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NEWSLETTER ~ MARCH 2007

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This month we will keep it short (but not necessarily sweet), with a troubling “what can happen if . . .” story; and we provide more definitions of the “Terms of Art” that our clients have asked us about during the last month.

Disposition of Remains Litigation

– In January of this year, we were called upon to represent the family of a woman who had passed away without executing a Disposition of Remains Designation. Also, the decedent had not left any instructions in her will regarding the disposition of her remains or who was to have authority over such disposition.

The decedent, who was of Jewish heritage on her mother’s side, had been raised as a Christian by her mother and father. When the decedent was quite young, her mother, with her children, moved out on their father, and afterwards told them to tell anyone who asked that their father was dead. Despite years of trying, the father was not able to locate his children.

The decedent and her two siblings grew up on the west coast of the United States, England and sub-Saharan Africa. In adulthood, the decedent and her two siblings became estranged from their mother and returned to the United States. The mother, living in England and apparently financially destitute, applied for Israeli citizenship under the Law of Return. She embraced (or “converted” to) Judaism, moved to Israel, and after some time in Israel, moved back to England.

In the meantime, the decedent was diagnosed with cancer and began a long course of treatment in New York. With the support of her siblings and friends, the decedent fought successfully against her cancer and endured a regimen of treatment for a long, long time.

Upon learning that her daughter was ill, the mother attempted to convince the decedent to move to Israel or various countries in South-East Asia for treatment of her cancer. The decedent, while grateful for her estranged mother’s concern, was determined to stay in New York City, where all her friends lived and where her siblings could visit her often from their homes in other states with relative ease.

Late last year, knowing that she was not going to win her battle with cancer forever, the decedent had a will prepared by an attorney. The will named her sister as her executrix but contained no provision regarding whether the decedent wanted her remains to be cremated or buried. The decedent died in January.

The decedent's sister, along with her father (who had come back into his children's life), knowing that the decedent wished to be cremated and her ashes taken to a house she owned in upstate New York, arranged for cremation at a local funeral home.

The mother opposed the cremation on religious grounds, stating that the decedent was a Jew and that therefore she should not be cremated. For many Jews, cremation is regarded as strictly forbidden by Jewish law, quite apart from its painful association with the Holocaust.

Research and investigation uncovered written proof that throughout her life the decedent had held herself out as a sometimes practicing Christian and a "non-Jew", and had even advised her mother (as well as her sister) that she wished to be cremated. Nevertheless, the decedent's mother persisted in her argument and attempted to enlist the assistance of several Jewish organizations in the New York City area to impose her wishes and beliefs on her daughter.

After nearly three weeks of litigation (including adjournments for due process concerns) in the New York State Supreme Court, we succeeded in protecting the decedent's wishes and obtained an order enjoining the mother or anyone else from interfering with the cremation. The decedent's body was cremated and her sister took custody of her ashes.

The legal fight was expensive financially. More importantly, it was traumatic emotionally not only for all of the parties but also for many others. Dozens of the decedent's friends appeared at the two hearings ready to testify. A half dozen friends, as well as the decedent's father and siblings, were interviewed and swore out affidavits in support of the decedent's wishes. And some of the Jewish organizations the decedent's mother attempted to recruit to her side found themselves in an awkward position when they realized that the mother was not acting in her daughter's interests but in her own.

You may come away from this story with uncomfortable feelings or a general sense of distaste. How could this happen? What if my relatives fight over whether I will be cremated or buried? What if they fight over where I am to be buried (with my first spouse or second, for example)? How can I avoid this type of dissension?

The answer is that by executing a Disposition of Remains Designation you can give instructions for the disposition of your remains and designate an agent to have control over such disposition. The State of New York enacted legislation effective August 2, 2006 giving legal status to such instruments.

While you can also set forth such instructions in your will, in New York a will is not considered "proved" (and therefore legally binding) until it is decreed so through the probate process. Thus, this approach is less desirable, and could, for example, result in your remains being held in a funeral home, as was the decedent's in this case, for weeks. Such a possibility is undesirable, regardless whether you wish to be buried or cremated. What is important is that your wishes are carried out.

Please see our January 2007 and our Summer 2006 Newsletters for further discussion on the importance and use of Disposition of Remains Designations. You can find both of these Newsletters on our website at www.maclea-law.com.

Glossary of Terms – Attorneys can toss around “terms of art” (not jargon) which puzzle clients. Clients asked us about the following such terms of art in the past month:

Probate – the process whereby a will is proved to be valid. New York is what is known as a “solemn probate jurisdiction.” This means that a will is not a “valid” document upon which one may rely until it is presented to a court of competent jurisdiction (The New York State Surrogate’s Court) along with certain other necessary documents, in a particular way (*a verified petition*), on notice to interested parties (*notice*), who have an opportunity to appear and be heard and object (*due process*), and only then (*assuming no objections are valid themselves*) admitted to probate by decree of the court after the court is satisfied as to the genuineness of the will and the validity of its execution. (Whew; got all that.)

Probate Estate – anything you own at your death that does not pass by operation of law or by contract. For example, personal or real property you own all of in your own name, or real property that you own part of as tenant in common or joint tenant with another, is includable in your probate estate. Real property that you own as joint tenants with right of survivorship or as tenants by the entirety with your spouse are not included in your probate estate, as those assets, by operation of law, pass at death to the survivor. Life insurance policies, qualified retirement plans and IRAs with designated beneficiaries are not part of your probate estate (unless you name your estate

as the beneficiary, which is not usually a good idea), as they are all contracts with beneficiaries. Such property may be includable in your gross estate for tax purposes, however; a gross estate and a Probate estate are not usually composed of the same property.

For more information please contact us at 212-682-1555 or by email at info@maclea-law.com.

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