

BOOK REVIEW

Commercial Litigators Valuable New Resource

By Scott M. Karson

Commercial litigators in New York have a valuable new resource to add to their arsenals: the Third Edition of *Commercial Litigation in New York State Courts*, edited by the well-known and highly-respected litigator Robert L. Haig of Kelley Drye & Warren in New York City.

Readers who are familiar with the Second Edition should know that the new Third Edition, a six volume treatise pub-

Commercial Litigation in New York State Courts, 3rd Edition

Edited by Robert L. Haig, Esq.
(West & New York County Lawyers Association, 2010)
6 Volumes

lished by West in 2010, has been improved in several significant respects: the 88 chapters carried over from the Second Edition have been substantially expanded, and 19 new chapters have been added. The first five volumes of the Third Edition contain more than 100 chapters covering virtually all aspects of commercial litigation practice. The sixth volume contains a table of laws and rules, a table of cases and a comprehensive index. Taken as a whole, the Third Edition is a much-needed response to the rapidly-evolving and expanding field of commercial litigation in this state.

The work begins with a fascinating and instructive discussion of the history of commercial litigation in New York written by Chief Judge Jonathan Lippman. Drawing upon the introductory chapter written for the Second Edition by his predecessor, former Chief Judge Judith S. Kaye, Chief Judge Lippman traces the evolution of commercial litigation from the 18th Century, when Alexander Hamilton was New York's preeminent commercial litigator, through the establishment of the Commercial Division of the New York Supreme Court in 1995, through the present. Chief Judge Lippman points with obvious pride to the fact that New York's Commercial Division has provided the business community with a viable alternative to the federal courts, courts of other states and alternative dispute resolution, and now serves as a model for the creation of business courts in many other jurisdictions.

The treatise continues by following the progress of a case, beginning with a series of chapters addressing the procedural aspects of handling a commercial matter in general. There are chapters covering such threshold subjects as case investigation and evaluation, determining jurisdiction and venue, identifying claims and parties and preparation of pleadings.

Continuing chronologically along the procedural continuum, the treatise includes chapters on pre-trial procedure. There are separate chapters covering the major disclosure devices including bills of particulars, document discovery, interrogatories, requests for admissions, depositions and expert witness disclosure. The chapter on document discovery is particularly useful because it contains an insightful and valuable discussion of the developing law



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of New York governing electronic discovery. There are also chapters on pre-trial motion practice and calendar practice.

With respect to trials, there are chapters devoted to topics including jury selection, opening statements, direct and cross examination, treatment of expert witnesses, admissibility of evidence, use of demonstrative evidence,

closing arguments, damages, judgments, effect of bankruptcy on pending litigation, attorney's fees, costs and disbursements, sanctions, enforcement of judgments and appeals.

In addition, there are chapters covering many substantive areas of law which commonly spawn commercial litigation, including contracts, insurance, bank litigation, letters of credit, collections, employment and restrictive covenants, sale of goods, warranties, bills and notes, secured transactions, agency, partnerships, products liability, mergers and acquisitions, securities litigation, shareholder derivative actions, director and officer liability, not-for-profit institution litigation, health care institution litigation, broker-dealer litigation and arbitration, professional liability litigation, franchising, antitrust litigation white collar crimes, the interplay between commercial and criminal actions, misappropriation of trade secrets, intellectual property, right of publicity claims, privacy and security, commercial defamation, consumer protection, e-commerce, information technology litigation, governmental entity litigation, CPLR article 78 challenges to administrative determinations, commercial real estate litigation, construction litigation and environmental and toxic tort litigation.

In addition to Mr. Haig's role as Editor-in-Chief, the Third Edition of *Commercial Litigation in New York State Courts* features contributions from 144 authors. Among them are 20 distinguished judges and justices, including five current or former members of the New York Court of Appeals, and many well-known and respected members of New York's commercial litigation bar.

Practitioners in Suffolk County will be interested in knowing that Justice Elizabeth Hazlitt Emerson of the Supreme Court, Suffolk County, who was instrumental in the creation of Suffolk County's Commercial Division and now sits as one of our county's two Commercial Division justices, authored the chapter on secured transactions. As is the case with each of the chapters in the set, Justice Emerson lays out the topic of secured transactions in a way that is logical and particularly useful to the practitioner. She begins by giving an overview of secured transactions, followed by a section on litigation strategy in secured transaction cases, a section on selected discovery and evidentiary issues, a section on security interests pursuant to the Uniform Commercial Code, a section on default and enforcement of security interests, a section on challenges to security interests, a section on damages and, finally, practice aids including a checklist of essential allegations and potential sources of proof and proposed jury instructions.

Our county's other Commercial Division justice, the Hon. Emily Pines,
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Support One of Our Own Serving in Afghanistan

Please show your support for SCBA member Assistant District Attorney Bethany Green who is serving in Afghanistan, by dropping her a line or two. Being away from family and friends is particularly difficult during the holiday season. It would be great if SCBA members took a few moments to thank Bethany for her service and wished her well.

Please send your cards and letters to Bethany at:

US Mail
Bethany Green
HHC82nd CAB, Task Force Poseidon
Bagram Airfield
APO, AE 09354

Bethany Green worked in the domestic violence bureau.



TRUSTS AND ESTATES

Tales from the Crypt – Disposing of Human Remains

By Robert M. Harper



Robert M. Harper

Trusts and estates litigators often see families at their very worst, fighting over everything from money to decision-making authority, and virtually anything else imaginable. As such, it should come as no surprise that there have been disputes over the disposition of human remains, which necessitated legislative action and judicial intervention to resolve the conflicts. Recently, in *Matter of Grace D.*, Nassau County Supreme Court Justice Joel K. Asarch addressed the extent to which a decedent's intent governs the disposition of his or her remains in an intra-family dispute concerning the decedent's final resting place. This article discusses that issue.

Although "the common-law right of sepulcher gives [a decedent's] next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial,"¹ Public Health Law section 4201 "sets forth a prioritized list of [individuals] who shall presumptively have the right to direct the disposition of a decedent's remains."² At the top of the list is an agent appointed in a written instrument that is duly executed in accordance with section 4201.³ Absent such an instrument, a decedent's surviving spouse, surviving domestic partner, surviving children who are 18 years of age or older, and surviving siblings who are 18 years of age or older, among others, in descending order, shall have priority. No matter who ultimately has priority, however, the individual charged with making a decision concerning the decedent's final resting place must do so in a manner that is consistent with "the moral and individual beliefs and wishes of the decedent." Otherwise, the survivor who has priority may be confronted with litigation in the Supreme Court.

Matter of Grace D. is illustrative.⁴ There, the decedent's surviving sister and niece were at odds as to how to dispose of the decedent's remains. On the one hand, the decedent's sister sought to have the remains cremated and transported to her home in Vermont, where the decedent experienced artistic and musical inspiration during his life. Although she acknowledged that the decedent never expressed any intention to be cremated, the sister explained that, upon her death, she wished to be cremated and to have the decedent's ashes combined with her cremains.

On the other hand, the decedent's niece

expressed her desire that the decedent be buried, as he intended, in the Catholic cemetery burial plot that he had purchased for himself 35 years before meeting his maker. The niece testified that the decedent "was a religious man, who served as the Choir Director at a local church for several decades, and expected that he would be buried in the customary garb of a Knight of the Order of the Holy Sepulcher of which he was a member."

Noting that the decedent's Last Will and Testament did not indicate his desire for the disposition of his remains, that there was no duly appointed agent to decide that issue, and that the decedent was survived by two sisters, including the one who sought to have his remains cremated, Justice Asarch found that the sisters would have statutory priority over all other surviving heirs to determine how to dispose of the decedent's remains. However, Justice Asarch also explained that since the decedent left a clear indication as to his wishes by purchasing a burial plot and paying for its permanent care, the court was bound to respect the decedent's intentions. Justice Asarch, therefore, ordered that the decedent's remains be buried in his cemetery plot, not cremated, as his sister, but not the decedent, wished.

In sum, in disputes concerning the disposition of a decedent's remains, the decedent's intent is a paramount concern. To the extent that the decedent's wishes can be ascertained, they must be honored by the decedent's surviving relatives, most especially those who have priority to decide where the decedent's final resting place will be.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of trusts and estates litigation. Mr. Harper serves as co-chair of the Bar Association's Membership Services and Activities Committee and a vice-chair of the New York State Bar Association's Trusts and Estates Law Section's Governmental Relations and Legislation Committee. He can be reached at rharper@farrellfritz.com.

1. *Melfi v. Mt. Sinai Hosp.*, 64 A.D.3d 26, 31 (1st Dep't 2009).
2. *Maurer v. Thibeault*, 20 Misc.3d 631, 632 (Sup. Ct., Cortland County 2008).
3. Public Health Law § 4201.
4. *Matter of Grace D.*, 922 N.Y.S.2d 914 (Sup. Ct., Nassau County 2011).