

## **2B. Transfers on Death**



**DRAFTING NON-TAX WILL PROVISIONS**

by

**Michael E. O'Connor, Esq.**

DeLaney & O'Connor LLP  
Syracuse



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## DRAFTING NON-TAX WILL PROVISIONS

**Michael E. O'Connor Esq.**  
*DeLaney & O'Connor, LLP*  
Syracuse, NY 13202

### **I. GENERALLY**

- A. Do not simply reduce the client's wishes to writing. Advise on disadvantages of desired provisions. (Expense of administration, vagueness, ruling from grave)
- B. Be sure to develop exact extent and nature of assets.
- C. Where testator has insurance policies, inquire into alternate beneficiaries, particularly if there are minor children. Infants should not be named beneficiaries.

### **II. CHOICE OF FORMS**

- A. Banks provide form books and books are available from publishers.
- B. Develop your own forms for common clauses from all sources.
  - 1. Wording will be consistent in all cases.
  - 2. You can reduce those clauses which you use most often to forms so as to save time in Will drafting and avoid remembering when you last used the wording you want.
  - 3. Eliminates extensive dictation, copying and opportunity for mistakes.
  - 4. Reduces stylistic and grammatical differences which would make the Will look like it came from forms.
  - 5. If you have word processing equipment, it streamlines Will drafting and speeds it up.
  - 6. BEWARE of blindly following forms however. Each clause in each Will must be considered for appropriateness.

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### III. COMPLEXITY

- A. Greatest volume of litigation in Surrogate's Court stems from deficiencies in Will drafting or estate planning.
- B. Treat potential problems, not just the present problems. For example, if there is any possibility of an infant coming into a share, some provision should be made for handling that share. Do the job, don't save paper.

### IV. WILL VS. REVOCABLE TRUST

- A. General Treatment: When a revocable trust is used as the centerpiece of an estate plan, it is important that the disposition of property be handled with care. For example, a bequest under a Will would be impossible to carry out if all or substantially all of the client's assets were held in a revocable trust. It is generally preferable therefore that everything passing to a beneficiary be defined in the revocable trust and not in the Will.
  - 1. Non-dispositive language, such as a tax apportionment clause, should be considered between the Will and revocable trust carefully. First, similar provisions should not conflict with one another. Secondly, if tax is being paid from a fund, it should be one arising in the trust rather than under the Will. The Will may pass nothing if the trust is fully funded.
- B. Revocation of Trust: Even though a trust is created at the time the Will is signed, and the trust is valid, it may not be at death. In addition to pouring over property from the estate into the revocable trust, the Will should provide an alternative disposition in the event the trust has been revoked. That alternative disposition in the Will would, presumably, be the same disposition as called for in the trust.
  - 1. If the client makes dispositive amendments to the trust, the same amendments should be incorporated in a new Will each time, so as to keep them consistent.

**SAMPLE PROVISION - Pour over Will.**

**XX : All the residue of my estate, both real and personal and wheresoever situate, I give, devise and bequeath to the Trustee of a living trust created under an agreement which I have executed immediately before my execution of this will, which is designated the JOHN DOE TRUST. If the living trust has terminated at my death, or if it is ineffective for any other reason, then I give the residue to my wife, MARY P. CLIENT, if she is living, or if not to my**

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children then living and the issue of any deceased child, per stirpes.

V. **GENERAL & SPECIFIC BEQUESTS**

A. **Types of Pre-Residuary Transfers:** Pre-residuary gifts under a Will generally fall into 3 categories. They are specific, general or demonstrative dispositions.

1. **Specific Gift:** A gift of personal property or real property owned by the decedent and specifically identified in a devise or bequest is a specific gift. EPTL §1-2.16.

**PRACTICE NOTE: The client should be discouraged from disposing of an entire estate by a series of specific bequests. The disposition of a bank account or general securities account is almost always inappropriate. Making such gifts allows an agent under a power of attorney or a guardian to manipulate the estate plan by depositing to or withdrawing from accounts specifically bequeathed. It also allows changes in the dispository plan by the client's mistake.**

- a. **Ademption:** If the decedent does not own the item specifically gifted at the time of death, then the gift fails. EPTL §3-4.3 An exception to this would occur where the specifically gifted property is lost or damaged and insurance proceeds are payable to the estate as a result. EPTL §3-4.5. Or if the committee or conservator of an incapacitated person transfers the specifically gifted property prior to death, in which case, the traceable proceeds pass to the beneficiary. EPTL §3-4.4.
- b. **Anti-Lapse Statute:** When a testamentary benefit is provided for issue or brothers or sisters of a testator, the default rule is that the bequest does not lapse. For instruments executed prior to September 1, 1992, the benefit would pass to the surviving issue of the deceased, per stirpes. EPTL §3-3.3(a)(1). In the case of instruments executed on or after September 1, 1992, the issue of a deceased take by representation. EPTL §3-3.3(a)(2).

**PRACTICE NOTE: While gifts to issue, brothers or sisters may be intended by the client not to lapse, that is not always so. For example, a gift of a specific item of tangible property may be meant exclusively for the benefit of that client. If the intent is for the gift to lapse if the client dies, it should be specifically stated. Similarly, if a named alternate is intended, it should be stated.**

2. General Gift: A general bequest is a gift of a dollar amount. It comes out of the general estate after payment of tax, debts and expenses of the estate. Since the gift does not look to any specific property, it does not adeem if the nature of the assets change.
  - a. Abatement of Dispositions: All of the property of a decedent is subject to payment of administration and funeral expenses, debts of the decedent and taxes which the estate may owe. EPTL. §13-1.3. The expense of the estate obligations are applied to dispositions in the priority provided by the statute. EPTL. §13-1.3(c). The expenses are applied to the following shares until they are fully consumed, at which time the expenses would begin being born by the subsequent share:
    - i. Distributive shares which pass by intestacy (not disposed of by Will).
    - ii. Residuary dispositions.
    - iii. General dispositions.
    - iv. Specific dispositions.
    - v. Any disposition to a surviving spouse which qualifies for the estate tax marital deduction.
  - b. Protecting Residue: Often clients are choosing the amount of general bequests so that the total of such bequests leaves a substantial residue. The residual beneficiary is typically the one of most importance to the client. Consideration should be given to limiting the general bequest by defining it as the lesser of the dollar amount or a percentage of the estate. If the estate shrinks to the point where the general bequest is too large, then the beneficiary would entitled only to the percentage. Alternatively, the residuary beneficiary can be given a general bequest which would assume some priority if the estate shrinks.
3. Demonstrative Disposition: A demonstrative disposition is a gift of property to be taken out of specific or identified property. EPTL. §1-2.3. Like a specific bequest, a demonstrative gift will fail if the subject property is not owned at death. It also may fail because of the need to use the property to pay the expenses of the estate. In that case however, a demonstrative disposition will have the same priority as a specific gift, thus staying in tact until all general bequests and residuary dispositions have

been consumed. EPTL §13-1.3.

- a. **Example:** An example of a demonstrative gift would be “I direct that all of my shares of General Electric Co. common stock be sold and that the sum of Five Thousand Dollars (\$5,000) from such sale proceeds shall be paid to my brother, ROBERT F. SMITH”.

**PRACTICE NOTE: It is very rare for a demonstrative gift to be appropriate. It is not uncommon however for a client to suggest it. The risk of a demonstrative gift should be pointed out to the client and alternatives explored.**

B. Gifts of Business Interest: Special care must be taken in designing the disposition of a client’s business interest.

1. If the business is incorporated, then care must be given to adequately describe the stock being transferred. Is it voting stock only? Is it all stock? If a beneficiary of stock is non-participating in the business, how will he or she be assured of being treated fairly? Is it possible to substitute another asset for the non-participant family member? Could those in control of the business be delegated to purchase the shares of others over time?
2. If the business is a partnership, what are the terms of the partnership agreement? Can a new partner be admitted? Will the beneficiary want to be a partner?
3. If the client does business as a sole proprietor, then special care must be given to the definition of what will pass to the beneficiary of the business. It is often difficult to define business assets in such a case versus personal assets. If there is inventory, tools and equipment, customer lists, patents or trademarks, vehicles, office equipment and accounts payable, special consideration must be given to each of these assets. The client must determine whether they are necessary for the operation of the business, or whether they could pass other than to the beneficiary of the operating business. Cash contained in business bank accounts must also be considered carefully by the client.
4. If it is necessary for the fiduciary to operate and manage a business for any period of time during estate administration or as an asset of a trust, then it is important that specific authority be given the fiduciary to manage the business and that some method of compensation, apart from fiduciary commission, is allowed for.

**SAMPLE PROVISION - Operation of Business.**

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(A) To retain and continue the operation of any business, either incorporated, unincorporated or limited or general partnership (whether or not income-producing or resulting in lack of diversification) which I may own or in which I may have an interest at the time of my death, and any successor business thereto; and to purchase or otherwise acquire any business or interest in any business (incorporated or limited or general partnership) and to operate the same; and in connection with any business, to have the following authority and to exercise the following powers, as may be deemed advisable: to take part in the management of such business and to delegate such duties, with the requisite powers, to any employee, manager, partner or associate, without liability for such delegations; to reduce, expand, limit or otherwise fix and change the operation or policy of any such business and to act with respect to any other matter in connection with any such business; to advance money or other property from my estate or any other source to any such business as may be deemed advisable; to make loans of cash or securities to any such business and to guarantee the loans of others made to any such business; to borrow money for any such business from any lender and to secure such loan or loans by a pledge or mortgage of any part of my estate; to select and vote for directors, partners, associates and officers of any such business; to act as directors, general or limited partners, associates and officers of any such business and to reasonably compensate such directors, partners, associates and officers, including any person who is a beneficiary or fiduciary under this my Will; to establish and to join with others in establishing such partnerships, limited partnerships, corporations and other business organizations and associations for the carrying on of any such business, and to contribute to the capital of such business any part or all of my estate as may be deemed advisable; to deposit securities with a voting Trustee; to enter into stockholders' agreements with corporations in which my estate or any trust estate has an interest and/or with the stockholders of such corporations; to sell any such business, any interest in any such business, or any stock or other securities representing the interest of my estate or any trust estate in any such business; to liquidate, either alone or jointly with others any such business or any or any interest in such business; and generally, to exercise any and all powers as my Executor and Trustee may deem necessary with respect to the continuance, management, sale or liquidation of any such business.

(B) In the event "Subchapter S Corporation" stock is to be allocated to a trust created hereunder and the recipient trust must qualify as a "Qualified Subchapter S Trust" (QSST) or an "Electing Small Business Trust" (ESBT) as defined in the Code, the

**Trustee shall be authorized to amend the terms of such trust so as to qualify it as a QSST or ESBT, but only to the extent that doing so does not affect the availability of the estate tax marital deduction for such trust.**

- C. Gifts to Charity: A gift to charity under a Will is not too different from other bequests:

**PRACTICE NOTE: In the case of bequest to charity, it is critical that the correct corporate name of the charity be identified and confirmed. If the local organization is an affiliate of a national organization, which is to receive the gift? If there are restrictions on the use of the funds, be clear concerning them. If the restrictions might cause the charity to refuse the gift, be sure that an alternate is provided.**

1. Tax Considerations: If an estate is subject to estate tax, then the property passing outright to charity would be entitled to a charitable deduction, without limitation IRC §2055(a)(2). Most estates are exempt from estate taxation however, either because the sum of the assets is less than the amount protected from the tax or because a marital deduction will defer the tax until the second spouse dies.
  - a. Charitable Deduction: Since there is no estate tax due in the typical estate, and because there is no income tax charitable deduction applying to property passing to a charity by Will, there is no deduction for the charitable gift. Further, because the income tax basis on a decedent's capital assets is "stepped up" to the date of death value, IRC §1014(a) there is no avoidance of capital gain tax resulting from a gift to charity through a Will. A client with a non-taxable estate wishing to leave an amount to charity, should be counseled about alternative approaches which might be more tax efficient.
    - i. IRA Beneficiary: A client with an IRA or qualified plan may name family members as beneficiaries. Those family members could receive the benefits of the plan subject to both estate tax (if the estate passing other than to a spouse is large enough) and income tax (in all cases). Even a non-taxable estate would result in income tax being due on all funds in such a plan as they pass out to the beneficiaries. If the client wishes to benefit a charity under a Will, and has a non-taxable estate, a good suggestion would be to name the charity as an IRA beneficiary instead. The amount passing

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to the charity would escape income taxation completely. The family members, on the other hand, who no longer are IRA beneficiaries could receive an equivalent increased amount from the estate, not subject to income taxation.

- ii. Precatory Bequest: Another approach in the non-taxable estate to generate an income tax deduction arises from the use of a precatory bequest to a trusted relative. In such a case, the relative is given an amount of money and requested (not directed) to contribute that amount to charity. The individual beneficiary then makes a voluntary contribution which entitles him or her to an income tax deduction for the gift to charity. The following is suggested language to accomplish this:

**SAMPLE PROVISION: “If my wife MARY X. SMITH survives me, I give and bequeath the sum of Ten Thousand Dollars (\$10,000) to her. It is my wish and hope, but I do not direct, that she make a donation in my memory to SMITH MUSEUM, Syracuse, New York. If my wife does not survive me, I give such amount to that organization for its general uses and purposes.”**

- iii. Bequest of IRD: A third option to maximize income tax savings is to direct that an asset constituting Income in Respect of a Decedent (IRD) be used to satisfy the bequest. For example, a client with substantial taxable interest from US Series EE savings bonds might leave those (or their proceeds) directly to a charity so that the IRD ends up passing to the non-taxable entity.

## **VI. TANGIBLE PERSONAL PROPERTY**

- A. Personal Property: Personal property is generally divided into two major categories. Tangible personal property is that which is “used” and has an intrinsic value. Intangible personal property is simply evidence of a value. For example, furniture would be tangible property, but a stock certificate would be intangible. No statute specifically defines tangible personal property and case law must be looked to when certain assets might be tangible or intangible. Examples of problematic assets are cash, coin or currency collections and collectible stamps.
- B. Specific Bequests of Tangibles: It is almost always good practice to provide for the specific disposition of tangible personal property. The reasons are many:
  - 1. Often tangible personal property, like household furniture, has very little market value and may be difficult to dispose of at more than a nominal



price.

2. While tangible property often has very little economic value, it can have substantial sentimental value to those family members closest to the decedent. Forcing the sale of such property would often be contrary to the desires of the family members.
3. It may be advantageous for an estate to be capable of trapping taxable income at the estate level, so as to protect it from income taxation totally by use of estate deductions or to make use of the lower brackets of the estate. To accomplish that objective, it is necessary to control distributions of the estate which would carry Distributable Net Income (DNI) with it. A distribution from the residue of an estate carries DNI out to the beneficiaries. IRC §662(a)(2). The distribution of a specific bequest does not. IRC §663.
4. If a trust is created from the residue of the estate, and if tangibles are not specifically bequeathed, the Trustee would be obligated to dispose of them and make the proceeds income producing, unless specific language to the contrary is provided authorizing retention of such tangibles.
5. If, on the other hand, the Trustee retains tangibles, how will the Trustee keep them under his control or in his possession? They should be insured in the name of the trust, which will be difficult or impossible to accomplish.

C. Drafting Considerations For Tangibles:

1. When tangibles are left to a class (such as children), should the anti-lapse statute be allowed to replace a deceased child with grandchildren? If the tangibles are of more emotional value than economic value, the question would be whether that emotional value applies only to the children or would be applicable to a grandchild. If the grandchildren are infants, the inclusion of one in the distribution of tangibles would complicate matters in that the infant would not be able to consent to or receive distributions personally. Most often in such a case therefore, the distribution of routine tangibles will be *per capita* rather than by representation or *per stirpes*.
2. What can be done if the intended beneficiaries of tangibles would not be expected to agree on their disposition, or if the beneficiaries do not get along with one another at all? Depending upon who has been named as Executor, authority may be given to that Executor to distribute the tangibles among the beneficiaries, using the Executor's discretion. In the alternative, some mechanism may be established in the Will for the beneficiaries to

select items by lot or by bid.

3. The client may wish to provide for the disposition of tangibles in a separate writing (apart from the Will). New York law does not provide for the incorporation of an outside document by reference into a Will. An approach which can be used in New York would be a bequest of the tangibles to a single trusted individual with a precatory request that the individual distribute those items in accordance with the wishes of the client which will be provided in a separate writing. Because the assignment is so personal to the beneficiary under the Will, it is important that the anti-lapse statute *not* apply to this bequest.
4. Special consideration should be given to very valuable tangibles. Does the client want expensive jewelry and the automobile passing to children equally?
5. Special consideration should be given to tangible personal property used in conjunction with a business or some other special purpose. For example, farm equipment would typically best be passed to whomever receives the farm animals or land. A boat and motor would be useful to the person receiving lake front real estate.
6. Since title to specifically bequeathed personal property vests at death in the beneficiary, the costs of storing, shipping and insuring such property would be the beneficiary's. This result can be reversed if the client wishes, with the estate being directed to pay those costs out of the general estate assets.
7. Avoid describing tangibles as "contents of my house" or other such terms. This will allow fraud to be practiced by moving tangibles after death, or before.

**SAMPLE PROVISIONS - Tangibles to spouse - alternate adult children:**

**XX: To my wife, MARY P. SMITH, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me.**

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**SAMPLE PROVISIONS - Tangibles to beneficiary with precatory request to distribute:**

**\_\_\_\_\_ XX \_\_\_\_\_: To \_\_\_\_\_ (personally, and not in a fiduciary capacity), I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. It is my wish, but I do not direct that the beneficiary will distribute such property in accordance with my instructions, which I shall provide during my life. If \_\_\_\_\_ fails to survive me, then I give such property to \_\_\_\_\_ with the same request.**

**DRAFTING NOTES:** A clause such as this one allows the client to make elaborate lists and to revise them periodically, without the need of revising the Will. Unlike many other states, there is no provision in New York law allowing incorporation of an outside list into a Will, by reference. The above language might be a useful substitute for that concept. The risk of the beneficiary not carrying out the client's wishes must be pointed out. If there are tangibles which have substantial economic value, consideration should be given to excluding them from a clause such as this. Automobiles, jewelry and art work might better be disposed of specifically. An alternate beneficiary is also useful so as to prevent the anti-lapse statute from passing the tangibles to the children of the intended beneficiary. In the alternative, consider language requiring the beneficiary to be living to receive the bequest.

**SAMPLE PROVISIONS - Tangibles to children with direction to select by lot:**

**The tangible personal property described above shall be divided among my children in approximately equal shares. If the children do not all agree on such division, I direct that they shall choose items individually in order of age, with the oldest child choosing one item first, followed by the second oldest and so on, until all items are selected or until the children have no interest in taking more items. For purposes of this paragraph, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes or a table and chair set shall each be treated as one item. If such a formal procedure is used, the Executor shall first have such items**

appraised, and the appraisal value of each item shall be the charge to the share of the child who chooses it. Any items not chosen by any child shall be disposed of by the Executor in whatever manner seems reasonable. Adjustments between the beneficiaries for items which have greater or lesser value than those selected by other beneficiaries may be made from the residuary share of each under this Will.

**SAMPLE PROVISION** - Tangibles to spouse, or if deceased to children, with formal procedure for disposition and equalization of value for each:

**XX** To my wife, **MARY P. SMITH**, if she survives me, I give and bequeath all of my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as furniture, jewelry or a coin collection. It does not include cash, books, documents or other papers which are only evidence of intangible property rights such as bank accounts, stock certificates, promissory notes, insurance policies, and the like. If my wife fails to survive me then such property shall pass equally to those of my children who survive me, subject however to the following:

(A) It is my intent that the items of tangible personal property owned by me at my death will be distributed among my children fairly and consistent with their wishes, to the extent possible. It is also my wish that the economic value received by each will be approximately equal. To accomplish this objective, I direct that either my children reach unanimous agreement on the disposition of the tangible personal property or, in the alternative, that the Executor use the following procedure in order to dispose of such property:

(1) The Executor shall first obtain an appraisal of the fair market value of each item of my tangible personal property, except that items of little value may be assigned only a nominal dollar value.

(2) Upon receipt of the appraisal, a copy will be provided to each of my children. With each of them present (or with each of their representatives present), they shall be allowed to select items which they wish to receive, with the oldest child choosing first, followed by the second oldest, and so on. Each child may select one (1) item at each round of the selections. For purposes of this Article, sets of items shall be considered single items. For example, a set of matched silverware, a set of matched dishes, or a table and chair set shall each be considered one (1) item. The selection will continue until all children have chosen everything they wish to.

(3) After the completion of the selection process, as described above, there may be remaining items which one or more children have an interest in receiving, but which they do not believe to be worth the appraised value. If that is the case, each of my children may institute an auction of any remaining item. Each child will be entitled to bid, and the child who bids the greatest amount will be entitled to receive the item. All such bidding shall be open and will continue until there is a winner.

(4) The Executor shall record the value of each item selected by each of my children, either from its value on the appraisal or, if not selected in that stage, then its value from the auction. If the value of the items selected by one child is less than his or her equal share of the total of all such items, then cash shall be paid from the general estate to that beneficiary to make up any difference. If the value of such items is greater than the child's equal share, then cash will be paid from the general estate to those other children who received less than their equal share, so as to make the distribution of tangibles equal among all children.

(5) Any items not selected in the above process shall be disposed of by the Executor in accordance with any method agreed to unanimously by all of my children. If there is no such agreement, then the remaining items shall be disposed of in a commercially reasonable manner. Items which have no reasonable sale value may be donated to charity or given to grandchildren or more remote descendants of mine. Any net proceeds from the sale of any such property shall become part of the value being distributed to my children pursuant to this Article.

## **VII. GIFTS OF REAL PROPERTY**

A. Specific Devise: For a number of reasons, it may be desirable for a client to specifically devise real property. For example, a primary residence may be devised to a spouse in order to prevent it from passing into a trust. A seasonal residence may be devised to some or all of the children to facilitate its being retained long into the future.

1. Advantages of specific devise of real property:

a. Vest title immediately in the beneficiary.

- b. Eliminates the asset from being used to compute the commission of the Executor.
  - c. Gives priority to the devise over property passing in the residue.
  - d. Avoids any part of the real property being deemed as income and carrying out income earned in the estate. IRC §662 & §663.
2. Disadvantages of specific devise of real property:
- a. If the beneficiary does not want the property, it is no longer possible to sell it as an estate asset and distribute it with the residue.
  - b. An Executor may sell real property owned as part of the residue of the estate without it being subject to liens of the beneficiaries. Specifically devised real property however would be subject to such liens.
  - c. Unless specifically provided otherwise, the beneficiary will take the real property subject to liens and mortgages. EPTL§3-3.6.

B. Special Detail: Real property should be described with as much detail and specificity as possible. Try to avoid over-broad descriptions such as “all my real estate, wherever located”. Such language raises the question of whether it is intended that all forms of real property (such as leases, partnerships, cooperative apartments, real estate investment trusts and condominiums are to be included). Such broad language also would pass property acquired after the Will is made, such as an inheritance from another.

- 1. At least the street address of the property, with municipality and county, should be provided. Better practice is to refer to the deed(s) by which title was taken, a tax map number or even the legal description.
- 2. Often with a devise of a vacation home, the client desires to include the furniture and other tangibles in the gift. Use of the word “contents” as defining tangibles to be included should be avoided. During the period the client is occupying the property, there may be valuable jewelry or other property which is not necessary for the operation of the real property and not intended to be included with it. Specificity in defining the tangibles to go with real property is critical. Consider language such as **“together with all furniture, rugs, appliances, dishes, silverware, art work permanently maintained in the property and tools necessary for the maintenance and**

**operation of the property”.**

3. Beware of the anti-lapse statute causing an infant to become an owner of an interest in real property. If the objective is to provide ownership to pass through multiple generations, a trust should be considered instead of a specific devise.
4. Out of state property creates special concerns. The probate of a Will in New York does not give authority to an Executor to administer or dispose of real property in another state. Such authority must be obtained by the ancillary probate of the Will in the state where the property is located.
  - a. To avoid the complications of ancillary probate, it may be helpful to have it pass other than by the Will. This can be accomplished by putting the property in joint ownership, by conveying it to a revocable trust or partnership or by deeding it to the ultimate beneficiaries with a life use retained by the client.

C. Life Estate Transfers: On occasion, a client will wish to grant use of real property to someone for life, with the remainder passing to others. It is used primarily where there are not sufficient funds available to create a trust with the property and other assets to pay for its maintenance and operation.

1. If the life beneficiary fails to maintain the property and pay the taxes, the remaindermen may be adversely affected. This type of transfer is very difficult for the remaindermen to adequately monitor what is going on with such property, and it may be lost before they know there is a problem. A devise of real property for life is an approach which should be used sparingly, and only when there are no other alternatives available.

**SAMPLE PROVISIONS** - Language for Devise of Life use of Real Property:

**XX      : To WINONA SMITH (beneficiary), if she survives me, I give and devise the real property located at 123 Main St., Pristine Forest, NY 12345 in the County of St. Lawrence and State of New York, together with all appurtenances and improvements used in connection therewith. Such devise shall, however, be only for the period of the beneficiary's life, or until she ceases to use the property as**

her principal residence, whichever occurs first.<sup>1</sup> If she fails to reside in the said property for a continuous period of one hundred eighty (180) days, she will be deemed to have changed principal residence, and her interest therein shall terminate.

(A) The beneficiary shall be required to pay all costs of maintenance, assessments, insurance premiums, taxes, water charges, and repairs to the property. Upon failing to pay any such charge, any one or more of the remaindermen may pay the same, and in such event, the person or persons shall be entitled to reimbursement from the beneficiary, and shall have a lien against the property for the amount so expended plus interest at nine (9%) percent per annum. If the property is sold to a bonafide purchaser for value, such lien shall be deemed extinguished as to the real property, but shall follow the proceeds, payable first from the beneficiary's share of the proceeds, if any.

(B) The beneficiary shall obtain and keep in force a policy of insurance (at her own expense) with sufficient fire insurance coverage to represent the replacement value of all structures from time to time; and personal injury liability coverage in a minimum amount of \$150,000. Such policy shall include the remaindermen as additional insureds.

(C) No bond or other security shall be required of the beneficiary.

(D) Upon the termination of the interest of the beneficiary in the said property, I give and devise it to my then living children, equally per capita and not be representation.

(E) If any beneficiary under this Article is a minor, the property distributable to the minor may be delivered to the guardian or other person with whom the child resides, without further responsibility to the child. Any cash proceeds due a minor may be paid or held as otherwise provided under the terms of this Will.

#### **VIII. RESIDUARY GIFTS**

- A. Powers of Appointment: A power of appointment may be created under any Will or trust. If the client is a beneficiary of such a power, then it is important for

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<sup>1</sup> This provision would prevent the estate tax marital deduction if the life beneficiary is a spouse. QTIP trusts require interest for life, and no shorter period.



the attorney to know that and to consider whether the power should be exercised or not. Knowledge of such a power is critical even if it is drafted in such a way that specific reference to the document which is the source of the power must be made in order to effectively exercise it.

1. If a power of appointment is held by the client, and if the terms of the instrument created that power does not require specific reference in order to exercise, then the residuary clause of the client's Will will exercise it. EPTL §10-6.1 (a)(4).

PRACTICE NOTES: If there are powers of appointment unknown to the client, or if the client expects to be a beneficiary of multiple family trusts, then it may be advantageous to specifically provide that no powers of appointment are intended to be exercised by the terms of the Will.

- B. Trusts for Infants: An issue of primary importance to younger clients is the protection of their underage children in the event of both parents dying. The financial concerns fall into two categories. First, the clients wish to protect the needs of their youngest children until they are "out of the nest". Once all of the children have reached adulthood, the second priority is to treat them all equally.
1. In order to provide for the needs of the youngest, it is most often desirable to keep the funds together in a single trust so that they can be applied for the needs of the youngest without concern about equality. This is referred to as a Sprinkling Trust or a Pot Trust.
  2. After the children have reached adulthood, or typically when the youngest has had an opportunity to complete an undergraduate education, the preferred approach is to divide the trusts so that each has a separate fund. This prevents the needs of one adult child from consuming the share of another. The ultimate outright disposition to the individual child can then be tailored to the desires of the client. Where the children are very young, so that the parent does not know how they will turn out, or when the children are older and the parent is not totally satisfied with how they turned out financially, multiple distributions may improve the chances that the child will use the benefits more responsibly, or at least some of them.

**SAMPLE PROVISION** - Gift of residue to spouse with alternate to children. (Sprinkling to 21 and Distribution at 30/35):

XX : All the rest, residue and remainder of my estate, both real and personal and wheresoever situate, I give, devise, and bequeath to my wife, MARY P. CLIENT, if she survives me.

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(A) If my wife does not survive me, and I leave no child under 21 years of age, I give all the residue of my estate in equal shares to my living children, and the issue of any deceased child, per stirpes, subject however to the provisions of Article XX hereof.

(B) If my wife does not survive me, and if any of my living children (including any afterborn child) is under 21 years of age, I give the residue to the Trustee, hereinafter named, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal in the sole and uncontrolled discretion of the Trustee, for the support, maintenance, health, education and cost of a wedding of my children and the descendants of any child who dies (whether before or after my death) as their respective circumstances may indicate, without regard to inequality among the beneficiaries in respect of sums so paid or applied, even to the extent of exhausting the entire principal. It is my wish that priority be given to the needs of my children who have not reached the age of 21 years. The trust shall continue until such time as there is no living child of mine under 21 years, whereupon the trust shall terminate and the remaining principal, together with all accumulated or accrued income shall be divided among my then living children and the then living descendants of any deceased child, per stirpes, subject to the provisions of Article XX hereof.

XX : In the event any beneficiary under this Will is under the age of 35 years at the time he or she becomes entitled to a principal share hereunder (even at the conclusion of a trust hereunder), I direct that the amount due such person be paid to or retained by the Trustee, IN TRUST, to invest and reinvest the same, to collect, receive and accumulate the income therefrom, and to pay or apply said income and the principal, in the sole and uncontrolled discretion of the Trustee for the support, maintenance, health, education or cost of a wedding of said individual as his or her circumstances may indicate, even to the extent of exhausting the entire principal. For all purposes of this Will, education expenses shall include the costs of tuition, room, board and transportation expenses for college, post-graduate programs, private primary or secondary schools and occupational training programs. Upon the beneficiary reaching the age of 30 or upon creation of this trust if the beneficiary has already reached that age, an amount equal to one half of the value of the property held for such beneficiary shall be distributed to the beneficiary. The trust shall continue until such time as the beneficiary reaches the age of 35 years or sooner dies, whereupon the trust shall terminate and the remaining principal together with all accumulated or accrued income shall be paid to the beneficiary, if

living, or to his or her Executor or administrator if deceased.

- C. Trusts (non-tax) for Spouse: Anytime it will be inappropriate to give funds or property to a beneficiary directly, a trust should be considered. A trust may be provided for the spouse to save estate taxes, or the client may simply want to maintain control over the estate by providing protection and benefits to the family for a period of time and then providing for the ultimate disposition of the property. A common situation where this occurs is in the case of a second marriage. The client may want to provide for and protect the second spouse, but not have assets pass into the full control of the second spouse, potentially disinheriting the client's family or children. A trust can provide for the spouse and upon the spouse's death deliver the assets to the client's children. However, to protect this trust plan the second spouse must waive the elective share rights provided by EPTL 5-1.1-A.

**IX. FIDUCIARY APPOINTMENTS -** The fiduciaries commonly appointed in a Will are Executor, Trustee and Guardian of an infant.

- A. Executor: An Executor can be any natural person or an institution authorized to be a fiduciary, so long as the individual is not an infant, incompetent, a non-domiciliary alien, a felon or unable to fulfill the duties due to "drunkenness, dishonesty, improvidence or want of understanding". SPCA § 707.

1. The most commonly appointed Executor is the beneficiary who is entitled to the largest share. Such an individual would be most likely to waive the statutory commission. If the commission is not waived, then it would be passing to the person who would have received the same benefit as an inheritance anyway. If there is no single predominant beneficiary, then the next most frequently chosen individual is one of several residuary beneficiaries. That person should have the client's absolute trust, as well as the respect of the other beneficiaries.

Often when there is no candidate from among the beneficiaries to act as Executor, the client will choose a friend or professional advisor (accountant or attorney). A corporate fiduciary can also be designated.

2. Conflicts of interest must be considered in the selection of Executors and other fiduciaries. For example, a business partner might be very close to the client and trusted, but after the death of the client the partner might have personal interests which are in conflict with those of the estate. An attorney should be careful to draft his or her own appointment only in those circumstances where the selection is in the best interest of the client.

- B. Co-Executors: Frequently when there are two equal beneficiaries, Co-Executors will be considered. If the primary beneficiary is not comfortable handling the assignment of Executorship, there may be a Co-Executor to help him or her. A Co-

Executor may also be useful where the estate will hold assets requiring specialized knowledge. An example of this would be the estate of an author or painter. In such a case, the duties of the Executors can be divided by specific drafting, so that the Executor with specialized knowledge handles only those assets requiring it.

1. Where Co-Executors are designated, there can be difficulties encountered. For example, certain documents must be signed by each Executor, and delay can result from having to circulate to each and possibly in different parts of the country. Multiple Executors also cause multiple compensation to be paid.
- C. Executor Compensation: The statutory commission for an Executor is provided at SPCA §2307. If the commissionable estate amounts to less than \$100,000, then only one commission is paid, regardless of how many Executors may act together. If the estate is \$100,000 or more, but less than \$300,000, up to two commissions can be divided among multiple Executors. If the commissionable estate is \$300,000 or more, then three commissions can be divided among three or more Co-Executors.
1. The Will can provide any specific compensation plan the client would like. For example, a family Co-Executor might be prohibited from taking any commission, while a professional Co-Executor is allowed a full commission, regardless of how small the estate is.
    - a. It is not good practice to name two individuals as Co-Executors who do not get along with each other. Such a situation tends to make more court involvement necessary and frequent. It does not encourage the efficient settlement of the estate, and may be a circumstance where an Executor from outside the family would be appropriate to consider.
- D. Alternate & Successor Executors: Depending upon the age of the client and other circumstances, it is important to have one or more alternate or successor Executors designated for the possibility of the original appointees being unable or unwilling to serve through the whole estate administration. If no alternate is named, then an Administrator CTA (with Will annexed) will be designed. SPCA §1418. An Administrator CTA would be subject to the requirement of a bond and the selection of the fiduciary could be the cause for dispute among the beneficiaries. If there are no alternates agreeable to the client, then a suggestion should be made that the primary appointee be given authority to select his or her own successor. SPCA §1418 (1).
- E. Trustees: The legal requirements to serve as a Trustee are the same as those of an Executor. SPCA §707. Because the term of the trust can be very long, the mortality of individuals becomes a factor in selection of Trustees. It can be very disruptive to

a trust to have a Trustee become incapacitated so as to be unable even to resign. It is therefore more common to see corporate fiduciaries used as Trustees than as Executors.

1. The duties of a Trustee fall into two major categories. First, the Trustee is responsible for investment of the trust funds so as to generate income and/or growth for the trust beneficiaries. Secondly, the Trustee must make decisions about distributions, particularly those distributions which are made in the discretion of the Trustee. For this reason, it is common to have Co-Trustees designated on family trusts. One Trustee would be chosen because of skills in managing the assets or the ability to seek out adequate managers. Another Trustee would be chosen because of familiarity with the family and understanding of the circumstances each beneficiary will be in.

F. Alternate Trustees: It is even more important that alternates be designated as Trustee, because the term of the trust is likely far longer than the term of the estate administration.

G. Removal of Trustees: A Trustee can become inappropriate after the passage of time, even though that individual or institution was an appropriate choice initially. For example, the sole beneficiary of a trust created in New York might live his or her adult life in California. A California Trustee would become more appropriate. A Trustee might become senile or otherwise incapacitated with age, but be unwilling to resign. The Trustee might even lose touch with the family members who are beneficiaries, and be incapable of adequately performing the duties expected. For all of these reasons, and others not mentioned, it is useful to provide the flexibility to replace a Trustee, even against the Trustee's wishes.

1. Giving the beneficiary the right to replace the Trustee can have substantial tax disadvantages. For example, a trust which is created to prevent the inclusion of the trust principal in the beneficiary's estate, when the beneficiary dies, could suffer tax inclusion if the beneficiary is given discretion to remove the Trustee and appoint another, particularly where distributions can be made without an ascertainable standard.
2. The client may be hesitant to give authority to remove a Trustee to a beneficiary also because of the client's distrust of the beneficiary's judgment. It is possible to select an independent individual who has authority to remove a Trustee and appoint another. This would solve the tax problem created by the beneficiary having the power and also might satisfy the client that the beneficiary would not misuse the power. **An example of such a power follows:**

**I hereby appoint \_\_\_\_\_ of \_\_\_\_\_ as the Trust Protector.  
The Trust Protector is authorized, in the exercise of absolute discretion,**

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to remove any and all Trustees acting hereunder (other than my wife), to designate successor Trustees in their place and to appoint co-Trustees; provided, however, no Trust Protector may appoint as Trustee himself or herself, any relative or employee of a Trust Protector, or any person who has a beneficial interest in any trust hereunder or who is married to, related to or employed by any person who has such a beneficial interest. The Trust Protector also is authorized, in the exercise of absolute discretion, to designate, by instrument in writing delivered to the Trustee, a successor Trust Protector to act if there is not a Trust Protector otherwise appointed hereunder who is willing and capable of serving, and to revoke any such designation before it becomes effective. Any successor Trust Protector shall have all the powers of the initial Trust Protector.

I am not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee or otherwise. Except for any matter involving the Trust Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Trust Protector shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken hereunder if in good faith reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof. The Trust Protector shall not be liable for failure to remove any Trustee even if cause exists. Each trust existing hereunder shall indemnify the Trust Protector against all costs of legal proceedings which involve the Trust Protector, including legal fees.

- H. Trustee Compensation: An individual Trustee is entitled to commission computed at the statutory rates provided in SCPA §2309. As with Executors, if there are multiple Trustees, then there may be multiple commissions payable, depending upon the size of the trust. SCPA §2309 (6). As with executorial commissions, the Will can provide for specific compensation for a Trustee, or for an alternate method of computing it.
1. Unlike an individual, a corporate Trustee will be entitled to such commissions as “may be reasonable” if the trust value exceeds \$400,000. SPCA §2312 (2). If drafting for a corporate Trustee, it is important that the proposed Trustee have an opportunity to review the document. Most will want specific language concerning commissions. Typically, a minimum commission will be called for, no matter how small the trust becomes.
- I. Guardians: Guardians of a minor child’s person are responsible for the child’s upbringing. They take over the role of the parents. Guardians of a child’s property are charged with protecting, preserving and managing the property of the infant. SPCA §1723. The Court has power over the property of an infant. SCPA §1701. An annual account is required of the Guardian and no payments can be made from

Guardian funds without authorization by the Court.

1. When the client has selected a Trustee in whom the client has confidence, it is the objective of the planning process to prevent any funds from falling into a court supervised Guardianship. Rather, all assets left for the benefit of any infant would be best contained in trust. Even with careful drafting, funds can come into ownership of an infant, particularly if the infant is named specifically as an alternate beneficiary of life insurance, an IRA or some other type of beneficiary account.
2. A client with multiple children will be concerned about the ability of the Guardian to care for those children. There may also be a concern with keeping all of the children in a single household. Further, the client may be concerned about the financial burden being put upon the Guardian in taking on this assignment.

**SAMPLE PROVISION:** The following is sample language for lifting the financial burden for Guardianship. Such language might not be appropriate if the Guardian and sole Trustee are the same individual:

**(A) I am relying upon the Guardian of the person of my children to take care of them. This will result in increased living expenses for her and may require her to buy a larger home or to add to the house in which she already lives. It is my wish that the shouldering of the burden of my children should not cost her anything, and I therefore authorize and direct my Trustee to pay any amounts to her for any added out-of-pocket expense resulting from her doing so, even though, as in the case of an addition to the Guardian's existing house for the purpose of housing my children, the expense may be of direct benefit to her. My Trustee shall make such payments out of the trust.**

**(B) My Trustee shall be under no duty to seek, nor the Guardian to make, repayment for any benefit she may receive hereunder.**

**(C) My Trustee shall be entitled to rely upon statements of fact made by the Guardian in arriving at the amount of any payment made hereunder, without any further verification.**

- J. Guardian Compensation: A Guardian of the property is entitled to the same compensation as an Executor. SCPA §2307 (1). If income is received and paid over, the Guardian is entitled to annual commissions at the principal rate. SCPA §2307 (4). As with other compensation, the Will can provide some specific alternative compensation. SCPA §2307 (5).
- K. Guardianship After Divorce: Even though a deceased was the custodial parent, he or she cannot appoint a Guardian that will take priority over the surviving, non-custodial parent. DRL §81. An ineffective appointment results in the appointee

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becoming a donee of a power to manage property during minority, subject to all of the provisions of the Guardianship statute. SCPA §1714. The effect of such an appointment is to leave management of the property of the infant in the hands of the person selected by the client, rather than the surviving parent of the infant.

- X. **IN TERRORUM CLAUSE:** When the client is concerned that one or more of the distributees will contest the will, a solution may lie in an In Terrorem Clause which takes away the benefit left to any contesting distributee. Such clauses are strictly and narrowly construed. It is not possible to prevent an incompetent or infant from contesting by such a clause. EPTL §3-3.5(b)(2). Further, the effectiveness of the clause is proportionate to the size of the bequest which would be forfeited. The greatest protection comes where a substantial benefit would be lost by the distributee who chooses to contest.

A. The following is language which could be used to discourage a contest:

**\_\_\_\_\_:** In the event that any beneficiary named herein shall, directly or indirectly, under any pretense or for any cause or reason whatever, oppose the probate of my last Will and Testament, or institute, abet, take or share, directly or indirectly, in any action or proceeding against my estate to impeach, impair, set aside, or invalidate any of the provisions of my Will, or make any agreement, direct or indirect, in connection with any of the foregoing, with any person instituting, abetting, taking or sharing in such action directly or indirectly, I do hereby revoke any and all devises, bequests, trusts, or other provisions to or for the benefit of any such person, and I direct that any such devises, bequests, trusts, or other provisions, to or for the benefit of any such person, shall become part of my residuary estate, except that if such person shall be entitled to share in or benefit from my residuary estate, then the share of such person shall be disposed of as if such person had predeceased me, without leaving issue surviving him or her.

- XI. **SIMULTANEOUS DEATH CLAUSE:** EPTL §2-1.6 provides that where spouses die simultaneously, with no evidence that one outlived the other, each spouse's estate is retained and disposed of as though the other predeceased. If one spouse's estate is substantially larger than the other's, then the statutory result is that there are no transfers to the smaller estate and the larger estate is exposed to estate taxation in its bracket.

The statute further provides that its provisions will not apply if a Will makes some other provision. Therefore, if a Will provides that a defined spouse is presumed to survive (the "defined spouse" being the spouse with the smaller estate), then any marital provision in the larger estate owner's Will can be implemented to reduce that estate's size and bring it down into a lower tax bracket. If, however, everything flows to the smaller estate, the bracket problems are simply transferred and magnified. Therefore, the executor of the smaller estate should receive assets until both estates are approximately equal and then disclaim any further transfers. In this way, the ultimate taxation of the combined estates will occur at the lowest possible tax bracket.

All spousal planned Wills should have a clause that provides that the smaller estate owner is presumed to survive the larger owner in the event of a simultaneous death, together with



a disclaimer provision authorizing the executor of the smaller estate to disclaim. The effect of this is to keep the disclaimed property out of the deemed survivor's estate and direct where any disclaimed property should go.

**SAMPLE PROVISION:** Simultaneous Death Clause-- Wife Presumed to Survive

**“If my wife, \_\_\_\_\_, and I shall die under such circumstances that there is not sufficient evidence to determine the order of our deaths, then it shall be presumed that she survived me, and my estate shall be administered and distributed, in all respects, in accordance with such presumption.”**

A requirement that any beneficiary (other than a spouse with a smaller estate) must survive the client for a limited period of time (i.e., three months) in order to receive any disposition offers some protection if the client and beneficiary are involved in a common accident that results in their simultaneous deaths or in their deaths in short succession. Without this provision, if the beneficiary survives, if only for a day or less, the beneficiary is still entitled to the disposition. Thus, what was meant to be a gift to the now-deceased beneficiary instead passes to that beneficiary's estate, possibly defeating the client's alternative disposition of the property.

**SAMPLE PROVISION:** Nonspousal Simultaneous Death Clause

**“If any beneficiary named or designated in this Will shall survive me but die within ninety (90) days after my death, he or she shall be deemed to have predeceased me , and I direct that all provisions of this Will shall be construed accordingly.”**



## **WILL DRAFTING**

**Refer to outline by Carl T. Baker in Section 4B**



**REVOCABLE TRUSTS**

by

**David C. Reid, Esq.**

Attorney at Law  
Rochester

Reprinted from Introduction to Estate Planning (NYSBA, Fall 2007)



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## I. INTRODUCTION

A **revocable express trust** is a contract created by the Settlor, or Grantor, which imposes responsibilities, ie, obligations of administration, on the Trustee to administer the trust according to the contract and the promises, covenants and provisions imposed by the Settlor to which the Trustee has agreed. The terms of the trust will be enforced so long as it is not for an illegal purpose. Not only is there a relationship with the Settlor and the Trustee, there is also a relationship which the Trustee has with the beneficiary, whether the beneficiary has only an income interest or a remainder interest. This total relationship is referred to as a **fiduciary relationship** which means that the Trustee has to put the equitable interests of the trust beneficiaries before his/her own; that the Trustee must exercise good prudent judgment (something more than mere good business judgment); and the Trustee must show impartiality between the sometimes competing interests of the trust beneficiaries, such as the desire by the income beneficiary to maximize income and the remainder interest to preserve capital and have the trust estate principal grow in value. It is both a standard of care and of conduct of the highest ethical order and as with all fiduciary relationships, once there is some evidence of its breach by the Trustee, the burden of proof shifts and obligates the Trustee to show that he/she has properly discharged the Trustee's duties which were within the scope of the trust relationship.

In order for a natural person to create a lifetime trust, that person must be eighteen years of age or older<sup>1</sup> and the property which may be disposed of shall include every estate in property<sup>2</sup>, such as life estates, or for a term of years, reversions, remainders, etc. Further, every legal estate and interest not embraced in an express trust and not otherwise disposed of remains in the creator.<sup>3</sup>

Unless the trust **expressly provides that it is revocable, it is irrevocable.**<sup>4</sup> There is additional provision in the EPTL for the revocation of an irrevocable trust (EPTL 7-1.9) which allows a trust created on or after 9/1/1951 to be revoked or amended in whole or in part with the written consent of all the persons beneficially interested in the trust, the Settlor and Trustee. A disposition in favor of a class of persons such as heirs, heirs at law or next of kin does not create a beneficial interest. See *Re Dodge's Trust* 25 NY2d 273, 303 NY2d 847, 250 NE2d 849

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<sup>1</sup> EPTL 7-1.14

<sup>2</sup> EPTL 7-1.15

<sup>3</sup> EPTL 7-1.17

<sup>4</sup> EPTL 7-1.16

(1969) where the Settlor retained the power to amend the trust and it was construed that the power to amend was in fact a power to revoke. See also Estate of Case 154 Misc2d 699; 585 NY2d 1004 (1992) where the Court permitted reformation of trusts created by the decedent to minimize the estate taxes of the widow so as not to waste any deductions and credits upon her eventual death.

Revocable trusts, provided that the Settlor is **not the sole Trustee**, may be unfunded by the Settlor where there is a pour-over Will which passes property from the creator's estate to the trust at the creator's death.<sup>5</sup> This is contrary to the traditional trust concept which requires a res or trust corpus upon the establishment to the trust. See section III following.

In the typical revocable trust, the Settlor conveys assets to the Trustee and directs that the Trustee shall pay to the Settlor all of net annual trust income in convenient installments during the Settlor's lifetime together with such sums of principal as the Settlor may request from time to time. Income payments can be made to or for the benefit of the Settlor's spouse and there is provision for the invasion of principal which may include the comfort and general welfare of the Settlor or the standard of living to which the Settlor and his spouse are accustomed. Generally, the trust provides that upon the death of the Settlor, the trust principal will be paid over in some fashion to another beneficiary or continue in trust for another beneficiary. During the lifetime of the Settlor, the trust for income tax purposes is treated as a Grantor trust and all of the trust income will be taxed to the Settlor.<sup>6</sup> To avoid the administrative burden of obtaining a new taxpayer identification number (TIN) and the filling of form 1041, the Internal Revenue Service, where the Settlor is the sole Trustee or a Co-Trustee, will not require the TIN so long as the information is properly reflected on the Settlor's 1040 as the income recipient.<sup>7</sup> Generally, trusts have a calendar tax year (formerly IRC 645 now IRC 644). Question; how do you handle the reporting of income from the trust if the Settlor is one of those rare taxpayers who is on a fiscal income tax year? The trust is on a fiscal year, too.<sup>8</sup>

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<sup>5</sup> EPTL 3-3.7, See Matter of Bourcet 175 Misc 2d 144, 668 NYS 2d 329 (1997)

<sup>6</sup> IRC 676

<sup>7</sup> Treas. Reg. 1-671-4(b)

<sup>8</sup> Rev. Rul 90-55

Thus, as would be expected, there is no income tax advantage to the taxpayer in establishing a revocable lifetime trust, but there is no income tax disadvantage either, unless the Settlor is not the Trustee or Co-Trustee, in which case the reporting requirements are the same as any Grantor Trust and that may result in an additional administrative burden and expense.

For purposes of capital gain or loss on the sale of trust assets by the Trustee, the tax cost (basis) of assets held in the hands of the Trustee during the Settlor's lifetime will be the same basis as that previously in the hands of the Settlor. Generally, the transfer of assets to the Trustee by the Settlor is viewed as an incomplete transfer for gift tax purposes. The tax treatment of the trust at the Settlor's incompetence and after the death of the Settlor will be discussed later.

## **II. REASONS IN FAVOR OF OR AGAINST THE CREATION OF THE REVOCABLE TRUST**

### **A. Asset Management**

While many clients enjoy the management of their securities or other assets, over time it can be a burden to collect the dividends, or be aware of bond calls when obligors refinance, or go to the bank or follow low basis stocks. With age, the client wants to simplify his/her life and may want help in managing assets. A revocable trust where the creator is not the sole Trustee is an excellent vehicle to accomplish such a purpose. In many instances, the trust creator is an older client whose children are willing to help as they see their parent begin to decline mentally and physically.

The type of revocable trust should be discussed with the client. For example, the client may want to maintain as much independence as possible and the **standby revocable trust** may be appropriate. Generally a standby trust is created when the Settlor appoints the Settlor and a bank (or other person) as Co-trustees and establishes a custodial account at the bank which, during the Settlor's competency or until requested otherwise, has no investment or other trust responsibilities except as custodian. When the Settlor becomes disabled or upon his/her request, the bank, as Trustee, takes over the investment responsibility and active management of the trust, which may include the payment of bills. The standby trust is desired by the client who does not wish to depend upon others, such as well

meaning children or other relatives.

Some older clients may simply want the investment expertise offered by the Trustee who shall consult with the Settlor from time to time. The Settlor is passing the investment burden to the Trustee, consistent with the risk tolerance of the Settlor/Beneficiary.

## **B. Incapacity**

The law does not deal well with the incapacity of a citizen and places before the client an array of mandated hurdles which the family and the client must overcome. The legal proceeding is called a Guardianship and it can be expensive. There is the legal work of preparing and filing the Petition, supporting documents, notices, waivers, evaluators, plan of care, Orders, bonds, accounting, etc. It is little wonder that clients are encouraged to consider signing a short form statutory durable power of attorney, in lieu of such a cumbersome judicial proceeding. Moreover, if a spouse or parent is incapacitated, the additional stress of a legal proceeding does not help in dealing with family concerns about the medical problems of the client.

The revocable trust can be an excellent vehicle in dealing with the preservation of the client's assets, but it can be subject for wrongful conversion by the Trustee. The same may said for the felonious agent operating under the grant of a durable power of attorney.

As a practice tip where the client is not inclined to create a revocable trust (or as part of your planning generally), have the client consider a direction in the power of attorney to establish a revocable trust with the agent and a designated bank as Co-trustees, with the further direction that upon the death of the Settlor, the remaining trust assets shall be paid over to the Settlor's estate. This will allow the agent to oversee the professional investment of the Settlor's assets which have been gathered under the trust umbrella and the agent will not be burdened with administrative details. In addition, the family will know that the assets are secure and the mistrust, which can occur when an agent acts alone, will be substantially diminished. There will be a cost for the services of a bank as Co-trustee, but such expense is similar to that of a money manager and it is tax deductible, depending upon the nature of the securities managed.

If the trust is in place at the time of the Settlor's incapacity, then the Co-trustee or Successor Trustee will be in a position to act. But the critical question will be "Can I trust my Successor Trustee? My agent? If the answer is yes, then this arrangement can be a superior method in dealing with a client's incapacity. There is continuity of asset management.

### **C. Avoidance of Probate**

A client's Will operates only to transfer property which is in the client's name alone, or the estate for one reason or another is the beneficiary of contractual rights, or assets are payable to the estate by default. The law has already made a presumed pattern of estate distribution which is called the law of intestacy. The law permits a citizen of age to transfer property in a fashion which is different from the statutory scheme through the use of a Will, so long as certain statutory requirements are met. The client's Will, if admitted to probate, will cut off the created statutory property rights under the law of intestacy. The legal proceeding of proving the client's Will is called probate and there is an entry of a decree wherein the Surrogate Court judge orders that the Will is genuine and valid and appoints the legal representative to administer the decedent's estate

The revocable trust places legal title to the Settlor's assets in the name of the Trustee by conveying such assets during lifetime to the revocable trust. Hence, at the death of the client/Settlor, those assets are not in the name of the client and are not subject to the terms of the decedent's Will unless the decedent's Will has altered or amended the trust, or the trust terminates at the client's death in favor of his/her estate. But, most often, there are dispositive provisions in the trust which direct the transfer of the trust's assets. Accordingly, if substantially all of the client's assets have been transferred into the trust, there may be no need to probate the client's Will.

On occasion, the client, due to advanced years, has a family tree with substantial gaps of unknown distributees or distributees whose whereabouts are unknown. One client, age 96, refused to answer to questions about his next of kin with whom he had no contact in 40 years and who were somewhere in Canada and Ireland. In order to avoid any probate proceeding, filing fees, guardian ad litem fees, and for ease of administration, a revocable trust was created for the client and all assets were transferred to the trust.

The avoidance of probate assumes that substantially all of the assets of the client are, in fact, placed in the trust prior to death. But, life is rarely so tidy. Indeed, that is why the client will have executed a pour-over Will which directs that if property remains outside of the trust at the client's death, such property shall be transferred into the trust. Does that mean that the Will has to be probated? It depends whether exempt property (EPTL 5-3.1) passing to a surviving spouse will be able to absorb the value of property in the decedent's name, and if not, whether the \$20,000 threshold of a voluntary administration under SCPA Article 13 can absorb such property. Additionally, the lawyer will want to know if there is real estate owned outside the trust? Is a wrongful death suit contemplated? Will the Executor have to sue someone to press a claim or collect an asset? In short, there are a variety of reasons why the probate of the client's Will may be required even when the client has a revocable trust.

The confusion which the trust sales promoter creates in the client's mind is in describing the "Probate Process". Of course, there is no such process. The marketer combines the limited probate proceeding with estate administration whose timeframe, regardless of how the decedent's assets are held, depends in large measure upon the required clearances from the estate tax authorities.

Can a revocable trust avoid probate? Yes. Will it? Who knows.

#### **D. Privacy**

Since the revocable trust is usually not recorded in Surrogate's Court, it does not become a public document which is available for viewing by friend and foe alike. A client's concern for privacy presumes that people are interested in the provisions of a client's Will. Years of practice tell me otherwise, unless the client is Margaret Strong (Kodak family) or Joseph C. Wilson (Xerox family). What if the trust is challenged in Surrogate's Court or Supreme Court? What if the trust holds title to real property? If you are representing a prospective purchaser of real estate held in a revocable trust, what document do you want to have recorded to show the chain of title? What authority does the Trustee have to sell the parcel? Does any other party need to consent or sign the deed beside the Trustee? Or suppose you want to lease the parcel. What authority does the Trustee have to encumber the property? Is the Trustee going to sell and take back a mortgage? In one instance, the bank giving a mortgage on a parcel required the parcel to be removed from the trust before putting the mortgage on.

Can the revocable trust allow for client privacy? Yes. Will it? Who knows.

#### **E. Reduce Estate Expenses**

The suggestion put forward is that the use of the revocable trust will save both executor commissions, attorney fees and Court filing fees. The fact that the use of the revocable trust can save Court filing fees on probate (there is no estate tax proceeding filing fees in Surrogate's Court) reinforces the outrageous New York State Court filing fee structure. No person can explain why the filing fee for the settlement of a \$650,000 revocable trust in Surrogate's Court is \$210 and the filing fee for the same size estate or testamentary trust is \$1,250.

Moreover, the fact that every proceeding for an individual estate in Surrogate's Court is a separate proceeding with a separate filing fee is hardly consumer or customer friendly. Compare Florida's estate filing fee of \$200 which includes all proceedings for the estate before the Court.

A revocable trust can save Executor commissions under certain circumstances. First, there is the assumption that the Executor will, in fact, take commissions and will not waive them. In the case of a surviving spouse who may inherit all or a large portion of the estate, there is usually no reason for such spouse as Executor to take commissions from either an estate tax or income tax point of view. In numerous family settings, a child will often forego his/her commissions as Executor, unless his/her siblings start making trouble, in which case the threat of taking commissions can temper some family discord.

Alternatively, in a large estate of a single taxpayer, such as a parent, it can be beneficial to have multiple deductible Executor commissions since the estate may be in a higher estate tax bracket than the income tax bracket of the children/beneficiaries. If you contemplate more than two commissions becoming payable see SCPA 2313 which requires a written signed statement by the decedent authorizing such additional third commission.

Banks are willing to reduce their Executor commissions (if they are appointed as Executor), when the client is willing to have the bank become the Trustee or Co-trustee of the client's revocable trust today while the client is alive. The benefit to the bank is that it will receive current fee revenue based upon its fee schedule and in all likelihood that annual revenue will continue for a number of

years, plus if the client dies, the bank will receive about a 50% Executor's commission for performing Executorial services which is future business it might not have obtained. The recurring annual Trustee commissions and trust terminating commission will more than make up for a reduced Executor commission. From the client's perspective, the estate administration fees have been reduced and the client is receiving professional asset management.

A revocable trust can reduce attorney fees if the attorney charges by the hour and knows what he/she is doing, but there is no guarantee that such fees will be reduced since it will depend upon the work to be performed and responsibilities of the professional engagement as set forth in the attorney's retainer letter. Many of the same estate and tax issues arise whether there is a trust or not.

Consider the following trust expenses:

1. Development of the estate/tax plan
2. Preparation of documents
3. Funding the trust
4. Trustee commissions/annual/terminating
5. Attorney counsel to the trustee(s) during the trust term
6. Accounting services/tax services annually
7. Final accounting for the trust
8. Expenses for judicial or informal settlement of the trust
9. Administration services after death/transfers/tax returns (gift, estate, income)

#### **F. Avoid Delay/Allow Immediate Asset Distribution**

As previously stated, the revocable trust is an excellent vehicle for continuity of asset management. This is true at death, assuming that all the client's assets have been consolidated under the trust umbrella. If so, there will be no probate proceeding and there will not be the gathering process of assets and inventorying those assets. With a completely funded trust, the inventory for the Trustee will be relatively simple.

The continuity of asset management may be especially valuable in a volatile stock market when action should be taken following the Settlor's death. See Estate of Carroll Donner 82 NY 2d 574; 626 N.E. 2d 922; 606 NYS 2d 137 (1993) for



failure by fiduciary to conserve estate/trust principal after death. On the other hand, if a nominated Executor is concerned about a volatile market, it is possible to obtain preliminary letters of appointment upon a petition presented to the Surrogate Court and the Executor will be prepared to act to protect the estate. Preliminary letters authorize the nominated Executor to act as Executor, except that since the Will is not probated, there is a restriction that the Executor cannot distribute the estate assets to legatees or other beneficiaries. Full letters can be granted at a later time. Unhappily, in some of the more populated counties in New York, the time it takes to obtain preliminary letters from Surrogate's Court is no less than the time it takes to receive full letters. This Court delay may be sufficient reason to create a revocable trust, at least over volatile assets/securities.

The question arises will the third party Trustee have to account for its proceedings as Trustee upon the death of the Settlor? The answer should be yes. Who do you represent? If you represent the Trustee who will be accountable to continuing or remainder interests, or to a Successor Trustee, then your client has a duty to make sure that the trust administration has been proper. The trust may contain a provision that a subsequent Trustee need not inquire into the earlier administration of the trust, but that provision is, in all likelihood, unenforceable as contrary to public policy. As a practical matter, if the Settlor is the sole Trustee (now deceased) and the remainder interests are well aware of the trust's transactions and no one has objection, an accounting could be waived. But, if there is a bank as Trustee, or if the Co-Trustee is also the nominated Executor who will be appointed, or if there is family discord or suspicion of self dealing or any possible question of the acts of the Co-Trustee of any aspect of the administration of the Trust, then a trust accounting is in order for the protection of your client. This is not an issue to just skip over. Unbelievably, the need to account is an issue which one trust promoter, who was soliciting attorney participation for his national program, disingenuously referred to as the "real mining of gold".

An accounting question arose concerning the extent to which remaindermen could object to the account of a joint revocable trust for the administration during the period when both A and B were co-trustees and living. A and B created the trust and were beneficiaries. The objectants were A's three children by a prior marriage. The Court ruled that since A and B could revoke the trust during their lifetimes, A's children had no standing to object to the trust's administration. The children did have standing to object to the trust's administration after A's death.<sup>9</sup>

<sup>9</sup> In re Mataskey 290 AD 2d 631; 736 NYS 2d 151 (2002)

Where the Trustee has taken annual commissions or where the Trustee intends to take a termination commission, the remainder beneficiary, as well as the Executor, if any, of the decedent's estate are entitled to and should receive an accounting.

An issue sometimes presented as a "selling point" is the trust's ability to distribute assets immediately after the death of the Settlor. How would you advise your client? Although the Trustee has the power to cause the distribution of trust assets, should your client do so? Has the decedent/Settlor left his/her financial affairs in such a state of disarray that there are substantial creditors whose claims may exceed the assets of the trust/estate? What estate tax or income tax liabilities are anticipated? What about those taxable transfers made to family and friends over the past 15 years which no one wants to talk about? What provision has been made for the surviving spouse? Will there be a right of election exercised? Are life insurance proceeds payable to the trust? Are qualified plan benefits or IRAs payable to the trust? Will there be an examination of the use of disclaimers? Who will be responsible for resolving these issues and the taxes to be paid? Your client, the Trustee.

As a practice tip, the client should anticipate that there will be immediate cash needs at death. At a parent's death, children do not come to town with their thoughts on how to pay the funeral bill or other out of pocket expenses. Therefore, have your client consider establishing a modest joint bank account with the child or one for each of the children. This will provide ready cash, if needed. Additionally, the Settlor and spouse while living should retain their joint checking account outside of the trust. This will make check cashing easier, since there will not be "Trustee" checks and there will be immediate cash available outside the trust at the death of the first spouse, thereby allowing time to assess whether there should be a full or partial disclaimer.

While the possibility of a Will contest is remote in the vast majority of probate proceedings, the use of the revocable trust is alleged to avoid this problem. The reason why the possibility of a trust contest may appear more diminished is that the trust's existence may not be made known to the decedent's distributees and no one is given any kind of notice by the Trustee of any amendments or changes to

the trust's provisions which might impact the interests of the beneficiaries. The issues of capacity, due execution, fraud and undue influence are raised in a Will contest. The proponent of the Will must establish the first two. These same issues can be raised in the revocable trust setting.<sup>10</sup>

There are procedural issues which differentiate a Will contest and the trust contest. Those issues involve (1) attorney-client privilege CPLR 4503(b); (2) right to examine the attesting witnesses to a Will (SCPA 1404). See execution of a self trustee trust; (3) right to trial by jury (SCPA 502 (1)).<sup>11</sup> Court held that there was no right to jury trial on issues raised in proceeding to set aside a revocable trust. Compare *in re Buscher* (7/11/1998) Rockland County, wherein the Court concluded a jury trial was appropriate because the Will and revocable trusts issues were so intertwined, having been executed on the same day.

#### **G. Save Estate Taxes**

The assets of the trust are fully includable in the decedent's estate under IRC 2036 which provides that the assets are included in the decedent's estate for tax purposes where the Settlor retains the use, enjoyment, possession or right to income therefrom for life or a period of time not ascertainable without reference to the Settlor's death. And IRC 2037 states that the trust is included for estate tax purposes if the trust arrangement constitutes a transfer taking effect a death. And IRC 2038 provides for inclusion where the Settlor has the power to alter, amend or revoke the trust.

The application of the tax law to save estate taxes applies whether the decedent has a Will or trust. Indeed, it is the planning to keep assets out of the estate which is critical, not solely the tax planning which may be embodied in the dispositive instruments of the client. The unified credit/exempt amount/ marital deduction/ charitable deduction, etc. are all available.

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<sup>10</sup> See *Matter of Ricardino* (Feb 5, 1998, Nassau County) and *Matter of Davidson* 677 NYS2d 729 (1998). The Surrogate Court took jurisdiction of the matter because the trust was part of the decedent's estate plan. See *In re Freilich* 179 Misc 2d 889, 686 NYS 2d 294 (1999) where action to contest a trust and 2 wills signed on same day were consolidated.

<sup>11</sup> See *Estate of Aronoff* 171 Misc 2d 172, 653 NYS 2d 844 (1996).

## **H. Avoidance of Ancillary Proceedings**

With clients owning real and personal property in a variety of state jurisdictions, the lawyer would like to avoid an ancillary probate in such non-domiciliary jurisdictions. There are several methods to accomplish this objective such as the use of joint ownership with right of survivorship; or the creation of a partnership into which the parcel of real property is transferred, or the use of a corporation/LLC or make a gift of the assets to the kids, now.

The use of revocable trust is recommended because it provides for asset management continuity, since the asset is in the trust and not in the decedent's name alone. But, make sure the trust meets the legal conveyancing requirements of the foreign jurisdiction.

Of course, the fact that the decedent owned property in another jurisdiction either individually, jointly or in a revocable trust will not avoid the claim by such jurisdiction for its share of state death taxes. As a practice tip, note that these ancillary state death taxes are generally based upon a proportionate share of the gross value of the foreign asset to the gross value of the entire estate. Do not assume that because the New York State estate tax appears to use up the entire federal credit for state death taxes (or what remains of that credit) on the federal estate tax return that no tax is due a foreign jurisdiction.

In addition to the problems and expense of an ancillary proceeding, some jurisdictions such as Florida place restrictions on the non-domiciliary person who can be appointed as legal representative of an estate. Will the legal representative be limited to persons who are blood related to the decedent? If a bank in New York or a friend is appointed as Executor of the client's estate in New York, who will qualify as the ancillary legal representative in the foreign jurisdiction?

Note also that generally while a Will which is validly executed in one jurisdiction will be valid in a foreign jurisdiction, that is not the rule for trusts.

If the Settlor transfers out of state property to the trust, then in lieu of a successor trustee at the Settlor/Trustee's death, consider the appointment of the Settlor and another party as Co-trustees when the trust is created so that the remaining Co-trustee can act at the Settlor's death.

## **I. Funding the Trust/The Joint Revocable Trust**

The funding of the revocable trust has important consequences which are central to the effectiveness of the trust plan. If not properly funded, the client's Will is going to be probated; the gathering of assets will occur, etc. Obviously, the first step is to examine the nature and the registration of the client's assets. For the older client, the trust can serve as a vehicle to consolidate the registration of securities whether they are held by the bank as Trustee in nominee name or in a brokerage account. Is there any advantage to holding the actual certificates? Indeed, many companies who have split their stocks in the past several years make "book entry" ownership on their records and no longer send the certificates for the split shares.

As a practice tip, make sure you examine the dividend receipts and communications from the company to pick up shares of stock for estate tax and administration purposes since these book entry shares which can be easily overlooked. The same may be said for dividend reinvestment plans.

You should encourage the establishment of a brokerage or custody account. This will also help in the preparation of an annual (or trust termination) account because almost all of the financial information will be in one place. Let the client and the bank/broker work together.

The typical registration will be "A and X", as Trustee(s), of a Revocable Trust U/A dated \_\_\_\_\_ by X, as Settlor and A and X, as Co-Trustee(s)." See also Treas. Reg. 25.2511-2 which states that there is no gift even if the power to revoke is restricted and requires the consent of another person and such person does not have a substantial adverse interest in the disposition of the transferred property or the income there from; A Trustee is not a person having an adverse interest in the disposition of the trust property or its income.

What tax issues are presented in creating a joint revocable trust where the husband and wife are both Settlers and Co-trustees? The notion is that the husband and wife create separate identifiable shares within the trust and they fund those separate shares with their individual assets. While this arrangement may feel cozy, it contains all of the traps which joint registration can cause, such as, when the trust is examined upon the death of one spouse, what proof does the surviving spouse have of the contribution by him/her to any particular asset. It might not

make a difference in a community property state such as California, but it will in New York. Has a gift occurred? If there is going to be a disclaimer, is the surviving spouse disclaiming her own property? Or, what do you advise when you are asked whether the house should be put into the trust? Does title retain its character as tenancy by the entireties or has it been converted to tenants in common? If so, what happens at the death of the first Settlor? If not, same question. Thus, there are issues of basis, of unintended gifting, of title, of commingling, of disclaimer, among others.

The use of the joint revocable trust has an estate planning (good side) in dealing with the exempt amount under the 2001 Tax Act (EGTRRA) and a reality check (bad side).

In the midsized estate (\$1M to 4M), the expansion over time of the exempt amount for federal estate tax purposes can create problems in estate planning for the proper utilization of the applicable exempt amount at any point in time. One marital partner may not have sufficient assets to use the entire exempt amount.

PLR 200101031 and 2002110051 posited the fact pattern under which the husband and wife created a joint revocable trust of which they were both Trustees and funded it with property owned as tenants by the entireties. Either party could terminate the trust upon notice to the other Settlor and the property would be distributed as tenants in common. At the death of the first spouse, that spouse's share would be used to fund the credit shelter trust which was created under the first spouse's will for the benefit of the surviving spouse and their descendants with any excess passing to the surviving spouse and eligible for the marital deduction. The first spouse to die was also given a general power of appointment over all the assets in the trust, including those assets attributable to the surviving spouse. Thus, if the trust assets of the first spouse were not sufficient to fully fund the federal exempt amount under the deceased spouse's Will, the assets under the general power would be used to fund the balance of the exempt trust and any excess would pass to the surviving spouse. The IRS ruled that no gift was made upon the original funding of the trust since either Settlor had the power to get his or her property back. Further, at the death of the first spouse, the entire value of the trust was included in the first spouse's estate since it included property subject to the general power of appointment. Any transfer due to the exercise general power by the spouse who was first to die was a completed transfer and eligible for the marital deduction for gift tax purposes at the first spouse's death.

In these two PLRs, the IRS addressed the income tax issue of tax basis for those assets which passed from the surviving spouse's trust assets into the credit shelter trust under the first spouse's will. Those assets which passed from the share of the trust of the surviving spouse did not receive a step up in basis under IRC 1014(e) which provides that if assets are transferred to a decedent within 1 year of death and those assets pass either directly or indirectly to the donor, there is no step up in basis for the assets so transferred. The assets which passed back to surviving spouse did not get a step up in basis and to the extent that assets of the surviving spouse passed into the credit shelter trust of which that spouse was a beneficiary, then those assets did not receive a step up in basis.

The bad news reality check for the joint revocable trust is that in the United States 50% of marriages end in divorce (the pursuit of happiness?). Since the possibility of marital discord is so substantial, the use of the joint revocable trust should be avoided. In a recent consultation with the husband, he and his wife some years prior created a joint revocable trust. Each spouse had the power to terminate the revocable trust into which the husband had transferred all of his substantial assets and into which his wife had transferred all of her very modest assets. The trust language caused two equal shares to be immediately created for all assets contributed to the trust; one share for each spouse. Both spouses were co-trustees. Thus, the husband had created a gift to his wife at the inception of the trust. To obtain additional financial leverage during the subsequent divorce proceedings, his wife refused to transfer any assets out of the trust to either herself or to her husband. She already owned one-half, and if he died prior to their divorce and if he made other provisions for his share, she could exercise her right of election against his remaining share.

The better practice is to have separate trusts for each spouse and leave the house alone. There is a good deal of comfort to a spouse to know that the home will pass to her upon her husband's death. If there is a concern about disability of one spouse, then a durable power of attorney can be used, unless there is reason to believe that both husband and wife will sustain incapacity at the same time, and even then, a successor POA agent can sell the house and add the proceeds to each spouse's respective trust.

In addition, you should exercise some care in transferring real estate into a joint revocable trust. Recall that under the 1981 Reform Tax Act, property owned

together by husband and wife is viewed for estate tax purposes as being owned one-half by each spouse. For purposes of basis (tax cost) at death, there is a new tax cost for the one-half share of the deceased spouse. The surviving spouse retains the original basis attributable to her one-half share. Under prior law, there was a contribution test whereby generally the asset was included in full in the estate of the joint tenant who was first to die except to the extent that the surviving joint tenant could prove her contribution. This usually caused the asset to be fully includible and therefore, the asset received a full step up in basis. The 1981 Tax Act changed this for assets owned by husband and wife as previously mentioned.

As part of the estate plan consideration must be give to basis issues since although there may be no estate tax at the first spouse's death, the subsequent sale of jointly held assets by a surviving spouse can generate capital gain tax because the asset at the first spouse's death did not receive a full step up in basis. The transfer of an asset to a joint revocable trust may cause a loss of the full step up in basis.<sup>12</sup>

Some lawyers who are not familiar with IRAs or qualified plan benefits should make sure that their clients are advised **not** to fund the trust with these benefits during lifetime. The transfer of an IRA into the trust's name will cause an immediate recognition of income to the participant. More will be said on this later. Further, make sure that if a residence or other real property is transferred into the trust that the homeowner's insurance will cover the property and that any mortgage with a "due on transfer" clause will not result in the mortgage being called. If the client has S Corporation shares, a revocable trust can hold the shares up to two years after death without causing a termination of the S Corporation tax status. Care must be used if the trust might contain S Corporation shares. Consider creation of separate trusts after death for each beneficiary of the S Corporation shares.

The funding of the revocable trust is often not followed up. Perhaps the client does not understand its importance or perhaps because the client just doesn't take the time to do it. Put a tickler on the calendar to follow up each month. Give your client a checklist.

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<sup>12</sup> See Hahn v. Commissioner, 110 TC 140 (1998) acq. 2001-2 C.B. and Gallenstein v. Commissioner, 975 F 2d 286 (1992) for joint interest in realty created prior to 1977, Court allowed full step up in basis based upon the contribution rule under IRC 2040.



## J. Need for a Will

As has been previously stated, as part of the package of documents for the client, the plan should include a pour-over Will, which provides that the residue of the client's estate will pass to the trust. There should be coordination between the trust and the Will in terms of their respective dispositive Articles, as well as, the tax non-apportionment clauses. The latter will be discussed later.

Suppose that the client's Will provides a \$20,000 legacy to the church and at the time of death, the client's probate assets amount to \$10,000. The revocable trust says nothing about funding legacies under the decedent's Will. The Remainderman of the trust is an atheist. What do you tell the church?

Suppose that the client's Will provides a \$20,000 legacy to the church and at the time of death, the client's probate assets amount to \$30,000, but the client's creditors claims amount to \$18,000. The revocable trust says nothing about the payment of debts by the trust nor legacies. The trust Remainderman has recently completed bankruptcy. What do you tell the church?

What if the client's Will has a specific tangible personal property Article and that property is the only probate asset and the funeral bill is unpaid. Will the trust Remainderman expect the personalty to be liquidated?

The point is that there should be provision in the revocable trust for the satisfaction of any legacies and the payment of bills and it should **not** be based upon "if there are insufficient assets in my probate estate, I direct ...". Rather, direct the Trustee to comply with any requests from the Settlor's Executor for cash for the satisfaction of any legacies or the payment of any creditor claims without regard to the property comprising the Settlor's probate estate at the time of his death.

Of course you may wish to draft around these and other issues. Consider the following language in part:

ARTICLE III  
Administrative Matters

At the Settlor's death, the Trustee shall pay over to the Legal Representative of the Settlor's estate such sums as may be requested by such Personal Representative to pay any cash legacies under the Settlor's Will, together with the debts, burial or administration expenses of the Settlor or the Settlor's estate, so that any specific bequests or other non-cash assets owned by the Settlor and held outside of this trust shall not have to liquidated to satisfy any obligations of the Settlor's estate or any specific or general legacy or devise of real property under the Settlor's Will. For purposes of this Article estate taxes shall not constitute debts of the Settlor or his estate and the payment of all such taxes shall be governed by Article \_\_\_\_\_ of this instrument.

In Addition, no general cash legacy (specific cash amount), if any, payable first from the general trust estate shall be entitled to any trust income earned by the general trust estate after the Settlor's death and such income shall pass as part of the remaining general trust estate, except that any share or amount passing as part of the marital or charitable deduction, or any share or amount which shall pass in trust and be payable from the general trust estate shall receive its proportionate share of income earned.

In addition, the Trustee, and the Settlor's Personal Representative if any, may elect to aggregate all trust and estate income under section 645, or its successor, of the Internal Revenue Code.

**K. Creditors/Estate Tax payments by the Trustee**

EPTL 7-3.1 provides that "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." A revocable trust does not avoid the payment of creditors.<sup>13</sup>

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<sup>13</sup> See Matter of Granwell, 20 NYS 2d 91 (1967), to the extent that the Settlor had an interest in the property gratuitously transferred at death, creditors had a right to recoup the property. See also Matter of Martin 259 9D2d 809, 686 NYS 2d 809 (1999)

As you might expect, the Internal Revenue Service really doesn't care who pays the estate tax when a taxpayer dies, so long as it gets paid. If the probate estate is small or non-existent, there is provision in the tax code for "transferee liability" or the IRS will look to the holder of the assets to make payment of the estate tax. This is why, your client, the Trustee, should exercise care when considering the distribution of trust assets following the Settlor's death.<sup>14</sup>

#### **L. Other Thoughts**

The EPTL contains provisions which are applicable to Wills which are not codified with respect to revocable trusts and therefore the draftsperson should add such provisions to the trust document. It is easy to assume that the EPTL provisions for Wills apply with equal force to revocable trusts, especially with the 1997 legislative changes for self-trusteed trusts. Assume nothing.

For example, EPTL 3-3.3 provides that when testamentary dispositions are made to issue or to brothers or sisters of the testator and the beneficiary dies during the testator's lifetime that the disposition is not extinguished but vests in such beneficiary's issue. There is no such statutory provisions for revocable trusts.

Or, consider EPTL 3-3.5 relating to the limitation on in terrorem clauses in Wills. This provision in a Will does not prohibit the statutory right to examine the Will's attesting witnesses. Will this apply to a revocable trust? Should the draftsperson be specific regarding any examination of persons who witnessed the trust?

Or, consider EPTL 3-3.2 relating to possible voiding of a legacy to a witness to the decedent's Will. There is no similar witness restriction for a revocable trust. Or, consider incorporation by reference. It cannot be used in a Will. Is it applicable to a trust as a contract?

Or consider an adopted child. See EPTL 2-1.3 which includes adopted children (and or posthumous children) where a disposition is made to children, issue, descendants and includes adopted children and their issue in their adoptive relationship. The EPTL provides that this provision applies to trusts, but put provision in the trust anyway.

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<sup>14</sup> See IRC 6324(a)(2)

Or, consider EPTL 5-1.4 which voids will provisions for a divorced spouse. No comparable provision for a revocable trust.

Is interest payable on trust legacies? Nothing in the law excuses interest being payable on a payment from a trust. Compare an estate. You should draft provision to avoid these issues.

### **III. SELF-TRUSTED/SELF-SETTLED TRUSTS/CASE PERSPECTIVE**

Since 1993 the New York State Bar Association supported legislation to enable the establishment of self-trusteed revocable trusts. In 1997 this effort was successful and the EPTL was so amended.<sup>15</sup> Prior to the amendments, New York lawyers were concerned that where the Settlor was the creator, Trustee and beneficiary of the trust, there was a merger of the all of the legal and equitable interests and the trust was illusory and hence it was void and the dispositions could fail. One interesting case decided by Judge Radigan of Nassau County which dealt with the issue of merger was Matter of Sackler, (1989)145 Misc2d 950, 548 NYS2d 866 which involved a Settlor who created a revocable trust, of which he was the Trustee and into which his residuary estate poured over at death. As Trustee, Mr. Sackler could pay out income to himself, his wife or his lineal descendants. He and his 3<sup>rd</sup> wife had executed a prenuptial agreement wherein she had waived both her elective share rights and her intestate right to inherit. His revocable trust created a marital deduction QTIP trust from one portion of the trust and a charitable lead trust with other portion of the trust. He initially funded the trust with \$1. After the death of Mr. Sackler, three of his four children attacked the trust, claiming that there was a merger of the trust interests and the trust was void. If the trust was void, then there was no trust into which the estate could pour and the estate would pass by intestacy to the children. Mr. Sackler's estate was \$100 million. In his analysis, Judge Radigan noted that there would be merger if the Settlor's estate were the remainderman of the trust, otherwise a legal life estate was created with defeasible remainder interests which became vested at Mr. Sackler's death.

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<sup>15</sup> See EPTL 1-2.20; 7-1.1 and 7-1.14 through 7-1.18.

Before examining the requirements for self-trusteed trusts, the starting point is the revision of EPTL 1-2.20 which exempts certain business trusts when stating that “The term “lifetime trust” shall mean an express trust and all amendments thereto created other than by will...” (eff 6/25/97)

#### **A. Trust Interests do not Merge**

EPTL 7-1.1 was amended effective June 25, 1997 to provide “A trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of the **present beneficial interest** therein, provided that one or more other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the creator’s estate.” This would seem to apply to any trust, revocable or otherwise, past or presently established.

#### **B. Who can create a Lifetime Trust?**

Under EPTL 7-1.14 “Any person, as defined in EPTL 1-2.12, may by lifetime trust dispose of real and personal property. A natural person who creates a lifetime trust shall be eighteen years of age or older.”

The reference to EPTL 1-2.12 broadens the entities which may create lifetime trusts to include in the definition of person “a natural person, an association, board, any corporation whether municipal, stock or non-stock, court, governmental agency, authority or subdivision, partnership or other firm and the state.”

With respect to guardianship proceedings, perhaps a Court should consider the use of a lifetime trust with a corporate Trustee in lieu of the appointment of a financial guardian to gather and administer the client’s property if there is a likelihood of long term administration.

#### **C. What may be disposed of by a Lifetime Trust?**

The disposition of property by Will under EPTL 3-1.2 provides that “Every estate in property may be devised or bequeathed.” And accordingly, since revocable lifetime trusts are dispositive in nature, EPTL 7-1.15 makes similar

provision, stating “Every estate in property may be disposed of by lifetime trust”.

#### **D. Execution/Written Trust/Amendment**

Most lawyers use a certain ritual pattern of execution of Wills by clients which ritual is supposed to impress upon the client the solemnity of the occasion. Some lawyers have a client sign or initial each page of the Will and recite the declaration, ending with a question to which the correct response is the client’s saying “yes” or “ I do.” For trust execution there was no such requirement. The trust must be acknowledged in a manner sufficient for the execution of a deed in properly recordable form, ie, a notary public’s acknowledgment. There are some commentators who suggest that prior to the 1997 amendments that a simple memorandum of the trust signed by the Settlor and the Trustee without acknowledgment would be sufficient to establish the trust relationship. Other jurisdictions, such as Florida, require the same formalities in signing a revocable trust as the execution of a Will due to concerns about fraud, capacity, duress, etc and it would seem advisable that New York follow this provision and bring revocable trusts into conformity in all aspects of testamentary dispositions.

Today, EPTL 7-1.7 allows for either an acknowledgment of the signatures or “in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.”

Any amendment must be in writing and either acknowledged or so witnessed.

There is also the requirement where the **Settlor is not the sole Trustee** that any subsequent written revocation of the trust or amendment thereto must be delivered to at least one of the Trustees. The amendment is effective when it is properly executed, but any Trustee is not liable for continuing to act on the basis of the present trust provisions until the Trustee receives actual notice of the written amendment or written revocation. (Eff 12/25/97) What if the Settlor advises the Trustee that the trust is revoked, but the Trustee knows the Settlor may be mentally ill, depressed? What should the Trustee do?<sup>16</sup> Should revocation or amendment of the trust require two witnesses? Disinterested witnesses?

<sup>16</sup> See *Bird v. Citibank* 103 AD2d 718; 477 NYS2d 1 (1984).

#### **E. Mandatory Funding for Self-Trusteed Trust**

You recall that under EPTL 3-3.7 there is authorization for the establishment of an unfunded revocable trust where there is a pour-over Will passing property to the trust at the Settlor's death. For example, the Settlor, X, could create a revocable trust of which his son, Y was the Trustee and X's Will could direct that his estate was to pour-over into the trust at his death. The revocable would not have to be funded in order for it to be valid. The better practice is to always fund a revocable trust with some cash, say \$10.

EPTL 7-1.18 provides that a lifetime trust shall be valid as to any assets transferred to the trust. It is not enough to merely recite that there has been an asset transfer. Generally, there is a rule that when there is a written acknowledgment in a document, such as a deed, of the receipt of consideration, it is presumed that the consideration was so furnished. In this instance, it will not be sufficient funding to have a general recitation of the assignment of assets when in fact the property is not transferred. For the trust where the creator is the sole Trustee, the trust will operate only upon assets transferred, ie, upon those assets which have been actually transferred into the Trustee's name, at least as to assets

capable of such re-registration. For assets which are not capable of re-registration, there must be a written assignment describing the asset with particularity. Example, tangible personal property should be inventoried and a written assignment made to the trust with an acknowledgment of delivery. (Eff 12/25/97) EPTL 7-1.18 codifies the funding requirement of the trust contrary to the ruling in Matter of Newlin 119 Misc 2d 815, 465 NYS 2d 102 (1982) where the Settlor was also the Trustee.

In short, if the self trustee trust is unfunded at death, it is not valid.

#### **F. Revocable Trust Must State it is Revocable/Revocable by Will**

EPTL 7-1.16 is a codification of the case law that if a trust does not say that it is revocable, then it is irrevocable.

When drafting, put the fact that the document is a revocable trust in your general description of the trust. Example: This trust shall be referred to as the

“\_\_\_\_\_ Revocable Trust”. In addition, add a separate Article in the trust document reciting that the trust is revocable.

Moreover, this section of the EPTL says that in addition to the provisions for revocation and amendment contained in EPTL 7-1.17, a revocable lifetime trust can be revoked or amended by express direction in the creator’s Will which specifically refers to such trust or the trust’s particular provision.

It may appear that this provision is treating a revocable trust the same as a totten trust which under EPTL 7-5.2(2) can be revoked by the testator’s Will. But there is a vast difference between the purposes of the two arrangements, the former capable of disposing of a Settlor’s entire estate. Are we not simply opening the door for having the trust plan of an elderly, infirm client destroyed by fraud, undue influence and duress in a later Will? Recall, the law requires less capacity to make a Will than a contract.

#### **G. Invasion of the Trust Principal.**

On occasion the sole Trustee of an express trust or a testamentary trust is an income beneficiary and the trust provides for either the discretionary distribution of income or the invasion of principal subject to certain ascertainable standards, or both. There is obviously a conflict of interest confronting the Trustee who wants to obtain income or trust principal for his/her own purposes. Since the conflict is so clear, EPTL 10-10.1 provides that such Trustee is disqualified from making the discretionary decision in his or her own favor. The decision devolves to the Supreme Court or the Surrogate Court. This will mean a proceeding before the Court on notice and possibly a hearing and filing fees, legal fees, etc. Effective 6/25 /97, this limitation shall not apply to the Trustee of a revocable trust who is the person who holds the power of revocation. **“Except in the case of a trust which is revocable by such person during lifetime, a power conferred....”**. The provision of EPTL 10-10.1 would apply to any Trustee after the Settlor’s death when the trust becomes irrevocable. For example, the trust may name the husband and wife as the initial trustees. The trust further provides that upon the husband’s death, the trust is split into two new trusts, a QTIP trust and a credit shelter/exempt amount trust. Principal of the QTIP trust is payable to the surviving spouse at the discretion of the trustee. Income and principal of the credit shelter trust are payable to such spouse at the Trustee’s discretion. The husband dies and the wife is now the sole surviving trustee. How do you advise her regarding her



role as trustee who cannot exercise her discretion in her own favor? She was told by the trust marketer that she would be “in control” of the trusts if her husband died.

#### **IV. INCAPACITY AND THE POWER TO REVOKE/GIFT TAX CONSEQUENCES**

The notion presented was that upon the incapacity of the Settlor, he/she is no longer able to revoke, amend or alter the trust and the property interests become irrevocable with the Settlor retaining the trust life income (not a transfer) and the remainder interests vesting (a taxable transfer). IRS viewed the Settlor as no longer having dominion and control over the assets and thus arguably there was a completed gift. Unfortunately, under IRC 2702 the value of a retained life income interest by the Settlor is ignored for gift tax purposes and thus, the full value of the transfer became taxable.

The easiest way to avoid this potential gift tax issue in the past was for the Settlor to retain a general power of appointment over the trust. The fact that the Settlor may have been unable to exercise the general power was of no concern, since the mere possession of this retained general power was sufficient to make any potential transfer deemed incomplete for gift tax purposes.<sup>17</sup>

If the trust authorizes the “suspension” of the power to revoke, alter or amend the trust during a period of incapacity of the Settlor, does that mean that it cannot be exercised by anyone else? Yes. The power to alter, amend or revoke is viewed as personal to the Settlor, similar to a client revoking or amending a will. A guardian would not be able to revoke a client’s will. So too, with a revocable trust. However, see Matter of Elsie B 265 AD 2d 146, 707 NYS 2d 695 (2000) where under the broad powers of the Mental Hygiene Law 81.21 the Court authorized adding a co-trustee to incapacitated Grantor’s revocable trust.

#### **V. MAKING GIFTS FROM THE REVOCABLE TRUST**

In a case, Estate of Jalkut v. Commissioner, 96TC 675 (1991) IRS in applying IRC 2035 and 2038 included in the decedent’s estate for tax purposes annual gift

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<sup>17</sup> See IRC 25.2511-2 (c). But see PLR 9831005 dtd 4/20/98 referring to Treas. Reg. 25.2511-2(c) which noted that a gift is incomplete in every instance in which the donor reserved the power to revest the beneficial title to property in himself.

tax exclusion transfers made from a revocable trust within 3 years of death on the basis that the transfers were tantamount to the release of a power by the Settlor through the Trustees which would otherwise be included in the Settlor's estate. The same result was decided by the Tax Court in Estate of Kisling TCMemo 1993-262. The Eighth Circuit reversed saying that the decedent Settlor had the power to revoke the trust and as such she could have withdrawn the entire trust and transferred the assets herself.

The 1997 Taxpayer Relief Act amended IRC 2035 effective 8/5/1997 to provide that transfers from revocable trusts will not be subject to inclusion through 2038, thus treating gifts from revocable trusts as if they were made from the Settlor.

But importantly, is there any authority in the trust instrument for making gifts if the Settlor/Trustee is incapacitated?

## VI. SPOUSAL ELECTIVE SHARE

A 1937 New York case dealing with the elective share after dower was abolished involved a transfer of all of the husband's assets to a revocable trust three days prior to his death. The trust made no provision for his wife from whom he was seeking a divorce after forty years of marriage. The Court of Appeals held that the trust was "illusory" for purposes of the elective share due to the Settlor's continued dominion and control over the trust assets.<sup>18</sup>

EPTL 5-1.1-A sets forth the present provisions for the elective share in New York which shall be a pecuniary amount equal to the greater of first \$50,000 of the capital value of the net estate or one third (1/3) of the net estate. The net estate includes property which constitutes the capital value of "testamentary substitutes". The latter, valued as of date of death, include:

- a. gifts causa mortis
- b. taxable transfers after 8/31/92 in excess of the federal annual gift tax exclusion made within one year of the date of death including a release of a property interest without adequate consideration

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<sup>18</sup>Newman v. Dore 275 NY 371, 275 NY (NYS) 371 (1937)

- c. totten trust accounts/deposits
- d. money deposited after 8/31/1966 and earnings thereon with the name of another person and payable on death- joint accounts
- e. any disposition of property made after 8/31/1966 held as joint tenants with right of survivorship or as tenants by the entirety, or a disposition of property held by the decedent and payable on death to a person other than the decedent or his/her estate. (includes US savings bonds and other US obligations)
- f. any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that the decedent after 8/31/92 retained for his or life...or for any period which does end in fact before his/her death, or the right to income or (ii) ...a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof
- g. qualified plan and IRA benefits, deferred compensation, stock bonus, death benefit. With respect to a IRAs and qualified plans only to the extent of 50% of the value...provided that if the decedent did not change the beneficiary designation on or after 9/1/92, it is not a testamentary substitute. (Remarriage/ Revocation/what does plan provide if death within one year of marriage?)
- h. Property subject to a general power of appointment presently exercisable immediately before death or which he/she released within 1 year of death, or exercised in favor of any person other than the decedent or his estate.

The augmented estate includes just about everything in which the decedent held a present interest except life insurance proceeds. If the life insurance is payable to the revocable trust, will the elective share apply to the proceeds? Under prior Florida Statutes, (FS)732.201; 732.206 and 732.207, the surviving spouse's elective share was applicable only to the assets of the probate estate of the deceased spouse, thus excluding assets held in a revocable trust.<sup>19</sup>

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<sup>19</sup> See *Friedberg v Sunbank Fla* 3d DCA; 648 So.2d 204 (1995).

However, in 1999, the Florida Legislature under Bill 310 changed its elective share statute to include revocable trusts. This law applies to a decedent's estate for date of death on and after 10/01/2001. Unlike New York law, a QTIP trust, under certain circumstances, can satisfy the elective share.<sup>20</sup>

## **VII. WHAT HAPPENS PROCEDURALLY AT THE DEATH OF THE SETTLOR?**

Assuming that the decedent has a revocable trust and a pour over Will, the lawyer will initially go through the same analysis as she/he would if there was no trust. Does the Will have to be probated at all? What property is in the decedent's name alone? Disclaimer?

### **A. Set-off Property.**

Under Article 5 of the EPTL there is provision for what is commonly called set-off property. See EPTL 5-3.1 which sets forth the categories of property which pass to the surviving spouse and if there is no spouse, then to those of the decedent's children who under 21 years of age. Household furniture, etc in and about the house up to a value of \$10,000; pictures, bibles, CD's, books, etc. up to \$1,000, farm tractor, lawn tractor and machinery and domestic animals, etc. up to \$10,000; one motor vehicle up to value of \$15,000; **money or other property** up to \$15,000 unless the funeral bill is unpaid in which case the legal representative must apply this money or other property to the bill.

### **B. Article 13. (Small Estate Administration)**

Next, see if SCPA Article 13 dealing with small estates will apply. The threshold is \$20,000 of assets in the decedent's name alone. However, this article does not apply to any interest in real estate. Example: Client's checking account was in joint name with daughter with understanding to split account with her brother after expenses and debts paid; two brokerage accounts were transferred to the revocable trust of which Settlor (client) was sole Trustee and daughter was

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<sup>20</sup>FSA 732.2035; FSA 732. 2095.

successor Trustee (she signed the trust in that capacity at inception); Eastman Kodak life insurance was payable to daughter and son equally. Refund by Valley Manor of substantial senior apartment deposit was payable to the daughter. Only “probate” asset was home furnishings and personal effects which after being valued were removed from the apartment. What result? Anything to administer?

**C. Notice/ SCPA 702.**

Does the decedent’s will change any of the benefits in the revocable trust? Or if the trust was amended (which is common), were any of the trust benefits changed? Generally, if there is a revocable trust, the party noticed upon probate of the decedent’s pour over Will is the Successor Trustee. The official statutory forms provide notice to be given to all of the trust beneficiaries, (but that requirement does not appear in SCPA 1402 or 1403). If probate is required, the Successor Trustee should be mailed a Notice of Probate and the estate would account at a later time to the Trustee for its proceedings.

However, if the trust benefits are changed by the Will, it is proper to cite the trust beneficiaries. Moreover, where the personal representative and the Trustee are the same person (which is common) or where the benefits of the trust are changed by amendment, consider citing all the trust beneficiaries and put them on notice at the outset, rather than wait for a trust accounting proceeding. The probate petition and the citation should reflect that if there is objection to the Will or the trust, objections should be made in the probate proceeding and the decree of probate should include a recitation of the fact that no objection having been made to the trust instrument dated \_\_\_\_\_ or, as amended by amendment dated \_\_\_\_\_ as filed with the Court. The idea is to give the Trustee protection by equitable estoppel from any later attack by a beneficiary whose interests have been cut down.

The Court may require that the entire trust and amendments, or those portions which dispose of property, be attached to the citation. Would a waiver by a trust beneficiary be meaningful without a copy of the entire document? What is the best route to protect your client, the trustee, from future attack?

Where an alteration of the trust occurred in the Settlor’s hand writing, it was held that the Trustees who would benefit from the change had the burden of

proof to show that the change was made prior to execution of the document whether the trust was viewed as a contract or testamentary in nature.<sup>21</sup>

But suppose there is no proceeding following the death of the Settlor, how does one proceed to attack the trust? You need to get authority to challenge the trust or the amendment, and it would seem that you start at SCPA 707, which authorizes letters to “any person” and SCPA 702 which allows limited letters so that the petitioner can account on behalf of the decedent 702(5); or to commence and maintain any action or proceeding against a fiduciary...See entire SCPA 702.

Proceeding under SCPA 702 would appear to be the more pro-active course when you want to try to put immediate pressure on the Trustee, since a grant of limited letters would give you access to all of the decedent’s books, records, discovery, etc.<sup>22</sup> The more passive approach would be to bring an action for a compulsory accounting and then object to the account. See SCPA 2206. If you are going to select the latter course, make sure that as part of the compulsory accounting petition and citation that you include in your relief that the Trustee shall file a judicial settlement proceeding with the Court. Assuming the Court grants your requested relief, put in the Order not only the direction to account, but, also, to file such a judicial settlement proceeding within thirty (30) days of your Order.

## VIII. TRUST ADMINISTRATION UPON THE SETTLOR’S DEATH

Now that the Settlor has departed, there are fiduciary income tax and estate tax issues to address.

### A. New Income Tax Entity Section 645 Election.

The trust now becomes a **new income tax entity** and must have its own TIN. There were differences between the estate as an income taxpayer and a trust as an income taxpayer; differences such as trusts being required to be on calendar income tax years; throw back rules applicable to trusts/not to estates; trusts do not

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<sup>21</sup> See *In re Robert Smith*, NYLJ 9/25/98 Suffolk Co., Surr Prudenti.

<sup>22</sup> See *Davidson* 177 Misc 2d 928, 677 NYS2d 729 (1998) where distributee brought action under SCPA 702 to gain access to information to attack the trust.

get an income tax deduction for amounts permanently set aside for charity/estates do; estates do not have to make estimated income tax payments during the first two income tax years; estates can hold S Corp shares for a reasonable period of time/trusts have two years; the 65 day rule did not apply to estates; active participation in rental real estate allowing deductions up to \$25,000 annually applied to an estate and not to a trust; trusts have a \$300 or \$100 exemption v. the \$600 exception for an estate.

Under the 1997 Taxpayer Relief Act IRC 646 (now redesignated 645) was introduced. The purpose of IRC 645 is to allow for post mortem income tax planning the income from the revocable at the death of the Settlor to be included in the fiscal tax year of the estate, rather than have the trust income be forced into a trust tax calendar year separate and apart from the estate's income tax year. Final Regs 1.645-1 were issued 12/24/2002 and require that the revocable trust be a "qualified revocable trust" (QRT) to be eligible for this irrevocable election. If the Settlor has the power of revocation, the trust will be a QRT. If the power to revoke requires the consent a "non-adverse" part, such as a trust protector or independent trustee, and the trust is treated as being owned by the Settlor under IRC 676 (power to revoke alone or in conjunction with a non-adverse party) the regulations permit that trust to be QRT. If the party needed for consent is an adverse party or the Settlor's spouse, then the trust is not a QRT at the Settlor's death.

The final regulations preamble addresses when a Settlor becomes incapacitated and the power to revoke is suspended or terminated due to a fear of undue influence upon the Settlor. If state law would permit an agent or legal representative of the Settlor to revoke the trust, then at the incapacitated Settlor's death, the trust will be a QRT. The regulation's definition of a QRT does not so state. The preamble position may be problematic in New York and other jurisdictions. Generally, the agent under a power of attorney would lack the authority to revoke the revocable trust which was the dispositive instrument of the Settlor's estate. An agent lacks the authority to revoke a testator's will or make a new will for the principal. Arguably, many Settlers may become incapacitated immediately prior to death. The better practice would be not to suspend or terminate the power to revoke, but instead to require the consent of a protector/non-adverse party as an additional party to the Settlor to revoke the trust and leave the power to revoke vested in the Settlor.

It should be noted that IRC 663(b) was also amended to allow the 65 day rule to apply to estates for tax years beginning after 8/5/1997.

IRC 663(c) was amended to require estates to apply the separate share rule for persons dying after 8/5/1997 for estate income distributions.

IRC 267(b) was amended and added a new subsection 10 which disallows losses for sales between the estate and a beneficiary, except where the estate is funding a pecuniary bequest to the beneficiary.

Suppose the trust directs that all of the income from the trust is to be paid out to X after the Settlor's death, does that mean under IRC 651 and 652 that the beneficiary will be taxed with the estate income where a 645 election has been made whether the beneficiary receives all of the income or not? Simple trusts tax the DNI (distributable net income) to the trust income recipient whether he/she takes it or not.

Moreover, in an estate, when a distribution of assets occurs to fund the marital or credit shelter trust, that date is the beginning of the trust. In a revocable trust setting, the assets are already in the hands of the Trustee. Is the Trustee required to distribute income on an ongoing basis to the spouse for her marital share? Or, can the estate select a fiscal tax year and "fund" the marital trust in a new calendar tax year?

Also, be aware that the separate share rule applicable to trusts applies to estates, so that if the estate income is not distributed in accordance with the shares of the estate, it is possible to have the estate erroneously retain some income by not fully distributing a beneficiary's income share.

New York has adopted a new uniform income and principal act applicable to estates and trusts.<sup>23</sup> The act is consistent with the prudent investor act under EPTL 11-2.3 which looks to the total return of the trust. The total return takes into account both the income and the capital appreciation of the trust. Over the past 15 years, corporations have cut back on dividends (which have been subject to income tax at both the corporate and individual shareholder levels) in favor of reinvestment of capital and share value appreciation. In some instances a trust's

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<sup>23</sup>EPTL Article 11-A, effective 1/1/2002



income was cut in half and the trust income beneficiary, after Trustee's annual commissions, received about 2/3rds of the reduced trust annual income. One option for the Trustee under the new Uniform Income and Principal Act is to make an annual adjustment and supplement income with principal to the income beneficiary. This adjustment will cause the distribution to the income beneficiary of a combined income and principal to total about 3% to 4% of the principal value of the trust (similar in concept to a charitable remainder unitrust distribution). The Trustee may wish to make payment of the adjustment on a quarterly basis so that if death of the income beneficiary occurs, there is not an accrued payment of the full amount of the principal adjustment.

**B. New Tax Cost.**

The general rule for obtaining a new tax cost (a full step up in basis) is that the asset must be included in the estate for estate tax purposes and must pass or be transferred, since that transfer is the premise upon which the estate tax is assessed.<sup>24</sup> The holding period of assets after death of the Settlor in the hands of the Trustee will be long term, unless the property was used to satisfy a pecuniary bequest to such trust, such as certain marital deduction trusts, in which case, after funding, the holding period begins anew.

**C. Installment Sale of Assets.**

Installment sales will retain their character as such and care should be exercised in satisfying any type of bequest or legacy with such an asset. It is preferable that the assets pass as part of the remaining trust assets. Do not use it to satisfy a pecuniary bequest or there will be an acceleration of gain to the trust which may affect the remainder interests.

**D. Series E/EE Bonds.**

Series EE bonds held in the name of the trust do not receive the same tax treatment as an estate wherein the Executor may elect to treat as income all of the

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<sup>24</sup> See IRC 1223(11)

Series E/EE bond income on the decedent's final income tax return with the resulting income tax as a deduction on the estate tax return as a debt.<sup>25</sup> The IRS views this as an election which the Personal Representative may make as the party charged with filing the decedent's final 1040. The Trustee is not the party designated to file the decedent's final return.

**E. General Administration.**

There still will be trust records to be maintained for future accounting and income tax purposes. You will be seeking source documents to verify assets or liabilities, estate tax returns may be needed etc. There may even be a few problems.

**F. Use of Alternate Valuation.**

If a revocable trust after the death of the Settlor is to be divided into separate trusts, will the funding of those trusts within six months of death allow application of alternate valuation under IRC 2032, i.e., is there a disposition? Rev Rul 57-495 says no. But see Rev Rul 73-97 which approves use of alternate valuation when new trusts are funded from the revocable trust and distinguished Rev Rul 57-495 which involved a revocable trust which simply split up shares which continued in trust for common beneficiaries. Does the trust simply continue after death, or do you create a "new" trust?

**G. Funding of the Marital/Credit Shelter (Exempt Amount) Trusts/ Legacies.**

The mechanism for funding the revocable trust from a pour-over Will can be an issue, depending upon the language used in the decedent's Will or within the trust itself. Generally, when there are dispositions in trust, there will be an allocation of income between the trusts, even when one of the trusts is described as a pecuniary trust. That is, there is difference between an outright cash legacy under a Will where no interest need be paid, at least without demand after the creditor's period and a pecuniary legacy which passes into trust. The cash legacy

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<sup>25</sup>See Rev Rul 79-409

passing **into trust** is entitled to a share of income.<sup>26</sup> Arguably, an outright cash gift provided under a revocable trust should carry with it a share of income from the Settlor's date of death until paid. There is nothing to excuse the Trustee from such income payment, unless the trust provides otherwise.<sup>27</sup> Draft a provision which foregoes interest or income on legacies payable from the trust.

With a revocable trust which creates fractional share trusts, there is an allocation of the trust income based upon the fractional interests of the trusts prior to the payment of estate tax and subsequent to the payment of estate tax. The allocation is not as easy as it appears because the fraction keeps changing. In theory, the allocation should be made against items of income as they come in and adjusted for each debt or other payment made. This complex allocation of income is why many practitioners loathe fractional share dispositions within a trust or otherwise.<sup>28</sup>

#### **H. Provisions from Promoter's Forms to Avoid.**

Pour-over language of questionable value: (Actual will/trust provisions of promoters)

**"If my revocable living trust is not in effect for any reason, I give all of my property to my Personal Representative under this Will as Trustee who shall hold, administer and distribute my property as a testamentary trust the provisions of which are identical to those of my revocable living trust on the date of the execution of my Will".**  
(emphasis added. What if the trust was invalid?)

This language came from a preprinted form in a loose-leaf notebook by a New York attorney. For a scathing opinion on these franchised trust products. See *Matter of Pozarny* 77 Misc 2d 752, 677 NYS 2d 714 (1998).<sup>29</sup> Not only did the Court void this language as an attempt

<sup>26</sup> See EPTL 11-1.1

<sup>27</sup> See EPTL 11-2.1

<sup>28</sup> See *In re Meyers Trust* 20 Misc 2d 990, 190 NYS 2d 566 (1959).

<sup>29</sup> See *Matter of Dickstein* 146 Misc2d 164; 549 NYS2d 595 (1989) where legacy to a trust was voided because the pour-over trust was not properly acknowledged.

at incorporation by reference, thereby causing the estate residue to pass by intestacy, but it raised the question whether, as matter of law, a valid revocable trust in a loose-leaf format would be a valid receptacle of the testator's pour over Will. Because the trust amendment was improperly executed, the Court never got to the question, but made its thinking clear that the loose-leaf format would not be a valid trust receptacle when it could not be complete, authentic and reliable. In a more recent case *In re Estate of Klosinski* 192 Misc 2d 714; 746 NYS 2d 350 (2002), Judge Feinberg, Surrogate of Kings County, upheld such a looseleaf notebook trust as a valid trust and valid receptacle of the pour-over Will, finding that the looseleaf trust and stapled duplicate original were consistent in order and confirmed the document's integrity.

Consider this provision of another promoter which describes the credit shelter trust division as follows:

"Upon Settlor's death...Trustee shall allocate and set aside a sum equal to the lesser of \$600,000 or 40% of the trust estate after paying any specific bequests. Alternatively, Trustee shall, in its discretion, set aside the maximum amount that can be allocated to permit such amount, under the statutes applicable at the time of allocation, together with subsequent accumulations, to bypass Federal and/or State Estate Taxes, in the estates of both spouses. The amount so allocated shall be the CREDIT TRUST." (Construction?)

Or a devise of realty

"Upon the death of Settlor, if Settlor's spouse has survived Settlor, and as to **any real estate to which the trust holds title**, including the family residence, Trustee **may, in its discretion**, convey the trust's right, title and interest in said property, as tenants in common, to Trustee of the \_\_\_\_\_ Trust" (surviving spouse's separate trust.) (emphasis added.)

Or

“All joint property, quasi-joint property, tenancy in common property and separate property **transferred by the Trustor into our trust shall retain its character as...**” (emphasis added.) (What if house and all property were jointly held when transferred into the trust, and husband later dies. What passes to surviving spouse regardless of the trust provisions?).

The point is that the administration of the trust after death will be no less, and in some cases more, time consuming than might originally be anticipated.

#### **IX. TAX NON-APPORTIONMENT/CLAUSE COORDINATION**

The general rule regarding the payment of estate tax is that if nothing is stated in the Will or other instrument, then the recipients of the property passing to them are responsible for the tax attributed to their property and the recipient is entitled to claim any exemption available to the particular recipient, such as the charitable or marital deduction.<sup>30</sup>

In a trust setting, EPTL 2-1.13 provides that unless otherwise directed in the decedent’s Will, the decedent’s estate has the right to recover estate taxes (plus provision for penalty and interest) from the recipient of such property where the decedent retained an interest in such property under IRC 2036. The computation is based upon the value such property bears to the taxable estate. The section does not apply to charitable remainder trusts.

Note that the tax reimbursement is not a general charge against the trust, but rather against the recipient of the property. This allows the Trustee of a marital trust to avoid reimbursement, but requires reimbursement from the Trustee of the trust entity which generates all or a portion of the estate tax.

The issue you wish to avoid in a marital deduction trust setting is to have the revocable trust or the estate required to make payment of the estate tax, bills, etc. as a general charge against the trust assets as an expense of administration. This means that all such payments will have to come off of the top before the marital share is calculated. You will then have a problem of an interrelated calculation

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<sup>30</sup> See EPTL 2-1.8

wherein the taxes are not known until the marital share is known which, in turn, is not known until the taxes are known, etc. This same issue can arise in a charitable deduction setting if the estate taxes are a general administrative charge.

The tax apportionment provisions are contained in EPTL 2-1.8(d) and with respect to revocable trusts, may be summarized as follows:

1. Unless the Will or non testamentary instrument provides otherwise, a direction for the apportionment or non-apportionment of taxes, whether contained in the will or otherwise shall relate only to the property passing thereunder.
2. Where a trust directs the payment of tax, a later Will can change that but only if the Will specifically refers to the trust direction.
3. Where a Will directs the payment of tax, a later trust can change that but only if the trust specifically refers to the Will direction.

The problem is that lawyers are so accustomed to drafting tax non-apportionment clauses in Wills, it will be likely that the tax clause will appear in the pour-over Will without due regard as to the source of funds available and what portion of the trust should bear the estate tax payment.

The tax apportionment of the client's Will and revocable trust must be coordinated, especially if there are sub-accounts/trust to which IRA benefits are payable. The trust agreement could provide as follows:

It is anticipated that the Settlor's Will shall direct that all estate, inheritance, death and similar taxes, plus interest and penalties, are to be paid from this trust and the Settlor directs that all such payments shall be made from Section B of Article II...(where Section A contains the marital deduction gift)...with respect to all property included in the Settlor's gross estate for estate tax purposes and passing under the Settlor's Will or this trust, or passing outside of the Settlor's Will or the Trust, including but not limited to property receivable from any IRA or Qualified plan benefits passing under separate sub-trust under Article \_\_\_ of this trust agreement, it being the Settlor's intention that no such taxes shall be charged against any

property or shares thereof passing or allocated to Article \_\_\_\_, nor to Section A of Article II, which Section A shall be eligible for the marital deduction and that such marital deduction shall be allowed for its full pretax value.

## **X. USE OF REVOCABLE TRUST AND RETIREMENT BENEFITS**

Over the past decade more and more planners have seen the client's retirement plan/IRA benefits become a larger part of the asset mix. The other large assets consist of real estate and insurance. The qualified plan or IRA benefit can offer opportunities and traps, the latter resulting in the payment of estate and income tax in excess of 75% of the benefit. Moreover, in a trust setting, if the benefit is not properly payable to a surviving spouse, it is possible that marital deduction at the first spouse's death may be lost with grave tax consequences. Whether benefits are payable to a surviving spouse or children, you want to keep the tax deferred engine alive as long as possible whether or not it is payable to a trust. This is sometimes referred to as a "stretch IRA".

The first step is to make sure that there is a "designated beneficiary" of the benefit, since without a designated beneficiary, the payment of the benefit, generally, will be made over five years from the participant's date of death where the participant dies prior to the required beginning date. If there is no designated beneficiary after the required beginning date, then at death, payment will be over the remaining life expectancy of the participant. By having a designated beneficiary, the payment in both cases may be made over the designated beneficiary's life expectancy (LE) so long as payments begin by 12/31 of the year following the participant's date of death.

A surviving spouse has additional options. First, a spouse may roll over the benefit and create her own new IRA which will be as if it was hers for all future purposes. Use a trustee/custodian to trustee/custodian transfer. Alternatively, a spouse may continue to defer any benefit distributions until the participant would have reached age 70 ½ and then begin distributions as the designated beneficiary.

The final Regs., adopted April 17,2002, reaffirm that an estate cannot be a designated beneficiary, although there is a letter ruling allowing a roll over where the surviving spouse was the residuary legatee and the executor.<sup>31</sup>

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<sup>31</sup> PLR 9951046

A charity cannot be a designated beneficiary. A trust cannot be a designate beneficiary unless it is a qualified trust.

The requirements for a qualified Trust are:

- (1) The Trust must be valid under state law even though it had Trust corpus
- (2) The beneficiaries of the Trust who are entitled to the retirement benefits must be identifiable
- (3) The Trust is irrevocable or by its terms becomes irrevocable as of the participant's death
- (4) Certain documentation requirements must be satisfied.  
Where the participant died, a copy of the Trust Agreement must be supplied to the plan administrator or a list of all beneficiaries (effective September 30 of the year following the participant's death) and any conditions of entitlement and certify that the list is complete. This information must be given by October 31 of the year following the participant's death. Under Treas. Reg. 1.401(a)(9)-5 simply naming separate shares for different beneficiaries in the Trust will not give rise to separate share treatment allowed if separate beneficiaries are designated as recipients in the beneficiary designation form. Hence, if there are multiple Trust beneficiary shares, the LE of the eldest will be used as applicable.

The importance of a valid trust as designated beneficiary cannot be over emphasized, but in a marital deduction setting more is required. For example if the participant has not reached his required beginning date and has designated the marital QTIP trust under his will/or under his revocable trust as the recipient of his retirement benefit and if such trust is a qualified trust, then, the trust beneficiary (spouse) will be deemed to be the designated beneficiary and in this case her LE can be used in the payment of the benefit. In this example, the wife's LE is 34 years and the required minimum distribution payments will be made from the IRA over this period of time. If the surviving spouse was not a designated beneficiary of the trust, then payments to the trust would be made over the 5 years. The



additional issue presented is that if the required payments are \$100/year and the IRA earns \$200 per year, will the trust qualify for marital deduction QTIP treatment? The answer was no under Rev Rul 89-89 which by Rev Rul 2000-2 is now considered "obsolete". The requirement for QTIP treatment (marital deduction) is that all the trust income must be payable to the spouse no less than annually and under Rev Rul 2000-2 if the surviving spouse has the power to compel the trustee to distribute all of the IRA annual earnings, this will meet the "all of the income" requirement for QTIP/marital deduction treatment under IRC 2056. The Executor must elect QTIP for both the trust and the IRA. Will the surviving spouse be taxed with the income not taken but which she could compel? No, she is treated as any IRA beneficiary who can take larger distributions as beneficiary. If she leaves the excess income in the IRA, has she made a gift to the remainder interest? Not from an actuarial viewpoint since the entire IRA must be distributed over her LE.

The revocable trust offers potential as a vehicle for the passing of qualified plan/IRA benefits to beneficiaries, but as with any trust for retirement benefits, care must be used. This author's reading of the final Regs. suggests that the IRS pension positions are not concerned with documents drafted for flexibility, powers of appointment, default charitable takers, GST or other considerations. Rather, the pension side of IRS is focused on the participant and getting the retirement benefit into the hands of individuals, outright or through a qualified trust, revocable or testamentary.

For example, the first test is whether the trust beneficiaries are "designated beneficiaries" so that the life expectancy (LE) of the eldest beneficiary will be used to stretch out the payments into the future. If the trust is for X's lifetime, remainder to Strong Memorial Hospital, the trust will not have a designated beneficiary and X's LE cannot be used. Or, suppose the trust, established by A is for his son, X's, lifetime, income at the discretion of the trustee and remainder to B, A's younger brother. The trust has designated beneficiaries, but as the eldest trust beneficiary, B's LE will be the measuring life for payments and not X's. (See PLR 200228025). B is viewed as a "contingent" beneficiary and there is an additional "contingency" which is that the trust could accumulate income. Therefore, B will be taken into account in determining the designated beneficiaries of the trust and the IRA LE payout based upon the eldest designated beneficiary.

Generally, unless the trust is a conduit trust or unless the trust's initial income beneficiary has an unfettered right to withdraw the entire IRA, all individuals who have a present or future interest in the trust will always be considered in determining whether such trust beneficiaries are designated beneficiaries which in turn will allow the determination of whose LE must be used during the trust's term. Further, if you try to add a power of appointment, all potential appointees will be considered.

The revocable trust may provide that the benefit passes to the trust and through it to the surviving spouse and gives the surviving spouse an absolute right of withdraw so that she can "remove" it from the trust and roll it over or otherwise withdraw the entire IRA. While this may defeat the purpose of the trust, this withdrawal right can allow the remainder interest or contingent beneficiary to be disregarded. The same would be true if A's son X was given the absolute right to withdraw the IRA upon demand. B would be disregarded since the entire IRA is under X's control. This may be important for GST purposes, since the IRA balance would be included in X's estate for estate tax purposes. Alternatively, you could provide X with a power of appointment in favor of his lineal descendants and the power should be disregarded due to X's absolute right of withdrawal. Thus, if the trust is a qualified trust and the IRA annual minimum distributions are paid out to the beneficiary and the beneficiary is given an absolute right of withdrawal of the IRA, then the contingent beneficiary should be disregarded and the income beneficiary's LE should be used.

The other approach is to provide that the IRA payments/minimum distributions are to pass through the trust and upon receipt by the Trustee are to be paid over to the income beneficiary and upon the income beneficiary's death, the payments based upon her LE will continue and be made to her issue. This is sometimes referred to as a conduit trust since all IRA payments pass straight through the trust and there are no contingencies and the issue are merely successors in interest and can be disregarded for purposes of their LE. Note, that any continued payments to the successor in interest beneficiary in the above examples will be based upon the initial designated beneficiary's/X's LE. In both of these examples, draft the payment language so that the payments are not considered as Trust principal (income in respect of a decedent) under Trust accounting rules.

It is recommended that (1) the benefit trust be separate from the Will, although you could draft a separate IRA trust into the Will; (2) the benefit trust be separate from any other existing revocable trust since you do not want this IRA benefit trust to be responsible for any apportionment of the estate tax; (3) you do not want the benefit trust responsible for estate taxes attributable to the QTIP trust at the surviving spouse's death and (4) you should exempt the trust from the payment of any of the decedent's debts, taxes, claims, or administration expenses.<sup>32</sup>

Be careful in using general or limited powers of appointment. In drafting, define the class of potential recipients so that the power cannot be exercised in favor of older beneficiaries or an estate or charities. You should not use a charitable payover provision, if all lineal descendants are deceased. This is the conservative approach even if the successor beneficiary is to be disregarded. If your client is set on making a charity the remainder beneficiary, then consider a charitable remainder trust with a larger annual payout percentage for the individual beneficiary and have the CRT become the IRA beneficiary.

What if the trust provides that IRA payments pass through the trust to the beneficiary and do so in a manner which will presumptively use up the beneficiary's life expectancy. For example, the trust directs that annual minimum distributions from the IRA will pass through the trust to the son and that the trust will terminate when son attains age 40. In theory from a pension perspective, this means that the son actuarially will come into possession of the entire IRA well within his life expectancy, and that any contingent beneficiary provision should be irrelevant.

Although your training and logic may suggest to you that the provisions which you place in the benefit trust are reasonable and equitable, even eminently rational, the safe road is better for your client.

## **XI. CONCLUSION**

The revocable lifetime trust can offer continued asset management of the client's assets, but as has been discussed, it is not an estate planning vehicle which can simply be pulled off the shelf and produced without actually working through

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<sup>32</sup> See PLRs 9912041 and 200010055

the client's assets and examining the consequences of each dispositive provision for those assets. The revocable trust makes good sense for an elderly client who may need help in managing his/her assets. It may be a vehicle to accept retirement benefits. It may help with a client's incapacity as a vehicle created during lifetime or by an agent under a power of attorney. If there is a guardianship, consider establishing a revocable trust by Court Order. It may avoid a probate proceeding or it may not. In every case, the client's will and revocable trust must be drafted with care and clarity in the exercise of the attorney's best professional judgment.