

DISTRICT OF COLUMBIA BAR
ESTATES, TRUSTS, AND PROBATE LAW SECTION
REVIEW OF RECENT DEVELOPMENTS IN
PROBATE DIVISION LAW
2016 - 2017

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PART 1 - LEGISLATIVE CHANGES

Between June 1, 2016 through May 31, 2017, there were no legislative changes that affect practice in the Superior Court Probate Division.

There are several proposed legislation now pending before the City Council. The Committee on Judiciary and Public Safety is currently considering these proposals and are inviting public comment. Written comments may be submitted up to June 15, 2017. Details of the legislation, including the text of each proposed bill, is on the Committee's website.

Revision of Guardianship of Minors and Creation of Supplemental Needs Trust Act of 2017.

This legislation proposes replacing the existing law governing guardianships of minors with an entirely new guardianship law. The manner in which guardians are appointed is changed, bond requirements are optional and flexible, and the manner in which expenditures are made is made easier and more flexible. It provides for different methods of holding property of a minor, including in arrangements which extend beyond age 18. Compensation is changes to fee for services instead of commission-based compensation.

It also proposes a new chapter of Title 21, governing the establishment and administration of supplemental needs trusts.

Consumer Disclosure Act of 2017

This legislation will regulate the sale of structured settlements and similar interests. It provides for more detailed disclosures of the financial consequences of the sale of a structured settlement arrangement and other consumer protections.

Uniform Power of Attorney Amendment Act of 2017

This legislation proposes the adoption of the Uniform Power of Attorney Act in the District of Columbia. It provides for statutory form powers of attorney, interstate recognition of statutory powers of attorney, and mandates acceptance of powers of attorney unless there is a valid reason for withholding recognition of a POA. There are also some protections intended to curb abuse by an agent appointed under a POA.

The ETP Section Steering Committee anticipates submitting a public statement generally supporting the proposed legislation, but recommends certain modifications to reflect specific District of Columbia considerations.

Electronic Signature Act of 2017

This bill establishes that a video recording or other electronic record may be admissible as evidence of the proper execution of a will (whether a U.S. or international will), the intentions and mental capacity of a testator, the authenticity of a will, or other matters relevant to the probate of a will. The bill also provides a method of authentication for electronic signatures.

Uniform Partition of Heirs' Property Act of 2017

This bill governs court-ordered sales of real property held as tenants in common by heirs; an heir being a person who acquires an interest in property from a relative (defined rather broadly in the law). It establishes notice requirements, how fair market value is determined, a right of first refusal for other co-tenants, and other matters. It

also governs partition in kind (although this is unlikely to have much practical effect in the District of Columbia.)

[This bill, as written, does not apply to sales by a personal representative of a decedent's estate, but note the preference for distribution in kind set out in D.C. Code § 20-1102.]

Uniform Fiduciary Access to Digital Assets Act of 2017

This bill identifies an electronic record in which an individual has a right or interest as a digital asset. It establishes procedure for disclosure of contents of electronic communications and other digital assets or a deceased user. It also establishes procedures for disclosure of contents of electronic communications and other digital assets of a decedent or held in trust of by a person who is the ward in a conservatorship. The Bill required that the legal duties imposed on a fiduciary charged with managing tangible personal property also apply to the management of digital assets.

PART 2 - REVIEW OF CASES

NOTE: While published opinions of the Court of Appeals are binding precedent, a ruling or memorandum opinion of a trial judge is not. "Superior Court holdings are never binding authority in other cases, even in the Superior Court itself." Lewis v. Hotel and Restaurant Employees Union, Local 25, 727 A.2d 297, 302 (D.C., 1999). Accord, In re Estate of James, 743 A.2d 224 (D.C., 2000).

Although not binding authority, a memorandum opinion of one trial judge may be persuasive to another judge, or may contain analysis or discussion of precedent that may be helpful in another case with similar facts. Also, on some matters, Probate Division judges do try to be consistent with each other. The practitioner should therefore consider memorandum orders and opinions of Superior Court judges, but should rely on such orders and opinions with caution.

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ESTATE OF FORD, Rosa North

Case No. 2016-ADM-001014

04/07/2017, Judge Alfred S. Irving, Jr.

GENERAL SUBJECTS:

Standing to File Petition for Probate

Only an interested person or creditor has standing to open a petition for probate.

Standing: Heir at Law

Only a biological or legally adopted person can be an heir at law; equitable adoption is not recognized in the District of Columbia

FACTS:

A purported son of the decedent seeks a court order to petition for the appointment of a personal representative of an estate in which the only estate asset, the decedent's real property, is being sold in a tax sale.

The petitioner is not a biological child of the decedent, but asserts that he is a child of the decedent by virtue of the doctrine of equitable adoption.

HOLDING:

The court reviewed the statutes governing adoption in the District of Columbia and concluded that adoptions are subject to specific statutory requirements, and that neither Congress nor the City Council, while amending some adoption procedures, has not acted to change the fundamental requirement of adoptions by court order.

The court also reviewed and joined prior Superior Court orders holding that the Superior Court order is required for an adoption. No Court of Appeals decision has been rendered, and in light of the statutory requirements, a court order allowing an equitable adoption, the court would be either acting as a legislature or acting to evade statutory requirements.

The Court noted the petitioner's assertion that many states have recognized some form of equitable adoption, including Maryland, but that there are limitations on when an equitable adoption can be recognized. Many states, however, have not recognized equitable adoption.

YOUNG-BEY v. YOUNG

Unpublished *Per Curium* Memorandum Opinion
01/12/16

GENERAL SUBJECTS:

Validity of Will

A videotaped will is not valid in the District of Columbia

HOLDING:

The Court of Appeals affirmed Judge John M. Campbell order dated June 6, 2014, entered in case No. 2010-LIT-000025, granting summary judgment on a complaint to declare a purported will as invalid. The purported will did not comply with D.C. Code § 18-103, in that it did not contain an attestation clause showing that it was signed by the testator and two witnesses who signed at the request of the testator. (The will was alleged to be a forgery, prepared by the appellant while he was serving a sentence for a felony in a Maryland prison.)

The additional information in the DCCA memorandum opinion is the Court of Appeals' affirming the trial court's denial of the appellant's motion to admit a purported videotaped will of the decedent. (The appellant did not produce the videotape, but alleged its existence and sought an order for its production.) As a purported videotaped will does not meet the requirements of D.C. Code § 18-103, it cannot be admitted to probate as the decedent's last will.

ROSS, et al. v. BLACKWELL, et al.

– A.3d – (D.C., 09/22/2016)

GENERAL SUBJECTS:

Will Contest: Undue Influence

When a confidential relationship existed between the testator and another, the burden to establish that a will was the product of undue influence, while still must be borne by the plaintiff, is less heavy.

Undue Influence:

Evidence of concealment can support an inference of undue influence.

Evidence: Hearsay

Unobjected-to hearsay may be competent evidence which the finder of fact may consider.

Powers of a Conservator

A conservator must exercise the statutory powers for the support, care, and welfare of the ward or to prevent waste or dissipation of the ward's property; expenditures that do not meet that criteria may not be allowed.

Auditor Master

The trial court has the discretion to approve the recommendations of the Auditor Master if they conform to the order of reference, were prepared with consideration of the requisite criteria, and were reasonable.

FACTS:

This case is on appeal of Judge John M. Campbell's order dated 10/02/2015 entered in Case No. 2009-LIT-000025. The court trial court found that the decedent was the victim of "a classic con, perpetrated on an elderly, vulnerable, lonely woman by two plausible but unscrupulous opportunists." The trial court invalidated a Will executed by an elderly and frail women which left her entire estate to a handyman with whom she had become recently acquainted and his wife. The couple essentially assumed sole control over the decedent and, among other things, obtained a loan on the decedent's home but falsely reported the disposition of those funds. The appellate opinion does not contain a review of the facts, but rather finds that the trial court's findings of fact were not clearly erroneous.

One of the appellants had served as conservator for the decedent while she was alive. During that period of time, the decedent's home was mortgaged; the proceeds of the mortgage had not been satisfactorily accounted for. In a separate proceeding, reviewing the appellant's administration of the estate and also whether there was any liability owed by the appellants to the estate, the trial court referred the matter to the Auditor Master. The order of reference required the Auditor-Master to state a final account for the removed co-personal representatives, and specifically noted that a \$127,000 mortgage loan (obtained by the appellants) remained unaccounted for.

The appellants contended that they spend significantly more than that amount on repairs and renovations to the decedent's

property, and that these expenditures should be offset against the mortgage loan liability. However, upon learning that the appellants had used their own funds, the Auditor Master did not consider the appellants' receipts and documentation with respect to the repairs when he determined that the loan proceeds were not used for the repairs and renovations. The Auditor Master noted that the order of reference required him only to determine the use of the loan proceeds and that, to the extent that appellants were asserting that they should be reimbursed for the use of their personal funds for the renovations, that would have to be dealt with in a different proceeding. The Auditor Master found that the decedent did not benefit from the loan proceeds but instead that the loan proceeds were spent on a scam investment. The Auditor-Master recommended a judgment against the appellants for the amount of the loan, plus interest, penalties and costs.

At trial, after the close of evidence, the trial court was made aware of the appellants' receipts and documentation, but ruled that, as no testimony on the receipts and documents, the trial court did not consider them. The trial court adopted the auditor Master's report and recommendations and entered judgment as recommended.

HOLDING:

The Court of Appeals held that the trial court correctly applied the law governing undue influence. The trial court had stated, and the Court of Appeals reiterated, that a person challenging the validity of a will has the burden of proof to show influence amounting to moral or physical coercion which destroys free agency. However, when a confidential or fiduciary relationship exists between the donor and the beneficiary, the burden of showing undue influence is less heavy, as there is a danger that a special or fiduciary relationship of trust, confidence or authority can be misused. (NOTE: The court's memorandum opinion includes citations to and discussion of a number of important cases dealing with undue influence.)

The appellants' argument that the trial court relied on hearsay evidence in making some of its findings of fact was rejected on the basis that the hearsay evidence was introduced without objection. Unobjected-to hearsay may be competent evidence which the finder of fact may consider.

A trial court has the discretion to approve the recommendations of the Auditor Master if they conform to the

order of reference, were prepared with consideration of the requisite criteria, and were reasonable. The Court of Appeals held that the trial court did not abuse its discretion in approving the Auditor Master's recommendations and in denying the appellant's request for a subsequent hearing.

The Court of Appeals rejected the appellants' contention that the renovation expenditures were permissible expenditures for a conservator to make or allow. The Court held that, while D.C. Code § 21-2070(c)(8) gives a conservator power to make repairs or alternations to real property, that power must be used for the purpose of either preserving the property or for the support, care, and welfare of the ward. Virtually all of the renovations made by the appellants were not for the ward's benefit.

ESTATE OF VAUGHN, Yolanda K.

Case No. 2016-ADM-000730 (2016-WIL-000227, 2016-WIL-000958)
02/10/2017 and 04/04/2017; Judge Darlene M. Soltys

GENERAL SUBJECTS:

Implied Revocation of Will

The death of a testator prior to executing estate planning documents which had been prepared by retained counsel does not result in implied revocation of existing will.

Waiver of Surviving Spouse Rights by Post-Nuptial Agreement

A valid post-nuptial agreement may include a waiver of all rights of a surviving spouse to share in the estates and property of the deceased spouse.

FACTS:

Decedent had an existing Will, executed on December 2, 2015. The decedent was married, and had an adult son born prior to the decedent's relationship and married with her surviving spouse. On December 26, 2015, the decedent was diagnosed with terminal pancreatic cancer. On March 12, 2016, the decedent retained counsel for further estate planning, including drafting a revocable trust and pour over will. On March 19, 2016, the decedent executed an advance medical directive and durable power of attorney, but did not execute the draft trust and pour over will, as she had questions about them.

A friend of the decedent brought the unelected documents to the attorney and conveyed the decedent's questions, and the documents were revised. The decedent died on March 26, 2016, and had not executed the trust and pour over will prior to her death.

The Decedent's husband, not included as a beneficiary of the December 2, 2015 Will, claimed his statutory share as surviving spouse. He also argued that the decedent's expression of her intent to revoke the December 2015 will, combined with her acting on her intent by retaining counsel to revise her estate plan, affected a revocation of the existing will.

Further, the decedent's husband argued that he was entitled to his statutory benefits as surviving spouses notwithstanding the existence of a post-nuptial agreement executed two years after the parties' marriage. He asserted that the agreement was not valid, or that, if it is valid, it was ambiguous and should be interpreted as taking effect only if an "operative event," as defined in the agreement, occurred.

HOLDING:

The court reviewed the law governing revocation of Wills. A will may be revoked by (a) proper execution of a subsequent will, codicil or other writing; (b) by performing a physical act on a will, such as burning, tearing, cancelling, or obliterating it, with the intent to revoke it; or (c) by implication of law.

Implied revocation occurs when, subsequent to the valid execution of a will, (a) there is a divorce and a property settlement at the time of divorce, or (b) when the testator marries and has a child.

The court rejected applying a common law doctrine that was suggested, but not adopted, in 1903 case, that a will should be deemed to be valid if a testator expressed an intention to create a will by having a will prepared but was prevented from executing the will by reason of illness and death. (Effecting the implied intent to find the existence of a new will would effectively revoke any prior will.) The court ruled that the adoption of several laws and legislation governing wills and estates since that 1903 case, without including a provision for the implied adoption of a will (and resulting revocation of an existing will).

The court held that a party to a valid post-nuptial agreement can waive spousal rights. The court rejected the husband's contentions with respect to the validity, and extensively reviewed the agreement to find that it was not ambiguous, should therefore be interpreted according to its terms, and that it did provide for a valid waiver of spousal rights. (The court's memorandum opinion includes a detailed review of the principles of contract interpretation.)

ESTATE OF WHITE; Appeal of Saunders, Lorraine

Unpublished *Per Curium* Memorandum Opinion
12/29/2016

GENERAL SUBJECTS:

Removal of Personal Representative

Court must give notice of hearing to remove personal representative prior to removal.

Lis Pendens

A removed personal representative may have standing to file a lis pendens with respect to real property in a decedent estate.

FACTS:

Personal representative of an estate of a decedent sought court order to sell real property. (As decedent died in 1985, law at that time required court order to sell real property.) She obtained an appraisal of the property and had accepted an offer for the appraised value. Several interested persons objected, arguing that the property should be sold on the open market through a real estate agent. The Court ordered the personal representative to obtain two other appraisals and scheduled another hearing.

The personal representative obtained two other appraisals, updated the initial appraisal, and presented a revised contract for purchase at the average of the three appraisals at the rescheduled hearing. The interested persons still argued in favor of an open market sale, and the court agreed that the property should be sold on the open market. The personal representative expressed concern about the costs of sale, but agreed to sell the property on the open market. However, during the course of the hearing, the court removed the personal

representative and appointed a successor personal representative from the Fiduciary Appointment List.

The removed personal representative appeals.

The successor personal representative then filed another petition to sell the real property, which was granted. The removed personal representative appealed that order. The removed personal representative then filed a lis pendens, but on motion of the successor personal representative, the court released the lis pendens. That order was also appealed.

HOLDING:

The Court of Appeals vacated all three orders. The DCCA noted that DC Code Sec. 20-526(b) requires that, before a personal representative can be removed, the court must hold a hearing and give notice of the hearing. As the hearing at which the personal representative was removed was scheduled to review the appraisals and consider the interested persons' opposition to the proposed private sale, the personal representative was not given adequate notice of her possible removal. The language in the order scheduling a hearing on the initial petition for approval of the sale that "the court may grant the relief requested in the memorandum or such other relief that the court deems appropriate without further notice" was not adequate notice sufficient to meet the requirements of Section 20-526(b). As the removal of the initial personal representative was vacated, the order approving the sale by the successor personal representative was also vacated. (The DCCA noted with approval that the successor personal representative "prudently" chose to hold off selling the property until resolution of the appeals.)

The DCCA also vacated the order releasing the lis pendens. The trial court did so, in part, on the ground that the removed personal representative lacked standing to record a lis pendens. The DCCA suggested that a removed personal representative challenging the removal may have standing, as by contesting the legality of the P/R's removal, the P/R claims a right to be restored to a position in which the P/R would hold legal title to the property under D.C. Code Sec. 20-105. The DCCA also suggested that the appellant may have had standing as a legatee under the decedent's will.

ESTATE OF BUTLER, CLARENCE

Case No. 2013-ADM-000962

11/09/2016 Judge Erik P. Christian

GENERAL SUBJECTS:

Possession of Real Property: Legal Tenancy

A legal tenancy cannot exist for an uninhabitable dwelling which cannot readily be made habitable, and the landlord had a duty to terminate a tenancy at sufferance.

Possession of Real Property: Status as Tenant

A person assuming occupancy of premises, or a permissive user or licensee remaining on premises after permission to occupy is withdrawn, without establishing a tenancy is a squatter in adverse possession and is subject to eviction.

Motion for Reconsideration

Probate Rule 430, providing for reconsideration of a judgment, does not apply to matters initiated by complaint and summons, including a matter initiated in the Landlord and Tenant Branch. Probate Rule 430 motions are considered under the standards applicable to Civil Rules 59(e) and 60(b).

Stay Pending Appeal; Condition for Stay

A stay of an order for possession of real property pending appeal can be conditioned on the payment of the fair rental value of the premises.

FACTS:

An unusual arrangement between a father and son had the son occupying a "carriage house" located behind the main house owned and occupied by the father. The "carriage house" was little more than a shed, having no electricity, heat, or running water. Upon the father's death, the son moved into the main house.

The personal representative of the father's estate obtained a judgment of possession, after a finding that, while the arrangement between the decedent, while alive, and his son established a landlord / tenant relationship, the fact that the premises was an illegal habitation required the termination of the landlord / tenant relationship with respect to the carriage house. Moreover, the landlord / tenant relationship did not extend to the main house, so the son's occupancy of the main

house after the father's death did not establish a tenancy for the main house. The court ordered that, if the son appealed the judgment for possession and order for writ of restitution, he must pay a monthly rental amount into the Estate Deposit Account.

The son filed a motion for reconsideration.

HOLDING:

The court reviewed the law governing the establishment of a tenancy and denied that motion for reconsideration. The son did not show a basis for relief under Rule 59(e) or Rule 60(b). The court did not make legal error in its determination that no tenancy could be established for the carriage house, which was an uninhabitable dwelling, and that the son did not establish a tenancy in the main house merely by using the bathroom facilities while the father was alive and moving into it after the father's death. Therefore, the writ of restitution for both the carriage house and the main house was validity issued, and could be reissued after denial of the motion for reconsideration.

Conditioning the stay of the judgment of possession while any appeal was pending on the son making monthly deposits into the Estate Deposit Account is valid. The son's continued occupancy of the premises without payment damages both the estate and creditors of the estate, including mortgage company holding the mortgage on the premises. The amount set is both the amount of the accumulating interest on the mortgage, and also reflects a fair rental value of the entire property.

WILLA FORD v. FREDERICK FORD

- A.3d - (D.C., 09/04/2014)

GENERAL SUBJECTS / HOLDING

Title to Real Property

A Recorder of Deeds Real Property Recordation and Transfer Tax Form (FP 7/C) does not grant or transfer title in land, and therefore is not conclusive evidence of title.

Title to Real Property: Will vs. Deed

A deed that conveys real property to joint tenants results in property passing by operation of law and cuts off any future interest that may have existed pursuant to one of the joint tenants' will.

WELLS FARGO BANK v. NEAL, AS P/R OF ESTATE OF MELBY

Case No. 2014-LIT-000031

05/11/2105; Judge Russell F. Canan

GENERAL SUBJECTS:

Unrecorded Deed or Deed of Trust

An unrecorded deed of trust creates an equitable mortgage or lien on real property

Equitable Subrogation

A lender who pays off a pre-existing mortgage or lien will be subrogated to the rights of the mortgagee that was paid, and receives that paid mortgagee's priority.

Creditor Claims

D.C. Code § 20-914, which prevents claims from attaching to a specific estate asset, does not apply to enforcement of mortgages, deeds of trust, or other security interests.

FACTS:

In 2007, Wells Fargo Bank gave the decedent (acting through her daughter as attorney-in-fact) a reverse mortgage. At that time, it paid off the existing mortgage secured by the decedent's residence. The deed of trust securing the reverse mortgage was never recorded and was lost; a copy of the deed of trust existed, as did proof of Wells Fargo's payoff of the existing mortgage.

The decedent died in March 2009. In May 2013, Wells Fargo filed a petition for probate as a creditor, and Attorney Neal was appointed personal representative. Subsequent to the appointment of the personal representative, Wells Fargo filed a complaint for declaratory judgment, seeking declaratory relief as follows:

- declaration of the existence of an equitable mortgage;
- declaration of equitable subrogation for the amount of the payoff of the then-existing mortgage; and
- declaration of an existing lien on the real property held by the estate.

The declaratory judgment action was certified to the Probate Division. There was no dispute on the material facts. Wells Fargo's motion for summary judgment was opposed by the personal representative.

HOLDING:

The court held that the plaintiff's claims deal with an interest in real property; the case was not a matter regarding enforcement of a contract (the promissory note for repayment of the loan). Thus, the 15 year statute of limitations for actions involving real property was applicable, not the three-year statute of limitations for actions on a contract. Because the plaintiff was seeking equitable relief, the doctrine of laches applies; equity normally observes the limitations period applicable to equivalent actions at law, and also requires a showing of delay AND prejudice. Thus, the court applied the limitations period for real property actions, and denied the personal representative's motion to dismiss.

When a property owner intends to charge a specific interest in property as security for a debt or other obligation, and that intention is clearly expressed in writing but is frustrated through some default of form or procedure, an equitable lien in the property is created and is enforceable in the hands of the lender. Thus, given the clear intention shown by the execution of the (unrecorded) deed of trust, an equitable lien was created on the decedent's real property, for the full amount of the loan.

When a lender pays off an existing loan from the proceeds of the new loan, and takes a new security for the loan in the same property that secured the first loan, the lender stands in the shoes of the first lender and is subrogated to rights of the first lender, up to the amount of the payoff. Thus, as alternative relief, Wells Fargo was subrogated to the mortgage paid off when the reverse mortgage was granted, up to the amount of the payoff, and assumes the same priority position as the first lender.

The personal representative's argument that D.C. Code § 20-914 prevents Wells Fargo from acquiring a lien on the decedent's real property was rejected. The court noted that Section 20-914 specifically does not prevent the enforcement of a mortgage or deed of trust. The court cited a similar DCCA case in support of its holding.

The court granted the motion for summary judgment, and further ordered that the Recorder of Deeds record the photocopy of the deed of trust and the memorandum order and judgment.

IN RE ROBINSON, Pearl; Appeal of Gardner

Unpublished *Per Curium* Memorandum Opinion
02/24/2017

GENERAL SUBJECTS:

Recovery of Attorney Fees

Absent bad faith, the court has no authority to award attorney fees to a prevailing party in litigation, to be paid by the losing party.

FACTS:

A conservator filed a claim for recovery of property of the ward (certificate of deposit) from the D.C. Unclaimed Property Office. The claim was denied. The conservator then initiated a show cause proceeding. The Unclaimed Property Unit, after becoming satisfied that the ward was the sole owner of the CD, agreed to pay the claim, thus rendering the show cause proceeding moot. However, the conservator sought an order for attorney fees to be paid by the Unclaimed Property Unit, which was denied as not falling within the bad faith exception to the "American Rule", holding that, absent bad faith, each litigant bears his or her own costs and legal fees.

HOLDING:

The DCCA affirmed the trial court. There was no showing of bad faith, so the American Rule applies. The Guardianship Fund, although allowing for payment of legal fees by District of Columbia funds, does not apply here, as there was no showing that the ward's estate was depleted.

IN RE Y.P., An Adult

Case No. 2015-INT-000129
04/10/2017 Judge Russell F. Canan

GENERAL SUBJECTS:

Withdrawal of Life Support; Court Order

When an incapacitated ward did have an advance medical directive or previously had provided a clear statement of her wishes for end-of-life care, the court will allow withdrawal of life support based on a consideration of objective factors in determining whether, in the ward's best interests, life support should be withdrawn.

FACTS:

The ward, a 51 year old woman, suffered cardiac arrest following a drug overdose. As efforts to revive the ward were not successful, the ward incurred anoxic brain injury resulting in suffer massive brain damage. The ward was placed on a ventilator, which remained in place, and the ward received artificial nutrition and hydration. Several months later, on petition of the social worker at the long term care facility at which the ward was staying, the ward's adult daughter was appointed her guardian. The ward was married, but her husband did not participate in the intervention proceedings. The ward had three children, and four siblings.

The ward had no condition requiring ongoing medication, but periodically suffered acute care issues, some of which required short-term hospitalization. Her physician testified that the ward was entirely unresponsive to stimulation; because of that it could not be determined whether the wad was in pain. The ward had developed a sacral ulcer and contracture due to lack of mobility. The unanimous medical opinion was that there was no hope that the ward could regain life-sustaining function.

The ward did not have an advance medical directive, and had never expressed her views with respect to end-of-life care. The ward did attend church and had some religious beliefs, but none that guided end-of-life care decisions.

Eight months after her appointment, the guardian filed a petition post-appointment, seeking authority to consent to the withdrawal of the ward's feeding tube and ventilator. The ward's son agreed that the petition should be granted; it was his view that his mother would want to be kept alive on life support for the rest of her life. The ward's siblings and a niece opposed the request. They believed that, at best, the request was premature, and contrary to the views of the treating medical personnel and the court-appointed visitor, they believed that the ward was responsive to her family. The siblings all had very strong religious convictions and that God would work to have their sister recover, and that life support should continue to "give her more time."

HOLDING:

In a detailed memorandum opinion, the court reviewed the law governing a guardian's medical decision-making and the standards to be applied for the withholding or withdrawal of non-emergency,

life-saving medical procedures (life support) under D.C. Code § 21-2047.01(3).

D.C. Code § 21-2047(a)(6) provides that a guardian should make medical decisions on a substituted judgment standard (conforming, as closely as possible, to the ward's wishes) or, if the ward's wishes are not known and cannot be reasonably discerned, on the basis of the ward's best interests. However, D.C. Code § 21-2047.01(3) does not specify the standard to be used when the court is asked to authorize the withholding or withdrawal of life support.

The court extensively reviewed the statutory and case law authority, and concluded that, in determining whether to authorize the withholding or withdrawal of non-emergency life-saving medical procedures, the court should act as follows.

a. The court should first attempt to apply the substituted judgment standard, ascertaining whether the ward had determined, or would determine that treatment should be withdrawn under the circumstances.

The court discussed in detail the process for ascertaining and determining, as best as possible, the choices that the patient would make if competent regarding medical procedures.

In so doing, the court rejected an approach that required the continuation of life-sustaining treatment unless there was clear evidence that the patient would desire its withdrawal.

b. In the absence of an ability to determine what the patient's wishes would be, the court should determine the patient's best interests based on what is known about the patient and a list of objective factors. The use of objective factors informs an inquiry into what the patient most likely would have chosen by applying "objective, societally-shared criteria."

The court set out a detailed list of objective factors that should be considered in such circumstances.

Applying that analysis to the case before the court, the court concluded that the absence of evidence of the ward's own

view regarding end-of-life decisions made the application of the substitute judgment standard was not possible. The court therefore considered the objective factors it listed and concluded that the ward's best interests were such that, if the ward were competent, she would consent to the withdrawal of life-sustaining medical procedures. The guardian's petition for authority to consent to the withdrawal of life support was therefore granted.

DAVID & VERA MANN v. BAHI, et al.

Case No. 16-949 (JDB), District Court for the Dist. of Columbia 03/17/2017, Judge John D. Bates, Jr.

GENERAL SUBJECTS:

Intentional Infliction of Emotional Distress:

An elderly couple's victimization by a caregiver, is amounting to conduct which is extreme and outrageous, can be a basis for a tort claim of intentional infliction of emotion distress.

Intentional Infliction of Emotional Distress:

Property-related crimes can be a basis for a claim of intentional infliction of emotion distress.

FACTS:

Following a serious illness and hospitalization, an elderly couple hired three caregivers referred by a home care referral agency. In their complaint, the couple allege that the caregivers engaged in systematic theft; citing instances of the caregivers going into locked rooms and areas of the house in which they have no purpose being, going through personal papers and files, and removing valuables from bedrooms when the occupants appeared to be sleeping. When one caregiver was confronted, he spoke about his religious convictions and said that the woman would have a revelation and be rewarded by God for all the good that her property would do in the hands of others. When the elderly couple called the police, the caregivers stopped coming.

The defendant filed a motion to dismiss, for failure to state a claim upon which relief can be granted.

HOLDING:

The District Court judge denied the motion, holding that the plaintiffs alleged sufficient facts to support a plausible claim for intentional infliction of emotion distress.

The tort of IIED requires that the plaintiff show (a) extreme and outrageous conduct by the defendant, which (b) intentionally or recklessly, (c) causes the plaintiff severe emotional distress. The complaint must allege facts that go beyond mere speculation. The defendant's intent or recklessness can be inferred from the outrageousness of the acts, which must be extreme in character and degree as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community.

In determining whether conduct is extreme and outrageous, context is a critically important factor. That an elderly and frail couple invited caregivers into their home for care, and being put in a position of trust, with that trust being abused as it was, if true, the type of conduct that could be viewed by the factfinder as extreme and outrageous.

The District Court judge rejected the defendant's assertion that property-related crimes cannot be a basis for a claim of intentional infliction of emotion distress, citing several District of Columbia cases in support of that assertion.

IN RE HARGROVE, Barbara

Report and Recommendation of the
Board on Professional Responsibility
Board Docket No. 15-BD-060

GENERAL SUBJECTS:

Attorney Discipline

FACTS:

An attorney was appointed successor personal representative of a decedent's estate. The BPR report includes a detailed review of the circumstances of the attorney's errors and omissions and failures to act over an extended period of time, which resulted in the attorney's removal as personal representative and the estate referred to the Auditor-Master. Subsequently, the attorney failed to comply with court orders to

turn over files and records, which resulted in a finding of contempt.

HOLDING:

The attorney's conduct resulted in a finding of violations of multiple Rules of Professional Conduct, including failure to act with competence, skill and care; failure to act with reasonable promptness, and conduct that seriously interfered with the administration of justice.

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COMPENSATION ORDERS

IN RE SMITH, Edward T.; Petition of Bruce Gardner

Case No. 1958-CON-000101
10/03/2016; Judge Gerald I. Fisher

The ongoing litigation regarding compensation in "old law conservatorships", *In re Smith I*, 99 A.3d 714 (D.C., 2014), and compensation for services rendered in an appeal of an order regarding fiduciary compensation, *In re Smith II*, ___ A.3d ____ (D.C., 05/12/2016) resulted in the court's consideration of three pending petitions for compensation, for both appellate services and travel time for out of town travel for visits to the elderly ward.

GENERAL CONSIDERATIONS REVIEWED:

Reasonable Compensation - Reasonableness of Services

In determining reasonable compensation, the court can consider the fiduciary's overall management of the guardianship and conservatorship, including whether the protective arrangement should be continued, terminated, or transferred to another jurisdiction.

Compensation: Travel to Ward

When appropriate, a guardian can request that the requirement for monthly visits be modified to allow for less frequent contact, or contact through contact with nursing home staff. The failure to do so may result in a reduction in compensation for travel time.

Compensation: Excessive Services

The failure of a fiduciary to efficiently manage the ward's resources or to engage in tasks not justified by the cost of the tasks in relationship to the necessity of the task or the size of the estate may result in a reduction of requested compensation.

Compensation: Public Policy

A fiduciary can be compensated for services reasonably thought to benefit wards and prospective wards generally, and perhaps not the specific ward in the case in which the compensation is requested, or foster the availability of fiduciaries by allowing compensation for reasonable services the services rendered by a fiduciary in clarifying or protecting the right of fiduciaries to be reasonably compensated. This may include compensation for services in an appeal of a compensation order. The court, however, can review the reasonableness of the appellate work and apply the same standards of reasonableness for compensation generally, including whether the work is in fact of benefit either to the specific ward or reasonably promotes the consideration identified by the Court of Appeals.

IN RE HALL, Mark

Case No. 2014-INT-000096

03/08/2017; Judge Kaye K. Christian

GENERAL CONSIDERATIONS REVIEWED:

Guardian Compensation: Medical Appointments

An attorney guardian is not required to attend every medical appointment scheduled for a ward. The trial judge in this case stated that "typically, attending appointments is handled b a nurse, some sort of home health staff, or a service hired to accompany the ward and provide transportation." If there are specific reasons that require the guardian to personally attend medical or dentist visits, that should be specified in the request for compensation.

Guardian Compensation: Personal Services

A guardian will not be compensated for "running errands" such as picking up medication for the ward or grocery shopping. This work is analogized to clerical or secretarial tasks, which is considered part of the "overhead component" of an attorney's fee.

IN RE ZELAYA, Maria

Case No. 2014-INT-000138

08/10/2016; Judge Erik P. Christian

GENERAL CONSIDERATIONS REVIEWED

Compensation: "Block Billing"

Block billing, when several tasks are reported together and the time expended is cumulated, is disfavored, and may result in a reduction or disallowance of the compensated time.

Compensation: Legal Research

An attorney will be compensated for legal research in "extraordinary circumstances." Compensation for time expended for general research on probate law may not be allowed. An attorney seeking compensation for legal research should specify the issues which were the subject of the legal research and reason for the research.

Compensation: Detailed Description of Services

Conferences or telephone conferences should identify the individual(s) participating in the conference, that person(s) relationship to the case, a description of the purpose and subject matter of the conference, and, for more lengthy meetings or telephone calls, how the conference benefitted the ward. This information is needed in order for the court to determine whether the conference was necessary or reasonable in purpose or duration and whether it was of benefit to the ward.

IN RE WILLIAMS, Helen V.

Case No. 2009-INT-000021

11/09/2016; Judge Peter H. Wolf

GENERAL CONSIDERATIONS REVIEWED:

Compensation: Travel Time

If compensation is paid from the ward's estate, travel time is compensated at the rate of \$90.00 per hour.

Compensation: Services on Appeal

The Court of Appeals has sole jurisdiction over attorney fees for services in appellate matters. While the DCCA

frequently refers determination of compensation for appellate work to the Superior Court, absent such a referral, the Superior Court will not consider compensation requests for work on appeal.

IN RE SLOAN, Robert

Case No. 2011-INT-000398

03/08/2017 Judge Peter H. Wolf

GENERAL SUBJECTS:

Compensation: Travel Time

Compensation for travel from an attorney's office, calculated as if made from the courthouse, is not allowed.

Compensation: Estimated Time

Requests for compensation for travel time must be based on actual travel time and distance and not MapQuest estimates or similar "virtual time and distance" calculations.

FACTS:

The memorandum opinion is not entirely clear, but it appears that an attorney, guardian of an incapacitated adult, included in his request for compensation time and expenses for travel as calculated as beginning and ending at the D.C. courthouse rather than from his office in Anne Arundel County. The attorney, relying on one sentence in a prior order, thought that, when travel took place outside of the Washington metropolitan area because of the location of the attorney's office, the courthouse location must be used as the starting and ending point. Because of that, the attorney used MapQuest time estimates rather than actual time.

HOLDING:

Judge Wolf held that the attorney's approach was erroneous and therefore disallowed the requested compensation and expenses. Judge Wolf "instructed" the attorney not to claim "similar time and expenses" in the future in any other Probate Division case.

What is not clear is whether travel time and expense calculated from the attorney's Anne Arundel County office would be permissible.

IN RE LESTER

Case Number 2014-INT-00043
06/15/2016; Judge Judith N. Macaluso

GENERAL SUBJECTS:

Compensation: Rate of Compensation

FACTS:

An attorney, serving as successor guardian and conservator for an 85 years old man who was in a personal residence, sought compensation at her normal hourly rate of \$300.00 per hour, paid from the ward's assets. The ward had approximately \$120,000 in assets; his annual care costs exceed his income by about \$20,000 per year. Payment of compensation at the requested rate would further deplete the ward's assets.

The court acknowledged that the attorney guardian and conservator has been attentive to the ward's needs, working with care providers and a senior services case management agency to assure that the ward's medical and personal needs are being met. The attorney properly managed the ward's income and assets, and paid all expenditures. Her normal hourly rate is not unreasonable.

The initially-appointed guardian and conservator, also an attorney was confronted by a horrific situation of elder abuse. As the ward was almost completely blind, he was virtually helpless to protect himself. That attorney dealt with "exceptional challenges" and worked to get the ward into the "stable situation" which was in place with the successor guardian and conservator was appointed. The first attorney was compensated at her normal hourly rate of \$250.00 per hour (by a different judge.)

HOLDING:

Because the successor attorney's tasks were distinguishable from the challenges confronting the first attorney guardian and conservator, and because compensation at the successor attorney's normal hourly rate, the court determined that the successor should be paid at the Guardianship Fund rate of \$90.00 per hour, even though the compensation is paid from the ward's funds.

ESTATE OF FARMER; SHARON FARMER v. JONATHAN L. FARMER

Case No. 2007-ADM-000764; 2010-LIT-000005
09/30/2016; Judge Rhonda Reid Winston

GENERAL SUBJECTS:

Attorney Fees: Attorney for Removed Personal Representative

FACTS:

Counsel represented the personal representative of a decedent's estate. The personal representative was removed, and the attorney claimed fees for work in closing the estate administration of the removed personal representative. Those fees were disallowed, and but the law firm requested reconsideration and submitted additional information.

The additional information showed that the amount billed and disallowed was calculated using the wrong hourly rates for an associate and legal assistants, and therefore the correct amount was approximately 2,000.00 less than the billed amount. However, the billing information submitted with the reconsideration amount shows that the law firm had actually expended for it services. The law firm therefore requested full allowance of the requested compensation.

The firm's records showed that the firm had provided services for its client both in her capacity as removed personal representative and in her individual capacity as an heir of the estate.

HOLDING:

The court held that, as the law firm is responsible for calculating its fees correctly, it is limited to the amount of fees it should have claimed with a correct calculation, not the larger amount originally claimed.

Services required to close the estate by the former personal representative are compensable from estate funds, but services rendered to the former personal representative in her individual capacity as an heir of the estate are not compensable from estate assets.

IN RE NGASSA, Basile

Case No. 2014-INT-395

07/27/2016 and 10/19/2016; Judge Ronald Wertheim

GENERAL CONSIDERATIONS REVIEWED:

Travel: Milage Expense

Compensation petitions that seek milage expenses must state the correct rate milage expense rate. An attorney cannot expect that the court will correct compensation requests to reflect the official milage rate.

(The rate is found in the CJA guidelines.)

Administrative Order Certification - Accuracy

It is an attorney's responsibility to ensure that the certification required by Administrative Orders 04-06 and 13-15 is accurate. An inaccurate certification that all required filings are current may result in sanctions and, for repeated false certifications, can result in the court referring the matter to the Office of Disciplinary Counsel.

Administrative Order Certification - Current Filings

It is the attorney's responsibility to ascertain the date on which a filing is due. An attorney's reliance on court notifications of notices of delinquency or pending due date, or summary hearing orders, is not reasonable or appropriate.

OTHER CONSIDERATIONS REGARDING

ADMINISTRATIVE ORDERS 04-06 AND 13-15

Text of Certification Cannot Be Modified

A series of memorandum orders makes it clear that the prescribed text of the Administrative Order Certification cannot be modified. Efforts to modify or alter the prescribed text of the certification may result in denial of the petition for compensation with which the certification was filed, or other sanctions.

Date of Certification

Administrative Order 16-16 clarifies the existing administrative orders by providing that the certification must be e-filed along with a petition for compensation.

This Administrative Order makes it clear that the certification shall be effective as of the date of the filing of the petition. (In Intervention Proceedings, petitions for compensation must be served 20 days prior to filing, but the effective date of the certification is the date of filing.)

ACKNOWLEDGMENTS

The Register of Wills, Anne Meister, assisted by ROW staff member Maureen Conly, provided invaluable assistance in putting together the material for this hand-out.

2016 – 2017 D.C. ESTATE TAX DEVELOPMENTS

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LEGISLATIVE DEVELOPMENTS

On February 26, 2015, the District of Columbia enacted the Tax Revision Commission Implementation Amendment Act of 2014 (the “TRC Act”).¹ The TRC Act added D.C. Code § 47-181, which provides a list of 17 tax reforms that would be phased in to the D.C. tax system upon receiving sufficient revenue to support such tax cuts. The 6th tax reform on the list, which would increase the D.C. estate tax exemption from \$1,000,000 to \$2,000,000 became effective January 1, 2017. Accordingly, the D.C. estate tax exemption for decedents dying on or after January 1, 2017, is \$2,000,000.

ADMINISTRATIVE DEVELOPMENTS

In 2015, the D.C. Office of Tax and Revenue (“OTR”) overhauled the D.C. Estate Tax Forms and Instructions. The forms booklet was revised again in 2016.

The 2016 version of the forms applies to all D.C. estate tax returns currently being filed, regardless of the year of the decedent’s death. Taxpayers are still required to use the D.C. Estate Tax Computation Worksheet that corresponds to the year of the decedent’s death.

- I. **Federal EIN.** The new forms omit the requirement to provide the estate’s Federal Employer ID Number, which had been added in the 2015 revisions.
- II. **Foreign Accounts.** The new form continues to ask whether a refund will go to an account outside of the United States and whether a payment will be made from an account outside of the United States and directs the taxpayer to “see instructions” for these questions; however, the revised instructions still do not address the use of foreign accounts. The “What’s New” summary prefacing the short-lived June 2015 version of the forms booklet indicated that funds cannot be deposited into or drawn from an account outside of the United States.
- III. **Third Party Designee.** The revised forms allow the taxpayer to appoint a “third party designee” who is authorized to discuss the return with the OTR.
- IV. **Computation Worksheet.** The revised D.C. Estate Tax Computation Worksheet reintroduced the “worksheet” by which the taxpayer indicates the portion of the gross estate that is located in the District of Columbia, which had been removed from the 2015 worksheets.

¹ 61 D.C. Reg. 9990, 10,083–86 (Oct. 3, 2014). Certain provisions of the TRC Act were amended by the Prior Budget Act Amendment Act of 2015, which was effective on October 1, 2015. 62 D.C. Reg. 10,905, 11,012–13 (Aug. 14, 2015).