Berwitz & DiTata LLP

A STEP AHEAD

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"Orphan Elders"—Is Aging in Place Always the Best Option?

"Orphan Elders" is the term used to describe seniors who are aging alone - without a network of family and friends. They are single or widowed, have no children, or none with whom they have a regular and supportive relationship, and no support system. Because of health or financial reasons, they may be isolated socially.

Most seniors want to "age in place." Home is familiar and comfortable. Change is frightening, as is the thought of "institutionalization" and the financial drain it brings. But aging in place can be dangerous, especially for vulnerable orphan elders who rarely, if ever, leave their homes. In a suburban area, with little or no convenient transportation, home can become a prison for those who are no longer capable of driving and may even have difficulty walking unassisted. While aging in place engenders a sense of control, that control is illusive at best. It necessitates a variety of essential services which, in turn, require financing and a support team with the flexibility to manage many

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Berwitz & DiTata LLP Wins First Case Under New NYS Decanting Law

What is "decanting" and why does this matter? Decanting is the legal term for transferring assets from one irrevocable trust to another irrevocable trust. Typically, when we think of irrevocable trusts, we think they cannot be changed - and that's true. But, if an irrevocable trust is seriously flawed, decanting is the process that provides a solution in the *right* case.

In this case, the question brought on appeal concerned whether assets, decanted from the first irrevocable trust to a new irrevocable trust, could be payable to relatives after the trust beneficiary dies rather than to the State. The trust beneficiary was receiving governmental benefits.

Ordinarily, we would recommend implementing a supplemental needs trust ("SNT") for such a beneficiary. An SNT allows trust funds to be used to supplement government benefits

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José Fernández's Untimely Death Raises Estate Planning Issues

José Fernández was a talented, young pitcher for the Miami Marlins. His death, on September 25, 2016 at the age of 24, was a tragic loss for the baseball community, the Cuban-American community and, most importantly, his family. The loss was made more tragic by the reports that, shortly before his death, Fernández announced, on Instagram, that his girlfriend was pregnant with their child. If Fernández was like most 24-year olds, despite the fact that he was potentially worth millions, he likely had done no estate planning. This will present real challenges for his family in the days to come.

We have previously discussed the dangers of failing to plan - for celebrities and non-celebrities alike. For celebrities, the implementation of

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without disqualifying the beneficiary from receiving needs-based benefits. Some SNTs require that, after the death of the beneficiary, Medicaid be reimbursed from the remaining trust assets. In our case, the original irrevocable trust did not contain an SNT. The new irrevocable trust contained SNT provisions but did not include a provision that Medicaid be paid back. The issue was first successfully litigated by Berwitz & DiTata LLP in the Surrogate's Court. The Surrogate agreed with our position that the new irrevocable trust did not have to contain a "payback provision" to Medicaid after the trust beneficiary dies. The State appealed the Surrogate's determination and we then litigated this question in the Appellate Division. We are happy to report that the Appellate Division affirmed the Surrogate's determination, in other words, they, too, agreed with us.

The facts: In 1992, Moses R. created an irrevocable trust for his then infant grandson, 19-month old Daniel S. The original trust would have allowed Daniel to withdraw all of the trust assets when he reached 21 years of age. What grandfather Moses could not have known was that Daniel would later be diagnosed with epilepsy and bipolar disorder, in addition to obsessive compulsive disorder (OCD), attention-deficit disorder (ADD) and attention-deficit/hyperactivity disorder (ADHD). When Daniel turned 18, he qualified for Medicaid and Supplemental Security Income, both needs-based governmental benefits. Absent additional planning, he would have become ineligible to receive those benefits if he had received the trust assets at 21.

The law: Before 2011, NYS had a statute that permitted a Trustee to decant (transfer) the trust assets to another trust that was so restrictive that it would not have permitted the Trustee of Daniel's trust to protect the assets. In 2011, New York liberalized the decanting statute. The amended statute allows a Trustee to decant an irrevocable trust that offers no protection for the beneficiary to a new irrevocable trust that contains an SNT that will protect the assets for the beneficiary who is receiving governmental benefits. But the statute did not address the terms of that new SNT.

The argument: The State unsuccessfully argued that the new trust should require that, after Daniel's death, the trust assets be first used to reimburse Medicaid for the benefits that Daniel had received during his lifetime on the theory that the trust was funded with *Daniel's assets*. In contrast, the Appellate Division agreed with our position that the 1992 trust, having been funded at the outset with *assets belonging to Moses*, the grandfather, could be decanted to a new irrevocable trust which deprived Medicaid of the right to be reimbursed after Daniel's death. Thus, any remaining trust assets will be distributed to Daniel's siblings.

The impact of the new statute is now clearer. There is now a mechanism for modifying an existing irrevocable trust where the trust provisions require adjustment because circumstances have changed. Timing can be critical. We, of course, are available to review and evaluate these trusts and to discuss the available options with the Trustee.

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ever-changing responsibilities. A strong correlation exists between social isolation and diminished physical or mental health.

What adds to the complexity of the situation is that the progression into 'orphanhood' is typically not sudden and it is often unforeseen. An individual who was once healthy, vibrant, active and hard-working may, over the course of time, lose their spouse, close friends and acquaintances as the result of illness, accident or age. People who were once "defined" by their jobs or careers are isolated by retirement and their business associates and acquaintances become remote. The activities that once filled their time can no longer be performed and, if there are no family members, children or others with whom they maintain a *regular* and close relationship, they are at risk. Although they may want to remain in their own homes, it is important to recognize and acknowledge that alternatives to aging in place may ultimately be most beneficial.

If you or someone you know is or may be an orphan elder and you want to present alternatives to aging in place and the associated risks, call Berwitz & DiTata LLP for an appointment.

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trusts becomes even more critical because these devices can shield their estate from becoming public. Assuming Fernández had not retained an attorney or created estate planning documents, the disposition of his assets will follow state law, regardless of what Fernández may have wanted. Disputes among family members, and the nature and disposition of his assets will all be in the public eye. The failure to plan is exacerbated by the relationship between Fernández and his girlfriend and because of their unborn child. Those whom Fernandez held most dear during life will now be engaged in a battle to control his estate rather than comforting and supporting each other.

In New York, a girlfriend has no right to inherit from a decedent. Fernández and his girlfriend may have owned assets jointly, with right of survivorship. Fernández may have designated his girlfriend as a beneficiary on one or more of his accounts or insurance policies. He may have implemented a Last Will and Testament or trust designating his girlfriend as a beneficiary. However, in New York, if he did none of the above, his girlfriend would not inherit a penny from Fernández's estate.

For his unborn child, the situation is more complex. A child conceived before Fernández's death but born after his death can inherit. However, in New York, if the mother and father are not married, as in the case of Fernández and his girlfriend, this right of inheritance is not automatic. It requires "clear and convincing evidence" (a higher standard than in most civil cases) that Fernández was the father of the child. Under New York law, clear and convincing evidence can be established by a DNA test or Fernández's open and notorious acknowledgment that this child is his. Whether making an announcement on Instagram or on any other social media site before a child is born would be considered open and notorious acknowledgment is likely a question that only the courts will decide.

If Fernández did no estate planning, in New York his estate would pass according to the laws of "intestacy" - when a decedent has no Will that meets the required formalities. Under New York law, if it can be established that the unborn child was Fernández's or that he or she was openly and notoriously acknowledged, this would be his only child and, as Fernández was never married, this child would inherit the *entire* estate. The rest of Fernández's family, including his mother and grandmother, with whom he was seemingly very close, and any other family members Fernández might have been supporting, would inherit absolutely nothing. In New York, a guardian would be appointed to hold the inherited property on the child's behalf until he or she reaches 18, the age of majority, at which time the funds would be released to the child outright.

Naturally, most parents would not want their child to receive what may be millions of dollars as an inheritance at the age of 18, without oversight or supervision as to the management or utilization of those funds. If Fernández did no estate planning, that would be the result. With planning, he could have protected the assets by establishing a trust for the child and naming a trustee to manage the assets and use them for the benefit of the child. The trustee would ultimately distribute the estate when the child was old enough to manage the assets.

This tragedy highlights the importance of having an estate plan at every age and stage of life. Call now for an appointment. Berwitz & DiTata LLP will be happy to help you ensure that your family is protected and that your wishes are carried out.

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Berwitz & DiTata LLP Welcomes Michelle


Michelle A. Dantuono

Berwitz & DiTata LLP welcomes associate attorney Michelle A. Dantuono to the firm. After earning a bachelor's degree *magna cum laude* in American Studies from Providence College, Michelle A. Dantuono obtained her law degree *cum laude* from Hofstra University School of Law. During law school, Michelle was an associate editor of the Hofstra Law Review and Dean's Scholar. She was a child and family advocacy fellow and participated in the Child Advocacy Clinic. Michelle has spent the majority of her career practicing exclusively in the area of trusts and estates, handling litigation, estate planning and administration and elder law matters. She is admitted to practice law in the state of New York and in the Eastern and Southern Districts of New York. Michelle is a member of the New York State Bar Association and the Nassau County Bar Association. Michelle has significant roots in the Mineola and East Williston communities, having lived there her entire life. Outside of work, she enjoys spending time with her husband, young son and large extended family.

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