Keeping Current

Probate

Keeping Current—Probate Editor: Prof. Gerry W. Beyer, Texas Tech University School of Law, Lubbock, TX 79409, gwb@ProfessorBeyer.com. Contributors include Dave L. Cornfeld, Claire G. Hargrove, Christopher L. Harris, and Prof. William P. LaPiana.

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

CASES

ABATEMENT: Homestead property passes through residue and is not available to satisfy general gifts. The testator, a Florida domiciliary, made general bequests of cash, one of which was to a nephew, and left the residue to his half-brothers. The nephew and the half-brothers were heirs and the nephew claimed the proceeds of the sale of the homestead to satisfy his general bequest, the rest of the estate being insufficient to pay debts and expenses. In *McKean v. Warburton,* No. SC04–1243, 2005 WL 2155180 (Fla. Sept. 8, 2005), the court held that if a decedent is not survived by a spouse or minor children, the homestead passes through the residue unless there is a direction in the will to sell and add the proceeds to the general estate.

ACCRETIONS: Gift of stock includes increase in value. The testator's will devised certain farm property to three of his children, placed the residue in trust for his widow, and directed that when she died stock in a local bank that he owned "at the time of my death" be distributed to three other children and the rest of the trust property divided equally among all of his children. At the widow's death, the stock had appreciated to 80 times its original value. In *In re Nobbe,* 831 N.E.2d 835 (Ind. Ct. App. 2005), the court held that the gift to the three children was a specific bequest that carried with it all increases in the value of the stock, that equitable deviation did not apply, and that evidence supported the finding that the shares in the trust were the natural growth and accretion of the original bequest.

ADEMPTION: Sale of real property by agent adeems specific devise. In *In re Estate of Bauer,* 700 N.W.2d 572 (Neb. 2005), the court refused to extend the statutory exception to the ademption by extinction rule for sales by a conservator or guardian to a sale by an agent for an incompetent principal.

CONTRACTUAL WILLS: Mere recitation in a will of the existence of a contract does not create a contractual will. The husband's will devised real property to his wife and children if she predeceased him. The will also recited that it was executed in accordance with a contract between husband and wife. The wife survived and petitioned the court to construe the will as giving her the real property in fee simple. The court in *In re Estate of Friesenhahn,* No. 04–05–00036-CV, 2005 WL 2860022 (Tex. App. Nov. 2, 2005), held that the language of the will created a fee simple in the wife and that the absence of any language distributing the estate on the death of the second to die indicated that the will was not actually executed under a contract.

FORCED SHARE: Surviving spouse's share of wrongful death proceeds are not part of the augmented estate. During litigation with asbestos manufacturers over responsibility for his asbestosis, the decedent died. Some claims were settled before his death. After his death, a claim for wrongful death was added and then all the outstanding claims were settled. The widow asserted her elective share and the guardian ad litem for the minor children asserted that her share of the settlement was part of the augmented estate as property owned by her at the decedent's death. The court in *In re Estate of Maldonado,* 117 P.3d 720 (Alaska 2005), held that the wrongful death recovery was not owned by the widow at the decedent's death and therefore could not be part of the augmented estate, but that remand was necessary to determine how much of the settlement was attributable to the decedent's survivorship claims, which would be part of the augmented estate as property owned by the decedent.

FUNDING DELAY: A delay in funding a trust does not invalidate the

trust. The corporate owner of a life insurance policy created a trust that remained unfunded for 18 months, at which time the proper documents were executed to make the trust owner of and beneficiary of 80% of the proceeds of the policy. In *Tonkovich v. Crown Life Ins. Co.,* 165 S.W.3d 210 (Mo. Ct. App. 2005), the court affirmed the trial court's upholding of the validity of the trust. The court explained that under neither the state statute validating unfunded insurance trusts nor the common law does a delay in funding invalidate the trust.

POWER OF ATTORNEY: Bank has limited ability to refuse to honor power of attorney. A bank officer refused to honor a durable power of attorney, and the agent sued the bank. In reversing the trial court's grant of a summary judgment to the bank, the court in *Maenhoudt v. Bank,* 115 P.3d 157 (Kan. Ct. App. 2005), held that a trial was necessary to ascertain whether the bank had fulfilled its duty to compare the signature on the power of attorney with the principal's signature on file, to obtain proper identification from the agent, to determine whether the requested transaction was within the scope of authority granted by the power of attorney, and to ascertain whether the bank knew or had reason to know that the principal was the victim of fraud.

POWER OF ATTORNEY: Language in power did not create a trust. On the day he died, the decedent executed a statutory durable power of attorney, to which he added language indicating that a lawsuit he was prosecuting should continue and that any proceeds should be held in trust for his sons with his sister, who was also the named agent, as trustee. The court in *Hardy v. Robinson,* 170 S.W.3d 777 (Tex. App. 2005), held that the power of attorney was to be strictly construed, that the special instructions did not create a trust but granted power to the agent to create a trust and to pursue the lawsuit, and that the decedent did not create an oral trust or orally transfer his rights in the lawsuit to the agent.

TANGIBLE PROPERTY MEMORANDUM: Memo may direct sale of listed assets. While a resident of Florida, the testatrix made a will disposing of tangible items by reference to a separate memorandum as permitted by Florida law. She then moved to Delaware, where she executed the memorandum along with a codicil to her will. The memorandum, also permitted under Delaware law, directed the distribution of 18 items to five named persons and that the remainder of the testatrix's tangible property be sold with the proceeds being distributed to the same five persons. In litigation in Delaware, the court held that the direction of sale was permissible under the statutes of either state, it being the public policy of both to enforce a testatrix's clearly expressed intent. *In re Last Will and Testament and Trust Agreement of Moor,* 879 A.2d 648 (Del. Ch. 2005).

TRUST TERMINATION: Charitable trust cannot be terminated by agreement of the trustee and the beneficiary. The testator's will created a charitable trust to pay an annuity to her sister (who predeceased her), an annuity to a church "for as long as it shall exist," and to pay the rest of the income to an orphanage that was also the named trustee. The trustee petitioned the court to terminate the trust *ab initio,* the church having indicated its willingness to accept $10,000 as the commuted value of its interest. The court reversed the lower court's grant of the petition holding that (1) the grant of the power to the trustee to do all acts necessary for the distribution of the trust does not, in context, allow the trustee to terminate the trust, (2) the doctrine of equitable deviation does not apply because there had been no change of circumstances, and (3) the merger doctrine does not apply. *Epworth Children's Home v. Beasley,* 616 S.E.2d 710 (S.C. 2005).

UNITRUSTS: Interested trustees may make unitrust election. In accord with local law, the trustees of a marital trust for their stepmother, who were also remainder beneficiaries, elected to convert the trust into a unitrust, which had the effect of reducing annual distributions to the life beneficiary by more than 60%. The court in *In re Heller,* 800 N.Y.S.2d 207 (N.Y. App. Div. 2005), upheld the denial of summary judgment to the income beneficiary, holding that nothing in the statute or the common law prevents an interested trustee from making a unitrust election. The court, however, remanded the matter for trial on whether the statutory standards for making such an election had been met. In addition, the court held that nothing in the statute prevented the trustees from making the election retroactive.

WILL REVOCATION: Revocation of premarital will governed by statute in effect on the date of marriage, not the date of death. The testator wrote a holographic will the day before his marriage that did not provide for his future spouse. On the day of the marriage, local law provided that upon marriage, premarital wills are automatically revoked subject to exceptions not applicable in this case. Before the testator died, however, the statute was amended to provide that marriage does not automatically revoke a will. The court in *Riggins v. Floyd,* No. 2004-CA-001486-MR, 2005 WL 2173990 (Ky. Ct. App. Sept. 9, 2005), determined that the will was revoked by the statute in effect on the date of marriage and that therefore the testator died intestate.

RULES AND REGULATIONS

ANNUITY: IRS determined that the value of an annuity contract in excess of the decedent's basis is income in respect of a decedent. PLR 200537019.

CHARITABLE REMAINDER UNITRUSTS: IRS provides sample CRUT forms. Rev. Proc. 2005–52 (inter vivos CRUT for one measuring life), Rev. Proc. 2005–53 (inter vivos CRUT for a term of years), Rev. Proc. 2005–54 (inter vivos CRUT with consecutive interests for two measuring lives), Rev. Proc. 2005–55 (inter vivos CRUT with

concurrent and consecutive interests for two measuring lives), Rev. Proc. 2005–56 (testamentary CRUT for one measuring life), Rev. Proc. 2005–57 (testamentary CRUT for a term of years), Rev. Proc. 2005–58 (testamentary CRUT with consecutive interests for two measuring lives), and Rev. Proc. 2005–59 (testamentary CRUT with concurrent and consecutive interests for two measuring lives).

MARITAL DEDUCTION: IRS approves severance of marital trust followed by disclaimer of one of the severed trusts without adverse consequences for the nondisclaimed trust. PLR 200530014.

QTIP ELECTION: Election allowed for late-discovered asset. The estate discovered an additional asset after the tax return was filed. The IRS allowed the asset to be reported on a supplemental Form 706, placed in a non-GST marital trust, and elected as QTIP property as of the date of the original return. PLR 200536015.

LITERATURE

Business Trusts. Robert H. Sitkoff outlines a research agenda for the study of the modern business trust—in particular, the statutory business trust—as a form of business organization in *Trust as "Uncorporation": A Research Agenda*, 2005 U. Ill. L. Rev. 31.

Charitable Corporations. Author Robert A. Katz examines and evaluates the policy of trust law parallelism in *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 Chi.-Kent L. Rev. 689 (2005).

Charitable Trusts. Whether a charitable trust with a single trustee, or lacking separation of oversight and management, should be subject to closer scrutiny to determine whether the governing board and its members meet their fiduciary duty is the argument of Evelyn Brody in *Charity Governance: What's Trust Law Got to Do with It?*, 80 Chi.-Kent L. Rev. 641 (2005).

Connecticut and Trustee Removal. In her article, *Changing Horses: Some Thoughts About Removal of Trustees*, 18 Quinnipiac Prob. L.J. 273 (2005), Gayle B. Wilhelm examines the history of trustee removal and some of the issues arising from Connecticut's adoption of Conn. Gen. Stat. § 45a–242(a)(4).

Creditor Protection. In *Planning with Domestic Asset-Protection Trusts: Part I*, 40 Real Prop. Prob. & Tr. J. 263 (2005), Richard W. Nenno provides an extensive discussion on using irrevocable self-settled spendthrift trusts to protect property from creditors.

Duty to Inform Beneficiaries. Kevin D. Millard supplies a careful examination of *The Trustee's Duty to Inform and Report under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (2005).

Family Limited Partnerships. Helen W. Gunnarsson discusses the *Estate of Bongard v. Commissioner* case and how it sets *New Limits for Family Limited Partnerships*, 93 Ill. B.J. 385 (2005).

Health Insurance Portability and Accountability Act. Jacqueline Myles Crain explains *HIPAA—A Shield for Health Information and a Snag for Estate Planning and Corporate Documents*, 40 Real Prop. Prob. & Tr. J. 357 (2005), and includes practical suggestions for addressing HIPAA-related issues.

Illinois Spousal Disinheritance. *'Til Death Do Us Part . . . After That, My Dear, You're on Your Own: A Practitioner's Guide to Disinheriting a Spouse in Illinois*, 29 S. Ill. U. L.J. 207 (2005), by Ronald Z. Domsky provides cutting edge advice in a world where family dynamics are constantly changing.

Intestate Succession. The issue of inheritance rights for children conceived and born after the death of at least one biological parent is becoming an increasingly timely topic and the discussion is continued by Kristine Knaplund in her article, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. Kan. L. Rev. 627 (2005).

Massachusetts Elective Share. Author Todd D. Kremin criticizes the decision of the Supreme Judicial Court of Massachusetts in his note, Bongaards v. Millen: *Who Do You Trust*?, 18 Quinnipiac Prob. L.J. 290 (2005), arguing that the court failed to update antiquated and murky rules regarding the elective share and failed to give due regard, as it has in other cases, to the updated *Restatement*.

New York Legislation. Elizabeth A. Hartnett explores recent legislation in her article, *2003–2004 Survey of New York Law: Estates and Trusts*, 55 Syracuse L. Rev. 981 (2005).

Rule Against Perpetuities. The author, Joshua C. Tate, seeks to offer state legislatures full disclosure as to what the proposals of James E. Krier and the late Jesse Dukeminier really mean in *Perpetual Trusts and the Settlor's Intent*, 53 U. Kan. L. Rev. 595 (2005).

Self-Fiduciary Instruments. In *Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest*, 66 U. Pitt. L. Rev. 411 (2005), Paula A. Monopoli explores the flaws with the existing norm and suggests revisions to minimize agency costs while remaining consistent with the fiduciary character of the attorney-client relationship.

Tax Apportionment. David A. Berek provides valuable advice, especially for Illinois practitioners, regarding *Taxes, Marital QTIP Trusts, and Anti-Apportionment Clauses*, 93 Ill. B.J. 418 (2005).

Tennessee and Will Signatures. Chad Michael Ross explores a case on the cutting edge of probate law in his comment, *Probate*—Taylor v. Holt*: The Tennessee Court of Appeals Allows a Computer Generated Signature to Validate a Testamentary Will*, 35 U. Mem. L. Rev. 603 (2005).

Texas Judicial Developments. In *Wills and Trusts*, 58 SMU L. Rev. 1205 (2005), Gerry W. Beyer discusses recent cases relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters.

Utah and Asset Protection Trusts. In his note, *Offshore Asset Protection Trusts Are Making Waves in Utah*, 6 J.L. & Fam. Stud. 397 (2005), Deacon G. Haymond explores how assets in APTs enjoy protection from creditors and may exempt trust assets from the settlor's state income taxes under certain circumstances.

Washington and Lost Wills. Sarah Shirey argues against the adoption of a "two witness requirement" in her comment, *Lingering Questions Regarding the Devise of Black's Acre: How Many Witnesses Are Required to Prove the Execution of a Lost Will?*, 80 Wash. L. Rev. 757 (2005), which discusses the recent case of *In re Estate of Black.*

Will Interpretation. Kent Greenawalt's article, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 San Diego L. Rev. 533 (2005), is primarily designed to explicate particular theoretical questions about the interpretations of wills and contracts.

LEGISLATION

California updates law regarding inheritance rights of posthumously conceived children. 2005 Cal. Legis. Serv. 285.

North Carolina allows consideration of the fees paid by the estate for professional services when determining the appropriate amount of commission for the personal representative. This does not apply, however, if the decedent's will provides for the method or specific amount to compensate the personal representative. 2005 N.C. Sess. Laws 388.

North Carolina authorizes a parent to include a will provision recommending the appointment of a guardian for an unmarried child who has been adjudicated an incompetent person and to specify desired limitations on the powers to be given to the guardian. 2005 N.C. Sess. Laws 333.

North Carolina expands the authority of an agent under a medical power of attorney to control disposition of the principal's remains, including the ability to make anatomical gifts. 2005 N.C. Sess. Laws 351.

Oregon disqualifies certain parents who did not provide sufficient support for their children from inheriting from a deceased child. 2005 Or. Laws 741. ■