Autumn 2018

the SideBar

Grandparent Visitation Is in Jeopardy

By Meredith Chesler, Esq.

There is a bill pending in New York State which would have a severe impact on the legal rights of grandparents to visitation with their grandchildren.

The current statute

Under the current statute, a parent's opposition to grandparent visitation is insufficient to sway a court against ordering that grandparents receive visitation with their grandchild. This comes as a great relief to many grandparents who have been prevented from seeing their grandchildren.

The current statute allows a grandparent or the grandparents of a child to apply to the court for visitation rights under two circumstances:

1. Where either one or both parents of a minor child residing in New York State is/are deceased. The statute does not require that the deceased parent be the child of the grandparent or grandparents seeking visitation rights.

Meredith Chesler, Esq.

2. Where "conditions exist which equity would see fit to intervene," a standard that is extremely fact-sensitive. It is important to note that Domestic Relations Law Section 72 is limited to grandparents and does not extend to great-grandparents or other family members. Furthermore, the Court has held that a step-grandfather does not fall within the statute.

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With Blended Families, There Comes an Increased Risk of Estate Litigation

By Jordan M. Freundlich, Esq.

Jordan M. Freundlich, Esq.

I recently had the pleasure of presenting at a VMM Academy program on blended families, which is defined as families that include a couple and their children from this and all prior relationships. In our Estate Litigation Practice, we have found that blended families can lead to an increased risk of disgruntled beneficiaries and will contests. Accordingly, testators (persons who make valid wills) in blended families must take precautions to avoid their family later litigating the validity of their wills.

WILL CONTESTS

Imagine that your very wealthy father, who has remarried and has children from the second marriage, executed a new will just months before he died, leaving the bulk of his estate to his second wife and the children from the second marriage. You are angry, and want to challenge the will, as you do not believe that your father would have executed such a will voluntarily.

So, what do you do?

• You have the right to challenge the will.

• First, you have the right to examine (under Section 1404 of the Surrogate's Court Procedure Act ("SCPA")) the attorney draftsperson and the witnesses to the will as to the facts and circumstances surrounding the instrument's drafting and execution, as well as other issues that may be the basis of an objection to the will.

• You have the right to pre-examination discovery of documents, which generally is limited in scope to the period from three years prior to the date of the will through two years after the date of the will, or to the testator's death, whichever is earlier.

• You generally have ten days from the end of the SCPA 1404 examinations to decide whether to file objections to the validity of the will.

• If you decide to file objections to the will, you are entitled to additional discovery and depositions.

There are four common objections to a will:

1. The will was not executed properly, i.e., the statutory requirements for the execution of a will were not met. These requirements include:

• The testator, or someone on his/her behalf, must sign at the end of the will, in the presence of at least two attesting witnesses.

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With blended families, there comes an increased risk of estate litigation

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• At some time during the ceremony of execution and attestation, the testator must declare to each of the attesting witnesses that the instrument to which his signature is affixed is his will.

• The witnesses must, within one 30 day period, attest the testator's signature, as affixed or acknowledged in their presence, and, at the request of the testator, sign their names and affix their addresses.

2. The testator lacked testamentary capacity, which is the mental capacity required to execute a will.

• The level of capacity required to execute a will is lower than for almost all other contracts under the law, as it is recognized that wills often are executed by the elderly and infirm.

• The proponent (supporter/advocate) of the will has the burden of proving that the testator possessed testamentary capacity and the court looks to the following factors:

– Whether the testator understood the nature and consequences of executing a will;

– Whether the testator knew the nature and extent of the property being disposed of in the will; and

– Whether the testator knew who would be considered the natural objects of his or her bounty and the nature of his or her relationship with them.

• Even if a testator is suffering from cognitive ailments such as dementia, if the testator has periods of lucidity, he or she can execute a will while in a lucid period.

3. The will was the result of fraud or undue influence:

• To invalidate a will on these grounds, an objectant must prove that, absent fraud or undue influence, the testator would not have executed the will.

• It is the challenger's burden to prove fraud or undue influence and it often is a difficult burden to overcome.

– However, the burden of proof shifts to the will proponent if there is a confidential relationship between the testator and the proponent, such as attorney-client, guardian-ward, physician-patient, or when one person is dependent on, and subject to the control of, another.

4. Revocation

• The will being offered for probate was revoked by the testator.

THE IN TERROREM "NO CONTEST" CLAUSE

• The ***in terrorem*** or no contest clause is a device used by estate planners to try to avoid will contests altogether.

• ***In terrorem*** translates to "in order to frighten," and its aim is to frighten beneficiaries from challenging the will.

• New York allows ***in terrorem*** clauses; certain states do not.

• An ***in terrorem*** clause generally provides that, where a beneficiary under a testamentary instrument unsuccessfully challenges the instrument's validity, the beneficiary will forfeit any interests obtained under the instrument.

• Such clauses are narrowly construed, so they must be drafted broadly and specifically.

• In construing an ***in terrorem*** provision, or any part of a will, the paramount consideration is identifying and carrying out the testator's intent. However, the testator's intention will not be given effect if doing so would violate public policy.

– For example, ***in terrorem*** provisions which attempt to preclude a beneficiary from seeking the removal of a fiduciary based upon the fiduciary's misconduct violates public policy

Counsel Jordan M. Freundlich, Esq. is a member of Vishnick McGovern Milizio LLP's Estate and Trust Litigation and Commercial Litigation Practice Groups. He can be reached at jfreundlich@vmmlegal.com, or 516.437.4385, ext. 142.

Grandparent Visitation Is in Jeopardy

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A significant modification of the proposed Bill

Bill number A07821 seeks to restrict severely the rights of grandparents by modifying Domestic Relations Law Section 72. The proposed changes support a desire to defer to the decisions of a child's parent regarding the care and custody of that child. This deference also includes a parent's decision to restrict a child's contact with his/her grandparents, thereby hindering the creation and/or maintenance of a grandparent-grandchild relationship.

Currently, the death of one of the child's parents automatically allows a grandparent to petition the Court for visitation rights. The proposed revision would completely eliminate that automatic right and merely "consider" a death of a parent. Therefore, before enabling the Court to hear a matter of a visitation, a grandparent would be required to show that "conditions exist which equity would see fit to intervene," language that is part of the current statute, but the grandparent would be faced with an additional hurdle: "a strong presumption exists in favor of parental decisions concerning visitation." This means the Court would begin its analysis with the premise that the child's parents have the right to make decisions for their child and that their decisions should be respected. The burden is placed on the grandparent to "allege, with detail and specificity, that the child would experience significant harm to his or her health, safety, or welfare if visitation were denied." Absent the requisite "detail and specificity," there would be a strong likelihood that visitation would be denied. This is a very high burden to meet.

Furthermore, the grandparent must set forth in the verified petition or in a verified affidavit to be submitted to the Court with his/her petition for visitation that he/she made a "good faith attempt at reconciliation" with the parent(s) of the child. Once again, this attempted reconciliation must be alleged with specificity. Merely stating that the grandparent was prevented from seeing his or her grandchild is insufficient.

Adding to the already high burden

The grandparent also would be required to demonstrate that "he or she is a fit and proper person to have visitation rights with the child and that he or she has no reported history of domestic violence." The Court would perform its own independent search to determine whether the grandparent was ever subject to an order of protection or has a criminal history.

The proposed revisions to the statute state that the Court may direct that costs and allowances, including attorney's fees, be paid by an unsuccessful petitioner (the grandparent), "where the court finds that the contest was brought in bad faith or was frivolous or non-meritorious." There is no reciprocal language proposed in the event that the grandparent emerges victorious after a legal battle in which the parent's position was "in bad faith or was frivolous or non-meritorious." As a result, this portion of the statute may act to deter a grandparent from litigating for visitation with his or her grandchild. Paying the legal fees of one law firm may be difficult enough without facing the risk of having to pay the legal fees of another law firm.

The differences between the language in the current statute and the proposed revisions to the statute are enormous. If the bill is passed and Domestic Relations Law Section 72 is revised, the results may be disastrous to grandparents. If the statute is revised as proposed, only time will tell how the courts will deal with the many restrictions and high burden placed on grandparents.

Associate Meredith Chesler is a member of Vishnick McGovern Milizio LLP's Trust and Estate Administration Practice Group. She can be reached at mchesler@vmmlegal.com, or 516.437.4385, ext. 116.

news & Events

VMM is pleased to welcome **Phillip Hornberger, Esq.**, to the firm's Real Estate Law and Transactional and Business Law practice groups. Prior to joining VMM, Mr. Hornberger practiced law with a general law firm, concentrating his work on real estate, trusts and estates, and corporate law matters. Mr. Hornberger received his Juris Doctor degree from St. John's University School of Law and his undergraduate degree in Business Management from Providence College in Providence, Rhode Island. While at St. John's, he served two judicial internships in the Suffolk County Supreme Court. Licensed to practice law in New York State, he is a member of the New York State Bar Association (Real Estate Section) and Suffolk County Bar Association (Real Estate and Young Lawyers Committees).

Phillip Hornberger, Esq.

Andrew A. Kimler and Avrohom Gefen

Partners **Andrew A. Kimler** and **Avrohom Gefen** will present a program, entitled "New Tip Credit and Pooling Rules; and Federal Wage and Hour Requirements for Employers," at the 16th Annual Nassau/Suffolk Chapter of the NCCPAP (National Conference of CPA Practitioners)/IRS Long Island Tax Professional Symposium on November 16, 2018 at the Crest Hollow Country Club in Woodbury. Joining Messrs. Kimler and Gefen is **Irv Miljoner**, District Director for Long Island at U.S. Department of Labor.

Council **Michael Humphrey's** article, "Focus On Charitable Bequest Accounting," was the lead piece in the Fall 2018 issue of the NFP Advisor, a publication of Cerini & Associates LLP. In it, he cautioned not-for-profit organizations to be laser-focused in their analysis of fiduciary accountings to avoid the potential for leaving thousands of dollars on the table.

Michael Humphrey

VMM was a "Pride Supporter" sponsor for Long Island Crisis Center's Pride for Youth (PFY) 25th Anniversary Celebration on October 11, 2018 at the Westbury Manor. Managing Partner **Joseph G. Milizio**, who heads VMM's LGBT Representation Practice Group, was a member of the planning committee for the event, which supports the pivotal role Pride for Youth programs play in instilling self-awareness, self-esteem and self-acceptance through free counseling and support services, among other activities.

Kevin Claus, Joseph G. Milizio, PFY Honoree Marcia F. Namowitz and Joseph Trotti.

news & Events

New Laws on Sexual Harassment

By Andrew A. Kimler, Esq. and Avrohom Gefen, Esq.

In the wake of the #MeToo movement, both New York State and New York City have enacted new laws to stop sexual harassment. Key deadlines to be aware of are as follows:

September 6, 2018: New York City employers must display a "Stop Sexual Harassment Act Notice" and provide employees at the time of hire with a "Stop Sexual Harassment Act Fact Sheet." Both of these documents are accessible by visiting vmm.legal.com/blog. The Fact Sheet may also be included in an employer's handbooks.

October 9, 2018: Every New York State employer must provide anti-sexual harassment training on an annual basis. Employers can use either a training program created by the State or a program that equals or exceeds the State devised program. The State's draft model program provides that current employees must have this training by October 9, 2019. All new employees should complete this training within "as soon as possible" after their start date. In addition, the State will require employers to distribute the State's Anti-Harassment Policy to all employees. Employers may use a model policy that will be created by the State.

April 1, 2019: New York City will require employers with 15 or more employees to provide anti-sexual harassment training annually and to new employees within 90 days of hire. The City will create an interactive training program.

In addition to the foregoing, New York State has already enacted laws which limit the use of confidentiality provisions in settlement agreements that resolve sexual harassment claims. Moreover, new legislation provides that most employment agreements in New York State cannot require employees to submit claims for sexual harassment to mandatory arbitration.

Should you have any questions on this or other employment-related matters, please contact Mr. Kimler at 516.437.4385, x122, or akimler@vmmlegal.com, or Mr. Gefen at 516.437.4385 x119, or agefen@vmmlegal.com.

A SPECIAL VMM ACADEMY PROGRAM FOR BUSINESS OWNERS, MANAGERS and HR PROFESSIONALS

NEW YORK EMPLOYERS FACE NEW SEXUAL HARASSMENT LEGISLATION: AN OVERVIEW

Both New York State and New York City recently adopted new laws which expand anti-harassment requirements for employers, including the implementation of written policies and sexual harassment prevention training.

VMM Partners Andrew A. Kimler, Esq. and Avrohom Gefen, Esq. will highlight the key requirements under both laws.

Seating is limited … register now!

DATE: WEDNESDAY, NOVEMBER 28, 2018
TIME: 5:45—7:30 PM
PLACE: LOWER LEVEL CONFERENCE CENTER
5 DAKOTA DRIVE, NEW HYDE PARK

RSVP: mwolfle@vmmlegal.com or call Mindy Wolfle at 516.390.3027. Please provide full name, title, place of business, email and phone number for all registrants.

THERE IS NO FEE TO ATTEND VMM ACADEMY.
LIGHT REFRESHMENTS WILL BE SERVED.

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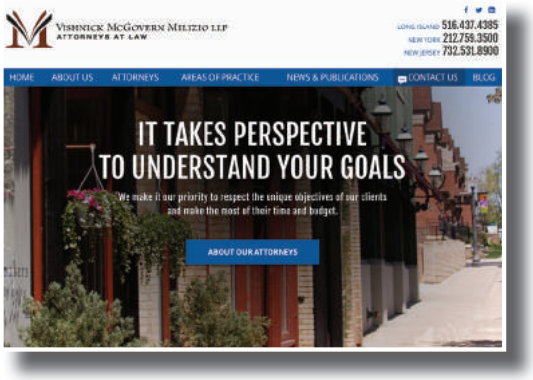

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