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MSBA PROBATE & TRUST LAW SECTION E-NEWSLETTER

April 2020

Call for Submissions

We are always looking for attorneys to write brief articles for this newsletter. Articles can focus on any issues relevant to probate and trust law. This newsletter is distributed to the Probate and Trust Law Section membership, which consists of approximately 1,088 practitioners. Writing for the newsletter is a great way to share your knowledge and expertise with your colleagues.

If you are interested in submitting an article, please contact Kiley Henry (KEH1@ntrs.com) or Jennifer Colich (colich.jennifer@dorsey.com) with your idea.

Please visit the Section's website for ideas and to see the various articles that have been written in the past.

Best Regards,
Kiley Henry & Jennifer Colich
Probate & Trust Newsletter Editors

Upcoming Events and CLE Programs

- **Greater MN Probate & Trust Study Group Conference Call**
  - Wednesday, April 29, 2020 at 9:00 a.m. (every other Wednesday)
  - Call-in Number: (877) 226-9607 Passcode: 9295091072
  - Contact Patrick Lowther (pat@lawmanpal.com) with any questions or to join the group

- **MSBA Probate & Trust Law Section Meeting**
  - Thursday, May 21, 2020 at 3:30 p.m.
  - Location: MSBA Office in City Center, Minneapolis (tentatively scheduled to be held in-person, however, due to the current crisis, this meeting may be held via conference call)
  - Call-in Number: (877) 226-9607 Passcode: 9295091072

- **CLEs**
  - RCBA, April 23, 2020: WEBINAR- Ethics and Technology: Practical Tips for Your Practice
  - MSBA, April 23, 2020: WEBINAR | Emerging Issues in Long-Term Care

- MSBA, April 28, 2020: WEBINAR | Impact of COVID-19 on Certain Minnesota District Courts and Court of Appeals - Moving to Remote Hearings
- RCBA, April 29, 2020: WEBINAR-Mental Health in the Legal Profession - Real Solutions to Real Issues
- MSBA, May 7, 2020: WEBINAR | Determining Resident Trust Status in the Aftermath of Kaestner and Fielding
- HCBA, May 8, 2020: WEBINAR | Ethics, Bias and Artificial Intelligence for Lawyers
- RCBA, May 14, 2020: WEBINAR-To Modify or not to Modify an Irrevocable Trust is not the Question, but How to do it Right Is...
- MSBA, June 18, 2020: Medical Assistance for Home and Community - Based Services
- MinnesotaCLE, July 28, 2020: Understanding Trusts: Practical Advice for Creating and Administering a Trust

2020 Probate & Trust Law Section Conference

As a reminder, the 2020 Probate & Trust Law Section Conference has been rescheduled from Monday, June 8th and Tuesday, June 9th to Friday, October 16th and Saturday, October 17th at the St. Paul RiverCentre.

Minnesota Enacts "Harmless Error" Rule Relaxing Formalities That Govern the Execution of Wills

By: Brian Dillon and Amy Erickson, Lathrop GPM LLP

On April 15, 2020, Minnesota became the latest state to enact the "Harmless Error" rule into law.[1] The new law relaxes traditional formalities that govern the execution of wills and other will modifications created between March 13, 2020 and February 15, 2021. The law effectively recognizes that social distancing during the COVID-19 pandemic could make it difficult to satisfy traditional execution formalities, and it empowers courts to recognize wills and will modifications as valid if there is "clear and convincing evidence" the testator intended the document to be controlling. While the new law is a well-intentioned response to the COVID-19 crisis, it is not difficult to imagine future disputes over wills and will modifications executed without traditional formalities during these uncertain times.

Traditional Will Signing Formalities

In order to be valid under Minnesota law before the Harmless Error rule was adopted, a will or will modification had to be: 1) in writing; 2) signed by the testator or another individual at the testator's direction; and 3) signed by two witnesses who could verify they witnessed the testator's signature. These formalities had several purposes, including to prevent fraud and abuse, and to ensure the testator understood the importance and finality of the document. For obvious reasons, social distancing during the COVID-19 pandemic will make it difficult for

testators to meet all of these requirements, and particularly the requirement that two witnesses sign and verify they witnessed the testator's signature.

The Harmless Error Rule

Under the new Harmless Error rule, Minnesota courts are empowered to recognize a will or will modification as valid as long as there is "clear and convincing" evidence the testator intended the document to be controlling, even if it fails to meet one of the traditional requirements. The law is immediately effective and applies to wills and will modifications executed between March 13, 2020 and February 15, 2021.

How Will the Harmless Error Rule Be Applied in Practice?

It remains to be seen how Minnesota courts will apply the Harmless Error rule in practice, particularly as to documents created during a time when government officials encouraged people to practice social distancing. At this stage, however, a few notable trends have emerged in other states that have adopted the rule, which allow us to make a few predictions:

1. A document that does not adhere to traditional formalities is more likely to be challenged by a beneficiary who is disinherited or unhappy with the document. The burden of proof will be on the proponent of the document to demonstrate, by clear and convincing evidence, that the testator intended the document to be controlling.
2. The clear and convincing evidence standard is a high bar for anyone seeking to validate a document that does not adhere to traditional formalities. Accordingly, testators should adhere to traditional formalities whenever possible.
3. When adhering to the traditional formalities is not possible, a testator or the proponents of a document should develop as much evidence as they can to demonstrate the testator intended the document to be controlling. Although not required, best practice might include documenting the reason why traditional formalities could not be followed and, perhaps, why the testator had to create the document at that time.
4. Courts are more likely to invoke the Harmless Error rule to validate a document when deviations from traditional execution formalities are minor — e.g., one witness signature instead of two; no witness signatures, but two individuals who testify they watched the testator sign the document in their presence). The more deviation there is, the more challenging it will be for proponents of the document.

As noted above, the Harmless Error rule is a well-intentioned response to the COVID-19 pandemic, but wills and will modifications permitted under the rule are likely to be the subject of disputes down the road. In order to avoid these disputes, individuals seeking to execute new wills or will modifications who cannot adhere to traditional execution formalities should proceed with caution and are strongly encouraged to consult with an attorney to ensure their testamentary intentions will be carried out.

[1] Other states that have adopted the Harmless Error rule include: California, Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah and Virginia.

Elder Law Case Law Update

By: David Rephan[1], Chestnut Cambronne PA

I. MEDICAL ASSISTANCE

a. Minnesota

***Appellant v. Wright County Human Services*, Decision of State Agency on Appeal, Decided April 24, 2019.**

Attorney Jill Adkins brought this successful appeal against Wright County for its denying Medical Assistance nursing home benefits for her client. In 1974, as part of her divorce, Appellant received a partial interest in her homestead. Appellant's long-time domestic partner lived together with Appellant in her homestead for 37 years. In 2017, after Appellant received the remaining interest in the homestead pursuant to her divorce, Appellant and her partner asked an attorney to add the partner to the title as a joint owner. Appellant did not need care at the time and did not anticipate needing care. Appellant's partner contributed to the expenses and upkeep of the property since she began living in the homestead in 1980 and because she was younger, did much of the physical work in the home and the surrounding six acres. Wright County imposed a penalty for an uncompensated transfer of half the value of the home. On appeal, the human services judge concluded the gift of the half-interest in the homestead was for "other valuable consideration," which is one of the transfer penalty exceptions for the transfer of an interest in a homestead, and reversed the denial of Medical Assistance by Wright County.

***In Re the Matter of: Esther Schmalz*, 2019 WL 3770834 (Minn. App. 2019) Review granted October 29, 2019**

Attorney Laura Zdychnec brought this appeal against the Commissioner of Minnesota DHS. DHS determined Esther Schmalz was ineligible for Medical-Assistance long-term care ("MA-LTC") benefits due to the life estate interest owned by Esther, the "institutionalized spouse", and her husband, Marvin Schmalz,

[1] *The author thanks Ryan M. Prochaska, Mark G. Wermerskirchen, Paul Nguyen and Nick Wolfson for their invaluable assistance in helping prepare these materials.*

the "community spouse". The district court reversed this determination and the Court of Appeals of Minnesota affirmed the district's court decision.

Between 1987 and 2002, Esther and Marvin sold three parcels of farm land to their sons reserving a life-estate interest for themselves in each parcel. In 2015, Esther entered a long-term care facility while Marvin continued to reside in the homestead property. In 2017, Esther applied for MA-LTC benefits in Renville County. The county determined the couple's assets included their life-estate interests in the three conveyed farmland parcels. Esther appealed to the Commissioner of DHS, challenging this determination. After an evidentiary hearing with a human services judge (HSJ), the Commissioner adopted the order concluding that the life-estate interests would not count toward Esther's asset limit for MA-LTC eligibility because of an exemption under Minn. Stat. § 256B.056, subd. 4a.

The case was remanded back to Renville County, who determined that Esther's life-estate interests were not counted, but Marvin's life-estate interests were counted. Esther appealed. The HSJ and Commissioner affirmed the county's decision and denied Esther's application for MA-LTC benefits. Esther appealed to the district court, which reversed the decision and concluded the language of Minn. Stat § 256B.056, subd. 4, includes Marvin's life-estate interests as well. The case was appealed to the Court of Appeals of Minnesota.

Before the Court, the Commissioner argued that the term "individual" in Minn. Stat § 256B.056, subd. 4, only pertained to a "medical-assistance applicant," and did not cover the community spouse or non-applicants. The Commissioner further argued that, from a policy perspective, including the community spouse in the definition would "allow the community spouse to retain an unlimited amount of real property while taxpayers fund MA-LTC benefits for the institutionalized spouse." Esther argued the term "individual" included both the institutionalized and community spouse.

The Court ruled for Esther, interpreting the Minnesota Legislature's decision to use the word "individual" instead of a more restrictive phrasing as the legislature's intent to not limit the reach of Minn. Stat. § 256B.056, subd. 4a, to only medical-assistance applicants. The Court concluded the unambiguous language of Minn. Stat. § 256B.056, subd. 4a, provides that the life estate of both the community spouse and the institutionalized spouse, barring an intent to sell, is deemed not salable and is therefore excluded from the institutionalized spouse's asset limit.

b. Other Jurisdictions

***Stewart v. Azar,* 366 F.Supp.3d 125 (D.D.C. 2019) (Appealed filed *Ronnie Stewart, et al v. Alex Azar, II, et al,* D.C. Cir., No. 19-5095, April 11, 2019) ("*Stewart II*")**

This is one of several state cases challenging Medicaid Waiver amendments. In this case, the D.C. District Court held the reapproval of Kentucky HEALTH, a waiver program created by Kentucky to comprehensively transform its Medicaid program, was both contrary to the Medicaid Act and arbitrary and capricious.

Stewart v. Azar is the second round of class-action litigation regarding a § 1115 approval of Kentucky HEALTH. In a prior decision, *Stewart v. Azar*, 313 F.Supp.3d 237, 243 (D.D.C. 2018) ("*Stewart I*"), the Court found the "Secretary never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens" and thus "promote a central objective of the Medicaid Act." The Court vacated the approval and remanded the program to Department of Health and Human Services ("HHS") for further review. Following the remand and an additional notice-and-comment period, the HHS Secretary reapproved the program on the basis that, if Kentucky HEALTH was not approved, more people would lose coverage than if the program was approved. The class plaintiffs again challenged this reapproval, maintaining the Secretary had still not adequately considered Kentucky HEALTH's likelihood to cause significant coverage loss.

The class plaintiffs' main argument was the Secretary's reapproval of Kentucky HEALTH was arbitrary and capricious primarily because it did not adequately consider whether the § 1115 waiver promotes the objectives of the Medicaid Act. The Court looked at the statutory scheme of the Medicaid Act and the Affordable Health Care Act. It also reexamined its earlier decision in *Stewart I*, as well as the HHS and its Secretary's actions following the remand. The Court found that under § 1396-1 of the Medicaid Act, the central objective of the Act is to furnish medical assistance to the populations covered by the Act. Therefore, under the § 1115 waiver, the Secretary must adequately consider any program's implications for such assistance or coverage.

Next, the Court reviewed the Secretary's analysis of the objectives of the Medicaid Act in reapproving Kentucky HEALTH. It found the Secretary failed to adequately analyze Kentucky HEALTH in terms of the Medicaid Act's objectives and the consequences of reapproval. Therefore, the Court once again vacated the reapproval and remanded to the HHS. This decision is being appealed.

II. SPECIAL NEEDS TRUSTS

a. Minnesota

Pfoser v. Harpstead*, 939 N.W.2d 298 (Minn. Ct. App. 2020), *review granted (Minn. Mar. 25, 2020)

Attorney Laurie Hanson, on behalf of David Pfoser, challenged the Minnesota DHS's determination that the transfer of assets by individuals age 65 or older into pooled special needs trusts are uncompensated transfers for Medical Assistance eligibility because the transfer does not constitute "fair market value." The district court held that the DHS's decision was arbitrary and capricious and unsupported by substantial evidence, and that David Pfoser received fair market value for the transferred assets in the form of an "immediate vested equitable interest" in the trust assets, and the DHS appealed this decision.

The court of appeals affirmed the district court's decision, holding that when a medical assistance recipient challenges a transfer penalty for having transferred assets into a pooled special-needs trust, DHS must make a factual determination, based on the evidence, whether a "satisfactory showing" was made that the recipient "intended to dispose of the assets either at fair market value or for other valuable consideration." In making that determination, DHS must consider evidence of the asset's fair market value at the time of the transfer and evidence of other valuable consideration received by the recipient before, during, and after the transfer into the pooled special-needs trust.

First, DHS committed an error of law by limiting its fact-finding to the time the transfer was made. DHS should have considered compensation Pfoser received *after* the transfer into the pooled special-needs trust. Second, DHS failed to consider evidence that Pfoser received "other valuable consideration," which included a list of one-time and ongoing expenditures for his benefit that medical assistance would not cover. The court of appeals also held that characterizing the pooled special-needs trust as an irrevocable trust did not automatically lead to a transfer penalty. A per se rule against transferring assets into an irrevocable trust "is inconsistent with the fact-specific determination required by the asset-transfer exception." Finally, DHS erred when it failed to consider the value of Pfoser's equitable interest in trust principal.

In sum, the record showed Pfoser intended to receive other valuable consideration in exchange for his transfer of funds into the pooled special-needs trust.

III. FINANCIAL EXPLOITATION

***Reece v. Wells Fargo Bank, N.A.*, 2019 WL 2612745 (Ca. Ct. App. 2019)**

The Court of Appeals of California held, in part, that a reverse mortgage lender may be liable for financial abuse of an elderly borrower when the lender failed to provide the mortgagor with the statutory required counseling.

The issue surrounding the liability of a reverse mortgage lender for failure to meet the counseling requirement is fairly new. Some jurisdictions have stated the failure to meet

the counseling requirement does not in itself provide the mortgagor with a private cause of action, so this decision provides a possible solution to this problem.

In the fall of 2008, Stella, an 82-year-old homeowner, entered into a reverse mortgage agreement with Wells Fargo Bank. At the time, she had substantial physical and mental limitations that restricted her ability to read, understand, and carry out normal activities. It is alleged that Wells Fargo knew or should have known that Stella had limited capacity. Furthermore, when she entered into the reverse mortgage agreement, federal regulations required that she receive counseling from a HUD qualified counseling agency that was not employed by, associated with, or compensated by Wells Fargo, as the lender. However, Wells Fargo failed to provide Stella with a list of qualified counseling agencies, and instead sent John Couste, a person employed by, associated with, or compensated by Wells Fargo, to provide counseling. Further, Couste did not meet other qualifications for a reverse mortgage counselor and had not completed the mandatory HUD education course. It was alleged that Stella felt pressure and unduly influenced to take out the reverse mortgage, and, at the time of the agreement, was unable to manage her financial resources and resist fraud or undue influence.

Though federal regulations and statutes do specifically provide a person with a private cause of action when a lender violates this requirement, the California Court of Appeals found that an individual may have a cause of action for elder financial abuse if the lender fails to meet this requirement. The Court held that, based on the circumstances, the allegation that Wells Fargo intentionally provided improper and deficient counseling with the intent to defraud Stella was sufficient to allege a cause of action for elder financial abuse.

IV. VETERANS ADMINISTRATION

***Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019)**

The Federal Circuit Court of Appeals, interpreting Congressional intent, overruled *Haas v. Peake* and held that those who served in the 12 nautical mile territorial sea of the Republic of Vietnam are entitled to the Agent Orange Act's presumption of service.

Procopio v. Wilke is a landmark case that finally granted "blue water" Vietnam veterans the same presumption of service enjoyed by Vietnam veterans that served on land and in "brown water."

The case came before the Federal Circuit Court of Appeals after a decision by the Court of Appeals for Veterans Claims denying Alfred Procopio, Jr. service connection compensation benefits for prostate cancer and diabetes mellitus as a result of exposure to an herbicide agent, Agent Orange, during his Vietnam War era service in the United States Navy. The Court of Appeals for Veterans Claims decision resulted from a 1993 Department of Veterans Affairs regulation, 38 C.F.R. § 3.307(a)(6) (1993), that stated "'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam."

Furthermore, in an earlier case, *Haas v. Peake*, the Federal Circuit Court of Appeals upheld the agency's regulation.

The Federal Circuit Court of Appeals reexamined its earlier decision and again looked at 38 C.F.R. § 3.307(a)(6) (1993) and the Agent Orange Act. However, unlike its earlier decision in *Hass*, the Court found that the Agent Orange Act is unambiguous. Further, the Court stated that the earlier *Haas* court "went astray when it found ambiguity in § 1116 based on 'competing methods of defining the reaches of a sovereign nation' and the government's urged distinction between Regulations 311 and 313."

While no judge on the Court's panel found that the veteran's benefits should be denied, the concurring Judge opined that the Agent Orange Act is ambiguous, but the VA's interpretation is unreasonable. However, due to the passing of the Blue Water Navy Vietnam Veterans Act of 2019, Congress unambiguously announced that those who served offshore in Vietnam were entitled to the Agent Orange Act's presumption of service.

V. MEDICARE

***Bagnall v. Sebelius* and *Alexander v. Azar* (D. Conn., 3:11-CV-01703)**
***Alexander v. Azar*, 3:11-CV-1703 (MPS), 2020 WL 1430089 (D. Conn. Mar. 24, 2020)**

This case involved a lawsuit over the Medicare "observation" status issue that has long plagued seniors and persons with disabilities. Judge Michael P. Shea of the U.S. District Court of Connecticut recently summarized the history of the litigation as follows:

> This case is now approaching its eighth year. It has been to the Circuit and back, through two motions to dismiss, through two lengthy periods of discovery, and survived two rounds of summary judgment. I have certified a class, reconsidered that decision, and declined to decertify the class. All of the named Plaintiffs who were alive when the case was filed have since passed away. The time for motion practice is over. I will hold a telephonic status conference on April 3, 2019 at 11:00 AM to choose a trial date. I will not move that date once it is established.

Alexander v. Azar, 370 F.Supp.3d 302 (D. Conn. 2019). The case was finally argued on August 12, 2019. Judge Shea held that "class members who were initially admitted as inpatients by a physician but whose status during their stay was changed to observation, have demonstrated that the Secretary is violating their due process rights." However, class members who were initially placed on observation status and never admitted as inpatients failed to prove their due process claims because.

Judge Shea ordered the Secretary to establish a procedure that will allow the following modified class of Medicare beneficiaries to challenge decisions by hospitals to place them on observation status:

> All Medicare beneficiaries who, on or after January 1, 2009: (1) have been or will have been formally admitted as a hospital inpatient, (2) have been or

will have been subsequently reclassified as an outpatient receiving "observation services"; (3) have received or will have received an initial determination or Medicare Outpatient Observation Notice (MOON) indicating that the observation services are not covered under Medicare Part A; and (4) either (a) were not enrolled in Part B coverage at the time of their hospitalization; or (b) stayed at the hospital for three or more consecutive days but were designated as inpatients for fewer than three days, unless more than 30 days has passed after the hospital stay without the beneficiary's having been admitted to a skilled nursing facility. Medicare beneficiaries who meet the requirements of the foregoing sentence but who pursued an administrative appeal and received a final decision of the Secretary before September 4, 2011, are excluded from this definition.

VI. MISCELLANEOUS

***Brown v. District of Columbia*, 928 F.3d 1070 (D.C. 2019)**

In this class action case, a D.C. Circuit Court of Appeals held that D.C. bore the burden of proving the unreasonableness of the requested accommodation once the disabled individual had shown the District's treatment professionals determined that community placement was appropriate and transfer from institutional care to a less restrictive setting was not opposed by the affected individual.

***Anderson v. Ghaly*, 2019 WL 3227461(9th Cir. 2019)**
***Anderson v. Ghaly*, 15-CV-05120-HSG, 2020 WL 225343 (N.D. Cal. Jan. 15, 2020)**

The Ninth Circuit Court of Appeals, applying the factors articulated in *Blessing v. Freestone*, held that the Federal Nursing Home Reform Act's (FNHRA) provision for hearings on appeals of transfers and discharges of nursing home residents gives rise to a statutory right enforceable under section 1983, which includes the opportunity for redress following a favorable appeal decision. The Ninth Circuit remanded the case for further proceedings because the complaint did not allege a plausible violation of the FNHRA appeals provision.

On remand, the district court denied the defendant's motion to dismiss the first amended complaint. First, the district court held that each plaintiff had Article III standing. The court found that each plaintiff's "inability to return to his desired home and engage in familiar interactions constitute[d] a concrete and particularized injury-in-fact," The court also found that the plaintiffs' injuries were fairly traceable to the defendant's conduct; "[a]ccording to Plaintiffs, if Defendant were to require either [the Department of Health Care Services] or [the California Department of Public Health] to enforce readmission orders by, for example, withholding funds from noncompliant nursing facilities, the Resident Plaintiffs could return home." Finally, the court found that the plaintiffs' harms would be redressed by their requested injunction, which would allow the plaintiffs to return to their previous nursing homes.

In response to the defendant's failure to state a claim argument, the court found in favor of the plaintiffs because the amended complaint "alleged that there is no state-provided process capable of enforcing DHCS's readmission decision, whether it be through a state agency or through the state judicial system."

***Alexander v. Harris*, WL 2147281 (2d Cir. 2019)**
***Alexander v. Harris*, 278 So. 3d 721 (Fla. Dist. Ct. App. 2019), *reh'g denied* (Aug. 26, 2019)**

The Second Circuit Court of Appeals held that the spendthrift provisions of a special needs trust were unenforceable against a valid support order, and, although the trial court could not compel the trustee to make distributions to or for the beneficiary, any discretionary distributions that were made by the trustee were subject to a continuing garnishment for payment of child support regardless of whether the distributions were made to the beneficiary or directly to a third party.

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