The Anatomy of a Trust Contest

Hon. Vincent W. Versaci
Schenectady County Surrogate's Court, Albany

Gary B. Freidman, Esq.
Greenfield Stein & Senior, LLP, NYC

Frank T. Santoro, Esq.
Farrell Fritz, P.C., Uniondale

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
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Trust Litigation in the 21st Century

Presented by: Hon. Vincent W. Versaci, Frank T. Santoro and Gary B. Freidman

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On March 28, 2016, Sammy Settlor, then age 85, was discharged from the Standish Sanitarium, a psychiatric hospital, after suffering from severe depression and anxiety. His physician, Dr. Hugo Z. Hackenbush of the Standish Sanitarium (a for profit institution owned by Dr. Hackenbush), has prescribed a high dose regimen of anti-depressants and mood stabilizing medications – some of the side effects of which are intermittent memory loss, hallucinations and delusions, and impaired vision.

On April 1, 2016, Sammy, who resided in Columbia County, New York (but maintained a pied-a-terre in Manhattan) executed a Will and revocable trust ("Trust") prepared by Louis Litt, whom Sammy met at one of Louis' many catered breakfast seminars on avoiding probate. Sammy named as his trustees both Louis Litt -- whose offices were in Manhattan and Copake, NY, but who is now retired and a resident of Naples, Florida -- and an old girlfriend, Jessica Pearson, who resided in New York County, but who moved a few months later to an apartment at the Ritz Carlton in Naples, Florida. Sammy's 2016 Will pours his entire probate estate into his Trust and contains a direction that his Will be probated in the Surrogate's Court, New York County. His prior Will, executed in 2010, left a $2 Million bequest to his alma mater, the School of Hard Knocks.

On April 2, 2016, the day after the Will and Trust were executed, Sammy funded the Trust with $10 Million in marketable securities maintained at an account at First Jersey Securities, headquartered in Hoboken, NJ, his 500-acre horse farm in Columbia County, valued at $5 Million, and a $500 saving account at a Citibank branch on East 42nd Street in Manhattan, New York. All decisions concerning Trust investments and administration are made in Naples

The Sammy Settlor Revocable Trust gives $500,000 to Louis Litt, $500,000 to the Standish Sanitarium, Inc. $1 Million to each of Sammy's 2 children from his first marriage, $4 Million to each of his two children from his second marriage and his horse farm to Jessica Pearson. The Trust residuary is bequeathed to the New York Bar Foundation. The Trust contains a detailed in terrorem clause which provides that any person who directly or indirectly challenges the Trust, Sammy's Will, his nomination of fiduciaries or any actions of his fiduciaries will be deemed to pre-decease Sammy without issue.

Sammy died on May 1, 2019 while feeding the pigeons at City Hall Park and it is not clear whether his probate estate contains any assets other than a few hundred dollars in a bank account in New York County.

His grieving third wife of 10 months, Donna Paulsen, and his 2 children from his first marriage Mike Ross and Rachel Zane, have made an appointment to see you on your return to your office in Manhattan from Naples, Florida. Rachel is named as Sammy's executor.

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1. Challenging Trusts

a. Differences between will and trust contests

i. There are numerous procedural, substantive, and practical differences between probate contest and trust contests in New York. SCPA 1404 and New York's rich common law provides a well-worn path for litigating the issue of the validity of a will. Not so with trust contests. However, the law continues to evolve as the courts have confronted trust contests more frequently and statutes have been amended to address issues raised repeatedly in trust contests. The contours of a trust contest have become more defined (Colleen F. Carew and Gary B. Freidman, *Trust Contests - - The Developing Law*, NYLJ, 4/18/07 at 3, col. 1 [APPENDIX 1]; John J. Barnosky, *The Incredible Revocable Living Trust*, Journal of the Suffolk Academy of Law, Volume 10 [1995] [APPENDIX 2]).

b. Choice of Forum

i. Supreme Court versus Surrogate's Court

1. The Supreme Court and the Surrogate's Court have concurrent jurisdiction over lifetime trusts. CPLR Article 77 authorizes a special proceeding for the determination of matters relating to express trusts (*see Chiantella v Vishnick*, 84 AD3d 797 [2d Dept 2011]). SCPA 207 and SCPA 1501 address Surrogate's Court jurisdiction over lifetime trusts and the applicability of the SCPA to lifetime trusts (Frank T. Santoro, *CPLR Article 77 and Trust Litigation in Supreme Court*, NY St BA T&E Newsletter [Fall 2016] [APPENDIX 3]).

2. The nature of the proceeding will likely affect choice of forum.

a. Challenge the validity of a trust and/or trust amendment? (CPLR Article 77; SCPA 202, 207).

b. Seek remedies related to trust administration, conduct of fiduciary? The SCPA contains numerous provisions that provide beneficiaries and interested parties with avenues to seek remedies and relief. For example, SCPA 2102 [1] provides a person with an interest in a estate, such as a trust beneficiary with the right to compel disclosure of information (*see In re Kassover*, NYLJ, 2/11/91, at 28 [Sur Ct, Nassau County] [miscellaneous proceeding by contingent remainderperson seeking information concerning a

testamentary trust was permitted after written demand made upon fiduciary and denied]).

c. The trust instrument may even direct the forum for any dispute or it may contain an arbitration clause, and public policy favoring arbitration is strong (*see Matter of Ismailoff*, 2007 NY Slip Op 50211[U] [Sur Ct, Nassau County, 2007])

c. Jurisdictional Issues

i. Subject matter jurisdiction

1. The Surrogate's Court has jurisdiction over "the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state." (SCPA 207). Venue would be proper in the county where the assets of the trust are located, where the grantor was domiciled at the time of the commencement of the proceeding, or where the trustee then serving resides or has its principal place of business.

2. Surrogate's Court has limited by expansive jurisdiction (*see Matter of Mastroianni*, Sur Ct, Schenectady County, August 6, 2012, Versaci, J., File No. 2008-90 [APPENDIX 4]). The Supreme Court is New York's Court of general jurisdiction - - it could probate a will - - but it will not.

ii. Personal jurisdiction

1. SCPA 309 governs the exercise of personal jurisdiction over persons required to be given notice and opportunity to be heard.

2. An express trust proceeding under Article 77 is a special proceeding governed by CPLR Article 4, and CPLR 403 [c] requires service in the same manner as a summons in an action, to wit, pursuant to CPLR Article 3.

iii. Forum *non conveniens*

1. Under N.Y. Const. art. VI, § 19 [a] and CPLR 325, the Supreme Court may, and quite often does, transfer trusts and estates related disputes to the Surrogate's Court. Where there are existing proceedings pending pertaining to an estate or a trust in the Surrogate's Court, the Supreme Court will generally refrain from exercising its concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court and where the Surrogate's Court has already acted (*In re Tabler's Will*, 55 AD2d 207 [3d Dept 1976]). Commencing a proceeding

in Supreme Court may result in an unnecessary battle over the forum, delay the proceedings, and add to the expense of inevitable litigation.

d. Statute of Limitations

i. Revocable versus Irrevocable?

1. Revocable trusts are the functional equivalents of wills (*see Matter of Tisdale*, 171 Misc 2d 716, 718 [Sur Ct, NY County 1997). They are "ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked In order for a trust to be revocable, the instrument must state that the trust is revocable; otherwise, the trust will be deemed irrevocable (*see* EPTL § 7-1.16). A revocable trust may set the standard of "competence" that is required on the grantor's part in order for the grantor to amend or revoke the trust instrument (*see Manning v Glens Falls Nat. Bk. & Tr.*, 265 AD2d 743, 743-45 [3d Dept 1999] [finding that the grantor lacked the requisite "competence" to remove the trustee under the terms of the trust instrument]). While a grantor certainly can amend or revoke a revocable trust during his or her lifetime, the grantor's distributees or the fiduciary of the grantor's estate can only commence a proceeding to invalidate a revocable trust after the grantor's death (*see Matter of Heumann*, NYLJ, 11/2/06, at 21, col. 3 [Sur Ct, Westchester County]). Surrogate's Courts have held that the statute of limitations on claim to invalidate a revocable trust accrues at the grantor's death, rather than the trust's creation (*see Matter of Dalton*, NYLJ, 2/2/09, at 47, col. 4 [Sur Ct, Suffolk County]). A six-year statute of limitations begins to run against a distributee or person adversely affected by a revocable trust at the grantor's death (*see Matter of Davidson,* 177 Misc 2d 928, 930 [Sur Ct, NY County 1998]; *see also Matter of Kosmo Family Trust*, NYLJ, 12/17/18, at 33 [Sur Ct, Albany County] *citing Tilimbo v Posimato*, 2008 NY Slip Op 51366[U] [Sur Ct, Bronx County 2008] [APPENDIX 5]).

2. An irrevocable trust can only be amended or revoked upon the written consent of the grantor and all parties having a beneficial interest in the trust (*see* EPTL § 7-1.19). For a challenges to an irrevocable trust created by the decedent and for the recovery of assets funded therein, the statute will run from the date of the creation of the trust and will be governed by applicable theory (*see Cheliotis v Stratakis*, 2008 NY Slip Op 33503[U] [Sur Ct, Nassau County] [applying a six-year statute of limitations on a claim to set aside the creation of an irrevocable trust into which decedent's real property was funded on the grounds of fraud]; *see also Estate of Napoli*, 2017 NYLJ Lexis 2960 [Sur Ct, Kings County]).

e. Standing to challenge a trust or trust amendment

i. Those persons who may commence a proceeding to set aside a trust are a distributee, an executor, and an administrator to whom limited letters issued pursuant to SCPA 702 [9] (*see Davidson*; *see also Matter of Kosmo Family Trust*, NYLJ, 12/17/18, at 33 [Sur Ct, Albany County]).

f. <u>Necessary parties to the proceeding</u>

i. Where the relief sought is to set aside the trust, the necessary parties are the same as those required to be served with citation in a will contest. Any person who may be adversely affected by the relief sought is a necessary party (*see Matter of Ricardino*, NYLJ, 2/5/98, at 30, col. 5 [Sur Ct, Nassau County]). The Attorney General should not be forgotten - - and often is by those who are commencing a proceeding where they are most comfortable (in Supreme Court) pertaining to an *inter vivos* trust.

g. <u>Discovery issues</u>

i. SCPA 1404 and CPLR Article 31

1. SCPA 1404 permits a potential objectant to a will the right to inquire into the circumstances surrounding the preparation and execution of the propounded instrument in order to determine whether to file objections. The ostensible reason for this "one-way street" is to afford a potential objectant an opportunity to assess the facts surrounding the preparation and execution of the will, which he or she has no first-hand knowledge of, and has no other means of obtaining such information. In a contested trust proceeding no such analogy exists. There are no attesting witnesses who may provide opinion evidence of capacity and the absence of undue influence. The person seeking to set aside the trust must commence the proceeding and proceed with discovery under Article 31 of the CPLR.

ii. Evidentiary/discovery Issues

1. Attorney-client privilege:

a. A 2016 amendment of CPLR 4503 [b] created another exception to the attorney-client privilege in the case of revocable trusts. The purpose of the attorney-client privilege is to promote the use of legal representation by assuring clients that they may freely confide in their counsel without concern that such confidences may be divulged to outsiders (*see Matter of Colby,* 187 Misc 2d 695 [Sur Ct, NY County 2001]). Naturally, because the privilege shields evidence from disclosure, it obstructs the fact-finding process. CPLR 4503 [b] contemplates the fact that revocable trusts serve as the equivalent of wills. The exception only applies after the death of the

grantor, in recognition of the fact that a party, other than the grantor, has no standing to challenge a revocable trust during the grantor's lifetime (*see* N.Y.S. Assembly Memorandum in Support of Legislation, *citing Matter of Davidson,* 177 Misc 2d 928, 930 [Sur Ct, NY County 1998]).

b. While the statute addresses revocable trusts in the 2016 amendment, justification exists for an exception to privilege and waiver by an interested party where an irrevocable trust is in issue. In *Matter of Leddy* (2014 NYLJ LEXIS 4921 [Sur Ct, Nassau County] [APPENDIX 6]), where a revocable trust was in issue, the court held that the "[i]n a dispute between parties as to an interest in property which they claim through the same decedent, attorney-client privilege does not apply (*id., citing* RESTATEMENT [THIRD] OF THE LAW GOVERNING LAWYERS § 81 [2000] *and Matter of Levinsky*, 23 AD2d 25 [2d Dept 1965, *appeal denied* 16 NY2d 484 [1965] *and* 1 MCCORMICK ON EVIDENCE § 94 [7th ed.]; *see also Matter of Bronner*, 7 Misc 3d 1023[A] [Sur Ct, Nassau County 2005] [holding that "objectant may waive attorney-client privilege on behalf of the decedent in a probate contest in the interests of the estate in the truth finding process"]).

2. Physician-patient privilege

a. CPLR 4504 [c] – "A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

i. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or

ii. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or

iii. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next [of] kin or any other party in interest" (*see* CPLR 4504 [c]).

b. To obtain the grantor's medical records – which may reveal information concerning the grantor's mental and physical capabilities at the time of the trust's creation or amendment – it generally will be necessary to obtain signed HIPAA-complaint authorizations from the fiduciary of the grantor's estate.

c. If the fiduciary has not been appointed or refuses to cooperate, it may be possible to obtain a "so ordered" subpoena for the court having jurisdiction over the trust contest. To do so, the party seeking a "so ordered" subpoena will have to file the document with the court, together with an affirmation explaining why the subpoena is needed, on notice to the other parties who have appeared in the proceeding.

d. Arguably, CPLR 4504, which provides an exception to physician patient privilege does not apply in a proceeding to set aside a trust.

3. *In terrorem* provisions

a. The use of *in terrorem* clauses has been recognized in trust contests. While the statutory safe harbor provisions (EPTL § 3-3.5) are limited to wills, some authorities suggest that a proceeding to rescind or invalidate a trust in whole or in part may not trigger an *in terrorem* clause (*see Oakes v Muka*, 31 AD2d 834 [3d Dept 2006]; *Matter of Shamash*, NYLJ, 6/16/09, at 38, col. 2 [Sur Ct, NY County]).

h. How to Prove Your Case

i. Grounds to challenge a trust

1. Due execution

a. EPTL § 7-1.17 provides the requirements for the creation of a lifetime trust. Per statute:

> (a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

> (b) Any amendment or revocation authorized by the trust shall be in writing and executed by the person authorized to amend or revoke the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (a) of this section, and shall take effect as of the date of such execution. Written notice of such amendment or revocation shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment or revocation is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which same shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof.

2. Capacity – Revocable Trust or Irrevocable Trust

a. For an irrevocable trust, the relevant inquiry is whether the party was capable of making “a rational judgment concerning the particular transaction” - - in other words, contractual capacity. Contractual capacity is lacking where the party is “wholly and absolutely incompetent to comprehend and understand the nature of the transaction” (*Matter of ACN*, 133 Misc 2d 1043 [Sur Ct, NY County 1986]).

b. In *Matter of ACN*, the parties disagreed on the standard of capacity to be applied in addressing whether an irrevocable trust was created by the grantor with the requisite capacity. “A will, by nature, is a unilateral disposition of property whose effect depends upon the happening of an event *in futuro*. A contract is a bilateral transaction in which an exchange of benefits, either present or deferred, is exchanged.” The court determined that the standard for contractual capacity would apply, as the irrevocable trust was created by way of a bilateral transaction between the creator of the trust.

c. Courts have applied the contractual capacity standard to revocable trusts as well (*Matter of DelGatto*, 98 AD3d 975 [2d Dept 2012]). However, authority exists suggesting that the lower, testamentary capacity standard, should apply to revocable trusts

(*see Matter of Williams,* 2018 NY Slip Op 32497 [U] [Sur Ct, NY County]; *Matter of Aronoff*, 171 Misc 2d 172, 177 n 6 [Sur Ct, NY County 1996]).

3. Undue influence

a. In *Matter of Williams* (2018 NY Slip Op 32497 [U] [Sur Ct, NY County] [APPENDIX 7]), Surrogate Anderson recently summarized undue influence in a trust contest citing the leading cases on the claim, and stating:

> [W]here an instrument is proved to be the product of "a moral coercion, . . . restraining independent action and destroy[ing] free agency, . . . which, by importunity[,] . . . constrained [the purported creator to execute the instrument] . . . against [her] free will and desire," it must be invalidated *(Children's Aid Society v Loveridge,* 70 NY 387, 394 [1877]).
>
> As is often noted, undue influence can seldom be demonstrated by direct proof, since such an influence rarely occurs in plain view *(Rollwagen v Rollwagen,* 63 NY 504, 519 [1876]), instead taking the form of a "subtle but pervasive" *(Matter of Neary,* 44 AD3d 949, 951 [2d Dept 2007]) manipulation of another that is aimed at displacing the other's volition with one's own. Proof of undue influence must establish more than a motive to achieve such effect on another and an opportunity to do so: it must establish also that such effect was actually achieved *(Matter of Fiumara,* 47 NY2d 845 [1979]).

b. As in will contests, the burden of proof in trust contests generally lies with the party asserting undue influence (*see Matter of Walther,* 6 NY2d 49 [1959]. However, where there is a confidential relationship between the beneficiary and the grantor, an inference of undue influence arises which. In the absence of an explanation, the beneficiary has the burden of proving by clear and convincing evidence that the transaction was fair and free from undue influence (*see Matter of DelGatto*, 98 AD3d 975 [2d Dept 2012]; *Oakes v. Muka*, 69 AD3d 1139 [3d Dept 2010]; *Matter of Engstrom*, 47 Misc 3d 1212[A] [Sur Ct, Suffolk County 2014][APPENDIX 8]; *Matter of Graeve*, Sur Ct, Schenectady County, September 5, 2012, Versaci, J., File No. 2010-126/B [APPENDIX 9]).

4. Other grounds for a challenge

a. Invalid *ab initio*: There are four elements to a valid trust, it must have: 1) a designated beneficiary; 2) a designated trustee; 3) a fund or identifiable property; and 4) actual delivery of the fund to the trustee (*see Matter of Fontanella*, 33 AD2d 29 [3d Dept 1969]). As with wills, courts favor the enforcement of trusts and may cure certain defects, such as appointing a trustee where the grantor failed to do so (*Matter of Gold*, NYLJ, 10/16/02, at 20, col. 2 [Sur Ct, Kings County]), but a failure to fund the trust has been held to be fatal (*Matter of Hird*, NYLJ, 10/2/03, at 29, col. 1 [Sur Ct, Suffolk County]).

b. Ineffective pour over: Under EPTL § 3-3.7, a testator can pour his estate over into a lifetime trust so long as he has, before or contemporaneously with his will, executed the trust with the formalities required by EPTL § 7-1.17. In *Matter of D'Elia*, 40 Misc 3d 355 [Sur Ct, Nassau County 2013), the decedent left his residuary estate to a revocable trust. However, the decedent did not execute the trust until a week after the will was made and the disposition failed.

c. Duress – In a will contest, and in a trust contest the objectant must bear the burden of proof on the issue of duress (see *Matter of Osgood*, NYLJ, 2/11/91, at 22, col. 6 [Sur Ct, Nassau County]), by a preponderance of the evidence (*see* 3 Warren's Heaton on Surrogate's Court Practice § 42.04). "A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made" (see *Matter of Rosasco*, 31 Misc 3d 1214[A] [Sur Ct, NY County 2011]). In this regard, "[a]n act is wrongful if it is criminal or one that the wrongdoer had no right to do" (*id.)*.

d. Fraud – As in a will contest, the burden is on the person challenging the trust to prove fraud (*see* Warren's Heaton, *supra* § 42.04). The objectant must carry this burden by clear and convincing evidence (see *Matter of Klingman*, 60 AD2d 949 [2d Dept 2009]), as conclusory allegations and speculation will not suffice (*see Matter of Dietrich*, 271 AD2d 894 [3d Dept 2000]). In the context of a probate contest, which serves as an apt analog for a trust contest, fraud arises when someone "knowingly [makes] a false statement to the testator which cause[s] [the testator] to execute a will that dispose[s] of his property in a manner differently than [the testator] would have in the absence of that statement" (*see Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]).

i. <u>Trying the case</u>

i. Before the Judge or a jury

1. SCPA 502 unequivocally provides a party to a contested proceeding over the validity of a revocable lifetime trust the right to a trial by jury.

2. Prior to the amendment of SCPA 502, the courts were not in accord on whether a jury was available in challenges to revocable trusts. Some courts held that there was no right to a jury in challenges to revocable trusts (*see Matter of Aronoff*, 171 Misc 2d 172 [Sur Ct, NY County 1996]; *Matter of Stralem*, NYLJ, 7/14/1997, at 37 [Sur Ct, Nassau County 1997]), while others held to the contrary on similar facts (*see Matter of Tisdale*, 17 Misc 2d 716 [Sur Ct, NY County 1997]; *Matter of Richman*, NYLJ, 4/26/2000, at 27 [Sur Ct, Queens County]). The same reasoning could be employed in addressing many cases involving irrevocable trusts and a question remains as to whether and to what extent the right to a jury exists in a case challenging an irrevocable trust.

3. Where the right to a jury in a revocable trust proceeding exists, a party seeking to avail themselves of the right to a jury must comply with SCPA 502, which requires that the party seeking a jury file a demand. The demand must be filed either with the petition or six days after the service of objections. A party who fails to make a timely demand is deemed to have waived his or her right to a jury. As with a will contest, a party should not rely upon a demand made by another party because that demand may be withdrawn at any time. Under CPLR 4102 [e], the Surrogate's Court has discretion to relieve a party from the failure to timely make a jury demand (*see* CPLR 4102 [e] ["The court may relieve a party from the effect of failing to comply with this section if no undue prejudice to the rights of another party would result."]). Why go there.

4. In Supreme Court practice, the jury demand is made at the time of the filing of the Note of Issue and Certificate of Readiness (CPLR 4102).

ii. Motions in Limine

1. A motion in limine is made prior to trial to address evidentiary issues in aid of preventing a mistrial through disclosure of prejudicial and even inadmissible materials. The motion is

addressed to the inherent powers of the court to set guidelines for permissible conduct at the trial. *Matter of Kochovos*, NYLJ, 3/28/88, at 16, col, 3 [Sur Ct, Bronx County 1988]).

iii. Burdens of proof

1. Unlike a probate contest, the party seeking to set aside a trust bears the burden of proof on all issues. Notwithstanding certain parallels to wills (i.e., the existence of statutory requirements to execute a trust) the trustee does not have any burden after the decedent's death to establish the validity of the trust. Nor does the trustee have a duty to demonstrate that the grantor was competent when the trust was executed (*Matter of DelGatto*, 98 AD3d 975 [2d Dept 2012]; *Matter of Arnoff*, 171 Misc 2d 172, 653 NYS2d 844 [Sur Ct, NY County 1996]; *Vultaggio v Vultaggio*, 2015 NY Slip Op 32456[U] [Sur Ct, Nassau County]).

iv. CPLR 4519

1. Under CPLR 4519, a person interested in the event who may be otherwise barred from testifying in a will contest may not be so barred in the contested trust proceeding, if the witness's interest differs under the two instruments. The key whenever ascertaining whether a witness may testify is to determine whether the person seeking to testify has a direct economic interest in the outcome.

2. The statute does not apply to any pre-trial disclosure (CPLR Article 31) or in pre-trial discovery proceedings such as depositions. At the trial on the merits, the Dead Man’s Statute precludes the respondent-witness’s testimony (*Rosenberg v Grace*, 158 Misc2d 32[Sup Ct, NY County 1993] *Mesbahi v Blood*, Sup Ct, Schenectady County, May 21, 2018, Versaci, J., Index No. 2017-0953 [APPENDIX 10])

3. Summary Judgment? CPLR 4519 may be asserted or waived only at the time of trial and does not bar consideration of interested testimony on a summary judgment motion because the privilege may be waived at trial (*Phillips v Joseph Kantor & Co.,* 31 NY2d 307 [1972]). Thus, evidence which would may be excluded at trial, may be considered in denying a motion for summary judgment. However, evidence that would be precluded by CPLR 4519 cannot, in and of itself, overcome a prima facie case for summary judgment.

v. Hearsay

1. Defined

a. Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.

b. The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.

c. A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.

2. Can we hear from the creator of the trust?

a. A statement which is not offered for its truth is not barred by the hearsay rule.

b. An out-of-court statement by a declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design, or mental condition and feeling, but not including a statement of memory or belief to prove the fact remembered or believed, is admissible, even though the declarant is available as a witness.

An out-of-court statement by a declarant describing the declarant's physical condition at the time the statement is made is admissible provided the declarant is unavailable at the time of the proceeding.

vi. Using Experts

1. As an analog, in as will contest, a properly qualified expert witness may opine as to decedent's testamentary capacity. CPLR 4515 provides that the expert "may express an opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion." Additionally, the questions calling for the expert's opinion need not be in hypothetical form.
2. Weight of the evidence will depend. The testimony of an expert physician, who only reviewed the medical records, did

not see or examine the testator is the "weakest and most unreliable" evidence (*Matter of Vukich*, 53 AD2d 1029 [4th Dept 1976], *affd* 43 NY2d 668).

3. CPLR 3101 [d] provides that upon demand a party must identify expert for trial and set forth the substance of the opinion to be rendered. Failure to comply with this section could result preclusion (Colleen F. Carew and Gary B. Freidman, *Expert Disclosure in Surrogate's Court*, NYLJ, 2/18/11 at 3, col 1; Charles F. Gibbs and Gary B. Freidman, *Expert Disclosure in Surrogate's Court*, *Part II,* NYLJ, 9/29/11 at 3, col. 1 [APPENDIX 11])

j. Who pays for the cost of a challenge?

i. Matter of Hyde

1. In *Matter of Hyde* (15 NY3d 179 [2010] [APPENDIX 12]), the Court of Appeals held that SCPA 2110 gives the Surrogate's Court the discretion to determine the allocation of attorney's fees paid from the trust or estate. The court is authorized to direct the source of payment either from the estate generally, or from the funds in the hands of the fiduciary belonging to the legatee.

2. Other Trust Litigation

a. SCPA 2102 relief

i. SCPA 2102 [1] authorizes an interested party to commence a proceeding to compel a trustee to "supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor" (*see* SCPA 2102 [1]). For example, in *Matter of Preston*, NYLJ, 11/15/12, at 27, col. 2 (Sur Ct, NY County), petitioner petitioned to compel the trustees of a lifetime trust to deliver a copy of the trust instrument and to provide financial information for the trust. The court granted the petition, to the extent that it directed that the trustees provide a copy of the trust. However, the court denied the petition, to the extent that the petitioner requested financial information for the trust. The petitioner would have to establish her interest in the trust's assets before the trustees would be required to provide financial information

b. Reformation Proceedings

i. Appropriate where there is a mistake or change in the law

1. Reformation of a trust involves the Court changing the language of the trust by the addition or deletion of words (*Matter of Stahle*, NYLJ, Jan. 23, 2001, at p. 32, col. 6 [Sur Ct, Onondaga County]). Unlike construction, which is necessitated when the

grantor's/testator's intent is questionable and needs to be ascertained, reformation can be appropriate only when such intent is determinable but the terms of the instrument do not comport with such intent due to, *e.g.,* a mistake or change in the law (*Matter of* Meyer, NYLJ, 2/26/02 at 8, col. 5 [Sur Ct, NY County] [allowing reformation due to drafting error]).

a. Are the floodgates going to open? *(see Matter of Sukenik*, 2016 NY Slip Op 31217[U] [Sur Ct, NY County]; *Matter of Sukenik,* 162 AD3d 564 [1st Dept 2018] [APPENDIX 13]).

c. <u>Construction Proceedings</u>

i. SCPA 1420

1. Construction of an irrevocable trust (which could be contained either in a will, or in a free-standing lifetime trust) occurs when a court ascertains the testator's/grantor's intent as expressed in the words of the instrument. Section 1420 of the Surrogate's Court Procedure Act allows a court to construe a will in one of three procedural contexts: (1) an independent construction proceeding, (2) an accounting proceeding, and (3) a probate proceeding *(see* Margaret Valentine Turano and Hon. C. Raymond Radigan, New York Estate Administration § 3.11 [LexisNexis 2019 ed.]).

2. A court will construe when certain language of the trust is ambiguous, making it impossible to carry out the grantor's intent. The goal of every construction is "to ascertain [the] decedent's [or grantor's] intent in order that it may be effectuated" (*Matter of Richard*, NYLJ, 7/7/03, at 20, col. 1 [Sur Ct, NY County]). "That intent is to be ascertained 'not from a single word or phrase but from a sympathetic reading of the will [or trust] as an entirety and in view of all the facts and circumstances under which the provisions of the will [or trust] were framed'" (*Matter of Bieley*, 91 NY2d 520, 525 [1998] [citations and quotations omitted]). When the grantor's/testator's intent as expressed in the entire instrument is clear and unambiguous, courts will not look further than the instrument itself to ascertain the meaning of that part of the instrument that is ambiguous *(In re Manufacturers & Traders Trust,* 42 AD3d 936 [4th Dept 2007]). "The prime consideration [in all construction proceedings] is the intention of the testator as expressed in the will. All rules of interpretation are subordinated to the requirement that the actual purpose of the testator be sought and effectuated as far as is

consonant with principles of law and public policy" (*Matter of Fabbri,* 2 NY2d 236 [1957]).

3. Extrinsic evidence of the grantor's/testator's intent is admissible to clarify an ambiguity in a trust's language for which the intent of the grantor cannot be gleaned from the four corners of the trust. However, "if the terms of the will [or trust] are clear and unambiguous, extrinsic evidence will not be admitted to contradict those terms" *In re* Cole, 18 Misc.3d 1105[A], N.Y. Slip. Op. 52417[U] [Sur Ct, Nassau County 2007]).

d. <u>Revoking trusts</u>

i. Revocable trusts

1. The instrument must state that the trust is revocable; otherwise, the trust will be deemed irrevocable (*see* EPTL § 7-1.16).

ii. Irrevocable trusts

1. An irrevocable trust can only be amended or revoked upon the written consent of the grantor and all parties having a beneficial interest in the trust (*see* EPTL § 7-1.9).

2. A minor with a beneficial interest cannot consent to such an amendment or revocation, but some courts have dispensed with the need for a minor's consent when the proposed amendment benefits the minor (*see Matter of Johnson*, NYLJ, 6/3/11, at 30, col. 1 [Sur Ct, NY County]).

3. If the trust agreement contains any other conditions to revocation, those must be satisfied. Revocation, amendment, or modification can only be accomplished by complying with any requirements set forth in the trust agreement to effect a revocation, and (2) complying with the statutory requirements of EPTL § 7-1.9, which permits revocation of an express trust by the grantor thereof only upon the consent of all persons who hold a beneficial interest in the trust (*see Matter of Dodge's Trust*, 25 NY2d 273, 285 [1969]; *Elser v Meyer*, 29 AD3d 580 [2d Dept 2006]; *Matter of Mordecai's Trust,* 24 Misc 2d 668 [Sup Ct NY County 1960]; *Matter of French-American Aid for File Children, Inc.*, 151 AD3d 662 [1st Dept 2017]; *Matter of French-American Aid for File Children, Inc.*, NYLJ, 4/20/16, at 24, col. 6 [Sur Ct, NY County] [APPENDIX 14]).

e. <u>Challenging decanting</u>

i. Under EPTL § 10-6.6, a trustee may exercise the "power to invade the principal of an irrevocable trust by paying over some or all of the principal to a separate trust" (*see* Joseph T. La Ferlita, *New York's Newly-Amended Decanting Statute*, N.Y.S.B.A. Trusts and Estates Section Newsletter 10 [Winter 2011]; Steven H. Holinstat, Henry J. Leibowitz and Daniel W. Hatten, *Who Can Recant a Decant? Who Is the 'Creator' of a Decanted Trust*, NYLJ, 8/29/16 [APPENDIX 15]), subject to the certain limitations. Statutory formalities must be adhered to – notice provisions and statutory time frames are critical. At this juncture the courts have yet to confront procedural and substantive challenges to statutory decanting.

3. Challenging a Trust Within an Article 81 Proceeding

a. <u>Mental Hygiene Law § 81.29</u>

i. Authorizes court to modify, amend, or revoke, *inter alia*, any previously executed contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian while the person was incapacitated. Except, the statute forbids courts from invalidating a will or codicil of a living person. Article 81 proceedings have, consequently, changed the face of estate plans of living persons.

4. Challenging a Trust Within a Divorce Proceeding

a. <u>Domestic Relations Law § 236 [B] [5] [d] [12]</u>

i. In determining the equitable distribution of marital property, the court may consider "any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration" (*see Ferraro v Ferraro*, 157 AD2d 596 [2d Dept 1999]). Funds placed in a trust (revocable or irrevocable) are not beyond the reach of the in matrimonial actions. New York courts routinely subject trust assets to equitable distributions in matrimonial actions (*see Pena v Alves*, 50 AD3d 336 [1st Dept 2008]; *Feldman v Feldman*, 204 AD2d 268 [2d Dept 1994]; *Goldberg v Goldberg*, 172 AD2d 316 [1st Dep't 1991]).

5. Miscellaneous Observations

a. <u>Attorney fiduciaries</u>

i. SCPA 2307-a requires that certain disclosures be made to testators before attorneys are nominated as fiduciaries under wills (*see* SCPA 2307-a). These disclosures concern the nomination of fiduciaries and the failure to make them requires that an attorney fiduciary's commissions be reduced by one-half (*see id.*). There is no analogous provision for attorneys who are appointed to act under *inter vivos* trusts.

1. In *Matter of Rothwell*, 189 Misc 2d 191, 196 (Sur Ct, Dutchess County 2001), the decedent's lifetime trust nominated the instrument's attorney-draftsperson to serve as successor trustee. The instrument further provided that "the successor trustee 'shall be entitled to be paid trustee's commissions as provided by law and in addition to reasonable attorney's fees." There was no evidence of any SCPA 2307-a-type disclosures. The Surrogate's Court directed a *Weinstock* hearing to determine whether the attorney-draftsperson unduly influenced the grantor to make the appointment. The Court also directed a *Putnam* hearing to determine whether the trust was a product of undue influence in light of the fact that the trust called for a $50,000 distribution to the attorney's wife.

THE INCREDIBLE REVOCABLE LIVING TRUST

John J. Barnosky*

INTRODUCTION

The revocable living trust is an increasingly popular will substitute.[1] Like Totten trusts, joint accounts with right of survivorship and insurance policies, the revocable living trust is a mechanism for passing title to assets on death to the beneficiaries of a decedent without the formalities or difficulties of the probate system.[2] Such trusts are now touted by financial planners and the media as a panacea for obtaining estate tax savings and avoiding all the perceived ills of the probate system. As a result, in many states the revocable living trust has found its way to be the estate planning device of choice among the legal community and the general public.[3] In New York, the revocable living trust is valid "provided that the trustee has real, well-defined duties to perform, and the settlor has not retained exclusive control of the trust corpus."[4]

However, in these days of lawyer bashing, the probate system is often portrayed as a complicated and mysterious system with no other legitimate purpose except to line the pockets of lawyers. Norman Dacey, in his million-seller book "How to Avoid Probate"[5] states:

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* John J. Barnosky is a senior partner at the law firm of Farrell, Fritz, Caemmerer. Cleary, Barnosky & Armentano, P.C. of Uniondale, New York. He is a former Chair of the Trusts and Estates Law Section of the New York State Bar Association and the Nassau County Bar Association. He is also a member of the Estates, Powers and Trusts Law Advisory Committee and is a frequent lecturer and writer on trust and estate topics.

1. *See* Rochelle A. Smith, *Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts*, 43 HASTINGS L. J. 1391, 1394 (1992) ("Because the probate process can be expensive, expose private family matters to the public, take years to conclude, and cause families trauma and anxiety, more and more estate planners are counseling clients to avoid probate by using will substitutes instead of wills to distribute the bulk of their estates.").

2. *See* Robert L. Wolff, *Elder Law Planning Tools*, 65 N.Y.B.J. 12, 49 (1993). In addition to avoiding the need to probate an estate, living trusts provide privacy, while at the same time providing for the orderly disposition of the estate.

3. Robert A. Esperti & Renno L. Peterson, *Joint Trusts Are a Good Planning Tool for a Married Couple*, 20 EST. PLAN. 148, 149-50 (1993) [hereinafter Esperti & Peterson].

4. Howard Oken, *Is a Revocable Living Trust Valid As a Will Substitute?*, N.Y. L.J., July 20, 1993, at 1.

5. NORMAN F. DACEY, HOW TO AVOID PROBATE! (1983).

> The probate system, conceived generations ago as a device for protecting heirs, has now become their greatest enemy. Almost universally corrupt, it is essentially a form of private taxation levied by the legal profession upon the rest of the population. All across the land, both large and small estates are being plundered by lawyers specializing in 'probate practice.'[6]

As with most controversial issues in society, the zealots argue the extreme positions on either side, while the true answer lies in the middle. Neither the probate system, nor the living trust alternative, is all bad, nor all good.

This article explores the historical reasons for the popularity of such trusts in some jurisdictions, and the advantages and disadvantages of their use in New York State from both tax and non-tax points of view.

I. NATURE OF THE BEAST

A. Definition

While inter-vivos trusts can be either revocable or irrevocable, the term "living trust" has come to mean an inter-vivos trust over which the grantor expressly retains the power to revoke the trust and re-acquire its assets.[7] Generally, a power to revoke must be expressly retained in the trust indenture, and such an express provision is recognized in New York.[8] A reservation of the right or power to modify or alter the trust, or to substitute trust securities, may be so unrestricted in its wording as to be the equivalent of a power to revoke.[9] However, a provision permitting a partial invasion of principal, or a provision giving the trustee a discretionary power to invade so much of the principal as may be necessary for the settler's well being, is not the equivalent of a power of revocation.[10]

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6. *Id.* at 15.

7. *See* Wolff, *supra* note 2, at 49 (stating that in a revocable living trust, the grantor reserves the power to revoke and amend the trust thereby allowing the trust property to be transferred back to the grantor).

8. This recognition has a well-established pedigree. *See, e.g.*, Van Cott v. Prentice, 104 N.Y. 45, 52, 10 N.E. 257, 260 (1887) (stating that such a provision is plainly an amplification of the idea involved in the power of revocation, in that the beneficiaries shall take what they receive as proceeding from the grantor subject to his right to revoke at any moment).

9. *See* Bankers Trust Co. v. Topping, 180 Misc. 596, 599, 41 N.Y.S.2d 736, 738 (1943) (holding that the broad language used in the original indenture reserving to the settlor the right to modify and alter is equivalent to the right to revoke).

10. *See* Matter of Heller, 10 Misc. 2d 363, 365, 115 N.Y.S.2d 343, 346 (1948) (stating that provisions permitting an invasion of the principal of a trust have ...

Typically, the living trust is funded by the grantor during lifetime by the transfer to the trust of virtually all of his or her assets. Additionally, the grantor may also have non-probate assets, such as life insurance and employee benefits, payable to the trust. During the grantor's lifetime, the grantor utilizes as much of the income or principal as is needed by simply withdrawing money or assets from the trust. Upon the grantor's death, the trust generally will become irrevocable and be disposed of pursuant to the terms of the trust instrument.[11] In the case of married couples, the classic marital deduction/credit shelter trust methodology is often used.[12] The trust is, in effect, a contract which is self-executing, effective, and requires no blessing from the surrogate's court to allow its terms to be carried out upon the death of the grantor.[13]

B. Execution Requirements

A living trust need not be executed with the same degree of formality as a will.[14] New York Estates, Powers and Trusts Law (hereinafter "EPTL") section 3-2.1 describes the formalities necessary for the proper execution of a will, which includes the requirement that there be at least two attesting witnesses.[15] There are no such statutory requirements for the execution of a living trust. It is simply a contract that must be signed by the grantor and trustee. It need not be witnessed, notarized, or ac-

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peatedly held not to be the equivalent of a right of revocation); McKnight v. Bank of New York and Trust Co., 254 N.Y. 417, 420, 173 N.E. 568, 569 (1930) (holding that although the trustees were given a certain amount of discretion in applying the principal to the settlor's needs, it did not amount to a reservation of a power of revocation).

11. *See* Joseph R. Pozzuolo & Audrey Mittleman, *Living Trusts May Provide Tax Benefits*, TAX'N FOR ACCT., May 1993, at 285 [hereinafter Pozzuolo & Mittleman].

12. *Id.* at 286-87 ("For a married couple, a revocable living trust can ensure that each spouse's unified credit shields a full $600,000 from estate tax. This is accomplished by providing that $600,000 will pass without qualifying for the marital deduction, usually to a trust with the surviving spouse as income beneficiary or outright to other heirs.").

13. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 656 n.3 (3rd ed. 1993).

14. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1981). Section 3-2.1 states the statutory provisions for formality of will execution.

15. N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(C)(4) (McKinney 1981). Section 3-2.1(c)(4) states:

> There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will.

Id.

knowledged. This high degree of informality may make a living trust less susceptible to objection for lack of proper execution. On the other hand, this same informality may make it subject to abuse. In any event, it is recommended that all such trusts be acknowledged, since only acknowledged trusts may serve as a receptacle for a pour-over from a will.[16] EPTL section 3-3.7 authorizes wills which pour-over to a living trust, but requires that the trust be executed in the same manner required by New York law for recording a deed.[17] Since virtually every estate plan involving the use of a living trust will also include a simple pourover will to pick up any assets which may not have been conveyed into the living trust,[18] care should be taken that living trusts are signed and acknowledged by the parties.

C. Challenge to a Living Trust

Article 14 of the Surrogate's Court Procedure Act (hereinafter "SCPA"), lays out, in great detail, the procedure for probate of a will and the filing of objections.[19] No such statutory scheme exists to pro-

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16. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-3.7(a) (McKinney 1981); *see also* SANFORD I. SCHLESINGER & BARBARA J. SCHEINER, *Planning for the Elderly or Incapacitated Client*, ALI-ABA COURSE OF STUDY: PLANNING FOR THE SENIOR CITIZEN, November 15-16, 1991, at 205 (stating that in New York the trust must be executed simultaneously with or before the will is executed, and as such, a will can "pour over" only to a trust under a pre-existing instrument).

17. N.Y. EST. POWERS & TRUSTS LAW § 3-3.7(a) (McKinney 1981). Section 3-3.7(a) states in relevant part:

> A testator may by will dispose of or appoint all or any part of his estate to a trustee of a trust . . . provided that such trust instrument is executed and acknowledged by the parties thereto in the manner required by the laws of this state for the recording of a conveyance of real property, prior to or contemporaneously with the execution of the will, and such trust instrument is identified in such will.

Id.; *see also* N.Y. REAL PROP. LAW §§ 291, 298 (McKinney 1989) (stating in relevant part: "A conveyance of real property . . . may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office.").

18. *See* DENIS CLIFFORD, MAKE YOUR OWN LIVING TRUST 16/4 (1993) ("A pourover will takes all the property you haven't gotten around to transferring to your living trust and at your death, leaves it . . . to that trust.").

19. N.Y. SURR. CT. PROC. ACT §§ 1408, 1410 (McKinney 1967 and Supp. 1995). Section 1408 states:

> (1) Before admitting a will to probate the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution. The court may, however, accept an affidavit of an attesting witness in the manner and under the circumstances prescribed in this article.

vide a road map for challenge to a living trust. However, as with any contract, a living trust may be set aside if the grantor was incompetent at the time of its creation, or if its execution was the product of undue influence or fraud.[20] In the contest of a will, a proceeding for probate must be commenced by the proponent of the will, with notice to those who would take in intestacy and those adversely affected by the instrument offered for probate.[21] No such notice exists in the living trust scenario

> (2) If it appears that the will was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint it must be admitted to probate as a will valid to pass real and personal property, unless otherwise provided by the decree and the will and decree shall be recorded.

Id.

Section 1410 states:

> Any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or any portion thereof. The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination of the attesting witnesses be requested pursuant to 1404, objections must be filed within 10 days after the return day of the process or within such other time as is fixed by stipulation of the parties or by the court.

Id.

20. *See* Pozzuolo & Mittleman, *Living Trusts May Provide Tax Benefits*, TAX'N FOR LAW., July 1993, at 48 (stating that if the grantor was subject to undue influence or lacked the requisite mental capacity when the trust was created, such conditions will invalidate the trust).

21. N.Y. SURR. CT. PROC. ACT § 1402 (McKinney 1967). Section 1402(1) states:

> A petition for the probate of a will may be presented by (a) any person designated in the will as legatee, devisee, fiduciary or guardian or by the guardian of an infant legatee or devisee or the committee of an incompetent legatee or devisee; (b) a creditor or any person interested; (c) any party to an action brought or about to be brought in which action the decedent, if living, would be a party; [and] (d) the Public Administrator or County Treasurer on order of the court, where a will has been filed in the court and proceedings for its probate have not been instituted or diligently prosecuted.

Id. See also N.Y. SURR. CT. PROC. ACT § 1411 (McKinney 1967). The statute states:

> Whenever objections are filed to the probate of a will, the proponent shall file a notice stating; (a) the name of the testator; (b) the name and address of the proponent, each person named or referred to in the will who has not appeared in the proceeding, and such other persons as directed by the court to be notified; (c) that the will has been offered for probate, that objections have been filed thereto, and that such objections will be heard on a date or at a term of court stated or as may thereafter be fixed by the court.

Id. Section 1411 continues by stating such notice shall be served on each of the persons therein named in the manner and within the time directed by the court, and that in the event the proponent shall fail to file such notice, the court may authorize any party to the proceeding to do so. *Id.*

and it will be up to the potential objectant to a living trust to fashion a pleading, either in supreme court or surrogate's court, which seeks to set aside the trust.[22] While the procedural road to such objections may be a bit murky, there is no question that there is a right to challenge a living trust judicially, and ultimately the persistent objectant will have his day in court.

What is the standard of proof necessary to set aside a living trust? Here there is a major difference between a living trust and a will. In probate, the proponent has the burden of proof on capacity and must, as part of his prima facie case, meet the burden of proving that the testator had the necessary capacity to execute a will.[23] This is often described in terms of knowing "the natural objects of his or her bounty" and the "nature and extent of his or her assets."[24] In the living trust situation, however, the burden is entirely on the objectant as to capacity.[25] Every person is presumed under the law to be competent,[26] and the proponent of the living trust may rely simply on its proper execution and acknowledgment.

Ostensibly, it would appear that it is more difficult to set aside a living trust than a will. As a practical matter, however, there may not be any substantial difference. In a will contest, the proponent easily meets his burden on capacity by the testimony of the attesting witnesses who opine that the will was properly executed and that the testator, in their opinion,

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22. *See* Fredda L. Cohen & Karen J. Walsh, *Revocable Trusts and Wills Compared*, ALI-ABA COURSE OF STUDY: PLANNING FOR THE SENIOR CITIZEN, (Nov. 15, 1991) at 59 [hereinafter Cohen & Walsh] (stating that if the grantor has died, objections to a revocable trust must be commenced by the objectant in a special proceeding in either the surrogate's court or the supreme court).

23. *See* Matter of Kaplan, 50 A.D.2d 429, 387 N.Y.S.2d 105 (3rd Dep't 1976) (holding that the proponents must establish that the decedent possessed the required testamentary capacity to execute a valid will).

24. *See* Matter of Bush, 85 A.D.2d 887, 446 N.Y.S.2d 759 (4th Dep't 1981) (stating in order to determine whether a testator possessed testamentary capacity, the court looks to, among other things, whether the testator knew those who would be considered the natural objects of his bounty and whether the testator knew the nature and extent of the property that he was disposing); *see also* Matter of Estate of Scalone, 170 A.D.2d 507, 566 N.Y.S.2d 75 (2nd Dep't 1991); Matter of Estate of Fish, 134 A.D.2d 44, 522 N.Y.S.2d 970 (3rd Dep't 1987).

25. *See* Matter of Estate of Obermeier, 150 A.D.2d 863, 540 N.Y.S.2d 613 (3rd Dep't 1989) (stating that the burden of proving incompetence rests with the party asserting incapacity).

26. *Id.* at 864, 540 N.Y.S.2d at 613; *see also* Matter of Beneway, 272 A.D. 463, 71 N.Y.S.2d 361 (3rd Dep't 1947) (stating as a general rule a testator is presumed to be sane

had capacity to make a will.[27] The proponent then rests and the objectant must rebut the proponent's proof. Additionally, the degree of competency necessary to create a living trust may be slightly higher than the capacity necessary to execute a will.[28] This issue was addressed by Surrogate Lambert of New York County in *Matter of A.C.N.*[29] In that case, the court was dealing with a challenge to the creation of an inter-vivos charitable remainder unitrust.[30] The court cited the familiar axiom that the making of a will requires "less capacity than the execution of any other legal instrument," but found that a living trust does not have the same standard.[31] The court found that a living trust is a contract, thus, the standard of capacity for making a contract should be the governing principle.[32] Surrogate Lambert discussed contractual capacity at length, which is described as the ability of a contracted party to comprehend the nature of the transaction,[33] as well as the "impulse test," which deals with whether the contracting party is entering into the contract as the result of an irrational and uncontrolled reaction to some mental illness or defect.[34]

D. *The Merger Doctrine*

While many states specifically authorize, and give validity to, a revocable living trust in which the grantor is the sole trustee and beneficiary during his or her lifetime,[35] New York has no such statutory imprimatur, and a serious question exists as to the validity during the grantor's lifetime of such a trust. The doctrine of merger, which comes into play when the same person acts as trustee and sole beneficiary, causes an ex-

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27. *See* N.Y. SURR. CT. PROC. ACT § 1404 (McKinney 1967).

28. *See generally In Re* Coddington's Will, 281 A.D. 143, 118 N.Y.S.2d 525 (3rd Dep't 1952), *aff'd*, 307 N.Y. 181 (1954) (stating less capacity is required to enable one to make a will than to make a contract); Matter of Will of Goldberg, 153 Misc. 2d 560, 582 N.Y.S.2d 617 (Surr. Ct. 1992) (stating less mental capacity is required to execute a will than any other legal instrument).

29. Matter of Estate of A.C.N., 133 Misc. 2d 1043, 509 N.Y.S.2d 966 (Surr. Ct. 1986).

30. *Id.*

31. *Id.* at 1047, 509 N.Y.S.2d at 969.

32. *Id.*

33. *Id.* at 1047, 509 N.Y.S.2d at 970; Ortelere v. Teachers Retirement Bd., 25 N.Y.2d 196, 250 N.E.2d 460 (1969).

34. Estate of A.C.N., 133 Misc. 2d at 1046, 509 N.Y.S.2d at 970 (stating the test for contractual incapacity includes those "whose contracts are merely uncontrolled reactions to their mental illness").

35. *See* Michael Patiky Miller, *Update on Whether to Consider Using a Funded Living Trust to Avoid Probate*, 16 EST. PLAN. 140, 141 (1989).

tinction of the trust during the time the dual positions exist.[36] The trust, after the current life, may, if it has a remainderman, spring up in a valid form when the trustee and beneficiary interest separate, but until then the current trustee/beneficiary would be said to have a legal life estate free of trust.[37]

This conversion of the trustee/beneficiary's interest in the transferred property from that of a trust beneficiary to "a legal estate in such property of the same quality and duration and subject to the same conditions as his beneficial interest," is mandated by section 7-1.1 of the EPTL.[38] While the use of the phrase "the same conditions" in the statute would seem to mean that the merger is of little moment, there are differences. For example, it has been held that the spendthrift provisions of EPTL section 7-1.5,[39] which apply to a trust, do not apply to a legal life estate. As such, the beneficiary of the legal life estate is able to sell, assign or encumber his or her life interest notwithstanding an expressed intent to the contrary in the governing instrument.[40] Additionally, if there is no real trust during the income trustee/beneficiary's lifetime, much of the law of trusts may not apply which is most likely contrary to the intent of the testator.[41]

The merger doctrine is easily avoided by appointing a co-trustee, or more simply, by adding additional beneficiaries.[42] Such a situation is

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36. *See* In re Sackler, 145 Misc. 2d 950, 953, 548 N.Y.S.2d 866, 869 (Surr. Ct. 1986); Matter of Reed v. Browne, 295 N.Y. 184, 189, 66 N.E.2d 47, 49 (1946). *See also* AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS 60 (4th ed. 1990) ("Where the life beneficiary is originally named as sole trustee, or becomes sole trustee by survivorship or by appointment by the court, the New York courts have sometimes said that the intended trust does not arise or that the trust is extinguished.").

37. *See* Weeks v. Frankel, 197 N.Y. 304, 90 N.E. 969 (1910) (stating because trustee was entitled to sole possession as well as entire rents and profits, his interest became a legal estate). *See also* SCOTT, *supra* note 36, at 61.

38. N.Y. EST. POWERS & TRUSTS LAW § 7-1.1 (McKinney 1992). ("Every person who by virtue of any disposition is entitled to the actual possession of property and the receipt of income therefrom has a legal estate in such property of the same quality and duration and subject to the same conditions as his beneficial interest.").

39. N.Y. EST. POWERS & TRUSTS LAW § 7-1.5(a)(1) (McKinney 1982).

40. *See* In re Reed v. Browne, 295 N.Y. 184, 66 N.E.2d 47 (1946) (holding that sister was the owner of a legal, and thus assignable, life estate in the fund).

41. *See* In re Will of Seidman, 88 Misc. 2d 462, 470, 389 N.Y.S.2d 729, 736 (Surr. Ct. 1976) (stating that no testator intends for a trust to terminate due to operation of law).

42. *Id.* The court will simply make provisions for an additional trustee whether or not the will makes a provision relating to such. *Id.*; *see also* SCOTT, *supra* note 36, at 49 ("Where there are several trustees or several beneficiaries, the trust is valid even though

clearly demonstrated by a Nassau County case; *Matter of Sackler*.[43] In that case, Mr. Sackler created a trust, but retained, as trustee, the discretion to pay income or principal to himself, his wife or descendants.[44] This addition of current beneficiaries other than the named trustee prevents merger. While a careful draftsman may get around the merger doctrine, it still remains a trap for the unwary. More beneficial would be legislation which would bring us into conformity with the law in many other states by specifically authorizing a sole grantor to serve as trustee and current income beneficiary without invoking the doctrine of merger and elimination of the true trust relationship.

II. ADVANTAGES AND DISADVANTAGES OF THE REVOCABLE LIVING TRUST IN NEW YORK: NON-TAX CONSIDERATIONS

As this article will discuss further, there are many advantages to the use of a living trust as the principal dispositive mechanism upon death.[45] However, living trusts have not been as popular in New York as in other states. This is not, as Mr. Dacey would suggest, because lawyers are seeking to protect their turf,[46] but simply because the reasons for using the living trust are not as compelling in New York as in other states. New York has probate in solemn form, meaning that notice is given to all distributees upon the filing of a probate petition.[47] The distributees have a set time to file objections prior to probate,[48] and once a probate decree is signed, the executor never needs to return to court unless there

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43. In re Sackler, 145 Misc. 2d 950, 548 N.Y.S.2d 866 (Surr. Ct. 1989).

44. *Id.*

45. *See* CLIFFORD, *supra* note 18, at 1/7. The advantages of setting up a revocable living trust include saving your family time and money by avoiding probate. *Id.*

46. *See* DACEY, *supra* note 5, at 33 (stating likely reasons for lack of support for living trusts is the attorney's desire for continuing handsome legal fees as a result of probate).

47. *See* N.Y. SURR. CT. PROC. ACT §1406 (McKinney 1967).

48. *See* N.Y. SURR. CT. PROC. ACT §1410 (McKinney 1967). Section 1410 states in relevant part:

> Objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination of the attesting witnesses be requested pursuant to 1404, objections must be filed within 10 days after the return day of the process or within such other time as is fixed by stipulation of the parties or by the court.

Id.

is some controversy or requirement of a judicial accounting proceeding.[49] The estate administration process is unsupervised. Once appointed, the executor can make investment decisions, pay creditors, and make distributions without any court involvement.[50]

This is not true in the states which have adopted the Uniform Probate Code[51] and other states which have probate in common form. In those states, the will is admitted to probate on an administrative basis without prior notice.[52] After probate, notice is given to the heirs and they have a certain time within which to file objections.[53] In those states, because the decree is not final until after the statutory time period for filing objections has passed, the statutes require the court to take an active and supervisory role over the estate administration process. Consequently, court approval may be required each time the estate is required to sell assets, pay creditors or make a distribution.[54] Legal fees generated in a supervised probate state may, accordingly and justifiably, be more than in an unsupervised state.[55]

Additionally, in some states, attorneys' fees for handling an estate are set forth by statute and are a percentage of the estate.[56] In these states,

49. *See* N.Y. SURR. CT. PROC. ACT § 2216 (McKinney 1995); *see also* Estate of Hoffman, 98 Misc. 2d 732, 414 N.Y.S.2d 863 (Surr. Ct. 1979) (stating that during an accounting, the court may direct a conveyance, delivery, or assignment of property).

50. *See* N.Y. EST. POWERS & TRUSTS LAW § 11-1.1(b) (McKinney 1995).

51. *See* DACEY, *supra* note 5, at 24. The states adopting the Uniform Probate Code include: Alabama, Arizona, Colorado, Florida, Hawaii, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. *Id.*

52. *See* In re Eighmie's Will, 121 Misc. 750, 753, 201 N.Y.S. 876, 878 (Surr. Ct. 1923) (stating that a will subject to common form is admitted to probate without giving notice to interested parties).

53. *See, e.g.*, Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills, and Administration and the Proposed Mississippi Uniform Probate Code: A Comparative Analysis*, 62 MISS. L.J. 1, 43. Under Mississippi law, a probated will can be contested within two years. Under the Mississippi Uniform Probate Code, it may be contested within 12 months of probate or three years from the decedent's death. *Id.*

54. *See* N.Y. SURR. CT. PROC. ACT ART. 19 (McKinney 1995), for the New York procedures, which are not mandatory.

55. *See* DACEY, *supra* note 5, at 25. Under the Uniform Probate Code, the attorney has more responsibility, needs to be more creative, and therefore, deserves to be compensated accordingly. *Id.*

56. *See, e.g.*, Mary Sue Donohue, *Probate and Trust Law: 1993 Survey of Florida Law*, 18 NOVA L. REV. 355 (1993) (stating statute utilizes a percentage of the value of the estate with an hourly rate); *see also* Miller, *supra* note 35, at 142 (stating California and Hawaii determine fees based on a percentage of the gross value of the decedent's assets subject to administration), CAL. PROB. CODE § 10810 (Deering 1995) (providing

the revocable living trust has gained popularity as a mechanism to avoid supervised probate and statutory attorneys' fees. New York, however, does not have either supervised probate or statutory fees. In addition, the New York probate process, in the majority of the proceedings where there is no contest and where waivers of citation can be submitted by all distributees, is extremely fast, usually no more than 45 days and often as quick as two weeks.[57]

A. Avoidance of Cost of Probate

The savings allegedly attributable to "avoidance of probate" has been the principal focus of articles and seminars which enthusiastically promote the living trust system.[58] Certainly there is money to be saved, although perhaps not at the level advertised by the promoters. First, if probate is completely avoided, there is no filing fee in the surrogate's court.[59] The filing fee for an estate of $500,000 or more is $1,000.[60] Secondly, there can be a savings in fiduciary commissions, since presumably the grantor will charge no commissions during lifetime,[61] and upon death, trustees' commissions may be less than an executor's commission.[62] Assuming a three year administration, trustees' commissions on an estate of $1,000,000 would come to $20,700 versus one full executor's commission of $34,000. The savings in fiduciary commissions, however, may be academic since more often than not a family member is named fiduciary and that family member may well serve without

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"the attorney for the personal representative shall receive compensation based on the value of the estate accounted for by the personal representative . . . .").

57. *See* DACEY, *supra* note 5, at 24.

58. *See* Michael J. Berger, *How Title to Assets is Held Can Determine Whether Probate is Avoided*, 18 EST. PLAN. 98, 100 (1991) ("Probably the best method to avoid the entanglements of probate is to use a revocable living trust."); *see also* Miller, *supra* note 35; DACEY, *supra* note 5 (stating American Bar Association agrees with the recommendation that one utilize the living trust for probate avoidance).

59. JAMES F. FARR & JACKSON W. WRIGHT, JR., AN ESTATE PLANNER'S HANDBOOK 77 (4th ed. 1979). Property held in the trust is not included in probate and thus, the expense of probate court is entirely avoided. *Id.*

60. N.Y. SURR. CT. PROC. ACT § 2402(8) (McKinney 1967); *see also* Howard E. Sayetta, *No Service Provided For High Filing Fee*, N.Y. L.J., Nov. 29, 1993, at 1; John J. Barnosky, *Objections to Electronic Recording*, N.Y. L.J., May 8, 1992, at 1 (stating that surrogate's court filing fees are the highest in the country).

61. *See* Peter A. Borrok, *The Benefits of Living Trusts: Just a Figment of Your Imagination?*, 20 WESTCHESTER B.J. 295 (1993). Quite often a settlor is trustee and the commission will be avoided during settlor's lifetime. *Id.*

62. *See* N.Y. SURR. CT. PROC. ACT §§ 2307-2309 (McKinney 1967).

commissions.[63] Also, the savings in the surrogate's court filing fee may also be unrealized, since it may be necessary to probate the pour-over will in order to pick up any assets not held by the living trust at the time of death.[64]

It is in the area of attorneys' fees that some larger savings are claimed. Certainly there is the possibility of some savings. If probate is avoided completely, the attorney need not prepare the customary probate papers.[65] Additionally, the transfer of assets to the beneficiaries is more readily accomplished by a trust since the fiduciary is already in place and the assets are already registered in the name of the fiduciary.[66] However, most of the legal aspects of the administration of an estate are still present.[67] Some studies have indicated that the total savings in attorneys' time through the use of a living trust, assuming probate is avoided completely, might be in the 10-20% range. This number can be substantial, but must be weighed against the initial additional cost of creating a living trust versus a will, and the inconvenience of living one's life with virtually all assets titled in the name of the living trust.

B. Avoidance of Delay

When the grantor of a living trust dies, there is no interruption in the continuation of the trust.[68] The trust simply continues and bills may be paid immediately, as well as distributions made to the surviving spouse

63. *See* Paul J. Steer, *Estate Planning to Benefit the Medium Sized Estate*, 18 EST. PLAN. 218, 220 (1991) (noting a spouse or other family member willing to serve as a fiduciary is often willing to waive the statutory fee).

64. *See* JEROME A. MANNING, ESTATE PLANNING: HOW TO PRESERVE YOUR ESTATE FOR YOUR LOVED ONES 237-39 (1993) [hereinafter MANNING, PRESERVE YOUR ESTATE].

65. JEROME A. MANNING, ESTATE PLANNING 632 (4th ed. 1991) [hereinafter MANNING, ESTATE PLANNING]. Costs can be reduced significantly by using a living trust. *Id.* The major portion of attorney's fees are charged when an estate is to be administered. *Id.*

66. *Id.* at 633. This is to be distinguished from a fiduciary under a will who can do nothing until the probate court places that person in office. *Id.* Although such a situation may only take a short period of time, it can still be hurtful. *Id.*

67. For example, filing of the federal estate tax return, post-mortem income tax planning, planning for disclaimers, valuation of assets, transfer of assets to the name of beneficiaries, preparation of an accounting and obtaining either judicial settlement or settlement of the fiduciary's account by receipt and release, and preparation of 1041 form.

68. *See* MANNING, ESTATE PLANNING 65, at 633 ("One important advantage of such a trust is that immediately upon death the trustee who is then serving can deal promptly with assets. including selling what is needed to raise cash or avoid possible losses . . ..").

or other beneficiaries.[69] This compares to a month or two delay in obtaining probate and collecting assets in the typical probate estate administration. This delay in availability of funds in the probate scenario, however, is very often avoided through the use of joint accounts, life insurance, prompt issuance of preliminary letters testamentary,[70] or full letters.[71]

C. *Avoidance of Probate Costs in Special Situations*

In the case of a decedent who dies leaving minor children or remote distributees, the revocable living trust can provide a significant advantage. Under the probate system, a guardian ad litem is appointed to represent the interest of minor distributees.[72] The fee of the guardian ad litem, although often modest, is chargeable against the estate.[73] More importantly, however, depending on the speed of the guardian ad litem in filing his or her report, the system can create an additional delay of a month or two.[74]

In the case of a decedent who has remote heirs whose whereabouts are not readily known or who simply does not know who his distributees are, a revocable living trust can be a godsend. Here, the entire cost of publication, the fee of a guardian ad litem and the delay involoved in

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69. *Id.* at 675. The individual chosen by the grantor to manage the affairs of the grantor has the power of both management and investment authority which includes distributions based on provisions which were made for successors. *Id.*

70. *See* N.Y. SURR. CT. PROC. ACT § 1412 (McKinney 1967 and Supp. 1995).

71. *See* N.Y. SURR. CT. PROC. ACT § 1414 (McKinney 1967 and Supp. 1995).

72. *See* N.Y. SURR. CT. PROC. ACT §§ 402-403 (McKinney 1994). ("[A]n infant over the age of 14 years or his parent or guardian may petition the court on or before the return day of process for the appointment of a named attorney as his guardian ad litem."). *See also* Leona Beane, *The Role of the Guardian Ad Litem in Court Proceedings, Fiduciary Appointment How To's: Receivers, Guardians Ad Litem, Conservators*, March 31, 1992.

73. *See* Seidel v. Werner, 81 Misc. 2d 220, 367 N.Y.S.2d 694 (Sup. Ct. N.Y. 1975) (holding that it was proper to require the trustees to pay the necessary compensation for the guardian ad litem out of the share of the trust that was the subject of the litigation); Livingston v. Ward, 248 N.Y. 193 (1928) (holding that the Appellate Division had power to allow the guardians ad litem compensation for their services, payable by the adverse parties or out of the proceeds of the property which was the subject-matter of the action).

74. *See* Robin Herman, *Planning for the Elderly Client*, TAX MGMT. EST.. GIFTS & TR. J., September 1989, at 139 (stating that the drawbacks of appointing a guardian include the possibility of delay in the appointment of a fiduciary and court approval of proposed transactions, expense of legal fees and court fees, and record keeping burdens in accounting to the court).

tracking down the missing heirs and the due diligence attendant thereto, can be avoided completely.

D. Privacy

Another argument for a living trust is that under the probate system, anyone can review the records of the surrogate's court, and in some cases, know the estate tax return,[75] the assets of the decedent, identify the estate beneficiaries and the decedent's dispositive plan.[76] Accordingly, for the testator with an extreme concern about privacy, the living trust may provide an advantage.

E. Avoiding Guardianship During Lifetime

A growing number of senior citizens are putting their assets into a revocable living trust because they want to avoid having their assets put under control of a court appointed conservator or guardian should they become unable to manage their own affairs.[77] The guardianship proceeding is expensive, involving a guardian ad litem and bonding requirements of the fiduciary.[78] It is also time consuming, since frequent applications to the court are required for a sale of assets and other rather routine administrative tasks.[79] The placing of assets into a living trust can avoid these complications and expenses completely. A durable power of attorney might also suffice in most situations, but a well drawn trust does permit additional flexibility in terms of the powers of the fiduciary to make gifts and utilize other tax planning devices.[80]

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75. *See* N.Y. RULES OF COURT § 207.20(c) (McKinney 1995).

76. *See* MANNING, ESTATE PLANNING, *supra* note 65.

77. *See generally* LAWRENCE A. FROLIK & ALLISON PATRUCCO BARNES, ELDERLAW 783 (1992) [hereinafter FROLIK & BARNES]. Guardianship is a device by which the judgment of a more capable person is substituted by the court for the judgment of an impaired individual. *Id.* This substitution clearly raises the issue as to what extent an individuals right to self-determination must be recognized. *Id.* at 783.

78. Priv. Ltr. Rul. 91-50-012 (Sept. 12, 1991).

79. *See* Herman, *supra* note 74.

80. *See* MANNING, ESTATE PLANNING, *supra* note 65, at 246 ("Among [the] powers you might want your agent to have is the authority to sign your tax return and deal with the I.R.S. Some people even give their agents the authority to make gifts from their [illegible]")

F. Avoidance of Ancillary Probate

If the decedent owns real property located in another state, the executor will normally have to bring ancillary proceedings in that state as well. This often involves retention of out-of-state counsel to bring ancillary probate proceedings in the foreign jurisdiction. The use of a living trust can avoid this procedure entirely, provided that the assets located in the foreign jurisdiction have been transferred into the living trust prior to the death of the grantor.[81] If a decedent owns real estate in a number of states outside of New York, the value of the living trust is even more beneficial.

Having explored the historical reasons for the popularity of the revocable living trust and the non-tax pros and cons, this article will now discuss the tax advantages and disadvantages of the use of such trusts and provide some helpful tips as to their drafting and administration. Both income and estate tax considerations must be considered prior to the establishment of a living trust. The nature of the assets and size of the estate, as well as the dispositive inclinations of the client, must also be addressed.

III. INCOME TAX CONSIDERATIONS

A. Grantor Trust

Under the Internal Revenue Code (hereinafter "IRC") section 676, the grantor of a revocable trust is treated as the owner of the trust for income tax purposes.[82] All items of trust income, deductions and credits attributable to the trust, are taken into account in computing the taxable income or credits of the grantor.[83] If the grantor is a trustee or co-trustee

81. Paul H. Waldman, *Estate Planning for the Terminally Ill Client,* TAX MGMT. EST., GIFTS & TR. J., July 11, 1991, at 144. The assets in a client's revocable trust are not subject to the probate process and, therefore, are not subject to ancillary probate for assets located in other jurisdictions. *Id.*

82. I.R.C. § 676 (West 1994). This section provides:

> The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to re-vest in the grantor title to such portion is exercisable by the grantor or a non-adverse party or both.

Id.

83. I.R.C. § 671 (West 1994).This section provides:

> Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in com-

of the trust, Treasury Regulation section 671-4(b) provides that no trust income tax returns need be filed.[84] The grantor will pick up such items on his personal income tax return as though no trust existed, and so, as a practical matter, the trust is invisible for income tax purposes.[85] If the grantor is not a trustee or co-trustee, then a separate fiduciary income return is required,[86] as well as a separate taxpayer identification number.[87] In such circumstances, simplified tax forms[88] are filed with the Internal Revenue Service and New York State.[89] These forms are filed for informational purposes only, and are filed simultaneously with the grantor's individual income tax return.[90] The revocable trust taxable year must be the same as the taxable year of the grantor, and the method of accounting must be the same.[91]

B. Holding Period of Property

Under IRC section 1223(11), any beneficiary who acquires property from a decedent, including property from a revocable trust, is deemed to have held such property for more than one year.[92] This may become important, especially if Congress passes legislation with respect to the tax on long-term capital gains and losses.

> puting the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual.

Id.

84. Treas. Reg. § 1.671-4(b) (1981).

85. Treas. Reg. § 1.671-4(b) (stating that all items of income, deduction, and credit from the trust should be reported on the individual's Form 1040 in accordance with its instructions).

86. *See* Howard M. Zaritsky, *An Estate Planner's Perspective of Recent Developments*, TAX MGMT. EST., GIFTS & TR. J., Jan. 1991, at 5. If the grantor is not a trustee or co-trustee, then the general rule is that items of income, deduction, and credit must be reported by the trustee on a separate statement attached to a 1041form. *Id.*

87. Page 8 of the Instructions for Form 1041, line C, provides that every estate or trust must have an employer identification number. This identification number must be different than the grantor's identification number.

88. Form 1041 and IT-205 (N.Y. Fiduciary Income Tax Form).

89. Treas. Reg. § 1.671-4(b)(3) (1981).

90. Treas. Reg. § 1.671-4(b)(3) (1981). If the grantor is not a trustee or co-trustee, then items of income, deduction, and credit are not reported by the trust on a separate fiduciary income tax return (Form 1041), but should be shown on a separate statement attached to that form. *Id.*

91. *See* Rev. Rul. 57-390, 1957-2 C.B. 326.

Any asset transferred to a revocable trust has a carry-over holding period from the grantor.[93] If the revocable trust becomes irrevocable, a new holding period begins.[94] Although the trust becomes irrevocable upon the death of the grantor,[95] many trusts also provide that they become irrevocable upon incapacity.[96] Since the trust changes from revocable to irrevocable, it also changes the holding period. Therefore, tax considerations should be taken into account.[97]

C. Sale of Principal Residence

Even though the grantor's principal residence is transferred into the revocable trust, the rules with respect to the roll-over provisions under IRC section 1034 still apply. Therefore, if the grantor purchases a new residence in excess of the sales price of the former residence, within the statutory time period of 24 months, the recognition of gain by the grantor may be deferred.[98]

It also appears that if the trust sells the grantor's principal residence and the grantor is over the age of 55, IRC section 121 may still be used to exclude from gross income $125,000 of the gain.[99]

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93. I.R.C. § 1223(2) (1986). Section 1223(2) states, in pertinent part, "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person..."

94. *See* Rev. Rul. 73-209, 1973-1 C.B. 614.

95. See FROLIK, *supra* note 77, at 1197.

96. *Id.*

97. *Id.*

98. I.R.C. § 1034(a) (1986). Pursuant to section 1034, if a taxpayer sells his principle residence, and within two years purchases a new principle residence, the gain from the sale shall be the sales price of the old residence (minus certain expenses for work performed on the old residence in order to assist in its sale) minus the purchase price of the new residence.

99. I.R.C. § 121 (West. 1994) states:

At the election of the taxpayer, gross income does not include gain from the sale or exchange of property, if -

(1) the taxpayer has attained the age of 55 before the date of such sale or exchange, and

(2) during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as his principal residence for periods aggregating 3 years or more.

Id.; *see also* Priv. Ltr. Rul. 80-07-050 (November 23, 1979).

IV. OTHER INCOME TAX CONSIDERATIONS

As a result of the grantor trust rules under IRC sections 671-677, lifetime income taxation of the income from the grantor's property is not affected by the transfer of that property into a revocable trust.[100] For example, the transfer of Series E, EE, H or HH bonds to a revocable trust will not be a transfer requiring the reporting of accrued interest.[101] Neither will a transfer of an installment obligation to the revocable trust be deemed a disposition that accelerates the reporting requirements of deferred gain under IRC section 453(e) and (f)(1).[102]

V. GIFT TAX CONSIDERATIONS

Upon transfer of assets by the grantor into a revocable trust, a gift is considered incomplete in every instance where the grantor has reserved the power to re-vest the beneficial title to the property in himself, or to the extent that a reserved power gives him the right to name the beneficiaries, or even to change the interests of the beneficiaries as between themselves.[103] However, significant problems arise if the trust provides that it becomes irrevocable upon the incapacity of the grantor.[104] While

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100. *See* Borrok, *supra* note 61, at 295

101. I.R.C. § 454(a) (West Supp. 1994); *see also* Brenda J. Rediess-Hoosein, *Methods of Transferring Assets to Minors Affected by Recent Tax Changes*, 18 EST. PLAN 86, 89 (1991) (stating that shifting assets to a minor through Series EE savings bonds can defer taxable income until the bonds are redeemed and that the deferral period can be extended by converting bonds to Series HH bonds); *see also* C. Douglas Miller & R. Alan Rainey, *Dying With the "Living" (Or "Revocable") Trust and Federal Tax Consequences of Testamentary Dispositions Compared*, 37 VAND. L. REV. 811, 817 [hereinafter Miller & Rainey] (stating a grantor may transfer "E" or "H" bonds to a revocable trust without income tax consequences).

102. Mertens Law of Fed Income Tax § 15.76 (1993); *see* Frederick R. Keydel, *Use of Trusts in Estate Planning 1988*, PLI TAX LAW & EST. PLANNING COURSE HANDBOOK SERIES NO. 180; *see also* Miller & Rainey, *supra* note 102, at 817 (stating grantor may transfer installment obligations to a revocable trust without income tax consequences); *see also* Rev. Rul. 74-613, 1974-2 C.B. 153.

103. Treas. Reg. § 25.2511-2 (c) (1981) states:

> A gift is incomplete in every instance in which a donor reserves the power to re[-]vest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

Id.

104. Fifth Ave. Bank of New York v. United States, 41 F. Supp. 428, 432 (1941) (stating that the death of the grantor which ended the revocability of the trust and fixed

neither the creation of the revocable trust nor its revocation and return of the property to the grantor are deemed to be taxable gifts, in such a situation, there would be a completed gift upon the incompetency of the grantor.[105] IRC section 2702 provides for valuation rules in cases of transfers of an interest in trust.[106] Arguably, and most probably, any transfer in trust which becomes irrevocable and was established by the grantor, will fall within the purview of IRC section 2702.[107] This section provides that with respect to any transfer in trust for the benefit of a family member, the value of the retained interest held by the grantor will be valued at zero unless one of several exceptions apply.[108] Almost all existing revocable trusts with such provisions concerning incapacity are subject to this rule even if created before the effective date of the statute.[109]

For years, the IRS has issued private letter rulings stating that any distributions from a revocable trust made within three years of the decedent's death are included in the gross estate.[110] The IRS has been relying upon both the statute and case law.[111]

Once again, the IRS has recently reviewed this issue in a technical advisory memoranda, wherein the issue was whether transfers from the decedent's revocable trust were included in her gross estate under IRC sections 2035(a) and 2038.[112] During the three years prior to the decedent's death, the trustee acted upon the decedent's written instructions to

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the basis for the valuation of the property also began the period of holding the trust within the meaning of section 117(a)).

105. Jeff Kohn, Jr., *Revocable Trusts - An Overview*, 49 ALA. L. REV. 332, 336 (1988) (stating that upon incapacity of grantor, a gift to the trust may be complete and gift tax consequences may be imposed).

106. I.R.C. § 2702 (1986).

107. *Id.*

108. I.R.C. § 2702(a)(2) and (a)(3) (1986). "The value of any retained interest which is not a qualified interest shall be treated as being zero." *Id.* However, the exceptions of section 2702(a)(3) provide that this rule will not apply to any transfer "(i) to the extent such transfer is an incomplete transfer, or (ii) if such transfer involves the transfer of an interest in trust all the property in which consists of a residence to be used as a personal residence by persons holding term interests in such trust." *Id.* at (a)(3).

109. Under section 11602(e)(1)(A) of the Revenue Reconciliation Act of 1990, section 2702 applies only to transfers made after October 8, 1990. Therefore, section 2702 will not apply to a trust created before October 8, 1990, but will only apply to transfers of property made after October 8, 1990.

110. *See* Borrok, *supra* note 61, at 295.

111. *See* Estate of Jalkut v. Commissioner of Internal Revenue, 96 T.C 675 (1991): *see also*, I.R.C. § 2702 (a)(2)(A) (West 1994) (stating "the value of any retained interest which is not qualified interest shall be treated as being zero.").

112. Tech. Adv. Mem. 92-26-007 (Feb. 28, 1992).

transfer shares of stock to various individuals. The trust assets were reported on the decedent's estate tax return. However, the gifts were not reported as includable in her gross estate for federal estate tax purposes. The IRS determined that transfers within three years of the date of death are includable in the gross estate under section 2038.

In Estate of *Jalkut v. Commissioner of Internal Revenue*, the decedent created a revocable trust during his lifetime.[113] The trust provided for payments of income and principal to the grantor as the grantor requested.[114] The grantor appointed himself as trustee.[115] If the grantor became unable to manage his affairs, the trustee was authorized to make payments to designated individuals, similar in nature to those the grantor had been accustomed to making.[116] During the three-year period prior to his death, the grantor became unable to manage his affairs, and a successor trustee was appointed.[117] Distributions were made to the grantor's family both before and after the appointment of a successor trustee.[118] The court held that the distributions made before the grantor became unfit to manage his affairs were properly characterized as withdrawals by the grantor,[119] followed by direct gifts from the grantor to the distributees,[120] because under the terms of the trust, the grantor was the only permissible distributee of the trust during this period.[121] However, the court concluded that direct transfers from the trust made after the decedent was declared unfit,[122] although specifically authorized by the trust instrument,[123] could not properly be recharacterized as withdrawals by the grantor from the trust.[124] Rather, the transfers were viewed as direct transfers from the trust to the beneficiaries.[125] Accordingly, those transfers were includable in the gross estate of the decedent.[126]

Subsequent to *Jalkut*, however, a bill was passed by Congress that amended IRC section 2035 to include in the decedent's gross estate, the

113. 96 T.C. at 675.
114. *Id.* at 676.
115. *Id.*
116. *Id.*
117. *Id.* at 677.
118. *Id.* at 676.
119. *Id.* at 685.
120. *Id.*
121. *Id.* at 684.
122. *Id.* at 685.
123. *Id.*
124. *Id.*
125. *Id.*

value of property transferred by the decedent during the three-year period ending on the date of the decedent's death.[127]

VI. ESTATE AND POST-DEATH TAX CONSIDERATIONS

A. Estate Tax Savings

There is a common misconception among some practitioners and most clients that the creation of a living trust will, in and of itself, save estate taxes. This is incorrect. Under IRC section 2038, the value of the gross estate includes the value of any and all revocable transfers.[128] IRC section 2038(a)(1) refers to this power to revoke as "by the decedent alone, or by the decedent in conjunction with any other person."[129] This also includes the power to alter, amend or terminate the trust.[130] Even if this power is relinquished three years prior to death, IRC section 2038, in conjunction with IRC section 2035,[131] will bring the entire trust balance into the estate.[132] Also, IRC section 2036 would bring the revocable trust back into the grantor's estate due to the retained right to the income of the trust.[133]

B. S-Corporation Stock

The transfer of S-corporation stock into a revocable trust may constitute poor planning. Although under IRC section 1361(c)(2), a revocable trust may qualify as a shareholder of an S-corporation,[134] the statute

127. H.R. Rep. No. 4210, 102nd Cong., 2nd Sess., 1382, 1441 (1992) (seeking to amend the Internal Revenue Code of 1986 to provide incentives for increased economic growth and to provide tax relief for families).

128. I.R.C. § 2038(a) (1986).

129. *Id.*

130. *Id.*

131. I.R.C. § 2035(a) (1986). (providing that the value of the decedent's gross estate includes the value of any property which the decedent transferred, by trust or otherwise, within three years before the decedent's death).

132. I.R.C. § 2038(a)(1) (1986). Pursuant to this section, transfers of property the decedent made after June 22, 1936 will be included in the gross estate, even where any power to alter, amend, revoke, or terminate the transfers had been relinquished during the three-year period before the decedent's death. *Id.*

133. I.R.C. § 2036(a) (1986). Section 2036(a) only applies if the decedent retains the right to "(1) the possession or enjoyment of, or the right to the income of, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom." *Id.*

134. I.R.C. § 1361(c)(2) (1986).

provides that upon the death of the grantor, the trust may only continue for a period of two years without losing eligibility as an S-corporation shareholder.[135] Circumstances may arise such as a contest to the trust or a prolonged IRS audit, which might cause the S-corporation to remain in the revocable trust beyond the two-year period. However, in an estate, the rule is different. An estate may continue as a shareholder for the full reasonable period of estate administration, even beyond two years.[136] If the estate administration is unduly prolonged for an unreasonable length of time, however, it may lose its eligibility as an S-corporation shareholder.[137]

C. Passive Gains and Losses

As with S-corporation stock, assets which generate passive activity losses may be better retained in the grantor's individual name than transferred to a revocable trust prior to death.[138] Under IRC section 469(i), an individual who is active in the participation of rental real estate activities may be allowed to deduct-against other income losses from such activities up to $25,000.[139] After the individual's death, IRC section 469(i)(4) provides that the decedent's estate may take this loss for two years after the grantor's death.[140] However, this rule does not apply to a

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135. I.R.C. § 1361(c)(2)(ii) (1986) (providing that a trust which was owned by an individual who is a citizen or resident of the United States, and if the entire corpus of the trust is includible in the gross estate of the owner, shall continue in existence after the death of the owner for a period of two years without losing eligibility as an S-corporation shareholder).

136. An estate may properly continue as a shareholder of an S-corporation. However, an estate may only be kept open during a period (up to 15 years) for extended payments of estate taxes under section 6166. *See* Rev. Rul. 76-23, 1976-1 C.B. 264.

137. See *Old Virginia Brick Co v. Commissioner of Internal Revenue*, 44 T.C. 724 (1965), *affd*, 367 F.2d 276 (4th Cir. 1966) (citing Treas. Reg. § 1.641(b)-3(a) (1986)) (holding if the estate administration is unduly prolonged, the estate is deemed terminated after the expiration of a reasonable period for the performance by the executor of all the duties of administration, thus, if the estate no longer exists, it cannot be an S-corporation shareholder).

138. I.R.C. § 469(a)(1) and (b) (1986) (stating a grantor may want the passive activity losses on his or her income tax return to net against activity income).

139. I.R.C. § 469(i) (1986).

140. I.R.C. § 469 (P) (4) (West Supp. 1994) stating:

In the case of taxable years of an estate ending less than 2 years after the date of the death of the decedent, this subsection shall apply to all rental real estate activities with respect to which such decedent actively participated before his death.

revocable trust.[141] Therefore, it may be advantageous to maintain all rental real estate property in the individual name of the decedent. In addition, there are other rules which appear to be available to an estate with respect to disposition of passive activity losses, which are clearly not available to a revocable trust after the death of the grantor.[142]

VII. OTHER TAX CONSEQUENCES

A. Taxable Year

Generally, an estate may pick and choose its own fiscal year.[143] For example, assume a decedent died on March 15, 1994, and a large source of income is received by the estate during June of that same year. A trust would be required, under IRC section 645(a), to adopt a calendar year.[144] Therefore, the beneficiaries may be required to recognize a large amount of income during 1994. However, an estate may elect a taxable year up until February 28, 1995. This will result in a deferral of income of one year.

B. Personal Exemption

An estate is allowed a personal exemption of $600 while the simple trust and complex trusts are only entitled to a $300 and $100 personal exemption, respectively.[145]

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141. Lisa Brown Petkun & Deborah M. Lerner, *Income Taxation of Trusts and Estates Under TRA '86*, 66 J. TAXATION 38 (1987) [hereinafter Petkun & Lerner] (Rule 469 (i) (4) applies only to estates. Prohibiting trusts enacted so that individuals could not circumvent the ceiling by transferring rental real estate to trusts); *see also* Anne K. Hilker, *Post - Mortem Tax Planning*, 854 ALI - ABA COURSE OF STUDY: PLANNING FOR THE SENIOR CITIZEN, 1639 (1993) (stating I.R.C. 469 (i) does not currently run to trust).

142. ANDREW M. KATZENSTEIN, *Special Passive Loss Rules Applicable to Trusts, Estates, Create Planning Opportunities*, 15 EST. PLAN 106 (1988).

143. Lloyd Leva Plaine, *Post Mortem Tools for Income Tax Planning In Light of the TRA - 86*, 1 PROB. AND PROP. 56, 58 (1987); *See* David W. Reinecke, *Post - Mortem Tax and Estate Planning*, 9 T.M. COLLEY L. REV. 383, 395 (1992) (stating estates are permitted to elect a taxable year other than the calendar year).

144. I.R.C. § 645 (a) (West 1988) states, "The taxable year of any trust shall be the calendar year."

145. I.R.C. § 642 (b) (West Supp. 1994); *see also* Miller & Rainey, *supra* note 101, at 831 (stating personal exemptions for estate of $600 in computing taxable income. a deduction of $100 for a complex trust, and a $300 deduction for a simple trust).

C. Estimated Taxes

Under IRC section 6652, estates are not required to file quarterly estimated income taxes for the first two years following the decedent's death.[146] Revocable trusts are required to file quarterly estimates immediately upon the death of the grantor.[147]

D. Throwback Problems

Estates are not subject to the throwback rule on accumulated distributions, so income taxed to an estate will not thereafter have to be taxed at the beneficiaries' brackets.[148] However, after the decedent's death, a revocable trust is fully subject to the throwback rule.[149]

E. Charitable Set Aside Deduction

Under IRC section 5642(c), an estate receives an income tax deduction for amounts paid or permanently set aside for charities.[150] However, except for certain trusts created before October 9, 1969, a revocable trust will receive no deduction for amounts set aside for charitable purposes.[151] Therefore, if a qualified charitable organization is the residuary beneficiary of an estate, capital gains realized during the administration period can be deducted when set aside,[152] but a trust recognizing such gains cannot deduct them until they are actually paid out.[153]

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146. I.R.C. § 6654 (L) (2) (West Supp. 1994): *See* Reinecke, *supra* note 143, at 395 ("estates are not required to make federal estimated tax payments in any taxable year ending within a 24-month period after the date of decedent's death").

147. Dic Dorney, *Changes in the Income Tax Treatment of Estates and Trusts*, 66 MICH. B.J. 620 (1987) (stating revocable trust is required in order to file declarations from the death of the estate owner); *see also* Keydel, *supra* note 102 (stating disadvantages of post death revocable trust include quarterly estimated tax payments).

148. I.R.C. § 643(a)(3) (1986).

149. Treas. Reg. § 1.665(a) - 0A(a)(1) (1972); *see* Miller & Rainey, *supra* note 101, at 835 (throwback rule not applicable to a simple trust); *see also* Caroline D. Strobel & Cheryl A. Hamilton, *Trapping Distributions From Estates to Trust Can Permanently Save Taxes or Defer Them*, 13 EST. PLAN 90 (1986) [hereinafter Strobel & Hamilton] (stating "complex trusts are subject to the throwback rules").

150. I.R.C. § 642(c) (1986). This deduction is in lieu of the deduction for charitable contributions and gifts under section 170(a) of the Internal Revenue Code.

151. I.R.C. § 642(c)(2) (1986).

152. Treas. Reg. § 1.643(a)-3 (1994). If a capital asset is required to be paid, credited, or distributed to a qualified organization under the terms of the trust document, gains from the sale or exchange of the capital assets are included in the computation of distributable net income. *Id.*

153. I.R.C. § 643(a)(3) (1986). Section § 643(a)(3) states:

F. Distributions Within 65 Days of Taxable Year

Under IRC section 663(b), trustees are afforded the ability to treat distributions made within the first 65 days of any taxable year of the trust to be considered paid or credited on the last day of the preceding taxable year.[154] This rule only applies to a complex trust.[155] The amount elected may not exceed the greater of the amount of the trust income or the amount of the trust's distributable net income less any amounts paid, credited or required to be distributed.[156] This irrevocable election is made on the appropriate line on Form 1041[157] and is effective only for the year of election.[158] This election allows the trustee to prevent a trust from accumulating income which would be subject to the throwback rule under IRC section 665.[159] The beneficiary must include the amount covered by the election in his income covered by the election.[160] This election is not available to an estate.[161]

VIII. JOINT TRUSTS

Some practitioners have created a joint revocable trust for the benefit of a husband and wife. If the combined assets of the husband and wife do not exceed the $600,000 federal exemption equivalent, this may be

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> Gains from the sale or exchange of capital assets shall be excluded to the extent that such gains are allocated to corpus and are not (A) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (B) paid, permanently set aside, or to be used for the purposes specified in section 642(c).

Id.

154. I.R.C. § 663(b)(1) (1986).

155. Strobel & Hamilton, *supra* note 149, at 90 ("A simple trust is one which...is required to distribute its entire accounting income to designated beneficiaries in the current year. . . ." Therefore, a simple trust has no need for the election in section 663(b).).

156. I.R.C. § 662(a) (1986).

157. Douglas L. Siegler, *Relief May be Available for Missed Tax Elections*, 21 EST. PLAN 139, 145 (1994); *see also* Treas. Reg. § 1.663(b)-2(a)(1) (1994).

158. I.R.C. § 663(b)(2) (1986). Section 663(b) applies only to the taxable year in which the fiduciary elects the distribution treatment.

159. Pozzuolo & Mittleman, *supra* note 20, at 46 (stating section 663(b) allows the trustee to distribute income, thus avoiding the "accumulation" problem of the "throwback rule"); *see also* Strobel & Hamilton, *supra* note 1549, at 92. (stating "throwback rules" are designed to tax the beneficiary of a trust that accumulates, rather than distributes, all or part of its income currently).

160. Treas. Reg. § 1.663(b)-1(a)(2)(ii) (1994).

161. *See* Miller & Rainey, *supra* note 101, at 834. (stating election to treat distributions within the first sixty-five days of a taxable year as occurring during the preceding taxable year is available to revocable trusts not to estates). *Id.*

advantageous. However, in situations where the estate is greater than $600,000, problems arise.

In a joint trust situation, the ability to shelter the $600,000 exclusion becomes difficult. If upon contribution by a husband and wife of assets into a revocable trust, there is a commingling of those assets, it is difficult to determine with which assets to establish a credit shelter trust for the surviving spouse and the IRS may claim that there were insufficient separate assets of the first spouse to fully fund the credit shelter trust. Although use of such a joint trust is not recommended, if it is done, each contribution of property by a husband or wife should be separately maintained within the trust. However, the use of this type of trust is generally more complex during administration than separate trusts for the husband and wife. Keeping records of the separate shares can be difficult and time consuming. A possibility always arises as to commingling between the shares which may defeat the estate tax planning the couple originally intended.

Attorneys who have clients planning for Medicaid also may determine that a joint trust may not be advisable.

IX. UPCOMING LEGISLATION

Legislation drafted by the EPTL/SCPA Advisory Committee dealing with revocable trusts was introduced in the 1995 Session of the New York State Legislature.[162] The legislation dealt with large issues such as execution requirements, funding, and elimination of the Merger Doctrine. On the procedural side, the legislation provided for a clear road-map on how to proceed in the case of challenges to the validity of a revocable trust as well as other proceedings. It is expected that the bill will be introduced in the next legislative session in 1996.

CONCLUSION

As advisors to their clients, attorneys must make a determination whether or not a revocable trust will meet their needs. In this article we have reviewed the pros and cons of the revocable trust from both a tax and non-tax perspective. These should be discussed with each client in detail. In many situations, the revocable trust may be the most appropriate estate planning tool.

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162. The legislation did not pass primarily because of requests by the New York State Bar Association Trust & Estates Section for additional time to comment.

CPLR Article 77 and Trust Litigation in Supreme Court

By Frank T. Santoro

For good reasons, trusts and estates litigators gravitate towards the Surrogate's Court as the appropriate venue for litigated matters pertaining to the affairs of decedents and lifetime trusts. The Surrogate's Court, with its expansive jurisdiction, routinely presides over cases involving substantive matters of law concerning trusts and estates.[1] Moreover, the Surrogate's Court has a structure and staff specifically geared to handle such matters, and the necessary resources to handle issues that arise in the administration of decedent's estates.[2]

While the Supreme Court, as New York's court of general jurisdiction,[3] has the power to probate a will and issue letters testamentary and trusteeship, the Surrogate's Court is really the only appropriate venue for a probate proceeding. Similarly, accountings, discovery proceedings, and other miscellaneous proceedings pertaining to estates and testamentary trusts most often belong in the Surrogate's Court.

However, the Surrogate Court's jurisdiction should not necessarily eliminate consideration of Supreme Court as an appropriate venue for disputes pertaining to trusts. Civil Practice Law and Rules (CPLR) 7701, which introduces CPLR article 77, authorizes a special proceeding for the determination of matters relating to express trusts.[4] Article 77 is intended to provide an economical and relatively expeditious method for the adjudication of trustees' accountings and other trust matters in Supreme Court.[5] Article 77 is seldom discussed at length—for example, *Siegel's New York Practice*, an old friend to all civil litigators, mentions article 77 only once, stating "[a] special proceeding is also used in the Supreme Court to determine matters relating to a trust."[6] Given the goals underlying article 77, economy and swift adjudication of disputes pertaining to trusts, Supreme Court is a venue worth considering when bringing such a proceeding. A closer look at article 77 is thus in order—this article addresses only the basics.

> *"While the Supreme Court, as New York's court of general jurisdiction, has the power to probate a will and issue letters testamentary and trusteeship, the Surrogate's Court is really the only appropriate venue for a probate proceeding."*

The Statute and Cases Decided Thereunder

Article 77 has only a few sections and incorporates certain provisions of the Surrogate's Court Procedure Act (SCPA) by reference. CPLR article 4, governing procedure in all special proceedings, applies to special proceedings commenced pursuant to CPLR article 77.[7] As stated, CPLR 7701 introduces article 77, and is followed by five more sections that are specific to trusts.

- CPLR 7702 provides that a trustee seeking a judicial discharge on an accounting must file his accounting with an affidavit of accounting party in the manner prescribed by SCPA 2209.
- CPLR 7703 incorporates the SCPA's virtual representation provisions to article 77 proceedings.
- CPLR 7704 limits the court's power to appoint a referee in certain circumstances.
- CPLR 7705 and 7706 provides for the filing of an account settled informally and procuring an order thereon in a manner similar to SCPA 2202. CPLR article 4, governing all special proceedings applies in a special proceeding brought pursuant to article 77.

While article 77 contains only a few provisions, the Supreme Court has addressed a myriad of issues and disputes in article 77 proceedings. For example, the proper application of Estates Powers and Trust Law (EPTL) Section 7-1.9 was addressed in an article 77 proceeding in *Elser v. Meyer*.[8] In *Elser*, the Supreme Court held that a settlor of a lifetime trust could revoke a trust without the consent of the trustee notwithstanding language in the trust instrument which, in sum and substance, required the consent of the trustee to revoke the trust. The Appellate Division reversed, and remitted the matter to the Supreme Court to determine whether the trustee had unreasonably withheld his consent.[9]

In *Andrews v. Trustco Bank*,[10] the Supreme Court, *inter alia*, addressed objections to an accounting reviewing New York's former Principal and Income Act.[11] In *Addesso v. Addesso*,[12] the Supreme Court dismissed an article 77 proceeding to compel a trustee to account and compel a distribution where uncontroverted evidence before the court showed that there were no assets remaining in the trust account and the petitioner previously had been provided with an accounting.

In another article 77 proceeding where beneficiaries sought an accounting from a trustee, the court extended judicial approval of a sale of a parcel of real property.[13] Removal of a trustee on the grounds that the trustee has disregarded court orders and engaged in self-dealing has also been granted in an article 77 proceeding.[14]

Concurrent Jurisdiction and Removal to Surrogate's Court

Concurrent jurisdiction notwithstanding, the courts generally err on the side of transferring matters pertaining to trusts and estates to the Surrogate's Court. A petitioner seeking relief from the Supreme Court with respect to a trust may find himself mired in the delay and expense of motion practice, and may find himself ultimately awaiting the administrative transfer of his article 77 proceeding from Supreme Court to the Surrogate's Court following decision and order on a motion. Under N.Y. Const. art. VI, § 19(a) and CPLR 325, the Supreme Court may, and quite often does, transfer trusts and estates-related disputes to the Surrogate's Court.

Where there are existing proceedings pending pertaining to an estate or a trust in the Surrogate's Court, the Supreme Court will generally refrain from exercising its concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court and where the Surrogate's Court has already acted.[15] Thus, by way of example, the Supreme Court is unlikely to exercise jurisdiction over a proceeding to remove a trustee where that trustee has petitioned the Surrogate's Court for judicial settlement of her account. However, the Supreme Court will retain jurisdiction over a dispute affecting a decedent's estate when it is the first court to assume jurisdiction over the matter, especially where no motion is made in Supreme Court asking it to exercise its discretion to transfer of the action to the Surrogate's Court.[16]

While the law favors the Surrogate's Court as a venue for adjudicating disputes pertaining to trusts, the cases cited above plainly show that the Supreme Court deals with trusts regularly. Moreover, the Supreme Court, and in particular the commercial division as it exists in some counties,[17] frequently addresses the kinds of issues that are featured prominently in trust litigation. For example, the administration and management of closely held businesses, solely owned or controlled by a trust, will often raise questions of self-dealing, prudence, and the proper exercise of fiduciary power. Issues surrounding corporate governance, complex taxation, business valuation, and real estate valuation are as commonly encountered in trust litigation as they are in business divorce litigation in the Supreme Court.

Under the right circumstances, the Supreme Court should be persuaded to decline to exercise its power to transfer an article 77 proceeding to the Surrogate's Court. It would seem, in a situation involving a lifetime trust over which the Surrogate's Court has never entertained jurisdiction for any purpose, that the Supreme Court should exercise and retain its jurisdiction to fulfill article 77's goals of expediency and economy in the adjudication of disputes pertaining to trusts. While the Supreme Court may not frequently delve into the minutiae of the Principal and Income Act[18] or explore the canons of trust construction, as New York's court of general jurisdiction, it is well-equipped to do so, and to administer justice in matters involving same.

Practical Issues May Arise

While it always falls upon the practitioner to ensure that jurisdiction is obtained over all necessary parties, and to ensure that all pleadings include the necessary information for the court to afford the relief requested by the petitioner, the Surrogate's Court is unique. The Supreme Court does not have an accounting clerk or a miscellaneous clerk who will evaluate accountings or pleadings and firmly inform the practitioner as to the minimum requirements that, in the clerk's view, must be met before process issues. While article 77 incorporates by reference the SCPA's provisions pertaining to virtual representation, and requires that an accounting and affidavit of accounting party be filed in a proceeding seeking judicial approval of accounting, it does not, for example, statutorily identify all of those parties entitled to notice in an accounting proceeding. Creditors, potential creditors, beneficiaries, legatees, devisees, co-trustees, successor trustees, court-appointed guardians, fiduciaries of deceased beneficiaries (or the beneficiaries or distributees of the deceased beneficiary where no fiduciary is appointed), and the New York State Attorney General[19] are all parties who may be interested in a trust accounting.[20] A binding decree in an accounting proceeding approving a trustee's accounting will only be binding on those who had notice and opportunity to be heard with respect to same, so it is critical that all interested parties be joined therein.[21] Moreover, the failure to join a necessary party, such as the New York State Attorney General where there is a charitable interest in the trust, can result in a motion to dismiss for failure to join an indispensable party, resulting in unnecessary delay and expense.[22]

Similarly, where the Surrogate's Court will almost always automatically appoint a guardian *ad litem* for an infant or a person under a legal disability to ensure that their interests are protected, the practitioner in an article 77 proceeding should highlight the necessity of a guardian *ad litem*, or move pursuant to CPLR 1202 to seek the appointment of a guardian *ad litem* where appropriate at the outset of the proceeding.

There are other practical considerations that must be considered before commencing an article 77 pro-

ceeding. For example, the service provisions of the SCPA are unique to the Surrogate's Court,[23] while the general service provisions of CPLR article 3 apply in a special proceeding under article 77.[24]

Conclusion

In sum, practitioners should not discount the Supreme Court as an appropriate venue for litigating disputes pertaining to trusts, especially with respect to lifetime trusts. Depending on the circumstances, deference to the Surrogate's Court's experience in matters pertaining to trusts and estates may yield to other considerations, and Supreme Court is a permissible and suitable venue for the adjudication of disputes pertaining to trusts.

Endnotes

1. *In re Piccione's Estate*, 57 N.Y.2d 278, 289, 456 N.Y.S.2d 669 (1982); *Wagenstein v. Shwarts*, 82 A.D.3d 628, 920 N.Y.S.2d 55 (1st Dep't 2011); SCPA 207; SCPA 209(6).
2. *Cipo v. Van Blerkom*, 28 A.D.3d 602, 813 N.Y.S.2d 532 (2d Dep't 2006); *Zamora v. State of New York*, 132 Misc. 2d 119, 503 N.Y.S.2d 262 (NY Ct. Cl. 1986).
3. N.Y. Const. Art. VI, § 7(a).
4. *Chiantella v. Vishnick*, 84 A.D.3d 797, 922 N.Y.S.2d 525 (2d Dep't 2011).
5. *See* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 7701.
6. Siegel, N.Y. Prac. § 547 (5th ed.).
7. Id. §§ 550-556.
8. 29 A.D.3d 580, 814 N.Y.S.2d 684 (2d Dep't 2006).
9. *Id.*
10. 289 A.D.2d 910, 735 N.Y.S.2d 640 (3d Dep't 2001).
11. *See* EPTL 11-2.1.
12. 131 A.D.3d 1052, 16 N.Y.S.3d 472 (2d Dep't 2015).
13. *In re Jensen*, 107 A.D.3d 1222, 967 N.Y.S.2d 495 (3d Dep't 2013).
14. *Gouiran v. Gouiran*, 263 A.D.2d 393, 693 N.Y.S.2d 127 (1st Dep't 1999).
15. *In re Tabler's Will*, 55 A.D.2d 207, 389 N.Y.S.2d 899 (3d Dep't 1976).
16. *Gaentner v. Benkovich*, 18 A.D.3d 424, 795 N.Y.S.2d 246 (2d Dep't 2005).
17. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70.
18. EPTL art. 11-A.
19. EPTL 8-1.4
20. *See* SCPA 2210.
21. *See In re Hunter*, 4 N.Y.3d 260, 794 N.Y.S.2d 286 (2005); *Estate of Monroe*, N.Y.L.J., June 20, 2001, p. 1, col. 5 (Sur. Ct., N.Y. Co.).
22. *See* CPLR 3211 (a)(10); CPLR 1001.
23. *See* SCPA 307.
24. *See* CPLR 403(c).

Frank T. Santoro is counsel with the trusts and estates litigation group at Farrell Fritz, P.C. in Uniondale.

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Pierce McDowell
(605) 338-9170
piercemcdowell@sdtrustco.com

Al King
(212) 642-8377
alking@sdplanco.com

James Paladino
(212) 642-8377
jpaladino@sdplanco.com

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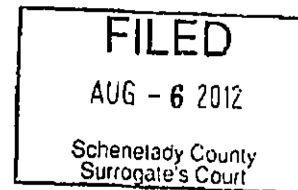

STATE OF NEW YORK
SURROGATE'S COURT COUNTY OF SCHENECTADY

PROBATE PROCEEDING,

WILL OF ARMOND X. MASTROIANNI
a/k/a ARMOND MASTROIANNI,

ARMOND X. MASTROIANNI,

Deceased.

DECISION/ORDER

File No. 2008-90

APPEARANCES:

Attorneys for Petitioner, Nathaniel H. Daffner, Trustee:
Christopher Massaroni, Esq.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207-2503

Attorneys for Respondents Mary V. Mastroianni, Mary Drescher, Josepha Abba, Anthony Mastroianni, Pasquale Mastroianni, and Laura Salvatore:
Kenneth J. Bobrycki, Esq.
Melvin & Melvin, PLLC
217 South Salina Street
Seventh Floor
Syracuse, New York 13202-1390

Attorneys for Respondent Tracy Mastroianni:
Margaret J. Gillis, Esq.
Whiteman, Osterman & Hanna, LLP
One Commerce Plaza
Albany, New York 12260

Attorneys for Respondents Howard Maximilian Miller, Aurelia Mensh, Esq. and Josepha Miller:
Aurelia Mensh, Esq.
Roemer Wallens Gold & Mineaux LLP
13 Columbia Circle
Albany, New York 12203

VINCENT W. VERSACI, S.

By Order to Show Cause dated April 18, 2012, the Petitioner, Nathaniel H. Daffner, the Trustee of two (2) separate trusts created by the Decedent's Last Will and Testament (collectively referred to herein as the "Trusts"), brought this proceeding pursuant to SCPA §2107 seeking the advice and direction of the Court concerning the ownership of the

shares of stock of Mastroianni Bros., Inc., a New York corporation previously owned by the Decedent as sole shareholder. Specifically, the Petitioner requests an Order confirming (1) that the Trusts collectively are the holders of 100% of the shares of stock of Mastroianni Bros., Inc., and (2) that Nathaniel H. Daffner, as the Trustee of the Trusts, is solely authorized to manage the day-to-day operations of the business and to make any and all decisions that owners of shares of stock of a corporation are authorized to make. In the Petition and the other papers filed in support of the Order to Show Cause, the Petitioner states that this proceeding has been made necessary by the recent claims of the Decedent's mother, Mary V. Mastroianni, who proposes that she owns some of the shares of the stock. The Petitioner disputes this alleged claim, and essentially seeks a declaratory judgment silencing any claim she may have due to its staleness and/or untimeliness.

In opposition to the Petition, Respondent Mary V. Mastroianni along with the other individuals represented by Attorney Bobrycki solely argue that this SCPA §2107 proceeding must be dismissed because this statute does not govern disputes over title to property and therefore it is not a proper proceeding within which a determination can be made as to the ownership of the corporate stock. They contend that since this is not the proper proceeding to determine title to property, Mary Mastroianni is therefore not obligated to assert her ownership claim in this proceeding, which claim would be more appropriately addressed in a plenary action brought in Supreme Court under the provisions of the Business Corporation Law or the Civil Practice Law and Rules.

In addition to opposing the Petition, Respondent Mary Drescher, who is one of the remaindermen of the Trusts, filed a Cross-Petition to Compel an Intermediate Accounting from the Trustee. In her Cross-Petition, Ms. Drescher raises certain questions concerning the operation and management of the corporation and the financial activity that has occurred under the control of the Trustee. Her questions were formed after a preliminary forensic review was conducted by John Dubiel, CPA/CFF, CFE, CVA, an expert retained

by the remaindermen of the Trusts to review the financial statements and books of the corporation.

The Court has considered all of the papers that have been submitted, as well as the oral argument of counsel presented on May 23, 2012. While the Court had reserved decision pending settlement discussions on a global level, it has recently become apparent through various correspondences from counsel that the parties are at an impasse in trying to achieve a global settlement, thus rendering a decision on these proceedings necessary.

FACTS

Prior to his death on January 18, 2008, the Decedent was the sole shareholder of Mastroianni Bros., Inc. (hereinafter referred to as the "Bakery"). The Decedent executed his Last Will and Testament on April 20, 2006, providing that all of his right, title and interest in the Bakery is to be conveyed to Mr. Daffner as the Trustee named therein, to be held in trust and to pay the income to the Decedent's wife, Tracy Mastroianni, during her life. Upon her death, the Trustee is to pay the remaining principal of the trust to the Decedent's siblings or their issue, per stirpes. The Decedent's Will was admitted for probate without objection on February 22, 2008. Simultaneous therewith, Mr. Daffner was appointed as the Executor and as the Trustee of the testamentary trust. Thereafter, in October, 2008, the Trustee elected to divide the trust into two separate trusts pursuant to EPTL §7-1.13 and IRC §2056(b)(7), thereby creating the Armond X. Mastroianni Credit Shelter Trust which holds 63% of the shares of stock of the Bakery, and the Armond X. Mastroianni QTIP Testamentary Trust which holds 37% of the shares of stock of the Bakery. The Trusts hold no assets other than the stock in the Bakery.

According to the Stockholder's Transfer Ledger for the Bakery, annexed to the Petition as Exhibit "H", a total of 114 shares of stock were originally issued to the Decedent's father, Pasquale Mastroianni back in 1996. From 1996 to 2002, the Decedent's father periodically transferred some of his shares of stock to the Decedent, in

increments of 4 shares at a time, totaling 28 shares. Then on August 7, 2002, the remaining 86 shares held by the Decedent's father were conveyed to the Decedent, making the Decedent the sole shareholder of all 114 shares of stock. These shares were transferred to the Decedent's Estate after the Petitioner was appointed Executor and Trustee, and then subsequently reissued to the Trusts. All 114 shares of stock that were originally issued remain outstanding, and are now owned by the Trusts in proportion to the percentages mentioned above. (See Exhibit "H").

The Petitioner represents that based on his personal involvement with the Bakery as its accountant and consultant prior to the Decedent's death, and then as Trustee since the Decedent's death, he has personal knowledge that the Decedent acted with full authority as the sole shareholder of the Bakery and that to his knowledge, the Decedent's mother never challenged his authority until August of 2009 when she retained counsel and asserted a claim to ownership of some of the shares of stock in the Bakery. Despite her retention of counsel, the Decedent's mother to date has not commenced an action to adjudicate her purported claim or otherwise filed a formal claim to establish her ownership of shares of stock in the Bakery.

LEGAL ANALYSIS

The Court will first address the Respondents' single argument in opposition to the Petition that this SCPA §2107 proceeding is not the proper proceeding for determination of the validity of title to property. In suggesting that the appropriate course of action would be to commence a plenary action in Supreme Court to resolve this title dispute, the Respondents are essentially arguing that this Court lacks the jurisdiction and power to adjudicate the issue of the ownership of the stock which is the sole asset of the Trusts.

The subject matter jurisdiction of the Surrogate's Court is derived from the New York State Constitution, Article VI, §12, which by an amendment effective September 1, 1962, expanded the historically limited jurisdiction of the Court and conferred jurisdiction "over

all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law." NY Const. Art. VI, §12(d). This broad jurisdiction has also been codified by statute. SCPA §201 delineates the general jurisdiction of the Surrogate's Court and specifically provides as follows:

> 3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

SCPA §201(3). In addition, the Surrogate's Court has extensive powers incidental to its jurisdiction, including but not limited to the power to "determine a decedent's interest in any property claimed to constitute a part of his gross estate subject to estate tax, or to be property available for distribution under his will or in intestacy or for payment of claims, **and to determine the rights of any persons claiming an interest therein, as against the decedent, or as between themselves**, and to construe any instruments made by him affecting such property." SCPA §209(4). [Emphasis added]. See also, SCPA §202, entitled "Enumerated proceedings not exclusive."

In construing the foregoing provisions of law, our State's Judiciary has consistently recognized the broad jurisdiction and powers of the Surrogate's Court to hear and decide all matters pertaining to a decedent's estate and all claims affecting the affairs of a decedent. The Court of Appeals in Matter of Piccione, 57 N.Y.2d 278, clearly defined the breadth of the Surrogate's Court jurisdiction over all matters that relate, even if only

peripherally, to a decedent's estate, and held that "[a]bsent the need for specific statutory authorization for a particular proceeding, the emphasis now shifted so that, 'for the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate.'" Id. at 288. The Court in that case found that the eviction proceeding brought by the executors in order to wind up the administration of the estate and sell the real property held by the estate was cognizable in the Surrogate's Court. Id. at 290. See also, Matter of Stern, 91 N.Y.2d 591, 598 ("the subject matter jurisdiction of New York's Surrogate's Courts is necessarily more embracive when it is the predominant tribunal for administering and preserving estate rights and assets").

Other courts have similarly ratified the expansive subject matter jurisdiction of the Surrogate's Court. See, Maki v. Estate of Ziehm, 55 A.D.2d 454 (Surrogate exercised jurisdiction over a stockholders' derivative action); Wagenstein v. Shwarts, 82 A.D.3d 628 (Surrogate had jurisdiction over a partition action); Goodwin v. Rice, 79 A.D.3d 699 (transfer to the Surrogate's Court of a breach of contract action was warranted); Cipo v. Van Blerkom, 28 A.D.3d 602 ("The Supreme Court and the Surrogate's Court have concurrent jurisdiction over the administration of a decedent's estate . . . However, '[w]herever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court'").

Applying these well settled principles to the case at bar, there can be no doubt that this Court has jurisdiction over the controversy concerning the ownership of the stock of the Bakery, the only asset of the Decedent's testamentary trust. Whether the Trusts own all of the stock of the Bakery or only some of the stock is clearly a matter that affects the administration of this estate. In other words, it certainly cannot be said that this controversy in no way affects the Decedent's estate when a resolution of this controversy will directly affect the extent of the assets for which the Trustee must eventually account

to the Trust beneficiaries.

Moreover, Mary Mastroianni's purported claim to part ownership of the Bakery stock apparently stems from the Decedent's father, Pasquale's, transfer of stock to the Decedent in 2002. Any challenge to the validity of that stock transfer, and the extent of the Decedent's ownership of the stock at the time of his death, clearly relates to the affairs of the Decedent and is therefore cognizable in this Court pursuant to the vast legal authority and precedents cited above.

Turning now to the issue of whether an SCPA §2107 proceeding for advice and direction is a proper proceeding within which to hear and decide the dispute over the ownership of the corporate stock, the Court begins with a recitation of the broad language contained in SCPA §2107(2), which provides that the "court may entertain applications by a fiduciary to advise and direct in other extraordinary circumstances such as . . . where there is conflict among interested parties". Clearly, the purported claim of the Decedent's mother to part ownership of the stock of the Bakery is in conflict with the Trustee whose position is and has always been that all of the stock was owned by the Decedent prior to and at the time of his death and is now owned solely by the Trusts.

To the extent that the Respondents argue that Mary Mastroianni is not an "interested party" in this proceeding because she is not a distributee of the Decedent nor a beneficiary of the Estate or Trusts, this fact is of no consequence. As quoted above, SCPA §209(4) gives this Court the authority "to determine the rights of **any** persons claiming an interest" in any property constituting part of the gross estate. SCPA §201(3) also grants this Court jurisdiction to "determine all questions . . . arising between . . . any party **and any other person** having any claim or interest therein" (emphasis added). In furtherance of this command, the Surrogate is not only permitted to but is required to join necessary parties "who might be inequitably affected by a judgment" so that "complete relief can be accorded between the parties". See, CPLR §1001(a) and SCPA §102

(provisions of the CPLR are applicable in *Surrogate's Courts* unless SCPA provides otherwise).

Mary Mastroianni, who is purportedly claiming an interest in property belonging to a testamentary trust, is clearly an interested party in this proceeding. Her rights, if any, to part ownership of the Bakery stock "might be inequitably affected" by the Court's decision in this proceeding. Complete relief could not be accorded unless Mary Mastroianni was made a party to this proceeding. Thus, despite the fact that she was not an interested party in the probate proceeding, nor would she have standing in a trust accounting proceeding, Mary Mastroianni was properly named as a party respondent in this proceeding to determine whether she has a viable claim to any part of the trust assets.

Nor does the Court find any merit to the argument that the Court should not entertain this proceeding because to do so would be merely to substitute the Court's judgment for that of the fiduciary. The Trustee is not asking this Court to exercise its business judgment over the administration of the Trusts. Rather, the Trustee needs the Court to give its advice and direction by resolving the legal dispute over the ownership of the Bakery stock so that the Trustee can effectively manage the business and pursue a sale of the business while having clear title to all of the stock. These extraordinary circumstances clearly bring this matter well within the broad scope of a SCPA §2107 proceeding. See, Matter of Morse, 150 Misc.2d 415, where the Surrogate entertained a SCPA §2107 proceeding to resolve an ownership dispute over a testamentary asset; Matter of DeChiaro, 35 Misc.2d 485, where a SCPA §2107 proceeding was used to resolve a family dispute regarding the ownership of corporate stock.

The Respondents' reliance on Matter of Gerold, NYLJ at 29 (Queens County Surrogate's Court Oct. 29, 1999), in light of the overwhelming statutory and common law authority to the contrary, carries no weight with this Court. The decision in that case offered no reasoning for the denial of the SCPA §2107 petition, and in any event, it is not

binding on this Court which has the discretion to entertain applications "in order to make a full, equitable and complete disposition of the matter as justice requires." SCPA §201(3).

Having found that this Court has jurisdiction over the stock ownership dispute and that a proceeding brought under SCPA §2107 is a proper proceeding for adjudication of this dispute, the Court can now turn to the merits of the dispute. Although the Respondents did amend their Answer to the Petition to deny the allegations that the Decedent was the sole shareholder of the Bakery at the time of his death, they have not in any of their papers before the Court addressed the merits of Mary Mastroianni's purported claim to part ownership of the stock. As stated earlier, the sole argument the Respondents made in opposition to the Petition was a procedural one, that this SCPA §2107 proceeding is not a proper proceeding within which to determine the validity of title to property. Not only did they not address the merits of any claim, they did not even describe to the Court the nature of the claim Mary Mastroianni would ultimately pursue.

Having failed to come forward with any proof in admissible form in support of a claim, or even present an argument as to the merits of a claim, the Respondents have failed to raise an issue of fact sufficient to warrant a hearing in this matter. The bare denial contained in the Respondents' Amended Answer that the Trusts solely own all of the Bakery stock, without more, is simply insufficient as a matter of law to raise a triable issue of fact or preclude a judgment being awarded summarily to the Petitioner.

Alternatively, even if the Respondents had raised a triable issue of fact preventing the Court from summarily granting the Petition, the Court agrees with the Petitioner that any claim Mary Mastroianni might have to some of the shares of stock is now barred by the applicable statute of limitations and the doctrine of laches. Based on the correspondences between counsel that are annexed to Attorney Massaroni's Affidavit in support of the Petition, it appears that Mary Mastroianni purports to challenge the validity of the August, 2002 stock transfer from the Decedent's father to the Decedent on the basis of fraud.

CPLR §213(8) governs the statute of limitations for actions based upon fraud which "must be commenced within six years from the date the cause of action accrued or two years from the time the claimant discovered the fraud, or could with reasonable diligence have discovered it, whichever is greater." Any cause of action based on fraud would have accrued on August 7, 2002, the date of the last transfer of stock to the Decedent, and therefore would have to have been commenced by August 7, 2008. Or, assuming that Mary Mastroianni did not discover the alleged fraud until August 18, 2009 at the very latest, which is the date of correspondence from counsel retained by Mary Mastroianni questioning the Decedent's sole ownership of the stock, her action would have to have been commenced at the very latest within two years of that date, or by August 18, 2011. No such action for fraud was filed before the expiration of the statute of limitations, nor has any such action or formal claim been filed to date.

Any claim Mary Mastroianni may have to set aside the August, 2002 stock transfer is also barred by the equitable doctrine of laches. See, Bryer v. Bank of New York, 72 A.D.3d 532, wherein the petitioner was found guilty of gross laches absent a valid excuse for the 12-year delay in seeking to vacate a probate decree; White v. Priester, 78 A.D.3d 1169, wherein the plaintiff's deliberate inaction in formally pursuing an ownership claim to real property, together with the prejudice caused by the 6-year delay, warranted application of the doctrine of laches; Dedeo v. Petra Inv. Corp., 296 A.D.2d 737, wherein the defense of laches operated as a bar to recovery when the neglect in promptly asserting a claim for relief caused prejudice to one's adversary.

Mary Mastroianni is clearly guilty of laches based on her lengthy delay and neglect in prosecuting her purported claim, resulting in prejudice to the Petitioner who has had to live with the threat of this potential claim for several years and certainly would be at a disadvantage if forced to defend against this claim years after the subject transaction since both parties to the transaction are now deceased. Mary Mastroianni's failure to formally

pursue an ownership claim to the Bakery stock is inexcusable and warrants application of the doctrine of laches.[1]

Simply put, any ownership claim that Mary Mastroianni may now try to pursue squarely falls under the Black's Law Dictionary definition of a "stale claim", which is one that "has long remained unasserted, or is first asserted after an unexplained delay, rendering it difficult for the Court to ascertain the truth of the matters in controversy and do justice between the parties." Where the delay is so long, it "creates a presumption against the existence or validity of the claim, or a presumption that the claim has been abandoned or satisfied. The doctrine is purely an equitable one, and arises only when, from the lapse of time and laches of the claimant, it would be inequitable to allow a party to enforce his or her legal rights at this time." Black's Law Dictionary, 5th ed.

Accordingly, for all of the foregoing reasons, the Court finds that Mary Mastroianni has no viable claim to ownership of any of the shares of stock of the Bakery. The Petition is hereby granted to the extent that the Court declares that the Trusts collectively are the holders of 100% of the shares of stock of Mastroianni Bros., Inc., and that Nathaniel H. Daffner, as the Trustee of the Trusts, is solely authorized to manage the day-to-day operations of the business and to make any and all decisions that owners of shares of stock of a corporation are authorized to make.

Lastly, with respect to the Cross-Petition to Compel an Intermediate Accounting of the Trusts, the Court finds that the Cross-Petitioner has not demonstrated a need for a formal accounting at this time given the extensive, informal financial disclosure that has been voluntarily produced to the Respondents by the Trustee in response to their questions and demands. In addition to a formal accounting being unnecessary, it would not be in the best interests of the estate to require the Trustee to devote resources to the

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1 Notably, nowhere in their opposition papers did the Respondents respond to or in any way address either the statute of limitations or the laches defense raised by the Petitioner.

preparation of an accounting at this time. See, SCPA §2205(1).

It is also premature to order a formal accounting of the Trusts at this time. No sale of the Bakery has yet occurred or is even on the horizon. As suggested by the Petitioner and the Respondent Tracy Mastroianni, the Court will revisit this issue towards the latter part of this year, and will entertain a renewal of this request at such time. The Cross-Petition is therefore denied, without prejudice to refiling it at a later date.

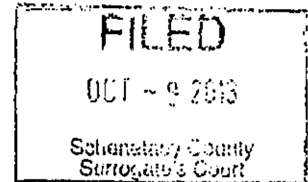
The parties' remaining arguments, to the extent not specifically addressed herein, have been considered and found to be unavailing. All other requests for relief that have not heretofore been granted herein, including any request by the Petitioner for an order confirming that he is authorized to sell the Bakery, are hereby denied.

The foregoing shall constitute the Decision and Order of this Court.

Signed at Schenectady, New York, this 6th day of August, 2012.

HON. VINCENT W. VERSACI
Surrogate

ENTER: August 6, 2012


FILED
OCT - 9 2013
Schenectady County
Surrogate's Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 4, 2013 515506

In the Matter of the Estate of
ARMOND X. MASTROIANNI,
Deceased.

NATHANIEL H. DAFFNER, as
Trustee of Certain Trusts
Made by the Will of
ARMOND X. MASTROIANNI,
Deceased,
Respondent;

MARY V. MASTROIANNI et al.,
Appellants,
et al.,
Respondents.

(Proceeding No. 1.)

MEMORANDUM AND ORDER

In the Matter of the Estate of
ARMOND X. MASTROIANNI,
Deceased.

MARY DRESCHER,
Appellant;

NATHANIEL H. DAFFNER, as
Trustee of Certain Trusts
Made by the Will of
ARMOND X. MASTROIANNI,
Deceased,
Respondent,
et al.,
Respondents.

(Proceeding No. 2.)

Calendar Date: February 13, 2013

Before: Mercure, J.P., Rose, McCarthy and Garry, JJ.

Melvin & Melvin, PLLC, Syracuse (Elizabeth A. Genung of counsel), for appellants.

McNamee, Lochner, Titus & Williams, PC, Albany (Christopher Massaroni of counsel), for Nathaniel H. Daffner, respondent.

McCarthy, J.

Appeal from an order of the Surrogate's Court of Schenectady County (Versaci, S.), entered August 6, 2012, which, among other things, dismissed Mary Drescher's application to compel an intermediate accounting of certain trusts.

Nathaniel H. Daffner is the trustee of two testamentary trusts of decedent's estate. The sole assets of the trusts are shares of Mastroianni Brothers, Inc., a corporation that operates a bakery. In 2009, respondent Mary V. Mastroianni, decedent's mother, contacted Daffner and informally asserted a potential claim to some of the corporation's shares. Daffner subsequently commenced proceeding No. 1 seeking advice and direction from Surrogate's Court (see SCPA 2107), specifically determinations on the ownership of the shares and Daffner's authority to control the affairs of the corporation. Several of the trusts' remaindermen opposed the petition, and Mary Drescher cross-petitioned seeking an intermediate accounting. Surrogate's Court granted Daffner's petition, holding that the trusts own 100% of the corporation's shares and Daffner, as trustee, had the right to control the corporation's affairs. The court dismissed the cross petition. Mary Mastroianni and remaindermen Anthony Mastroianni, Pasquale Mastroianni, Josepha Abba, Laura Salvatore and Mary Drescher (hereinafter collectively referred to as

respondents) now appeal.[1]

Surrogate's Court properly entertained Daffner's petition. Preliminarily, respondents do not attack the court's substantive determination on this issue, nor did they address the substance in their response to the original petition. Instead, they only argue that the court erred in entertaining Daffner's petition because SCPA 2107 is allegedly inapplicable in these circumstances. That statute provides that "[t]he court may entertain applications by a fiduciary to advise and direct in . . . extraordinary circumstances such as . . . where there is conflict among interested parties" (SCPA 2107 [2]). The court may entertain such applications in its sole discretion (see SCPA 2107 [2]). Respondents acknowledge that the court had jurisdiction over this proceeding (see SCPA 205; see also SCPA 201 [3]). Indeed, Surrogate's Court has jurisdiction over all matters that affect the affairs of a decedent or the administration of an estate, even without "specific statutory authorization for a particular proceeding" (Matter of Piccione, 57 NY2d 278, 288 [1982]; see SCPA 202; Matter of Lupoli, 275 AD2d 44, 51-52 [2000], lv dismissed 97 NY2d 649 [2001], lv denied 99 NY2d 503 [2002]).

Daffner's application specifically requested relief in the form of an order confirming that the trusts own 100% of the corporate shares and that he had the authority to act on behalf of the corporation. The application included the facts applicable to the requested relief and notice was given to the proper individuals (see SCPA 2101 [1] [c]; [3]). Even if the application was more in the nature of a request for a declaratory judgment (see CPLR 3001) than for advice and direction (see SCPA 2107 [2]), Surrogate's Court could ignore the improper form of the application and treat the matter as if it had been commenced in the proper form (see CPLR 103 [c]; SPCA 102; Matter of Van Patten, 190 AD2d 322, 326 [1993]; see also SCPA 2101 [1], [4]). Respondents did not address the substance of Daffner's

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[1] The trusts' other remaindermen take no position on appeal. The lifetime beneficiary supports Daffner's position on appeal.

application, instead raising only procedural arguments. Thus, Surrogate's Court properly entertained the application and did not abuse its discretion in determining the proper ownership of the corporate shares (see Matter of Van Patten, 190 AD2d at 326; cf. H & G Operating Corp. v Linden, 151 AD2d 898, 901 [1989]; Matter of Garofalo, 141 AD2d 899, 900-901 [1988]).

Surrogate's Court did not err in denying Drescher's cross petition seeking an intermediate accounting. Where a trust holds a controlling share of stock in a corporation, the trustee can be compelled to "disclose the details of the corporate activities" (Matter of Sylvester, 5 AD2d 970, 970 [1958]; accord Matter of Brandt, 81 AD2d 268, 276 [1981]). "Although the SCPA does not require a fiduciary to give periodic or intermediate accountings, where trusts are managed over a lengthy period trustees often account periodically" (Matter of Hunter, 4 NY3d 260, 267 [2005] [footnote omitted]). As for the timing of such accountings, certain persons may seek to compel an intermediate or final accounting, which the court may order a fiduciary to complete if such an accounting appears to be in the best interests of the trust or estate (see SCPA 2205; Tydings v Greenfield, Stein & Senior, LLP, 11 NY3d 195, 202 [2008]). A court's determination in this regard will not be disturbed absent an abuse of discretion (see Matter of Sangiamo, 116 AD2d 654, 654 [1986]; Matter of Taber, 96 AD2d 890, 890 [1983]).

Here, Daffner had provided respondents with financial information related to the trusts and corporation, including an informal interim accounting, financial statements for five years, tax returns for three years, and a confidential analysis and report prepared by a business consultant. Daffner also provided answers to 31 questions posed by respondents regarding the corporation's operations and finances, and offered to answer any further questions that arose. Surrogate's Court favorably considered the extensive voluntary financial disclosures provided by Daffner. Although respondents deemed the information and answers insufficient, the court did not abuse its discretion in finding that a formal accounting was not currently in the best interests of the trusts and denying the request for an intermediate accounting at that time.

Mercure, J.P., Rose and Garry, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

2018 NY Slip Op 51732(U)

In the Matter of the Kosmo Family Trust, dated July 18, 1994. LAURA E. KNIPE WIELAND, Petitioner, v. DONNA SAVINO, Respondent.

2018-235

New York Surrogate's Court, Albany County

Decided on December 3, 2018

Richard D. Cirincione, Esq., Attorney for Petitioner, McNamee Lochner, PC, 677 Broadway, Albany, New York 12207

William F. Ryan, Jr., Esq., Attorney for Respondent, Tabner, Ryan & Keniry, LLP, 18 Corporate Woods Blvd., Ste. 8, Albany, New York 12211

Stacy L. Pettit, S.

Pending before this Court is respondent Donna Savino's motion for summary judgment to dismiss the petition brought by petitioner, Laura E. Knipe Wieland, which seeks an order determining that the first, second and third amendments to the Kosmo Family Trust are void due to the lack of capacity of Janet D. Kosmo (hereinafter decedent) or the exercise of undue influence upon her by respondent. Respondent argues that petitioner lacks the authority to challenge the trust amendments. Petitioner opposes the motion, and the matter is submitted for decision.

Decedent died in December 2017, a resident of Orange County, California. She was survived by two of her three children, petitioner and Richard X. Knipe. Her third child, Claudia

Page 2

Knipe, was diagnosed with Down's Syndrome and resided in a group home where respondent worked as a health care worker, until her death in 2006. Decedent was also survived by two adult grandsons, Brent Knipe and Steven X. Knipe. In 1994, decedent and her spouse, Joseph Kosmo, created the Kosmo Family Trust, naming themselves as the trustees of the trust upon its creation. Kosmo died a resident of California in January 2013, predeceasing decedent. Under the 1994 trust, after the death of Kosmo and decedent, petitioner was to receive the residue of decedent's half of the trust, after some general gifts to other family members.

In 2008, decedent and Kosmo executed the Amendment and Restatement of the Kosmo Family Trust dated August 25, 2008. Pursuant to the terms of the 2008 trust, after the death of Kosmo and decedent, the remaining trust assets would be divided in half, and decedent's half would be distributed 90% to Richard X. Knipe and 10% to Charles Wendel. Thereafter, decedent executed three amendments to the trust, in 2013, 2015 and 2016. Pursuant to the 2013 amendment, the residue of decedent's share was left in equal shares to Steven Knipe and Brent Knipe, after a $25,000 gift to respondent and to decedent's friends. The 2015 amendment kept the cash gift to decedent's friends and left the remainder to respondent. Finally, the 2016 amendment left decedent's entire share to respondent. The trusts contain a choice of law provision, which provides that California law shall apply to the validity of the trust and the construction of its beneficial provisions, regardless of any change in the residence of the trustee.

Petitioner alleges that respondent exercised undue influence over decedent which resulted in decedent executing the amendments to the 2008 trust, ultimately removing her friends and family as beneficiaries and leaving the entirety of the trust assets to respondent. In March 2018, petitioner commenced this proceeding to

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invalidate the 2013, 2015 and 2016 amendments to the 2008 trust. Thereafter, jurisdiction was obtained over all interested parties. Respondent answered the petition, raising several affirmative defenses including inconvenient forum, and contemporaneously moved to dismiss the petition pursuant to CPLR 327. By decision and order of this Court dated May 29, 2018, respondent's motion to dismiss for inconvenient forum was denied.

Respondent then brought this motion for summary judgment under CPLR 3212 to dismiss the petition. Respondent asserts that petitioner did not have the legal authority to challenge the amendments to the 2008 amended and restated trust because petitioner was not a beneficiary of the trust under Cal Prob Code § 17200 and she did not have an interest in the 2008 trust at the commencement of the proceeding in March 2018. In July 2018, after this motion was made, petitioner's brother, Richard X. Knipe, assigned 50% of his interest in the 2008 trust to petitioner pursuant to Cal Civ Code § 699. In response to the filing of the assignment, respondent argues that standing must be established at the outset of the proceedings and cannot be established retroactively through a later assignment of interest. Respondent further argues that the proceeding is time barred because the assignment of interest took place after the statute of limitations to challenge the trust amendments expired pursuant to Cal Prob Code § 16061.8. In opposition, petitioner argues that the assignment of her brother's interest in the trust gave her standing to contest the amendments to the 2008 trust. Petitioner also asserts that respondent is precluded from raising a defense that the proceeding was barred by the statute of limitations because it was not raised in her answer or pre-answer motion as required by CPLR 3211 (e). Finally, petitioner argues that New York's six-year statute of limitations should apply under

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conflicts of law rules.

DISCUSSION

To determine whether petitioner has the legal authority to challenge the amendments to the 2008 amended and restated trust, it must be found by the Court that petitioner has both the legal capacity and standing to bring this proceeding. Capacity and standing are related, but distinguishable, legal concepts. Capacity is a threshold matter that seeks to determine whether "the legislature invested [petitioner] with authority to seek relief in court," whereas standing relates to "whether a party has suffered an injury in fact conferring a concrete interest in prosecuting the action" (Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 NY3d 377, 384 [2017] [internal quotation marks omitted]; see also Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 [1994]; Socy. of Plastics Indus. v County of Suffolk, 77 NY2d 761, 772-773 [1991]).

The Court must first consider whether California or New York law applies to the capacity and standing issues raised in respondent's motion to dismiss. Article VIII (E) and (F) of the Declaration of Trust dated July 18, 1994, along with all of the amended and restated trusts, contain a choice of law provision which states that "[t]he validity of this trust and the construction of its beneficial provisions shall be covered by the laws of the State of California in force on the date of execution of this instrument." A choice of law provision such as this one operates to apply California law to substantive issues, however, procedural matters are left to the forum state (see Tanges v Heidelberg N. Am., Inc., 93 NY2d 48, 54 [1999]; Kilberg v Northeast Airlines Inc., 9 NY2d 34, 41 [1961]). In determining whether an issue is substantive or procedural, the law of the forum applies (see Tanges v Heidelberg N. Am., Inc., 93 NY2d at 54; see also Nestor v Putney Twombly Hall & Hirson, LLP, 153 AD3d 840,

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842 [2d Dept 2017], lv denied, 30 NY3d 907 [2017]).

Under New York law, capacity is a substantive issue to be determined by California law (see Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 NY3d at 384). Respondent argues that petitioner lacks capacity to bring this proceeding, citing Cal Prob Code § 17200. This section provides that "a trustee or beneficiary of a trust may petition the court . . . concerning the internal affairs of the trust or to determine the existence of the trust" (Cal Prob Code § 17200 [a]). As explained by the court in Barefoot v Jennings, (27 Cal App 5th 1, 237 Cal Rptr 3d 750, 753 [2018], review filed [Oct. 19, 2018]), "[t]he plain language of section 17200 makes clear that only a beneficiary or trustee of a trust can file a petition under [this section]." However, this section is intended to allow beneficiaries and trustees operating under a trust agreement to resolve their disputes, and is not dispositive in the dispute before this Court because "[s]eparate proceedings against [a] trustee in his or her official or personal capacities are already available to resolve disputes regarding the validity of proffered trust agreements and are not foreclosed by the existence of section 17200" (Barefoot v Jennings, 27 Cal App 5th 1, 237 Cal Rptr 3d at 753-754; see Lintz v Lintz, 222 Cal App 4th 1346, 167 Cal Rptr 3d 50, 59-60 [2014]). Trust contests under California law on the basis of incapacity, undue influence and fraud may be brought by an "interested person" as defined in Cal Prob Code § 48, including "[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent" (Cal Prob Code § 48; see Lintz

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v Lintz, 222 Cal. App 4th 1346, 167 Cal Rptr 3d at 59-60).[1] Petitioner, as decedent's intestate heir, has capacity to bring this proceeding under the applicable law of California.

Whether petitioner has the legal authority to bring this proceeding also requires a determination that petitioner has standing. Under conflicts of law principles, standing "goes to the jurisdiction of the court" and is a procedural matter to be determined by New York law (*see Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig*., 30 NY3d at 384, *quoting City of New York*, 86 NY2d 286, 292 [1995]). To establish standing, New York courts require that a "litigant have something truly at stake in a genuine controversy" (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003]; *see also Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d at 772). Under New York's Surrogate's Court Procedure Act, a "person interested" includes "[a]ny person entitled or allegedly entitled to share as a beneficiary in the estate" (SCPA 103 [39]). The definition of "estate" under SCPA 103 (19) includes the property of a trust (*see Matter of Stephen Dehimer Irrevocable Trust*, 52 Misc 3d 1203[A] [Sur Ct, Oneida County 2016], *affd* 155 AD3d 1600 [4th Dept 2017]). The beneficiaries of a trust are defined as "the persons or classes of persons, or the successors in interest of persons . . . upon whom the settlor manifested an intention to confer beneficial interests (vested or contingent) under the trust, . . . [including] persons who have succeeded to interests of beneficiaries by assignment, inheritance or otherwise" (*Matter of Wells Fargo Bank*, 2018 NY Slip Op 31883[U] [Sup Ct, NY County 2018], *citing* Restatement [Third] of Trusts § 48, Comment a]). Although petitioner is the assignee of a beneficial interest under the 2008 trust, the assignment did not occur until four months after the commencement of this proceeding. While interests in trusts may be assigned under California law (*see* Cal Civ Code §§ 699; 1458), petitioner did not have an interest in the 2008 trust in March 2018 when this proceeding was commenced and therefore

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lacked standing to bring this proceeding (*see Matter of Brown*, 144 AD3d 587, 587 [1st Dept 2016]). Post-filing events do not cure standing defects that exist at the time a proceeding is filed (*see Shareholder Representative Servs. LLC v Sandoz Inc*, 46 Misc 3d 1228[A], 2015 NY Slip Op 50326[U] [Sup Ct, NY County 2015]). Accordingly, respondent's motion to dismiss is granted, without prejudice, given petitioner's lack of standing at the outset of this proceeding. It is noted that petitioner now has standing to commence a proceeding on the facts of this case, given the assignment of an interest in the trust. The dismissal of this proceeding is not on the merits.

Although unnecessary to the determination of this motion, the Court will address respondent's argument that, by the time petitioner had a pecuniary interest in the trust, the statute of limitations to challenge the trust amendments had expired under Cal Prob Code § 16061.8 because the 120-day time period to challenge the trust had expired. Under conflicts of law principles, statutes of limitations are procedural matters to be determined by the law of the forum because they are considered "as pertaining to the remedy rather than the right" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010], *quoting Tanges v Heidelberg N. Am.*, 93 NY2d at 54-55). In New York, the statute of limitations to set aside a revocable trust on the basis of undue influence and fraud is six years from the settlor's death (*see Tilimbo v Posimato*,

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20 Misc 3d 1116 [A], 2008 NY Slip Op 51366[U] [Sur Ct, Bronx County 2008]; CPLR 213). Respondent argues that even if the statute of limitations were to be determined under New York law, the Court must apply the shorter of the two time-periods pursuant to CPLR 202 because the cause of action accrued in California. This rule, which states that the shorter of the time limits should be applied except "where the cause of action accrued in favor of a resident of [New York]," is designed to prevent forum shopping by a *non-resident* and is inapplicable in this case (*see* CPLR 202). Petitioner is a resident of New York, and CPLR 202 requires the application of the New York statute of limitations in that case.[2] Finally, even if California law did apply, respondent waived the statute of limitations defense by failing to raise it in her answer or in a motion to dismiss pursuant to CPLR 3211 (e). Because this proceeding has not been dismissed on the merits and the Court has determined that the statute of limitations has not expired, petitioner may re-file this proceeding. Any remaining contentions, to the extent not specifically addressed, have been considered and found to be lacking in merit.

Accordingly, it is

ORDERED that respondent's motion to dismiss for lack of standing is granted, without prejudice.

This constitutes the Decision and Order of the Court.

Dated and Entered: December 3, 2018

Hon. Stacy L. Pettit, Surrogate

Papers Considered:

1) Respondent's Notice of Motion, Memorandum of Law and Affirmation of William F. Ryan, Esq. in Support of Respondent's Motion for Summary Judgment, with exhibits, dated June 29, 2018;

2) Assignment of Interest in Trust dated July 16, 2018;

3) Affirmation of Richard D. Cirincione, Esq., with exhibits, in Opposition to Respondent's Motion for Summary Judgment, dated July 25, 2018;

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4) Reply Affirmation of William F. Ryan, Jr., Esq., with exhibits, and Memorandum of Law in Support of Respondent's Motion, dated August 1, 2018;

5) Petitioner's Sur-reply in Opposition to Respondent's Motion for Summary Judgment, dated August 8, 2018;

6) Respondent's Memorandum of Law in Further Support of Summary Judgment, dated October 17, 2018;

7) Supplemental Affirmation of Richard D. Cirincione, Esq., with exhibits, and Supplemental Memorandum of Law in Opposition to Respondent's Motion, dated October 17, 2018.

Footnotes:

[1.] Under New York law, petitioner would also have capacity to challenge the amendments to the 2008 trust (*see Matter of Davidson*, 177 Misc 2d 928, 930 [Sur Ct, NY County 1998]).

[2.] It is noted that Respondent is also a resident of New York.

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43 Misc.3d 1214(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Surrogate's Court, Nassau County, New York.

In the Matter of the Proceeding to
Invalidate the Alleged Amendments to the
Living Trust of **John LEDDY**, dated
February 25, 2013 and March 15, 2013.

No. 2013–374927/A.
|
Feb. 28, 2014.

Attorneys and Law Firms

Nelson A. Vinokur, Esq., Long Beach, for Respondent.

Robert M. Harper, Farrell Fritz P.C., Uniondale, for Petitioners.

Opinion

EDWARD W. McCARTY III, J.

***1** In this proceeding to determine the validity of an amendment to an inter vivos trust, petitioners move for an order compelling disclosure.

Decedent died on March 18, 2013 survived by five children four of whom are the petitioners in this proceeding. A purported will of the decedent dated February 25, 2013 bequeaths the residue of the estate to an inter vivos trust. The instrument is on file with the court but has not been offered for probate. An inter vivos trust, dated April 12, 2011, designates the decedent/grantor as the income beneficiary and provides for the division of the remainder into equal shares for his children. A purported amendment to the trust directs the payment of the entire remainder to one child, Richard **Leddy**, respondent in this proceeding. Petitioners commenced this proceeding to determine the validity of the amendment.

At issue on this motion is the disclosure of communications between the decedent and the attorney-draftsman of the amendment. The attorney represents the respondent in this proceeding. At a deposition, the attorney refused to testify regarding communications with the decedent on the grounds of attorney-client privilege.

Barbara Ruff, one of the petitioners on this proceeding, is the nominated executor of the instrument dated February 15, 2013. However, she lacks standing to waive the privilege, in the capacity of executor (*Maryorga v. Tate,* 302 A.D.2d 11 [2d Dept 2002]) as the instrument has not been admitted to probate. She cannot receive preliminary letters testamentary as the instrument has not been offered for probate. Petitioners seek the issuance of temporary letters of administration for the purpose of exercising control of the privilege.

CPLR 4503 pertains to a proceeding concerning the validity, probate and construction of a will. Petitioners make a persuasive argument that the trust is the "functional equivalent of a will," based upon the pour over provision in the February 15, 2013 instrument. The court need not determine whether this meets the statutory requirement.

It is generally recognized that, in addition to the statutory exception, the privilege does not apply in a dispute between parties as to an interest in property which they claim through the same decedent (Restatement [Third] of the Law Governing Lawyers § 81 [2000]; *see also Matter of Levinsky,* 23 A.D.2d 25 [2d Dept 1965; appeal denied 16 N.Y.2d 484 [1965]; 1 McCormick on Evid. § 94 [7th ed.]).

It is therefore concluded, consistent with this court's decision in *Matter of Bronner* (7 Misc.3d 1023[A] [Sur Ct, Nassau County 2005]) that petitioners can examine the attorney as to communications with the decedent concerning the drafting of the amendment in question.

Settle order.

All Citations

43 Misc.3d 1214(A), 988 N.Y.S.2d 523 (Table), 2014 WL 1508829, 2014 N.Y. Slip Op. 50643(U)

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

New York County Surrogate's Court
Date: October 4, 2018

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In the Matter of a Proceeding for Various Types of Relief in Relation to a Trust Created by

LUCILLE B. WILLIAMS,

as Grantor,

under Agreement dated October 2, 2007.

---x

File No. 2012-2554/A/B

A N D E R S O N , S .:

Presently before the court is a motion for summary determination (CPLR 3212) in a contested proceeding involving a revocable trust (the "Trust") established by Lucille B. Williams (the "Grantor") on October 2, 2007, and restated by her on November 7, 2008, and on March 20, 2009.[1] The proceeding was commenced by Grantor's five stepchildren, who seek various types of relief in relation to the Trust. Movant, Grantor's daughter, asks the court to dismiss her step-siblings' petition.

Factual Background

To the extent that the facts are undisputed, they are as follows. Grantor died on October 9, 2011, aged 83, survived by movant as her sole distributee. On the date of Grantor's death, her probate estate had a value of approximately $200,000 and the Trust remainder had a value of more than $10 million. Grantor's second husband, Bob, to whom she was married for about 30 years, had died some 15 years earlier. The couple had each brought children to the marriage -- his four sons and a daughter and her son and daughter (in combination, "the seven children").

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[1]Movant purports to make this motion in the probate proceeding that is currently pending in Grantor's estate, as well as in the present proceeding. However, the probate proceeding is uncontested, and a motion for summary determination therein would be anomalous (*see* CPLR 3212[a]). Accordingly, the court must limit its analysis of the motion to the issues raised in the present proceeding.

With Bob's three older children already living independently, the household established by Grantor and Bob consisted of his two younger children and both of hers. Whether the blended-family arrangement generally fared as badly as movant alleges or as well as objectants would have it is a sharply disputed question. For present purposes it is enough to identify the points upon which the parties agree in such connection.

For one, from the start of their marriage Grantor and Bob in various respects took pains to be even-handed toward the seven children. For another, when Bob died, on December 27, 1995, he left his estate outright to Grantor, but only after directing (in a pre-residuary bequest) that $600,000 be divided among the seven children equally. Notably, the bulk of the assets that Bob left to Grantor consisted of securities held in a brokerage account then valued at approximately $10 million (the "Brokerage Account").

Another point of agreement among the parties is that Grantor and Bob had at some point established a practice of regular, joint, and equal giving to the seven children (and, from time to time, to the couple's grandchildren) in the form of semi-annual cash gifts celebrating the end-of-year holidays and the date of their marriage. It is undisputed that after Bob's death Grantor continued the tradition for years, but discontinued it in 2009, which was in several respects a pivotal year for her. That year was the first following the death of her son (movant's brother) as a result of a motorcycle accident on September 7, 2008, that had left him hospitalized as a paraplegic to the date of his death (December 20, 2008). Although the son's relationship with his step-siblings through the years is among the matters presently in dispute, all parties agree that the son's death was a deeply tragic loss for Grantor, who as she aged had come to rely increasingly on his companionship and assistance as to her household and other personal needs,

including the hiring of round-the-clock aides to help her cope with her various physical ailments. It is also undisputed that movant, who lived with her husband and children in Pennsylvania and whose contact with Grantor over the decades was mainly by telephone, came to occupy a considerably more important practical role in Grantor's life – with, as movant puts it, a relationship that was "stronger"after the son was hospitalized and then after he died. Although the frequency of the step-children's own in-person visits with Grantor over the years is itself a point of some disagreement, it is undisputed that only two of them lived in the New York area, but it is also undisputed that they remained in contact with Grantor by phone and in writing both before and after the son's death.

The record establishes that Grantor executed two testamentary instruments prior to the one now propounded as her will. The first, executed in 1984, left her tangibles and any real estate interests to Bob if he survived her and bequeathed her residuary estate to the seven children in equal shares. The second, executed in 2001, left the investment assets in the Brokerage Account – representing the bulk of her estate -- to the seven children, again in equal shares, with the residuary passing to her son and daughter.

The third testamentary instrument, now propounded as Grantor's will, was executed on November 7, 2008, on which date Grantor also executed a power of attorney and health care proxy naming her daughter as her agent (replacing Grantor's son as her agent under instruments executed at the time the Trust was created) . The third testamentary instrument left Grantor's tangibles to her daughter and her residuary to the Trust created about a year earlier. The original Trust agreement between Grantor and her son, the latter as her co-trustee, provided that at Grantor's death the investment assets in or traceable to the Brokerage Account were to be

divided equally among the seven children, with the balance of the Trust's assets (including her Manhattan apartment) to be divided between her son and daughter. An amendment of that instrument, executed concurrently with the propounded will, was prompted by the son's changed circumstances in the wake of his accident: it provided that his share of the remainder was to be held in further trust, and it replaced the son with the daughter as co-trustee. By contrast, a second instrument to amend the Trust (the "Trust Restatement") , executed some four months later and now at the center of the parties' dispute, substantially altered decedent's dispositive provisions for the remainder: under it, the entire trust remainder was left to Grantor's daughter, with a provision explaining that the absence of any gift to the step-children was not for want of love and affection for them but because, as the provision put it, they had been "adequately" provided for from other sources.

In their petition for relief concerning the Trust, the step-children seek to set aside the Trust Restatement on the grounds that Grantor lacked capacity to execute it and that it was the product of movant's fraud and undue influence. The step-children's other stated "grounds" for invalidating the Trust Restatement (lack of due execution, duress, "overreaching") are in essence mere variations of lack of capacity and undue influence.

Standards Applicable to Summary Determinations

Although on summary judgment motions the phrases "burden of proof" and "preponderance of the evidence" are occasionally invoked by the courts or, as in this case, repeatedly by the parties, the phrases are misplaced in such a context. Where a factual dispute is raised in an action or proceeding, at trial one of the parties will necessarily have a heavier burden than the other to prove or disprove the fact. However, the very premise of a motion for summary

judgment is that the material facts are not open questions and that the issues therefore can be determined as a matter of law, *i.e.*, without the need for trial. Thus, although a movant for summary judgment has an evidentiary burden, for purposes of the motion he does not have a "burden of proof" within the standard meaning of that phrase. Instead, the movant must submit evidence making a prima facie case for his position on the law, "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In considering whether the movant has made a prima facie case, a court must be mindful that she cannot do so through evidence that is hearsay as to her (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Nor may she do so through evidence that would violate section 4519 of the CPLR, the so-called "Dead Man's Statute" (*see Phillips v Kantor & Co.*, 31 NY2d 307).

Where the movant has succeeded in making a prima facie case of entitlement to a favorable ruling as a matter of law, the adversary must then demonstrate that a material issue of fact nonetheless is in genuine dispute ([*id.*]) and that a trial is therefore necessary (*see Zuckerman v City of New York, id.*). If the adversary fails to do so, the motion must be granted.

Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such relief should be considered with caution (*F. Garofalo Elec. C. v NY Univ.*, 300 AD2d 186, 188 [1st Dept 2002]. On the other hand, "timidity in exercising the power [to rule summarily] in favor of a legitimate claim and against an unmerited one ... contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation" (*Di Sabato v Soffes,* 9 AD2d 297, 299 [1st Dept 1959]).

On a motion for summary determination, the opposing party must be allowed the benefit

of any reasonable inference in that party's favor. Moreover, a credibility issue clearly points to the need for trial (*Dauman Displays v Masturzo*, *supra*, at 205). Finally, allegations by the party opposing the motion must be "substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 (2d Dept 1981), and mere speculation cannot serve as a substitute for proof (*see, e.g., Shaw v Time-Life Records*, 38 NY2d 201 [1975]; *Matter of Eastman*, 63 AD3d 728, 740 [2d Dept 2009]; *Matter of Hatzistefanou*, 77 Misc 2d 594 [Sur Ct, NY County 1974]).

<u>Motion for Summary Determination as to Capacity</u>

On the capacity issue, the parties disagree as to the standard of capacity that applies where the instrument in question involves a revocable trust. According to movant, the standard is fixed by the character of the Trust as a testamentary substitute, revocable as it was during Grantor's lifetime. Thus, movant contends that, to have executed the Trust Restatement effectively, Grantor needed no more than testamentary capacity – the least demanding condition of mind required of an individual executing a legal instrument (*see Matter of Coddington*, 281 AD 143 [3rd Dept 1952]). Under that standard, a testator must understand the nature and extent of his property and, at least on an elementary level, the function and content of the will disposing of that property, as well as that certain persons would ordinarily be the natural objects of his bounty (*Matter of Kumstar*, 66 NY2d 691 [1985]).

According to the stepchildren, by contrast, the standard of capacity applicable to the Trust Restatement, as a bilaterally executed instrument amending an "agreement," is the more demanding standard applied to contracts (*see Ortelere v Teachers' Retirement Bd.*, 25 NY2d 196, 202-203 [1969])(under traditional contract standard of capacity, party to employment-severance

contract must have ability to understand nature and consequences of transaction and to make a rational judgment concerning it);[2] *Blatt v Manhattan Med. Group, P.C.*, 131 AD2d 48 [party to contract had capacity where his mental faculties were sharp enough to allow him to understand nature of the give-and-take between himself and other party and to assess agreement's affect on his personal interests]; *see Matter of Goldberg*, 153 Misc 2d 560 [Sur Ct, NY County 1992] [same as to antenuptial agreement]).

As it happens, the capacity issue is a somewhat awkward one for each side. The problem for the step-children is implicit in their attempt to invalidate the Trust Restatement on the ground that Grantor was without capacity when it was executed, since they thereby risk raising a question as to her capacity to have created the Trust less than 18 months earlier. The problem for movant, on the other hand, is that the court in *Matter of ACN* (133 Misc 2d 1043 [Sur Ct, NY County 1986]) – the decision she claims as support for validating the Trust Restatement by applying the lower standard of testamentary capacity – did the exact opposite when it invalidated the trust involved in that case. The problem for both parties is that there is no square precedent to guide us on the capacity issue arising with respect to this revocable trust.

In the end, however, the very differences between this case and *ACN* point to the appropriate standard for determining capacity here. It was clearly pivotal to the *ACN* ruling that the charitable-remainder unitrust there at issue amounted to an irrevocable surrender of its grantor's full ownership of the entrusted property during his lifetime. Such a transaction was

[2]Although the enactment of Article 81 of the Mental Hygiene Law, in 1992, to some extent altered the effect of the *Ortelere* standard, it did not do so to the extent relevant to the issues here.

appropriately put to a more stringent test for validity than should be applied to the revocable gift in this case, which, viewed from the time the Trust Restatement was executed, would take effect (if ever) only upon the owner's death (*id.*, at 1046-1047).

The mere the fact that the Trust Restatement had two signatories did not per se make the instrument the product of a negotiated transaction warranting the more rigorous test for capacity that is appropriate to a negotiated contract. Rather, as another court has noted, the fact of two signatures on a trust "agreement" may be "largely a matter of form" (*Matter of Goldberg*, 153 Misc 2d 560, 565 [Sur Ct, NY County 1992]). In any event, the instrument creating the trust in this case was by its express terms amendable by Grantor unilaterally, and the dispositive change effected by the Trust Restatement therefore had not required any signature other than Grantor's and thus cannot be said to have entailed a negotiation requiring the degree of mental acuity on Grantor's part as would be demanded of a contract.

For the foregoing reasons, the court concludes that the gauge of capacity to be applied here is the less demanding, testamentary standard.

The question as to whether movant has made a prima facie case for capacity need not detain us long. As a threshold matter she is aided by the law's presumption of capacity (*see, e.g.*, *Matter of Betz*, 63 AD2d 769 [3d Dept 1978]; *Matter of Smith*, 180 AD 669 [2d Dept 1917]; *Jones v Jones*, 17 NYS 905, 908 [1st Dept 1892]["the legal presumption is that every man is compos mentis"]). In addition, movant has submitted the affidavit and deposition testimony of two lawyers, partners in the same firm, with whom Grantor consulted in relation to their preparation and her execution of the Trust Restatement, as well as the lawyers' written

memorializations of their discussions with Grantor concerning the Trust Restatement. The lawyers' separate accounts as to Grantor's responses and questions during their discussions near or at the time the Trust Restatement was executed describe a client who understood the nature of the legal steps that she was taking and of the property that would pass pursuant to those steps; who was aware of the identity of the natural objects of her bounty and of the provisions that she had made for them in the past; and who was mentally flexible enough to evaluate her estate-planning alternatives. Additional submissions by movant, including the affidavit and deposition testimony of, among others, one of the stepchildren and a home care aide who had worked for Grantor for some ten years (both before and after the Trust Restatement was executed), are consistent with the proposition that Grantor had not declined so far mentally that she would have been unable to execute a valid will or will substitute. In short, movant has made a prima facie case that Grantor had capacity for purposes of executing the Trust Restatement.

The stepchildren can successfully resist summary dismissal of their capacity objection only if their evidence puts movant's prima facie case for such dismissal into genuine question. To that end, they have submitted their own sworn statements and deposition testimony; the affidavit and deposition testimony of the home care aide; the deposition testimony of several of the medical doctors who treated Grantor within the last few years of her life; and the medical records of Grantor's several visits to hospitals in the years immediately preceding her death. The foregoing indicates that, by the time Grantor executed the Trust Restatement, she had suffered noticeable memory loss and instances of confusion. She had also experienced apparent delusions or hallucinations (repeatedly complaining of skin problems purportedly caused by lice or ticks, pests that were, however, undetectable to her medical providers, and repeatedly reporting to

police that she was being contacted by UFOs and terrorists).

But such proof of mental decline does not establish lack of capacity for purposes of probate. As precedents establish, even a diagnosis of Alzheimer's Disease or senile dementia would not per se disprove testamentary capacity if execution occurred during a lucid interval (*Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]; *Matter of Morris*, 208 AD2d 733 [2d Dept 1994]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]; *Matter of Villani*, 28 AD2d 76 [1st Dept 1967]; *Matter of O'Donnell*, NYLJ, Oct. 28, 2008, at 35, col 2 [Sur Ct, NY County]). Indeed, among objectants' own proofs are medical records, compiled near or after the Trust Restatement was executed, reporting that Grantor appeared to be "oriented" as to time, place, and person." Nor is incapacity proved by evidence that decedent entertained a delusional belief or experienced hallucinations unless – as does not appear to be the case here – a delusion or hallucination caused or altered the dispositive provisions of the propounded will (*see, e.g.*, *Matter of Honigman*, 8 NY2d 244 [1960] [remand to jury to determine whether delusion as to wife's infidelity was the basis for reduction of her inheritance]; *American Seamen's Friend Soc. v Hopper*, 33 NY 619, 625 [1865] [will invalidated by delusion if testamentary dispositions "were or might have been caused or affected by ... delusion"]; *Matter of Etoll*, 30 AD2d 224, 228 [3d Dept 1968] ["lack of capacity evidenced by abiding, insane delusion directed at the person who would normally be the principal or only object of testatrix'[s] concern and bounty"]).

In the absence of evidence that would create a genuine question as to capacity, the motion to dismiss the objection as to lack of capacity is granted.

Motion for Summary Determination as to Undue Influence

The premise of an objection alleging undue influence is that the legal instrument at issue expresses the wishes of someone other than the instrument's purported creator. This is not to say that influence per se is necessarily "undue." But where an instrument is proved to be the product of "a moral coercion, ... restraining independent action and destroy[ing] free agency, ... which, by importunity[,] ... constrained [the purported creator to execute the instrument] ... against [her] free will and desire," it must be invalidated (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]).

As is often noted, undue influence can seldom be demonstrated by direct proof, since such an influence rarely occurs in plain view (*Rollwagen v Rollwagen*, 63 NY 504, 519 [1876]), instead taking the form of a "subtle but pervasive" (*Matter of Neary*, 44 AD3d 949, 951 [2d Dept 2007]) manipulation of another that is aimed at displacing the other's volition with one's own. Proof of undue influence must establish more than a motive to achieve such effect on another and an opportunity to do so: it must establish also that such effect was actually achieved (*Matter of Fiumara*, 47 NY2d 845 [1979]).

It is movant's task on this motion to lay bare her proof that the Trust Restatement was a natural expression of Grantor's knowing and free wishes. To that end, movant is aided by the fact that she was by that point Grantor's only living child (and, indeed, her only close blood relative), a relationship that on the face of it could make her an unsuspicious choice as Grantor's sole beneficiary. Moreover, although movant's own affidavit largely consists of evidence that cannot be considered in support of summary judgment, movant is aided by the sworn testimony

of others, including the affidavit and deposition testimony of the two lawyers who prepared the Trust Restatement after discussions with Grantor and the deposition testimony of the financial adviser with whom Grantor consulted for many years, until her death.

The lawyers attest that Grantor, some eight years earlier, had independently chosen their firm to draft the 2001 will for her, and then eventually to draft the Trust and various other legal instruments. According to the lawyers, the change effected by the Trust Restatement was prompted by Grantor's fear that the stock market might continue the very sharp declines it had experienced in 2008 and the first quarter of 2009 and that movant would not be adequately provided for as a result. The testimony of the financial advisor (who, two days before the Trust Restatement was executed, participated in a meeting with Grantor, movant, and the lawyers) agrees with the lawyers' testimony on this point. According to one of the lawyers, Grantor had volunteered the observation that Bob's outright bequest to her of the Brokerage Account reflected his intention to leave her free to dispose of it at her death as she wished. Moreover, according to the financial adviser, decedent had expressly commented that the stepchildren were otherwise provided for by inheritance from their mother, who had died some ten years earlier. The lawyers further testify that Grantor had specifically considered, and expressly rejected, their suggestion that she leave relatively modest bequests to each of them, coupled with an in terrorem clause, in order to discourage them from challenging the Trust Restatement. The lawyers and financial adviser are agreed that decedent had demonstrated a strength of will in other respects as well, such as her insistence on making certain investments frowned upon by the adviser.

The foregoing evidence is sufficient to make a prima facie case for dismissal of the objection as to undue influence. It remains to be considered, therefore, whether the

stepchildren's proofs create a genuine question as to that case.

Those proofs include, inter alia, the affidavits of two of the stepchildren as well as of the former spouse of one of them and the companion of another; the deposition testimony of all five of the stepchildren (which, as opposition to a summary ruling, can be considered); movant's own deposition testimony; the affidavit and deposition testimony of Grantor's long-time home aide; the deposition testimony of several doctors with whom decedent consulted during the time period proximate to her execution of the Trust Restatement; and the various testamentary and trust instruments executed by Grantor, as well as Bob's probated will. The stepchildren's testimony describes various ways in which Grantor and their father took pains to blend their respective offspring as naturally as possible and to avoid even the appearance of favoritism. The stepchildren's testimony, corroborated by that of the home aide, also describes a continuing and amiable relationship between Grantor and the stepchildren after Bob's death. Although all but two of the stepchildren lived outside New York during the last decades of decedent's life, their evidence shows that they and Grantor, by occasional in-person visits, but largely by mail and phone, retained some closeness until her death.

Even viewed in light of the stepchildren's evidence of a long-time affinity and affection between them and Grantor, the absence of a beneficial provision for the stepchildren could not by itself create a genuine question as to undue influence. Nor could such question be raised solely by the fact that, by the time Grantor executed the Trust Restatement, circumstances had made her more dependent upon her daughter than ever before (*cf. Children's Aid Soc. v Loveridge,* 70 NY 387, 394-395) ("attachment arising from consanguinity, or the memory of kind acts and friendly offices ... cannot be regarded as illegitimate or as furnishing cause for legal condemnation").

However, such a question arises when the daughter's positioning vis-a-vis the mother is viewed in combination with other aspects of Grantor's situation at the time she executed the Trust Restatement.

Thus, there is the evidence that, by March 2009, Grantor's physical and mental frailty had been aggravated by Grantor's then-recent loss of the son who had been her daily mainstay; that some degree of Grantor's dependency upon the son had transmuted into some degree of dependency upon movant (as witness the power of attorney and health care proxy that Grantor gave movant when the son was no longer available to act under the same type of agency instruments that she had previously given him). There is the additional evidence that Grantor and Bob had for decades treated their children and stepchildren equally in relation to their worldly goods; that, until the Trust Restatement, Grantor's estate plan had continued the pattern of equal treatment as to the major property at her disposal – the Brokerage Account that the stepchildren's father had established, nurtured, and then bequeathed to her; that 18 months earlier, when the daughter was slated to receive only half of Grantor's assets outside the Brokerage Account, Grantor had seen fit to give her only one-seventh of the Account.

Also to be considered is the stepchildren's evidence that Grantor would not have had cause for the concern that movant attributes to her, *i.e.*, that movant had become less well-heeled financially as a result of her divorce and was thus in need of the entire Brokerage Account in addition to all of Grantor's net estate; and there is the fact that, until March 2009, the stepchildren's inheritance from their mother years earlier (such as it was) had not prompted Grantor to deny them the stakes in the Brokerage Account that she had given them under her prior estate plans. Added to that is the evidence that, in early 2009, Grantor had initially turned

to the lawyers to prepare an instrument amending the Trust that would have simply deleted the provisions for her now-deceased son, leaving the Trust on the same dispositive course as she had set for it a few years earlier. To be considered also is evidence that movant was a participant in the discussion with the lawyers, only a few days before execution of the Trust Restatement, during which Grantor first expressed an intent to depart from that course.

Furthermore, all of the foregoing is informed by two major elements in the record. The first, on the one hand, is the absence of evidence that Grantor's sentiments toward the stepchildren had critically changed by the time she executed the Trust Restatement. The second, on the other hand, is the presence in the record of movant's decades-long, almost palpable, animus toward her step-sister and stepbrothers. These two elements add to the genuineness of the question as to whether the Trust Restatement's elimination of benefits for the stepchildren, to movant's gain, was an expression of Grantor's wishes or her daughter's.[3]

As the First Department observed many years ago, "A change of intent from a formal instrument, with a carefully thought-out plan of distribution, to a subsequent plan which benefits a person charged with undue influence is always an important element for consideration in a contest" (*Matter of Brush*, 1 AD2d 625, 629 [1st Dept 1956], *quoting Matter of Lachat*, 184 Misc 492, 497 [NY County, 1944]). This of course is not to say that a major departure from the immediately preceding estate plan alone could support invalidation of the challenged instrument.

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[3]. In light of the foregoing, there is no present need to determine whether, as objectants contend, there was a confidential relationship between movant and Grantor that would significantly strengthen objectants' position as to undue influence (*see Matter of Satterlee*, 281 AD 251 [1st Dept 1953]).

Nor is it to say that a court may properly regard an instrument with suspicion solely on the basis that the change was in favor of an adult child who had sway over her parent. But there are several additional factors here to prompt concern as to the validity of the trust instrument in question: that the parent's mental and physical condition had by then been seriously compromised by advanced age and further buffeted by a traumatic event proximate in time to the challenged instrument; that the dispositive plan from which the challenged instrument departs was long-held; that the adult child participated in the process by which the past dispositive plan was radically altered in that child's favor, to the loss of beneficiaries for whom there is no evidence (outside of the challenged instrument itself) of change in the parent's heart. In such a case, the party claiming undue influence should be allowed to put the facts underlying that claim to the test of trial.

For the above reasons, the motion for summary dismissal of the petition on the ground of undue influence is denied.

This decision constitutes the order of the court.

Dated: October 4, 2018

SURROGATE

FILED
SURROGATE'S COURT
SUFFOLK COUNTY

DEC 19 2014

MICHAEL CIPOLLINO
CHIEF CLERK

SURROGATE'S COURT : SUFFOLK COUNTY

In the Matter of the Petition of Michelle Engstrom as a beneficiary of the

LEONARD B. HARMON 2003 TRUST,

Created pursuant to instrument, dated April 25, 2003, as restated by instrument dated January 27, 2010, for a decree determining and declaring invalid the instrument purporting to be a restatement of the LEONARD B. HARMON 2003 TRUST, dated January 27, 2012.

DECISION

By: HON. JOHN M. CZYGIER, JR., Surrogate

Dated: 12/19/14

File #: 2013-918

Before the court are a motion and cross-motion for summary judgment in the captioned proceeding. For the reasons set forth herein, respondent's motion is granted, in part, and denied, in part; petitioner's cross-motion is denied.

Background and Arguments

Leonard B. Harmon ("Harmon") died testate on November 27, 2012. His last will and testament, dated April 5, 2003, and a codicil, dated December 23, 2003, were admitted to probate by this court on November 22, 2013, whereupon letters testamentary issued to Richard Pinner and Harris Polanksy. The residuary estate, pursuant to the terms of said will, poured over into captioned trust. According to the probate petition, Harmon was survived by only one distributee, a paternal first cousin, who has no beneficial interest in his estate.

Petitioner describes herself as a close family friend, upon whom Harmon came to depend. According to petitioner, respondent Richard Pinner ("Pinner") is an attorney, who was Harmon's godson. It is alleged that Pinner was Harmon's attorney-in-fact, who orchestrated a change in Harmon's dispositive (trust) provisions in order to benefit himself and his sister.

As restated by the instrument dated January 27, 2010, Harmon made $100,000 bequests to petitioner, Maxine Pinner, Elizabeth Pinner, Richard Pinner and the Unitarian Universalist Congregation of the South Fork in Water Mill, New York. The balance of the trust was to be divided among Elizabeth Pinner Glezerman (3 shares), Richard Pinner (3 shares) and petitioner (2 shares). The instrument named Harmon, Pinner and Harry Polansky (an accountant

and friend) as trustees. According to the January 27, 2012 restatement at issue herein, Pinner was named sole trustee; $100,000 was bequeathed to petitioner, Maxine Pinner, Elizabeth Pinner Glezerman and Pinner; $25,000 was bequeathed to the Unitarian Universalist Congregation of the South Fork; and the residue was to be split between Pinner and his sister (Elizabeth). The instrument was executed ten (10) days after Harmon suffered a stroke and was residing in a nursing home. Petitioner alleges that Harmon was significantly impaired, at that time.

Respondent Pinner, in his responsive pleading, refers to petitioner as a housekeeper hired by Harmon's late wife who stayed on after her death; and that this proceeding is merely an expression of her disappointment in the gift left to her by the latest version of the trust, which was amended no fewer than six times in nine years. Pinner denies all allegations of undue influence and fraud; and registers a counterclaim against petitioner for funds allegedly owing the trust in an uncertain amount (less than $2,000).

In her reply to the counterclaim, petitioner avers that the counterclaim fails to state a cause of action and is barred by the doctrine of laches, unclean hands, waiver and estoppel.

It is noted that the Office of the Attorney General has also filed a responsive pleading in this matter, asking the court to determine the allegations made in the petition.

Respondent Pinner has moved for summary judgment, supported by numerous exhibits obtained during the course of discovery, claiming that Harmon communicated all changes embodied in his most recent restatement of trust to his personal attorney (Attorney Hager) in private conversations more than a month before the stroke he sustained on January 17, 2012. Pinner alleges that he did not contribute to the most recent restatement, which was, he maintains, not a significant deviation from prior iterations of the trust. It is also Pinner's argument that Harmon's care givers and medical providers all assessed his mental status just before execution of the 2012 instrument and found him to be competent.

Pinner and his sister Elizabeth were Harmon's godchildren, the children of a very close friend of Harmon's who is deceased. They are named in each of the versions of the trust executed after Harmon's wife died in 2003.

Medical records obtained from Stony Brook University Hospital for the period following Harmon's transfer from Southampton Hospital (January 17, 2012 - January 20, 2012) where he was initially hospitalized after a stroke affected his speech, repeatedly refer to Harmon as alert, oriented and able to communicate and make his needs known. Such descriptions continued upon his admission to Smithtown Center for Rehabilitation and Nursing Care on January 20, 2012 and continued through the morning of January 27, 2012. Indeed, Pinner notes that Harmon's examining physician opined that he had full mental capacity and his social worker concluded that he could participate in medical decisions.

Respondent Pinner argues that the record reflects that Harmon's attorney (Hager) delivered the drafted version of the 2012 restatement to Pinner so that he could obtain Harmon's execution of same. When questioned during his deposition in this matter, Hager testified that Pinner was unaware of the dispositive provisions in the latest restatement, and that he (Hager) was unaware of any cognitive impairment affecting Harmon's ability to sign the papers, which had been discussed and drafted before Harmon's stroke. Harmon himself told the staff at Smithtown Center that someone would be bringing him documents to sign and that he would require a notary. The social worker noted in her progress notes that Harmon had a clear understanding of what he was signing. The notary confirmed that her signature on the document reflected that she was satisfied that Smithtown Center's policy had been followed concerning Harmon's understanding with respect to the instrument he was signing.

Pinner also refers to the testimony of a private duty nurse (Baan), who saw Harmon at Smithtown Center and attested to his recognizing her and watching the game show Jeopardy on television and answering correctly, as supporting his allegations of Harmon's cognitive awareness.

It is Pinner's argument that, not only is there no evidence of undue influence, but the trust agreement, although amended six times, consistently left the majority of assets to Pinner and his sister Elizabeth. According to Pinner, petitioner is the one who explained why Harmon reduced the bequest to the Unitarian Universalist Congregation of the South Fork in the 2012 restatement. In fact, Pinner stresses that Harmon was handling his own finances up until the time he suffered the stroke in January 2012, and that it was petitioner who sent Pinner the checkbook so that Harmon's bills could be paid. Pinner notes that Harmon's

financial advisor discussed investments with Harmon up until August, 2012; and, while acknowledging that his physical health was in decline, his mind was still sharp.

Based on the foregoing view of the facts at his disposal, Pinner maintains that petitioner, who Pinner argues has the burden of proof on issues of undue influence and Harmon's mental acuity, cannot offer more than speculative and conclusory allegations concerning these issues. It is Pinner's argument that petitioner must overcome a presumption of competency; and that the mere fact that Harmon had a stroke does not, in and of itself, establish the contrary. Harmon was not isolated and, apparently, had access to various care givers, as well as acquaintances. Further, Pinner claims that he took no action either under the power of attorney or as co-trustee. It is also claimed that the court should counterbalance the power of attorney with Pinner and Harmon's "close, family-like relationship" (Memorandum of Law in Support Pinner's Motion for Summary Judgement, p.38).

In addition, Pinner argues that there is no evidence of fraud. No statement appears to be forthcoming that would allow for the conclusion that Pinner exercised fraud in order to obtain the latest restatement of trust. Nor is there any evidence supporting an allegation of duress.

Finally, Pinner contends that the 2012 restatement was executed in accordance with the requisites of EPTL 7-1.17(a).

In opposition to the motion and in support of her cross-motion for summary judgment, petitioner essentially claims that Pinner is cherry-picking the evidence obtained during discovery. Pinner stood in a confidential relationship with the decedent when the 2012 restatement was executed and that it was not properly acknowledged, making it void *ab initio*. Further, she claims that Harmon's capacity is a question of fact, which should be submitted to the trier of fact. It is noted that petitioner filed a jury demand on May 1, 2013.

Petitioner maintains that, after the death of Harmon's wife in 2003, she (petitioner) became "most precious" (Affirmation in Opposition..., p.2, ¶4) to Harmon whose health steadily waned in the years since his wife's death. By 2011, there are indications that Harmon was suffering from memory loss, noted by Pinner in an email at the end of 2011. Petitioner argues that Harmon was a different man after the stroke in January, 2012.

Leonard B. Harmon 2003 Trust

It is petitioner's claim that the execution presided over by Pinner was botched and that the notary admitted during depositions that no acknowledgment took place, as required by EPTL 7-1.17.

An email exchange between Pinner and Harmon's attorney Hager reflects an advance discussion concerning the changes to the 2012 restatement, including questions concerning Harris Polansky's continuing as co-trustee.

Petitioner maintains that, as Pinner was in a confidential relationship with Harmon, the burden of proving that the 2012 restatement was procured without undue influence is Pinner's burden.

It is petitioner's contention that she began working as a housekeeper for Harmon in the 1980's, but eventually after his wife passed, they became the "closest of friends" (Affirmation in Opposition..., p.7, ¶23).

Petitioner refers to medical records obtained from Harmon's primary care physician (Dr. Dempsey) indicating that Harmon was being treated for depression and memory loss as early as 2009, and was referred to a neurologist in 2011 for memory loss.

Petitioner produces emails generated by Pinner in 2011 indicating that he felt Harmon's cognition was waning, and contacting Harmon's legal advisors to curtail transactions undertaken by Harmon without his (Pinner's) approval. This allegedly became more compelling after Harmon's stroke in January, 2012. Petitioner produces medical records from Stony Brook University Hospital, indicating that an occupational therapist noted Harmon's impaired orientation and limited cognition. Petitioner, as Harmon's health care agent, signed the papers after Harmon's stroke for his medical treatment. Upon Harmon's transfer to the Smithtown Center, petitioner points to a short term care plan produced as an exhibit that indicates Harmon was confused and was alert and oriented only as to person (not place). Cognitive decline was noted in his occupational therapy progress reports subsequent to the date of the January, 2012 trust restatement.

Petitioner maintains that respondent Pinner acted as Harmon's attorney-in-fact, and often attorney-at-law, after the stroke. Attorney Hager's deposition testimony supports the contention that Hager came to the conclusion that Harmon suffered a small stroke and had capacity to execute the trust restatement.

On his sole visit to the Smithtown Center, Pinner brought the trust restatement, documents concerning Harmon's social security and military pension, and a deed to effectuate the transfer of Harmon's home into the trust.

Petitioner points out inconsistencies in the Smithtown Center's social worker's deposition, argues that the notary did not verify Harmon's identity and could not establish that an acknowledgment took place.

Petitioner supports her arguments with affidavits from a licensed practical nurse who tended Harmon from 2010 to 2012 (Baan); Harmon's accountant, long time friend and co-trustee (Polansky); a personal friend (Greenberger); Harmon's minister (Cornish); an aide who provided care to Harmon from 2007 until his death (Lowig); and petitioner's spouse (Engstrom). All of these individuals attest to petitioner and Harmon's devotion to each other and the change in his condition after the stroke he suffered in January, 2012.

In response to the foregoing, respondent Pinner produces an affidavit from Attorney Hager, who emphasizes his private discussions with Harmon concerning the changes Harmon himself wanted to make to the trust on three separate occasions before Harmon had his stroke. Hager insists that he did not take direction from Pinner concerning the trust restatement, but merely answered Pinner's questions concerning administration of the trust. Hager states that it was his suggestion that Pinner take the draft to Harmon for execution, when he learned that Harmon would not have received the draft(s) sent to Harmon's home while he was either in the hospital or the nursing home. Hager further insists that Pinner knew nothing about the dispositive provisions of the restatement before he was asked to bring them to Harmon for execution.

Also in reply to petitioner's papers, respondent Pinner reiterates his position that petitioner is merely disappointed with the specific bequest Harmon left her in the 2012 trust restatement, and that petitioner has failed to demonstrate fraud or duress, or establish that Pinner wielded power over Harmon. Pinner emphasizes the notes of medical personnel minutes before the trust execution to show that Harmon was alert and oriented, with the requisite understanding, ***at that time*** (emphasis added), dismissing his sister Elizabeth's testimony that Harmon had experienced a cognitive decline as the result of a comparison of Harmon to his younger self

and not the more objective measurement employed by Harmon's care givers and medical providers.

With respect to the acknowledgment, the notary had no independent recollection of the event, but Pinner notes that she testified that her usual practice and the facility's policy required that she determine whether Harmon understood what he was signing.

Pinner argues that all indications from Harmon's medical records and providers' notes reflect that he had capacity at the time the restatement was executed. He further states that petitioner was named as a residuary beneficiary on only one iteration of the trust (the 2010 restatement), the residuary bequests to Pinner and his sister Elizabeth appear in each iteration.

In short, Pinner argues that all indications are that Harmon had capacity at the time the 2012 restatement was executed, petitioner has failed to satisfy the requisites of her undue influence claim and has not demonstrated the presence of a disparate power of Pinner over Harmon sufficient to establish that a confidential relationship should shift the burden of proof to respondent Pinner, has provided no admissible evidence of fraud or duress, and has failed to provide evidence that the restatement was not properly acknowledged, pursuant to EPTL 7-1.17(a).

Discussion and Analysis

Summary judgment is designed to eliminate from the trial calendar litigation that can be resolved as a matter of law (see *Andre v. Pomeroy*, 35 NY2d 361). The court's burden is not to resolve issues of fact, but merely to determine if such issues. exist (see *Dyckman v. Barrett*, 187 AD 2d 533). It is a drastic remedy that will only be awarded where there is no triable issue of fact (see *Barclay v. Denckla*, 182 AD2d 658). The court, therefore, must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person of her day in court (see*Russell v. A. Barton Hepburn Hospital*, 154 AD2d 796).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Zarr v. Riccio*, 180 AD2d 734). Failure to make out a *prima facie* case requires a denial of the motion regardless

of the sufficiency of opposing papers (see *Winegrad v. New York University Medical Center*, 64 NY2d 851). If, however, this burden is satisfied, the burden of going forward shifts to the opposing party to establish the existence of material issues of fact requiring a trial (see *Romano v. St. Vincent's Medical Center*, 8 AD2d 467), by the tender of evidentiary proof in admissible form (see *Friends of Animals, Inc. v. Associated Fur Manufactures Inc.*, 46 NY2d 1065).

EPTL 7-1.17(a) requires that:

> Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

A copy of the 2012 trust restatement reflects the signatures of Harmon, as grantor and trustee, and Pinner, as trustee. Both signatures are notarized; Pinner's on January 30, 2012, and Harmon's on January 27, 2012 by Donna M. Paliugli, stating that Harmon "...personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual...executed the instrument as grantor and trustee."

In the notary's deposition testimony (Cross-Motion Exhibit KK), she testified that she does not notarize a Smithtown Center resident's documents unless a social worker advises her that the resident understands what he/she is signing (Paliugli Deposition Transcript, pp. 18-19). She had no independent recollection of notarizing Harmon's signature (Paliugli Deposition Transcript, p. 22, l.4), but then testified to her usual procedure when asked to notarize a resident's signature. This procedure includes being present when a social worker, who the deponent later indicated asks all the questions during the process, identifies the resident (Paliugli Deposition Transcript, p. 25, ll.13-15).

This process was also the subject of social worker Duffy-Phillip's deposition, who testified that while assessing a resident's ability to make a decision, she does not take into account the complexity of the specific document being signed (Duffy-Phillip Deposition Transcript, p.34, ll.16-21, Cross-Movant Exhibit LL). The social worker also indicated that her notes reflected that Harmon verbalized to her his understanding of what it was he was signing (Duffy-Phillip Deposition Transcript, p.56, ll.15-25).

It is petitioner's argument that, in the absence of an oral declaration by Harmon and the notary's verification of Harmon's identity, the certificate of acknowledgment attached in accordance with RPL §306 is meaningless (Petitioner's Memorandum of Law in Support of Cross-Motion, p.17). Petitioner cites *Galetta v. Galetta*, 21 NY3d 186 for this proposition. In response to this argument, Pinner notes that petitioner has the burden of proving that the document was not properly executed, citing language from *Galetta, supra,* to argue that all the relevant statutes require is that the notary knew the signer or obtained satisfactory evidence of the signer's identity (RPL §303), its primary purpose being to prove the identity of the signer.

The court finds that the statutory requisites of EPTL 7-1.17(a) concerning acknowledgments has been satisfied by the statement that the notary received proof "...on the basis of satisfactory evidence..." that Harmon was the individual whose name was subscribed on the 2012 trust restatement, and upon the notary's testimony concerning the process she followed when asked to notarize an instrument for a resident.

Before addressing the claims of undue influence, fraud and duress, the court must address the allegations concerning whether respondent Pinner stood in a confidential relationship with Harmon.

The burden of establishing the existence of a confidential relationship rests with the party asserting it. A confidential relationship may be inferred if one party has disparate power over the other such as the power of an attorney, an attorney-in-fact, guardian, clergymen, doctor or nursing home director *(Matter of Zirinsky,* 10 Misc3d 1052(A)*8, *aff'd.* 43 AD3d 946, *lv den.* 9 NY3d 815; see also *Matter of Hoerter*, 15 Misc3d 1101(A)*9; citing *Ten Eyck v. Whitbeck*, 156 NY 341, 353), where a confidential relationship is said to exist as a matter of law. The law recognizes, however, that a close family relationship

"counterbalances any contrary legal presumption" and it has been said that an "explanation by the [agent] is not required" (*Matter of Hoerter*, supra; citing N.Y. PJI 7:56; other citations omitted).

The relationship between an attorney-in-fact and the grantor of that power of attorney is one which can rise to the level of a confidential relationship when the relationship is one of disparate power (see *Estate of Lee*, 11/23/2009 NYLJ p.41, (col.5); citing *In re Petix*, 15 Misc3d 1140(A)). As indicated, despite the existence of a power of attorney and any presumptions that may arise through this relationship, a close family relationship can "counterbalance any contrary legal presumption" (*In re Walther's Will*, 6 NY2d 49; *In re Moskowitz' Will*, 279 AD 660, *aff'd*, 303 NY 992; *In re Camac*, 300 AD2d 11). The essence of the confidential relationship is the disparate power of one party over another (*In re Zirinsky*, 43 AD3d 946; *Ten Eyck v. Whitbeck*, 156 NY 341) where one party is in a position of weakness, dependence or trust (*Gordon v. Bialystoker Center and Bikur Cholim, Inc.*, 45 NY2d 692, 699; *In re Mazak*, 288 AD2d 682). When one acts as attorney-in-fact for another, he is considered the agent of the principal and from such agency necessarily flows a relationship of trust and confidence that the agent will act with the utmost good faith and loyalty toward the principal (*In re Estate of DeBelardino*, 77 Misc2d 253). Once a confidential/fiduciary relationship is found to exist between the parties, transactions between them must be scrutinized with extreme vigilance and there must be a clear showing of integrity and fairness (*Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim*, *supra*). Thus, under certain circumstances, such transactions are presumed void (*Cowee v. Cornell*, 75 NY 91). In the absence of such proof, the transaction must be set aside.

In the case before the court, Pinner maintains that he merely used the power of attorney to pay Harmon's bills after he became ill. While petitioner alleges that Pinner also drafted the deed, effectuating the funding of Harmon's home into the trust, which was executed when the 2012 restatement was executed, Pinner argues that every allegation petitioner makes concerning his alleged use of the power of attorney took place after the restatement was executed.

The court does not accept Pinner's contention that there was a close "family-like" relationship negating any possible finding of a confidential relationship as the only relationship enunciated here was one of a "god child" of Harmon, and, as such, is too far removed to be considered a "close family relationship" (*Matter of Hirschorn*, 11/5/2008, NYLJ p.36, (col.3)). The court, however,

cannot conclude that petitioner has established as a matter of law that the relationship between Pinner and Harmon was confidential. Pinner resided and worked in New York City and was rarely a presence on Harmon's property. All indications from the evidence before the court is that he was unaware of the 2012 restatement dispositions until shortly before its execution. The use of the power of attorney was only demonstrated after the fact of the restatement's execution, and there is no evidence that Pinner exercised any authority as co-trustee of the trust up until that time.

While Harmon may have been in decline prior to his stroke, there is no demonstrated dependency on Pinner for his daily care. Reliance on someone in order to pay bills does not rise to the level of disparate power necessary to allow for the conclusion that this was a confidential relationship (*Estate of Stanton*, 12/5/2014, NYLJ p. 22, (col.6); citations omitted).

Assuming that petitioner has laid bare her proof, she has failed to establish that Pinner had a confidential relationship with Harmon allowing for the burden of proof to shift on the issues of fraud, duress and undue influence (see *Weber v. Burman*, 22 Misc3d 1104(A)*6; citing *Matter of Connelly*, 193 AD2d 602, *lv den.* 82 NY2d 656; *Sepulveda v. Aviles*, 308 AD2d 1, 7; *Matter of Gordon v. Bialystoker Center & Bikur Cholim, Inc.*, 45 NY2d 692, 699; other citations omitted; *In re Mazak*, 288 AD2d 682).

The elements of fraud include a knowing misrepresentation of a material fact, deception, and resultant injury (see *Matter of Zirinsky*, 43 AD3d 946; *Matter of Spangenberg*, 248 AD2d 543; *Matter of Walther*, 6 NY2d 49). An instrument may be set aside for fraud where the signer knew the contents of the instrument he executed, but was induced to execute it by the fraudulent representations of the grantee under such instrument or of someone in privity with the grantee (see *Matter of Coniglio*, 242 AD2d 901). There is absolutely no proof in the record before the court that Harmon was induced to sign the 2012 restatement by any fraudulent misrepresentations made by Pinner.

Nor is there any proof that Harmon was under duress or being threatened in any way (see *In re Estate of Rosasco*, 31 Misc3d 1214(A)).

Petitioner also has the burden of proving that the trust amendment was the product of undue influence. The influence

exerted must amount to a moral coercion which restrained Harmon's independent action and destroyed his free agency, or which constrained him to do something against his wishes (*Matter of Walther, supra;* see also *Matter of Fiumara's Estate,* 47 NY2d 845; *Matter of Efros,* 19 Misc3d 1113(A)).

To establish the undue influence claim, petitioner must show (1) the existence and exercise of undue influence; (2) the effective operation of undue influence as to subvert the mind of the grantor at the time of the execution of the testamentary instrument; and (3) the execution of a testamentary instrument that, but for undue influence, would not have occurred. Thus, the three elements are motive, opportunity and the actual exercise of the influence (*Matter of Walther, supra; Matter of Foranoce,* NYLJ, 8/7/2000, 25 (col. 6); citing, *Matter of Fiumara, supra; Matter of Holly,* 16 AD2d 611, *aff'd,* 13 NY2d 746). Among the factors to be considered when the court is asked to make a determination concerning a claim of undue influence are: (1) the testator's or principal's physical and mental condition; (2) whether the attorney who drafted the will (or instrument at issue) was the testator's/grantor's attorney; (3) whether the testamentary instrument at issue deviates from the testator's/grantor's prior testamentary pattern; (4) whether the person who allegedly wielded undue influence was in a position of trust; and, whether the testator/grantor was isolated from the natural objects of his affection (*Weber v. Burman,* 22 Misc3d 1104(A)*7; citations omitted).

As indicated above, there is no indication that Pinner influenced Harmon to make the 2012 changes to the trust. All indications, including the testimony of his personal attorney (Hager) are that the changes sought were drafted prior to Harmon's stroke and Pinner's increased participation in Harmon's affairs.

Petitioner has raised a triable issue of fact concerning whether Harmon had the requisite capacity at the time the 2012 restatement was executed. A person is, of course, presumed competent and it is up to the person challenging that competence to establish incapacity at the time the action, execution of the contested document(s), took place (*Matter of Obermeier,* 150 AD2d 863). On this record, it is unclear whether Harmon fully understood the terms of the trust at the time of its execution (see *Estate of Roth,* 9/15/2006, NYLJ, p. 33, (col.1); *Matter of Prevratil,* 121 AD3d 137). Even Pinner's papers admit that there were good days and bad days (Respondent's Memorandum of Law in

Further Support, p. 22). The court agrees that the moment of execution is the time at which Harmon's capacity must be measured. Indeed, Pinner almost appears to be arguing that, having directed his attorney to make the disputed changes in the trust agreement, Harmon's execution of same may be treated as a ministerial act.

While Pinner characterizes the testimony and assessment of the social worker and the medical records as "overwhelming" compared to Baan's testimony concerning Harmon's condition on the day in question and other medical records indicating an aging man in decline for at least a few years, this issue should be left to the trier of fact.

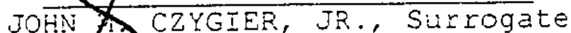
Accordingly, for the reasons set forth herein, it is

ORDERED that respondent Pinner's motion for summary judgment is granted solely to the extent of dismissing petitioner's claims sounding in fraud, duress, undue influence and improper execution; and it is further

ORDERED that the motion is denied with respect to petitioner's claims that Harmon lacked capacity on the day the 2012 restatement was executed, petitioner having raised triable issues of fact with respect thereto; and it is further

ORDERED that petitioner's cross-motion for summary judgment or partial summary judgment is denied.

Counsel for the parties shall appear in the Suffolk County Surrogate's Court on January 22, 2015 at 9:30am for further proceedings consistent herewith.



JOHN M. CZYGIER, JR., Surrogate

Farrell Fritz, P.C.
By: Frank T. Santoro, Esq.
Attorneys for Petitioner
1320 RXR Plaza
Uniondale, New York 11556

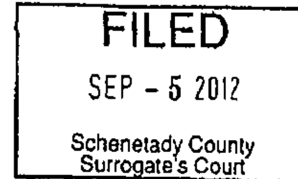
Leonard B. Harmon 2003 Trust

Greenfield Stein & Senior, LLP
By: Elana L. Danzer, Esq.
Attorneys for Respondent
600 Third Avenue
New York, New York 10016

Shlom & Littman, Esqs.
Attorneys for Unitarian Universalist
Congregation of the South Fprk
370 Lexington Avenue, Suite 202
New York, New York 10017

Office of the Attorney General
Of the State of New York
By: Robert R. Molic, Esq.
Assistant Attorney General
Charities Bureau
120 Broadway
New York, New York 10271

STATE OF NEW YORK
SURROGATE'S COURT   COUNTY OF SCHENECTADY



In the Matter of the Application of
DEBRA LECHLEITNER
As Limited Administrator of the

Estate of HARRY L. GRAEVE,

Deceased,

To Discover Property Withheld.

DECISION/ORDER

File No. 2010-126/B

APPEARANCES:

Attorneys for Petitioner Debra Lechleitner
Parisi, Coan & Saccocio, PLLC
Gerard F. Parisi, Esq., of counsel
376 Broadway, 2nd Floor
Schenectady, New York 12305

Attorneys for Respondents Harry S. Graeve and Karen Szubinski
Michael L. Breen, Esq.
P.O. Box 982
109-1 Railroad Avenue
Middleburgh, New York 12122

VINCENT W. VERSACI, S.

The Petitioner, Debra Lechleitner, who is the Decedent's daughter and the Limited Administrator of this Estate, commenced this discovery proceeding pursuant to SCPA §2103 against the Respondents, Harry S. Graeve, the Decedent's son, and Karen Szubinski, the Decedent's daughter-in-law, seeking the delivery or turnover of certain property belonging to the Decedent that is now in the possession or control of the Respondents. Specifically, the Petitioner alleges that two days before the Decedent's death, the property which served as the Decedent's residence located at 4

Lorelei Lane, Glenville, New York, was transferred to the Respondent, Harry S. Graeve, without consideration while the Decedent was in the hospital and on his deathbed. Petitioner seeks the return of this property to the Estate,[1] along with cash in excess of $200,000 and a 2008 Chevrolet pickup truck that were allegedly taken by the Respondent, Harry S. Graeve, just prior to or subsequent to the Decedent's death without proper authorization.

After issue was joined by the filing of a Verified Answer, the parties engaged in paper discovery and conducted depositions. Based on the testimony elicited at the depositions and other evidence, the Petitioner filed the instant Motion seeking an Order declaring that a confidential or fiduciary relationship existed between the Decedent and the Respondents. The Petitioner seeks this relief because if a confidential relationship is found to have existed, the burden of proof at trial will shift from the Petitioner to the Respondents to show by clear and convincing evidence that the transactions at issue were free from any undue influence exerted by them against the Decedent. See, Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim, 45 N.Y.2d 692; Matter of Mazak, 288 A.D.2d 682.

In essence, the Petitioner's Motion is one for partial summary judgment, which asks this Court to find, as a matter of law, that there are no material facts in dispute as to the existence of a confidential relationship between the Decedent and the Respondents. The proponent of a summary judgment motion, herein the Petitioner,

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1 Since the property was subsequently sold by the Respondent, the Petitioner is actually requesting that the net proceeds from the sale be turned over to the Estate. The proceeds are being held in escrow pending the outcome of this proceeding.

must make 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 genuine material issues of fact. See, Alvarez v. Prospect Hosp., 68 N.Y.2d 320; Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853. If the proponent makes such a prima facie showing, the burden shifts to the party opposing the motion to come forward and lay bare his evidentiary proof in admissible form sufficient to establish the existence of genuine material issues of fact which require a trial. See, Alvarez v. Prospect Hosp., supra, at 324; Zuckerman v. City of New York, 49 N.Y.2d 557, 562. On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., LP, 7 N.Y.3d 96, 105; Martin v. Briggs, 235 A.D.2d 192; McArdle v. M & M Farms, 90 A.D.2d 538. However, mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. Zuckerman v. City of New York, supra.

The deposition testimony reveals that the Decedent indeed had a close relationship with his son and daughter-in-law. They lived in close proximity to one another for more than a decade prior to the Decedent's death in 2009. Even when the Respondents moved, the Decedent would also move and reside within minutes of the Respondents, allowing for regular visits between them on a weekly basis. In 2005 or 2006, the Decedent moved to 4 Lorelei Lane in Glenville, the property in question, which was just down the road from the Respondents who lived at 20 Lorelei Lane. From this time forward, the Respondents would visit the Decedent daily, checking on him to make sure he had what he needed or wanted. The Petitioner claims that these

undisputed facts show the Decedent's reliance and dependence upon the Respondents.

The deposition testimony also revealed that sometime prior to his death, the Decedent added his son to his bank accounts, his safe deposit box in which the Decedent allegedly kept a large sum of cash, and also added his son on the title to his truck. The Petitioner claims that these actions demonstrate the Decedent's trust and confidence in his son to handle his affairs when the Decedent could no longer do so.

In the Fall of 2009, the Decedent was diagnosed with esophageal cancer. During his illness, the Decedent was cared for by the Respondents due to his physically weakened state. They would take him to doctor's appointments, clean his house, do his laundry and basically just keep him company. When the pain of the cancer became severe, the Decedent's son would administer morphine to him.

Upon becoming hospitalized a few weeks prior to his death, the Decedent executed a Health Care Proxy naming his son as his agent and his daughter-in-law as the alternate agent. Both of the Respondents were actively involved with the medical decisions related to the Decedent's care, including his admission to Baptist Health Nursing and Rehabilitation Center one (1) week prior to his death. The Respondents were at the nursing home every day, and arranged for the Decedent to speak to his daughter, the Petitioner, on the phone. The Petitioner also visited the Decedent about four (4) days prior to his death. The Petitioner described the Decedent as being "incoherent" during this visit.

There is no dispute that after the Decedent went into the nursing home, his son initially contacted Attorney Michael West regarding the contemplated transfer of the

Decedent's home to his son. Attorney West testified that the Decedent's son acted as a go-between for the Decedent and Attorney West. The Decedent's son advised Attorney West that his father had requested that he prepare a deed transferring his home to his son. Attorney West did so, and went to the nursing home where the Decedent signed the deed three (3) days before he died. Attorney West testified at his deposition that when the Decedent signed the deed, "there was really no question in my mind that he [the Decedent] knew what he was doing, . . . he knew what he wanted."

Despite the above events, it is undisputed that there is no evidence that the Decedent ever executed a Power of Attorney naming either of the Respondents as his attorney-in-fact. Nor is there any evidence that either of the Respondents ever wrote or signed any checks for the Decedent, conducted any banking transactions for him or handled any financial affairs for him other than the initial phone call made to Attorney West by the Decedent's son.

It is well settled that a confidential relationship exists between two parties when their relations are of a nature that they deal on an unequal footing, with one party having superior knowledge of the matter at hand and the other dealing from a position of "weakness, dependence, or trust justifiably reposed" upon the dominant party. Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim, supra, at 699. See also, Oakes v. Muka, 69 A.D.3d 1139, 1140; Mazza v. Fleet Bank, 16 A.D.3d 761, 762. An indication that the parties are in fact dealing on unequal terms is the weaker party's "established lack of interest in, or ability to manage, [his] own finances, and concomitant dependence upon others to do so". Matter of Antoinette, 238 A.D.2d 762, 764.

Where a confidential relationship is found to have existed, "unfair advantage" in

a transaction between the parties "is rendered probable, the transaction is presumed void, and the burden shifts to the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood." Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim, supra, at 699; Oakes v. Muka, supra, at 1140; Mazza v. Fleet Bank, supra, at 762; Matter of Mazak, supra, at 684; Matter of Bumbaca, 182 A.D.2d 756, 757. However, "close family ties may negate the presumption of undue influence that would otherwise arise from a confidential or fiduciary relationship". Matter of Antoinette, supra, at 764, citing, Matter of Swain, 125 A.D.2d 574, 575. See also, Matter of Walther, 6 N.Y.2d 49, 56, wherein the Court of Appeals ruled that "[t]he sense of family duty is inexplicably intertwined in [a confidential] relationship which, under the circumstances, counterbalances any contrary legal presumption". This is not to say that a confidential relationship can never exist if the parties have a familial relationship. It simply means that all of the evidence must be carefully considered before deciding whether the accused party "acted not out of family duty, but rather cupidity." Matter of Antoinette, supra, at 764.

The underlying facts of this case as recited above clearly show that a very close, familial relationship existed between the Respondents and the Decedent for a long period of time prior to the Decedent's death. The transactions at issue occurred during the time when the Decedent was physically ill and the Respondents were actively involved with the Decedent's care on a daily basis. However, these facts do not support a finding, as a matter of law, that in addition to his physically weakened state, the Decedent in fact dealt with the Respondents from a mentally weakened and inferior position. Rather, the deposition testimony of Attorney West supports a contrary finding.

Specifically, Attorney West's testimony that the Decedent himself requested, albeit through his son, to have the deed prepared, that the Decedent understood and was fully aware of the nature of the transaction and expressed his independent desire to execute the deed in question, all suggests that the Decedent was not dealing from a position of weakness but was fully competent and exhibited an interest in and the ability to manage his own financial affairs right up to his death.

Nor do the Decedent's medical records submitted with the moving papers support a finding, as a matter of law, that the Decedent was in a mentally weakened state or was not competent to make decisions at the time of the transactions at issue. In fact, progress notes written three (3) days before the Decedent died, being at or around the same time that the Decedent executed the deed, indicate that the Decedent was "alert and able to make all needs known". In addition, as mentioned above, there is no evidence in the record presently before the Court that the Decedent ever executed a Power of Attorney, was ever unable to manage his own finances, or that the Respondents ever handled or took over any of the Decedent's financial affairs.

These facts render this case distinguishable from the cases relied upon by the Petitioner in which, after a trial, a confidential relationship was found to have existed. See, e.g., Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim, supra (non-familial relationship, and evidence at trial established that the decedent was not coherent, was confused and was not capable of understanding); Matter of Mazak, supra (non-familial relationship, and the trial testimony revealed that the decedent was dependent on the respondent for all the essentials of daily living, including the payment of the decedent's bills); Oakes v. Muka, supra (the trial proof indicated that the decedent was suffering

from Alzheimer's disease, was consistently confused, delusional, and was having hallucinations); Matter of Antoinette, supra (jury verdict was not against the weight of the trial evidence which revealed the decedent's lack of involvement in and lack of understanding of the transactions at issue). Thus, not only were these cases decided after a full examination of all the credible evidence presented at a plenary trial, whereas the instant proceeding is only at the summary judgment stage, the facts of these cases are altogether different from the facts outlined herein.

Based on the above, the Court finds that at this summary judgment stage of these proceedings, an issue of fact exists as to whether the Decedent and the Respondents dealt on an unequal footing, precluding a finding as a matter of law that a confidential relationship existed between them. Since the Petitioner has failed to make a prima facie showing of entitlement to judgment as a matter of law, the Motion must be denied, and the issue of whether a confidential or fiduciary relationship existed between the Decedent and the Respondents is one that will be decided at trial.

Accordingly, based on all of the foregoing, the Petitioner's Motion is hereby denied. The Court hereby schedules a conference, for the purpose of scheduling a trial date in this matter, to be held on **Tuesday, October 2, 2012, at 10:30 a.m.**

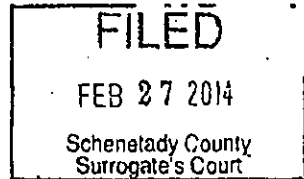
The parties' remaining arguments, to the extent not specifically addressed herein, have been considered and found to be unavailing.

The foregoing shall constitute the Decision and Order of this Court.

Signed at Schenectady, New York, this 5th day of September, 2012.

HON. VINCENT W. VERSACI
Surrogate

ENTER:


FILED
FEB 27 2014
Schenectady County
Surrogate's Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 23, 2014 516748

In the Matter of the Estate of
HARRY L. GRAEVE, Deceased.

DEBRA LECHLEITNER, as
Limited Administrator of the
Estate of HARRY L. GRAEVE,
Deceased,
Appellant;

MEMORANDUM AND ORDER

HARRY S. GRAEVE et al.,
Respondents.

Calendar Date: November 14, 2013

Before: Rose, J.P., Lahtinen, McCarthy and Garry, JJ.

Parisi, Coan & Saccocio, PLLC, Schenectady (Gerald F. Parisi of counsel), for appellant.

Michael L. Breen, Middleburgh, for respondents.

Lahtinen, J.

Appeal from an order of the Surrogate's Court of Schenectady County (Versaci, S.), entered September 5, 2012, which denied petitioner's motion for partial summary judgment declaring that a confidential relationship existed between respondents and decedent.

Harry L. Graeve (hereinafter decedent) died in November 2009 and petitioner, his daughter, was granted limited letters in March 2011 to pursue a discovery proceeding pursuant to SCPA 2103. She sought information regarding: decedent's transfer

shortly before his death of his home (valued at about $180,000) to his son, respondent Harry S. Graeve (hereinafter respondent); the location of $200,000 in cash that was allegedly missing;[1] and the transfer of decedent's 2008 truck to respondent. Respondent Karen Szubinski, respondent's spouse, was added as a respondent and, following disclosure, petitioner moved for summary judgment declaring that a confidential relationship existed between respondents and decedent. Surrogate's Court denied petitioner's motion and petitioner now appeals.

We affirm. The existence of a confidential relationship shifts the burden to the stronger party in such a relationship to prove by clear and convincing evidence that a transaction from which he or she benefitted was not occasioned by undue influence (see Matter of Nealon, 104 AD3d 1088, 1089 [2013], affd ___ NY3d ___, 2014 NY Slip Op 00139 [2014]; Oakes v Muka, 69 AD3d 1139, 1140-1141 [2010], appeal dismissed 15 NY3d 867 [2010]). "In determining whether a confidential relationship exists, 'the existence of a family relationship does not, per se, create a presumption of undue influence; there must be evidence of other facts and circumstances showing inequality or controlling influence'" (Matter of Nealon, 104 AD3d at 1089, quoting Feiden v Feiden, 151 AD2d 889, 891 [1989]).

The proof was inadequate to establish a confidential relationship as a matter of law. Decedent died at age 84, a short time after being diagnosed with cancer. About two weeks before his death, he was admitted to a hospital and then was transferred to a nursing home. Prior to such time, he lived basically in an independent fashion. Respondents resided on the same street and, thus, visited more frequently than petitioner, who lived further away. Respondents assisted decedent with some chores and household matters, but he certainly was not completely dependent on respondents nor was there proof that his mental condition had deteriorated. Although respondent was listed on decedent's bank account and safe deposit box, there is no evidence that he accessed the accounts or funds prior to

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[1] Respondent asserted that decedent gave the cash to petitioner, but she denied receiving the money.

decedent's passing or successfully exerted any pressure on decedent regarding his finances. Decedent's attorney testified at a deposition that, when respondent was not present in the room, he met with decedent at the nursing home and decedent ably discussed his estate and executed the transfer of real property. The attorney observed that, even at that time within days of his death, decedent was "bold in his voice" and "knew what he wanted." This record does not reflect the type of inequality and controlling influence such that, as a matter of law, respondents were exerting a confidential relationship (as that term is used in the context of a proceeding of this nature) rather than simply acting out of familial affection or duty.

Rose, J.P., McCarthy and Garry, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

EMBAREK MESBAHI,

Plaintiff,

- against -

PETER E. BLOOD,

Defendant.

DECISION/ORDER

Index No. 2017-0953
RJI 46-1-2017-0677

APPEARANCES:

Attorney for the Plaintiff:
John T. Casey, Jr., Esq.
47 Second Street
Troy, New York 12180

Attorney for the Defendant:
Frederick W. Killeen, Esq.
The Killeen Building
179 ½ Jay Street
Schenectady, New York 12305

VINCENT W. VERSACI, A.S.C.J.

The Plaintiff, Embarek Mesbahi, commenced this declaratory judgment action against the Defendant, Peter E. Blood, on May 12, 2017, after a dispute arose between the parties regarding an Art Sales Agreement that the Plaintiff had entered into with Robert Blood, the father of the Defendant, on February 23, 2012. Robert Blood was a local sculptor who died testate on December 1, 2016. Pursuant to the terms of the Art Sales Agreement (hereinafter referred to as the "Agreement"), the Plaintiff, referred to in the Agreement as "Agent", had the right to sell the art work of Robert Blood, referred to in the Agreement as "Artist", "at prices agreed upon between Artist and Agent". The Agreement provided that the Plaintiff (hereinafter referred to interchangeably as the "Agent"), shall receive 40% of the sales price of the art work that he sells on behalf of Robert Blood (hereinafter referred to interchangeably as the "Artist" or the "Decedent"). The Agreement further provided that "[t]he art work shall remain the property of Artist at all times until such time it is transferred to buyer", and "[t]hat either party may terminate this Agreement upon notice to the other party". The Agreement also provided that it "shall continue after the

death of Artist", at which time the Agent "shall continue to sell the art work in [his] possession and shall be entitled to take possession of all artist's work located at artist's residence", and that "upon the sale of the art work in agents possession, the agent shall retain 60% of the proceeds of the sale and 40% of the proceeds of the sale shall become the property of Artist's son Peter E. Blood, his heirs and assigns." Lastly, the Agreement provided that "[t]he agent shall also have the authority to donate certain number of artist's pieces to a museum."

After the death of the Decedent, the Defendant was duly appointed as the Executor of the Decedent's Estate by the Schenectady County Surrogate's Court. The Defendant, in his capacity as the Executor of the Decedent's Estate, elected to cancel, rescind, and terminate the Agreement pursuant to and in accordance with the termination clause contained in the Agreement. A Notice of Termination was signed by the Defendant as the Executor of the Decedent's Estate, which also demanded the immediate return of any and all of the Decedent's art work in the Plaintiff's possession, and an accounting of all art work sold or transferred by the Plaintiff before or after the Decedent's death. The Notice of Termination was sent to the Plaintiff and his counsel on or about May 1, 2017, prompting the filing of this lawsuit.

Immediately following the joinder of issue, the Plaintiff filed a motion for summary judgment seeking a declaration that the Agreement is valid and remains in full force and effect, and that he has the sole and exclusive right to take possession of all of the Decedent's art work and to sell or donate the art work as he chooses in accordance with the explicit terms of the Agreement. In response thereto, the Defendant opposed the Plaintiff's motion and filed a cross-motion for summary judgment seeking a dismissal of the Complaint. The grounds upon which the Defendant's cross-motion is based are that the Plaintiff failed to sue the proper party and failed to pursue his claims in the proper court, rendering this action jurisdictionally defective. Specifically, the Defendant contends that

since the Agreement explicitly stated that the art work shall remain the property of the Artist until transferred to a buyer, all of the art work that remained unsold at the time of the Decedent's death became an asset of the Decedent's Estate immediately upon his death by operation of law, to be distributed by the Defendant in his capacity as Executor pursuant to the terms of the Decedent's Last Will and Testament. Thus, the Defendant argues that the proper party to name as the defendant in this lawsuit is not the Defendant in his individual capacity, but the Defendant as the Executor of the Decedent's Estate. In other words, the Defendant maintains that the Plaintiff's claims regarding the art work should have been brought in the Surrogate's Court where the Decedent's Will was probated and his Estate is being administered, not in the Supreme Court. Additionally, the Defendant argues that the Complaint should be dismissed on the merits based on the fact that the Defendant, in his capacity as the Executor of the Decedent's Estate, rightfully terminated the Agreement pursuant to the termination clause contained therein, thus triggering the Plaintiff's obligation under the explicit terms of the Agreement to return all of the Decedent's art work in the Plaintiff's possession to the Decedent's Estate.

Nevertheless, the Court must first determine whether this case has been properly filed in this Court and whether the Defendant individually, is the proper party to be sued herein. In order to determine these threshold jurisdictional questions raised by the Defendant, the Court must necessarily begin its analysis with a close reading of the Agreement itself within the framework of the basic principles and fundamental tenets of contract law.

There is no dispute between the parties as to the existence of the writing entitled "Art Sales Agreement", and that it was drafted by or with the assistance of the Artist's attorney, Dean Riggi, Esq. There is no dispute as to the authenticity of the signatures of the Artist and the Agent appearing at the foot of the Agreement, and that the Agreement was signed and properly sworn to before a Notary Public. Where the parties' positions

diverge is in their interpretation of the nature of the Agreement, what was intended by the Artist in entering into this Agreement and the use of certain language contained therein, and the legal and binding effect of the Agreement or lack thereof at the present time.

It is well settled that a contract, or written agreement, should be construed in accordance with the intent of the parties, and the best evidence of the parties' intent is what they express in their written agreement. If the terms of the written agreement are clear, unambiguous and unequivocal, the Court need only look between the four corners of the agreement to determine the rights and obligations of the parties to the agreement. A determination of whether or not an agreement is clear and unambiguous is a question of law to be decided by the Court, and only after an analysis of the four corners of the instrument. See, Kass v. Kass, 91 N.Y.2d 554, 566; Todd v. Grandoe Corp., 302 A.D.2d 789, 790. An agreement is unambiguous if "the language it uses has a definite precise meaning, unattended by danger of misconception . . . and concerning which there is no reasonable basis for a difference of opinion". Greenfield v. Philes Records, 98 N.Y.2d 562, 569, quoting, Vreed v. Ins. Co. of North America, 46 N.Y.2d 352, 355. See also, Williams v. Village of Endicott, 91 A.D.3d 1160, 1162. However, "if any ambiguity exists in the instrument, then the courts will look to extrinsic evidence and may consider such facts in its analysis of the terms contained therein". See, F & K Supply v. Willowbrook Dev. Co., 288 A.D.2d 713, 714; Ruthman, Mercadante & Hadjis v. Nardiello, 260 A.D.2d 904, 906. See also, Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173, 176; MHR Capital Partners L.P. v. Presstek, 12 N.Y.3d 640.

Examining the language of the Agreement reveals that there are ten (10) enumerated paragraphs, each containing a separate operative provision of the Agreement. Each individual paragraph is clearly written, and when read in isolation from the other paragraphs, appears to have a definite, unambiguous meaning. However, when all of the paragraphs are read together and the Agreement is reviewed as a whole, the intent of the

parties regarding the nature of the Agreement, the manner in which it is to be executed, and its legal effect under the present circumstances is anything but clear and unambiguous and leaves many unanswered questions.

For instance, it is unclear whether the Artist gave the Agent the ***exclusive*** right to sell and the ***sole*** authority to donate ***all*** of the Artist's art work both before and after his death as advocated by the Plaintiff, despite the fact that the words "sole" and "exclusive" do not appear anywhere in the Agreement and the last paragraph refers to a "certain number" of artist's pieces, not all, that can be donated to a museum. It is unclear what, if any, prices at which to sell the art work were agreed upon between the Artist and the Agent as required in paragraph "1" of the Agreement, and how the Artist could possibly agree to any prices after his death despite the provision contained in paragraph "8" that the Agreement shall continue after the Artist's death. There is nothing contained in the Agreement that specifies the length of time the Plaintiff has, after the Artist's death, to either sell the art work or decide to donate the art work. It is also unclear who shall pay for the cost of delivery since the provision contained in paragraph "3" merely states that the Agent shall be responsible to "arrange" the cost of the delivery.

Turning to the heart of the present controversy, it is unclear from simply examining the contents of the Agreement whether it is in the nature of a trust as argued by the Plaintiff, or whether it could be construed as a consignment contract as argued by the Defendant. Furthermore, it is difficult to determine whether the Artist's right to terminate the Agreement as contained in paragraph "4" is personal to him and evaporates upon his death, as argued by the Plaintiff, or whether such right survives his death and vests in his Executor who now stands in the shoes of the Artist, as argued by the Defendant. Given all of these ambiguities which could lead reasonable minds to have different interpretations of the Agreement, the Court is compelled to consider the extrinsic evidence offered by both parties on these motions pursuant to the parol evidence rule. See, Matter of Friedman, 64

A.D.2d 70, 81-82.

First, the Defendant offers the Affidavit of Dean Riggi, Esq., who attests that he represented the Decedent in connection with a variety of legal matters over the years, including the preparation and execution of his Last Will and Testament dated March 17, 2004. He also provided assistance at the Decedent's request in connection with reviewing and drafting the Agreement at issue herein. Attorney Riggi states that the Decedent decided not to follow his recommendation to include certain terms and conditions in the Agreement because the Decedent wanted to keep the Agreement "short and simple".

Attorney Riggi represents that based upon his extensive discussions and communications with the Decedent, the Decedent's purpose, intent, and understanding of the Agreement was that the control and ownership of his art work would not be transferred to or vested in the Plaintiff, but rather that his art work would remain his property at all times until it was sold to an actual buyer, and that upon his death, any art work that remained unsold would belong to and constitute an asset of his Estate. Furthermore, based on his discussions with the Decedent both before and after the execution of the Agreement, Attorney Riggi concludes in his Affidavit that the Decedent did not intend to create a trust that conveyed legal title to, or vested ultimate control over his art work to the Plaintiff as trustee.

Also, Attorney Riggi further confirms that the Decedent was fully aware of the terms of his Will and that his Will named the Defendant as the Executor and also as the sole beneficiary of his Estate. Attorney Riggi unequivocally states that it was the Decedent's understanding, intention and expectation that the right of cancellation contained in the Agreement "was mutual and would survive his death", and that it was never the Decedent's "intention or understanding that the Agreement would become irrevocable upon his death."

The Plaintiff contends that Attorney Riggi's Affidavit is barred by CPLR §4519, commonly referred to as "the Dead Man's Statute", precluding it from the Court's

consideration. The Plaintiff is mistaken. Attorney Riggi is a disinterested witness to these proceedings and neither the Defendant nor the Plaintiff derives his interest in these proceedings from or through Attorney Riggi simply by virtue of the fact that Attorney Riggi assisted the Decedent in drafting the Agreement. See, Johnson v. Cooney, 27 Misc.3d 1210(A); Matter of Hoffman, 2006 N.Y. Misc. LEXIS 6363. Attorney Riggi's Affidavit is in admissible form, and can be considered by the Court as long as his statements regarding his personal transactions and communications with the Decedent would not "tend to disgrace the memory of the Decedent", which they do not. See, CPLR §4503(b).

Next, the extrinsic evidence offered by the Plaintiff, on the other hand, in the form of informal letters allegedly written and exchanged between the Defendant and the Decedent after the Agreement was executed, and some of which are undated, unsigned and illegible, are not sworn to and therefore are not in admissible form. See, Krupp v. Aetna Life & Casualty Co., 103 A.D.2d 252. Even if the letters were in admissible form, and the letters authored by the Defendant were viewed as an admission against interest, the Defendant argues that they are automatically barred by the Dead Man's Statute since they are personal communications between the Defendant, a party having an interest in the outcome of this case, and the Decedent. While the Defendant is correct that these communications might be inadmissible at trial, they can be considered on a motion for summary judgment. See, Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307.

With that being said, even if the Court were to consider these letters despite not being authenticated or in admissible form, they shed little to no light on the Decedent's intent and understanding regarding the nature of the Agreement and its legal effect after his death. The letters authored by the Defendant, who was not a party to the Agreement, simply reflect his thoughts and concerns about the Agreement, and his understanding and interpretation, as a layperson, of the legal effect of the Agreement. The letters allegedly written by the Decedent are just as ambiguous and unclear as the Agreement itself. The

fact that the Decedent wrote, "right off, I say the contract stands", simply reflects his decision not to change or terminate the Agreement at that time. Further, even if the Decedent wrote in another letter that he wanted to "endow" the Defendant's children "with the securities in our name and the house and whatever else excluding the sculpture", these words do not translate into an expression of intent to exclude his art work from his Estate and convey legal title to his art work to the Plaintiff through the Agreement. Similarly, the Decedent referring to the Plaintiff as his "agent" and "custodian of unsold work" does not equate to naming the Plaintiff as his "trustee" in the legal sense of the word. These letters offered by the Plaintiff as extrinsic evidence of the Decedent's intent are thus unhelpful, unpersuasive, and in large part irrelevant.

Accordingly, based on the above, the Court finds that the Decedent did not intend to create a trust when he entered into the Agreement with the Plaintiff. The words "trust", "trustee", "grantor", or "settlor" do not appear anywhere in the Agreement which would typically appear in a trust agreement. Despite the fact that the Agreement provides that it shall continue after the Artist's death, the Plaintiff is consistently referred to as an "agent". The Agreement is entitled, "Art Sales Agreement", not a trust agreement. The Agreement does not transfer the Decedent's ownership of the art work to a trust either before or after his death, but explicitly states that the art work shall remain the Decedent's property until sold.

Furthermore, it is clear from Attorney Riggi's Affidavit that the Decedent had legal counsel when he entered into this Agreement, given by the same attorney who had prepared the Decedent's Last Will and Testament that was executed eight (8) years earlier. The Will does not exclude the Decedent's art work, and names the Defendant as the Executor and the sole beneficiary of his Estate. The Agreement does not mention the Decedent's Will. The Decedent knew he had executed a Will and knew the provisions thereof. He never revoked his Will or executed a subsequent Will or a codicil to the Will.

If the Decedent had wanted to create a trust, fund it with his art work, and name the Plaintiff as a sole trustee with total authority and exclusive control over the disposition of the unsold art work after his death, and thereby exclude the art work from his Estate, the Decedent, who had legal counsel at the time, could have included such operative language in the Agreement or he could have executed the proper documents required by law in order for such an intended testamentary disposition to have the desired legal effect. The Decedent did neither, rendering the Plaintiff's desired disposition of the art work by way of a trust agreement untenable.

The Plaintiff further attempts to convince the Court that while ownership of the art work concededly may not have been transferred to the Plaintiff, legal title to the art work was conveyed to him through a statutory trust created under the Arts and Cultural Affairs Law §12.01, as it read in February, 2012 when the Agreement was executed. As a result, the Plaintiff maintains that the art work is excluded from the Decedent's Estate because the statute refers to such art work as "trust property". The Court does not share the same statutory interpretation.

This section of the Arts and Cultural Affairs Law, entitled "Artist-art merchant relationships", explicitly "establishes a consignor/consignee relationship" between the artist and the art merchant upon delivery to the art merchant of the artist's art work "for the purpose of exhibition and/or sale on a commission". The statute goes on to deem the consignee "the agent" of the consignor, and provides that even if the consignee "purchases" the art work from the consignor "for his own account", and the art work is thereafter "resold to a bona fide third party before the consignor has been paid in full", the art work "shall remain trust property in the hands of the consignee for the benefit of the consignor" until the consignor is paid in full. See, Arts and Cultural Affairs Law §12.01(1)(a)(I)-(iv).

It is undisputed that the majority of the Decedent's art work is physically located at

the Plaintiff's art gallery on Jay Street in Schenectady, New York, and that these pieces were delivered to the Plaintiff by the Decedent pursuant to the Agreement for the purpose of exhibition and/or sale. It is also undisputed that the Decedent signed Certificates of Authenticity and blank Bills of Sale for all of his art work and delivered these documents to the Plaintiff at some point prior to his death. The Plaintiff never purchased the art work from the Decedent and no money was exchanged when these documents were delivered to the Plaintiff. Thus, while there was a "delivery" of all of the art work to the Plaintiff, such delivery did not give the Plaintiff an inalienable right to legal title to the art work under the statute. It merely established a consignment relationship between the Decedent as the artist, and the Plaintiff as his agent. See also, Matter of Friedman, supra, at 82.

Once a consignment relationship is established, the statute serves to protect the artist's art work and any proceeds from its sale that come into the hands of the agent/consignee, until the artist/consignor is paid in full. An amendment to the statute in November, 2012 served to clarify this purpose by adding that the art work and/or any proceeds from the sale thereof shall not "become the property of the consignee or be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever of the consignee's creditors." See, Arts and Cultural Affairs Law §12.01(1)(a)(v). The statute, either before or after the amendment, does not serve to convey legal title to the artist/consignor's art work to the agent/consignee, and in fact with the amendment, it clearly states the opposite. Nor does the pre-amendment or post-amendment statute address what effect the death of the artist/consignor has on the consignment relationship or on the disposition of the "trust property" after the artist's death. The Plaintiff would like the Court to read into the statute and broadly interpret it as if there is a conveyance of legal title upon the creation of a consignment relationship, which would in turn create a type of irrevocable trust or testamentary substitute in favor of the agent/consignee upon the death of the artist/consignor. This interpretation, which would

result in the clawing of these assets from the Estate to this "trust", is not only unsupported and inconsistent with the actual wording of the statute and its clear purpose, but is also contrary to the Decedent's intention and understanding of the Agreement as previously determined herein.

All of the above findings necessarily lead the Court to the conclusion that the Agreement was not intended to be a trust agreement, but rather, was intended to be a consignment relationship which by its terms did not convey ownership or legal title to the Decedent's art work to the Plaintiff. Nor was the ownership or legal title to the art work conveyed to the Plaintiff by statute or any other provision of law or legal mechanism that would serve to exclude the Decedent's art work from his Estate. At the time of his death, the Decedent's art work remained titled to him as its sole owner and thus became an asset of his Estate by operation of law. Accordingly, the Defendant, in his capacity as the Executor of the Decedent's Estate, is a necessary party to this lawsuit which seeks to declare the rights to and obligations regarding the art work that now belongs to the Decedent's Estate.

While the Court finds that the Defendant as the Executor of the Decedent's Estate is a necessary party herein, it was not improper for the Plaintiff to sue the Defendant in his individual capacity since the Defendant took possession of the Decedent's remaining art pieces that are not located at the Plaintiff's art gallery. While the Plaintiff is currently seeking declaratory relief, he clearly is seeking to enforce, or intending to enforce if successful on his motion, the provision of the Agreement that entitles him to take possession of all of the art work after the Decedent's death. The Defendant is also named in his individual capacity in the Agreement as a third-party beneficiary. Moreover, the ownership of the Decedent's art work is now vested in the Defendant as the sole beneficiary of the Decedent' Estate. The Court thus finds that the Plaintiff should have named the Defendant in both of his capacities as an individual and as the Executor of the

Decedent's Estate.

In the interests of justice and judicial economy, and since the same attorney represents the Defendant in both of his capacities, the Court will *sua sponte* join the Defendant in his capacity as the Executor of the Decedent's Estate as a necessary party herein and amend the caption accordingly. However, the Court will not transfer this case to the Surrogate's Court since the Supreme Court is a court of general subject matter jurisdiction and has the authority to hear and determine this case. Moreover, all of the interested parties in the Estate proceeding are now parties before this Court and whose rights will be protected by this Court. Having thoroughly addressed the jurisdictional issues raised by the Defendant, the Court will now determine the ultimate disposition of this case on its merits.

The Court having established that the Agreement formed a consignment relationship between the Plaintiff and the Artist, the question remains as to the legal effect the Agreement has now that the Artist is deceased. The Agreement does explicitly state that it shall continue after the Artist's death, and goes on to provide how the proceeds from the artwork should be divided if sold after his demise. These provisions render the Agreement a contract to make a testamentary provision, invoking the provisions of EPTL §13-2.1.

EPTL §13-2.1 governs "contracts to make a testamentary provision of any kind" and only requires that they be in writing and subscribed by the party to be charged therewith, which the Agreement clearly was. See, EPTL §13-2.1(a)(2). However, pursuant to case law, it is well settled that in order for a contract to make a testamentary provision to be enforceable, it must not only be in writing and subscribed by the party to be charged with its performance as required by EPTL §13-2.1(a)(2), but that it "must further evince 'a clear and unambiguous manifestation of the testator's intention to renounce the future power of testamentary disposition'". Aaron v. Aaron, 64 A.D.3d 1103, 1104 [internal citations omitted], lv denied, 13 N.Y.3d 714. In other words, a contract to make a testamentary

disposition must include a clear and unambiguous agreement not to revoke it in order for it to be enforceable. See, The American Committee for the Weizmann Institute of Science v. Dunn, 10 N.Y.3d 82, 92; Matter of Argondizza, 2015 N.Y. Misc. LEXIS 613. See also, Matter of Attanasio, 52 Misc.3d 1216(A), affirmed by, 2018 NY Slip Op 01527.

A party seeking to enforce a contract to make a testamentary provision has a high burden to establish by clear and convincing evidence that the decedent "unequivocally" and "indisputably" renounced or surrendered his rights to freely revoke the agreement and later change his testamentary plan. Id. See also, Hamlin v. Stevens, 177 N.Y. 39, 48 ("contracts to make testamentary bequests should only be enforced 'when they have been established by evidence so strong and clear as to leave no doubt'"); Rubenstein v. Mueller, 19 N.Y.2d 228, 232 ("intention to not revoke must be manifested 'clearly and unambiguously'").

Applying this strict evidentiary standard to the Agreement in this case, the Court finds that the Plaintiff has failed to present indisputable evidence that the Decedent unequivocally intended to renounce his right to revoke the Agreement. The Agreement contains no provision stating that it is irrevocable. In fact, it contains a provision that gives him and the Plaintiff the absolute right to terminate the Agreement upon notice to the other party. The fact that there is no evidence that the Decedent actually terminated the Agreement prior to his death or attempted to do so, is not what controls its enforceability. The Decedent, even without revoking or terminating the Agreement, retained ownership and control over his art work and could have sold some or all of the pieces himself, gifted some or all of the pieces to someone else, or allowed someone other than the Plaintiff to try to sell his art work. The Agreement did not give the Plaintiff the exclusive, indefeasible right to sell the art work nor did it prohibit the Decedent from otherwise disposing of his art work as he in fact did through his Last Will and Testament.

Moreover, the extrinsic evidence in this case lends further support for the Court's

finding that the Decedent did not intend for the Agreement to be irrevocable. As set forth above, Attorney Riggi, who assisted the Decedent in reviewing and drafting the Agreement, unequivocally represents as an officer of this Court that the Decedent intended the right to terminate the Agreement to survive his death and that the Agreement would not become irrevocable upon his death. While it may have been the Decedent's desire or wish that the Agreement shall continue after his death, he did not make the Agreement irrevocable either during his lifetime or upon his death.

Since the Agreement is a contract to make a testamentary provision, and there is no evidence, let alone any clear and convincing evidence, that the Decedent unequivocally intended to surrender his rights to revoke the Agreement or to make the Agreement's testamentary provisions irrevocably binding on his Estate, the Court finds that as a matter of law, the Agreement is unenforceable by the Plaintiff against the Decedent's Estate and has no binding effect against the Decedent's Estate and certainly not against the Defendant in his individual capacity.

However, although the Agreement cannot bind the Estate beyond the Decedent's passing, this is not to say that the Agreement could not continue after the Decedent's death, if his Executor, now standing in the shoes of the Artist, chose to continue the Agreement. But the Plaintiff cannot force the Decedent's Estate to be bound by the Agreement, just as the Decedent's Estate could not force the Plaintiff, or the Plaintiff's Estate if he were to die, to be bound by the Agreement if the Plaintiff or his Estate elected to terminate the Agreement. It is clear that the Decedent intended the right to terminate the Agreement to be mutual and that this mutual right would continue after his death, giving the Executor of his Estate the option to either continue the Agreement or terminate it, just as he had the right to do during his lifetime and as the Plaintiff had and still has the right to do. Any other interpretation of the Agreement would result in a situation where the Plaintiff has the option to decide whether to perform under the Agreement or terminate it,

while the Executor of the Decedent's Estate, who now owns the art work, is irrevocably bound by the Agreement because the right to terminate expired with the Artist. In other words, the Plaintiff wants to obligate the Executor of the Decedent's Estate to perform under the Agreement, but take away his rights to terminate the Agreement. Such a unilateral contract, or contract of adhesion, is clearly inequitable, contrary to the Decedent's intention, and would force the Defendant, as Executor of the Decedent's Estate, to dispose of the Decedent's art work in a manner that is inconsistent with the terms of the Decedent's Will which he is bound as a fiduciary to follow.[1]

Accordingly, if the Agreement is treated as having survived the death of the Artist, then all of its provisions, including the mutual right to terminate the Agreement, must necessarily survive and inure to the benefit of the Decedent's Estate. Since the Defendant, in his capacity as the Executor of the Decedent's Estate, properly terminated the Agreement on notice to the Plaintiff pursuant to the termination clause, the Agreement is no longer valid and is not binding on the Decedent's Estate.

The Executor's right to terminate the Agreement is not only consistent with the Decedent's intent as determined above, but it is also supported by the principle of law that when a contract does not expressly contain a definite, fixed term of duration, the contract is "terminable at will." See, Better Living Now, Inc. v. Image Too, Inc., 67 A.D.3d 940, 941, citing, Double Fortune Prop. Investors Corp. v. Gordon, 55 A.D.3d 406, 407 ("The escrow agreement contained no definite term and therefore was terminable at will"), citing, Interweb, Inc. v. iPayment, Inc., 12 A.D.3d 164, 165 ("The agreement between the parties failed to contain a term certain for its duration. Thus, the agreement was terminable at will"). Since the Agreement does not contain any language regarding the length of time

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[1] See, Matter of Friedman, supra, at 82 ("[C]ourts 'will endeavor to give the construction most equitable to both parties instead of one which will give one of the parties an unfair or unreasonable advantage over the other'", quoting, Rush v. Rush, 19 A.D.2d 846).

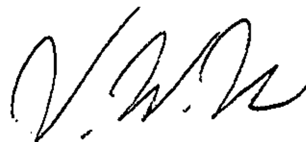
the Plaintiff would have to sell the art work or decide whether to donate the art work after the Decedent's death, the Decedent's Executor, now standing in the shoes of the Artist, is authorized to terminate the Agreement at will.[2]

Based on all of the foregoing, the Court hereby declares that the Agreement is no longer in full force and effect, and is unenforceable by the Plaintiff against the Artist, the Artist/Decedent's Estate, his Executor, or the Defendant in his individual capacity. The Plaintiff's Motion for Summary Judgment is hereby denied, and the Defendant's Cross-Motion for Summary Judgment is hereby granted. The Complaint, and all claims asserted therein, is hereby dismissed in its entirety, and upon searching the record, the Court *sua sponte* dismisses the Defendant's counterclaim for damages as lacking in merit.

The parties' remaining arguments, to the extent not specifically addressed herein, have been considered and found to be unavailing.

The foregoing shall constitute the Decision and Order of this Court.

Signed at Schenectady, New York, this 21st day of May, 2018.



HON. VINCENT W. VERSACI
Acting Supreme Court Justice

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2 The termination of the Agreement is also consistent with the general rule that a consignor-consignee, or principal-agent relationship ordinarily terminates upon the death of either party. See, Matter of Friedman, supra, at 83. An exception to this general rule is when "an agency coupled with an interest" is created. Id. This exception does not apply here. The Plaintiff's agency created under the Agreement was not coupled with an interest since neither ownership nor legal title to the art work was conveyed to the Plaintiff at any time as determined herein.

906 N.Y.S.2d 796
15 N.Y.3d 179
933 N.E.2d 194

In the Matter of a Trust Created by Charlotte P. HYDE, Deceased. Glens Falls National Bank and Trust Company et al., as Trustees of a Trust Created by Charlotte P. Hyde, Deceased, Respondents; Carol J. Whitney, as Executor of Louis H. Whitney, Deceased, et al., Respondents,
and
Mary W. Renz et al., Appellants. (And Another Proceeding.).

Court of Appeals of New York.

June 29, 2010.

[906 N.Y.S.2d 797]

Nolan & Heller, LLP, Albany (David H. Wilder of counsel), for appellants.

Judge & Duffy, Glens Falls (H. Wayne Judge and Monica A. Duffy of counsel), for Carol J. Whitney and others, respondents.

Putney Twombly Hall & Hirson LLP, New York City (Christopher M. Houlihan of counsel), for Glens Falls National Bank and Trust Company, respondent.

McNamee, Lochner, Titus & Williams, PC, Albany (G. Kimball Williams of counsel), for Banknorth, N.A., respondent.

[906 N.Y.S.2d 798]

[933 N.E.2d 196]

OPINION OF THE COURT

Chief Judge LIPPMAN.

[15 N.Y.3d 182]

We hold that Surrogate's Court Procedure Act (SCPA) § 2110 grants the trial court discretion to allocate responsibility for payment of a fiduciary's attorney's fees for which the estate is obligated to pay-either from the estate as a whole or from shares of individual estate beneficiaries. In so doing, we overrule our holding in *Matter of Dillon,* 28 N.Y.2d 597, 319 N.Y.S.2d 850, 268 N.E.2d 646 (1971).

We consequently modify the order of the Appellate Division affirming the order of the Surrogate and remit to the Surrogate's Court for de novo consideration of allocation of the trustees' counsel fees.

I

This dispute developed out of a joint trial concerning intermediate accountings of two trusts. The first proceeding involved a testamentary trust created by Charlotte P. Hyde (Hyde Trust). At the outset of the trust accountings in 2001, Hyde's grandchildren, Mary Renz and her brother Louis H. Whitney, were the two life income beneficiaries of two equal shares of the Hyde Trust. Mary Renz's three children (Renz Children) and Louis H. Whitney's two children (Whitney Children) each possessed a presumptive one-fifth remainder interest in both the Mary Renz Share and the Louis H. Whitney Share that would vest upon the death of Mary Renz and Louis H. Whitney, respectively. Upon Louis H. Whitney's death in January 2008,[1] the Renz Children and the Whitney Children each received a one-fifth interest in the principal of the Louis H. Whitney Share of the Hyde Trust.

The second proceeding concerned an inter vivos trust created by Nell Pruyn Cunningham (Cunningham Trust). The Cunningham Trust term is measured by the lives of two of

[15 N.Y.3d 183]

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Cunningham's grandnephews. In 2003, when the Cunningham accounting commenced, Mary Renz and Louis H. Whitney were each income beneficiaries and presumptive remaindermen of undivided one-sixth shares of the Cunningham Trust. The Mary Renz Share and the Louis H. Whitney Share were to pass to their living issue per stirpes upon the death of Mary Renz or Louis H. Whitney. Thus, upon Louis H. Whitney's death, the two Whitney children became the income beneficiaries and presumptive remaindermen of their father's undivided one-sixth share of the Cunningham Trust.

The two proceedings arose out of objections made to the Hyde trustees' accountings by Louis H. Whitney and the Whitney Children (the Whitneys) and objections made to the Cunningham trustees' accountings by Louis H. Whitney (and carried on by the Whitney Children and Louis H. Whitney's executor after his death). The Whitneys sought to deny the Hyde trustees and the Cunningham trustees their commissions and surcharge them on the basis of their alleged failure to diversify the Trusts' assets, among other objections.

Mary Renz and the Renz Children (the Renzes) did not participate in the Whitneys' objections to trustee conduct in either the Hyde or the Cunningham Trust accounting proceedings. Neither did any of the other income beneficiaries or remaindermen of the Cunningham Trust, aside from Louis H. Whitney (and later his executor and the Whitney Children), interpose

[933 N.E.2d 197, 906 N.Y.S.2d 799]

objections to the accounting of that Trust.

In advance of the joint trial on the Whitneys' objections, the Renzes filed an acknowledgment, attesting that they were non-objectors; and thus, under the Pro Tanto Rule,[2] they would not be entitled to share in any surcharges that might be imposed on the Hyde or Cunningham trustees. The Renzes simultaneously filed a cross motion seeking to require that all future trustees' counsel fees be deducted exclusively from the objecting beneficiaries' shares of the Hyde Trust and Cunningham Trust assets. The Renzes' cross motion also sought to reserve the right to seek reallocation of and reimbursement of the Hyde Trust for all counsel fees that had already been advanced from the Renzes' interests in the Hyde Trust.

[15 N.Y.3d 184]

Surrogate's Court dismissed all of the Whitneys' objections. As to the question of attorney's fees, the court acknowledged that the Pro Tanto Rule had applied, which meant that the non-objecting beneficiaries had not stood to gain from the success the Whitneys' objections might have had. Yet, the court stated it was constrained by *Dillon* to treat the trusts as single entities for purposes of trustee indemnification. Thus, regardless of potential unfairness to the Renz beneficiaries who abstained from the costly litigation, the Surrogate's Court ordered that the trustees' counsel fees be disbursed from the corpus of each trust generally. As a result, the Renzes' shares of the Hyde and Cunningham Trusts were held responsible for more than $700,000 in attorney's fees incurred by the trustees.

The Appellate Division affirmed, citing the construction of SCPA 2110 articulated in *Dillon* and finding no basis to distinguish this case (61 A.D.3d 1018, 876 N.Y.S.2d 196 [3d Dept.2009]).

II

SCPA 2110(2) provides: "The court may direct payment [for legal counsel rendered a fiduciary in connection with the performance of his or her fiduciary duties] from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested." [3]

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We first construed SCPA 2110(2) in our 1971 memorandum decision, *Matter of Dillon,* 28 N.Y.2d 597, 319 N.Y.S.2d 850, 268 N.E.2d 646 (1971). In *Dillon,* a legatee

[933 N.E.2d 198, 906 N.Y.S.2d 800]

under a testator's will that had been admitted to probate challenged probate of a subsequent will that increased the number of legatees who would inherit and thereby reduced the original legatee's portion of the testator's estate. The Surrogate's Court refused to vacate probate and charged the

[15 N.Y.3d 185]

objecting legatee's share of the estate with the executor's legal fees expended in defending probate of the later will. The legatee then appealed, asserting that legal fees should be allocated to the whole estate generally, not to the legacy of an individual party. Ultimately, this Court held that "SCPA 2110 does not authorize payment for legal services rendered a party to be charged against the share of other individual parties. Accordingly, although appellant lost in this litigation, the legal fees of the executor as her adversary were not chargeable to her personally" (*Dillon,* 28 N.Y.2d at 599, 319 N.Y.S.2d 850, 268 N.E.2d 646).

Although the decision in *Dillon* offers little rationale for its conclusion, the statutory interpretation requiring the corpus of the estate generally, and not the shares of individual beneficiaries, to pay for fiduciaries' counsel seems guided by the common-law American Rule. In brief, the American Rule requires all parties to a controversy-the victors and the vanquished-to pay their own "incidents of litigation" (*Chapel v. Mitchell,* 84 N.Y.2d 345, 349, 618 N.Y.S.2d 626, 642 N.E.2d 1082 [1994], quoting *Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989]). Thus, the unsuccessful objectant, under the American Rule, was required to pay only its own attorney's fee, not the executor's attorney's fees as well, which were paid for by the estate.

However, the *Dillon* decision, finding that SCPA 2110 required that the whole of the estate be charged with the executor's counsel fees, in spite of the fact that actions of the objecting party did not effect a benefit to the estate and bordered on the vexatious, seems to have ignored the plain meaning of the statute and departed from the earlier jurisprudence of this Court.

In interpreting SCPA 2110, we bear in mind that it is "presumed that no unjust or unreasonable result was intended and the statute must be construed consonant with that presumption" (*Zappone v. Home Ins. Co.,* 55 N.Y.2d 131, 137, 447 N.Y.S.2d 911, 432 N.E.2d 783 [1982], citing *Matter of Breen v. New York Fire Dept. Pension Fund,* 299 N.Y. 8, 19, 85 N.E.2d 161 [1949] and McKinney's Cons. Laws of N.Y., Book 1, Statutes § 143). The Legislature's intentions should normally be ascertained from a careful reading of the statute itself, especially where, as here, the language is unambiguous, and the legislative history reveals nothing that would counsel an alternative interpretation (see McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92 [b]). On its face, the statute provides the trial court with discretion to disburse funds from any beneficiary's share in the estate-and not exclusively from "the estate generally."

[15 N.Y.3d 186]

In addition to departing from the plain meaning of the statute, *Dillon* did not focus on the considerations of fairness that guided *Matter of Ungrich,* 201 N.Y. 415, 94 N.E. 999 (1911) and its progeny (e.g. *Matter of Garvin,* 256 N.Y. 518, 177 N.E. 24 [1931]; *Matter of Bishop,* 277 App.Div. 108, 98 N.Y.S.2d 69 [1st Dept.1950]; *see also Matter of Burns,* 126 A.D.2d 809, 510 N.Y.S.2d 732 [3d Dept.1987]). In *Ungrich*, the plaintiff, a life tenant under a testamentary trust, brought an action for a

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trust accounting and to remove the trustees for alleged misconduct. The Surrogate's Court there had dismissed the objectant's challenges. Regarding the question of attorney's fees, we determined as a matter of common law,

[933 N.E.2d 199, 906 N.Y.S.2d 801]

prior to any statute on the subject, that the court should have discretion to disburse fees from the estate generally or from individual shares, depending on the circumstances of each case. We stated that trustees should have "an opportunity to prove their expenses and the circumstances under which they were incurred," and at that point, "it would be for the court to determine on the facts of the case what part, if any, of such expenditures should be allowed to the [trustees] and charged against the life tenant and what part against the corpus of the estate" (*Ungrich,* 201 N.Y. at 420, 94 N.E. 999).

Because we find that this construction is more faithful to the statute, our precedents prior to *Dillon,* and fairness, we choose to restore the plain meaning of SCPA 2110(2): to place discretion in the hands of the trial courts to allocate expenses when ordering that fiduciaries be indemnified by an estate for attorney's fees.[4] The trial court's discretion extends to the timing and structure of deducting funds against the present and future interests of the beneficiaries.

In cases where a fiduciary is to be granted counsel fees under SCPA 2110(2), the Surrogate's Court should undertake a multi-factored assessment of the sources from which the fees are to be paid.[5] These factors, none of which should be determinative, may include: (1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual

[15 N.Y.3d 187]

beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary's participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally (*see e.g. Matter of Greatsinger,* 67 N.Y.2d 177, 183-184, 501 N.Y.S.2d 623, 492 N.E.2d 751 [1986] [providing factors to guide courts in discretionary allocation of attorney's fees among multiple trusts in estate litigation]). Inasmuch as Surrogate's Court never exercised its discretion, we remit to allow it the opportunity to do so.

Accordingly, the order of the Appellate Division should be modified, with costs to appellants, by remitting to Surrogate's Court for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Order modified, etc.

Judges CIPARICK, GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

[1] Following Louis H. Whitney's death, his widow and executor, respondent Carol J. Whitney, was substituted for him in both proceedings by order entered in April 2008. The Whitney Children were simultaneously joined as respondents in the second proceeding.

[2] The court-made Pro Tanto Rule dictates that beneficiaries who did not file objections to a fiduciary's conduct are not entitled to share in the surcharge that accrues to the estate or trust when other beneficiaries file successful objections. The rule sought to prevent non-objecting beneficiaries from

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being rewarded for their quiescence while their co-beneficiaries defended the estate assets (*see Matter of Garvin,* 256 N.Y. 518, 177 N.E. 24 [1931]).

3 The present SCPA 2110 was enacted in 1966 as part of a recodification of the Surrogate's Court Act. The original Surrogate's Court Act § 231-a, adopted in 1923, stated in relevant part, "The surrogate may direct payment therefor from the estate generally or from the funds in the hands of the representative belonging to any legatee, devisee, distributee or person interested therein." (L. 1923, ch. 526.) SCPA 2110, like Surrogate's Court Act § 231-a before it, provides for compensation out of estate funds for a fiduciary that accrues counsel fees in the course of fulfilling its fiduciary duties to the estate. Although the fiduciary conducts the litigation and may have all the hallmarks of a party to a suit (especially when the fiduciary is defending itself in a surcharge proceeding), the estate is ordinarily obligated to indemnify the fiduciary for attorney's and litigation fees (*see e.g. Wetmore v. Parker,* 52 N.Y. 450 [1873]; *cf. Matter of Wadsworth,* 275 N.Y. 590, 11 N.E.2d 769 [1937]). The rationale is that the actions of fiduciaries, absent misconduct, are undertaken to benefit the estate, and the estate should therefore be charged with the fiduciaries' costs.

4 This holding does not involve or affect SCPA 2301(4), which provides for costs and allowances that may be made payable by any party *personally.*

5 This holding does not involve or affect the Surrogate's discretion to make the underlying determination of whether or not the fiduciary is entitled to charge its counsel fees to the estate, or whether or not the amount of counsel fees is reasonable. In assessing the reasonableness of a fee award, the Surrogate should consider such factors as the extent of services provided, the amount of time spent on the matter, the level of sophistication required, and the size of the estate relative to the amount of fees.

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32 Misc.3d 661
929 N.Y.S.2d 650
2011 N.Y. Slip Op. 21195

In the Matter of the INTERMEDIATE ACCOUNTING OF the GLENS FALLS NATIONAL BANK AND TRUST COMPANY and Samuel P. Hoopes, As Trustees under the Will of Charlotte P. Hyde, Deceased.

Surrogate's Court, Warren County, New York.

May 20, 2011.

[929 N.Y.S.2d 652]

Nolan & Heller, LLP (David H. Wilder of counsel), for Mary W. Renz and others.Judge & Duffy (H. Wayne Judge and Monica A. Duffy of counsel), for Louis H. Whitney and others.McPhillips, Fitzgerald & Cullum, LLP (James E. Cullum of counsel), for Byron Lapham.McNamee, Lochner, Titus & Williams (Richard D. Cirincione and G. Kimball Williams of counsel), for Banknorth.Bartlett, Pontiff, Stewart & Rhodes, P.C. (Benjamin R. Pratt of counsel), for Samuel Hoopes.Putney, Twombly, Hall & Hirson, LLP (Christopher M. Houlihan of counsel), for Glens Falls National Bank and Trust Company.**JOHN S. HALL, J.**

[32 Misc.3d 662] The Finch Pruyn Paper Company, Inc. (hereinafter referred to as “Finch Pruyn”) was, until recently, a large family-owned paper manufacturing company located in Glens Falls, New York. Through a series of successful innovations, including the development of a type of white, opaque paper requisite for making photocopies, the company flourished for more than a century. Unfortunately, the paper industry fell into a downturn [32 Misc.3d 663] during the 1990s when many paper mills were forced to close and the value of Finch Pruyn greatly diminished.

Charlotte Pruyn Hyde and Nell Pruyn Cunningham were the descendants of one of the founders of Finch Pruyn. During the time that the mill was flourishing, the sisters established several trusts which were funded primarily (and some, exclusively) with their shares of Finch Pruyn corporate stock. During the mid

[929 N.Y.S.2d 653]

2000s, after the decline in the paper market, Intermediate Accountings were filed by the trustees. These were followed by objections alleging, *inter alia,* that the investment portfolios of the trusts were not diversified and as a result, the trusts suffered a significant loss in value.

Prior to the trial, one family of beneficiaries, the Renz family, chose to withdraw their objections to the accounting and acknowledged in writing that they would not, and could not, share in any surcharge awarded against the trustees if the other objectants were successful, in accordance with a common law trust doctrine known as the *Pro Tanto* Rule. On the other hand, the Whitneys, the remaining family of beneficiaries, contended that the trustees should have sold 95% of the Finch Pruyn stock prior to 1995. As a result of their allegedly negligent failure to do so, the Whitneys contended that the trusts lost tens of millions of dollars in value.

In opposition to the Whitney's motion for summary judgment, the trustees maintained that Finch Pruyn had a unique capital structure preventing it's sale, that a fair price could not be obtained if they tried to liquidate the Finch Pruyn stock because there were no buyers for the stock, nor any public market in which to sell it. They argued that a sale of the Finch Pruyn stock would have been detrimental to the beneficiaries' interest who would suffer adverse tax consequences due to significant unrealized capital gains. Partial summary judgment was granted to the

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objectants holding that the trusts were not diversified and that the governing trust instruments did not prohibit diversification. At a lengthy trial involving seventeen (17) days of testimony, the Court heard many witnesses including expert testimony by Professor Kenneth Joyce, one of the authors of the Prudent Investor Act, and Lawrence Griswold a Senior Trust Officer of the Lincoln Chase Bank, on behalf of the objectants. Following the trial this court issued a decision dated January 3, 2007 dismissing the objections. It held that a unique corporate stock arrangement prevented the sale of the Finch Pruyn stock and diversification of the trusts assets.

[32 Misc.3d 664] After the trial, the Renz family moved to have the attorney fees, in excess of $900,000, allocated to the objectants' interests in the trusts, not to the principal of the trusts which would diminish the value of their shares. Despite significant misgivings and strongly expressed doubts as to the fairness of requiring the Trusts to bear the entire costs of the litigation, this Court was constrained to follow *In re Dillon's Estate,* 28 N.Y.2d 597, 319 N.Y.S.2d 850, 268 N.E.2d 646 [1971], thus denying the motion for allocation of fees. The Appellate Division affirmed but the Court of Appeals granted leave to appeal and reversed. It overruled *In re Dillon's Estate* and remanded to this Court to allocate the attorney fees and expenses in it's discretion by applying several factors.

ISSUE PRESENTED

How to allocate litigation costs to balance the competing interests of the beneficiaries of a trust by protecting non-objecting beneficiaries from bearing the costs of litigation of a contested accounting matter they chose to not participate in, with the interests of the unsuccessful objecting beneficiaries who chose to litigate in good faith after being granted partial summary judgment.

THE TRUSTS

The **HYDE ARTICLE SEVENTH** trust is a testamentary trust established under Article SEVENTH of the Will of Charlotte P. Hyde. This trust was established solely for the benefit of Louis Whitney

[929 N.Y.S.2d 654]

and his children. The Renz family had no interest in this trust. Upon the death of the primary income beneficiary, Louis Whitney, the remainder was to go to his surviving children. As such, all expenses relative to the proceedings involving Article SEVENTH should be and has been borne by the Whitney children.

The **HYDE ARTICLE NINTH TRUST** is a testamentary trust established under Article NINTH of the Will of Charlotte P. Hyde. Upon the death of the primary income beneficiary, Mary VanNess Whitney, the principle of the Hyde Article NINTH Trust was divided into two separate and equal trusts to provide income for her children, Mary Renz and Louis H. Whitney. Upon each of their deaths, the principal of their respective trusts were to be distributed to the surviving great-grand children of Charlotte P. Hyde, or their issue surviving. Mary Renz has three children. Louis H. Whitney had two children. Thus, there are five great-[32 Misc.3d 665] grandchildren, each of whom possesses a presumptive one-fifth (1/ 5) remainder interest in both trusts. Neither Mary Renz nor Louis Whitney had a remainder interest in either of the trusts.

Objectant Louis Whitney died on January 16, 2008. Upon his death, the five surviving Renz and Whitney children received the principal of the Louis Whitney share of the Hyde Article NINTH Trust in equal five shares, subject to this Court's prior order, dated October 12, 2007, granting a stay of enforcement.

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The **CUNNINGHAM TRUST** is an *inter vivos* trust established in 1935 for the benefit of Nell Pruyn Cunningham's husband, several friends and their descendants. Mary Renz and Louis Whitney are income beneficiaries and presumptive remaindermen of an undivided 1/6 share each. Upon Louis Whitney's death on January 16, 2008, his two children became the current income beneficiaries and presumptive remaindermen of that undivided 1/6 share of the Cunningham Trust (*i.e.* 1/12 each).

OBJECTIONS

Louis Whitney and his children filed objections to the accounting for the two Hyde Trusts. Significantly, only Louis Whitney filed objections to the Cunningham Trust Accounting.

During May of 2002, Mary Renz and her children filed objections to the intermediate accountings in Hyde but objected only to a portion of the attorneys fees which they believed were unreasonable. In the Cunningham accounting they objected to the lack of diversification of the trusts.

However, following the completion of discovery in 2006, they decided not to litigate their objections. They filed an Acknowledgment dated February 3, 2006 stating that they did not object to the accounts and acknowledged that “They are not entitled to share in any surcharges imposed against the Trustees in these proceedings”. They also filed a cross-motion opposing the Whitney's objections and requesting that all legal fees be paid from the Whitney's share of the trusts. This was denied as being premature.

On January 3, 2007 this court dismissed the Whitneys objections and the Renzes renewed their motion to require that legal expenses be paid by the Whitneys. By Order dated April 14, 2007, this Court held that while it appeared to be fair to allocate the attorneys fees to the Whitneys, it was constrained to follow the Court of Appeal's holding's in *Dillon's Estate*. The Court noted that the *Dillon* decision had been universally criticized by [32 Misc.3d 666] the leading commentators of the EPTL and that the outcome was harsh and unfair. However, established precedent required that attorney's fees be paid from the principal of the trusts to the detriment of the non-objecting beneficiaries, such as the Renz children.

[929 N.Y.S.2d 655]

COURT OF APPEALS

After the Appellate Division affirmed this Court's decision, the Court of Appeals granted leave to appeal and reversed. It overruled it's decision *In re Dillon's Estate (supra)* and restored discretion to the Surrogate when deciding issues of fee and expense allocation. It specifically held that SCPA 2110(2) gives the trial court discretion to allocate the payment of a fiduciary's attorney's fees either from the estate as a whole or from shares of individual estate beneficiaries, and that Surrogate's Court had discretion to charge individual trust beneficiaries' shares of trusts for counsel fees incurred by trustees in defense of beneficiaries' objection to an accounting.

PRO TANTO* RULE COMPARED TO THE RULE IN *HYDE

The *Pro Tanto* Rule is an equitable rule from the common law intended to protect fiduciaries by limiting their liability for negligent (but not egregious) conduct. Simply stated, a beneficiary who does not object to a fiduciary's conduct cannot share in the benefits obtained if an objecting party is successful. It is based on the concept that those who do not object to an account are deemed to have accepted it, and promotes the public policy of encouraging parties to take on the necessary and sometimes onerous duties of a fiduciary. Beneficiaries cannot await the

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outcome of an attack on a fiduciary by other parties, then share in the surcharge without taking any of the risks or doing any of the work. (*See, Valente and Bochstein, Pro Tanto Rule: Sword or Shield,* N.Y.L.J.; pg. 3; Col. 1, 7/2/2010).

The Court of Appeals was presented with the inverse situation in Hyde. It held that a beneficiary who objects but is not successful can be held responsible, in whole or in part, for the litigation expenses incurred (see *Matter of Bishop,* 277 A.D. 108, 98 N.Y.S.2d 69 [1st Dept., 1950]). The *Pro Tanto* rule protects fiduciaries by limiting their liability wherein the *Hyde/Bishop* rule discourages frivolous litigation. The *Pro Tanto* Rule applies to the *receipt of benefits* resulting from *successful* objections. The *Hyde/Bishop* rule applies to the *payment of costs* resulting from *unsuccessful* objections.

[32 Misc.3d 667] MULTI–FACTORED ASSESSMENT

The Court of Appeals also held that:

“[I]n cases where a fiduciary is to be granted counsel fees under SCPA 2110(2), the Surrogate's Court should undertake a multi-factored assessment of the sources from which the fees are to be paid. These factors, none of which should be determinative, may include: 1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; 2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; 3) the extent of an individual beneficiary's participation in the proceeding; 4) the good or bad faith of the objecting beneficiary; 5) whether there was justifiable doubt regarding the fiduciary's conduct; 6) the portions of interests in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries, and 7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead to the corpus of the estate generally.”

APPLYING THE FACTORS*HYDE ARTICLE NINTH TRUSTFactor 1* Whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate.

The Whitneys objected that the trust portfolios were not diversified as required

[929 N.Y.S.2d 656]

by the Prudent Investor Act. At no time during this lengthy litigation did any party suggest that diversification was not in the best interests of the trusts. Partial summary judgment was granted to the Whitneys by Decision and Order dated September 8, 2005 which found that the trusts were not diversified as required and that the terms of the governing trust instruments did not prohibit diversification.

According to affidavits in related matters filed in this Court and as announced by Finch Pruyn & Company and widely reported by the media, the Finch Pruyn shareholders voted to approve the sale of the company to Finch Pruyn Holdings, LLC on April 24, 2007. The sale occurred in June of that year. The Court takes judicial notice of documents subsequently filed in Court that the portfolios of the trusts have now been liquidated and diversified. Although the Renzes chose to withdraw their [32 Misc.3d 668] objections and waived any claim for surcharges resulting from the Whitney objections, the Renzes nevertheless benefitted from that liquidation. While this diversification may have occurred had the Whitneys not filed objections, this development cannot be ignored as the trustees managed the trusts without diversifying the assets for decades.

***Factor 2* The possible benefits to individual beneficiaries from the outcome of the underlying proceeding.**

The Renz respondents filed an Acknowledgment on February 3, 2006 prior

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to the trial that they did not join in the litigation and understood that they could not benefit in the event that surcharges were awarded. Consequently they contend that they stood to gain nothing from the objections. However, as noted above, the Trustees failed to comply with the Prudent Investor Act for decades (for unique and valid reasons), but achieved diversification shortly after this matter was decided.

***Factor 3* The extent of an individual beneficiary's participation in the proceeding.**

Following discovery, the Renzes withdrew their objections and did not participate in the trial. The Whitney children filed objections in the Hyde Accountings and participated in the joint trial. Significantly only Louis H. Whitney filed objections in the Cunningham accounting.

***Factor 4* The good or bad faith of the objecting beneficiary.**

The Court is all too familiar with disgruntled, vexatious estate litigants who are more (often exclusively) concerned with emotional rather than legal issues. Frequently they act without, or contrary to, the advice of counsel, often *pro se*. In contrast, the Whitneys consulted experienced counsel, who performed extensive investigation into the facts, the voluminous documents and records, the applicable law, and had a good faith belief in the necessity and validity of their proposed litigation.

Prior to filing their objections they correctly determined that failure to object to the intermediate accountings would prevent them from raising those objections in the future. They met with Buffalo Law School Professor Kenneth Joyce, one of the authors of the Prudent Investor Act, who confirmed that the Whitneys appeared to have a valid basis for objecting to the accountings. They also consulted with Lawrence Griswold, a retired senior trust officer at Lincoln Chase Bank in Rochester, who opined that the trustees were legally responsible for their failure to diversify the portfolios. Both experts offered to, and did, testify [32 Misc.3d 669] as a witness on behalf of the objectants. Finally, this Court granted partial summary judgment decision to the Whitneys and denied summary judgment to the Trustees finding

[929 N.Y.S.2d 657]

that there were no questions of fact that several elements of the Prudent Investor Act had been violated.

Where an account discloses possible mismanagement or a substantial loss, it

“in and of itself, does not imply negligence, imprudence or mismanagement on the part of the trustees, it does seem to imply a duty of explanation [by the trustees] to the beneficiaries and remaindermen” (*Matter of Penney,* 60 Misc.2d 334, 302 N.Y.S.2d 886 [1969]).

The Whitneys filed their objections in good faith, and they justifiably relied on the advice of numerous respected experts and experienced legal counsel.

***Factor 5* Whether there was justifiable doubt regarding the fiduciary's conduct.**

Unlike many objectants who base their claims on surmise, supposition or suspicion, the Whitneys had a plethora of proof of the Trustees' failure to diversify. Experienced counsel and several knowledgeable experts advised the objectants of the merits of the case. This Court's summary judgment decision established that their objections were justified and not a vehicle to retaliate against the trustees or family members.

***Factor 6* The portions of interests in the estate held by the non-objecting**

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beneficiaries relative to the objecting beneficiaries.

This Court is well aware of litigation by beneficiaries of an inconsequential share in a trust or estate who appear to be, and often state, that they are motivated more by a desire to swamp the main beneficiaries in litigation costs rather than in succeeding. That is not a factor in the present matter. While the Renz children own a collective 3/5 (60%) remainder interest in the principal of the Hyde Article NINTH Trust, the Whitneys own the remaining presumptive 2/5ths (40%). The trust is worth several million dollars. The damages for failing to diversify could have exceeded several million dollars. Therefore, the Whitneys had a significant economic interest on the litigation.

***Factor 7* The future interests that could be affected by reallocation of fees to individual beneficiaries instead to the corpus of the estate generally.**

The Renz children own a collective 3/5 (60%) remainder interest in the principal of the Hyde Article NINTH Trust. Therefore, if the litigation fees are paid from the trust [32 Misc.3d 670] corpus and not reallocated to the Whitney share, the Renz beneficiaries who did not object and did not participate in the trial will bear a larger portion of the expenses than the actual objectants.

HYDE ARTICLE SEVENTH TRUST

The Hyde Article SEVENTH Trust was established solely for the benefit of Louis Whitney and his children. The Renz family had no interest in said trust. As such, all litigation expenses involving Article SEVENTH should be and have been paid from the Whitney grandchildren's interest.

CUNNINGHAM TRUST

Unlike the two HYDE trusts, neither of the Whitney children filed objections to the Cunningham accountings. Their father, Louis Whitney was the only objectant. In fact, the Whitney children were not added as parties to that proceeding until after their father died, and the trial had concluded. Consequently the Cunningham Trust presents an issue separate and distinct from the Hyde Article NINTH Trust: Whether non-objecting remaindermen should be responsible for litigation expenses incurred as the result of unsuccessful objections filed by their father.

[929 N.Y.S.2d 658]

Although this court previously held in its prior decision and order, dated April 29, 2008, that the Whitney children should be substituted in for their father as respondents, this was not because the Whitney children desired to litigate the Cunningham appeal on their own behalf, but because the court required a new party to finalize the litigation on behalf of their father. This does not, however, negate the fact that they never objected to the Cunningham accounting.

Since the Whitney children never objected to the intermediate accounting, they should not be penalized. They had no economic interest in the outcome. The *Pro Tanto* rule prohibits them from receiving any benefit. Any surcharge gained would have to be held in an earmarked fund specifically for the benefit of the life income beneficiary, their father (see *Matter of Hall,* 164 N.Y. 196, 58 N.E. 11 [1900]).

Litigation expenses resulting from an unsuccessful action against a trust should be paid, not by remaindermen who had no part in instituting the action and no interest in the outcome, but by an income beneficiary who instituted the action solely for his own benefit (*Matter of Ungrich,* 201 N.Y. 415, 94 N.E. 999 [1911]). In *Ungrich,* the remaindermen were charities and the objectants [32 Misc.3d 671] commenced litigation termed “unwarranted” by the court, thus perhaps making a more compelling case. However, in

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balancing the equities, the Whitney remaindermen should not be treated differently than the other remaindermen, including the Renz children, who did not object to the accounting.

In *Matter of Bishop,* (*supra*) the Appellate Division held that where an income beneficiary instituted an unsuccessful action, the trust, not the remaindermen, should be responsible to pay litigation costs. The court found that the action was reckless and lacking merit, contrary to the facts here. However, where an account reflects mismanagement or a substantial loss to the estate or trust, it implies a duty of explanation by the trustees to the beneficiaries and remaindermen (*see Matter of Penney, supra*).

Where such as here a...

“court cannot say that [issues raised in litigation] ... were so lacking in substance as to constitute proof of ... malice on the part of the income beneficiaries ... [the court] will follow the usual practice and will charge the attorneys' fees **wholly to principal** ...” (*In re Bishop's Estate,* 79 N.Y.S.2d 220) (emphasis supplied).

The remaindermen should not have to pay for the action of their father, especially since he acted in good faith. The Court of Appeal's decision in this matter reiterates that parties who do not object to an accounting should not be required to bear to costs of the litigation. While the practical effect of having the litigation expenses paid from the corpus of the trust will result in the non-objecting Renz family bearing some of the costs of the litigation, the Renz remaindermen hold only a 1/12 interest. Therefore their liability will be *de minimus.*

ADDITIONAL FACTORS

The list of factors set forth by the Court of Appeals in the *Matter of Hyde* is not exhaustive. Rather, the decision states “these factors, none of which should be determinative *may* include ...” the seven factors set forth above (see *Matter of Hyde,* 15 N.Y.3d 179, 906 N.Y.S.2d 796, 933 N.E.2d 194, *at* 186) (emphasis added). There are additional factors unique to these proceedings that must be considered.

First, the Renz beneficiaries filed objections to the Hyde accounting dated May

[929 N.Y.S.2d 659]

16, 2002 and to the Cunningham accounting dated June 4, 2003. In Hyde, the objectants complained of a specific, relatively small payment of attorneys fees. In the Cunningham accounting the objections were broader; they objected to the lack of diversification of the trust assets. Thereafter they [32 Misc.3d 672] engaged in discovery from 2003 until 2006, then withdrew their objections to both accounts by filing the Acknowledgment dated February 3, 2006. They did not, participate in the trial. Therefore, a small portion of the attorney's fees charged in this matter were incurred as a result of the Renz's participation in the discovery process. It is likely that some of the discovery occurred simultaneously to discovery conducted by the Whitneys.

Second, Louis Whitney, who died January 16, 2008, filed objections to the Cunningham account. However, his children did not. The Hyde and the Cunningham objections were tried jointly. This created some unique issues. The Whitney children were present and participated in the trial regarding the Hyde objections. Although they lacked standing to participate in Cunningham, they were present while issues regarding the Cunningham Trust were heard. Although they should not be responsible to pay litigation expenses involved in the Cunningham Trust, it is impossible to determine precisely what litigation expenses pertained to which trust. For instance, when the Attorneys for the Whitney Trust

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presented testimony that the trust could not diversify the trust assets due to the unique structure of its corporate stock, that testimony also established the validity of the Cunningham Trust's account. When the Hyde Trust lawyers cross examined the objectant's experts, the points raised also benefitted the Cunningham Trust. There is no exact method of dividing the litigation expenses by number of questions asked, time spent, or whether any particular witness or question benefitted the Hyde Trust, the Cunningham Trust, both or neither.

In preparing for trial, the parties agreed to share the expert witness fees equally. Although respondent Renz subsequently asked the court to overrule that agreement and allocate the payment of said expert witness fees based on the number of shares that each respective trust controls, this court denied said request. By decision and order dated August 16, 2007, this court directed that the expert witness fees be shared equally as originally agreed upon.

Consequently, the only practical method of allocating the Cunningham Trust's litigation expenses is to order that they be paid from the trust principal, even though it is apparent that at least some of those expenses were incurred because objections were filed in the Hyde Trust, and that some of the Whitney objectants were present in the courtroom while issues involving the Cunningham Trust were litigated. As a result, the Renz family's [32 Misc.3d 673] share will be reduced despite the fact that they, like the Whitney children, did not object or participate in the litigation.

Finally, the size of the litigation expenses, in excess of $1,000,000 must be considered in light of the substantial assets being held in trust. Each trust is believed to be currently worth approximately $2,500,000.

Following the trial, on July 14, 2008, this court awarded attorneys fees in the amount of $966,087.90 and disbursements of $54,819.06, to the Law Firm of Putney, Twombly, Hall & Hirson LLP. It directed that those expenses be shared equally by the parties and that they be paid from the principal of the Hyde Article NINTH Trust for the benefit of Mary W. Renz and Louis H. Whitney. The Court also awarded attorneys fees in the amount of

[929 N.Y.S.2d 660]

$104,549.90, and disbursements of $4,028.02 to the law firm of Bartlett, Pontiff, Stewart & Rhodes. It ordered that those expenses be shared equally by the parties and paid from the principal of the Hyde Article NINTH trust.

Based on the foregoing, it is hereby

ORDERED, all litigation expenses incurred by the trustees of the Hyde Article SEVENTH Trust, which was established exclusively for the benefit of the Whitneys, be paid from principal from the corpus of the trust, as directed in this court's July 14, 2008 Decision and Order, and it is further

ORDERED, that all litigation expenses incurred by the Hyde Article NINTH accountings ***before*** February 3, 2006 shall be paid from the corpus of the trust. All litigation expenses incurred by the Hyde Article NINTH accountings ***after*** February 3, 2006, shall be paid as follows:

(1)one-half (1/2) shall be paid from the shares of the objectants, Louis H. Whitney, Charlotte Whitney and Louis Whitney, II, **and**

(2)the remaining one-half (1/2) of said expenses shall be paid from the trust corpus, and it is further

ORDERED, that the trustees of the Hyde Article NINTH Trust reallocate the litigation expenses that were previously paid

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from the Article NINTH Trust so as to comply with this decision and order.

ORDERED the Renz counterclaim is granted to the extent that one-half (1/2) of all future litigation expenses incurred by the Hyde Article NINTH Trustees in defending this accounting proceeding be paid from the Whitney share, one-half (1/2) from trust corpus and it is further

ORDERED, all litigation expenses of Cunningham accounting, shall be paid from the principal of the trust without reallocation.

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New York County Surrogate's Court
Date: June 28, 2016

SURROGATE'S COURT : NEW YORK COUNTY
---------------------------------------X
Reformation Proceeding in the Estate of

CHARLES SUKENIK,

Deceased.
---------------------------------------X

File No. 2014-20/A

A N D E R S O N, S.

Petitioner, the wife of decedent Charles Sukenik, asks the court to reform an inter vivos trust he established, as well as the IRA beneficiary designation form he executed in which he left his IRA to petitioner. The purpose of the reformation is to remedy "inefficient estate and income tax planning" which, absent the requested reformation, will result in petitioner's incurring an income tax liability of approximately $1.6 million.

Decedent died on August 17, 2013. Under his will, executed on November 4, 2004, decedent left his tangible personal property and cooperative apartment to petitioner and left his residuary estate to The Charles and Vivian Sukenik Philanthropic Fund, Inc. (the "Foundation"). Under the trust, established on August 21, 1996, and amended and restated the same day as the will's execution, decedent provided that, upon his death, petitioner would receive certain real property in Columbia County, New York, with the balance of the trust remainder to be distributed to the Foundation. The will was admitted to probate and letters testamentary issued to the nominated executor, a cousin, who is also the sole trustee of the trust. The IRA beneficiary

designation form at issue was executed by decedent on July 29, 2009, almost five years after the will and trust, and it names petitioner as the recipient of decedent's IRA at UBS Financial Services, Inc.

Petitioner asks the court to reform the trust to add a pecuniary bequest to petitioner in a sum equal to the value of the IRA (about $3.2 million) and to reform the IRA beneficiary designation form to name the Foundation the beneficiary instead of petitioner. If such relief were granted, petitioner would avoid receipt of an asset (the IRA) on which income tax would be due. According to petitioner, decedent intended to benefit the Foundation and his spouse, but his estate plan "could have been structured in a more tax efficient manner ...." By "swap[ping]" assets, petitioner notes that decedent's intent to benefit her and charity, *i.e.*, the Foundation, will be carried out "more tax efficiently." Neither the Foundation nor the Attorney General of the State of New York has opposed the application.

Courts have the power to reform an instrument, *i.e.*, to add, excise, change or transpose language, if doing so would effectuate a decedent's intent (*see e.g. Matter of Snide*, 52 NY2d 193 [1981]). As a general rule, courts will rarely reform a testamentary or trust instrument to correct a mistake (*see e.g. id.; Matter of Dickinson,* 273 AD2d 89 [1st Dept 2000]) unless the reformation is required to rescue the instrument from a

circumstance that threatens to subvert the intent of the testator or grantor to maximize available tax exemptions or deductions (*see e.g. Matter of Martin*, 146 Misc 2d 144 [Sur Ct, New York County 1989]; *Matter of Choate*, 141 Misc 2d 489 [Sur Ct, New York County 1988]; *Matter of Lepore*, 128 Misc 2d 250 [Sur Ct, Kings County 1985). These tax-related reformations are normally sought to cure an instrument's failure to meet the technical requirements of the Internal Revenue Code ("IRC") because of a drafting error (*see e.g. Matter of Gottfried,* NYLJ, Apr. 11, 1997, at 46, col 4 [Sur Ct, New York County 1997]) or because of a subsequent change in law (*see e.g. Matter of Choate*, 141 Misc 2d 489, *supra*).

By contrast, the reformation requested here is prompted by neither a drafting error nor a subsequent change in law. Several years after executing his will and trust, decedent himself thwarted the tax efficiency of his own estate plan by making petitioner the beneficiary of the IRA. There is nothing in the record indicating why, after executing these estate planning instruments, decedent chose to leave additional assets to his wife in this manner or why, in the four years before his death, he did not take steps to cure the unfavorable tax consequences of

his choice of IRA beneficiary.[1]

Petitioner relies on the general presumption that those executing testamentary instruments intend to minimize taxes (*see e.g. Matter of Lepore*, 128 Misc 2d 250, *supra*). However, that presumption has been applied to support tax-related reformations where there was a drafting error or a change in law and the intent of the testator to secure the specific tax advantages sought through reformation/construction was clear (*see e.g. Matter of Choate*, 141 Misc 2d 489, *supra; Matter of Marino*, NYLJ, Nov. 5, 2007, at 43, col 4 [Sur Ct, Suffolk County 2007]; *cf. Matter of Kaskel*, 146 Misc 2d 278 [Sur Ct, New York County 1989] [will executed years before enactment of first generation skipping transfer tax ("GST") reformed to preserve the surviving spouse's GST tax exemption because, among other things, language of will indicated testator intended to minimize/postpone taxes related to grandchildren). Thus, in *Matter of Dunlop* (162 Misc 2d 329 [Sur Ct, Hamilton County 1994], the court refused to reform an instrument to secure GST exemptions for decedent and his spouse where testator expressed an intent to maximize only the marital deduction and was silent as to the GST, which had been in

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[1] According to petitioner, at some unspecified time, decedent's estate planning attorney (who post-deceased decedent) had suggested that decedent leave the IRA to charity and leave certain non-IRA accounts to petitioner rather than to charity, but shortly thereafter - a characterization that leaves too much to conjecture - grantor became too ill to make the necessary changes.

existence when the will was drafted.

Petitioner has offered no authority to support the reformation of a clear and unambiguous instrument in order to remedy the adverse tax consequences of poor estate planning. Although the court is sympathetic to petitioner's regret that grantor's decision to leave her additional assets left her with an additional tax burden as well, nothing in the trust or the will indicates that decedent intended to minimize the income tax consequences of distributions to any beneficiary. Indeed, in both instruments, decedent indicated that he was neutral as to the tax consequences of distributions by giving his fiduciaries the power to distribute assets without regard to "income tax basis." The IRA beneficiary designation is, of course, silent on this issue.

To reform instruments such as those at issue here 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 (*see Matter of Manville*, 112 Misc 2d 355 [Sur Ct, Westchester County 1982]; *see also Matter of Rubin*, 4 Misc 3d 634, 640 [Sur Ct, New York County 2004] [rejecting argument that presumption applied in reformation case where the instrument did not contain "technical drafting errors"]). As the Appellate Division, First Department, stated in

Matter of Dickinson (273 AD2d 89, 90, *supra*), a case in which the court affirmed dismissal of a reformation proceeding:

> "'When the purpose of the testator is reasonably clear by reading his words in their natural and common sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him (*Matter of Tamargo*, 220 NY 225, 228 [1917].'"

Based upon the foregoing, the petition is denied.

This decision constitutes the order of the court.

Dated: June 28, 2016

S U R R O G A T E

162 A.D.3d 564
75 N.Y.S.3d 422 (Mem)

IN RE Charles SUKENIK, Deceased.

Vivian J. Sukenik, Petitioner–Appellant.

6949
6950
File 20A/14

Supreme Court, Appellate Division, First Department, New York.

ENTERED: JUNE 21, 2018

Farrell Fritz, P.C., Uniondale (Eric W. Penzer of counsel), for appellant.

Richter, J.P., Tom, Mazzarelli, Gesmer, Moulton, JJ.

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered November 16, 2016, pursuant to an order, same court and Surrogate, entered June 28, 2016, which denied the petition to reform an inter vivos trust and designation on an IRA beneficiary form, unanimously reversed, on the law, and the petition granted, without costs. Appeal from above order unanimously dismissed, without costs, as subsumed in the appeal from the decree.

The petition should have been granted. Decedent's intent to minimize taxes and provide for his wife of 39 years was apparent in the donative instruments. The Will and Trust agreements demonstrated his intent to take full advantage of all deductions and exemptions provided by law. For example, Article One, paragraph C of the Trust agreement specifically stated that the Trust funds could be transferred to the philanthropic fund only if it was a tax exempt entity, and Article Three authorized the trustee to sell assets in order to minimize taxes payable by beneficiaries. Article Eleventh of the Will also permitted the executor to make certain elections in order to reduce taxes. Furthermore, the presumption that testators intend to take full advantage of tax deductions and exemptions, the lack of opposition, including by the State of New York, and the presumption in favor of widows, all favor petitioner's requested reformation (*see e.g. Matter of Berger,* 57 A.D.2d 591, 393 N.Y.S.2d 600 [2d Dept. 1977] ; *Matter of Hicks,* 10 Misc.3d 1078[A], 2006 N.Y. Slip Op. 50118[U], 2006 WL 250508 [Sur. Ct., Nassau County 2006] ; *Matter of Lepore,* 128 Misc.2d 250, 492 N.Y.S.2d 689 [Sur. Ct., Kings County 1985]).

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151 A.D.3d 662
Supreme Court, Appellate Division, First Department, New York.

In re FRENCH–AMERICAN AID FOR FILE CHILDREN, INC., et al., Petitioners–Respondents,
Joerg Klebe, Objectant–Appellant,
Eric T. Schneiderman, Attorney General, Respondent–Respondent.

June 29, 2017.

Attorneys and Law Firms

John A. Barone, Bronx, for appellant.

*851 Greenfield Stein & Senior, LLP, New York (Gary B. Freidman of counsel), for French–American Aid for Children, Inc., respondent.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for Attorney General, respondent.

Opinion

Decree, Surrogate's Court, New York County (Rita Mella, S.), entered June 9, 2016, inter alia, adjudging that petitioner's revocation of a trust of which objectant is a trustee was valid, unanimously affirmed, without costs.

Objectant's contention that petitioner did not properly revoke the trust because it used Estates, Powers and Trusts Law (EPTL) § 7–1.9(a) instead of § 8–1.1.(c)(2) is unavailing. Before 1985, cases held that a charitable trust could use the predecessor of EPTL 7–1.9(a) (*see e.g. Hanover Bank v. United Brethren's Church on Staten Is.*, 134 N.Y.S.2d 356, 361–362 [Sup.Ct., N.Y. County 1954]). In 1985, EPTL 7–1.9 was amended to add subsection c, which provided that "[a] trust ... wholly benefitting one or more charitable beneficiaries *may* be terminated as provided for by" EPTL 8–1.1(c)(2) (emphasis added). Nothing in either the text of EPTL 7–1.9(c) or the legislative history thereof indicates that charitable trusts were restricted to EPTL 8–1.1(c)(2) after 1985 (*see generally Allstate Ins. Co. v. Belt Parkway Imaging, P.C.*, 78 A.D.3d 592, 914 N.Y.S.2d 5 [1st Dept.2010]). Moreover, post-amendment cases indicate that charitable trusts may still use EPTL 7–1.9(a) (*see e.g. Board of Trustees of Museum of Am. Indian, Heye Found. v. Board of Trustees of Huntington Free Lib. & Reading Room*, 197 A.D.2d 64, 85–86, 610 N.Y.S.2d 488 [1st Dept.1994], *lv. denied* 86 N.Y.2d 702, 631 N.Y.S.2d 606, 655 N.E.2d 703 [1995]; *Matter of Forester*, NYLJ, Dec. 3, 2001, at 17, col. 3 [Sur.Ct., N.Y. County 2001]).

SWEENY, J.P., RENWICK, ANDRIAS, KAPNICK, KAHN, JJ., concur.

All Citations

151 A.D.3d 662, 54 N.Y.S.3d 850 (Mem), 2017 N.Y. Slip Op. 05324

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