BSR&B

JANUARY 2016 | VOL. 8 – NO. 1

Legal Notes

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A Tale Of Two Wills

By Rita G. Rich, J.D.
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No two New York State probate proceedings are the same. Let's take a closer look at two examples, each with opposite outcomes.

In the first case, a man named Frank executed a will in 2006 naming Neil, one of his two sons, as executor and sole beneficiary. Early in 2011, Frank was diagnosed with lung cancer. Frank's brother, Charles, and Charles' wife traveled to New York from their home in Florida to care for Frank. On May 24, 2011, five days before Frank died, Frank executed a new will. The new will named his other son, Frank A., as executor, with three equal beneficiaries, namely Charles and two of Frank's friends, Sonya and Rebecca. In the new 2011 will, Frank disinherited Neil.

As might be predicted, Neil petitioned the Court to admit the earlier 2006 will, rather than the 2011 will. When Neil's brother, Frank A., would not file a petition to admit the 2011 will, refusing the three beneficiaries' request to do so, Charles, Sonya, and Rebecca petitioned Surrogate's Court in a separate proceeding to admit the 2011 will.

Neil objected, and his objections revolved around the typical arguments:

- Frank's lack of capacity to make the will, and
- Undue influence by Frank's brother, sister-in-law, and Frank's two friends.

These arguments were rejected, and the Surrogate's Court dismissed Neil's objections to probate. He appealed to the Appellate Division.

Neil's arguments continued within the appeal. The Court addressed Frank's capacity, finding that even though Frank was suffering from terminal cancer and was taking many medications, testimony of the witnesses and the attorney-draftsman of the will established that **Frank was aware of the nature and extent of his property, and knew who the objects of his bounty were** (these are terms of art in probate law), both prior to and during the execution of the 2011 will. As far as undue influence by Frank's friends, Sonya and Rebecca, as well as Charles and his wife, who attended to Frank's needs during his last days, the Court found nothing in the record to support the claim.

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In July, 2014, the Appellate Division affirmed the lower court's ruling, and the 2011 will was admitted to probate.

takeaway:
It's a good practice for a client to physically destroy an existing will when a new will is executed.

This will avoid the type of hornets' nest seen in Frank's case. I strive to have a client's last will at the execution of the new will, so that he or she can tear it up in my presence. Admittedly, it's not always easy, as often clients don't know where the original will is located.

In the second case, decided on April 16, 2015, the decedent's earlier will was dated 2009; the later will was signed on February 10, 2011. The decedent, Rita, died in March, 2012, a widow with no children. Her husband, Jack, died in the 90's. Because of his health problems, Jack needed a caretaker, and so a younger man, Leo, moved in with Rita and Jack to assist with Jack's care. After Jack's death, Leo remained to assist Rita.

Rita's 2009 will was executed using the services of an attorney, Michael G. Aside from modest bequests to others, she left the bulk of her estate to Leo, and named him as her executor. In 2003, Rita had already added Leo as a joint owner with right of survivorship to one of her properties.

Now we turn to the 2011 will. But first, to set the stage, we introduce Mildred, another person who assisted Rita, primarily serving as a driver due to Rita's age and many chronic health problems. Mildred's daughter, Leah, had also been a caregiver to Rita since 2010. They, as with Leo, were like family to Rita.

Early in 2011, a secretary in the office of an attorney, Francis O., prepared a power of attorney for Rita, naming Mildred as Rita's agent. The record does not reveal who made the request. The secretary handled the execution of the document in Mildred's car, in the lawyer's parking lot. Francis O. testified that he was out of the office at that time.

Shortly thereafter, on Feb. 9, 2011, Francis O. met with Rita and Mildred. He was asked to prepare a deed so that Mildred would replace Rita as a joint owner of the property Rita held with Leo. Francis prepared the documents, but they weren't executed, because **in Francis O.'s opinion, Rita was not competent to sign.**

On Feb. 11, 2011, Rita signed a will prepared by Mildred, witnessed by Mildred's daughter, Leah, and Mildred's sister, Carol, at Rita's home, without the assistance of counsel. Keep in mind that Mildred was orchestrating other legal matters for Rita with attorney Francis O. during that same time period; assistance from counsel was certainly available.

Within the probate proceeding, Francis O. testified to his documented determinations concerning Rita's lack of legal capacity as of February 9th, which was just two days before she signed the 2011 will.

Not surprisingly, the 2011 document offered to Surrogate's Court as Rita's last will and testament was denied admission to probate.

takeaway:
It's best to take care of legal matters with the assistance of an attorney long before legal capacity becomes a question.

Snow & Ice: A Slippery Slope Of Liability For Property Owners

By Raymond P. Raiche, J.D.
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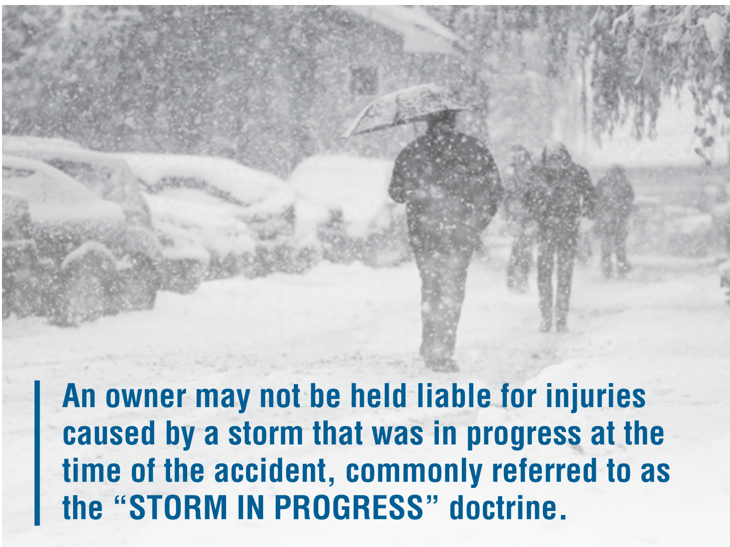
As winter approaches, it is important to consider the responsibility of a home or property owner to keep their land clear of snow and ice. This duty applies to walkways, entranceways, and parking lots.

An owner's duty to remove any accumulation of snow or ice that presents a hazard to persons entering unto the premises - or to take other remedial measures to render the property safe for use - arises where the owner has actual or constructive notice of the existence of the hazardous condition, and also has a reasonable opportunity to act upon it. Even if an owner has actual or constructive notice of the dangerous condition on the premises, the owner has no duty to clear away snow and ice until the expiration of a reasonable amount time after the end of the storm that created it.

In other words, an owner may be held liable for a hazardous condition resulting from an accumulation of snow and ice only if the owner has had reasonable time from the cessation of the precipitation to remedy the condition.



An owner may not be held liable for injuries caused by a storm that was in progress at the time of the accident, commonly referred to as the "STORM IN PROGRESS" doctrine.

An owner is under no obligation to correct a storm-related ice and snow condition while the storm is still in progress. It is unreasonable to expect a property owner to remedy the conditions created by a storm during the pendency of the storm. Such a requirement could endanger the owner, and require him or her to needlessly engage in repetitive activity.

Factors to be considered in determining what period of time to lapse is reasonable before remediation to occur include:

- The availability of labor,
- The intended use of the premises,
- The duration of the storm, and
- High winds that cause snow to drift.

Statutory provisions requiring an owner to maintain premises in a safe condition have been considered in determining what constitutes a reasonable time for the removal of snow and ice. However, inasmuch as a statute requiring owners of abutting premises to remove snow from public sidewalks in front of their premises within a specified time limit is inapplicable to private ways within the boundaries of an owner's premises.

An owner's duty to remove snow and ice from locations where persons walk or ride does not impose a duty to ensure that such precipitation will never cause harm. The owner need only act reasonably under the circumstances.

However, an owner may be held liable if snow removal efforts actually increase or exacerbate the hazardous condition caused by the natural condition of the snow. For example, the existence of snow piles creates a foreseeable risk of melting and refreezing, therefore an owner need not be required any additional notice of the possible danger arising from its method of snow clearance, apart from widely available local temperature data.

With winter weather on the way, owners should prepare now and develop a plan for cleanup of accumulating snow and ice from their property, within a reasonable period of time from the cessation of a storm, in order to prevent possible liability and future litigation.

Unwanted Occupant On Your Property Requires Legal Intervention

By Brian Newman, J.D.
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Picture yourself involved in one of the following scenarios:

Scenario 1: You go through the lengthy process of buying a new home. The closing goes well, all the documents are signed, the purchase price is paid, and you receive the keys to the house. Later that day, after a celebratory meal, you and your family pull up in front of the house with your moving van, only to discover that the seller is inside and is refusing to leave.

Scenario 2: You own a second home in the Catskills or further upstate. One summer, you and your family take a vacation for the season and arrive at the house, only to find that someone is living there, refuses to let you in, and won't leave.

Scenario 3: You decide to purchase a property at a tax sale or a foreclosure auction for a bargain, with the goal of renovating it and then selling it for a profit. You buy the property at the sale/auction and drive over to take a look, and find out that the former owner, or some other person, is still residing in the home and won't move out.

Scenario 4: You decide to let a friend of yours live in a spare bedroom in your home without having to pay rent. There isn't a written or oral lease, just your permission for your friend to stay. You and your friend then suffer a severe breakdown of your relationship, and you ask him or her to pack up and leave, but he or she won't do so.

Each of these scenarios, while uncommon, do occur, and many people who encounter them don't know what they can or cannot do to deal with them.

The first thing you need to be aware of if you find yourself in such a situation is that you cannot exercise what is called "self-help." Self-help is when you, or another person, use physical force to remove an unlawful occupant or his or her belongings from the premises, or engage in activities designed to coerce the occupant into leaving, such as cutting off the water, electricity, or heat (if they are currently in service). **Self-help is considered to be unlawful in New York in almost all situations, so engaging in such conduct would expose a property owner to significant legal liabilities.**

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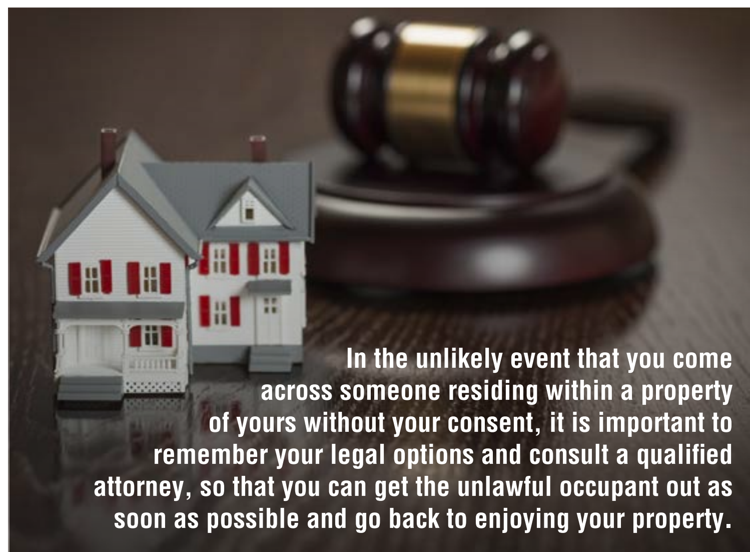
With self-help being unavailable, the recourse for the property owner is to commence a summary proceeding. **A summary proceeding is an expedited court process for the recovery of real property in certain situations.** These proceedings are most commonly applied to landlord-tenant disputes, but they also apply to non-landlord/tenant situations in specific contexts.

Section 713 of the New York Real Property Actions and Proceedings Law details 11 different grounds upon which a summary proceeding may be commenced against a non-tenant occupant of real property, including the scenarios detailed above.

This law requires that in these situations, the property owner must serve upon the property occupant a 10-day "notice to quit." The notice must detail the specific legal grounds relied upon by the property owner. If the unlawful occupant has not vacated the property within ten days of service of the notice, the property owner may then commence the summary proceeding to obtain possession of the property. This requires a notice of petition, and a petition to be prepared and filed with the local court of the municipality within which the property is located. It must then be served on the occupant between five and 12 days prior to the scheduled court date.

Afterwards, all that remains is to establish before the local court at the hearing that you own the property, and that the occupant is residing there without your consent, pursuant to the legal grounds detailed in your petition. The court will award you a judgment of possession of the property, as well as a warrant of eviction to remove the occupant from the property. You would then need to deliver the signed warrant to the county sheriff's department, which handles all evictions.



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