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Estate Planning Techniques to Avoid or Survive Probate Litigation

**April 2008
PLE08**

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Estate Planning Techniques to Avoid or Survive Probate Litigation

Sponsored by the Probate Law Section

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CHAPTER ONE

CHECKLIST FOR THE PROBATE LAWYER

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Rev. 3/25/08

1. Introduction

The probate lawyer's analysis must begin with the question of whether the decedent executed a Will prior to death. If not, the decedent's property will be administered and distributed according to the laws of intestate succession.

2. Administration of Intestate Decedent

Appointment of an administrator:

A decedent who dies without a Will is said to die intestate. If the decedent died owning property in his or her own name (probate property) an administrator must be appointed by the probate court for the purpose of administering the decedent's assets. Only the following individuals can serve as administrator in the order of priority set forth below, G.L. c. 193, s. 1:

- A. Surviving spouse
- B. Next of kin
- C. Creditors
- D. Public administrator (If no surviving spouse or next of kin residing in Massachusetts.)

The administrator must be found to be suitable and competent. In the event of a disagreement between surviving spouse and/or next of kin, the probate court will decide.

3. Taking Possession Of The Decedent's Property

The fiduciary cannot take possession of the decedent's property until the fiduciary's appointment has been approved by the probate court. The following steps must be followed prior to appointment:

- A. A petition to appoint an administrator must be filed either with or without sureties.
- B. A certified copy of the death certificate must be filed with the petition.

4. Affidavit of Medical Assistance

This document has been eliminated and its notice function has now been incorporated into the petition. On the petition, the fiduciary certifies that a copy of the death certificate and the petition has been sent to the DPW by certified mail. Receipt of these documents from the fiduciary initiates DPW's estate recovery procedure.

5. Fiduciary Bonds

Bond (or an insurance policy) is required prior to appointment to insure the fiduciary faithfully carries out its lawful duties. Bond may be with or without sureties. G.L. c.205, § 4. Bonds are purchased from surety companies but can be waived by the probate court if the fiduciary's activities are personally guaranteed by two individuals and they are certified by a third person to have sufficient wealth and liquidity to compensate any person for errors and omissions of the fiduciary. In an effort to save money, an attorney is often requested to become either a personal surety or to certify that the personal sureties are adequate. This is not a good idea since the attorney is at risk for errors and omissions of the fiduciary.

6. Citation and Publication

A citation will be issued by the court relating to the petition for the appointment of a fiduciary. The citation must be published at least once in the local newspaper where the decedent died at least seven days before the return date of the citation. G.L., c.215, § 46 and § 49. The citation alerts creditors and any other interested parties that a petition has been presented either requesting the appointment of an administrator or for the allowance of a will if a decedent died testate.

7. Statute Of Limitations For Claims Against The Decedent

A creditor of the decedent must commence an action against the decedent's estate within one year of the date of death of the deceased or such action must be served, upon the administrator prior to the expiration of the one year period. G.L. c.197, § 9.

This statute of limitations applies to decedents dying on or after January 1, 1990. This statute appears to be dispositive even if a creditor did not receive notice of the decedent's death. This rule is inconsistent with the Supreme Court case of Tulsa Professional Collection Services, Inc. v. Pope, 108 S.Ct. 1340 (1988) which held that creditors who are "reasonably ascertainable" must be given actual notice of the proceeding or publication would otherwise be sufficient. The holding of the Tulsa case, which was decided on due process grounds, would require actual notice of death to creditors of which the fiduciary is aware even though the state statute of limitations would suggest otherwise for decedents who died after to January 1, 1990.

8. Statute Of Limitations For Claims Against Decedent Dying Before January 1, 1990

Within four months after approval of fiduciary's bond, the claimant was required to deliver to the fiduciary or file with the appropriate court a written statement of any claim. If the fiduciary failed within 60 days from the end of the four month period to notify the claimant in writing of disallowance, the claim was treated as allowed. If disallowed, the fiduciary must give notice of the pending bar of the claim. The creditor then had 60 days after notice to commence suit in the appropriate district or superior court. If the claim was not filed within nine months of the date of appointment, the claim was barred.

In the alternative, the claimant could begin a suit in either the district or superior court against the fiduciary at any time before expiration of nine months from the date of appointment. A fiduciary was not held to answer an action by a creditor within three months of the fiduciary giving bond. As a result, creditors had only the time between four and nine months of giving bond to make such claims.

9. Probate Accounts

A fiduciary must account to the probate court at least once each year. G.L. c.206, § 1. There is no penalty for failure to file such accounts and in many small estates, only one account will be filed entitled the "First and Final Account". If a fiduciary fails to account, any interested person may petition the court to obtain an order to render an account and ease grounds for removal. G.L. c.205, § 1.

10. Payment Of Claims Against The Estate

If the estate is solvent, the fiduciary may pay debts after six months after the date of death.

11. Other Claims Against The Estate

The fiduciary will be personally liable if debts are paid improperly. If the decedent died before January 1, 1990, the fiduciary could pay claims four months after approval of his bond if the fiduciary did not receive notice of accounts which would have informed the fiduciary that the estate was insolvent. For decedent's dying after January 1, 1990, claims may be paid six months after death if within six months following the date of death, the fiduciary did not receive notice of claims which would make him believe the estate was insolvent. Claims against the estate should be paid promptly.

12. The Insolvent Estate

If the fiduciary is confident that the estate has sufficient assets, the fiduciary may pay all claims in full. If, however, the assets are insufficient, claims will abate proportionately. G.L. c.198, § 1. If the estate is insufficient to pay all debts, after the payment of all necessary expenses of funeral, last sickness, and charges of administration, assets shall be applied to the payments of the decedent's death in the following order:

- A. Debts entitled to preference under the laws of the United States.
- B. Public rights, taxes and excise duties.
- C. Debts due to the Department of Public Welfare.
- D. Wages or compensation to an amount not exceeding \$100 due to a clerk, servant or operative if they performed labor within one year last preceding the death of such deceased person or for such labor so performed as recovery of payment for which a judgment has been rendered.
- E. Debts to an amount not exceeding \$100 for necessaries furnished to such person or his family within the six months last preceding his death or for such necessaries so furnished for the recovery of payment for which a judgment has been rendered.

F. Debts due to all other persons.

If the assets are insufficient to pay all debts within any class, the creditors of the particular class shall be paid ratably. No payments shall be made to creditors of any class until all those in the higher class of whose claims the executor has notice, have been fully paid. G.L. c.198, § 1.

13. Payment of Legacies

Payment of a legacy should be distinguished from a payment of claim. A legacy is a specific bequest of a decedent to a person as set forth in the decedent's will which has been duly probated and allowed. There is no prohibition against paying such legacies prior to the expiration of the applicable one-year statute of limitations but for decedent's dying after January 1, 1990, the fiduciary does so at his own risk. On the other hand, pecuniary legacies, which are not paid within one year of the date of death, carry interest on the bequest at the rate specified by the Supreme Judicial Court general rules and in the absence of any such rules the rate shall be 4 percent per annum. G.L. c.197, § 20. If a payment is required to be made to a minor, a guardian ad litem must be appointed. Uniform Transfers to Minors Act provides an exception to this rule for bequests of \$10,000.00 or less. G.L. c.201A, § 6.

14. Payment of Estate Taxes

Unless the decedent's estate consisted of closely held stock in an amount in excess of thirty-five percent (35%) of the decedent's estate, both state and federal estate taxes are required to be paid within nine months of the date of death. In the absence of a provision in the will to the contrary, the Massachusetts estate tax apportionment statute, G.L. c.65A, § 5(1) requires that estate taxes be apportioned among probate and non-probate assets in accordance with the proportion of the net amount of such property included in the measure of such tax bears to the amount of the total net estate.

15. Within the probate estate, estate taxes should be paid out of the residue without contribution by specific legatees. See also, *First National Bank of Boston v. Judge Baker Guidance Center*, 13 Mass. App. 144, 151-2, 431 N.E.2d 243, 249 (1982).

Commonwealth, the person in actual or constructive possession of the property of the decedent, other than property held at death by the deceased in joint tenancy, is permitted to sign and file the affidavit.

16. Heirs and Next-Of-Kin

If the decedent died without a will, the decedent's probate estate will be distributed to the persons set forth in G.L. c.190 depending upon the existence of decedent's heirs and next of kin.

A. The definition of heirs and next-of-kin

Heirs are defined in Massachusetts as those who would take by intestacy under the Massachusetts descent and distribution statutes set forth in G.L., c.190, § 1, et seq. Next-of-kin is defined as the nearest blood relative(s).

In Massachusetts, the surviving spouse is an heir although she is not considered a next of kin. If, however, a decedent is survived by a brother and three nephews who are children of a deceased brother, only the brother is next of kin, but all are heirs. If the deceased is not the surviving spouse, the right of all such heirs will be subject to the rights of the surviving spouse by first determining the rights of the surviving spouse and then applying the rules of inheritance of the remaining estate. G.L. c.190, § 3.

17. Statutory Rules of Descent and Distribution

G.L. c.190 is the comprehensive statute dealing with intestate distribution and all common law rules to the contrary shall be disregarded. The statute applies to all real and personal property not disposed of by will or by a form of ownership such as jointly owned property, life insurance, beneficiary designation, subject always to the rights of the surviving spouse. This statute applies to all real estate located in Massachusetts and the personal property wherever situated. Property located in another state will pass under the laws of intestate distribution in effect in the state where the property is located and at the time of death.

"Per stirpes", sometimes referred to as "right of representation", is the taking of the share by the descendants of the deceased heir which their parent (the deceased heir) would have taken if the parent had lived. G.L. c.190, § 8.

"Per capita" on the other hand means that the property will be distributed in accordance with the persons who are then living with no right in a deceased person's offspring.

A. Decedent who dies with a spouse and issue:

After payment of debts of the decedent and charges of last illness, funeral and administration expenses, the surviving spouse takes one-half of the decedent's estate outright.

B. Decedent who dies with a spouse and no Children:

If the decedent died with a spouse but with no children or issue but with kindred (brothers and sisters) the surviving spouse takes \$200,000 outright and if the estate is in excess of \$200,000, one-half of the balance outright.

C. Decedent who dies with no Issue and no Kindred:

If there are no issue and no kindred, the surviving spouse takes all the property outright.

D. Deceased issue and deceased siblings:

The issue of the decedent and issue of deceased siblings take on a per stirpes or by right of representation basis. This means that the issue of a deceased child or the issue of a deceased sibling will inherit.

E. Death of a single decedent

- (1) If a person dies with children, in equal shares to his children and to the issue of any deceased child by right of representation.
- (2) If there is no surviving child of the intestate decedent, then to all his other lineal descendants (grandchildren) per capita if all said descendants are in the same degree of kindred to the intestate. If not, the descendants shall take according to right of representation.
- (3) If the decedent leaves no issue, in equal shares to his father and mother.
- (4) If the decedent leaves no issue and no mother, to his father.
- (5) If the decedent leaves no issue and no father, to his mother.
- (6) If the decedent leaves no issue and no father and mother, to his brothers and sisters and to the issue of any deceased brother or sister by right of representation.
- (7) If there is no surviving brother or sister of the intestate, to all the issue of the deceased brothers and sisters, per capita if such issue are in the same

degree of kindred to the intestate, otherwise the issue shall inherit according to the right of representation.

- (8) If the decedent leaves no issue and no father, mother, brother or sister and no issue of any deceased brother or sister, then to his next of kin in equal degrees. Next of kin is defined as the closest blood relative.
- (9) If an intestate leaves no kindred and no widow or husband, the estate shall escheat to the Commonwealth of Massachusetts provided, however, if such intestate is a veteran who died while a member of the Soldiers Home in Massachusetts or the Soldiers Home in Holyoke, the estate shall inure to the benefit of the legacy fund or legacy account of the soldiers' home of which he was a member. G.L. c.190, § 3.

18. Real Property

Under Massachusetts law, title to real property vests in the heirs as of the date of death of the decedent, subject only to the rights of the surviving spouse and the rights of creditors. Newhall, Settlement of Estates § 86 (4th Ed., 1958)

19. Miscellaneous

A. Step children:

Step children are not blood kindred and therefore are not heirs.

B. Illegitimate children:

A child born out of wedlock may inherit from his mother, including anyone from whom the mother might have inherited, if living, and his descendants inherit from him and take by descent his share which he would have taken if living. G.L. c.190, § 5.

An illegitimate child will also inherit from the father where the father either acknowledged paternity or was adjudged a father. A child born out of wedlock may institute proceedings for adjudication of paternity after the father's death. G.L. c.190, § 7.

C. Adopted children:

Adopted children are treated as though they had born to their adoptive parents. The words child, grandchild, issue, heir or heirs at law shall include adopted children unless the instrument plainly indicates otherwise. G.L. c.210, § 7 and 8.

20. Simultaneous Death

In the case of a simultaneous death, or death where it is difficult to determine the order of death, the estate of each person is disposed of as if he or she had survived and jointly held property is distributed as if each of the deceased joint tenants had been a tenant in common. G.L. c.190(A), § 1 and § 3.

21. Probate of the Will

The person in possession of the original will of the decedent must file it with the Probate Court, or with the executor named in the will, within thirty (30) days after notice of the death. (This does not mean probate the will.) G.L. c.191, § 13.

22. The Allowance of the Will

The allowance of the will is similar to the process involving the appointment of an administrator. The probate proceeding is commenced by filing the original will with a petition for the allowance of the will and appointment as executor with or without sureties. If the named executor is deceased or otherwise fails to serve, a petition may be commenced for appointment as administrator with the will annexed.

23. Purpose of the Will

If the Last Will and Testament is allowed, the will governs the disposition of the decedent's probate assets. Any attempt to dispose of assets which are governed by the terms of a contract (IRA, Keogh, pension plans, life insurance, jointly owned property) will fail.

24. Statute of Limitations

The statute of limitations for claims against the decedent are the same whether the decedent died with or without a will (one year following the date of death). G.L. c.197, § 9.

25. Will Contests

Any person who would inherit the decedent's estate if the decedent had not executed a will, can attempt to challenge the will. The will may be challenged on the grounds that the will was not properly executed or that the decedent was of unsound mind and memory or the will was procured by fraud or duress, See I Newhall, Settlement of Estates, § 40 (4th edition, 1958). Any person objecting to a will and who has filed an appearance by 10:00 a.m. on the return date, must file a written affidavit of objection within thirty (30) days after the return date. Failure to comply with this rule will result in the striking of the objector's appearance.

26. Temporary Executor

In the event of a will contest or to protect the assets from wasting during the appointment process, the Probate Court may appoint a temporary executor. Under G.L. c.192, § 13. The court may appoint the executor named in the will as temporary executor (1) if the testator requested such appointment, or (2) if the fiduciary petition is assented to by the surviving spouse and all heirs at law and next of kin of full age and legal capacity. A temporary executor or administrator with a will annexed is: (1) specifically authorized to take charge of the property of the decedent and to collect rents, make necessary repairs, and do all things which the court may consider necessary for the preservation of real property; (2) may sell any personal property of the estate and make such investments as would be proper investments for a fiduciary; (3) pay from the personal property in his hands the reasonable expenses of the last sickness, funeral and taxes of the deceased; and (4) to continue the business of the deceased for the benefit of his estate. G.L. c.192, § 14.

The powers of a temporary executor expire upon the appointment of the executor or administrator, or the earlier of ninety (90) days after his appointment or an order terminating the fiduciary's appointment. Usually on motion filed before the end of the ninety (90) day period, the special administrator's term is extended for one or more terms not to exceed ninety (90) days each. A temporary executor not appointed permanent fiduciary must within thirty (30) days of discharge, render an inventory and account. G.L. c.192, § 15

27. Allowance of the Will

The decedent must have been eighteen (18) years or older and of sound mind and memory at the time of execution. In addition, the will must be signed by the decedent (or by a person in his presence by his express direction) and attested and subscribed to in his presence by two (2) or more competent witnesses. G.L. c.191, § 1. Most wills executed or published after December 31, 1977 are "self proving" wills and will be admitted to probate without testimony of the attesting witnesses. A self proving will contains an affidavit of the decedent and of the witnesses that the will was properly executed, sworn to before an authorized administrator oaths and under official seal. G.L. c.192, § 2.

28. Will Substitutes

A living trust may be incorporated into a will by the express terms of the will but the trust must already be in existence at the time the will was made. An existing trust may be incorporated by reference into a will even though the creation of the trust itself does not require the formalities incident to the execution of a will. See *Shawmut National Bank of Boston v. Joy*, 315 Mass. 457, 43 N.E.2d 113 (1944).

Trusts need not be funded at the time of execution to be valid. Also, a revocable living trust may be amended after execution of the will without affecting the validity of the will.

29. Lost Wills

A will known to exist but which cannot be found after the decedent's death, is presumed to be destroyed by the testator with the specific intention to revoke. *Smith v. Smith*, 244 Mass. 320 (1923). The presumption is rebuttable but testimony to rebut and establish the will is very difficult and must be "free from doubt". *Coughlin v. White*, 273 Mass. 53 (1930).

30. Disclaimers

Any beneficiary may disclaim property which would pass to him by intestacy, by will, by exercise or nonexercise of a power of appointment by will, by testamentary or inter vivos trust, by operation of law, by insurance contract or by survivorship as joint tenant or tenant by the entirety. G.L. c.191A, § 2. A disclaimer must be in writing and must be filed in the Probate Court within nine (9) months after the event determining that the beneficiary is finally ascertained and indefeasibly vested. G.L. c.191A, § 3 and § 4. If the property being disclaimed is an interest in real property, the disclaimer shall be acknowledged in the manner provided for deeds of real property. G.L. c.191(A), § 5.

A disclaimer which complies with the requirements of the statute shall be irrevocable and the property disclaimed will be deemed to have passed to the decedent's heirs under the laws of intestate succession. Real property may be disclaimed provided the live joint tenant cannot disclaim the portion of the joint property contributed by him or her. A disclaimer will be valid for estate tax purposes under IRC § 2518 if the following requirements are met:

- A. the refusal is in writing;
- B. the writing is received by the transferor or appropriate representative within nine (9) months of the later of:
 - (1) the date on which the transfer creating the interest in such person is made, or
 - (2) the day on which such person attains 21 years.
- C. the claimant has not accepted the interest or any of its benefits;
- D. As a result of such refusal, the interest must pass without any direction on part of the person disclaiming and pass either to the decedent's spouse or to person other than disclaimant.

The IRS has taken the position that a disclaimer is invalid if it is made more than nine (9) months after the joint tenancy was created rather than nine (9) months after the date of death. Rev. Rul. 83-35, Reg. § 25.2518-2(c)(4). This view has been rejected by the 7th

Circuit in *Kennedy v. Commissioner*, 804 F.2d. 1332 (1986) and the 8th Circuit in *McDonald v. Commissioner*. See also, PLR 9135043 (On the death of a wife, her husband can disclaim the wife's one-half interest in a personal residence in Massachusetts owned with her as tenants by the entirety, even though the husband paid the original purchase price, paid all mortgage payments, and will continue to occupy the property with his daughter who will take the one-half interest by reason of the disclaimer.) See also PLR 9135044, permitting such a disclaimer where the disclaimed interest would pass to a trust of which the disclaimant was a beneficiary. These cases are now moot since the IRS has ruled that both tenancies by the entirety and joint tenancies can be disclaimed within nine (9) months of the death of a joint tenant. Regs. 25.2518-2(c)(4)(iii)

31. Spouse's Right To Waive A Will

The surviving spouse who is unhappy with the bequests under the terms of a will has an absolute right to waive the will without notice or adjudicatory proceedings and take a statutory share of the estate. G.L. c.191, § 15. The statutory share depends on the size of the estate and the existence of heirs and next of kin. While historically it was understood that the statutory share related to the decedent's probate assets only, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E. 2d 572 (1984) held that for purposes of computing the spouse's share, the value of assets held in an *intervivos* trust created or amended by the deceased spouse after January 23, 1984, wherein the deceased spouse alone retained the power during his or her lifetime to direct the disposition of the assets will be included in the computation. The statutory shares are as follows:

- A. If the decedent has issue, the surviving spouse takes one-third of the personal and real property, but if the real value of the personal and real property exceeds \$25,000, the spouse takes the first \$25,000 and income interest for life in the balance. (This will mean that the estate must remain open.)
- B. If the decedent left no issue, but the decedent had kindred, the spouse takes \$25,000 outright plus a life estate in one-half of the excess of the estate over \$25,000.
- C. If there are no issue and no kindred, the surviving spouse takes \$25,000 outright and one-half of the balance outright.

In electing the statutory share, the surviving spouse must file a written waiver of the will and claim the statutory share within six months from the date of the probate of the will. The six month period cannot be extended. G.L. c.191, § 15.

A surviving spouse who is incompetent may waive the will by her guardian subject to the approval of the Probate Court. *Dolbeare v. Bowser*, 254 Mass 57 (1925).

32. Forgotten Child

A child or issue of a deceased child who is accidentally omitted from the decedent's will is considered a pretermitted child. Under G.L. c.191, § 20, the child must file a claim in the Probate Court within one year of the date of approval of the bond in order to take a share in the decedent's real estate. As to other property, the claim may be made at any time. This right applies only to a child who was accidentally omitted. The decedent may intentionally fail to provide for a child in which case a child will have no right in the estate. When a child or issue of a child is unintentionally omitted, the child will take the same share of the decedent's estate which the child would have taken if the decedent had died intestate. G.L. c.191, § 20.

If a child is not identified in the will, there is a presumption that the child was unintentionally overlooked but the presumption is rebuttable and the burden of proof is on the child petitioning the Probate Court to determine whether the omission was intentional and not occasioned by accident or mistake. Draper v. Draper, 267 Mass. 528, 166 N.E. 874 (1929).

**PROBATE PROCEDURES
OF THE DIVISION OF PUBLIC CHARITIES**

October 16, 1998

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Probate Paralegal
Division of Public Charities
Office of the Attorney General

[These materials represent the opinions and legal conclusions of the author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.]

I. INTRODUCTION

The Attorney General represents, through his Division of Public Charities, the public interest in the enforcement of charitable gifts. Accordingly, the Attorney General oversees "the due application of funds given or appropriated to public charities within the commonwealth" and prevents "breaches of trust in the administration thereof". G.L. c. 12, § 8. In furtherance of his authority, the Attorney General is an interested party in the probate of estates in which there are charitable interests.

As the initial reviewer of most probate matters that come before the Division, the Probate Paralegal recommends that the probate practitioner, in dealing with the Division on probate matters, refer to the following resources in addition to applicable law and court rules: (1) The Uniform Practice XXXIC: Charitable Interests, which summarizes the requirements for notice to the Attorney General; and (2) this guide, which provides information on the Attorney General's review of charitable gifts which are subject to probate.

The Paralegal reviews probate matters on a case by case basis. The information required, however, is standard in most instances. The inclusion of all pertinent information in your initial mailing will expedite the Paralegal's review.

The Division would appreciate any comments or suggestions you may have with respect to this guide.

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II. WORKING WITH THE DIVISION

A. INITIAL NOTICE

In connection with a petition for the allowance of a will and the appointment of an executor, a special administrator, or an administrator with the will annexed, The Uniform Practice XXXIC: Charitable Interests (hereinafter, "The Uniform Practice") requires notice to the Division of Public Charities ("the Division") in the following instances:

1. "The will contains a devise or bequest to a named charity or for charitable purposes. The initial notice shall be accompanied by a copy of the will." The Uniform Practice, A.1.a.

2. "The will (i) contains a devise or bequest to the trustee(s) of an inter vivos trust, which trust instrument provides for one or more charitable gifts; and (ii) either the executor(s) or administrator(s) with the will annexed and the trustee(s) are the same persons or entities or the trustee or one of the trustee(s) has a beneficial interest in the estate or trust. The initial notice shall be accompanied by a copy of the will and either a copy of the trust instrument or a summary of the charitable gifts contained therein...". The Uniform Practice, A.1.b.

In addition, G.L. c. 192, § 1a requires that, when a person dies with no known heirs, the Attorney General shall be made a party to any petition for the probate of the will. The Division ordinarily does not take any action with respect to the notice, other than to request a copy of the will in order to determine whether there is a charitable interest.

B. DIVISION'S RESPONSE TO INITIAL NOTICE

Upon receipt of the initial petition for allowance of will and appointment of fiduciary, the Paralegal reviews the will and trust instrument, if any, and creates a file if there are one or more charitable gifts. The Division does not formulate a position with respect to the petition.

C. SUBSEQUENT NOTICE

The Uniform Practice requires notice to the Division of any subsequent filing relating to a matter which will affect the charitable interest, including without limitation the allowance of accounts, the sale of an asset, the compromise of a claim or the appointment or removal of a fiduciary or successor fiduciary. The Uniform Practice, A.2.

The Division is also a necessary party to the following actions: a complaint for cy pres and/or deviation relief; a complaint for instructions or a declaratory judgment in which the relief sought may affect a charitable interest; the compromise of a will, which compromise may affect the charitable interest; a complaint for a license to sell an asset, the sale of which may affect a

charitable interest; a complaint for authority to terminate or consolidate a trust pursuant to G.L. c. 203, § 25, or otherwise, which consolidation or termination may affect a charitable interest. The Uniform Practice, B.

For detailed information on proposed cy pres and deviation relief, please see Meyer, Holley C., "Cy pres and Deviation", in Boston Bar Foundation Continuing Legal Education, Bringing Equity Actions in the Probate Courts. A Fiduciary's Primer to Equitable Procedures and Remedies in Probate.

(C)(1) PETITION FOR SALE OF REAL ESTATE

In the course of winding up an estate, the fiduciary is often required to sell the real estate. Notice to the Division of a proposed sale is required where the real estate is not specifically devised. If, for example, the testator specifically devised the real estate "to my friend, Mary Smith", the Division is not interested in the proposed sale. If the real estate passes through the residuary clause, the Division will review the details surrounding the proposed sale.

The nature of the charitable gift determines the Division's level of review. If the charitable gift is specific and not yet paid, the fiduciary should provide a copy of the Petition and a copy of the Inventory. The Division merely seeks to ascertain from the Inventory that the estate is solvent for purposes of satisfying the specific charitable gifts.

If the charitable gift is specific and paid at the time of the proposed sale, the fiduciary should provide a copy of the Petition and copies of the receipts or canceled checks. The Division does not scrutinize the details surrounding a sale under these circumstances because they will not affect gifts which are paid.

If the charitable gift is residuary in nature, the Division scrutinizes the proposed sale details with an eye for conflict of interest and unfair price. The Division is interested in the sale details because the fiduciary ultimately distributes the proceeds to charity under the residuary clause. Accordingly, the fiduciary should provide the following information: copy of Petition; sale price; fair market value; property description; explanation of means taken to obtain a fair price; relationship, if any, between estate or fiduciary and the proposed purchaser; and the assents of all named charities. The Paralegal does not need a copy of the Inventory. Please note that, in the interest of the fiduciary's time and convenience, the Division does not require supporting documentation of the above information. The fiduciary does not need, for example, to provide a copy of the purchase and sale agreement or broker's valuation. With the exception of the assents of all named charities, the fiduciary may submit the information in a letter. If everything is in order, the Division typically issues an assent to the petition based on the letter and the assents.

(C)(2) ACCOUNT OF SPECIAL ADMINISTRATOR

The Uniform Practice requires the fiduciary to provide the Division with notice of a special administrator's proposed account. The Uniform Practice, A.2. A special administrator is appointed for the purpose of preserving, handling, or recovering the assets of an estate where immediate attention is required and where there is a delay in the appointment of a permanent fiduciary, and where no application has been made for the appointment of a temporary executor or administrator with the will annexed. The account will show the special administrator's transfer of assets to the fiduciary. The Division determines from the accounting that everything is in order but does not issue a written response unless there is a problem.

(C)(3) ACCOUNT OF EXECUTOR OR ADMINISTRATOR WITH THE WILL ANNEXED

The fiduciary is required to provide the Division with notice of the proposed final account. The Uniform Practice, A.2. The Division does not take a position with respect to the proposed allowance of an interim account. It does, however, take a position with respect to the majority of final accounts. In fact, the Attorney General's assent to the final account is issued in most instances.

The Division is primarily interested in the fiduciary's satisfactory transfer of the charitable gifts under the account. The Paralegal scrutinizes the account with an eye for the unsubstantiated reduction of specific charitable distributions, and excessive legal and/or executor fees. The Division additionally requires that the fiduciary provide copies of the receipts or assents of all named charities.

If there is a citation for the allowance of a final account, the fiduciary should provide a copy of the account and one of the following items of information: the charities' receipts; the charities' assents to the account; proof of notice to the charity; or copies of canceled checks.

If no citation has been issued, the fiduciary should provide a copy of the account and copies of the assents of all named charities.

If there is a pour-over gift to an inter vivos trust for which notice to the Attorney General was required, the fiduciary should provide copies of the assents of the named charities. If these assents are unavailable, please contact the Division to make alternative arrangements.

If there is a charitable gift which is residuary in nature, the fiduciary should provide copies of itemized bills for legal and executor fees which appear, at first glance, to be excessive. Fees deplete the residuary amount and, thereby, the charitable distribution. The Probate Attorney reviews the bills with at least the following factors in mind: administration complications, such as a will contest or a contract claim; value of the estate; the time and labor required; and the skill required.

(C)(4) ACCOUNT OF TRUSTEE

a. Interim Account of Trustee

The Uniform Practice requires the fiduciary to notify the Division of the proposed interim trust account. The Uniform Practice, A.2. The Division reviews the interim account under the following circumstances: the interim account is accompanied by a citation and involves (1) a charitable interest without contingency; and (2) a charitable interest which does not benefit a large entity, such as a hospital or university. The Division lacks the resources with which to review every interim trust account and, accordingly, relies upon the resources of larger entities to scrutinize their distributions.

The fiduciary should provide the Division with copies of all proposed accounts. The Paralegal, in turn, reviews the following information contained therein: the amount in charitable distributions; the amount in proposed trustee's fees; and the amount in undistributed income, if any. If the charitable gift involves an indefinite class of charitable beneficiaries, in contrast to named beneficiaries, the Paralegal additionally will want to receive a description of the trustee's method of selection. The Division, in its review, looks for excessive amounts in undistributed income; the depletion of the charitable gift through excessive fees; and the misapplication of the testator's designated class of unnamed beneficiaries. The Division additionally recommends that the fiduciary file a petition for termination under G.L. c. 203, § 25 for uneconomic trusts.

b. Trustee's Final Account

The Uniform Practice requires the fiduciary to notify the Division of the proposed final trust account. The Uniform Practice, A.2. If no citation has been issued with respect to the proposed final account, the fiduciary should provide a copy of the proposed account and copies of the assents of all named charities. If a citation has been issued, the fiduciary should provide a copy of the account and copies of one of the following: the charities' receipts; proof of notice; or copies of canceled checks. The Division issues an assent to the account in most instances.

THE TOP FIVE MOST FREQUENTLY ASKED PROBATE QUESTIONS

1. **Q: Do I need to notify the Division of the probate of a contingent charitable gift under a will?**

A: Yes. The nature of the charitable gift does not affect the notice requirement. Any testamentary charitable *interest*, however conditional, triggers the notice requirement.

2. **Q: Do I need to notify the Division of the probate of a will under which the charitable gift is insignificant in dollar value?**

A: Yes. There is no "small gift" exception to the notice requirement. The Uniform Practice requires notice to the Division of *any* charitable gift.

3. **Q: Do I need to notify the Division of the probate of a will if the charitable beneficiary is an out-of-state organization?**

A: Yes. The Massachusetts domicile of the *testator*, in contrast to that of the charitable beneficiary, triggers the notice requirement to the Division.

4. **Q: Do I need to notify the Division of the probate of a will under which there is a charitable pour-over gift to an inter vivos trust?**

A: Notice is required under certain circumstances. The question is frequently asked in light of the non-probated nature of the charitable gift under the trust. In any event, pursuant to The Uniform Practice, notice is required where "the will (i) contains a devise or bequest to the trustee(s) of an inter vivos trust, which trust instrument provides for one or more charitable gifts; and (ii) either the executor(s) or administrator(s) with the will annexed and the trustee(s) are the same persons or entities or the trustee or one of the trustees has a beneficial interest in the estate or trust." The Uniform Practice, A.1.b. Given the underlying concern here about a potential for self-interested dealing, the Division interprets the Uniform Practice as requiring notice to the Attorney General if there is *any* identity between the executors and the trustees of a pour-over will and trust (e.g. executor is also a co-trustee).

5. **Q: Is a charitable remainder interest subject to the registration and Form PC filing requirements under G.L. c. 12, § 8f?**

A: During the lifetime of the income beneficiary, a trust with a charitable remainder interest is not subject to the registration and filing requirements under G.L. c. 12, § 8f. Registration and Form PC filing is required only where a charity benefits from a *present and periodic* income interest. Termination of the prior income interest, therefore, triggers the registration and Form PC filing requirements.

CHECKLIST

1. *PETITION FOR ALLOWANCE OF WILL AND APPOINTMENT OF FIDUCIARY*

If there is a charitable gift, please provide the following:

1. Copy of Petition
2. Copy of Will and Trust instrument, if any

2. *PETITION TO SELL REAL ESTATE*

A. If the testator specifically devised the real estate, you need not provide the Division with notice of the proposed sale.

B. If there is a residuary charitable gift, please provide the following:

1. Copy of Petition
2. Proposed sale price
3. Assessed value
4. Brief description of property
5. Brief description of means taken to obtain a fair price
6. Disclosure of relationship between proposed purchaser and estate or fiduciary
7. Copies of assents of all named charities

C. If the charitable gift is specific in nature and not yet paid in full, please provide the following:

1. Copy of Petition
2. Copy of Inventory

D. If the charitable gift is specific in nature and paid in full, please provide the following:

1. Copy of Petition
2. Copies of charities' receipts or canceled checks

3. *PETITION FOR ALLOWANCE OF ACCOUNT OF SPECIAL ADMINISTRATOR*

Please provide the following:

1. Copy of Petition
2. Copy of account

4. PETITION FOR ALLOWANCE OF ACCOUNT OF EXECUTOR OR ADMINISTRATOR WITH THE WILL ANNEXED

A. If you are presenting an interim account, please provide the following:

1. Copy of citation, if any, and copy of account

B. If you are presenting a final account with a citation, please provide the following:

1. Copy of citation and copy of account
2. Copies of one of the following: charities' assents; charities' receipts of distribution in full; canceled checks; or proof of notice to charities
3. If there is a pour-over gift to an inter vivos trust for which notice to the Attorney General was required, please provide copies of the assents of the named charities. If these assents are unavailable, please contact the Division to make alternative arrangements.

C. If you are presenting a final account without a citation, please provide the following:

1. Copy of account
2. Copies of charities' assents
3. If there is a pour-over gift to an inter vivos trust for which notice to the Attorney General was required, please provide copies of the assents of the named charities. If these assents are unavailable, please contact the Division to make alternative arrangements.

5. PETITION FOR ALLOWANCE OF ACCOUNT OF TRUSTEE

A. If you are presenting an interim account, please provide the following:

1. Copy of citation, if any, and copy of account

B. If you are presenting a final account with a citation, please provide the following:

1. Copy of citation and copy of account
2. Copies of charities' assents or receipts

C. If you are presenting a final account without a citation, please provide the following:

1. Copy of account
2. Copies of charities' assents

CHAPTER TWO

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**Outline for Presentation
Estate Planning Techniques to Avoid or Survive Probate Litigation
Avoiding Disputes Down the Line
Family Issues
April 1, 2008
Massachusetts Bar Association**

- I. Estranged children
 - A. Child lives away and rarely visits parents
 - B. Sense of entitlement. I am entitled to my inheritance.
 - C. "My father would never disinherit me."
 - D. Grandchildren of deceased child. "My grandfather treated me like his son."

- II. Second Families
 - A. Prenuptial signed but parties throughout marriage ignore the arrangements.
 - B. Children are unaware of what changes have been made ---- changes in beneficiaries.
 - C. Not adequate waivers on 401K plans

- III. Sibling Rivalry
 - A. Mom always liked you best.
 - B. Fighting over possessions --- ten rounds over an \$800 necklace. Legal fees in the tens of thousands.
 - C. Some issues date back to childhood.

- IV. Caretaker roles
 - A. Neighbor steps in where there is a void.
 - B. Housekeeper steps in where there is a void.
 - C. One sibling takes on the caretaking role.

V. Change in circumstances

- A. Parents prior to illness (somewhat excitedly) tell children how much money they will inherit. By the time they die, they have spent tons of money on health care and in home services. Children are incredulous that they are not getting what they were promised.
- B. Sometimes they have given money away to others.

WILL CONTESTS
Initial Procedure
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Outline for Presentation
Estate Planning Techniques to Avoid or Survive Probate Litigation
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- I. Time Lines
- A. File Petition for Approval of Will.
 - B. Court issues a citation in accordance with Probate Rule 6 with directions as to who must be served and by what date.
 - C. Return Date – The citation has a return date by which any one who cares to object to the allowance of the will must file a Notice of Appearance. In accordance with Probate Rule 2 no appearance may be filed after 10:00AM of the return date, except by leave of court or in substitution or addition of attorneys.
 - D. In accordance with Probate Rule 16, an Affidavit of Objections must be filed within 30 days of the Return date. If additional time is required for filing the affidavit, a motion with proper notice should be marked and heard within the 30-day period. Failure to do so can result in the appearance being struck either upon the court's own motion, the motion of the petitioner, the guardian ad litem or any person whose appearance is on file.
 - E. If you need additional time to do some discovery, request additional time and a request to do discovery *within the 30-day period* to either file the affidavit late or file a supplemental affidavit . You must be able to show that there is a bona fide basis for contesting the will. See Hobbs v. Carroll, 34 Mass.App.Ct. 951 (1993).

- F. *Waiver of will by spouse.* Note also that pursuant to G.L. c. 191, §15 a surviving spouse may file ***within six month after the probate of the will*** a writing signed by him or her waiving any provisions that may have been made in it for him or for her, or claiming such portion of the estate of the deceased as he or she is given the right to claim under that section.

- G. *Omitted Children* – Note also that pursuant to G.L. c. 191, §20, if a testator omits to provide in his will for any of his children, whether born before or after the testator’s death, or for the issue of a deceased child, whether born before or after the testator’s death, they shall take the same share of his estate which they would have taken if he had died intestate, unless they have been provided for by the testator in his life time or unless it appears that the omission was intentional and not occasioned by accident or mistake; provided however that no such child or issue shall take any share in any real property in the testator’s estate unless **a claim is filed in the registry of probate by or in behalf of such child or any such issue within one year after the date of the approval of the bond of the executor.** See also G.L. c. 191, §25.

- H. Time Standards – Standing Order 1-06 applies to will contests. If a timely appearance in opposition or objection is filed in a case initially assigned to the 3-6 month Track, the Register shall reassign the case to the 8 Month Track and issue to all parties a Track Assignment Notice. The Register shall also issue a Pre-Trial Notice and Order with an established date for a Pre-Trial Conference unless another future court event has been scheduled. The date for the pre-Trial Conference shall be after the return date, but not more than 45 days after the return date.

II. Standing

- A. Heirs
- B. Spouse
- C. Legatee under a prior will whose legacy is adversely affected.
- D. Creditor who has attached property that would descend to the debtor but for the allowance of the will
- E. A will contest survives the death of a contestant. The contestant’s personal representative should be substituted for the deceased party.
- F. A *guardian ad litem*, if appointed in the discretion of the court on behalf of a minor or incompetent heir, devisee, or legatee. See Unif. Prob. Ct. Prac XXVI; G.L. c. 201, §34; G.L. c. 192, §1C

III. Probate Court Rule 16 - Affidavit of Objections

- A. The objector by affidavit must state specific facts and grounds upon which the objection is based. Probate Court Rule 16.

B. The affidavit must be signed by the objector, not the attorney. Howland v. Cape Cod Bank and Trust Company, 26 Mass. App. Ct. 948, 949 (1988).

C. The affidavit must be signed under oath by a person having direct knowledge of the facts which he verifies, except as otherwise clearly stated in the affidavit itself. Id., i.e., "on information and belief which the objector believes to be true."

D. Grounds

1. Improper execution
2. Lack of testamentary capacity at the time instrument was executed.
3. Undue influence
4. Suitability of Executor

IV. Motions to Strike

A. Appearance.

1. If there is a question as to a person's standing, it should be raised before a hearing on the petition to prove the will by filing a motion to strike the appearance.
2. The motion should be marked for a hearing.

B. Affidavit of Objections

1. "The purposes of revised Rule 16 are two-fold: to screen out frivolous will contests and to provide an expeditious resolution of those will contests which are advanced with serious intent." Baxter v. Grasso, 50 Mass. App. Ct. 692, 694 (Mass. App. Ct. 2001).
2. Must keep in mind "court rules in other areas" such as Mass. R. Civ. P. 9 (b), 365 Mass. 751 (1974), which states, in part, that "[i]n all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity." O'Rourke v. Hunter, 446 Mass. 814, 818 (2006), citing Baxter v. Grasso, 50 Mass. App. Ct. 692, 694, 740 N.E.2d 1048 (2001).
3. A motion to strike an affidavit of objections is similar in some ways to a motion to dismiss a complaint in a civil action under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). See Brogan v.

Brogan, 59 Mass. App. Ct. 398, 399, (2003), citing Wimberly v. Jones, 26 Mass. App. Ct. 944, 946, (1988). The judge considers only the affidavit of objections, accepting all of its facts as true, and may not consider any affidavits or other evidence submitted by the proponent. See Brogan v. Brogan, supra at 400-401, citing Baxter v. Grasso, 50 Mass. App. Ct. 692, 694, 1048 & n.4 (2001). "The filing of counter-affidavits by the proponent in support of [a motion to strike affidavit of objections] is not appropriate". O'Rourke v. Hunter, 446 Mass. 814, 818 (2006).

4. The Appeal Court's suggestion in Brogan v. Brogan, 59 Mass. App. Ct. 398, 796 N.E.2d 850 (2003), that consideration of an affidavit of objections is akin to considerations that arise on summary judgment has been altered by O'Rourke v. Hunter, 446 Mass. 814, 818 (2006), which stated, "[n]ow that motions for summary judgment are available in will contests, applying a summary judgment standard to rule 16 affidavits may cause needless confusion. Judges ruling on rule 16 motions should ensure only that the contestants have met the standards specified in that rule."

V. Motions for Summary Judgment

- A. Probate Court Rule 27B incorporates Mass.R.Civ.P. 56 (summary judgment).
- B. Should be filed after discovery if it can be shown that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
- C. Can be filed by either the petitioner or objector.
- D. At this juncture the moving party may file affidavits in support of motion.
- E. Affidavits may not contradict previously sworn testimony. O'Brien v. Analog Devices, Inc., 34 Mass.App.Ct.905, 906 (1993).

VI. Hearsay in Rule 16 Affidavits

A. Rule

1. As shown above, the affidavit is supposed to either based on personal knowledge of the objector or on information and belief that the objector believes to be true. The objector should state which allegations are based on information and belief.
2. A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." G.L. c. 233, § 65.

3. Even prior to the statute, in a will controversy we have always adhered to the rule that the declarations of a testator are admitted merely to show the state of mind or feelings of the testator. They are evidence of mental acts or conduct and their truth or falsity is not material. Such declarations are not admitted to prove the actual fact of undue influence or fraud. Mahan v. Perkins, 274 Mass. 176, 180 (1931).
4. In terms of capacity, only the witnesses to the will, "the testator's family physician, and experts of skill and experience in the knowledge and treatment of mental diseases, are competent to give their opinions of the testator's mental condition." Old Colony Trust Co. v. Di Cola, 233 Mass. 119, 124, citing Neill v. Brackett, 241 Mass. 534, 539-540, Murphy v. Donovan, 295 Mass. 311, 314-315.

B. Practice

1. Some judges give great leeway in allowing affidavits even if clearly not based on personal knowledge.
2. Attorney-client privilege of draftsman usually waived or allowed in as evidence regardless. You should obtain the draftsperson's entire legal file, including notes from meetings, telephone message slips, calendar and diary entries, emails, memoranda and correspondence.

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**Outline for Presentation
Estate Planning Techniques to Avoid or Survive Probate Litigation
Intake & Questions to Ask Client
April 1, 2008
Massachusetts Bar Association**

1. Who are the "Good Children"? Who are the "Bad Children"? How are you making that determination? What recommendations do you make as a result?
2. Who is your client?
3. How many children do you have? Not as simple as you might think.
4. Informally separated spouses, and the statute you never want to encounter.
5. How can your role as guardian for a disabled elder lead to litigation --- one example.

6. If you and/or the family of the deceased knows that one of the beneficiaries is disabled, say so up front on the Petition --- it can save painful litigation.

7. Turning over financial documents that your client may not want to turn over can save long, drawn out objection to accounts.

8. Undue Influence Red Flags –
 - *Omitted Children
 - *Omitted grandchildren of deceased child
 - *Caretakers
 - *Housekeepers

9. Deeds --- do your clients really own their property as they think they do? Check out their deeds.

10. Competency issues – If you are having a will signed while a client is in the hospital or at end stage of life, take special precautions.

April 11, 2005

33 M.L.W. 1785

Elder Law

When Aging Issues Lead To Family Conflict

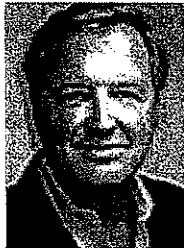


ARLINE KARDASIS

By Arline Kardasis and Rikk Larsen

Why would you suggest mediation to your elder client? Why might you consider mediation for a middle-aged client burdened with fears and frustrations concerning her aging parents and her uncooperative siblings?

You have been practicing law for years. You are proud of your experience, your judgment and your ability to help elderly clients manage complicated family decisions. But are you always as effective as you could be when a decision requires you to look at family interests beyond those of just your client?



RIKK LARSEN

On the surface you may come to a resolution. But is it the best possible resolution for the entire family?

Lisa M. Cukier, a probate lawyer in Boston, says that family litigation "is particularly rough on all members of the family. Often, the client's goal and desired end is unequivocally the right thing to do, but litigation, as a means to reach the outcome, can fracture family relations far into the future."

The simple fact is that decision-making in the aging process rarely involves just one issue. Whether it's an estate planning issue, an elder health care crisis or the transitioning of financial control to the next generation, simply telling your client the "best" way to handle the matter may not lead to the optimal solution.

Why? Because most major life changes involve the whole family and process may be as important as outcome. Perhaps you spoke with each family member or even convened a full family meeting. Was that meeting as effective as it could be?

Cukier says "a family meeting can expose more pain than resolve key issues when there is no professional present to assist the individual members to find a common ground and shared goal."

Or are there members of the family who think they weren't involved enough, feel they weren't heard properly, or harbor quiet grudges and hurt feelings that you will never know about?

No one is suggesting that mediation of complex family issues should supplant the classic attorney/client relationship. Nor is it suggested that mediation is always necessary. If you look out in the world and study families to see how they handle major elder transitions, they generally fall into the following four categories:

- **Graceful Transitions** — These are families that thoughtfully and effectively manage old age and its intrinsic transitions, through targeted planning and effective communication. They get good legal and financial advice. They make reasoned, timely and harmonious decisions about elder activities and the transfer of power to the next generation. Finally, they manage their elders' physical declines with dignity

and respect.

- **Successful Struggles** — Here we see families that have one or two major issues to work through but manage to come to a positive outcome with the support of friends, family and advisors. Whether they have a parent who is resistant to unwelcome changes or an adult child who resents perceived inequities of care giving commitment, their solutions are successful and family members feel comfortable with the final decisions.

- **Quietly Bruised Families** — Here we see families who may be unable to move forward with important decisions and are living with situations that leave an aging parent in peril and increase emotional, financial and safety risks. We also find others who may have accomplished a generational transition but have a sense of discomfort with choices made. Sometimes disagreements are festering under the surface about care giving, housing or inheritance decisions. Some continued family alienation may exist and relationships within the family may have gotten worse instead of better.

- **Litigious Solutions** — Either the threat of litigation or actually going to court seems to be required to get decisions made. Wounds abound even after a guardianship has been awarded or a will contest decided. Often relationships are destroyed forever between some family members.

"Litigation among these families," says Cukier, "can last for years, and can extend beyond the elder's life, leading to litigation over wills, deeds and trusts."

For families in the third and fourth categories, a mediator trained in elder issues can be a significant enhancement to the resolution process. Here the attorney steps away from the center of the decision process and allows a trained neutral who specializes in conflict resolution to help the family navigate the multiple challenges at work in that process.

Most often these challenges include:

- The tensions of dependence versus independence in multiple areas of life — physical, cognitive, social, domestic and financial — where unwelcome changes make for a period of intense decision-making;
- Multiple parties involved in decisions — parents, brothers, sisters, spouses, adult grandchildren, trusted friends and legal, medical and financial advisors — often have trouble communicating with each other in trying to identify, plan for and act on key questions;
- Decision difficulty and conflict may arise from misunderstandings, superstitions, prejudices, poor planning, entrenched relationship patterns, disagreement about what is needed, or a lack of information about what services are available;
- Waiting too long can lead to "crisis mode" decision-making. Without "decision deadlines" like court dates, families facing these challenges often wait too long to have the important conversations that are needed in order to move forward. These delays often decrease options, increase costs, and may put health and safety at risk.

Elder mediators help their clients address their own family dynamics and encourage them to seek out key information and professional service options when needed.

"Family members can have their own attorneys to advise them, either inside or outside of the mediation room, of the ramifications of options [that] are under consideration" adds Cukier.

Family dynamics consist of:

- Emotions. "I never knew I cared so much about that house."

- Myths. "Talking about money subverts parental authority."
 - Superstitions. "Writing a will could hasten my death."
 - Closely held prejudices. "My definition of maturity is 10 years older than whatever age you are now."
 - Entrenched relationships. "I just can't talk to him about anything."
 - Complicated role reversals. Parents become children and children become parents.
 - Passivity. Being overwhelmed with multiple issues causes inertia ("deer in the headlights" mentality).
- Key information and professional service options include:
- Medical workups — from a basic physical exam to advanced diagnostics;
 - Legal steps — wills, trusts, POAs, HCPs;
 - Financial planning — investment strategies, tax planning, monthly budgets, bill paying services, Medicaid planning, real-estate advice and appraisals;
 - Insurance issues — life insurance, medical insurance, long-term care insurance;
 - Living options — range of choices from independent living to nursing homes.

When should you recommend mediation to your clients? Mediation is most likely to be accepted by all parties and is quite likely to achieve a successful outcome when the parties have an ongoing relationship; when they have an interest in resolving their conflict outside of court; and when there is trust between the parties and a willingness to disclose pertinent information.

Why not "do it yourself"? As an advocate, you cannot act as a neutral and it is sometimes difficult to gain the trust of other family members. Only a neutral third party, a mediator, with statutory protection regarding confidentiality, can provide a safe, unbiased setting in which all parties are encouraged to express their needs and work toward a lasting solution.

Describing mediation to your clients means educating them about the benefits of facilitated conversations. Clients need to know that mediation is voluntary and confidential and that the mediator has no interest in the outcome and will not force anyone to agree to anything.

In fact, clients will appreciate knowing that professional ethics require that mediators determine that all parties participate under the principles of informed consent and self determination.

The role of an attorney in mediation is an active one. You will want to prepare your clients to think carefully about their genuine interests and their best alternative to a negotiated solution. You may participate in the mediation sessions as an advocate for your client or you might act as a resource between sessions, and review proposed agreements.

Finally, you might draft interim agreements and/or the final agreements for court filing.

"Attorneys can enhance the progress toward settlement, rather than encumber it, by arming their client with valuable explanations and alternatives so the client can make an informed decision before signing settlement agreements," encourages Cukier.

While elder mediation is a new field that is rapidly emerging as a resource for attorneys and their clients,

mediators are finding that they are adding elder attorneys to their referral lists for clients who have unmet legal needs or who require specific legal advice in order to make informed decisions.

It's a new day for attorneys who want to provide the best possible outcome for clients embroiled in highly emotional family disputes. The goals of preserving family harmony, addressing unresolved elder issues and creating long-lasting resolutions can now be achieved for clients so that lawyers can return to the work of providing legal services unhampered by disruptive family conflict.

Arline Kardasis and Rikk Larsen are founding partners of Elder Decisions, a Lexington-based elder mediation firm. Elder Decisions is an approved mediation provider for the Middlesex, Norfolk and Suffolk divisions of the Probate & Family Court Department.

Lawyers Weekly, Inc., 41 West Street, Boston, Massachusetts, 02111, (800) 444-5297

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"This article originally appeared in Massachusetts Lawyers Weekly on April 11, 2005. Reprinted with permission from Lawyers Weekly."

WHEN GOOD THINGS HAPPEN TO BAD PEOPLE

The Spousal Elective Share

By Maureen E. Curran

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In Massachusetts, in order to protect a surviving spouse, if a testator does not provide for his or her spouse in a will, the surviving spouse may “waive the will” pursuant to G.L. c. 191, §15. Depending on the size of the estate and whether the testator died with issue or kindred, the surviving spouse will receive a certain proportion of the estate. As will be discussed below, applying specific facts to the statute can be a logistical nightmare and will create havoc on the testator’s estate plan. Moreover, as the statute contemplates, there are some spouses who do not warrant protection.

To that end, the statute makes an exception when the couple has been “living apart from each other for justifiable cause.” *See G.L. c. 209, §36.* One can think of a plethora of reasons why couples would be living apart for justifiable cause, yet the statute requires that in order for this statute to take effect a “probate court” must have previously entered a judgment that a person had been deserted or living apart for justifiable cause. This statute was enacted in 1906, long before the enactment in 1978 of the domestic relations abuse prevention statute, G.L. c. 209A. As a recent case that was pending in Suffolk County Probate and Family Court illustrates, a husband who had physically abused his wife and was prevented from living with his wife pursuant to an existing restraining order from a district court was nonetheless allowed to waive his wife’s will. This case also illustrates that when a court attempts to apply the statute to real life circumstances, its lack of clarity can sometimes result in a windfall for undeserving spouses.

The decedent and the surviving spouse were married in 1985. It was a second marriage for the both of them, and the decedent had two children from her first marriage. At the time of their marriage, the decedent was the sole owner of her home where she resided with her two children. The ownership of the property remained in her name alone from the date of purchase in 1981 until her death in 2005. Three and a half years prior to her death, the couple separated. The decedent continued to live in the home with her adult son. The decedent's daughter lived in her own home with the decedent's granddaughter.

Seven months prior to her death, the surviving spouse forced his way into the decedent's home. When she asked him how he gained entrance, he told her that "I used to work with locks years ago." The decedent asked him repeatedly to leave. He left after she gave him a bag of groceries. When the decedent went back to bed, the surviving spouse re-entered the house. The decedent again asked him to leave, and he stated that he was not leaving and this was his house. When the decedent tried to call a friend to assist her in getting the surviving spouse to leave, he became more hostile and abusive. He snatched the phone out of her hand, pushed her into the wall, grabbed her by the neck, and was kicking her with his knee. She finally broke away, ran upstairs, and called 911 on her cell phone.¹

The next day, the decedent obtained an abuse prevention order ordering the surviving spouse not to abuse her, not to contact her, and to immediately leave and stay away from her residence. The order was extended the following week with an expiration date of January 5, 2006. The decedent died while the restraining order was still in force.

¹ The stated facts were taken from the unchallenged affidavit of the decedent when she was applying for a restraining order.

Around the time the abuse occurred, the decedent was diagnosed with melanoma. During her final illness, the decedent without the assistance of an attorney, prepared her last will and testament. She left her entire estate to be distributed "equitably to her children", except that her residence was left solely and exclusively to be held in trust for her granddaughter, two other adjoining properties were left to her daughter, and her automobile was left to her son. The surviving spouse was not mentioned in the will.

During the decedent's final hospitalization, the surviving spouse took her keys and moved back into the decedent's home without her permission. After her death, the surviving spouse continued to live at the residence with his adult stepson and refused to leave or pay any expenses of the property. He even went so far bring his girlfriend to the decedent's home over the strong objection of her two children. When the decedent's daughter filed a Petition to Probate her mother's will, the surviving spouse filed a waiver of the will pursuant to G.L. c. 191, § 15. The decedent's daughter filed an equity complaint to determine the rights of the parties.

Other than the real property, the estate had minimal personal property at a value of approximately \$ 50,000.00, most of which was in an account titled "in trust" for the decedent's daughter. Commenting on the effect of a waiver, 1 Belknap, *Newhall's Settlement of Estates and Fiduciary Law in Massachusetts*, § 20:3 (5th ed. 1994), states:

It is in the havoc which it works on the rest of the will that the devastating effects of the waiver become apparent. Where the testator has set up a complicated framework for distributing the estate, a waiver by the surviving spouse completely upsets it and leaves only shattered fragments to be reassembled by the court.

Here the “shattered fragments” were profound. Instead of providing for her children and grandchildren as she had intended, the court had to wrestle with the bizarre question of just what is meant by the surviving spouse entitlement to \$25,000 plus “*only the income*” during [his] life generated from his one-third share of the real and personal property. Did a one-third income only life estate entitle him to live in the property rent free, as he alleged, or only entitle him to the one-third of the income, if any, derived from the property? If he was entitled to live there, but not rent free as he alleged, how much credit should he be given toward the fair market rental value of the property, and was he still obligated to share in the expenses of the property? Also, did his interest in the property entitle the surviving spouse to invite his girlfriend to live with him over the objection of the decedent’s children? Was the bank account that the decedent had titled in her own name “in trust” for her daughter part of the estate for spousal waiver pursuant to *Sullivan v. Berkin*, 390 Mass. 864 (1984)?

As is often the case, especially in low value estates such as this one, the cost of litigating these issues is prohibitive resulting in a settlement. That may explain the scarcity of appellate cases to help determine just how the courts should interpret this statute. One thing is certain in this case. The decedent’s intent was not upheld. Rather than providing for her children and grandchild as she had wished, her abusive husband lived rent free for a year and a half and walked away with a cash payment.

For some years now, there have been discussions and committees dedicated to the task of revising the spousal elective share statute. Everyone seems to agree that it is in need of revision, but there is no agreement as to how it should be accomplished. At the very least this case illustrates that the legislature should consider expanding G.L. c.

209, § 36 to include prohibiting a surviving spouse who is subject to a G. L. c. 209A restraining order from being able to waive a will. In addition, the statute must be clearer as to what is meant when there is a surviving spouse and issue and the total value of the estate of greater than \$25,000. Normally, a life estate does confer property rights, but what property rights, if any, are conferred by receiving “only the income during [the surviving spouse’s] life of the excess of his or her share of such estate above [\$25,000], the personal property to be held in trust and the real property vested in him or her for life”? G. L. c. 191, § 15. Does the statute dictate that the property, unless it is income property, be sold? In its current form, the rights of the surviving spouse and legatees are unclear.

In revising this statute, it should be kept in mind that there could indeed be “justifiable cause” to prohibit a spouse from waiving a will even though the parties are not legally separated. The surviving spouse in the example noted above should not have been rewarded for his bad acts in violation of the testator’s clear intent to the contrary. In addition, if a spouse is allowed to waive a will, the statute must provide the courts with better guidance as to exactly what benefits should be conferred on the surviving spouse and how the court can best “reassemble” the “shattered fragments” of the testator’s intent.

CHAPTER THREE

Capacity to Sign Wills and Advance Directives

By Lisa M. Cukier

Competent adults can make dispositions of their property by Will and they can designate people to serve as their decision makers under advanced directives such as a Health Care Proxy and a Durable Power of Attorney. All adults are presumed competent by law unless adjudicated incompetent, even if suffering from physical disabilities, advanced age, mental retardation, or mental health issues. An individual, however, may be presumed competent by law, yet be functionally incapable of executing a Will and advanced directives. If a person's functional mental capacity is questionable when she signs these documents, the documents may later be legally attacked. What mental capacity does the law require of the person signing?

In order to execute a Will, a person must have testamentary capacity. This requires the person signing the Will to understand the nature and situation of her property and her relationships with people who she would naturally choose to benefit under her Will. It requires the person signing the Will to have the mental capacity to understand the contents of the Will and how the Will operates upon death. Capacity, however, may vary from day to day. So long as the person signing the Will has testamentary capacity at the moment of signing, the fact that she may lack capacity at other times is irrelevant.

A competent adult can appoint, in advance of incapacity, a surrogate decision maker to later make health care decisions on her behalf in the event of subsequent incapacity pursuant to a Health Care Proxy. The person signing is called the Principal, and the person(s) appointed are called Agents. The Agent(s) become legally recognized decision makers for the Principal. The Health Care Proxy does not take effect until and unless a physician certifies that the Principal has become incapacitated. The document directs health care professionals, family, and friends to honor the Agent's decisions. At the time the Principal signs a Health Care Proxy, the Principal does not necessarily need to have capacity to weigh risks and benefits of the actual types of medical treatments that might potentially be needed in the future. It is sufficient that the Principal have mental capacity to understand the effect of designating an Agent to weigh risks and benefits and make health care decisions in her stead should she later become incapacitated.

A competent adult can also sign a Durable Power of Attorney as part of an estate plan. A Durable Power of Attorney is a document that appoints an Attorney-In-Fact to make financial decisions on behalf of the Principal. Depending on the language in the document, financial decision making authority can be granted immediately upon signing the document, or it can take effect upon the subsequent incapacity of the Principal. In order to sign a Durable Power of Attorney, the Principal must have enough mental capacity to understand and appreciate what it means to designate another person to handle her finances on her behalf. It requires that the Principal, at the time of signing, understand the nature of her financial affairs and understand what it means to relinquish control of management of those finances to the Attorney-In-Fact.

Unfortunately, some people do not plan in advance to execute Wills and advanced directives. Sometimes people delay execution of Wills and advanced directives until they are already of questionable mental capacity. When this happens, disputes might later arise in connection with the Principal's mental capacity to sign these important documents.

If signing a Will or an advanced directive occurs at a time when, or under circumstances in which mental capacity is



questionable, it is best practice to obtain a written narrative from a physician that speaks to the issue of the Principal's present capacity to execute the particular estate planning and advance directive documents. Since competence can vary from day to day and indeed from moment to moment, it is critical in many cases for a physician to document proof of capacity to execute these documents at the same time the documents are executed. This will help to establish the Principal's then capacity if the documents are later attacked or questioned at a time when the Principal lacks capacity.

January 2008

AS SEEN IN...

BOSTON SPIRIT

Whose Hands Hold Your Parents' Wallets? —Financial Exploitation—

By Lisa M. Cukier, Esq.

In 2006, the Massachusetts Appeals Court ruled against family members, allowing an elderly man's friend to inherit his estate to the exclusion of the elder's own family. The friend had already taken control of much of the dying elder's assets during the elder's life. When the friend inherited everything, the elder's family sued arguing that the friend exercised undue influence, and that he should not be allowed to benefit himself. The Court disagreed with the family and let the friend inherit all. The family was left out.



In another case one year later, in 2007, the Massachusetts Appeals Court went the other way, ruling against an elder's friend/companion. The Court held that the friend/companion ripped-off the elder by taking control of all his assets for the friend's own benefit. The court held that the friend/companion had exercised undue influence and financially exploited the elder, by transferring the elder's assets to trust which would benefit himself.

There Goes My Inheritance!

Unfortunately it is not uncommon for friends and home health companions to exploit elders for their money and property. All too often, people step into an elder's life in their final years, initially offering help, but later insidiously swaying elders' thoughts about family members and creating fear about being placed in a nursing home or about the government taking the elders' assets. These folks who may have had good intentions at first, later insinuate themselves into others' estate plans and convince elders to gift them money or deed real estate over to themselves. Sometimes, elders feel dependent and weakened and are manipulated late in life to change their estate plans or to make gifts or sign deeds that leave out family members and long-term friends.

Sometimes, parents are financially exploited by one or two of their own kids. Other siblings later discover that they were left out. Indeed, the late Manhattan philanthropist, Brooke Astor, seems to have been pilfered by her own son. According to the indictment in the Astor case, Ms. Astor's son benefited himself from his mother's assets by exploiting his authority under a Durable Power of Attorney. He took her assets at a time when Ms. Astor had questionable mental capacity.

Reverse The Transaction!

Massachusetts law provides a mechanism for invalidating Wills and Deeds that are the product of undue influence or that were executed when a person lacked mental capacity. If the abuse is discovered while the elder