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BROOKS & BROOKS, LLP
Estate Planning with Certainty

PUBLICITY IN PROBATE

Routinely at our workshops throughout the area we talk about the problems of probate, one of which is the public nature of the Court. In New York State, our Probate Courts (Surrogate's Courts) are courts of public record, which means that almost all of the documents filed in a decedent's estate are open for public inspection. There are a small handful of documents that are protected from public view by statute, but the list is very short. Everything else is open for anyone in the public to stop by and view.

A recent case from Dutchess County illuminates the publicity issue as a problem. *In Matter of Patrick, N.Y.L.J. 4/26/14, p. 21*, the preliminary executors filed an application with the Court for an Order sealing the records of the estate. Their rationale was sound, the decedent's business was a real estate company and the decedent also had a financial stake in six commercial properties at the time of her death. The preliminary executors were concerned that the financial information disclosed in the court filings could be used by third parties in dealing with the estate for either a sale or lease of the properties. Without a court order sealing those records, any potential buyer of the properties or, for that matter, anyone else, could obtain all of the vital financial information related to the operation of the company and properties.

Generally speaking, when business owners are interested in selling their businesses, potential suitors are asked to sign a confidentiality agreement to guaranty that sensitive business financial information is not disclosed to other parties. In the context of a probate estate, this becomes increasingly difficult, if not impossible to do.

In the Patrick Case the Judge denied the request. The court stated that it may not enter an order in any action or proceeding sealing court records, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court must consider the interest of the public as well as the parties. Herein lies the problem! Under probate law, it is not just the family of the decedent and the decedent's fiduciaries who apparently have an interest in the estate, but also the general public!

The court in Matter of Patrick added that there is a broad presumption that the public is entitled to access to judicial proceedings and court records, and that a party seeking to seal court records has the burden to demonstrate *compelling circumstances* to justify restricting public access. The Judge characterizes "compelling circumstances" as substantial. He also noted that confidentiality was clearly the exception, not the rule.

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Free Workshops

June 2, 2015

Jamestown Hampton Inn with
Chad Murray
Community Investment
Services
6:30 to 8:30 p.m.

July 28, 2015

Springville Country Club with
Laura Dealy
Manning & Napier
6:30 to 8:30 p.m.

Publicity in Probate cont'd.

The Court left open the possibility of a future application for sealing records, however, it would have to be at a time when the executors could show that the information would likely result in harm to a compelling interest of the estate, which would have to be based on facts as they exist at that time. The practical problem of that scenario is that important financial information may have already been exposed before the executors could show that it then became harmful to the estate.

Is there a solution? Yes. Utilizing trusts to hold and administer peoples' assets will in all likelihood avoid the need for involving the Probate Court, or any court, in the administration of the trust estate. The trustees of the trust are free to withhold information from non-beneficiary third parties and enter into Confidentiality Agreements with potential suitors of a deceased owner's business interest. We at Brooks & Brooks have assisted hundreds of clients in arranging their assets in trust form to avoid the necessity of probate and court involvement.

Another Problem with Joint Bank Accounts

A recent Maryland case, *Wagner v. State of Maryland (Md. Ct. Of Special App., No. 2299, Oct. 30, 2014)* points out the problems associated with joint accounts between non-spouses. The substance of the Wagner case was that at least in the State of Maryland, a co-owner of a joint account can be guilty of theft for stealing from the account.

The facts of the case are as follows: father asked to daughter to assist him with his finances (an all too often occurrence). To facilitate this, father added daughter to his bank account as a joint owner. Later, daughter withdrew money from the account for her personal use. Apparently this upset her father, because the daughter was charged with theft from the account.

At trial, the daughter argued that she could not be charged with theft because both she and her father owned the account equally. This would be true especially in New York, where New York Banking Law specifically states that adding a joint owner to the account constitutes making a gift of one-half of the money to the account. However, at trial the father testified that he added his daughter to the account only so that she could access his money to pay his bills. After trial, the Trial Court found the daughter guilty of theft and she appealed. The Maryland Court of Special Appeals affirms the conviction, holding that she could be guilty of theft from stealing from a joint account. The Court reasoned that "titling an account as 'joint owners' presumptively creates an ownership interest in both parties, but that presumption can be rebutted by evidence of a contrary intent of the original owner of the account." This analysis is also true in New York State. However, the problem is that someone must come forward with evidence that the account was not intended to be a true joint account with right of survivorship. In the Wagner case, the best evidence was the testimony of the father himself. Unfortunately, most of the cases we have seen over the years have involved the rest of the family after the elder joint account owner has died. Without independent evidence to clearly show that the account was not intended to be a true joint account with right of survivorship, it is a very uphill battle for an executor of an estate to prove that the surviving joint owner is not entitled to the entire account.

Over the years we at Brooks & Brooks have cautioned people to be very careful about establishing joint accounts with anyone other than a spouse. If a person needs assistance in paying bills, giving a Power of Attorney to a third party is a better answer to the problem.

To the optimist, the glass is half-full. To the pessimist, the glass is half-empty. To the engineer, the glass is twice as big as it needs to be.