

**THE ESTATE AND PROBATE CLE COMMITTEE OF THE  
PALM BEACH COUNTY BAR ASSOCIATION**

**MARCH 2, 2020**

Current Issues of  
Administration/Litigation  
Between Florida and  
New York

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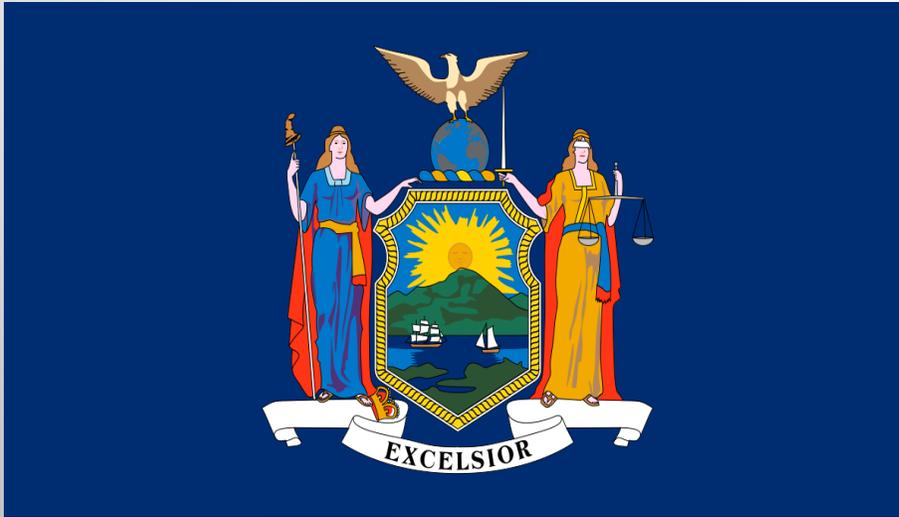
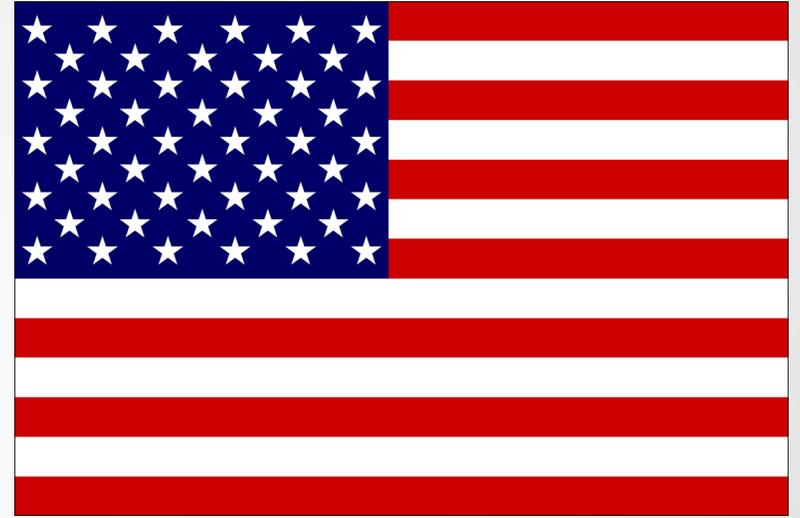


- v. -

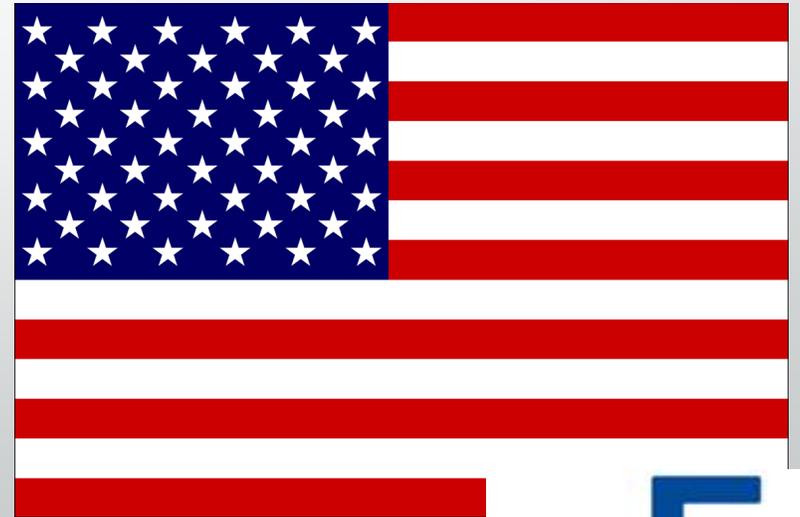




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- v. -





**N.Y. Supreme Court**



**N.Y. Surrogate's Court**



**Commercial Division of  
N.Y. Supreme Court**



# Personal Jurisdiction: State Long-Arm Statutes

- FLA. STAT. ANN. § 48.193 (1)(a); see also FLA. STAT. ANN. § 736.0202 (trusts)
- C.P.L.R. § 302(a)

# Personal Jurisdiction: Federal Due Process

“The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there.”

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)

“[I]n cases such as this, the trial court will have to hold a limited evidentiary hearing in order to determine the jurisdiction issue [of ‘minimum contacts’].”

*Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 503 (1989)

# Subject Matter Jurisdiction

- Varies by state and by court.
- Never waivable.
- Can be raised at any time in the proceeding.
- Can be raised *sua sponte* by the court.

# Probate Exception to Federal Court Jurisdiction

“[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. Thus, the probate exception ***reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate***; it also precludes federal courts from endeavoring to dispose of property that is ***in the custody of a state probate court***. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.”

*Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006) (citations omitted; emphasis added)

# Circuit Court Jurisdiction in Florida

“Circuit courts . . . shall have exclusive original jurisdiction . . . of proceedings ***relating to the settlement of the estate[s] of decedents*** and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate.”

FLA. CONST. art 5. § 20(c)(3); FLA. STAT. ANN. § 26.012(2)(b), § 717.1242(1) (emphasis added)

“The circuit court has original jurisdiction in this state of all proceedings arising under this [Florida Trust Code].”

FLA. STAT. ANN. § 736.0203

# Potential Benefits of Florida State Courts Over New York State Courts

- Relative speed toward final resolution.
- Get into court much quicker than in New York.
- Significantly lighter briefing and papers.
- Mediation more prevalent than in New York trust and estate disputes.

# Kaminsky v. Hecht

“[M]ere injury in Florida resulting from a tort committed elsewhere is insufficient to support personal jurisdiction over a nonresident defendant.”

“There are no allegations of acts or misconduct by Kaminsky in Florida. The failure to provide an accounting and any mismanagement of Trust assets occurred in New York or New Jersey.”

*Kaminsky v. Hecht*, 272 So. 3d 786, 788 (Fla. Dist. Ct. App. 2019)

# Litigating in New York State Courts



N.Y. Supreme Court



N.Y. Surrogate's Court



Commercial Division of  
N.Y. Supreme Court

# Surrogate's Court Subject Matter Jurisdiction Over Estates

“The surrogate’s court shall have jurisdiction over ***all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates*** and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.”

N.Y. CONST. art. 6 § 12(d)

“The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in ***all matters relating to estates and the affairs of decedents . . . .***”

SCPA § 201(3) - General jurisdiction of the Surrogate’s Court

# Surrogate's Court Subject Matter Jurisdiction Over *Inter Vivos* / Lifetime Trusts

"The surrogate's court of any county *has jurisdiction over the estate of any lifetime trust* which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state."

SCPA § 207(1) - Lifetime trusts; jurisdiction and venue (emphasis added)

"The court has power: . . . [t]o determine *any and all matters relating to lifetime trusts.*"

SCPA § 209(6) - Powers incidental to jurisdiction of the court (emphasis added)

"These amendments to the SCPA were adopted with the intention of imbuing the Surrogate's Court with *broad jurisdiction over inter vivos trusts*; indeed, there is no explicit limitation on the Surrogate's jurisdiction '[t]o determine any and all matters relating to lifetime trusts.'"

*Wagenstein v. Shwarts*, 82 A.D.3d 628, 631 (1st Dep't 2011) (emphasis added)



Surrogate's Court Procedure Act (SCPA); Estates, Powers and Trusts Law (EPTL);  
Civil Practice Law and Rules (CPLR); New York Codes, Rules and Regulations (NYCRR)

# Matter of Mahoney

“As decedent was a New York domiciliary whose will was probated in Albany County, this Court has subject matter jurisdiction of all of ***decedent's tangible and intangible personal property*** at issue in this proceeding, whether located in Florida or elsewhere.”

“Matters concerning the condition, value and proof of maintenance of the ***real property of decedent***, as well as proof of payment of levied fees, clearly fall within the court's powers enumerated under SCPA § 209(4) to supervise a New York domiciliary's estate.”

*Matter of Mahoney*, 62 Misc. 3d 522, 526 (Sur. Ct. Albany County 2018) (emphasis added)

# Supreme Court Subject Matter Jurisdiction

“The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided.”

N.Y. CONST. art. 6 § 7(a)

# Commercial Division Jurisdiction Provisions

“Except as set forth in subdivision (b), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interests, costs, disbursements and counsel fees claimed, are established as follows:”

Kings County	\$150,000
Nassau County	\$200,000
New York County	\$500,000
Queens County	\$100,000
Suffolk County	\$100,000
Westchester County	\$100,000

Section 202.70(a) - Rules of the Commercial Division of the Supreme Court

# Commercial Division Jurisdiction Provisions

“Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought: (1) ***Breach of contract or fiduciary duty***, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is ***alleged to arise out of business dealings . . . .***”

Section 202.70(b) - Rules of the Commercial Division of the Supreme Court (emphasis added)

# Commercial Division Jurisdiction Provisions

“The subject matter jurisdiction of the Commercial Division – including both substantial monetary thresholds and carefully chosen case types (see § 202.70[a] and [b]) – is designed to ensure that it is the forum of resolution of ***the most complex and consequential commercial matters*** commenced in New York’s courts.”

Section 202.70(g)(1) - Rules of the Commercial Division of the Supreme Court (emphasis added)

# Legal Fees



# Legal Fees in New York

- This is an extremely important question.
- In New York, a fiduciary can pay defense costs directly from the assets controlled by the fiduciary without prior court approval.
- The ability to use your adversary's money to defend against them is a significant tactical advantage, both in real terms and psychologically.

# How Does a Fiduciary Protect Reimbursement of Counsel's Fees?

- Fee affidavit (*Matter of Potts*, 213 A.D. 59 (4th Dep't 1925)).
  - Make certain to carefully document legal fee expenses.
  - Reasonable amount of hours incurred?
    - Varies with complexity of the matter.
    - Varies with amount of money at stake.
  - Reasonable hourly rate?
    - Court will reimburse for expertise.
    - Hire a fiduciary litigator.

# How Does a Beneficiary Attack Reimbursement of Counsel's Fees?

- All legal fee expenditures will be subject to disgorgement if the fiduciary is ultimately found to have engaged in undisclosed self-dealing or some other *per se* breach.
- Limited path to victory for a beneficiary.

# Allocation of Legal Fees

- SCPA § 2110 is the New York statute permitting a court to set the compensation of attorneys.
  - Not limited to victors.
  - Carefully explaining litigation strategy can help ensure reimbursement of legal fees to the fiduciary from the estate or trust.

# Matter of Hyde

“[SCPA] § 2110 grants the trial court discretion to allocate responsibility for payment of a fiduciary’s attorney’s fees for which the estate is obligated to pay—either from the estate as a whole or from ***shares of individual estate beneficiaries.***”

*Matter of Hyde*, 15 N.Y.3d 179, 182 (2010) (emphasis added)

# Conclusions

- Trust and estate litigators have lots of court options.
- Florida trust and estate litigators faced with matters touching upon New York must consider New York court options.
- Use them wisely and perhaps get a tremendous leg up on your adversary before the merits are even reached.



# Jay W. Freiberg

## *Partner*



Jay is laser-focused on efficiently obtaining wins for his clients, who hire him for his seasoned judgment in dispute resolution both in and out of the courtroom. A trusted counselor, he has deep expertise representing all types of stakeholders in all manner of sophisticated and complex trust and estate disputes. As part of this practice, he counsels private clients in potentially contentious business and personal matters regarding, among other areas, closely held businesses, real estate, and tax and insurance. An aggressive advocate, Jay's clients look to him for their thorniest matters.

Jay is admitted in numerous courts, and understands the hurdles, pitfalls, and opportunities within the courtroom setting. Partnering with local counsel, notably in Delaware and in Florida, Jay is able to provide seamless counsel to his multi-jurisdictional clientele.

Jay is an adjunct professor at Fordham University School of Law, where he has taught legal writing for over 10 years.

Prior to forming Elman Freiberg, Jay was the chair of Katten Muchin Rosenman's New York Fiduciary Litigation practice. He also served as a law clerk for the Honorable Diane Weiss Sigmund, judge for the U.S. Bankruptcy Court in the Eastern District of Pennsylvania.

Jay resides in Manhattan with his wife and two children. When not with his family or in the office, he can be found training for his next race. Jay is a veteran of numerous road races and triathlons and, on occasion, makes the podium.

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