

Wills, Trusts & Estates

Who will live and who will die: Part one

By Charles Wagner



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(September 22, 2020, 1:36 PM EDT) -- Opposing counsel in *Bennett v. Gotlibowicz*, [2008] O.J. No. 1351, Ron Bohm, was extremely effective in his responding submissions. As I heard his arguments and saw the judge's apparent receptiveness, I feared the case was lost. At issue was our respective clients' arguments as to the validity of two different powers of attorney for personal care of a person I will refer to as "Mr. G."

Mr. G was at a nursing home. There was a medical emergency requiring his immediate hospitalization. His wife told the nursing home not to take Mr. G to the hospital. My client was visiting her father and called an ambulance. The head nurse directed the ambulance driver to leave Mr. G alone. My client pleaded for him to be taken to hospital. Mr. G pleaded with the ambulance driver "I can't breathe. Take me to the hospital." The ambulance driver took him to the hospital and saved his life. The question was what would happen when the next emergency took place.

My client claimed her power of attorney was the valid one and that she wanted all steps necessary to be taken to save her father's life. Mr. G's wife claimed she had the valid power of attorney and wanted nature to take its course. The nursing home refused to take Mr. G back until a court ruled who was the valid attorney for personal care. With the choice faced by the judge, I am reminded of this case every Rosh Hashanah.

This time of year is an emotional occasion for Jews. Observant Jews believe it is a time for Divine judgment when the Master of the Universe decides who shall be inscribed in the Book of Life or Book of Death. Observant Jews believe that names are written down on Rosh Hashanah — the Jewish new year — and that there is still a chance for us to repent for 10 days until Yom Kippur — the Day of Atonement.

There is a prayer Jews say on both Rosh Hashana and Yom Kippur called *Unetanneh Tokef* that is rooted in the above-described belief. The prayer, in part, reads: "On Rosh Hashanah will be inscribed and on Yom Kippur will be sealed — how many will pass from the earth and how many will be created; who will live and who will die; who will die after a long life and who before his time ..."

In *Bennett v. Gotlibowicz*, I felt a very familiar feeling when I was fighting for Mr. G's life.

I had an opportunity to make submissions in reply. As I saw the judge listening to opposing counsel and heard the effectiveness of his arguments, I thought the case was lost and recognized that the next time Mr. G might not be saved. I thought of the *Unetanneh Tokef* and remembered my late father teaching me about the prayer and the sanctity of life.

My late father of blessed memory always reminded me that we have to fight for our health and to preserve life. He quoted a biblical verse, *u'bacharta b'chaim*. Literally, that phrase means "and you shall choose life." To be fair — in the actual context of the verse there was a different meaning, but the message was nonetheless relevant to me personally. As a survivor of the Holocaust who lost so many of his family, my father appreciated how each life mattered and understood the precious nature of the gift. I know it sounds crazy, but while listening to Bohm's submissions in response, I kept hearing my father's voice yelling at me and saying *u'bacharta b'chaim*. When Bohm finished it was my turn to present submissions in reply.

I had already made my legal arguments in my initial submissions. There was no point in repeating my submission that Mr. G's lawyer believed he had capacity and wanted my client to make decisions on his behalf. Or that given the conflicting evidence about capacity or validity of the different powers of attorney the court should exercise its discretion and adhere to the thesis statement of substitute decision cases — that we should do what was in the best interests of the allegedly incapable person. I also did not again argue about the court's inherent jurisdiction. Instead, in reply I told the court that this was a very difficult case and I felt badly for the judge who had to make this decision. I beseeched Justice T.P. Herman to pay heed to the words of my late father who taught me a biblical verse that when faced with a health decision and in doubt to remember the Bible's teaching u'bacharta b'chaim — choose life.

This is the first of a two-part series.

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