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# Keeping Current

## Probate

### Keeping Current—Probate Editor:

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**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

**ADEPTION: Change of broker does not adeem gift of securities in account.** The decedent's holographic will bequeathed his brokerage account to his wife making reference to the municipal bonds that were 95% of the value of the account. The decedent then changed brokers and at the time of his death, the same investments were held in the new account. The court in *In re Estate of Geary*, 275 S.W.3d 835 (Tenn. Ct. App. 2008), held that the gift was a specific bequest and that it did not adeem, the change being one of form and not substance.

**ANTI-LAPSE STATUTE: Lapsed gift distributed as if it were property of deceased legatee.** The California anti-lapse statute provides that if a covered "transferee" dies before the testator, the transferee's issue take the subject of the gift "in the manner provided in Section 240," which defines "representation" as modern per stirpes with the division into shares beginning in the eldest generation with living members. The testatrix's will left most of her estate to her father if he survived and in equal shares to her two sisters if he did not. All three named beneficiaries predeceased the testator, but three children of one sister and four children of the other survived. The trial court held that the nieces and nephews each took a one-seventh share. The court, however, in *Estate of Mooney*, 87 Cal. Rptr. 3d 115 (Ct. App. 2008), reversed, construing the statute to require that representation applies as if the deceased transferee's own property were being distributed. Thus, the children of one sister receive one-third of one-half share each and the children of the other sister, one-quarter of one-half share each.

**CONTRACTUAL WILLS: Binding agreement voids revocable trust.** A husband and his wife executed mutual wills and an agreement not to change their wills. Before executing the wills, the husband transferred substantial property to his wife to equalize their probate estates. Before his death, the husband engaged in day trading and incurred substantial losses. After the husband's death, his 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 court in *Self v. Slaughter*, No. 1061041, 2008 WL 5274663 (Ala. Dec. 19, 2008), 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.

**EXPECTANCY TO BE BENEFICIARY: Expectancy to be beneficiary of a living testator may be assigned.** The testator's child and her siblings signed an agreement relating to the testator's care, agreeing that the child would buy the testator's home, that the testator would be placed under conservatorship, and that any conservatorship funds remaining at the testator's death would belong to the child. After the testator's death, her will was admitted to probate and the remaining funds distributed under the will in equal shares to the testator's children. The child's suit against her siblings was dismissed by the trial court. Both the immediate appellate court and the state's supreme court, however, held that a prospective beneficiary may assign an expectancy under a will and that the child must have the opportunity to prove the existence of consideration, lack of fraud, and that the agreement embodied the parties' intent. The child would also have a cause of action based on promissory estoppel. *Rector v. Tatham*, 196 P.3d 364 (Kan. 2008).

**FORCED SHARE: Control over non-probate property devices not a per se**

**denial of elective share rights.** The decedent had created a funded inter vivos revocable trust that 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 under Maryland's forced share statute. In *Karsenty v. Schoukroun*, 959 A.2d 1147 (Md. 2008), the court 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.

**HOMESTEAD: A home held in trust qualifies for homestead protection, but the express language of the testatrix's will made it subject to creditors.** The testatrix transferred her home and the adjacent vacant lot to a trust of which she was the sole beneficiary for life. On her death, the properties were to be distributed to her estate and her will devised the home to her daughter and the vacant lot to her son. The will also stated that all claims, charges, allowances, and costs of administration were to be paid equally out of the two gifts to her children. The residuary estate was insufficient to pay all of the claims on the testatrix's estate and her daughter claimed that the home was exempt as homestead property. In *Cutler v. Cutler*, 994 So. 2d 341 (Fla. Dist. Ct. App. 2008), the court held that the home did not lose its status as a homestead because of the transfer to the trust but that the language of the will made the home subject to the testatrix's debts.

**OUT-OF-WEDLOCK CHILDREN: Gift to "lawful" descendants excludes nonmarital children.** In a case of first impression in Washington, the court in the case of *In re Estate of Wright*, 196 P.3d 1075 (Wash. Ct. App. 2008), held that the use of the word "lawful" to modify the term "descendants" limits those who can take to persons born during a valid marriage. The court also held that enforcing the testator's exclusion of nonmarital children is not a violation of the Equal Protection Clause of the Fourteenth Amendment.

**PRETERMITTED CHILDREN: Pre-terminated heir statute does not apply to revocable lifetime trust.** In *Kidwell v. Rhew*, 268 S.W.3d 309 (Ark. 2007), the court held that the Arkansas pre-terminated heir statute does not apply to a revocable lifetime trust, expressly rejecting *Restatement (Second) of Property: Donative Transfers* § 34.2, which states that a pre-terminated heir statute should apply to a will substitute.

**REVOCATION OF WILL: Writing "revoked" on photocopy of will deemed insufficient to revoke the will.** Unable to secure the original copy of his will, the 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 court in *Gushwa v. Hunt*, 197 P.3d 1 (N.M. 2008), held that the will was not revoked. The New Mexico revocation statute 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 were the case, the court may impose a constructive trust on the beneficiaries of the will in favor of the heirs.

**VALUATION FOR ESTATE TAX: Code § 7520 tables deemed to reflect market value of lottery annuities.** In *Negron v. United States*, 553 F.3d 1013 (6th Cir. 2009), the Sixth Circuit held that the Internal Revenue Code's annuity tables properly value lottery annuities for estate tax purposes.

#### RULINGS AND REGULATIONS

**CHARITABLE DEDUCTION: A gift to a trust registered as a charity in a foreign country deemed deductible for gift tax purposes.** PLR 200901023.

**CHARITABLE REMAINDER TRUST: A reformation of a CRT to correct a scrivener's error deemed not to be self-dealing.** PLR 200850046.

**DISCLAIMER: Qualified disclaimer by beneficiaries of IRA caused proceeds to be payable to the decedent's estate.** The will was then reformed by the court to provide for benefits to charity to be paid from the IRA. The IRS decided that there would be no income in respect of a decedent to the estate. PLR 200850004.

**SPLIT-DOLLAR INSURANCE: Split-dollar agreement between two irrevocable trusts with respect to insurance on the settlor's life will not be a gift for gift tax purposes and will not result in inclusion in the settlor's estate.** PLR 200851013.

#### LITERATURE

**Beneficiary Complaints.** The premise set forth by Robert Whitman in *Dealing Fairly with Estate and Trust Beneficiary Complaints*, 22 Quinnipiac Prob. L.J. 46 (2008), is that it is in the interests of all parties to an estate or trust administration that complaints by beneficiaries have a fair hearing.

**Benefit-the-Beneficiaries Rule.** Jeffrey A. Cooper explores the evolution of the benefit-the-beneficiaries rule and concludes that however well-intentioned, the rule simply cannot achieve its desired effects in his article, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. Rev. 1165 (2008).

**California—Transfer on Death Deeds.** In his comment, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & Estates Attorneys Heading for the Hills*, 49 Santa Clara L. Rev. 285 (2009), David Major analyzes the debate between the proponents and opponents of the TOD deed legislation proposed in the California Legislature. He then argues for adoption and subsequent measures to ensure that this estate planning mechanism is used safely and effectively by prospective transferors.

**Corpse Disputes.** In *Individualized Justice in Disputes over Dead Bodies*, 61

Vand. L. Rev. 1351 (2008), Frances H. Foster argues that courts ruling on inheritance issues model their analysis on the way courts have determined the disposition of a decedent's remains, using an equitable, individualized scheme to recognize the particular decedent's intent and actual relationships with his or her survivors.

**Digital Wills.** In *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. Mich. J.L. Reform 105 (2008), Joseph Karl Grant advocates that other states follow Nevada's lead by adopting digital will legislation and embracing electronic technology.

**FDIC Coverage.** In *Estate Planning for FDIC Coverage*, 96 Ill. B.J. 590 (2008), Katarinna McBride explains how new FDIC rules provide more protection, at least until January 1, 2010, for revocable trusts.

**Illinois—Estate Tax.** In *How to Use Gifts to Reduce Illinois Estate Taxes*, 96 Ill. B.J. 580 (2008), Robert J. Kolasa "explores how estate planners can use gifts to help clients reduce Illinois estate taxes."

**Intestate Succession and Caregivers.** In *Caregiving and the Case for Testamentary Freedom*, 42 UC Davis L. Rev. 129 (2008), Joshua C. Tate provides an in-depth analysis and suggests possible improvements to the current regime, including how courts and legislatures might reform contract law to treat caregivers more fairly when the care recipient dies intestate.

**Louisiana—Devolution.** Matthew Berger and Jill M. Berger propose that Louisiana courts should analyze alienation of property subject to a *fidei commissum de residuo* under the existing statutory scheme or by enacting default provisions based on the likely intent of the average testator in *Property and Estate Devolution Utilizing Fidei Commissum de Residuo: Finding Residual*, 54 Loy. L. Rev. 129 (2008).

**Mistake Avoidance.** Gerry W. Beyer

discusses estate planners' potential liability for malpractice, the common nontax-related mistakes attorneys may make while preparing estate plans, and the risky, but commonly seen, practice of preparing estate plans for both spouses in his article, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, 1 Est. Plan. & Comm. Prop. L.J. 61 (2008).

**Probate Exception.** In her comment, *Marshall v. Marshall: The Past, Present, and Future of the Probate Exception to Federal Jurisdiction*, 59 Ala. L. Rev. 1643 (2008), Allison Elvert Graves addresses the problems the lower courts had in applying the probate exception, the Supreme Court's attempt to clarify the *Markham* rule in *Marshall*, and the effect the *Marshall* rule will have on the future of the probate exception.

**Retirement Benefits in Community Property States.** An analysis of the eight community property jurisdictions is provided by Alvin J. Golden in *Selected Problems in Planning with Retirement Benefits: Community Property Issues and Creditor's Rights*, 1 Est. Plan. & Comm. Prop. L.J. 169 (2008).

**Same-Sex Marriages.** In *The "Socially Endorsed, Legally Framed, Normative Template": What Has In re Marriage Cases Really Done for Same-Sex Marriage?*, 1 Est. Plan. & Comm. Prop. L.J. 203 (2008), Meghan McCalla contends that (1) the benefits of marriage are indispensable; (2) while domestic partnerships advance the rights of same-sex couples, they are inadequate compared to the rights attendant to the marriage bond; and (3) the full recognition that same-sex relationships deserve will not come until same-sex marriages are treated equally to opposite-sex marriages.

**Terminally Ill Clients.** The purpose of Georgia Akers's article, *On Death and Dying: Counseling the Terminally Ill Client and the Loved Ones Left Behind*, 1 Est. Plan. & Comm. Prop. L.J. 1 (2008), is to better prepare attorneys to counsel terminally ill clients and their families.

**Texas—Attorney Liability.** In *Project Runaway—One Day You're In as the Attorney and the Next Day You're Out!*, 1 Est. Plan. & Comm. Prop. L.J. 111 (2008), Sharon B. Gardner traces the history of attorney liability in Texas as it relates to probate and trust lawyers, suggests ways to reduce potential liability, and discusses the viability of using arbitration agreements in fee arrangements.

**Texas—Trustee's Duty to Disclose.** Frank T. Messina analyzes the evolution and current status of a Texas trustee's duty to disclose in *To Affirmatively Disclose or to Passively Disclose, That Is the Texas Trustee's Question: What Duty of Disclosure Does a Texas Trustee Owe to a Beneficiary?*, 1 Est. Plan. & Comm. Prop. L.J. 237 (2008).

**Undue Influence.** In *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 Duke J. Comp. & Int'l L. 41 (2008), Ronald J. Scalise Jr. explores the history of undue influence, examines the concept in American law, and compares it to French and German law by providing comparative insights and lessons.

**Virginia—Update.** J. Rodney Johnson reports on Virginia's recent legislative and judicial developments in *Wills, Trusts, and Estates*, 43 U. Rich. L. Rev. 435 (2008).

## LEGISLATION

**Michigan authorizes the adoption of deceased individuals under specified circumstances.** 2008 Mich. Legis. Serv. 31.

**Ohio adopts Revised Uniform Anatomical Gift Act.** 2008 Ohio Laws File 164. ■

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