

# Stim & Warmuth, P.C.

In this issue we will discuss some topics which frequently come up in our estate practice. We hope this is of help to you.

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## Health Care Proxy

For the last ten years, a competent adult in New York may appoint a health care agent<sup>1</sup>. The health care agent has the authority with certain limitations to make health care decisions on your behalf if you lack the capacity to make your own health care decisions. An alternate agent may also be designated to act under certain circumstances. The appointment of a health care agent is done by the execution of a health care proxy which must be signed and dated in the presence of two adult witnesses who must also sign the proxy.

## Power of Attorney

You may authorize an agent in writing to perform specified acts on your behalf. You do this by executing a power of attorney. New York law prescribes forms for a durable power of attorney which continues should you become disabled or incompetent, a nondurable power of attorney which ceases to be effective should you become disabled or incompetent, and a power of attorney which is effective at a future time or the occurrence of a

specified contingency (springing power of attorney)<sup>2</sup>. A power of attorney can be used for real estate transactions, banking transactions and other matters. A power of attorney may be revoked and it terminates at your death.

## Will

A will is an oral declaration or written instrument made as prescribed by statute to take effect upon death whereby you dispose of property, direct how it shall not be disposed of, dispose of your body or any part thereof, exercise a power, appoint a fiduciary and make any other provision for the administration of your estate and which is revocable during your lifetime<sup>3</sup>. If you die without a will, you die "intestate" and your estate goes to your distributees. A distributee is a person entitled to take or share in your property under the statutes governing descent and distribution<sup>4</sup>. In New York, if you die intestate and are survived by a spouse and issue (descendants in any degree from a common ancestor), the spouse receives \$50,000 and 1/2 of the residue and the balance goes to the issue<sup>5</sup>. This may not be how you want your estate distributed. It is best to have a will which reflects your wishes, rather than relying on the rules governing intestate succession.

## Will Contests

Even when you execute a will, it can be contested after your death in a probate proceeding. A will is probated or proved by bringing a probate proceeding in the Surrogate's Court. The Court must be satisfied that the will is genuine and validly executed before admitting the will to probate. The testator must also

have been competent to make a will at the time of its execution and not under any restraint<sup>6</sup>. The probate of a will can be contested by any person whose interest in property or in the estate would be adversely affected by the admission of the will to probate<sup>7</sup>. These will contests do occur. Our office is currently handling several contested probate proceedings. There are steps you can take to avoid having your will successfully challenged.

### **Right of Election**

Another area which engenders litigation is the right of election by the surviving spouse. Even if you disinherit your spouse in your will, your spouse has a personal right of election to take a share of your estate<sup>8</sup>. The elective share in New York is currently a pecuniary amount equal to the greater of \$50,000 (or the capital value of your net estate if the net estate is less than \$50,000) or 1/3 of the net estate. In computing the net estate, certain assets called testamentary substitutes are included. Some testamentary substitutes are Totten Trusts, joint bank accounts, joint tenancies, certain transfers to trusts and gifts in contemplation of death (gifts causa mortis). During your lifetime, your spouse may waive or release a right of election against a will or testamentary substitute.

### **Pro Bono Work**

Attorneys are urged to provide at least 20 hours of pro bono (free) legal service to poor persons each year<sup>9</sup>. In the past two years our firm handled three matters on a pro bono basis. In addition, Glenn did volunteer work for the

Long Island Association for Aids Care (LIAAC) including bankruptcy representation and estate counseling.



### **Recent Decision**

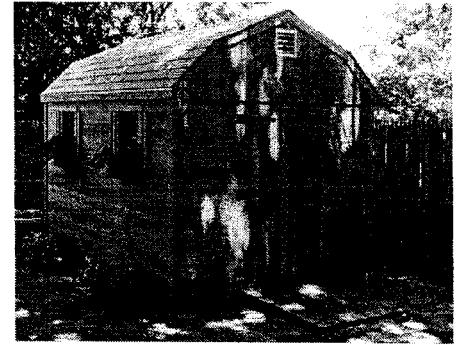
**Stim & Warmuth** represented a landowner in a suit in which a real estate developer claimed that there was an oral contract for the sale of land<sup>10</sup>. The general rule is that oral contracts for the sale of land are unenforceable. However, the developer relied on an exception to this rule known as the "part performance" exception. The developer claimed that it had performed several acts including ordering a survey, doing revised engineering and ordering a title report as well as attempting to clear title exceptions and scheduling a closing. The developer claimed that as a result of the oral contract and the acts performed by it, our client should be forced to sell the property.

The Court held that the acts performed by the developer were the types of acts which would be done in anticipation of entering into a contract and that they did not meet the part performance standard. As a result, our client was able to keep his property. This decision was featured in the Long Island Litigation Review of the New York Law Journal.

### **Web Site**

We told you in a past issue of our newsletter that we were in the process of setting up a website. We have retained an award-

winning graphic designer, Sarah Friedland, to design our site. You can check out her work at [www.sarahfdesign.com](http://www.sarahfdesign.com). A preliminary color test for the **Stim & Warmuth** site can be found at [www.sarahfdesign.com/stimwarmuth/pjtestcolors.html](http://www.sarahfdesign.com/stimwarmuth/pjtestcolors.html).



### **New Storage Facility**

Once your matter is concluded, we retain your closed file for seven more years. As you can imagine, this requires a large amount of storage space. We recently established a new storage facility (pictured above) for our closed files.

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<sup>1</sup>Public Health Law Article 29-C.

<sup>2</sup>General Obligations Law Title 15.

<sup>3</sup>EPTL Section 1-2.19(a).

<sup>4</sup>EPTL Section 1-2.5.

<sup>5</sup>EPTL Section 4-1-1(a)(1).

<sup>6</sup>SCPA Section 1408.

<sup>7</sup>SCPA Section 1410.

<sup>8</sup>EPTL Section 5-1.1-A.

<sup>9</sup>Pro Bono Resolution adopted by the Administrative Board of the Courts in May 1997.

<sup>10</sup>*Forest Road Development Corp. v. Nemeth*, Index No. 99/10457 (Sup. Ct., Suffolk Co.).