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TRUSTS AND ESTATES UPDATE

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Future Issues: Posthumous DNA Test Results, Same-Sex Marriages

With the opening of the year 2005, we are greeted by decisions and issues that portend changes in the law relevant to trusts and estates practice. With opinions addressed to such topics as DNA testing, privity and same-sex marriages, the year 2005 promises to be an eye-opener.

Posthumous DNA Test Results

Over the past several years, this column has addressed the issue of DNA testing and, more particularly, the bill now pending in the New York State Legislature to amend the provisions of the Estates Powers and Trust Law (EPTL) §4-1.2(a)(2)(D) to authorize use of posthumously obtained DNA test results to establish paternity. The need for such an amendment is evident scientifically, as well as legally, as reflected by opinions which have considered posthumous DNA evidence in finding paternity, albeit pursuant to the provisions of EPTL §4-1.2 (a)(2)(C). See e.g. *Matter of Bonnano*, 192 Misc2d 86; *In re Estate of Santos*, The New York Law Journal, July 28, 2003, p. 22.

Most recently, in *In re Estate of Kenneth V.*, NYLJ, Jan. 24, 2005, p. 22, Surrogate Alfred J. Weiner followed suit, perhaps moving us one step closer to favorable legislative action. Pending before the court in that case was an unopposed application by petitioner for an order declaring him to be the son and sole heir of the decedent.

The proof at the hearing revealed that the mother of the petitioner and the decedent had a three-year relationship at the conclusion of which she discovered she was pregnant. Thereafter, she gave birth to the petitioner, although she had, by then, married another man. The decedent acknowledged that he was the father of the petitioner to the petitioner's mother, to his mother and to his brother.

After the decedent's death, the funeral home was requested to and did provide a lock of the decedent's hair to a lab for DNA testing. However, the sample did not contain the requisite hair follicles and therefore nuclear DNA testing was unavailable. As a consequence, the petitioner submitted the decedent's toothbrush for DNA nuclear and mitochondrial testing, together with the decedent's cut hair sample. The test results established that the DNA from the toothbrush had a 99.79 percent probability of being from the biological father of the petitioner.

The court said that a nonmarital child will be held the child of his father where paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own. Given the fact that the decedent had acknowledged the petitioner to be his son, the question became whether clear and convincing evidence of paternity existed. Based upon the DNA test results, the court concluded that the standard had been met. Significantly, the court recognized that posthumously obtained DNA test results have been accepted as clear and convincing evidence of paternity pursuant to the provisions of EPTL §4-1.2(a)(2)(C). Moreover, the court noted that mitochondrial DNA analysis has been found reliable by the scientific community and has been accepted as evidence.

Accordingly, the court held that the petitioner had established himself to be the son and sole heir of the decedent, and granted the petitioner's application in its entirety.

Generally, in the absence of a written contract, an attorney-client relationship will not exist and privity will not lie for purposes of suit against counsel for breach of contract or negligence, or by counsel for legal fees. Two recent opinions addressed to the attorney-client relationship have taken a broadened view of this issue, providing the groundwork for similar approaches in the trusts and estates context. See, e.g., *Matter of Pascale*, 168 Misc2d 891 (1996).

In *Gottlieb, Rackman & Reisman v. Marusya Inc.*, NYLJ, Jan. 10, 2005, p. 18 (Civ. Ct., N.Y.Cty.) (Engoran, J.), plaintiff, law firm, sought fees for work performed on behalf of the defendants. Defendants maintained that the plaintiff was not entitled to payment of its fees, and moved to dismiss the action on the grounds that counsel did not inform them of the Rules of the Chief

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Administrator allowing for the arbitration of fees for work commenced on or after Jan. 1, 2002. The plaintiff maintained that because it was retained prior to the effective date of the rule, no such notification was required.

The record revealed that subsequent to meeting the defendants, the plaintiff opened a file and sent defendants a retainer letter, which was received in mid-December 2001. Although defendants stated that they signed the retainer agreement and retainer check upon receipt, and planned on forwarding the documents to counsel before the holidays, in fact, they did not reach counsel's office until after the New Year. Based upon the foregoing, defendants argued that plaintiff's representation did not commence until after Jan. 1, 2002. The court disagreed.

The court said that there was no rule, either in statute or case law, that established when an attorney's representation of a client begins. Indeed, although most courts have relied upon the existence of a contract between the parties, the court found that such formality is not essential to the formation of an attorney-client relationship, and that the words and conduct of the parties are equally as relevant to such a determination.

Within this context, the court concluded that plaintiff's representation of the defendants began in December 2001. Although defendants had not sent their retainer letter and check to to plaintiff until after the first of the year, the court found that the Rules of the Chief Administrator required a written retainer or letter of engagement within a reasonable time after commencing representation of a client. Moreover, the court held that it is not essential to the attorney-client relationship that the client be billed or that a fee arrangement be made, especially where, as in the case before it, the plaintiff sent a retainer agreement and fee request to the defendants, and the defendants indicated a willingness to engage counsel by executing the agreement and check.

Accordingly, the court determined that plaintiff was under no obligation to adhere to the notification Rules of the Chief Administrator pertaining to arbitration and denied the defendants' motion to dismiss the action.

In a similar vein, the court, in *National Arts Club v. Kaye Scholer LLP,* NYLJ, Jan. 18, 2005, p. 18 (Sup. Ct., N.Y. Cty.) (Heitler, J.), the court denied defendant/law firm's motion to dismiss a complaint against it for, inter alia, breach of fiduciary duty and breach of contract, finding that the plaintiff had standing to bring suit for breach of fiduciary duty, based upon an attorney-client relationship with the firm, despite the fact that he had not signed a retainer agreement.

In reaching this result, the court considered the words and conduct of the parties, as alleged in the complaint, which revealed that plaintiff contacted the firm on behalf of the other plaintiffs for the purpose of discussing the firm's representation of plaintiffs in contemplated litigation, that plaintiff had communicated with a partner in the firm regarding the merits of the potential litigation, that he had engaged in frequent verbal and written communications with the firm, and that he guaranteed the payment of the firm's fees on behalf of the other plaintiffs. Based upon these allegations, the court concluded that the formation of an attorney-client relationship between plaintiff and the law firm could be implied.

Despite arguments by the law firm to the contrary, the court held that the facts in *Conti v. Polizzotto,* 243 AD2d 672 (2d Dept. 1997), wherein the court dismissed a breach of fiduciary action where plaintiffs alleged little more than that they arranged and paid for the drafting of a will for their aunt, were distinguishable, in view of the numerous allegations as to plaintiff's direct involvement and active participation in discussions with the firm and the course of litigation which was being pursued by the firm on plaintiffs' behalf.

Nevertheless, the court found that plaintiff did not have standing to bring a claim for breach of the retainer agreement, inasmuch as he had not signed the agreement and there was no basis in the record for concluding that he was a third-party beneficiary of its terms.

Same-Sex Marriage

• ***Constitutional Right to Marry Upheld for Same-Sex Couples.*** The issue of same-sex marriage came to the fore on Feb. 4, 2005, when the New York Supreme Court (Ling-Cohan, J.), granted plaintiffs' motion for summary judgment in *Hernandez v. Robles,* NYLJ, Feb. 7, 2005, p.18, declaring that the exclusion of same-sex couples from civil marriage violates the New York State Constitution.

The legal implications of same-sex marriages have been extensively examined by a special committee of the New York State Bar Association appointed to study issues affecting same-sex couples. The Report of the Special Committee was issued in October 2004, and addressed, inter alia, aspects of same-sex marriages relative to trusts and estates. Subsequent thereto, and upon examination of the report issued by the special committee, the trusts and estates law section of the Bar Association issued its own report of the issue.

Based upon the foregoing reports and the opinion in *Hernandez,* recognition of same-sex marriages in New York would afford same-sex couples with benefits not previously available to them insofar as estate-related matters are concerned. These benefits would include the right to an elective share, the right to serve as administrator of a deceased partner's estate, a more preferential status in serving as a surrogate decision-maker, standing to commence a wrongful death action and the right to exempt property. Recognition of same-sex marriages should also accord greater rights to the surviving children of same-sex couples.

The issue of same-sex marriages will soon be addressed by the New York State Court of Appeals and, perhaps, the New York State Legislature. The end-result remains to be seen.