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TRUSTS AND ESTATES UPDATE

Expert Analysis

Legislation Signed and Vetoed And Court Opinions Calling for Change

The 2009-2010 legislative sessions were instrumental in addressing a multitude of issues affecting the practice of trusts and estates. This month's article will examine legislation passed and vetoed by the Governor. In addition, it will discuss two recent decisions calling for legislative change in the areas of spousal rights and SCPA Article 17-A guardianships.

By **Ilene Sherwyn Cooper**

Signed Into Law

Simultaneous Death. On July 11, 2009, the Governor signed into law legislation amending EPTL §2-1.6 in relation to the disposition of property when persons die simultaneously. (2009 N.Y. Laws ch. 92 §1) The bill repeals the prior provisions of the law relating to simultaneous death, and replaces them with a new section which provides that unless it is established by clear and convincing evidence that an individual survived the decedent by 120 hours, then such individual shall be treated as having predeceased the decedent. With certain exceptions, if it appears that persons died simultaneously, then the property of such person is disposed of as if such persons had survived.

As written, the statute shall not apply if (1) the governing instrument contains language dealing explicitly with simultaneous death in a common disaster ad that language is operable under the facts of the case; (2) the governing instrument expressly indicates that an individual is not required to survive an event by any specified period or expressly requires the individual to survive the event for a specified period; (3) the imposition of the 120-hour requirement for survival would cause a nonvested property interest or a power of appointment to be invalid; (4) the application of the 120 hour survival period to multiple governing instruments would cause an unintended failure or duplication of a disposition; (5) application of the statute would result in a taking of the intestate share by the state; and (6) the surviving spouse exercised the right of election, but died less than 120 hours after the death of the decedent.

Subject to certain limitations, the law took effect on July 21, 2009.

Two recent decisions call for legislative change in the areas of spousal rights and SCPA Article 17-A guardianships.

Renunciation of Property Interests. On March 30, 2010, legislation was signed into law amending certain provisions of EPTL 2-1.11 in order to provide that certain renunciations shall not necessarily constitute a qualified disclaimer for purposes of estate and gift tax. (S.B. 3528-A). Parties seeking to renounce under New York law are clearly warned that compliance with the provisions of the New York renunciation statute will not be sufficient under all circumstances to qualify as a disclaimer for federal tax purposes. In addition, the law allows a beneficiary of a disposition to renounce certain portions of his or her interest in joint property or a tenancy by the entirety.

The law takes effect on Jan. 1, 2011.

Establishing Paternity. On April 28, 2010, the Governor approved legislation relating to the inheritance rights of non-marital children and proof of paternity through the use of genetic testing (NY A.B. 7899).

The legislation repeals the provisions of EPTL 4-1.2 (a)(2)(D), and amends the provisions of EPTL 4-1.2(a)(2)(C) in order to add that proof of paternity by clear and convincing evidence may include evidence derived from a genetic marker test, or evidence that the father openly and notoriously acknowledged the child as his own.

The measure was introduced at the request of the Chief Administrative Judge, upon the recommendation of the Surrogate's Court Advisory Committee, and resolves a split in the appellate courts evidenced by the decisions in *Matter of Poldrugovaz*, 50 A.D.3d 117 (2d Dept. 2008) and *Matter of Morningstar*, 17 A.D.3d 1060 (4th Dept. 2005). To this extent, the legislation establishes two different methods of proving paternity utilizing the clear and convincing standard of proof; i.e., through the use of a genetic marker test administered at any time, or through evidence that the father openly and notoriously acknowledged the child as his own.

The law reflects recognition of the scientific accuracy of DNA testing in proving paternity, and significantly advances the rights of non-marital children.

Vetoed Legislation

Disclosure under the Elective Share Statute. On March 30, 2010, the Governor vetoed proposed legislation (A 2873/S2971) that would have required that a spouse be given "full and reasonable disclosure of the income, assets and financial obligations" of the decedent in order for a waiver of the right of election by such spouse to be effective. This requirement would not apply if the surviving spouse had specifically waived such disclosure or had independent knowledge of the decedent's financial situation. In order to make this assessment, the legislation provided that the limitations of the dead man's statute would not apply.

The legislation was opposed by the New York State Bar Association and the New York City Bar, and was ultimately vetoed by the Governor who

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stated, inter alia, that the measure would "replace well-established common law standards" with subjective statutory language that could provoke unnecessary litigation.

Court Decisions

In addition to the foregoing developments, recent opinions have sought legislative change. Consider the following:

In *Campbell v. Thomas*, the Appellate Division rendered a decision of first impression when it denied the right of election asserted by the decedent's surviving spouse based on the equitable principle that a party may not profit from his or her own wrongdoing.

In pertinent part, the record revealed that the decedent was diagnosed with terminal prostate cancer and severe dementia, which was apparently attributable to Alzheimer's disease. Shortly thereafter, the decedent's daughter and primary caretaker went away for a one-week vacation, and left the decedent in the care of the defendant, who was then 18 years his junior. The decedent's daughter and other children later learned that during this time period the defendant married the decedent and subsequently transferred his assets into her name.

Six months later, the decedent died, and his children commenced an action in the Supreme Court requesting, in part, that the marriage between their father and the defendant be declared null and void. Judgment in the plaintiffs' favor was ultimately awarded by order of the Appellate Division, which determined that the decedent lacked the mental capacity to consent to the marriage, and the matter was remitted to the Supreme Court for the entry of a judgment accordingly. The Supreme Court followed suit by, inter alia, declaring that the defendant had no legal rights in the decedent's estate, and the defendant appealed.

In finding for the plaintiffs on this issue, the court recognized that the existing statutes, most particularly, the provisions of EPTL §5-1.1-A, require that a party be treated as a surviving spouse and afforded a right of election against a decedent's estate, without regard to whether the marital relationship itself came about through an exercise of overreaching or undue influence by the surviving party. Indeed, the court noted that when there has been no pre-death annulment, the provisions of EPTL §5-1.2 do not, by their terms, disqualify the surviving spouse from asserting a right of election when the deceased spouse's consent was lacking due to fraud or want of understanding.

Nevertheless, under the circumstances of the case, the Court opined that the defendant should not be permitted to benefit from her undue influence and overreaching, and that as such, equity required that she be deemed to have forfeited any rights that would flow from the marital relationship, including the statutory right she would otherwise have to an elective share of the decedent's estate. In reaching this result, the court called upon the Legislature to re-examine the relevant statutes in the EPTL and Domestic Relations Law and to "consider whether it might be appropriate to make revisions" that would accommodate for and prevent the financial exploitation of the infirm and elderly and unjust enrichment at the expense of their rightful heirs.

Campbell v. Thomas, __N.Y.S.2d__, 2010 NY Slip Op 02082 (2d Dept. 2010).

Modernization of SCPA Article 17-A Sought. Before the court in *Matter of John J.H.* was an application by the petitioners for their appointment as guardians of their 22-year-old son. Incident to the relief requested, the petitioners sought the power to sell their son's artwork and make charitable contributions with the proceeds on their son's behalf.

Legislation amends the provisions of EPTL 4-1.2(a)(2)(C) in order to add that proof of paternity by clear and convincing evidence may include evidence derived from a genetic marker test, or evidence that the father openly and notoriously acknowledged the child as his own.

Although the court praised the petitioners for their altruism, it felt constrained by the confines of the provisions of Article 17-A to deny the additional relief sought. The court noted that it lacked the power to grant anything other than a plenary property guardianship to the petitioners, which did not include blanket gift-giving authority. While the court acknowledged that two prior judges of the court assumed that Article 17-A guardians had the power to make gifts, it found these decisions distinguishable and questioned the authority upon which they were based.

As such, the court expressed frustration and dissatisfaction with the restrictive provisions of SCPA Article 17-A, most certainly as compared to the provisions of Article 81 of the Mental Hygiene Law, finding it particularly pertinent that Article 81 specifically authorizes the court to allow the guardian of the property to make gifts from the funds of the incapacitated person (IP). Toward this end, the court commended the efforts of various stakeholders, including public interest groups, bar associations, advocates for persons with disabilities, civil liberties organizations, and relevant governmental authorities, as well as the SCPA Legislative Advisory Committee, for their work on a proposal to modernize SCPA Article 17-A in order to effectuate a more progressive and protective system of guardianship.

Nevertheless, as a result of the limitations of the statute, the petitioners withdrew their petition in favor of commencing a proceeding under Article 81, where a more tailored guardianship suitable to their son's needs could be obtained.

In re John J.H., NYLJ, March 15, 2010, at 19 (Sur. Ct. New York County) (Glen, S.)

Note: To be compared with the foregoing decision is the opinion rendered in *Matter of Yvette A.*, NYLJ, April 2, 2010, at 26 (Sur. Ct. New York County) (Webber, S.). Yvette A. was a contested guardianship proceeding, in which the petitioner sought his appointment as guardian for his daughter pursuant to Article 17-A of the SCPA. The application was opposed by all parties, including the guardian ad litem, who recommended that the matter be referred to the Supreme Court for commencement of an Article 81 guardianship proceeding in order for the special needs of the alleged incapacitated person (AIP) to be accommodated. Despite the opposition, the court granted the petition and appointed the petitioner Article 17-A guardian of the person and property of his daughter, subject to certain restrictions.

In reaching this result, the court noted that although Article 17-A does not specifically provide for the tailoring of the guardian's powers or for reporting requirements similar to Article 81, the statute implicitly authorizes the court to impose such terms and restrictions on a guardianship in order to best satisfy the interests of the IP. Further, the court noted that the provisions of Article 17-A empower the court to modify an existing order appointing a guardian in order to adapt it to new circumstances regarding the IP. In view thereof, the court concluded that it had the power to tailor an order of guardianship at the outset to suit the needs of the IP.