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From: Steve Leimberg's Estate Planning Newsletter
Jeff Baskies on *Fiel v. Hoffman*: Soap Opera/Probate Litigation Highlights the
Subject: Limits of State Slayer Statutes and Poses Questions Regarding Public Policy
Issues Which Should Be Explored in Many States

*“The underlying case that led to the appeal in *Fiel v. Hoffman* is the ongoing and fascinating probate of Ben Novack, Jr., an heir to the fortune of the developer of the iconic Fontainebleau hotel on Miami Beach. Ben Novack, Sr. was the primary developer and initial operator of the Fountainbleau hotel until it was lost in bankruptcy in 1977.*”

Ben Novack, Jr. was murdered in a particularly gruesome and sordid manner in July of 2009. Details of his torture and murder made national news. After Ben’s murder, a subsequent investigation into the prior death of his mother, Bernice Novack, revealed that she too was murdered, although her death in April 2009 was initially ruled accidental.

In 2012, Ben’s wife, Nancy Novack, was convicted of the crimes and sentenced to life in prison for paying hit men to torture and kill her husband, Ben, and to kill her mother-in-law, Bernice. In this probate case (and on-going litigation relating thereto), Ben’s wife, Nancy, has been treated as predeceased by the application of the Florida slayer statute which prohibits a murderer from inheriting from the estate of the person she killed. However, in a cruel twist, the alternate beneficiaries of Ben’s will, if Nancy and his mother predeceased him, were Nancy’s daughter (receiving a pecuniary bequest) and trusts for Nancy’s two adult grandsons as the residuary beneficiaries.”

Jeff Baskies provides members with his fascinating analysis of *Fiel v. Hoffman*.

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Before we get to Jeff’s commentary, members should note that a new **Podcast** by **Bob Keebler** and **Vince Lackner** was recently posted to the **LISI** homepage. In their commentary, Bob and Vince discuss the basis consistency rules in Code sections 1014(f) and 6035, as well as Form 8971 that was recently released by the IRS. Click this link to listen: [Bob Keebler and Vince Lackner](#)

Now, here is Jeff Baskies' commentary:

EXECUTIVE SUMMARY:

Genuinely interesting and debatable public policies issues regarding state slayer statutes are rising from the ashes of a smoldering soap opera/probate litigation in Fort Lauderdale, Florida. *Fiel v. Hoffman*, 169 So. 3d 1274 (4th DCA, 2015) stems from a case worthy of a good old fashioned soap opera, or maybe "COPS" or a similar crime melodrama. However, the holding points out the limits of Florida's slayer statute and implicates genuine public policy concerns for consideration in Florida and other states.

The *Fiel v. Hoffman* case (i.e., the Ben Novack, Jr. case) presents the following issue regarding state slayer statutes: Is it good enough to only disinherit the murderer under a state slayer statute or should the law go further and disinherit other collateral beneficiaries?

Consider the following scenarios:

A. If a wife kills her husband and his will leaves his entire estate to his wife or if she predeceases to his children (or generically to persons who may be considered the natural objects of his bounty), is it sufficient for the slayer statute to treat only the wife as predeceased?

B. If a wife kills her husband and his will leaves his entire estate to his wife or if she predeceases to her children (or generically to persons who may not be considered the natural objects of his bounty), is it sufficient for the slayer statute to treat only the wife as predeceased?

In Scenario A, a slayer statute that "only" disinherits the slayer/spouse probably works just fine, but in Scenario B, that same statute perhaps fails to accomplish its policy and purposes.

Scenario B was essentially posed to the 4th District Court of Appeal in Florida which ruled that Florida's slayer statute (which is apparently similar to many other state statutes) only disinherits the slayer/murderer (the wife) and not the other beneficiaries (the wife's children) even if they were not the natural objects of the victim's bounty. The 4th DCA noted there may be public policy issues exposed by the case, but declined to "legislate," relying instead on the plain meaning of the statute.

FACTS:

The underlying case that led to this appeal is the ongoing and fascinating probate of Ben Novack, Jr., an heir to the fortune of the developer of the iconic Fontainebleau hotel on Miami Beach – which has been featured in movies such as *The Bellboy* (a Jerry Lewis movie), *Goldfinger* (a James Bond movie), and *Scarface* (Al Pacino's 1980s Cuban immigrant/drug lord smash). Ben Novack, Sr. was the primary developer and initial operator of the Fountainbleau hotel until it was lost in bankruptcy in 1977.

Ben Novack, Jr. was murdered in a particularly gruesome and sordid manner in July of 2009. Details of his torture and murder made national news. After Ben's murder, a subsequent investigation into the prior death of his mother, Bernice Novack, revealed that she too was murdered, although her death in April 2009 was initially ruled accidental.

In 2012, Ben's wife, Narcy Novack, was convicted of the crimes and sentenced to life in prison for paying hitmen to torture and kill her husband and mother-in-law, Ben and Bernice. Quick Google and Wikipedia searches reveal that Ben's case was the subject of intensive media scrutiny, including: a feature on *My Dirty Little Secret*, *48 Hours*, *Dateline NBC*, *Snapped* and *True Crime*, plus it was the basis of a *Lifetime* made for TV movie called, *Beautiful and Twisted*, featuring Candice Bergen (as Bernice) and Rob Lowe (as Ben).

In this probate case (and on-going litigation relating thereto), Ben's wife, Narcy, has been treated as predeceased by the application of the Florida slayer statute (FS 732.802), which prohibits a murderer from inheriting from the estate of the person she killed. However, in a cruel twist, the alternate beneficiaries of Ben's will, if Narcy and his mother predeceased him, were Narcy's daughter (receiving a pecuniary bequest) and trusts for Narcy's two adult grandsons as the residuary beneficiaries.

Two of Ben's cousins, Meredith and Lisa Fiel, who were the beneficiaries under Ben's prior will (the 2002 will) sued to invalidate the probated, last will (the 2006 Will) alleging: (a) the 2006 Will was the product of undue influence and (b) the slayer statute should be applied to exclude not only Narcy as a beneficiary under the 2006 Will, but it should also exclude her daughter and grandchildren (which would then leave the disposition in the 2006 Will invalid and thus either the estate would pass to the cousin's as heirs at law or under the prior 2002 will).

The trial court dismissed the two claims, and the two issues were heard on appeal by Florida's 4th DCA.

The 4th DCA overturned the dismissal of the undue influence claims, and thus the cousins may still ultimately prevail in the case. However, the 4th DCA upheld the dismissal of the cousins' claims under the slayer statute.

The 4th DCA held the slayer statute was clear and the court had no discretion to disinherit anyone other than the murderer (the wife/spouse/Narcy). The appellate panel indicated its hands were tied due to the unambiguous statute. Further, the opinion noted, it is the purview of the Legislature to address whether or not to expand the slayer statute's reach. Thus, the 4th DCA didn't say the statute shouldn't be expanded to disinherit collateral beneficiaries as well as the murderer, but in its ruling, the court said it couldn't hold that way under the statute as it was presently constituted.

COMMENT:

State Slayer Statutes and Collateral Beneficiaries

So a question probate lawyers may properly ask is: should we be looking at our state slayer statutes to consider if it should be the public policy to disinherit collateral beneficiaries, at least in limited circumstances like Ben Novack's case, where the beneficiaries are related to the murderer and are not the natural objects of the deceased victim's bounty.

Or said differently, if our public policy is not to directly benefit one who murders someone, should our public policy nevertheless allow the murderer to indirectly benefit by allowing the ultimate beneficiaries of the estate to be the relatives/heirs of the murderer even if those persons are not the heirs/relatives or natural objects of the bounty of the deceased victim?

Focus on Florida's Slayer Statute and the Holding

As presented in the Novack appeal, Florida's slayer statute clearly severs the rights of a murderer to inherit from the victim, under a will, joint tenancy, and/or contractual arrangement (including beneficiary designation), but does not address collateral beneficiaries. The statute reads in pertinent part:

732.802 Killer not entitled to receive property or other benefits by reason of victim's death.—

(1) A surviving person who unlawfully and intentionally kills or participates in procuring the death of the decedent is not entitled to any benefits under the will or under the Florida Probate Code, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(2) Any joint tenant who unlawfully and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This provision applies to joint tenancies with right of survivorship and tenancies by the entirety in real and personal property; joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions; and any other form of coownership with survivorship incidents.

(3) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who unlawfully and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement; and it becomes payable as though the killer had predeceased the decedent.

(4) Any other acquisition of property or interest by the killer, including a life estate in

homestead property, shall be treated in accordance with the principles of this section.

(5) A final judgment of conviction of murder in any degree is conclusive for purposes of this section. In the absence of a conviction of murder in any degree, the court may determine by the greater weight of the evidence whether the killing was unlawful and intentional for purposes of this section. (Emphasis added)

This same slayer rule is similarly applied to sever a murderer's beneficial interests in trusts under FS 736.1104.

However, as emphasized above, the slayer statute is limited to severing the rights of a surviving person who unlawfully and intentionally kills another (i.e., the killer). In that event, the murderer is treated as predeceasing the victim. However, there is no mention of excluding anyone other than the murderer from a will, trust, joint account or otherwise.

In its decision in *Fiel v. Hoffman*, citing to prior Florida case law on the slayer statute, the 4th DCA refused to extend the slayer statute's reach to other beneficiaries of the estate plan. In its holding, the 4th DCA approvingly quoted from a 2nd DCA opinion from 1989 (*In re Estate of Benson*, 548 So. 2d 775 [Fla. 2d DCA 1989]):

We have no difficulty in rejecting appellant's contention that there exists a public policy in Florida that would extend Florida's Slayer Statute so as to disinherit the natural and/or statutory heirs of a killer who except for his murderous act would have been a beneficiary of his victims' estates. We find the statutory language clear and unambiguous. If there is to be declared in Florida such a public policy as appellant urges, it must be accomplished by a legislative amendment to the Slayer Statute and not by a pronouncement of this court. . . . It is difficult to advance a credible argument as to any ambiguity in the statute or how the legislature could have more clearly spoken. It is the "surviving person who . . . kills" who is prohibited from benefiting from the act of killing. The statute clearly states without any exceptions that the property of the decedent "passes as if the killer had predeceased the decedent."

Similarly, in Ben Novack's case, the 4th DCA stated the Florida slayer statute is "clear and unambiguous and disinherits only the slayer, or anyone who participates in the killing of the decedent, from any rights to the victim's estate." In its holding, the 4th DCA declined to extend the slayer statute, as it stated that public policy is the purview of the legislature:

The statute is clear. To interpret the statute to preclude the stepchildren from recovering would require us to add words to the statute, something we cannot do. If the Legislature deems as a public policy matter that anyone inheriting through the slayer should be barred from receiving any share of a victim's estate, it can amend the statute to accomplish that result. (emphasis added)

Public Policy Implications: Should Slayer Statutes Exclude Collateral Beneficiaries?

While the issue of a killer's heirs inheriting is not necessarily a new one (note the 1989 case cited to above), perhaps the gruesome nature of the *Novack* case and its public notoriety coupled with the odd estate plan favoring the heirs of the murderer will cause the bar and legislature to give the issue a fresh look - which seems to be invited by the 4th DCA.

Indeed, while the slayer statute may be clear and unambiguous, and thus the results in the *Benson* and in the *Novack* cases may be proper (based on the law as constituted), should the public policy be revisited in light of the holding? Does it make sense that heirs of the murderer should inherit in a case like this? I'm not the arbiter of public policy, but it seems the result is disturbing enough to suggest state bars and legislatures should revisit and reconsider their slayer statutes and the public policies behind them given the holding in this case. Is this type of a result (where Nancy's child and grandchildren inherit Ben's estate even though their mother and grandmother murdered him) one that lawyers feel the public policy of our states should support? Is this a result we want?

To make the facts simpler, suppose a man's will (let's call him Joe) left a pecuniary bequest to his children and the residue of his estate to his friends and caregivers, Bob and Betty Jones, husband and wife, or all to the survivor of them. If it later turns out Betty killed Joe by slowly poisoning him, and as a result she is treated as predeceased by the slayer statute, do we really want Joe's entire estate to pass to Betty's spouse, Bob, instead of Joe's children? Or might we prefer a public policy that assumes in such a case the bequest was conditioned on Joe's belief that Bob and Betty were helping him, and if Joe really knew Betty was instead killing him, then Joe likely would not have benefited either of them in his plan? An extension of the slayer statute to bar collateral heirs would rely in part on applying substituted judgment, but that's not necessarily a new concept - see state statutes treating divorced spouses as predeceased, for example.

At a minimum, the issue of expanding the state's slayer statute to excluded collateral heirs (perhaps only if they are not within the class of heirs already) seems worthy of some consideration by the real property, probate and trust law section of the Florida bar and perhaps ultimately by the Florida legislature if it is deemed the state's public policy should be revisited.

Collateral Beneficiaries Issue Exists in Many States

This is not a uniquely Florida issue, however. Apparently, many other states have similar statutes, so this is an issue worthy of consideration for practitioners in other states as well. The good news is there may be models worthy of consideration. The 4th DCA notes the appellants cited to several cases from other states with laws that may be more progressive on this issue.

According to the decision, the appellants cited to state slayer statutes and cases in Rhode Island, Indiana and Illinois, all of which precluded stepchildren from inheriting where their parent was the killer.^[i] However, the 4th DCA found all of those statutes and cases distinguishable due to the clear language of Florida's slayer statute (and likely the same

statutes in other states).

In the opinion, the 4th DCA quoted from the Rhode Island Act, which in pertinent part provides that "[n]either the slayer *nor any person claiming through him or her* shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but the property shall pass as provided in this chapter." Quoting *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283 at 291 (R.I.2012). In *Swain*, the court held that the Rhode Island statute precluded stepchildren of the deceased from inheriting from her, when their father was charged with her murder, and the children stated that they would use their inheritance to pay for their father's criminal defense.

The 4th DCA also cited to an Illinois case, *In re Estate of Mueller*, 655 N.E.2d 1040 at 1043 (Ill. App. 1 Dist. 1995), noting the Illinois slayer statute provides that a slayer should not receive "any property, benefit, or other interest by reason of the death, whether as heir, legatee, beneficiary... or in any other capacity...." In *Mueller*, the court construed this language as prohibiting the slayer/wife's children from their share of her husband's estate, because the wife could receive a benefit in her capacity as guardian of her minor child. *Id.* at 1046.

For states considering other models for dealing with collateral heirs in their state slayer statutes, perhaps Rhode Island, Indiana or Illinois offer helpful examples.

Public Policy Implications: Should Slayer Statutes Exclude Those Who Commit Elder Abuse and Exploitation?

Although this issue was not presented in the Novack case, if your state is reviewing its slayer statute, another subject worthy of consideration is whether or not to expand the class of persons triggering the exclusions of the slayer statute beyond those who have killed (murderers).[ii]

For example, recently 8 states have expanded their slayer statutes to broaden the categories of persons triggering the statute beyond murderers, so as to cover those who abused or financially exploited a decedent. In 2009, Washington State expanded its slayer statute to disqualify heirs who are "abusers" and took advantage of a vulnerable adult. The obvious intention of the legislation was to protect victims from financial exploitation and financial abuse.

The 8 states to broaden their slayer statutes to apply to abusers are: Arizona, Oregon, California, Illinois, Kentucky, Maryland, Michigan and Washington. Some of the states require only financial exploitation (Arizona, Maryland and Washington) while others require physical abuse and financial abuse (Oregon, California, Illinois, Kentucky, and Michigan). Also some states do not require a criminal conviction, only requiring clear and convincing evidence of abuse (California and Washington); whereas the other states require a criminal conviction as a basis for triggering the disqualification of the slayer (and abuser) statutes.

The public policy of most (if not all) states has long held that a killer should not inherit from the victim's estate, based on a theory that the wrongdoer shouldn't benefit from his wrongdoing. Now that 8 states have already done so, perhaps it is time for your state to consider expanding the class of wrongdoers who are disinherited by statute so as to disinherit those guilty of various forms of financial abuse and exploitation of vulnerable seniors.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jeff Baskies

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Fiel v. Hoffman, 169 So. 3d 1274 (4th DCA, 2015); *In re Estate of Benson*, 548 So. 2d 775 (Fla. 2d DCA 1989); *In re Estate of Mueller*, 655 N.E.2d 1040 at 1043 (Ill. App. 1 Dist. 1995); *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283 at 291 (R.I.2012); *In re Estate of Mueller*, 655 N.E.2d 1040 at 1043 (Ill. App. 1 Dist. 1995); Florida Statutes 732.802.

CITATIONS:

[i] The court cited to the Appellants' brief and the following cases: Appellant also relies on several cases from other states which concluded that their Slayer Statutes precluded stepchildren from inheriting. See *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283, 292-94 (R.I.2012); *Heinzman v. Mason*, 694 N.E.2d 1164, 1167-68 (Ind.Ct.App.1998); *In re Estate of Mueller*, 275 Ill.App.3d 128, 211 Ill.Dec. 657, 655 N.E.2d 1040 (1995).

[ii] "Expanding Slayer Statutes to Elder Abuse" by Jennifer Piel, JD, MD, in the Journal of the American Academy of Psychiatry and the Law, 43:369-76, 2015.