GENERAL OBLIGATIONS LAW 5-703 GIVES AN EQUITY COURT THE POWER TO ENFORCE AN ORAL CONTRACT FOR THE PURCHASE OF REAL PROPERTY; THE CAUSES OF ACTION SEEKING TO ENFORCE AN ALLEGED ORAL AGREEMENT GIVING PLAINTIFFS THE OPTION TO PURCHASE THE PROPERTY UPON THE OWNER'S DEATH SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, held that the general statute of frauds statute, General Obligations Law (GOL) 5-701, did not apply to the alleged oral agreement to give plaintiffs the option to buy the decedent's property upon her death. Rather GOL 5-703, which carves out an exception for specific performance of a real estate contract, applied. Decedent owned a two-unit property and plaintiffs rented the second unit. Plaintiffs alleged decedent asked them to care for her in exchange for the option to purchase. Plaintiffs did in fact care for decedent until her death. The executor refused to honor the alleged oral agreement and plaintiffs sued:

> General Obligations Law § 5-701, the general statute of frauds provision outlining which agreements must be in writing, contains no explicit statutory authority for a court, exercising its equitable powers, to grant specific performance of an oral agreement insufficiently memorialized in writing so as to satisfy the statute of frauds. Notably, in Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group (93 NY2d 229, 234 n 1), the Court of Appeals clarified that New York has not adopted a judicially created common-law exception to General Obligations Law § 5-701, which would permit a court to direct specific performance of an oral agreement in cases of part performance.
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> By contrast, General Obligations Law § 5-703, the more specific statute of frauds provision relating to contracts concerning real property, contains an explicit carve-out, which provides that "[n]othing contained in [General Obligations Law § 5-703] abridges the powers of courts of equity to compel specific performance of agreements in cases of part performance"… .
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> Here, the plaintiffs' allegations that they entered into an oral option agreement … to purchase the subject property from her estate describe, in sum and substance, "[a] contract to devise real property . . . or any interest therein or right with reference thereto" … , and therefore, this action is governed by General Obligations Law § 5-703 … . Accordingly, since the action is governed by General Obligations Law § 5-703, the plaintiffs are not foreclosed, as a matter of law, from obtaining the remedy of specific performance … . Korman v Corbett, 2020 NY Slip Op 02637, Second Dept 5-6-20

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT IN THIS CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT ACTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that summary judgment was not available in this dispute about ownership of land and personal property. Plaintiff alleged that land, personal property and the the proceeds of the timber business were his, despite the fact that the land, personal property and bank account, based upon the documentary evidence, appeared to belong to defendant. There were questions of fact whether a constructive trust had been created and whether defendant had been unjustly enriched:

> "The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment. As a constructive trust is an equitable remedy, courts do not rigidly apply the elements but use them as flexible guidelines. In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction. Similarly, courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred" … . Here, both parties concede that they had a confidential relationship. However, it is sharply disputed whether there was a promise, a transfer or unjust enrichment. * * *
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> "A person is unjustly enriched when his [or her] retention of the benefit received would be unjust considering the circumstances of the transfer and the relationship of the parties" … . Plaintiff claims this is his business, that he worked full time and utilized all funds earned in the business to purchase the equipment, personal property and the vacant land. On the other hand, defendant argues it was their business, she held title to all assets, paid for all assets and debts and paid for plaintiff's services by paying his expenses, housing and cash. Baker v Harrison, 2020 NY Slip Op 01233, Third Dept 2-20-20

WIFE'S MOTION TO BE SUBSTITUTED FOR HER DECEASED HUSBAND TO ENFORCE

THE PAYMENT OF THE SETTLEMENT IN HER HUSBAND'S SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's wife's (Jesenia's) motion pursuant to CPLR 1015 for leave to substitute herself for her deceased husband in this slip and fall case should have been granted. Defendant had settled the case and Jesenia was seeking payment:

> Contrary to the Supreme Court's determination, the settlement of the action did not preclude the granting of a motion for substitution (see CPLR 1015[a]; 1021 ...). "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)" ... . Without substitution as a party plaintiff, Jesenia may not seek relief pursuant to CPLR 5003-a. CPLR 5003-a provides that if a settling defendant fails to pay the sum due under a settlement agreement within 21 days of tender of a duly executed release and a stipulation discontinuing the action, the settling plaintiff may, without further notice, pursue the entry of a judgment in the amount of the settlement, plus interest, costs, and disbursements ... . Rivera v Skeen, 2020 NY Slip Op 01100, Second Dept 2-13-20

ORDERS ISSUED WHEN THE STAY PURSUANT TO CPLR 321(c) WAS IN EFFECT, DUE TO THE INABILITY OF PETITIONER'S COUNSEL TO CONTINUE FOR MEDICAL REASONS, SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, reversing Surrogate's Court, determined that orders issued when a stay was in effect pursuant to CPLR 321(c), due to the inability of petitioner's counsel to continue for medical reasons, should have been vacated. The petitioner is Oleg Cassini's (the fashion designer's) wife and the underlying matter is the heavily litigated (to say the least) administration of his estate. The opinion is overwhelming in its detail and cannot be fairly summarized here:

> On these appeals, we consider the interplay between CPLR 321(b)(2), which permits the attorney of record for a party to withdraw by order of the court, with the court having the ability to stay proceedings pending substitution of new counsel, and CPLR 321(c), which automatically and effectively suspends all proceedings against a party whose attorney becomes incapacitated until 30 days after notice to appoint another attorney has been served upon that party. In this contentious, complex estate litigation, the Surrogate's Court determined, in the context of a motion by the attorneys for the petitioner to withdraw from representing her, that the attorney primarily responsible for the matter had become unable to continue to represent the petitioner due to health reasons. While the Surrogate's Court relieved counsel and provided for a 30-day stay of proceedings, it failed to require that the adverse parties serve the orders relieving counsel upon the litigant whose counsel was permitted to withdraw. The adverse parties themselves failed to serve the orders and also to serve the petitioner with a notice to appoint new counsel. However, several months later, the petitioner appeared with prospective new counsel at a court conference and was advised by the court that a trial would be conducted some six weeks later, regardless of whether the petitioner was present and regardless of whether the petitioner had representation. This was, under the circumstances, the practical equivalent of more than 30 days' notice to the litigant to appoint new counsel. In conformity with the controlling statutory and decisional authorities, and to protect the litigant's right to legal representation, we conclude that the judicial determinations rendered in between the Surrogate's Court determination of incapacity and its subsequent practical notification of a deadline to appoint counsel should be vacated. Matter of Cassini, 2020 NY Slip Op 01057, Second Dept 2-13-2o

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THE APPEAL OF THE DENIAL OF PETITIONER'S REQUEST FOR AN ADJOURNMENT TO OBTAIN COUNSEL WAS NOT MOOT, DESPITE THE FACT THE TRIAL WAS HELD AND COMPLETED IN PETITIONER'S ABSENCE; THE ADJOURNMENT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, reversing Surrogate's Court, determined petitioner's motion for an adjournment to obtain new counsel should have been granted and the appeal of the denial of an adjournment was not moot. The matter was before Surrogate's Court for an accounting in the estate of Oleg Cassini, who died in 2006. At the time of the request for an adjournment three attorneys had withdrawn from the case. The trial went ahead without the presence of petitioner, Oleg Cassini's wife Marrianne, and without counsel for petitioner:

> An appeal is not moot "[w]here the case presents a live controversy and enduring consequences potentially flow from the order appealed from" ... . On the other hand, "[a]n appeal is moot unless the rights of the parties will be directly affected by the

determination of the appeal and the interest of the parties is an immediate consequence of the judgment'" ... . Here, enduring consequences flow from the order appealed from since, absent a reversal of the order appealed from, the Surrogate's Court's determination after a trial in which Marianne did not participate will bind the parties. * * *

The Surrogate was rightly concerned about the lengthy history of delay in this case, just as we are. However, there was no evident urgency that required the trial to start on July 25, 2016, as opposed to 60 days later, and any prejudice to the objectants could have been readily addressed by appropriate orders dealing with the administration of the estate and its assets. In the overall context of this long-running litigation, an adjournment of 60 days to allow Marianne's prospective counsel, McKay, to prepare for the trial should have been granted. Indeed, the failure [*6]to grant it has resulted in additional delay and expense in the conclusion of this estate. Given our preference that matters be determined on their merits, and the absence of any indication on this record that Marianne's motion for an adjournment was made solely for the purpose of delay, the Surrogate's Court should not have rejected the request out of hand. Matter of Cassini, 2020 NY Slip Op 01056, Second Dept 2-13-20

AN EMAIL EXCHANGE WAS INSUFFICIENT TO RESTART THE STATUTE OF LIMITATIONS FOR AN OTHERWISE TIME-BARRED DEBT PURSUANT TO GENERAL OBLIGATIONS LAW 17-101 (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined that an email exchange did not acknowledge a debt owed to decedent such that the statute of limitations started anew when the exchange took place in 2015. Any action on the debt was time barred:

> Jean M. Hollis (hereinafter Jean) died in October 2015, and was survived by six children. Jean's will, which was admitted to probate in February 2016, provided that "[i]n the event that any of my surviving children shall be indebted to me at the time of my demise, . . . then such indebtedness shall be deducted from any bequest made to said children." In January 2016, Paul James Hollis (hereinafter the decedent), one of Jean's children, died, and his wife, Bernadette Hollis (hereinafter Bernadette), was appointed administrator of his estate. In September 2016, the respondent Peter H. Hollis (hereinafter Peter), as an executor of Jean's estate, filed a notice of claim against the decedent's estate alleging that it was indebted to Jean's estate in the sum of $147,265.35, representing the sum of $146,765.35 borrowed by the decedent from Jean between April 2005 and January 2008, and an additional loan made by Jean to the decedent in December 2011 in the sum of $500. ...
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> The subject email arguably acknowledged that the decedent owed a pre-existing debt to Jean, inasmuch as it stated that he had been "informed" by his sister, Jeanine Hollis, that "[he] owe[s] around $140,000 to Mom." Although the subject email initially stated that "I have every intention of paying this debt," it then went on to state that "there are some mitigating circumstances that I would like to note sometime in the near future." In an email sent the next day, the decedent stated "I just want the process to be fair and not arbitrary." Since the subject email contained language inconsistent with an intention on the part of the decedent to pay the alleged debt, the court erred in concluding that the subject email renewed the statute of limitations pursuant to General Obligations Law § 17-101 ... . Matter of Hollis, 2020 NY Slip Op 00860, Second Dept 2-5-20

THE TRUST-ASSET-SUBSTITUTION AGREEMENT, SUBSTITUTING LIFE INSURANCE FOR CERTAIN ASSETS, WAS SUBJECT TO EPTL 11-1.7(a)(1); THEREFORE THE PROVISION OF THE AGREEMENT RELEASING THE TRUSTEE FROM LIABILITY WAS AGAINST PUBLIC POLICY AND THE TRUSTEE IS LIABLE FOR FAILING TO ENSURE THE LIFE INSURANCE PREMIUMS WERE PAID (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the 1992 agreement substituting life insurance for trust assets was covered by Estates, Powers and Trusts Law (EPTL) 11-1.7(a)(1) and the trustee, which owned the policies, was liable in negligence for failing to ensure the premiums were paid (the policies had lapsed). The provision of the trust-asset-substitution agreement exonerating the trustee from liability was invalid as against public policy. The matter was remitted for a determination of damages:

> The Surrogate's Court found that the 1992 agreement created a "new trust agreement" funded in part by the life insurance policies, which was not part of the testamentary trust, and therefore not governed by EPTL 11-1.7(a). The court further found that the agreement released the trustee from any promises relating to "the substitution of property," which relieved the trustee of any "liability to monitor the investment owed to the trust," released the trustee and any successor trustee "from any future lawsuit," and released the trustee of any fiduciary duty to act upon Robert's default in paying insurance premiums.

Contrary to the conclusion of the Surrogate's Court, the agreement did not create a new trust. Rather, the agreement provided for the substitution of testamentary trust property with life insurance policies. The petitioner included the life insurance policies in its final account of the testamentary trusts as worthless assets. There is no reference to any separate accounting for the life insurance policies as part of a separate trust. Thus, the duty of the trustee was governed by EPTL 11-1.7(a)(1), which states that the exoneration of a testamentary trustee from liability for failure to exercise reasonable care, diligence, and prudence is contrary to public policy. Matter of Wilkinson, 2020 NY Slip Op 00286, Second Dept 1-15-20

PARTY WHICH PURCHASED THE PROPERTY AFTER FORECLOSURE WAS COMMENCED WAS ENTITLED TO INTERVENE IN THE FORECLOSURE PROCEEDINGS BUT DID NOT HAVE STANDING TO ALLEGE PLAINTIFF BANK DID NOT COMPLY WITH NOTICE REQUIREMENTS; THE ESTATE OF THE ORIGINAL BORROWER IS NOT A NECESSARY PARTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the party (appellant) which purchased the property after foreclosure was commenced should have been allowed to intervene in the foreclosure proceedings. The Second Department further determined the estate of the original borrower was not a necessary party, the appellant did not have standing to allege plaintiff bank's noncompliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 and plaintiff's failure to serve a notice of default:

> On September 10, 2015, the plaintiff commenced this action to foreclose a mortgage on premises owned by the defendant Shawn A. Carrington. Carrington failed to answer the complaint. On March 23, 2016, Carrington sold the premises to the appellant 1698 Management Corp. ...
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> The appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale ... . Contrary to the court's determination, the appellant was not limited to continuing the action in Carrington's name pursuant to CPLR 1018. The fact that the appellant obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention ... , nor does the fact that Carrington defaulted in answering the complaint ... . Furthermore, under the circumstances of this case, the appellant's motion, made less than five months after it purchased the premises, and before an order of reference was issued, was timely ... . **US Bank N.A. v Carrington, 2020 NY Slip Op 00173, Second Dept 1-8-20**

THE TRUST PROVISION IN THE WILL WAS INVALID FOR LACK OF A BENEFICIARY; SURROGATE'S COURT'S CONSTRUCTION OF THE WILL PROPERLY EXPRESSED THE DECEDENT'S INTENT (THIRD DEPT).

The Third Department determined Surrogate's Court properly found that the trust in the will was invalid for lack of a beneficiary and the court's construction of the will effectuated the decedent's intent:

> There is no dispute regarding Surrogate's Court's determination that the trust created in article six of decedent's will is invalid due to the lack of a beneficiary. Thus, the issue turns on whether the court's construction of the will, after striking the trust, effectuated decedent's intent. In addition to creating the invalid trust, the purpose of which was to manage and continue the Dawe Family genealogical research, article six of decedent's will provides, "I am mindful of my two brothers . . . and of my other relatives, all of whom I love dearly, but I do not make any other direct testamentary disposition for any of them."... This language is unambiguous and manifests decedent's intent that none of his family members was to receive direct testamentary gifts ... . The language at the end of article six provides that, upon the termination of the trust, "all the assets of the trust . . . shall be distributed outright, free of future trust, to [respondent], a not-for-profit library . . . which promotes and facilitates genealogical research, it being my hope that said library will then preserve (and continue) the Dawe family genealogical research I have conducted (and my said related web site)." This language is similarly unambiguous, manifesting decedent's intent that respondent receive the residuary of his estate with the hope that decedent's genealogical research would be continued ... . Matter of Dawe, 2020 NY Slip Op 00017, Third Dept 1-2-20

THE EXECUTOR PROPERLY WAIVED THE ATTORNEY-CLIENT PRIVILEGE ON DECEDENT'S BEHALF TO DEMONSTRATE THROUGH DECEDENT'S ATTORNEY'S TESTIMONY THAT SHARES OF STOCK HAD BEEN TRANSFERRED TO THE EXECUTOR WELL BEFORE DECEDENT'S DEATH (FOURTH DEPT).

The Fourth Department determined the executor of the estate (respondent) properly waived the attorney-client privilege on decedent's (Anthony's) behalf and demonstrated. through the decedent's attorney's testimony, that decedent's shares in the corporation (NYSFC) had been transferred to the executor well before decedent's death. Therefore the shares were properly excluded from the estate. Despite the absence of stock certificates and corporate records, there was no showing that the executor destroyed evidence:

> ... [T]he Surrogate held a nonjury trial during which respondent, in his capacity as executor, waived decedents' attorney-client privilege, and decedents' former counsel thereafter testified that she did not include a specific bequest with respect to Anthony's NYSFC shares in his most recent will because Anthony had already transferred those shares to respondent. After the trial, the Surrogate concluded that respondent had in fact satisfied his burden and specifically established that the shares of NYSFC were sold and transferred to respondent prior to Anthony's death. * * *
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> On appeal, petitioners contend that Mayorga [302 AD2d 11] and Johnson [7 AD3d 959] support waiver of the attorney-client privilege by an executor only if the waiver benefits the estate. Petitioners assert that excluding an asset from the estate would not benefit the estate or its beneficiaries and that those cases therefore do not support a waiver of the attorney-client privilege here inasmuch as any waiver would only benefit the executor respondent. The 2nd Department, however, has permitted the waiver of the attorney-client privilege under circumstances similar to those presented here ... .
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> ... [W]e ... reject petitioners' contention that respondent should not have been allowed to waive the attorney-client privilege on decedents' behalf as executor due to his own self-interest in the testimony of the decedents' former counsel. Thus, we hereby join the 2nd and 3rd Departments in concluding that the attorney-client privilege may be waived by an executor. Matter of Thomas, 2019 NY Slip Op 08293, Fourth Dept 11-15-19