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RONALD D. AUCUTT
703.712.5497 | raucutt@mcguirewoods.com

MICHAEL H. BARKER
804.775.1679 | mbarker@mcguirewoods.com

DENNIS I. BELCHER
804.775.4304 | dbelcher@mcguirewoods.com

KEONNA D. CARTER
804.775.7848 | kcarter@mcguirewoods.com

ADAM M. DAMEROW
312.849.3681 | adamerow@mcguirewoods.com

CHARLES D. FOX IV
434.977.2597 | cfox@mcguirewoods.com

MEGHAN L. G. HUBBARD
804.775.4717 | mghubbard@mcguirewoods.com

WILLIAM M. LONG
312.750.8916 | wlong@mcguirewoods.com

SEAN F. MURPHY
703.712.5487 | sfmurphy@mcguirewoods.com

STEPHEN W. MURPHY
434.977.2538 | swmurphy@mcguirewoods.com

JOHN B. O'GRADY
804.775.1023 | jogrady@mcguirewoods.com

MARTA A. STEIN
312.849.8191 | mstein@mcguirewoods.com

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Strange v. Towns et al., 769 S.E.2d 604 (Ct. App. GA, March 4, 2015)

A Georgia Court of Appeals determined that a settlor validly amended her living trust through the execution of a durable power of attorney during her lifetime

Facts: Pauline Strange created the Pauline Strange Inter Vivos Trust in 2001 naming herself as initial trustee. . In 2011, Pauline amended the trust to name her son Tony Strange and her nephew and sister (the "Towns") as successor co-trustees. In July 2012, Pauline executed a general durable financial power of attorney, which provided that Tony would be the executor of her estate and trust. While somewhat ambiguous, the power of attorney stated that the document was intended for Tony's sole benefit in the management of the trust of which he had full ownership. One month later, Pauline sent a letter to the estate planning attorney who prepared the 2011 amendment to her trust, advising him that her trust needed to be revised to appoint Tony as trustee of her trust and executor of her estate. The letter also mentioned that Pauline had executed a document to revise the trust in the event Pauline died before the trust was amended. Two months later, Pauline died before any formal amendments to the trust documents could be prepared by the estate planning attorney to whom she had directed the letter.

Tony filed a declaratory judgment action seeking a determination that he was the sole trustee of Pauline's trust pursuant to the power of attorney. The trial court denied Tony's petition and found that Tony and the Towns were co-trustees of the trust.

Holding: On appeal, the Georgia Court of Appeals reversed the judgment of the trial court and held that Tony was the sole trustee of the trust. The court found that under the terms of the trust, the document could be amended at any time by a "duly executed written instrument." The court found that Pauline's power of attorney showed Pauline's clear intent to name Tony as sole successor trustee.

The court also rejected the trial court's finding that the power of attorney was not properly notarized. The Towns' argument that the August 2012 letter showed that another trust amendment document was required to appoint Tony as sole trustee did not persuade the court. The court observed that the August 2012 letter also requested a change to Pauline's will to name Tony as sole executor. Such a letter confirmed that Pauline had previously changed the successor trustee designation in her power of attorney. The court found no further, more formal trust amendment was required to confirm that Tony was the sole successor trustee of Pauline's trust.

Practice Point: Amendments to estate planning documents can exist in strange places. For trustees, this case highlights the importance of a careful review of the decedent's estate planning documents to make sure that any will, codicils, trust amendments and ancillary trust administration documents are in the file and their impact understood. For drafting attorneys, this case underscores the importance of getting the draft estate planning documents out to the client for review, and then scheduling the documents' execution without delay.

In re: Eleanor Pierce (Marshall) Stevens Living Trust, 159 So. 3d 1101 (Ct. App. LA, February 18, 2015)

Court upholds an appointment of a trust protector as valid under Louisiana law

Facts: Eleanor Pierce Marshall Stevens created a living trust in 1979. In 2000, Finley Hilliard began serving as trustee. The trust was amended on several occasions, including the 2006 appointment of Preston Marshall as trust protector. A 2007 amendment to the trust gave the trust protector the power to remove the trustee and appoint a successor trustee.

In 2009, the trustee resigned as trustee of the trust, conditioned upon the appointment and acceptance of a successor trustee. One week later, the trustee, still acting on behalf of the trust as trustee, filed a trust modification action with the court to amend the successor trustee provisions of the trust to provide that upon a vacancy in the office of the trustee, that the trust protector would become a co-trustee of the trust and be required to name a co-trustee of the trust. The modification also sought confirmation

that the trustee was authorized to resign as trustee of the trust. The court granted an order allowing the requested modification to the trust's trustee succession provisions.

In 2010, the IRS sought payment from the trustee for unpaid gift taxes attributable to indirect gifts Stevens received from her ex-husband. The government asserted that the trustee violated the federal priority statute when the trustee took actions in the administration of the trust to pay trust expenses and make charitable distributions before paying the gift taxes. In separate federal litigation, the trustee, along with a co-defendant estate executor, were held personally liable for the gift taxes under the federal priority statute.

In this case, the trustee sought to undo his 2009 conditional resignation as trustee under the theory that the resignation was never effective because the trust protector never accepted the office of co-trustee or acted to name another co-trustee of the trust. The trustee also sought indemnification from the trust to pay attorneys' fees and bond premiums.

The trust protector contacted the IRS seeking a determination of whether the IRS would regard distributions from the trust to pay attorneys' fees and bond premiums as a further violation of the federal priority statute. To no one's surprise, the IRS confirmed it would deem such distributions a further violation of the statute.

The trial court subsequently entered an order finding that effective in 2013, the trustee had both effectively resigned and been removed as co-trustee of the trust by the trust protector. The court viewed this removal as consistent with the authority granted to the trust protector through the 2007 trust amendment. The trustee appealed.

Holding: On appeal, the trustee argued that trust protectors are invalid under Louisiana law. The trustee sought a declaration that the trust protector could not accept the trustee's 2009 resignation four years later because too much time had passed and the trustee had withdrawn his resignation. The Louisiana Court of Appeals rejected the trustee's arguments.

The court found no provision under Louisiana law that forbade or was inconsistent with the appointment of a trust protector. Therefore, the appointment of the trust protector was valid and not against public policy. In fact, the court observed that the trust protector's contact with the IRS regarding a possible further violation of the federal priority statute potentially protected the trust from further liability and an additional lawsuit, had additional distributions been made from the trust.

The court affirmed the trial court's order recognizing the trust protector's authority to remove the trustee. Because the court concluded that the trust protector had the authority to remove the trustee, the court determined that the issue of whether the trust protector could accept the trustee's 2009 resignation in 2013 was moot.

Practice Point: This is yet another recent case in which a court has upheld the validity of both the existence and actions of a trust protector. So long as the trust protector is acting within the scope of the authority given to the trust protector in the trust instrument, the trust protector's actions should be valid.

Colbert v. Kraek, 2015 Ind. App. LEXIS 242 (March 30, 2015)

Court gives effect to unambiguous trust funding formula

Facts: In 2008, Donald Colbert created a revocable trust agreement that provided, upon his death, the trust assets would be divided between a marital trust for the benefit of his wife, Barbro, and a credit shelter trust for the benefit of his daughter, Katherine. The marital trust was to be funded with the "minimum value [necessary] to reduce the federal estate tax to the lowest possible amount." The remaining trust assets would fund the credit shelter trust.

Mr. Colbert died in 2013 with an available estate tax applicable exclusion amount in excess of $5 million. The trust assets had a value of roughly $2 million. A suit followed to determine the proper funding of the trusts.

Based on the plain language of the funding formula in the trust agreement, the trial court ruled that the "minimum value" needed to minimize the estate tax was zero. Thus, no funding of the marital trust was required. Barbro appealed.

Law: When interpreting a trust instrument, the court must give effect to the testator's intent as set forth in the four corners of the trust instrument. A court may not, and need not, interpret unambiguous terms of a trust instrument.

Holding: The Court of Appeals of Indiana affirmed the trial court's ruling, determining that the trust instrument unambiguously stated that the marital trust would be funded only as necessary to reduce the federal estate tax due. Because the credit shelter trust was to be funded with assets valued at less than Mr. Colbert's available federal estate tax applicable exclusion amount such that no federal estate tax would be due at Mr. Colbert's death, no funding of the marital trust was required.

Practice Point: The federal estate tax applicable exclusion amount has increased dramatically over the past decade. Practitioners should revisit tax-driven trust funding formulas to confirm they still meet the needs and wishes of the client in light of the changes in the tax law.

In re Johnson, 46 Misc.3d 1213(A) (N.Y. Surr., Broome Cnty, January 12, 2015)

When last will and testament favored daughter who served as agent under power of attorney and managed testator's finances, summary judgment was not appropriate, and claims of lack of testamentary capacity and undue influence were allowed to proceed to the jury

Facts: Ruth Mae Johnson died on September 10, 2012. Prior to Ruth's death, Ruth's daughter Marjorie was her primary caregiver. Ruth lived with Marjorie and Marjorie managed Ruth's finances as agent under a power of attorney. Before her death, Ruth executed a new will that favored Marjorie and named Marjorie as executor. Upon her death, Marjorie offered the will for probate. Ruth's other children objected, asserting lack of testamentary capacity, undue influence by Marjorie, and other claims. Following certain discovery, Marjorie moved for summary judgment dismissing the claims against her.

Law: Under New York law, proper execution of a will establishes a prima facie case for capacity and a lack of undue influence. The burden then shifts to those who object to the will. To have testamentary capacity, a testator need only have a general awareness of the nature and extent of her assets. Undue influence requires evidence of a substantial nature that shows motive, opportunity, and specific acts of undue influence. However, a confidential relationship gives rise to an inference of undue influence, which shifts the burden back to the proponent of the will.

Holding: The New York Surrogates Court denied summary judgment on the issues of lack of testamentary capacity and undue influence. As for testamentary capacity, the court found that the attorney preparing the will had not explored Ruth's full asset picture with her, and accordingly it was not clear whether she had even a general awareness of the nature and extent of her assets. With respect to the undue influence allegations, relying on factually similar case precedent, the court held that a jury should decide whether undue influence existed.

Practice Point: Practitioners must exercise additional caution in preparing a will that leaves property to an agent under a power of attorney or another individual, even a family member, who handles the testator's finances. The practitioner should be sure to explore the relevant facts with the testator and to make sufficient notes of these interactions with the client. Failure to serve as independent counsel not

only risks that the will might be overturned, but also subjects the estate to litigation that can be resolved only through a trial or settlement.

Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue, 12 CVS 8740 (April 23, 2015)

North Carolina court holds statute taxing trust income unconstitutional

Facts: A New York resident created a trust for the benefit of his descendants and appointed a New York resident as the initial trustee. In 1997, the beneficiary of the trust, Kimberly Rice Kaestner, moved to North Carolina and established residency. The parties agreed that the trust was administered in New York and had no connection or activity in North Carolina. The trustee did not make any distributions to Ms. Kaestner.

The trustee filed North Carolina state fiduciary income tax returns and paid state income taxes on the undistributed taxable income of the trust based on the provisions of a North Carolina statute which states that tax is imposed on the taxable income of a trust that is for the benefit of a resident of North Carolina. Subsequently, the trust filed claims for a refund of the tax paid for the years 2005 through 2008 on the basis that the fiduciary income tax statute violates the due process and commerce clauses of the U.S. Constitution. Ms. Kaestner and the North Carolina Department of Revenue cross-moved for summary judgment.

Law: In essence, for a tax to withstand scrutiny, there must be nexus and voluntary connectivity between the taxing state (North Carolina) and the taxpayer (the trust). For a tax to be constitutional as applied, the taxpayer must "purposefully avail itself of the benefits of an economic market in the forum state." The trustee, not the beneficiary, controls the trust; therefore, the analysis of the connection between North Carolina, as the taxing authority, and the taxpayer, the trust, is based on the activities of the trustee and not the beneficiary.

Holding: Last April, the Business Court Division of the Superior Court of Wake County, North Carolina, issued a decision holding the application of the statute unconstitutional as applied to the income taxation of the trust. The court stressed that although the beneficiary had a nexus with North Carolina, only the trust's contacts with North Carolina were relevant to the analysis, and there was no nexus between the trust and North Carolina. Specifically, the court noted that the "infrequent contact as reflected in the record, contact driven by the beneficiary and not [the trust], cannot, as a matter of law, constitute sufficient contact of [the trust] with the State such that all of [the trust's] undistributed income is subject to taxation in North Carolina." Accordingly, the lack of any physical presence or voluntary activity of the trust, as the taxpayer, in North Carolina was determinative in the court's holding that the statute is unconstitutional as applied to the trust.

Practice Point: Trustees in situations in which the *only* nexus to North Carolina (or other jurisdictions with similar statutes) is the residency of a beneficiary should consider filing protective claims for refund. However, given the specific and unique facts of the case and the court's heavy reliance on these facts in reaching its decision, the application of this opinion to any situation should be analyzed to determine if a claim for refund is appropriate. Typically, activities of a trustee will cross state lines and into the jurisdiction where the beneficiaries reside, which may yield a different result.

Sanders v. Riley, 296 Ga. 693 (March 16, 2015)

Clarifying the durability of virtual adoption under Georgia law

Facts: Clifford Riley and Corine Riley were married in 1964. Mrs. Riley gave birth to Ernestine Riley in 1966, Curtis Riley in 1968 and Shalanda Riley in 1978. By the time Shalanda was born, Mr. Riley had not lived in the marital home for over three years. During that time, Mrs. Riley began an affair with Roy Neal Warren. At Shalanda's birth, Mr. Riley, Mrs. Riley and Mr. Warren agreed that Shalanda likely was Mr. Warren's biological daughter. They further agreed that Mr. Riley would be Shalanda's legal father and that Mr. Riley's name would be on Shalanda's birth certificate. Mr. Riley held Shalanda out as his daughter and treated her in the same manner in which he treated

Ernestine and Curtis. Although Mr. Riley did not return to live in the marital home until all the children were adults, he visited the home two or three times a week and assisted Mrs. Riley with whatever the children needed.

When Shalanda was 14, Mrs. Riley told her that Mr. Warren was her biological father. Shalanda met Mr. Warren and he visited her once or twice in the year following their initial meeting. When she was 16, Shalanda ran away from home and lived with Mr. Warren for a few weeks. Following that period, Shalanda had no contact with Mr. Warren for a few years. Shalanda spoke to or saw Mr. Warren occasionally during her twenties.

When Shalanda was 28, she was engaged to be married. Mr. and Mrs. Riley put engagement and wedding notices in the newspaper for "their daughter." At the wedding, Mr. Warren walked Shalanda halfway down the aisle to symbolize his "creating" her before handing her off to Mr. Riley who walked the rest of the way to "give [her] away" to the groom. In December 2009, Mr. Riley moved back into the marital home.

In February 2011, Mrs. Riley shot and killed Mr. Riley and herself. Their daughter had previously died in 2004. Mr. Riley did not have a will but had multiple life insurance policies. Shalanda and Curtis obtained affidavits to collect on the proceeds of some of the policies. Shalanda and Curtis affirmed they were the children and heirs of Mr. Riley. Thereafter, Curtis began to dispute Shalanda's claim to inherit from Mr. Riley.

In November 2011, Curtis filed a petition for letters of administration over Mr. Riley's estate, which petition did not mention that Shalanda had an interest in the estate. The petition was not served on Shalanda. Shalanda filed a motion to intervene and a request for heir determination asserting an interest in the estate both as a child of the marriage of Mr. Riley and Mrs. Riley and, alternatively, through the equitable doctrine of virtual adoption.

Curtis filed a motion for partial summary judgment on Shalanda's claim of virtual adoption. Curtis argued that Shalanda could not show the existence of an agreement pursuant to which Mr. Riley agreed to adopt her or the partial performance on such agreement necessary to sustain a virtual adoption claim.

The Superior Court of Macon County concluded there was no clear and convincing evidence of "a specific agreement to adopt by" Mr. Riley or a "severance of [the] relationship with her biological father." The Superior Court granted the motion for partial summary judgment. Shalanda appealed.

Law: Georgia recognizes the equitable remedy of virtual adoption pursuant to which one agrees to adopt the child of another virtually, but not statutorily, and all parties involved act upon such adoption for many years during the life of the adopting parent. *See Crawford v. Wilson*, 139 Ga. 654 (1913). This remedy is available only upon the death of the adopting parent and is invoked by the adopted child to avoid an unfair application of intestacy statutes. *Williams v. Murray*, 239 Ga. 276 (1977).

To recover based on virtual adoption, there must be clear proof of the agreement to adopt and partial performance by the parties to the agreement including severance of the biological parent's relationship with the child and the adopting parent acting as if he or she is the child's parent. *See Crawford*, 139 Ga. at 658. Importantly, "[j]ust as children, once legally adopted, do not become unadopted by forming a relationship later in life with a biological parent − something that is occurring with increasing frequency – children, once virtually adopted, do not become unadopted by developing a relationship later on with their biological parents."

Holding: The Supreme Court of Georgia reversed the trial court's granting of partial summary judgment on the issue of virtual adoption. The court found that the trial court erroneously held that the partial performance requirement necessary to establish virtual adoption was undone because the child formed a relationship with her biological parent after she learned of his existence as a teenager.

Practice Point: In the current day and age, legally and virtually adopted children have become increasingly likely to meet their biological parent or parents later in life. Practitioners should be mindful that under Georgia law once an adopting parent virtually adopts the biological child of another, the child's later reunion or relationship with the biological parent does not impair the child's virtual adoption claim against the estate of the intestate adopting parent.

Rafert v. Meyer, 290 Neb. 219 (February 27, 2015)

The limited application of exculpatory clauses and primacy of statutory law over trust terms

Facts: On March 17, 1999, Jlee Rafert executed an irrevocable trust for the benefit of her four adult daughters. Her attorney, Robert J. Meyer, prepared the trust, which named Mr. Meyer as trustee. The trust included a provision that states: "The Trustee shall be under no obligation to pay the premiums which may become due and payable under the provisions of such policy of insurance, or to make certain that such premiums are paid by the Grantor or others, or to notify any persons of the noon-payment [sic] of such premiums, and the Trustee shall be under no responsibility or liability of any kind in the event such premiums are not paid as required." Mr. Meyer did not meet with Ms. Rafert to explain the provisions of the trust or to explain who would be responsible to monitor insurance policies that the trust owned.

Mr. Meyer, as trustee, signed three life insurance applications, each naming Ms. Rafert as the insured and the trust as the owner. For reasons not explained in the court's opinion, on each application, Mr. Meyer included a false South Dakota address for his address. Thereafter, Mr. Meyer paid the initial premiums on each policy. The insurance companies sent notices to the South Dakota address that premium payments were due, that the policies were in danger of lapsing and that the policies had lapsed and were eligible for reinstatement. After the policies lapsed, Mr. Meyer paid additional premiums directly to an insurance agent. These payments were never forwarded to the insurers. It is unknown what happened to these premium payments.

Ms. Rafert and her daughters sued Mr. Meyer for breach of trust. Mr. Meyer filed a motion to dismiss the complaint on the grounds that (1) he did not cause the nonpayment of premiums, (2) he had no notice from the insurers of nonpayment and (3) his failure to submit annual reports had no causal connection to the damages claimed.

The district court dismissed the complaint finding that, pursuant to the trust terms, Mr. Meyer had no duty to pay the insurance premiums or notify anyone of the nonpayment. The court concluded that Mr. Meyer had no responsibility for failing to pay the premiums. Ms. Rafert and her daughters appealed.

Law: "As a general rule, the authority of a trustee is governed not only by the trust instrument but also by statutes and common-law rules pertaining to trusts and trustees." *Wahrman v. Wahrman*, 243 Neb. 673 (1993). Any violation of a duty the law imposes on a trustee constitutes a breach. The Nebraska statutes provide that the terms of a trust prevail over statute except, among other things, with respect to the trustee's duty to act in good faith and in accordance with the terms of the trust and the beneficiaries' interests and the duty to keep qualified beneficiaries reasonably informed. Further, an exculpatory term in the trust may not relieve the trustee of liability for a breach made in bad faith or with reckless indifference to the purposes of the trust or the interest of the beneficiaries. Neb. Rev. Stat. §§ 30-3805, -3897. Moreover, an exculpatory clause is invalid unless the trustee proves that the exculpatory term is fair and its existence and content is communicated to the settlor. Neb. Rev. Stat. § 30-3897(b).

Holding: Under Nebraska law, exculpatory language in a trust may not limit certain mandatory duties of the trustee. The settlor (and Mr. Meyer, in drafting the trust) could not nullify the trustee's duty to keep the settlor and beneficiaries informed of material facts necessary to protect their interests or to eliminate the trustee's duty to act in good faith and in the best interest of the beneficiaries. Notice of nonpayment of the insurance premiums would certainly qualify as such a material fact, the communication of which was necessary for the beneficiaries to protect their interests. Meyer also

provided a false address on each insurance application, which resulted in the insurer's notices not reaching the necessary parties.

Even though the trust instrument expressly provided that the trustee had no obligation to pay the premiums on life insurance policies that were trust assets, no obligation to ensure that the premiums were paid, and no obligation to notify anyone about the nonpayment of premiums, these provisions were ineffective to absolve the trustee from liability under Nebraska law. The trial court's decision was reversed and remanded for further proceedings because Mr. Meyer had a statutory duty to inform the settlor and beneficiaries of material facts necessary for them to protect their interests, a duty which arose when the insurers issued notices of nonpayment.

Practice Point: Practitioners and fiduciaries should be aware of the statutorily limited application of exculpatory clauses under Nebraska law. Although a trust's terms generally prevail over statutory and common law, exculpatory provisions cannot expand a trustee's exculpation past the limits of the state statute.

In the Matter of the Estate of Robyn R. Lewis, Deceased, 2015 N.Y. LEXIS 1292; 2015 NY Slip. Op. 04674 (June 4, 2015)

Duplicate original wills create problems; revocation by physical act is presumed when will cannot be found after diligent search

Facts: Robyn Lewis died in 2010, apparently intestate. Her parents qualified as administrators of her estate. As sole distributees under New York law, the parents renounced their interest in the decedent's New York residence in favor of the decedent's brothers. The residence had been in the decedent's family for generations.

A few months after the administration process began, a petition was filed to revoke the parents' letters of administration and to admit to probate a 1996 will the decedent had executed in Texas when she was married to James Simmons. They divorced in 2007. The 1996 will proffered for probate was an original will that had been in the possession of Simmons' mother in a dresser drawer.

Simmons' father filed the petition because the 2007 divorce disqualified Simmons from serving as executor and taking under the 1996 will. The former father-in-law was named alternate executor and alternate beneficiary under the will.

Although Texas law revokes testamentary distributions to and fiduciary appointments of ex-spouses and all of their family members, New York law, which applied to this case involving real property owned by a New York domiciliary, revokes appointments and distributions to former spouses only. Thus, the father-in-law could be the alternate beneficiary under the 1996 will if that will was valid.

The issue on appeal was whether the decedent had executed four duplicate original wills, or only the one original will that was offered for probate. At one point, Simmons testified that he and the decedent had intentionally executed their 1996 reciprocal wills in quadruplicate originals because they both traveled extensively and knew that fire or other catastrophe could strike. They stored one set of the documents in each of four separate locations, including Simmons' parents' home, the couple's Texas home, the decedent's New York residence, and a safe deposit box. At another point, however, Simmons described the documents as comprising one original and three "copies." A friend and confidante of the decedent testified that the decedent had shown her a document in 2007 that the decedent believed effectively revoked her 1996 will.

The lower court refused to give effect to the friend's testimony because there was no proof that the revocation had been executed with the proper formalities, and then admitted the 1996 original will to probate despite acknowledging the open question of whether there were four original wills, or one original and three copies.

Law: Under New York law, revocation of one of several multiple duplicate original wills can be accomplished in two ways: through a writing that is executed with the formalities prescribed for the execution and attestation of a will, or through a physical act of destroying it with revocatory intent. The destruction of one original will "achieves the revocatory purpose" even if there remain will duplicates outstanding. Physical revocation is "strongly presumed where the will, although once possessed by the testator, cannot be found posthumously despite a thorough search." Once made, the presumption of destruction must be rebutted by the will's proponent before the will can be probated.

Holding: The New York Court of Appeals found that the lower court properly concluded that there was no proof that the 1996 will had been revoked by a subsequent writing. However, the lower court erred in admitting the 1996 will to probate while there remained open questions of whether duplicate wills were created and, if so, whether such wills had been properly revoked by physical destruction.

Because the issues were not properly framed in the lower court, the matter was remitted to the lower court for further proceedings to allow for further fact-finding and an opportunity for the ex-father-in-law to rebut the presumption of revocation. In doing so, the court expressed its belief that the totality of the testimony supported the inference that the decedent had in fact executed four original wills, with "each document having been meant to possess the force of an original instrument." The concurring opinion expressed concern that the majority's *dicta* might be viewed as a "disguised holding," leading the fact-finding lower court to weigh too heavily the all-but-certain conclusion by the majority that there were four original wills and that the presumption of revocation had been met.

Practice Point: This case is a good reminder that state laws differ on the effect of divorce on the provisions of a testamentary document, and those differences can affect a testamentary plan in unexpected ways. In addition, the law governing interpretation of a testamentary document can be affected by a decedent's domicile at death, even if the will was executed elsewhere, which was the case here. The case is also an admonition that creating duplicate originals wills and scattering them far and wide is unwise and can make revocation or modification more difficult to prove.

Blechman v. Estate of Blechman, 160 So.3d 152 (April 1, 2015)

A decedent's testamentary devise of his ownership interest in an LLC was invalid based on the operating agreement's restriction on conveyances to non-family members

Facts: Mr. Blechman formed a limited liability company (LLC) with his sister. The operating agreement required that each member of the LLC obtain the prior written consent of the other member before conveying an interest in the LLC, with limited exceptions that did not apply in this case. The operating agreement also provided that unless a member bequeathed his or her interest in the LLC to immediate family members by will, the interests would vest in the member's children upon the member's death.

Shortly after executing the agreement, Mr. Blechman amended his revocable trust by devising his residence and one-half of the distributions from the LLC to a trust for the benefit of his girlfriend. The remaining distributions from the LLC were to be distributed to his children. Mr. Blechman did not amend his will, which directed that the residue of his estate be held in the trust. Moreover, the will did not refer to Mr. Blechman's interest in the LLC.

Mr. Blechman subsequently died, survived by his two children and estranged wife of 60 years. As personal representative of the estate, Mr. Blechman's son transferred Mr. Blechman's monthly distributions from the LLC to the estate. Relying on the trust amendment, however, the girlfriend sought to transfer the funds to her account, asserting that Mr. Blechman's interest in the LLC was an estate asset and therefore poured into the previously unfunded trust at Mr. Blechman's death instead of passing to the children.

Agreeing with the girlfriend, the trial court held that the interest in the LLC was an estate asset, and consequently passed to the trust under the terms of the will. The children appealed, arguing that the

interest in the LLC passed to them outside probate because Mr. Blechman failed to specifically devise his interest in the LLC as the operating agreement mandated.

Law: In deciphering a probate estate's parameters, the deciding factor is the decedent's ownership interest in property. If the subject property will pass either intestate or by way of a will, then it is part of the decedent's probate estate. However, under the principles of contract law, the express language in an agreement specifically addressing the disposition of property upon death defeats a testamentary disposition of said property.

Holding: The Court of Appeal of Florida, held that the children were the rightful owners of Mr. Blechman's interest in the LLC because the interest immediately passed outside of probate to them at Mr. Blechman's death by virtue of the operating agreement's default provision. The default provisions of the operating agreement nullified Mr. Blechman's attempted testamentary devise.

Practice Point: Where a client owns business interests, practitioners must be mindful of the entity's governing instruments that may affect the individual's ability to transfer business interests at death.

Megiel-Rollo v. Megiel, 2015 Fla. App. LEXIS 5601 (April 17, 2015)

Court allows reformation of trust to correct scrivener's error recognizing Florida's liberal policy with regard to reforming written instruments to conform to the intention of the parties

Facts: Margaret Megiel executed her last will and testament on July 16, 1992. The will provided for the division of the residue of her estate into equal shares for the benefit of her three children, Denise, Sharon and Robert. Five years later, Margaret executed a document known as the P.M. Revocable Trust dated July 29, 1997. Margaret named herself as initial trustee of the trust and the trust instrument allowed the trustee to expend income and principal for the benefit of Margaret during her life. Margaret transferred a residence in Punta Gorda to herself as trustee to be held and administered as part of the trust assets. A warranty deed effectuating the transfer was recorded in Charlotte County.

At Margaret's death, the trust instrument provided, in relevant part, that the remaining trust assets be divided "between the Beneficiaries as tenants in common in proportion to their respective interests as set forth in the Schedule of Beneficiaries." The draftsman of the trust instrument neglected to prepare the schedule of beneficiaries when Margaret executed the trust instrument.

Upon Margaret's death, Sharon filed a complaint against her siblings, Denise and Robert, seeking a declaration that the trust was void for lack of beneficiaries and that the Punta Gorda residence passed to the three siblings in accordance with the terms of the 1992 will.

Denise answered and filed a counterclaim seeking judicial reformation of the trust pursuant to Fla. Stat. §736.0414 claiming: (1) that prior to execution of the trust instrument, Margaret had instructed her attorney to name only Denise and Robert as beneficiaries of the trust; (2) Margaret's attorney had inadvertently failed to include the schedule of beneficiaries; (3) at the time Margaret executed the trust instrument she mistakenly believed that the schedule of beneficiaries naming Denise and Robert as sole beneficiaries was included in the trust instrument; and (4) this unilateral mistake of fact would preclude Margaret's intent from being carried out unless the trust instrument was judicially reformed to include the schedule of beneficiaries naming Denise and Robert as the beneficiaries.

Sharon and Denise filed cross-motions for summary judgment. In connection with these motions, Denise filed two affidavits, her own and her husband's (the drafting attorney), attesting to the facts alleged in her counterclaim.

The trial court found that the P.M. Revocable Trust was never created pursuant to Fla. Stat. § 736.0402, as there was no definite beneficiary to the purported trust so the P.M. Revocable Trust was void *ab initio*. Because no valid trust was ever created, the trust instrument could not be reformed. Lastly, the Punta Gorda residence was not properly titled in the name of P.M. Revocable Trust and should be held in a resulting trust for Margaret's estate. Denise appealed.

Holding: The Court of Appeal of Florida disagreed with the trial court's ruling that the trust instrument did not name any beneficiaries. The court noted that the draftsman failed to name remainder beneficiaries but that the trust instrument clearly designated Margaret as a beneficiary of the trust during her lifetime. Further, the court found that Margaret had in fact effectuated a valid transfer of the Punta Gorda residence to the trust. The court rejected Sharon's argument that the failure to name remainder beneficiaries of the trust necessarily resulted in merger or a resulting trust in favor of the estate. The court noted that absent reformation, the failure of the trust instrument to designate remainder beneficiaries would result in a resulting trust in favor of Margaret's estate, but the court thought reformation of the trust could be appropriate and turned to review whether reformation of the trust instrument was available.

The court held that an examination of Florida trust law and section 736.0415 itself lead to the conclusion that reformation of the trust instrument was available to avoid what would otherwise result in a merger on grounds that: (1) Florida courts have long followed a liberal policy with regard to reforming written instruments to conform to the intention of the parties; (2) Fla. Stat. § 736.0415 is broad in scope and available to correct the alleged drafting error resulting from the omission to prepare and incorporate the contemplated schedule of beneficiaries; (3) Fla. Stat. § 736.0415 is a remedial statute which should be liberally construed in favor of granting access to the remedy provided by the Florida legislature; and (4) a construction of Fla. Stat. § 736.0415 that allows for reformation only to correct "simple scrivener's errors" would render the statute incapable of judicial enforcement because there is no way to distinguish the simple and routine matters from the complex and unusual.

The court held that the trial court erred when it found that the trust instrument was incapable of reformation and granted summary judgment in favor of Sharon. The court reversed the order granting summary judgment and remanded the case for further proceedings.

Practice Point: This case highlights the importance of careful draftsmanship and performing a complete review of the entire trust instrument and all exhibits for not only the requisite formalities under state law but the appropriate use of defined terms and references to make sure they properly effectuate the settlor's estate planning goals. Some courts in other states will not so readily reform a trust to correct a scrivener's error.