

**20th Annual Spring Symposia – ABA Section of Real Property Trust & Estate Law
A Non-Tax Cornucopia
Thursday April 30, 2009**

HOT TOPICS: RECENT CASES OF INTEREST

CONTRACTUAL WILLS: Binding agreement voids revocable trust. Husband and wife executed mutual Wills and an agreement not to change the Wills. Prior to executing the Wills, husband transferred substantial property to wife to equalize their estates. Before his death, husband engaged in day trading and incurred substantial losses. After husband's death wife transferred all of her property to a revocable trust which on her death made distributions different from those in her Will. After her death the disappointed Will beneficiaries sued and won summary judgment. The Alabama Supreme Court affirmed, holding that the agreement was valid, that the husband's losses did not cause a failure of consideration, and that the creation of the trust breached the agreement even though it did not involve a change in the Will. *Self v. Slaughter*, ---So.2d---, 2008 WL 5274663 (Ala. 2008)

ELECTIVE SHARE: Control over non-probate property devices not per se denial of elective share rights. Decedent created an inter vivos revocable trust which on his death was for the sole benefit of his daughter by a prior marriage. His widow renounced the Will and claimed her statutory one-third share of decedent's estate (Md.Code, Estates and Trusts, § 3-203). In an extensive opinion the Maryland Court of Appeals held that retention of control by the decedent was not enough to make an inter vivos transfer subject to the elective share and remanded for a determination of whether or not the transfer was intended to frustrate the spouse's marital rights. *Karsenty v. Schoukroun*, 959 A.2d 1147 (Md. 2008)

WILLS: Florida appellate court clarifies requirement that witness must sign "in the presence of" testator. Administrator filed a petition to probate a lost Will. The trial court determined that the lost Will was invalid because it had not been witnessed "in the presence of" the decedent and therefore was not executed with the formalities required under Florida law. (Florida Statutes Annotated § 732.502) Decedent brought his handwritten Will to a bank and a teller was called over to witness after the Will was signed. Administrator argued that the decedent signed his Will in physical proximity of the witness/teller, and therefore met the requirement that the witness sign his Will "in the presence of" the testator. The 5th District Court of Appeals of Florida cited the definition of "presence" for purposes of the lewd and lascivious act statute which required seeing or sensing the act taking place and reasoned that the teller's mere physical proximity to testator did not suffice. *Price v. Abate*, --- So.2d ----, 2009 WL 559908 (Fla. App. 5th Dist. 2009)

WILLS: Writing and acts on photocopy do not revoke; constructive trust possible. Unable to secure the original copy of his Will testator on advice of counsel signed before witnesses and had notarized a document stating that he revoked his Will. He also wrote "revoked" on each page of a photocopy of the signed Will. The trial and intermediate appellate courts held that the Will was not revoked and a divided New Mexico Supreme Court agreed. The New Mexico revocation statute (NMSA § 45-2-507(A)(1)) does not allow for revocation by a writing other than a Will. Revocatory acts performed on a photocopy do not revoke the Will. The court

remanded for consideration of whether the original Will was wrongly withheld from the testator. If that was the case a constructive trust can be imposed on the beneficiaries of the Will in favor of the heirs. *Gushwa v. Hunt*, 197 P.3d 1 (N.M. 2008)

TRUSTS: Pretermitted heir statute does not apply to revocable trust created as Will substitute. Oklahoma's pretermitted heir statute provides an intestate share for a child of a testator omitted from the testator's Will "unless it appears that such omission was intentional." (84 Okl.St. Ann. § 132) In *Estate of Jackson*, 194 P.3d 1269 (Okla. 2008), a case of first impression, the Oklahoma Supreme Court held that the statute does not apply to a revocable lifetime trust because, unlike the statute applicable to a surviving spouse, this statute does not limit the testator's power to dispose of his or her property.

MALPRACTICE: Legal malpractice claim that arises after death barred after probate claims period. Estate planning attorney was sued for malpractice by a beneficiary for a trust amendment he prepared for decedent. The Illinois Supreme Court ruled that the malpractice claim was barred under 735 ILCS 5/13-214.3, which provides that the statute of repose for claims against an attorney for an injury that did not occur until the death of an individual must be brought within the time in which a claim may be brought against the individual's estate, if letters of office are issued or a Will is submitted to probate. The court determined that this statute of repose applies even if the claim relates to a trust that is outside the estate of the decedent. *Wackrow v. Niemi*, 899 N.E.2d 273 (Ill. 2008)

BENEFICIARY DESIGNATIONS: Plan administrator had duty under ERISA to follow beneficiary designation, despite beneficiary waiver. Decedent was a participant in his employer's savings and investment plan (SIP). Decedent designated his wife as the beneficiary of the SIP, however, decedent subsequently divorced his wife and never changed his beneficiary designation. In the divorce decree, wife waived her right to any proceeds from any retirement, pension or similar plan. The U.S. Supreme Court, in a unanimous opinion, concluded that wife's waiver did not constitute a qualified domestic relations order (QDRO) or an assignment or alienation of decedent's SIP benefits and therefore did not invoke ERISA's antialienation provision applicable to covered pension benefits. Accordingly, the plan administrator had a duty, pursuant to ERISA's plan documents rule, to follow decedent's (outdated) beneficiary designation. *Kennedy v. Plan Adm'r for DuPont Sav. And Inv. Plan*, 129 S. Ct. 865 (2009)

-Karin Prangley. Special thanks to Professor William LaPiana who contributed significantly to these materials.