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ESTATE AND TRUST LITIGATION DIGEST

Summary of 2012 New Jersey
Estate and Trust Litigation
Published and Unpublished Court Opinions

Prepared by Ronald P. Colicchio, Esq.

Office Locations

Princeton
750 College Road East, Suite 100
Princeton, NJ 08540-6617
(609)452-3100 Fax (609)452-3122

Newark
One Riverfront Plaza, Suite 1520
Newark, NJ 07102-5426
(973)286-6700 Fax (973)286-6800

New York
555 Fifth Avenue, Suite 1700
New York, NY 10017
(212)980-7200 Fax (212)980-7209

Additional Office Locations

Philadelphia
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
(215)972-7777 Fax (215)972-7725

Harrisburg
Penn National Insurance Plaza
2 North Second Street, 7th Floor
Harrisburg, PA 17101-1619
(717)257-7500 Fax (717)238-4622

Pittsburgh
One PPG Place, Suite 3010
Pittsburgh, PA 15222
(412)209-2500 Fax (412)209-2570

Chesterbrook
1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087-5569
(610)251-5050 Fax (610)651-5930

Wilmington
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899
(302)421-6800 Fax (302)421-6813

Boston
131 Dartmouth Street, Suite 501
Boston, MA 02116
(617)723-3300 Fax (617)723-4151

Baltimore
Lockwood Place
500 East Pratt Street, Suite 900
Baltimore, MD 21202-3171
(410)332-8600 Fax (410)332-8862

Washington, DC
1919 Pennsylvania Avenue, N.W., Suite 550
Washington, DC 20006-3434
(202)333-8800 Fax (202)337-6065

Attorneys of the Personal Wealth, Estates and Trusts Department

David R. Berk, Pittsburgh, PA
(412)209-2511
dberk@saul.com

Ross E. Bruch, Philadelphia, PA
(215)972-1898
rbruch@saul.com

Ronald P. Colicchio, Princeton, NJ
(609)452-3133
rcolicchio@saul.com

Russell J. Fishkind, Princeton, NJ
(609)452-5043
rfishkind@saul.com

Ryan R. Gager, Philadelphia, PA
(215)972-8387
rgager@saul.com

Jeffrey S. Glaser, Baltimore, MD
(410)332-8712
jglaser@saul.com

Nancy S. Hearne, Princeton, NJ
(609)452-3156
nhearne@saul.com

Maurice D. Lee, III, Philadelphia, PA
(215)972-7746
mlee@saul.com

Robert H. Louis, Philadelphia, PA
(215)972-7155
rlouis@saul.com

John F. Meigs, Philadelphia, PA
(215)972-7812
jmeigs@saul.com

Eileen D. O'Brien, Baltimore, MD
(410)332-8703
eobrien@saul.com

Cathleen C. Opel, Baltimore, MD
(410)332-8615
copel@saul.com

Sheldon S. Satisky, Baltimore, MD
(410)332-8732
ssatisky@saul.com

Nancy A. Slowe, Princeton, NJ
(609)452-3132
nslowe@saul.com

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Accounting Action – Denial of Attorneys' Fees

In the Matter of the Estate of Lillian Schmidt, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0210-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County. Before Judges Grall, Alvarez and Skillman.

Plaintiff appeals the denial of her request for counsel fees and from the lower Court's approval of the accounting filed by Decedent's attorney in fact.

Decedent was the aunt of Plaintiff and Defendant. Prior to her death, Decedent appointed her nephew, the Defendant, as her attorney in fact, and executed a Will leaving her entire estate to Defendant's mother. Defendant's mother predeceased the Decedent and therefore Defendant became Decedent's sole beneficiary.

Plaintiff, a niece of the Decedent, filed suit requesting an accounting of Defendant's actions under Decedent's Power of Attorney and as administrator of her Estate. Plaintiff accepted the accounting as to the administration of the Estate but questioned Defendant's conduct under the Power of Attorney. A trial ensued and the Court found that Defendant did not keep proper records and often made payments out to cash, but most of the funds were used for Decedent's benefit. The Court ordered $8,036 which Defendant had yet to account for put back into Decedent's account. Plaintiff then sought attorneys' fees out of a fund in Court, which the Court denied, as Plaintiff's application did not serve to create, protect or preserve the Estate as Defendant is the sole beneficiary.

The decision was upheld on appeal, with the Appellate Court finding that the lower Court made credibility determinations which were adequately supported by the record and that Plaintiff's attorneys' fees were properly denied as the Estate was not enhanced by years of litigation, as Defendant is the sole beneficiary of the Estate.

Accounting Action – Failure to Abide by Settlement Agreement and Sanctions

Frank A. Marinaccio v. Rosemarie Grgec and Suzanne Dapkins, jointly, 2012 N.J. Super. Unpub. ____ (Docket No.: A-3962-10T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Somerset County. Before Judges Grall, Alvarez and Skillman.

Plaintiff appeals form a final order entered by the Chancery Division confirming an umpire's determination pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act (the APDRA) that Plaintiff violated the terms of the Settlement Agreement and the umpire's award of legal fees to Defendants.

Plaintiff acted as trustee of testamentary trusts established by the parties' aunt and parents which ultimately benefited the parties in equal shares. After a Complaint was filed by Plaintiff's sisters seeking an accounting and distribution from the trusts, the parties agreed to mediate the matter and enter into a final Settlement Agreement. In this Agreement, Plaintiff agreed to sell

their parents' residence and pay to each of his sisters, the Defendants, $250,000, in recognition of their respective shares in the trusts. They also agreed that all disputes pertaining to the settlement would be resolved through arbitration under the APDRA.

Six months after the settlement, Defendants moved under the APDRA before the umpire to declare Plaintiff in violation of the Settlement Agreement, wherein he agreed to list and market for sale their parents' residence, and to keep the Defendants informed on the listing of the property and any offers. Defendants discovered that Plaintiff received an offer on the property well above the amount required to be paid to the Defendants pursuant to the Agreement. In response, Plaintiff sought to vacate the settlement. Plaintiff's request to vacate the settlement was dismissed, and affirmed on appeal, as Plaintiff failed to offer newly discovered evidence which would probably alter the judgment and which by due diligence could not have been discovered in time to move for a new trial. Plaintiff claimed that he found documents in his basement that were grounds to vacate the settlement. The umpire found that plaintiff did not make diligent inquiry prior to entering into the settlement, and thus, these documents are not newly discovered evidence pursuant to the rule. The umpire also found that Plaintiff violated the terms of the Settlement Agreement and ordered him to pay $15,000 of Defendants' attorneys' fees. The trial Court upheld these findings.

On appeal, the Appellate Division agreed with the trial Court that Plaintiff failed to establish newly discovered evidence to vacate the Settlement Agreement, and the award of fees was proper in light of Plaintiff's obligations under the Agreement.

Business Planning – Beneficiary Designation Naming Corporation Effective After Corporate Buy-Out of Decedent's Share in Business

IVF Investment Company, LLC v. Estate of Jeryl G. Natofsky, MD and US Financial Life Insurance Co., 2012 N.J. Super. Unpub. ____ (Docket No.: A-4136-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Somerset County. Before Judges Carchman, Baxter and Maven.

Defendant appeals from the trial Court's decision to award the proceeds of insurance to Plaintiff Corporation, claiming the Court failed to properly conduct a summary proceeding under Rule 4:67, incorrectly determined the identity of the insurance policy beneficiary, and improperly excluded witness testimony before making a decision.

Dr. Natofsky joined FGC, a corporation providing medical services, as a shareholder, and entered into a shareholder's agreement with the other shareholders. The shareholders of FGC created an LLC, IVF Investment, which was the beneficiary of insurance policies held on the lives of the shareholders, intended to fund a buy-out of their shares upon death. The Shareholder's Agreement authorized FGC to purchase life insurance on the lives of each shareholder. In 2005, FGC and IVF Investment purchased a $3.0 million policy on the life of Dr. Natofsky, and paid all premiums. The designated beneficiary, which was never changed, was IVF Investment.

In February of 2010, Dr. Natofsky withdrew as a shareholder of FGC, negotiating a buy-out and severance package, and signed a mutual release. At the time, FGC inquired as to whether Dr. Natofsky wanted to continue the policy and pay the premiums, he did not. The parties then entered into the buy-out agreement and exchanged mutual releases. Dr. Natofsky agreed that he was not entitled to any other compensation or benefits other than the money which he was to receive under the agreement. Dr. Natofsky died soon thereafter and IVF Investment attempted to collect the insurance proceeds. So did the Estate. The insurance company refused to pay until the dispute was litigated, so IVF Investment filed suit and the Estate answered, seeking a jury trial.

IVF Investment filed a motion to proceed in a summary manner on the issue of the owner and beneficiary of the policy, and the trial Court agreed. After reviewing the matter on the papers, the Court ruled that IVF Investment was the beneficiary of the policy and ordered the proceeds paid to IVF. The Estate appealed.

The Appellate Division upheld the lower Court's decision, finding it was proper to proceed summarily and that the only beneficiary designated was IVF Investment, that IVF had an insurable interest at the time the policy was created, and that their was no error in excluding certain testimony which was hearsay or not relevant to the issue as only a change in beneficiary filed in accordance with the insurance company's procedures would have effectuated a change in beneficiary. The insurance policy was never intended to benefit Dr. Natofsky, and the buy-out agreement did not alter the beneficiary status on the policy.

Estate Administration - Accounting Upheld After Buy-Out of Decedent's Shares in a Closely Held Business Were Deposited Into Estate and Made Subject to Expenses

In the Matter of the Estate of Dominic Denora, 2012 N.J. Super. Unpub. ____ (Docket No.: A-3101-11T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Middlesex County. Before Judges Yannotti and Harris.

Appellant, Decedent's ex-wife, was a beneficiary under Decedent's Will of 51% of the shares of Decedent's company, King George Auto Sales ("King George"), with the remaining 49% devised to Decedent's brother, Robert. Appellant was also named as the residuary beneficiary under Decedent's Will. Appellant appeals from the trial Court's dismissal of her exceptions to the accounting filed by the Estate and Trustee of Decedent's inter vivos trust.

Decedent appointed Alfred Krivak as Executor and Trustee, and appellant and her children were the beneficiaries of the inter vivos family trust.

In August, 2006, Decedent's Will was admitted to probate. In January, 2007, appellant filed a law suit claiming that she was an oppressed minority shareholder of King George and also asserted an interest in a partnership owned by Decedent and his brother, Robert, which held the land occupied by King George. The matter was submitted to arbitration and a decision and award was entered on September 17, 2008. The arbitrator ordered Robert to purchase appellant's share in King George for $731,000 and dismissed the oppressed shareholder claim. The Estate

agreed to be bound by the award. The arbitrator ordered the Estate to issue 100% of the shares of King George to Robert upon its receipt of $731,000. The trial Court affirmed the arbitrator's award as fully supported by the record, as the buy-out was the only practical solution. Appellant appealed.

While this appeal was pending, appellant filed a motion seeking an order directing the Estate to distribute the $731,000 received from Robert to appellant, which was denied.

On appeal, the arbitrator's award was confirmed.

In December of 2010, the Estate filed a motion seeking an order requiring disbursement of $500,000 to appellant with the remainder being held to cover the Estate's ongoing litigation costs. The trial court agreed, allowing for the Executor to use a portion of the monies to pay litigation expenses of the Estate.

Krivak then filed a complaint seeking approval of his accountings for the Estate and inter vivos trust. Exceptions were filed by appellant, including exception to the use of the proceeds received by the Estate concerning the buy-out of her shares. The Estate then filed a motion seeking to strike certain exceptions, and the trial Court agreed, entering an order striking certain exceptions. A motion for reconsideration was denied and a hearing held, when the trial court dismissed the remaining exceptions and approved the accountings. Appellant appealed.

Appellant argues on appeal that the trial court erred in directing that a portion of her buy-out of the shares in the amount of $731,000 could be used for Estate expenses. Appellant claimed that the shares should have passed directly to her at death and payment should not have been made to the Estate. The Appellate Division upheld the trial Court's dismissal of the exceptions, finding that appellant was bound by collateral estoppel because she failed to raise the issue as to ownership of the shares with the arbitrator and is therefore bound by its decision. It is also clear from the record that the issue was an issue in the arbitration proceeding and it was decided by the arbitrator that the proceeds would be paid to the Estate. The trial Court's approval of statutory commissions to the Executor and Trustee was also found to be proper.

Estate Administration – Appointment of Administrator ad Prosequendum to File Malpractice Action on Behalf of Estate

In the Matter of the Administration of the Estate of Kolapo Ojebuoboh, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5647-09T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County. Before Judges A. A. Rodriguez and Grall.

Decedent's wife appeals the Chancery Division's appointment of Decedent's girlfriend as Administrator ad Prosequendum to file and prosecute a medical malpractice action on behalf of the Estate.

Decedent was married in 1983 and filed for divorce from his wife in 1996. The divorce proceedings were never finalized, but Decedent owed spousal support in excess of $69,000 and a

judgment was issued against him. In 1997, Decedent's girlfriend moved to the U.S. from Nigeria, settled in New Jersey and began living with Decedent and conceived a son. They held themselves out as husband and wife on income tax returns and the like, despite the fact that there was no evidence that they were ever married. Decedent also named his girlfriend as a beneficiary of his life insurance policy.

Decedent died intestate with no assets. After his death, Decedent's girlfriend applied for Letters of Administration, and his wife filed an Answer and Counterclaim, also seeking to be appointed as Administrator. The Chancery Division appointed Decedent's girlfriend as Administrator ad Prosequendum, and his wife appealed.

On appeal, Decedent's wife argued that the statute required her appointment. N.J.S.A. 3B:10-2 states that a spouse shall be appointed as administrator so long as she files for letters within 40 days of Decedent's death. Decedent's wife filed for administration more than 40 days after the date of death. In light of the passage of time, the statute grants the Court authority to appoint "any fit person" applying for letters.

After reviewing the arguments, the Court found that Decedent's wife was conflicted with an incentive to collect the debt owed to her, and would not necessarily look after the rights of Decedent's only son, as heir of the Estate. Decedent's girlfriend, as the person listed as next of kin on Decedent's medical records, who was much more familiar with Decedent's medical condition and care, was in a superior position to pursue the malpractice action on behalf of the Estate. She had no apparent interest adverse to those entitled to share in the Estate or Decedent's wife's interest in collecting the debt owed to her. The Chancery Division's appointment of Decedent's girlfriend was therefore affirmed, and the matter remanded for the Court to clarify the scope of the Administrator's duties.

Estate Administration - Attorneys' Fees – Legal Malpractice Action Filed Against Former Attorneys in a Will Contest Dismissed Based on Lack of Expert Testimony, and Attorneys' Fees Upheld

John K. Walsh, Jr., Esq. and Walsh & Walsh, Esqs. v. Daniel Provenzano and Jo-Anne Olszewski, 2012 N.J. Super. Unpub. ____ (Docket No.: A-4043-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Bergen County. Before Judges A. A. Rodriguez, Sabatino and Ashrafi.

Defendants appeal from the trial Court's dismissal of their legal malpractice Complaint filed against their former attorneys who represented them in an unsuccessful claim against the Estate of their deceased father.

In July 2005, Defendants met with and then hired Plaintiffs regarding their late father's Estate. Plaintiffs prosecuted a claim on Defendants' behalf and were paid $93,700 by Defendants during the Estate litigation pursuant to an executed retainer agreement. After an unsuccessful trial, Plaintiffs' services were terminated. Plaintiffs then filed suit requesting that

the additional fees owed by Defendants be paid. Defendants counterclaimed claiming legal malpractice, but did not produce an expert witness.

After holding a trial, the trial Court issued a judgment in Plaintiffs favor for the outstanding fees and dismissed Defendants' claim of legal malpractice, as they failed to produce an expert witness on the issue of Plaintiffs' alleged deviation from the standard of care. Defendants appealed, and the decision of the trial Court was affirmed on appeal.

In rendering its decision, the trial Court pointed to the fact that Plaintiffs made substantial payments on account pursuant to a written retainer agreement, were provided with detailed monthly statements and an accounting, and did not object to the requested fees until receiving an adverse judgment in the Estate litigation. Based on these facts, their opposition to the fee request was dismissed. Also, the fact that Plaintiffs failed to produce expert testimony on their legal malpractice claim rendered their counterclaim dismissible as a matter of law.

Estate Administration – Collection of Debt Owed to Decedent Summary Judgment Reversed Given Issues of Fact in Dispute

Stephen C. Leonard, Esq., Administrator of the Estate of Maria Radziewicz v. Polish Army Veterans Association of America, Post 208, Polanka, 2012 NJ Super ____ (Docket No.: A-4415-10T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Middlesex County. Before Judges Parrillo and Skillman.

Appellant appeals the trial Court's grant of summary judgment awarding the Estate of Maria Radziewicz $48,416.59 representing principal and interest on a purported promissory note executed on behalf of Post 208 of the Polish Army Veterans Association ("Post 208"). Summary judgment was granted without oral argument or any findings of fact or conclusions of law. On appeal, summary judgment was reversed.

In November of 2001, Post 208 entered into a contract with its National Headquarters agreeing to pay $171,107 owed on a loan. In December 2001, the Board of Directors of Post 208 voted unanimously to accept member loans to pay off the existing loan with National Headquarters, with no member becoming entitled to repayment until Post 208 became solvent.

On June 25, 2002, Maria Radziewicz gave Post 208 a check for $30,000 towards loan repayment. Post 208's financial secretary confirmed the loan in writing. It was acknowledged that Maria Radziewicz deposited $30,000 and reserved the right to have the entire amount repaid within 2 years with interest of 7%.

In discovery, the Board of Directors of Post 208 certified that the financial secretary ignored the requirement that loans will only occur if the post was solvent, and that he acted without the authority of the Board. Maria Radziewicz never demanded repayment of the loan during her life, but after she died, her Estate sought repayment.

After her death, the administrator of her Estate demanded repayment which was rejected. Plaintiff administrator then sued Post 208 for interest and principal due on the promissory note. Post 208 answered, denying liability and characterizing the deposit as a donation. Plaintiff sought summary judgment, which was opposed. Without holding oral argument, the Court granted summary judgment in favor of the Estate.

Post 208 appealed, claiming that issues of fact exist as to whether the financial secretary acted outside his scope of duty or whether the promissory note was ratified by Post 208. The Appellate Court agreed, and reversed.

The Appellate Court found that there are issues of fact as to the purpose and binding effect of the so-called promissory note which was in the form of a letter sent 3 months after the payment of $30,000 was made, and questions as to the financial secretary's authority to bind Post 208 still exist. There were also no payments of principal or interest during Decedent's life, well beyond the 2 year period she was guaranteed the right to repayment.

Given the issues of fact left unresolved, the grant of summary judgment was inappropriate.

Estate Administration – Creditor Claim on Israeli Estate – Lack of Jurisdiction

Barbara L. Newman v. Estate of Rose Newman, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: A-2641-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Hudson County. Before Judges Yannotti, Espinosa and Kennedy.

Plaintiff filed a claim against her mother-in-law's Estate claiming that the Estate owes her for legal fees incurred over a 10 year period prior to Decedent's death. Decedent lived in Israel where her estate was being administered. The claim for fees was filed after an administrator was appointed in Israel for the Estate.

The lower Court dismissed the claim, without prejudice, allowing for Plaintiff to pursue her claims in Israel against the Estate. The Plaintiff appealed.

In affirming the decision, the Court found that the lower Court properly found that the first-filed action occurred in Israel, when the Decedent's Will was probated, and that New Jersey should therefore defer to that jurisdiction. The principle of comity would cause the Court to decline to interfere with the Israeli Court's jurisdiction, provided that Plaintiff's claims are cognizable in that jurisdiction. Plaintiff failed to establish that her claim could not be addressed in Israel. The matter was dismissed without prejudice, allowing Plaintiff to proceed in Israel for payment of her legal fees.

Estate Administration – Denial of Legal Fees to Mother Seeking Guardianship and a Trust Over her Adult Son's Inheritance

In the Matter of the Estate of Willie Booker, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0382-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County. Before Judges Cuff, Lihotz and St. John.

Willie Booker died intestate survived by an adult son, his sole heir. Decedent's mother filed a verified Complaint seeking her appointment as administrator, creation of a special needs trust and appointment of trustee for her grandson, the sole heir. She filed another Verified Complaint seeking a medical and psychiatric evaluation of her grandson, a declaration of incapacity, and her appointment as guardian over his person and property.

Six months after filing the Complaints, Decedent's mother fired her attorney and proceeded pro se. She also withdrew the guardianship action. Decedent's mother sought legal fees from the Estate which were denied. The trial Court held that there was no basis to award counsel fees from the Estate, noting that the guardianship action was withdrawn, it was severely deficient on its face, and Decedent's mother had not demonstrated how any of her actions aided in preservation or protection of the corpus of the estate. This decision was affirmed on appeal.

Estate Administration – Denial of Pension Benefits to Surviving Spouse Based on Binding Retirement Plan Elections

In the Matter of A. Lynne Lindenthal for Peter W. Lindenthal, deceased v. Board of Trustees, Public Employees' Retirement System, 2012 N.J. Super. Unpub. ____ (Docket No.: A-2793-09T3) (App. Div. 2012). On appeal from the Board of Trustees, Public Employees' Retirement System. Before Judges Waugh and St. John.

Plaintiff appeals the final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System (the "Board") denying her request to receive a monthly pension benefit upon the death of her husband, Peter.

In September of 2008, the Division of Pensions and Benefits (the "Division") received Peter's retirement application requesting a veteran retirement, effective January 1, 2009, under the maximum option, in lieu of smaller payments during his life and a pension to his wife upon his death. He indicated he had a spouse and thus, the Division sent her a letter about the option's future effect. Instead of selecting a beneficiary to receive a survivor's benefit at his death, Peter chose the "Maximum Option – No Pension to Beneficiary".

On December 10, 2008, the Board approved Peter's retirement application under the maximum option, with an effective date of January 1, 2009. Peter passed away on January 28, 2009, 27 days after making the election. Under N.J.S.A. 43:15A-50, if a member dies within 30 days after the date of retirement, he is treated as an active member. Subsequent to Peter's death, the Division notified Lynn that she was entitled to a group life insurance benefit of $262,292.86. She was also informed that because Peter chose the maximum option, she was not entitled to a

monthly pension and any unpaid contributions and interest would be returned to Peter's Estate. Lynn filed an appeal with the Office of Administrative Law disputing the non-payment of monthly pension benefits to her, which was denied.

On appeal, the Court agreed, holding that the statutory scheme governing payments to beneficiaries of members who had applied for retirement but died during the thirty-day period, allowed the beneficiary to elect between the retirement benefit or full life insurance death benefits, but precluded receipt of both. Since Peter did not choose the optional retirement benefit for his spouse, he was only entitled to life insurance benefits as an active member under the statute. Also, the accumulated contributions and interest were properly paid to his estate as Peter did not name a beneficiary.

Estate Administration – Division of Personal Property and Other Issues

In the Matter of the Estate of Frank M. Leonard, Deceased, 2012 N.J. Super Unpub. ____ (Docket No.: A-5181-10T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Sussex County. Before Judges Reisner and Simonelli.

This is appellant's second appeal. Appellant's father, Frank Leonard ("Decedent") was married to Ada Leonard who predeceased him. Decedent died in 1991, and his will bequeathed a life estate in his Branchville, NJ residence to his second wife, Elizabeth, and the personal property belonging to Ada Leonard to his children, including appellant.

Elizabeth filed a complaint seeking to prohibit Decedent's children from occupying or interfering with her use of the Branchville property, and appellant counterclaimed, alleging waste and seeking her removal as Executrix, a forced sale of the property and access to Elizabeth's apartment in Washington, DC to remove any personal property belonging to Ada Leonard. After holding a trial on the counterclaim, the trial Court denied the relief requested by appellant in his counterclaim and issued an order in October of 2008. Appellant did not appeal this order.

Appellant subsequently filed a motion seeking access to the Branchville property to remove Ada's personal property, which was denied. The trial court also awarded Elizabeth legal fees for having to defend the motion. Appellant appealed from this Order and also sought appeal of some issues covered by the October, 2008 order of the trial Court. The matter was remanded to the trial Court by the Appellate Division, and appellant sought to vacate the October order of the trial Court, claiming misconduct. In an oral decision, the trial Court refused to vacate the October order, finding no misconduct, vacated the award of counsel fees to Elizabeth, and required Elizabeth to respond to a list of 78 items appellant claimed belonged to Ada Leonard. An order was subsequently issued and appellant appealed. A few months later, the trial court ordered that 8 of the 78 items belonged to Elizabeth, and appellant appealed from that Order.

On appeal, the Orders were upheld, with the Court failing to find any misconduct or collusion, and if appellant believed there was any misconduct, he should have timely appealed the October 2008 order, which was now time barred.

Estate Administration – Life Insurance Ordered Paid to Decedent's Divorced Spouse in Light of Judgment of Divorce Giving her the Rights to Decedent's Choses in Action

In the Matter of the Estate of Mittal Barua, 2012 N.J. Super Unpub. ____ (Docket No.: ESX-CP-0017-2011) (Ch. Div. 2012).

Plaintiff married Decedent on June 25, 1993. At the time, Plaintiff's son was six years old. On January 19, 2006, Decedent traveled to Bangladesh with the intention of staying for 30 days, however, he never returned.

Two years later, Plaintiff filed for divorce. An Amended judgment of Divorce was entered on February 5, 2008 wherein Plaintiff was granted Decedent's interest in certain real property and any and all choses in action.

At the time of his disappearance, Decedent had a life insurance policy naming Plaintiff and her son as primary and secondary beneficiaries. Plaintiff continued to pay the premiums.

Three years after the entry of the Judgment of Divorce, Plaintiff filed an Action seeking a Declaration of Death of Decedent, who they have not seen for five years. An Answer was filed by the Office of the Attorney General, Unclaimed Property Administrator. The Court ultimately declared Decedent dead, ordered the insurance policy proceeds deposited with the Court, and allowed Plaintiff to file an Amended Complaint seeking the turnover of the insurance poliy proceeds.

Plaintiff then amended her Complaint. A motion for summary judgment was brought and the Court, after analyzing the terms of N.J.S.A. 3B:3-14 in light of the Judgment of Divorce, ordered the proceeds paid to Plaintiff as beneficiary.

N.J.S.A. 3B:3-14 provides that a Judgment of Divorce revokes any revocable designations in a governing instrument, which includes a life insurance policy. Plaintiff argued that the statute didn't apply to these facts, as Plaintiff became entitled to the insurance proceeds by virtue of the judgment of Divorce which gave her all of Decedent's choses in action. The Court found ample authority to support the position that the policy proceeds were a choses in action, and therefore granted summary judgment in Plaintiff's favor, ordering the proceeds paid to her as beneficiary under the policy.

Estate Administration – Palimony Claim Arising Prior to Change in Statute Upheld

Maria Harrison v. Estate of Carl J. Massaro, 2012 N.J. Super. Unpub. ____ (Docket No.: A-3497-09T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Family Part, Hunterdon County. Before Judges Payne, Reisner and Hayden.

Defendant, the Estate of Carl J. Massaro, appeals from the trial Court's award of palimony in the amount of $2,273,031 to Plaintiff.

After a fourteen day trial, the Court ordered that palimony be paid to Plaintiff. Decedent had died 1 and ½ years prior to the effective date of the new statute requiring all agreements to be in writing, which the Court refused to apply retroactively.

After a trial, the Court found substantial credible evidence of Decedent's promise to provide for Plaintiff after an extensive relationship that they shared for over 14 years. There were numerous witnesses to support Decedent's promise that Plaintiff would receive income of $20,000 per month so that she did not need to work for the rest of her life, that Plaintiff assisted Decedent in his business ventures over the years, and lived in a marital type relationship with him for over 14 years.

This decision was upheld on appeal, with the Appellate Division failing to retroactively apply the changes in the Statute of Frauds which requires all palimony agreements after the enactment of the statute to be in writing. The Court also upheld the trial Court's failure to award fees in the matter.

Estate Administration – Removal of Executor and Trustee and Appointment of Custodial Receiver for Decedent's Business Deemed Premature in Light of Clear Dispute Over the Underlying Facts

In the Matter of the Estate of Ronald E. Manus, Deceased, 2012 N.J. Super Unpub. ____ (Docket No.: P-065-12) (Ch. Div. 2012).

Decedent passed on September 17, 2010, leaving a Will dated July 22, 2009, which named his brother, Kenneth as Executor, and his brother, Lawrence, as Trustee of separate trusts established for Decedent's three children.

Plaintiff, Decedent's ex-wife, filed a Complaint seeking a distribution from the trusts for her three children, an accounting, removal of Decedent's brothers as Executor and Trustee, and for the appointment of a custodial receiver for Decedent's bagel stores that were being run by Decedent's brother and executor, Kenneth.

In denying the appointment of a receiver and Plaintiff's request to remove the fiduciaries of the Estate as premature, the Court cited the fact that Plaintiff failed to establish the likelihood of success on the merits in light of the specific factual denials of Kenneth and Lawrence as Executor and Trustee. Discovery had yet to commence and there were insufficient facts to support the request for a custodial receiver. The Court denied Plaintiff's request, without prejudice, and instead ordered an accounting and an expedited discovery schedule.

Estate Administration – Request for a Return of Decedent's Property Which Escheated to the State was Denied in Light of the Passage of Time

In the Matter of the Real and Personal Property of Carl Bekysewycz, Deceased, 2012 N.J. Super Unpub. ____ (Docket No.: A-4455-09T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County. Before Judges Payne and Hayden.

On December 11, 1987, the Chancery Court entered an Order providing for the escheat to the State of funds constituting Decedent's Estate if no next-of-kin were discovered within three years of Decedent's death, which occurred on May 10, 1986. In 2008, appellant was appointed as administrator of the Estate following an ex parte application with the Hunterdon County Surrogate. Appellant appeal's from the April 16, 2010 order of the trial Court denying appellant's request to amend the Chancery Division's order of December 11, 1987 to provide for payment of the escheated funds to either the Administrator of Unclaimed Property to hold for the benefit of the Decedent's heir, or to his Estate.

Decedent died intestate on May 30, 1986. On July 3, 1986, the State filed a Complaint for escheat of the Decedent's real and personal property under prior law. The Court appointed a conservator of Decedent's property and ordered publication in the Hunterdon County newspaper thereby providing notice to all heirs and creditors that the State has filed an action seeking adjudication as to the title of the property owned by Decedent. The Court subsequently ordered Decedent's real property sold, his claims paid and for the remaining funds to be turned over to the Attorney General for a period of three years. If no next of kin were discovered during that period of time, the order authorized the Attorney General to pay the proceeds to the State Treasurer, which occurred in 1993.

Approximately 22 years after Decedent's death, Appellant applied for Letters Testamentary and 16 months later, brought suit, claiming the State failed to conduct a diligent inquiry for Decedent's heirs.

Despite the fact that the Court file was no longer available, nor the file of the Attorney General which had been destroyed, and the conservator appointed by the Court was also deceased, the trial Court refused to reopen the matter, finding that the Notice published by the conservator was sufficient notice under prior law. The Court also refused to retroactively apply the current Unclaimed Property laws to an Estate which was governed by prior law.

On appeal, the Appellate Division affirmed, finding that the statutory amendments to the code which would place the funds with the Administrator of Unclaimed Property did not take effect until some time after the final escheat of Decedent's property in 1993. Appellant therefore had no claim for principal, interest or fees.

Estate Administration – Husband's Right to Funds From Marital Estate to Pay For Criminal Defense Under the Slayer Statute Was Properly Denied

In the Matter of the Estate of Linda Ann Rambo, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5308-09T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Warren County. Before Judges Fuentes and Graves.

Decedent's husband, Roy Rambo, appeals from the Chancery Division's denial of his request for a distribution of 50% of the marital estate to fund his criminal defense.

In 2002, Roy Rambo was indicted and charged with murdering his wife, Linda. While awaiting trial on this criminal charge, Decedent's only son, Bruce Rambo, obtained an order from the Chancery Division under the Slayer Statute (N.J.S. 3B:7-1.1) restraining Roy Rambo from utilizing any assets of the marital estate to fund his criminal defense. The Court also appointed Bruce Rambo as administrator of Linda's Estate. The Estate consisted of parcels of real estate, extensive personal property and investment accounts which totaled over $3.0 million.

While awaiting the criminal trial, Bruce Rambo filed a wrongful death action and survivor action against Roy Rambo on behalf of himself and the Estate. On February 9, 2005, Roy Rambo was convicted of murdering his wife and he was sentenced to a term of forty years. On July 6, 2005, the Law Division entered judgment against Roy Rambo in the wrongful death suit awarding $6,310,000 in damages.

Roy Rambo now appeals an order entered by the Chancery Division on May 17, 2010 equitably distributing the assets of his former marital estate, arguing that the Court misapplied the Slayer Statute and improperly prevented him from accessing funds which were rightfully his. Following an equitable distribution hearing, the Chancery Division entered its order of May 17, 2010, awarding Roy Rambo $290,314.51 of the marital estate, deducting this amount from the judgment entered on the wrongful death suit, leaving a balance of $5,709,6895.49 owed by Roy Rambo to Bruce Rambo and the Estate, awarding Roy Rambo's sister his personal clothes, and ordering Roy Rambo responsible for the taxes associated with the distribution of his IRA to the Estate.

In his appeal, Roy Rambo claimed that the Chancery Division misapplied the Slayer Statute in failing to release funds to him to pay for his criminal defense, forcing him to hire a Public Defender in lieu of counsel of his choice. On Appeal, the Appellate Division held that the restraints issued by the Chancery Division were supported by the Slayer Statute, which provides that a surviving spouse who intentionally kills the decedent is not entitled to any benefits from the estate and the estate passes as if the killer predeceased the decedent. This includes property of a joint tenant which severs any rights to survivorship that the killer had in the property. To permit Roy Rambo to use the proceeds of the marital estate to pay the cost of private counsel would be a perversion of justice under the Slayer Statute. The order was therefore affirmed.

Estate Administration – Wrongful Death Action – Heir's Loss of Prospective Inheritance Resulting From Increased Estate Taxes Are Cognizable in a Wrongful Death Claim

Robert B. Beim and Franklyn Z. Aronson, as Co-Executors of the Estate of John G. Kellogg, et al. v. Trevor R. Hulfish and Teresa Cupples, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: A-5947-10T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Mercer County. Before Judges Fuentes, J. N. Harris and Koblitz.

The Appellate Division, in reversing the lower Court, held that an heir's loss of a prospective inheritance resulting from the imposition of increased estate taxes incurred due to the premature death of a decedent is recoverable in a wrongful death action.

On January 25, 2008, John Kellogg and his second wife, Barbara Kellogg, were passengers in a car which collided with a car owned by Defendant. Mr. Kellogg was 97 years of age. After the collision, Mr. Kellogg was treated at the hospital for a week then released. Within a week, Mr. Kellogg died from injuries suffered as a result of the accident.

In 2008, Mr. Kellogg's estate paid $1,195,083.57 in estate taxes. Plaintiffs allege that had Mr. Kellogg survived until 2009 or later, his estate tax obligation would have been reduced by $626,083 in 2009, and by the full amount of $1,196,083.57 in 2010. In the law division, Plaintiffs sought to recover the difference in estate tax consequences under the Wrongful Death Act as pecuniary injuries resulting from the premature death of Mr. Kellogg. Defendants' motion to dismiss this claim was granted, with the lower Court finding that the damages were too speculative in nature. This decision was entered nine days before the existing estate tax law and exemptions were extended through 2012 by Congress. This extension would have exempted Mr. Kellogg's property from estate taxation had he lived past 2009. Plaintiffs filed a motion for reconsideration based on the change in law which was denied, with the Court holding that the damages contemplated by Plaintiffs were still too speculative in nature.

After the balance of Plaintiff's claims were dismissed by motion practice or Stipulation, this appeal was filed.

The goal of the Wrongful Death Act is to compensate survivors of those wrongfully killed for their pecuniary loss, and permits recovery only for a survivor's calculable economic loss. The question before the Court is one of first impression. Given the narrow window of Mr. Kellogg's life expectancy of 3.2 years and the extension of the existing estate tax law, the Appellate Division held that it was not unduly speculative to recognize that but for Defendant's alleged tortious conduct that Mr. Kellogg might have survived to a point that his estate's tax liability was eliminated, resulting in a tangible economic benefit to his heirs. It was also proper to submit this question to a jury, which regularly considers the life expectancy of individuals in personal injury actions. The Court also noted that evidence sufficient to guide the jury on this issue must be accompanied by competent expert opinion.

Estate Planning – Judicial Dissolution of Partnership Held for Decedent's Heirs Upheld in Light of Well Documented Partnership Discord

Debaron Associates (a Partnership) and Ronald A. Durante v. Barbara R. Van Slooten and Debra S. Scheibel, 2012 N.J. Super. Unpub. ____ (Docket No.: A-6209-10T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Bergen County. Before Judges Reisner and Simonelli.

Plaintiff appeals from the August 4, 2011 order of the law division appointing a receiver for the partnership and ordering its dissolution.

The parties' father, John Durante ("Durante"), a successful builder and real estate investor established a partnership in 1977 for estate planning purposes to avoid negative tax consequences. He transferred title to substantial real estate assets to the partnership and made his children, Plaintiff and Defendants, Van Slooten and Scheibel, equal one-third partners. Although not a named partner, Durante controlled the partnership until his death in 1999. One of the assets in the partnership were vacant lots abutting the Durante family home, which the parties equally inherited at Durante's death. Durante wanted Defendant Scheibel and her husband to have the building lots and tried to assist them in their application for a building permit with the zoning board prior to his death.

In October, 1984, the parties signed an Amended and Restated Partnership Agreement which provided that the partnership may be dissolved upon the vote of all of the partners. After Durante's death, Defendant Scheibel advised Plaintiff and Van Slooten that she wanted to withdraw as a partner and have her partnership interest purchased by them. The partnership's accountant advised that they had to wait five years to avoid negative tax consequences, and the parties agreed to dissolve the partnership in five years. Plaintiff later refused to dissolve the partnership and also refused to conduct any partnership business unless the other partners gave him the docks and the Durante's Lake George home. Plaintiff also refused to attend any partnership meetings. In May 2006, Defendants advised Plaintiff that they would seek judicial dissolution of the partnership.

At a partnership meeting in October of 2007, the parties agreed that Scheibel would submit an application for approval to build a house adjacent to the Durante's family home on one of the building lots owned by the partnership and that she would purchase the lot from the partnership once she obtained approval. She incurred costs regarding same. Plaintiff later refused to sell the lot to Scheibel. Plaintiff also filed suit against Defendants seeking contributions from them to equalize their capital accounts. Scheibel filed a counterclaim seeking declaration that the partnership was an at-will partnership subject to dissolution or otherwise subject to judicial dissolution. Scheibel eventually obtained a building permit for the lot and asked Plaintiff to consent to her purchase of the lot from the partnership, which he refused to grant. Scheibel then completed construction and expended $600,000 of her own funds to build a house on the lot.

Plaintiff agreed to a bench trial on the issue of dissolution. On July 6, 2011, the trial Court rendered an oral decision finding it necessary to appoint a receiver because the partnership

needed someone to take control since the parties could not agree on anything, and also ordered the partnership dissolved, permitting Scheibel to purchase the building lot where she built her house and ordered the sale or division of the remaining properties among the partners. Plaintiff appealed, arguing that the Court erred in appointing a receiver and ordering the dissolution of the partnership as unanimous consent by all partners was required to dissolve the partnership.

The Appellate Division affirmed, finding that the partnership was an at-will partnership subject to dissolution upon notice by any partner that they intend to withdraw because it did not have a fixed term and no longer had a particular undertaking. Durante formed the partnership for estate planning purposes to transfer the properties to his children without negative tax consequences. After his death, there was no further need for the partnership. As a result, Scheibel's intent to withdraw would cause the partnership to be dissolved by operation of law. The Court also believed that a judicial dissolution was proper as partner discord rendered it impracticable to carry on partnership business.

Estate Planning - Parties Ordered to Submit Shareholder's Claim to Arbitration

Anthony L. Gatta v. Joseph L. Gatta, and Joseph Gatta & Sons, Inc., 2012 N.J. Super. Unpub. ____ (Docket No.: A-3161-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Camden County. Before Judges Graves, Espinosa and Guadagno.

Defendants appeal from the trial Court's denial of their motion seeking to compel arbitration of a claim filed by a shareholder of a closely held corporation seeking a buyout of his shares.

The shareholders of Joseph Gatta & Sons, a father, his two sons and a daughter, entered into a shareholder's agreement seeking to restrict the transfer of shares. The agreement also provided that all disputes be submitted to arbitration.

The employment of Plaintiff shareholder was terminated and he filed suit, seeking access to the books and records and a purchase of his shares. His complaint was amended to include counts for damages as an oppressed minority shareholder and breach of fiduciary duty. Defendants sought to compel arbitration and their motion was denied by the trial court, which found that plaintiff's underlying claims did not arise under the agreement. Defendants appealed.

On appeal, the Appellate Division reversed, finding that the genesis of Plaintiff's claim amounted to a request for a buyout of his shares, a claim clearly within the ambit of the arbitration provision of the shareholder's agreement. The matter was governed by Pennsylvania law requiring the Court to broadly construe the arbitration provision of the agreement. Once a court finds that the dispute falls within the arbitration provision, then the court must order the parties to arbitration. The parties were therefore ordered to arbitration.

Estate Planning – Validity of Mortgage Created by Decedent as Part of his Estate Plan Subject to Review by Bona Fide Purchaser for Value of Decedent's Interest in an LLC

Sea Village Marina, LLC and Baywatch Marina, LLC v. Patricia Ann Best, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0193-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Atlantic County. Before Judges Lihotz, Waugh and St. John.

Plaintiff, Baywatch Marina, LLC ("Baywatch") appeals from the Chancery Division's grant of summary judgment against Baywatch's attempt to review the validity of a mortgage established for Decedent's wife pertaining to his interest in an LLC.

Prior to 1994, Decedent, John Best ("Decedent") and his wife, Patricia Ann Best ("Patricia") created Sea Village Marina, a community of floating homes and a boatyard. In April 1994, Patricia and John transferred a 25% interest in the LLC to their son, Mark. Patricia owned 75%.

In 2003, John was diagnosed with a terminal illness and began working on an estate plan. John intended to acquire Mark's interest in the LLC for a $200,00 mortgage, which would be subordinate to a $1.6 million mortgage that the LLC would give to Patricia and John with rights of survivorship. In October of 2003, Patricia assigned her 75% interest in the LLC to John in exchange for a $1.6 million note and mortgage. The mortgage stated it was given in exchange for loans to the LLC made by Patricia and John. According to John, they had lent over $1.9 million over the years. John signed his Will and directed that his interest in the LLC be held until the two mortgages were paid.

John died on December 22, 2003 and his Will was probated. Although John sought a transfer of Mark's 25% interest prior to his death, Mark refused, so Mark and the Estate became owners of the LLC at John's death. Patricia recorded the mortgage on December 30, 2003.

While Patricia was initially appointed as Executor of the Estate and as managing member of the LLC, she applied to the Court for a third party administrator, which was granted, with the Court appointing a third party, Barbara Lieberman ("Lieberman").

In July 2007, Lieberman field an application in the probate part to determine the validity of the mortgage. Instead of deciding the issue, the Judge ordered John's heirs to file objections by October 15, 2007, and when no objections were filed, the Judge observed that since there were no objections, that the mortgage is valid "in a general sense", but did not issue an Order.

Lieberman then applied to the Court for directions on the sale of the LLC. Bids were taken and one of the bids, submitted by Baywatch, was accepted by the Court. Baywatch specifically excluded from the purchase price the $1.6 million mortgage which Baywatch intended to challenge.

After Baywatch closed on the sale, it filed a Complaint seeking to set aside the $1.6 million mortgage as invalid. In response, Patricia filed a motion for summary judgment claiming that Baywatch could not challenge the mortgage as the Estate's heirs did not challenge the

validity. The trial Court agreed and granted summary judgment to Patricia. This appeal followed.

On appeal, the matter was reversed for further proceedings on the validity of the mortgage, holding that the trial Court erred in light of its failure to rule on the validity of the mortgage, especially in light of Baywatch's clear offer and its intention to challenge the mortgage in the first instance.

Inter Vivos Transfers – Joint Account Set Aside in Light of Confidential Relationship and Undue Influence

Henry Mangarelli, Jr., Individually and on Behalf of the Estate of Henry A. Mangarelli v. Ruth E. Snyder, 2012 N.J. Super. Unpub. ____ (Docket No.: A-4577-10T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Passaic County. Before Judges Parrillo and Grall.

Defendant appeals from the trial Court's entry of a judgment against her in the amount of $176,959.98 finding that she exerted undue influence inducing her father, Henry, to establish and fund a joint account with her prior to his death contrary to the terms of his Will which named his son, the Plaintiff herein, as sole beneficiary.

Henry died on January 29, 2008 at the age of 90. He lived independently and managed his affairs until 2004, when he exhibited signs of degeneration such as loss of the sense of time and the inability to recall where he placed his personal belongings. In January of 2005, Henry was hospitalized. Plaintiff, Henry's son, visited Henry in the hospital at a time when Henry gave him several things for safekeeping, including $11,000 consisting of cash and two checks that he had received after withdrawing funds from his accounts. Henry endorsed the checks and Plaintiff deposited the checks into his own account, and put the cash in his safe. After Henry was released from the hospital, he did not recall making the withdrawals and did not believe Plaintiff when he reminded him about the checks. Plaintiff returned the monies months later after receiving a letter from Henry's new estate planning attorney requesting the return of the monies.

By Christmas 2005, Henry and Plaintiff resumed communications but Henry refused to talk about the checks. During 2005, Defendant saw Henry more frequently than she had in the past, she went to the bank with him, and took Decedent to an attorney who had represented her in the past to redo his Will. The attorney advised Henry that they should meet alone, but Henry insisted that Defendant attend the meeting. The attorney subsequently drafted a new Will and Power of Attorney in favor of Defendant. The attorney also explained to Henry how money could pass outside the Will, and it was his understanding that Henry wanted to transfer funds to Defendant by establishing a joint account to ensure that Plaintiff received nothing.

In early 2006, Henry was hospitalized again. After he was discharged, Henry and Defendant went to a financial advisor, opened a joint account with Defendant listing Defendant's address, and transferred a majority of his assets into the joint account. From June 2005 until

Henry's death in January of 2008, Plaintiff and his family were in regular contact with Henry but never discussed financial matters. Other than a truck, the joint account held with Defendant was the only remaining asset of the Estate.

Plaintiff filed suit claiming that the transfer of Henry's accounts to the joint account were the product of undue influence. Based on the evidence, the trial Court concluded that the essential elements of a confidential relationship were present, including Henry's confidence in and dependence on Defendant, who benefited from the transfer. Henry consulted with Defendant's former attorney and Defendant accompanied Henry to meetings with the attorney and the financial advisor. Defendant was also named as attorney in fact under Henry's Power of Attorney months before he established the joint account. Based on this evidence the trial Court found that Defendant had a confidential relationship with Henry, and also found that there were suspicious circumstances giving rise to a presumption of undue influence. The Court deemed it suspicious that Henry did not transfer the monies to a joint account with Defendant until more than six months after he signed his new Will naming Defendant as sole beneficiary.

The Court went on to hold that Defendant exerted undue influence and a judgment of $176,959.98 was entered against her. Defendant appealed, claiming that the Court erred in determining that she had a confidential relationship with her father at the time the transfer occurred, which created a presumption of undue influence. The Appellate Division affirmed, finding that the trial Court's findings were adequately supported by the evidence.

Power of Attorney – Attorney in Fact Responsible for Payment of Nursing Home Costs as Responsible Party

Royal Suites Healthcare and Rehabilitation Center v. Estate of Dora Palladino, Theodore Fusco and Rita Fusco, 2012 N.J. Super. Unpub. ____ (Docket No.: A-1711-09T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Atlantic County. Before Judges Fuentes, Graves and Koblitz.

Defendants Theodore and Rita Fusco appeal from a judgment entered against them for an unpaid nursing home bill of their deceased aunt, Dora Palladino ("Palladino), along with costs of suit, in favor of Royal Suites Healthcare and Rehabilitation Center ("Royal Suites"). On March 10, 2008, Mr. Fusco signed an agreement to admit Palladino to Royal Suites, a residential nursing home facility. At the time of admission, Palladino was suffering from dementia and medical problems. Mr. Fusco signed the admission agreement on the line "Signature of Responsible Party", and wrote "P.O.A.", meaning Power of Attorney, after his signature.

The admission agreement at Royal Suites stated that a Responsible Party who signs for a Resident pursuant to a Power of Attorney must provide a copy of the Power of Attorney at the time of admission, and takes on the primary obligation of payment out of the resident's funds or otherwise, and upon failure to pay, becomes a personal guarantor for payment.

On May 14, 2008, Medicare benefits were exhausted. At that time, Palladino had the choice to stay at Royal Suites or to leave, and she chose to stay. On June 3, 2008, Royal Suites

sent Mr. Fusco a thirty day discharge notice which stated that he had not paid or come to any arrangements regarding payment, and that he must contact Royal Suites or they will no longer provide services to Palladino. Palladino was discharged to home on June 13, 2008. At that time, Palladino owed a balance of $7,755 to Royal Suites.

From January 2008 until Palladino's death in August 2008, she received four checks totaling $160,418.52. The checks were deposited into joint accounts held by Palladino and the Fuscos or into the Fuscos' individual names.

At trial, the Court noted that a Power of Attorney was never produced, not was a copy of Palladino's Will admitted to probate. Without the Power of Attorney or Will, the Court held that Mr. Fusco, by signing the agreement, was acting on his own and not as agent on behalf of Palladino or her estate. Thus, the Court found the Fuscos liable for payment of the debt. The Court also reduced the legal fee request of Plaintiff's counsel, which was not appealed.

On appeal, the Appellate Court cited Mr. Fusco's handling of Palladino's finances and the fact that Mr. Fusco acknowledged that over $160,000 in Palladino's funds were deposited into accounts accessible to the Fuscos. Now that Palladino is deceased, the Fuscos do not believe they are obligated to pay her debts. In light of the contract with Royal Suites signed by Mr. Fusco wherein he agreed to be responsible for Palladino's debts, coupled with the fact that a significant amount of Palladino's monies were accessible by both defendants, the judgment against them is affirmed.

Power of Attorney – Revocation of Trust on Grantor's Behalf Allowed Under the Terms of the Power of Attorney

In the Matter of the Revocable Trust u/a dated June 30, 1995 established by Mildred Quick Muller, 2012 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0299-2011) (Ch. Div. 2012).

Pursuant to the terms of an executed Power of Attorney, Grantor's attorney in fact sought to transfer assets held by her revocable trust into a new revocable trust established by Grantor. The acting trustee of the prior revocable trust, JP Morgan Chase bank, refused to transfer the assets, and suit was filed by Grantor's attorney in fact seeking directions from the Court as to whether he had the requisite authority to transfer the assets to the new trust as agent under the Power of Attorney.

Grantor established a revocable trust for her own benefit in 1995, and said trust was restated in 1998 (the "1998 Trust"). The 1998 Trust named Grantor's attorney and JP Morgan Chase bank as Co-Trustees and allowed the Co-Trustees to distribute the entire trust corpus to grantor. Grantor also reserved the right to revoke the trust. Her Will, signed in 2004, provided that her assets would be distributed to various charities and to her nieces and nephews.

In 2010, Grantor signed a new Will and trust (the "2010 Trust"), naming her nephew, Mr. Niemann, as Executor and Trustee. Grantor also signed a Power of Attorney naming Mr. Niemann as her attorney in fact. Mr. Niemann then asked JP Morgan Chase, the Trustee under

the 1998 Trust, to transfer the Grantor's assets to the 2010 trust, and the bank refused. Suit was then filed.

The Court reasoned that the terms of the 1998 Trust and the Power of Attorney granted Mr. Niemann the requisite authority to transfer the assets to the 2010 Trust. Article 1 of the 1998 trust allowed the trustee's to exhaust the corpus for Grantor's benefit. Paragraph 19 of the Power of Attorney granted Mr. Niemann, as agent, the power to take any action that the Grantor may take and exercise "full and complete power and discretion" in the same manner as Grantor. Paragraph 17 of the Power of Attorney allows Mr. Niemann the power to transfer Grantor's property into a trust of which Grantor was a beneficiary. Therefore, Mr. Niemann had the requisite authority to withdraw assets of the 1998 trust "even to the point of completely exhausting corpus", and transfer them to the 2010 Trust.

The authority conferred upon Mr. Niemann by the Power of Attorney therefore afforded him the right to make the transfer to the new Trust.

Power of Attorney – Undue Influence and Breach of Fiduciary Duty Committed by Attorney in Fact

Thurman E. King v. Terri E. Johnson, 2012 N.J. Super. Unpub. ____ (Docket No.: A-4357-09T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Camden County. Before Judges Grall and Alvarez.

Defendant appeals from a judgment against her which was entered by the trial Court after a jury trial finding that she breached her fiduciary duty and committed undue influence through a Power of Attorney given to her by her father, the Plaintiff herein.

When Plaintiff was 57 years old, he had a stroke leaving him paralyzed on his left side. His daughter, the Defendant herein, was living in Maryland at the time. She left her job and moved in with Plaintiff to care for him. Defendant was given a Power of Attorney and access to Plaintiff's bank accounts and his 401(k), which she used to purchase a residence for her and the Plaintiff, paid for certain repairs to the residence, purchased a car, in part, with Plaintiff's funds, and paid for some of Defendant's personal expenses and for some trips taken with Plaintiff.

Plaintiff commenced this litigation through his attorney in fact, Barbara Johnson. In his complaint, Plaintiff charged Defendant with conversion, breach of fiduciary duty, undue influence, and he sought an accounting and sole title to their residence. After a jury trial, the Court found that there was insufficient evidence to support the claim that Defendant received her interest in the residence through deception and undue influence, and dismissed that claim. The Court left to the jury the issue of breach of fiduciary duty and undue influence on the remaining transfers. The jury found that Defendant had committed undue influence and breach of fiduciary duty and ordered her to pay Plaintiff $114,000 as reasonable compensation for his loss.

On appeal, the Appellate Court affirmed the decision, finding that Defendant's appeal was procedurally defective as she did not seek a new trial at the conclusion of the jury trial

before filing her appeal, which is required under Rule 2:10-1. In addition, the Appellate Division noted that the evidence adduced at trial was sufficient to support the jury verdict.

Probate Litigation – Application Seeking to Set Aside Consent Order Entered in Probate Matter is Denied

In the Matter of the Estate of Lillian A. Hogan, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-1920-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hunterdon County. Before Judges Espinosa and Koblitz.

Plaintiff, Decedent's son, appeals from the lower Court's order denying his application to set aside a Consent Order of settlement resolving the underlying probate matter.

Decedent died in 2002, leaving surviving her two children, Brian and Betty. Decedent's estate was divided in two equal shares, with Betty receiving her share outright and Brian's share being held in further trust for his benefit (the "Hogan Trust"). Pursuant to the Will, Betty and a cousin serve as Trustees of the Hogan Trust. The Hogan Trust allows for discretionary distributions, in the Trustees' sole and non-reviewable discretion, out of the income and principal for Brian's health, maintenance, support and education. Upon Brian's death, the remaining principal is distributed to Betty or her descendants.

Brian enjoys purchasing old fire trucks, restoring them and then gifting them to local fire departments. In addition to monthly support payments, the Trustees of the Hogan Trust distributed $300,000 to Brian to pay for his restoration of old fire trucks. The remaining principal of the Hogan Trust approximates $3.0 million. In 2009, after the Trustees refused to distribute additional funds to Brian to allow for him to continue to restore fire trucks, he filed suit, alleging breach of fiduciary duty, waste, conflict of interest, tortious interference with inheritance and he sought an accounting. A settlement was placed on the record on August 26, 2010, when the parties agreed that the Trustees would pay Brian $110,000 to satisfy his debts, $35,000 for vans, and $7,100 for his monthly expenses going forward. In exchange, Brian agreed to release and discharge the Trustees from all claims. Brian agreed to these terms on the record.

After the Consent Order was signed, Brian communicated to his attorney that he was dissatisfied and instructed counsel not to abide by the agreement. Counsel filed a motion to be relieved and the Trustees filed a motion requesting an Order requiring Brian to abide by the Agreement. Both motions were granted. Brian then filed a motion seeking to set aside the settlement, which was denied. The trial Court found that Brian understood and voluntarily entered into the terms of the agreement. Brian appealed, seeking to set aside the Will and the Hogan Trust and to invalidate the agreement because of fraud, undue influence, duress, lack of independent advice and trickery, claiming he was pressured to accept the settlement.

On appeal, the trial Court decision was affirmed, with the Appellate Division pointing to the fact that the same judge who had questioned Brian extensively regarding his satisfaction with

the settlement at the time it was entered on the record also had the opportunity to observe Brian's demeanor and ensure that he understood the settlement. Therefore, there was no abuse of discretion in denying Brian's application to have the settlement set aside.

Probate Litigation – Application to Reconsider Terms of Consent Judgment Entered in Probate Matter is Denied

In the Matter of the Estate of Raymon Antelman, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5399-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Passaic County. Before Judges Espinosa and Koblitz.

Plaintiff, Lisa Antelman, daughter of Decedent, appeals the lower Court's denial of her request to reconsider the terms of a Consent Judgment entered with her step-mother, which required Plaintiff to cancel a duplicate homeowner's insurance policy she held on Decedent's residence and ordered her to refrain from prepaying real estate taxes owed on the residence.

Plaintiff, represented by counsel, her step-mother, Ruth, and others resolved a probate dispute concerning Plaintiff's father's estate in a January 7, 2010 consent judgment that provided that Plaintiff would own the residence subject to Ruth's life estate. Plaintiff was also obligated to pay Ruth $114,000, $20,000 of which was subject to certain deductions. Ruth remained responsible for taxes, utilities, insurance and routine maintenance on the residence. Should Ruth fail to make such payments, Plaintiff reserved the right to make the payments directly with said payments being deductible from the amount due Ruth under the judgment.

In response to a subsequent motion filed by Plaintiff, Ruth cross-moved to compel Plaintiff to terminate the duplicate insurance policy she obtained, or, in the alternative, to prevent Plaintiff from deducting the amount of the policy from the amount due Ruth under the judgment. Ruth attached evidence of a policy she obtained on the residence to the motion, and the Court ordered Plaintiff to terminate the duplicate policy, and also ordered her not to pay the property taxes early, and to give Ruth the opportunity to pay the taxes timely.

Plaintiff filed a motion for reconsideration, claiming that the Court did not order her to terminate the policy until she ascertained that the policy obtained by Ruth was appropriate. At oral argument on this motion, the Court accepted the statement from Ruth's insurance carrier that its policy was the proper insurance policy for a person with a life estate. Plaintiff also asked to be reimbursed for the property taxes she paid early, which Ruth maintained was already reimbursed. The Court denied any further reimbursement, informing Plaintiff that if she insisted on paying the taxes early, she ran the risk of not being reimbursed for those payments.

Plaintiff appealed, arguing the Court erred in finding the insurance policy appropriate without a plenary hearing. The Appellate Court found the lower Court reviewed a written explanation of the policy and from that was able to determine the issue without the need for testimony. The lower Court also determined that the taxes which were paid by Plaintiff were not past due and therefore Plaintiff did not have authority under the consent judgment to pay the taxes. Nonetheless, they were already reimbursed. Affirmed.

Probate Litigation – Interim Ruling on Complaint Seeking Removal of Executor, Replevin, Conversion and Exceptions to Accounting

In the Matter of the Estate of Patricia Hardy Johnson, 2012 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0013-2011) (Ch. Div. 2012).

The Decedent died testate on May 21, 2008, survived by three daughters, Plaintiff, Mistri and Alexander. Decedent's 1998 Will was admitted to probate and Letters Testamentary were issued to daughter, Mistri. The Will provides for a bequest of $10,000 to Decedent's grandson, and divides the residuary equally between her three daughters. The Estate included joint brokerage and bank accounts, a residence in Decedent's name, and a condo owned as tenants in common with Mistri. Due to the titling of accounts which created an uneven distribution between the daughters, Plaintiff filed a Complaint seeking removal of Mistri as Executor, replevin of certain items which Plaintiff claimed were removed from Decedent's residence, return of the assets converted by Mistri, and sought an accounting. Mistri then filed a formal accounting. Plaintiff filed numerous exceptions to this accounting.

After completion of discovery, the parties filed cross-motions for summary judgment which were denied in pertinent part, with the Court finding sufficient facts to overcome the motions. In doing so, the Court performed a detailed analysis of the burden of proof pertaining to each account and asset, defining the burdens among the parties in anticipation of trial.

As to the exceptions, Mistri claimed that Plaintiff's exceptions to the formal accounting should be dismissed as a matter of law. The Court disagreed, finding that although the exceptions do not include "the modification sought in the account and the reasons for the modification," as required by R. 4:87-8, the Court found that Plaintiff articulated her particular issues with each entry and the Court understands the basis for her Exceptions.

On summary judgment, the Court was also asked to determine as a matter of law whether Mistri and Decedent shared a confidential relationship, which would shift the burden to Mistri to prove that the accounts were properly formed and created. After a thorough analysis, the Court found that there were sufficient factual issues to overcome summary judgment on this issue.

On the issue of Decedent's IRA, Alexander argued that she should have been included as a beneficiary of the IRA along with her two sisters. However, the Court granted summary judgment on this issue, finding that Alexander had no standing to object to the beneficiary designation as she was never named as a beneficiary, with three prior designations only naming her two sisters.

Finally, the Court declined to order partial distributions until the accounting and other issues were resolved at trial.

Probate Litigation – Motion to Compel Arbitration of the Value of Decedent's Interest in LLC is Granted

Ora Billig v. Estate of Josef Billig, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: BER-C-374-11) (Ch. Div. 2012).

Motion was filed by Valley National Bank, the Executor of the Decedent's Estate, seeking to compel the parties to arbitrate the value of Decedent's interest in Billig Realty Co., LLC (the "LLC"). The parties agreed to submit to arbitration in accordance with the LLC's Operating Agreement, but the LLC's minority members objected to the participation of Decedent's widow in the arbitration. After reviewing the arguments of the parties, the Court granted the motion and directed that Decedent's widow be included in the arbitration.

The Arbitration process will be critical in establishing the value of Decedent's interest in the LLC, and the interest of Decedent's widow as beneficiary of the Estate will therefore be affected by the outcome of the arbitration. The results of the arbitration will also be binding on the Estate. The fact that the Estate is a party to the arbitration is not sufficient to protect the interest of Decedent's widow in the Estate, as their interests are not directly aligned, given tax and other considerations. Finally, the participation of Decedent's widow in the arbitration will promote judicial economy as the valuation and accounting issues will be minimized.

The Court therefore granted the motion and directed that Decedent's widow, as beneficiary of the Estate, be allowed to participate in the arbitration.

Probate Litigation - Motion to Set Aside Florida Judgment in New Jersey Required Plenary Hearing in Light of Plaintiffs' Claims of Lack of Notice

Samuel Schuyler, et al. v. Eileen Meltzer, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5937-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Essex County. Before Judges Fuentes, Graves and Koblitz.

Plaintiffs appeal from the trial Court's order vacating a judgment obtained in Florida which dismissed Defendant's unsuccessful will contest. The Florida judgment was entered in 1994 and the Plaintiffs' docketed it in New Jersey in 2000.

In 2002, Defendant moved in the Law Division, Essex County, seeking to declare the Florida judgment void and unenforceable. The motion was unopposed and therefore granted by the trial Court. In 2011, Plaintiffs moved to vacate the trial Court's order, claiming that they did not receive notice of Defendant's motion, and once they received a copy of the trial Court's order and copy of Defendant's certification, they promptly moved to vacate the trial Court's order removing the Florida judgment. Plaintiffs' motion was denied by the trial Court, which did not make any findings of fact in light of the lack of any opposition, and Plaintiffs appealed.

On appeal, the order was reversed, with the Appellate Division remanding the matter to the trial court to make findings of facts and conduct a plenary hearing on the notice and other issues, which is required on every motion tried without a jury and appealable as of right.

Probate Litigation – Omitted Spouse Claim Barred by Laches

Lilly Buie and Antwan Moses v. The Estate of Isom Buie, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: ESX-C-192-10) (Ch. Div. 2012).

Decedent died on January 9, 1996 survived by his then wife, Lilly, and his six children. Decedent's Will dated March 12, 1988 which left his Newark residence to his six children, equally, named one of his sons as Executor.

One week after Decedent's death, his wife, Lilly, received non-probate assets of approximately $95,000, consisting of joint bank accounts and a life insurance policy of $10,000. Lilly then immediately left the Newark residence and moved back to her home state of South Carolina with her son, Antwan. Since that time, Decedent's remaining children maintained the house, paid debts and fees owed on the house, and made repairs and capital improvements. These children lived in the house and paid rent, continuing to make payments on the mortgage.

Lilly and Antwan filed a Complaint on April 22, 2010, fourteen years after Decedent's death, seeking Lilly's intestate share as an omitted spouse, or an elective share, along with Antwan's 1/6 interest in the house under the Will.

Under the omitted spouse statute, Lilly claims she is entitled to her intestate share, $50,000 plus 50% of the residuary estate, as she was not mentioned in the Will. Although Lilly only had an eighth grade education and was otherwise unsophisticated, the Court found that the doctrine of laches should apply to bar her claim as an omitted spouse and for her elective share.

When determining whether laches should apply, the court considers (1) the length of the delay, (2) the reasons for the delay, and (3) how the circumstances of the parties have changed over the course of the delay. First, there has been substantial delay in filing the action, fourteen years. Despite being given notice that she had an obligation under the mortgage secured by the Newark residence, Lilly failed to take any action after Decedent's death. Second, Lilly was the cause of the delay in this matter. She voluntarily removed herself to South Carolina a week after Decedent's death, and despite receiving a letter regarding her spousal interest in the Estate back in 1996, she failed to act. Finally, the remaining children were prejudiced by Lilly's failure to act, as they have carried the residence for fourteen years with no contribution from Lilly, and have been foreclosed from performing a proper investigation into Lilly's claims. Therefore, the doctrine of laches bars the claim and Lilly's portion of the Complaint was dismissed with prejudice.

The matter was then remanded on the issue of the partition of the Newark residence to properly determine Antwan's 1/6 interest in the property.

Probate Litigation – Palimony Agreement Had No Effect on Allocation of Proceeds of Wrongful Death Action in Light of Plaintiff's Failure to Pursue her Rights in the Wrongful Death Action Filed by Decedent's Estate

In the Matter of Approval of a Settlement Reached in the Matter of Kevin J. Daul, Individually and as Administrator of the Estate of Christopher J. Daul, Deceased v. East Coast Jets, Inc., 2012 N.J. Super. Unpub. ____ (Docket No.: A-3190-11T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Atlantic County. Before Judges Lihotz and Kennedy.

Decedent, Christopher Daul, was killed in a plane crash on July 31, 2008. Plaintiff asserted a claim for palimony against the Estate.

On behalf of the Estate, Kevin Daul as administrator settled a wrongful death action filed in the Court of Common Pleas, Philadelphia County, Pennsylvania against East Coast Jets on behalf of the Estate. The Pennsylvania court directed the Estate administrator to obtain approval of the allocation of the settlement proceeds from the Superior Court, Law Division, New Jersey.

The Estate then filed an action in the Law Division in New Jersey seeking approval of the allocation of the proceeds in the wrongful death action and Plaintiff answered, claiming an equitable interest in the Estate based upon her palimony claim. She claimed that a portion of the recovery should be allocated to the survivor action and payable to the Esate to which she seeks entitlement. On December 22, 2010 the Law Division approved the 100% allocation to the wrongful death portion. Plaintiff did not appeal this order.

Over a year later, Plaintiff filed a R. 4:50-1 motion seeking to vacate the December 22, 2010 Order.

According to Plaintiff, she had cohabited with Decedent for more that 4 years with Decedent and they planned to marry. On January 13, 2010, Plaintiff filed a palimony claim against the Estate which was dismissed by the Chancery Division for failure to comply with the Statute of Frauds. This was reversed on appeal and the matter reinstated on August 12, 2012, as the action occurred prior to the enactment of the Statute.

In the interim, the Estate filed and then settled its wrongful death claim, with the Pennsylvania court allocating 100% of the recovery to the wrongful death portion. Plaintiff sought to intervene in that action which was denied based on lack of standing. Plaintiff did not appeal this order. Plaintiff also sought to intervene to object to the allocation by the Pennsylvania Court, which was denied. Plaintiff also failed to appeal this order.

In her R. 4:50-1 motion, filed over a year after its entry, Plaintiff sought relief from the December 22, 2010 order, claiming that reinstatement of her palimony claim justified allocating a portion of the recovery to the survivorship claim. The Appellate Division disagreed, finding that the Law Division, in upholding the allocation, properly followed Pennsylvania law requiring approval of its allocation.

In light of her failure to appeal the Pennsylvania orders, and in light of the Law Division's reasoned analysis, the Law Division's decision was upheld on appeal.

Probate Litigation - Palimony Agreement Upheld Despite the Trial Court Holding a Plenary Hearing the Same Day Default Was Entered Againt Pro Se Defendant

Grazyna Kozikowaka v. Wieslaw Wykowski, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5466-09T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County. Before Judges Axelrad, Sapp-Peterson and Ostrer.

Defendant seeks reversal of the trial Court's judgment awarding palimony to his former paramour, claiming the Court erred in not retroactively applying the Statute of Frauds requiring palimony agreements to be in writing and entered into with advice of counsel, erred in proceeding with a default hearing the same day default was entered against Defendant, that Plaintiff failed to establish a valid palimony agreement, that the award was unsupported by the evidence, and that the court failed to find Defendant was incompetent.

Defendant and Plaintiff had two children and lived with each other for 20 years, and the Plaintiff moved out because she was afraid of Defendant's conduct. Plaintiff filed a Complaint in June 2008, a year and a half before the Amendment to the Statute of Frauds was enacted, seeking palimony. After protracted proceedings, and as a result of Defendant's failure to provide discovery, the trial Court entered a default against him, suppressing his Answer. While Defendant acted pro se, the trial Court held a proof hearing and thereafter awarded Plaintiff palimony. Plaintiff testified that Defendant promised to support her and to marry her, but "something happened" to Defendant. The trial Court found valid consideration for Defendant's promise as Plaintiff cohabited with Defendant for 20 years, she prepared meals, shared responsibilities of the home, raised the children and took care of tenants. The Court also found that Plaintiff was simply unable to support herself and the children on her salary. The parties had two multi-unit residences and the Court awarded Plaintiff one of the residences for her and her children, with the value to serve as a reduction in the total palimony award.

Defendant appealed, then filed a motion for a stay and for an Order declaring him incompetent. However, Defendant's expert failed to opine that Defendant was incompetent and the motion was denied. On appeal, a majority of the Court upheld the lower Court. A dissent was entered, claiming that having the proof hearing the same day the default was entered, at a time when Defendant was acting pro se, was reversible error given Defendant's capacity issues.

Probate Litigation - Settlement Upheld Despite Failure of Parties to Put Settlement in Writing

Vincent Rutigliano v. James P. Rutigliano, 2012 N.J. Super. Unpub. ____ (Docket No.: A-2797-11T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Ocean County. Before Judges Axelrad and Haas.

Plaintiff appeals from the Law Division's Order upholding a settlement reached at a mediation session with his brother, the Defendant herein, regarding the disposition of their mother's estate, claiming that the Court erred in allowing Defendant to testify as to the terms of settlement in light of the confidential nature of the mediation. The settlement and order were affirmed on appeal.

Plaintiff and Defendant are brothers and beneficiaries under their mother's Will. Plaintiff alleged by way of a Complaint that Defendant induced their mother to leave a portion of the Estate to Defendant's children. The Court ordered the parties to mediation. On July 21, 2011, after a six and a half hour mediation session, held at Plaintiff's attorney's office, the mediator advised the Court that a settlement had been reached.

On July 28, 2011, Plaintiff's attorney sent a letter to Defendant's attorney that Plaintiff does not consider the settlement binding. Defendant's attorney responded in a letter concluding that a settlement was reached after full disclosure before the mediator and also set forth the complete terms of settlement. Defendant subsequently filed a motion to enforce the settlement.

The Court set down a hearing and in light of the confidential nature of the mediation, only allowed testimony from Plaintiff and Defendant. While Plaintiff refused to testify, Defendant testified about the settlement. Defendant told the Court about the terms of settlement which were reached in front of the mediator, that despite not being reduced to writing, that the Plaintiff understood and agreed to the terms of settlement, and that the agreement was not reduced to writing because Plaintiff had to leave for a previous engagement.

Based on this testimony, the Court determined that Plaintiff has authorized the settlement, its terms were clear and definite, there was adequate consideration, and that the absence of a written agreement was not fatal. Plaintiff's argument on appeal that the testimony of Defendant should not have been considered as the settlement was confidential was rejected, and the matter affirmed, with the Appellate Division finding that the parties had waived the mediation privilege in light of their consent to report the matter settled to the Court after the mediation.

Probate Litigation - Settlement Upheld in Light of Parties' Voluntary Agreement Which Was Placed on the Record

Rosemary Casagrande, et al. v. Roberta Casagrande, et al. and Mark Casagrande, et al. 2012 N.J. Super. Unpub. ____ (Docket No.: A-3609-09T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County. Before Judges Messano, Yannotti and Kennedy.

Defendant, Mark Casagrande, appeals from Chancery Division orders enforcing a settlement agreement between the parties claiming that there was no meeting of the minds, that enforcement was unconscionable and would violate public policy, various conflicts of interest and that mediation was contrary to the Court's Order formally directing the parties to mediation.

Frank and Roberta Casagrande were married in 1974 and had three children, Mark, Sabrina and Christina. Frank purchased life insurance in the amount of $1.7 million from Sentry Life and named Roberta as primary beneficiary with their children as equal contingent beneficiaries. Frank also purchased a $1.0 million policy from Guardian Life naming Roberta as primary beneficiary.

Frank and Roberta divorced in 1995, and as part of their matrimonial settlement agreement (MSA), Frank was required to maintain life insurance in favor of Roberta and the children.

On September 6, 2000, Frank created a trust naming his girlfriend, Rosemary, as trustee, and providing that the life insurance requirement of the MSA should be segregated and held in a separate fund in the trust as long as the obligation remained. In 2001, Frank transferred the Sentry policy to the trust but failed to change the beneficiary. In 2002, Frank married Rosemary. In 2007, he executed a new Will leaving small bequests for his children with the remainder of his Estate distributable to Rosemary.

On June 13, 2008, Frank died, prompting Rosemary to file a Complaint seeking reformation of the Sentry policy, which Frank never changed, to conform to the MSA, trust and Will. Defendants, Roberta, Mark, Sabrina and Christina answered seeking payment of the insurance proceeds and payments under the MSA.

After some discovery, the parties were ordered to mediation and the matter was mediated in front of Judge John M. Boyle. After ten hours of discussions, the matter was settled with the parties placing their agreement on the record as to the disposition of the Sentry policy proceeds among the parties as well as disposition of the Estate.

Judge Boyle then questioned Rosemary who acknowledged, along with the other parties, that they understood the terms of settlement, that they were represented by counsel who answered their questions, that the settlement was voluntary, that it was a compromise and was reasonable, that they had the right to litigate in lieu of settling, and that they were satisfied with the services provided by counsel. Judge Boyle also warned the parties that the settlement was

binding on them. Counsel also agreed that a Consent Order and Releases would be signed by the parties.

When Mark, Sabrina and Roberta refused to sign the releases, Rosemary filed a Complaint seeking to enforce the settlement. Mark, Sabrina and Roberta claimed that they did not understand that the settlement was binding. This argument was rejected out of hand in light of the entry of their knowing and voluntary agreement to the settlement on the record. Mark also argued that there existed conflicts of interest, which was rejected.

The trial Court upheld the settlement and Mark appealed, claiming there was no meeting of the minds. The Appellate Division upheld the lower Court, finding adequate evidence in the record to support enforcement of the settlement. Mark was advised that the settlement would be binding and conclusive and he explicitly approved the settlement on the record, and there is no basis to vacate the settlement.

Taxation – Request for Compensatory and Punitive Damages Against Division of Taxation for Failure to Audit in a Timely Manner is Denied

Estate of Sadie Wishnick, et al. v. Division of Taxation, 2012 N.J. Super. Unpub. ____ (Docket No.: 000185-2011) (Tax Court 2012).

The Executor of the Estate filed a motion seeking to impose compensatory and punitive damages against the Division of Taxation for taking an unreasonable amount of time to determine the estate tax owed by the Estate. The Division of Taxation cross-moved for summary judgment requesting acceptance of its final notice of assessment against the Estate.

Decedent died testate on October 23, 2007. Plaintiff, Decedent's daughter, was appointed as Executrix of the Estate. On May 19, 2008, the Executor filed a resident decedent estate tax return but failed to pay the tax. Starting in September of 2008 and continuing through 2010, several letters of inquiry were sent to Decedent's son requesting additional information. The initial letters went unanswered.

The Executor then hired counsel, made a payment on account of taxes, but failed to provide the additional information.

Adjustments were made, and a notice of assessment was mailed in September of 2010 to the Executor. The Notice of Assessment was amended a few more times with the final notice of Assessment being mailed on November 16, 2010. The tax was paid, penalties and interest were assessed, and also paid.

Plaintiff, as Executor, then filed a Complaint seeking to impose compensatory and punitive damages against the Division of Taxation claiming the Estate was "penalized and taxed in an excessive manner" and that the Division employees "took their sweet time in coming to a settlement." Plaintiff admitted that she was not challenging the actual assessment made, rather she was contesting the length of time it took to complete the audit.

On October 6, 2011 Plaintiff moved for summary judgment, and the Division cross-moved for summary judgment and dismissal of the Complaint.

Under the applicable statute, the Division is given a period of four years after the filing of the initial return to review the tax returns and assess additional tax, interest and penalties. In this case, the return was filed on May 19, 2008, and the final Notice of Assessment was issued on November 16, 2010, well within the four year period for making additional assessments. In light of the statute, and the fact that the Estate accepted the final assessment issued by the Division, the Division's motion for summary judgment was granted and Plaintiff's Complaint dismissed with prejudice.

Taxation – Retroactive Application of New Jersey Estate Tax Held Constitutional Where Decedent Did Not Rely on Previous Statute in Drafting Estate Plan

Estate of Stanley Kosakowski v. Director, Division of Taxation, 2012 N.J. Super. Unpub. ____ (Docket No.: A-4499-10T2) (App. Div. 2012). On appeal from the Tax Court of New Jersey. Before Judges Payne, Simonelli and Accurso.

The Estate appeals from the Tax Court's grant of summary judgment in favor of the Division of Taxation which upheld the retroactive application of the provisions of the New Jersey Estate Tax to this Estate because Decedent did not rely, to his detriment, on prior existing law in drafting his estate plan.

Decedent died on March 22, 2002. On April 3, 2002, Decedent's Will was admitted to probate. The Will, executed on May 24, 1997, was a simple will and contained no devices to avoid estate taxes. His taxable estate was valued at $5,394,851, with $438,182 in New Jersey Estate tax, which was paid on December 23, 2002.

Significant legislative changes effected the amount of NJ estate taxes due from the Estate. In 2001, Congress raised the federal exclusion amount, with NJ subsequently decoupling the NJ estate tax from these increases in July of 2002. The NJ law was given retroactive effect to January 1, 2002, thereby causing the Decedent's Estate additional taxes.

Successful challenges to the retroactive application of the NJ estate tax were made by other Estates wherein the Decedents had engaged in tax planning in reliance on state and federal law which had existed on January 1, 2002. These individuals died during the period of January 1, 2002 and July 1, 2002 and their estates were adversely effected by the retroactive application of the decoupling of the NJ estate tax. In those cases, the Tax Court held that retroactive application to these estates, although constitutional, would effect a manifest injustice. Summary judgment was therefore granted in favor of the Estate in those actions. These decisions were reversed on appeal to the Appellate Division, and reinstated by the Supreme Court, which held that the doctrine of manifest injustice offers an equitable remedy in the circumstances presented and determined that the Estates' interest in preserving Decedents' careful plans to legally avoid estate taxes outweighed the public's interest in preserving tax revenues.

In this case, Decedent Kosakowski did not engage in any tax planning and could not demonstrate reliance on the prior state of the law to support an equitable claim for relief premised on manifest injustice, and therefore the Tax Court's denial of the Estate's claim for refund was proper under the circumstances.

Trust Litigation – Accounting Issues, Removal of Guardian ad Litem and Denial of Attorneys' Fees

In the Matter of the Inter Vivos Trust, Joseph Brandes, Grantor (September 12, 1994) and In the Matter of the Inter Vivos Trust, Dorothy Singer, Grantor (December 23, 1999), 2012 N.J. Super. Unpub. ____ (Docket No.: A-1998-09T3, A-6049-09T3, A-6050-09T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County. Before Judges Fisher, Baxter and Nugent.

This appeal centers around the Chancery Division's removal of Ricki Singer as guardian ad litem for her son, Daniel Martin Singer, who is a beneficiary of two (2) trusts established by his grandmother (the "1999 Trust") and his Uncle (the "1994 Trust"), which named his Uncle, Steven Singer as Trustee. Ricki, as guardian ad litem, had brought suit against the Trustee on Daniel's behalf seeking an accounting of the two (2) trusts.

After a discovery master was appointed, and discovery conducted between the parties, accountings for both trusts were produced. The Trustee sought summary judgment on the adequacy of these accountings. Summary Judgment was granted on the 1999 Trust, while litigation on the 1994 suit continued. In the 1994 Trust suit, Ricki amended her Complaint to add certain corporations as named Defendants, alleging they had engaged in fraud with the Trustee. A counterclaim against Ricki Singer for sanctions and legal fees was filed by these Corporate Defendants claiming that the filing was frivolous. Before a trial on the merits could occur, the Court removed Ricki Singer as guardian ad litem, finding that there was a conflict between her interest in defending against the imposition of legal fees against her individually and her representation as guardian ad litem for her son. Once she was removed, the newly appointed guardian ad litem settled the 1994 Trust dispute with the Trustee. The parties sought legal fees of over $1,500,000, more than the potential recovery to the Trusts under any scenario, which were denied. The parties appealed.

On appeal, the Appellate Division reversed the lower Court's Order removing Ricki as guardian ad litem, finding that the potential for a fee award against either the trust or the guardian ad litem, or both, as an insufficient reason to remove her. The settlement following Ricki's removal as guardian ad litem was also vacated and the matter remanded for further proceedings. The Appellate Division also set aside the lower Court's disposition of the fee applications in the 1994 Trust dispute, holding that they could be renewed following the ultimate disposition of the action. The matter was remanded for further proceedings.

The matter was appealed to the New Jersey Supreme Court, and summarily remanded to the Appellate Division requesting a written opinion on the reasons that the Appellate Division overturned the lower Court's decision on legal fees in this matter.

On remand, the Appellate Division reaffirmed its holding that Ricki should not have been removed as guardian ad litem, upheld its earlier holding that the settlement should be vacated, and that the fee applications should be addressed at the conclusion of the 1994 Trust suit, as the disposition of that action will have a profound effect on the issues raised by the parties in their fee applications. The lower Court had found that the fees in the 1994 Trust suit were exorbitant and beyond what is appropriate, and therefore denied the applications. The counsel fees far exceeded the alleged loss in assets due to the Trustee's alleged mishandling of the Trust. The judge also found that Ricki's discovery requests were abusive of the process and unnecessary. A guardian ad litem may be entitled to counsel fees out of a fund in court when the guardian's efforts have produced a tangible economic benefit for a class of persons that did not contribute to the cost of the litigation. Ricki argued her efforts benefited her son, Daniel, as beneficiary. However, until final resolution occurs, the Court is unable to measure the economic benefit received by the 1994 Trust and whether any fees should be awarded to Ricki. As to the request for sanctions, the lower Court concluded that Ricki's claims on behalf of the beneficiary were not frivolous. The Appellate Division reaffirmed its holding that all fee applications should be addressed at the conclusion of the 1994 Trust suit.

Trust Litigation – Breach of Fiduciary Duty for Conversion of Assets

Richard C. Pfeifer, et al. v. Joan A. Langone, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: A-3168-10T4, A-4095-10T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Law Division, Ocean County. Before Judges Carchman and Baxter.

Trustee who converted assets of a Trust which was established by her mother was ordered to reimburse the Trust for the assets which were converted to her own use, contrary to the terms of the Trust, and also ordered to pay punitive damages and legal fees. Trustee appealed and the Appellate Division affirmed, subject to the trial Court's determination of whether the parties' mother exercised the power of appointment given to her in the Trust and whether additional parties needed to be compensated.

On October 6, 1999, Verna and John Obermuller conveyed title to their residence located in Brooklyn, New York to a Trust held for the benefit of their four children. They named their daughter, Joan, as Trustee, and Verna and John each reserved a life estate in the residence. They also provided for a power of appointment limited to their issue. In the Trust Agreement, Joan, as Trustee, acknowledged that she held the property in trust for her and her siblings. The Trust Agreement also prohibited Joan from encumbering the property.

Despite the terms of the Trust, in March, 2002, Joan obtained a $100,000 mortgage on the property and used the proceeds for her own benefit. On November 4, 2002, Joan conveyed the property to a third party for $230,000, satisfied the mortgage balance, and retained the remaining proceeds by establishing a stock portfolio in her own name.

On June 22, 2009, Joan's siblings filed suit, seeking an accounting and reimbursement to the Trust, claiming that Joan had breached her fiduciary duty. They sought compensatory and punitive damages. Since the proceeds from the sale of the residence were deposited in New Jersey, New Jersey was a proper forum to bring the action. On December 7, 2010, Joan consented to the entry of default against her and a consent order was entered subject to a determination of damages. The trial Court conducted a proof hearing, finding that the consent order included a concession of fraud, and punitive damages were therefore awarded, with Joan forfeiting her share of the Trust. The trial Court found that Joan had breached her fiduciary duty and therefore ordered Joan to pay back the proceeds from the mortgage, the proceeds received from the sale of the residence, awarded punitive damages with Joan forfeiting her share in the residence, and compelled Joan to pay Plaintiffs reasonable attorneys' fees. The Appellate Division affirmed, also holding that the life estate in the parties' mother should be quantified to determine whether there are any other beneficiaries who should be compensated, as the parties' mother reserved a power of appointment and was a necessary party to the action.

Trust Litigation - Income from Special Needs Trust Included as an Asset for Child Support Purposes

Christina Mazyk v. Marcos Cozze, Jr., Richard C. Pfeifer, et al. v. Joan A. Langone, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: A-1013-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hunterdon County. Before Judges Sapp-Peterson and St. John.

Defendant appeals from a judgment of the Family Part finding that distributions of income from Defendant's self-established Special Needs Trust be recognized for purposes of his child support obligation.

After Defendant's daughter was born, he had a serious motorcycle accident. A law suit was filed with Defendant receiving $1,800,000. Defendant then established a Trust, for his own benefit, with the settlement amount, meeting the requirements of the Federal Medicaid Statute, which allows trusts to be established for a disabled person to supplement Medicaid Assistance. The Trustee had absolute discretion to make distributions for Defendant's benefit.

The mother of Defendant's daughter filed a Complaint seeking child support. She also received state assistance for her daughter. The trial Court issued a written opinion finding that gross income for computing child support includes income from a Trust. The Court noted that Defendant's Trust allowed for distributions for Defendant's special needs, including vacations, cable television, etc. and that nothing prevented the court from determining why such special needs should not include support for his daughter.

While it was conceded by the lower Court that the Trustee could not make distributions from the Trust for unpaid child support, the Defendant's trust income and social security assistance should be considered income for child support purposes. The Court therefore ordered an accounting of the income of the Trust to compute Defendant's child support obligation.

On appeal, the Appellate Division affirmed, noting that this was a matter of first impression in New Jersey. Defendant voluntarily gave up the assets of his settlement by creating the Special Needs Trust and, while the trial Court appropriately recognized that the assets were not available for child support obligations, the distributions from that Trust were appropriately considered as income for support purposes.

Trust Litigation – Reimbursement of Expenses Out of Special Needs Trust to Beneficiary's Mother Allowed

In the Matter of Jennifer Rogiers, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0389-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County. Before Judges Yannotti, Kennedy and Guadagno.

Ruben Martinez appeals from the trial Court's judgment granting $441,391.16 to Rosa Rogiers in unreimbursed expenses to be paid out of the funds remaining in a special needs trust held for the benefit of their now deceased daughter, Jennifer. Rosa appeals from the denial of pre-judgment interest. After considering the arguments, the decision was affirmed on appeal.

Jennifer was born in 1983, severely handicapped as the result of cervical cord injuries inflicted upon her at birth. Jennifer resided with her mother, Rosa until her death in 2005, and Rosa provided Jennifer with ongoing medical assistance. Suit was brought by Rosa on Jennifer's behalf alleging medical malpractice. They obtained a judgment of $2.6 million which was placed in a special needs trust for Jennifer's benefit. There are $1.1 million remaining in trust, which is to be distributed to Ruben and Rosa, equally, as Jennifer's parents under intestacy.

After Jennifer's death, Reuben sought 50% of the funds held in the Trust, which was challenged by Rosa, who sought reimbursement for expenses she incurred and services she provided on Jennifer's behalf during her lifetime, including, compensation at $15 per hour for 8 hours per day for attending to Jennifer's needs which was previously approved by the New York Surrogate's Court, $204,936.91 in out of pocket expenses listed in an exhibit filed with the Court, $172,320 for care given by Rosa while Jennifer was hospitalized prior to her death in Ecuador, unpaid bills from Rosa and Jennifer's trip to Ecuador prior to her death, and a $2,000 a month household allowance that was withheld from Rosa over the past few years prior to Jennifer's death. It was undisputed that Jennifer required nursing care twenty-four hours a day and that Rosa performed this task with fidelity and devotion, a duty for which people are normally compensated. The trial Court found that these expenses were for legitimate services provided by Rosa over the years. This decision was upheld on appeal.

Trust Litigation – Trust Terminated by its Terms Based on Finding of Probable Intent of Grantors

In the Matter of the David Markowitz and Rosalie Markowitz Insurance Trust, 2012 N.J. Super. Unpub. ____ (Docket No.: MER-12-00220) (Ch. Div. 2012).

After reviewing the submitted documents and ascertaining Grantors' probable intent as to the termination of their irrevocable trust, the Court found that Grantors intended that the Trust terminate upon the second to die should they live past the date of termination set forth in the Trust.

After the death of their parents, Grantors' children filed a Complaint seeking a final distribution from their parents' Irrevocable Insurance Trust along with an accounting. The Trustee, PNC Bank, NA, filed an answer claiming that the Trust was intended to continue for the term of the lives of Grantors' children.

After reviewing the submissions of the parties, the Court determined that the issue would be resolved by an interpretation of Grantors' probable intent.

Grantors established the Trust and funded it with a second to die life insurance policy. The Trust provided that the proceeds of insurance would be held until January 1, 2005 at which time the assets would be distributed to Grantors' children. The Trust also provided that after the death of the Grantors, that the assets would be divided into equal shares for each of Grantors' children and held in further Trust for their lifetimes. And the termination paragraph provided that the Trust shall terminate on January 1, 2005 unless either Grantor was alive or trusts have been established pursuant to the terms for Grantors' grandchildren. This ambiguity required the Court to determine Grantors' probable intent.

Factually, Grantors survived the January 1, 2005 date. They both died in 2009, and thereafter the Trust was funded. The Trustee believed the Trust continued and the Grantors' children sought an immediate distribution.

In analyzing the probable intent of the Grantors, the Court looked to the various estate planning letters which led to the conclusion that the Grantors' wanted their children to receive an immediate distribution on January 1, 2005, or thereafter when the second to die passed and the Trust was actually funded. The Court was unable to find any evidence of an intention to continue the Trust after January 1, 2005. The Court therefore ordered the Trust terminated and an accounting by the Trustee.

Will Contest - Attorneys' Fees Capped by Court Based on Representations by Attorneys Prior to Settlement

In the Matter of the Estate of Halina Krzeminski, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-3182-10T1) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County. Before Judges A. A. Rodriquez and Ashrafi.

Attorney Joel Davies, Esq. appeals from the trial Court's order denying his motion for reconsideration of the amount of attorney's fees awarded to him following litigation of a contested will. Davies claims on appeal that the trial court improperly reduced his fee request based on an improper policy of capping the hourly rate charged by attorneys payable from an estate.

On appeal, although the Appellate Division agreed that a particular Judge's policy of capping fees should not be a basis for an award of fees under R. 4:42-9, the Judge in this case did not abuse his discretion.

Decedent's unexecuted Will was offered for probate and Davies represented potential beneficiaries. Settlement discussions were held between the parties and after hearing estimates on fees from the attorneys, the judge indicated that it was the policy of the Surrogate's office to cap fees at $200 per hour. At the time, none of the attorneys objected, and Davies estimated his fees to be $50,000.

The parties then entered a settlement and a consent judgment was entered, with the Court authorizing the attorneys to submit Affidavits of Services to the Court for approval. Davies submitted an Affidavit seeking $92,155 based on an hourly rate of $350, an amount higher than the other attorneys. The Court awarded Davies a reduced amount of $52,988. Davies then filed a motion for reconsideration which was denied. In his oral decision, the Judge carefully reviewed the Affidavit of Services filed by Davies and considered the applicable standard of review. The Judge stated while he did not have a set policy of capping the rate at $200, it was his belief that the attorneys had consented to that rate at the time of settlement. Davies appealed.

In calculating an award of fees, the Court must determine the lodestar, the number of hours reasonably expended, multiplied by a reasonable hourly rate. This must be weighed against the specific circumstances and the recovery. Davies was paid 25% of the amount of his clients' total recovery, and the hourly rate of $350 was higher than the remaining attorneys, who were agreeable to the $200 per hour cap on fees.

Although the trial court relied on the $200 cap, it was proper given the Court's finding that the parties apparently agreed to the cap in settlement discussions. The award was upheld as fair and reasonable given these facts.

Will Contest – Caveat Dismissed Based on Inadequate Proofs

In the Matter of the Estate of Michael Fleischer, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0668-11T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County. Before Judges Espinosa and Kennedy.

Plaintiff, the daughter of Decedent, appeals dismissal of her Complaint and caveat challenging the Will of her father. Without reviewing the contents of Decedent's Will dated in October of 1995, Plaintiff filed a caveat. The Will provided that Plaintiff and her sister, Decedent's children from a prior marriage, would each receive $1,000, with Decedent's second wife inheriting the remainder of the Estate.

In her Complaint, Plaintiff alleged that Decedent had drafted an updated Will that he had discussed with her and that the Will offered for probate was not drafted by Decedent's attorney. The Executor under the Will then filed a Complaint seeking to dismiss the caveat, which was accompanied by a Certification from the scrivener confirming that Decedent had signed the Will freely and that there was no undue influence. A hearing on the Orders to Show Cause were scheduled. On the return date, the Court dismissed Plaintiff's caveat.

Plaintiff, acting pro se, filed a second Complaint with various allegations, which was also dismissed. Plaintiff, represented by new counsel, then filed a third Complaint seeking an accounting and for the first time, alleged that she received a handwritten birthday card from Decedent on January 27, 2009 which she contended should be admitted as a holographic will. The card allegedly instructed her to handle the Estate and split the assets with her sister. In the alternative, Plaintiff sought admission of a prior Will, dated in August of 1995, that was consistent with Decedent's premarital agreement providing that Decedent's assets would pass to his children. A hearing was held and the Court ordered plaintiff to submit a report from a hand-writing expert regarding the alleged holographic will. The Court also continued the restraints on distributions and ordered an accounting.

In early 2011, Plaintiff submitted an expert report which concluded that the alleged holographic will was in Decedent's handwriting. The parties then entered into a consent order regarding discovery, providing in part that Plaintiff would deliver the original birthday card for inspection by Defendant's expert. Plaintiff failed to produce the card, despite an order from the Court and motion practice, and the matter was ultimately dismissed, with the Court awarding counsel fees to Defendants.

On appeal, the Appellate Division affirmed, finding sufficient factual support for the trial Court's dismissal of the action in light of Plaintiff's failure to abide by the Court's Order to produce the alleged holographic will. The fee award was also proper in light of Plaintiff's failure to abide by her discovery obligations.

Will Contest – Complaint Dismissed for Failure to File Within Time Limitations of R: 4:85-1 or R. 4:50-1

In the Matter of the Estate of Chaim Lichtsztra, deceased, et al. v. Pizem and Wiley, Malehorn, et al., 2012 N.J. Super. Unpub. ____ (Docket No.: A-3162-10T3, A-4615-10T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Essex County. Before Judges Messano and Yannotti.

Plaintiff, the daughter of Decedent, appeals from the trial court's grant of summary judgment and dismissal of her Complaint for failure to bring a timely Will contest under Rule 4:85-1 within six months of the date of probate.

Decedent's daughter, who resided in New York, had a falling out with the Decedent in 2003, just prior to his death. Decedent executed a new Will in 2003 when he moved from his home in Brooklyn to New Jersey to live with his good friends. After Decedent's death in 2004, Decedent's attorney, who drafted the 2003 Will, sought probate of the 2003 Will in New Jersey. Decedent's attorney was unable to locate the Plaintiff daughter and therefore the trial court allowed for notice by publication.

After his death, Decedent's daughter probated Decedent's prior Will, executed in 1996, with the Kings County Surrogate in Brooklyn, New York. Despite receiving constructive notice of the probate of the 2003 Will in 2004 and 2005, Plaintiff did not bring a claim to set aside the 2003 Will which was probated in New Jersey until 2010. On a motion for summary judgment, the trial Court dismissed Plaintiff's action finding that she did not bring her claim within 6 months, as required by Rule 4:85-1. The Appellate Division upheld this decision, finding that Plaintiff had received constructive notice of the New Jersey probate, as her attorney was aware of the probate and the appointment of an Executor of the Estate in New Jersey in 2004, and that there was no reasonable justification for the delay in filing the New Jersey action.

Will Contest - Decedent's Will and Inter Vivos Transfers Were Set Aside in Light of Defendant's Confidential Relationship

In the Matter of the Estate of Antoinette Zarrillo, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0108-2008) (Ch. Div. 2012).

Decedent favored one child over another due to the sacrifices made by that child in caring for her. In a detailed discussion of the facts, Judge Koprowski found that the confidential relationship shared between the care-giving child and Decedent overcame Decedent's free will. The will and inter vivos transfers were therefore set aside.

Antoinette Zarillo died testate on January 19, 2008. Her husband predeceased her in 2000, and they had three sons, Michael, Nicholas and Joseph. Antoinette left a Last Will and Testament dated December 14, 2004 in which she devised her residence to Joseph, and left her residuary estate, 10% to Michael, and 45% to both Nicholas and Joseph, with Joseph named as

Executor. This Will was signed the day before Decedent underwent heart surgery. Decedent's prior wills signed in 2000 and 1978, devised her estate in equal shares to her three children.

After Decedent's death, Michael filed a caveat. Michael and Nicholas then filed a Complaint seeking to admit the 2000 Will to probate. Joseph counterclaimed, seeking admission of the 2004 Will to probate. In response, Michael and Nicholas amended their complaint seeking to set aside the 2004 Will as the product of undue influence.

Factually, Joseph and his wife, Ivette, lived with Decedent since 2000, and Joseph shared a confidential relationship with Decedent, and was in a dominant position. He was named as power of attorney and was intimately involved with her finances, and her medical and legal decisions. Joseph contacted an attorney in 2004 to prepare a deed transferring Decedent's house to he and his wife, which Decedent did not sign. Joseph was present at the estate planning meetings with Decedent when the 2004 will was drafted and executed. Joseph also orchestrated inter vivos transfers of Decedent's assets to he and his wife.

In a thorough factual analysis, the Court held that although Decedent was relatively independent, her health began to decline during the time that the 2004 will and inter vivos transfers were made. Joseph shared a confidential relationship with Decedent, and suspicious circumstances in light of the change in disposition between the 2000 and 2004 wills, creating a presumption of undue influence which Defendant failed to rebut by a preponderance of the evidence. The testimony of the scrivener of the 2004 will was simply not sufficient to overcome the presumption. The 2004 will was set aside, and the 2000 will admitted to probate.

As to the inter vivos transfers orchestrated by Joseph in 2004, the Court found that they were also the product of undue influence in light of the confidential relationship, and Joseph failed to rebut the presumption. The assets were therefore returned to the Estate for distribution in accordance with the terms of the 2000 will.

Will Contest – Denial of Attorneys' Fees for Contesting Probate of a Copy of Decedent's Will Without Reasonable Cause

In the Matter of the Alleged Will of Allan C. Schnecker, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5249-10T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Waugh and St. John.

Plaintiff appeals from the trial Court's denial of her request for attorneys' fees. Plaintiff, a widow of the Decedent, contested the validity of a copy of Decedent's Will which was offered for probate by Decedent's daughter. After a trial, the trial Court found by clear and convincing evidence that the Decedent did not destroy or revoke his Will. The Court did not find Plaintiff's testimony credible but Decedent's testamentary intentions were adequately set forth in the copy of his Will offered for probate. The Court specifically relied on the fact that Plaintiff had called Decedent's attorney, right after he died, asking where the Will was, so she assumed that there was a Will.

After the trial, Plaintiff sought attorneys' fees from the Estate pursuant to R. 4:42-9(a)(3), claiming she had reasonable cause to contest the probate of Decedent's Will. The Court disagreed, finding that Plaintiff had a weak case. This decision was affirmed on appeal as the trial Court's findings were amply supported by credible proof, that the testimony offered by Plaintiff or on her behalf lacked credibility, was inadmissible or lacked probative value with respect to whether Decedent destroyed his Will. To satisfy the reasonable cause requirement for an award of fees, Plaintiff was required to provide the Court with a factual background reasonably justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process. Instead, it was clear that Plaintiff possessed knowledge that the Will was not destroyed and simply failed to establish a factual background to justify her challenge.

Will Contest – Decedent's Will Admitted to Probate with Alterations and Cross-outs

In the Matter of the Estate of Catherine R. Hoch, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-0758-10T2; A-4881-10T2; A-5019-10T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County. Before Judges Parrillo and Grall.

Brothers of the Decedent and a niece and nephew appeal from the trial Court's admission of Decedent's Will to probate, claiming that the Court erred in finding clear and convincing evidence that Decedent intended that her Will, which contained numerous cross-outs and alterations, should act as her Last Will and Testament. They also appeal the trial Court's failure to award full counsel fees.

Decedent entered a nursing home in January of 2008 where she remained until her death on October 15, 2008. While a resident, Decedent asked Davis, her long time friend and Executrix under the Will to retrieve her Last Will and Testament dated April 1, 1999 from her residence. In its original form, the Will included some bequests to a charity and its principal beneficiaries were Decedent's niece and nephew. Subsequent to the execution of the Will, Decedent made significant cross-outs and alterations in handwriting on the Will. She voided the residuary bequest to her niece and nephew, changed the bequest to charity and named the Hopewell Museum as her residuary beneficiary. She crossed out the words "Last Will" and the words "Living Trust," "Corrected" and "Reviewed 9/23/07" have been added, along with a signature of the Decedent.

After Decedent's death, Davis, the named Executrix, sought probate of the Will in its altered form. Answers in opposition were filed by Decedent's brothers, intestate takers, and Decedent's niece and nephew, the original residuary beneficiaries. Mediation proved unsuccessful. A trial was conducted and Davis was the only witness. She testified that she brought Decedent the April 1, 1999 Will and Decedent acknowledged it to be her Last Will and Testament. Davis expressed concern to Decedent over the handwritten cross-outs and alterations, and Decedent remarked that she intended the cross-outs and alterations to be revisions to her Will. She did not share Davis' concern over their effectiveness. Nevertheless,

Davis convinced Decedent to sign a new document which was typed by Davis and incorporated Decedent's changes. However, before this document could be signed, Decedent passed away.

The trial Court found Davis's testimony to be "credible, clear and convincing", thereby finding that the Decedent made valid alterations to the Will, and that the Will in its altered form should be admitted to probate under N.J.S.A. 3B:3-3. The trial Court also reduced respondents' request for legal fees, finding a duplication in services. The Appellate Division affirmed, finding that there was adequate support for the trial Court's decision. A court's duty in probate matters is to ascertain and give effect to the probable intention of the testator. Here, Davis' testimony was unequivocal that Decedent intended the April 1, 1999 document to act as her Will, with the alterations and cross-outs. This is corroborated by the fact that Decedent preserved the document rather than destroying it. There was also no abuse of discretion in reducing the award of attorneys' fees in light of the overlap in services.

Will Contest – Lack of Capacity and Undue Influence

In the Matter of the Estate of Vivian Fassett, 2012 N.J. Super. Unpub. ____ (Docket No.: A-3310-10T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County. Before Judges Cuff and Waugh.

Plaintiff appeals from the Chancery Division's denial of his application seeking to set aside the Last Will and Testament of his sister claiming that she lacked the requisite testamentary capacity and in the alternative, her Will was the product of undue influence.

On his lack of capacity claim, Plaintiff failed to introduce competent medical testimony to support his lack of capacity claim and therefore it was denied. Plaintiff had the burden of proof to overcome the presumption of capacity, which he failed to do. The fact that Decedent passed away within 30 days of executing her Will was certainly not dispositive without additional evidence. Plaintiff had the obligation to produce competent evidence that his sister did not comprehend the nature and scope of her assets, the identity of the persons to receive these assets, the fact that she was executing a will, and that the document would distribute those assets to the persons she had identified as her beneficiaries. Plaintiff failed to carry his burden. Instead, he only submitted unauthenticated documents and information about his sister's condition at various points in time, which were not dispositive or admissible.

Plaintiff also failed to carry his burden on the issue of undue influence. He failed to establish undue influence by anyone, let alone require a shift of the burden of proof to the proponents of the Will. The parties appeared for a hearing before the Chancery Division, twice, and the Judge's credibility determinations were entitled to great weight because he had an opportunity to see and hear the witnesses and form an opinion about the credibility of their testimony.

Affirmed.

Will Contest –Standing – Contestant Presented Sufficient Evidence of Paternity to Contest Validity of Will

In the Matter of the Probate of the Will of Darryl Fields, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-2349-10T2) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Cape May County. Before Judges Carchman and Nugent.

Appellant appeals from the trial Court's order admitting the Will of her putative father to probate and issuing Letters Testamentary to Respondent, Lisa Perkins. The trial Court determined that appellant lacked standing to contest the validity of the Will because she could not prove that Decedent was her father. On appeal, this decision was reversed, with the Appellate Division finding that appellant presented sufficient evidence of paternity to establish standing.

On September 27, 2010, Decedent executed a pre-printed form Will in which he left his entire estate to his landlords, the Respondent and her husband, with whom he lived, and named Respondent as executor. Five and a half weeks later he died. On November 5, 2010, appellant filed a caveat.

Respondent filed a Complaint seeking probate and an order to show cause was issued. Appellant answered the Complaint and asked for leave of Court to file a counterclaim, which was answered by Respondent. On the return date of the order to show cause, Respondent argued that the Will was valid, and that until paternity was established, appellant lacked standing. Appellant argued that three documents attached to her Answer established paternity, including her birth certificate, her mother's Affidavit of paternity, and the certificate she signed authorizing the cremation of Decedent's remains. She argued that since Decedent was an alcoholic, she needed to explore the circumstances surrounding the signing of the Will; the relationship between the witnesses and the beneficiaries, and whether Decedent had capacity.

The Court then questioned the parties, without objection from counsel. Respondent testified that she was friends with Decedent for 20 years, that he lived with them over that time, that she had not met appellant until after Decedent's death and that Decedent referred to appellant once after receiving a call from her claiming she was his daughter. There was otherwise no contact with appellant. Shortly before signing his Will, Decedent had recovered an inheritance from his father and purchased the home next door, and died shortly thereafter. Decedent signed the Will in a storage unit where there was a notary, Respondent's daughter-in-law and her nephew were the witnesses, and Respondent's husband and Decedent obtained the form Will from the internet.

The Court then questioned appellant who said she found out that Decedent was her father when she was 11, and she had no relationship with him because of his alcoholism.

After hearing additional argument from counsel, the Court dismissed the caveat, dismissed the counterclaim, admitted the Will to probate and appointed Respondent as executrix. The Court stated that if appellant had standing as Decedent's daughter then she probably would

have standing to contest the Will, however, this should be the subject of an independent paternity action. Appellant appealed, and the order admitting the Will to probate was stayed pending appeal.

On appeal, the Appellate Division held that appellant had standing to contest the admission of the Will to probate and is entitled to a hearing to establish paternity. Having asserted that Decedent was her father and having presented prima facie evidence of that fact, appellant had standing to file the caveat and contest the admission of the Will to probate. The lower Court conducted no paternity hearing and afforded the parties no opportunity to present evidence. The matter was therefore reversed and remanded.

Will Contest –Undue Influence and Accounting Issues

In the Matter of the Estate of John C. Dobish, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: BER-P-004-11) (Ch. Div. 2012).

Decedent's son, Darin, filed a caveat against admitting the Will of his father, John C. Dobish (the "Decedent"), to probate. In response, Darin's sister, Dorice, filed a Complaint seeking admission of Decedent's Will to probate and dismissal of the caveat. Darin counterclaimed, alleging lack of due execution, lack of testamentary capacity, undue influence and certain accounting deficiencies by Dorice while acting as agent under Decedent's Power of Attorney. The prior Will and Trust, executed in 1998, left Dorice a term of years in Decedent's residence and distributed the remainder of his Estate equally between Darin and Dorice. In 2009, Decedent executed a new Will, Trust and Deed, wherein Dorice was left his residence, and the remainder of the Estate was distributed equally between Dorice and Darin.

After a trial and hearing testimony of the scrivener and the attorney preparing the Deed transfer benefiting Decedent's daughter, the Court dismissed the caveat.

On the issue of due execution, the Court found the testimony of the scriveners and the witnesses credible that the documents were duly executed. The Court also failed to find any evidentiary support that Decedent lacked testamentary capacity.

On the issue of undue influence, the Court failed to find a confidential relationship or evidence to support any influence by Dorice. Decedent was motivated by a sense of fairness in leaving Dorice his house, as he had loaned Darin monies over the years that were forgiven at his death. Dorice also assisted Decedent, cooking and cleaning for him. The evidence also revealed that Decedent made his own financial and medical decisions before the estate planning documents were signed in 2009. After he had a stroke, Dorice acted under the Power of Attorney, but this was after the documents were signed. The scriveners also testified that when they met with Decedent he understood the terms of the Will, his intentions were clear, and that he did not appear to be under any influence. Also, Darin was never denied access to Decedent. Based on the foregoing, Darin failed to establish a confidential relationship or the existence of undue influence.

The Court also considered payments made by Dorice under the Power of Attorney, finding that certain payments pertaining to the house were improper as they were made by Dorice directly after Decedent had a stroke, and inured solely to Dorice's benefit. The Court also went on to award Darin fees on the accounting issues, but denying him fees on the Will contest finding his proof to be weak. Dorice was also awarded modified fees from the Estate.

Will Contest - Undue Influence - Decedent's Intentions Were Adequately Documented and the Will was Properly Admitted to Probate

In the Matter of the Probate of the Alleged Will of Joan Pennella, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-1958-11T4) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Reisner, Yannotti and Hoffman.

Defendants appeal from the trial Court's admission of Decedent's May 24, 2010 Will to probate.

Decedent's husband died in 1996 leaving her with a multi-million dollar estate. They had 7 children, Carl, Sam, Carol, Madeline, Joseph, Joan and Roseanne. Beginning in 1996, Decedent made substantial annual gifts to her children and made a will leaving her estate in equal shares to each of them. After Sam had borrowed a substantial amount of money from Decedent and refused to pay it back, and Carol borrowed an expensive necklace and refused to return it, and also mistreated Decedent, she decided to change her estate plan leaving Sam and Carol only small bequests, with the remainder being devised in equal shares to her other five children. These intentions were documented by Decedent's estate planning attorneys and letters from the Decedent, who also executed three Wills documenting these intentions.

After Decedent's death, Carl sought to probate Decedent's 2010 Will and asked for dismissal of the caveat filed by Sam and Carol, who claimed Decedent lacked mental capacity and that the 2010 Will was the product of undue influence. After a trial de novo, the Court admitted the 2010 Will to probate. Relying on the testimony of Decedent's probate attorneys and Decedent's daughter, Roseanne, also an attorney, who testified as to Decedent's strong will and her clear intentions, the Court found that Carl did not share a confidential relationship with Decedent, who made her own decisions, nor were there suspicious circumstances. The documented changes to Decedent's estate plan were a valid expression of Decedent's intentions. The Court went on to find that even if a confidential relationship existed, Carl presented sufficient evidence to rebut the presumption undue influence.

On appeal, Sam and Carol argue that the trial Court abused its discretion. The Appellate Division affirmed, finding that there was sufficient evidence to support the Court's findings of fact.

Will Contest –Undue Influence, Lack of Testamentary Capacity; Forgery

In the Matter of the Estate of Betsy A. Schnitzer, Deceased, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5670-09T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Essex County. Before Judges Yannotti, Espinosa and Guadagno.

Relying on the extensive testimony of Decedent's estate planning counsel, the New Jersey Appellate Division recently upheld the Chancery Division's admission of Decedent's Will and subsequent Codicil to probate despite her son's allegations of undue influence, lack of capacity and forgery. The matter is instructive on proper planning techniques to defend against an anticipated Will contest.

Betsy Schnitzer ("Decedent") was married to Morris Schnitzer, an attorney with the firm of Connell, Foley & Geiser, and they had two children, Sandra Stern ("Sandra") and Stephen Schnitzer ("Stephen"), and several grandchildren. Sandra and Stephen are both attorneys.

On April 19, 1995, Betsy and Morris executed reciprocal Wills in which they left their respective residuary estates upon the second to die in equal shares to Sandra and Stephen. This disposition was consistent until Morris' death on March 8, 1997, when he died leaving Betsy a multi-million dollar estate.

While initially meeting with the Connell Foley firm to update her estate plan, Betsy decided to retain a new firm, Dewey Ballantine ("DB"), who was recommended by Sandra. It turns out, Sandra's husband used to be a partner at the firm. John Olivieri ("Olivieri"), of DB, consulted with Betsy who requested that he draft a new Will disinheriting Stephen. Betsy had become angry with Stephen who questioned Betsy's handling of the administration of Morris' Estate as Executrix. While Betsy's feelings towards Stephen were well documented and well known, Olivieri advised against disinheriting Stephen, and Betsy agreed.

On August 18, 1998, Betsy executed a Will (the "1998 Will") and related trust documents after Olivieri reviewed the documents with her and explained the contents. Olivieri testified that the documents were prepared at Betsy's request, that he had no doubt that Betsy was mentally competent and capable of executing the documents, and that he had no reason to believe that she was being influenced in making decisions. In the 1998 Will, Betsy named Chase Bank ("Chase") as executor, made specific bequests of personal property to Stephen and to one of Sandra's daughters, and left the rest of her personal property to her daughter, Sandra. The remainder of her estate was placed in trust, granting 75% to Sandra and 25% to Stephen, with rights to invade principal.

In September, 1999, Chase, as Co-Trustee of a Trust under Morris' Will for Betsy's benefit, filed suit against Betsy who was acting Executrix of the Estate to compel an accounting and distribution from Morris' Estate to the Trust. Betsy was enraged, blaming Stephen for his meddling in her affairs. Although the litigation was settled in 2002, Betsy harbored resentment against Stephen over the suit.

In June 2003, Betsy again retained DB to perform additional work on her estate plan. At the time, Betsy required assistance with her finances. And in February 2004, Sandra called Olivieri and advised that Betsy wanted to leave 75% of her residuary estate to Sandra and the remainder to Sandra's children. When Olivieri spoke to Betsy to confirm the change in disposition, Betsy was clear, she confirmed that she wanted Sandra to inherit her entire Estate.

She stated she was concerned over Sandra's finances and wanted to disinherit Stephen. Olivieri once again advised Betsy against disinheriting Stephen but she rejected his advice.

On April 14, 2004, a meeting was held at Betsy's home for about half an hour. Olivieri was present with his associate and a trust officer from Chase, who acted as the witnesses. Sandra had arrived earlier that day and had breakfast with Betsy. Sandra testified she did not speak with Betsy about her estate plan. Sandra was present for the beginning of the meeting when Betsy executed a change to the Trust naming Sandra as co-trustee with Chase, but left thereafter. After she left, Olivieri discussed with Betsy the requested changes to her estate plan. He brought two sets of documents, one set would keep the division of the residuary the same, 75% to Sandra and 25% to Stephen, and the other disinherited Stephen. Betsy was clear, she wanted to disinherit Stephen. It was something she was thinking about for a long time and she was still angry with him over the litigation. Betsy then executed the 2004 Codicil that disinherited Stephen.

Betsy died on October 1, 2007 and Stephen filed a Complaint seeking to set aside the 1998 Will, the 2004 codicil and related Trust documents, alleging undue influence, lack of capacity and a forgery.

Stephen argued that Sandra had a confidential relationship with Decedent, raising a presumption of undue influence. This was rejected by the Court. While Betsy turned to Sandra for companionship and some assistance, particularly in finding a new attorney to do an estate plan for her, Betsy did not rely on Sandra due to a state of weakness or dependence, nor did Sandra dominate Betsy or have superior knowledge or an over-mastering influence over her. Decedent's scrivener, Olivieri, testified that Betsy had strong opinions on many issues including investment strategy and the disposition of her estate, and there was no evidence of any influence. The Appellate Division therefore affirmed the lower Court's dismissal of the action.

Practice Notes:

* An unbiased scrivener, meeting alone with a testator, who properly documents the testator's intentions through hand-written notes or a letter from the testator, is the cornerstone to defending against a Will contest.

* A beneficiary, especially one assisting testator with her daily activities, should avoid actual involvement in the preparation and execution of estate planning documents to avoid any inference of undue influence.

Will Contest – Validity of Undated Will Upheld

In the Matter of the Estate of Albertha Blackwell, 2012 N.J. Super. Unpub. ____ (Docket No.: A-5441-10T3) (App. Div. 2012). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County. Before Judges Lihotz and Waugh.

Appellant, Decedent's daughter, appeals from the trial Court's dismissal of her Complaint and admission of the Last Will and Testament of her mother to probate. On appeal, appellant maintains that the Court erred by allowing the Will to be probated because it was undated, not self-proving and otherwise failed to comply with the statutory attestation requirements of a valid will.

Decedent died on November 15, 2008, survived by six of her eleven children, and eight grandchildren. Only one grandchild, A.Q., was a minor, and Decedent had been appointed A.Q.'s guardian after A.Q.'s mother had died.

After Decedent's death, one of her daughters found Decedent's Will among her possessions, and she presented the Will for probate. The six page document was drafted by Decedent's long-time attorney, who notarized the document and observed its execution in the presence of two witnesses who also signed the document. The Will named two of Decedent's daughters as executors and devised her entire estate to A.Q.

Appellant filed a caveat challenging the Will. In response, the executors filed a complaint seeking to set aside the caveat and have the Will admitted to probate. Appellant filed an Answer and Counterclaim claiming that the Will was invalid or the result of undue influence. Without the benefit of an evidentiary hearing, the trial Court dismissed the caveats and admitted the Will to probate. Appellant appealed, and the trial Court's order was reversed, with the matter being remanded for a plenary hearing to determine the authenticity and validity of the Will.

The trial Court then conducted a three day hearing, with testimony being presented by the witnesses who witnessed Decedent's execution of the Will. The trial Court remained unconvinced of appellant's arguments, and in a written opinion found no evidence to support appellant's assertion that the Will was not signed by Decedent. The witnesses testified that Decedent acknowledged the document was her Will and voluntarily signed in their presence. The trial Court then ruled that proponents established by clear and convincing evidence that the document was Decedent's Will, that she signed it voluntarily, that the witnesses signed the self-proving affidavit and witnessed her signature, and that the Will should be admitted to probate.

Appellant filed a motion and the proponents cross-moved for attorney's fees, which the trial Court declined to consider. On appeal, appellant argues that the trial Court's ruling was not supported by the evidence. The Appellate Court affirmed the trial Court's ruling, finding its decision to be based on sufficient evidence contained in the record.

In order to comply with the necessary formalities, a Will must be in writing, signed by the testator and signed by at least two witnesses. N.J.S. 3B:3-2. Also, if a document lacks these formalities, the writing may nevertheless be treated as if it complied with N.J.S. 3B:3-2 if the proponent of the document establishes by clear and convincing evidence that the Decedent intended the document or writing to constitute her Will. N.J.S. 3B:3-3. The trial Court found that despite the omission of a date, two independent witnesses and Decedent's long time attorney testified that each saw Decedent execute the document, the same document they witnessed, and that Decedent voluntarily signed the document following her express understanding that she intended the document to act as her Will. Appellant failed to refute this testimony. Therefore, the trial Court's decision is affirmed. In addition, the Appellate Court failed to exercise jurisdiction over the fee issue until it was presented and ruled upon by the trial Court.

Will Contest - Writing Intended as A Will – Unexecuted Copy of Will Admitted to Probate

In the Matter of the Estate of Richard D. Ehrlich, Deceased, 2012 WL 2470122, (N.J.Super.A.D.). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Burlington County. Before Judges Parrillo, Alvarez and Skillman.

On June 29, 2012, the New Jersey Appellate Division continued to relax the formalities required for admission of a Will to probate, holding that the unexecuted copy of Decedent's Will which had purportedly been executed by the Decedent and sent to his attorney-executor for safe-keeping sufficiently represented the Decedent's final testamentary intent allowing for the document to be admitted to probate as a writing intended as a will under N.J.S.A. 3B:3-3.

Decedent was a trusts and estates attorney in Burlington County, New Jersey for over 50 years. At his death on September 21, 2009, his only next of kin were the surviving children of his predeceased brother, Todd, Jonathan and Pamela. The Decedent had no contact with Todd or Pamela for over 20 years, but maintained a close relationship with Jonathan over the years. Upon learning of Decedent's death, Jonathan conducted an extensive search of Decedent's home for a Will. He found an unexecuted copy of a purported Will in Decedent's desk among numerous other papers. Jonathan filed a Complaint seeking to admit the Will to probate, and Todd and Pamela field an Answer asking the Court to deny probate.

The Court appointed a temporary administrator and ordered a thorough search of Decedent's home and law office for any other Wills of Decedent. No other Will was ever located.

The unexecuted copy proffered by Jonathan is a detailed 14 page document entitled "Last Will and Testament", on traditional legal paper, with Decedent's name and law office address in the margin of each page. The document does not contain the signature of Decedent. It does, however, include a notation in Decedent's handwriting on the cover page, "Original mailed to H.W. Van Scriver, 5/20/2000", the named executor under the Will. Van Scriver predeceased the Decedent and an original has yet to be located.

The proffered Will leaves $50,000 to Pamela, $75,000 to Todd, 25% in trust for the benefit of Decedent's friend, Kathryn Harris, and the remainder to Jonathan. It was undisputed that Decedent prepared the document just before he was to undergo surgery, and on the same day it was purportedly executed, May 20, 2000, Decedent executed a Power of Attorney and Living Will. Years after drafting these documents, Decedent acknowledged to others that he had a Will and wished to delete the bequest to his friend Kathryn as they had a falling out.

The parties filed cross-motions for summary judgment and the trial court admitted the unexecuted Will to probate, finding that Decedent's hand written notation on the cover page of the Will provided clear and convincing evidence of Decedent's final assent that he intended the original document to constitute his Last Will and Testament.

At issue on appeal was whether the unexecuted copy of a purportedly executed original document sufficiently represented Decedent's final testamentary intent to be admitted to probate under N.J.S.A. 3B:3-3.

Under N.J.S.A. 3B:3-3, although a document or writing was not executed with the normal formalities required under the statute, it may still be admitted to probate "if the proponent of the document or writing established by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will…"

Relying on its recent interpretation of the harmless error doctrine under In re Probate of Will and Codicil or Macool, 416 N.J. Super. 298, 311 (App. Div. 2010), the Court held that a writing need not be signed by the testator in order to be admitted to probate. In order to be admitted as a writing intended as a Will under Macool, the proponent must prove by clear and convincing evidence that "(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes." Id. at 310.

The Appellate Division went on to find that the Decedent prepared and reviewed the challenged document, that Jonathan, who received the bulk of the Estate was the natural object of his bounty, and the mailing of the document to the executor, even if not signed, reflected Decedent's final assent of his intention that the document act as his Last Will and Testament. This was bolstered by the testimony reflecting Decedent's intentions years after its preparation. The Appellate Division found these facts established clear and convincing evidence that the unexecuted document was reviewed and assented to by Decedent and accurately reflected his final testamentary wishes and was properly admitted to probate under Macool.

In dissent, Judge Skillman found that N.J.S.A. 3B:3-3 does not authorize the admission of an unexecuted will to probate. Mere verbal assent to the terms of an unexecuted copy of a will which was not formalized by any signature on the document does not satisfy the statute. Instead, Judge Skillman found that only defectively executed wills may be admitted to probate under N.J.S.A. 3B:3-3.