Using Trusts to Resolve Litigation

Hon. Acea M. Mosey
Erie County Surrogate's Court, Buffalo

Disputes involving trusts present unique challenges, including sensitive family dynamics, high financial stakes, and complex procedural, legal, and tax issues. Trust law has evolved to offer various options for resolving disputes and preserving the purpose of the trust and the grantor's intent. Aside from strictly legal considerations, however, it is important for attorneys to draft flexible trust instruments, trustees to stay current with the needs of beneficiaries, and to act promptly when altered circumstances necessitate a modification to the trust.

I. The Basics

Overarching consideration in planning and drafting: drafting flexible instruments and understanding and staying current with needs of beneficiaries (*Matter of Kroll*, 143 AD3d 716 [2016]).

A. Grantor's Intent

Trusts can be used for a variety of different reasons; therefore, it is of paramount importance to understand the grantor's objective and intent when drafting trust documents.

- Revocable trusts: can be used to manage assets during lifetime, avoid probate at death and protect beneficiaries.

- Irrevocable trusts: can be used to avoid probate, manage and protect assets, reduce taxes, qualify or maintain government benefits and provide for charities.

B. Execution

1. EPTL § 7-1.17 sets forth the required formalities for a lifetime trust:

- It must be in writing, executed and acknowledged by the creator and, unless he or she is the sole trustee, by at least one trustee, in the manner required by the laws of this state for the recording of a conveyance of real property, or

- Be executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

- The acknowledgment may be subject to challenge if not in compliance with the requirements for the recording of a deed.

2. A testamentary trust requires the same formalities of execution as a will pursuant to EPTL § 3-2.1.

3. Electronic signature not permitted for valid trust execution (NY Technology Law § 307).

C. Nomination of a Trustee

1. *Matter of Nuchereno*, Erie Co. Surrogate's Court, February 23, 2019 [Mosey, J.] - petition to appoint trustee of an inter vivos trust denied as decedent had entered into a Property Settlement and Separation Agreement, incorporated but not merged, into a divorce decree which created a trust for the sole infant beneficiary and provided for appointment of trustee at the sole discretion of the Surrogate's Court. The governing trust executed by decedent had a provision regarding the appointment of trustees that conflicted with the PSSA, in that it nominated decedent as the initial trustee, nominated a successor, and then provided that the trustee be whomever the adult beneficiaries "vote to nominate". Decedent's Will was a "pour over" Will that provided all his

assets be paid to the trust. The petition to appoint certain trustees was denied on the basis that the conflicting trust provision could not be used to contravene decedent's obligations pursuant to the PSSA by creating the Living Will to serve as a Will substitute, therefore, the Court appointed the successor trustees. Also, the no contest provision in the trust "cannot be applied to circumvent another party's claim under an agreement entered by the Decedent or grantor during his lifetime" (citing *Matter of Friedman*, 146 Misc 2d 91 [1989]).

2. *Matter of Gadsden*, Kings Co. Surrogate's Court, March 20, 2019 [Lopez Torres, J.] granted motion for summary judgment on petition filed by trust beneficiary pursuant to SCPA 711 (3) and (8) to remove nominated trustee who failed to make any principal distributions, used Trust assets to benefit some beneficiaries, and failed to file an accounting and judicial settlement proceeding despite being ordered to do so by the Court.

D. Exculpatory Clauses

1. Clear and concise forfeiture, i.e., "no contest" clauses that express settlor's intent – incentivize harmony amongst beneficiaries.

2. An amendment to EPTL §11-1.7 has extended the prohibitions against use of exculpatory clauses to inter vivos trusts.

   a. EPTL § 11-1.7(a), amended effective August 24, 2018, now states:

> "The attempted grant to an executor, testamentary trustee, or inter vivos trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy:

> (1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.
>
> (2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise."

b. EPTL § 11-1.7(c) states that:

> "Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding."

E. Situs

- Proceedings are frequently commenced to transfer the situs of a trust to another jurisdiction. In allowing the situs of a trust to be transferred out of New York, the courts have considered the intent of the decedent, and particularly the presence or absence of any provisions in the trust directing that only the laws of New York should govern the administration of the trust or a clause prohibiting the transfer of the situs of the trust.

- Where no such provisions exist, and the Court finds that the administration of the trust will be facilitated by the transfer and promote the interests of the

beneficiary, a request to allow the situs of a trust to be transferred to another state may be granted.

- There must be some nexus between the trust and the designated jurisdiction. In addition to the settlor's intent other factors generally considered by courts in determining the trust situs are the location of the trust corpus, the residence or domicile of the trustee, and to a lesser degree the residence of the beneficiaries.

Matter of Hettrick, 61 Misc 3d 1220(A) [2018]: Although the Court has the power to change the situs of a trust, removal is not automatic. Here, two trustees resided in New York; however, the beneficiary and trust protector requested removal to Virginia to "facilitate" the administration of the trust. Removal was denied, the Court pointing to advances in technology (such as e-mail, fax, video conferencing, on-line banking services [and the like]) which allow trustees, beneficiaries and the courts to "communicate almost instantly". Court e-filing also permits instantaneous access to the courts.

Matter of Rockefeller, 2 Misc 3d 554 [2003]: The Court approved the resignation of New York testamentary trustee and replacement with non-New York testamentary trustee on basis of eliminating trust's exposure to New York fiduciary income tax but, refused to grant change of situs to the location of the new trustee.

F. Trust Protectors or Advisors

New York does not currently have a statue governing the use of trust protectors. Generally, the role of a trust protector is to oversee the trustee's actions in administering a trust to ensure those actions comport with the terms of the trust and intent of the grantor.

1. What is a trust protector?

    - A trustee is required to administer a trust in accordance with the terms of the trust.

    - The role of a trust protector, however, is to oversee the trustee's actions in administering a trust to ensure that those actions comply with the law as well as the grantor's intent and purpose of the trust in question.

    - The powers given to a trust protector vary widely, however, generally a trust protector oversees many important decisions that a trustee makes.

2. Why consider a trust protector?

    - Alternative to going to court if a dispute arises

    - Remove/replace trustees

    - Arbitrate disputes between trustee and beneficiaries, or between beneficiaries

3. Proposed legislation permitting directed trusts in NYS, EPTL §11-2.2(a)

II. Reformation of a Trust, When Needed

A. Testamentary Trust – *Matter of Knapp*, 41 Misc 3d 1202(A) [2013] – co-trustees petition to reform testamentary trust to (1) allow trustees limited power to invade

trust principal, (2) reduce the age at which the current beneficiaries receive distributions of their shares of the trust and (3) dispense with Will's express requirement that one of the beneficiaries make certain visits to his grandmother, or face reductions in the value of his portion of the trust, (4) create a mechanism for the appointment of successor trustees without court approval, and (5) establishing that the trustees are held to the prudent investor standard (EPTL §11-2.3). Petition was denied in its entirety, although the trustees and beneficiaries had agreed to the relief in the petition. The Court held that when testator's intentions are clearly expressed in a will the petition must be denied, and the trustees are statutorily bound by EPTL §11-2.3.

B. Inter Vivos Trust - *Matter of Sukenik,* 162 AD 3d 564 [2018] – Appellate Division allowed a petition to reform an inter vivos trust and IRA beneficiary designation form even though the documents were clear and unambiguous on their face, and despite Surrogate's warning that "to reform instruments…based only upon the presumption that one who executes testamentary instruments intends to minimize taxes would expand the reformation doctrine beyond recognition and would open the flood gates to reformation proceedings aimed at curing any and all kinds of inefficient tax planning".

C. Recent Tax Changes and Implications

1. For New Yorkers, federal estate tax reform doesn't technically change anything about New York's estate tax, but it does mean that the difference between the federal exemption and the New York exemption has now increased significantly. New York's current exemption amount is $5.74 million, which would have made it equal to the previous federal exemption had that not been revised. Now, the federal exemption amount is almost double the New York exemption amount.

2. The discrepancy between the federal and New York exemptions underscores the need to check with an attorney as to how your current estate plan may be impacted by tax reform. If your current Will, for example, carves out a credit shelter trust for a surviving spouse with the deceased spouse's federal exemption (as opposed to his state exemption), there could be a significant – and unanticipated – state estate tax bill due at the death of the first spouse.

3. In addition, the absence of a New York gift tax, combined with an increase in the federal exemption, provides an opportunity for wealthy New Yorkers to give more away during life to reduce state estate taxes at death.

    - New Yorkers who have an estate close to the New York exemption amount may wish to consider a gifting program designed to continuously keep the value of their estate below the exemption amount. This is because New Yorkers are subject to a "cliff" whereby if their estate exceeds the New York exemption amount by 5%, they can no longer take advantage of the New York exemption at all. Their entire estate is subject to New York estate tax from dollar one.

4. Married New York residents whose estates will likely be valued more than the New York estate tax exclusion amount should review how their estate planning documents fund trusts that will not qualify for the marital deduction, such as "bypass," "credit shelter" or "disclaimer" trusts.

    - If their estates are likely to be valued below the federal estate tax exclusion amount, couples can take full advantage of New York's increased estate tax exclusion amount by funding these trusts with an amount equal to the New York exclusion amount. If these trusts are instead funded with the full federal exclusion amount at the first spouse's death, New York estate tax will be imposed on the portion of

the federal exclusion amount that exceeds the New York exclusion amount.

5. Non-grantor trusts are trusts which are independent taxpayers and which pay their own tax (versus a grantor trust where you are taxed on trust income).

6. Non-grantor trusts may help minimize benefits from the new 20% income tax deduction available to pass-through businesses entities.

7. Life Insurance will no longer be needed to pay estate tax but will be useful in new trust planning.

8. The doubling of the exemptions from $5 to $10 million inflation is a temporary benefit – the law may change after 2025 and the exemption may change back to $5 million.

    - Drafters should use as much of the new exemption as they can, which will require making transfers to trusts that constitute completed gifts for transfer tax purposes. This means that the plan will limit the control or strings your client has on the trusts receiving assets to avoid estate inclusion. This will affect the way the trusts are used.

    - Drafters will need to have trusts set-up, so trustee can gain access to trust assets.

    - Charitable trusts reduce taxable estate.

D. Why You May Still Need a Trust

1. GST/QTIP

Matter of Seiden, New York County, October 9, 2018 [Mella, J.] – proceeding pursuant to New York Tax Law 998. The Court was asked to decide the effect of a federal estate tax repeal for 2010 on the NY estate tax attributable to QTIP trusts for surviving spouses of persons who died in 2010, in a proceeding to vacate and set aside a notice of estate tax deficiency. Decedent died in Nov. 2014 predeceased by her husband in 2010. She was a beneficiary of a trust under husband's will that was eligible for estate tax treatment as QTIP--the trust qualified for a marital deduction in the estate of the first spouse to die. A repeal of the federal estate tax for 2010 did not require husband's estate to file a federal estate tax return but was required to file a NY estate tax return. The case here concerned the tax treatment of the trust in wife's estate, as surviving spouse--value of the trust property was excluded on the federal estate and NY estate tax returns. The tax department assessed additional tax for over $462,000 attributable to the QTIP trust. The Court found IRC §2044 inapplicable, the QTIP property was not included in wife's federal gross estate nor in the NY gross estate. Thus, the petition was granted, and the notice of tax deficiency vacated.

- Tax Department is not filing an appeal

- Defect may have been cured with passage of April 2019 NYS Budget – no QTIP allowed if not taken in first estate

2. Supplemental Needs Trust

- If a trust for a beneficiary who has a disability does not meet the criteria for a supplemental needs trust under EPTL§7-1.12 due to ambiguous language or language that clearly provides for support of the beneficiary,

the trustee should apply to a court to reform the trust into a supplemental needs trust under EPTL §7-1.12.

- Courts frequently face the question of whether to reform a trust created before the legislature's 1993 enactment of this section to meet the requirements of this section and obtain its benefits.

- In *Matter of Newman*, 18 Misc 3d 1118(A) [2008], for example, the decedent died in 1988, leaving a 60-year-old daughter who functioned at a third-grade level. He left his residuary estate in trust and directed the trustee to use the income for daughter's benefit. The trustees could also invade the principal for the "more adequate support and maintenance" of the daughter and could "defray" the daughter's health expenses. The executor wanted to reform the trust to make it a Supplemental Needs Trust, and the Court granted the petition, relying on the testator's words "more adequate support" and "defray" to conclude that he meant to supplement, not supplant, government benefits. He did not want her to be "relegated to living solely on available government benefits ...." The Court cited cases, relying on *Matter of DeRosa*, NYLJ, April 29, 2006, at 30, col. 2, and *Matter of Kamp*, 7 Misc 3d 615 [2005], which allowed reformation, and rejecting the narrow holding in *Matter of Rubin*, 4 Misc 3d 634 [2004], which prohibited it.

3. Pet Trust

- EPTL §7-8.1 allows a grantor to create a trust for the care and maintenance of a beloved pet, which is a legally enforceable document, like any other trust. A trustee is designated therein, or if none, the Court will appoint a trustee (EPTL §7-8.1(a)). The principal and income of the

pet trust must be used for the benefit of the designated animal, unless expressly stated differently. By operation of law, the pet trust terminates when the animal dies, upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor (EPTL §7-8.1(c)).

- A Court may reduce the amount of property transferred into the trust "if it determines that amount substantially exceeds the amount required for the intended use", and the amount of the reduction passes as unexpended trust property (EPTL §7-8.1(d)). Although a pet may be protected for its entire lifespan, this does not necessarily protect said pet from a bitter relative because, like any other trust, a pet trust may be contested. A party may bring an accounting proceeding against the trustee, may petition to remove a trustee, or even move to invalidate the pet trust for a grantor's lack of capacity. *Eg*: The Leona Helmsley Will which cut out her grandchildren and instead provided the bulk of her assets to her dog, Trouble. She left Trouble $12 million dollars in trust so that the dog may maintain its extravagant lifestyle which included thousands of dollars in routine dog grooming, gourmet dog food and around the clock security guards. The Court reduced the pet trust from $12 million to $2 million, finding that Helmsley's trust was overfunded for the carrying out of decedent's wishes. The Court did not adjust the trust principal to interfere with Helmsley's desire to care for her pet. Rather, the trust principal was reduced because the assets funding the trust were greater than what was required to carry out her intentions.

- Tax Treatment – Unlike other testamentary trusts where the designated beneficiary is responsible on paying tax for any income received by the trust, an animal is not a "person" pursuant to the IRC which is responsible for paying taxes. However, to ensure that taxes are

collected, the IRC provides that in jurisdictions where pet trusts are valid, assets that are distributed to a pet trust are included as part of the decedent's gross taxable estate and no deductions (charitable or otherwise) are permitted.

III. Decanting

EPTL § 10-6.6

Common reasons for decanting include income tax savings, administration and trustee succession efficiency, and to extend the trust term.

1. Power of Appointment
    - Decanting can be used to provide the trustees the power to grant beneficiaries a general power of appointment. Exercise of this power can result in income tax savings by causing part or all the trust to be taxed in a beneficiary's estate, sometimes without triggering estate tax because of increased federal and state tax exemption (currently $5,450,000). Under current estate tax laws, inclusion of trust property in a beneficiary's estate results in a step up in the income tax basis of trust assets to fair market value at the beneficiary's death, generating lower income taxes on the sale of trust assets.

2. Consolidate multiple trusts
    - Combining multiple trusts may lower administrative costs, resulting in a more efficient and economical trust for the benefit of the beneficiaries.

3. Separate trusts
    - Splitting one trust for multiple beneficiaries into different trusts for each beneficiary or family group allows different needs to be addressed.

- *Matter of Hoppenstein*, 162 AD3d 512 [June 14 2018], *lv to appeal denied* 32 NY 3d 967 [Oct 18 2018]. Contested proceeding for settlement of the trustees' account of an irrevocable trust by settlor, objectants sought partial summary judgment to void the trustees' distribution of a $10 million insurance policy on settlor's life from a 2004 trust to a new trust settlor created in 2012. The Court approved the exercise of a decanting power granted under the trust instrument as opposed to under the statute. Noting that EPTL §10-6.2(k) specifically provides that the statute shall not constrict any right of appointment that arises under the governing instrument or common law, Surrogate Rita Mella held that statutory compliance with procedure for decanting under §10-6.6 was "immaterial".

4. Add or modify spendthrift provisions

5. Avoid or Reduce State Income Taxes on Trust Assets

- A trust can be decanted to take advantage of the current estate tax exemption and achieve a full step up in income tax basis of the trust assets upon an individual's death, thereby reducing estate and income tax liability.

- If a New York resident trust no longer has a trustee domiciled in New York, has no real or personal property located in New York and has no New York source income, then capital gains and accumulated income will not be subject to New York income tax. [N.Y. Tax Law § 603(b)] Therefore, if a New York based trust includes assets located in another state, the trustee should consider decanting those assets to an appointed trust in the other tax jurisdiction. By doing so, the decanted assets might avoid New York capital gains tax and accumulated income tax.

IV. Miscellaneous Proceedings and Alternatives

A. Cy Pres – EPTL § 8-1.1 – *Matter of Lee*, Erie County Surrogate's Court, December 16, 2016 [Howe, J.]

B. Use of Informal Accountings to Reduce Trustee Liability

In New York, there is no requirement that trustees file recurring trust accountings. A recent decision out of the Appellate Division holds that informal accountings sever liability, as long as full disclosure has been given by the fiduciary.

- *Matter of Spacek*, 155 AD3d 747 [2017]: the decedent's will provided that her estate was to be split among six (6) beneficiaries. The executor sent an agreement releasing her from acts done as executor, accompanied by the estate's tax returns and other financial documents, to the beneficiaries, which they signed. After the executor petitioned to judicially settle the account, one of the beneficiaries filed objections. The Appellate Division affirmed the Surrogate's decision to deny the motion to set aside the release. The Court held that use of:

> "an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree...[I]f a fiduciary gives full disclosure in his [or her] accounting to which the beneficiaries are parties…they should have to object at that time or be barred from doing so after the settlement of the account." [internal citations omitted].

C. Termination of an Uneconomical Trust – EPTL § 7-1.19

- Under EPTL § 7-1.19, a trustee can seek termination of a testamentary or inter vivos trust if its continued administration is uneconomical. A

Court may grant termination of a trust if it is satisfied that: (1) it is economically impracticable to continue administering the trust; (2) the trust does not expressly prohibit administration; (3) termination would not defeat the purpose of the trust; and (4) termination serves the beneficiaries' best interests.

- *Matter of Sausner,* Erie County Surrogate's Court, August 6, 2014 [Howe, J.) see also *Matter of Kistner,* NYLJ, January 23, 2006, at p. 35, col. 1: The Court directed termination of the trust where the trust could pay little or no income to the income beneficiary and the remainder person did not object to the termination of the trust.

- Courts are constrained to respect the intent of the grantor, therefore the Court may deny an application to terminate a trust even when all beneficiaries consent to its termination: *Matter of Dauman,* 12 Misc 3d 1173A [2006]: The Court denied the application to terminate the trust, although such early termination was not expressly prohibited by the terms of the decedent's will. The Court based its conclusion on the following: (1) the petitioners had not sufficiently demonstrated that the continued expense of administering the trust was uneconomical; (2) the proposed early termination would defeat the trust purposes; and (3) the petitioners had not shown any benefit which would inure to the remainder persons by early termination. See also *Matter of Zara,* 2014 NY Slip Op 30854(U). The Court denied a request to terminate a trust as uneconomical even when all parties consented, holding that "intent should be respected by the Court, even where all the interested parties are willing to ignore it."

D. ADR/Mediation

Dispute resolution through mediation or other alternative dispute resolution is particularly helpful in resolving disputes arising out of trusts and estates.

- Facilitates working through some of the emotional issues and complex family dynamics inherent in trust and estate disputes.

- Consider drafting provisions requiring mediation or other dispute resolutions in trust documents.

APPENDIX

to

"Using Trusts to Avoid Litigation"

Presented by:
Honorable Acea M. Mosey
Erie County Surrogate's Court

Matter of Nuchereno, Erie County Surrogate's Court, File No. 2018-1408
Order dated February 23, 2019 [Mosey, J.]

Matter of Gadsden, Kings County Surrogate's Court File No. 2016-604
Decision dated March 20, 2019 [Lopez-Torres, J.] **(used with author's permission)**

Matter of Seiden, New York County Surrogate's Court File No. 2014-4802
Decision and Order dated October 9, 2018 [Mella, J.] **(used with author's permission)**

Matter of Lee, Erie County Surrogate's Court File No. 69-5100
Decree dated December 16, 2016 [Howe, J.]

Matter of Sausner, Erie County Surrogate's Court File No. 2011-3587
Memorandum and Order dated August 6, 2014 [Howe, J.]

STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF ERIE

FILED
FEB 23 2019
SURROGATE'S COURT
ERIE COUNTY, N.Y.

In the Matter of the trust held for the benefit of [redacted] under the Trust Agreement for the Raymond R. Nuchereno Revocable Living Trust dated January 27, 2017

ORDER

File No. 2018-1408

A petition having been filed by Maria Valeri [hereafter, Valeri], verified March 22, 2018, seeking the appointment by this Court of a trustee of the within *inter vivos* trust, and verified objections having been filed to the petition by Maureen Schmitt [hereafter, Schmitt], and this Court having appointed Sharon L. Wick, Esq., as guardian ad litem [hereafter, the GAL] for the beneficiary of the Article XII trust set up under this trust, [redacted], a minor who is the son and sole distributee of Raymond A. Nuchereno [hereafter, Nuchereno], the deceased grantor of this trust and Valeri's former husband, and the matter having duly come on to be heard before the undersigned, and this Court having read and filed all the papers listed at the foot of this Order, and upon all the prior papers and proceedings heretofore had herein, and due deliberation having been had, and this Court having determined as follows:

(a) Nuchereno, who died on June 17, 2017, had been married to Valeri, but they entered into a Property Settlement and Separation Agreement [hereafter, the Agreement] on May 3, 2012, which was incorporated into a June 12, 2012 judgment

of divorce but not merged therein;

(b) The Agreement provided, *inter alia,* that (i) [redacted] "shall receive, upon the death of [Nuchereno], his intestate share of [Nuchereno's] estate", (ii) "[Nuchereno] warrants, together with and on behalf of his representatives, next of kin, executors, administrators, and assigns, that the value of [Nuchereno's] estate which shall be available for [redacted] in Trust, will be no less than three million dollars" (emphasis added), and (iii) the trustee for [redacted] "shall be appointed at the sole discretion of the Surrogate in the County in which [decedent's] estate is probated", and that the trustee, in any event, shall not be Robert Nuchereno;

(c) The within trust, executed by Nuchereno on January 24, 2017, provides that he is the initial trustee, followed (i) by Schmitt, or (ii) by Timothy Joldos, Jr., or (iii) whomever the adult beneficiaries "vote to nominate";

(d) Nuchereno's January 24, 2017 Will, which has been admitted to probate by this Court, provides that all the assets in his estate be paid into the within trust;

(e) The GAL correctly points out that the successor trustee provisions of the within trust, designating Schmitt and/or others as trustee upon Nuchereno's death, are at complete variance with the Agreement entered into between Nuchereno and Valeri, and that, to "allow the designation of a Trustee in the Living Will to stand in contravention of the Settlement Agreement would mean that the Decedent can

circumvent his obligations under the Settlement Agreement by creating the Living Trust to serve as a 'Will substitute' ";

(f) The GAL also correctly points out that the "no contest provision" in the trust here "cannot be applied to circumvent another party's claim under an agreement entered into by the Decedent or grantor during his lifetime [*Matter of Friedman*, 146 Misc 2d 91 (1989)]";

and based upon the foregoing determinations, I hereby conclude as follows:

(1) Only this Court may, pursuant to the 2012 Agreement between Nuchereno and Valeri, appoint the trustee of the within trust now that Nuchereno has died;

(2) The "no contest" provision of the trust has no application to this petition and the relief sought herein;

(3) Neither Valeri nor Schmitt have any right to be appointed as successor trustee of this trust;

(4) The validity of the trusts under Articles VIII, X and XI, alluded to in petitioner's papers, are not presently before this Court for adjudication and are a matter to be brought hereafter either under the estate [file #2017-2802] or in this *inter vivos* matter;

and, accordingly, it is hereby

ORDERED that Chanel T. McCarthy, Esq., 424 Main Street, Suite 1820, Buffalo, New York 14202, and Bridget Williams, 4511 Hyde Park Blvd., Niagara Falls, New York 14305, shall be, and they hereby are, appointed as co-trustees of the Article XII trust hereunder, with the issue of a trustee under the Article X trust, of which [redacted] is also a beneficiary, deferred; and it is further

ORDERED that all assets pertaining to this Article XII trust shall be turned over to the co-trustees forthwith, together with an accounting thereof by whomever has been in possession of such assets since Nuchereno's death; and it is further

ORDERED that the GAL shall submit her fee application to the undersigned, with a copy thereof sent to the co-trustees appointed hereunder, on or before March 15, 2019, and the co-trustees shall have seven (7) days thereafter to file and serve any responsive papers, after which this Court will decide the fee application on the papers; and it is further

ORDERED that counsel for Valeri shall submit his application for reasonable attorney fees to be paid from this trust on account of having to bring this proceeding to compel compliance with the Agreement, and the same shall be filed on or before March 15, 2019, and served (on or before that same date) on the GAL and upon the

co-trustees, and the GAL and the co-trustees shall have until March 22, 2019 to file and serve any responsive papers after which that application shall be decided by me on the papers.

DATED: Buffalo, New York
February 23, 2019

HON. ACEA M. MOSEY
Surrogate Judge

Papers Considered

1. Verified petition, filed March 26, 2018, with exhibits;

2. Verified objections, filed September 11, 2018, with exhibits;

3. October 26, 2018, reply affirmation of Catherine B. Eberl, Esq., attorney for petitioner Maria Valeri;

4. November 9, 2018, surreply affirmation of William C. Moran, Esq., attorney for objectant Maureen Schmitt;

5. November 8, 2018, affidavit of Maureen Schmitt;

6. Report and Recommendation of Sharon L. Wick, Esq., guardian ad litem for [redacted], dated November 28, 2018;

7. December 4, 2018, supplemental affirmation of William C. Moran, Esq.;

8. December 14, 2018, supplemental reply affirmation of Catherine B. Eberl, Esq.;

9. December 14, 2018, supplemental Report and Recommendation of GAL Wick;

10. December 21, 2018, second supplemental reply affirmation of William C. Moran, Esq.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Petition of CARRIE GADSDEN
To Remove Robert Gadsden as Trustee of the Estate of

EFFIE GADSDEN,

Deceased.

DECISION
File No. 2016-604/F/G

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LÓPEZ TORRES, S.

The following papers were considered in this summary judgment motion:

PAPERS	NUMBERED
Amended Notice of Motion for Summary Judgment by Petitioner, Affidavit in Support with Exhibits	1,2
Affidavit in Opposition by Respondent	3

In this contested miscellaneous proceeding, Carrie Gadsden (the petitioner) moves for summary judgment granting her petition to remove Robert Gadsden (the respondent) as trustee of the Effie Gadsden Living Trust (the Trust), and to appoint herself as successor trustee of said trust.

Background

Effie Gadsden (the decedent) died at the age of 96 on June 15, 2015, survived by six adult children, including the petitioner and the respondent herein. In 2012, the decedent, as grantor, created the Trust for her benefit and, upon her death, for her children (the beneficiaries). The decedent named herself as trustee until her death and named two of her children, Mary Gadsden and the respondent, as alternate successor trustees. Mary Gadsden post-deceased on August 7, 2015, and the respondent became the successor trustee. The sole asset of the Trust is a parcel of real property located at 684 St. Marks Ave., Brooklyn 11216 (the property), which had belonged to decedent before she transferred her ownership interest to the Trust in 2012. None of the beneficiaries live at the property, a residential building generating rental income. Pursuant to the Trust, upon the decedent's death, the principal of the Trust shall be distributed in equal shares to all the decedent's children. To date, the respondent has not distributed the Trust property to the

decedent's children. The petitioner commenced a proceeding to compel the respondent to account, granted by order of the court dated July 6, 2016[1] (2016 order), wherein the respondent was directed to account within sixty days of service of the order with Notice of Entry, and to cause a citation to be issued to all interested parties "with due diligence, without undue delay." Although an accounting was eventually submitted, it was not filed within the ordered time frame, and no citation has issued. The petitioner commenced a proceeding on July 12, 2018, to compel the distribution of the Trust property, granted by decision and order dated December 19, 2017[2] (2017 order), wherein the respondent was directed to distribute the principal and retained income of the Trust to the decedent's children within thirty days. It is undisputed that the respondent has not complied with either the 2016 order or the 2017 order.

On December 28, 2017, the petitioner commenced the instant proceeding, seeking an order removing the respondent as Trustee. She contends that the respondent is unfit to serve based on his failure to comply with court orders, failure to distribute estate assets in a timely manner, failure to pay real estate taxes since at least 2012, and "wasting and improperly applying the assets of the Effie Gadsden Living Trust for his own personal use." She further contends that the respondent converted stocks which are estate assets into his own name, committed perjury in his pleadings, ignored requests for information, failed to distribute assets for over two years, treated the estate as his own personal property, and withdrew sums of cash from the Trust bank account ranging from $500 to $3,800 without explanation. Petitioner asserts that the market value of the property is $1,420,000 and must be sold in order to distribute the net proceeds equally to all the beneficiaries, as directed by the Trust.

Verified objections to the instant petition were interposed by the respondent, wherein he contends that four of the beneficiaries have purportedly expressed a desire to keep the property "in the family," that he has offered the petitioner cash payments of $5,000 or more in partial distribution, which she has rejected, and that he is ready to proceed with the transfer of title to each beneficiary as directed by the 2017 order.

The petitioner moves for summary judgment to dismiss the objections and for an order

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[1] Issued by the Honorable Diana Johnson

[2] Issued by the Honorable John Ingram

removing the respondent as Trustee pursuant to SCPA 711 (3), (8) and SCPA 719 (10)[3]. She contends that the respondent should be removed because he has not complied with the explicit provision of the Trust to distribute the Trust property to the children, despite the lapse of three yeas since the decedent's death. Furthermore, the petitioner asserts that the respondent is in violation of the 2016 and 2017 orders, which directed him to file a judicial accounting and cause citations to issue, and to distribute the Trust principal and retained income within 30 days. She asserts that, upon his alleged willful and repeated disobedience of the court's orders and apparent unwillingness to effectuate the express provisions of the Trust, the respondent is unfit to carry out the duties of a trustee pursuant to SCPA 711 (3) and removal is warranted.

In opposition, the respondent avers that the rental income he collected from the Trust property have been used to pay the living expenses of four out of six of the trust beneficiaries, namely, his brothers and a nephew, the sole distributee of a post-deceased beneficiary. The respondent further avers that the Trust provides that "no accounting is required." The court notes, however, that the respondent did not interpose any objection to the prior petition to compel an accounting, and made no motion to reargue after the 2016 order directing him to account was issued. The respondent further avers that he is filing a motion to vacate the 2017 order based on "law office failure;" however, the records of this court indicate that no such motion has been filed. The respondent contends the instant motion should be denied as he "has undisputedly administered the assets of the estate fully and efficiently."

On a motion for summary judgment, the movant, the petitioner herein, has the burden of establishing a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once met, the burden shifts to the party opposing the motion, the respondent herein, to demonstrate the existence of material issues of fact that preclude summary judgment determination. *Phillips v. Kantor & Co.*, 31 NY2d 307 (1972). Where there is any doubt as to the existence of material issues of fact, "or where the issue

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[3] The applicability of SCPA 719, which provides that the court may make a decree revoking letters issued to a fiduciary without process, to the instant proceeding is unclear where, here, the relief sought was on notice by petition and jurisdiction has been obtained.

is 'arguable,' 'issue-finding, rather than issue-determination, is the key to the procedure.'" *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957).

SCPA 711 sets forth specific grounds which may form the basis for a court to revoke letters, including where a fiduciary has "wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his duty" (SCPA 711 [3]) or where a fiduciary "does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of office" (SCPA 711 [8]). The removal of a fiduciary is a matter within the discretion of the court. *Stolz v New York Cent. R.R. Co.*, 7 NY2d 269 (1959). It is deemed a serious remedy to be used sparingly and "only upon a clear showing of serious misconduct that endangers the safety of the estate," *Matter of Duke*, 87 NY2d 465 at 473 (quotations omitted) (1996). *See also Matter of Delaney*, 2018 NY Slip Op 32755(U) (Sur Ct, Nassau County) (fiduciary's failure to comply with a so-ordered stipulation demonstrated an "unequiovocal showing of serious misconduct that endangered the estate"); *Estate of Bishop*, 2018 NYLJ LEXIS 3859 (Sur Ct, Bronx County) (fiduciary's failure to sell the estate property by refusing to select appraisers and brokers warranted revocation of letters); *Falum v Birnbaum*, 191 AD2d 227 (1st Dept 1993) (lower court's revocation of executor's letters for failure to provide a her correct address as ordered by the Surrogate was upheld).

Upon the papers presented, the petitioner has satisfied her burden of demonstrating entitlement to judgment as a matter of law, and the respondent has failed to raise the existence of any material issues of triable fact to preclude summary judgment. The clear and unambiguous language of the Trust requires that upon the grantor's death, the Trustee must distribute the Trust principal and retained income to all the beneficiaries. The Trust expressly provides

> Upon the death of the Grantor, the principal of this trust then remaining shall be paid and distributed to the children of the Grantor, Robert Gadsden, Mary Gadsden, Carrie Beatrice Gadsden, Russell Edward Gadsden, David Ralph Gadsden, and Willie Rivers in equal shares per stirpes

It is uncontroverted that the respondent has not distributed the principal of the Trust and by his own admission, the respondent has been using Trust assets to benefit some of the beneficiaries, specifically "the rents collected from the building pay their living expenses (i.e., rent, food,

telephone bill, and utilities)," while other beneficiaries, including the petitioner, have received no distribution since the decedent's death. Notwithstanding the issuance of the 2016 order, which directed the respondent to account within sixty days and "cause a citation to be issued and complete service to be made, with due diligence, without undue delay, on all persons interested in the proceeding," the respondent failed to timely file said petition and to date, no citation has been issued nor service completed in the proceeding. Notwithstanding the court's issuance of the 2017 order which directed the respondent "to distribute the principal and retained income of the Trust to the decedent's children within thirty days of receiving notice of this order," it is undisputed that no such distribution has been made. While the respondent claims in his opposition that "[he is] ready to proceed with the transfer of title to each beneficiary based on the [2017] Order," he nonetheless remains in clear violation of said order.

The respondent's continuing failure to distribute the Trust principal, despite the express language of the Trust and despite the order of this Court, demonstrates a want of understanding of his fiduciary responsibilities to carry forth the mandate of the Trust for the benefit of all the beneficiaries, not just those he chooses to benefit (SCPA 711 [3]), as well as a willful refusal or neglect to obey, without good cause, the lawful direction of the court (SCPA 711 [8]). These failures rise to the level of serious misconduct that endangers the estate, thereby warranting removal as fiduciary.

Accordingly, the petitioner's motion for summary judgment is granted to the extent that the objections are dismissed, Robert Gadsden is removed as Trustee of the Effie Gadsden Living Trust, and Carrie Gadsden is appointed as successor Trustee, upon her duly qualifying.

Settle decree.

Dated: March 20, 2019
Brooklyn, New York

HON. MARGARITA LÓPEZ TORRES
SURROGATE

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Application of Sara Jane Hogan, as Executor, Seeking to Vacate and set aside a Determination of the New York State Department of Taxation and Finance Declaring an Estate Tax Deficiency in the Estate of

EVELYN SEIDEN,

Deceased.

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DECISION and ORDER
File No.: 2014-4802/B

M E L L A, S. :

This is a proceeding pursuant to New York Tax Law § 998 to vacate and set aside a Notice of Estate Tax Deficiency. The court is asked here to determine the effect of the federal estate tax repeal for the year 2010 on the New York estate tax attributable to "QTIP" trusts for surviving spouses of individuals who died in that year.

Decedent Evelyn Seiden (decedent, or wife) died in November 2014, predeceased in 2010 by her husband, Jules Seiden (husband). Decedent was the beneficiary of a trust under her husband's will that was eligible for estate tax treatment as Qualified Terminable Interest Property, known as a "QTIP" trust. In general, a QTIP trust qualifies for the marital deduction in the estate of the first spouse to die, despite the surviving spouse's lack of control over the remainder as would otherwise be required (*compare* IRC § 2056 [b] [5], *with* IRC § 2056 [b] [7] [B]).[1] To so qualify under the federal law the first estate must make a specific election on its

[1] As aptly explained by the 9th Circuit federal appeals court,

> "The QTIP is an exception to an exception to an exception. In general, a tax is levied on the transfer of estates. § 2001. However, the marital deduction is an exception to this rule, and any interest in property which passes to a surviving spouse is not considered part of the decedent's gross estate. § 2056(a). Life estates and other terminable interests are an exception to the marital deduction. § 2056(b)(1). Finally, the QTIP regime is an exception to the terminable interest exception to the marital deduction. A QTIP is a terminable interest in property which has certain limiting characteristics: (1) the surviving spouse receives all of the income from the property for life, distributed at least annually (a "qualifying

federal estate tax return (IRC § 2056 [b] [7] [B] [i] [III]). A concomitant federal tax code provision, IRC § 2044, requires that trust property for which a marital deduction "was allowed" in this manner be included in the estate of the surviving spouse.

Due to the repeal of the federal estate tax for the year 2010, the estate of the husband in this case was not required to file, and did not file, a federal estate tax return.[2] The husband's executor was required to file, and did file, a New York estate tax return. On the New York return the executor elected QTIP treatment in the manner authorized by the New York State Department of Taxation of Finance (Tax Department) in its Technical Services Bureau Memorandum TSB -M-10(1)(M), Estate Tax, March 16, 2010 (TSB Memorandum). In accordance with those instructions, she filed a "pro forma" federal return with the New York return, indicating the election by listing the QTIP property in a space on the federal form

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> income interest"); (2) no person can appoint any part of the property to any person other than the surviving spouse; and (3) the decedent's estate elects to treat the interest as a QTIP. § 2056(b)(7)(B). If an interest is a QTIP, the regime establishes a legal fiction: for the purposes of estate taxes, the entire property is treated as if it passed to the surviving spouse (and, consequently, nothing to the remainder [beneficiaries])—even though the surviving spouse actually possesses only the income interest. § 2056(b)(7)(A). Therefore, the marital deduction of § 2056(a) applies to the entire QTIP property and the property is not included in the gross estate of the decedent.
>
> "The underlying premise of the QTIP regime is that the surviving spouse is deemed to receive and then give the entire QTIP property, rather than just the income interest. The purpose of the QTIP regime is to treat the two spouses as a single economic unit with respect to the QTIP property while still allowing the first-to-die spouse to control the eventual disposition of the property."

(*Estate of Morgens v C.I.R.*, 678 F3d 769, 771 [9th Cir 2012].)

[2] The federal estate tax for 2010 was repealed by Section 501 of the Economic Growth and Tax Relief Reconciliation Act of 2001. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 gave executors the option to apply the estate tax to the estates of decedents who died in 2010 in return for certain income tax benefits, but the husband's executor here did not exercise that option.

designated for that purpose.[3] The husband's estate took a marital deduction for the trust property in calculating the New York estate tax, and the Tax Department issued a closing letter accepting the return in 2012.

The case here concerns the tax treatment of the trust in the estate of the wife, as the surviving spouse. Her executor excluded the value of the trust property on the federal estate tax return on the basis that no federal marital deduction had been claimed or "allowed" in the husband's estate, as is required to trigger inclusion in the second estate under IRC § 2044. The Internal Revenue Service issued a closing letter accepting the return as filed. The estate also excluded the trust property on decedent's New York estate tax return, taking the position that New York law defines its gross estate by reference to the federal gross estate, which clearly excludes the property. The Tax Department disagreed and assessed additional tax in the amount of $462,546.18,[4] all attributable to the QTIP trust. Decedent's estate seeks here to vacate the alleged deficiency. There are no disputed factual issues, and the parties have agreed that the court decide the matter on the papers submitted.

The Estate's Position

The estate argues that IRC § 2044 has no application to the wife's estate because, as stated above, no federal marital deduction was allowed in the estate of her pre-deceased husband. Since the trust property is not includible in her federal gross estate, it follows, the estate maintains, that the property is not includible in her New York gross estate, which is defined solely by reference to the federal definition. As provided in New York Tax Law (TL) § 954 (a):

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[3] Specifically, the trust property for which the election was made and which is referred to herein as the "QTIP" property was 78.4 percent of a trust designated as "Family Trust" under the husband's will.

[4] Including interest, the deficiency amounts to $529,342.86. Decedent's estate has paid the deficiency to stop the running of interest.

> "The New York gross estate of a deceased resident means his or her federal gross estate as defined in the internal revenue code (whether or not a federal estate tax return is required to be filed) . . ."[5]

The Tax Department Position

The Tax Department contends that TL § 951 as it existed in 2010 requires a different result. That statute provided, "[A]ny reference to the Internal Revenue Code means the United States Internal Revenue Code of 1986, with all amendments enacted on or before July 22, 1998 . . ." Thus, the Tax Department argues, the reference in TL § 954 (a) to the internal revenue code means the internal revenue code as it existed on July 22, 1998, when a federal marital deduction was "allowed," making IRC § 2044 operative under New York's tax regime to require inclusion of the trust property in the second estate.

Discussion

The Tax Department analysis is incorrect. First, the relevant tax law is that which existed in 2014, when decedent died, and not in 2010, because it is the tax on the wife's estate that concerns us here. In 2014, TL § 951 (a) was rewritten to change references to the federal tax law from that in effect on July 22, 1998, to the law as in effect on January 1, 2014. The statute as amended was made applicable to estates of persons, like decedent, who died after April 1, 2014 (L 2014, ch 59, pt X, §§ 1, 11). Under the federal tax law in effect on January 1, 2014, no marital deduction was "allowed" for decedents dying in 2010.[6]

Second, even under the law as it existed prior to 2014, no federal marital deduction was "allowed" in the husband's estate. To be "allowed" as QTIP property, it is necessary that the

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[5] The statute includes modifications to the federal definition concerning out-of-state property, limited powers of appointment, and taxable gifts, not relevant here.

[6] As noted above, executors had the option of electing certain income tax benefits in lieu of the benefits of estate tax repeal, but no such election was made here.

executor make a particular election on the federal estate tax return. IRC § 2056 (b) (7) clearly states:

> "(i) . . . The term 'qualified terminable interest property' means property—
>
> . . .
>
> "(III) to which an election under this paragraph applies.
>
> . . .
>
> "(v) Election
> An election under this paragraph with respect to any property shall be made by the executor on the [federal estate tax return] . . . ."

See Estate of Morgens v C.I.R. (133 TC 402, 410-411 [2009], *affd* 678 F3d 769 [9th Cir 2012]) where the Tax Court stated:

> "Three requirements must be met for terminable interest property to qualify as QTIP: (1) The property passes from the decedent, (2) the surviving spouse has a qualifying income interest for life in the property, and (3) *the executor of the estate of the first spouse to die makes an affirmative election to designate the property as QTIP.* Sec.2056(b)(7)(B)" (*emphasis added*).[7]

The husband's executor did not make the required election in this case. Therefore, IRC §2044 does not apply, the QTIP property is not included in the wife's federal gross estate, and the property is not included in the New York gross estate as defined in TL § 954 (a).

The Tax Department also maintains that the TSB Memorandum referred to above is controlling and dispositive of the issue. The memorandum specifically states that if (as here) an election was made on a New York return to qualify trust property for QTIP treatment, "the value of the QTIP property for which the election was made must be included in the estate of the surviving spouse." This memorandum, however, is merely a statement of the Tax Department's

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[7] *Accord Terrell v Sullivan*, 2015 WL 2473178, *3 (Super Ct Conn, Jud Dist of New Britain, Tax and Administrative Appeals Session, Apr 29, 2015, No. CV136020308) ("Since January 1, 1982, federal law has *allowed* a marital deduction [*if an appropriate election is filed*] for certain trusts even though the surviving spouse only has life use in the trust assets" [*emphasis added*]).

position and has no legal effect. The role of memoranda such as this is explained in TL §171 [Rule Twenty-third]:

> "Technical memoranda issued by the department shall advise and inform taxpayers and others of existing interpretations of laws and regulations by the department or changes to the statutory or case law of interest to the public."

The memoranda "do not have legal force or effect, do not set precedent and are not binding" (20 NYCRR 2375.6 [c]). *See Matter of AIL Systems, Inc.*, NY St Tax Appeals Trib DTA No. 819303, May 4, 2006, *available at* https://www.dta.ny.gov/pdf/archive/Decisions 819303.dec.pdf:

> "Technical Service Bureau Memoranda are merely informational statements issued by the Division [of Taxation] to disseminate current policies and guidelines and are advisory in nature, have no legal force or effect, are not binding and do not rise to the level of promulgated rule or regulation."

The memorandum cites IRC § 2044 and Tax Law § 954, but, as discussed above, neither of these sections supports the policy it announces. The Tax Department cannot use a TSB memorandum to override statutory provisions.

The Tax Department argues further that the "duty of consistency" doctrine prevents the wife's estate from taking one position on its tax return when the husband's estate had taken another. This doctrine is a form of estoppel, intended to prevent a taxpayer from benefiting from its error or omission on a tax return, only to take a contrary position on a subsequent return after the statute of limitations has expired on the first. The flaw in this argument is twofold: the husband's estate did not make an error or omission, and the wife's estate has not taken a contrary position. Both estates followed the law in effect at the time of their decedents' respective deaths. In a related argument the Tax Department attempts to show that it "relied" to its detriment on the husband's estate return by allowing the statute of limitations to run on the claim for a marital

deduction. But that claim was entirely lawful, and the Tax Department cites no authority for how it might properly have denied that deduction.

The Tax Department also argues that the New York State legislature always intended that marital deduction property be taxed in the estate of the second spouse to die. The estate correctly responds that it is entitled to rely on the plain language of the statute, without resort to speculation about what the legislature intended. As the Court of Appeals stated in *Branford House, Inc. v Michetti* (81 NY2d 681, 686 [1993]),

> "Generally, a court may not assume the existence of legislative error and change the plain language of a statute to make it conform to an alleged intent."

It is true that a court may "correct" a legislative error in certain cases, but only "if it is established unquestionably that (1) the true legislative intent is contrary to the statutory language, and (2) the mistake is due to inadvertence or clerical error" (*id.*). The Tax Department has established neither of these elements. In fact, the legislature has amended the Tax Law in other ways to take account of the federal changes (including § 951, as discussed above, and § 955 [c]), but, in the eight years since the repeal of federal tax for the year 2010, has not acted to change the effect of the repeal on QTIP property in the circumstances of this case. The court also notes "the general rule" that "tax statutes are to be strictly construed with any doubt resolved in favor of the taxpayer" (*Compass Adjusters & Investigators v Commissioner of Taxation & Fin. of State of N.Y.*, 197 AD2d 38, 42 [3d Dept 1994]; *see also Matter of Gallatin*, 188 Misc 54, 55 [Sur Ct, Orange County 1946], *affd* 273 AD 870 [2d Dept 1948], *affd* 298 NY 812 [1949] ["In construing tax statutes it has been held that the literal meaning of the words is important, for such statutes are not to be extended by implication"]).[8]

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[8] This rule of construction applies to statutes that impose tax, such as that under consideration here, and is to be distinguished from laws relating to the collection of tax, not an

Lastly, the Tax Department posits that a decision vacating the deficiency in this case will "open the floodgates" to tax avoidance. As the estate points out, however, the legislature could still amend the Tax Law to apply to future estates. Moreover, it is not guaranteed that all or even part of any QTIP trust would be subject to New York estate tax at the death of the surviving spouse under present law. The trust property might decrease in value; it might be distributed and spent down; or the surviving spouse might change domicile to another state.

For the foregoing reasons, the petition is granted and the Notice of Deficiency is hereby vacated. This decision constitutes the order of the court.

Clerk to notify.

Dated: October 9, 2018

SURROGATE

issue in this case (*Matter of Roosevelt Raceway, Inc. v Bedell*, 24 Misc 2d 374 [Sup Ct, Nassau County 1960], *affd* 12 AD2d 787 [2nd Dept 1961]).

At a Surrogate's Court held in and for the County of Erie, at the County Hall, in the City of Buffalo, New York, in said County, on the 24 day of December, 2016.

FILED

DEC 16 2016

SURROGATE'S OFFICE
ERIE COUNTY, N.Y.

PRESENT: HON. Barbara Howe.
Surrogate Judge

STATE OF NEW YORK
SURROGATE'S COURT : ERIE COUNTY

In the Matter of the Application of HSBC Bank USA, N.A. as Surviving Trustee of the Trust Created under Article THIRD of the Last Will and Testament of

- of -

LILLIAN C. LEE,

Deceased.

DECREE

File No. 69-5100/C

HSBC Bank USA, N.A. (referred to herein as "Petitioner") as Trustee of the Trust created ("Trust") under Article THIRD of the Last Will and Testament of Lillian C. Lee ("Will"), having presented to this Court a verified petition ("Petition") praying for a decree (A) determining that Lillian C. Lee ("Decedent") had a general charitable intent to benefit a Catholic organization which provides health care services to patients in the Brooklyn, New York area and a general charitable intent to benefit a Catholic organization which provides services to destitute, abandoned, and neglected and dependent children in the Brooklyn, New York area; (B) determining the closing of St. Mary's Hospital and the judicial dissolution of the Catholic Child Care Society of the Diocese of Brooklyn have made the disposition of the Trust pursuant to the second paragraph of Article THIRD (a)(1) of the Will impossible; (C) determining that the substitution of the New York Methodist

Hospital and Calvary Hospital, Inc. for St. Mary's Hospital and the substitution of St. John's Residence for Boys, Inc. for the Catholic Child Care Society of the Diocese of Brooklyn will most effectively accomplish Decedent's general charitable intent with respect to the Trust; (D) ordering the substitution of the New York Methodist Hospital and Calvary Hospital, Inc. for St. Mary's Hospital and the substitution of St. John's Residence for Boys, Inc. for the Catholic Child Care Society of the Diocese of Brooklyn, as beneficiaries of the Trust; (E) ordering that the New York Methodist Hospital and Calvary Hospital, Inc. take St. Mary's Hospital's share of the remaining balance of Part A of the Trust ("Part A Balance") in equal shares and that Calvary Hospital, Inc. use its one-fourth (1/4) share of the Part A Balance for hospital purposes at its facilities in Brooklyn, New York; and (F) granting such other and further relief as the Court deems just and proper; and

Upon a citation having been issued to the interested parties to this proceeding as determined by this Court; and

Upon satisfactory proof of service of process upon all interested parties required to be served; and

Upon the appearance of Petitioner by Phillips Lytle LLP (Erica N. Carducci, Esq.); and

Upon the filing of a Notice of Appearance by Melissa H. Thore, Assistant Attorney General of the State of New York, indicating that the Attorney General has no objections to the relief requested in the Petition;

Upon the failure of any other interested parties to appear;

This Court having received no objections to the relief requested in the Petition; and

This Court being satisfied that all of the allegations of the Petition are true;

IT IS ORDERED AND DECREED that it is hereby determined that, in creating the Trust, the Decedent had a general charitable intent to benefit a Catholic organization which provides health care services to patients in the Brooklyn, New York area and a general charitable intent to benefit a Catholic organization which provides services to destitute, abandoned, and neglected and dependent children in the Brooklyn, New York area.

IT IS FURTHER ORDERED AND DECREED that it is hereby determined that the closing of St. Mary's Hospital and the judicial dissolution of the Catholic Child Care Society of the Diocese of Brooklyn have made the disposition of the Trust pursuant to the second paragraph of Article THIRD (a)(1) of the Will impossible.

IT IS FURTHER ORDERED AND DECREED that it is hereby determined that the substitution of the New York Methodist Hospital and Calvary Hospital, Inc. for St. Mary's Hospital and the substitution of St. John's Residence for Boys, Inc. for the Catholic Child Care Society of the Diocese of Brooklyn will most effectively accomplish Decedent's general charitable intent with respect to the Trust.

IT IS FURTHER ORDERED AND DECREED that New York Methodist Hospital and Calvary Hospital, Inc. be substituted for St. Mary's Hospital as beneficiaries of the Trust.

IT IS FURTHER ORDERED AND DECREED that St. John's Residence for Boys, Inc. be substituted for the Catholic Child Care Society of the Diocese of Brooklyn, as a beneficiary of the Trust.

IT IS FURTHER ORDERED AND DECREED that the New York Methodist Hospital and Calvary Hospital, Inc. take St. Mary's Hospital's share of the Part A Balance in equal shares and that Calvary Hospital, Inc. use its one-fourth (1/4) share of the Part A Balance for hospital purposes at its facilities in Brooklyn, New York.

Dated: December 16, 2016

Barbara Howe

Hon. Barbara Howe, Surrogate Judge

E-C4/Doc #01-2991172.1

STATE OF NEW YORK
SURROGATE'S COURT : COUNTY OF ERIE

In the Matter of the Estate of

FRANK D. SAUSNER
Deceased.

File No. 2011-3587/B

DENIS A. KITCHEN, JR., ESQ.
Attorney for Katharina Weinzler,[1] Executrix of the Estate

JOSEPH W. KEEFE, ESQ.
Attorney for Frank E. Sausner & Mark Sausner

MEMORANDUM AND ORDER

BARBARA HOWE, J.

Frank Sausner died on August 14, 2011 at the age of 78, survived by his three children, Frank E. Sausner [hereafter, Frank], Mark Sausner [hereafter, Mark], and Katharina Weinzler [hereafter, Katharina]. Decedent's Will, dated June 20, 2006, was admitted to probate on September 29, 2011, and his daughter Katharina was appointed fiduciary of the estate.

On December 4, 2013, Katharina filed a petition for judicial settlement of her final account, to which Frank and Mark have filed objections. They argue that the estate had a one-half interest in real property located at 9025 Tonawanda

[1] Katharina Weinzler was formerly known as Katharina Kaiser.

Creek Road, Clarence, New York, which was sold after decedent's death. They say that one-half of the sale proceeds should have been included in the accounting, but was not. Katharina has replied to the objections with both procedural and substantive opposition.

Also pending before me is a petition by Frank and Mark to terminate a testamentary trust set up for their benefit. They argue that the trust is "uneconomical"; and they also argue that the terms of the trust "are not in our best interests." Katharina filed an answer to the termination petition, opposing that relief. In support of her answer, she filed affidavits by Mordaunt and by Joanne Lazik [hereafter, Lazik]. Lazik was employed by Mordaunt and was a witness to decedent's Will.

(A)

THE ACCOUNTING PROCEEDING

(i)

In her reply papers, Katharina first seeks dismissal of the objections to the extent interposed by Mark:

> "Mark C. Sausner has already signed and acknowledged a Release dated June 21, 2013 stating that I as Executrix have fully and satisfactorily accounted to him and consenting to my release and discharge from all liability."

Mark's June 21, 2013 document fully releases Katharina with respect to her handling of this estate. Mark has never sought to set aside his release (*see, e.g., Matter of Frutiger*, 29 NY2d 143 [1971] and *Matter of Hunter*, 4 NY3d 260, 276, fn 6 [2005]), so that release precludes the filing by him now of any objection to the accounting (*Matter of Cheng Ching Wang*, 114 AD3d 939 [2014]). Thus, Mark's objections are hereby dismissed.

(ii)

Frank, then, remains as sole objectant to Katharina's accounting. Frank's only dispute with the accounting is his claim that one-half of the proceeds from the sale of real property in Clarence, New York following decedent's death should be included in the estate. He contends that a deed transferring that property in June, 2006 from decedent to himself and Katharina made the grantees tenants in common and <u>not</u> joint tenants with right of survivorship. As such, so Frank says, when decedent died, his estate became the owner of his one-half interest in the property.

Katharina filed her reply to the objections, together with an affidavit from Timothy Mordaunt, Esq. [hereafter Mordaunt], who was decedent's attorney and who prepared both decedent's Will and the deed in question. Mordaunt asserts that the deed language used by him was normal language used to convey out the fee interest in the property to Katharina but to reserve to decedent a life estate only, something that was reiterated and made explicit in a subsequent clause in the deed.

As the Court in *Matter of New Cr. Bluebelt, Phase 4*, 79 AD3d 888, 891 [2010], observed:

> "Real Property Law §240 (3) provides that deeds 'must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.' Where a deed is ambiguous, courts look beyond the written instrument to the surrounding circumstances (*see Wilson v. Ford*, 209 NY 186, 196 [1913]; *De Paulis Holding Corp. v Vitale*, 66 AD3d 816 [2009]; *Andersen v. Mazza,* 258 AD2d 726 [1999])" (emphasis added).

When the language in a deed is "clear and unambiguous," the meaning of its terms "cannot be changed by unexpressed intentions of the parties" (*Gross v. Cizauskas*, 53 AD2d 969, 970 [1976], *citing Geneva v. Henson*, 195 NY 447 [1909]). However, when the deed language is "doubtful or susceptible of varying interpretations" (*id.*), the Court may determine the parties' intent by considering the surrounding circumstances, the situation of the parties at the time of the conveyance, and the general subject matter of the transaction (*see Rome v. Vescio*, 58 AD2d 990, 991 [1977], rev'd on other grounds 45 NY2d 980 [1978]; *see also, Matter of Friedman*, 2009 NY Misc Lexis 4335 [2009]; *Stevens v. Smith*, 12 Misc 3d 1179A [2006]; and *Matzell v. Distaola*, 105 AD2d 500 [1984]).

Moreover, "construction of a deed is generally a question of law for the court" (*O'Brien v. Bocchino*, 13 AD3d 1055, 1056 [2004]), as is the issue of whether a deed's language is susceptible of more than one interpretation (*Chisholm*

v. De Rose, 41 AD3d 1158, 1159 [2007]). When a Court does construe a document, such as a deed, "'[f]orm should not prevail over substance' (*William C. Atwater & Co. v. Panama R. Co.*, 246 NY 519, 524 [1927])" (*Matter of Stravinsky*, 4 AD3d 75, 81 [2003]). And, as has been aptly observed, "'[t]here is no surer way to misread any document than to read it literally' (*Guiseppi v. Walling*, 144 F2d 608, 624 [1944] [HAND, J., concurring], *affd* 324 US 244 [1945])" (*id.*, at 82).

Here, the deed language in question is as follows:

> " This Indenture
>
> Made the 20th day of June Two Thousand and Six (2006) Between Frank Dean Sausner, individually and as Surviving Spouse of Frieda Sausner, Deceased (5/28/00) residing at 9025 Tonawanda Creek Rd., Clarence Ctr., N.Y. 14032, party of the first part, and Frank Dean Sausner, residing at 9025 Tonawanda Creek Rd., Clarence Ctr., N.Y. 14032, and Katharina R. Kaiser residing at 2068 Whitehaven Road, Grand Island, New York 14072; parties of the second part;
>
> Witnesseth that the said party of the first part, in consideration of One and No More Dollars, ($1.00 and No More) lawful money of the United States, paid by the parties of the second part, do(es) hereby grant and release unto the said parties of the second part, themselves and their heirs and assigns forever [the real property thereafter described]."

However, following the legal description of the property, the deed provides:

> "RESERVING in and to the parties of the first part a life estate in the subject premises; provided however, that in the event that the parties of the first part shall for a continuous period of ninety days fail to occupy the

premises as a place of residence, the life estate reserved herein shall thereupon terminate" (emphasis added).

Although the deed appears at first to convey title to decedent and Katharina as tenants in common, a reading of "the whole instrument" (*Matter of New Cr. Bluebelt, Phase 4, supra*, at 891) clearly demonstrates that that was not decedent's intent. Decedent clearly and unambiguously reserved to himself a life estate in the property. This reservation would have been completely unnecessary if he had not conveyed -- or intended to convey[2] -- the entire fee ownership of the property to Katharina. *See, e.g., Matter of Vadney*, 83 NY2d 885, 887 [1994].

Thus, it is clear as a matter of law, and I so construe this deed, that decedent intended to reserve a life estate for himself at the same time as he conveyed out his entire fee interest in the property to Katharina.

Accordingly, Frank's objection to the account must be, and it hereby is dismissed, and the account is approved.

(B)

PETITION TO TERMINATE THE TESTAMENTARY TRUST

Frank and Mark seek an Order from this Court terminating the testamentary trust created under decedent's Will. They claim that the trust is

---

[2] I need not, and do not, express any opinion as to whether the language of the deed used by Mordaunt in the "granting" clause is usual or ordinary language employed when a grantor seeks to convey himself or herself a life estate. Likewise, I do not consider Mordaunt's affidavit in construing the deed itself.

uneconomical and that the terms of the trust are not in their best interests.

Decedent's residuary estate was left in his Will to his sons, Frank and Mark, in equal shares. Article FOURTH of the Will, however, provided (1) that a separate trust be set up for each son, and (2) that the trustee (decedent's daughter, Katharina):

> "shall distribute to my sons . . . the sum of One Hundred ($100.00) Dollars, each, per month from the principal or net income of the Trust" (emphasis added).

According to their attorney, the value of each trust currently "is in excess of $50,000.00".

In *Matter of Keriotis*, 22 Misc 3d 1121A [2009], the Court pointed out that:

> "A New York testamentary trust is an irrevocable expression of the testator's intent, which is to be respected by the Court. *Matter of Wentworth*, 230 NY 176 (1920); *Matter of Abel*, NYLJ, Aug. 22, 2000, at 29, col 5 (Sur Ct, Bronx County). 'Its duration may not be foreshortened by judicial fiat or by act of the interested parties.' *In re Duignan's Will*, 85 NYS2d 846 (Sur Ct, Westchester County 1948). While EPTL 7-1.9 permits termination of a trust upon consent of all interested persons, the statute is limited to terminations during the lifetime of the settlor of the trust. Therefore, except in limited circumstances (see EPTL 7-1.19), a testamentary trust is indestructible. *In re Duignan's Will, supra.*
>
> In recognition of the difficulty of terminating a testamentary trust, the legislature enacted EPTL 7-1.19. L. 2004, ch. 359. EPTL 7-1.19 provides that the court

> may terminate a testamentary trust if it finds that: (1) the continuation of the trust is economically impracticable, (2) the express terms of the disposing instrument do not prohibit its early termination, and (3) such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries" (emphasis added).

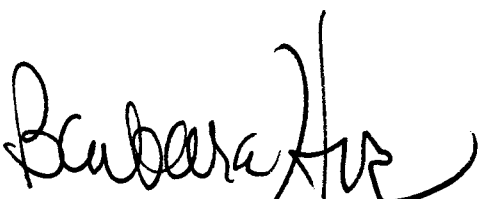
Here, the obvious purpose of the trust was to provide regular, albeit minimal, income to Frank and Mark. In essence, the trust was created as a spendthrift trust. Katharina, as trustee, opposes early termination of the trust, and she specifically "[d]enies that the trust is uneconomical."

Significantly, Frank and Mark have not offered anything to show the trust is economically impractical or "uneconomical." Their simple assertion that the trust is "uneconomical" is conclusory only, and it is unsupported in any way.

There being no basis before this Court to grant the relief sought in the termination petition, that petition must be, and it hereby is, denied, and the petition is dismissed.

This decision shall constitute the Order of this Court and no other or further order shall be required.

DATED: BUFFALO, NEW YORK
August 6, 2014



HON. BARBARA HOWE
Surrogate Judge

Using Trusts to Avoid Litigation

Presented by:
Hon. Acea M. Mosey
Erie County Surrogate's Court

USING TRUSTS TO AVOID LITIGATION

Disputes involving trusts present unique challenges, including sensitive family dynamics, high financial stakes, and complex procedural, legal, and tax issues. Trust law has evolved to offer various options for resolving disputes and preserving the purpose of the trust and the grantor's intent. Aside from strictly legal considerations, however, it is important for attorneys to draft flexible trust instruments, trustees to stay current with the needs of beneficiaries, and to act promptly when altered circumstances necessitate a modification to the trust.

I. Basics

II. Reformation of a Trust, When Needed

III. Decanting

IV. Miscellaneous Proceedings and Alternatives

The Basics: Grantor's Intent and Execution

Grantor's Intent

- Trusts can be used for a variety of different reasons; therefore, it is important to understand the grantor's objective and intent when drafting trust documents.
- Revocable trusts:
  - can be used to manage assets during lifetime;
  - avoid probate at death; and
  - protect beneficiaries.
- Irrevocable trusts:
  - can be used to avoid probate;
  - manage and protect assets;
  - reduce taxes, qualify or maintain government benefits; and
  - provide for charities.

Execution

- EPTL § 7-1.17 sets forth the required formalities for a lifetime trust:
- It must be in writing, executed and acknowledged by the creator and, unless he or she is the sole trustee, by at least one trustee, in the manner required by the laws of this state for the recording of a conveyance of real property,

OR

- Be executed in the presence of two witnesses who shall affix their signatures to the trust instrument.
- The acknowledgment may be subject to challenge if not in compliance with the requirements for the recording of a deed.

The Basics: Nomination of a Trustee

Matter of Nuchereno, Erie Co. Surrogate's Court, February 23, 2019 [Mosey, J.]

- Petition to appoint trustee of an *inter vivos* trust denied as decedent had entered into a Property Settlement and Separation Agreement, incorporated but not merged, into a divorce decree, which created a trust for the sole infant beneficiary and provided for appointment of trustee at the sole discretion of the Surrogate's Court.
- The governing trust executed by decedent had a provision regarding the appointment of trustees that conflicted with the PSSA, in that it nominated decedent as the initial trustee, nominated a successor, and then provided that the trustee be whomever the adult beneficiaries "vote to nominate".
- Decedent's Will was a "pour over" Will that provided all his assets be paid to the trust. The petition to appoint certain trustees was denied on the basis that the conflicting trust provision could not be used to contravene decedent's obligations pursuant to the PSSA by creating the Living Will to serve as a Will substitute, therefore, the Court appointed the successor trustees. Also, the no contest provision in the trust "cannot be applied to circumvent another party's claim under an agreement entered by the Decedent or grantor during his lifetime" (citing *Matter of Friedman*, 146 Misc 2d 91 [1989]).

The Basics: Exculpatory Clauses

Clear and concise forfeiture, i.e., "no contest" clauses that express settlor's intent – **incentivize harmony among beneficiaries.**

EPTL § 11-1.7(a), amended effective August 24, 2018, now states:

"The attempted grant to an executor, testamentary trustee, or *inter vivos* trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise."

EPTL § 11-1.7(c) states that:

"Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding."

An amendment to EPTL §11-1.7 has extended the prohibitions against use of exculpatory clauses to *inter vivos* trusts.

The Basics: Situs

Factors to Consider

- The intent of the decedent, and particularly the presence or absence of any provisions in the trust directing that only the laws of N.Y. should govern the administration of the trust or a clause prohibiting the transfer of the situs of the trust;
- There must be some nexus between the trust and the designated jurisdiction;
- Settlor's intent;
- The location of the trust corpus;
- The residence or domicile of the trustee; and
- Residence of the beneficiaries (to a lesser degree).

Matter of Hettrick, 61 Misc 3d 1220(A) [2018]

- Although the Court has the power to change the situs of a trust, removal is not automatic.
- Here, two trustees resided in New York; however, the beneficiary and trust protector requested removal to Virginia to "facilitate" the administration of the trust.
- Removal was denied, the Court pointing to advances in technology (such as e-mail, fax, video conferencing, on-line banking services [and the like]) which allow trustees, beneficiaries and the courts to "communicate almost instantly."
- Court e-filing also permits instantaneous access to the courts.

The Basics: Trust Protectors/Advisors

What is a trust protector?

- A trustee is required to administer a trust in accordance with the terms of the trust.
- The role of a trust protector is to oversee the trustee's actions in administering a trust to ensure:
  - that those actions comply with the law;
  - comply with grantor's intent; and
  - purpose of the trust in question.
- The powers given to a trust protector vary widely, however, generally a trust protector oversees many important decisions that a trustee makes.

Why consider a trust protector?

- Alternative to going to court if a dispute arises
- Remove/replace trustees
- Arbitrate disputes between trustee and beneficiaries, or between beneficiaries

New York does not have a statue governing the use of trust protectors.

Reformation of a Trust, When Needed

- Testamentary Trust
- Inter Vivos Trust
- Recent Tax Changes and Implications

Testamentary Trust

Matter of Knapp, 41 Misc 3d 1202(A) [2013]

Co-trustees petition to reform testamentary trust to:

(1) allow trustees limited power to invade trust principal;

(2) reduce the age at which the current beneficiaries receive distributions of their shares of the trust;

(3) dispense with Will's express requirement that one of the beneficiaries make certain visits to his grandmother, or face reductions in the value of his portion of the trust;

(4) create a mechanism for the appointment of successor trustees without court approval; and

(5) establishing that the trustees are held to the prudent investor standard (EPTL §11-2.3).

Petition was denied in its entirety, although the trustees and beneficiaries had agreed to the relief in the petition. The Court held that when testator's intentions are clearly expressed in a will the petition must be denied, and the trustees are statutorily bound by EPTL §11-2.3.

Inter Vivos Trust

Matter of Sukenik, 162 AD 3d 564 [2018]

Appellate Division allowed a petition to reform an *inter vivos* trust and IRA beneficiary designation form even though the documents were clear and unambiguous on their face, and despite Surrogate's warning that "to reform instruments…based only upon the presumption that one who executes testamentary instruments intends to minimize taxes would expand the reformation doctrine beyond recognition and would open the flood gates to reformation proceedings aimed at curing any and all kinds of inefficient tax planning."

Recent Tax Changes and Implications

- For New Yorkers, federal estate tax reform means that the difference between the federal exemption and the New York exemption has now increased significantly.
- New York's current exemption amount is **$5.74 million**, which would have made it equal to the previous federal exemption had that not been revised.
- Now, the federal exemption amount is almost double the New York exemption amount.

- The discrepancy between the federal and New York exemptions underscores the need to determine if a current estate plan may be impacted by tax reform.
- If a Will, for example, carves out a credit shelter trust for a surviving spouse with the deceased spouse's federal exemption (as opposed to his state exemption), there could be a significant – and unanticipated – state estate tax bill due at the death of the first spouse.

PRIOR LAW

DATE OF DEATH	FEDERAL EXCLUSION	NEW YORK EXCLUSION	SPREAD
April 1, 2017 to December 31, 2017	$5,490,000 per individual/ $10,980,00 per married couple	$5,250,000 per individual Not portable	$240,000 per individual Plus $5,490,000 portability
January 1, 2018 to December 31, 2018	$5,600,000 Individual/ $11,200,000 per married couple	$5, 250,000 per individual Not portable	$350,000 per individual Plus
January 1, 2019 and beyond	SAME	SAME	$0

2017 TAX REFORM ACT

DATE OF DEATH	FEDERAL EXCLUSION	NEW YORK EXCLUSION	SPREAD
April 1, 2017 to December 31, 2017	Approx. $11,180,000 per individual $22,360,000 per married couple	$5,250,000 per individual Not portable	Approx. $5,930,000 per individual Plus $11,180,00 portability
January 1, 2018 to December 31, 2018	Approx. $11,180,000* per individual $22,360,000 per married couple	$5,600,000* per individual Not portable	$5,580,000* per individual Plus $22,360,000 potability
January 1, 2019 and beyond	$5,600,000* per individual $12,200,000 per married couple	$5,600,000* per individual Not Portable	$0 Plus $5,600,000 portability

** Based on 2018 inflation-adjusted amounts, but could be higher*

What is Portability?

- At a first glance, a provision of the Tax Relief and Job Creation Act of 2010 (the "Tax Relief Act") might seem to have eliminated any necessity of CST planning by creating a default provision in the law that accomplishes what estate planners have done for years through careful planning and drafting. The law in 2010 created a way to ensure that the estate tax exclusion amount for the first-to-die spouse is preserved and carried over to the surviving spouse and then, eventually, to the ultimate beneficiaries. This is the so-called "portability."

Should Portability be Solely Relied on for Smaller Estates?

Full reliance on portability is not recommended. Rather, credit shelter trusts should continue to be used in estate planning. Why?

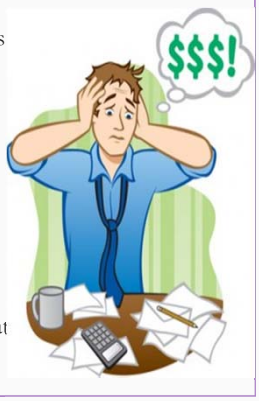
- No protection of growth and no indexing for inflation of the portability amount.
- Only federal exclusion amount is portable.
- The GST exemption is not portable.
- Portability is not automatic and requires an affirmative action.
- Portability does not add up in case of multiple predeceased spouses.
- Trusts offer advantages and planning outside of transfer tax savings.

A Closer Look at Credit Shelter Trusts

- Credit Shelter Trust is one of the most common trusts that is utilized in estate planning, and is typically (but not always)a testamentary trust as opposed to a trust created during life.
- This type of trust is also commonly referred to as a so-called "By-Pass Trust". Structuring and incorporating a credit shelter trust ("CST") into an estate plan starts with understanding two basic premises of transfer taxation:
- 1. Estate taxes are not imposed on assets of any amount passing to a surviving spouse (when surviving spouse is US citizen), and
- 2. The exemption amount (or a dollar-for-dollar corresponding tax credit amount) is an amount that is available at death to each spouse to shelter from estate taxes irrespective of who is the immediate or ultimate recipient of the "sheltered" assets

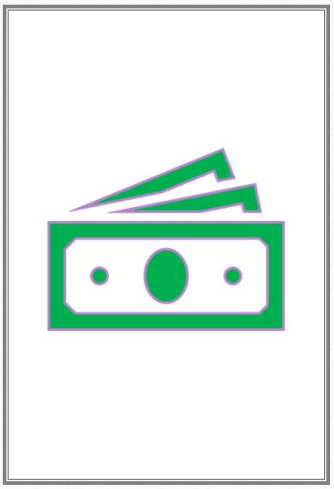
Why Credit Shelter Trusts are Still Necessary

- Trusts offer advantages and planning outside of transfer tax savings. Although portability may theoretically offer the same federal estate tax savings, planning with trusts opens doors to many valuable additional benefits such as asset protection, for example.
- No one is completely protected against potential creditor risk, especially anyone with substantial personal wealth.
- With portability, the inherited assets are fully reachable to all of the surviving spouse's present and future creditors, as well as creditors in bankruptcy and, if the surviving spouse then divorces, to the ex-spouse.
- Assets in CST can be protected from bankruptcy and divorce. Trusts can also provide professional money management and intelligent distribution of the trust fund.
- Finally, a CST offers certainty and the ultimate protection of the disposition of the assets at the termination of the trust (most often, on the death of the surviving spouse).



Why Credit Shelter Trusts are Still Necessary

- If relied upon portability, the deceased spousal unused exemption amount is subject to the disposition by the surviving spouse. This is most often a concern where spouses have children from prior marriages or other family members who they would like to separately provide for.
- The surviving spouse could easily benefit the beneficiaries of her choice – for example, her children from the first marriage, - to the detriment of the decedent's children if there is no trust created on the death of the first-to-die.



Annual Exclusion Gift Tax

- In 2017, the annual exclusion gifting amount was $14,000 (or $28,000 if spouses elect to split gifts).
- For calendar years 2018 and 2019, the annual exclusion amount was increased to $15,000 per recipient for present interest gifts.
- The annual exclusion of $15,000 permits spouses who consent to split their gifts to transfer a total of $30,000 per recipient per year without gift tax.

GST/QTIP

***Matter of Seiden,* New York County, October 9, 2018 [Mella, J.]** – proceeding pursuant to New York Tax Law 998.

- The Court was asked to decide the effect of a federal estate tax repeal for 2010 on the NY estate tax attributable to QTIP trusts for surviving spouses of persons who died in 2010, in a proceeding to vacate and set aside a notice of estate tax deficiency.
- Decedent died in Nov. 2014 predeceased by her husband in 2010. She was a beneficiary of a trust under husband's will that was eligible for estate tax treatment as QTIP--the trust qualified for a marital deduction in the estate of the first spouse to die.
- A repeal of the federal estate tax for 2010 did not require husband's estate to file a federal estate tax return, but was required to file a NY estate tax return. The case here concerned the tax treatment of the trust in wife's estate, as surviving spouse--value of the trust property was excluded on the federal estate and NY estate tax returns. The tax department assessed additional tax for over $462,000 attributable to the QTIP trust.
- The Court found IRC §2044 inapplicable, the QTIP property was not included in wife's federal gross estate nor in the NY gross estate. Thus, the petition was granted, and the notice of tax deficiency vacated.
- Tax Department is not filing an appeal
- Defect may have been cured with passage of April 2019 NYS Budget – no QTIP allowed if not taken in first estate

Planning with QTIPS

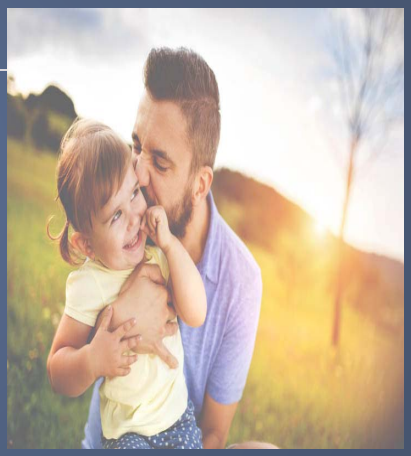
Disadvantages	Advantages
• Lack of control by the surviving spouse and inability to plan with the QTIP funds. • Conflicts Between Surviving Spouse and Remainder Beneficiaries.	• Certainty with respect to the final disposition of assets. • The availability of GSTT planning. • Assets are not included in the probate estate of the surviving spouse. • Flexibility of the post-death elections.

SUPPLEMENTAL NEEDS TRUST

If a trust for a beneficiary who has a disability does not meet the criteria for a supplemental needs trust under EPTL§7-1.12, due to ambiguous language or language that clearly provides for support of the beneficiary, the trustee should apply to a court to reform the trust into a supplemental needs trust under EPTL §7-1.12.

Supplemental Needs Trust

- In ***Matter of Newman*, 18 Misc 3d 1118(A) [2008],** the decedent died in 1988, leaving a 60-year-old daughter who functioned at a third-grade level.
  - He left his residuary estate in trust and directed the trustee to use the income for daughter's benefit. The trustees could also invade the principal for the "more adequate support and maintenance" of the daughter and could "defray" the daughter's health expenses.
  - The executor wanted to reform the trust to make it a Supplemental Needs Trust, and the Court granted the petition, relying on the testator's words "more adequate support" and "defray" to conclude that he meant to supplement, not supplant, government benefits. He did not want her to be "relegated to living solely on available government benefits ...." The Court cited cases, relying on *Matter of DeRosa*, NYLJ, April 29, 2006, at 30, col. 2, and *Matter of Kamp*, 7 Misc 3d 615 [2005], which allowed reformation, and rejecting the narrow holding in *Matter of Rubin*, 4 Misc 3d 634 [2004], which prohibited it.

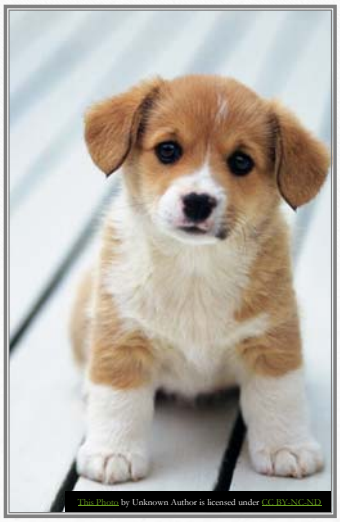


Irrevocable Medicaid Income Only Trust

- A Trust must be Irrevocable in order to preserve assets for Medicaid purposes.
- The Grantor CANNOT be the Trustee.
- The Grantor can retain right to income from the trust.
- The Grantor must not have any access to principal from the trust otherwise it will be considered available for Medicaid purposes.
- Any principal or income that can be distributed to the Grantor or Grantor's spouse will be considered available for Medicaid purposes
- H.E.M.S. standard is not acceptable for Medicaid.

Irrevocable Medicaid Income Only Trust

- Removes the asset from the Grantor's name for Medicaid purposes.
- Grantor will avoid a Medicaid penalty period after five years.
- All income is reported on the Grantor's individual tax return.
- Retain real estate tax exemptions with the equivalent of a life estate.
- Preserve step-up in basis upon Grantor's death.
- The Grantor can reserve limited power of appointment to make limited changes to beneficiaries by Will.
- Avoid the spend-down of assets.
- Save assets for heirs and beneficiaries
- **If the Trust provides income to the Grantor, it can effect Medicaid benefits down the road.**
- **If the Trust is not properly drafted, there may be a need for a separate tax return and there will be higher tax rates.**
- **Note: There will be a penalty tax of any gifts made within the 5 year period of applying for Medicaid.**



PET TRUSTS

Pitfalls in Pet Planning

Pet Trusts

- EPTL 7-8.1(a) provides that any individual may intervene for the benefit of the pet, and the court, *sua sponte*, may appoint someone to enforce the terms of the trust. This same section also creates an exception to the rule-against perpetuities problem in estate planning, which would have forced the pet trust to terminate 21 years after the death of a life in being, . Under the EPTL, the trust shall terminate only when all animal beneficiaries of the trust are no longer alive. The trust names a trustee to manage the funds of the trust, a caretaker who has physical custody of the pet, and an enforcer.

Karl Lagerfeld died on Feb. 19, 2019, and prior to his passing, he told French magazine, "Le Figaro," that Choupette is an heiress. The creative director had an estimated net worth of anywhere between $195 million and $300 million, and the feline could inherit at least a portion.

Filling in the Gaps: Power of Attorney & Inter-vivos Pet Trusts

- Attorneys who address only the pet issue on a limited basis through wills have permitted a huge gap in coverage for their client's pets. Having only a testamentary pet trust, or a trust which is contained in a will, leaves a gaping hole in pet planning for it can take months, if not years, to probate or administer an estate, receive letters testamentary and letters of trusteeship, and during this period of pendency, the pet will be without coverage as to its physical care and money to cover its care. Without a representative of an estate to take possession of the pet, the pet's care will be in limbo.

A Power of Attorney, and the Drafting of an Inter-vivos Pet Trust.

- A provision in a power of attorney that the agent should arrange for pet care and custody is the first step in ensuring that the pet is cared for when a client is alive, but unable to care for his pet, or communicate to whom the pet should be given.
- The attorney's job would purely be to transfer the pet to the caretaker of her choosing, or, if there is an inter vivos trust, custodian set forth in an inter vivos trust. The concept began as a "honorary trust" because in old trusts there were no means to enforce the terms of the trust for the benefit of a pet, a "beneficiary" that obviously did not have access to the courts to enforce its rights against the trustees. The trustee was part of an honor system where she was trusted to carry out the terms of the trust for the benefit of the pet, but could not be legally forced to do so.
- There are now provisions that may be placed in pet trusts for enforcers or those who have the ability to bring the custodian or trustee to court to force him to carry out the terms of the trust for the benefit of the pets.

DECANTING

The act of distributing assets from an old trust to a new trust with different terms.

Just as one can decant wine by pouring it from its original bottle into a new bottle, leaving the unwanted sediment in the original bottle.

DECANTING: Power of Appointment EPTL 10-6.6

- Decanting can be used to provide the trustees the power to grant beneficiaries a general power of appointment.
- Exercise of this power can result in income tax savings by causing part or all the trust to be taxed in a beneficiary's estate, sometimes without triggering estate tax because of increased federal and state tax exemption (currently $5,450,000).
- Under current estate tax laws, inclusion of trust property in a beneficiary's estate results in a step up in the income tax basis of trust assets to fair market value at the beneficiary's death, generating lower income taxes on the sale of trust assets.

DECANTING

Consolidate Multiple Trusts

- May lower administrative costs
- Resulting in more efficient and economical trust for benefit of beneficiaries

Separate Trusts

- Splitting 1trust for multiple beneficiaries into different trusts for each beneficiary or family group allows different needs to be addressed.

Add or Modify Spendthrift Provisions

DECANTING

Avoid or Reduce State Income Taxes on Trust Assets

- A trust can be decanted to take advantage of the current estate tax exemption

AND

- Achieve a full step up in income tax basis of the trust assets upon an individual's death, thereby reducing estate and income tax liability.

DECANTING

Avoid or Reduce State Income Taxes on Trust Assets

- If a N.Y. resident trust no longer has a trustee domiciled in N.Y., has no real or personal property located in N.Y. and has no N.Y. source income, then capital gains and accumulated income will not be subject to N.Y. income tax. [N.Y. Tax Law § 603(b)]
- If N.Y. based trust includes assets located in another state, the trustee should consider decanting those assets to an appointed trust in the other tax jurisdiction.
- By doing so, the decanted assets might avoid N.Y. capital gains tax and accumulated income tax.

Miscellaneous Proceedings and Alternatives

- Cy Pres – EPTL § 8-1.1 – *Matter of Lee*, Erie County Surrogate's Court, December 16, 2016 [Howe, J.]
- Use of Informal Accountings to Reduce Trustee Liability
- Termination of an Uneconomical Trust – EPTL § 7-1.19
- ADR/Mediation

In New York: Use of Informal Accountings to Reduce Trustee Liability

There is no requirement that trustees file recurring trust accountings. A recent Appellate Division decision holds that informal accountings sever liability, as long as full disclosure has been given by the fiduciary.

Matter of Spacek, 155 AD3d 747 [2017]: the decedent's will provided that her estate was to be split among six (6) beneficiaries. The executor sent an agreement releasing her from acts done as executor, accompanied by the estate's tax returns and other financial documents, to the beneficiaries, which they signed. After the executor petitioned to judicially settle the account, one of the beneficiaries filed objections. The Appellate Division affirmed the Surrogate's decision to deny the motion to set aside the release. The Court held that use of:

"an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree...[I]f a fiduciary gives full disclosure in his [or her] accounting to which the beneficiaries are parties…they should have to object at that time or be barred from doing so after the settlement of the account." [internal citations omitted].

Termination of an Uneconomical Trust

EPTL § 7-1.19

Matter of Sausner, Erie County Surrogate's Court, August 6, 2014 [Howe, J.) see also *Matter of Kistner,* NYLJ, January 23, 2006, at p. 35, col. 1:

The Court directed termination of the trust where the trust could pay little or no income to the income beneficiary and the remainder person did not object to the termination of the trust.

A Court may grant termination of a testamentary or inter vivos trust if it is satisfied that:

(1) it is economically impracticable to continue administering the trust;
(2) the trust does not expressly prohibit administration;
(3) termination would not defeat the purpose of the trust; and
(4) termination serves the beneficiaries' best interests.

ADR/Mediation

Dispute resolution through mediation or ADR is helpful in resolving disputes arising out of trusts and estates.

- Facilitates working through some emotional issues & complex family dynamics inherent in trust & estate disputes.
- Consider drafting provisions requiring mediation or other dispute resolutions in trust documents.

THANK YOU!

Questions?