NYSBA SUMMER 2013 | VOL. 46 | NO. 2

Trusts and Estates Law Section Newsletter

A publication of the Trusts and Estates Law Section
of the New York State Bar Association

A Message from the Section Chair

Carl T. Baker

Thank you.

It just seems to be the most appropriate way to begin my year as the Chair of our Section.

Thank you to our many committee members who take time from their practices and private lives to contribute to the work of our committees that improve our practices, and support and educate our Section Membership.

Thank you to our Committee Chairs, Vice-Chairs and District Representatives who make up our Executive Committee (listed on pages 33 and 34 of this newsletter) for their guidance and dedication that keep our committees and Section moving forward.

Thank you to Gary Freidman, Elizabeth Hartnett, Ilene Cooper and all the Chairs who have preceded me for their leadership and inspiration (…I have developed a new found appreciation for their service).

Thank you to our current officers, Ron Weiss, Marion Hancock Fish and Meg Gaynor, for their past, present and future contributions to our Section.

Thank you to the many members who have approached me with the offer "if there is anything I can help with, just ask."

Thank you to the NYSBA staff, most importantly Lisa Bataille and Kathy Heider, who keep us on track and so competently support our efforts.

Thank you to…well, it is simply not possible to properly thank all the people who make our Section successful; in fact, "it takes a village" to address all the active matters we have before us, and we have a great village.

As we begin another year we have a lot to look forward to and a lot to accomplish.

Inside

Once again, our legislative agenda has been refined and organized by the efforts of our Legislation and Governmental Relations Committee. Our Lobby Day was March 12 and Committee Chairs Ian MacLean and Rob Harper, supported by Jennifer Hillman and Natalia Murphy, presented our affirmative legislative proposals to key legislators and representatives of the governor's office. This year's agenda consisted of proposals dealing with: (1) interest on legacies; (2) posthumous annulment; (3) exoneration clauses; (4) trustee commissions and the power to adjust; and (5) technical amendments to the Marriage Equality Act. For further information on these items, and to check the status of our various legislative proposals, log in to the NYSBA website and go to: http://www.nysba.org/statewatch/SBA_TRST.HTM.

By the time you receive this *Newsletter*, our Spring meeting in Bermuda will be over. I know the program, organized by the Co-Chairs, Phil Burke and Mike Suprunowicz, and the presentations of all the speakers who volunteered their time and expertise, will have been immensely valuable and informative. Hopefully the weather cooperated enough for all to have a chance to enjoy the beauty and peacefulness of Bermuda.

As to programs, a great strength of our Section is our commitment to the education of our members. The CLE Committee, led by Frank Streng, quickly organized for February a webcast program dealing with the new Federal Estate Tax law, entitled *The American Taxpayer Relief Act of 2012 in the Transfer Tax Context: What Does 'Permanency' Mean?* and presented by former Section Chair Sanford ("Sandy") J. Schlesinger. Upon our return from Bermuda our Statewide Spring seminar will be "Contested Accounting Proceedings in Surrogate's Court." And once again, past Chair Josh Rubenstein will organize our now 11th Annual *Sophisticated Trusts and Estates Institute* to take place in New York City this fall, along with our regular, basic to intermediate, statewide Practical Skills program.

The Diversity Committee, chaired by Ashwani Prabhakar and Anta Cisse-Green, is planning its second sponsored program in the basics of our practice area for young and newly admitted attorneys who may want to pursue a career in the Trusts and Estates field, or simply provide better services to their clients in our practice area. That program will run in New York City the evenings of September 17 and 24.

On October 9th and 10th (mark your calendars) we'll be returning to Binghamton for our Fall Section Meeting at the Binghamton Riverwalk Hotel. Former Section Chair Eugene Peckham and past NYSBA President Kate Grant Madigan, and their firm of Levene Gouldin & Thomson, LLP, are preparing to host, entertain and educate us. In light of the new federal tax exemption and the portability election, what are the planning needs of our clients who now find themselves exposed only to the New York State estate tax? What is appropriate tax planning for this segment of the population? This program will be topical, addressing planning for medium-sized estates.

Watch your email for further announcements regarding these and other Section program offerings.

While the above highlights some scheduled events and programs taking place this year, it represents only a small portion of our Section's activities. Consider the *Newsletter* that you are reading and the wealth of information included. Edited and organized by the Newsletter and Publications Committee Chair, Jackie D'Agostino, a multitude of authors and contributors provide us with timely and topical information to keep us current and knowledgeable.

If you have not done so recently, check our Section's web site at www.nysba.org/trusts and note the plethora of materials and information that it offers. And as you explore, be sure to give us your feedback as to your experience using it. Does it meet your needs? Is it easy and intuitive to navigate? Do you have suggestions for improvements, as to content or navigability? Let us hear from you as our goal is to provide the support and information that our members need and look for.

In that light, check out our Listserve and note the matters of current concern that are explored there. To make this connection to our community more valuable, the officers are looking into and working on an additional web offering that will provide an opportunity to have more complex practice questions addressed by experienced practitioners. Stay tuned for information on this topic as we roll it out later this year, and we will look forward to your feedback on that as well.

Finally, each of our 16 Committees has important and independently active agendas. In addition, special Ad Hoc committees address matters requiring special attention. One significant example is the Uniform Trust Code Committee headed by past Chair Ira Bloom. It is charged with reviewing, analyzing and making recommendations on the adoption of a form of the New York Uniform Trust Code for New York State. The committee's extensive efforts, coordinated with many other stakeholders, will eventually result in significant, new statutory provisions that will affect all of us.

It is the overriding goal of our Section's leadership to make sure that we constantly improve the laws governing Trust and Estate work in our State and that we provide our members with the skills, tools and knowledge to best serve their clients. To accomplish this we need your input. We need your feedback as to how best to assist you. And we need your contributions of time and effort in the ongoing challenge.

I can assure you that if you become active in our Section, you will enjoy those you meet and will grow professionally. By far, the best way to become involved, to meet other practitioners, and to actively assist in the improvement of this area of practice is to join and contribute to a committee. The list of available committees, and ability to join one, is online at **www.nysba.org/trusts** (contact NYSBA State Bar Service Center if you need your website login information: **518-463-3200/800-582-2452**, or **sbsc@nysba.org**). Attending meetings and our CLE programs provides additional benefits. Finally, simply letting us know how we are doing will help focus and guide our future planning and make sure our efforts best support our members needs.

As the year progresses, if you have any questions, ideas, suggestions or concerns, please feel free to contact me directly at any time. I can be reached by phone at 518-745-1400, or by email at ctb@fmbf-law.com.

Carl T. Baker

Upcoming Events

Fall Section Meeting

October 9-10, 2013
Binghamton Riverwalk Hotel
Binghamton, New York

The Basics of the Trusts and Estates Field for Young and Newly Admitted Attorneys

September 17 and September 24, 2013
New York Law School
New York City

11th Annual *Sophisticated Trusts and Estates Institute*

November 2013
New York City

For more information visit our website at:
www.nysba.org/trusts

Editor's Message

This edition of our *Newsletter* explores a multitude of topics relevant to trust and estate planners, administrators and litigators alike. In an article addressing the digital media, Jill Choate Beier and Susan Porter discuss considerations for the estate practitioner in our technologically advanced world, the complexity of legal issues that may arise within that context, and the manner in which they are being addressed by various state legislatures, as well as the Uniform Law Commission. Andrew S. Katzenberg advises as to potential issues presented by the relatively new decanting statute, while Jonathan P. McSherry discusses the importance of revoking a prior power of attorney when a new one is executed.

Of particular interest to the litigators among us, Gary E. Bashian's article provides an explanation of enforcing judgments and the manner in which to pursue a contempt proceeding when necessary; issues that have become more prevalent in the face of the widespread economic distress of recent years. Additionally pertinent to the litigator, Hillary Frommer explains the difference between a trial expert and litigation consultant, the privilege that attaches to certain communications with these individuals, and warns of the ways that privilege may be waived inadvertently. Also addressing the issue of privilege, Anne C. Bederka analyzes the extent to which an attorney's work product may be shielded from the probate exception to the attorney-client privilege in a contested probate proceeding, and discusses steps a practitioner may follow in an attempt to distinguish work product as such in an attempt to maintain its protection from disclosure.

We continue to urge Section members to participate in the *Newsletter*. The deadline for submissions for our Fall 2013 edition is June 14, 2013.

Jaclene D'Agostino

The Digital Asset Dilemma

By Jill Choate Beier and Susan Porter

It is the worst nightmare for a parent. Seemingly out of nowhere, your 15-year-old son commits suicide. You search for answers, finding none. Like all teenagers his age, your son spent a lot of time on his computer and, in particular, on the Facebook website. So, you hope to find some answers by accessing his account. The problem is that Facebook refuses your request stating that you have no rights to access or obtain a copy of the content within your own son's account.[1] Or, imagine that your son is fighting for our country in Iraq and is killed by a bomb near Fallujah. Your son frequently communicated by email with family and friends while serving in the military. After his death, you request the contents of your son's email account from Yahoo! as a sort of modern-day collection of his letters home. The company, however, denies the request for privacy reasons, noting that the Terms of Service for its free email accounts state that a person's rights to the accounts and its contents terminate at death.[2]

Welcome to the age of digital assets. These scenarios raise questions concerning not only ownership of an individual's web assets, but also the right of the deceased individual's survivors to access his or her web assets after death. As just one example of the enormity of this issue, it is estimated that there are 30 million Facebook accounts that belong to deceased persons.[3] Few people consider the fate of their online accounts or web-based assets upon death or incapacity. Before addressing what happens to such accounts and/or assets upon one's death, we first need to define what these assets are.

What Are Digital Assets?

A general definition of a digital asset is "any file on your computer in a storage drive or website and any online account or membership."[4] Digital assets, therefore, can be found in many different forms. For example, some digital assets may be stored on a computer or smartphone or uploaded to a website. These assets would include items such as music, videos, medical records, tax documents, financial records, photographs stored on websites such as Shutterfly or Flickr, or generic file storage sites in the Cloud such as Dropbox. Most, if not all, of these types of digital assets require a login ID and password to gain access to the stored materials.

Other assets involve social media websites, such as Facebook, Twitter, LinkedIn, Pinterest, or Google Plus,[5] which promote social interaction, messaging and connection to other individuals.[6] Again, these types of digital accounts typically require a login ID and password to gain access. In addition, there are many other types of accounts that we use in our daily lives that have secured access. These accounts include email accounts such as Yahoo!, Gmail or Hotmail,[7] on-line banking accounts, Paypal accounts, eBay accounts and Amazon accounts, just to name a few. Certain digital assets have their own pecuniary value such as ownership of a domain name or a blog.

It is no wonder that with all of these digital assets, estate planners and administrators are wondering how to deal with them after the death or incapacitation of the "owner."

What Is the Law Regarding Digital Assets?

Terms of Service of the Service Provider

As discussed below, very few states have enacted statutes to deal with electronic content and digital assets. That means for most people in most states, if the service provider has a policy regarding the transfer or disposal of account access and content under the provider's Terms of Service ("TOS"), then the TOS will control the fate of the deceased person's account and content for that service provider.[8] Most people agree to the TOS of the service provider by clicking on the "I agree" button when establishing an account.[9] Some service providers have a policy that indicates what will happen upon the death of an account holder. Others have no detailed policy.

For example, Shutterfly's TOS does not include an explicit discussion of what happens when the account holder dies. Shutterfly's TOS states that the individual agrees not to disclose his or her username or password to any third party and acknowledges that the individual's access to the account is non-transferable.[10] The TOS for LinkedIn, Google and Twitter each contain similar language regarding disclosure of the secured access information and transferability.[11]

Conversely, Gmail has a policy for potentially releasing emails to the personal representative of a deceased account holder.[12] The policy makes it clear, however, that there is no guarantee the email content will be released and a court order will be required.[13] Yahoo! explicitly states in its TOS that the account cannot be transferred and any rights to content within the user's email account terminate upon death and all content may be permanently deleted.[14] Facebook allows someone to report a user as deceased and the deceased user's Facebook page may then be converted into a memorial to the deceased user. Only confirmed friends will continue to have access to the deceased user's profile and may continue to post messages in memoriam on the deceased user's wall.[15]

A more complex issue surrounds the choice of law clause that is generally included in a service provider's TOS. A choice of law clause dictates which state's law will govern the TOS itself and any transaction that is related to the TOS.[16] The result may be that even where the deceased resides in a state with a statute governing the disposition of and access to the deceased's digital assets, if the state law governing the TOS does not have a similar statute, the TOS may override the state law where the deceased resides.

Current Law Regarding Fiduciary Access to Digital Assets

At the time of this writing, only six states, Connecticut, Rhode Island, Indiana, Oklahoma, Idaho, and Virginia, have enacted statutes to deal with electronic content and digital assets. Connecticut enacted the first statute in this country in 2005[17] to respond to situations similar to that of the Yahoo! case described in the opening paragraph of this article. The Connecticut statute specifically addresses fiduciary access to email accounts and requires an email service provider to provide the executor or administrator of the deceased person's estate "access to or copies of the contents of the electronic mail account of such deceased person…."[18] The executor or administrator must submit a written request for the email account access along with a certified copy of the death certificate and his or her certificate of appointment as executor or administrator of the deceased person's estate, or submit an order of the court of probate that has jurisdiction over the deceased person's estate.[19] The legislation, however, does not address the other types of digital assets previously discussed.

Rhode Island enacted a statute in 2007 that is very similar to the Connecticut statute and only deals with fiduciary access to a deceased person's email account.[20] Indiana, by contrast, enacted a statute in 2007 that attempts to deal with additional types of digital assets.[21] The Indiana statute provides that a custodian[22] "shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian…."[23] Similar to the Connecticut and Rhode Island statutes, the personal representative must submit a written request for access along with the death certificate and the official documents appointing the personal representative, or provide a court order issued by the probate court that has jurisdiction over the deceased person's estate.[24] The statute further prohibits the custodian from destroying or disposing of any electronically stored documents or information of the deceased person for two years after the request from the personal representative was received by the custodian.[25]

Oklahoma enacted a digital asset statute in 2010[26] and Idaho enacted a similar statute in 2011.[27] These statutes are, arguably, the most comprehensive regarding digital assets enacted to date. Oklahoma's statute provides:

> The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.[28]

Idaho's statute uses virtually identical language.[29] These statutes make good progress toward resolving the digital asset dilemma. However, the Oklahoma and Idaho statutes do not authorize full-blown access to all of the decedent's digital property. In addition, the Oklahoma statute expressly grants the executor power only "where otherwise authorized."[30] This language can give the service provider the ability to claim control over the transfer of the deceased's account through the TOS. As discussed above, most service providers utilize a TOS that does not allow for transfer or assignment, much less access to the deceased's accounts by a fiduciary.

Finally, Virginia's statute was very recently passed in March 2013, and was crafted to specifically address the inability of the parents of the 15-year old who committed suicide to gain access to their son's Facebook account.[31] The statute, however, appears to only address the access of digital accounts that were controlled by a minor.[32]

Proposed Law Regarding Fiduciary Access to Digital Assets

Several states have recently introduced legislation regarding fiduciary access to digital assets. New York, Nebraska, Maryland, North Dakota and Nevada have each introduced bills with proposed language similar or identical to the language used in the Oklahoma and Idaho statutes described above.[33] Other states such as North Carolina and Oregon are proposing broader legislation to include laws that would provide an agent or a conservator, in addition to a decedent's personal representative, access to the digital accounts and digital assets of the individual whom the agent or conservator represents.[34] Many more states are also studying possible legislation.

The digital asset dilemma has become such a prominent topic for discussion among estate planners and administrators around the country that the Uniform Law Commission ("ULC") has formed a drafting committee to create a uniform law relating to fiduciary access to digital assets entitled the "Fiduciary Access To Digital Assets Act."[35] The ULC proposal includes thorough definitions of a custodian, digital account, digital asset, digital device and digital service, just to name a few.[36] It also adds the term "digital property," which consists of the "ownership and management of and rights related to a digital account and digital asset."[37] The proposal authorizes a fiduciary, such as a personal representative, conservator, trustee or an agent, to exercise control over the deceased person's digital property so long as it is permitted under the provisions of the terms of service agreement.[38] Finally, the proposed law provides that the personal representative is an "authorized user" under all applicable state and federal statutes.[39] This last provision ensures that the fiduciary is considered an authorized user under two federal statutes that prohibit unauthorized access to computers and computer data,[40] as well as pursuant to any comparable state laws prohibiting unauthorized access.[41]

Although the ULC's proposal is comprehensive, it is arguable that some of the proposed language will simply allow the service provider to refuse to cooperate with the executor or comply with the law because the TOS prohibits a third party from accessing the deceased's account. In the absence of clear statutory language, therefore, the practitioner should contemplate the disposition of digital assets in crafting a client's estate plan.

Planning for Digital Assets

The first step in planning for digital assets is simply to identify your client's digital assets, which, sometimes, can be the most difficult aspect of planning for them. It is important to create an inventory of all digital accounts with password protection, including the login ID and password for each site. Some websites require a user to periodically change the password for the account, so this list will need to be updated for new passwords and for any new accounts that your client may create. A sample digital inventory form can be found at http://www.digitalpassing.com/digitalaudit.pdf.[42] After the inventory has been created, the next step is to ensure the inventory is stored in a secure and private location. If the inventory is in hard copy format, it may be stored in a safe deposit box or with an attorney. If the inventory is stored in an electronic file or multiple electronic files, the client should consider creating a master password for the storage device such as a CD or USB flash drive.[43] The main purpose is to save the information in a secure and private location so that upon the user's death or incapacitation, the information is easily accessible to the appropriate parties. An alternative option is to entrust the information to a digital estate planning service. These services are discussed in more detail below.

The Will

Disposing of digital assets concerns the disposition of both tangible (*e.g.,* computers, tablets and smartphones) and intangible (*e.g.,* email, social accounts and business and financial accounts) property. Current documents may—or may not—anticipate the proper disposition of these assets. For example, what does a bequest of "all my tangible personal property" include? Who inherits the books downloaded on a Kindle or music downloaded on an iPod? The Kindle plan provides a one-time payment to buy the hardware and it is accompanied by a "forever" service of holding the books purchased by the account holder (presumably, in the event the Kindle is lost, stolen or destroyed and needs to be replaced).[44] So, in general, your clients own the hardware, but probably do not own the content. Content is not "purchased" in the traditional sense, because it is leased or, sometimes, the term "licensed" is used. Under the iTunes TOS, clients only "borrow" music tracks rather than owning them outright.[45]

In light of this, the decedent may wish that one beneficiary receive the tangible digital asset, such as the computer, and another beneficiary receive the content. Consequently, it is crucial to read and understand the end-user agreement for the hardware as well as the TOS in place for the content. The practitioner must also ensure that the language in the will properly specifies the distribution of tangible and intangible digital assets in accordance with the client's wishes.

In addition, the will should grant the deceased's executor with the authority to access, control and/or delete the deceased's digital accounts. This is preferable even in a jurisdiction that has a statute governing the disposal of digital assets. The estate planner should advise the client to carefully consider the choice of executor if the client has significant digital assets. Care should be taken to ensure that the chosen executor possesses the necessary skills and/or knowledge to administer the client's digital assets. Nevertheless, if the executor lacks the necessary skill, the will should authorize the executor to engage the services of a technology specialist. Indeed, some jurisdictions may recognize the appointment of a "digital executor" to deal with administering digital assets.[46]

Power of Attorney

Although the law is unclear on the issue, an individual could execute a power of attorney that authorizes another person to access, control and/or delete the individual's digital assets and accounts in the event the individual becomes incapacitated. However, as previously discussed, most TOS agreements prohibit providing a person other than the account holder with the login and password information. Doing so may violate the TOS and cause the service provider to terminate the account and delete all the content contained therein.[47]

Trust

A third planning option is to consider advising clients to transfer ownership of digital assets to a revocable trust. As discussed above, some digital assets are in the form of licenses which may be transferred to a trust, thus enabling a trustee to manage and administer all online accounts without violating the TOS agreements.[48]

Third Party Service Providers for Administering Digital Assets

There are a number of third party services ("TPP") that will provide planning assistance for digital assets. For example, Deathswitch is a company which utilizes an automated system to prompt the subscriber for a password on a regular schedule to ensure the subscriber is still alive. If the subscriber does not enter the password for some period of time and after additional prompts, the computer deduces that the subscriber is either dead or incapacitated and the subscriber's "pre-scripted messages are automatically emailed" to those individuals named by the subscriber.[49] AssetLock provides an "electronic safe deposit box" that holds estate information and messages and will release information upon the user's death or incapacity.[50] Legacy Locker is another provider that lets the user grant access to online assets in the event of "loss, death or disability."[51]

One advantage of using a TPP is the likelihood that survivors will receive the information maintained by the TPP in a timely manner and without difficulty. In addition, updating the information in a TPP account is easier than updating a physical document and storing the hard copy securely. Despite the advantages, using a TPP may create some difficulties as well. As discussed above, providing the TPP with the subscriber's login and password may be a violation of the service provider's TOS. In addition, the TPP is not a legally recognized representative of the subscriber's estate in the way of an executor or administrator appointed by the court.[52] Finally, because TPPs typically store a subscriber's account login credentials and other private information, they are sure to become prime targets for hackers and identity thieves.[53]

Conclusion

As evidenced by the discussion in this article, digital assets and planning for them can create many legal issues. Those issues are increasing day-by-day as new technologies emerge. In addition, there is no doubt that the number of clients with digital assets will only continue to rise. Amidst the uncertainty in the law, a practitioner must navigate the landscape to help clients accomplish their testamentary objectives for digital assets. The emotional hurt suffered by the family of the 15-year-old who committed suicide or the family of the soldier killed in Fallujah will ameliorate over time. However, a well-prepared practitioner who understands how to properly handle digital assets can make the distribution of such digital assets easier for the executor and, perhaps, less painful for those families who have suffered so much.

Endnotes

1. Tracy Sears, *Family, lawmakers push for Facebook changes following son's suicide*, available at http://wtvr.com, January 8, 2013.
2. Evan E. Carroll, John W. Romano and Jean Gordon Carter, *Helping Clients Reach Their Great Digital Beyond,* TRUSTS & ESTATES, September 2011, 66 at p. 67. *See also In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005). The Michigan probate court appointed the father as personal representative of the estate and obtained a court order directing Yahoo! to turn over the emails. (*N.B*. Yahoo! was made a party to the proceeding.) Yahoo! ultimately provided a CD with photographs and emails—but only the emails the deceased received because he set up the account not to save sent messages.
3. Craig Blaha, *Over 30 Million Accounts on Facebook Belong to Dead People*, TECHNORATI (March 7, 2012), http://technorati.com.
4. John Conner, *Digital Life After Death: The Issue of Planning For a Person's Digital Assets After Death*, ESTATE PLANNING & COMMUNITY PROP. L.J., Vol. 3:301 at p. 303. Nathan Dosch, an estate planning and tax attorney with Nieder & Boucher, pieced together this definition.
5. Sample websites taken from "Top 15 Most Popular Social Networking Sites," updated March 2013, available at http://www.ebizmba.com.
6. Many of these sites also offer storage for photographs and videos.
7. It should be noted that these email account providers are free services. Many people pay a fee for their email service to companies such as Time Warner Cable, Optimum Online and AT&T. For these types of services, the email accounts will remain active as long as the fee is paid.
8. Service providers routinely amend the TOS agreements with no notice to the account holder, so it is wise to periodically check the service provider's website for any changes to the TOS.
9. Naomi Cahn, *Postmortem Life On-line*, PROBATE & PROPERTY, July/August 2011 (also stating that the courts have routinely upheld and enforced these TOS agreements).
10. *See* http://www.shutterfly.com/help/terms.jsp.
11. *See* http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag; http://www.google.com/intl/en/policies/terms/; https://twitter.com/tos.
12. http://support.google.com/mail/answer/14300?hl=en&ref_topic=1669055.
13. *Id*.
14. http://help.yahoo.com/kb/index?page=product&y=PROD_ACCT&locale=en_US.

15. http://www.facebook.com/help/?ref=pf#!/help/103897939701143/?q=death&sid=0G0Ow9oru3HcT7v4v.
16. The TOS for Shutterfly, Twitter, LinkedIn, Yahoo!, Facebook and Google are each governed by the laws of the State of California.
17. *See* Conn. Gen. Stat. § 45a-334a (2013).
18. Conn. Gen. Stat. § 45a-344a(b) (2013).
19. *Id.*
20. *See* R.I. Gen. Laws § 33-27-1 (2012).
21. *See* Burns Ind. Code Ann. § 29-1-13-1.1 (2012).
22. Burns Ind. Code Ann. § 29-1-13-1.1(a) (2012) defines custodian as "any person who electronically stores the documents or information of another person."
23. Burns Ind. Code Ann. § 29-1-13-1.1(b) (2012).
24. *Id*.
25. Burns Ind. Code Ann. § 29-1-13-1.1(c) (2012).
26. *See* 58 Okl. St. § 269 (2012).
27. *See* Idaho Code § 15-5-424 (2012).
28. 58 Okl. St.. § 269 (2012).
29. Idaho Code § 15-5-424(z) (2012).
30. 58 Okl. St. § 269 (2012).
31. *See* note 1 *supra.*
32. *See* Va. Code Ann. §§ 64.2-109 and 110 (2013) which will become effective July 1, 2013.
33. *See, e.g.,* New York Assembly Bill 823 introduced Jan. 9, 2013; Nebraska Bill LB37 introduced Jan. 25, 2013; Maryland Senate Bill 29 introduced Jan. 9, 2013; North Dakota House Bill 1455 introduced Jan. 21, 2013; Nevada Senate Bill No. 131 introduced February 18, 2013.
34. See North Carolina Senate Bill 279 introduced March 13, 2013; Oregon Senate Bill 54 introduced March 2013.
35. The full report of the drafting committee may be found at www.uniformlaws.org/committees.
36. *See id.,* Section 2 Definitions.
37. *Id.*
38. *Id.* Sections 4, 5, 6 and 7.
39. *Id.* Section 8.
40. *See* Stored Comm. Act, 18 U.S.C. §§ 2701 *et. seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq*. (2006).
41. *See, e.g*., N.Y. CLS Penal § 156.05 (2012).
42. James D. Lamm, Editor of Digital Passing blog, available at http://www.digitalpassing.com.
43. *See* Cahn, *supra* at Note 9.
44. *See* https://kindle.amazon.com/.
45. *See* http://www.apple.com/legal/terms/site.html.
46. *See* Cahn, *supra* at note 9.
47. *See* discussion notes 10 through 15 *supra.*
48. Joseph M. Mentreck, *Estate Planning in a Digital World*, 19 Ohio Prob. L.J. 195 (2009).
49. *See* http://www.deathswitch.com.
50. *See* http://www.assetlock.net.
51. *See* http://www.legacylocker.com.
52. *See* Cahn, *supra* note 9.
53. Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning*?, 24 Quinnipiac Prob. L.J. 376 2010-2011.

Jill Choate Beier, MBA, JD, LL.M., is an Assistant Professor at Marymount Manhattan College in New York City. Prior to joining Marymount, Professor Beier practiced as a trusts and estates attorney at Sullivan & Cromwell LLP and Patterson Belknap Webb & Tyler LLP. She is currently the Chair of the Estate and Trust Administration Committee of the Trusts and Estates Law Section.

Susan Porter is a Senior Advisor with Brown Brothers Harriman Trust Company, N.A. She is a visiting adjunct professor at the University of Miami School of Law Graduate LL.M. program in Estate Planning, a member of the Advisory Committee of the Heckerling Institute on Estate Planning and a member of the Estate and Trust Administration Committee of the Trusts and Estates Law Section.

The views expressed are as of April 2013 and are a general guide to the views of Brown Brothers Harriman ("BBH"). The opinions expressed are a reflection of BBH's best judgment at the time. This material should not be construed as legal advice. Please consult with an attorney concerning your particular circumstances.

Some Practical Applications and Pitfalls of New York's Decanting Statute

By Andrew S. Katzenberg

There has been much discussion about the 2011 amendments to Section 10-6.6 of the New York Estates, Powers & Trusts Law, known as New York's decanting statute. The statute was originally enacted in 1992 and has been amended three times since its effective date, namely in 1995, 2001 and most recently in 2011. Signed into law on August 17, 2011 by Governor Andrew Cuomo, the amended decanting statute substantially broadened the powers available under EPTL 10-6.6. One notable expansion allows a trustee to decant despite a lack of unlimited discretion to distribute the principal of the trust. The amended statute also clarified the permissibility of excluding beneficiaries and extending the trust term by providing that the new, or "appointed," trust could have one or more beneficiaries of the original or "invaded" trust to the exclusion of other current beneficiaries,[1] and that the appointed trust could have a longer term than the invaded trust.[2] Despite the much needed clarification offered by the amended statute, there are a number of issues practitioners should keep in mind when counseling clients on the decanting of trusts.

Power of Appointment

The new decanting statute specifically authorizes the trustee who has unlimited discretion to invade principal to grant powers of appointment to any of the current beneficiaries of the invaded trust, even to the exclusion of one or more of the current beneficiaries.[3] However, the power of appointment must either be identical in its scope and objects to the power of appointment in the invaded trust, or be a "broad" power of appointment which only excludes the "beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors or the estates of the beneficiary, the creator or the creator's spouse."[4]

Where an entirely new trust is being created specifically for the purpose of decanting, it is easier to address this issue since the new trust could either track the power of appointment of the invaded trust or give the beneficiary a "broad" limited power of appointment. When a client wants to decant to an existing trust but the power of appointment is neither identical nor is not broad, problems may arise.

One solution is to have the beneficiary of the appointed trust release his power of appointment to the extent required to either match the invaded trust's power of appointment, or to eliminate his power of appointment altogether.[5] For example, assume a beneficiary has a power of appointment for the benefit of the grantor's descendants and charities, and the trust into which the trustee wants to decant (the "recipient trust") grants the beneficiary a power of appointment for the benefit of the grantor's descendants, spouses of the grantor's descendants and charities. The beneficiary would have to release his power to appoint the recipient trust in favor of spouses of the grantor's descendants.[6] At that time, the trustee could decant from the original trust to the recipient trust because they would have identical powers of appointment. The same method could work if the original trust had a broader power of appointment than the recipient trust. For example, if the original trust had a power of appointment for the benefit of the grantor's descendants and charities and the recipient trust had a power of appointment for the benefit of only the grantor's descendants, the beneficiary could release his power to appoint the original trust in favor of charities.

Grantor Trusts and Tax Reimbursement

One purpose of decanting is to convert a non-grantor trust into grantor trust or to convert a grantor trust into a non-grantor trust. A non-grantor trust reports its income and gain on the trust's tax return, whereas a grantor trust is disregarded for income tax purposes, and the trust's income and gain are reported and paid by the grantor.[7]

There is no provision in the decanting statute specifically authorizing the change of the tax status of the trust to and from a non-grantor trust and grantor trust. The only relevant provision of the decanting statute is that the trustee must consider the tax implications of decanting to a new trust.[8]

Depending upon the individual client's situation, converting a non-grantor trust to a a grantor trust may be beneficial from an income tax perspective since it may allow the trust to grow without being subject to separate income tax at the compressed trust brackets. In effect the income can remain in the trust while being taxed to the grantor and the grantor's payments of the income tax, depending on the terms of the new trust may be tantamount to additional tax free gifts to the trust, above and beyond the federal annual exclusion and lifetime exclusion limits.

When converting a trust into a grantor trust, practitioners include a tax reimbursement clause giving the trustee discretionary authority to reimburse the grantor for income taxes paid attributable to the trust.[9] This clause can ease clients' reservations that the burden of the trust's tax liability will become too great at some point in the future. It is important to note that by including a tax reimbursement clause (where the original trust did not have a reimbursement clause) the trustee has actually included the grantor as a discretionary beneficiary of the new trust.[10] The decanting statute only authorizes the trustee to allow current beneficiaries of the invaded trust to be beneficiaries of the new trust. New beneficiaries cannot be added.

Fortunately, New York trust law, by default, specifically gives trustees of all *inter-vivos* trusts discretion to pay the grantor an amount equal to the income taxes attributable to the trust property charged to the grantor.[11] Therefore, the grantor is always a current discretionary beneficiary of the original trust by default.[12] This means it would be permissible to include or exclude the grantor as a discretionary beneficiary of the new trust (but only for the amount of tax liability of the trust), whether or not the original trust had a reimbursement clause.

However, the original trust can expressly negate the default New York statute, prohibiting the trustee from reimbursing the grantor for income taxes charged to him.[13] In this case, the new trust would not be allowed to have a tax reimbursement clause since by doing so it would add the grantor as a new beneficiary not included in the original trust. It is also important to note that the new trust would also need to expressly negate the default statute as well. Therefore, practitioners should be sure to review older trusts for this issue before adding a tax reimbursement clause as a matter of practice.

Conclusion

Though the amended decanting statute resolved much of the ambiguity of the former statute and eased the trust administration, issues still exist and further exploration of the new decanting statute should continue.

Endnotes

1. N.Y. Estates, Powers & Trusts Law (EPTL) 10-6.6(b).
2. EPTL 10-6.6(e). The statute states that the term includes, but is not limited to, a term measured by the lifetime of a current beneficiary. The language "but not limited to" in the statute permits longer terms than the life of a beneficiary. For example, a trust that terminated when the beneficiary reached the age of 30 could be decanted into a new trust which terminated at the death of the beneficiary. However, there may be adverse tax consequences if the term is extended longer than the rule against perpetuities, though such extension may be prohibited by EPTL 10-6.6(n)(5).
3. EPTL 10-6.6(b)(1).
4. EPTL 10-6.6(b)(2) and (3). A power of appointment granted to a current beneficiary of the invaded trust may be either identical to the power of appointment in the invaded trust or a broad power of appointment regardless if that beneficiary had the power of appointment in the invaded trust or not. If the power of appointment granted is the identical power of appointment from the invaded trust, is it not necessary that the original beneficiary who had the power of appointment in the invaded trust continue to have it in the appointed trust.
5. EPTL 10-9.2.
6. EPTL 10-9.2(b).
7. I.R.C. § 671 (2013).
8. EPTL 10-6.6(o).
9. New York State law specifically protects the trust assets from the grantor's creditors if such power exists. EPTL 7-3.1(d).
10. EPTL 10-6.6(b) and (c).
11. EPTL 7-1.11(a).
12. However, the grantor is limited as a beneficiary to the amount of the tax liability of the trust charged to him. Similarly, if a beneficiary had only an income interest in the invaded trust, that beneficiary could only have an income interest in the appointed trust.
13. EPTL 7-1.11(a).

Andrew S. Katzenberg is an associate with Kirkland & Ellis, LLP in the Trusts and Estates practice group, focusing in wealth preservation, estate and trust administration and charitable giving.

Revoking a Prior Power of Attorney Using the New York Statutory Short Form

By Jonathan P. McSherry

The current New York Statutory Short Form Power of Attorney,[1] if not modified, could result in unintended consequences for the principal. The issue relates to revocation of a prior statutory short form or other general[2] power of attorney. The current law provides that the execution of a power of attorney does not revoke any power of attorney previously executed by the principal.[3] This law is reflected in subsection (e) of the current statutory short form power of attorney.

Typically, in conjunction with financial or estate planning, a principal will execute a general power of attorney (*e.g.*, statutory short form) which grants the agent broad authority to act on behalf of the principal. If the principal wishes to have more than one agent acting at the same time, he or she can appoint co-agents under one power of attorney.[4] The co-agents could act separately or be required to act together.[5] It is rare that the principal would need two separate New York general powers of attorney that are valid at the same time. If the principal is able to execute a new power of attorney, then any authority or restrictions contained in the prior power of attorney can be added to the new one in addition to any new changes.

When executing a new power of attorney, the principal should be sure to revoke his or her prior general power of attorney, especially if the principal wishes to change agents or change the scope of authority granted to an agent. Although this can be done at any time, it is advisable to do it simultaneously with the execution of the new power of attorney. This is not only the easiest method, but it can help avoid potential problems. For example, if the prior power of attorney is revoked before the new one is executed, there will be a period of time in which there is no valid power of attorney. If the principal became incapacitated during that period so that execution of a new power of attorney was not possible, the principal would have no agent to take care of his or her financial affairs and a guardian would need to be appointed. In contrast, if a new power of attorney is executed before the prior one is revoked, there will be a period of time in which there are two separate, and potentially conflicting, valid powers of attorney, which could lead to more problems. However, as a result of the change in the law and use of the current statutory short form power of attorney, the execution of a new general power of attorney will not automatically revoke any and all prior general powers of attorney.

In order to revoke a prior general power of attorney using the statutory short form, the statutory short form power of attorney must be modified. The law allows certain modifications to the statutory short form without disqualifying it from being a valid statutory short form power of attorney.[6] These modifications, which are optional, must be stated in subsection (g) of the current statutory short form power of attorney. More specifically, the principal can include a modification which revokes one or more powers of attorney previously executed by the principal.[7]

A modification should be added to subsection (g) of the statutory short form power of attorney, which provides that all New York general powers of attorney, including all New York statutory short form powers of attorney, are revoked by the execution of the new power of attorney. Sample language for this modification is as follows:

> My execution of this Power of Attorney shall revoke any and all general powers of attorney, including any and all New York Statutory Short Form Powers of Attorney, previously executed by me in accordance with the laws of, and for use in, the State of New York. If I have executed a general power of attorney in accordance with the laws of another state or jurisdiction other than the State of New York, then such power of attorney shall not be revoked by my execution of this Power of Attorney, unless I state otherwise in this "Modifications" section.

The distinction between New York powers of attorney and powers of attorney for other states is important. For example, a principal who spends a significant amount of time in New York and Florida and has assets in both states may want to execute a New York power of attorney for use in New York and a Florida power of attorney for use in Florida. Although a valid power of attorney duly executed in one state may be accepted as valid in another state,[8] the practical use of such power of attorney may be limited and there may be added difficulty and expense in using it. Unless the principal is also executing a new power of attorney for the other state at the time he or she executes a new power of attorney for New York, the principal may not want to revoke the prior general power of attorney for the other state.

Even if a proper modification is included so that the execution of a new power of attorney serves to revoke a prior power of attorney, the principal must still give written notice of the revocation to the agent under the prior power of attorney.[9] Since a principal who has just revoked a prior agent's authority may not want to provide the prior agent with a copy of the new power of attorney, a separate writing signed and dated by the principal should be given to the prior agent as notice of the revocation. This could be a formal revocation document or simply a letter from the principal to the prior agent. It is important to provide the prior agent with notice of the revocation as soon as possible because termination of an agent's authority or of the power of attorney is not effective as to the agent until the agent has received a revocation.[10] If the prior power of attorney was recorded in the office of any county clerk, then the revocation must also be recorded in the same office.[11]

Notice of the revocation of the prior power of attorney should also be given to all third parties, including financial institutions, who have received a copy of the prior power of attorney or who hold assets of the principal.[12] It is important that such notice be given as soon as possible because termination of an agent's authority or of the power of attorney is not effective as to any third party who has not received actual notice of the termination and acts in good faith under the power of attorney.[13]

Another advantage of revoking all prior powers of attorney in the new power of attorney is that all third parties who receive a copy of the new power of attorney will have notice that any and all prior powers of attorney have been revoked and are no longer valid. Therefore, no separate written notice is necessary. However, it is still advisable to provide separate notice or at least highlight in a cover letter accompanying the copy of the new power of attorney that all prior powers of attorney have been revoked.

If a prior general power of attorney is not revoked upon execution of a new general power of attorney, then the prior general power of attorney, and the authority of any agents designated therein, will remain valid and both agents may act for the principal. In addition, if the agent under the prior general power of attorney is granted the same authority as the agent under the new power of attorney, then each agent may act on their own, with regard to such authority, without the consent of the agent under the other power of attorney, unless the principal specifically states otherwise in the "Modifications" section in subsection (g) of the statutory short form power of attorney.[14]

A further issue concerning revocation of a prior power of attorney may arise with regard to a power of attorney that was previously executed by the principal on or after September 1, 2009 but before September 12, 2010. The new power of attorney legislation enacted on January 27, 2009,[15] which became effective on September 1, 2009,[16] provided that the execution of any power of attorney would revoke any and all prior powers of attorney executed by the principal, unless the principal expressly provided otherwise.[17] At the time, for purposes of the power of attorney legislation contained in the General Obligations Law, a "power of attorney" included any "written document by which a principal with capacity designates an agent to act on his or her behalf."[18] As a result, unless the principal expressly provided otherwise in the document, the execution of a general power of attorney would serve to revoke any and all limited or specific purpose powers of attorney, including, for example, a stock power of attorney, bank power of attorney, or government power of attorney. In addition, the execution of a limited or specific purpose power of attorney would serve to revoke the principal's general power of attorney, unless the principal expressly provided otherwise.

In response to this problem, amended power of attorney legislation was enacted on August 13, 2010.[19] The amendment, which represents the current law, reversed the prior legislation as it related to revocation of prior powers of attorney, by providing that the execution of a power of attorney shall not revoke any power of attorney previously executed by the principal.[20] In addition, certain limited powers of attorney were excluded from the definition of "power of attorney" for purposes of the power of attorney legislation contained in the General Obligations Law.[21] While this new legislation became effective on September 12, 2010, it is deemed to have been in full force and effect on and after September 1, 2009.[22] The correction to the law and its retroactive effect would seem to solve this revocation issue for powers of attorney executed on or after September 1, 2009 but before September 12, 2010, where those powers of attorney made no modification relating to the revocation of prior powers of attorney.

However, for those powers of attorney executed on or after September 1, 2009 but before September 12, 2010 which did include a modification relating to the revocation of prior powers of attorney, there may still be an issue which needs to be addressed if and when the principal wishes to execute a new power of attorney. For example, before the amended legislation, many drafters of general powers of attorney included a modification therein which attempted to prevent that general power of attorney from being automatically, and unintentionally, revoked by the principal's subsequent execution of a limited or specific purpose power of attorney. An example of the language which some drafters used for this modification is as follows:

> This Power of Attorney shall not be revoked by any subsequent Power of Attorney I may execute, unless such subsequent Power of Attorney specifically provides that it revokes this Power of

Attorney by referring to the date of my execution of this document.

The rationale for using such a modification is that a principal executing a limited or specific purpose power of attorney would not intentionally include reference to the prior general power of attorney; therefore, such execution would not serve to automatically revoke the general power of attorney.[23] The problem that remains now is that inclusion of this modification in the prior general power of attorney may cause such power of attorney to remain valid after the new power of attorney is executed, even where the new power of attorney contains a modification which revokes any and all prior powers of attorney.

An argument can be made that execution of the new power of attorney does not revoke the prior modified general power of attorney because the new power of attorney does not specifically reference the prior power of attorney by the date of its execution. Since the current default law provides that the execution of a power of attorney will not revoke any prior powers of attorney[24] and the terms of the prior modified power of attorney govern that document, it could be argued that the modification in the new power of attorney, which attempts to generally revoke all prior powers of attorney, is not sufficient to revoke the prior modified general power of attorney. If that argument is successful, another modification would need to be included in the new power of attorney which specifically references the prior modified power of attorney by its date of execution and provides that such power of attorney is specifically revoked.

In conclusion, a drafter of a New York statutory short form power of attorney should always be sure to include a modification which revokes the principal's prior New York general powers of attorney. In addition, if the principal executed a general power of attorney on or after September 1, 2009 but before September 12, 2010, the drafter should obtain a copy of that document to ascertain whether any modifications were included therein. If the prior general power of attorney contains a modification which requires a specific reference to such document in order to revoke it, then the drafter should be sure to include an additional modification in the new general power of attorney which specifically references and revokes the prior modified general power of attorney.

Endnotes

1. N.Y. General Obligations Law § 5-1513 (Consol. 2011).
2. The author uses the term "general" power of attorney in contrast to a "limited" or "specific purpose" power of attorney.
3. GOL § 5-1511(6) (Consol. 2011). Note: This subsection became effective on September 12, 2010 but is deemed to have been in full force and effect on and after September 1, 2009. 2010 N.Y. Laws 340 § 31.
4. GOL § 5-1508(1) (Consol. 2011).
5. Unless the principal provides otherwise in the power of attorney, the co-agents must act jointly. GOL § 5-1508(1) (Consol. 2011).
6. GOL § 5-1503 (Consol. 2011).
7. GOL § 5-1503(3) (Consol. 2011).
8. *See, e.g.*, GOL § 5-1512 and FLA. STAT. ch. 709.2106(3) (2011).
9. GOL § 5-1511(3)(b) (Consol. 2011). Also see "Caution to the Principal" in subsection (a) of the New York statutory short form power of attorney. GOL § 5-1513 (Consol. 2011).
10. GOL § 5-1511(5)(b) (Consol. 2011).
11. GOL § 5-1511(4) (Consol. 2011).
12. See "Caution to the Principal" in subsection (a) of the New York statutory short form power of attorney. GOL § 5-1513 (Consol. 2011).
13. GOL § 5-1511(5)(a) (Consol. 2011).
14. See subsection (e) of the New York statutory short form power of attorney. N.Y. GOL § 5-1513 (Consol. 2011).
15. 2008 N.Y. Laws 644.
16. 2008 N.Y. Laws 644 § 21, amended by 2009 N.Y. Laws 4 § 1.
17. 2008 N.Y. Laws 644 § 19.
18. 2008 N.Y. Laws 644 § 2.
19. 2010 N.Y. Laws 340.
20. 2010 N.Y. Laws 340 § 26. GOL § 5-1511(6) (Consol. 2011).
21. 2010 N.Y. Laws 340 §§ 2, 6. GOL §§ 5-1501(1) and (2)(j); 5-1501C (Consol. 2011).
22. 2010 N.Y. Laws 340 § 31.
23. Whether that rationale would be upheld in court is uncertain. We know that the modification applies to the general power of attorney in which it is contained. However, it is unclear whether that modification will also apply to the subsequent power of attorney which, by its terms, revokes all prior powers of attorney unless the principal expressly provides otherwise therein. Since a subsequent limited or specific purpose power of attorney likely will not expressly provide that the prior general power of attorney is not revoked, it could be argued that the modification in the prior general power of attorney has no effect at all. This issue, however, is moot with the amended legislation enacted on August 13, 2010, which is deemed to have been in full force and effect on September 1, 2009, since the execution of a subsequent power of attorney would not revoke any prior powers of attorney unless expressly provided therein.
24. GOL § 5-1511(6) (Consol. 2011).

Mr. McSherry is an associate attorney and Certified Public Accountant at DeLaney & O'Connor, LLP in Syracuse, NY, where he works primarily in the fields of trusts and estates, elder law, and tax law.

Contemptible: Enforcing Money Judgments in Surrogate's Court

By Gary E. Bashian

"*JUDGE*: Are you trying to show contempt for this court?
MAE WEST: I was doin' my best to hide it."

— Mae West

Litigation in New York is undeniably on the rise. Market volatility, unemployment, ever increasing medical, health care, and living costs, the reasons for this explosion in litigated matters of all kinds are innumerable. The confluence of political, economic, and social turmoil that has made headlines across the globe over the past several years, and has been felt especially hard here in New York, has prompted a downward pressure that has undeniably fueled this litigation boom.

These same underlying factors that have led to this surge in litigation generally have also directly impacted a growth in estate litigation. The noticeable increase in contested accounting proceedings, and even discovery/turnover proceedings, is forcing many trusts and estates practitioners to cope with a problem more regularly encountered by civil litigators in other areas of practice: Judgment Enforcement.

Ordinarily, a favorable Order, or final Judgment, on an issue that directs an opposing party to pay money is considered to be a victory by counsel and client alike. However, they can find themselves "clutching defeat from the jaws of victory" where they are forced to deal with an opposing party who simply refuses to remit the funds, documents, goods etc. as directed by the Court. Increasingly, if not unsurprisingly, this is a situation many of us are facing.

The problem here is obvious: how is a party who has no compunction about flouting the authority of the Court forced to comply with what amounts to be little more than a piece of paper telling him or her what to do with a raised seal and signature?

Enforcement of Judgments is governed by New York Civil Practice Law and Rules ("CPLR") Articles 51 and 52. Consisting of over 40 subsections, almost all are characterized by a deeply technical tone even for the CPLR, the denseness of the language itself serving almost as a warning about the practical difficulties of utilizing their provisions.

Generally speaking, enforcement falls into one of two categories: Execution or Contempt. Overwhelmingly, executing a judgment is a complex, costly, and time consuming endeavor that may ultimately fail in compelling payment if the judgment debtor has effectively hidden assets and/or income.

However, enforcement by way of Contempt, though rarely granting immediate relief, in my experience remains the most practical and effective enforcement mechanism to compel payment.

By no means can it be implied that moving for, and actually having a party held in Contempt, is an easy task. On the contrary, it is a highly technical and formalized application to the Court whose procedural requirements must be followed to the letter if due process is to be satisfied, and the application granted.

Though CPLR Articles 51 and 52, working in conjunction with Judiciary Law article 19, authorize the Courts generally to exercise Contempt powers, Article 6 of the Surrogate's Court Procedure Act ("SCPA") governs Contempt proceedings in the Surrogate's Courts, specifically SCPA 606 and 607 in conjunction with Judiciary Law Article 19.

With the dual powers of fine and imprisonment, enforcement by Contempt is very much a coercive tool for compelling payment, but as indicated above, one that is very technical, if not arcane.

It is important to note that only the violation of an Order or a Judgment can lead to the finding of Contempt, meaning one must first Settle and later Enter a Decision with the Court where compliance has not occurred.[1]

Initially, the Petitioner must, via in-hand personal service, serve a certified copy of the Order or Judgment upon the Contemnor.[2] Substituted service is not sufficient, a requirement that invites obvious practical problems as a party who refuses to comply with the directive of the Courts will undoubtedly have no issues about evading service at every opportunity.

Subsequent to service of the Certified Order or Judgment, if the judgment debtor still has not complied with the Order or Judgment, which he or she probably has not, the application to hold the individual in Contempt must be brought before the Court by an Order to Show Cause. Notably, the Order to Show Cause must include, in at least an 8-point bold font, the language: "WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT" in order to even be considered by the Court.[3] Additionally, the face of the Order must also include the language: "The purpose of this hearing is to punish you for a Contempt of Court. Such punishment may consist of fine or imprisonment, or both, according to law."

In many cases, the Petitioner is forced to seek enforcement by Execution before moving for Contempt. However, where the Contemnor is a fiduciary of an Estate, and the violation relates to an Order or Judgment germane to the Estate, the requirement for the Petitioner to first attempt Execution can be waived by the Surrogate.[4] Be sure to request this waiver in the underlying Affirmation and/or Affidavit in support of the application itself. Although the Court may grant such a waiver *sua sponte*, showing that Execution will prove futile, ineffective, and be an overall waste of judicial resources, it is an important point to draw to the Court's attention at this juncture.

The Petition itself must be made by a person interested, and the Order or Judgment at issue must direct the payment of a sum of money, or the performance of any act. The Petition itself must establish:

1. A lawful Order or Judgment of the Court has been issued, is in effect, and contains an unequivocal mandate to pay monies;
2. One of the grounds prescribed in the SCPA 606;
3. That the actions of the Contemnor have been calculated to, or actually defeated, impaired, impeded, or prejudiced the rights or remedies of the other side;[5]
4. That a certified copy of the has been personally served on the contemnor;
5. That the contemnor has refused or willfully neglected to obey such order or decree;[6] and
6. Praying that the contemnor be directed to show cause why he should not be punished for contempt.[7]

Most of these elements can be proven with relative ease assuming that compliance with the Order of Judgment has not been met, and harm has been suffered as a result.

Not surprisingly, the third element of Petitioner's burden can be the hardest to establish. Though a bare refusal to comply with the Court's directive can be easily shown, often the Court will require a showing of willful neglect before granting a final Order of Contempt—which will in turn lead to fine and/or imprisonment. Presumably, the application of this higher burden on Petitioner is used in order to ensure that all constitutional considerations are met. After all, deprivation of liberty and/or property is not something to be taken lightly by either the Court, or by the Contemnor. By requiring a showing, and making a finding, of willfulness, the Court inoculates itself against claims of error and abuse of discretion which would undoubtedly be raised on appeal. Commonly, in the absence of direct evidence otherwise, a hearing will be scheduled by the Court to determine if the Contemnor's violation of the Order or Judgment has been willful.

To my knowledge, a definition of willfulness, or a bright line test to determine that the Contemnor acted willfully in refusing to comply with the Order of Judgment at issue, has not been articulated completely by case law. It does not appear that a strict definition, circumstantial presumption, or allowable inference exists that can guide a Petitioner in the task of establishing Contemnor's willfulness.

However, an argument of willfulness will be buttressed by proof that the Contemnor made no serious effort to comply with the Order or Judgment of the Court until the commencement of the contempt proceeding;[8] proof that is often easy to establish. Moreover, the operative case law describing what specifically constitutes the willful refusal/neglect to pay monies can be distilled to the basic rule that: Knowledge of the Order or Judgment (established by in-hand service) + the failure to comply with the directives of the Order of Judgment = willfulness.[9] Although this test may not be the most elegant of interpretations, it concisely summarizes the Court's approach to determining the extent of a Contemnor's willingness.

The level of willfulness in a Contemnor's refusal to comply with a directive of the Court is also an important point in and of itself, as it determines whether Contemnor is to be held in either Civil or Criminal Contempt for the violation. Civil or Criminal Contempt can be found from the same violation of the Court's directive, willfulness having to be found with reasonable certainty to find Civil Contempt, and beyond a reasonable doubt for Criminal Contempt.[10] The distinction between Civil and Criminal Contempt is important not only because it determines the burden of proof on Petitioner for establishing willfulness, but because each is utilized for a different purpose. Civil Contempt is used as a coercive tool to force a Contemnor into compliance with the directive of the Court, designed to compensate the injured party for the loss caused.[11] Alternatively, Criminal Contempt is a punitive measure taken against a Contemnor to punish and deter disobedience of Judicial mandates.[12] This distinction is important not only on academic grounds, but because one can move for concurrent penalties for both Civil and Criminal Contempt. Furthermore, a finding of Civil vs. Criminal Contempt will determine the length of time that the Contemnor can be incarcerated. Oddly, the period of confinement for Criminal Contempt is less than that for Civil Contempt. Criminal Contempt ordinarily carries with it a maximum confinement of thirty days.[13] Alternatively, a Contemnor found to be in Civil Contempt for the omission to perform a duty or act can be confined indefinitely, as his or her release if conditioned on his or her compliance; a Civil Contempt based on a failure to pay a fine of $500 or less carrying with it a maximum sentence of three months, and for a fine above $500 a maximum sentence of six months.[14]

The second, and sometimes overlooked, power of the Court when finding a party in contempt is that of a fine.[15] The power of the fine should not be discounted; an economic levy, either coupled with or separate from confinement, can prove very effective. The power of the fine is most notable where the Court allows for a penalty in the amount of the uncollected money judgment itself.[16] In lieu of the proving actual losses, the statutory fine imposed is set at $250.[17]

Given that the potential periods of incarceration are significant, the Judiciary Law provides several defenses that can be argued to avoid imprisonment.[18] The most common defenses made being 1) an inability to pay, and 2) the inability to endure confinement—usually based upon medical grounds. Predictably, the burden is on the Contemnor to prove either a financial inability, or any defense of sickness. Conclusory statements, allegations, and claims of insolvency unsupported by documentary and independent and verifiable sworn proof will not be sufficient to establish these defenses; i.e., financial records, tax records, sworn doctor affidavits, etc. are needed to meet this burden.[19] Importantly, the Contemnor's inability to pay cannot be caused by his or her own misconduct,[20] such as a series of fraudulent transfers,[21] or as is often the case, involving an errant Executor, where the funds of the Estate have been misapplied and their misappropriation forms the substance of the Judgment itself.[22] Clearly, the Court is cognizant of the lengths that judgment debtors will go to avoid paying their creditors, and the fact that they have little hesitation perpetrating a fraud upon the Court.

If and when the Order to Show Cause is Ordered by the Court, the initial return date will usually be uneventful. However, the Order itself must be served upon the Contemnor no less than ten days prior to the initial hearing, and no more than thirty days prior to the initial hearing.[23]

Thereafter, the Court will issue a Decision regarding the application. Usually, but dependent on the circumstances and level of culpability of the Contemnor, a second hearing will be scheduled on the Court calendar. At this second hearing, the Court will resolve any issues not determined in the Decision, address any questions it may have regarding the willfulness of the Contemnor, and prepare to issue a Final Order of Contempt if warranted. Again, depending on the circumstances of the case, the Court will offer the Contemnor one final time period to cure the Contempt by providing a final limited window for compliance to be made. If the Contemnor fails to comply by the end of the period laid out in the Final Order of Contempt, depending on the terms of the Order itself, the fine will be levied, and a warrant of commitment will be issued.

To enforce the warrant, it must be delivered to a sheriff or local law enforcement so that they can then arrest the Contemnor. Each county has its own procedure and fee schedule for this process. The NYC.gov website[24] has a description of this process for the boroughs in New York City; other counties in the metropolitan area should be contact directly to ensure compliance with their own unique requirements.

If the Court agrees with the Petitioner and the facts support a finding of Contempt, a warrant of commitment is issued, and if the Contemnor is incarcerated, monies that were previously claimed to be unavailable often appear and are remitted in order to avoid further incarceration—especially in the cases where the Contemnor's release is entirely predicated on compliance with the Court's directives.

Endnotes

1. CPLR 5101.
2. CPLR 5104; SCPA 606 (1).
3. Judiciary Law § 756.
4. SCPA § 606(1)(d).
5. *Farkas v. Farkas,* 209 A.D.2d 316, 618 N.Y.S.2d 787 (1st Dep't 1994).
6. *In re Kahr*, 85 Misc. 2d 363, 366, 379 N.Y.S.2d 638 (Sur. Ct., Albany Co. 1976).
7. *Id.*
8. *In re Cinquemani*, 96 Misc. 2d 531, 409 N.Y.S.2d 192 (Sur. Ct., Bronx Co. 1978).
9. *See generally In re Kahr, supra*; *In re Storm*, 28 A.D.2d 290, 284 N.Y.S.2d 755 (1st Dep't 1967); *McCormick v. Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279 (1983); *McCain v. Dinkins*, 84 N.Y.2d 216, 616 N.Y.S.2d 335 (1994).
10. *N.A. Development Co. Ltd v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984).
11. *Id.* at 240.
12. *Id.*
13. Judiciary Law § 751.
14. Judiciary Law § 774.
15. Judiciary Law § 753.
16. *Corpuel v. Galasso*, 240 A.D.2d 531, 659 N.Y.S.2d 65 (2d Dep't 1997); *cf. Matter of Barclays Bank v. Hughes*, 306 A.D.2d 406, 761 N.Y.S.2d 278 (2d Dep't 2003).
17. Judiciary Law § 773.
18. Judiciary Law § 775.
19. *Farkas v. Farkas*, 209 A.D.2d 316, 618 N.Y.S.2d 787 (1st Dep't 1994).
20. *In re Garrity*, 149 Misc. 180, 266 N.Y.S. 892 (Sur. Ct., Kings Co. 1933); *James Talcott Factors, Inc. v. Larfred, Inc.*, 115 A.D.2d 397, 496 N.Y.S.2d 27 (1st Dep't 1985).
21. *In re Collins*, 39 Misc. 753, 80 N.Y.S. 1119 (Sur. Ct., Kings Co. 1903).
22. *In re Gall*, 29 NYCiv.Proc.R. 178, 57 N.Y.S. 835 (2d Dep't 1899).
23. Judiciary Law § 756.
24. http://www.nyc.gov/html/dof/html/services/services_enforcement_arrests.

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trusts and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section. Mr. Bashian can be reached at garybashian@bashianfarberlaw.com.

Mr. Bashian would like to thank Andrew Frisenda, an associate attorney at Bashian & Farber, LLP concentrating in estate, guardianship, trust, and corporate litigation, for his contribution to this article.

Who's Your Expert? The Trial Expert v. The Litigation Consultant

By Hillary A. Frommer

To most lawyers and clients, the "expert" is the individual who persuades a jury of a party's position with his or her superior knowledge and stature in the professional community, be it in medicine, engineering, accounting, or any other technical area. That is not the only role of an expert. There are two types of experts in litigation: the trial expert and the litigation consultant. The trial expert is, by virtue of his or her education, training, skill or experience, believed to have proficiency and specialized knowledge in a particular subject beyond that of an average person. Utilized by both sides to advocate their respective positions, the trial expert prepares a written report and testifies at trial. The litigation consultant, on the other hand, does not issue a report or testify at trial. Rather, the consultant provides advisory services to the lawyer and helps prepare a case for trial. Defined as "an adjunct to the lawyer's strategic thought process,"[1] the litigation consultant assists in the litigation from its earliest stages by identifying important facts and issues, or the strengths and weaknesses of the case.

The distinction between the two types of experts is critical for purposes of pre-trial discovery. In both the state and federal courts, discovery is generally permitted of the trial expert only. In state court, expert discovery is governed by CPLR 3101(d)(1), which mandates disclosure of: (1) the name of the expert the party intends to call at trial; (2) the subject matter "in reasonable detail" on which the expert is expected to testify; (3) the substance of the expert's facts and opinions; and (4) the expert's qualifications. On its face, CPLR 3101(d)(1) does not apply to the litigation consultant who does not testify at trial. However, the consultant is not always (or automatically) immune from discovery. CPLR 3101(d)(2) allows for discovery concerning the litigation consultant in certain, narrow circumstances, stating:

> Subject to the provisions in paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative (including… consultant) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Because the materials are disclosed under CPLR 3101(d)(2) only pursuant to a court order, the statute instructs the court ordering the disclosure to "protect against the disclosure of the mental impressions, conclusions or legal theories of the representative concerning the litigation."

The Federal Rules of Civil Procedure similarly limit discovery to the trial expert. Rule 26(b)(3)(A) exempts from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's…consultant…)" unless: (1) the materials are otherwise discoverable under FRCP 26(b)(1), the general rule addressing the scope and limits of discovery; or (2) the requesting party demonstrates a substantial need for them to prepare its case, and cannot obtain their substantial equivalent without undue hardship.[2] If a court orders discovery of a litigation consultant's materials then, under Rule 26(b)(3)(B), it must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of that consultant.

Discovery disputes frequently arise when parties seek documents prepared by or sent to a litigation consultant, as such materials are rarely produced without opposition. In those circumstances, courts engage in a fact-based inquiry to determine whether a litigation consultant's materials are in fact discoverable under the applicable rules. Indeed, CPLR 3101(d)(2) and FRCP 26(b)(3) raise numerous factual questions: Was the litigation consultant's work product prepared solely in anticipation of litigation or for trial? Do the materials sought contain the litigation consultant's mental impressions, conclusions or any legal theories? Is the requesting party's need for that material substantial? Can the requesting party obtain substantially the same information from other sources? What constitutes undue hardship?

For example, in *Oakwood Realty Corp. v. HRH Constr. Corp.*, the Appellate Division affirmed the trial court's decision ordering the plaintiff to return a report prepared by the defendant's litigation consultant, upon finding that it had been prepared in anticipation of litigation and thus was exempt from disclosure under CPLR 3101(d)(2). Similarly, in *Skolnick v. Skolnick*,[3] the respondent was alleged to have forged certain checks that were the subject of that turnover proceeding.

The respondent sought to obtain documents that the petitioner had provided to a handwriting expert, and communications between petitioner's counsel and the handwriting expert. The court denied that discovery, concluding that the handwriting expert was retained as a litigation consultant and the subject materials were prepared in anticipation of litigation. In *Christie's, Inc. v. Zirinsky*,[4] the plaintiff sought from the defendants' engineer, who had been the defendants' "long-time consultant," certain letters between the defendants, defense counsel, and the engineer. The defendants argued that the materials were immune from discovery because the engineer was a non-testifying litigation consultant. The court found, however, that merely naming the engineer as a litigation consultant did not automatically render the materials immune from discovery. The court also stated that the fact that letters between the engineer and the defendants were routed to the defendants' counsel did not protect them from discovery, because the documents must be prepared "primarily if not solely for litigation" for such immunity to attach.[5] Importantly, the court ordered an *in camera* inspection of the documents at issue—and the documents were thus potentially exposed to the plaintiff—because it could not determine, on the record before it, whether the letters had been prepared in anticipation of litigation.

So now the question becomes, can one expert wear both hats in the same litigation? Technically, yes. Neither the state nor federal rules prohibit a party from retaining a consultant to help prepare a case for trial and then designating that same individual as a trial expert. But beware: by engaging the same expert as consultant and trial witness, a party runs the risk that information provided to the consultant, which is generally not subject to disclosure under CPLR 3101(d)(1) or FRCP 26(b)(3)(A), may become discoverable.

For example, materials an expert obtains while acting as a consultant may become discoverable if the expert then relies on them in forming the opinions to which he will testify at trial. This is precisely what occurred in *Semi-tech Litigation LLC v. Bankers Trust Co.*[6] The plaintiff retained an expert as a litigation consultant and subsequently designated him as a trial witness. During discovery, the plaintiff refused to produce documents that it had provided to the expert while the expert was acting in his consultant capacity and before he was designated as a trial witness, but which the expert relied on in forming his opinions. The plaintiff's counsel also prohibited the expert from answering questions at his deposition about communications he had with the plaintiff during that "consultant" period, even though the expert testified that he relied on those very communications in forming his opinions. Pursuant to FRCP 26(a)(2), an adverse party may question an expert on the data he considered in forming his expressed opinions. The court therefore ordered the plaintiff to produce all documents the expert considered in forming his opinions, regardless of when the expert obtained them, and ordered the expert to answer all questions at his deposition concerning that same subject matter.

A similar situation arose in *Beller v. William Penn Life Ins. Co.*[7] The defendant retained one accountant as both a litigation consultant and testifying witness. During the accountant's deposition, agreed to by the parties notwithstanding CPLR 3101(d)(1)(B), the expert was instructed not to answer questions unless he could do so without divulging his "thought process in connection with the litigation."[8] Unsurprisingly, the accountant refused to answer questions about certain communications he had with defense counsel on the grounds that he could not distinguish between attorney work-product and the mechanics of the assignment itself. A discovery dispute ensued. However, in arguing against the disclosure, the defendant did not attempt to differentiate the accountant's role as consultant from that as trial witness.[9] The court noted that the defendant made a "wise" decision and stated that it would have rejected such an argument.[10] Instead, the defendant argued that the communications were immune from discovery as attorney work-product (under CPLR 3101(c)), and as materials prepared in anticipation of litigation (under CPLR 3101(d)). Because an expert's report must contain in reasonable detail the substance of the facts and opinions of the expert's expected testimony and a summary of the grounds for each opinion,[11] the court determined that at a deposition, the adversary may inquire into the information the expert relied on in rendering the opinion. Examining the communications at issue, the court found that the attorney had indeed provided the expert with explanations necessary for the accountant to complete his report, but that parts of the conversations at issue could be protected from disclosure either as attorney work-product or trial preparation materials because they may have included the attorney's mental impressions. Ultimately, the court determined that the plaintiff was entitled to learn from the defendant's expert what was said to him during conversations with the defense counsel which the expert used as grounds for his opinion.

A party may also be required to disclose information it provides to a consultant if a court concludes that an expert realistically cannot segregate that material from the information the expert obtains while acting as a trial witness. *American Steamship Owners Mut. Protection & Indemnity Assoc., Inc. v. Alcoa Steamship Co.*[12] is a perfect example. There, the plaintiff retained an attorney as a consultant and then subsequently designated him as a rebuttal expert at trial. The defendant sought production of a letter which the expert obtained while acting in his consultant capacity. Although the expert neither prepared that letter nor reviewed it in forming his opinion, the court ordered the plaintiff to produce it because it was "unlikely that an expert can cast from his mind knowledge relevant to the issue on which he is asked to opine merely because he learned of it prior to receiving the assignment."[13] The court appeared keenly aware that the plaintiff placed itself in that discovery situation by designating its litigation consultant as a rebuttal witness, as it stated in a footnote, "of course, the [plaintiff] could have avoided this result by choosing an expert with whom it had no prior relationship and then being circumspect in choosing what documents to provide for the expert's review."[14]

As the case law reveals, using one expert as a consultant and trial witness in the same case may result in the disclosure of communications between the attorney, client, and expert which may otherwise be immune from discovery. Before designating a consultant as a trial witness, an attorney should consider whether such disclosure, if court ordered, will impact the case, and to what degree. Will a communication be exposed at trial? If so, will it negatively alter the jury's perception of the expert witness or dilute the strength of the expert's opinion? One way to avoid both the disclosure and potentially problematic results thereof, as noted in *American Steamship Owners*, is to retain two distinct experts. However, if there can be only one expert, attorneys and clients should be very careful what, when, and how they communicate with the expert.

Endnotes

1. *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dep't 2008).
2. Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii).
3. 2010 NY Slip Op. 33074(U) (Sur. Ct., Nassau Co. 2010); *see also Concorde Art Assoc., LLC v. Weisbrod Chinese Art*, Ltd, 17 Misc. 3d 1115[A] (Sup. Ct., N.Y. Co. 2009) (court denying the defendant's request for a report prepared by the plaintiff's expert upon finding that it was prepared in anticipation of litigation, because it was done before the action commenced and on counsel's recommendation, and because the defendant failed to show a substantial need for the report or that it could not obtain the same information from other sources).
4. 17 Misc. 3d 1123[A], 851 N.Y.S.2d 68 (Sup. Ct., N.Y. Co. 2007).
5. *Id.*
6. 02 Civ. 0711 (S.D.N.Y. 2004) (Kaplan, J).
7. 15 Misc. 3d 350, 828 N.Y.S.2d 869 (Sup. Ct., Nassau Co. 2007).
8. *Id.* at 351.
9. Although the defendant did not make that argument, the court turned to the retainer letter to see if it revealed whether the accountant was acting as a consultant when he communicated with the defendant's attorney (*Id.*). That proved unhelpful. In light of the dates of the retainer letter and expert report, the court concluded that the accountant was retained simultaneously as a litigation consultant and trial witness. The retainer letter is an important tool. If a party uses the same expert as both a litigation consultant and trial witness, it is crucial to clearly delineate when the expert's role changes. One way to accomplish this is with a clearly stated, dated retainer letter. Courts often turn to the retainer letter to determine whether an expert was functioning as litigation consultant or trial expert (*See id.*; *Delta Financial Corp. v. Morrison*, 14 Misc. 3d 428, 827 N.Y.S.2d 601 (Sup. Ct., Nassau Co. 1996).
10. *Id.* at 352.
11. CPLR 3101(d)(1).
12. 04 Civ. 4309 (S.D.N.Y. 2006) (Francis, J).
13. *Id.*
14. *Id.*

Hillary A. Frommer is Counsel in the trusts and estates litigation and commercial litigation departments at Farrell Fritz, P.C. in New York City.

Does the Work Product Rule Fall Within the Probate Exception?

By Anne C. Bederka

While the work product privilege has been the subject of abundant judicial scrutiny, there is surprisingly little discussion of its role in probate proceedings and whether CPLR 4503(b)'s probate exception requires production not only of attorney-client communications otherwise protected by CPLR 4503(a), but also of an attorney's work product otherwise shielded from discovery under CPLR 3101(c).

Consider the following example. Client seeks to disinherit his son, make a gift to his grandson, and give the majority of his estate to a nephew. The attorney recommends that the Client change all beneficiary designations on his accounts, transfer assets to a living trust, and execute a pour-over will. His ideas are embodied in an internal memorandum, never shared with the client, that sets forth: (i) the Client's goals as relayed to the attorney, (ii) the attorney's analysis of how to protect the will and the executor from attack, including giving the grandson a general rather than residuary bequest and inserting a no-contest clause to deprive the Client's grandson of his inheritance in the event of the son's challenge, and (iii) specific instructions for drafting. The attorney prepares all necessary forms and drafts a trust and will together with a power of attorney, health care proxy and living will.

After the Client's death, the will is offered for probate and the Client's son seeks SCPA 1404 examinations. The son serves a broad demand for the production of documents. The attorney asserts the attorney-client and work product privileges to protect his memorandum from disclosure, and the son moves to compel production.

How will the court analyze the issue? Our courts uniformly hold that the scope of disclosure in a will contest is broad and encompasses any and all matters that may form the basis of an objection.[1] Typically, an objectant is entitled to the production of prior wills, trusts created simultaneously with the propounded will, decedent's financial information, powers of attorney, health care proxies, living wills, and medical records. Is the Client's son also entitled to the attorney's memorandum containing his legal analysis and conclusions?

The attorney-client privilege in CPLR 4503(a) shields from disclosure "confidential communications made between attorney and client in the course of professional employment" if the communications are made "for the purpose of facilitating the rendition of legal advice or services…."[2] Subdivision (b) of CPLR 4503 contains the "probate exception" to the attorney-client privilege. It provides that in a probate proceeding, a proponent shall disclose all information related "to the preparation, execution or revocation of any will or other relevant instrument" unless the information would disgrace the memory of the decedent. The exception is premised upon the assumption that the confidentiality once important to the promotion of the attorney-client relationship should become secondary, upon a client's death, to determining his true testamentary intent. In other words, the probate exception assumes that "the decedent would expect the seal of confidentiality to be lifted in the interests of resolving disputes over his will."[3]

The work product privilege, in contrast, applies to shield from disclosure documents reflecting an attorney's analysis, impressions, opinions, theories, strategies, and conclusions concerning a legal matter.[4] For the work product privilege to attach, documents must have been prepared by a lawyer using skills particular to his profession, such as legal reasoning, research and drafting, and strategic planning. In other words, work product encompasses "materials which are uniquely the product of an attorney's learning and professional skills."[5] Public policy dictates that the work product privilege be narrowly construed.[6] In our example, the attorney has the burden of establishing[7] that the memorandum—reflecting his analysis and legal conclusions on the best way to effect the Client's wishes—is protected from disclosure as work product. Will his claim of work product privilege survive the probate exception embodied in CPLR 4503(b)?

Interestingly, CPLR 4503(b) does not by its terms limit application of the probate exception to the attorney-client privilege. There is nothing in the statute that distinguishes between information embedded in documents reflecting attorney-client communications, on the one hand, and documents containing an attorney's analysis, on the other. While the exception makes explicit reference to the attorney-client privilege insofar as it prohibits disclosure of communications *privileged under subdivision (a)* that would tend to disgrace the decedent's memory, this reference does not necessarily mean that the statute's reach is limited to attorney-client communications; it may instead reflect the legislature's recognition that facts disgracing a client's memory will be derived from a client's privileged communications with his counsel.

Nevertheless, the probate exception's location in a subparagraph of New York's statute codifying the attorney-client privilege—CPLR 4503—would suggest that its application is limited to otherwise privileged communications between attorney and client. Furthermore, courts and commentators have traditionally characterized CPLR 4503(b) as an exception only to the attorney-client privilege.[8] While the legislative history of CPLR 4503 does not expressly rule out the application of subsection [b] to work product, neither does it invite application. One court recently concluded, however, that CPLR 4503(b) applies to compel disclosure both of documents otherwise protected by the attorney-client privilege *and* of documents otherwise protected by the work product privilege.[9] The court did not discuss its rationale, but a good starting point in analyzing the issue is a comparison of the respective policies underlying each privilege with the objective of the probate exception.[10]

The attorney-client privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his legal detriment."[11] The purpose of the attorney-client privilege is thus to allow the free flow of information so that the lawyer may give and the client may obtain legal advice. The policy behind work product, in contrast, is to give lawyers freedom to identify relevant facts, develop legal theories or frameworks, and adopt an appropriate legal approach without undue interference or fear of memorializing the analytical process. As the U.S. Supreme Court in *Hickman v. Taylor*[12] observed, the practice of the law requires "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel…. [Otherwise,] much of what is now put down in writing would remain unwritten." Reduced to its simplest form, work product privilege provides an assurance of privacy which allows lawyers to commit their thoughts—so long as they are "legal" in nature—to writing.

Not surprisingly, the person most desirous of maintaining the confidentiality of attorney-generated work product may be the deceased client's attorney. And yet the Court of Appeals has held it is the client, not the attorney, to whom work product belongs.[13] Thus, it is the client's privilege to waive, with narrow exceptions.

Compounding the problem, the protections afforded by the privileges are distinct; waiver of one does not automatically result in waiver of the other. As the court in *In re Pretino*[14] observed, "[w]ork product is a separate and distinct source of immunity from the attorney-client privilege and waiver of the attorney-client privilege does not necessarily result in waiver of the protection afforded under the work product category."[15] In a will contest, however, it may ultimately be a distinction without a difference.

Indeed, it would be illogical to assume that a client deemed to want his otherwise privileged estate-planning communications to be disclosed would at the same time desire that his attorney's analysis—in some cases, in the very same documents—be protected from disclosure on the alternate ground of work product privilege. Logic dictates that in both instances, the client could be expected to forgo claims of privilege to obtain the post-death benefit of ensuring that his testamentary wishes are effected. The deceased client's reasonable expectations therefore support the conclusion that neither the attorney-client privilege nor the work product privilege can shield from disclosure documents relating to the preparation and execution of a will or other relevant instrument.

Even if CPLR 4503(b) is not sufficiently broad to overcome the work product privilege in probate proceedings, public policy may serve as an alternate basis for doing so. As the court acknowledged in *Priest v. Hennessy*, claims of privilege must yield to strong public policy considerations.[16] If the legislature has determined that the attorney-client privilege cannot prevent disclosure of information relating to the preparation or execution of a will, there appears to be no principled reason to allow the work product doctrine to step in and eviscerate the legislature's clear intention to allow full disclosure. Our public policy favoring full disclosure is particularly compelling where, as here, work product may go to the heart of the dispute. In our example, successive drafts of the propounded will and trust and the attorney's memorandum may directly inform issues ranging from the client's testamentary intent to his participation in the will-drafting process to his knowledge of the terms of the will, an essential element of testamentary capacity. Those documents may contain the attorney's work product, but public policy favoring full disclosure should require their production.

Furthermore, case law would seem to support a waiver by objectants, on the deceased testator's behalf, of the work product privilege. Concluding that discerning a testator's true intentions serves the best interests of the estate, courts have authorized objectants to whom limited letters have issued to waive the attorney-client privilege in the same manner as a personal representative.[17] While no court appears to have addressed a similar waiver by an objectant of the work product privilege, the same consideration of truth-finding may apply to allow a waiver.[18]

A legitimate concern with expanding the probate exception to include work product, however, is that some documents prepared by attorneys neither reflect the substance of communications with their client nor reveal information concerning the client's capacity or testamentary desires, but nevertheless could be characterized as involving the preparation or execution of a will or other relevant instrument. If the work product privilege is lifted without qualification, the attorney might hesitate to engage in frank assessments or preliminary analyses outside the client's purview, affecting his obligation to zealously represent the client.

Recognizing that some documents are intended only for "internal law office review," the Court of Appeals has sought to address this issue by adopting a limited sphere of attorney-generated materials the disclosure of which should occur at the election of the attorney only. Protected materials include "tentative, preliminary impressions" of the legal and factual issues designed to give "internal direction to facilitate performance."[19] This exception could and should be adapted for use in the probate context. To the extent that attorney-generated documents were clearly intended to be for attorneys' eyes only and do not reflect any information exchanged between attorney and client, they should generally remain protected from disclosure. (Information concerning a client's capacity to make a will would, under this analysis, constitute information conveyed from client to attorney and would therefore be subject to disclosure.)

As a practical matter, this will usually mean that relevant documents for which claims of both attorney-client privilege and work product privilege are made—such as the internal memorandum in this case—will have to be produced, because assertion of the attorney-client privilege signals that the documents cannot be characterized as merely internal. Conversely, a memorandum from a partner to an associate explaining the firm's drafting preferences or a document reflecting drafting corrections or guidance that has never been shared with the client and is not the product of client communications should not have to be produced even though it relates to the preparation of the instrument in question.

While there are no bright lines to guide attorneys preparing an estate plan, it may be prudent to identify the preparation of documents as work product at the time services are rendered and to avoid combining the attorney's legal analysis and internal drafting instructions in any document that also reflects attorney-client communications on the particulars of the client's testamentary desires. A court may not ultimately agree, but the attorney has established a basis for his work product privilege argument.

Endnotes

1. SCPA 1404(4); In re MacLeman, 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005); *In re Roth*, 7 Misc. 3d 1010(A), 801 N.Y.S.2d 242 (Sur. Ct., Bronx Co. 2005).
2. *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-78, 575 N.Y.S.2d 809 (1991).
3. *In re Snider*, N.Y.L.J., Nov. 15, 1995, p.37, col. 4 (Sur. Ct., Suffolk Co.), *citing In re Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965) *app. den.*, 16 N.Y.2d 484, 264 N.Y.S.2d 1026 (1965).
4. *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991).
5. *In re Pretino*, 150 Misc. 2d 371, 567 N.Y.S.2d 1009 (Sur. Ct., Nassau Co. 1991); *see also Salzer v. Farm Family Life Ins. Co.*, 280 A.D.2d 844, 721 N.Y.S.2d 409 (3d Dep't 2001).
6. *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d at 377.
7. In recognition of the strong public policy of full disclosure, the party asserting the privilege has the burden of establishing its application. *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d at 377; *Goldberg v. Hirschberg*, 10 Misc. 3d 292, 806 N.Y.S.2d 333 (Sup. Ct., N.Y. Co. 2005).
8. *In re MacLeman*, 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005); 1-20 Weinstein, Korn & Miller § 20.02; 2 Harris New York Estates: Probate, Administration and Litigation § 19.68 (5th ed.).
9. *In re Kirk*, 2011 NY Slip Op. 51185(U), 32 Misc.3d 1205(A), N.Y.L.J., May 26, 2011, p. 35 (Sur. Ct., N.Y. Co.) (Glen, J.).
10. The Court of Appeals has recognized that the application of the work product privilege "must be consistent with the purposes underlying the immunity." Spectrum Systems International Corp. v. Chemical Bank, 78 N.Y.2d 371, 371, 575 N.Y.S.2d 809 (1991).
11. *Matter of Bronner*, 7 Misc. 3d 1023(A), 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005), *citing Priest v. Hennessy*, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980).
12. 329 U.S. 495, 510-11 (1947).
13. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997); *see also Matter of Kotick*, 2008 NY Misc. LEXIS 2597 (Sur. Ct., N.Y. Co.); *Matter of Llewellyn*, N.Y.L.J., Oct. 31, 2011, p.18, col. 4 (Sur. Ct., N.Y. Co.).
14. 150 Misc. 2d 371, 373, 567 N.Y.S.2d 1009 (Sur. Ct., Nassau Co. 1991).
15. *See also Charter One Bank v. Midtown Rochester*, 191 Misc. 2d 154, 159, 738 N.Y.S.2d 179 (Sur. Ct., Monroe Co. 2002).
16. 51 N.Y.2d 62, 69, 431 N.Y.S.2d 511 (1980).
17. *In re MacLeman*, 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co.); *Matter of Bronner*, 7 Misc. 3d 1023(A), 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
18. Objectants' ability to waive the attorney-client privilege as to all relevant matters upon a showing that disclosure is in the best interests of the estate renders the lesser protections of CPLR 4503(b)—which lifts the privilege only as to a limited category of information relating to preparation, execution, and revocation—superfluous.
19. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d at 37-38.

Anne C. Bederka, Esq., is a Partner with Greenfield Stein & Senior, LLP and a co-author of Harris 6th Edition New York Estates: Probate Administration and Litigation (2013). She has written and lectured on a range of topics including evidence in will contests and has acted as court-appointed discovery referee and guardian *ad litem* in probate proceedings. She has served as an adjunct professor and as guest lecturer on probate litigation at Fordham Law School and, in 2012, served as a panelist for the New York State Bar Association's certified training program, "What You Need to Know as a Guardian *ad Litem*."
Anne gratefully acknowledges the invaluable contributions of her law partner, Colleen F. Carew, in the preparation of this article.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

COURTS

Surrogate's Court Does Not Have Jurisdiction Over Dispute Involving Totten Trust

The petitioner brought a proceeding pursuant to SCPA 207 to have an agent under a power of attorney restore monies to the beneficiaries of a Totten trust. Petitioner alleged that the agent had wrongfully converted the monies three days before the depositor's death. The Surrogate granted the requested relief and the agent appealed. The Appellate Division reversed, holding that the proceeding involved living parties and in no way implicated the estate of the deceased depositor. In addition, the court held that SCPA 207, which gives the Surrogate court jurisdiction over lifetime trusts, was not applicable because the definition of lifetime trust in SCPA 103(31) expressly excludes Totten trusts. *Matter of O'Connell*, 98 A.D.3d 673, 951 N.Y.S.2d 28 (2d Dep't 2012).

EMPLOYMENT BENEFITS

Surrogate's Court May Determine Whether Pension Benefits Governed by Federal Law are Part of Deceased Employee's Estate

Decedent's administrator moved for summary judgment that (1) the decedent and his ex-spouse were divorced before the decedent died and (2) the decedent's ex-spouse was required to turn over to the estate certain federal pension benefits even though she was the named beneficiary. Surrogate granted summary judgment in favor of the administrator.

The Surrogate first determined that the decedent and his ex-spouse were divorced because the decedent and his then spouse were granted a divorce in open court some three months before decedent's death. Although the judgment of divorce was signed after the decedent's death, *nunc pro tunc* to the date of the grant of the divorce, the decedent was deemed divorced at the time of his death because the signing of the decree of divorce was a ministerial act. Second, while under the rules and regulations of the Federal Retirement Thrift Investment Board the ex-spouse was entitled to the decedent's benefit accumulations because she was the named beneficiary at the time of his death, the Surrogate held that this determination was not binding on the court because the Board is not a court of law. Finally, the separation and settlement agreement entered into by the decedent and his then spouse contained an express waiver by the decedent's then spouse of any interest in his pension benefits. The administrator was therefore entitled to an order requiring the ex-spouse to turn over the decedent's pension benefits to the decedent's estate. *Matter of Kelly*, 36 Misc. 3d 736, 950 N.Y.S.2d 415 (Sur. Ct., Richmond Co. 2012).

William P. LaPiana

JOINT ACCOUNTS

Possibility of Ratification by Non-Withdrawing Party Requires Resolution of Issues of Fact

The executor of decedent's will brought a proceeding seeking recovery of the excess amount that respondent withdrew from bank accounts during the decedent's lifetime. Specifically alleged was that prior to the decedent's death the respondent withdrew more than his moiety from a joint money market account and joint savings account held by respondent and decedent. Surrogate Murphy denied the executor's summary judgment motion. The Appellate Division affirmed because the joint holder who made the withdrawal may resist recovery by showing that the decedent had consented to the withdrawal. The Surrogate was correct in concluding that the proceeding presented issues of fact bearing on whether or not the decedent had consented, which precluded summary judgment on the issue. *Matter of Civiletto*, 101 A.D.3d 1585, 956 N.Y.S.2d 713 (4th Dep't 2012).

TRUSTS

General Charitable Intent to Benefit an Operating Hospital Justifies Application of *Cy Pres*

The wills and revocable trust of three decedents involved in this *cy pres* proceeding all made dispositions to the same hospital by name, either outright or as the remainder beneficiary of charitable remainder trusts. In all cases the hospital was one of several charitable beneficiaries. Before the death of each of the decedents the hospital ceased to exist as an operating hospital; all of its assets were transferred to another hospital in the same city. The hospital's Foundation continues to exist, however, with plans to provide information, programs and special events promoting the health of the community "in a manner consistent with the convictions and teachings" of the church with which the hospital had been affiliated.

The fiduciaries of the wills and trusts petitioned the Surrogate's Court to apply *cy pres*, as codified in EPTL 8-1.1, to the various dispositions. After the completion of the discovery the named hospital's Foundation and the successor hospital both moved for summary judgment. The Foundation argued that it should receive the charitable gifts because the elements for *cy pres* had not been met. The successor hospital argued that the court should exercise its *cy pres* authority in its favor. Surrogate Versaci granted the successor hospital's motion, finding that the instruments evidenced the general charitable intent of the decedents, putting particular emphasis on the lack of personal relationships between the decedents on one hand and the named hospital on the other, and the multiple charitable gifts in all of the instruments. Finally, in a discussion citing and discussing several precedents dealing with gifts to hospitals by name and *cy pres*, the court found that the named hospital's ceasing to operate as a hospital was a sufficient change in circumstances to justify the exercise of *cy pres* to give make the successor hospital the beneficiary of all of the dispositions. *Matter of Trustco Bank*, 37 Misc. 3d 1045, 954 N.Y.S.2d 411 (Sur. Ct., Schenectady Co. 2012).

WILLS

Ambiguity Warrants Admission of Extrinsic Evidence

Decedent's will devised his residence "and the plot of land appurtenant thereto" to the woman with whom he lived. The probate estate included the residence which sat on a lot measuring 120 feet by 300 feet, adjacent to which was an 88 acre parcel of farmland also owned by the decedent. Decedent's daughters began a construction proceeding and argued that the gift was limited to the lot on which the house sat; the beneficiary of gift moved for summary judgment. The Surrogate granted the motion, ruling that the language of the gift unambiguously included the farmland. The Appellate Division reversed, finding that the will was ambiguous because neither the definition of the word "appurtenant" nor the other terms of the will clarified the decedent's intent. As a result, because proper construction required extrinsic evidence, the case was remanded. *Matter of Phillips*, 101 A.D.3d 1706, 957 N.Y.S.2d 778 (4th Dep't 2012).

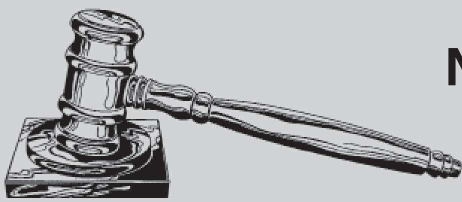
Demand that Bequests Be Paid with Interest Is Not Equivalent to Demand for Payment of Bequests

Decedent's will poured over the residuary estate to the decedent's lifetime trust, which provided for the payment of cash to the decedent's son and grandson, as well as cash in a separate trust for another son. Almost three years after decedent's death, one of the sons individually, as trustee of the trust and as guardian for the grandson, moved pursuant to EPTL 11-1.5(d) to compel the decedent's executors to pay the bequests with interest at the statutory rate of 6%. He alleged that his attorney had received receipts and releases for the bequests approximately 30 months after the decedent's death, to which the attorney responded with a letter demanding that statutory interest be paid on the bequests.

Surrogate Reitz denied the motion and the Appellate Division affirmed, agreeing with the Surrogate that the demand for the payment of interest was not a demand for the payment of the bequests which must be made in order to invoke application of the provisions of EPTL 11-1.5. *Matter of Abrams*, 100 A.D.3d 746, 953 N.Y.S.2d 679 (2d Dep't 2012).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, DRAFTING NEW YORK WILLS AND RELATED DOCUMENTS (4th ed. Lexis Nexis).



Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Attesting Witness/Beneficiary

In an uncontested probate proceeding, the petitioner requested a determination that the bequests under Articles Fourth and Fifth of the propounded instrument were unaffected by the fact that employees of the beneficiaries were utilized as attesting witnesses.

Pursuant to the provisions of Article Fourth of his Will, the Decedent bequeathed $150,000 to the Peconic Landing Community Fund for the unrestricted use by the Fund Directors. In Article Fifth of the instrument, the Decedent bequeathed $100,000 to the Peconic Landing Employees Appreciation Fund. All three witnesses to the Will were employees of Peconic Landing at the time of its execution.

In support of the relief requested, the petitioner submitted documents to the Court, including, *inter alia,* the Peconic Landing Resident Handbook, from which it appeared that all three witnesses under the Will could benefit from the beneficial disposition to the Appreciation Fund. Accordingly, based upon the provisions of EPTL 3-3.2, the Court held the bequest to the Fund was void.

In re Altstedter, N.Y.L.J., Jan. 29, 2013, p. 29, col. 6 (Sur. Ct., Suffolk Co.).

Attorney-Fiduciary

In an uncontested probate proceeding, the Surrogate's Court, Richmond County, considered whether the disclosure requirements of SCPA 2307-a applied to a non-domiciliary attorney-fiduciary, so as to preclude him from receiving a full statutory commission. Specifically, the attorney-fiduciary prepared a will for an out-of-state testator, who died a domiciliary of New York, and never executed an affidavit in compliance with the statute prior to death.

The record revealed that the attorney-draftsman and the decedent knew each other for 43 years and had a longstanding friendship. At the time the propounded Will was executed in 1998, the decedent and the draftsman were both residents of New Jersey. However, three months thereafter, the decedent relocated to Staten Island, New York, where he remained until his death in 2012.

In addressing whether the requirements of SCPA 2307-a were applicable to the attorney-draftsman, the court reviewed the provisions of the statute and the basis for the legislation underscoring its passage. The court noted that while the statute has been the frequent subject of case law and commentary, there was little guidance regarding the application of the statute to the circumstances *sub judice.* The court found the decision in *In re Newell,* N.Y.L.J., June 6, 2002, p. 28, col. 6 (Sur. Ct., Suffolk Co.), instructive but distinguishable.

In concluding that the attorney-fiduciary was entitled to a full statutory commission, the court found that the statute failed to make a distinction as to whether the attorney-draftsman subject to its terms must be an attorney licensed in New York or an attorney licensed elsewhere. More importantly, however, the court noted that a plain reading of the statute reveals that it was intended to address testamentary instruments to be proven in New York, a condition that could be difficult for an attorney-draftsman to predict. Indeed, the court recognized that an attorney-draftsman cannot always foresee where his client will be domiciled at the time of death in order to comply with the applicable laws of that state.

Within this context, the court held that it was only logical to conclude that if a non-New York attorney drafts a will for a non-New York domiciliary and has no knowledge of the intent of the client to change his domicile, the attorney cannot be expected to comply with a New York based statute, nor a statute of any other state or country to which the client may possibly move. Accordingly, under the circumstances, the court determined that the attorney-draftsman was not required to comply with the requirements of SCPA 2307-a, and was entitled to a full statutory commission.

In re Restuccio, N.Y.L.J., Jan. 14, 2013, p. 32 (Sur. Ct., Richmond Co.).

Contested Accounting

In a contested accounting proceeding, the fiduciary moved for summary judgment dismissing the objections of his brothers.

The decedent died survived by three sons. The principal asset of his estate was a rent-stabilized apartment building in Manhattan. The decedent lived in one apartment of the building with his wife and three sons, until two of the sons married and moved elsewhere. When his third son (the estate fiduciary) married, he and his wife continued to live with his father in the family apartment, until the death of his father. During the time he resided in the building, the fiduciary-son also acted as a caretaker of the building with no compensation. The terms of the Decedent's will directed that his estate be sold. At the time of its sale, the apartment building was valued at more than $2.1 million.

The objections to the executor's accounting involved claims related to the sale of the apartment building, and the legitimacy of accounting fees, legal fees and commissions. Specifically, with regard to the sale of the building, the objectants maintained that the executor failed to sell the asset in a timely fashion, and that he failed to maximize the price by continuing to reside in the rent-stabilized apartment that he had long occupied.

The court found the undisputed proof revealed that the executor had listed the building for sale shortly after being appointed, that the executor's attorney had prepared eight different contracts of sale for the apartment, but through no fault of the fiduciary the sale failed to be consummated, and that a sale ultimately occurred at four times the date of death value of the asset, and $200,000 more than its "closing date" value. The court concluded that the objectants had failed to submit any proof that the executor had breached his fiduciary duty in connection with the sale.

The court further found that objectants had failed to demonstrate that the fees of the executor's counsel were excessive, or were paid for his personal benefit. The court noted that objectants' claims to the contrary were based on nothing more than conclusory allegations without any evidentiary support. Similar conclusions were reached with respect to the objectants' claims pertaining to accounting fees.

Accordingly, summary judgment was granted to the executor.

In re Vartanian, N.Y.L.J., Jan. 18, 2013, p. 30 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Discovery of Personal Income Tax Returns

In a proceeding for removal of the trustee of a testamentary trust, the respondent moved for a protective order to prevent disclosure of his personal income tax returns for the years he served as a trustee, claiming that they were private and confidential in nature, irrelevant to the issues before the court, and that the petitioner had failed to demonstrate that the information contained in the returns could not be obtained from another source. Petitioner opposed the motion, contending that the information was discoverable due to respondent's status as a fiduciary and the allegations against him centered on his diversion of trust funds into his own accounts and fraud. Petitioner cited case law standing for the proposition that where substantial allegations of fraud and self-dealing on the fiduciary's part are at issue, personal tax returns are discoverable.

The court noted that while there is broad disclosure under Article 31 of the CPLR, there is a long-recognized exception to the general rule which shields an individual's personal income tax returns from disclosure absent a strong showing that the information is indispensable to a party's claims and is unobtainable from other sources. Citing *Matter of Zirinsky*, 26 Misc. 3d 625 (Sur. Ct., Nassau Co. 2009), *Matter of Morrell*, 154 Misc. 356 (Sur. Ct., Kings Co. 1935), and *Matter of Romano*, 8 Misc. 3d 1010 (Sur. Ct., Nassau Co. 2005), the court recognized that a further exception to this rule exists where the conduct of a fiduciary is at issue.

Accordingly, based on the serious allegations of fiduciary misconduct at issue, and the relevance of the tax returns to both corroborate information and the respondent's credibility, the court held the returns were relevant to the proceeding and ordered that they be produced. Respondent's motion for a protective order was, therefore, denied.

In re Desantis, N.Y.L.J., Jan. 23, 2013, p. 40 (Sur. Ct., Richmond Co.).

Privilege

In *In re West,* the Surrogate's Court, New York County (Surr. Anderson), explored the scope and definition of the qualified privilege that attaches to material prepared in anticipation of litigation.

Before the court was an application by the proponent of the decedent's Will to compel discovery of the objectants notes memorializing their communications with non-party witnesses after the decedent's death. Objectants opposed the application, contending that the notes constituted material prepared in anticipation of litigation and were privileged. Additionally, objectants' maintained that the documents fell outside the scope of the three-year/two-year rule and, therefore, were not subject to discovery.

The record revealed that in the course of deposing objectants, the proponent learned that information contained in the subject notes formed the basis for the objections to probate. The information was derived from telephone calls and in-person conversations with third parties pertaining to the decedent's estate plan and Will. According to the deposition testimony, at the time of the conversations, the objectants were investigating whether they had grounds for opposing probate.

The court opined that while the provisions of CPLR 3101 generally require "full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3101(d)(2) provides a qualified privilege for materials prepared in anticipation of litigation or for trial. The court found that this privilege is limited to materials which are prepared *exclusively* for litigation, and imposes upon the party seeking to prevent disclosure the burden of proving that the privilege applies. To this extent, when the motive for preparing the materials is mixed, even if a predominant motive is for use in litigation, the privilege does not apply.

In considering whether materials fall within the scope of the privilege, courts have considered the time when the documents were created, the possible uses of the information, and the relationship between the informant and the person to whom the information was provided. Thus, by way of example, the court noted that materials prepared during the investigatory stage of what later becomes a litigation are generally not privileged, as "…reports prepared for the purpose of assisting a party in making the decision to litigate or not are considered to have a mixed purpose, and therefore must be disclosed…" *Plimpton v. Massachusetts Mut. Life Ins. Co.*, 50 A.D.3d 532, 533, 855 N.Y.S.2d 544 (1st Dep't 2008).

Based upon the foregoing, the court concluded that when non-lawyers hold conversations to explore the facts that ultimately result in litigation, the notes derived from such conversations are not privileged.

Further, the court held that the subject documents were not shielded from discovery pursuant to the three-year/two-year rule. While the objectants argued that the subject notes were prepared after the decedent's death and therefore fell outside the scope of the rule, the court found that because the events described in the notes occurred within the time frame of the rule, they were subject to production.

In re West, N.Y.L.J., Jan. 7, 2013, p. 20, col. 5 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Sealing of Court Records

In *In re Rubin,* the Surrogate's Court, New York County (Surr. Glen) addressed an application to redact certain information submitted to the court four years ago within the context of a proceeding, since discontinued, to recover artwork claimed to be an asset of the decedent's estate. The proposed redactions generally included financial information, inventories of artwork, insurance documents, and descriptions of jewelry, furniture and other personal property. In support of the application, the movant alleged that inclusion of the foregoing information as part of the public record would cause the assets to be at risk.

The court opined that the right of public access to court records is recognized by common and statutory law. Furthermore, pursuant to the Uniform Rules of the Trial Courts, 216.1(a), court records shall not be sealed, either in whole or in part, except upon a written finding of good cause. The burden of proving good cause is upon the movant, and requires a showing of a legitimate need and a particularized risk of harm. The fact that the record in a Surrogate's Court proceeding may contain personal and financial information is not in and of itself sufficient to establish a basis for sealing a file. Nevertheless, the court noted that financial information will be sealed when copies of personal income tax returns or the social security numbers of a litigant are at issue.

With respect to the pending application, the court found it significant that the movant waited over four years to assert the confidentiality of the subject pleadings. Moreover, the court found that the movant's claim that the assets were at risk failed to show any particularized risk of harm.

Accordingly, the court denied the motion except to the extent of those portions of the record which contained movant's social security number, and the social security number of her daughter.

In re Rubin, N.Y.L.J., Jan. 7, 2013, p. 22, col. 1 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Spoliation

In an action arising from, *inter alia,* the termination of plaintiffs as the exclusive distributor of diagnostic veterinary equipment, and defendants' alleged breach of restrictive covenants, the defendants moved for dismissal of the complaint as a sanction for plaintiffs' spoliation of evidence. The record revealed that an ex-employee of plaintiffs admitted that he had been directed by the president of the plaintiff/firm to retrieve, review, delete and destroy e-mails that were damaging to plaintiffs' position. The former employee also alleged that the plaintiffs' president broke into his home to remove, *inter alia,* his hard drive, without his knowledge and consent. A spoliation hearing resulted in a forensic investigation that recovered over 600,000 deleted files from plaintiffs' server.

Based upon the foregoing, the court dismissed the plaintiffs' complaint finding that they had intentionally deleted electronic documents in an attempt to gain an advantage in litigation. The court reasoned that New York courts have broad discretion in determining sanctions for spoliation of evidence. Sanctions may include issuing an order of preclusion employing an adverse inference instruction at the trial of the action or imposing the ultimate sanction of dismissal.

The court noted that in assessing whether there has been spoliation of electronic material, the applicable standard requires a party who reasonably anticipates litigation to suspend its routine document retention/destruction policy and to put in place a "litigation hold" to ensure the preservation of relevant documents. On the other hand, a party seeking sanctions for spoliation of evidence must demonstrate (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. Citing *VOOM HD Holdings LLC v. Echostar Satellite LLC,* 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012), the court opined that "[t]he intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance is rebuttable by the spoliating party upon a showing that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses.

Within this context, the court held that plaintiffs had an obligation to preserve the electronic data at the time it was destroyed, and that plaintiffs acted willfully when they destroyed the documents. Specifically, in reaching this result, the court relied upon evidence that revealed e-mails that had been recovered were deleted after plaintiffs reasonably anticipated litigation, that plaintiffs were able to recover e-mails dating back to well before the litigation commenced, and thus the e-mails that had been deleted were not part of plaintiffs' business practices as claimed, that the plaintiffs' president had directed that relevant e-mails be deleted from the server, engaged in destruction of hard copies of documents, and entered his former employee's home without a warrant and removed the hard drive to the firm's computer with the aim of obstructing inquiry into the spoliation issue. Finally, the court concluded that the evidence that had been destroyed was relevant if not crucial to defendants' claims and defenses.

In determining the appropriate sanction to be imposed under these circumstances, the court concluded that because of the critical nature of the subject evidence to the defendant's case and the willful and contumacious nature of plaintiff's conduct, particularly the removal and destruction of the hard drive, dismissal was warranted.

UMS Solutions Inc. v. Biosound Esaote Inc., N.Y.L.J., Oct. 23, 2102, p. 30 (Sup. Ct., Westchester Co.).

Surcharge

The petitioner, decedent's nephew and twenty percent beneficiary of the decedent's residuary estate, requested a partial distribution from the estate for himself individually, and as sole distributee of the estate of his post-deceased mother, who was a forty percent residuary beneficiary. The other residuary beneficiary of the estate was the fiduciary's father.

The fiduciary's account revealed that while the initial distributions from the estate were in the proportions required by the Decedent's Will, subsequent distributions favored the fiduciary's father to the exclusion of the petitioner and his mother. During the pendency of the proceeding, the fiduciary made payments of the pro rata share amounts.

The court opined that a fiduciary has a general duty to deal impartially with the beneficiaries of an estate or trust, and owes a duty of undivided loyalty to each of the estate beneficiaries. As such, when a distribution was made to one residuary beneficiary, an equal distribution should have been made to petitioner and his mother's estate. Accordingly, the court held that petitioner and his mother's estate were entitled to interest on the excess sum distributed to the fiduciary's father, which sum was to be paid by the fiduciary personally, as a surcharge.

Pursuant to CPLR 5001(a), the court may award pre-judgment interest for surcharges based upon a breach of fiduciary duty to fully compensate a beneficiary for any losses which he may have suffered or gains which he may not have fully realized due to the fiduciary's negligence. Accordingly, in the exercise of its discretion, the court imposed interest at the rate of 6% per annum from the date of each payment to the fiduciary's father through the date of adjusted payments to the petitioner and his mother's estate.

In re Ryan, N.Y.L.J., Dec. 31, 2012, p. 29, col. 2 (Sur. Ct., Suffolk Co.).

Unconscionability

Before the Surrogate's Court, Bronx County, was a discovery proceeding instituted by a co-executor of the estate to set aside a transfer by the decedent of his 50% interest in the company, Aurora Gems, Inc., to his stepson. Upon the trial of the matter, the petitioner argued that the stepson, as President of the company, had a confidential relationship with the decedent, which he breached in connection with the sale. Further, he maintained that because the attorney, who represented the decedent, also represented the company and stepson in the transaction, a conflict of interest existed for which a waiver from the decedent was required. The petitioner claimed that these circumstances, combined with the alleged sale of the company at less than its fair market value, made the transaction unconscionable. Finally, the petitioner argued that the stepson had failed to meet his burden of establishing that the decedent intended to make a gift of his interest in the company to him, and that the transaction was free from fraud and overreaching.

In opposition to petitioner's contentions, the company and the stepson argued that the sale was an arm's length transaction at fair consideration. Alternatively, they claimed that in the event the consideration was found insufficient, the decedent intended to make a gift of the difference. Indeed, they maintained that the transfer accomplished the decedent's objective, as evidenced in prior testamentary instruments, of transferring his interest in the company to his stepson, whom he considered to be like a son.

In concluding that there was no basis to set aside the transaction, the court discussed the prevailing principles of law governing fiduciary relationships, gifts and unconscionability. The court opined that the relationship between shareholders in a close corporation is akin to that between partners and imposes a high degree of fidelity and good faith. In order to recover damages for breach of these duties, a party must establish (1) the existence of a fiduciary relationship; (2) misconduct by the fiduciary; and (3) damages directly caused by the fiduciary's misconduct. On the subject of gifts, the court noted that a valid inter vivos gift by a decedent requires the donee to prove donative intent, delivery, and acceptance by clear and convincing evidence. Further, with regard to the issue of unconscionability, the court found that an unconscionable agreement is "one where the inequality is so strong as to 'shock the conscience' and confound the judgment of any person of common sense (citations omitted)." To that extent, the court held that in order to find a transaction or conduct unconscionable, the party must show both procedurally and substantively, "'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party' (citations omitted)." However, if a contract is not unconscionable, the adequacy of consideration exchanged will not be considered.

Within this context, the court found that while the proof adduced established that the decedent suffered from various physical ailments during the last few years of his life, it was also clear that at the time of the subject transaction, he was intelligent, alert, responsive and had an outstanding memory. Additionally, based on the testimony of the witnesses, the court concluded that the decedent always considered Aurora to be his stepson's brainchild, and considered his stepson to be like a son and natural object of his bounty.

To this extent, the court found it relevant that in each of his prior wills, the decedent disposed of his interest in the company to his stepson. Moreover, the court noted that while the decedent's stepson had an interest in the transaction, there was no proof that he made a single demand or suggestion as to the manner in which it was structured. Instead, the court found that the decedent's attorney of many years attempted in good faith to effectuate his testamentary plan through the inter vivos transaction, which apparently was to the decedent's satisfaction, as evidenced by the fact that he never took any steps during his lifetime to set it aside, despite his expressed concerns over his finances. Indeed, while the court found that the consideration for the transaction was less than might have otherwise been demanded from a stranger, it concluded that the consideration received by the decedent comported with the love and affection that he held for his stepson.

Accordingly, the court held there was no basis for setting aside the transaction on the ground of unconscionability, breach of fiduciary duty, undue influence or fraud, and dismissed the petition.

In re Rodman, N.Y.L.J, Jan. 14, 2013, p. 22, col. 2 (Sur. Ct., Bronx Co.).

Ilene S. Cooper is a partner at Farrell Fritz, P.C., Uniondale, New York.

Florida Update

By David Pratt and Jonathan Galler

David Pratt

CASE LAW UPDATE

Durable Power of Attorney

Maximiliana Albelo—described by the Third District Court of Appeal as an octogenarian who suffered from age-related cognitive disabilities—commenced a premises liability claim for damages to her home caused by a burglary. However, Albelo's sworn proof of claim was filed not by Albelo personally but, rather, by her son, who was acting pursuant to a properly executed durable power of attorney. The validity of the power of attorney was not challenged in the trial court. Nevertheless, the trial court dismissed the complaint on grounds that Albelo should have been required to petition the probate court to determine her own incapacity prior to the filing of a claim. The Third District reversed the dismissal, concluding that Albelo's durable power of attorney empowered her son to bring claims on her behalf without the necessity of a judicial determination of incapacity or the appointment of a guardian. Moreover, the appellate court went so far as to sanction the appellant and its counsel for their persistence in frivolously arguing that Albelo was required to seek a guardian for herself as a condition of pursuing her claims.

Albelo v. Southern Oak Ins. Co., 2013 WL 440199 (Fla. 3d DCA Feb. 6, 2013) (not yet final).

Discovery and Attorneys' Fees in Probate

Florida's Probate Rule 5.080 provides that certain rules of civil procedure apply in all probate and guardianship proceedings, whether the proceedings are adversarial or not. These include the rules that authorize the use of basic discovery tools like depositions, interrogatories, and requests for the production of documents. Rule 5.080 also authorizes the court to employ broad discretion in limiting the scope of such discovery and in assessing attorneys' fees associated with discovery. However, as the Fifth District Court of Appeal recently emphasized in *Bishop v. Estate of Rossi*, any award of attorneys' fees must be supported by express judicial findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of proceedings involved. In that case, the trial court awarded the personal representative attorneys' fees incurred in connection with discovery sought by an interested person, but the Fifth District reversed—"reluctantly," as the appellate court put it—and remanded the case so that the trial court could make express findings of fact to support its award of fees.

Jonathan Galler

Bishop v. Estate of Rossi, 2013 WL 132449 (Fla. 5th DCA Jan. 11, 2013) (not yet final).

Trustee Indemnification

Section 736.1011(1)(a), Florida Statutes, governs and limits the enforceability of provisions in a trust instrument that seek to relieve or exculpate a trustee from liability. For example, pursuant to the statute, a provision that relieves a trustee from liability for a breach of trust committed in bad faith is unenforceable. In *Campbell v. Chitty*, the First District Court of Appeal addressed the enforceability of a trust provision that sought to indemnify a trustee for damages caused by the trustee so long as the trustee's actions or omissions did not rise to the level of negligence. In that case, the trial court had assessed damages against the trustee based on a finding that she had breached her fiduciary duties. However, the First District reversed the award of money damages and remanded the case because the trial court had never made a finding, prior to assessing such damages, that the trustee's conduct rose to the level of negligence—a finding that was required to support an award of damages, given the indemnification provision contained in the trust instrument.

Campbell v. Chitty, 2013 WL 6031283 (Fla. 1st DCA Dec. 5, 2012) (not yet final).

Foreign Personal Representative

Section 734.201(3), Florida Statutes, provides that "[a] foreign personal representative submits personally to the jurisdiction of the courts of this state in any proceeding concerning the estate by…(3) [d]oing any act as a personal representative in this state that would have given the state jurisdiction over that person as an individual." In *Juegea v. Davidson*, the Third District Court of Appeal noted the dearth of case law interpreting this provision. In that case, a Spanish citizen and resident was appointed by a Spanish court to serve as the administrator of the estate of Simon Davison. The Spanish administrator commenced a lawsuit against the decedent's brother for civil theft and conversion in the United States. The decedent's brother then sought to assert a counterclaim against the Spanish administrator *personally*. The Third District held that the Florida court lacked personal jurisdiction over the Spanish administrator in his personal or individual capacity. The appellate court concluded that section 734.201(3) did not confer personal jurisdiction over the Spanish administrator in his individual capacity because Florida's probate code defines a "foreign personal representative" as the personal representative of another state or a foreign country who has been appointed by the circuit court of Florida to serve as an ancillary administrator. Because no ancillary estate had been opened and no ancillary administrator had been appointed, section 734.201 was inapplicable.

Juega v. Davidson, 105 So. 3d 575 (Fla. 3d DCA 2012).

David Pratt is a partner in Proskauer's Personal Planning Department and the head of the Boca Raton office. His practice is dedicated exclusively to the areas of estate planning, trusts, and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan Galler is a litigator in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation Department and are admitted to practice in Florida and New York.

Section Committees and Chairs

The Trusts and Estates Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

Ad Hoc Committe on Multi-State Practice
William P. LaPiana
New York Law School
185 West Broadway
New York, NY 10013-2921
william.lapiana@nyls.edu

Charitable Organizations
Christine Woodcock Dettor
Bousquet Holstein PLLC
110 West Fayette Street
One Lincoln Center, Ste. 900
Syracuse, NY 13202
cdettor@bhlawpllc.com

Mary Anne Cody
Mackenzie Hughes LLP
101 South Salina St., Ste. 600
Syracuse, NY 13202
mcody@mackenziehughes.com

Continuing Legal Education
Frank W. Streng
McCarthy Fingar LLP
11 Martine Avenue, 12th Fl.
White Plains, NY 10606-1934
fstreng@mccarthyfingar.com

Diversity
Ashwani Prabhakar
Greenfield Stein & Senior LLP
600 Third Avenue
New York, NY 10016
aprabhakar@gss-law.com

Anta Cisse-Green
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
antac3@aol.com

Elderly and Disabled
Cora A. Alsante
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
calsante@hancocklaw.com

Estate and Trust Administration
Jill Choate Beier
Marymount Manhattan College
221 E. 71st Street
New York, NY 10021
jbeier@mmm.edu

Estate Litigation
Charles T. Scott
Greenfield Stein & Senior, LLP
600 Third Avenue, 11th Fl.
New York, NY 10016-1901
cscott@gss-law.com

Estate Planning
Sharon L. Wick
Phillips Lytle LLP
1 HSBC Center, Ste. 3400
Buffalo, NY 14203-2887
swick@phillipslytle.com

International Estate Planning
Daniel S. Rubin
Moses & Singer LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
drubin@mosessinger.com

Law Students and New Members
Michelle Schwartz
Fulbright & Jaworski LLP
666 Fifth Avenue
New York, NY 10103
mschwartz@fulbright.com

Legislation and Governmental Relations
Robert Matthew Harper
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556
rharper@farrellfritz.com

Ian William MacLean
The MacLean Law Firm, P.C.
100 Park Avenue, 20th Fl.
New York, NY 10017
ianwmaclean@maclean-law.com

Life Insurance and Employee Benefits
Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com

Members and Membership Relations
Jennifer N. Weidner
Boylan Code LLP
The Culver Road Armory
145 Culver Road
Rochester, NY 14620
jweidner@boylancode.com

Newsletter and Publications
Jaclene D'Agostino
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

Practice and Ethics
Eric W. Penzer
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
epenzer@farrellfritz.com

Surrogates Court
Lisa Ayn Padilla
Brady, Klein & Weissman, LLP
501 Fifth Avenue, 19th Fl.
New York, NY 10017
lisa@eflm.com

Taxation
Susan Taxin Baer
Law Offices of Susan Taxin Baer
399 Knollwood Road, Ste. 212
White Plains, NY 10603-1937
stbaer@baeresq.com

Technology
Gary R. Mund
P.O Box 1116
New York, NY 10002-0914
gmund@mundlaw.com

Executive Committee District Representatives

First District
Natalia Murphy,
Day Pitney LLP
7 Times Square
New York, NY 10036
nmurphy@daypitney.com

Second District
Marilyn Ordover
Cullen & Dykman LLP
44 Wall Street
New York, NY 10005
mordover@cullenanddykman.com

Third District
Stacy L. Pettit
State of New York
Appellate Division, Third Dept.
P.O. Box 7288, Capitol Station
Albany, NY 122224
spettit@courts.state.ny.us

Fourth District
Cristine Cioffi
Cioffi Slezak Wildgrube P.C.
2310 Nott Street East
Niskayuna, NY 12309-4303
ccioffi@cswlawfirm.com

Fifth District
Ami Setright Longstreet
Mackenzie Hughes LLP
P.O. Box 4967
Syracuse, NY 13221
alongstreet@mackenziehughes.com

Sixth District
Hon. Eugene E. Peckham
Levene Gouldin & Thompson LLP
P.O. Box F-1706
Binghamton, NY 13902
epeckham@binghamtonlaw.com

Seventh District
Barbara R. Heck James
Harris Beach PLLC
99 Garnsey Rd.
Pittsford, NY 14534
bjames@harrisbeach.com

Eighth District
Victoria L. D'Angelo
Damon Morey LLP
9276 Main Street, Suite 3B
Clarence, NY 14031-1913
vdangelo@damonmorey.com

Ninth District
Elana L. Danzer
Greenfield Stein & Senior LLP
600 Third Avenue
New York, NY 10016
edanzer@gss-law.com

Tenth District
Joseph T. La Ferlita
Farrell Fritz P.C.
1320 RXR Plaza
Uniondale, NY 11556
jlaferlita@farrellfritz.com

Eleventh District
Mindy J. Trepel
Sweeney Gallo Reich & Bolz LLP
95-25 Queens Blvd, 11th Floor
Rego Park, NY 11374
mtrepel@msgrb.com

Twelfth District
Carl Lucas
Lucas & Lucas, Esq.
110 Wall Street, 11th Floor
New York, NY 10005-3101
esqcarl@aol.com

Thirteenth District
Paul S. Forster
P.O. Box 61240
Staten Island, NY 10306
psflaw@aol.com

(paid advertisement)

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

PRSRT STD
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word or WordPerfect. Please include biographical information.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge.

ISSN 1530-3896 (print) ISSN 1933-852X (online)