NYSBA WINTER 2010 | VOL. 43 | NO. 4

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

Gary B. Freidman

Greetings. As I write this message, I am in Rochester at our Fall Meeting. It's hard to believe that this is already my final Chair's Message—which is too bad since I finally have a decent photo for the *Newsletter*.

Our Program Co-Chairs, Audrey Peartree and Eric Penzer, put together a wonderful program. On Thursday, members could choose to attend three of six roundtable discussions on diverse topics: a power of attorney update; the pitfalls of exculpatory, tax allocation, in terrorem and retention clauses; planning for same-sex couples; planning for second marriages; an estate litigation update; and the new Family Health Care Decisions Act. For those of you who have not attended a Fall Program before or in several years, the roundtables are a relatively new addition. We break out into small groups for focused discussion, questions and answers. Most attorneys—newly minted and more seasoned—find these roundtable discussions highly useful. The feedback is resoundingly positive.

On Friday morning, we had a lively panel discussion on the recent Court of Appeals decisions in *Singer*, *Hyde*, and *Schneider v. Finmann*. This was followed by a presentation on why it may make sense to name a trust

Inside

NYSBA

as beneficiary of retirement account benefits, followed by a lecture on the potential benefits of converting a traditional IRA into a Roth IRA. The program was followed by a luncheon presentation by Monroe County Surrogate Calvaruso (our host Surrogate) about the Monroe County's new Lawyer Succession Registry. For those of you who were unable to attend the program, all I can say is that you missed a fun and educational event.

Thank you to all our roundtable moderators and presenters: Kate Madigan, Ian MacLean, Bill LaPiana, Karen Schaefer, John Farinacci, Heidi Gregory, Surrogate Doyle, Surrogate Holzman, Jim Ayers, Eric Penzer, Phil Burke, Mike O'Connor, Brian Haynes and Surrogate Calvaruso.

I am still somewhat incredulous that we are nine months into 2010 and we still have no federal estate tax and no clear indication of what will happen in 2011. Will we be back to a $1,000,000 unified credit on January 1, 2011? As I noted in a prior *Newsletter*, there is likely to be some interesting litigation over whether the estate tax can be reinstated retroactively.

You may have noticed that our Section now has two new committees: Diversity and New Members. Both committees have been very busy creating programs to increase Section membership by minority attorneys and attorneys who are new to the field of trusts and estates. Our able Co-Chairs have run several networking receptions and seminars over the past year. I encourage you to attend an event in your area to help spread the word about the benefits of belonging to our Section and how it has helped you in your professional career.

It has been a busy quarter on the Legislative front. In August the Governor signed the so-called technical corrections to the recent, sweeping overhaul of the General Obligations Law, power of attorney provisions. (N.Y. Sess. Laws 2010, Ch. 340). Space does not permit even a partial summary of the changes made; however, in short: The 2010 Amendments exclude powers of attorney granted in connection with business transactions from the requirements of the statute; eliminate the presumption that execution of a power revokes all prior powers unless expressly provided to the contrary; clarify that a power executed in another jurisdiction in compliance with its or New York law is valid in New York; and provide that termination of an agent's authority is not effective as to the agent until the agent has received the revocation (however, revocation is deemed received within a reasonable time after a principal delivers the notice by specified means).

In addition, the Governor has signed several bills that we supported. These new laws will (a) establish a two-year statute of limitations in seeking a default in failing to exercise a right of election (Laws 2010, Ch. 545); (b) amend EPTL 7-1.17 to clarify that a lifetime trust must be executed by the person establishing such trust, who need not be the "creator" (Laws 2010, Ch. 451); (c) increases the assets which constitute exempt property under EPTL 5-3.1 (Laws 2010, Ch. 437); and (d) provide a default rule construing language in wills with reference to the pre-January 1, 2010 Internal Revenue Code (a consequence of the temporary expiration of the federal estate tax) (Laws 2010, Ch. 349). Once again, kudos to all of our Section members who labored long and hard for enactment of these bills.

It has been my pleasure and privilege to serve as Section Chair. My job has been made so much easier by the groundwork laid by our past Chairs, by our officers, and by each member of the NYSBA who has contributed his or her time and energy to our Section. I would be remiss if I did not also thank our Section Liaison, Lisa Bataille, and the other professionals at the Big Bar such as Kathy Heider who help to make our events so successful. Thank you everyone.

Now, on to planning the program for our Annual Meeting which will be held on January 26, 2011 in New York City. I hope to see you there.

Gary B. Freidman

Editor's Message

As I write this, the leaves are crisp and crackle under foot. Autumn's brilliance and cool clean air offer a cheerful and sobering prelude to winter's coming chill. It was terrific to see so many TELS members at the Fall Meeting in Rochester for the outstanding program chaired by Eric Penzer and Audrey Peartree.

If you were there you got advance copies of the Fall *Newsletter* and the eight outstanding, interesting and useful articles, the first published letter to the editor, the third Best of the Listserve and the customarily superb case reporting columns of Ilene Cooper and Professors LaPiana and Bloom. This issue, my last as Editor in Chief, has nine excellent articles, more dialogue from the Listserve on New York T&E issues, and Ilene Cooper and the professors' terrific columns.

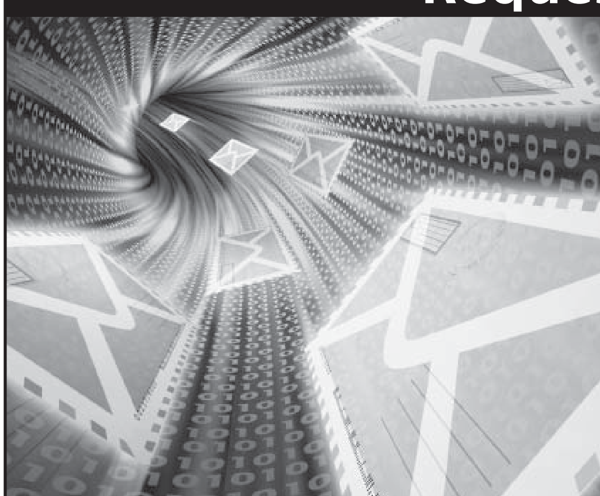
The editorial board is soliciting for the Spring *Newsletter* articles and columns, alerts on pending legislation, case notes, outlines and transcripts from continuing legal education or other presentations, letters to the editor and opinion pieces, agenda and submissions from the various committees of the Section, CLE program updates and excerpts from articles related to trusts and estates issues in other publications. The deadline is January 15, 2011.

As in the past, and for the last time, I encourage you to submit an article discussing a case, matter or issue in which you are or have been recently involved. The editorial board invites you to voice your opinion on pending legislation or existing laws, regulations and practices, and to otherwise get involved in the Section. Perhaps your ideas will be the springboard for an improvement in the way we all practice law, the laws of the state and the lives of the people in our community.

It has been a privilege and a pleasure to shepherd this publication and lead the editorial board for the past two years. This endeavor is a team effort, and I thank each of the associate editors for their hard work, all of the authors who have contributed to the Newsletter and especially Lyn Curtis and Wendy Harbour at the NYSBA in Albany, who make this publication happen.

Ian W. MacLean, Editor in Chief

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact the *Trusts and Estates Law Section Newsletter* Editor:

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

Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/TrustsEstatesNewsletter

Probate by Order to Show Cause

By Sean R. Weissbart

Introduction

Although jurisdiction over the necessary parties in a probate proceeding is obtained in the typical case by service of a citation, when the decedent's estate is faced with an imminent risk of irreparable harm, practitioners should consider filing the probate petition by order to show cause. In these rare situations, orders to show cause offer two advantages over citations. First, orders to show cause can be made returnable sooner than citations, thereby reducing the time period in which harm could be inflicted on the decedent's estate. Second, orders to show cause can include temporary restraining orders enjoining potentially harmful actions, thereby maintaining the status quo through the return date. These are advantages that cannot always be achieved if the Surrogate grants preliminary letters testamentary to the will's named executor. And clients face no greater risks or significantly larger costs by filing probate petitions by order to show cause.

This article explains the benefits of filing probate petitions by order to show cause when the decedent's estate is faced with an imminent risk of irreparable harm. Section One compares orders to show cause with citations; Section Two explains the statutory procedural basis for filing probate petitions by order to show cause and compares filing by order to show cause with the will's executor's ability to expedite probate by applying for preliminary letters testamentary; and Section Three discusses emergency situations when practitioners should consider filing probate petitions by order to show cause.

Section One: Comparing Citations and Orders to Show Cause

Although citations and orders to show cause share several similarities, as indicated above, orders to show cause provide two advantages over citations when the decedent's estate faces an imminent risk of irreparable harm: (i) a quicker return date and (ii) the possibility of obtaining a temporary restraining order.

The functional purposes of both documents is the same: to obtain jurisdiction over all necessary parties who have not waived issuance and service of process, and secondarily, to notify them that a special proceeding to probate the decedent's will has been initiated.[1] As a result, the respective documents must name all parties who are required to receive process under SCPA 1403. There are a number of other basic similarities. Both documents are submitted to the Surrogate *ex parte*. The Surrogate then signs the document and the court issues a return date before the documents are returned to the filing party to effectuate service of process. At the return date, all interested parties have the opportunity to appear and object to the admission of the will to probate and the issuance of letters testamentary to the nominated executor.

Under the SCPA, a citation must be made returnable no earlier than ten days from the date of service if the necessary parties all reside in New York and twenty days if a necessary party resides in a state other than New York. If a necessary party resides outside the United States, that party is entitled to thirty days notice.[2] In cases where even one party is not a domiciliary of New York, the citation cannot be made returnable until the longest applicable period has lapsed. For example, if three parties live in New York and one party resides in Delaware, the citation cannot be made returnable for at least twenty days from the date of service. If an additional party in that circumstance lived in France, the earliest return date would be thirty days after service is completed. Given the requirements of SCPA 308, coupled with scheduling issues in Surrogate's Court, in many cases, the Surrogate's Court may schedule a citation's return date for more than one month after it is filed.

On the other hand, no statutory timetable governs the return date of orders to show cause. Indeed, CPLR 2214(d) provides that orders to show cause are returnable at "a time and in a manner specified therein." As a result, orders to show cause can be made returnable at any time that pleases the court, even as early as the following day.

In addition to the significantly shorter return time, orders to show cause also differ from citations because they can include temporary restraining orders. Temporary restraining orders enjoin specified parties from taking potentially harmful actions through the return date, at which point the court will hear argument on "converting" the temporary restraining order into a preliminary injunction; if granted, the preliminary injunction would remain in effect through the final disposition of the probate proceeding.[3]

Citations cannot include temporary restraining orders because the court would not be able to hold a preliminary injunction hearing prior to the return date of the citation as determined by SCPA 308. The time periods for return dates in SCPA 308 conflict with the requirement in CPLR 6313(a) that a court set a preliminary injunction hearing "at the earliest possible time" after issuing a temporary restraining order. As a result, citations cannot include temporary restraining orders.

On the other hand, orders to show cause can include temporary restraining orders because they can be made returnable at the court's discretion.[4] As a result, the court would be able to comply with the requirement in CPLR 6313(a) to set a hearing for a preliminary injunction shortly after issuing the temporary restraining order. The requirement to set a hearing date "at the earliest possible time" is required because the temporary restraining order is an *ex parte* restraint, and it is unfair to restrain another party's activity for longer than necessary without giving him or her an opportunity to oppose the injunction.[5]

Section Two: Procedure for Filing a Probate Petition by Order to Show Cause

Although probate petitions are typically filed with a citation, New York law does not prohibit filing probate petitions by orders to show cause. Sections 307, 1402 and 1403 of the SCPA regulate the filing and serving of probate petitions. These sections do not mention citations, and all of the jurisdiction requirements in these sections can be met with orders to show cause.

The procedure to file a probate petition by order to show is not markedly different than with a citation. The order to show cause would replace the citation and should be placed in front of the probate petition. The order to show cause and probate petition should share a blueback that reads, for example, "Order to Show Cause and Petition for Probate." If the order to show cause includes a temporary restraining order (discussed below), the blueback could be titled, "Order to Show Cause with Temporary Restraining Order and Petition for Probate."

Probate petitions filed by order to show cause can be filed by any party with an interest specified in SCPA 1402—just like a citation. Finally, pursuant to CPLR 2217, orders to show cause must be accompanied by an affidavit stating whether an application has ever been made for similar relief, and if applicable, the result of any prior application and any new facts not raised therein.

If the order to show cause includes a temporary restraining order, the requested restraints should be listed. The order to show cause should include a paragraph that begins, for example, "Until the further order of this court," followed by a list of the requested temporary restraints. The Surrogate may strike or modify the list of temporary restraints (as well as any other language) before signing the order to show cause. Finally, when an order to show cause includes a temporary restraining order, the accompanying affidavit should state why "immediate and irreparable injury" will result if the requested restraints are not immediately imposed.[6]

The use of an order to show cause cannot circumvent the requirements of Sections 307, 1402 and 1403 of the SCPA. As required by SCPA 307, service on domiciliaries must be by personal delivery, subject to an exception from the court.[7] Likewise, a person without an interest specified in SCPA 1402 cannot file a probate petition by order to show cause. And filing by order to show cause does not eliminate the requirement to name and serve all of the interested parties specified in SCPA 1403 who have not waived issuance and service of process.

Although not required, an attorney may want to appear to file the probate petition by order to show cause. Because filing probate petitions by order to show cause is unusual, clerks are likely to question the procedural basis for doing so. Furthermore, an attorney can persuasively ask the clerk for a quick return date. And if a temporary restraining order is requested, it is even possible that the Surrogate or the Court's Law Department may have questions about the requested restraints. The preference for an attorney to file increases when the order to show cause includes a temporary restraining order or if there is a need for an early return date.

Finally, before filing a probate petition by order to show cause, practitioners should consider whether their clients' goals can be accomplished by applying for preliminary letters testamentary when the probate petition is filed. The petitioner in the probate proceeding can apply for preliminary letters testamentary to enable the nominated executor to begin administering the estate and to take such actions as may be required to preserve and collect estate assets. Under SCPA 1412(1), the Surrogate has discretion to grant preliminary letters prior to the completion of process "upon such proof as the court shall deem necessary." As a result, preliminary letters testamentary may enable the executor to begin carrying out most fiduciary duties well in advance of the return date of a citation.[8] Receipt of preliminary letters also enables the fiduciary to initiate any legal action on behalf of the estate.[9]

Nonetheless, filing a probate petition by order to show cause may still be the preferred method in certain emergency situations. First, the Surrogate may grant preliminary letters testamentary only to the will's named executor. Therefore, parties with other interests specified in SCPA 1402, who desire to petition for probate, should still consider filing by order to show cause.[10] As explained in the next section, using an order to show cause by someone not named as fiduciary will be especially attractive when that party believes the named executor may breach his fiduciary duties and harm the decedent's estate. With respect to executors, although the nominated executor could apply for preliminary letters and also bring an independent action requesting a temporary restraining order, such a strategy would likely take more time and cost more money than filing a probate petition by order to show cause.

Section Three: Reasons to File a Probate Petition by Order to Show Cause

Notwithstanding all of the structural and procedural similarities between citations and orders to show cause, the advantages of orders to show cause—a quicker return date and the ability to obtain a temporary restraining order enjoining harmful action—are enormous when the decedent's estate is faced with an imminent risk of irreparable harm. Although there are no reported decisions addressing filing probate petitions by order to show cause, orders to show cause may be particularly useful when it is necessary to (i) stay a related proceeding or (ii) prevent a party from taking actions that could cause harm or loss to the decedent's estate. Examples for these situations are explained below.

A. Staying a Proceeding Involving Property in the Decedent's Estate

When property in the decedent's estate is at issue in another proceeding, either in Surrogate's Court or in a different court, the outcome of that case may impact the Surrogate's Court's ability to ensure that the decedent's property is distributed according to his or her wishes. In such cases, it may be useful to request that the Surrogate stay the other proceeding pending the final disposition of the probate proceeding.[11] However, when a stay is urgently needed, it may be too late to request a stay on the citation's return date.

For example, in *In re Estate of Pignataro*,[12] the court granted an order to show cause together with a temporary restraining order staying an eviction proceeding in Housing Court.[13] The case provides an instructive example of filing a probate petition by order to show cause with a temporary restraining order staying a proceeding in a different court.

In that case, petitioner filed a petition to probate her mother's will. In the will, the decedent devised a life estate in her residence to the petitioner. The residence was the sole asset of the decedent's estate and the home of petitioner for nearly her entire life. The petitioner was also the respondent in an eviction proceeding in Housing Court involving the aforementioned property. The eviction proceeding was brought by the sister of petitioner, who had obtained legal title to the property prior to the decedent's death. Shortly after the mother's death, petitioner's sister initiated an eviction proceeding in Housing Court.

Petitioner commenced the action by the filing of a probate petition by order to show cause with a temporary restraining order staying the eviction proceeding in Housing Court. Petitioner contended that a stay of the eviction proceeding was needed to allow the Surrogate's Court to take discovery under SCPA 2103 and 2104 to determine if the home should be considered an asset of the decedent's estate. Had the petitioner waited for the citation's return date, the Housing Court probably would have granted the application to evict petitioner from the home and, in effect, determined that title to the property belonged to the petitioner's sister. If that occurred, it may have been too late for the Surrogate's Court to determine whether the house was an asset of the decedent's estate and petitioner would have been homeless.

The benefit to using an order to show cause to stay a proceeding involving property in the decedent's estate is not limited to the facts in the above case or to cases involving real property. Practitioners should consider filing probate petitions by order to show cause any time property (real or personal) allegedly belonging to a decedent's estate is at issue in another proceeding and the result of that proceeding may render moot a Surrogate's determination concerning the estate's ownership of property.

B. Risk of Loss to Property in the Decedent's Estate

Using orders to show cause should also be considered when there is an imminent risk of harm to property in the decedent's estate. For example, when the decedent's estate includes personal property with a unique or sentimental value and a risk of loss to such property exists, it may be too late to wait until a citation is made returnable. Instead, consider obtaining a quicker return date and even enjoining the harmful actions from occurring through the return date by filing an order to show cause with a temporary restraining order.

Imagine a distributee possesses a valuable and unique painting, which is an asset of the decedent's estate. And imagine further that the distributee, who is angry about being disinherited, has listed the painting for sale with an art dealer. In such a case, it may be too late to wait ten or more days for a citation's return date. However, an order to show could force the distributee to appear before the Surrogate sooner than a citation's return date and could also include a temporary restraining order enjoining the sale of the painting.

In this example, once the order to show cause is signed, it should be served immediately on the distributee (and the art dealer). If the distributee or dealer proceeded with the sale, they would be in contempt of court and potentially subject to penalties for such willful disobedience of a court order.[14]

Finally, practitioners should remember that any person with an interest specified in SCPA 1402 may file a probate petition by order to show cause. Probate petitions filed by order to show cause do not need to be filed by a named fiduciary. In fact, for example, if a legatee or creditor (or anyone interested) is concerned about a named executor's prospective conduct, the order to show cause could request the appointment of an administrator c.t.a. or limited administrator. In such cases, practitioners should name the proposed additional or replacement fiduciary (consider the public administrator) in the order to show cause.

Conclusion

When the decedent's estate is faced with an imminent risk of irreparable harm, practitioners should consider filing probate petitions by order to show cause. In such emergency situations, orders to show cause can have enormous advantages over citations. Orders to show cause can force parties to appear before the Surrogate well in advance of the return date of a citation, thereby reducing the time period in which damage may be done to the decedent's estate. Orders to show cause can also include temporary restraining orders, which maintain the status quo by enjoining potentially harmful actions from occurring through the return date.

Endnotes

1. Citations are the form of process addressed in Section 306 of the N.Y. Surrogate's Court Procedure Act (SCPA). Orders to show cause are addressed in Section 2214(d) of the N.Y. Civil Practice Law and Rules (CPLR).
2. SCPA 308(1)(a).
3. CPLR 6301, 6311, 6313(a).
4. CPLR 2214(d).
5. *See* David D. Siegel, New York Practice § 330 (Thomson West, 4th edition, 2005).
6. CPLR 6313(a).
7. An order to show cause could request that service on a domiciliary be completed other than by personal delivery. For such a request to be granted, the movant would need to show "with due diligence" that service by personal delivery cannot be "effected" or would be "impracticable." SCPA 307(3). The Surrogate may be wary of such a request because service had not yet been attempted by personal delivery. In any event, the reason for such a request in an order to show cause should be provided in the accompanying affidavit. If such reasons exist, avoiding the personal-service requirement in SCPA 307(1) may be an additional benefit of filing probate petitions by order to show cause.
8. Although the Surrogate must generally grant preliminary letters testamentary to the will's named executor, under the SCPA, Surrogate has broad power to impose limitations and restrictions on the letters. The Surrogate can also require the executor to file a bond prior to receiving preliminary letters testamentary. SCPA 1412(5).
9. In certain cases, the fiduciary may bring an action on behalf of the estate prior to the issuance of preliminary letters testamentary. For a discussion on the topic, see 5 Warren's Heaton Surr. Ct. Practice 61.01[2] (7th ed., 2010).
10. In such cases, practitioners should also consider an application for limited and restrictive letters under SCPA 702.
11. There are few decisions addressing the Surrogate's Court's power to stay proceedings in other courts. In *In re Estate of Pignataro*, N.Y.L.J., Feb. 5, 2010, p. 33, col. 1 (Sur. Ct. Bronx Co.), which is discussed in this section, the Bronx County Surrogate's Court stayed a proceeding in Housing Court involving assets of the decedent's estate. For further information on stays, see CPLR 2201 and 3211(a)(4) and David D. Siegel, New York Practice §§ 255, 262 (Thomson West, 4th edition, 2005).
12. N.Y.L.J., Feb. 5, 2010, p. 33, col. 1 (Sur. Ct., Bronx Co.).
13. The decision does not address filing probate petitions by order to show cause.
14. N.Y. Judiciary Law, Article 19; SCPA 606, 607.

Sean Robert Weissbart is a litigator at the law firm of Patterson Belknap Webb & Tyler LLP in New York City. Mr. Weissbart represented the petitioner in the *In re Estate of Pignataro* case discussed herein. He is a member of the New York State Bar Association's Estate Litigation Committee.

Late Payment of Legacies: After Seven Months Things Can Get Interesting

By Deidre O'Byrne and Peter Slater

On its face, the New York Estates, Powers, and Trusts Law (EPTL) is clear with respect to when a New York executor should pay interest on a delayed distribution of a pecuniary legacy. In practice, the question has been a bit complicated to navigate. The statutory provisions indicate that a legatee must bring an action or proceeding to compel payment of a disposition or distributive share before being entitled to receive interest; however, case law has not always arrived at this same conclusion.

The consequent uncertainty leads to some interesting questions: (i) Does the executor have a fiduciary duty to the legatee to pay interest or to alert a legatee to the possibility of requesting interest or (ii) could such actions be a breach of fiduciary duty to the other beneficiaries under the will?

This article provides an overview of the statutory framework governing payment of interest on specific distributions from an estate, and reviews some of the case law on point. The article also explores the fiduciary duties owed to the legatee and to the other beneficiaries under a will, and attempts to draw conclusions from this patchwork of authorities to assist the beleaguered executor in determining whether to pay to interest or not.

Statutory Framework

Subdivision (d) of EPTL 11-2.1 addresses "[i]ncome earned during administration of a decedent's estate," that is, income realized by estate assets during the period from date of death to date of distribution. Paragraph (2) provides that, absent a direction in the will to the contrary, specific legatees are entitled to the income from the property bequeathed to them and the balance of the income is shared pro rata by "all other beneficiaries, *except beneficiaries of pecuniary dispositions not in trust.*"[1]

Under certain circumstances, however, interest is payable on delayed payments of pecuniary legacies. Subdivision (d) of EPTL 11-1.5 provides that "*in any action or proceeding to compel payment of a disposition or distributive share*, the interest thereon, if any, shall in the case of a disposition be at the fixed rate in the will or if none is so fixed in any case at the rate of six percent (6%) per annum commencing seven months from the time the letters, including preliminary or temporary letters, are granted."[2] Subdivision (c) grants a beneficiary the right to bring an action against a fiduciary to enforce payment if after seven months the fiduciary refuses the demand of the beneficiary for payment of his share.[3] Entitlement to interest on pecuniary disposition thus appears dependent on bringing an action or proceeding to compel payment of a disposition or distributive share.

Case Law Application

In interpreting the foregoing statutory regime, two lines of cases have emerged.

Ask and Ye Shall Receive

The Court of Appeals in *In re Crea* upheld an allowance of interest on a $20,000 legacy when payment of such legacy was delayed beyond seven months after letters testamentary were issued to the executors.[4] The matter came before the courts due to a dispute between the co-executors of the decedent's estate concerning whether the pecuniary beneficiary under the decedent's will, who also happened to be an executor, was entitled to interest on the delayed payment. Notwithstanding that statutory provisions substantively similar to EPTL 11-2.1(d) and EPTL 11-1.5 were operative at the time, and that the delay was partially caused by the beneficiary, the Appellate Court, and later, the Court of Appeals, without more than a cite to Surrogate's Court Act § 218 (the predecessor to EPTL 11-1.5), awarded the legatee interest even though no proceeding had been brought to compel the fiduciaries to pay the legacy.

In *In re Zalaznick*,[5] the Bronx County Surrogate's Court (in the context of an accounting proceeding) was asked to determine whether a marital bequest was entitled to interest when it had not been paid within seven months of the issuance of letters testamentary. The court concluded that because EPTL 11-1.5 is the present embodiment of Section 218 of the Surrogate's

Court Act, the *Crea* decision controlled. Thus, the court held that the decedent's wife was entitled to interest even though she as the executrix of the decedent's estate could timely have made a distribution to herself.

In the 1994 decision of *Matter of Schwarz*,[6] which was also an accounting proceeding, the corporate executor sought guidance from the New York County Surrogate's Court as to whether the testator's widow was entitled to interest on the delayed payment of her pecuniary legacy. The court's opinion first reviewed the statutory framework and noted that pursuant to EPTL 11-2.1(d) and EPTL 11-1.5, an action must be brought to compel payment of the legacy before interest becomes payable. Notwithstanding the statute's plain language, the court found *Crea* controlling based on the similarity of the facts under review (i.e., both involved delayed payments of pecuniary legacies where suit had not been brought against the fiduciary to compel payment). The court posited that *Crea* was correctly decided (despite the apparent lack of statutory authority), because to hold otherwise would encourage unnecessary litigation and penalize beneficiaries who patiently awaited distribution.

The court in *Schwarz* also observed that EPTL 11-1.5 does not specifically preclude the payment of interest other than as a result of a proceeding to compel payment. It noted that if interest could only be awarded after litigation had commenced, a fiduciary that paid interest on a legacy at the specific request of a legatee would arguably be subject to surcharge by the residuary legatees for not requiring the legatee to bring an action against the estate. The court was disinclined to take a position that arguably encourages litigation and appeared swayed by the fact that as the beneficiary was deprived of the use of her money for over a year, the equities of the case dictated that she receive some compensation.[7]

In *Estate of Park-Montgomery*, the executor in a contested probate proceeding sought to force certain beneficiaries of the will to accept their pre-residuary bequests without interest in accordance with the stipulation which settled the probate contest.[8] The pre-residuary beneficiaries, relying upon *Schwarz*, argued that they were entitled to interest on their legacies even absent a proceeding to compel payment. The Nassau County Surrogate's Court concluded that *Schwarz* did not stand for the proposition that a court *must* impose interest on delayed bequests, but rather a court *may* impose interest after reviewing the facts and circumstances and equities of a particular case. The court determined that the reason for the delay in payment was due to the actions of the beneficiaries seeking interest, and thus declined to impose interest on their bequests.

Similarly, in *In re Kasenetz*, the co-guardians *ad litem* for contingent remainder beneficiaries disputed in a final accounting proceeding the executors' decision to pay interest on the payment more than seven months after the issuance of letters testamentary of the surviving spouse's elective share.[9] The Nassau County Surrogate's Court concluded that an elective share is a pecuniary amount, and that when its payment is delayed it becomes entitled to interest under EPTL 11-1.5. The court, noting the split of authority between it and Oswego County Surrogate's Court (discussed below), stated that it would adhere to its prior decisions wherein it held that "in the absence of a proceeding to compel payment, interest may be imposed in the discretion of the court."[10]

So Sue Me!

Unlike the foregoing authorities, the Oswego County Surrogate's Court took a hard line in *In re LaFave*[11] and denied the legatee of a pecuniary bequest interest on the delayed payment of such bequest. The court based its ruling on the fact that the legatee had not made a demand for payment or commenced an action to effect distribution prior to its payment by the executor. In dicta, the court stated that "at the very least, as the statute requires, this court feels that the claimant should demand payment of his distributive share from the personal representative, and then if he refuses to make distribution, have notice by the commencement of an action given to the personal representative before this court will consider granting of interest for any delay in payment of a legacy."[12]

What Should a Fiduciary Do?

As a fiduciary, an executor has the duty to deal impartially with the beneficiaries of an estate or trust.[13] A fiduciary also has a duty of undivided loyalty to each of the estate beneficiaries,[14] constituting a duty of absolute loyalty, fairness, and impartiality to all beneficiaries.[15] Interestingly, none of the foregoing cited authorities examine head-on the difficult fiduciary duty issues an executor faces in determining whether he must pay, should pay, or may pay interest on a late distribution without an action having first been brought. Instead, the courts seem to weigh the equities of each case outside the framework of a fiduciary duty analysis, and use their discretion to impose interest where they see fit.

Should an executor be guided by her fiduciary duties (or subject to surcharge for failing to follow such duties) when determining whether to pay interest or whether to inform the recipient of the delayed bequest that he or she may be entitled to interest if he or she sued the executor? Would the executor be in breach of a fiduciary duty to either the current beneficiary or the residuary beneficiary no matter which course of action she pursues? Each is owed a duty, and payment or nonpayment of interest is contrary to the interests of one of those beneficiaries. The answer appears to be that the prudent executor should always consider her fiduciary duties when deciding whether to pay interest (or suggesting to a beneficiary that interest may be payable), and that the apparent contradiction of duties may not actually be as stark as it first appears.

A resolution may be that the residuary beneficiaries aren't equitably entitled to the interest due to the pecuniary legatee, whether or not it is claimed. The delay in payment could be said to deprive the pecuniary legatee of the right to use the funds and result in unjustly enriching the residuary beneficiaries. If allowing the residuary beneficiary to benefit from the nonpayment of interest is inequitable, its payment to the pecuniary beneficiary should not be a breach of the executor's duty to the residuary beneficiary. A similar conclusion should be reached applying the same logic to an executor who alerts a pecuniary legatee to the possible payment of interest. One must consider, though, whether in the current economic environment the rate of interest earned on a delayed bequest alters this conclusion.

Conclusion

While the relevant provisions of the EPTL require an executor to pay interest on a delayed bequest to a pecuniary legatee only if suit is brought against the executor, case law is not as formulistic. Many courts have found that if a legatee inquires about whether interest is payable, an obligation arises to pay interest on the delayed bequest. An executor is thus faced with a number of choices: alert the beneficiary to the possibility of interest prior to an action being brought, pay the interest without being sued and without asking the court, pay the interest only if approved by a court, or finally, wait to pay the interest only after an action has been brought. Likely the most prudent approach is for an executor to fold the question concerning the propriety of paying interest into an accounting proceeding. Absent statutory direction that is in fact supported by the case law, seeking the court's direction in this way would not result in unnecessary litigation, and would also establish a basis for the executor's actions.[16]

Endnotes

1. N.Y. Est. Powers & Trusts Law 11-2.1(d)(2) (2010) (emphasis added).
2. EPTL 11-1.5(d) (emphasis added). EPTL 11-1.5(e) provides for the 6% rate to be increased to 9% if the delay in payment was unreasonable.
3. EPTL 11-1.5(c).
4. *In re Crea*, 27 N.Y.2d 339 (1971), *rev'g Cornelius v. Crea*, 307 N.Y.S.2d 521 (N.Y. App. Div. 1969).
5. *In re Zalaznick*, 389 N.Y.S.2d 736 (Sur. Ct., Bronx Co. 1976).
6. *In re Schwarz*, 614 N.Y.S.2d 668 (Sur. Ct., N.Y. Co. 1994).
7. Surrogate Roth concluded the court's opinion with an exhortation to the legislature to reconsider the fixed rate of interest provided by EPTL 11-1.5(d) since the statute's 6% rate of interest was excessively high in the economic climate at the time. Surrogate Roth stated that it would be more equitable to allow a pecuniary legatee a pro rata share of net income actually earned during the period of the delay in payment. In support of her position, she cited the following passage from the Attorney-General's Amended Memorandum to the Governor (see Mem. of Atty-Gen, L 1985, ch 634, 1985 NY Legis Ann, at 233-234) which advocated for an increase of the statutory rate from 3% to 6%: "[T]he three percent rate is clearly too low for the present time, when interest rates of nearly ten percent are not uncommon…the proposed figure of six percent in the case of a reasonable delay in payment of a legacy is appropriate because that amount is a minimum reasonable rate of return for estate assets prudently invested…the proposed changes are intended to encourage prompt payment of outright pecuniary dispositions and to prevent the imposition of undue hardship on beneficiaries of such dispositions."
8. *Estate of Park-Montgomery*, N.Y.L.J., May 19, 1997, p. 33, col. 4 (Sur. Ct., Nassau Co.).
9. *In re Kasenetz*, 765 N.Y.S.2d 216 (Sur. Ct., Nassau Co. 2003).
10. *Estate of Park-Montgomery*, col. 4; *see also Estate of Lottie Gentry*, N.Y.L.J., Jan. 4, 2001, p. 37, col. 6 (Sur. Ct., Nassau Co.) (The Nassau County Surrogate's Court concluded that it had discretion to award interest on delayed pecuniary bequests.).
11. *In re LaFave*, 456 N.Y.S.2d 964 (Sur. Ct., Oswego Co. 1982).
12. *Id.* at 966; *See also In re Erlich*, N.Y.L.J., Jul. 6, 2001, p. 23, col. 3 (Sur. Ct., Kings Co.).
13. S*ee Redfield v. Critchley*, 300 N.Y.S. 305 (N.Y. App. Div., 1937), *aff'd Redfield v. Critchley*, 277 N.Y. 336 (1938); *Estate of Hayes*, N.Y.L.J., Sept. 3, 1998, p. 22, col. 6 (Sur. Ct., N.Y. Co.).
14. *See In re Duke*, N.Y.L.J., May 24, 1995, p. 27, col. 2 (Sur. Ct., N.Y. Co.); *In re De Planche*, 318 N.Y.S.2d 194, 196 (Sur. Ct., N.Y. Co. 1971).
15. *See In re Muller*, 24 N.Y.2d 336, 341 (N.Y. App. Div. 1969); *In re Heinrich*, 90 N.Y.S.2d 875, 881 (Sur. Ct., Monroe Co. 1949).
16. It should be noted that a distribution to the pecuniary beneficiary prior to the accounting should not be premised upon execution of release agreement as courts likely will not permit payment of interest to the legatee after the legatee has released the executor.

Deidre O'Byrne is a partner at Withers Bergman LLP. Deidre represents families in a broad range of estate planning and tax matters, including charitable giving, and advises fiduciaries on trust and estate administration and probate.

Peter Slater is an associate at Withers Bergman LLP. Peter focuses on complex tax and estate planning issues for high net worth individuals, family groups and family offices, and represents clients in estate administration and probate matters. He also advises individuals and their closely held businesses on the acquisition, sales and use of whole aircraft and fractional shares in aircraft.

New York Proposal to Eliminate Tax Exemption for Resident Trusts with Nonresident Trustees… Introduced, Then Stricken, but Will It Return?

By Sharon Klein

On January 19, 2010, a bill was introduced to the New York State Assembly to amend the definition of a "resident trust" for New York income tax purposes. The stated purpose of the bill was to reduce tax avoidance opportunities through the use of nonresident trustees.

New York Income Taxation of a "Resident Trust"

A "resident trust" is a testamentary trust created by a New York decedent, an irrevocable trust created by a New York domiciliary or a revocable trust that became irrevocable while the creator was a New York domiciliary.[1] The income of a resident trust is generally subject to New York State income tax under Section 601(c) of the New York Tax Law. However, under Section 605(b)(3)(D) of the New York Tax Law, a resident trust will not be subject to New York tax if three conditions are satisfied:

1. All trustees are domiciled outside of New York;
2. The entire corpus of the trust, including real property and tangible personal property, is located outside of New York; and
3. All income and gains of the trust are derived from sources outside of New York.

Intangible property is considered located outside of New York if all of the trustees are domiciled outside of New York. Accordingly, a New York resident trust with no trustees in New York, no real property or tangible personal property in New York and no New York source income is not subject to New York income tax. Under this rule, New York tax liability at the trust level can often be eliminated merely by appointing non-New York trustees.

Bill Would Have Eliminated Tax Exemption for Resident Trusts with Non-New York Trustees and Classified All Testamentary Trusts Created by New York Decedents as Resident Trusts

The bill would have eliminated the three conditions for tax exemption currently contained in New York Tax Law Section 605(b)(3)(D), making residency of the trustees irrelevant.

Pursuant to the bill, all testamentary trusts created by the will of a decedent domiciled in New York would have been considered resident trusts, and their income would have been fully taxable. Non-testamentary trusts created by resident grantors would also have been considered resident trusts subject to New York tax on all of their income, with a limited exception provided for resident non-testamentary trusts with no New York source income and one or more non-New York resident beneficiaries. Such trusts would have been taxed based on the percentage of identifiable beneficiaries who were New York residents.

Resident non-testamentary trusts with any New York source income would continue to be fully taxable.

The bill was projected to increase revenue by $25 million annually and would have applied to taxable years beginning on or after January 1, 2010.

Mercantile-Safe Deposit & Trust Company Case Outdated?

The exception to the taxation of resident trusts in New York Tax Law Section 605(b)(3)(D) originated from the decision in *Mercantile-Safe Deposit & Trust Company v. Murphy.*[2] In the *Mercantile-Safe Deposit* case, the New York Court of Appeals held that it was unconstitutional for New York to tax a trust created by a New York resident that had an out-of-state trustee and was administered out of state, even though the primary beneficiary was a New York resident.

The summary of the bill to change the taxation of resident trusts stated that (1) recent state and federal appellate decisions had upheld the constitutionality of taxing a percentage of trust income based on the percentage of trust beneficiaries who are state residents when the grantor was a state resident and (2) many states also taxed all of the income of testamentary trusts under the wills of decedents domiciled in that state. The summary noted that a number of states tax trusts in a manner similar to the legislative proposal.

Was the Reasoning in the Bill Summary Sound?

The *Mercantile-Safe Deposit* case relied on the U.S. Supreme Court case of *Safe Deposit and Trust Co. v. Virginia*.[3]

In *Safe Deposit and Trust Co.*, the Supreme Court held that it violated the Due Process Clause of the Constitution to tax a trust based on the residence of the grantor. That case has never been overruled.

Apparently there are only two recent cases upholding the constitutionality of taxing a trust's income based on the percentage of trust beneficiaries who are state residents when the grantor is a state resident—one in Connecticut and the other in Washington, D.C.

In *District of Columbia v. Chase Manhattan Bank*,[4] the District of Columbia Court of Appeals held that the residence of the testator was a sufficient basis on which to impose taxation of a testamentary trust. In *Chase Manhattan Bank, Trustee v. Gavin, Comm'r of Revenue Services*,[5] the Connecticut Supreme Court reached a similar conclusion with respect to both testamentary trusts and an inter-vivos trust.

In making their determinations, the D.C. and Connecticut courts relied on *Quill Corporation v. North Dakota*,[6] a Supreme Court case that did not address the constitutionality of a state income taxation statute but instead dealt with the ability of North Dakota to levy a use tax on an out-of-state mail order company. That leads to the reasonable question: What does a case about an out-of-state mail order company have to do with the constitutionality of a state's characterization of a resident trust for income tax purposes?

The *Quill* court held that where a corporation purposefully avails itself of an economic market in a state, the state could fairly impose a tax. In applying the reasoning of *Quill* to the taxation of trusts, the courts in the *District of Columbia* and *Gavin* cases reasoned by analogy and focused on the extent to which a trust has benefited from the protections of a state's laws and its courts. They held that, just like a corporation, a trust "owes its existence" to the laws of its home state, and this provides a sufficient nexus in order to impose taxation. Despite this apparently broad holding, two conclusions are clear from the *District of Columbia* case:

1. The determination in the *District of Columbia* case turned on the District's "continuing supervisory authority" over the testamentary trust at issue, which was governed by D.C. law (the will was probated in the D.C. courts, accountings were filed in the D.C. courts and disputes were adjudicated in the D.C. courts).
2. The court specifically declined to rule on the constitutionality of taxing an inter-vivos trust based exclusively on the residence of the grantor.

In the *Gavin* case, the court did uphold the constitutionality of a statute that imposed taxation on an inter-vivos trust created by a Connecticut domiciliary. Consider, however, the specific fact pattern before the court—the trust at issue had only one current beneficiary, who was a Connecticut domiciliary; she was to receive all of the trust property, including accumulated income, at age 48; and she had the power to direct the disposition of the trust property if she died before 48. The court expressed no opinion regarding the constitutionality of imposing state income taxation in circumstances where the contacts with the taxing state were less substantial.

Apart from the constitutional considerations raised by the proposed New York law, many practitioners believed that, if this legislation were enacted, it would in fact lead to a loss of supervisory control by the New York courts over trusts and a *loss* of revenue for New York.

In the case of testamentary trusts, consider that the determination of the *District of Columbia* court turned on the fact that the trust in question "owed its existence" to D.C. law. In order to eliminate the constitutional underpinning of the court's ruling, many practitioners believed that draftspersons would be more likely to provide that the law of a state other than New York governed, and that the courts of the other state had exclusive jurisdiction over, a trust. Trustees and beneficiaries of existing New York testamentary trusts might also have been incentivized to decant under Estates, Powers & Trust Law Section 10-6.6(b) or exercise powers of appointment to change the trust situs and governing law to other jurisdictions.

In the case of inter-vivos trusts, many practitioners believed that New York residents would be encouraged to create and fund revocable trusts during their lifetimes in jurisdictions that would not tax the trust after death. That, in turn, would lead to the avoidance of New York probate, with the attendant loss of supervisory control by the New York courts.

Consider also that the proposed legislation was projected to increase revenue by a very modest $25 million annually. Yet how much revenue would be lost in New York if the proposed legislation was enacted?

There was concern that the proposal would drive affluent New Yorkers out of New York to avoid the cumulative burden of yet another New York tax—in this case the New York income taxation of a testamentary trust for its entire duration. Driving affluent New York residents to another state could result in substantial losses to New York estate tax revenues. Indeed, in a study that appeared in the *Wall Street Journal* on February 10, 2010, it was reported that wealthy residents were "fleeing New Jersey" after tax increases. The state Chamber of Commerce Chairman, Dennis Bone, was quoted as saying it was "crystal clear that the state's tax policies are resulting in a significant decline in the state's wealth."

Additionally, to the extent that more New York residents began to create and fund revocable trusts in other jurisdictions that would not tax the trust after death, that would result in the loss to New York of the income tax otherwise payable by New York probate estates.

Proposal to Eliminate Tax Exemption for Resident Trusts Stricken

As a welcome relief to many, the section of the Governor's Budget Bill A9710 that was introduced to eliminate the tax exemption for resident trusts with nonresident trustees was stricken from the bill. The bill was signed into law on August 11, 2010 without that proposal. Whether the proposal has been permanently abandoned or will reappear at some later point is unclear, but at least for now, it has been dropped.

New York Imposes New Filing Requirements for Resident Trusts Not Subject to Tax

On July 23, 2010, the New York Department of Taxation and Finance issued TSB-M-10(5)I regarding filing requirements for resident trusts that are not subject to tax.

Although resident trusts that meet the conditions of Section 605(b)(3)(D) of the New York Tax law are not currently subject to New York tax, TSB-M-10(5)I requires resident trusts to file a New York State fiduciary income tax return under certain conditions. This reverses previous New York policy described in earlier guidance (TSB-M-96(1)I), which provided that a resident trust not subject to New York taxation pursuant to Section 605(b)(3)(D) was not required to file a return. The new filing requirements are effective for tax years beginning on or after January 1, 2010.

TSB-M-10(5)I provides that a New York State resident trust must file a New York State fiduciary income tax return if the trust:

- is required to file a federal income tax return for the tax year;
- had any New York taxable income for the year;
- had tax preference items for minimum income tax purposes in excess of the specific deduction; or
- is subject to a separate tax on lump-sum distributions.

According to the guidance, there is no longer any exception to these filing requirements for resident trusts that are not subject to tax because they meet the conditions of Section 605(b)(3)(D) of the Tax Law.

A trust that is required to file a New York State income tax return must file using Form IT-205, Fiduciary Income Tax Return. Resident trusts that are not subject to tax under the conditions of Section 605(b)(3)(D) of the Tax Law, but are required to file Form IT-205 will also be required to complete and attach a new Form IT-205-C (not yet available), New York State Resident Trust Nontaxable Certification, to Form IT-205.

Why the New Filing Requirements?

As noted previously, the proposal originally introduced to eliminate the tax exemption for certain resident trusts was projected to increase income tax revenues by $25 million. Many practitioners believe that the $25 million projection was a substantial underestimate. The filing requirements may have been introduced so that the tax authorities can more accurately gauge the potential revenue increase and provide impetus for a possible reintroduction of this proposal.

Additionally, the filing requirements will probably serve as a policing mechanism. Unless resident trusts report their income, it is very difficult for the tax authorities to rule on a trust's position that no New York tax is due.

Endnotes

1. N.Y. Tax Law 605(b)(3).
2. 19 A.D.2d 765 (3d Dep't 1963), aff'd, 15 N.Y. 2d 579 (1964).
3. 280 U.S. 83.
4. 689 A.2d 539 (1997).
5. 733 A.2d 782 (Conn. Sup. Ct., 1999).
6. 504 U.S. 298.

Sharon Klein is a Managing Director and Head of Wealth Advisory at Lazard Wealth Management LLC, where she is responsible for leading the delivery of Wealth Advisory services, including trusts and estates, tax, and philanthropic planning. Ms. Klein has spoken for many professional organizations, including the New York State Bar Association, the American Bar Association, the BNA Tax Management Advisory Board, the Practising Law Institute, and is a frequent seminar presenter at continuing legal education seminars throughout the country. Ms. Klein's articles and quotes have appeared in prominent publications such as *The Wall Street Journal, The New York Times, The New York Law Journal, Trusts & Estates magazine* and *BNA Estate, Gifts and Trusts Journal*. Ms. Klein is a Chair of the Life Insurance and Financial Planning Committee of the American Bar Association. She is also a member of the New York City Bar Association Committee on Trusts, Estates & Surrogates Courts, a member of the Trusts & Estates Leadership Committee for the UJA-Federation of New York and a member of the Professional Advisory Committee of the Anti-Defamation League.

This material is written by Lazard Wealth Management LLC for general informational purposes only and does not represent our legal advice as to any particular set of facts and does not convey legal, accounting, tax or other professional advice of any kind; nor does it represent any undertaking to keep recipients advised of all relevant legal and regulatory developments. The application and impact of relevant laws will vary from jurisdiction to jurisdiction and should be based on information from professional advisors. Information and opinions presented have been obtained or derived from sources believed by Lazard Wealth Management LLC to be reliable. Lazard Wealth Management LLC makes no representation as to their accuracy or completeness. All opinions expressed herein are as of the date of this presentation and are subject to change.

Florida Homestead, QPRTs, and "Living Trusts"—Florida Property Tax Could Get You "Coming" and "Going"!

By Lisa Schneider and Bette Kester Conrad

Lisa Schneider

Florida's essentially "no tax"/"low tax" laws bring many New Yorkers to Florida to establish their permanent residences, even while maintaining many New York ties. While many seek the more favorable treatment for estate/inheritance and income tax, many just want the advantage of comparatively low real estate taxes in Florida. They come to Florida to purchase personal residences which will qualify for both the lower real estate taxes and the added values of the homestead ad valorem property tax exemption and the annual homestead property re-valuation cap placed on qualified Florida realty. Often, these New Yorkers retain their professional relationships with their New York attorneys. Almost invariably, they eventually elect to use living trusts and/or Qualified Personal Residence Trusts (QPRTs) to hold legal title to their residences, for various estate planning purposes.

However, what may be Florida "homestead" for some purposes, is not necessarily Florida "homestead" for *all* purposes. This is especially true for the homestead ad valorem property tax exemption and re-valuation tax cap qualification. There are quirks in the homestead ad valorem property exemption and re-valuation tax cap rules which tend to vary somewhat from county to county. Failure to understand and plan for these differences may result in notable costs and inconvenience to the property owner.

What does this mean for your trust clients (and the remaindermen of their trusts)? Homestead ad valorem exemption status for Florida domiciliaries provides two primary benefits. First, there is a $50,000 reduction in the "just value" for the annual computation of the tax assessment value.[1] This exemption may be augmented by modest additional exemptions for widows, certain veterans, blind persons, certain seniors, and totally disabled persons.[2] Second, the annual homestead re-valuation (or reassessment) amount is capped at the *lower* of three percent (3%) or the percent change in the Consumer Price Index for the preceding calendar year.[3]

In an escalating real estate market, this cap will keep the real estate tax bill of Florida domiciliaries much lower over time than if they never declared Florida as their domicile. The loss of the re-valuation cap is particularly troublesome if the grantor (typically, the parent) originally purchased the property 10-15 or more years before the transfer to a trust is made (at a notably lower basis than its current value), or if the grantor more recently bought in an area which has seen at least as much gain as loss in property values. Such scenarios are not uncommon in Florida. That said, it is important to note that there is now a ten percent (10%) cap on tax re-valuation assessment for non-homestead residences.[4]

Bette Kester Conrad

Transfer your client's residence to a revocable trust? Put the residence in a QPRT and plan an "exit strategy" of a lease to the grantor (and/or spouse), if the grantor survives the term and does not want to move? "Just do it," no problem, right?

It depends on how you define "problem." If your client wants to qualify for homestead exemption from ad valorem taxation and the homestead property re-valuation cap on the homestead being transferred to a revocable "living" trust or QPRT (with or without a lease exit strategy), you may find that it is not as easy in practice as it looks in theory. You may want to engage Florida counsel for more than just preparation of the deed(s) of conveyance. This homestead tax exemption qualification and property re-valuation cap preservation arena is fraught with potential traps for any attorney who is unfamiliar with local rules and protocols in the various counties. Moreover, those attorneys not practicing in the county where the realty is located are particularly at risk. How do these potential estate planning traps get "sprung"? There are a number of factors to consider.

Do not be confused when dealing with Florida "homestead" definitions and qualifications. Florida has "homestead" for three purposes: (i) post mortem descent and distribution; (ii) creditor protection; and (iii) ad valorem property taxation. Descent and distribution are governed by the Florida Constitution and the correlative Florida Statutes.[5] Most descent and distribution permutations found in case law in past years have now been codified. Creditor protection from forced sale is likewise governed, with the federal and common law being interposed.[6]

The homestead exemption(s) and annual re-valuation cap for ad valorem property taxation, however, are governed by a combination of the Florida Constitution;[7] Florida Statutes;[8] Florida Attorney General Opinions;[9] rulings and "advisories" by the Florida Department of Revenue;[10] local ordinances (in some cases);[11] and unpromulgated rules and protocols established by the property appraisers of the various counties. The constitution, statutes, and Attorney General Opinions are reasonably readily available to all practitioners. Local ordinances and some advisories from the Department of Revenue can be found with more diligence and digging.

However, the local rules and protocols in the various tax appraisers' offices (which are supervised by publicly elected officials) are not so readily determined. Moreover, these local rules and protocols may change with elections or simply by the determination of the sitting elected tax appraiser/collector and the attorney who advises that office.[12] It is the latter ambit (referred to in this articles as "local rules and protocols") which is most problematic. Here, New York attorneys and even out-of-area Florida attorneys can encounter the most potentially dangerous missteps in the use of trusts to hold primary residences, and for so-called "lease-overs" or "lease-backs" for QPRTs, intended to qualify for homestead ad valorem and property re-valuation cap tax exemption benefits.

So, what's the downside, if the New York attorney does not ensure that all of the "reasonably ascertainable" local "i's" are dotted, and "t's" crossed? If New Yorkers are not properly advised, if their QPRTs, living trusts, and lease-backs/lease-overs are not drafted to meet the requirements of the Florida Department of Revenue and Florida Statutes (as well as any applicable ordinances in the county of their homesteads), and/or if they do not follow local rules and procedures in the course of the transfers, then:

1. The homestead exemption and re-valuation tax cap may be lost at the moment the conveyance to the QPRT or living trust is recorded;

2. Many so-called "end game" techniques (*e.g*., lease-backs and leases-over to surviving spouses) to avoid the grantor (or the grantor's spouse) having to move out after a QPRT term has ended will fail to qualify for the homestead exemption and re-valuation tax cap after the QPRT has ended; *and*, in the context of *both* a QPRT and a living trust,

3. If the home goes to the remaindermen of a living trust or to the remaindermen of a QPRT, it will have no continuing homestead property re-valuation cap unless a qualified person in the class resides in the homestead and follows required local rules and protocols to perfect the homestead exemption and property re-valuation cap qualification.

Can one "recover" a lost homestead exemption? Yes, given the right set of facts and timely, proper appeal, recovery is possible. There are notice and appeal provisions in the statutes.[13] There are, however, no guarantees; and it has been the authors' observations that too often a favorable result comes together with not insignificant fees, costs, and inconveniences to the client.

In addition, there are instances where the result is an erstwhile "tie" in which: (1) the property appraiser "wins" for the instant year and may re-value the property at its January 1st value of the ensuing year (most frequently resulting in a higher base of calculation for the property tax which will be capped from that year forward); while (2) the property owner realizes only the ensuing year's homestead exemption and re-valuation cap on a higher assessment base cost, thus having higher overall property taxes to be paid, generally speaking.

That said, arguably in the last two or three years, values on Florida homes purchased at the heyday of the 2004-2006 real estate frenzy have plummeted—so, some owners of property who bought at those peaks may actually benefit from a re-valuation, if done before the real estate market's general values climb notably. However, the attorney should *not* count on that possibility as being a safety net.

On the plus side, the 2010 statutes technically recently provide a specific exemption for a change in ownership (conveyance) from an owner, individually, to the owner as the grantor of his/her revocable ("living") trust from being deemed a homestead ad valorem tax exemption *disqualifying* "change in ownership."[14] There is also a provision which exempts lessees owning the leasehold interests in a bona fide lease having an original term of 98 years or more in a residential or condominium parcel.[15]

One would think that, with all these rules being promulgated and codified, it should be easy to draft living trusts and QPRTs around the potential to lose homestead ad valorem tax exemptions and re-valuations caps, and to obtain or retain the homestead exemption and tax cap. That is true…as far as it goes, in theory. It just does not go far enough in practice. The bump in the road is "local rules and protocols." While there are codified rules of procedure, the local property appraiser is given broad latitude in creating (and changing) local procedural rules and protocols.[16]

"Lawyer-logic" tells us that revocable "living" trusts should be the least problematic of all. "Regulatory-logic" and local bureaucracy seem to argue against that. Intriguingly, living trusts seem especially prone to requiring intimate familiarity with local rules and protocols, as well as some degree of relationship with the respective county property appraisers' designated attorneys, in order to preserve homestead exemptions and property re-valuation caps upon transfers of homestead to these trusts.

Some county property appraisers and their attorneys seem to be more attuned to estate planning techniques like placing one's home in one's living trust. These counties, by and large, do not require any "magic language" in the trust terms or in the deed of conveyance, provided the title of the trust (reflected in the deed) adequately describes the trust as revocable (or "living"). This is especially true if the initial trustee/grantee is also the grantor. Other counties require essentially "magic language" to be present in the trust instrument. In addition, they require the trust to be reviewed by the property appraiser's designated attorney before the appraiser will allow the homestead exemption to continue (or to be obtained, if initial title is taken in the name of the trust/trustee, by way of a properly completed and timely filed Florida Form DR 501). They seem to base this on the regulatory requirement that a qualifying residential right in trust realty must be subject to certain prescribed trust provisions.[17]

Fail to get prior approval of the property appraiser's attorney? Neglect to send the trust or neglect to send the attorney's approval letter with the deed for recording? In some counties, your client's residence will likely be rejected for homestead qualification in the first instance. Then ensues the appeals process, both informal and, if needed, formal. Other counties have been known to require an erstwhile re-application process to retain homestead ad valorem exemption status on the property, on the grounds that the property appraiser must have notice of the newly named owner of the property—even though the homestead exemption status will basically continue uninterrupted if this is done.[18]

One good practice, in all counties, is to include language *in the deed*—set apart from the other verbiage, for high visibility—indicating that the property being conveyed is homestead in the hands of the grantor and is intended to remain the grantor's homestead in the hands of the grantee.[19] The best practice, in all instances, is to take the *un*recorded (proposed) deed to the property appraiser, with a copy of the revocable trust (the page containing the grantor's right to remain in homestead for life, etc., flagged, and "magic language" highlighted), and ask the clerk/appraiser if this conveyance will qualify for continuation of homestead for the grantor, without more—or do they require something else? Taking the grantor's current year's homestead exemption "card" (sent out by the property appraisers of the counties annually), as quick-reference proof of current homestead status, is a good added precaution. This avoids running afoul of any unpromulgated, perhaps relatively new, local rule or protocol, and enables the attorney (or client) to take remedial action prior to recording the deed and potentially losing homestead exemption(s) status—temporarily or permanently.

Oddly enough, after two cases which have been codified, QPRTs present the least problem at the time of the initial transfer—if, *and only if*, all local rules and protocols are followed.[20] Regardless, the language noted above for incorporation into deeds conveying homesteads to revocable trusts, and the procedures suggested to avoid problems at the outset (prior to recording the deed) for revocable trusts, should be followed. Of course, if the attorney has established a good working relationship with the property appraiser's office or the property appraiser's designated attorney, this process is much more streamlined and straightforward for the client and the client's attorney.

Nevertheless, QPRTs are not without challenges. Getting the homestead exemption to continue upon transfer to the trust is only the first hurdle. What about when the grantor survives the term but does not want to vacate (or cannot feasibly vacate immediately)? From a pure estate-planning standpoint, the QPRT default position is to do a bona fide lease from the remaindermen to the grantor or a lease-over to the grantor's spouse (or the grantor and spouse, until the last of them dies). Many such leases are done on a year-to-year basis, for a variety of reasons. Commonly referred to as an "exit strategy," these techniques have become so commonplace as to be standard procedures for estate planners.

But, what about homestead exemption? The potential cost of the loss of homestead exemption, and particularly loss of the re-valuation cap if values continue to climb as they are beginning to do, is not insignificant. Clients who are not apprised of this potential cost can become quite irritated when their descendants/ remaindermen unexpectedly get a large re-valued, non-homestead-exempt real property tax bill. This is especially true when the children come back to the parents seeking funds to pay the tax bill—which is now *their* obligation.

To break it down, both revocable trust remaindermen and QPRT remaindermen are faced with the fact that, in most cases, the homestead ad valorem tax exemption and re-valuation cap on the realty is immediately lost when the property goes from the grantor to the remaindermen.[21] If the remaindermen happen to be (or become that year) qualified Florida residents and they take up permanent residence in the property, they are entitled to apply for homestead exemption at any time before March 1st of the year following the year in which they took legal or equitable ownership.[22]

However, that exemption will be based on the appraised assessment value as of January 1 of that ensuing tax year, with limited exceptions.[23] In a market where the original cost was equal to, or greater than, the fair market value in the assessment valuation year in which the remaindermen take ownership, this is not a real problem. Some could argue that, in the right fact pattern, it could be a benefit to get a new tax assessment valuation basis. Again, the attorney should *not* count on this aberration to be a safety net. What about QPRTs when the grantor or the grantor's spouse wishes or needs to continue living in the QPRT residence, but the grantor survives the term?

Fortunately, there are now statutes which preserve homestead exemptions and property tax caps for the lessee of a bona fide lease having an original term of 98 years or more.[24] So, it's a "slam-dunk," right? Just do a 98-year lease for the grantor and/or the grantor and his/her spouse, and the homestead exemption continues. Close—but no prize.

Once again, the local rules and protocols will come into play, as experience has taught Florida estate planners. Much like taking the QPRT or revocable trust and *un*recorded deed to the property appraiser's office and asking if the appraiser requires any other action before homestead exemption status will continue when conveying homestead realty to a trust, the client or attorney should go back through those same paces. However, this time, take the 98-year lease, together with the most recent homestead exemption "card." Note that the lease must ultimately be recorded for this process to be effective.[25]

In sum: Where homestead exemptions, property re-valuation caps, and trusts are involved, don't be lulled into a false sense of security based on statutes and promulgated regulations, or even case law, alone. In the final analysis, it is the local rules and protocols established by the respective counties' property appraisers, from time to time, which ultimately determine whether a client receives homestead exemption and whether uninterrupted homestead exemption status may continue. Always remember that remaindermen will likely lose any homestead exemption and the more favorable property re-valuation cap, and continuing trusts for otherwise qualified remaindermen (such as a surviving spouse) will require special provisions for homestead exemption(s) and re-valuation caps to continue or be granted. "Home court advantage" takes on new meaning in the context of transfers of homesteads to trusts (or having a trust obtain a residence intended to qualify for the homestead exemption for residents) and doing lease-back/lease-over QPRT exit-strategies in Florida.

Endnotes

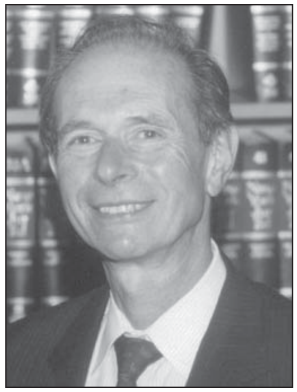
1. There is an annual reassessment of tax value. § 193.155(1), Fla. Stat.
2. *See*, *generally*, § 196, Fla. Stat.
3. § 193.155, Fla. Stat.; *see*, Fla. Const., art. VII § 4(d).
4. § 193.1554(1), (3), Fla. Stat.
5. Fla. Const., art. X, § 4; *e.g.*, §§ 732.401, 732.4015, 732.4017, 732.402(4), (7), Fla. Stat.; *see*, Fla. Prob. R. 5.405.
6. Fla. Const. art. X, § 4(a)(1); *e.g.*, § 732.402, Fla. Stat.; *see*, BAPCPA § 522(p); *see, e.g.*, *In re Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006).
7. Fla. Const. art. VII, § 6(a), art. X, § 4(a).
8. §§ 196.001, 196.012, 196.015, 196.031, 196.041, *et seq*., Fla. Stat.
9. *See*, *e.g*., Fla. AGO 2008-44 (8/29/2008), 2005-52 (9/22/2005), 2001-31 (4/26/2001), 94-50 (June 2, 1994).
10. *E.g*., Fla. DOR Bulletin DAV-96-03 (6/6/1996).
11. *E.g*., § 71.272, *et seq*., Fla. Stat.; Martin Cy Muni. Ord. No. 656, pt.1, 10-26-2004; *see*, § 196.031(1)(a), Fla. Stat. ("The property appraiser may request the applicant to provide additional ownership documents to establish title.").
12. *See*, *e.g*., §§ 196.011, 196.015, Fla. Stat.; *see*, *also*, *e.g*., Fla. AGO 94-50 (June 2, 1994); Fla. DOR Bulletin DAV-96-03, *supra* .
13. §§ 196.141, 196.151, Fla. Stat.
14. § 193.155(3)(a)(1)(b), Fla. Stat.; *see, generally*, Fla. H.B. 927 (2010), Chapter 2010-109, Laws of Fla. (2010).
15. § 196.041(1), Fla. Stat.
16. *E.g*., §§ 196.011(1)(a), (5), (8), (9)(c); 196.015, Fla. Stat.
17. § 12D-7.011, Fla. Admin. Code.
18. *E.g*., § 196.015, Fla. Stat.
19. *E.g*., "This property is the homestead of the Grantor. Pursuant to the above-referenced Trust Agreement, the Grantor retains the beneficial right to occupy the Property as his homestead and, pursuant to F.S. §196.031(1), desires to evidence of record, in the Official Records, his complete and total right to occupy the Property as his homestead, in the hands of the Grantee."
20. § 196.041(1), Fla. Stat.; *Nolte v. White*, 784 So. 2d 493 (Fla. 4th DCA 2001); *Robbins v. Welbaum*, 664 So. 2d 1 (Fla. 3d DCA 1995); Fla. AGO 94-50 (6/2/1994).
21. §§ 196.011(1)(a), (9)(a), 196.015, 196.031, Fla. Stat.; *see*, *also*, §§ 196.041, 193.155, Fla. Stat.
22. §§ 196.011, 196.015, 196.031, Fla. Stat. ("The property appraiser may request the applicant to provide additional ownership documents to establish title.").
23. *Id*.; *see*, § 193.155, Fla. Stat.
24. §§ 193.155(3)(b), 196.041(1), Fla. Stat.
25. § 196.031(1)(a), Fla. Stat. ("The property appraiser may request the applicant to provide additional ownership documents to establish title.").

Lisa Schneider is a shareholder in Gunster's Private Wealth Services practice. She is admitted to the New York, New Jersey and Florida Bars. She is Board Certified by the Florida Bar in Wills, Trusts and Estates. She has been named a Top Lawyer by the *South Florida Legal Guide*, a Florida Super Lawyer, *The Best Lawyers in America*, and is AV rated by Martindale Hubbell.

Bette Kester Conrad is a shareholder in Gunster's Private Wealth Services practice. She is AV rated by Martindale Hubbell and is a member of the Palm Beach County Bar Association, Florida Bar, Real Property, Probate and Trust Law Section and the Palm Beach County Bar Professionalism Committee. She has authored numerous articles discussing trusts and estates as well as given presentations to diverse organizations addressing various trusts and estates topics.

Disclaimer of Jointly Held Real Estate, Bank and Brokerage Accounts

By Howard M. Esterces



Disclaimers are a useful tool in estate planning. For example, estate planners are frequently dismayed to learn for the first time after a client's death that most of his or her assets are in joint names with the decedent's spouse. An elaborately drawn Will with credit shelter and perhaps QTIP trust provisions will be useless unless a way is found for some of the jointly held assets to pass to the trusts under the Will as probate assets, rather than outright to the survivor by operation of law. That way is through a disclaimer under IRC 2518[1] and its New York State law counterpart EPTL 2-1.11 (a disclaimer is referred to as a "renunciation" in the EPTL).[2] As discussed below, the problem is compounded when it is the survivor whose contributions were used to acquire the jointly held assets.

Section 2518 of the Internal Revenue Code provides generally that if a person makes a "qualified disclaimer" of an interest in property, the interest disclaimed will be treated as though it never passed to the person making the disclaimer for gift and estate tax purposes. A qualified disclaimer is defined in IRC 2518 as an irrevocable and unqualified refusal to accept an interest in property. The refusal must be in a writing, which must be received by the transferor of the interest or his legal representative not later than nine months after the date of the transfer (or if later, nine months after the person making the disclaimer reaches age 21). The person making the disclaimer ("disclaiming party") must not have accepted the interest or any of its benefits. As a further requirement, the disclaimed interest in property must pass without direction by the disclaiming party, and must pass to someone other than the disclaiming party. An important exception allows an interest in the disclaimed property to pass to or for the spouse of the transferor when the spouse is the disclaiming party. For example, a wife may make a qualified disclaimer of a bequest under her deceased husband's Will, even though the disclaimed property passes to a credit shelter trust under the husband's Will for her benefit. New York and other states also have statutory and common law provisions governing disclaimers.[3]

Jointly Held Interests Other Than Bank and Brokerage and Investment Accounts

After much litigation, clear guidelines were provided at the Federal level in the case of interests held as a joint tenant with right of survivorship or as a tenant by the entirety (other than "joint bank, brokerage, and other investment accounts").[4] Interests covered by these paragraphs are divided into two parts. The interest to which the disclaiming party succeeds upon creation of the tenancy must be disclaimed no later than nine months after the tenancy's creation. The interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be disclaimed no later than nine months after the death of the first tenant to die. The Regulations resolve important issues fought over in prior litigation, by clarifying that the provisions apply whether or not the property can be unilaterally severed under local law. Of particular importance, the survivorship interest is deemed to be a one-half interest in the property, *regardless of the portion of the property attributable to consideration furnished by each of the joint tenants,* and "*regardless of the portion of the property that is included in the decedent's gross estate under Section 2040.*"[5] To illustrate, a surviving spouse may effectively disclaim a one-half interest in a residence held as tenants by the entirety with the deceased spouse, even if the survivor contributed all of the consideration to purchase the residence.

Jointly Held Bank, Brokerage and Investment Accounts

Federal disclaimer rules for joint bank, brokerage or other investment accounts (e.g., mutual funds) discussed in paragraph (c)(4)(iii) of Regulation 25.2518-2 are not as clear as those described above.

The result depends on whether the transferor to these accounts "may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under Regulation 25.2511-1 (h)(4)."[6] If the gift is not complete, the disclaimer must be made within nine months following the cotenant's death, and the survivor may not disclaim any portion of the joint account attributable to the survivor's own contributions.

In *First Wisconsin Trust Company v. United States*,[7] the Court found that a completed gift occurred at the time a brokerage account was opened in names of husband and wife as joint tenants with right of survivorship, with funds contributed by the wife. Under Wisconsin law, each joint owner was obligated to account to the other for withdrawals of more than half of the account, even though the brokerage firm was authorized to act upon instructions from either cotenant.

New York

With the above in mind, the issue is whether a completed gift occurs under New York law when a bank or brokerage account is created in the names of cotenants as joint tenants with right of survivorship.

Under Section 675 of the New York Banking Law, subdivisions (a) and (b), a deposit in the name of the depositor and another, to be paid to either or the survivor, is prima facie evidence of the parties' intent to create a joint tenancy. (It has been held that survivorship provisions must be included on the bank signature card for the presumption to apply.) The burden of proof to overcome this presumption is on the challenger. An incident of a joint tenancy is that so long as both tenants are living, each has a present unconditional property interest in an undivided half of the money deposited.[8]

The presumption of joint tenancy may be refuted by proof that the joint account was opened merely as a matter of convenience, or as a result of undue influence, fraud, or lack of capacity.[9] In Rev. Rul. 69-148, the Internal Revenue Service found that a brokerage account in joint names with right of survivorship, where securities were held in nominee ("street") name, was akin to a jointly held bank account.

In 2009, in *Matter of the Estate of Catherine K. Corcoran*,[10] the Appellate Division (Third Department) held that the statutory presumption of Banking Law 675(b)—that parties to a joint bank account intend to create a joint tenancy—applied to brokerage accounts in the names of the parties as joint tenants with right of survivorship. This is a clear departure from the Court's earlier decision in *Matter of Antoinette*.[11] In support of its changed position, the *Corcoran* Court cited numerous decisions.[12]

Where the presumptions of Banking Law 675 are not overturned, an account holder in the type of joint brokerage or bank account described does not have a right to "unilaterally regain the transferor's own contributions…without the consent of the cotenant." Each cotenant has a duty to account to the other for withdrawals, and thus paragraph (c)(4)(iii) of Treasury Regulation 25.2518-2 does not apply. This is so even though each co-owner, in dealing with the bank or brokerage firm, is authorized to act alone.[13] Accordingly, the general rule of paragraphs (c)(4)(i) and (ii) of Regulation 25.2518-2 should also apply in New York, i.e., there is a nine month period to first disclaim an interest in the account, with nine months following death to disclaim a survivorship interest. The survivorship interest is considered to be one-half of the account no matter who provided the consideration.

A Quandary Under EPTL 2-1.11 and the 2010 Amendments

Alas, a quandary lurks in the issue how much of a joint brokerage or joint bank account may be disclaimed in New York. At present, paragraph (b) (i) of EPTL 2-1.11 provides that "…[A] surviving joint tenant or tenant by the entirety may not renounce that portion of an interest in joint property or property held by the entirety which is allocable to amounts contributed by him to the interest in such property."

A recent amendment to EPTL 2-1.11,[14] effective for dispositions on or after January 1, 2011, is a welcome addition. The amendment, renumbered as paragraph (c) (i), brings the New York statute into conformity with Federal law, and provides instead that "…[A] surviving joint tenant or tenant by the entirety may renounce the interest to which such tenant succeeds, by operation of law upon the death of another joint tenant or tenant by the entirety, to the extent such interest could be the subject of a qualified disclaimer under section 2518 of the United States Internal Revenue Code of 1986, as amended."

What happens prior to the effective date of the amendments to EPTL 2-1.11 while the New York renunciation statute differs from Federal law? A small measure of guidance is contained in Regulation 25.2518-1(c)(1)(i) for interests created before 1982. In that case, a disclaimer which meets the requirements of IRC 2518 and corresponding regulations, but which is not effective under State law, may nevertheless be treated as a qualified disclaimer under IRC 2518. The attempted disclaimer must result in transfer of the disclaimed interest under State law to another person without direction or discretion on the part of the disclaiming party. No guidance is provided in the regulations for transfers in 1982 and later, however.

To illustrate some of the problems resulting from the present dichotomy between New York and Federal law, consider a situation where the deceased spouse contributed all of the consideration for a jointly held brokerage account, or residence held as tenants by the entirety. The survivor's disclaimer of the entire account or residence would be recognized under New York law, and would also be recognized under Section 2518 (but only to the extent of one-half). It would no doubt be considered a gift to the extent the disclaimer exceeded one-half.

Suppose instead that the survivor contributed all of the consideration for a jointly held brokerage account or for a residence held as tenants by the entirety. Under Federal law, the survivor would be entitled to disclaim one-half, despite having furnished all of the consideration. The disclaimer would not be effective under EPTL 2-1.11 as it presently exists, however, since under present New York statutory law a person cannot disclaim his own contribution. It would probably be effective for Federal purposes under the regulations even though not complying with the New York statute. It might even be effective in New York as a common law disclaimer[15] and under EPTL 2-1.11(h), which recognizes disclaimers under common law which may not be in conformity with EPTL 2-1.11.

Conclusion

Beginning with interests in property arising on or after January 1, 2011, New York and Federal disclaimer statutes and regulations will be in substantial synchronization, eliminating issues that have existed for years. In most cases, a surviving joint tenant with right of survivorship or tenant by the entirety will be able to disclaim one-half following the first co-owner's death, whether the survivor contributed all of the consideration for the jointly held asset, none of the consideration, or something in between.

Endnotes

1. Except as otherwise stated, references to IRC and "Sections" are to sections of the Internal Revenue Code of 1986, as amended, and references to "Regulations" or "T. Regs." are to current Treasury Regulations.
2. N.Y. Estates, Powers and Trusts Law 2-1.11 (EPTL) (McKinney's 2010).
3. *See Id*.
4. *See* Treas. Reg. § 25.2518-2(c)(4)(i) & (ii).
5. *Id*. at § 25.2518-2(c)(4)(i) (emphasis added). A surviving spouse may disclaim any portion of a joint interest includible in the decedent's gross estate under Section 2040, in the case of joint tenancy or tenancy by the entirety created on or after July 14, 1988, where the spouse of the donor is not a United States citizen.
6. *Id*. at § 25.2518-2(c)(4)(iii).
7. 553 F. Supp. 26 (E.D. Wisc. 1982).
8. *See Brezinski v. Brezinski*, 94 A.D.2d 969, 463 N.Y.S.2d 975 (4th Dep't 1983) (citing *Matter of Kleinberg v. Heller*, 38 N.Y.2d 836, 841, 345 N.E.2d 592, 594, 382 N.Y.S.2d 49, 51 (1976); *Matter of Filfiley*, 63 Misc.2d 824, 825, 313 N.Y.S.2d 793, 796 (Sur. Ct., Kings Co. 1970) *aff'd* 43 A.D.2d 981, 353 N.Y.S.2d 400 (2d Dep't 1972)).
9. *See id*. (and citations therein).
10. 63 A.D. 3d 93, 877 N.Y.S. 2d 522 (3d Dep't 2009).
11. 291 A.D.2d 733, 738 N.Y.S.2d 452 (3d Dep't), *lv. to app. den.* 98 N.Y.2d 604 (2002).
12. 63 A.D.3d 93, 877 N.Y.S.2d 522 (citing the Third Department case *Fehring v. Fehring*, 58 A.D.3d 1061, 1062 (2009) and cases of the other departments, *Schwalb v. Schwalb*, 50 A.D.3d 1206 (3d Dep't 2008); *Matter of Richichi*, 38 A.D.3d 558 (2d Dep't 2007); *Chamberlain v. Chamberlain*, 24 A.D.3d 589 (2d Dep't 2005); *Garner v. Garner*, 307 A.D.2d 510 (3d Dep't 2003); *Kay v.* Kay, 302 A.D.2d 711 (3d Dep't 2003); *Matter of Kiejliches*, 292 A.D. 2d 530 (2d Dep't 2002); *Rosenkranse v. Rosenkranse*, 290 A.D. 2d 685 (3d Dep't 2002); *Fischedick v. Heitmann*, 267 A.D. 2d 592 (3d Dep't 1999); *Pinasco v. Del Pilar Ara*, 219 A.D. 2d 540 (1st Dep't 1995)).
13. *See First Wisconsin Trust Company v. United States*, 553 F. Supp. 26 (E.D. Wisc. 1982).
14. EPTL 2-1.11(3)(1) (eff. Jan. 1, 2011).
15. *See Matter of Estate of Stephens*, 177 Misc.2d 469 (Sur. Ct., N.Y. Co. 1998).

Howard M. Esterces practices law in Mineola, New York, with Meltzer, Lippe, Goldstein & Breitstone, LLP. He has an LL.M in Taxation from N.Y.U. School of Law School and an MBA from Columbia University Graduate School of Business, in addition to his law degree from Fordham Law School. He is on the Editorial Board of Practical Tax Strategies, has published close to three dozen articles which have appeared in *The New York Law Journal, Trusts and Estates* magazine, *Practical Tax Strategies, Taxation for Lawyers, Taxation For Accountants, The Journal of Taxation, Estate Planning, The CLU Journal* and other national publications, and is a Fellow of the American College of Trust and Estate Counsel. Mr. Esterces is also past Chairman of the Tax Law Committee of the Bar Association of Nassau County, New York, is a recipient of the President's Award of the Bar Association of Nassau County, and is past Chairman of the District Director's Liaison Committee for the Brooklyn, New York District of the Internal Revenue Service. Mr. Esterces was also a member of the Board of Directors of the Nassau County Bar Association. He was recently selected as one of the "Super Lawyers"in Estate Planning and Probate.

The New York Court of Appeals Rules Personal Representative of an Estate May Sue Estate Planners for Malpractice: The Practice Management Issues: *Estate of Schneider v. Finman*

By Anthony J. Enea

This is the first part of a two-part article. Several years ago I had the occasion of taking the deposition in a Will Contest of an attorney who regularly engaged in Will drafting as part of his practice. The attorney during said deposition testified that he did not as a matter of practice make any inquiry as to the extent of the client's assets, as said information in his opinion was personal and private to the client, and that he did not believe he was engaging in estate planning. Clearly, said attorney had no concern as to the estate tax implications of the legal advice he provided and the documents he prepared. As a result of the Court of Appeals decision discussed herein, I am willing to venture that said attorney will be making some important modification to his practices.

In *Estate of Schneider v. Finmann*,[1] the New York Court of Appeals reversed the decision of the Appellate Division, Third Department, and made a significant dent in the strict privity rule which for decades had prevented a third party without privity (contractual relationship with the attorney) from maintaining a malpractice claim against the attorney, absent fraud, collusion, malicious acts, or a special relationship with the attorney.

In *Schneider*, the attorney had represented the decedent prior to his death. During the period of representation the attorney allegedly failed to advise the decedent appropriately about a life insurance policy which the decedent had made transfers of the ownership thereof which was ultimately taxable in his estate upon his demise. The client had purportedly transferred ownership of the policy from a limited liability company to himself upon the advice of counsel.

The Court of Appeals held that "privity," or a relationship sufficiently close to "privity," exists between the personal representative of an estate, and the estate planning attorney. The Court opined that the personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. The Court stated, "The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional."[2]

The Court in support of its decision cited the decision of the Texas Supreme Court in *Belt v. Oppenheimer, Blend, Harrison & Tate*.[3] In *Belt*, the Texas Supreme Court held that the estate essentially "stands in the shoes of the decedent" and thus, "has the capacity to maintain the malpractice claim on the estate's behalf." The Court also held that its decision complied with EPTL 11-3.2(b)[4] which permits the representative of an estate to maintain an action for "injury to person or property" after that person's death.

In deciding to relax the requirement of strict privity between the representatives of an estate and the estate planner, the Court of Appeals also made it clear that strict privity still remains a ban against beneficiaries and other third parties who wish to pursue a malpractice claim against the estate planner absent evidence of fraud, collusion, malicious acts, etc. While the Court may have not completely opened the door to suits for malpractice against the estate planner, it has sufficiently opened the door to increased malpractice claims.

In making the blanket statement that one of the central tasks entrusted to the estate planner is "minimizing the tax burden of the estate," the Court failed to give any recognition to the possibility that there may be other objectives that to the client are more important than estate tax minimization which play a significant role in the planning undertaken.

Many estate planners can attest to the fact that the client may be wholly unwilling to undertake the recommended steps to minimize estate taxes espoused by the attorney, and that the client may have legitimate reasons for doing so. By its decision the Court has placed the attorney in the position of having to answer to individuals (estate representative) who may have played no role in the estate plan, and who have no knowledge of the conversations between the attorney and client. On numerous occasions I have strongly recommended to a client that he or she gift their assets, utilize the annual personal exclusion and their lifetime gift tax credit (one million dollars per person), and the client, although he had the means to do so, refused to do so. The gifting would have reduced the size of the client's estate, and minimized the potential for any estate taxes. However, the client preferred maintaining control over his assets. Said control in many instances is a significantly more important objective to the client than minimizing estate taxes. The Court's decision now leaves the attorney engaging in Will drafting, whether it be simple or complex, needing to document all of the recommendations made, the estate tax minimization options proposed, specify the client's stated objectives and delineate which steps he or she decided to engage in.

In the second part of this article, I will address some of the relevant issues the Court did not address in its decision, such as the statute of limitations and the continuation and or end of the attorney-client relationship. I will also address what steps attorneys can take to adequately address any potential estate tax issues the client may have, and to appropriately define the client's objectives and the steps taken by the attorney to address same.

With the Court of Appeals decision in *Schneider*, we are now going down a very slippery slope in the attorney-client relationship with respect to Will drafting and estate planning—a slope that may very well change the dynamics of the attorney-client relationship in New York forever.

Endnotes

1. 15 N.Y.2d 306 (2010).
2. *Id.*
3. 190 S.W.3d 780, 787 (Tex 2006).
4. N.Y. Estates, Powers and Trusts Law 11-3.2(b) (McKinney 2010).

Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. Mr. Enea is the former Editor-in-Chief of the *Elder Law Attorney*, a quarterly publication of the Elder Law Section of the New York State Bar Association. Mr. Enea is the Vice Chair of the Elder Law Section of the New York State Bar Association. Mr. Enea is the President and a founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA.

Trustee Commissions and the Power to Adjust: Should We Re-Characterize Adjustments?

By Joseph T. La Ferlita and Jill Choate Beier

In this low-interest rate environment, trustees often find themselves utilizing the power set forth in Section 11-2.3(b)(5) of the New York Estates, Powers and Trusts Law (EPTL) to adjust between the principal and income of a trust to ensure that the income beneficiaries receive timely and appropriate distributions of income. As a result, many trustees must face the issue regarding the calculation of commissions for trusts where he or she has exercised the authority to make adjustments from principal to income. Many practitioners and trustees believe that the statute does not clearly address the commission calculation issue where a trustee utilizes the power to adjust.

Overview

Section 11-2.3(b)(5) of the EPTL empowers a trustee to make adjustments between principal and income if the trustee considers such adjustment to be "advisable to enable the trustee to make appropriate present and future distributions" that would be "fair and reasonable to all of the beneficiaries…." However, a trustee is prohibited from making such adjustments in several circumstances.[1] One such circumstance is where the adjustment would benefit the trustee, either directly or indirectly.[2] Many trustees frequently decide to exercise the power to adjust to treat the beneficiaries fairly and in accordance with the statute. Such adjustments often incidentally result in an increase in trustee's commissions. This situation raises the question of whether such an adjustment violates clause (b)(5)(c)(viii) of Section 11-2.3 because the increase in the trustee's commission is a prohibited indirect benefit to the trustee within the meaning of the statute.

The amendments to the statute in 2008 clarified this issue by adding the parenthetical phrase "(which, however, shall not include the possible effect on a trustee's commission)."[3] The parenthetical language makes it clear that an incidental increase in the trustee's commission resulting from a trustee's exercise of the power to adjust is not the type of indirect benefit that would violate the statute. Indeed, the Practice Commentaries of McKinney's Laws of New York, written by Professor Margaret Valentine Turano ("Turano"), discusses whether the increase in trustees' commissions is a prohibited indirect benefit to the trustee and concludes that the 2008 amendments to the statute clarify this issue.[4]

Richard Nenno[5] points out, however, that a question regarding the calculation of trustee's commissions arises where such commissions are based on the trust's income. Nenno concludes that it is unclear whether the trustee should be compensated on amounts adjusted from principal to income (e.g., whether the amount adjusted should be re-characterized for purposes of calculating commissions) notwithstanding the fact that some state statutes permit the trustee to be compensated on such adjusted amounts. In New York, for example, the commissions for a trustee of a wholly charitable trust are calculated based on the amount of income collected in a given year.[6] Under EPTL 11-2.3, the trustee would be entitled to compensation on such income even where the trustee exercised the power to adjust and transferred an amount from principal to income, thereby increasing the base on which commissions are calculated. Nenno's questioning of whether amounts adjusted from principal to income should be re-characterized for purposes of calculating trustees' commission highlights the need for clarification, particularly in the case of wholly charitable trusts.

Other types of situations also present the need for clarification. For example, where an individual trustee of a private trust exercises his or her power to adjust principal to income, such trustee may prefer to continue to characterize the transferred amount as principal for purposes of the paying out and annual commission calculations. On the other hand, many banks and trust companies do not include such transferred amounts in the calculation of annual commissions. Consequently, there is the potential for conflict between an individual and a bank or trust company who are acting as co-trustees of a trust regarding the calculation of trustees' commissions.

In light of these situations, perhaps it is time to consider an amendment to the statute to clarify the impact of the power to adjust on the calculation of trustees' commissions. However, the problem cannot be addressed in a vacuum, but rather must be considered in light of (i) the basic purpose of the Prudent Investor Act (PIA), codified in New York at EPTL 11-2.3, as amended, as well as of the Uniform Principal and Income Act, codified in Article 11-A of the EPTL (UPIA), (ii) the definitional section of the UPIA codified at EPTL 11-A-1.2, and (iii) the technical corrections that were made to the PIA in 2008.

The Power to Adjust and the Uniform Principal and Income Act

1. Background

Prior to the adoption of the PIA in 1994 and the UPIA in 2001, the trustee of an irrevocable trust that mandated the distribution of fiduciary accounting income but did not authorize the trustee to distribute principal to the current beneficiary faced a conflict of interest between the current and remainder beneficiaries. The conflict was rooted in the fact that, often, assets that produce generous income suffer from meager growth or heightened risk, whereas assets that are likely to appreciate generate little or no income.[7] Thus, investing for maximum yield often came at the price of inhibited trust growth and increased risk, while investing for maximum growth often came at the price of meager income.[8] Compounding the problem was the fact that the interest generated by fixed-income assets continued to decrease over the years.[9] This interest rate environment placed the trustee in a difficult situation because of the fiduciary obligation owed to each of the current and remainder beneficiaries.

In 1994 when New York adopted the PIA, the standard by which trust investments were to be judged was transformed. Prior to the PIA, trustees' performance was judged by considering the prudence of each individual investment.[10] Under the PIA, however, a trustee is required "[t]o pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the entire portfolio."[11] The PIA embodies what is commonly referred to as a "total return" investment philosophy.

While the PIA articulated the new standard by which a trustee was to be held, it did not go far enough in providing the tools to implement it. The definitions of fiduciary accounting income and principal were too restrictive.[12] Many trustees investing for total return saw terrific growth of principal coupled with ever decreasing income levels, but were unable to shift some of the benefits of the growth to the current beneficiary.

In response, in 2001, New York adopted sweeping changes to the law of fiduciary investments by enacting two new alternative ways of defining fiduciary accounting income and principal: (a) the UPIA (which includes the power to make adjustments between income and principal codified within the PIA,[13] and (b) the unitrust option, under which fiduciary accounting income generally is defined simply as four percent of the trust's value each year irrespective of the trust's actual income.[14]

The UPIA redefined the definitions of fiduciary accounting income and principal to better suit modern realities. The power to adjust, which applies to a trust that is subject to the UPIA (and thus not the unitrust provisions of EPTL Section 11-2.4), provides a trustee with the authority "to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make appropriate present and future distributions…if the trustee determines…that such adjustment would be fair and reasonable to all of the beneficiaries."[15]

The power to adjust is a necessary part of the total return investment regime because it ensures that a trustee has the flexibility to conform to the PIA. It "frees up the trustee to invest for the total portfolio, and then adjusts if the income flow is insufficient."[16] Thus, it can be viewed as a trustee's "back-up tool" in the event that the new definitions of fiduciary accounting income and principal as set forth in the UPIA fail to enable the trustee to fulfill his or her fiduciary obligations to both the current and remainder beneficiaries. For example, if in a given year the trust's assets appreciated significantly but produced insufficient income, the trustee can transfer an appropriate amount of the trust principal to income and then make a distribution of income to the current beneficiary. Conversely, if in a given year the trust's assets generated a tremendous amount of fiduciary accounting income but appreciated little, or even depreciated, the trustee can transfer a portion of such income to principal. The point is that, unitrusts aside, the power to adjust ensures that the total return investment strategy can be implemented, and frees the trustee from the archaic, limited definitions of income and principal.

2. Approaching the Commission Statutes in a Manner Consistent with the PIA and the UPIA

After the adoption of the PIA and the UPIA, the commission statutes (e.g., Surrogate's Court Procedure Act ("SCPA") Section 2309), which were enacted decades ago at a time when the definitions of income and principal were rigid, should be reconciled to these relatively recently adopted laws. Reconciliation has proven difficult because the PIA and the UPIA introduced more fluid concepts of principal and income.

The effect of the adoption of the PIA and the UPIA is that a trustee may now be obligated to invest the assets of a trust differently than he or she would have been obligated to do prior to the adoption of these laws. For example, the emphasis on total return might require a trustee to invest in assets that produce less income but exhibit greater growth potential than other assets in which the trustee would have invested had the emphasis not been on total return. As discussed above, the interests of the current beneficiary are not lost under the PIA and the UPIA. Rather, the UPIA's revised definitions of income and principal, as well as the PIA's power to adjust, afford the trustee the ability to allocate the appropriate share of the investment returns to the current beneficiary.

The power to adjust is a means of bridging the gap between the realities of total return investments with the interests of the current beneficiary and the remaindermen. Accordingly, any assets that are transferred pursuant to the PIA from the income account to the principal account, or vice-versa, should be deemed a re-characterization of the nature of such asset for purposes of calculating commissions. When calculating commissions, therefore, the relevant commission base should be analyzed after the adjustments are made, and not before. To do otherwise would be inconsistent with the total return investment regime inherent in the PIA and the UPIA.

The Definitional Section of the UPIA

The definitional section of the UPIA provides additional support for the authors' conclusion. The UPIA defines "income beneficiary" as "a person to whom net income of a trust is or may be payable."[17] "Net income," in turn, is defined as "the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, *plus or minus transfers under [Article 11-A of the EPTL] or under subparagraph 11-2.3(b)(5) to or from income during the period*."[18]

For example, if a trustee were to exercise the power to make an adjustment from principal to income, the transferred amount is re-characterized; i.e., what began as principal is transformed into income such that an income beneficiary becomes entitled to receive it. Thus, the notion of re-characterization is consistent with the definition of net income.

The 2008 Technical Corrections to the PIA

1. Background

From the time it was enacted, the PIA contained multiple safeguards aimed at preventing abuse of the power to adjust.[19] One of the original safeguards prevented a trustee from making adjustments "if the trustee is not a current beneficiary or a presumptive remainderman, but the adjustment would benefit the trustee directly or indirectly…."

This particular safeguard, however, presented a problem to many trustees. According to the memorandum of the EPTL-SCPA Legislative Advisory Committee (Advisory Committee) in support of the technical corrections of the PIA:

> The banking community has expressed deep concern that this provision could be interpreted as denying the adjustment power because of an adjustment's incidental effect on computation of the trustee's commissions. *Thus, e.g., an adjustment from income to principal would increase the amount of principal on hand on which annual commissions will be based and which may eventually qualify for a 1% termination commission. The provision was in no way intended to cover such a minuscule side effect of a trustee act having such high independent significance as its achievement of a proper overall investment strategy through the use of the adjustment power.* The law has never required that the trustee's power and duty to adopt investment policy be exercised only in a manner that would have no incidental effect on its commission. In clear cases of significant benefit to a trustee, EPTL 10-10.1 will prevent the exercise of allocation discretion if there is no independent co-trustee to do it. An in any event, under general equitable principles, it should still be expected and permitted that trustee acts can be tested by the apparent balance between their independent significance, benefits to the trust, and benefits flowing directly or indirectly to the trustee.[20]

Upon the Advisory Committee's recommendation, New York State in 2008 amended the PIA such that, inter alia, it became clear that the prohibited benefits of the exercise of the power to adjust do not include increases to trustees' commissions as a result of such exercise. The statute now states that "[a] trustee may not make an adjustment…if the adjustment would benefit the trustee directly or indirectly *(which, however, shall not include the possible effect on a trustee's commission)*…."[21]

2. The Advisory Committee Assumes That an Adjustment Effectuates a Re-Characterization

One could argue that the phrase "which, however, shall not include the possible effect on a trustee's commission" would not have been necessary if the legislature concluded that an adjustment would not effectuate a re-characterization. Others could argue that the word "possible" indicates the legislature's silence on this issue; it did not decide the matter, but wanted to make clear that, to the extent the matter is decided in favor of re-characterization, the effect of such re-characterization on commissions would not be deemed a prohibited benefit.

The authors conclude that any doubts about this issue are resolved by the Advisory Committee's above-referenced memorandum. Implicit in the Advisory Committee's comments, emphasized above, is the assumption that an adjustment pursuant to the PIA effectuates a re-characterization. The example given by the Advisory Committee involves an adjustment from income to principal. This adjustment would result in a benefit to the trustee in that such transferred amount might eventually qualify for the one percent paying-out commission. That qualification could be possible only to the extent that character of the transferred amount is transformed from income to principal for purposes of the commission statutes.

Conclusion

Based on the many conflicts discussed above and analyzing the issue in light of the PIA and the UPIA, the authors conclude that it seems appropriate to revise and amend EPTL 11-2.3 to clarify that, for purposes of the calculation of a trustee's commission, any adjustment of a trust asset from the trust's principal account to the trust's income account pursuant to the PIA effectuates a re-characterization of such transferred asset as an item of income. In addition, any adjustment of a trust asset from the trust's income account to the trust's principal account pursuant to the PIA would effectuate a re-characterization of such transferred asset as an item of principal.

Notwithstanding the various issues in connection with amending the statute to require a re-characterization after an adjustment, it is clear that the calculation of trustee's commissions is treated inconsistently by individual trustees, corporate trustees and by trustees of wholly charitable trusts. Therefore, to avoid future conflicts, an amendment to EPTL 11-2.3 to clarify the treatment of trustee's commissions is warranted.

Endnotes

1. *See* EPTL 11-2.3(b)(5)(C).
2. EPTL 11-2.3(b)(5)(C)(vii) applies to trustees who are neither a current beneficiary nor a presumptive remainderman of the trust.
3. *Id*.
4. Margaret V. Turano, McKinney's Laws of New York, EPTL Article 11, 2008 Practice Commentaries.
5. Richard Nenno, *The Power to Adjust and Total-Return Unitrust Statutes: State Developments and Tax Considerations*, 42 Real Prop. Prob. & Tr. J. 657 (2008).
6. SCPA 2309.
7. S*ee Supplement to the Fifth Report of the EPTL-SCPA Legislative Advisory Committee* 2-3 (May 26, 2000).
8. *See New York Estate Administration*, § 14.06, by Margaret V. Turano & C. Raymond Radigan (LexisNexis 2009).
9. *See* Nenno, 42 Real Prop. Prob. & Tr, J., p. 657.
10. *See* Turano & Radigan § 14.06.
11. EPTL 11-2.3(b)(3).
12. *See Supplement to the Fifth Report of the EPTL-SCPA Legislative Advisory Committee* 2 (May 26, 2000).
13. EPTL 11-2.3(b)(5).
14. *Id.* at 11-2.4.
15. *Id.* at 11-2.3(b)(5)(A).
16. Turano, McKinney's Laws of New York, EPTL Article 11, 2008 Practice Commentaries.
17. EPTL 11-A-1.2(5).
18. *Id.* at 11-A-1.2 (8) (emphasis added).
19. *See id.* at 11-2.3(b)(5)(C).
20. EPTL-SCPA Legislative Advisory Committee Memorandum dated March 22, 2007, at pp. 6-7 (emphasis added).
21. EPTL 11-2.3(b)(5)(C)(vii) (emphasis added).

Jill Choate Beier, MBA, JD, LL.M, is a 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 Vice Chair of the Estate and Trust Administration Committee of the Trusts and Estates Section.

Joseph T. La Ferlita is an associate in the Trusts and Estates Department of Farrell Fritz, P.C. Mr. La Ferlita focuses his practice on estate planning and the administration of estates and trusts. He is Chairman of the Surrogate's Court Committee of the Trusts and Estates Section of the New York State Bar Association and is a member of the Administration Committee of the same organization.

Singer Contra *Hallman*: New York's Evolving Approach to In Terrorem Clauses

By Gary E. Bashian

Over the past two years the New York Courts have taken increasingly nuanced positions in the interpretation and enforcement of in terrorem clauses in a variety of contexts. A more expansive reading of Estates, Powers and Trusts Law (EPTL) 3-3.5(b) advocated by the Court of Appeals in the 2009 case *Matter of Singer*[1] has led to a broader discovery process and, arguably, a narrower interpretation of a testator's intent. In contrast, in 2010 the Appellate Division, First Department, declined to broaden the application of EPTL 3-3.5(b), surprisingly yielding a more expansive interpretation of an in terrorem clause in *Hallman v. Bosswick*.[2] Each of these cases is instructive on how to better draft and use the in terrorem clause when trying to preserve a client's estate plan and offers insight into the Courts' approach to determining a testator's intent regarding its application.

An in terrorem, or "no-contest," clause is an indispensible tool for many trusts and estates practitioners. Clients often want not only to protect their assets and legacy through estate planning but to preserve the estate plan's specific terms and conditions. The in terrorem clause is the primary mechanism used for protecting an estate plan from challenges by dissatisfied beneficiaries who are left unequal or less-than-hoped-for bequests.

Generally, an in terrorem clause prohibits actions that would constitute a challenge to the estate. If the clause is triggered, the challenging beneficiary will forfeit his or her share under a testamentary or trust instrument. The challenger will be treated as though he or she had predeceased the testator, denying the challenger and his or her heirs a bequest, legacy or devise. If effectively invoked, the in terrorem clause not only revokes a bequest, but it can prevent intestate distributions, block the invocation of the anti-lapse statute and provide for a host of alternative distributions in the event that a beneficiary is deemed subject to its provisions.

The in terrorem clause itself serves a dual purpose. As noted above, the clause is used to preserve a Will, trust, or estate plan as the testator envisioned it. It is a protective measure, literally meaning "in order to frighten," that attempts to scare off those who would challenge the testator's intentions regarding how their estate is to be distributed. The threat that such a challenge, if unsuccessful, will result in a complete forfeiture of the beneficiary's interest under the instrument effectively dissuades many from filing objections or attempting to exert leverage to force a settlement. Additionally, the in terrorem clause is a device that fosters judicial economy by filtering out those objections that may be unfounded, unsustainable or downright frivolous as it forces those who would challenge an instrument to be sure they have the necessary evidence to back up their allegations.

Make no mistake, though—the in terrorem clause is not a silver bullet that can prevent all potential objectants from challenging an estate plan or Will. For example, those who are excluded from an estate plan entirely have nothing to lose by challenging a Will with an in terrorem clause. After all, the threat of forfeiture has no practical effect on someone who was disinherited in the first place. However, now that the Court of Appeals has overturned *Dillon*[3] in *Matter of Hyde*,[4] the Surrogate is now permitted to apportion liability for a fiduciary's attorney fees on a beneficiary party who unjustifiably initiates a proceeding, which is another reason why a beneficiary will have to carefully consider whether to litigate at all.

The general case law has held that because the enforcement of in terrorem clauses results in harsh punishment of an objectant (and potentially frustrates the public policy of ensuring that Wills are valid), they are disfavored and must be strictly construed.[5] Furthermore, an in terrorem clause, no matter how well drafted when defining the conditions that will trigger forfeiture, is limited by statute.

EPTL 3-3.5(b) limits the circumstances that can trigger an in terrorem clause. Commonly referred to as the "safe harbor provisions," EPTL 3-3.5(b) dictates that:

> The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:
>
> (A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.
>
> (B) The disclosure to any of the parties or to the court of any information

relating to any document offered for probate as a last will, or relevant to the probate proceeding.

(C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.

(D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding.

(E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

Another important factor that determines the scope and application of an in terrorem clause is, of course, the testator or grantor's intent.[6] Indeed, determining a grantor or testator's intent from whatever facts are available is one of the most common yet difficult tasks that a Surrogate or Judge must undertake. The primary means by which intent can be determined is by a plain reading of the clause itself. Precisely because an in terrorem clause will be strictly construed, it must be crafted with great care. The draftsperson must consider all of the contingencies that might arise which would threaten the client's estate plan and include them in the clause in order to ensure that it will effectively prevent a challenge or ensure a forfeiture of an objectant's share. Failure to include likely contingencies that would trigger forfeiture may result in a permissible challenge that can upset the estate plan.

Two of the New York judiciary's recent decisions involving in terrorem clauses have revolved around the interplay between the limitations imposed by EPTL 3-3.5(b) and the intent articulated in an in terrorem clause.

In *Matter of Singer*,[7] the Court of Appeals concluded that the "statutory safe harbor provisions of SCPA 1404 and EPTL 3-3.5 are not exhaustive"[8] and therefore the enumerated protections they offer to an objecting beneficiary who would otherwise be subject to an in terrorem clause are not exclusive. *Singer* involved a situation where the testator's Will included two in terrorem clauses, the first directed to all beneficiaries, and the second to the testator's son:

> If any beneficiary shall, in any manner, directly or indirectly, contest, object to or oppose, or attempt to contest, object to or oppose, the probate of or validity of this Will or the revocable trust agreement created by me, or any part of my estate plan or any gifts made by me, or any of the provisions of this Will or of the revocable trust agreement created by me, in any court or commence or prosecute any legal proceeding of any kind in any court to set aside this Will or the revocable trust agreement created by me or any part of my estate plan or any gifts made by me, then in that event, such beneficiary, and all of such beneficiary's issue, shall forfeit and cease to have any right or interest whatsoever under this Will or under the revocable trust agreement created by me, or in any portion of my estate, and, in such event, I hereby direct that my estate and the trust estate under such revocable trust agreement shall be disposed of in all respects as if such beneficiary had predeceased me without issue.[9]
>
> I specifically direct that my son, Alexander I. Singer, not contest, object to or oppose this Will or The Joseph Singer Revocable Trust Agreement, or any part of my estate plan or any gifts made by me, and I specifically direct that my son not take my daughter, Vivian S. Singer, to a Bet Din (religious court) or to any other court for any reason whatsoever; and I specifically direct that if my son takes any such action or brings on any such proceeding, neither my son nor any of his issue shall receive any share of my estate, whether passing under this Will, under The Joseph Singer Revocable Trust Agreement or otherwise.[10]

Each clause contained the pro forma language that the beneficiaries were not to "contest, object to or oppose"[11] the Will in any way. The clause that applied to all beneficiaries generally included a prohibition on direct or indirect challenges to the Will, and the specific direction that no beneficiary oppose the estate plan "in any court or commence or prosecute any legal proceeding of any kind in any court."[12] Additionally, the in terrorem clause that was specifically addressed to the decedent's son directed that he not take his sister, another named beneficiary, "to a Bet Din (religious court) or to any other court for any reason whatsoever."[13]

Shortly after the Will was offered for probate, the testator's son sought discovery under both Article 31 of the Civil Practice Laws and Rules (CPLR) and SCPA 1404 of several witnesses, including the testator's previous attorney. Predictably, the testator's daughter asserted that the deposition of an individual not enumerated in SCPA 1404—namely, the former attorney of the testator—had triggered the in terrorem clause. Both the Surrogate and the Appellate Division, Second Department, agreed and revoked the son's bequest.

The Court of Appeals reversed the lower Courts and determined that no such violation of the in terrorem clause had taken place due to the enlarged scope of depositions undertaken. The Court of Appeals stated that:

> Although the statutes include only a few particular groups, certain circumstances may exist such that it is permissible to depose persons outside the statutory parameters without suffering forfeiture.… [T]he trend has been for courts "to allow broad latitude in discovery of matters that could provide the basis for objections" and… the Legislature intended to balance the testator's right to prevent unwarranted will contests against the beneficiary's right to investigate in order to evaluate the risk involved in contesting the will notwithstanding the in terrorem clause.[14]

Furthermore, the Court of Appeals noted that "the crucial inquiry is whether the conduct violated the testator's intent…. [T]hese in terrorem provisions can reasonably be interpreted to express testator's wish that [the testator's son] not commence court proceedings of any type against the estate plan." [15]

Having determined that the testator's intent was readily ascertainable—i.e., that he wanted to ensure that his estate plan would not be contested in any Court—the Court of Appeals construed the in terrorem clause narrowly, holding that the taking of the deposition did not amount to an "attempt to contest, object to or oppose the validity of the estate plan"[16] and thus did not require a forfeiture.

Importantly, Justice Graffeo's concurrence offers further clarity into the way the Court navigates the interplay between a testator's intent and the statutory limitations of EPTL 3-3.5:

> Because we are required to construe the in terrorem clauses at issue here narrowly, we found it reasonable to conclude that the language of this will did not specifically impose forfeiture… [T]he fact that the testator's former attorney does not fall into one of the categories of persons listed in the statutes is irrelevant in this case. I believe, however, than an in terrorem clause can be drafted to explicitly prohibit this type of inquiry. A testator could, for example, draft an in terrorem clause that incorporates the statutorily-authorized preliminary examinations by explicitly stating that a beneficiary who makes or attempts to make any inquiry about the will other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her bequest.…[17]

Hallman v. Bosswick[18] offers another, less forgiving approach when balancing the strict construction of an in terrorem clause and the limitations of SCPA 3-3.5(b). In *Cohn*, the in terrorem clause disinherited any beneficiary who "commenced proceedings 'to void, nullify or set aside all or any part' of the will."[19] One of the beneficiaries brought a construction proceeding to determine if the in terrorem clause would apply to a proposed SCPA 711 proceeding to revoke letters issued to two non-family members appointed as co-executors and co-trustees. Petitioner's theory was that because the testator made bequests only for the benefit of his descendants and not to the co-fiduciaries, the in terrorem clause must only apply to challenges against family members who were beneficiaries under the Will.

The Appellate Division, First Department, disagreed. It stated that "[a]s the proposed proceeding does not fall within the safe harbor provisions of EPTL 3-3.5(b), the applicability of the in terrorem clause is a matter of the decedent's intent."[20] The testator's decision, the Appellate Division determined, not to leave his estate outright to his descendants but to set up lifetime trusts for their benefit was "consistent with an intent that they not have unfettered control over his fortune."[21] This intent was furthered by nominating two non-family members to serve as co-fiduciaries with the decedent's two children, which prevented the children from having a majority vote. Thus, any attempt by the family members to gain greater control over the trusts, including seeking the removal of non-family fiduciaries via a SCPA 711 proceeding, would contravene the testator's intent and would trigger the in terrorem clause, as such a proceeding was outside the safe harbor of EPTL 3-3.5(b).

Importantly, the *Hallman* Court noted that the petitioner's alternative argument—that an in terrorem clause could not apply to the pursuit of a SCPA 711 proceeding based on public policy grounds—was not valid. The Appellate Division reasoned that such an argument "assumes that the safe harbor provisions of Estate Powers and Trusts Law § 3-3.5(b) are not exhaustive. Although a recent decision of the Court of Appeals expressly so states (*Matter of Singer*, [citation omitted]), that statement appears to be dictum.…"[22]

Although the *Hallman* decision challenges the more expansive interpretation of EPTL 3-3.5(b) advanced by the Court of Appeals in *Singer*, it nevertheless focuses on the testator's intent in determining whether the in terrorem clause has been violated. Based on these two cases, it remains unclear where the jurisprudence regarding the interpretation and application of in terrorem clauses is heading. One thing that can be gleaned from these decisions, however, is that close attention to the drafting of the terms in the clause itself, coupled with the guideline for a narrow construction, can be used to a client's advantage to deter challengers to an estate plan.

Endnotes

1. *Matter of Singer*, 13 N.Y.3d 447, 892 N.Y.S.2d 836 (2009).
2. *Hallman v. Bosswick*, 72 A.D. 3d 616, 899 N.Y.S.2d 233 (1st Dep't 2010).
3. *In re Dillon's Estate*, 28 N.Y.2d 597, 319 N.Y.S.2d 850 (1971).
4. *Matter of Hyde*, 15 N.Y.3d 179, 906 N.Y.S.2d 796 (2010).
5. *In re Baugher*, 906 N.Y.S.2d 856, 2010 N.Y. Slip Op. 20359.
6. *Singer*, 13 N.Y.3d at 452.
7. *Id*.
8. *Id*. at 449.
9. *Id*. at 450.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*. at 452 (citing Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 1404, at 178-179; Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 3-3.5, at 451-452).
15. *Id*.
16. *Id*. at 453.
17. *Id*. at 454.
18. *Hallman*, 72 A.D. at 616.
19. *Id*.
20. *Id*. at 617.
21. *Id*.
22. *Id*.

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, 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.

The author gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP, for his assistance in the preparation of this article.

Message from the TELS Technology Committee— A Road Map to the Trusts and Estates Law Section Home Page

By David Goldfarb, TELS Technology Committee Chair

The Technology Committee of the Trusts and Estates Law Section makes important contributions to our Section's ability to practice law efficiently and smoothly. For example, the Technology Committee addresses practice questions related to electronic forms and electronic filing; it deals with issues of office automation and the use of computer hardware and software in the practice of trusts and estates law. In addition, the Committee helped develop the Section's home page on the NYSBA.ORG website. Among its continuing website responsibilities, the Committee monitors, makes recommendations and assists with the continual development and improvement of Section's home page.

This article discusses some features on the Trusts and Estates Law Section home page on the NYSBA.ORG website.

When you first go to the NYSBA website at www.nysba.org, you should log in. If you do not know your login password, there is a link on the log in page called "Need help logging in?" that will guide you in the logging in process. Once you have logged in, the website will automatically recognize you and know which Sections you belong to; and you will be able to access member only information. If you go to "My NYSBA," you can see what Sections you belong to; you can track your CLE credits; and you can go to some of the most popular association links, such as the Lawyers Code of Professional Responsibility. On the NYSBA home page if you navigate to "For Attorneys" you will also find many valuable resources. The association provides online ethics opinions and Loislaw offers the NYSBA Ethics Opinions in a searchable, citation enhanced format. The "For Attorneys" page also provides links to the Office of Court Administration website, the New York Codes, Rules and Regulations (NYCRR) and other legal resources.

Next you should go to the Trusts and Estates Law Section home page. The navigation on the NYSBA website is uniform across all of the various Section and Committee home pages. Links to upcoming events and announcements can be found on the right side of the page. On the left is a comprehensive list of all the features of the Section's website. This list will expand as you go to pages that have subpages.

In the center of the Section's home page is the Section Chair's welcome message and below that are recent cases provided by Loislaw based on search terms that were provided by the Section. Under "Trusts and Estates Law Section Newsletter" on the lefthand navigation, you can access the current and prior newsletters in PDF format. By choosing the link "Citation Enhanced Version from Loislaw" you can search the newsletters for various topics and will get to the articles where all the citations to statutes and cases will be active links.

www.nysba.org/trusts

The link to "Estate Planning and Will Drafting Forms" will take you to a comprehensive list of forms that can be purchased. Of particular note is the free version of the new New York State Statutory Power of Attorney Form and the Statutory Gift Rider. The link to "Legal

Links" is a page of links prepared for the Section with the assistance of Cornell Law School.

"Pending Legislation" is a special feature of the Trusts and Estates Law Section site which has legislative bill tracking of all current legislation of interest to the Section. Aside from the bill status report, by clicking the link to the bill number you can access the legislation on the legal information website of the New York State Legislature.

The Section's Member Directory provides a searchable directory of all Section members.

If you leave the Section home page and navigate via the left hand list to Forums/Listserves, you will see a listing of all the NYSBA Forums and Listserves to which you are subscribed. You should be subscribed to the Trusts and Estates Law Section Listserve. If you are not already on the Listserve you can subscribe by using the link "Join the Section Listserve." Most members choose to receive this Listserve through their email. There are 2,586 members on this Listserve. On the website you can look at the messages organized by threads. There are currently 25 pages of listed threads. Click on a thread topic and you will see the original message and all the replies.

The NYSBA website, the Trusts and Estates Law Section home page and the T&E Listserve are valuable member benefits. New features are always being added to the website and your suggestions are welcome. Keep revisiting the website to see what's new.

David Goldfarb is the Chairman of the Trusts and Estates Law Section Technology Committee.

Standby, Temporary and Other Guardians for Children

Subject: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 3:55 PM
To: Trusts and Estates Law Section

Listmates,

Parents of minor children typically name a guardian in their will in the event that both parents die together, or the second dies when the children are minors.

Can someone point me in a direction on this—statute/reading material: Guardian named in the will is not a family member and both natural parents are deceased—Can a family member object to the appointment of the named guardian and seek to become the guardian instead? How much control do the deceased natural parents' wishes as expressed in their will have over the placement of their children when family members object?

I see from SCPA 1711 that the guardian needs to qualify under SCPA 708, but the commentaries in 708 provide no insight on my specific issue. Thank you for any assistance!

Bethany Schumann-McGhee, Esq.
Attorney at Law
164 Guy Park Avenue, Suite 2
Amsterdam, New York 12010
Tel: 518-842-4228
Cell: 518-221-4709
Fax: 888-842-1286

Subject: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 4:20:46 PM
To: Trusts and Estates Law Section

Bethany,

Consider having your clients execute a standby guardianship designation consistent with the appointment terms in their will. See SCPA 1726. We recommend this to ALL our clients with minor children. The standby guardianship designation is presumptive evidence to a court (and the family and the rest of the world (including CPS/foster care)) that the incapacitated or deceased parents wanted the person(s) named in the designation to be the guardians of their minor child(ren).

Whether your clients should discuss presently their wishes with their respective family members (and memorialize that discussion in a loving letter to the potential family objectants) so that their designation is no surprise and you will have additional support for their designation if you ever need it, is something also for you to discuss with your clients.

Call me if you get stuck.

Kind regards,
Ian
Ian W. MacLean
THE MACLEAN LAW FIRM, P.C.
We Help People Enforce Their Rights, Protect Their Assets and Plan for the Future. TM *~ Probate ~ Estate & Trust Administration ~ Related Dispute Resolution & Litigation ~ Estate Planning ~ Asset Protection ~ Business Succession ~ Elder Law ~ Private Client Services ~*
100 Park Avenue, 20th Floor
New York, NY 10017
T: 212-682-1555
F: 212-682-6999
E: ianwmaclean@maclean-law.com
W: www.maclean-law.com

Subject: Re: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 4:29 PM
To: Trusts and Estates Law Section

Hi Ian:

Great advice per below. I never fully saw the need for the standby designation with 2 living parents, but what you express below is very, very practical.

1-About how many of your clients execute both the standby guardianship document and, of course, their Wills with the same provisions?

2- Can you advise mechanically how the standby works? If the parent or parents pass, leaving their minor children, does the standby guardian run to the house and wisk the kids away knowing they are designated in the standby document? With an order to be obtained within 60 days, does the standby go to court ASAP to submit the designation to the Surrogate to disclose to all that the kids are to remain with them pending the order?

Sorry—your good advice leads to me picking at your brain! Thanks, Ian.

Please consider the environment before printing this email.

Rob Brusca
123 South Street- #104
Oyster Bay, N.Y. 11771
(516-802-0255; Fax (not for service of process): 516-802-0256)

Subject: Re: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 4:47:43 PM
To: Trusts and Estates Law Section
9/1/2010 5:47:43 P.M. Eastern Daylight Time, ianwmaclean@maclean-law.com writes:

Rob,

Good questions. I'm posting them to the list serve because this is important stuff. Here are my answers (others please weigh in).

1. All who execute standby guardianship designations have the same designations in their wills and RLTs.

2. The designated standby guardian(s) may be running to the house, the hospital, the local police precinct or the child services office. The authority of the designated standby guardian commences upon the guardian's receipt of determination of incapacity of the parent(s) signed by an attending physician, receipt of a determination of debilitation and a consent signed by the parent(s), legal guardian, custodian or primary caretaker signed by two witnesses, or receipt of a death certificate or other document indicating death of the parent(s). See SCPA 1726(4)(c). The commencement of a standby guardian's authority confers upon the standby guardian concurrent authority with the incapacitated parent (until a judicial determination) and if the parent is dead, there is no one with whom the standby guardian would have concurrent authority. See 1726(7). And the standby guardian has 60 days to file his or her petition.* So the race to court may not be necessary. It's more a race to the kids. If, for example, a desk sergeant or child services bureaucrat is not familiar with the statute, and "aunt Jane" or "grandma" shows up at the same time as the designated guardian, it would be helpful if we were there too as trusted counsel. In some situations, judicial relief may be necessary. But the formal witnessed designation (and we notarize ours and put our law firm name, address and contact information on it) creates a strong presumption in favor of the parent's or parents' choice. See *In re Ammon*, NYLJ, Mar. 10, 2004 at 29 col. 1 (Surr. Ct. Suffolk County) [and Professor Turano's indispensible Practice Commentaries]. The point of the statute is to streamline the process for the care and custody of the minor children when parents are incapacitated, debilitated or dead. So if presented with a choice of the overbearing auntie or grandparent or the cool collected friend with the document and attorney present, the likelihood is the public servant is going with the cool, calm document carrying people. It helps too if the parents have everyone, including the kids if of appropriate age, on board while "life was good."

Hope this helps. Got to go.

Ian

Ian W. MacLean
THE MACLEAN LAW FIRM, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
T: 212-682-1555
F: 212-682-6999
E: ianwmaclean@maclean-law.com
W: www.maclean-law.com

* In the original Listserve posting, I wrote 120 days was the time limit. This is incorrect. The window is 60 days under SCPA 1726 and 180 days under Section 1757 for Article 17-A proceedings.—Ian W. MacLean

---

Subject: Re: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 6:04 PM
To: Trusts and Estates Law Section

Thank you, Ian. It certainly does help. Appreciate the technical and practical insight very much.

Please consider the environment before printing this email.

Rob Brusca
123 South Street- #104
Oyster Bay, N.Y. 11771
(516-802-0255; Fax (not for service of process): 516-802-0256)

Subject: RE: [trusts-estates] naming a guardian in a will
Sent: Wednesday, September 01, 2010 6:12 PM
To: Trusts and Estates Law Section

My pleasure Rob. The technical aspect is what it is. The really important aspect is this, and I know you get this: In this context, what, in the world, is more important than the peace of mind of knowing that you have taken all reasonable steps to ensure that your children will be protected, provided for and loved by the people you want if you are no longer able to care for and protect your children because of incapacity or death? Most of our clients, when they pause and think about it answer, "nothing is more important than that."

Kind regards,
Ian
Ian W. MacLean
THE MACLEAN LAW FIRM, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
T: 212-682-1555
F: 212-682-6999
E: ianwmaclean@maclean-law.com
W: www.maclean-law.com

Subject: RE: [trusts-estates] naming a guardian in a will
Sent: Tuesday, September 07, 2010 10:15 AM
To: Trusts and Estates Law Section

Ian:

Thanks for the insight. My understanding is that the designation of standby guardian form was only valid for 12 months? Do clients re-execute one annually or am I missing something?

Thanks,

Michael B. Karlsson II, Esq.
Admitted to Practice in Connecticut and New York
Eugenia M. Vecchio & Associates PLLC
Attorneys at Law
550 Mamaroneck Avenue - Suite 210
Harrison, New York 10528
MBK@EugeniaMVecchioEsq.com
Ph.(914) 835-1818
Fx.(914) 835-1858

Subject: RE: [trusts-estates] naming a guardian in a will
Sent: Tuesday, September 07, 2010 12:06 PM
To: Michael Karlsson

You may be thinking of the temporary guardianship for education and medical decisions when a legal guardian is out of the country. That is provided for under Title 15-A of the General Obligations Law.

Title 15-A provides a means by which a parent can designate, in a written instrument and for a period no longer than six months, another person as "a person in parental relation" to a minor or incapacitated person for purposes of making medical decisions and being considered a custodian of such minor or incapacitated person under the Education Law. The legislation is particularly important because a written designation provides a means by which a parent can ensure with reasonable certainty that the health and educational needs of a minor or incapacitated person will be provided for in a timely manner in the parent's absence. The purpose of the legislation is to ensure that minors or incapacitated persons are not deprived of needed medical care or access to education. Additionally, the statute provides protection for medical providers and schools which reasonably and in good faith accept that the parent has in fact authorized the designee to provide such consent.

(From a memorandum in support for adding cross references between MHL Article 81, SCPA Article 17 and 17-A and GOL Title 15-A.)

Ian
Ian W. MacLean
THE MACLEAN LAW FIRM, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
T: 212-682-1555
F: 212-682-6999
E: ianwmaclean@maclean-law.com
W: www.maclean-law.com

More on Guardianship

Subject: [trusts-estates] Stand By Guardianship
Sent: Wednesday, September 22, 2010 9:11 AM
To: Trusts and Estates Law Section

Hi,

Can a person appoint a stand-by guardian that is a different individual than the guardian named in their Will? I have a client who wishes to name a family member who resides in NY as a stand-by guardian in the event they are incapacitated or upon their debilitation but if they pass away they would like the guardian to be their sister in Florida. The reasoning is that if they are still living they do not want to send the child/children out of state and away from them. Can they do this? Is it advisable? My thinking is that it should be the same person since the conditions that trigger this appointment are "chronic and substantial" and if the children go to one person and then the parent passes away the child will have to change guardians which may be difficult for the child. Also, this may lead to more disputes within the family.....thoughts?

Also, if a couple is executing the SBG form, can they do one form together or should they execute separate forms?

Thanks once again for all of your help in advance.

Maria Bucci-Orozco, Esq.
1230 Avenue of the Americas-7th Floor
New York, New York 10020
Tel: 646-756-2586
Fax: 646-756-2999
Email: maria@newyorkadoptionlaw.com
www.newyorkadoptionlaw.com

Subject: RE: [trusts-estates] Stand By Guardianship
Sent: Wednesday, September 22, 2010 10:24 AM
To: Trusts and Estates Law Section

Maria,

Take a look at SPCA 1726 and the practice commentaries thereto. What you seek to do can be done, IMHO. But, your client is setting up a very expensive and a two step process that is potentially disruptive for her children. Best interests of the children is the rule. Hopefully your client has taken the time to think through whether that is really the best interests of her children to have one guardian and then another. If the local guardian is good enough to be the guardian of the children while your client is incapacitated, how is it that the same guardian is not good enough, or not as good, as the guardian in Florida who is to serve after the client is dead? Perhaps there is good reason. If that is what is and what works for your client, then IMHO, it can be done. You can also name the guardian in Florida in the Section 1727 papers as the back up to the local standby guardian.

Kind regards,
Ian
Ian W. MacLean
THE MACLEAN LAW FIRM, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
T: 212-682-1555
F: 212-682-6999
E: ianwmaclean@maclean-law.com
W: www.maclean-law.com

Cousins as Distributees

Date: Tue, September 21, 2010 2:50:33 PM
To: Trusts and Estates Law Section <trusts-estates@lists.nysba.org>
Subject: [trusts-estates] New York County Probate Questions

Decedent is survived only by first cousins (and children of predeceased first cousins, i.e., first cousins once removed). It is my understanding that only the surviving first cousins are required to be cited, and not the first cousins once removed—correct? I am also informed that in other counties (Bronx, for example), if the closest diastributees are cousins, the Surrogate requires that the Public Administrator and the Attorney General be listed in paragraph 6.a. of the probate petition and that they must be cited. Is this the practice in New York County as well? Thanks for all responses.

Daniel S. Wohlfarth, Esq.
Schwartzman Garelik Walker & Troy, P.C.
355 Lexington Avenue – 20th Floor
New York, NY 10017
Tel. (212) 557-2900
Fax (212) 983-4193
DWohlfarth@sgwkt.com

Date: Tuesday, September 21, 2010 10:01 PM
To: Trusts and Estates Law Section
Subject: Re: [trusts-estates] New York County Probate Questions

Daniel—

The PA will be appointed if the only distributees are cousins or more remote—see SCPA 1123 2 (i) (2). The AG should not be required to be cited unless there are distributees whose whereabouts are unknown.

I think the issue of the predeceased cousin take by representation and should be included in the petition and cited as distributees. "Issue" is cut off at grandchildren of grandparents of the decedent, but those persons (the decedent's first cousins) take by representation. So if there is a member of the class of first cousins, and there are first cousins who predeceased leaving issue, those issue would appear to be included as distributees. Just my interpretation of the statute—I have not done any research on it though and can't recall any recent cousins cases of my own.

Lori Perlman, Esq.
Of Counsel, The Law Office of Hugh Janow LLC, Pearl River, NY
Special Counsel, Jill Miller & Associates, NY, NY
Phone: 609-799-6619 Fax: 609-799-6170
loriperlman@yahoo.com

Sent: Wednesday, September 22, 2010 9:25 AM
To: Trusts and Estates Law Section
Subject: RE: [trusts-estates] New York County Probate Questions

I recently had a similar situation in Kings County. It was an administration, not a probate.

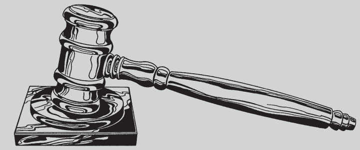
Although the Court appointed the PA temporary administrator (because real property needed to be secured), it quickly conducted a kinship hearing, at which I was able to prove that the cousins were the sole distributees. After the hearing, the Court granted letters of administration to one of the cousins and revoked the PA's temporary letters.

It is my understanding that this way of proceeding is a recent change in policy in King's Surrogate's. Before recently, under these circumstances, the PA would have been appointed full administrator. The new way is better for the family, since a kinship hearing would have to be conducted in any event upon the PA's accounting. Why not get the kinship hearing out of the way sooner and let a family member administer the estate?

I do not know what NY County is doing but it seems to me that, if this works for an administration, it certainly should work for a probate, where presumably the decedent has named an executor. Ask the court to conduct a kinship hearing at the outset, to determine the distributees who need to be cited. Once that is determined, move forward with getting the executor appointed, instead of the PA.

Kevin J. Farrelly, Esq.
Law Offices of Kevin J. Farrelly
270 Madison Avenue
Suite 1500 - 40th Street
New York, New York 10016
phone: (212) 684-8700
fax: (212) 686-1706
kjf@farrellylaw.com

Recent New York State Decisions



By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

DISTRIBUTION

Some Evidence of Paternity Necessary Before Genetic Testing May Be Ordered

Mother of decedent's alleged child began a proceeding for a compulsory accounting in alleged father's estate and a declaration of paternity. The Surrogate denied the request for testing, holding it was premature and without any legal basis. The Appellate Division reversed, based on former EPTL 4-1.2 which requires some evidence that decedent notoriously and openly acknowledged the child as his own before genetic testing will be ordered and that posthumous testing is "reasonable and practicable" under the circumstances. This is the standard established by the Second Department in *Matter of Poldrugovaz*, 50 A.D.3d 117, 851 N.Y.S.2d 254 (2008). Here photographs of the decedent with the child provided "some evidence" of acknowledgment and testing was practical because samples held by the coroner were available. *Matter of Betz*, 74 A.D.3d 1459, 903 N.Y.S.2d 557 (3d Dep't 2010).

MARRIAGE

Elements of Common-Law Marriage Not Proven

Plaintiff began a proceeding for the declaration of validity of her purported common-law marriage to the defendant and of its dissolution by divorce. The Supreme Court granted summary judgment for the defendant on all causes of action premised on the validity of the common-law marriage and the Appellate Division affirmed. The defendant's prima facie entitlement to judgment as a matter of law was based on the following: the defendant's evidence of the plaintiff's marriage to another man during much of the parties' relationship, the brief duration and sporadic nature of the parties' visits to the jurisdictions in which common-law marriage can be contracted (Pennsylvania and the District of Columbia), the plaintiff's failure to make specific allegations evidencing the parties' mutual agreement "expressed in the exchange of words in the present tense" to enter into marital relationship while present in those jurisdictions, substantial documentary evidence establishing that the parties continued to consider themselves unmarried after visits to those jurisdictions, judicial admissions by the plaintiff that she and the defendant were not married and that he had no legal or financial obligations to her all established *Baron v. Suissa*, 74 A.D.3d 1108, 906 N.Y.S.2d 50 (2d Dep't 2010).

William P. LaPiana

PARENTAGE

Unmarried Partner May Have Visitation Rights with Child of Other Partner Based on the Parties' Vermont Civil Union

A lesbian couple entered into a Vermont civil union one month before one of the women gave birth. The couple separated two and half years later, and while the child's mother at first allowed her former partner to visit with the child she eventually cut off all communication between the child and her former partner. The former partner then sought joint legal and physical custody of the child. Supreme Court ruled in the former partner's favor, finding that she had made a prima facie case for invoking equitable estoppel against the mother's attempt to deny her access to the child. The Appellate Division reversed on the authority of *Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) where the Court of Appeals held that only a biological or adoptive parent can seek visitation against a custodial parent's wishes.

The Court of Appeals granted leave to appeal and reversed for a hearing on whether visitation by the former partner would be in the best interests of the child. While the entire Court concurred in the result, only four judges voted to reaffirm *Alison D.* The majority then stated that the birth of the child after the parties had entered into a Vermont civil union would make both parties the child's parent. The majority then held that New York would recognize the civil union under the doctrine of comity for purposes of recognizing parentage. *Debra H. v. Janice R.*, 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010).

TRUSTS

Trustees' Litigation Expenses Can Be Charged Solely to Objecting Beneficiaries' Share of Trust; *Matter of Dillon* Overruled

One family of beneficiaries objected to trustees' accountings in two related trusts. Another group of beneficiaries filed an acknowledgment that they had no objections and that they would therefore not share in any surcharges imposed on the trustees under the "pro tanto rule," a common-law rule which prevents beneficiaries who have not filed objections from sharing in a recovery obtained because of objections by other beneficiaries. All objections were dismissed and although the beneficiaries who did not object argued that reimbursement of the trustees' litigations expenses should come only from the shares of the trusts belonging to the beneficiaries who had filed objections, the Surrogate ordered that the expenses be paid from each trust generally and the Appellate Division affirmed, both courts relying on *Matter of Dillon*, 28 N.Y.2d 597, 319 N.Y.S.2d 850, 268 N.E.2d 646 (1971).

Dillon held that SCPA 2110(2), which allows the court to direct the payment of a fiduciary's litigation costs from "the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested," did not authorize the court to allocate the costs among the persons interested in the estate. The Court reversed the Appellate Division and expressly overruled *Dillon*, holding that the opinion had misconstrued the statute which on its face gives the court discretion to disburse funds from the share of any person interested in the property under the fiduciary's control and not only from the "estate generally." In addition, the decision in *Dillon* ignored the importance of fairness in allocating the burden of paying a fiduciary's litigation costs, citing *Matter of Ungrich*, 201 N.Y. 415, 94 N.E. 999 (1911) and cases following it.

The court remanded the matter to the Surrogate's Court so that it could undertake "a multi-faceted assessment of the sources from which the fees are to be paid," and listed factors which may be included: whether the objecting beneficiary acted in his or her individual interest or that of the entire estate, the possible benefits to individual beneficiaries, the extent of an individual beneficiary's participation in the proceeding, whether there was "justifiable doubt" regarding the fiduciary's conduct, the relative size of the interests of the objecting and non-objecting beneficiaries, and the future interests that could be affected. *Matter of Hyde*, 15 N.Y.3d 179, 906 N.Y.S.2d 796, 933 N.E.2d 194 (2010).

WILLS

Witness's Failure to Remember Circumstances of Will Execution Not Sufficient to Rebut Presumption of Due Execution

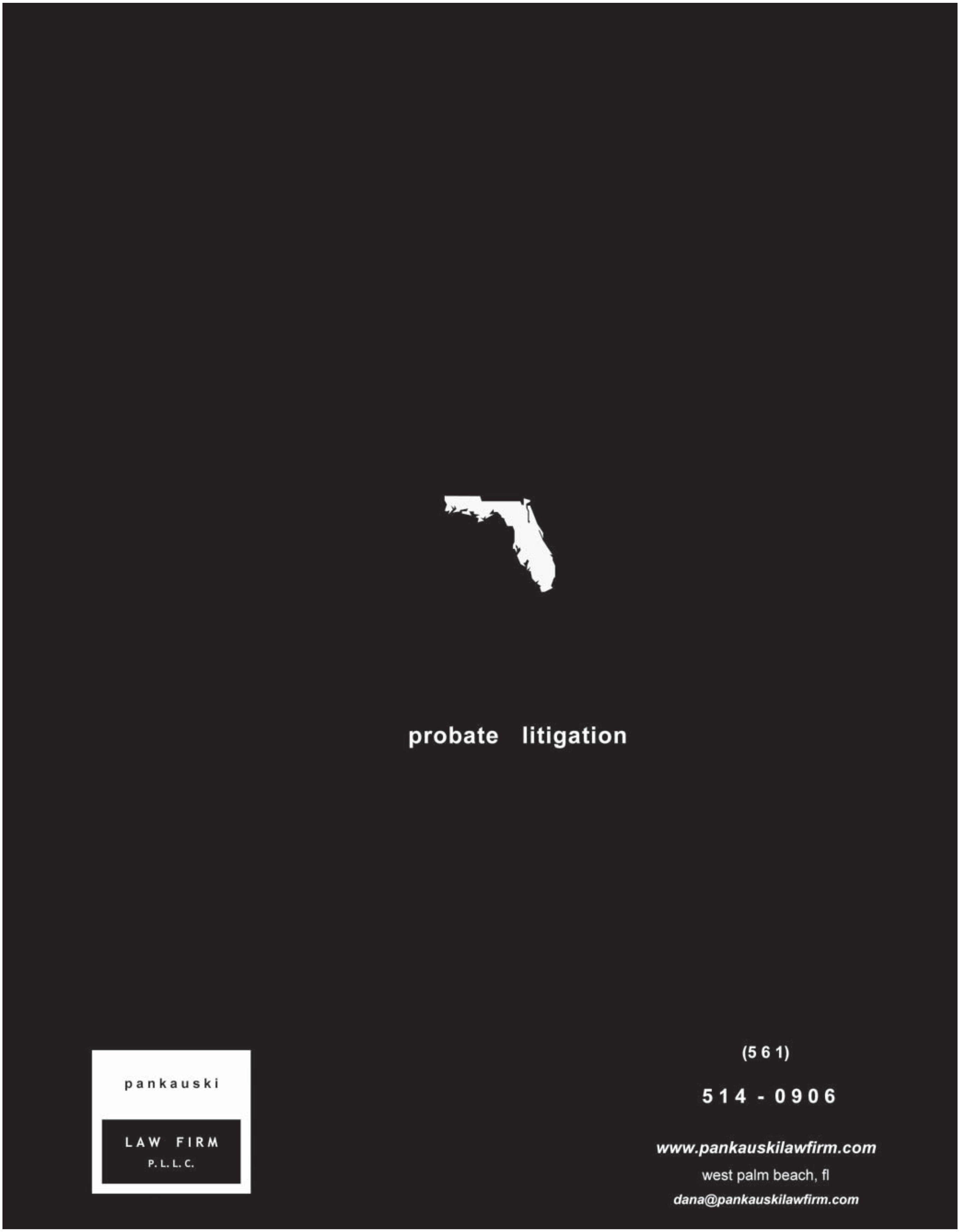
Decedent's children offered for probate an almost fifty-year old document bearing the decedent's signature, the signatures of three witnesses, one of whom was the lawyer whose letterhead appears on the cover page of the document, and an attestation clause properly reciting the details of the execution ceremony required by statute then in effect under DEL § 21. Decedent's widow filed objections. Handwriting experts authenticated the signatures of the testator and the lawyer. The proponents also submitted an invoice from the attorney-drafter to the decedent for services in connection with the preparation of a will. The only surviving witness was deposed. She recognized her signature and identified the address appearing next to her signature as the address at which she lived at the time the will was signed. She could not remember the execution ceremony. The Surrogate granted summary judgment for the proponents and admitted the will to probate. The Appellate Division affirmed, holding that the witness's inability to remember anything about the will signing did not overcome the presumption of due execution raised by the attestation clause and the supervision of the execution by an attorney and that given all of the circumstances the grant of summary judgment was proper. One judge dissented, arguing that the ambiguities in the witness's deposition are sufficient to allow the objectant to proceed to trial. *Matter of Halpern*, 76 A.D.3d 429, 906 N.Y.S.2d 253 (1st Dep't 2010).

Potential Objectants May Examine Witnesses Not Included in "Safe Harbor" but No Contest Clause Cannot Be Construed Before Admission of the Will

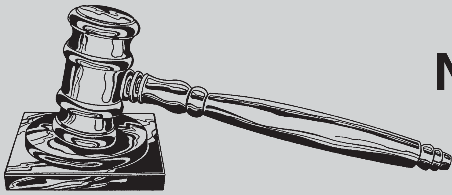
Nominated executor petitioned for probate of the decedent's will, which contains a no contest clause. Respondents completed examination of the persons listed in EPTL 3-3.5(b)(3)(D), the "safe harbor," whose examination does not trigger a no contest clause and then requested orders (1) construing the no contest clause and (2) granting the respondents the right to examine the nominated successor executor and the attorney-draftsman of a purported prior will of the decedent. The court granted the motions for the examinations under the authority of *Matter of Singer*, 13 N.Y.3d 447, 892 N.Y.S.2d 836, 920 N.E.2d 943 (2009) [discussed in the Spring 2010 issue of the *Newsletter*], reading that opinion to permit the examination of any person with potentially valuable or relevant information and to require that the decision on whether examinations outside of the safe harbor violate a no contest clause be determined by the testator's intent as found by the Surrogate. However, because under governing Appellate Division precedent (*Matter of Martin*, 17 A.D.3d 598, 793 N.Y.S.2d 458 (2d Dep't. 2009)) a will cannot be construed before it is admitted to probate, the question of whether or not the proposed examinations violate the no contest clause must await probate of the will. *Matter of Baugher*, 906 N.Y.S.2d 856, 2010 NY Slip Op. 20359 (Sur. Ct., Nassau Co. 2010).

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. 2010 Lexis-Nexis).



(paid advertisement)



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

By Ilene Sherwyn Cooper

Attorney's Fees

In *In re Rodriquez,* the petitioner, one of the two sons, requested an order, *inter alia,* directing payment of his distributive share of the estate, a portion of which was previously ordered, denying administrator's commissions, and surcharging the administrator for the fees incurred by the petitioner in bringing the application and a prior application for a distributive share, payable from the administrator's own funds or his presumptive share of the estate.

The decedent died intestate, and letters of administration issued to the respondent on consent of the petitioner upon his posting a bond. Thereafter, the petitioner and his counsel requested the respondent to account and to produce documents. An account was prepared but never signed. Based upon a prior petition filed with the court by the petitioner, the respondent was ordered to pay the petitioner his distributive share and to account. The respondent failed to comply with these directives.

As a consequence, the petitioner instituted the proceeding seeking the relief *sub judice.* The respondent failed to oppose the application. As a consequence of the respondent's default, the uncontroverted allegations in the petition regarding the administrator's failure to comply with the court's directives, to pay the petitioner his distributive share and to account were deemed due proof thereof pursuant to SCPA 509.

In view of the administrator's failure to account and to distribute estate assets, he was denied commissions. As such, the petitioner was awarded an additional distributive share of the estate equal to half the commissions that otherwise would have been paid to respondent. In addition, the petitioner's request for his reasonable legal fees, costs and disbursements incurred in commencing the proceedings to recover his distributive share was granted, pursuant to *Matter of Hyde.* The court directed that said award, as well as the distributive share of the petitioner, be paid in the first instance by the respondent personally or from his distributive share before the surety was held liable for such sums.

In re Rodriquez, N.Y.L.J., July 23, 2010, p. 35, col. 1 (Sur. Ct., Bronx Co.) (Surr. Holzman).

Attorney Malpractice

In an action brought by the plaintiff, individually, against her attorneys for, *inter alia,* breach of fiduciary duty, the court dismissed the complaint pursuant to CPLR 3211(a)(1) and (7) on the grounds that the scope of counsel's employment was limited to representing plaintiff in her fiduciary capacity, rather than her individual capacity. The record revealed that the defendants had been retained to represent the plaintiff as co-executor of her late father's estate. The plaintiff was the subject of a pending suit to recover monies due on notes that she executed before her father died. The plaintiff alleged that the defendants had failed to inform her about the circumstances surrounding the execution of those notes and had failed to question their validity. The defendants submitted a copy of their retainer with the plaintiff which reflected that she understood and accepted its terms before engaging counsel to represent her, and the limited nature of counsel's representation, i.e., as co-executor of her deceased father's estate.

Based on the foregoing, the Supreme Court dismissed the complaint, and the Appellate Division affirmed, holding that the language of the retainer agreement conclusively established a defense to plaintiff's claims of malpractice. Specifically, the court concluded that plaintiff's individual liability on the notes was outside the scope of defendants' representation of the plaintiff in her capacity as co-executor of the estate. The Court also found that the complaint failed to establish that the plaintiff's alleged damages were proximately caused by any acts or omissions of the defendants.

Hallman v. Kantor, 72 A.D.3d 895, 901 N.Y.S.2d 284 (2d Dep't 2010).

Certification of Transcript

In *Rosa v. City of New York,* the defendant moved for an order to reargue and/or renew its motion summarily dismissing the complaint. The court had based its prior decision and order denying the relief finding that absent proof that the unexecuted transcripts of the defendant's own witnesses had been sent to them for correction, they could not be used by the defendant in support of its motion despite being certified.

In denying the defendant's application, the court found that the defendant did not respond to plaintiff's requests that its witnesses sign their transcripts. As such, the court held that despite their certification the transcripts could not be used affirmatively by the defendant in support of its motion for summary judgment. The court noted that none of the cases cited by the defendant stood for the proposition that compliance with CPLR 3116(a) was unnecessary when the transcript is certified or the facts therein are not challenged by the opposing party.

Rosa v. City of New York, N.Y.L.J., June 1, 2010, p. 18, col. 3 (Sup. Ct., N.Y. Co.) (Jaffe, J.).

Discovery Proceedings

In *In re Tomshinsky,* a beneficiary of the estate sought to invoke the provisions of SCPA 2102 in order to obtain information regarding the disposition of an apartment in which the decedent was a tenant at the time of her death. The proceeding was instituted against the fiduciary of a deceased co-fiduciary of the estate, as well as a surviving child of the deceased fiduciary. Both respondents moved for summary judgment dismissing the proceeding on the grounds that neither of them is the fiduciary of the decedent's estate. In granting the motion, the court found that inasmuch as the respondent, son, had not served in a fiduciary role with respect to the estate, the strict language of the statute precluded relief against him. With respect to the respondent fiduciary of the deceased fiduciary, the court opined that if the statute had been intended to apply to fiduciaries in such capacity, it would have explicitly so stated. Finding that the statute omitted this category of fiduciaries from its scope, the court concluded that the second respondent, albeit a fiduciary, was not subject to the proceeding. Accordingly, the petition was dismissed.

In re Tomshinsky, N.Y.L.J., Apr. 12, 2010, p. 29, col. 3 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Discovery Proceedings

In *In re Delgatto*, the court denied a motion and cross-motion for summary judgment finding that there were triable issues of fact regarding the decedent's mental capacity to execute a revocable living trust and deed to which title to his home was transferred.

In support of their respective motions, the petitioner and the respondent submitted affirmations of their respective counsel with exhibits, including but not limited to unsigned, unsworn deposition transcripts. The court noted that an attorney's affirmation is of no probative value on a motion for summary judgment unless the attorney has first hand knowledge of the facts, or is accompanied by documentary evidence that constitutes admissible proof. However, neither attorney represented that he had personal knowledge of the facts. Moreover, the court opined that the deposition transcripts were of no probative value, because they were unsigned, and there had been no indication that the deponent had refused or otherwise failed to sign the transcript within sixty days after it was delivered for signature.

Within this context, the court concluded that the respondent had failed to submit sufficient proof that the decedent had the requisite capacity to sign the instruments in issue. Although respondent had proffered hospital and nursing records in support of her position, the court held that the affidavits of nursing and medical personnel submitted by the petitioner were sufficient to create a question of fact. Further, while the court concluded that the petitioner had not established a prima facie case of undue influence, it found that a confidential relationship existed between the respondent and the decedent which shifted the burden to the respondent to explain the circumstances surrounding the transactions. The court determined that a question of fact existed as to whether the proffered explanation was adequate.

In re Delgatto, N.Y.L.J., Apr. 6, 2010, p. 27, col. 1 (Sur. Ct., Kings Co.) (Surr. Johnson).

Discovery Proceedings

In *In re Greenspan,* the court was confronted by a motion and cross-motion for summary judgment in a proceeding for the turnover of funds in a bank account that the decedent maintained jointly with his spouse, the respondent, the petitioners' step-mother. The petition alleged that the decedent deposited the funds into the account as a result of the respondent's fraud, undue influence, and intimidation. The record revealed that the decedent had Parkinson's disease during his final years and had consequently retired from the practice of medicine as an oncologist. He was confined to a wheelchair and needed the assistance of home health care aides. Although his mobility was limited, he maintained contact with a close friend, who was a weekly dinner guest at his home, and who was also the decedent's stock broker and financial advisor.

The transfers in issue were two weeks apart, and consisted of deposits of funds withdrawn from the decedent's brokerage account into his joint account with the respondent. Each withdrawal of funds was effected by telephoned instructions by the decedent to his broker. However, the court noted that the first deposit of funds was via a deposit slip prepared by the respondent; and that it was not clear who prepared the second deposit slip. It was equally unclear who made the subject deposits, though there was no question that the decedent was too physically disabled to have handled these tasks on his own. The court also noted that on the date of the first transaction, the decedent arranged with his broker for a withdrawal of additional funds by way of separate check, which was deposited into his individual account. Further, the court found it relevant that the transfers in issue significantly altered decedent's testamentary scheme to leave respondent a relatively minimal portion of his estate, and his children the bulk of his largesse.

About five months before the transactions, decedent had undergone certain psychological testing incident to a hospitalization, which revealed that decedent suffered from a decline in his cognitive abilities associated with his Parkinson's disease. Nevertheless, the decedent's treating physician testified that in his view the decedent did not suffer from either dementia or Alzheimer's disease, and that he had no physical condition that affected his cognitive functioning.

Based on the foregoing, as well as additional proof in the record, the court held that the respondent had made a prima facie showing that the decedent voluntarily and knowingly transferred the funds in question to his joint account. On the other hand, while the court concluded that the petitioners had failed to sufficiently plead a cause of action for fraud or to submit adequate proof of duress, it found that a question of fact existed on the issue of undue influence. Significantly, the court opined that while typically the burden of proving undue influence rests upon the party asserting it, the burden shifts to the perpetrator when a confidential relationship between the donor and donee exists. The court recognized that while family relationships are not per se confidential, and thus do not necessarily give rise to a presumption that transfers between family members are unfair, when, as in the case *sub judice,* the record also shows that the donor is in a weakened and dependent state, that the donee participated in the transaction from which he or she benefited, and there is reason to question whether the gift was made voluntarily, summary dismissal of a claim of undue influence would be unwarranted.

In re Greenspan, N.Y.L.J., July 22, 2010, p. 32, col. 4 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Due Execution

In *In re Grancaric,* the decedent's paramour filed a proceeding for probate of a purported Will, after the issuance of letters of administration to his brother. The decedent's brother objected to probate on numerous grounds, including but not limited to due execution. Specifically, in this regard, the brother presented the testimony of a forensic handwriting expert at trial who opined that the signature on the Will was not the genuine signature of the decedent. To contradict this testimony, the petitioner presented the testimony of the attorney who supervised the execution of the Will, as well as the testimony of the three attesting witnesses, and her own handwriting expert, who opined that there were "indications" that the decedent was the individual who signed the instrument, but could not state with a degree of professional certainty that the signature was "probably" decedent's writing. The jury found that the Will had not been duly executed and the Surrogate denied probate. The Appellate Division affirmed, holding that despite the presumption of due execution resulting from the fact that its signing was attorney-supervised, the jury was free to accept the testimony of the objectant's handwriting expert and conclude that the signature on the instrument did not belong to the decedent.

In re Grancaric, 68 A.D.3d 1279, 890 N.Y.S.2d 685 (3d Dep't 2009).

Due Execution

In an uncontested probate proceeding, the court admitted the Will to probate despite the fact that the signatures of the attesting witnesses appeared after the testator's, on a self-proving affidavit affixed to the instrument. The court held that the appearance of the affidavit after the testator's signature and the dispositive provisions evidenced a desire by the testator to have the affidavit be a part of his Will. Moreover, although the addresses of the witnesses did not appear on the Will or the affidavit, the court concluded that was not fatal to compliance with the statutory requirements of due execution. Finally, the court determined that the lack of an attestation clause or the fact that the signatures followed the signature of the testator did not preclude probate.

In re Neville, N.Y.L.J., June 16, 2010, p. 28, col. 3 (Sur. Ct., Nassau Co.) (Surr. Riordan).

Marriage

In *In re Farraj,* the Appellate Division affirmed an Order of the Surrogate's Court, Kings County (Torres, S.), which denied the fiduciary's motion to dismiss a petition for a compulsory accounting. The petitioner was the alleged spouse of the decedent. The record revealed that the petitioner and the decedent entered into a formal marriage ceremony in accordance with the laws of Islam at the home of the petitioner's brother in New Jersey. An Islamic clergyman came to New Jersey to solemnize the marriage, although a marriage license was not obtained. Thereafter, the petitioner and the decedent returned to Brooklyn to hold a wedding celebration. They resided in New York until the decedent's death, intestate, in 2007. The decedent's son from a prior marriage obtained letters of administration with respect to his estate. Thereafter, the petitioner moved to compel an accounting, and the fiduciary moved to dismiss, alleging that the petitioner was not the decedent's surviving spouse, since her marriage to him was not valid under the laws of New Jersey.

The Surrogate's Court denied the motion, and the Appellate Division affirmed, concluding that New York law should apply to determine the validity of the marriage, and that under New York law the marriage was valid, even without a marriage license, since it was solemnized. In reaching this result, the Court relied upon the Restatement Second of Conflict of Laws §283, which provides that the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage. Analyzing the circumstances surrounding the marriage from this perspective, the Court noted that the petitioner and the decedent were married in New Jersey only to satisfy Islamic law, which requires that the parties be married at the residence of the bride's eldest male relative. However, thereafter, they resided in New York and held themselves out as a married couple in New York. The Court found that New Jersey's contacts with the couple were tangential, since they left the state immediately after the marriage ceremony to return to New York, where they remained for the entirety of their marriage.

In re Farraj, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2d Dep't 2010).

Motion to Dismiss

In *In re Villar Family Revocable Trust,* the court granted the respondent's motion to dismiss the petition of his co-trustee seeking his removal. The court opined that the determination of a motion to dismiss is limited to ascertaining whether the petition, liberally construed, states in some form a cause of action, rather than whether petitioner has a likelihood of success on the merits. The court noted that the sole basis alleged by the petitioner for the respondent's removal was his failure to respond to petitioner's attempts and the attempts of petitioner's mother to contact him. The court held that the allegations in the petition, without more, were insufficient as a matter to law to state a cause of action for removal. Specifically, the court concluded that respondent's failure to communicate with his co-trustee did not signify that he failed to fulfill the duties of his office.

In re Villar Family Irrevocable Trust, N.Y.L.J., June 4, 2010, p. 42, col. 5 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

Removal of Trustee

Before the court in *In re Bernstein* was an application by the settler to remove his son as trustee of the trust for self-dealing and alleged failure to cooperate with his co-trustee to such an extent that the proper administration of the trust was in jeopardy. Although the court noted preliminarily that the settler of a lifetime trust is not among the persons entitled to seek removal of a trustee under the applicable statutes, the settler based his claim of standing upon his status as a trust beneficiary. To this extent, the court considered the provisions of the trust, which authorized the trustee, in part, to make discretionary distributions of income to one or more individuals, other than the trustee, his spouse, descendants, or creditors, i.e., "almost every person in the world" as the trustee determined, and principal distributions to every person entitled to receive income.

The court found that as a member of the world population technically entitled to receive discretionary distributions of income and principal from the trust, the settler was a beneficiary. Nevertheless, the court concluded that this interest was not sufficient to grant him standing to seek removal of the trustee. Specifically, the court held that its determination was based not only on the de minimus nature of the settlor's interest, but also on constraints placed upon the settlor's control by tax laws that confer benefits for which the trust was expressly intended to qualify. Notably, with respect to the former ground, the court opined that if the settler had standing to seek the trustee's removal, so too would virtually every individual in the world, given the breadth of the trust instrument. Inasmuch as the concept of standing derives from the requirement that the court have jurisdiction over an actual controversy, when the interest of an individual is negligible there effectively is no controversy to which jurisdiction may attach. With respect to the second ground, the court recognized that the ability of the settler to remove the trustee would effectively subject the trust to estate tax, an outcome that the settler clearly intended to avoid.

In re Bernstein, N.Y.L.J., Apr. 30, 2010, p. 32, col. 3 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Wrongful Death

Before the court in *In re Diba* was whether it had authority to order a proposed division of one spousal share of a wrongful death recovery to two women to whom the decedent was legally married at the time of his death in accordance with the laws of Senegal.

The record revealed that although the decedent resided in the Bronx when he died, he was a citizen and domiciliary of Senegal. The decedent's spouses and eleven children were also domiciliaries of Senegal, and continued to reside there at the time of the proceeding.

The underlying action was commenced and venued in the Supreme Court, Bronx County, where the court approved a compromise and referred all issues relating to the payment of liens, allocation and distribution to the Surrogate's Court. With respect to the issue of distribution, the court referenced the provisions of EPTL 4-1.1(a)(1) and EPTL 5-1.2 (a)(2), which respectively refer to one class of distributees as including "a spouse," and disqualify a spouse where it is found that the marriage is bigamous. Nevertheless, the court noted that the law of Senegal permits polygamy, and therefore does not provide for a similar disqualification in the case of a bigamous relationship. The question thus became whether the laws of Senegal should be recognized in order to allow division of the wrongful death recovery between the two spouses of the decedent, or whether those laws were in conflict with or contrary to the public policy of New York.

The court found that authorizing a division between the two spouses would not be contrary to New York laws and statutes which require an award and distribution of only one spousal share. The court concluded that although such share would be divided in two, that result would not alter or be violative of the interests of New York in enforcing its distribution statute. To this extent, the court also noted that the distribution sought would not alter the interests of the decedent's children, as their shares of the recovery were neither enlarged nor diminished as a result of the division between the two spouses.

In re Diba, N.Y.L.J., July 26, 2010, p. 27, col. 2 (Sur. Ct., Bronx Co.) (Surr. Czygier).

Ilene S. Cooper, Esq., Farrell Fritz P.C., Uniondale, New York.

Trusts and Estates Law Section Fall Meeting

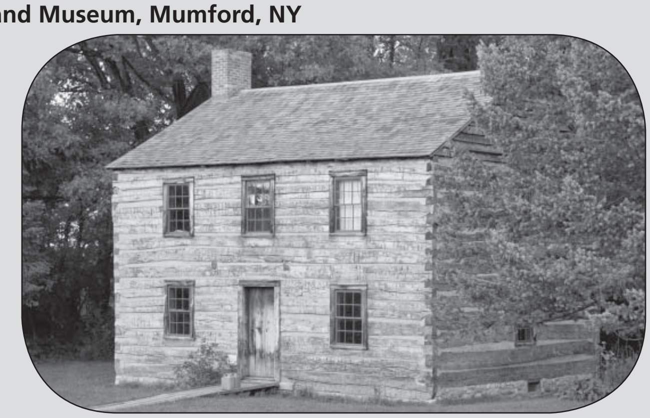
October 7–8, 2010 • Radisson Rochester Riverside • Rochester

Section Chair Gary Freidman welcomes Section members to Rochester

Good times and good food in Rochester

Genesee Country Village and Museum, Mumford, NY

Section members on a field trip to…



…the original Monroe County Surrogate's Court?

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.

Charitable Organizations
Ronni G. Davidowitz
Katten Muchin Rosenman LLP
575 Madison Ave., 21st Floor
New York, NY 10022
ronni.davidowitz@kattenlaw.com

Continuing Legal Education
Jennifer N. Weidner
Boylan, Brown, Code, Vigdor & Wilson, LLP
2400 Chase Square
Rochester, NY 14604
jweidner@boylanbrown.com

Diversity
Anne C. Bederka
Greenfield Stein & Senior, LLP
600 Third Avenue
New York, NY 10016
abederka@gss-law.com

Lori A. Douglass
Moses & Singer LLP
405 Lexington Avenue
New York, NY 10174-1299
ldouglass@mosessinger.com

Elderly and Disabled
Lisa K. Friedman
Law Office of Lisa K. Friedman
232 Madison Avenue, Suite 909
New York, NY 10016
lf@lisafriedmanlaw.com

Estate and Trust Administration
Natalia Murphy
Day Pitney LLP
7 Times Square
New York, NY 10036
nmurphy@daypitney.com

Estate Litigation
Eric W. Penzer
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
epenzer@farrellfritz.com

Estate Planning
Darcy M. Katris
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
dkatris@sidley.com

International Estate Planning
Richard E. Schneyer
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
schneyer@thshlaw.com

Law Students and New Members
Lauren M. Goodman
Katten Muchin Rosenman LLP
575 Madison Avenue, Room 2010A
New York, NY 10022-2511
lauren.goodman@kattenlaw.com

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

Legislation and Governmental Relations
Michael K. Feigenbaum
Ruskin Moscou & Faltischek PC
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
mfeigenbaum@rmfpc.com

John R. Morken
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jmorken@farrellfritz.com

Life Insurance and Employee Benefits
Brian K. Haynes
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202-1355
bhaynes@bsk.com

Members and Membership Relations
Stephen B. Hand
Jaspan Schlesinger LLP
300 Garden City Plaza
Garden City, NY 11530
shand@jaspanllp.com

Thomas J. Collura
Tuczinski, Cavalier, Gilchrist & Collura, P.C.
54 State Street, Suite 803
Albany, NY 12207-2524
tcollura@tcgclegal.com

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

Practice and Ethics
Ronald J. Weiss
Skadden Arps Slate Meagher & Flom LLP
Four Times Square, 28th Floor
New York, NY 10036
ronald.weiss@skadden.com

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

Taxation
Laurence Keiser
Stern, Keiser & Panken, LLP
1025 Westchester Avenue, Suite 305
White Plains, NY 10604
lkeiser@skpllp.com

Technology
David Goldfarb
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118-1100
goldfarb@seniorlaw.com

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

Executive Committee District Representatives

First District
Linda J. Wank
Frankfurt Kurnit Klein & Selz PC
488 Madison Avenue, 10th Floor
New York, NY 10022
lwank@fkks.com

Second District
James H. Cahill, Jr.
Cahill & Cahill PC
161 Atlantic Avenue, Suite 201
Brooklyn, NY 11201
james.cahilljr@verizon.net

Third District
Deborah S. Kearns
Albany Law School
Law Clinic & Justice Center
80 New Scotland Avenue
Albany, NY 12208
dkear@albanylaw.edu

Fourth District
Michael R. Suprunowicz
Higgins, Roberts, Beyerl & Coan, P.C.
1430 Balltown Rd.
Niskayuna, NY 12309
msuprunowicz@hrbclaw.com

Fifth District
Martin A. Schwab
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202
mschwab@bsk.com

Sixth District
John G. Grall
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902
jgrall@binghamtonlaw.com

Seventh District
Audrey Patrone Peartree
Harris Beach PLLC
99 Garnsey Road
Pittsford, NY 14534
apeartree@harrisbeach.com

Eighth District
Catherine T. Wettlaufer
Hiscock & Barclay LLP
1100 M&T Center
Three Fountain Plaza
Buffalo, NY 14203-1414
cwettlaufer@hblaw.com

Ninth District
Charles T. Scott
Chief Clerk—Surrogate's Court
Westchester County
9th Judicial District
111 Dr. Martin Luther King Jr. Blvd.
19th Floor
White Plains, NY 10601
cscott@courts.state.ny.us

Tenth District
Peter K. Kelly
Ruskin Moscou & Faltischek PC
East Tower, 15th Floor
1425 Rexcorp Plaza
Uniondale, NY 11556-1425
pkelly@rmfpc.com

Eleventh District
Madaleine S. Egelfeld
125-10 Queens Blvd., Suite 311
Kew Gardens, NY 11415
madaleinelaw@gmail.com

Twelfth District
Kate E. Scooler
Bronx Surrogate's Court, Law Dept.
851 Grand Concourse
Bronx, NY 10451
kscooler@courts.state.ny.us

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

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 (ianwmaclean@maclean-law.com) or mailed on a 3½" floppy disk or CD (Ian W. MacLean, The MacLean Law Firm, P.C., 100 Park Avenue, 20th Floor, New York, NY 10017) in Microsoft Word or WordPerfect. Please include biographical information. Mr. MacLean may be contacted regarding further requirements for the submission of articles.

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.

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

TRUSTS AND ESTATES LAW SECTION NEWSLETTER