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ESTATE AND TRUST LITIGATION DIGEST

Summary of 2011 New Jersey
Estate and Trust Litigation
Published and Unpublished Court Opinions

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Accounting Action – Court ordered informal accounting

In the Matter of the Estate of Gennaro Mecca, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3233-10T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Payne and Reisner.

Defendants appeal from the lower court's order requiring them to file an informal accounting. Helen Mecca, Decedent's widow, and Peggy Mecca, one of their daughters, are the trustees of three testamentary trusts created under decedent's Will. Pursuant to the Will, Helen is the income beneficiary of the trusts and her 5 children are the remainder beneficiaries, with the childrens' shares distributable to their children if they predecease Helen. Helen is also entitled to up to 5% of the principal of the trust during her life.

The Will requires that the trustees provide annual informal accountings to the income beneficiaries and the vested remaindermen. Decedent died in 2001 with a sizeable estate. The trustees failed to provide informal accountings since the inception of the trusts, resulting in a Complaint by one of decedent's daughters seeking an informal accounting. The trustees resisted, claiming that decedent's daughter was not a vested beneficiary and therefore not entitled to the accounting. According to the scrivener, the accounting provision was inserted into the Will to ensure that annual accountings were provided to the beneficiaries, in an effort to protect the remainder beneficiaries. The lower court took a plain reading of the Will and required that the trustees account to the remainder beneficiaries, finding that decedent's daughter was a vested beneficiary subject to defeasance if she didn't survive Helen.

On appeal, defendants argued that decedent's daughter had a contingent interest in the trust, not a vested interest. This was rejected by the Appellate Division, which held that it was decedent's likely intent to provide the remainder beneficiaries, including his daughter, with annual informal accounting.

Accounting Action filed by Creditor of Estate

In the Matter of the Estate of Leon Genet, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP0044-2011) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Decedent's brother and former business partner filed a complaint against the Estate seeking recovery of partnership assets, a constructive trust and an accounting, claiming that decedent, plaintiff's business partner, overpaid himself commissions from their real estate partnership. Decedent and his brother were partners in a realty business in which they made an arrangement regarding the payment of commissions. After decedent's death, plaintiff had negotiated with the beneficiaries a distribution of ongoing commission payments to which the decedent was entitled. When these payments stopped, the beneficiaries of the Estate sued plaintiff in New York, seeking payment of the commissions. This suit was dismissed as it should have been brought by the Estate. In the interim, plaintiff filed his complaint in New Jersey seeking an accounting.

In his complaint, plaintiff seeks a formal accounting of the Partnership from decedent's personal representatives. The Estate moved for summary judgment. The Court held that the Uniform Partnership Act (now repealed) applies to this case, but fails to allow for the remaining partner to compel an accounting from the Estate. As to an accounting from the Estate of the estate assets, plaintiff must file his claim in the Law Division, and after receiving a judgment, may refile his claim in the Probate Part seeking an accounting from the Estate. He is not entitled to an accounting from the Estate until judgment is entered. Plaintiff also failed to file a claim against the Estate within 9 months. In fact, it wasn't filed until 6 years later. Although plaintiff is also afforded the right to file a claim before the assets of the Estate are distributed, in this case, the assets of the Estate were distributed before plaintiff's complaint was filed. Plaintiff is therefore not entitled to an accounting or to a constructive trust, as there are no assets left to encumber. Summary judgment was therefore granted in favor of the Estate.

Accounting Action – Exceptions to Trust Accounting Require Specificity

In the Matter of the Inter Vivos Trust, James W. Phillips, Grantor; In the Matter of the Inter Vivos Trust, Jill A. Phillips, Grantor; In the Matter of G. Willard Phillips, 2011 N.J. Super. Unpub. ____ (Docket Nos.: BER-P-439-10, BER-P-440-10 and BER-P-441-10) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Bergen County.

This matter was brought by Order to Show Cause and Complaint filed by Bank of America, as Co-Trustee of various trusts established for the benefit of members of the Phillips family, seeking approval of interim accountings, approval of the actions of Bank of America as Trustee, and the payment of commissions and attorneys' fees.

The various beneficiaries filed a list of exceptions without providing specific reference to the accountings, as filed, and also sought affirmative relief regarding the distributions from the trusts, the timing and amount of same, removal of Bank of America as co-trustee, and various other relief.

Upon reviewing the various motions to dismiss and the underlying pleadings and certifications, the court issued an order allowing for the beneficiaries to resubmit their exceptions to provide the requisite specificity required by the Supreme Court in Higgins v, Thurber, No. A-12-10, 2011 N.J. LEXIS 327, at *5 (March 16, 2011) and R. 4:87-8, which requires that an interested party seeking to file exceptions serve the accountant with written exceptions which state with particularity the item or omission excepted to, the modification sought in the account and the reasons for the modification. An exception failing to provide adequate specificity may be stricken because of its insufficiency in law.

The exceptions listed by the beneficiaries lacked any reference to the accounting. Instead of dismissing their exceptions, the Court allowed for resubmission of the exceptions with the specificity required by R. 4:87-8. The Court also recognized that the beneficiaries may refile their requests for affirmative relief pertaining to the trusts in future proceedings, as they were not properly brought in the accounting action.

Disinterment –Decedent's Mother Has No Right to Force Disinterment on Daughter's Surviving Spouse

In the Matter of the Estate of Peggy X. Puder, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1639-09T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Carchman, Graves and Waugh.

Decedent's mother appealed from the lower court's denial of her right to force Decedent's spouse to return Decedent's remains to their original resting place. Decedent's spouse moved Decedent's remains after she was buried.

Decedent's mother claimed that her daughter had come to her to ask that she take care of her burial arrangements, but she never placed her intentions in writing. In fact, there were conflicting accounts of Decedent's intentions.

Under the disinterment statute (NJSA 45:27-23(a)), if the person does not otherwise specify in writing, the decision is left to the surviving spouse. The surviving spouse, adult children and owner of the disinterment space have authority to authorize remains to be moved. There are no notice requirements and Decedent's mother lacks standing on the merits as she is not a "stakeholder" under the statute.

Within a week of the lower court's decision, the Supreme Court decided Marino v. Marino, 200 N.J. 315 (2009), requiring the court to consider the interment and disinterment statutes separately in rendering its opinion. Specifically, in a case involving a dispute between a surviving spouse and adult children of the Decedent, the authority to disinter is not vested in the surviving spouse alone, but vested in the surviving spouse, adult children and owner of the interment space who must give their authorization jointly and in writing. The lower court distinguished the within matter from Marino since all of the parties required to sign off on the disinterment have signed off. This did not include authorization from Decedent's mother. Only in cases where there is a dispute between stakeholders, i.e. dispute between surviving spouse and adult children, will Decedent's intentions be considered. The Appellate Division therefore affirmed the lower court's dismissal of Plaintiff's Complaint.

Divorce – Enforcement of Decedent's Obligation to Maintain Life Insurance

In the Matter of the Estate of John P. Boyle, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3338-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County. Before Judges Axelrad, R. B. Coleman and Lihotz.

This appeal was taken from the lower court's order requiring the Estate to pay to Decedent's unemancipated son an amount of $250,000 in recognition of Decedent's obligation to maintain life insurance for his son under the Judgment of Divorce between Decedent and his ex-wife.

The Estate appealed. The Appellate Court upheld the lower court's finding that the Judgment of Divorce was clear in its terms that the insurance was required to be maintained until Decedent's son was emancipated. He remained in college and therefore the obligation continued. There was also no provision requiring a step down in the required amount of insurance as the child support obligation decreased over the years.

Divorce – Proper Forum

In the Matter of the Estate of John Kokinakos, 2011 N.J. Super. Unpub. ____ (Docket No.: A-2103-10T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County. Before Judges J. N. Harris and Fasciale.

This involves the question of the proper forum for resolving post-divorce equitable disputes involving an insolvent estate. The lower court dismissed plaintiff executor's declaratory judgment complaint seeking to transfer all matrimonial matters to the Probate Part. The Appellate Division affirmed, holding the matter is properly brought in the Family Part.

Decedent and his wife were divorced by final judgment entered on August 18, 2009, which incorporated the parties Divorce Settlement Agreement. As part of that agreement, decedent agreed to execute a Will providing for bequests to his ex-wife and children to secure his alimony and child support obligations. Although a Will was drafted for his review, decedent failed to execute the Will.

Decedent passed on November 1, 2009, and Peter Kokinakos qualified as administrator of his estate. Decedent's ex-wife filed a complaint in the Family Part seeking to join the estate as a party to the matrimonial action, and demanding payment under the Divorce Settlement Agreement. The Family Part granted the motion, adding the Estate as a party and ordering payment. The Family Part also directed the parties to file a motion in either the Family Part or Probate Part to determine jurisdiction.

On September 24, 2010, decedent's administrator filed a complaint in the Probate Part seeking an order requiring all future proceedings involving the estate to be conducted in the Probate Part. The Probate judge dismissed the action and an appeal was taken.

Citing In re Estate of Roccamonte, 174 N.J. 381 (2002), the Appellate Division held that the Probate Part was not an appropriate forum to deal with the parties' family-type claims. Instead, the matter should be brought in the family part. The Appellate Division also noted that the administrator failed to bring an action for insolvency in the Probate Part, which could have prevented the transfer of the matter back to the Family Part.

Estate Administration – Attempted Removal of Administrator

In the Matter of the Estate of Jason Marles, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3549-10T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County. Before Messano and Yannotti.

Decedent's ex-wife appeals from the lower court's denial of her Complaint seeking to have Decedent's mother removed as administrator as prosequendum of Decedent's Estate. Decedent and his ex-wife had 2 children. They were divorced in 2009 and in the marital settlement agreement, Decedent's ex-wife waived the right to administer his estate.

In 2010, Decedent was involved in a car accident which resulted in his death. Decedent died without a will. Decedent's ex-wife, and Decedent's mother met with an attorney and agreed to file a wrongful death suit. Decedent's mother wanted to be appointed administratrix and Decedent's ex-wife signed a renunciation in her favor. Letters were issued to Decedent's mother by the Surrogate. Subsequent to her appointment, Decedent's ex-wife had an argument with Decedent's mother, and hired her own attorney. A Complaint was filed seeking to have Decedent's ex-wife appointed as administratrix ad prosequendum as Decedent's two children were the sole heirs of the Estate. This was opposed by Decedent's mother.

The trial court found that the marital settlement agreement precluded Decedent's ex-wife from acting as administratrix ad prosequendum, and an appeal was taken. On appeal, the Appellate Division upheld this decision, finding that the trial court was authorized to allow Decedent's mother to continue as administratrix of the estate. The court also cited the potential conflict faced by Decedent's ex-wife who was exploring a claim based on a reconciliation between her and the Decedent, which would potentially conflict with the rights of Decedent's children.

Estate Administration – Attempted Removal of Co-Executor for Breach of Fiduciary Duty

In the Matter of the Estate of Albert Sauer, 2011 N.J. Super. Unpub. ____ (Docket No.: BER-P-088-11) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Bergen County.

An order to show cause and complaint was filed by plaintiff, co-executrix of the Estate, seeking removal of her sister, as co-executrix for failure to account and breach of fiduciary duty for failure to include plaintiff in estate administration decisions and the payment of bills on behalf of the estate.

In this matter, defendant, a co-executrix, acted unilaterally pertaining to the administration of her father's estate, despite having been appointed as a co-executrix with her sister, the plaintiff herein. Plaintiff sought information and documents and to be included in each decision pertaining to the estate, including paying bills. Defendant refused, instead providing information to plaintiff after decisions and payments were made. There was a guardianship

action between the parties prior to decedent's death, which muddied the waters between the parties.

Defendant also paid her attorney but refused to authorize payment for plaintiff's attorney. Defendant utilized monies in a joint account established before decedent's death to pay the bills and refused to transfer the monies into an estate account which would have necessitated a signature on each check by the plaintiff. Numerous letters between counsel were exchanged to no avail. Plaintiff then decided to file the complaint.

The Court held that defendant would not be removed so long as she involved plaintiff in all of the decisions pertaining to the estate, including the signing of any checks. Defendant had the obligation to include plaintiff in each decision as co-executrix. The Court also found that unless plaintiff's counsel was also paid, that defendant's attorney would need to disgorge the attorneys' fees paid to him from the estate until such time as they agreed to pay both attorneys. Each executrix was entitled to hire counsel who should be paid. The matter as to the accounting and misappropriation of funds was allowed to move forward and a case management conference was scheduled.

Estate Administration – Buy-out of Partnership Interest

Estate of Claudia L. Cohen v. Booth Computers and James S. Cohen, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0319-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County. Before Judges Carchman, Graves and St. John.

Plaintiff appeals from the trial court's enforcement of a buy-out of a deceased partner's share in a family limited partnership (FLP) at book value in accordance with the partnership agreement, despite the significant disparity between book value and market value. On appeal, the Appellate Division held that the formula utilized in computing net book value was appropriate, the buyout agreement was enforceable, and the disparity between book value and market value did not render the agreement unconscionable.

In 1978, decedent's father established a partnership owned by her and her two (2) brothers. Decedent's father placed a residence in Palm Beach County, Florida and two (2) commercial buildings in New Jersey into the partnership. The partnership agreement contained typical buy-sell provisions preventing the transfer of shares to third parties, and also provided that upon the death of a partner, their shares were required to be sold and bought by the remaining partners for an amount equal to their proportionate share of book value, plus $50,000. At the time of decedent's death, the real estate held by the partnership was worth in excess of $32.0 million, while book value was approximately $240,000.

When offered the buy-out of $178,000 by the partnership, decedent's executor asked for financial documentation to justify this figure, when decedent's interest at fair market value was valued at $11.0 million. Some documentation was produced. The trial court, relying on the language in the partnership agreement, and citing the fact that one of the siblings was bought out at book value ten years ago, without objection, ruled that the partnership agreement should control. Plaintiff also argued that this result rendered the buy-out provision unconscionable. The

court disagreed, finding that the parties could have negotiated a better deal and this arrangement in the partnership agreement was not unusual in the family context to avoid litigation. This decision was upheld on appeal. The language in the agreement was not ambiguous and nothing in the law or the agreement required that the buy-out occur at fair market value.

Estate Administration – Distributions

In the Matter of the Estate of Gerald Russomano, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1213-10T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Reisner and Simonelli.

Plaintiff beneficiary appeals the lower Court's denial of his application requiring the estate of his late father to sell him a piece of property where his business is located and the Court's order evicting him from the property.

Decedent's Will devised his garage business to his son, but he left the underlying property in Long Branch, NJ where the business was located to his wife and three children. After Decedent's death, a lease was entered into with the estate, allowing for the business to continue. At a point that the lease expired and the plaintiff son was in default under the lease for failure to pay taxes, the executrix of the estate filed an eviction action. The plaintiff son filed a Complaint in the Probate Part seeking to compel the Estate to sell him the underlying land. The matters were consolidated in the Probate Part for disposition.

In an oral opinion from the bench, the lower Court found that plaintiff son's failure to pay real estate taxes justified his eviction from the property. The Court also found that plaintiff son failed to properly exercise the purchase option under the lease requiring him to pay cash at closing, as plaintiff son sought a transfer in exchange for giving the estate back a mortgage, which was unacceptable to the estate.

On appeal, plaintiff son claimed the executrix lacked standing. This was rejected, with the Appellate Division upheld the lower Court's decision, as plaintiff son was not a ready, willing and able buyer.

Estate Administration – Mortgage Lien

Garruto v. Cannici, 2011 N.J. Super. Unpub. ____ (Docket No.: A-5639-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County. Before Judges Carchman and St. John.

Plaintiff loaned the decedent, his sister, some money in 1979. A mortgage was given on real property owned by the decedent which was due and payable in 1994. Upon decedent's demise, plaintiff and his brother filed a claim for tortious interference with rights of inheritance which was ultimately dismissed on summary judgment. Years later, plaintiff sought payment on the mortgage. The trial court dismissed this claim as barred by the relevant statute of limitation.

The court also noted that the plaintiff failed to make a claim for payment of the mortgage during the underlying probate litigation.

On appeal, the Appellate Division upheld the dismissal of the claim. The plaintiff failed to establish that there was a modification of the mortgage and the claim was therefore barred by the statute of limitations.

Estate Planning – Collection of Judgment Against Limited Partnership

Adams Associates, LLC v. Frank Pasquale Limited Partnership, et al., 2011 N.J. Super. Unpub. ____ (Docket No.: A-5724-08T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County. Before Judges Lisa, Reisner and Alvarez.

This appeal was taken by Plaintiff from the trial court's refusal to enter a judgment against Defendant, Frank F. Pasquale, and the Frank Pasquale Limited Partnership, for the loan given to his son, Frank A. Pasquale, who misrepresented to be acting on behalf of the Partnership in obtaining a loan from Eastern Savings Bank.

The mortgage went into default and when the father found out about the default judgment entered against him, he moved to vacate the judgment, which was granted. In the other action, brought by the assignee of the underlying mortgage, a judgment was entered against the son, but the father and the Partnership were granted summary judgment. Plaintiff – assignee, appealed, and the lower court's decision was upheld on appeal.

Factually, the father and his wife purchased a property in Hoboken in which he operated his business. In 1994, the property was placed into a limited partnership. A separate company was formed to act as general partner, and father appointed himself individually as limited partner. Father assigned a portion of the capital and profits to trusts in the name of his children, but none of the children were designated as partners or employees. Under the partnership agreement, only the father had the right to mortgage the property or to borrow money on behalf of the partnership. The son was also not appointed as agent to act on behalf of the partnership.

In 1996, father semi-retired, still coming in once a week. His son, Frank A. Pasquale, took over the operations of the business which substantially declined until the business was closed in 2005. Frank A. Pasquale applied for a mortgage to start a similar business. He applied for a mortgage forging documents showing that he owned the property which was actually owned by the partnership. The loan was approved and the underlying property was used as collateral. The loan entered default in 2005. A foreclosure complaint was filed but the father was never served. When he found out about it, he moved to vacate the default judgment entered against his son, and the Court agreed. Frank A. Pasquale had nothing to do with the partnership and did not own the underlying property. The mortgage against the property was removed of record and the default judgment vacated. A judgment was entered against Frank A. Pasquale individually.

Estate Planning – Payment of Estate Taxes From QTIP Trust Denied

In the Matter of the Estate of Sidney Stark, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3913-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County. Before Judges R. B. Coleman and Lihotz.

Plaintiff, as executor of Sylvia Stark's estate, sought reimbursement from the Estate of Sidney Stark for estate taxes imposed on Sylvia's interest in a QTIP trust established by Sidney for her benefit. The Defendants, children of Sidney's first marriage who were the remainder beneficiaries of the QTIP trust, opposed the application. The trial court entered summary judgment in favor of plaintiff ordering defendants to reimburse plaintiff for all of the federal and a portion of the New Jersey estate taxes attributable to the QTIP trust's assets. On appeal, defendants' argue that the trial court misinterpreted the tax clause of Sidney's will.

Under Sidney's will, he directed that "unless Sylvia directs otherwise by Will, if Sylvia dies within three (3) years after the date of my death", his executor is to reimburse Sylvia's estate for the estate taxes attributable to the assets of the QTIP trust. Sidney passed away n 1994 and the transfers to the QTIP trust qualified for the marital deduction. When Sylvia died in 2001, estate taxes were due on the assets of the QTIP trust from her estate. Under IRC §2207A(a)(1), the executor may recover the amount of estate tax attributable to the inclusion of the QTIP property in the surviving spouse's estate from a person receiving the property. This right to reimbursement can only be waived if the QTIP trust beneficiary specifically indicates a clear and unequivocal intent to waive it in her will. Defendants claimed the estate tax clause of Sidney's will and his probable intent required Sylvia's estate to pay the tax. Based on IRC §2207A(a)(1), the trial court disagreed, and this was affirmed on appeal, with the court finding that Sylvia did not waive her right to reimbursement.

Estate Tax – Inheritance Tax Issues

Estate of Alvina Taylor v. Division of Taxation, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3501-09T3) (App. Div. 2011). On appeal from the Tax Court of New Jersey. Before Judges A.A. Rodriguez, C.L. Miniman and LeWinn.

The estate appeals from the trial court's grant of summary judgment in favor of the Division of Taxation dismissing the estate's request for a refund of inheritance taxes.

Decedent died on 11/30/02 leaving a gross estate of $675,000. The inheritance tax return was due no later than 7/31/03. Eight days after the deadline passed, the estate made a $75,000 estimated payment of inheritance taxes and filed form IT-EP (1995). This form stated that the amount remitted "was an estimated payment to be applied" towards the inheritance tax, and stated that "any overpayment will be refunded after determination of the actual liability." On 12/3/03, the estate paid an additional $75,000 on account along with form IT-EP (1999). This revised form did not contain the refund language.

On 8/6/04, the Division of Taxation requested the overdue inheritance tax return. The estate failed to file. The Division then made an arbitrary assessment of $300,000, and demanded the balance of $250,000. The Division agrees that this amount is incorrect as it did not include the $75,000 paid by the estate in 12/03. The Notice of Assessment only reflected a payment of the initial $75,000. The estate took no action at the time. After the time for appeal expired, the Division filed a certificate of debt from $239,000.

Five years after the return was due the estate finally filed the inheritance tax return showing a total tax of $108,092. According to the return, this left a balance of $49,873 which was paid with the return.

On 1/1/09 the Division issued a Notice of Assessment with respect to the return, accepting the reported amounts and determining the estate was due a refund of $90,000. However, when the estate requested the refund, the Division denied the request because "the application for refund was made more than three years from the date that the tax was paid." The statute requires all requests for refunds to be made within three years of payment of the tax.

The estate appealed claiming that the judge erred in failing to preclude the Division under the Square Corners Doctrine from asserting the Statute of Limitations in light of the language in Form IT-EP (1995) which stated that an overpayment would be refunded. The Appellate Division cited the fact that the statute pertaining to refund claims have been in existence for 55 years, and that the estate was not misled or confused by the language in Form IT-EP (1995). The Square Corners Doctrine does not apply, and a claim for refund was required to be made within three years of payment. Affirmed.

Guardianship – Appointment of Guardian and Setting Aside Will and Transfers as Product of Undue influence

In the Matter of Lillian Glasser, an incapacitated person, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0500-08T3; A-0505-08T3; A-0509-08T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County. Before Judges Lisa, Reisner and Sabatino.

This appeal involved litigation between Lillian Glasser's daughter, Suzanne, her son, Mark and Lillian's nephew, Rick. Litigation was spawned in Texas and New Jersey. After trial in New Jersey, the trial court found that Suzanne had exercised undue influence over Lillian in having a December 2002 will and POA prepared and signed by Lillian naming Suzanne as agent and favoring her and her children. Mark acted in ways disruptive to Lillian's care. On the application of Rick, Lillian's nephew, the court appointed a third party attorney to act as Lillian's guardian over her person, and a financial institution as guardian over her property. The trial court found that Suzanne should reimburse Lillian's estate for monies used by Suzanne for her own counsel fees, and for counsel fees spent by Suzanne in created a family limited partnership for Lillian in Texas which was the product of undue influence. The court awarded Mark some fees and denied fees to Suzanne's children who intervened in the action. The December 2002 Will and the FLP were also set aside.

On appeal, Suzanne claims the court erred in failing to grant her fees, in removing her as her mother's health care representative and in deciding the issue of undue influence. The Appellate Division affirmed, finding the trial court's decision well founded on the facts. At the time the FLP and Will were prepared, Lillian was vulnerable to undue influence. She had just had surgery and although not yet incompetent, had dementia and was in a weakened state. It was at this time that Suzanne took advantage of her mother and arranged for her to see an attorney selected by Suzanne. The terms of the new Will were more favorable to Suzanne, and the new POA named Suzanne as sole agent. Suzanne also convinced Lillian to sign some FLP documents, which she could not understand. Thereafter, Suzanne isolated Lillian and created a FLP on her behalf by using the POA, transferring all of her assets. The FLP also favored Suzanne and her children. Lillian's nephew Rick brought suit in New Jersey to have these transfers scrutinized and to have a third party appointed as guardian. The court agreed, and removed Suzanne and surcharged her for her conduct.

Guardianship – Dismissal of Complaint

In the Matter of Susan Keeter, an alleged incapacitated person, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0553-10T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Yannotti and Roe.

Plaintiff appeals the dismissal of her complaint seeking a guardianship over her mother, Susan.

In support of her complaint, plaintiff submitted sworn certifications from two doctors to support her position that Susan was sufficiently incapacited. According to these reports, Susan exhibited dementia and was unable to administer her own medications. The court appointed an attorney for Susan, who interviewed her and also hired a doctor on her behalf. This doctor reported that although Susan had early signs of possible dementia, she was not incapacitated. The court appointed attorney's report detailed Susan's objection to the appointment of a guardian, and recommended a conservator over her assets. Prior to the hearing, Susan hired her own attorney who asked the court to forego oral testimony on the return date of the order to show cause, and the court agreed. The court then rendered a decision dismissing the complaint, finding that plaintiff failed to meet her burden of proof by clear and convincing evidence that Susan was incapacitated.

On appeal, the lower court's decision was affirmed. The court was not required to take testimony on the return date of the order to show cause and its decision was based on competent evidence in the record.

Guardianship – Declaration of Incapacity for Litigation Purposes

In the Matter of Robert Cohen, an alleged incapacitated person, 2011 N.J. Super. Unpub. ____ (Docket No.: A-5852-08T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Carchman, Graves and St. John.

Plaintiffs appeal from an order of the Probate Part denying plaintiffs' application to have defendant, Robert Cohen, declared incapacitated for the purposes of litigation pending between the parties.

The lower court determined that the defendant was not incapacited and rejected the appointment of a guardian ad litem, as he was represented by competent counsel. The Appellate Division affirmed, finding that the court's decision was supported by substantial credible evidence.

Although defendant suffers from Parkinson's disease and had progressing physical disabilities, the court found that he was able to understand the litigation. He continued to go to the office and the physician reports support a finding that defendant had the ability to discuss and give intelligent consideration to all of the issues, including financial matters. The lower court found that plaintiffs failed to prove incapacity by clear and convincing evidence as required. The Appellate Division also held that the guardianship statute does not require a court to appoint a third party attorney to represent the interests of the incapacitated person in light of his competent counsel.

Guardianship – Standing to Sue

In the Matter of Costa Nova, an alleged incapacitated person, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0196-10) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Costa Nova is a 99 year old resident of Montclair. The Plaintiffs are friends of Mr. Nova who had been appointed as attorney in fact under an advanced directive and power of attorney in 2008 and 2009. In 2010, Mr. Nova revoked the power of attorney and advanced directive, naming his attorney under the power of attorney and his caregiver as agent under his advanced directive. Plaintiffs field suit seeking appointment as guardians.

Mr. Nova was examined by several doctors and the reports were inconclusive. The doctors opined that Mr. Nova is not totally incapacited. This was supported by the guardian ad litem, who reported that although Mr. Nova needed some assistance, he was not incapacitated.

Mr. Nova's counsel filed a motion to dismiss claiming that plaintiffs lacked standing to pursue the guardianship. The Court agreed and dismissed the action. The plaintiffs are former friends of Mr. Nova and former attorneys in fact under a revoked power of attorney, they have no legal or equitable interest in Mr. Nova's assets, and therefore lack standing.

Plaintiffs sought to amend their pleadings to challenge the revocation of the power of attorney, which was denied, and the matter dismissed.

Inter Vivos Transactions – Ademption By Satisfaction

In the Matter of the Estate of Louis S. Grant, Sr., deceased, 2011 N.J. Super. Unpub. _____ (Docket No.: A-0078-09T2; A-0079-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Hunterdon County.

This matter is an appeal of the lower court's order on remand to determine whether a gift of Decedent's limited partnership interests were made to his son, Louis Grant, Jr. On remand, the lower court held that the transfers of limited partnership interests were valid, finding clear and persuasive evidence that the decedent intended to make the gift and performed an act of delivery. The court found significant the filing of gift tax returns and the consistent income tax treatment by the decedent and his son, in recognition of the gifts. On appeal, the Appellate Division affirmed, rejecting appellant's factual arguments.

Inter Vivos Transaction – Suit to Set Aside Beneficiary Designation of Decedent

In the Matter of the Estate of Hirokazu Sano, 2011 N.J. Super. Unpub. _____ (Docket No.: BER-P-442-09) (Ch. Div. 2011). In front of the Superior Court of New Jersey, Chancery Division, Bergen County, Judge Peter E. Doyne, A.J.S.C.

This matter involves an attempt by decedent's wife to set aside a change in beneficiary designation in favor of decedent's long-time employee and girlfriend, which was made prior to decedent's death.

Decedent was the owner of several bakeries in New Jersey/New York area. On September 27, 2002, decedent obtained a $2.5 million life insurance policy naming his business, Parisienne, Inc. as primary beneficiary, and naming his wife, the plaintiff, as secondary beneficiary. On January 22, 2004, decedent changed the beneficiary in favor of defendant, whose sister acted as decedent's life insurance agent. Both sisters had known decedent for many years and were the sisters of decedent's former business partner. Decedent and defendant were engaged in a romantic relationship since 1992.

Decedent died intestate on July 23, 2008, and the proceeds of $2.5 million were transferred to defendant. Defendant spent down approximately $1.5 million, and the court subsequently issued an injunction seeking to preserve the remaining funds.

Plaintiff's underlying complaint alleges that defendant procured the change in beneficiary by exerting undue influence. Plaintiff filed an amended complaint adding defendant's sister as a co-defendant, alleging that she conspired with defendant to secure the change in beneficiary. Plaintiff failed to provide an affidavit of merit against defendant's sister, the insurance agent.

The parties filed competing motions for summary judgment. The court denied the motions as to a majority of the claims, but granted summary judgment on the claims of breach of fiduciary duty and negligence on the counts alleged against the insurance broker as no affidavit of merit was supplied. The court found that there remain inconclusive facts as to whether a confidential relationship existed between decedent and defendant, and summary judgment was therefore denied.

Inter Vivos Transactions – Misappropriation of Decedent's Funds

In the Matter of the Estate of Mildred B. Trocolor, deceased, 2011 N.J. Super. Unpub. _____ (Docket No.: A-5005-09T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County. Before Judges Lisa, Reisner and Alvarez.

Defendants appeal from two orders entered by the trial court requiring them to pay back $240,000 which defendant son misappropriated from his mother without her knowledge or consent. Defendant orchestrated a reverse mortgage of decedent's residence and used a majority of the funds for his own benefit. Before trial, the lower court had warned each party that if looting was discovered, the court may bar the ability to inherit from the estate. Although defendant produced a "gift letter" from the decedent, the trial court found the letter to be a forgery, and ordered defendant to pay the estate back the money he looted, to pay punitive damages and legal fees. The court removed defendant son as executor and ordered that he had no claim against the estate. In upholding the decision, the Appellate Division found that the trial court's conclusions were amply supported by the record.

Inter Vivos Transactions - Undue Influence – Shifting Burden of Proof on Joint Accounts

In the Matter of the Estate of Ignazio Del Bagno, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3789-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Monmouth County. Before Judges R. B. Coleman, Lihotz and J. N. Harris.

Plaintiff appeals from the lower court's grant of summary judgment in favor of defendant which dismissed plaintiff's claims of undue influence pertaining to certain inter vivos transactions which benefited the defendant. On appeal, the Appellate Division reversed, holding that a hearing on credibility issues was required.

Plaintiff, a daughter of decedent, sued her sister, the defendant, alleging that decedent did not intend that his joint checking and savings account be transferred to defendant at his death. Plaintiff also alleged that the sale of decedent's commercial property, the proceeds of which were deposited by defendant into the joint savings account, were not intended to pass to defendant at decedent's death. Defendant admitted she did not get decedent's direction or consent to deposit the monies in the joint account, but that "this is what decedent would have

wanted her to do". After discovery, defendant moved for summary judgment which the court granted. Finding that the bank depository act required plaintiff to show, by clear and convincing evidence, that decedent did not intend for the joint account to pass to defendant at his death. The court went on to find that there was no challenge to the assertion that decedent used joint accounts as an estate planning tool, and was aware of the consequences. There being no facts in dispute, summary judgment was granted.

The Appellate Division overturned this decision, finding that the lower court did not properly shift the burden of proof on the undue influence claim in light of defendant's confidential relationship with the decedent. The court set out the burdens of proof as follows:

1. when examining joint accounts, the presumption that the assets pass to the joint account holder is rebuttable;
2. the assets are assumed to be property of the joint account holder unless there is clear and convincing evidence of a different intention at the time the account is created;
3. this burden of proof is modified when the moving party can prove by a preponderance of the evidence that the surviving joint account holder had a confidential relationship with the donor who established the account;
4. if a confidential relationship exists, there is a presumption of undue influence, and the surviving joint account holder must rebut the presumption by clear and convincing evidence;
5. if the survivor carries the burden of proof, the statute (NJSA 17:16I-5(a)) controls the disposition of the account and the objectant can offer additional evidence of undue influence to defeat the statutory presumption of survivorship.

In this case, once the confidential relationship was established, the burden shifted to defendant to establish that the accounts were not convenience accounts and that the proceeds of sale of the commercial property were intended to be transferred to defendant at decedent's death. This involves credibility issues and a plenary hearing was required before summary judgment may be granted.

Inter Vivos Transactions - Undue Influence

Pass v. Kirschner, et al., 2011 N.J. Super. Unpub. ____ (Docket No.: A-4002-07T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County. Before Judges Cuff, Payne and Waugh.

Defendant appeals from the lower court's ruling setting aside certain pre-death transfers of partnership interests in a family limited partnership which benefited the Defendant.

Alfred and Etta Kirshner, the parents of Plaintiff and Defendant, established a family limited partnership (FLP) and a family trust to benefit their children equally. Over the years, Alfred and Etta gifted their interests in the FLP to their children and their families. During Alfred's lifetime, Plaintiff and her family in turn gifted their interests in the FLP to Defendant, at the request of Alfred and Etta. After Alfred died, Defendant continued to own the interests in the FLP and Etta amended the family trust to disinherit Plaintiff and her family in favor of

Defendant. The underlying estate plan and the changes over the years were made by the attorney for Alfred and Etta, who also acted as Defendant's attorney. Plaintiff sued, seeking to aside the transfers to Defendant and the amendment to the family trust, claiming unauthorized transfers, undue influence and breach of fiduciary duty.

The trial court held that Defendant shared a confidential relationship with Etta and exercised undue influence over her, placing specific emphasis on Defendant's reluctance and failure to produce documents and records and his penchant for unresponsive answers to simple questions posed to him at trial. The court found that Defendant orchestrated the change in disposition, and vacated the amendment to the family trust and the transfer of the FLP interests. Defendant also breached his fiduciary duty as general partner of the FLP by making disbursements for his own benefit. The court awarded a money judgment for the amount of the transfers, together with interest and attorneys' fees.

Defendant appealed, and the Appellate Division upheld the lower court's findings, remanding the matter for recalculation of the prejudgment interest on the damage award. The Appellate Division found that the trial record supported the court's findings, Etta stated she was dependent on Defendant; when Defendant told her to stop seeing Plaintiff, she complied; Defendant refused to allow Plaintiff to see her mother; Etta had impaired vision and Defendant read her all of the documents; Defendant made all of Etta's appointments with her lawyers and doctors and spoke directly to her estate planning attorney; all of Etta's calls were forwarded to Defendant's office; and the file was replete with "suspicious circumstances" pertaining to the change in disposition, the gift-back program; Defendant's discussions with Etta's estate planning attorney; Defendant's attempt to buy out Plaintiff's share in the FLP; the documents which purportedly disinherited Plaintiff; the doctor visits and videos; Defendant's harassing phone calls to Plaintiff; and Defendant's thorough involvement with instructions to Etta's estate planning attorney. This created a presumption of undue influence which could not be overcome by Defendant.

Inter Vivos Transactions - Undue Influence – Entire Controversy Doctrine

Tina Raia, Administratirx CTA of the Estate of Edward Rodenbough v. William Rodenbough III, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1421-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Law Division, Bergen County. Before Judges A.A. Rodriguez and C.L. Miniman.

Plaintiff appeals from the lower court's dismissal of her complaint seeking to set aside certain death-bed beneficiary changes to Decedent's insurance policies as the product of undue influence exerted by Defendant. It was also alleged that Defendant mismanaged Decedent's Estate while he was the administrator. The Appellate Court affirmed the lower court's decision dismissing the Complaint based on the entire controversy doctrine, finding that Plaintiff had multiple opportunities to challenge the beneficiary changes during the pendency of prior litigation between the parties, but failed to do so.

Decedent was a veteran of World War II. Before being deployed, he signed a Will leaving his sisters his estate, and naming his mother, then his sisters, as beneficiary of any life insurance. These documents were signed in 1943. Upon his return from battle, Defendant was placed in a psychiatric facility where he remained for the rest of his life. His mother was named as guardian, and upon her death, his brother William. Upon William's death, William's son agreed to look after Decedent.

Decedent's Will and life insurance designations were held by his mother until her demise in 1968, and then given to plaintiff's mother and to plaintiff, who held them for 36 years without telling Decedent she had them.

On January 16, 2002, Decedent executed a change in beneficiary of his life insurance naming Defendant, his nephew and guardian as beneficiary. He died nine days later.

Upon Decedent's demise, Plaintiff filed a Complaint seeking to be appointed as administrator of Decedent's Estate. She believed that insurance policies should have been collected by the Estate. Defendant also sought appointment as administrator. The Court appointed Defendant as administrator, as the Court found that as guardian he had more information about Decedent's Estate. Defendant filed a Court ordered informal accounting disclosing insurance policies and other assets payable on death to him as beneficiary.

Plaintiff filed a second Compliant on September 6, 2005 on behalf of Decedent's sister, who predeceased Decedent and was named as a beneficiary under the original life insurance policy, seeking to set aside the change in beneficiary designations made by Decedent days before he died, at a time when he was incompetent. She also alleged the changes were the product of undue influence. The Court dismissed the Complaint finding that Plaintiff lacked standing as Decedent's sister predeceased the Decedent. Plaintiff did not appeal the dismissal or amend the Complaint as beneficiary of Decedent's intestate Estate.

Plaintiff's third Complaint seeking to admit Decedent's 1943 Will to probate was filed on July 24, 2006. Plaintiff did not amend this Complaint to request that the beneficiary designations be set aside. On August 21, 2008, Decedent's 1943 Will was admitted to probate.

On May 18, 2009, Plaintiff filed a fourth Complaint seeking to set aside the beneficiary designations. Plaintiff never took exception to Defendant's original informal accounting listing the transfers, and the Court therefore dismissed the matter based on the entire controversy doctrine. The facts alleged by Plaintiff in the second and fourth Complaint are nearly identical. Plaintiff had multiple opportunities to raise her claims to the insurance policy as an interested party in Decedent's Estate, and application of the entire controversy doctrine was therefore proper under the circumstances.

Intestate Estate – Foreign Domiciliary

In the Matter of the Estate of Yung-Ching Wang, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3035-09T3; A-3036-09T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Essex County. Before Judges Wefing, Payne and Baxter.

Decedent, YC Yang, died in 2008 in Short Hills, NJ at the age of 92. He was born in Taiwan and remained a citizen of that country. His estate was valued at over $5 billion, but he died without a Will. His first wife, second wife, and some children filed suit seeking to be appointed as administrator and seeking discovery of decedent's assets. The lower court limited the discovery and no New Jersey assets were found. Decedent was involved with four companies in the past, but none of them were based in New jersey. The Appellate Division therefore dismissed the Complaints holding that the New Jersey Courts should not be burdened with proceedings that seek world-wide discovery and present issues, the ultimate resolution of which turns on interpretation of Taiwanese law. Plaintiffs must seek recourse from Taiwan, not New Jersey.

Intestate Estate – Laches

Kurt Pratt v. Dexter Miller; Ladd World, Inc., 2011 N.J. Super. Unpub. ____ (Docket No.: A-3286-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Camden County. Before Judges Carchman and Messano.

Plaintiff filed suit seeking a distribution of his intestate share of his father's estate. Decedent died intestate in 1993 owning property in Camden solely in his name. Decedent was survived by his spouse and 5 children. Decedent's wife was the administratrix of the estate and conveyed the Camden property to herself in 1994. Plaintiff filed a Complaint in 2009 seeking damages equal to his intestate share in the property. The Court, in reviewing the intestate share of the surviving spouse, which was equal to the first $50,000 of the estate plus 1/2 of the remainder, was unable to compute the share as no evidence was presented regarding the Decedent's other assets. The Court also cited the fact that Plaintiff new of the Deed transfer since at least 2000 and did not file suit until many years later. Based on the length of the delay before Plaintiff filed suit, the failure of Plaintiff to articulate an adequate reason for the delay, and the prejudice that would result, the Court dismissed the matter based on laches. This decision was upheld on appeal.

Intestate Estate – Validity of Foreign Divorce

In the Matter of the Estate of Anthony Sarcona, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-6076-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery, Probate Part, Monmouth County. Before Judges Cuff and Simonelli.

Plaintiffs, the former wife and children of decedent, appealed the trial court's dismissal of their complaint seeking a declaration by the former wife that the Dominican Republic divorce decree obtained by decedent was void.

In 1979, decedent was divorced from his first wife in the Dominican Republic. He had entered into a settlement agreement with his former wife and a judgment of divorce was issued. Decedent was remarried in 1995 and died intestate in 2010. His wife obtained letters of administration, and plaintiffs sued, seeking to void the divorce decree and an order naming them as beneficiaries of the estate. Although the facts were in dispute, the trial court dismissed the matter summarily finding that the foreign divorce should be respected. The court applied New York law, where the spouses resided at the time that the divorce decree was entered. Under NY law, foreign divorces are recognized if both parties appeared in the action and were served with process. The plaintiff former wife signed a settlement agreement and a proxy agreeing to the divorce in 1979, and to the extent that fraud was cited, she failed to plead with particularity. Although she claimed she did not sign a proxy, the court dismissed this claim based on laches, as 31 years had lapsed since the divorce decree was entered.

Intestate Estate – Validity of Foreign Heirs

In the Matter of the Estate of Peter Bulhack, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3602-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery, Probate Part, Union County. Before Judges R. B. Coleman and Lihotz.

Decedent died intestate. He was not survived by a spouse, children, parents or grandparents. His heirs included first and second cousins. Plaintiffs, foreign beneficiaries living in Belarus, were represented by counsel. Decedent's first cousins living in the United States rejected Plaintiffs' lineal assertions. The trial court found that the eight Belarus plaintiffs were cousins of the Decedent and entitled to inherit a portion of his estate. The Defendant appealed, claiming that the Plaintiffs failed to offer proof that they survived the Decedent.

The trial court, in rendering its opinion, relied on NJRE 902(c), finding that copies of the sealed birth certificates, death and marriage certificates provided by Plaintiffs' expert were sufficient to prove their right to inherit. On appeal, the Appellate Division agreed, and also held that the powers of attorney given to Plaintiffs' counsel after Decedent's death to act of their behalf in the litigation were sufficient to show that they survived the Decedent. The matter was remanded to determine whether these documents were in fact, properly executed and sealed by the apostille of a foreign office, pursuant to the 1961 Hague Convention Treaty Abolishing the Requirement of Legalization of Foreign Documents.

In the Matter of the Estate of Peter Bulhack, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3602-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery, Probate Part, Union County. Before Judges R. B. Coleman and Lihotz.

On remand, the Appellate Court reviewed the trial Court findings and upheld the legitimacy of the claims of the foreign beneficiaries. The trial court reviewed the documents

presented by all of the parties to discern whether they survived the decedent. Citing the powers of attorney which were signed after decedent's death, and authenticated by apostille, the lower court concluded that they had survived the decedent. This was upheld on appeal.

Legal Malpractice – Beneficiary Suit Against Estate Attorneys May Move Forward Despite Prior Probate Proceedings

Higgins v. Thurber, 2011 N.J. Unpub. ____ (Docket No.: A-12-10) (2011). Before the New Jersey Supreme Court. On certification to the Superior Court of New Jersey, Appellate Division, whose opinion is reported at 413 N.J. Super. 1 (2010).

The Supreme Court considered whether Plaintiff's legal malpractice action against the attorneys who represented their late father's estate was barred by the entire controversy doctrine in light of the disposition of earlier law suits including an accounting action.

In a prior probate proceeding, the executor sought approval of his formal accounting of a Trust formed by plaintiffs' deceased father. Plaintiffs' filed exceptions in the prior proceeding, sufficient to constitute a legal malpractice claim against defendants, who intervened in the accounting action before trial. Following the conclusion of the accounting action, plaintiffs filed the within malpractice action. Summary Judgment was entered in favor of defendants barred the suit under the entire controversy doctrine. The Appellate Division reversed.

The Supreme Court, in upholding the Appellate Division's remand, found that although a potential claim sounding in legal malpractice may have been raised in the probate proceeding, it cannot be said that plaintiffs had a "full and fair opportunity to litigate those claims or that it would otherwise be equitable to bar this subsequent suit" under the entire controversy doctrine.

The Court also found that an accounting proceeding in the probate part is formalistic in nature, involving line by line exceptions, and that the entire controversy doctrine is out of place. It involves a proceeding to address the conduct of an executor but not others. The Court also took note of the fact that the underlying pleadings in the accounting actions did not encompass claims for legal malpractice.

Legal Malpractice – No Duty of Care to Beneficiary Adverse to the Estate

Taffaro v. James R. Connell, Esq., at al., 2011 N.J. Unpub. ____ (Docket No.: A-4928-09T2) (2011). On appeal from the Superior Court of New Jersey, Law Division, Bergen County. Before Judges Payne, Simonelli and Hayden.

This matter involves plaintiffs' appeal of the lower court's dismissal of his malpractice actions against his step-mother's estate planning attorneys for failure to include him as beneficiary of her Will. On appeal, the Appellate Court upheld the lower court's dismissal finding that defendant attorneys, as estate planning attorneys, owed no duty to plaintiff as they represented plaintiff's step-mother, not plaintiff, in preparing her estate plan. The Court also

held that no duty was owed to plaintiff who failed to file a Will contest but instead filed a claim adverse to the interest of the estate.

Vincent Taffaro was the father of plaintiff, Michael Taffaro, and Scott Taffaro. After Vincent's wife died, he married Dolores Taffaro, and they had 2 children. After Vincent's death in 1998, Dolores' daughter, Susan, asked attorney Connell to prepare a Will on Delores' behalf. Connell met twice with Delores, who was unsure whether to include plaintiff as a beneficiary under her Will, as he was on disability and suffered from drug use. Delores signed a Will prepared by Connell on December 2, 1999, deciding to include plaintiff as a beneficiary. Soon thereafter, Delores was hospitalized until her death on December 24, 1999. On December 17, 1999, Delores called Connell and told him she had a change of heart and wanted to remove plaintiff as a beneficiary of her estate. Delores executed a new will (the "second Will") on December 20, 1999, which did not include plaintiff as a beneficiary.

Following Delores death, the second Will was probated. Plaintiff did not challenge this Will as he claims that his sister, Susan, as Executrix agreed to include him as a beneficiary. Plaintiff eventually filed a Complaint seeking to establish a constructive trust over the assets of the Estate in an effort to receive his 1/4 share. The matter settled on December 5, 2005 with plaintiff receiving $110,000, representing his 1/4 share of Delores' residence which was in addition to the 1/4 share he had previously received from Delores' residual estate. On August 2, 2007, plaintiff and his brother Scott filed a complaint against attorney Connell claiming malpractice in the preparation of the second Will. Plaintiff also sued his attorney in the initial suit claiming that he failed to advise plaintiff that he had a viable claim for malpractice against Connell. The malpractice action was dismissed on summary judgment based on estoppel, statute of limitations, unclean hands and failure to establish damages. Plaintiff appealed.

To establish legal malpractice, a plaintiff must show:

1. the existence of an attorney-client relationship creating a duty of care upon the attorney;
2. the breach of that duty; and
3. proximate causation.

An attorney preparing a will owes a duty only to the testator, unless the attorney undertook a duty to the beneficiary. Also, an attorney owes no duty of care to a potential beneficiary if a beneficiary's interest is adversarial to the interest of the estate and contrary to the will of the testator.

Based on the foregoing, the Appellate Division held that attorney Connell owed no duty to plaintiff because he represented Delores with respect to preparing the second Will, not the plaintiff. In addition, attorney Connell owed no duty to plaintiff as he took an adversarial position against the estate. Note: plaintiff did not seek to have the second Will set aside.

Palimony Claims – Prospective Application of Statute of Frauds

Botis v. Estate of Gary G. Kudrick, 2011 N.J. Super LEXIS 76 (Docket No.: A-5562-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County.

This case required the Appellate Division to determine whether to retroactively apply the amendment to the Statute of Frauds requiring palimony agreements to be in writing and for each party to be represented by separate counsel. The Court held that the amendment applies prospectively, thereby allowing a palimony claim filed against the Decedent's estate prior to the effective date of the amendment on an alleged agreement enforceable when the complaint was filed to proceed against the Decedent's estate.

In her complaint, Plaintiff alleged that she and Decedent lived in a marital-type relationship for over 30 years, that they purchased real property together, and that Decedent promised to provide for her at his death. Prior to the enactment of the statute, such a claim was cognizable under the common law. Decedent passed and his Will failed to provide for Plaintiff. She sued the Estate seeking palimony. The trial court failed to retroactively apply the amendment to the statute of frauds, and defendant estate appealed.

In affirming the trial court's decision not to apply the amendment retroactively, the Appellate Court found significant the fact that the parties were simply unable to comply with the requirements of the amendment prior to its enactment. In this case, Decedent had died over a year and a half before its enactment and Plaintiff filed her Complaint almost a year before enactment. Decedent was simply unable to comply with the new statutory requirements, and prior to the amendment, case law supported a mutual expectation that the palimony agreement was enforceable without a writing executed after consultation with an attorney.

Palimony Claims – Prospective Application of Statute of Frauds

Pierson v. the Estate of Christopher Dahl, 2011 N.J. Super. Unpub. _____ (Docket No.: A-5997-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County.

The Appellate Division, relying on its decision in Botis v. Kudrick, 2011 N.J. Super LEXIS 76 (App. Div. 2011), reversed the trial court's dismissal of Plaintiff's palimony claim which had been filed before the effective date of the amendment to the Statute of Frauds requiring palimony agreements to be in writing.

In Botis, the Court held that the statutory amendment should not be given retroactive effect to dismiss palimony suits that were filed and pending before the date of enactment.

Probate Litigation – Settlement and Dispute of Disposition of After-Discovered Assets

In the Matter of the Estate of Lillian L. Fischer, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0091-10T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Atlantic County. Before Judges Axelrad and J.N. Harris.

This matter involved a probate dispute between decedent's domestic partner and decedent's sister over the estate. The parties entered into a settlement agreement in May 2009, after which a disagreement arose concerning the disposition of certain assets that had not been disclosed during the court-ordered mediation. The trial court ordered that the assets be distributed to decedent's sister, and an appeal was taken.

Appellant is 91 years old and the 66 year domestic partner of decedent. Decedent's sister is 90 years old. Decedent died intestate on 12/31/08 at the age of 86.

Decedent and her domestic partner jointly owned real estate in Somers Point, NJ and Croydon, Pa. The NJ property was titled in joint names and the Pa. property was acquired in 1967 as joint tenants with rights of survivorship. After her death, decedent's domestic partner was appointed as administratrix. Decedent's sister filed a complaint seeking to remove her as administratrix. The parties mediated their dispute and entered into a settlement agreement, which was subsequently incorporated into an order. According to the agreement, decedent's domestic partner was to receive the securities listed in Schedule A, and decedent's sister was to receive the Pa. property and "100% of ….[unidentified] additional assets…"

On 6/23/09, the Pa. property was conveyed to decedent's sister pursuant to the agreement. Some time thereafter decedent's sister claimed she was entitled to certain "additional assets", some stock, not listed in Schedule A of the settlement agreement. Following discovery, a hearing was held and the court awarded the securities to decedent's sister, despite the fact that she was aware of the securities before the mediation and failed to disclose them. She claimed no one asked her about it, and that her sister wanted her to have them. On appeal, decedent's domestic partner claimed bad faith. The trial court ruled that a reasonable reading of the agreement contemplated that decedent's sister would receive any assets not listed on Schedule A. This was affirmed on appeal. The settlement agreement was a contract, and settlement has long been encouraged by the Supreme Court. The court did not find bad faith, and that appellant received the benefit of her bargain.

Removal of Executor – Grant of Commissions and Legal Fees

In the Matter of the Estate of Geraldine Parks, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-5673-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Sussex County. Before Judges Fisher and Fasciale.

Plaintiff, a beneficiary of the estate, appeals the trial court's order granting commissions and legal expenses to her brother who was removed as executor of their mother's estate. On

appeal, the Appellate Division remanded the matter for clarification on the trial court's grant of commissions and legal expenses.

Decedent died in 2008 leaving a will which devised her property in equal shares to her 6 children. 2 of her children qualified as executors of her estate. In administering the estate, 1 of the co-executors misapplied funds for his own benefit. Due to difficulties in the administration of the estate, the other executor, plaintiff, filed a complaint seeking removal of the co-executors, appointment of a third party administrator and reimbursement for certain expenses.

The judge removed the executor who misappropriated funds, and also removed the plaintiff, requiring an informal accounting within 60 days. A third party attorney was appointed as substitute administrator. The informal accounting was provided and at a subsequent hearing on the accounting, the court accepted the accounting provided that the co-executors were not entitled to any reimbursement of legal fees or commissions other than reimbursement for fees in connection with the appointment of the administrator following the removal of the executors. Plaintiff filed a motion for reconsideration seeking reimbursement of all his fees and commissions, claiming that he was being prejudiced by the misappropriation of his co-executor. The court agreed and awarded legal fees and commissions. On appeal, the Appellate Division remanded the matter seeking clarification from the court on its rationale in awarding fees and commissions to the plaintiff.

Settlement During Non-Binding Mediation is Enforceable

Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC, et al., 421 N.J. Super. 445 (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Burlington County. Before Judges Cuff, Simonelli and Fasciale.

The Appellate Division upheld the lower court's enforcement of a settlement reached at non-binding mediation between a vendor of commercial real estate and some purchasers. By way of analogy, so long as there is an agreement at mediation which is reduced to writing shortly thereafter, the agreement will be upheld.

In this case, the court held that a settlement reached at mediation was not required to be reduced to writing during the mediation session to be enforceable, but instead could be reduced to writing after the conclusion of the mediation session. The addition of terms to effectuate the settlement that do not alter the basic agreement will not operate to avoid enforcement of an agreement to settle a litigated matter.

Settlement reached at a mediation session between vendor and purchaser of real estate was sufficiently reduced to writing, as required for settlement to be enforceable, where three days after the mediation session, purchasers' attorney prepared and sent a letter stating the terms of the agreement reached by the parties and two weeks later sent another letter informing purchasers that he had placed the sum required to resolve the dispute in an escrow account.

The parties had waived confidentiality of mediation proceedings to resolve dispute, and the court did not find the settlement to be the product of coercion, fraud, deception, undue pressure or unseemly conduct. It was therefore enforceable.

Settlement – Upholding Settlement Agreement

In the Matter of Peter, Susan and Steven Lindner Irrevocable Trust, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0634-10T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Union County. Before Judges Lisa and Sabatino

Appeal was taken from the lower court's decision to vacate the terms of a consent order to enforce the terms of settlement entered into between the parties. Finding sufficient questions of fact, the Appellate Division remanded the matter to the lower court to conduct a plenary hearing as to whether the parties in fact reached a settlement.

Plaintiff and Defendant are siblings and Co-Trustees of their mother's Trust. Plaintiff filed suit seeking to have Defendant removed as Co-Trustee for allegedly removing funds from the Trust for his own benefit and Defendant counterclaimed, seeking Plaintiff's removal. After undergoing mediation, Plaintiff and Defendant signed a three page handwritten Mediation Agreement prepared by the mediator. Thereafter, Plaintiff moved on several occasions to enforce the terms of the Mediation Agreement, eventually receiving Orders from the Court requiring Defendant to comply.

Following the signing of the Mediation Agreement, the parties attempted to enter into a more comprehensive and formal settlement agreement, but were unable to do so. On June 18, 2009, Plaintiff's counsel submitted an unsigned copy of the settlement agreement together with a Consent Order for the Court's signature under the five day rule, which the Court signed on June 25, 2009. No opposition was filed by counsel for Defendant. The Court also dismissed the matter. On July 24, 2009, Defendant moved to enforce a visitation provision of the Mediation Agreement requiring Plaintiff to return their mother to New York, and the Court entered an oral decision denying that motion on September 15, 2009, holding that the settlement agreement, not the Mediation Agreement, controlled the parties' visitation arrangement.

On November 6, 2009, Defendant filed a motion for reconsideration requesting the Court to vacate the settlement agreement, which was denied.

On January 20, 2010, Plaintiff filed an Order to Show Cause and Complaint seeking to enforce the Court's previous orders, and on February 22, 2010, the Court held a hearing. Defendant represented himself pro se, claiming that he never agreed to the terms of the settlement agreement. The Court enforced the terms of the settlement agreement. Defendant hired new counsel and moved to vacate the prior orders as Defendant did not give his prior counsel authorization to settle on his behalf and did not consent to the terms of the settlement agreement. Confidential emails were sent to the trial court in support of Defendant's lack of consent. The trial court ultimately concluded that Defendant did not consent to the settlement.

Finding that the trial court did not make any credibility determinations regarding Defendant's lack of consent, the Appellate Division remanded the matter for a plenary hearing, ordering that the emails be disclosed to opposing counsel, after redacting all information not pertaining to the consent.

Trust Litigation – Accounting Issues

In the Matter of the Irrevocable Funded Life Insurance Trust Established by Joseph Weinberg U/A Dated May 11, 1982, 2011 N.J. Super. Unpub. ____ (Docket No.: A-2351-09T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Somerset County. Before Judges Parrillo, Yannotti and Espinosa.

This is the third appeal brought by a beneficiary/trustee daughter of two (2) trusts established by Joseph Weinberg. Joseph Weinberg created two trusts for the benefit of his daughters, Lynn and Deborah, the 1982 life insurance trust and the 1997 revocable trust. Joseph named Lynn and Deborah as beneficiaries of his estate under his Will. In this appeal, Lynn requests a remand of the matter to allow for further review of the accounting irregularities.

Joseph was a resident of Florida when he died in 2001. In 2002, Deborah and Lynn entered into a settlement agreement pertaining to the estate and the 1997 trust. As a result of the settlement, Lynn became the sole executor of the estate, the sole trustee of the 1997 trust and the sole beneficiary of both. The settlement did not affect the 1982 trust, in which Deborah and Lynn remained equal beneficiaries. A third party remained trustee of the 1982 trust.

Lynn filed an action requesting an accounting and other relief against the trustee of the 1982 trust. After a hearing, the trial court allowed the third and final accounting of the trustee of the 1982 trust with certain exceptions. The court awarded commissions and allowed attorneys' fees paid from the 1982 trust. The court's order provided that the trustee was to supply documentation to Lynn. Five months later, Lynn filed a motion to enforce the Order. After oral argument on the motion, the trial court closed the case, directing the trustee to turn over to Lynn some stock and denying Lynn's request for further discovery and documentation. Lynn appealed.

On appeal, the Appellate Division affirmed the trial court's denial of Lynn's request for additional discovery, citing res judicata and estoppel issues. The trial court properly denied Lynn's request to reopen the estate and 1997 trust, which was settled, and to reargue issues already adjudicated in two prior appeals.

Trust Litigation – Creditor Collection – Spendthrift Clause

Pickett v. Pritchard and Peapack Gladstone Bank, 2011 N.J. Super. Unpub. ____ (Docket No.: A-2820-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Law Division, Mercer County. Before Judges Wefing, Payne and Koblitz.

This appeal involves plaintiff's attempt to collect a judgment against the interest of a beneficiary of a trust established for his benefit under the Wills of his late parents. The Trusts contained a spendthrift provision. The trial court dissolved a writ of execution served upon Peapack Gladstone Bank, respecting a prior order of dissolution entered by a Pennsylvania court, and the plaintiff appealed.

Plaintiff obtained a judgment against Defendant in the US District Court. Defendant is the beneficiary under trusts established under his late parents' wills. The Trusts were originally administered in Pennsylvania. Plaintiff sought a writ of execution in Pennsylvania seeking to attached Defendant's income interest in these trusts. A writ of execution was issued by a Pennsylvania Court. Defendant filed a request to dissolve the writ of execution in light of the spendthrift provisions of the trusts, and the Pennsylvania court agreed. No appeal was taken from the order dissolving the writ of execution.

Plaintiff then filed the judgment in New Jersey. The Pennsylvania trustees had resigned and the trust assets were transferred to a New Jersey bank. The Defendant sought execution on his judgment in New Jersey. The Bank objected, claiming that the Pennsylvania order of dissolution should be given full faith and credit, and the trial court in New Jersey agreed, thereby granting the bank's motion to dissolve the writ of execution. This was upheld on appeal, the Appellate Division finding that the spendthrift provisions of the trusts prevented attachment of the writ of execution.

Trust Litigation – Designation of Successor Trustee

In the Matter of the George Link, Jr. Charitable Trust Established Under the Last Will and Testament of Eleanor Irene Higgins Link, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-4930-09T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Law Division, Monmouth County. Before Judges C.L. Miniman and LeWinn.

This matter involves an appeal by two of the co-trustees of the George Link, Jr. Charitable Trust and the lower court's denial of their application to approve their designation of a successor trustee.

Soon after the death of decedent, the three trustees of the trust met to discuss trust issues. At the meeting, they appointed successor trustees pursuant to the terms of the will establishing the trust. One of the trustees, Robert Link, also announced his intention to resign as a trustee. Soon thereafter, the other two trustees executed designations of trustees naming their children and revoking any prior designations by Robert. They sent the designations to Robert for his signature. In response, Robert changed his mind about stepping down as trustee. Robert also executed a designation of trustee naming his daughter as his successor. A month later, Robert filed an Order to Show Cause and Complaint seeking to declare the prior designations by the other trustees null and void and to declare the designation of his daughter as successor trustee as valid.

Based on the terms of the will, the lower court found that Robert was given the "right" to designate his successor. Although the discretion exercised by the trustees was subject to majority vote, and Michael, also a trustee was given veto power of the exercise of the trustees' discretion in making distributions and investments, the court found that this did not apply to the designation of a successor trustee. The court concluded that there was no ambiguity in the terms of the will and therefore no need to examine extrinsic evidence outside the four corners of the will. The will provided that each trustee was given the "right" to appoint a successor. The designation made by Robert was valid, and this decision was affirmed on appeal.

Trust Litigation – Failure to Impute Income to Beneficiary of Discretionary Trust for Purposes of Computing Alimony

Tannen v. Tannen, 2011 N.J. Super. Unpub. ____ (Docket No.: A-53-10) (2011). Before the New Jersey Supreme Court. On appeal from the Superior Court of New Jersey, Appellate Division's decision reported at 416 N.J. Super. 248 (App. Div. 2010).

The Supreme Court, in affirming the Appellate Division, held that an ex-wife's beneficial interest in a discretionary trust is not an asset for purposes of computing alimony.

Mark Tannen and Wendy Tannen were married for 18 years. Mark filed for divorce. During their marriage, Wendy's parents established an irrevocable discretionary support trust for Wendy's benefit, with Wendy and her parents acting as co-trustees. Before trial, the trial court ordered Mark Tannen to name the trust as third-party defendants. After trial, the trial court issued judgment and applied the Restatement (Third) of Trusts, determining that the terms "support" and "maintenance" in the Trust required the trustees to distribute "such sums as are necessary to maintain" Wendy's lifestyle. The trial court then held that it must consider trust benefits before computing alimony and imputed income to Wendy from the Trust. An appeal was taken.

On appeal, the Appellate Division noted that the Restatement (Third) of Trusts had not been adopted by any reported decision in New Jersey, and therefore refused to apply this new law. Based on existing law, the Appellate Division held that Wendy's beneficial interest in the discretionary trust was not an asset for computing alimony. The Supreme Court affirmed for the reasons expressed by the Appellate Division in its decision reported at 416 N.J. Super. 248 (App. Div. 2010).

Trust Litigation – Insurance Broker Liability for Lapse of Life Insurance Policy

Joseph J. Triarsi, as Trustee for the Joseph H. Halpin Insurance Trust v. BSC Group Services, LLC and Herbert Wright , 2011 N.J. Super. Unpub. ____ (Docket No.: A-5047-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Law Division, Union County. Before Judges Carchman, Messano and Waugh.

Plaintiff, Trustee of an irrevocable life insurance trust, filed suit against the insurance broker and his agency for allowing the Decedent's life insurance policy to lapse before his death. Specifically, the Trustee claimed that the insurance broker assumed a role beyond that of a broker and because he regularly met with the insured, he knew that the insurance policy in question was critical to decedent's estate plan as the sole asset of the Trust.

Prior to his death, decedent's health declined, causing him to become despondent and less attentive to business affairs. This caused the policy to lapse. The Complaint alleged breach of fiduciary duty, breach of duty of care and breach of special relationship between insurance agent and claimant. The matter was designated as a professional malpractice matter requiring the filing of an Affidavit of Merit. Plaintiff did not file an Affidavit of Merit. Defendants filed a motion to dismiss which was opposed, and Plaintiff did not file an Affidavit of Merit in response. The lower court dismissed the Complaint, finding that the Affidavit of Merit Statute applied to insurance producers.

Plaintiff then field an Affidavit of Merit and a motion for reconsideration, claiming that the Affidavit of Merit statute was inapplicable as the lower Court did not hold a Ferreira conference, required within 90 days of the filing of a malpractice Complaint, and that there were extraordinary circumstances warranting reinstatement of the Complaint. This motion was denied. Plaintiff appealed.

On appeal, the Court found that it is the nature of the proof required to prove the claims that controls whether an Affidavit of Merit is required, not how the claims are captioned in the Complaint. The Court held that expert testimony is required to establish that the insurance broker had a duty with respect to the payment of renewal premiums, avoidance of cancellation and reinstatement in the event of cancellation. However, the third count of the Complaint alleged a special relationship between the broker and the decedent whereby the broker, by his conduct, took on responsibility for the policy and invited plaintiff's detrimental reliance. The appellate Court allowed this claim to go forward as it did not involve professional malpractice. Matter was reversed reinstating this count. The Court also failed to allow the filing of an Affidavit of Merit as no "extraordinary" circumstances existed, this was basically a judgment call by Plaintiff not to file. He also failed to file the Affidavit in response to the motion. Also the failure to hold a Ferreira conference does not toll the time limits of the statute.

Trust Litigation – Partition Action

James F. Silva, Jr. v. Ann E. Fitzpatrick and Joseph Fitzpatrick, husband and wife, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1528-09T3) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Atlantic County. Before Judges Carchman, Graves and Messano.

This matter arises out of a dispute between siblings and the lower court's order permitting either party to purchase the property which they owned together pursuant to an auction process, without any offsets.

The parties received real estate located in Longport, New Jersey worth approximately $900,000 as a distribution from a trust established by their now deceased parents. At the time of distribution from the trust, the interest of 2 of the siblings were paid off, and a Deed was transferred into the names of plaintiff and defendant. They owned the property equally, with plaintiff occupying the property during the winter months and defendant and her family using the property primarily in the summer months. Plaintiff testified he paid in excess of $200,000 to upgrade the property. He filed a complaint to have the property sold and for reimbursement of the costs associated with the upgrades, claiming that a partition was not practicable. Defendant field an answer claiming that plaintiff had sole possession of the property for over 10 years and that none of the improvements were approved by her. Defendant also sought reimbursement of monies she paid to maintain the property after plaintiff vacated the premises.

At trial, a real estate expert testified that improvements were made to the property but she was unable to pinpoint exactly what improvements were made and when, or what value may have been added by any such improvements. The parties presented conflicting testimony on the improvements. The trial court found that plaintiff failed to establish that defendant had agreed to reimburse him for the improvements, nor had plaintiff established that the improvements had improved the property. The court also recognized that plaintiff in fact made some improvements and therefore refused to charge him for the years of costs associated with maintaining the property after he moved out. Thus, neither party was entitled to a credit.

The Appellate Division affirmed the decision, finding that plaintiff simply failed to prove the value of his improvements to the property.

Trust Litigation – Reformation of Inter Vivos Insurance Trust after Decedent's Death

In the Matter of the Irrevocable Life Insurance Trust of William McLellan, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0107-2011) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Essex County.

Decedent's wife sought reformation of an insurance trust established by her husband to remove the generation skipping provisions of the Trust. Decedent filed for divorce and was living separate and apart from his wife at his death. Pursuant to the terms of the Trust, in the event the parties were living separate and apart, Decedent's wife was eliminated as a beneficiary. This was conceded, however, the plaintiff sought to continue as trustee.

The reformation of a trust agreement in a probate action requires clear and convincing proof of the testator's intent. Here, plaintiff sought reformation of the generation skipping provisions of the Trust to allow for her to distribute the insurance proceeds to decedent's children as opposed to his grandchildren, as she believed that the Trust was established to take advantage of the GST Tax provisions which were no longer necessary in light of the increased exemption of $5.0 million. The Court found that this request failed to meet the clear and convincing evidence standard required under the doctrine of probable intent as no evidence was offered to show that the only reason decedent's grandchildren were named as beneficiaries of the Trust was to take advantage of the federal estate tax exemption.

The Court also held that the plaintiff may continue as trustee as the provisions in the Trust pertaining to the appointment as trustee did not preclude her from acting as such, even though the decedent had filed for divorce and was living separate and apart from plaintiff at the time of his death.

Trust Litigation – Surcharge Against Trustee for Misappropriation of Trust Funds

In the Matter of the Trust Under the Will of Antonia Zanengo, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-4997-09T3 (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Somerset County. Before Judges Sapp-Peterson and Ashrafi.

Defendant appeals from the lower court's judgment entered against him in the amount of $414,457, plus interest, in favor of the trust for which he was the trustee.

Defendant, a CPA, was appointed as trustee under the Will of decedent, who died in 1994. The trust required defendant to pay income to decedent's husband, then 80 years old, and principal for his health, maintenance and support. Decedent's grandchildren were named as residuary remainder beneficiaries. The trust was initially funded with $320,000, but at the death of decedent's husband, the trust had virtually no assets.

Plaintiff, the father of three of decedent's grandchildren, brought an action for an accounting from the defendant. After trial, the lower court found that defendant had looted the trust, and entered judgment against him.

On appeal, defendant claims that plaintiff lacked standing, and that defendant had provided services to the beneficiary which the beneficiary agreed to pay for. These arguments were rejected by the court as a minor beneficiary is an interested person under the statute. Defendant also failed to prove by clear and convincing evidence, under the Dead Man's Statute, that the beneficiary had agreed to pay for services from the defendant. In light of defendant's looting of the trust's entire corpus, the court also denied his request for compensation under quantum meruit.

Will Contest - Attorneys' Fees will not be Assessed Against Assets that Pass by Operation of Law

In the Matter of the Estate of John Oliva, Jr., Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-2906-04T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Atlantic County. Before Judges A. A. Rodriguez and Grall.

Executrix and sole beneficiary of the Estate appeal the lower court's award of attorneys' fees to decedent's parents.

On September 22, 2002, decedent named McHugh as sole beneficiary of his estate under a holographic Will which he signed that day. Decedent killed himself 9 days later. Decedent's parents filed a Will contest resulting in a settlement. Decedent's parents then applied to the Court for an award of fees. The Court awarded them a portion of their fees. McHugh appealed, claiming that the award of fees was not proper. There was no finding of undue influence, and the only estate assets were life insurance and pension benefits that passed to McHugh by operation of law. McHugh argued that there was no fund and that any award should not be payable by her personally or out of the life insurance or pension proceeds which she received as beneficiary. The Appellate Division agreed, reversing the lower court's award of fees.

R. 4:42-9(a)(2) permits an allowance of fees from a fund when it would be unfair to saddle the full cost upon a litigant who is in court to advance more than his own interest. Fees are also allowed under that Rule in a Will contest. However, the only assets of the estate were assets that passed by operation of law, and decedent's parents failed to cite any authority as to why they should be included as probate assets in which an award of fees could attach.

Will Contest – Lost Will

In the Matter of the Estate of Allan C. Schenecker, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-4161-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Graves and Waugh.

Wife of Decedent appeals a decision by the trial court admitting a copy of Decedent's 2006 Will to probate. In the Will, Decedent left his residence to his recently married wife, and the remainder to his daughter. The Court also found that Decedent's wife was not an omitted spouse under the intestate statutes, and denied her counsel fees. On appeal, the lower court's decision admitting the Will to probate was affirmed, but the matter was remanded for further findings of fact on the issue of counsel fees.

In 1988, Decedent met his wife, a real estate broker who assisted Decedent with his real estate purchases over the years. She managed the properties and they became close. On November 20, 2006, Decedent purchased a residence in Tinton Falls, New Jersey in which he and his future wife resided. Although the property was placed in Decedent's name, it was eventually transferred to both of them with rights of survivorship. On November 29, 2006, Decedent executed a Will leaving the Tinton Falls property to his future wife and the remainder of his Estate to his daughter.

In 2008, Decedent was diagnosed with lung cancer. He decided to marry. Soon thereafter, he died.

Decedent's wife received letters of administration, forcing the filing of a Complaint by Decedent's daughter, seeking to probate a copy of the Will. The Complaint was supported by the testimony of Decedent's long time attorney, who testified that Decedent intended that the November 26, 2006 Will be his Last Will and Testament and that he had no intentions of

changing the disposition. In deciding the issue of admitting the lost Will to probate, the Court gave great weight to this testimony.

When a missing will is last seen in the possession of the testator there is a presumption that the testator destroyed the will with the intent to revoke it. The proponent of the will has the burden to show by clear and convincing evidence that it was not destroyed. The Court relied on the testimony of the various witnesses finding that the Decedent intended for the November 26, 2006 to control.

In upholding this decision, the Appellate Court held that the key issue in a case such as this is whether the testator had the intent to revoke the missing Will, even assuming he had the opportunity to do so. The trial court found by clear and convincing evidence that, whatever may have happened to the original, the Decedent did not intend to revoke it.

As to legal fees, the Appellate Division remanded the matter for further findings of fact, as the record was not clear as to whether the Court made a finding of reasonable cause to contest the Will.

Will Contest – Probable Intent – Stranger to the Adoption Rule

In the Matter of the Estate of Regina Mapes, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0160-10) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Decedent, Regina Mapes, died a resident of Essex County in 1963. her Will dated January 29, 1960 was probated in 1963. The Will created a trust, granting life income to decedent's daughter, Edith, who died on December 2, 1971. Upon Edith's death, Edith's son, Harry became successor life beneficiary. Harry died on July 29, 2009. Upon Harry's death, the Trust terminated and the remaining assets were to be paid to Harry's then living descendants.

Harry had 2 biological children, Cynthia and Kristina. These children were adopted by Harry's ex-wife's second husband in 1966. Harry specifically excluded his biological children as beneficiaries under his Will. In 1988, Harry adopted four children after they all attained majority: Brenda, Ricky, Kathy and Rhonda, all children of Harry's second wife.

The issue is who is a "then living descendant" under the terms of Regina Mapes' Will. Although Harry intended to cut off his biological children, the intent of Regina Mapes controls the situation. The Court went on to hold that the adoption of Harry's biological children did not cut off their rights to inherit from Regina Mapes, and her probable intent was to include them as beneficiaries.

On the other hand, as to the children adopted by Harry, they are excluded from the definition of descendants under Regina Mapes' Will under the "Stranger to the Adoption Doctrine", which holds that an adult adoptee may not share in the estate of a third party who was not a party to the adoption proceeding. The doctrine creates a presumption that an adult adoptee

is not included in a class gift to lineal descendants. This may be overcome by language in the governing instrument. But for such language, the Court must discern the testator's probable intent. In this case, there was no language to support divergence from the doctrine, and the adult adoptees were therefore excluded from the class.

The Court also awarded attorneys' fees to counsel for the trustee, but denied fees to counsel for the adult adoptees.

Will Contest – Undue Influence, Lack of Capacity

In the Matter of the Estate of Kevin Timothy Dekis, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1080-10T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Burlington County. Before Judges Axelrad and Sapp-Peterson.

Decedent's adult daughter appeals from the lower court's dismissal of her complaint seeking to set aside decedent's Will, remove defendant as executrix and remove her as beneficiary of the estate. Defendant was decedent's long time companion, who co-habited with the decedent for over 20 years until his death in 2007. They purchased 2 homes together as joint tenants with rights of survivorship. In addition, decedent named defendant as beneficiary of his pension plan and life insurance policies. In 2003, decedent underwent surgery due to blockage in his intestine, during which the bulk of his intestine was removed due to an infection, which became the basis for the filing of a malpractice action. Decedent had cancer which was treated with chemotherapy. Despite his illnesses decedent continued to care for himself until his death.

In discovery, defendant detailed her discussions with the decedent over the years regarding the preparation of a Will. In 2006, defendant again discussed the preparation of a Will. Defendant prepared a living will and Will for decedent after obtaining a fill in the blank form online. Defendant testified that she asked decedent the questions so she could enter the information on the form. Decedent initially said he did not want to leave his family anything and that defendant should get everything. Defendant then read a warning from the form that if you leave your family nothing, they may be able to challenge the Will later on. He then decided to leave some specific bequests of personalty to his family, which was typed into the Will. Decedent reminded defendant that he had left savings bonds in his plaintiff's name, so he left her the "savings bonds in her name" as a bequest. Decedent then named defendant as sole remainder beneficiary. They did not discuss decedent's assets at the time, including the pending malpractice claim. Decedent executed the Will at a local bank in front of 2 witnesses and a notary on December 28, 2006, and died 19 days later. The majority of his estate is made up of the malpractice settlement proceeds of $700,000.

Plaintiff filed suit seeking to have decedent's Will set aside as the product of undue influence and claiming decedent lacked testamentary capacity. The lower Court granted defendant summary judgment. The Court found no evidence of a confidential relationship or suspicious circumstances. The Court was not satisfied that decedent was in a position of dependency on defendant, finding that decedent and defendant shared a simple division of labors like many households, where defendant was the computer person. The Court also found that the

decedent's Will was consistent with the disposition of a majority of his assets which passed by operation of law to defendant, and also that decedent was of sound mind.

The Appellate Division affirmed, finding that the lower Court's decision was amply supported by the facts. The Court also did not find that defendant engaged in the unauthorized practice of law.

Will Contest – Undue Influence, Lack of Capacity – Barred by Prior Settlement

In the Matter of the Estate of Belva Plain, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0048-2011(Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Plaintiff, decedent's son, filed a Complaint seeking to set aside decedent's Last Will and Testament based on undue influence and lack of testamentary capacity. Decedent's Will dated March 21, 2007 was probated by the Essex County Surrogate on October 12, 2010. In her Will, decedent left her entire estate to her two (2) daughters, excluding her son, the plaintiff.

Plaintiff and decedent had engaged in litigation, whereby restraining orders were filed against plaintiff. They ultimately settled the litigation, with decedent agreeing to provide plaintiff with annual income and plaintiff agreeing not to contest decedent's Will at her death. The 2007 Will, and 9 prior Wills, excluded plaintiff as a beneficiary. Plaintiff's complaint only sought to set aside the 2007 Will.

In reviewing the settlement agreement, the Court held that plaintiff had given up any right he may have had to contest the probate of decedent's Will, which was bolstered by the fact that plaintiff continued to receive annual income since the settlement was reached, and the decedent signed a trust to continue these payments to plaintiff for his life. The fact that decedent did not send letters to plaintiff over the years, which was required by the settlement agreement, was immaterial as plaintiff failed to sue during decedent's life to assert any contract claims he may have had, and he also received hundreds of thousands of dollars over the years, without objecting to decedent's failure to write him letters. Plaintiff's complaint was therefore dismissed on summary judgment, with prejudice.

Will Contest – Undue Influence

In the Matter of the Estate of Rocco S. Stezzi, Sr., 2011 N.J. Super. Unpub. ____ (Docket No.: A-2660-08T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Gloucester County. Before Judges Reisner and Sabatino.

Plaintiff appeals from the lower court's dismissal of his complaint alleging undue influence by his sister, the sole named residuary beneficiary under their father's Will. The appeal was unopposed. Plaintiff claimed that his father's 2006 Will was the product of undue influence, changing the terms of his alleged prior Will of 1984, which named plaintiff as an

equal remainder beneficiary. Plaintiff submitted a copy of his mother's 1984 Will which plaintiff claims had reciprocal provisions.

After her father's death, plaintiff's sister submitted decedent's 2006 Will to probate. Plaintiff filed a Complaint seeking to have the Will and certain beneficiary designations set aside based on lack of capacity and undue influence. Plaintiff was initially represented by counsel, who was then granted leave to withdraw. The Court scheduled a case management conference to discuss what needs to be done to prepare the matter for trial. After a lengthy discussion on the record, the Court decided to summarily dismiss the Complaint. The lower Court found that plaintiff was not prepared for trial and that the legal basis of his contentions were not sufficiently articulated. Plaintiff appealed claiming he was denied due process.

On appeal, the Appellate Division vacated the Court's dismissal, finding that plaintiff was not given sufficient notice that his Complaint could be dismissed as a sanction if he was unable to proffer sufficient evidentiary support for his claims. The Appellate Division, in vacating the dismissal, also cited the fact that plaintiff was not in violation of any prior Court orders and that no motion for summary judgment had been filed. The matter was remanded for further proceedings.

Will Contest – Undue Influence Timing of Request for Legal Fees in Unsuccessful Will Contest

In the Matter of the Estate of Nancy L. Hermance, Deceased v. Brett Hermance, 2011 N.J. Super. Unpub. ____ (Docket No.: A-0907-10T4) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Morris County. Before Judges Cuff and Simonelli.

In this probate action, defendant appeals from the lower court's award of attorneys' fees to his sister, who filed an unsuccessful will contest claiming undue influence. On appeal, defendant claimed that the application for fees was required to be made within twenty days of the entry of final judgment in the matter. In the case, the request for fees was made approximately two months after the entry of final judgment.

The lower court held that an application for fees may be filed within a reasonable time following entry of final judgment and the motion requesting fees in the matter, filed approximately two months after entry of final judgment, was reasonable under the circumstances. This was affirmed on appeal.

Will Contest – Undue Influence – Denial of Legal Fees

In the Matter of the Estate of Edward A. Cantor, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3819-08T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Morris County. Before Judges Cuff, Sapp-Peterson and Simonelli.

Plaintiff, daughter of the Decedent, filed a Complaint claiming that certain family members and business associates of her father unduly influenced him to disinherit the Plaintiff. The lower court found no undue influence, but awarded her attorneys' fees. On appeal, the Appellate Division affirmed the lower court's finding that no undue influence occurred, but overturned the award of legal fees to the Plaintiff, as no reasonable cause existed to contest the Decedent's estate plan.

Decedent died with an Estate of over $90 million. He was survived by his third wife and two children. Plaintiff was estranged from her father for many years due to litigation filed by the Plaintiff pertaining to five properties that Decedent had gifted to her. Her brother, the Defendant herein, tried to dissuade his sister from suing the Decedent, as he would disinherit her. Plaintiff went ahead with the law suit and Decedent indeed disinherited her. Plaintiff won the suit against the Decedent, who was ordered to pay her $1.5 million. Decedent ceased speaking to her, as did her brother.

Plaintiff sued Decedent civilly under the RICO statute, having him arrested. Decedent also kept a list of all the things his daughter did to him over the years, and read it just prior to his death, claiming that he would not change his Will. Decedent executed consecutive Wills in April of 1991, another one several months later, and another Will in September of 1997, all disinheriting his daughter. On June 16, 1999, Decedent executed another Will, naming his son as the sole residuary beneficiary, stating that he made no provision for his daughter. The signing was taped, and Decedent expressed his clear intentions to disinherit her. Decedent's son had nothing to do with the Will and did not attend the signing.

Plaintiff claims that she reunited with Decedent in 2000. Decedent's attorney testified that despite some meetings between Decedent and his daughter, Decedent clearly intended to disinherit her. He also testified that Decedent was strong willed until the end and that there were never any signs of influence by anyone over the Decedent. Decedent signed a Codicil in October of 2000 reaffirming his intention to disinherit his daughter. His health was deteriorating but not his mental state, and on April 6, 2001, signed his final Will, again disinheriting his daughter.

Decedent died in 2002 and Plaintiff brought suit. Relying on the strength of the testimony, the contents of Decedent's Wills, and the fact that Decedent remained strong-willed until the end, still going into work, the lower court held that no undue influence occurred, but awarded fees. On appeal, the appellate court upheld the dismissal of the Complaint but overturned the award of fees, finding Plaintiff had no reasonable cause to contest the Will. Decedent's intentions were clear. Plaintiff had nothing more than "hope" that the examination of witnesses would uncover some wrongdoing, and that is not enough to satisfy the reasonable cause standard in awarding fees.

Will Contest/Inter Vivos Transfer – Undue Influence

In the Matter of the Estate of Georgia Tsairis, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0070-2009) (Ch. Div. 2011) and Pamela Conry, et al. v. Bazan, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-C-245-08) (Ch. Div. 2011) Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

These consolidated decisions by the Court addressed the following issues, whether the Deed transfer by decedent on July 21, 2008 was the product of undue influence, whether decedent effectively revoked her May 23, 2000 Will in July, 2008, and whether decedent's Will of May 23, 2000 was the product of undue influence.

Decedent had 4 children, Peter, Cynthia, Pam and Denise. She died on October 28, 2008. Decedent executed a Last Will and Testament on May 23, 2000 leaving her Nutley residence to her daughter, Cynthia, and Cynthia's husband, in equal shares. She also executed a Deed transferring her major asset, her Nutley residence, to her daughter, Cynthia, on July 21, 2008. The 2000 Will was drawn by an attorney chosen by Cynthia, in Cynthia's presence, days before decedent underwent major hear surgery. The 2008 Deed transfer was likewise drafted by an attorney chosen by Cynthia, in Cynthia's presence.

The remaining siblings filed a Complaint seeking to set aside the Deed transfer and a declaration that the 2000 Will was the product of undue influence. Factually, Peter moved in with decedent in 2000 and took care of her for several years. At the time, Cynthia visited the decedent daily and was in charge of her care. Cynthia brought decedent to her attorney where she signed the 2000 Will. Cynthia held onto the original. Years later, in 2008, decedent met with two different attorneys intending to do a new Will leaving her house to her son, Peter. One of these attorneys asked Cynthia to return decedent's Will, and she refused. Soon after meeting with these attorneys, decedent left her home and stayed with friends. It was at this time that Cynthia brought decedent to another attorney who drafted a blank Deed, which she signed, leaving her house to Cynthia.

As to the Deed transfer, the Court found that this was the product of undue influence. Cynthia orchestrated the signing by bringing decedent to a new attorney, after decedent had clearly expressed an intention to leave the house to Peter. Cynthia was also appointed as attorney in fact under a Power of Attorney. The Court found a confidential relationship, shifting the burden of proof on undue influence to Cynthia, which she failed to rebut.

The Court then went on to hold that the 2000 Will was not revoked, as decedent did not physically revoke the document in any way, despite her likely intention and despite the fact that Cynthia refused to turn over the original to decedent's initial attorney.

However, the Court then went on to find that the 2000 Will was the product of undue influence, finding both a confidential relationship and suspicious circumstances, shifting the burden of proof to Cynthia which she failed to rebut. The Court then ordered the decedent's estate disposed of under intestacy.

Will Contest –Undue Influence, Testamentary Capacity, Award of Legal Fees

In the Matter of the Estate of Blanche T. Riordan, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3819-08T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County. Before Judges Parrillo, Skillman, and Roe.

Plaintiffs, nieces and nephews of the Decedent, appeal from a judgment from the Chancery Division concluding that decedent had testamentary capacity when she signed her will and that the will was not the product of undue influence. The trial court awarded a portion of the legal fees incurred by plaintiffs' counsel, which was also appealed. The Appellate Division upheld the trial court's decision, finding adequate proof to sustain their judgment.

Decedent died in June of 2006 at the age of 91. She was survived by her brother and some nieces and nephews. Decedent's will bequeathed $25,000 to a nephew and the remainder of her estate to her surviving brother's three children. The will, a holographic will, was drawn by the decedent in the presence of her brother, while her brother's children, the residuary beneficiaries under the will, waited in another room of decedent's house. After she drew the will, decedent was brought to her bank, and her niece and nephew acted as witnesses and a notary at the bank notarized the document. Decedent's nephew, who only received $25,000 under the will, filed a complaint seeking to set it aside.

Plaintiff introduced evidence showing that decedent had fractured her back just before she signed the will, and was confused at times. Decedent's niece, who witnessed the will and was also a residuary beneficiary, shared a confidential relationship with the decedent. With the assistance of decedent's close friends, who testified that although decedent was frail, she was strong willed and was able to make her own decisions at the time she made the will. Decedent also visited her home in Florida, by herself, after she made the will out. There was also testimony that decedent adored the residuary beneficiaries. After hearing the testimony, the trial court found that although a confidential relationship existed, the defendants were successful in rebutting this presumption. There was no evidence that defendant overpowered the decedent. In light of the testimony regarding decedent's health, and the fact that NJ law requires only a very low degree of mental capacity to execute a will, the trial court held that decedent had testamentary capacity at the time she made out the will. The trial court then awarded legal fees, reducing same, in its discretion, based on the ultimate outcome of the case as well as the size of the estate. This opinion was upheld on appeal as the Appellate Division believed that there was sufficient evidence to support the trial court's conclusions.

Will and Trust Contest – Undue Influence and Lack of Capacity

In the Matter of the Probate of the Alleged Will of Joan Pannella, 2011 N.J. Super. Unpub. ____ (Docket No.: BER-P-376-10) (Ch. Div. 2011) Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Bergen County.

Decedent was survived by 7 children. She left a Last Will and Testament and Trust Agreement leaving small specific bequests to 2 of these children, with the remainder distributed to the remaining children. Decedent's son, Carl, filed a Complaint seeking to admit decedent's Will to probate and to lift the caveat filed by another of decedent's sons, Sam. In his Complaint, Carl alleges that decedent had executed prior Wills and amendments to her Living Trust which were consistent. Sam, and his sister, Carol, who were left only small bequests filed a counterclaim seeking to set aside the various Wills and Trust agreements based on lack of capacity and undue influence.

The Court took testimony of the decedent's children and other parties, and admitted the transcripts of the depositions of the scrivener into evidence. On the issue of lack of capacity, Sam's counsel conceded that the opinion of his medical expert failed to properly address the issue, and therefore this part of the Complaint was denied. The medical expert had opined that decedent lacked capacity, utilizing the wrong legal standard, and also opined that Carl had committed undue influence. This claim was rejected as the wrong legal standard was used.

On the issue of undue influence, the Court cited the testimony of the scrivener and the remaining siblings which were consistent, the decedent was lucid and clear on her intentions. Decedent had sent letters to Sam and her daughter, Carol, regarding the reasons why she was changing her estate plan. Sam had borrowed monies from his parents over the years which he failed to pay back, and the decedent considered the payments as his inheritance. Carol had a fight with her mother because she refused to give decedent back a piece of jewelry, and they had a falling out 2 1/2 years before her death. These stories were corroborated by the testimony of the witnesses. In addition, the testimony failed to support a finding of a confidential relationship between decedent and Carl. Carl was close to his mother, visited her daily, brought her to the attorneys, but the Court was convinced that decedent was strong willed and made her own decisions. The Court therefore dismissed the claim of undue influence, admitting the Will to probate.

Will Contest – Undue Influence – Timing

In the Matter of the Estate of Victoria Ehmer, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-5041-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Ocean County. Before Judges Carchman and Graves.

Plaintiff, a son of the decedent, appeals the dismissal of his complaint as untimely. Plaintiff's underlying complaint sought to set aside decedent's will, claiming undue influence and lack of testamentary capacity. On appeal, the Appellate Division reversed, holding that plaintiff, who filed a separate action in Hudson County before the expiration of the controlling statute (R. 4:85-1), which was ultimately dismissed, should be allowed to proceed in Ocean County in a complaint filed after the dismissal in Hudson County.

Decedent executed 2 wills, 1 in 2001 and the other in 2004. In the 2001 will, plaintiff, along with his mother, the defendant, and a local church were named as beneficiaries. In the 2004 will, defendant was named as sole beneficiary. Decedent died in July of 2008. In August

of 2008, defendant probated decedent's 2004 will, but did not give notice to plaintiff. In October of 2008, plaintiff's father attempted to probate the 2001 Will. On November 30, 2008, defendant's attorney sent a letter to the judge in the Hudson County matter stating that the 2004 will was admitted to probate in Ocean County, forwarding copies to all interested parties including the plaintiff. The Hudson County Chancery judge dismissed the matter by Order entered on December 12, 2008. On March 16, 2009, plaintiff filed a compliant in Ocean County seeking to set aside the 2004 will as the product of undue influence and claiming that decedent lacked testamentary capacity. Defendant filed an answer and counterclaim, but did not raise timeliness as a separate defense.

Approximately one year later, defendant filed a summary judgment motion seeking to bar plaintiff's claim as untimely under R. 4:85-1, as his complaint was not filed within 4 months of probate of the 2004 will. The trial court agreed, dismissing the matter. Plaintiff appealed.

R. 4:85-1 requires that a complaint to set aside the probate of a will must be filed within 4 months after probate. R. 4:85-1, however, incorporate the provisions of R. 4:50-1, permitting relief outside of the 4 month limitation period under appropriate circumstances. The Appellate Division, citing reference to the trial court's finding that if the Hudson County matter was transferred instead of dismissed, it would have been within the limitations period, concluded that in the interests of justice, plaintiff's complaint should be allowed to proceed.

Will Contest –Writing Intended as a Will

In re Estate of Albertha Blackwell, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0057-09) (Chan. Ct. 2011). On remand to the Superior Court of New Jersey, Chancery Division, Essex County.

At issue is whether the Last Will and Testament of Albertha Blackwell may be admitted to probate. The Will consisted of six (6) pages. Decedent signed the first five (5) pages and affixed her signature before the witnesses on the fifth page. The witnesses also signed the fifth and sixth page. Decedent failed to sign the side of page six (6), as she did with the other pages, and also failed to sign the attestation clause on the sixth page. The trial court on the return date of the Order to Show Cause, and without holding a plenary hearing, found that the Will was not self-proved, but was still a valid Will as it was signed by the Decedent, and also witnessed.

An appeal was taken, and the Appellate Court found that a will may be admitted to probate under circumstances where it does not literally comply with the statutory attestation requirements so long as there was "substantial compliance". The matter was therefore remanded to the trial court for a plenary hearing on whether the proponent of the Will can establish by clear and convincing evidence that there was substantial compliance with the formalities required by N.J.S.A. 3B:3-2, that (i) the Will is in writing, (ii) signed by the testator, and (iii) signed by two (2) witnesses. Additionally, under N.J.S.A. 3B:3-3, a document not in strict compliance with N.J.S.A. 3B:3-2 may 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 the decedent's Will.

After holding a plenary hearing, the trial court found that the plaintiff established, through clear and convincing evidence, that the document at issue is the Last Will and Testament of Albertha Blackwell, 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. The defendant challenged the signature but did not provide any evidence that is was a forgery. The scrivener of the Will, a long time attorney for Albertha Blackwell, testified on behalf of plaintiff that she recalls that the Will was signed in her office on March 1, 2007, that there was no coercion, that the witnesses also signed the document and that Ms. Blackwell intended that the document was her Will. The Court held that the document was both in substantial compliance with N.J.S.A. 3B:3-2 and was intended to constitute Ms. Blackwell's Will pursuant to N.J.S.A. 3B:3-2, and was therefore admitted to probate.

Will Contest –Writing Intended as a Will

In the Matter of the Estate of Inez Bull, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0084-10) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Decedent drafted a holographic Will on November 20, 1949 and a subsequent holographic Will on February 7, 1977 (the "1977 Will"). The 1977 Will expressly disinherits any part of decedent's family, and leaves her "Ole Bull Museum" to the Commonwealth of Pennsylvania and to the Norwegian government to run the museum. The Will had internal conflicts. In any event, the Court determined that the 1977 Will should be admitted to probate as a writing intended as a Will as the material portions of the document are handwritten, the document is signed by decedent, in her own hand, and it is clear that decedent intended the document to act as her Will by using the phrase, "Last Will and testament of Inez Bull." This, despite the conflicting terms and the fact that no executor was appointed. The Court admitted the Will to probate and appointed the temporary administrator as permanent administrator, leaving to future proceedings the mechanics of abiding by decedent's intentions as reflected in the 1977 Will.

Will Contest –Writing Intended as a Will

In the Matter of the Estate of Thomas J. Duffy, Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-3400-09T1) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Atlantic County. Before Judges Fisher, Sapp-Peterson and Fasciale.

This appeal involved the interpretation of Decedent's Will, which failed to mention the disposition of his residuary estate in the residuary clause. The Will left his "jewelry, personal effects" to his friend, Diane, and if she predeceased, the "entire estate" to his veterinarian for the care of his pets. Decedent's estranged wife and daughter sued, claiming that the decedent's assets should be distributed under intestacy.

The lower court held that the Will had a gap, to which the probable intent doctrine applied. In applying the doctrine, the court held that the decedent would have intended that his residuary estate be distributed to his friend, Diane. The court, after holding a plenary hearing, found that the decedent's intentions were clear inasmuch as he did not have any relationship with his estranged wife and daughter, and there argument that a partial intestacy should control was not convincing in this context.

Will Contest –Writing Intended as a Will

In the Matter of the Estate of Leigh Cameron Randall, 2011 N.J. Super. Unpub. ____ (Docket No.: ESX-CP-0199-10) (Ch. Div. 2011). Decision by the Superior Court of New Jersey, Chancery Division, Probate Part, Essex County.

Decedent died a resident of Arizona owning real property located at 861 Broad Street, Newark, New Jersey. She did not execute a formal Will. However, plaintiff, one of decedent's 6 first cousins, sought probate of a letter allegedly written by decedent in July of 1998 as a writing intended as a will. There is no signature on the pages offered for probate. The decedent made marks on some of the pages. She was never married and had no children.

Under New Jersey law, a document that was not executed in compliance with the Will statute may still be admitted as a writing intended as a Will if the proponent of the document establishes by clear and convincing evidence that the decedent intended that the writing to constitute her Will.

Plaintiff received the 1998 letter from decedent, assuming she had a Will and considered the letter to be informational only, as it listed her assets, discussed a testamentary trust and listed him and his sisters as beneficiaries. After decedent's death, plaintiff went to her Arizona home and found a photocopy of page 1 of the 1998 letter which included original notations in the margin. The Court was convinced that the handwritten notations on the margin of page 1 of the letter should be given testamentary effect, as the Court found that it was obvious that decedent believed that the 1998 letter and subsequent notations was an important document capable of disposing of her property at her death. It was therefore admitted as a writing intended as a Will.

Will Contest –Writing Intended as a Will

In the Matter of the Estate of William W. Walb, Jr., Deceased, 2011 N.J. Super. Unpub. ____ (Docket No.: A-1368-09T2) (App. Div. 2011). On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Burlington County. Before Judges Cuff, Simonelli and Fasciale.

In this matter, the lower court admitted a typed and signed addendum to Decedent's Will disposing of his tangible personal property. On appeal, the Appellate Division held that a

plenary hearing was required to determine whether the decedent intended the addendum to constitute an addition to or alteration of the Will.

Decedent executed the Will on January 24, 2003, devising certain amounts and percentages of his estate to some friends, with 81% being devised to Albright College. In the Will, Decedent referred to a list which he would prepare detailing the distribution of certain personal property. After executing the will, Decedent made two inter vivos gifts of stock to Albright College. Shortly thereafter, Decedent executed a document dated February 8, 2008 entitled "Addendum to Last Will and Testament of William W. Walb, Jr." The addendum devised certain personal property to his friend and nephew, devised his residence to his friends, and changed the distribution of his net estate.

Decedent died on September 19, 2008 and the Will was probated soon thereafter. After probate, the executor discovered the addendum. An Order to Show Cause and Complaint was filed seeking to admit the addendum as an addition to or alteration of the Will, requiring a showing of clear and convincing evidence.

The lower court failed to hold a plenary hearing, instead ruling that the addendum only controlled the disposition of Decedent's personal property as the executor failed to prove by clear and convincing evidence that Decedent intended the addendum to be an addition or alteration of his Will.

On appeal, the Appellate Division remanded the matter for a plenary hearing, finding that there are genuine issues of material fact as to whether the Decedent intended to alter his Will, and that the lower court should not have ruled on the matter in a summary fashion without a hearing.