MSBA PROBATE & TRUST LAW SECTION E-NEWSLETTER

February 2022

Call for Submissions

We are always looking for attorneys to write brief articles for this newsletter. Articles can focus on any issues relevant to probate and trust law. This newsletter is distributed to the Probate and Trust Law Section membership, which consists of approximately 1,023 practitioners. Writing for the newsletter is a great way to share your knowledge and expertise with your colleagues.

If you are interested in submitting an article, please contact Kiley Henry (henry.kiley@dorsey.com) or Jenny Colich (colich.jennifer@dorsey.com) with your idea.

Please visit the Section's website for ideas and to see the various articles that have been written in the past.

Best Regards,
Kiley Henry & Jenny Colich
Probate & Trust Newsletter Editors

Upcoming Events and CLE Programs

- **Greater MN Probate & Trust Study Group Conference Call**
  - Wednesday, March 16, 2022, 9:00 a.m.; Wednesday, April 20, 2022, 9:00 a.m.
  - Call-in Number: (888) 354-0094; Passcode: 9295091072
  - Contact Bradley W. Hanson (bhanson@quinlivan.com; (320) 251-1414) with any questions or to join the group

- **MSBA Probate & Trust Law Section Meeting**
  - Thursday, March 16, 2022, 3:30 p.m.
  - Location: Due to COVID-19, the meeting will be held virtually
  - Contact Tram Nguyen (tnguyen@mnbars.org) with any questions or if you would like to attend the meeting virtually

- **CLEs**
  - HCBA, February 24, 2022: Real Estate in Estate Administration - How to Handle Real Estate Through Trusts, Probates, and Non-probate Transfers
  - Minnesota CLE, February 24, 2022: Estate Planning for the Non-Specialist
  - HCBA, March 4, 2022: Virtual Tour of Minnesota State Law Library & Conversation with Judge Michelle A. Larkin
  - MSBA, March 9, 2022: All Rise - a Dialogue with the Bench about Probate and Trust Cases
  - MSBA, March 9, 2022: New Lawyers Social at Topgolf
  - MSBA, March 9, 2022: All Rise - a Dialogue with the Bench about Probate and Trust Cases

- MSBA, March 22, 2022: Bartenders Wanted | Women Need Not Apply
- Minnesota CLE, March 29, 2022: Litigating Probate & Trusts Disputes in 2022
- Minnesota CLE, April 27, 2022: Retirement Accounts & Social Security Benefits in Estate Planning
- Minnesota CLE, June 13 and June 14, 2022: 2022 Probate and Trust Law Section Conference

Reimbursement For COVID-19 Funeral Expenses And Medical Bills: Help Is Available

By: Michele R. Loughrey Tschida, Hellmuth & Johnson

If you know any loved ones that have passed due to COVID-19, they may be eligible for reimbursement for funeral expenses. That's right, FEMA (Federal Emergency Management Agency) will reimburse up to $9,000 per death and up to $35,000 per applicant, if multiple deaths.

REIMBURSED FUNERAL EXPENSES

As of January 3, 2022, FEMA has provided over $1.6 billion to more than 247,000 people to assist with COVID-19 related funeral expenses for deaths occurring after January 20, 2020.

How do I qualify?

- The applicant must be a United States citizen
- Funeral expenses must have occurred on or after January 20, 2020
- You will need a certified copy of the death certificate
- The death certificate MUST state that the cause of death "may have been caused by COVID-19" or "was likely the result of COVID-19 or COVID-19 symptoms" (Note: If the death occurred between January 20, 2020 and May 16, 2020, and the death certificate does not state that the death was attributed to COVID-19, FEMA may accept a signed statement by a medical official or coroner who certified the death and linked it to COVID-19)
- The death must have occurred in the United States

What is covered?

FEMA will reimburse up to $9,000 for funeral expenses. Eligible expenses included, but not limited to:

- Transportation to identify the deceased
- Transfer of remains
- Burial plat or cremation niche
- A marker or headstone
- Clergy or officiant services
- The use of funeral home equipment or staff
- Cremation or interment costs

How do I apply?

- Provide FEMA a certified copy of the death certificate
- Provide receipts for all funeral expenses that are NOT covered by funeral assistance that would be duplicative
- Provide documents or receipts for funeral expenses from other sources, if any (i.e. burial/funeral insurance, donations, government programs or non-profit organizations)

Documents can be uploaded to the FEMA website at DisasterAssistance.gov; faxed to 855-251-3452 or mailed to: COVID-19 Funeral Assistance, P.O. Box 10001, Hyattsville, MD 20782.

The next step is to call FEMA at 800-985-5990 (no online applications will be accepted). Simply provide:

- Your name, social security number, date of birth, mailing address and phone number
- The deceased's name, social security number, date of birth, location or address where he/she died
- The name and same info for up to one co-applicant if more than one person incurred expenses besides yourself

For further information go to:

https://www.fema.gov/disaster/coronavirus/economic/funeral-assistance

REIMBURSED MEDICAL BILLS FOR THE UNINSURED

In addition, the Administration is providing support to health care providers fighting the COVID-19 pandemic through the COVID-19 Claims Reimbursement to Health Care Providers and Facilities for Testing, Treatment and Vaccine Administration for the Uninsured Program. This applies to ALL uninsured people, regardless of their immigration status.

Therefore, if you are handling a Probate that involved a COVID-19 death, be aware that the medical bills may be waived and a Medical Assistance Lien should not be allowed. I have a current client who lost her husband to COVID-19. She received bills in excess of $400,000 from a hospital provider and $33,000 from the transportation services that had to airlift him to an alternative hospital. Interestingly, the bill for the $33,000 was waived with little problem. However, we are still battling the larger bill for his 2-week hospital stay before he passed. Clearly, not all medical providers are aware of how this program works. This is unchartered water for all. Just be aware that this help exists.

Hearing the Dead Speak: Hearsay in Probate Litigation

By: Jennifer Olson, Best & Flanagan

All litigators are familiar with the broad outlines of the hearsay rule, and probably with at least some of its exceptions. Generally, hearsay is not admissible.[1] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[2] But what if your entire case hinges on the intent of someone who cannot testify at trial because he or she has passed away?

This is a unique challenge facing litigators who take probate disputes to trial. The outcome of probate litigation hinges on the testator's intent, but the testator is necessarily unable to provide testimony. As a result, when the parties dispute the validity or terms of a will, they may seek to admit out-of-court statements the testator made to family, friends, and lawyers. But is witness testimony on statements the testator made before death admissible when offered to prove the truth of the testator's statement?

The answer depends—first on whether the testator's statement is forward-looking, backward-looking, or a statement of present sense, and, second, for backward-looking statements, whether the statement is related to the testator's estate plan.

The Repeal of the Dead Man's Statute

Until its repeal in 1987, Minnesota's dead man's statute provided that a person interested in the outcome of a probate litigation was incompetent to testify regarding conversations with a deceased person.[3] The statute was intended to reduce the possibility of perjury, but because the statute made it difficult for litigants to prove legitimate claims, the legislature repealed it.[4]

After repeal of the dead man's statute, the Minnesota Rules of Evidence were updated to provide that "[a] witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof."[5] But as the Minnesota Court of Appeals has pointed out, Rule 617 does not require the admission of a decedent's conversations with others, and it does not supersede other rules of evidence prohibiting the admission of such testimony on other grounds—such as the hearsay rule.[6]

The State of Mind Exception

Rule 803(3), the existing state of mind exception to the hearsay rule, sheds some light on the admissibility question:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.[7]

A close reading of the rule suggests the following principles:

- A testator's statements, whether related to past or future acts, are admissible to show intent so long as the statements are related to the execution, revocation, identification, or terms of the will.
- A testator's statements about his or her existing state of mind, emotion, sensation, physical condition, intent, or plan for the future are admissible to show intent or plan.
- But a testator's statements regarding past acts unrelated to the will are inadmissible hearsay.

Very few Minnesota cases analyze the issue, but the limited case law applying the hearsay rule to testimony about statements a decedent made to a witness supports this reading.

The Minnesota Court of Appeals suggested that hearsay statements offered to prove the testator's state of mind are admissible in *In re Estate of Perrault*.[8] There, the proponents of a will offered testimony from a family friend about a conversation he had had with the testator's husband.[9] The witness testified that the testator's husband said that he and the testator made new wills to change the beneficiaries, and that they destroyed the old wills.[10] The Court recognized that Rule 803(3) creates an exception to the hearsay rule for statements of the declarant's then-existing state of mind.[11] But the Court went on to conclude that the exception did not apply to the testimony at issue because the witness testified about statements made by the testator's husband rather than by the testator herself.[12] Because the statements were not the testator's, they were not admissible under Rule 803(3) to prove her state of mind.[13]

In *Estate of Jones by Blume v. Kvamme*, the Minnesota Supreme Court concluded that a decedent's statement of particular intention or belief is competent evidence of the existence of the decedent's belief.[14] There, the decedent was an employee and shareholder in a company that required employees to sell their stock back to the company on retirement.[15] When the decedent retired, the defendant offered to buy his stock.[16] At trial, there was a dispute about whether the decedent understood that the stock had been purchased by the defendant on behalf of the company or by the defendant individually.[17] The trial court admitted testimony from the decedent's wife about statements he made to her about his belief that only the company could repurchase the stock, and that the defendant was purchasing stock from the decedent on the company's behalf.[18] On appeal, the Minnesota Supreme Court confirmed that the statements were admissible because they were not admitted to prove an underlying fact, but rather were admitted to show the decedent relied on the defendant's statements that he was purchasing the stock on behalf of the company.[19]

Two cases decided by the Minnesota Supreme Court before Minnesota adopted the Rules of Evidence also provide support for this reading of how the hearsay rule applies to a testator's statements. In *Dougherty v. Garrick*, a 1931 decision, the Court observed that testimony about a decedent's statements was admissible to show "the mental condition of the decedents, to show incompetency to make a will or contract."[20] That same year, the Court distinguished between a testator's statements offered to prove the speaker's state of mind, and those offered to prove the truth of the matters asserted:

> It is true that declarations of a testator indicating his condition or state of mind are admissible in a will contest where competency or undue influence are the issues, but they are not admissible as proof of the facts declared or stated in the declaration.[21]

Purpose of the Hearsay Rule

This approach makes sense if you consider the purpose of the hearsay rule—to ensure that evidence presented to factfinders is inherently reliable and trustworthy and is tested by cross-examination.[22]

In a 1933 United States Supreme Court decision, Justice Benjamin Cardozo explained that the rules of evidence are intended to minimize confusion:

> It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of

> practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.[23]

This purpose is reflected in 19th century decisions from the United States Supreme Court and courts in Massachusetts and England addressing the admissibility of a testator's statements. For instance, in 1868 the Massachusetts Supreme Court considered whether statements a testator made after she executed her will were admissible in an undue influence case.[24] The Court concluded the statements were not admissible to prove undue influence, but that they were admissible to show the testator's mental state:

> The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity, and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it.[25]

The Court explained that such statements cannot be admitted to prove the fact of fraud or undue influence because the decedent was not available to explain or contradict the statements.[26] "Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve."[27]

Similarly, in *Mutual Life Insurance Co. of New York v. Hillmon*, the United States Supreme Court explained that a testator's statements were admissible to prove a testator's state of mind because "[i]ntention, purpose, mental peculiarity, and condition are mainly ascertainable through the medium afforded by the power of language."[28]

The *Hillmon* Court relied on *Sugden v. St. Leonards*, an English appellate court decision involving a dispute about the terms of a lost will.[29] The English court concluded that where a will was lost, a testator's prior instructions or statements of what he intended to do in his will were admissible to prove the contents of the will.[30]

Using Rule 803(3) at Trial

Putting these principles into practice, Rule 803(3) recognizes the unavailability of the witness with the best—and perhaps only—knowledge of what the testator intended with respect to his or her estate plan by allowing testimony about three kinds of statements made by testators: (1) statements related to present state of mind, (2) statements related to future intent, and (3) statements related to past acts about the creation, revocation, identification, or terms of the testator's will.

When witnesses testify during a probate trial, litigators should carefully consider any testimony about the testator's statements regarding his or her past acts. If the statements did not involve the creation, revocation, identification, or terms of his or her will, they are inadmissible under Rule 803(3). But forward-looking statements, statements of intent, and backward-looking statements related to the creation, revocation, identification, and terms of the testator's will are admissible.

A few examples illustrate how the rule works:

- If a witness testifies that the testator told her he wanted his unmarried romantic partner to inherit the testator's house, and that he does not want his children to inherit because he had already been generous with them during the testator's life, those statements are admissible. The statements indicate the testator's future intent and present state of mind.
- If a witness testifies that the testator told the witness he transferred his business five years ago because the testator no longer wanted to manage it, that statement is inadmissible. It relates to a past action unrelated to the creation, revocation, identification, or terms of the testator's will.
- If a witness testifies that the testator told the witness that one year ago he met with his attorney and changed his will to exclude his sons because he had had a falling-out with them, that statement is admissible. Although the statement relates to a past act, the statement relates to the terms of the testator's will.

If a litigator expects this issue to come up during a probate trial, she should consider making a written motion in *limine* that includes a thorough explanation of how Rule 803(3) applies. While hearsay objections must also be made during witness testimony, there is often less opportunity for a nuanced discussion in the rush of trial. Presenting arguments in advance allows litigators to present the court with a detailed explanation of how the state of mind exception applies to testimony about a testator's statements.

Keeping these principles gleaned from a close reading of Rule 803(3) top of mind will help you make quick decisions about when and how to make hearsay objections during your probate trial.

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[1] Minn. R. Evid. 802.

[2] Minn. R. Evid. 801(c).

[3] Minn. Stat. § 595.04 (1986), *repealed by* 1987 Minn. Laws ch. 346 § 18, at 2222; *see* Bronczyk v. Bronczyk, Case No. A09-1004, 2010 WL 1029738, at *3 (Minn. Ct. App. Mar. 23, 2010).

[4] *See In re* Estate of Lea, 222 N.W.2d 92, 95-96 (Minn. 1974); Minn. R. Evid. 617 Committee Comment - 1989.

[5] Minn. R. Evid. 617.

[6] *See* Bronczyk, 2010 WL 1029738, at *3; Manderfeld v. Krovitz, 539 N.W.2d 802, 809 (Minn. Ct. App. 1995).

[7] Minn. R. Evid. 803(3).

[8] Case No. A09-1103, 2010 WL 2035714, at *5 (Minn. Ct. App. May 25, 2010).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 449 N.W.2d 428, 431 (Minn. 1989).

[15] *Id.* at 429-30.

[16] *Id.* at 430.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 431.

[20] 239 N.W. 153, 155 (Minn. 1931).

[21] Reek v. Reek, 239 N.W. 599, 600 (Minn. 1931).

[22] *See* Lepak v. Lepak, 261 N.W. 484, 485 (Minn. 1935) (observing purpose of hearsay rule to "reject testimonial assertions untested by cross-examination" and stressing the "absence of such guaranty of trustworthiness as would be furnished by the oath of the declarant").

[23] Shepard v. United States, 290 U.S. 96, 104 (1933).

[24] Shailer v. Bumstead, 99 Mass. 112 (Mass. 1868).

[25] *Id.* at 120.

[26] *Id.* at 122.

[27] *Id.*

[28] 145 U.S. 285, 298 (1892).

[29] *Id.* at 297-98 (*citing* Sugden v. St. Leonards, 1 Prob. Div. 154 (1876)).

[30] *Id.* at 298.

This article was originally published on January 10, 2022 in the digital edition of Hennepin Lawyer presented by the Hennepin County Bar Association, and is available through this link.

University of Alabama School of Law Online LL.M. Degree Program

Correspondence received from Daniel Powell, Associate Dean for Graduate Law Programs at the University of Alabama School of Law

Bar Section Members,

I am the Associate Dean for Graduate Law Programs at the University of Alabama School of Law. I am providing you information about Alabama's online LL.M. degree concentrations in Business Transactions and Taxation.

Both of our programs are offered through live, interactive, internet technologies and they provide an opportunity for your bar members to gain further qualifications and distinctions in tax or business without leaving their jobs. They are also both 24 credit hour programs that most students complete in either one or two years. We are also currently offering a Juris Masters for non-lawyers in these same areas.

The course of study for the business transactions program is interdisciplinary in fields of law and business, including tax, finance, intellectual property, entrepreneurship, and traditional corporate classes. It is designed to train students to serve the needs of clients throughout the life cycle of a business venture beginning with formation and choice of business entity, then addressing financing in the growth phase, possible reorganizations and mergers as the business matures, and

then finally the law effecting recession and dissolution. The curriculum makes the program particularly well suited for associates who need training in transactional skills.

The tax program provides students with a broad coverage of tax law but also the opportunity to choose electives in Estate Planning or Business Tax. Required courses include Personal Income Tax, Corporate Tax, Partnership Tax, Capital Transactions, Tax Procedure and Tax Research. Estate planning students also take Estate and Gift, Income Tax of Estates and Trusts and Estate Planning. Business tax students take Advanced Corporate and Advanced Partnership Tax. The program also offers electives in International Tax, Deferred Compensation, State and Local and Criminal Tax Procedure to name a few. Students in the business program may take electives in the tax program and vice versa.

The interactive technology has made it possible to recruit, for both programs, the nation's leading professors and practitioners in their fields wherever they are located. The technology also allows the instructors and students to see and talk to each other. Lawyers take classes live any place they have a high speed internet connection.

For over the past 15 years, the Alabama Law School has been ranked among the top public programs in the country. Tax and Business Law are fields where an LL.M. degree can add the greatest value to one's legal career, and Alabama's programs deliver the degree in an efficient and economical way. The Program's relatively modest tuition, interactive quality, and distinguished Faculty are among the factors that distinguish it from other programs.

If you have questions about our LL.M. concentrations in Tax or Business Transactions, or would like to see an online demonstration, feel free to e-mail me directly at dpowell@law.ua.edu or call my direct line, 205-348-2648.

More information can be found by visiting https://www.law.ua.edu/llmdegrees/. Thank you.

Southern Minnesota Regional Legal Services (SMRLS)
UREGENT REQUEST: Call for Volunteers

SMRLS has a number of fairly urgent guardianship cases for which it needs volunteer attorneys, in addition to a general need for a network of pro bono attorneys willing to assist families of disabled individuals with guardianships or other support tools like POAs. SMRLS uses person-centered planning to best serve clients who contact us with a legal need for a supportive decision-making tool and are not able to afford traditional legal services. Many may not speak English and many are refugees who are new to the United States, although SMRLS can provide translators. SMRLS is seeing a large increase in these cases. Most volunteers spend 20-30 hours over the course of several months on a case like this. Volunteer attorneys need to have some experience with guardianship or person centered planning, but SMRLS can provide access to mentor volunteer attorneys and a training packet. SMRLS screens cases in advance of placement for a volunteer attorney to ensure that they meet criteria like pursing guardianship after having a physician recommend it. SMRLS has two volunteer coordinators to provide support for attorneys doing pro bono, malpractice insurance for volunteers, and CLE credit for pro bono hours.

To get more involved or sign up to volunteer, click here or contact Emily Bowen at emily.bowen@smrls.org.

Other Pro Bono Opportunities

Central Minnesota Legal Services:
Website: https://www.centralmnlegal.org/volunteer-attorney-program/new-attorneys/
Contact: (320) 257-4873 (St. Cloud); (320) 403-1051 (Willmar)
Geographic scope: Anoka, Benton, Big Stone, Chippewa, Chisago, Isanti, Kandiyohi, Lac Qui Parle, Lincoln, Lyon, Meeker, Mille Lacs, Morrison, Renville, Sherburne, Stearns, Swift, Todd, Wright, and Yellow Medicine Counties

Mid-Minnesota Legal Aid:
Website: https://mylegalaid.org/support-our-work/volunteer
Contact: (612) 746-3765; cdaly@mylegalaid.org
Geographic scope: Anoka, Benton, Big Stone, Chippewa, Chisago, Hennepin, Isanti, Kandiyohi, Lac Qui Parle, Lincoln, Lyon, Meeker, Mille Lacs, Morrison, Renville, Sherburne, Stearns, Swift, Todd, Wright, and Yellow Medicine Counties. Some services are available statewide

Southern Minnesota Regional Legal Services:
Website: https://www.smrls.org/volunteer
Contact: emily.bowen@smrls.org
Geographic scope: Blue Earth, Brown, Carver, Cottonwood, Dakota, Dodge, Faribault, Fillmore, Freeborn, Goodhue, Houston, Jackson, Le Sueur, Martin, McLeod, Mower, Murray, Nicollet, Nobles, Olmsted, Pipestone, Ramsey, Redwood, Rice, Rock, Scott, Sibley, Steele, Wabasha, Waseca, Washington, Watonwan, and Winona Counties

Volunteer Lawyers Network, LTD.:
Website: https://www.vlnmn.org/volunteer
Contact: (612) 752-6655
Geographic scope: Primarily Hennepin, but some opportunities in Anoka, Ramsey, and Statewide

Legal Aid Service of Northeastern Minnesota:
Website: https://lasnem.org/pai/
Contact: Eve Utyro at eutyro@lasnem.org
Geographic scope: Aitkin, Carlton, Cass, Cook, Crow Wing, Itasca, Kanabec, Koochiching, Lake, Pine, and St. Louis Counties

Legal Services of Northwest Minnesota, Inc.:
Website: https://lsnmlaw.org/volunteer/
Contact: Kristi Lanoue at klanoue@lsnmlaw.org (Alexandria); Ruth Ruch at rruch@lsnmlaw.org (Moorhead)
Geographic scope: Becker, Beltrami, Clay, Clearwater, Douglas, Grant, Hubbard, Kittson, Lake of the Woods, Mahnomen, Marshall, Norman, Otter Tail, Pennington, Polk, Pope, Red Lake, Roseau, Stevens, Traverse, Wadena, and Wilkin Counties

Legal Assistance of Olmsted County:
Website: https://laocmn.org/volunteer/
Contact: Victoria Ness at victoria@laocmn.org; (507) 287-2036
Geographic scope: Olmsted County

Cancer Legal Care:
Website: https://www.cancerlegalcare.org/donate/volunteer.html
Contact: (651) 917-9000
Who they serve: Minnesotans affected by cancer
Geographic scope: Statewide

Rainbow Health:
Website: https://rainbowhealth.org/community-resources/legal-advocacy/
Contact: Lynn Mickelson at Lynn.Mickelson@rainbowhealth.org; (612) 373-9160
Who they serve: People living with HIV and LGBTQ communities
Geographic scope: Statewide

For more information, contact Katy Drahos at kdrahos@mnbars.org.

Kiley Henry (henry.kiley@dorsey.com); Jenny Colich (colich.jennifer@dorsey.com)

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