particular trustee. The Court ruled that all attorney-client communications regarding any trust administrative matter would not be privileged as against a successor trustee. However, with respect to communications between a trustee and counsel on actual or potential breaches of fiduciary duty, the Court ruled that such communications could be protected from disclosure; the Court seemed to suggest that, to ensure the privilege, the fiduciary should obtain its own counsel and pay for such legal services personally. *Id.* at 1134.

Wells Fargo Bank, N.A. v. Superior Court, 990 P.2d 591 (Cal. 2000)

In this sequel to *Moeller*, the California Supreme Court refused to recognize an implied exception that would require trustees to share with trust beneficiaries privileged communications about trust administration. In *Wells Fargo*, William Couch established a trust in 1991. He served as the sole trustee until his death in 1992. Then, his widow and Wells Fargo became co-trustees. The beneficiaries accused the trustees of a variety of misconduct. Wells Fargo filed a court action to settle its account and obtain approval for its resignation as trustee. The beneficiaries filed objections.

The beneficiaries relied on *Moeller* to try to obtain in discovery documents regarding communications between the trustees and their counsel. The California Supreme Court did not allow this reliance, explaining that in *Moeller* “we did not suggest that anyone other than the current holder of the privilege might be entitled to inspect privileged communications. Nor did we create or recognize any exceptions to the privilege. Instead, without questioning that the communications at issue were privileged, we merely identified the current holder of the privilege.” *Id.* at 596. The California Supreme Court refused to recognize an implied exception that would require trustees to share privileged communications about trust administration with trust beneficiaries.

Thus, in *Moeller*, the California Supreme Court ruled that a successor trustee could obtain otherwise privileged communications, because the privilege moves with the office of the trustee. In *Wells Fargo*, that same court did not extend *Moeller* to rule that beneficiaries are able to obtain such privileged information.

Estate of Fedor, 356 N.J. Super. 218 (Ch. Div. 2001)

The New Jersey court adopted *Moeller*. The beneficiaries alleged mismanagement and self-dealing by the fiduciaries (who were both executors and trustees). In prior proceedings, the court had suspended the two individual fiduciaries of the subject estate and trust, and appointed an attorney as the temporary fiduciary. The substitute fiduciary and the beneficiaries then sought discovery of prior communications between the former fiduciaries and the attorneys and accountants for the estate. The former fiduciaries raised the attorney-client privilege.

The court ruled that the substitute fiduciary became the holder of the privilege and therefore was entitled to have access to all records of the estate, including attorney-client advice previously provided to the suspended fiduciaries by the attorneys and the accountants. Likewise, she was entitled to decide whether to waive the privilege as to the beneficiaries, based on the best interests of the estate. The court denied the beneficiaries’ motion without prejudice.

However, while the court did note that the beneficiaries did not seek discovery of communications between the former fiduciaries and their “personal” attorney, the opinion does not address those communications.

Bria v. United States, 89 A.F.T.R.2d 2002-2141 (D. Conn. 2002)

In this unreported but still noteworthy opinion, the co-executors of an estate retained counsel. However, the attorneys were terminated while in the process of preparing the United States Tax Form 706.

The IRS investigated whether the co-executors understated the value of the estate on the Form 706 that was eventually filed with the IRS. The IRS issued a summons to the former attorneys for the co-executors. An objection was raised based on the attorney-client privilege, especially since some of the information was not listed on the Form 706 which was filed.

Although the court sustained the objection as to certain points, the court still ordered the attorneys to answer questions and produce documents as to certain areas, including joint bank accounts valued at over \$407,000, held by the decedent but not listed on the estate tax return which was filed.

Eddy v. Fields, 18 Cal. Rptr. 3d 487 (Cal. Ct. App. 2004)

The court, following *Moeller*, held that a successor trustee was entitled to the files of the lawyer of the predecessor trustees. In *Eddy*, the former trustees resigned and the successor trustee requested that the attorney for the former trustees turn over his files. The attorney petitioned the court for guidance on whether the files should be released. The attorney argued that some of the documents had been prepared by him while representing the former trustees and were protected by the work product privilege. The trial court ordered the attorney to turn the files over to the successor trustee. *Id.* at 490.

The Court of Appeals affirmed, explaining that “a new trustee succeeds to all rights, duties and responsibilities of his or her predecessors, including those related to dealings with an attorney retained to assist the trustee in the management of the trust.” *Id.* The court reasoned that the documents within the file, including all correspondence, pleadings, expert reports, and other items reasonably necessary to the representation belonged to the client. The court also found that the work product privilege had been waived by disclosure. *Id.* at 491.

Jacob v. Barton, 877 So.2d 935 (Fla. Dist. Ct. App. 2004)

The Florida District Court of Appeals quashed the lower court’s order requiring production of a trust attorney’s billing records to a beneficiary. The beneficiary had sued to remove the trustee for mismanagement and for improper payments to the trustee’s attorneys. According to the court, when confronted with the issue of privilege, a court must consider whether the attorney represents the interests of the trustee or the beneficiary. The court noted that usually a lawyer retained by a trust represents the trustee, not the beneficiary, and therefore the trustee holds the lawyer-client privilege. However, the court acknowledged that the beneficiary might hold the privilege if he is the person who ultimately will benefit from the legal work the trustee has instructed the attorney to perform, and in that sense may be the “real client.” *Id.* at 937. The court ruled that, to the extent that the lawyer’s work concerned the dispute with the beneficiary, the client is the trustee, not the beneficiary. The court remanded with directions to conduct an in camera review to determine whether the billing entries would be protected by either the lawyer-client privilege or the work product doctrine.

17. Burden-shifting presumptions often apply in estate and trust litigation.

For policy reasons, the law shifts the burden of proof in various contexts, and some of these occur in the field of estate and trust litigation. To practice with competence in this area, counsel must be aware of these rules, which can determine the outcome of a case.

For example, burden-shifting rules can apply in contested litigation. Many jurisdictions hold that in the testamentary context, the burden of proving undue influence shifts if the contestant proves that the respondent had a confidential relationship with the decedent, actively participated in procuring the instrument, and unduly benefited by it; in these circumstances, the respondent must prove the lack of undue influence or else lose the case. (*Rice v. Clark* (2002) 28 Cal.4th 89, 97). Similarly, burden-shifting rules can apply to intervivos transactions as well. *O'Neil v. Spillane*, 45 Cal.App.3d 147, 155 (1975) (to shift the burden of proof when challenging a deed, the contestant did not need to show a confidential relationship and instead only needed to prove susceptibility to imposition and then provide slight evidence of wrongdoing).

Burden-shifting rules can also apply in fiduciary litigation. Given the nature of the fiduciary relationship, the law holds that when the trustee gains an advantage over the beneficiary in a transaction, that transaction is presumed fraudulent. *Prueter v. Bork*, 435 N.E.2d 109, 112 (Ill. 1981). Another example occurs in the context of maintaining records; when a fiduciary cannot document how money from the trust was spent, the law implies all presumptions against that fiduciary and requires a surcharge accordingly. *In re McCabe's Estate* 98 Cal.App.2d 503, 505 (1950).

Rules like these can easily affect the outcome of a case, and the attorney who litigates in this area should become familiar with them.

18. The drafting attorney may create a conflict -- and liability -- for himself.

A major area of ethical concerns for the estate planning attorney involves multiple representation of various family members at one time. When helping with the estate planning process, it is often impractical to demand that all family members (where all agree on the planning) seek separate counsel, particularly when it is most cost efficient for the same lawyer (who knows the family, their assets, goals and desires) to represent all. Estate planners often represent more than one family member by representing both husband and wife or a family, including parents and children, or fiduciaries and beneficiaries. After the death of the testator/client, all of these potential conflicts can give rise to major issues in the estate administration/ litigation process.

Representing joint clients in preparing wills, trusts, or other planning documents is a practical approach justified by economic as well as social factors. However, there has always been the potential for difficulties to arise. Adversity can develop in many instances, particularly where one party is potentially benefited at the expense of another, including some of the following: naming a trustee; creation of spendthrift trusts; incapacity of one of the parties; tax clauses favoring one beneficiary over another; QTIP powers; giving powers of attorney to only one of several siblings or children; disinheritance by will; decisions concerning tax elections; compensation of fiduciaries; discretion to be exercised by fiduciary; tangible property bequests; bequests of all kinds; and gifting decisions.

The basic problem is identifying the client. Who does the lawyer represent? This impacts what duties are owed and to whom. There is a related concern in the malpractice context of identifying the client, since a disappointed heir or beneficiary of the estate may be found an

“indirect client” for purposes of establishing standing in a later malpractice suit against the attorney.

Two specific duties owed by a lawyer are implicated. The first duty is to avoid conflicts of interest, so the attorney needs to be aware of any potential adversity under Model Rule of Professional Conduct (RPC) 1.7. This can usually be resolved by full disclosure and consent by all parties involved, particularly the potentially adverse parties. The second duty is that of confidentiality under RPC 1.6. The lawyer may be presented with unsolicited and unwanted confidentialities by one party that could potentially affect the other party, raising the issue of whether to breach one party’s confidence in order to fulfill the fiduciary duty to the other. These two issues are often intertwined, since unilateral confidentialities often lead to conflicts of interests. In such case the attorney/estate planner and confidant must be careful of what he or she says to whom.

In the litigation context, the counsel hired is often hired with the sole goal of representing the potentially aggrieved party. If, however, the counsel had previously represented (or continues to represent) other family members additional care is needed.

A problem area for attorneys when dealing with adult children and their possibly incompetent parents is that the attorney may be implicated in a claim of undue influence or fraud. In *Haynes v. First Nat’l State Bk.*, 87 N.J. 163 (1981), the New Jersey Supreme Court held that the lawyer’s representation of the child beneficiary and parent raised a presumption of undue influence “because the testator’s attorney has placed himself in a conflict of interest and professional loyalty between the testator and beneficiary.” Another New Jersey case, *A. v. B. v. Hill Wallack*, 158 N.J. 51(1999), gained national prominence and illustrated the difficulties that may arise when representing a husband and wife.

In *A. v. B.* a husband and wife had engaged Hill Wallack for estate planning. The firm incorrectly misspelled the client name in the conflict check software and missed an important connection. After the firm had begun the estate planning process, they realized that they also represented a woman bringing a paternity suit against the husband. The estate lawyer had already prepared a will for the clients leaving their estates to their descendants. Obviously, this created a dilemma since the wife’s estate plan included the husband’s children which, if the paternity suit were successful, would include children the wife did not even know about. The firm told the husband — as part of their duty to the wife — that if he did not tell the wife of the paternity suit, the firm would tell her.

The husband found a new lawyer and sued to prevent disclosure. The New Jersey Supreme Court held that although the firm was not required to disclose the existence of the illegitimate child, because it did not constitute a “substantial injury to the financial interest or property of another,” the firm was entitled to disclose the existence of the claim, as the husband’s deliberate concealment constituted a fraud on the wife.

The best way to avoid such problems is to have an open, candid discussion with the clients from the beginning. If there is full disclosure of potential problems and consent by all parties involved, even the more difficult problems can usually be surmounted. There are two steps to preventing conflicts of interest. First, the attorney must ascertain whether RPC 1.7 will

be applicable. Rule 1.7 will be applicable when there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” The Commentary to the Model Rules of Professional Conduct (2002) elaborates:

The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will occur and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The ABA Special Ethics Committee report on representing spouses, summarized in Moore & Hilker’s 1993 article *Representing Both Spouses: The New Section Recommendations*, Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 PROB. & PROP. 26, 28 (July/Aug. 1993) concluded that marriage does not necessarily produce the conflict contemplated by Rule 1.7, but may under certain circumstances. Potential conflict sufficient to invoke Rule 1.7 includes conflicts in rights or obligations, as well as certain confidences shared by one spouse. Confidences that induce Rule 1.7(b) may be action-related (one party asks the attorney to take an action without the knowledge or permission of the other), prejudicial (one party indicates an intent to materially harm the interests of the other), or factual (the attorney learns a fact from one party that contradicts the other party’s expectations or understanding of the facts). Nevertheless, all of these situations will produce a problem for the counsel to estate litigation where he holds information that places him in an adversarial position with a former client.

This potential for conflict is a matter that may suggest that the attorney withdraw from representation. This is a difficult situation, considering the harm of unexpected withdrawal during an active case and the possibility of the confidence being revealed as a result. The attorney has some discretion in balancing the harm, but should not use the unilateral confidence to the detriment of the other spouse. According to RPC 1.16, withdrawal is mandatory if the lawyer’s own actions will violate a law or Rule of Professional Conduct, and permissive if the client’s actions are fraudulent. In any case, the decision to withdraw (or decline from representation) should be made early on in any estate litigation.

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