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Midsummer's Madness

Unsigned Wills, DOMA Uncertainties, Portability Regulations, and Florida's New Statute for Former Spouses

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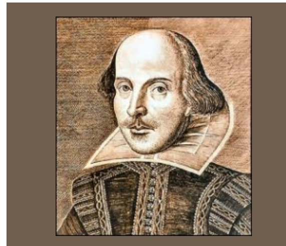
Here is a collection of interesting developments from across the nation that border, perhaps, on madness.Can a Will be probated if it has not been signed? Survey says: No, of course not—unless you are in New Jersey and a court has a generous application of the Uniform Probate Code's "oversight" provision.



"Why, this is very midsummer madness!"

—William Shakespeare, from "Twelfth Night"

This issue also reviews a sequence of Federal Court decisions against the constitutionality of the Defense of Marriage Act, new portability regulations, a Florida statute affecting non-probate assets for divorced couples, and a family estate brawl that is destined to become legend..

Presented With Our Compliments

Overlooked in New Jersey

Details, details. Such as signing one's Last Will and Testament, for example. Can an unexecuted document be probated? Perhaps in the instance of a Will that has been lost and is presumed revoked, a copy of the executed Will might be probated based on sufficient evidence of the testator's intent not to revoke or some plausible explanation of why the Will was lost.

If there were a fire in the Will's known location, for example, that would account for its loss and might overcome the presumption of revocation; at that point, the photocopy of the executed Will could provide sufficient evidence of the content of the lost Will.

But that is not the circumstance we speak of here. Can a purported draft document that was never executed and is not a photocopy of an executed document be admitted to probate?

One might logically conclude that this would never be true because any draft document might then be given credence. Yet a New Jersey case has now treated the absence of a testator's signature as an oversight, citing the Uniform Probate Code as the basis for the decision.

Under the New Jersey version of U.P.C. Section 2-503, a document can be admitted to probate if it is shown by clear and convincing evidence to have been intended as the decedent's Last Will and Testament. This provision of the Uniform Probate Code is designed to overcome "harmless error" and follow the intentions of the testator.

In the *Matter of the Estate of Richard D. Ehrlich*, 2012 W.L. 2470122 (June 29, 2012), the testator was, ironically enough, an estate planning attorney with 50 years of experience. Ehrlich apparently executed his Will nine years prior to his death and sent the original document to his executor. The named executor predeceased Ehrlich, and Ehrlich did not have a copy of the executed Will. Ehrlich did retain an unexecuted Will document that, in his own handwriting, had a notation, "original sent to H. W. Van Sciver, 5/20/2000."

Ehrlich was survived by his late brother's three children, but the contested Will left 25% of the estate to one of his friends and the remainder to only one of his nephews. The trial court accepted the proffered copy of the unexecuted Will to probate. The New Jersey Court of Appeals affirmed by a 2 to 1 vote with the majority, finding that Ehrlich gave "final assent" to the copy in his possession. The dissenting judge concluded that Ehrlich did not consider the document in his possession to be his final Will and should not be probated based on the harmless error doctrine of Section 2-503. However, the dissent would have allowed the copy to be probated under the Lost Will doctrine.

The majority relied upon the New Jersey precedent of *In Re Probate of the Will and Codicil of Macool,* 416 N.J. Super 298, 3 A.3d 1258 (App. Div. 2010), in which a testator consulted an attorney who then drafted a Will. That testator died hours later without having seen or approved the newly drafted document. As opposed to the harmless error of not signing a document that was otherwise approved, the testator in Macool had never seen or given final assent to the Will, and it could not be probated.

Note: In the *Matter of the Estate of Ehrlich,* a number of troubling issues arise. First, Ehrlich was not just the client, he was the attorney. Why didn't he have a copy of the signed document in his files? Old-school tradition may be the explanation. Some law firms have a long-standing practice of generating an unexecuted "conformed copy" and providing that to the client while keeping the original in their vault. Was this Ehrlich's standard practice?

Did he, as attorney, also keep copies of executed documents for other clients? If not, why not? Why wasn't his Will secured when his executor died? Why didn't he execute a new Will when his intentions changed (as was alleged)? Why not execute a new Will when his original could not be located? Surely attorney Ehrlich was aware that his Will would be presumed revoked if lost. Surely he, as an experienced estate planning attorney, would not have assumed that his unexecuted draft would be accepted to probate. Was he lax because he was his own client, or were his faculties diminished?

Even more troubling is the expansion of "harmless error" to include documents that are neither original executed documents, nor copies of executed documents, nor documents that are flawed originals but which, in fact, were never intended to be originals. In an age when digital signatures are zapped onto digital documents and zipped through the ether on clouds, a requirement that Wills really exist and have signatures makes more sense than ever.

DOMA on the Ropes?

A series of recent Federal Court decisions finding the Defense of Marriage Act (DOMA) unconstitutional now raise the question of whether DOMA is defensible at all and set the stage for a Supreme Court determination.

DOMA was enacted by Congress in 1996 to define marriage as the legal union between one man and one woman and to enable states to disregard or refuse to recognize the validity of same-sex marriages from other jurisdictions. Section 3 of DOMA was found to be unconstitutional by a California Bankruptcy court, several District Courts, and the Court of Appeals for the 1st Circuit. Several of these cases are on their way to the United States Supreme Court.

One of the most recently decided cases, Windsor v. United States, seeks a refund of $363,000 of estate tax that resulted when a widow was not permitted to utilize an estate tax deduction for her same-sex spouse.

New Yorkers Edie Windsor and Thea Spyer entered into a committed relationship in 1963. The couple married in Canada

in 2007. Spyer died in 2009; in her Will, Spyer left her estate to Windsor, who filed suit in her capacity as executor of the estate. On June 6, 2012, the Federal District Court for the Southern District of New York held the Defense of Marriage Act unconstitutional.

States currently permitting same-sex marriage are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. Washington, D.C., permits same-sex marriage. California had approved same-sex marriage prior to November 5, 2008. The states of Washington and Maryland will have referendum votes on same-sex marriage during the November 2012 election.

There are currently 12 states that prohibit same-sex marriage by statute and 30 that prohibit it by state Constitutions. However, with multiple rulings that DOMA is unconstitutional, several cases are working their way to the Supreme Court where it will be determined if same-sex marriages from out of state must be recognized in all U.S. jurisdictions.

Uncertainty has ramifications. It is uncertain whether a majority of states will ever adopt laws sanctioning same-sex marriage. It is unclear when particular states would agree to recognize same-sex marriages from other jurisdictions on their own or whether a ruling from the Supreme Court would require such recognition. Same-sex couples who are legally married in one jurisdiction may relocate, have children, divorce, acquire assets, and encounter a full gamut of circumstances for estate planners to anticipate.

Regardless of whether one supports or opposes it, uncertainties as to the legal standing of same-sex marriage have a profound impact on planning. Identification of specific individuals named as beneficiaries should be consciously evaluated during the drafting of Wills and Trusts, routinely identifying such persons by their status as husband, wife, or spouse.

If there is a potential for a desired beneficiary or spouse of a beneficiary to be erroneously excluded due to same-sex marriage not being recognized in some jurisdiction, the applicable document should make intentions crystal clear. The same clarity in effectuating intent is required, regardless of what that intention may be.

Regarding estate taxes, same-sex spouses should pay taxes that are due but file for refunds to avoid having the statute of limitations run out before cases are determined by the Supreme Court.

New Portability Regulations

On December 17, 2010, with the Great Abyss of returning to 2001 levels of transfer taxation and the reinstatement of the estate tax looming, President Obama signed the Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010 into law, thereby establishing a unified estate and gift tax for 2011 and 2012.

While the return to a unified transfer tax system was as familiar as an old pair of slippers by the fireplace, the new law also contained a shiny new set of running shoes, i.e., a newly devised mechanism for a deceased spouse's unused exclusion amount to be utilized by the surviving spouse.

Providing regulations for the new portability rules does not qualify as "midsummer's madness," per se—we need to know how to utilize the new rules—but the entire context of portability rules is incongruous, given the imminent day of reckoning when the transfer tax system is once again reconfigured.

Are tax regulators assuming that there will be a last-minute extension of the current estate tax and portability rule? Shall estate planners make the same assumptions in engaging in portability planning or try to exhaust large exclusions now before they are eliminated by Congress?

In any event, temporary regulations have recently been issued by the Internal Revenue Service concerning the use of a deceased spouse's unused exclusion amount and are added to the existing regulations.

To utilize the portability provisions, the estate of the deceased spouse must file an estate tax return (Form 706) on time (even if the return would not otherwise be required), calculate the unused exclusion, and make a portability election.

Because estate tax returns did not initially include the portability related provisions, IRS Notice 2011-82 states that if the first spouse to die files a timely return, it will be deemed to have calculated the unused exclusion and made a portability election. In Notice 2012-21, the IRS granted a six-month extension to the estates of decedents dying during the first six months of 2011, if the estate was less than $5 million. (See IR 2012-24.)

New temporary regulations have been issued by the IRS, effective June 15, 2012. Temp. Treas. Reg. §§ 20.2010-1T et seq. and 25.2505-1T et seq.; TD 9593, 77 Federal Register 36150 (June 18, 2012). The new regulations contain the following noteworthy points.

- As opposed to "complete" returns as referenced in previous Notices, the estate tax return need not include the amount of the estate that qualifies for marital or charitable deductions. The return must include a good faith estimate of the value of the gross estate within certain ranges. Note: The estate tax return must still report values of assets qualifying for marital and charitable deductions for other purposes, such as alternate valuation, special use valuation, disclaimers, etc.

- The executor of the deceased spouse's estate must file the return to elect portability. The surviving spouse has no authority to make the election by virtue of being the surviving spouse, raising the possibility that a surviving spouse may need to intervene if the executor is not filing a return that makes the portability election.

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- The estate can opt out of portability on the estate tax return or not file a return. The election or opt out becomes irrevocable when the return filing deadline, including extensions, has expired.

- A spouse who remarries can utilize the unused exclusion of the most recently deceased spouse and not of prior spouses.

- Regardless of statutes of limitations, at the death of the second spouse, the IRS may examine the estate tax return of the first spouse.

- A surviving spouse who makes gifts can first utilize the unused exclusion of the deceased spouse. Note: This is particularly useful if the surviving spouse remarries and is at risk of surviving a new spouse and losing the unused exclusion of the prior deceased spouse.

- Where assets are transferred to a qualified domestic trust for a non-citizen spouse, the amount of the unused exclusion can be calculated in preliminary fashion but cannot be utilized by the surviving spouse during life because the unused exclusion will need to be recalculated at the death of the surviving spouse.

- Portability is not available to nonresident aliens.

Notes: The IRS has not yet determined whether the unused amount of exclusion is calculated before or after the application of other credits, such as the foreign death tax credit, credit for tax on prior transfers, or credit for estate tax on remainder interests. Finally, note that unused exclusion amounts are not adjusted for inflation over time.

Nullifying Interests of Florida Exes

Effective July 1, 2012, new Florida Statute 732.703 treats a divorced spouse as predeceasing a former spouse as of the time of the divorce decree for purposes of certain assets.

Several states have adopted similar rules applicable to Wills, but the new Florida approach now extends to non-probate interests, such as insurance, annuities, pay on death accounts, transfer on death accounts, employee benefit plans, IRAs, and 401(k) plans. When such plans name ex-spouses as beneficiaries, those ex-spouses will now be treated as if predeceased, once the dissolution of marriage is finalized.

Joint accounts with rights of survivorship are not covered by the new statute.

The new law may resolve instances in which divorced spouses fail to revise beneficiary designations on non-probate assets. However, the potential for ambiguity remains extremely high because many former spouses continue to have relations, share children, have joint business interests, and may have reason to include each other as beneficiaries for certain assets. These designations must now be reestablished and verified to be as clear as possible.

A Notorious Estate Arrives

Guma Aguiar, 35, was worth approximately $100 million, including an interest in an Israeli soccer team, when his 31-foot boat washed up on the shore of Fort Lauderdale with its engine running and the lights on.

Was Aguiar despondent over his wife's demand for a divorce or over other legal troubles? Aguiar and his uncle reportedly sold a Texas energy company in 2006 for $2.5 billion but have been engaged in litigation over the division of assets ever since. Aguiar also had recent run-ins involving drugs, driving, and domestic violence. Was an alleged bipolar condition involved in the disappearance?

Florida will not declare Aguiar dead until five years have passed, but Aguiar's mother and wife have wasted little time in engaging in litigation to gain control over the estate. His mother, Ellen Aguiar, filed first and suggested that her son might be alive but suffering from some psychosis.

Jamie Aguiar, the surviving spouse and mother of Aguiar's four children (ages 7,4, 3, and 10 months) responded with a counter petition. "Rather than rally around her family in this most difficult of times," said Jamie Aguiar, "Ellen Aguiar instead focused on being first to the courthouse, petitioning this Court to serve in a position she is ill-suited to hold, as she is incapable of looking out for the interest of anyone but herself."

Jamie Aguiar also claims that her mother-in-law has interfered in the investigation of her husband's disappearance by persuading police investigators to give her the missing man's cell phone and wallet, providing her with an opportunity to delete messages.

These items were returned by Ellen Aguiar's attorney, who told ABCNews.com that his client had never asked for the phone. "That's complete and utter fantasy," he said. "It's creative writing. It's a third-rate novel."

Jamie Aguiar portrays her mother-in-law as someone being supported by Guma Aguiar's business operations. Ellen Aguiar tells a different story, in which her son's assets are in "imminent danger" of being "wasted, misappropriated, or lost" by Jamie Aguiar, who she says has been making decisions without a power of attorney.

This, of course, reveals how dangerous it is to take success and health for granted. With significant assets at stake, why was there no emergency plan in place? How could it be that no one was left in charge? Even modest estate plans should have the foresight to provide basic power of attorney provisions and business transition contingencies.

Regrettably, Guma Aguiar has not been located and may be deceased. With all the ingredients of a successful reality show (strong personalities, irrational displays, hot-tempered sniping), the estate of Guma Aguiar appears destined to join the ranks of the most notorious.