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Trusts and Estates Law Section Newsletter

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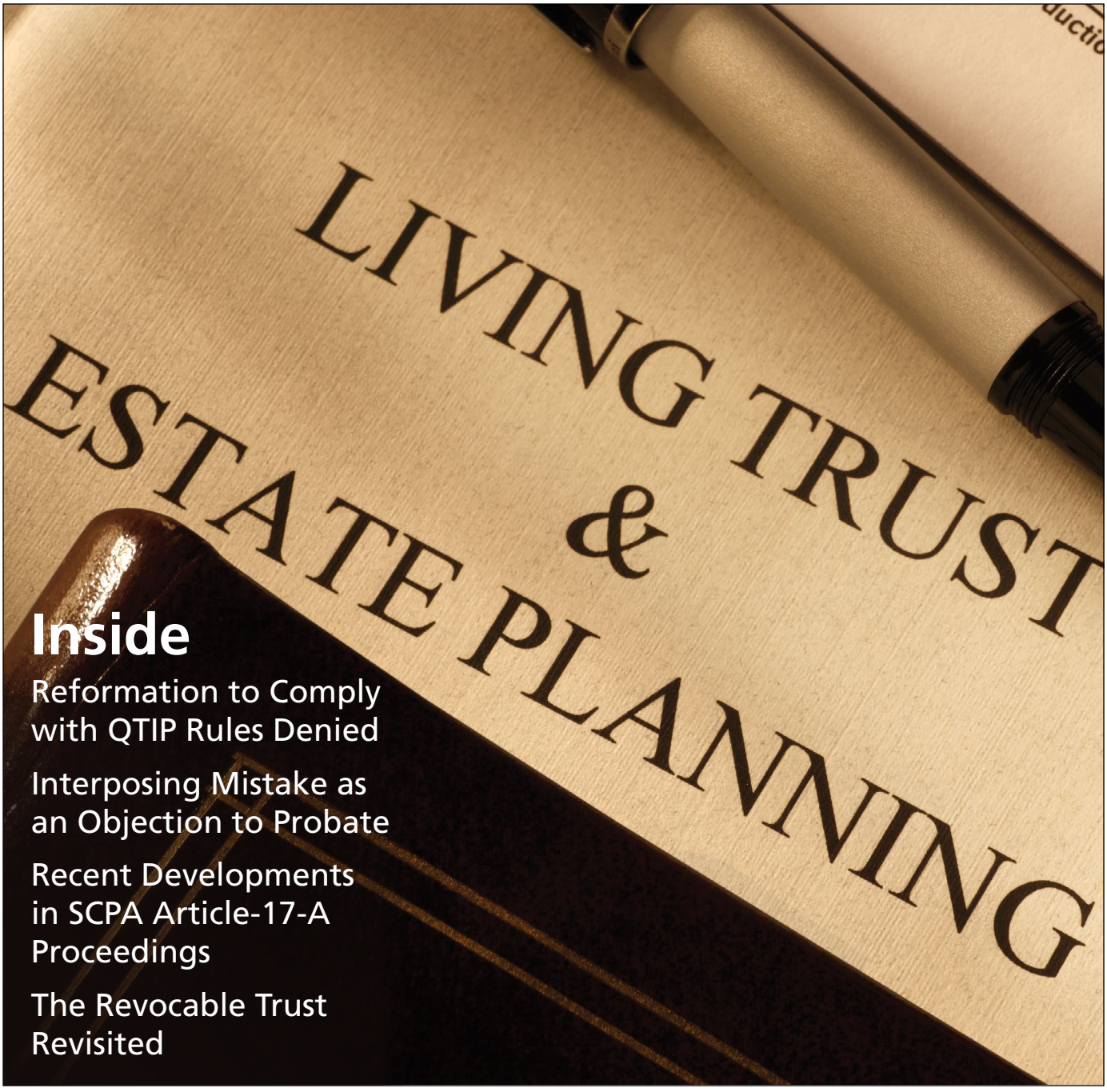

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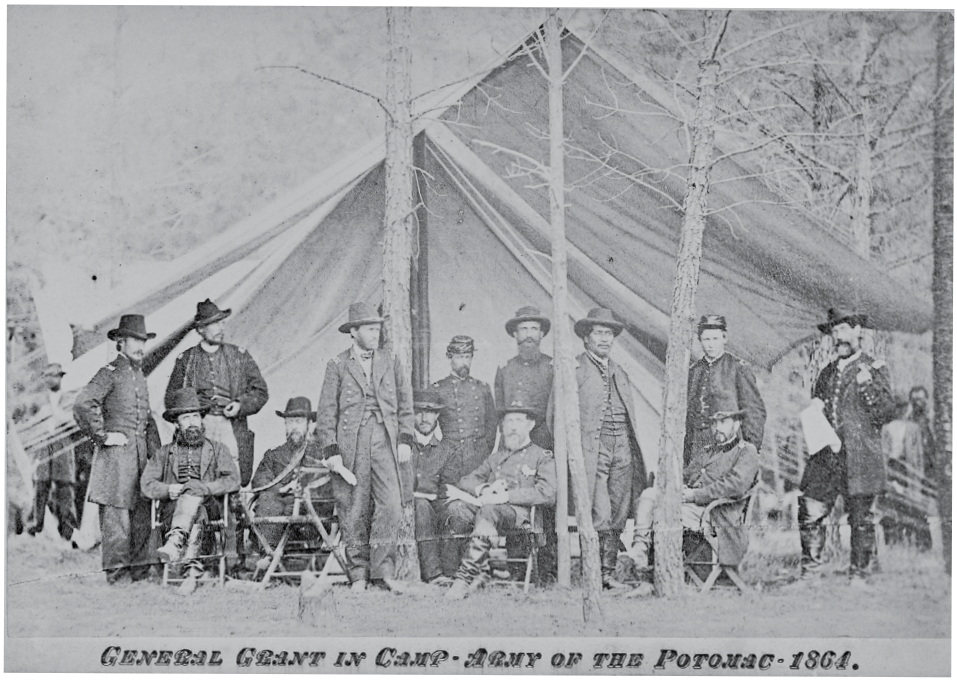

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Message from the Chair

The year is off to a good start. Our January 2017 Section meeting was excellent and well attended. Chaired by Georgiana Slade, Esq. of Milbank, Tweed, Hadley & McCloy, the CLE program was titled: "Lessons From Astor, Clark & Redstone: The Incapacitated Client." The program addressed issues that we, as trusts and estates practitioners, face day-in and day-out, especially with our aging population and the increase in persons suffering from dementia. The keynote speaker at the luncheon following the CLE program was James B. Stewart, Esq., a columnist for the *New York Times*, who addressed the audience about Sumner Redstone's affairs.

At the annual meeting for the Section, the following officers were elected:

- Sharon L. Wick, Esq. (Buffalo)—Chairperson
- Natalia Murphy, Esq. (NYC)—Chairperson Elect
- Cristine Cioffi, Esq. (Niskayuna)—Secretary
- Robert M. Harper, Esq. (Uniondale)—Treasurer
- Kathryn Grant Madigan, Esq. (Binghamton)—6th District
- Holly A. Beecher, Esq. (Buffalo)—8th District
- Laurence Keiser, Esq. (White Plains)—9th District

Thank you to the nomination committee, Meg Gaynor, Marion Fish and Ron Weiss.

To recap, in 2016 several pieces of relevant New York legislation were passed, including the extension of the QDOT sunset, New York's Fiduciary Access to Digital Assets Act, and an amendment to the CPLR which explicitly states that the attorney-client privilege protects communications over the preparation of revocable trusts. In 2017, the Section will continue actively working on proposed legislation.

With a new President of the United States, our Section's committees are monitoring any federal tax legislation affecting estate and trust planning and administration so that we are in a position to promptly educate our members on any changes.

While committee Chairs and Vice Chairs for 2017 are in place, there is always room for new committee members. I encourage all Section members to become involved. The committees' work on proposing legislation and continuing legal education is essential to maintaining the high level of trusts and estates practitioners that we currently have in the Bar.

Our Section's Spring Meeting will be held from May 11 to 13, 2017 in New Orleans, Louisiana; please save the date. The co-chairs are Marion Fish and Darcy Katris. The CLE topics will be focused on planning for married couples. Given the rich culture of the city of New Orleans, the social events should prove to be of great interest to everyone.

I am honored to serve as Chair of our Section. I appreciate the support of the NYSBA and most particularly our Section members and the staff. Last, but not least, we all owe a big thank you to Meg Gaynor for her leadership in 2016.

Sharon Wick

Message from the Editor

In this edition of our *Newsletter*, Lainie Fastman provides an in depth look at revocable trusts and the circumstances in which they should be considered for clients; Stephanie Hamberger suggests several alternatives to the New York Power of Attorney; and Gary Bashian gives an overview of the "three-two rule" in contested probate proceedings and situations in which it has been expanded.

Also in this issue, Laurence Keiser discusses a recent reformation proceeding that sought the benefits of the marital deduction in the context of a same-sex marriage; Daniel Reiter explains objecting to probate on the basis of mistake; and C. Raymond Radigan and Lois Bladykas address recent developments in Article 17-A proceedings.

Finally, Parth Chowlera, on behalf of the Section's Technology in Practice Committee, offers information about mobile apps that are particularly useful to the trusts and estates practitioner.

Our next submission deadline is June 9, 2017.

The editorial board of the *Trusts and Estates Law Section Newsletter* is:

Jaclene D'Agostino
jdagostino@farrellfritz.com
Editor in Chief

Naftali T. Leshkowitz
ntl@leshkowitzlaw.com
Associate Editor

Sean R. Weissbart
srw@mormc.com
Associate Editor

Thomas V. Ficchi
tficchi@cahill.com
Associate Editor

Shaina S. Kamen
skamen@stroock.com
Associate Editor

Jaclene D'Agostino

"Special Circumstances" and Recent Cases

Expanding the Scope of the "Three-Year Two-Year" Rule

By Gary E. Bashian

> "There's two possible outcomes: if the result confirms the hypothesis, then you've made a discovery. If the result is contrary to the hypothesis, then you've made a discovery."
>
> -Enrico Fermi

As all trusts and estates litigators know, in a contested probate proceeding, discovery is limited to the three years prior to the execution of a will, and two years thereafter—or the date of the decedent's death, whichever comes earlier. This rule is known as the "three-year two-year" rule, and is governed by the Uniform Rule for the Surrogate's Court § 207.27. Under this rule:

> In any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of article 31 of CPLR. Except upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period.[1]

The Nassau County Surrogate's Court recently held that the "three-year two-year" rule "is a pragmatic rule designed to prevent the costs and burdens of a 'runaway inquisition.'"[2] Although the rule is, on its face, straightforward, there are times when the "three-year two-year" rule can be expanded, i.e., in the presence of "special circumstances."

Whether or not to expand the scope of discovery, i.e., in the presence of "special circumstances," is an issue to be determined at the court's discretion.[3] The courts have found "special circumstances," warranting an expansion of the scope of discovery, where: (1) there is existing evidence of fraud and/or undue influence on the record; (2) there are multiple wills with inconsistent declarations of the natural objects of one's bounty; and (3) there is proof that a confidential or fiduciary relationship existed between the decedent and another person.

For example, the Erie County Surrogate's Court, in *In re Griffith*, held that if conduct suggesting fraud and/or undue influence is continuous from before the execution of a will through or after the execution, disclosure of the facts and circumstances relating to financial transactions outside the three-year two-year rule is "proper, especially as it relates to a continuous course of conduct commencing prior to date of execution of will . . . [and] which could bear weight on the question of undue influence and/or fraud."[4]

Similarly, in *In re Partridge*,[5] the Rockland County Surrogate's Court held that recordings of conversations that took place six to nine years prior to the execution of the will were admissible to determine if fraud and/or undue influence had been exerted over the decedent by a housekeeper because of a continuing and long-standing relationship.

When there are multiple wills with materially different provisions regarding the distribution of property, as well as inconsistent declarations of the natural objects of one's bounty, courts have found this to be sufficient to qualify as "special circumstances," warranting an expanded scope of discovery.[6] Therefore, if true, those seeking to extend the "three-year two-year" rule may argue that problems with the content and substance of the will itself can constitute "special circumstances" as the "three-year two-year" rule was only meant for the average case and is, as a result, flexible.[7]

"Special circumstances" may also be established by providing proof that a confidential or fiduciary relationship existed between the decedent and another person. A confidential relationship can be established based on circumstance, i.e., where an individual assists another with daily living needs, finances, or health care, provides food, medication, and/or transportation, etc., or may be established more formally, i.e., in the presence of an attorney-client relationship. The question is generally one of dependence, and if the decedent needed the assistance of another to meet his or her daily living needs, which in turn places the secondary party—such as a home health aide—in a position to exert undue influence or fraud during the course of the relationship.[8] Notably, an attorney-client relationship constitutes both a confidential and a fiduciary relationship.[9]

Furthermore, as found by the New York County Surrogate's Court in *In re Liebowitz*, expansion of the "three-year two-year" rule is wholly warranted when the decedent and a beneficiary/fiduciary were in a confidential business relationship.[10] As the court found in *Liebowitz*, a confidential relationship existed, warranting the expansion of discovery, where an individual acted as a decedent's business manager, was involved

in the drafting of the decedent's will, and had knowledge of a decedent's declining health.[11]

As the court stated in *Liebowitz*, "[t]he propounded instrument. . .was executed on March 6, 2012, and [was] the last of 29 testamentary instruments drafted by proponent for decedent during the dozen or so years immediately preceding her death."[12] Further, the court held

> [t]he propounded instrument contains significant bequests for the drafter and the business manager. The undisputed fact of a sizable bequest to the attorney drafter inevitably raises a question as to whether such bequest was a function of the drafter's intent rather than that of the decedent's. The business manager concedes that decedent substantially relied upon him in relation to her affairs. He does not challenge the authenticity of writings in which decedent herself expressed concern about his role in the preparation of her will. The business manager's affidavit in opposition – proposing to establish by his untested sworn statements that his influence on decedent was benign and limited – cannot substitute for the opportunity to examine him under oath. The presence of "special circumstances" within the meaning of the statute provides the authority for his examination.[13]

Therefore, the court found "that [m]ovants ha[d] presented sufficient evidence to meet the requirement of special circumstances. Thus, [the] movant [was entitled to] examine the business manager as to matters occurring between March 2001, the date on which the first of decedent's 28 wills was prepared, through the date of the decedent's death."[14]

The holding in *Liebowitz* is important to note: if a decedent's business manager, financial advisor, and/or accountant is involved in his or her estate planning, to one degree or another, and where, as in *Liebowitz*, these types of associates are injected into the decedent's estate plan, a "red-flag" should immediately be raised—causing both the proponent and objectant of a propounded will to scrutinize the relationship between the decedent and his or her "business manager" (or other confidant), and consider whether an expanded scope of discovery would be appropriate.

Clearly, there will be competing perspectives and objectives between the proponent on one hand and the objectant on the other when it comes to expanding the scope of discovery outside the "three-year two-year" rule. However, as it is the mandate of the Surrogate's Court to determine the testator's intent, there is often good cause to allow investigation into the circumstances that led to the drafts of the will, and thereafter, beyond the limited five-year window allowed under Uniform Court Rule 207.27. Accordingly, all trusts and estates litigators involved in a contested probate should apprise themselves of the nuances of the "three-year two-year" rule, and consider the appropriate discovery strategy to best achieve their clients' goals.

Endnotes

1. N.Y. Ct. R. 207.27.
2. *In re Yagoda*, 38 Misc. 3d 1218(A), *2, 967 N.Y.S.2d 871 (Sur. Ct., Nassau Co. 2013).
3. *In re Constant*, 128 A.D.3d 419, 6 N.Y.S.3d 477 (1st Dep't 2015).
4. 48 Misc. 2d 1048, 1049, 266 N.Y.S.2d 564 (Sur. Ct., Erie Co. 1966).
5. 141 Misc. 2d 159, 532 N.Y.S.2d 814 (Sur. Ct., Rockland Co. 1988).
6. *See Fiddle v. Estate of Fiddle*, 13 Misc. 3d 827, 823 N.Y.S.2d 859 (Sur. Ct., Sullivan Co. 2006). *Fiddle* also held that the three-year two-year rule only applies—as stated in the statute—to Post-Objection Discovery. However, the approach is generally not observed by a majority of Surrogate's Courts.
7. *See In re Kaufmann*, 11 A.D.2d 759, 202 N.Y.S.2d 23 (1st Dep't 1960).
8. *See generally In re Boatwright*, 114 A.D.3d 856, 858-59, 980 N.Y.S.2d 554 (2d Dep't 2014) (citing *Matter of Connelly*, 193 A.D.2d 602, 527 N.Y.S.2d 427 [2d Dep't 1993]); *Hennessey v. Ecker*, 170 A.D.2d 650, 567 N.Y.S.2d 74 (2d Dep't 1991).
9. *See* Pattern Jury Instructions 7:56; *see also Kurtzman v. Bergstol*, 40 A.D.3d 588 (2d Dep't 2007).
10. *In re Liebowitz*, N.Y.L.J., Feb. 18, 2016, p.22, col. 3 at *1 (Sur. Ct., N.Y. Co.).
11. *See In re Hirschorn*, 21 Misc. 3d 1113(A), 873 N.Y.S.2d 512 (Sur. Ct., Westchester Co. 2008); *see also* PJI 7:56.1.
12. *Liebowitz*, *supra* n.10.
13. *Id*. (citing *Matter of Putnam*, 257 N.Y. 140 [1931]; N.Y. Sur. Ct. Proc. Act 1404[4]).
14. *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; he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section, is a past Chair of the Westchester County Bar Association's Trusts & Estates Section, past Chair of the Westchester County Bar Association's Tax Section, and a member of the New York State Bar Association's Commercial and Federal Litigation Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, a senior associate of Bashian & Farber, LLP, and Samantha Osgood, a candidate for admission to the New York Bar, for their assistance in the composition of this article.

The Revocable Trust Revisited

By Lainie R. Fastman

Revocable trusts are frequently advertised to mass audiences as an estate planning vehicle to (a) save estate taxes, (b) avoid probate and its exorbitant cost, (c) protect assets and, sometimes, unbelievably, (d) to safeguard eligibility from the reaches of Medicaid in the event a need for long-term nursing home care arises. In reality, revocable trusts are not appropriate in all situations. Attorneys must consider all factors to determine whether a revocable trust is a good choice for a particular client. A true counselor will weigh all benefits and downsides to the revocable trust as they affect that client, the requirements for its creation, and the manners in which it can be challenged. This article contains a thoughtful review of these issues, one of which I earlier examined in an article published several years ago.[1]

The Trust Agreement and the Parties

Although we may be accused of returning to the womb, a trust requires a grantor or trustor; a trustee; a trust "res," or trust property; and a trust agreement. No discussion about the parties to a trust would be complete without reference to the "merger" doctrine. At common law, it was held that where the sole income beneficiary was also the trustee, the interests of the two merged and the trust, in essence, failed. The trustee's legal interest and the beneficiary's equitable interest were merged and the trustee would hold the property free from the trust. The rule was criticized because it defeated some of the practical purposes for the creation of trusts, such as the protection of the beneficiary from creditors[2] or the prevention of the life beneficiary from assigning income. The rule was abolished by statute in the State of New York, which provides that "[a] trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein . . . ."[3] The anti-merger statute applies to inter-vivos as well as testamentary trusts.[4] Formerly, a lifetime or inter-vivos trust could be created in writing, by deed, or as evidenced by the action of the parties, or both. New York State did not require a formal trust agreement; an oral contract between grantor and trustee that the latter was holding property for the benefit of another person, could suffice.

The Formalities of Execution

Effective December 25, 1997, N.Y. Estates, Powers & Trusts Law 7-1.17 sets forth the required formalities for a lifetime trust. It must be in writing, executed and acknowledged by the creator and, unless he or she is the sole trustee, by at least one trustee, in the manner required by the laws of this state for the recording of a conveyance of real property, or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument. Where the grantor is also the sole trustee, not uncommon in the revocable trust, it is wise, nevertheless, to either have separate signature lines for the grantor and trustee or to properly identify them below the sole signature line, i.e., Mary Marbel, grantor and trustee. The acknowledgment may be subject to challenge if not in compliance with the requirements for the recording of a deed.[5]

Funding Issues

Unfortunately, planning often stops at the creation of the trust. No assets are ever conveyed into the trust, and, upon mom's or dad's death the stunned beneficiaries or the surviving spouse learn that the decedent's assets are still titled in his or her personal account. Counsel's task when planning with a revocable trust clearly includes transferring into the trust the assets intended to be included. To convey real estate into a revocable trust, a deed to the trustee is required. Real property located in states other than New York may be conveyed into the trust. This procedure will obviate the need for an ancillary probate or administrator in the foreign state. Obviously, any deed must be recorded. For real estate in New York State, a change of title to the trustee of a revocable trust is a mere change of identity and not a gift, not a transfer for value. Accordingly, New York State real estate transfer taxes are not applicable.

A trustee of a trust containing real estate has all the powers a title owner has with respect to the property. If the real estate consists of shares in a cooperative apartment, the stock is transferred to the trustee. A trust can be the owner of a co-op according to the Internal Revenue Service, which in Internal Revenue Code § 7701(a) provides that the term "person" includes a trust. A trust as the owner of co-op shares, like a person, is entitled to deduct real estate taxes and mortgage interests, as the owner.[6]

Co-op boards may nevertheless object to the ownership of shares by a trust. The trustee may not be the occupant. Who will be responsible for maintenance? Whose financial information is to be obtained by the board? The board may, as a condition for giving its consent, (1) require that the trust execute an Occupancy Agreement, which will provide that a change in occupancy will conform to the proprietary lease; (2) obtain a personal guarantee from the grantor; and/or (3) ask for a letter agreement whereby the trustee agrees that, notwithstanding any purported disposition in the trust

agreement, the co-op board retains the right in its sole discretion to reject any further transfers.

With respect to underwriting guidelines regarding trusts, consult a title company.

If the real property is burdened by a mortgage, the lender may impose a number of requirements. A conveyance of real property of mortgaged premises may activate a "due-on-sale provision" in the mortgage. 12 U.S.C. § 1701j-3, "Preemption of Due-on-Sale Prohibitions," provides that a lender may enforce a "due-on-sale" clause, subject to, *inter alia*, certain exemptions, to wit: "(8) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or (9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board."

beneficiary designations must so indicate; a matter of some complexity as, presumably, the grantor desires a distribution in accordance with the trust's terms. Extensive communications with the IRA custodian always ensue. Confirmation is essential. Bank and brokerage accounts must be changed to bear the trust's title. Title is always in the trustee.

With regard to the transfer of insurance into the trust, be sure to be clear about ownership of the policy and the designated beneficiaries on the death of the insured, and get written confirmation of any changes.

Personal property can be conveyed into the revocable trust, but a deed of gift is required. A mere schedule attached to the trust agreement listing the assets the grantor intends to be included will not suffice to provide ownership by the trust.[10]

"The statute defines the terms 'Real Property Loan' so as to include a loan 'secured by a lien on . . . the stock allocated to a dwelling unit in a cooperative housing corporation.'"

The statute defines the terms "Real Property Loan" so as to include a loan "secured by a lien on . . . the stock allocated to a dwelling unit in a cooperative housing corporation."[7]

The regulations implementing the statute provide that the borrower must be and must remain the beneficiary and occupant of the property.[8] Furthermore, the lender may require the borrower to provide reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy. This statute pre-empts state due-on-sale statutes; it applies only to mortgages and liens secured by residential and real property containing fewer than five dwelling units.

What about IRA and other deferred compensation accounts? As only individuals can be the "owner" of such accounts during their lifetime, counsel may be tempted to make the trust the beneficiary upon grantor's death. This is a temptation that should be withstood unless counsel is knowledgeable about the income tax consequences and the trust will contain the required language to insure that the IRS will "look through" the trust agreement to find the qualified beneficiaries and, further, that certain language is included in the trust requiring that minimum distributions be paid to the beneficiary.[9]

If the grantor desires that the ultimate beneficiaries named in the trust be beneficiaries of his or her IRA,

Revocation and Amendment

In order for the trust to be revocable, it must say so. A lifetime trust "shall be irrevocable, unless it expressly provides that it is revocable."[11] An amendment or revocation must be in writing and is subject to the same formalities applicable to the creation of the instrument, unless otherwise provided in the trust agreement. Revocation or amendment of the revocable trust may also be effectuated by a Last Will & Testament by an express provision in the Will which specifically refers to such lifetime trust or a particular provision thereof. Needless to say, numerous complications can result where formalities are not adhered to.[12]

In *In re Goetz*, grantor signed a trust amendment to his revocable trust shortly before his death amending the trust's provision that the residue would be divided equally among his children, and granting his wife a limited power of appointment to shift the interests of the children. The amendment was not notarized. The following day, the wife signed the amendment as her husband's agent under her husband's power of attorney. The trust agreement did not specifically authorize an agent to sign on husband's behalf. In the wife's Last Will & Testament, the son received nothing. The son sought summary judgment setting aside the limited power of appointment under which his mother disinherited him. Paragraph Eleventh of the trust agreement provided that the trust could be amended or revoked by an instrument (other than a

will or codicil thereto) executed and acknowledged by the grantor and delivered to the trustees during the grantor's lifetime. The Surrogate's Court held that this provision clearly reserved the power to amend or revoke to the grantor, but did not explicitly confer the same authority upon the grantor's agent, or upon any other person, and granted son's motion for summary judgment.[13] The case is troublesome and has been distinguished. Nevertheless, it emphasizes the need to adhere to statutory requirements to avoid problems.

With respect to revocation or amendment by an agent under a power of attorney, the usual dichotomy between an agent's *power* under a power of attorney and his or her *right* is at play. We see this in an agent's authority concerning banking transactions, where the statute permits the agent to make withdrawals, or transfer assets to himself or herself, but he may not have the right to do so. The statute dealing with estate and trust transactions provides that an agent permitted by law to act for a principal "in . . . all matter affecting any estate of a decedent . . . or any trust . . . out of which the principal is entitled, or claims to be entitled, to some share or payment, or with respect to . . . which the principal is a fiduciary, the agent may . . . reform, release, or modify any such agreement."[14]

This blanket power to modify should not be confused with a right to modify, and, conceivably, act contrary to the grantor's interest or in contravention to the plan of distribution set forth in the trust. Many cases dealing with revocation or amendment pertain to irrevocable trusts, but the reasoning remains pertinent. Does the grantor have sufficient trust in his or her agent appointed in a power of attorney to amend or revoke the instrument? If so, what amendments are contemplated? If the principal is intent on not permitting an amendment or revocation by his or her agent, or wishes to limit the agent's power regarding revocation and amendment under a durable power of attorney, often executed as part of a host of planning documents, counsel should specifically so provide in the instrument. Caution is the watchword. Clearly grantor's entire estate plan can be easily destroyed. The grantor, with the guidance of his or her attorney, should include in a durable power of attorney those changes, if any, the principal's agent is authorized to make in the trust.

If the grantor of a revocable trust makes provisions for a spouse and thereafter the parties divorce or the marriage is annulled, or the parties obtained a final decree or agreement of separation recognized as valid under New York State law, the provisions for the benefit of the former spouse are deemed revoked unless the trust agreement provides otherwise. Similarly, the appointment of the former spouse as trustee or successor trustee is deemed revoked.[15]

Becoming Irrevocable

The attorney draftsman should keep in mind that a revocable trust becomes irrevocable upon the incompetence of the grantor. In contemplating the possibility of the revocable trust becoming irrevocable, it may be advisable to include trust powers that create flexibility. The following are mere suggestions of additional powers:

- Remove trustees.
- Change trust situs.
- Divide trusts so that assets can be invested in different way to coordinate with various beneficiaries needs.
- Combine identical trusts.
- Substitute charitable beneficiaries.
- Correct a drafting error that defeats trust purposes.
- Allow early termination of the trust.
- Invest in the stock of the grantor's family business. This may benefit both the trust and the grantor's family.
- Invest in non-income producing assets. This would allow the trustee to build equity at the expense of current income to seek higher long term gains.
- Accumulate income. This is another way of permitting a trustee to direct assets to certain heirs at the expense of others.
- Invest aggressively, using a diversified stock portfolio. This takes the more enlightened modern approach about trust investments.

Beware of tax ramifications which flow from some of these powers. It may not be a bad idea to insert a "savings clause" in which the trustee is directed not to exercise powers which contravene tax goals the grantor has set forth in the trust agreement.

Many clients value the possibility of eventually creating a Medicaid qualifying income-only trust, except they are not ready to do so at the moment of execution of the trust agreement. If this is the case, counsel should include a section dealing with the trust so qualifying upon, for example, the grantor's incompetence which may be determined by a letter from the grantor's treating physician that he or she can no longer manage her affairs. Appropriate language is required in such provision disclaiming any trust powers which would disqualify the trust as a Medicaid qualifying income-only trust. If the grantor contemplates the conversion of the revocable trust into an irrevocable Medicaid qualifying income only trust, counsel should carefully examine the trust powers to insure compliance with such a trust.

The Pour-Over Will

The revocable trust is customarily linked to a so called pour-will, a means by which the testator makes a bequest to a properly executed trust, revocable or irrevocable. New York has adhered to a minority position concerning incorporation by reference. In *In re Salmon*,[16] the decedent's Will directed that his tangible personal property be divided among individuals named in a memo to be found in his safe deposit box. The Court did not permit the memo to be followed, deeming the bequest an impermissible incorporation by reference.[17]

Certain exceptions to the doctrine of incorporation by reference are now permitted. EPTL 3-3.7 provides that a testator or testatrix may dispose by Will of all or any part of his or her estate, the terms of which are evidenced by a written instrument executed by the testator or testatrix, the testator or testatrix and some other person, or some other person, provided that such trust is executed in the manner provided for in EPTL 7-1.17, prior to or contemporaneously with the execution of the Will, and such trust instrument is identified in such Will.

The testamentary disposition is valid even though the trust instrument is revocable[18] and even though the trust instrument was not executed and attested in accordance with the formalities prescribed by EPTL 3-2.1.[19] However, where the bequest of the decedent's residuary estate was made to the trustee of the decedent's revocable trust, and the trust, although apparently prepared at the same time as the Will, was not signed by the decedent until a week later, the trust was not deemed in existence at the time the Will was signed and the bequest failed.[20] Clearly, once the trust agreement is revoked, the disposition to the trust is no longer valid and the statute so provides.[21] An interesting twist is found in *In re Estate of Gillespie*, where the revocable trust provided that the trust's residuary be poured over into decedent's Last Will and Testament. The court held that the trust's bequest was to be poured over in the Will actually admitted to probate, rather than to a prior Will in existence when the trust was executed, but later revoked by the testator.[22]

Although the statute is precise in its requirements that the trust be executed prior to or contemporaneously with the Will, it has been held that a pour-over provision will not lapse if the trust agreement was properly acknowledged in accordance with the dictates of the statute where there were no allegations or evidence of fraud or other wrongdoing and the trust agreement, which was signed contemporaneously with the Will, was identifiable, precise and definite.[23]

In *In re Estate of Pozarny*,[24] the decedent's living trust was marked by inconsistencies providing for the disposition of trust assets on the settlor's death. It was contained in a loose-leaf three-ring binder and amended in contravention of the specified statutory requirement under EPTL 3-3.7(b)(1). The court held that the provisions of the Will distributing the estate's assets to the trust could not be given effect. The court's discussion of draftsmen who employ a "one size fits all" living trust without regard to the testator's particular circumstances is noteworthy.[25]

Jurisdiction and Venue

There was a time when lifetime trust disputes were only litigated in Supreme Court. In 1966, the legislature amended the Surrogate's Court Procedure Act providing that the Surrogate's Court has the power to determine any and all matters relating to lifetime trusts.[26] The Act now provides that the Surrogate's court has the same jurisdiction and power as the Supreme Court over a lifetime trust and its trustee.[27] As the use of lifetime trusts increased, the legislature took note and added Section 207 of the Surrogate's Court Procedure Act, providing that the Surrogate's Court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the proceeding concerning the trust, or of which a trustee then acting resides in the state, or, if other than a natural person, has its principal office in the state. The proper venue for proceedings related to such lifetime trust is the county where (a) assets of the trust estate are located, or (b) the grantor was domiciled at the time of the commencement of the proceeding concerning the trust, or (c) a trustee then acting resides or, if other than a natural person, has its principal office.[28]

If a proceeding were commenced based on the grantor's domicile and he or she then died, the court would retain jurisdiction. Once a proceeding has commenced in a proper venue, in this case based upon the residence of the trustee and the location of the assets, the court will retain jurisdiction and a motion to transfer a proceeding to compel an accounting to another jurisdiction is properly denied, as SCPA 207(2) provides that the first county of proper venue exercising jurisdiction must retain jurisdiction.[29] Where a dispute arose over the transfer of property pursuant to a trust agreement, venue was proper in the county where the trustee resided at the applicable time even through the property concerned was located in another county.[30]

The Revocable Trusts and Tax Returns

A standard revocable trust is ignored for tax reasons. This is because the property is deemed to belong to the grantor, who has the ability to amend and revoke. Although the trustee is now the title owner of the property, all income and dividends payable to the grantor pursuant to the trust agreement are reported in his or her personal income tax return. Some custodians of property will insist on a tax ID number, and must be advised none is required as the trust's tax ID

number is the social security number of the grantor. If a revocable trust provides that certain income is payable to another person, that person must report the income in his or her personal income tax returns. A trust that is obligated to file an income tax return must furnish a copy of Schedule K-1 (Form 1041) to each beneficiary (1) who receives a distribution from the trust or estate for the year or (2) to whom any item with respect to the tax year is allocated.

Once the trust becomes irrevocable, the trustee must obtain a tax ID number from the IRS and file a return on Form 1041 for the trust regardless of the amount of taxable income or if any beneficiary of the trust is a nonresident alien (unless the trust is exempt under Code Sec. 501 (a)).[31]

Clearly, if the trust provides that it becomes irrevocable upon certain events, these requirements must be kept in mind. If the grantor wishes the trust to become an irrevocable Medicaid qualifying income-only trust, it may be wise to include advisory language in the trust agreement, directing the successor trustee to obtain the necessary tax ID number and to commence filing fiduciary income tax returns.

If the trust becomes irrevocable and thus must file income tax returns, with a few limited exceptions, it must adopt a calendar year. Generally, the fiduciary of a trust need not file a copy of the trust instrument with the trust income tax return unless the IRS requests it. If the IRS does request a copy of the trust agreement, the fiduciary should file it (including any amendments), accompanied by a written declaration of truth and completeness and a statement indicating the provisions of the trust instrument that determine the extent to which the income of the estate or trust is taxable to the trust, the beneficiaries, or the grantor.[32]

Litigation In the Surrogate's Court

Once the legislation and the courts recognized that the revocable trust "actually functions as a Will since it is an ambulatory instrument that speaks at death to determine disposition of the Settlor's property,"[33] any dispute concerning a Last Will & Testament will be heard. So we see a determination regarding the statute of limitations;[34] an accounting proceeding;[35] a cy-pres question;[36] whether a surviving spouse who is not a beneficiary and thus is entitled to her elective share and a portion of the trust assets has standing to object to an accounting;[37] a summary judgment motion brought alleging that the trust was defective because it was contained in a loose-leaf binder, unfastened;[38] the court having to determine whether the grantor has the requisite mental capacity to execute the document;[39] a construction proceeding;[40] and a grant of limited letters to challenge the revocable trust.[41]

The right to a jury trial where such rights exists is provided by statute or the State Constitution.[42] The litigant has a right to a jury trial when objecting to a revocable trust where he or she would have a right in objecting to a Will.[43] Although such right is now well settled, the issue was thoroughly discussed in a number of cases.[44] Needless to say, as the comparison of its like nature with a Last Will & Testament is now firmly established, burdens of proof will follow down that well-trodden path.[45]

Advantages and Disadvantages

It has been my profound conviction that the revocable trust is not a needed vehicle for every person. Its creation is costly; it takes time, effort and therefore money for most clients to have the trust properly funded, and its maintenance can be a nuisance. The mantra of our traveling minstrels, with their portable offices, that it saves the cost of probate neglects to point to the up-front costs and the downsides. The testator with a house and paid mortgage, a bank account and an IRA, and known distributees, may not need a revocable trust. However, where there is some complexity in the family tree; with, for example, an entire branch located in another country or severed from the testator by immigration or disaster, and given New York State's obsessive preoccupation with due diligence to find distributees, the revocable trust can serve very well, notwithstanding the fact that the trust may be questioned like a Last Will & Testament in the Surrogate's Court. The distributees whose lips are silenced by death may never come forward. Furthermore, if the testator or testatrix owns real property in more than one state, the revocable trust will obviate the need for ancillary probate. The testator who is essentially alone, without close kin, may find it comforting to spell out in a revocable trust a thorough plan of care in the event of illness and the frailty of old age.

Finally, where a Will contest would surely follow, the grantor of a revocable trust can show his or her active involvement with the trust; document his or her interactions with counsel, over time; consider an amendment as circumstances change; elaborate far more fully than is customarily done in a Last Will & Testament, and thus build a solid structure difficult to challenge on the basis of lack of capacity or undue influence, old war horses of the probate contest.

Endnotes

1. *Challenging the Validity of the Revocable Trust*, N.Y.L.J., May 19, 2000, p. 5, col. 1.
2. Not applicable to revocable trusts.
3. N.Y. Estates, Powers & Trusts Law 7-1.1.
4. *In re Lynn Hertzel*, 174 Misc. 2d 497 (Sur. Ct., N.Y. Co. 1997).
5. Real Property Law § 309-a.
6. Internal Revenue Code § 216.
7. 12 U.S.C. § 1701j-3(a)(3).
8. 12 C.F.R. 591.5(b) (vi).
9. See I.R.C. Treas. Reg. § 1.401(a)(9).

10. *In re Estate of Rothwell*, 189 Misc. 2d 191, 730 N.Y.S.2d 664 (Sur. Ct., Dutchess Co. 2001).
11. EPTL 7-1.16.
12. *Id*. at 7-1.17(b); *cf. Estate of Morris Abrams*, N.Y.L.J., Jan. 1, 1999, p. 27, col. 2 (Sur. Ct., N.Y. Co.) (determining a note found among the decedent's effects which purported to revoke a revocable trust was deemed insufficient because it did not comport with the requirements for revocation set forth in the instrument).
13. *In re Goetz*, 8 Misc. 3d 200, 793 N.Y.S.2d 318 (Sur. Ct., Westchester Co. 2005).
14. N.Y. General Obligations Law §5-1502G.
15. EPTL 5-1.4.
16. 46 Misc. 2d 541, 260 N.Y.S.2d 66 (Sur. Ct., N.Y. Co. 1965).
17. See Peter C. Valente et. al., *Incorporation by Reference*, N.Y.L.J., April 13, 1992 (containing a thorough treatment of the doctrine of Incorporation by Reference).
18. EPTL 3-3.7(b)(I).
19. *Id*. at 3-2.1 (setting forth the formalities required for the execution of a Last Will and Testament).
20. *In re D'Elia*, 40 Misc. 3d 355, 964 N.Y.S.2d 877 (Sur. Ct., Nassau Co. 2013).
21. EPTL 3-3.7(b)(e).
22. *In re Estate of Gillespie*, 145 Misc. 2d 542, 547 N.Y.S.2d 531 (Sur. Ct., N.Y. Co. 1989).
23. *In re Estate of O'Brien*, 233 A.D.2d. 561, 649 N.Y.S.2d 220 (3d Dep't 1996).
24. 177 Misc. 2d 752, 677 N.Y.S.2d 714 (Sur. Ct., Erie Co. 1998).
25. *Id*.
26. Surrogate's Court Procedure Act 209(6)
27. *Id*. at 1509.
28. *Id*. at 207(1).
29. *In re Meyers*, 45 A.D.3d 955, 845 N.Y.S.2d 510 (3d Dep't 2007).
30. *In re Linker*, N.Y.L.J., Dec. 17, 2004, p. 32, col. 1 (Sur. Ct., N.Y. Co.).
31. Treas. Reg § 1.6012-3.
32. Treas. Reg. § 1.6012-3(a)(2).
33. *In re Tisdale*, 171 Misc. 2d 716, 655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997).
34. *In re Sennett*, 2008 N.Y. Misc. Lexis 144 (Sur. Ct., Suffolk Co. 2008).
35. *In re Eisenberg*, 41 Misc. 3d 1216 (A), 981 N.Y.S.2d 634 (Sur. Ct., N.Y. Co. 2013).
36. *In re Trustco Bank*, 37 Misc. 3d 1045, 954 N.Y.S.2d 411 (Sur. Ct., Schenectady Co. 2012).
37. *In re Garrasi Family Trust*, 104 A.D. 3d 990, 961 N.Y.S.2d 594 (3d Dep't 2013).
38. *In re Estate of Klosinski*, 192 Misc. 2d 714, 746 N.Y.S.2d 350 (Sur. Ct., Kings Co. 2002).
39. *In re Vultaggio*, 2015 N.Y. Misc. Lexis 4780 (Sur. Ct., Nassau Co. 2015).
40. *In re Carcanagues*, 2014-3399 N.Y.L.J. 1202766601515, 1 (Sur. Ct. N.Y. Co. 2016).
41. *In re Estate of Davidson*, 177 Misc. 2d 928, 677 N.Y.S.2d 729 (Sur. Ct., N.Y. Co. 1998).
42. CPLR 1401; SCPA 502 (1).
43. *In re Tisdale*, 171 Misc. 2d 716, 655 N.Y.S.2d 809 (Sur. Ct, N.Y. Co. 1997); SCPA 502 (1); CPLR 4101.
44. *In re Solomon*, N.Y.L.J., Sept. 9, 1997, p. 30. col. 2 (Sur. Ct., Kings Co.); *In re Tisdale*, *supra*; *In re Aronoff*, N.Y.L.J., Dec. 20, 1996 (Sur. Ct., N.Y. Co., 1996).
45. *Id*.

Lainie R. Fastman is a partner at the law firm of Hall & Hall, LLP in Staten Island.

Useful Mobile Apps for the Trusts and Estates Practitioner

By Parth N. Chowlera

Greetings from the Technology in Practice Committee. This article is part of a series that highlights useful mobile apps for the Trusts & Estates practitioner.[1]

This article focuses on three apps that allow the practitioner to scan documents into PDF[2] format using their mobile devices' built-in cameras while on the go.

Genius Scan – PDF Scanner and Genius Scan + – PDF Scanner

Sold by The Grizzly Labs.

Available for Apple mobile devices running iOS 9.0 and higher, and Android mobile devices.

Costs:

- Genius Scan, with limited capability, is free in the Apple App Store and the Google Play Store.
- Genius Scan +, which has more features (such as encryption, cloud storage, and faxing directly from the mobile device), is available for $6.99 in the Apple App Store and the Google Play Store.

Tiny Scanner and Tiny Scanner +

Sold by Appxy.

Available for Apple mobile devices running iOS 7.0 and higher, and Android mobile devices.

Costs:

- Tiny Scanner, with limited capability, is free in the Apple App Store and the Google Play Store.
- Tiny Scanner +, which has more features (such as cloud storage and printing directly from the mobile device), is available for $4.99 in the Apple App Store and the Google Play Store.

CamScanner Free and CamScanner +

Sold by INTSIG Information Co., Ltd.

Available for Apple mobile devices running iOS 7.0 and higher, and Android mobile devices.

Costs:

- CamScanner, with limited capability, is free in the Apple App Store and the Google Play Store.
- CamScanner +, which has more features (such as additional cloud storage), is available for $0.99 in the Apple App Store and $1.99 in the Google Play Store.

These apps give the practitioner the option to scan documents (such as legal documents, letters, business cards, and receipts) while away from the office.

"These apps give the practitioner the option to scan documents (such as legal documents, letters, business cards, and receipts) while away from the office."

Each app has a free version that allows a document to be scanned and saved in the mobile device and a paid version with additional features, such as the ability to save scanned documents to cloud storage services (such as Dropbox, OneDrive, and Google Drive), or even fax the scanned documents directly from the mobile device.

Endnotes

1. A note about apps and mobile devices: like computers, mobile devices are powered by operating systems. The two most popular operating systems are known as "iOS" and "Android." The programs that run on these operating systems are known as "apps." iOS was created by Apple, Inc. and runs exclusively on mobile devices produced by Apple, namely, the iPhone, the iPad, and the iPod Touch. Apps designed for iOS are downloaded from Apple's "App Store." Android was created by Google Inc. and runs on mobile devices produced by several companies, such as Samsung, LG, and HTC. Apps designed for Android are downloaded from the "Google Play" store.
2. PDF (which stands for "Portable Document Format") is a file format that allows documents to be shared reliably across software and hardware platforms.

Parth N. Chowlera is the Chair of the Technology in Practice Committee and an Associate at Greenfield Stein & Senior, LLP. For ideas, comments, and suggestions, please contact him at pchowlera@gss-law.com. The first article in this series appeared in the Winter 2016 issue of the *Trusts and Estates Law Section Newsletter*.

Alternatives to the New York Power of Attorney

By Stephanie Hamberger

The Power of Attorney is an important document in which the Principal (i.e., the donor of the power) authorizes an Agent (i.e., the donee of the power) to act on his or her behalf in a number of capacities. For example, the New York Statutory Short Form Power of Attorney allows the Principal to authorize the Agent to manage the Principal's real estate transactions, banking transactions, and tax matters.

Due to the aging population, the need for planning for incapacity has increased over the past few decades. Individuals who are suffering from some form of incapacity and are unable to manage their own affairs should have someone to manage them on their behalf. For that very reason, Powers of Attorney are often prepared as a safeguard against an individual's possible future incapacity. A Durable Power of Attorney takes effect upon execution of the document and stays in effect even if the Principal is rendered incapacitated or incompetent. A Springing Power of Attorney takes effect only when the Principal is declared incapacitated or incompetent. (Some individuals choose to prepare a Non-Durable Power of Attorney, which becomes effective upon execution and terminates if the Principal is rendered incapacitated, but this type is not the focus of this article.)

In addition to choosing which type of Power of Attorney to prepare, the Principal must also designate an Agent. The Principal is permitted to designate anyone as his or her Agent on a Power of Attorney, but it is recommended that the Principal choose someone he or she trusts, such as a spouse, adult child, or sibling, due to the nature of the Agent's duties. Oftentimes, however, individuals have no trusted relatives or friends to designate as their Agents, which can leave them unprotected if they are ever rendered incapacitated. Fortunately, there are a number of solutions to this problem.

1. Designate an Attorney as the Agent

An attorney is permitted to act as Agent of a Power of Attorney. An individual should have this discussion with his or her attorney if he or she wants to prepare a Power of Attorney and has no trusted friends or relatives to designate as Agent.

Individuals should understand that attorneys are often reluctant to act as Agent, as assuming the role can be time consuming. In addition, the Power of Attorney creates a fiduciary duty in the Agent, who must keep accurate records of all actions undertaken in his role as Agent. Furthermore, under General Obligations Law § 5-1510(2)(e) and Civil Practice Law and Rules 213(1), certain individuals (e.g., the Principal, a nominated Monitor, co-Agent, Successor Agent) can request that the Agent produce these records at any time up until six years after the termination of the fiduciary relationship (i.e., the Principal's date of death). Attorneys may not want to assume these additional burdensome duties and may, therefore, be reluctant to act as Agent under a client's Power of Attorney.

Lastly, an individual should consider the disadvantages of appointing his or her attorney. Since the Statutory Short Form Power of Attorney was designed to grant broad powers to Agents, there is a potential for abuse. Although attorneys are professionals who must abide by a strict code of ethics, there is still a risk that an attorney might abuse the power granted to him or her by the Power of Attorney. An individual should only nominate his or her attorney if he or she trusts the attorney and believes that the attorney will carry out his or her duties and act in the individual's best interests.

2. Create a Revocable Trust

A Trust is a document created by a Grantor that gives legal title over the trust property to the Trustee and equitable title to the beneficiaries. The Trustee holds the trust property, invests it, and distributes the principal and income of the trust assets to the beneficiaries periodically for a fixed period of time. A Revocable Trust is a type of trust that takes effect the moment it is signed by the Grantor, but can be changed or revoked by the Grantor during his or her lifetime. When the Grantor dies, the Trustee generally distributes the remaining trust property outright to the named beneficiaries or invests and holds the remaining trust assets in further trust for named beneficiaries. After the Grantor's death, the trust becomes irrevocable.

What makes the Revocable Trust a great solution to the issue at hand is that the Grantor can appoint himself or herself as Trustee and appoint a Successor Trustee to act if the Grantor is no longer able to act (e.g., if the Grantor is rendered mentally incapacitated). In addition, the Grantor can appoint as Trustee an attorney (who may be more willing to act as Trustee than as Agent under a Power of Attorney) or a corporate Trustee, such as a bank or trust company. Since Trustees are generally given various types of powers, such as the powers to handle the Grantor's investments and real estate transactions, write checks on behalf of the Grantor, and pay the Grantor's bills, a Revocable Trust serves the same purpose as a Power of Attorney.

3. Petition for an Article 81 Guardian

A Guardian of the Property serves many of the same functions as an Agent under a Power of Attorney

and should be considered where the client has no one to designate as Agent and needs help managing his or her financial matters. Under Article 81 of the New York Mental Hygiene Law, the Court can appoint a Guardian of the person and property of an incapacitated individual if that individual (a) requires assistance in the management of his personal and/or financial affairs and (b) consents to the appointment or is determined to be incapacitated in accordance with a number of criteria. Among those with standing to file a Petition to Appoint an Article 81 Guardian is the incapacitated person himself or herself (known in the initial proceeding as the "Alleged Incapacitated Person" or "AIP").

After a petition is filed with the Surrogate's Court, a Court Evaluator will interview the AIP and provide a report to the Court, which provides analysis of the AIP's needs and capacity. After a hearing, if the Court determines that the AIP needs assistance managing his or her affairs, it will appoint a Guardian of the Person and/or Property. The Guardian must allow the Incapacitated Person[1] or "IP" to remain independent, but, just like the Agent of a Power of Attorney, a Guardian of the Property can assist in the management of the IP's financial matters. Like the Agent of a Power of Attorney, an Article 81 Guardian of the Property can pay the IP's bills, make gifts on behalf of the IP, manage the IP's tax matters, and use the IP's assets to provide support for the IP's dependents.

One thing an individual must consider before pursuing the Guardianship route is that Guardianship proceedings are costly and time consuming. Although a Power of Attorney can be quickly prepared and executed, Article 81 Guardianship Proceedings are much more complex. The initial petition and appointment process, as described above, can span several months.[2] In addition, the Incapacitated Person tends to incur tens of thousands of dollars in fees in connection with Article 81 Guardianship proceedings, including those related to preparation of legal documents, attorney court appearances, Court Evaluator services, and Guardian services.

For those who can afford the expense and time, however, Article 81 Guardianship is a plausible alternative to the Power of Attorney. Guardians may be more reliable than Agents under Powers of Attorney, since they are appointed by the Court and must fulfill certain requirements to qualify for appointment. Mental Hygiene Law § 81.39 specifies that before someone can be appointed as a Guardian, he or she must complete an approved training course regarding a range of topics, including the Article 81 Guardian's duties, the Incapacitated Person's rights, and the preparation of annual reports that Guardians must provide to the Court. In addition, the Guardian's duty to maintain accurate records of all financial activity and prepare annual reports may reduce the potential for abuse of the Incapacitated Person.

4. Hire an Organizer or Daily Money Manager

There are various types of professionals who can assume the responsibilities that are generally granted by way of an executed Power of Attorney. For example, a Principal can authorize his or her Agent to manage his or her financial transactions, which would include paying the Principal's bills and depositing funds into the Principal's bank accounts. If an individual has no one to name as Agent on his or her Power of Attorney, he or she can hire a Daily Money Manager ("DMM"). As stated on the American Association of Daily Money Managers, DMMs are authorized to pay bills, balance checkbooks, make bank deposits, organize tax records, maintain financial and medical insurance papers, and negotiate with creditors.

As with the above-mentioned alternatives, there is a possibility that DMMs might abuse their duties, so an individual should only hire a DMM if he or she believes that the DMM is trustworthy.

5. A Statewide Answer

As individuals are living longer, more are experiencing some form of incapacity, and this may become a much bigger problem in need of a more widespread solution. California and Arizona have both created agencies that license professional fiduciaries, such as Trustees and Agents under Powers of Attorney. Generally, to be licensed as a professional fiduciary in these states, individuals have to meet certain requirements, including fulfilling a specified number of hours of coursework before certification, passing an exam, and fulfilling Continuing Education requirements post-certification. Although New York has no comparable agency, creating one would be of benefit to many New Yorkers, including those individuals who do not have trusted friends or family members to appoint as Agents under their Powers of Attorney. Establishing such a program would make it easier for individuals to connect with qualified professionals who could serve as Agents. Until New York implements such a program, however, New York domiciliaries with no one to designate as Agent have a few options, as stated above, which can effectively protect them and their assets in case of current or future incapacity.

Endnotes

1. The AIP becomes the Incapacitated Person (or "IP") once the court has made the determination that the individual is incapacitated.
2. Although the initial appointment process *should* take no longer than 60 days, in practice, three months to a year may pass before a Guardian is appointed.

Stephanie Hamberger is a trusts and estates attorney at Holm & O'Hara, LLP, and a member of the Estate and Trust Administration Committee and Taxation Committee of NYSBA's Trusts and Estates Law Section.

Reformation to Comply with QTIP Rules Denied

By Laurence Keiser

Although New York Surrogate's court decisions rarely deal with Federal estate tax issues, practitioners should be aware of the recent decision by New York County Surrogate Nora Anderson in *In re Carcanagues*.[1] The case involves a petition to reform a trust, but more importantly points out the need to review all estate planning documents and their tax consequences after marriage.

The case dealt with a same-sex marriage in New York after enactment of the Marriage Equality Act dated June 24, 2011 ("the Act"), but is equally applicable to all.

The facts are fairly common. In June of 1977, Jacques Carcanagues (hereafter "Jacques") established a revocable living trust. He was the sole beneficiary and sole trustee during his lifetime. At his death, the sole primary beneficiary became his then partner in a civil union, Sergio Francescon (hereafter "Sergio"), who then became a co-trustee, along with Jacques' lawyer. Sergio was entitled to the Trust's "net income" and was a discretionary principal beneficiary for his health, support and maintenance.

At that time, prior to the Act, this was a common way for unmarried people to pass property. Though there would not be a marital deduction and tax might be due at the first death, the trust would not be included in the second estate because that decedent was not the transferor. Conversely, leaving property outright to an unmarried partner could produce a tax disaster, i.e., tax in both estates, perhaps with no credit for prior estate tax paid.

Early in 2013, Jacques was diagnosed with a terminal illness. On October 3, 2013, Jacques and Sergio married. Jacques died on January 13, 2014.

In August of 2013, the U.S. Treasury Department and IRS announced that same-sex couples who were legally married would be considered married for all Federal tax purposes including gift and estate taxes.

When Jacques and Sergio married, they became entitled to the Qualified Terminable Interest Property ("QTIP") provisions of Internal Revenue Code Section 2056(b)(7) and the tax consequences expressed above would have been reversed. Jacques' estate could have gotten a marital deduction (leaving more net assets for Sergio's support) and the principal of the trust would then be taxable in Sergio's estate.

We are not told of the extent of Jacques' assets, only that the trust contained a commercial condominium and cooperative apartment in Manhattan.

To get a marital deduction under IRC § 2056(b)(7) among other requirements, the surviving spouse must have the absolute right to all trust income. After Jacques death, the trust was reviewed.

Questions were raised about whether the trust would qualify for the marital deduction. The trustees identified three trust provisions as ambiguous. There was a provision allowing the trustee to withhold distributions in case of a disability. This included physical disability, but also divorce, bankruptcy, or a large unsatisfied and enforceable judgment; so there was a possibility that Sergio would not get all the income.

In addition, at Jacques' death, the trustees could pay the principal of the trust "and accumulated income" to the remaindermen (who were the grantor's sisters). It might be argued that this inferred that Sergio would not get all the income from the Trust.

Also, the trustees were allowed to retain and acquire non-income-producing properties. To get a marital deduction, generally, the spouse must have the right to demand that the trustees make the property productive.

So the trustees requested reformation of the above provisions to provide for Sergio in the manner the grantor intended and to take advantage of the marital deduction.

The court held that it had the power to reform the instrument to effectuate the decedent's intent. However, it noted that the power to reform should be applied sparingly and could be used only if literal application of the instrument's provisions would frustrate testator's actual intent as reflected in the entire document.

There was no intent expressed in the trust document to obtain the marital deduction. "Indeed, grantor could not have intended that the trust qualify for the marital deduction since, at the time of the Trust's creation in 1997, same-sex marriages were prohibited in every state."

Further, because the parties were not married at the time of the trust's creation, the general rule that testamentary provisions be construed in a spouse's favor had no application.

Citing *In re Tamargo*,[2] the court concluded that "when the purpose of the testator is reasonably clear by reading his words in their natural and common sense, the Courts might not have the right to annul or pervert that purpose upon the grounds that a consequence of it might not have been thought of or intended by him."[3]

For practitioners, the very important takeaway from the case is not to assume that a change in the law, even a beneficial change in the law, does not require a change in existing documents. Practitioners must advise clients that any change in personal circumstances should cause a review of wills, trusts, and other estate planning documents.

Of course, since the trust does not qualify for QTIP treatment and the election cannot be made, there will not be double taxation. The remaining principal of the trust will not be included in Sergio's estate at his death. But the acceleration of the tax to the first death is obviously a situation that Sergio wished to avoid.

Endnotes

1. N.Y.L.J., Sept. 6, 2016, p.26 (Sur. Ct., N.Y. Co.).
2. 220 N.Y. 225 (1917).
3. N.Y.L.J., Sept. 6, 2016, p.26, *10-11 (Sur. Ct., N.Y. Co.).

Laurence Kaiser, J.D., L.L.M. (Tax), C.P.A. is a partner in the law firm of Stern Keiser & Panken, LLP in White Plains.

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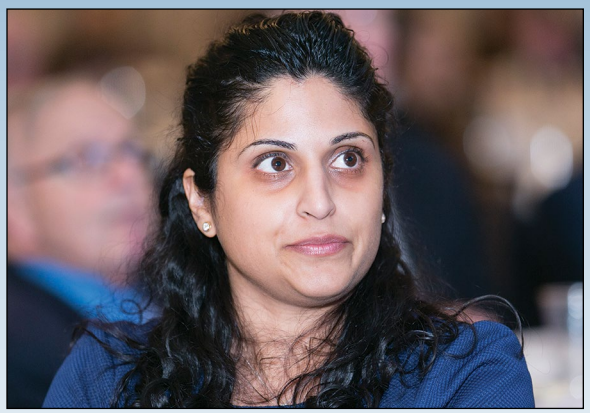

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Recent Developments in SCPA Article 17-A Proceedings

By C. Raymond Radigan and Lois Bladykas

A recent case has highlighted certain concerns about the scope and effect of Surrogate's Court Procedure Act Article 17-A guardianships. Kings County Surrogate Lopez Torres issued a decision in *Matter of Michelle M.*[1] denying a petition filed by Michelle's parents to be appointed guardian of Michelle. Surrogate Lopez Torres cited concerns over Article 17-A's scope, cautioning that the statute is an "extreme remedy" and "should be the last resort for addressing an individual's needs."[2] In addition to *Michelle M.*, other recent decisions have also advocated for a less restrictive means of meeting the needs of a developmentally or intellectually disabled person. This article explores those recent decisions and other legislative changes to Article 17-A.

Brief History of Article 17-A Proceedings

SCPA Article 17-A was originally enacted in 1969, and has since been amended several times. The initial statute was enacted to replace expensive and time-consuming committee and conservatorship proceedings, which at that time were essentially the only option for persons under the kind of disability contemplated under what is now Article 17-A. Often parents would be SCPA Article 17 guardians for their disabled children, but when the child reached majority they felt they had nowhere to go and sought legislation. Article 17-A was initially designed to assist parents of people with Down Syndrome and applied only to "mentally retarded" persons, not developmentally disabled persons.[3] Over time, guardianships were sought on behalf of individuals with other intellectual disabilities such as epilepsy, autism, and learning disabilities. Accordingly, the statute was changed in 1989 and authorized the court to appoint guardians for developmentally disabled persons as well as "mentally retarded" individuals.

The current statute authorizes the Surrogate to "appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person who is intellectually disabled"[4] or in the best interest of the "developmentally disabled person" (emphasis added).[5] The essential purpose of Article 17-A is to ensure long-term guardianship of a person under mental disability even after the age of majority.[6] It is "most often used to ensure long-term guardianship of the child who never was and never will be able to care for herself."[7]

Notably, the legislature amended the statute in 2016 to remove reference to "mentally retarded" people. Instead, the statute more appropriately describes people who are "intellectually disabled." The official legislative justification of this change cites efforts on part of disability advocates who "worked tirelessly to persuade state and federal governments to end official use of 'retarded.'"[8] Legislative bills S7132A and A2125 amended the Surrogate's Court Procedure Act by removing all reference to "mentally retarded" or "mental retardation" and the change was signed into law by the Governor in 2016.

Matter of D.D.

Even before the legislature officially amended the statute by removing all reference to "mentally retarded" people, Surrogate Lopez Torres elected to use the term "intellectual disability" in *Matter of D.D.*[9] Noting that "[t]his change in terminology has been approved and used in the most recent addition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), one of the standard texts used by psychiatrists and mental health professionals in classifying mental disorders,"[10] Surrogate Lopez Torres declined to use the term "mental retardation" throughout her opinion.

Matter of D.D. is also an instance in which Surrogate Lopez Torres declined to appoint a guardian under Article 17-A and expressed concern over the effect of the statute. In *Matter of D.D.*, the mother and brother of a 29-year-old man with Down Syndrome petitioned to be his guardians under Article 17-A. D.D. had a mild range intellectual disability, was able to work, had an active social schedule, and was able to travel and care for himself independently. D.D. also expressed that he did not want a guardian appointed for him. The guardian ad litem appointed for D.D. reported that D.D. appeared to be capable of making his own decisions, with help and support from his family. Surrogate Lopez Torres declined to grant the petition for guardianship of D.D., and suggested that alternate, "less restrictive legal tools," such as a power of attorney or health care proxy, could be utilized in the event D.D. was not able to make his own medical decisions.[11] She also expressed concern over the "immense loss of individual liberty" of the disabled individual that is a result of the appointment of a guardian under 17-A. The court held that an Article 17-A guardianship could only be imposed if the least restrictive alternatives (such as health care proxies and powers of attorney) were first explored and exhausted.

Matter of Mark C.H.

In *Matter of Mark C.H.*,[12] former Surrogate Kristin Booth Glen considered the petition for appointment of a guardian for Mark, an autistic man with a significant disability. Like Surrogate Lopez Torres, Judge

Glen also expressed concern over the fact that Article 17-A guardianship vests the guardian with "virtually complete power over the ward" which "clearly and dramatically infringes on a ward's liberty interests."[13] In addition to concerns about individual liberty and autonomy, Surrogate Glen emphasized the lack of periodic reporting and review for guardians appointed under Article 17-A (in contrast to guardianships under Mental Hygiene Law Article 81). The court suggested that in the absence of periodic reporting and review, individuals under guardianship could transition into "functioning, capacitated adults with guardians whose powers constitute a 'massive curtailment of liberty.'"[14] Although the court found that Mark was a person with developmental disabilities in need of a guardian and granted the petition for guardianship, the court conditioned the guardianship on petitioner's annual report to the court concerning Mark's disability and progress with regard thereto.

Matter of Michelle M.

As in *Matter of D.D.*, Surrogate Lopez Torres declined to appoint a guardian in *Matter of Michelle M.* In this case, Michelle's parents brought a petition seeking Article 17-A guardianship of their daughter, a 34-year-old woman with Down Syndrome. In declining to grant the petition for guardianship, the court noted that Michelle was able to live independently with roommates, cook for herself, manage her doctor appointments and medications on her own, and keep track of and access her money.[15] On the contrary, the petitioners alleged that Michelle was unable to manage her medical affairs and make decisions relating to her welfare. Considering these differing views, the court concluded that "less restrictive means" would be available to protect Michelle while maximizing her independence and autonomy, and declined to appoint a guardian for Michelle. Like in *Matter of D.D.*, the court expressed worry that an Article 17-A guardianship "wholly remove[s] an individual's legal right to make decisions." The court went further and stated that the appointment of a plenary guardian without careful inquiry into the individual's capacity would be contrary to conventions of human rights law and "the findings and underlying purpose of the Americans with Disability Act of 1990."[16]

The Future of Article 17-A

These recent cases and legislative changes suggest that Article 17-A is ripe for review. In accordance with this trend, a panel headed by former chief state administrative judge A. Gail Prudenti is reviewing Article 17-A guardianships and the related guardianship statute under Mental Hygiene Law Article 81. Considerations of individual autonomy and personal liberty, as well as the potential for a reporting requirement for guardians appointed under Article 17-A, are certainly issues that may come before the panel. Article 17-A is certainly not to be avoided at all costs, but courts should continue to review the issues associated with guardianships and exercise flexibility in their evaluation of individuals who may benefit from guardianship under the statute.

There was a movement to abolish Article 17-A and incorporate it within Article 81 of the Mental Hygiene Law. Many organizations and parents of those suffering the disabilities set forth under Article 17-A proceedings vigorously opposed such legislation, contending it was costly, timely and in many instances, overbearing. Their efforts succeeded.

There have been great advances in the education, treatment and caring for those having the disabilities proscribed under Article 17-A since the 1960s. Accordingly, there are many good alternate means to full guardianship that one can resort to when dealing with Article 17-A situations similar to that under Article 81. Both statutes were intended to provide the least intrusive means to accommodate the needs of those disabled. One of many matters to be reviewed should be extending limited letters both of the person and property under Article 17-A where that statute is found necessary to provide for the needs of those disabled but where full letters would not be necessary to accommodate those needs.

Endnotes

1. Matter of Michelle M., 52 Misc. 3d 1211(A), 2016 N.Y. Misc. LEXIS 2719 (Sur. Ct. Kings County 2016).
2. Matter of Michelle M., 52 Misc. 3d 1211(A), 2016 N.Y. Misc. LEXIS 2719, *13 (Sur. Ct. Kings County 2016).
3. McKinney's Practice Commentaries, Margaret Valentine Turano, SCPA 1750.
4. SCPA 1750.
5. SCPA 1750-a.
6. McKinney's Practice Commentaries, Margaret Valentine Turano, SCPA 1750.
7. McKinney's Practice Commentaries, Margaret Valentine Turano, SCPA 1750.
8. *Justification, Sponsor Memo*, Senate Bill S7132.
9. Matter of D.D., 50 Misc. 3d 666, 19 N.Y.S.3d 867 (Sur Ct. Kings County 2015).
10. Matter of D.D., 50 Misc. 3d 666, 667, 19 N.Y.S.3d 867 (Sur Ct. Kings County 2015).
11. Matter of D.D., 50 Misc. 3d 666, 675, 19 N.Y.S.3d 867 (Sur Ct. Kings County 2015).
12. Matter of Mark C.H., 28 Misc. 3d 765, 906 N.Y.S.2d 419 (Sur. Ct. New York County 2010).
13. Matter of Mark C.H., 28 Misc. 3d 765, 776, 906 N.Y.S.2d 419 (Sur. Ct. New York County 2010).
14. Matter of Mark C.H., 28 Misc. 3d 765, 778, 906 N.Y.S.2d 419 (Sur. Ct. New York County 2010).
15. Matter of Michelle M., 52 Misc. 3d 1211(A), 2016 N.Y. Misc. LEXIS 2719 (Sur. Ct. Kings County 2016).
16. Matter of Michelle M., 52 Misc. 3d 1211(A), 2016 N.Y. Misc. LEXIS 2719, *9 (Sur. Ct. Kings County 2016).

C. Raymond Radigan is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.

Lois Bladykas is an associate in the trusts and estates department at Ruskin Moscou Faltischek, P.C. where her practice focuses on trust and estate litigation, probate matters and estate administration.

Interposing Mistake as an Objection to Probate

By Daniel J. Reiter

I. Introduction

It has long been held in New York that in order for a propounded Will to be admitted to probate the instrument must contain the will of the testator.[1] The Surrogate must be satisfied not only that the instrument has been validly executed, but that the mind of the testator accompanied the act and that the instrument executed speaks his or her language and really expresses his or her will.[2] As a condition of probate, proponents must show affirmatively that the testator had an intelligent knowledge of the contents of the purported Will.[3]

But what of instances where a mistake or error is made by the attorney-drafter in preparing the instrument? Can such a mistake be grounds for objection to probate, or are such questions limited to a construction proceeding? A string of recent cases confirm that *mistake* remains a valid objection to probate, the outcome determined by the specific factual circumstances, the type of mistake, and the presence of testimony from the attorney-drafter or supervising attorney. To sustain the objection of mistake as a ground to deny probate, it must be shown that either (a) the decedent did not understand the provisions of the propounded instrument (at least in certain circumstances); or (b) the drafting attorney erred in misinterpreting the testator's instructions.[4]

II. Mistake in Action

In *Will of Rivera*, the objectant interposed "mistake" as a separate and distinct objection, and proponent brought a motion for summary judgment dismissing mistake and all other objections.[5] The Surrogate's Court of Kings County found there to be material issues of fact as to whether the decedent could understand, read, or write English, opining:[6]

> [W]hereas here the testator is not fluent in English [the proponent] has a greater burden in establishing "that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will."[7]

The Surrogate found that issues of material fact existed with respect to testamentary capacity and due execution because of the undisputed evidence that the propounded instrument was written, and the entire ceremony executed, in English.[8] Although *mistake* was interposed as an objection separate and distinct from testamentary capacity and due execution, the Surrogate analyzed the issue of mistake as relevant to these objections.[9]

The Surrogate's Court of Queens County in *In re Cookson* entertained mistake both as a separate and distinct objection and a factor in testamentary capacity.[10] In *Cookson*, the objectants alleged that that the propounded instrument was executed by the testatrix "by mistake in that she did not understand the contents of the instruments offered for probate," arguing that the decedent had a very different understanding of the value of her residuary estate at the time the propounded instrument was executed, and what the value would be at the time of her death.[11] The Surrogate described the objection as "nonsensical" in determining that a mistake on the part of the testator as to the size of her estate at the time of death is not grounds for denial of probate.[12] Consistent with longstanding precedent, the Surrogate opined, "What the testator has done, not what she meant but failed to do, is to be given effect (citations omitted)."[13]

Although the Surrogate dismissed the objection due to the *type* of mistake made by the testator, the *Cookson* decision solidifies the notion that *mistake* may be interposed as a valid objection to probate. The species of mistake, however, clearly factors into the Surrogate's analysis. A mistake of fact, as alleged in the *Cookson* case, is insufficient.[14]

Another factor that the Surrogate will consider when determining the validity of an instrument tainted by mistake is an attorney-drafter's sworn testimony regarding the circumstances of the mistake. In *Estate of Eleanor Martinico*, the objectants alleged two mistakes which the Surrogate analyzed under the objection of lack of due execution.[15]

First, objectants argued that an erroneous substitution of names in the attorney-drafter's notes led to the disinheritance of one of the objectants.[16] Second, the objectants argued that if the instrument had been duly executed, the decedent would have objected to the instrument when read aloud to her by the attorney-drafter because the instrument referred to the decedent as a male rather than female and the proponent as a female rather than a male.[17] With regard to objectant's first argument, the Surrogate rejected the notion that the error led to disinheritance, relying, in part, on an affidavit proffered by the attorney-drafter affirming that the decedent's recollection of her family tree was accurate.[18] In addition, the Surrogate determined that the erroneous gender designations in the propounded instrument "does not negate [its] execution in accord with EPTL 3-2.1, nor does it negate the testimony of the two witnesses, both attorneys, who knew the decedent for many years, and represented her on other matters."[19]

Attorney testimony also played a crucial role in *Estate of Andrew Walker*, in which the Appellate Division, Third Department, affirmed the decree of the Surrogate's Court of Broome County denying probate.[20] In *Walker*, the petitioner, prior to the testator's death, wrote down the decedent's wishes in changing a provision of his will, and delivered same to the office of the decedent's attorney.[21] However, on appeal, the attorney denied having drafted the alleged instrument, and acknowledged that, although his secretary typed the instrument, he never saw it or approved it.[22] The Appellate Division, citing *Rollwagen*, stated, "in light of the uncertainty surrounding the drafting and execution of the will, we decline to disturb the decree of Surrogate's Court denying admission of the will to probate."[23]

III. The Fifth Objection

It is important to note that our learned Surrogates have not gone rogue in entertaining mistake as a valid objection to probate over the years. The usual four objections, (i) failure of due execution, (ii) lack of testamentary capacity, (iii) fraud, and (iv) undue influence, are not exclusive. Indeed, with the enactment of Section 202 of the Surrogate's Court Procedure Act ("SCPA"), the Surrogate's Court "is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by [the SCPA] or other provisions of law, notwithstanding that the jurisdiction sought to be exercised in the proceeding is or may be exercised in or incidental to a different proceeding."[24]

In *Will of Nancy Artope*, a probate contest, objectants interposed a fifth objection alleging facts seeking to establish a constructive trust for the benefit of objectant.[25] In permitting "a joinder of the objection relating to the imposition of a constructive trust in this probate proceeding," Surrogate C. Raymond Radigan wrote that SCPA 202 "has in effect eliminated the holdings in those cases which have limited this court's equity powers to only those incidental to a specific statute or proceeding provided for in the SCPA (citation omitted)."[26]

Accordingly, a mistake that may be more appropriately analyzed in a construction proceeding may be complained of prior to probate. Of course, the practitioner should be mindful of the issues of claim preclusion, issue preclusion, and contractual release, in deciding whether to interpose mistake as an objection in a probate proceeding or reserve the allegation for a construction proceeding or other avenue of relief.[27]

IV. Interposing Mistake as an Objection

If counsel for an objectant determines to interpose mistake as an objection to probate, the language used should be stated in general terms.[28] Specifics are not necessary, and the objection of mistake need only give sufficient notice.[29] Counsel should be mindful of the case-specific facts, but will not be required to describe the mistake with particularity.[30] Moreover, the objectant is only required to furnish a bill of particulars after it has had an opportunity to conduct and conclude examinations before trial.[31]

A question does arise, however, as to which party bears the burden of proof. The answer is not entirely clear. In *Estate of Obermeyer*, the Surrogate held that the burden fell on the objectant.[32] However, *Obermeyer* analyzed mistake as a separate and distinct defense, and one could argue this general rule does not apply in cases where mistake goes to the issues of due execution or testamentary capacity, where the proponent bears the burden.[33]

"The usual four objections, (i) failure of due execution, (ii) lack of testamentary capacity, (iii) fraud, and (iv) undue influence, are not exclusive."

V. Conclusion

Mistake is an unusual, but oftentimes valid, objection to probate. Before interposing mistake as an objection, counsel should carefully consider whether a probate contest is the most appropriate forum to litigate mistake, as compared to a construction proceeding. The risks of claim preclusion, issue preclusion and contractual release should be carefully considered. In interposing mistake as an objection, the objectants should state the objection in general terms, assured that particulars need not be supplied until the conclusion of pre-trial examination. Whether objections will be successful will be heavily dependent on the particular facts and circumstances, the nature of the mistake, and whether, despite the mistake, "the instrument speaks the language and contains the will of the testator."[34]

Endnotes

1. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876).
2. *In re Watson*, 325 N.Y.S.2d 347, 348 (3rd Dep't 1971) citing *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876); *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).
3. *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).

4. *Estate of Obermeyer*, 2014 WL 1255193 at *3 (Sur. Ct., N.Y. Co. 2014); *But see In re Cookson*, N.Y.L.J., Dec. 16, 2015, p. 34, col. 4 (Sur. Ct., Queens Co. 2015); *In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934, 939 (Sur. Ct., New York Co. 1963); *In re Tousey*, 34 Misc. 363, 364, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
5. *Will of Rivera*, N.Y.L.J., June 20, 2016, p. 26 (Sur. Ct., Kings Co. 2016).
6. *Id.* at *6.
7. *Id.* at *5-*6.
8. *Id.* at *6.
9. *Id.* at *4-*7.
10. *In re Cookson*, N.Y.L.J., Dec. 16, 2015, p. 34, col. 4, at *7-*8 (Sur. Ct., Queens Co. 2015).
11. *Id.* at *7.
12. *Id.* at *7-*8.
13. *Id.* at *8; *see also In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934 (Sur. Ct., N.Y. Co. 1963); *In re Tousey*, 34 Misc. 363, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
14. *In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934 (Sur. Ct., N.Y. Co. 1963); *In re Tousey*, 34 Misc. 363, 364, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
15. *Probate Proceeding, Will of Eleanor Martinico*, N.Y.L.J., Oct. 28, 2016, p.41 (Sur. Ct., Kings Co. 2016).
16. *Id.* at *6.
17. *Id.*
18. *Id.*
19. *Id.*
20. *In re Estate of Walker*, 124 A.D.3d 970, 2 N.Y.S.3d 628 (3d Dep't 2015).
21. *Id.* at 630.
22. *Id.* at 630.
23. *Id.* at 631.
24. N.Y. Surrogate's Court Procedure Act 202.
25. *In re Will of Nancy Artope*, 144 Misc. 2d 1090, 545 N.Y.S.2d 670, 671 (Sur. Ct., Nassau Co. 2016).
26. *Id.* at 1092.
27. *In re Klasson*, 2004 N.Y. Slip Op. 50440(U) (Sur. Ct., Nassau Co. 2004).
28. *In re Schneider's Will*, 64 Misc. 2d 299, 314 N.Y.S.2d 587 (Sur. Ct., Westchester Co. 1970).
29. *Id.* at 301.
30. *Id.*
31. *In re Tribble's Will*, 34 Misc. 2d 130, 230 N.Y.S.2d 74 (Sur. Ct., Suffolk Co. 1962); *see also In re Estate of Meyers*, 158 Misc. 942, 287 N.Y.S. 81 (Sur. Ct., N.Y. Co. 1936).
32. *Estate of Obermeyer*, 2014 WL 1255193 at *3 (Sur. Ct., N.Y. Co. 2014).
33. *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900); *Will of Rivera*, N.Y.L.J., June 20, 2016, p.26 (Sur. Ct., Kings Co. 2016).
34. *In re Watson*, 37 A.D.2d 897, 325 N.Y.S.2d 347, 348 (3d Dep't 1971) *citing Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876); *In re DeCastro*, 32 Misc. 193, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).

Daniel J. Reiter is an estate litigator and Surrogate's Court practitioner based in New York City. Mr. Reiter is a member of the NYSBA Trusts and Estates Law Section's Committee on Estate Litigation. He can be reached at djr@djrattorney.com.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

FIDUCIARIES

Sale of Real Property for Below Market Value Justifies Surcharge and Imposition of Interest from Date of Sale

Decedent's estate included a brownstone residence which was given a value of $1,500,000 on the nominated executor's application for preliminary letters. The executor sold the property for $670,000 to an acquaintance, Basile, who the day before closing assigned the rights under the contract to Basile's own LLC, which three days later sold the property to an unrelated party for $1,300,000. The charitable beneficiaries of the estate and the Attorney General objected to settlement of the executor's account. Surrogate Lopez Torres granted the objectants' motions for summary judgment and surcharged the executor $630,000 plus 6% from the date of sale of the property.

The executor appealed and the Appellate Division affirmed. The court found that the evidence offered by the objectants made out a prima facie case of breach of fiduciary duty. Specifically, the executor chose a real estate agent unfamiliar with the relevant market, did not obtain an appraisal of the property at the time of sale or investigate the market value of comparable properties, and sold the property to an acquaintance when there was an unrelated third-party ready to purchase the property "for nearly double the price" paid by the LLC. The executor offered no evidence raising a triable issue of fact and therefore the grant of summary judgment was proper. In addition, Surrogate Lopez Torres providently exercised her discretion in awarding interest given the proof that the property was re-sold for nearly twice the original price three days after the executor sold the property. *Matter of Billmyer*, 142 A.D.3d 1000, 37 N.Y.S. 3d 330 (2d Dep't 2016).

TRUSTS

Decanting Into Supplemental Needs Trust Approved

In *Matter of Kroll*, 41 Misc. 3d 954, 971 N.Y.S.2d 863 (Sur. Ct., Nassau Co. 2013), Surrogate McCarty approved the creation of a third-party supplemental needs trust by decanting a trust for the sole benefit of the creator's grandchild. The Department of Health had objected, contending that the trust was created from the beneficiary's own assets and was therefore a first-party supplemental needs trust which must include a payback provision reimbursing the state on the death of the beneficiary. The decanting documents were executed days before the beneficiary turned 21 years of age, at which time the beneficiary would have a presently exercisable general power of appointment over the trust property. The decanting was effective immediately without regard to the 30-day waiting period in EPTL 10-10.6(j) because the beneficiary's parent consented to the decanting under a provision in the trust terms authorizing the parent or guardian of a beneficiary under a disability to receive notice and act for the beneficiary.

William P. LaPiana

On appeal by the Department of Health, the Appellate Division affirmed. The appellate court stated that the assets in the invaded trust never belonged to the beneficiary. The trust was funded by the beneficiary's grandparent and none of the beneficiary's assets were ever transferred to the trust. Under the Department of Social Services Regulation 18 NYCRR 360-4.5(b), an individual is considered to have created a trust to the extent that person's assets "were used to form all or part of the principal (corpus) of the trust." Therefore, the beneficiary was not the creator of the trust and the appointed trust was a valid third-party supplemental needs trust. *Kroll v. New York State Dep't. of Health*, 143 A.D.3d 716, 39 N.Y.S.3d 183 (2d Dep't 2016).

WILLS

Disposition to Employee Benefit Fund Is Void Because Potential Beneficiaries of Fund Were Witnesses to the Will

Testator's will made a general disposition of $100,000 to an employee appreciation fund of a homeowner's association. The association has a no tipping policy. Instead, residents are encouraged to contribute to the fund. Monies held in the fund are distributed

to staff members at year's end according to a plan approved by a committee of residents. All three witnesses to the testator's will were employees of the association and eligible to receive distributions from the fund. The probate decree invalidated the gift to the association because under EPTL 3-3.2 the witnesses were interested witnesses whose testimony was necessary to prove the will and therefore must be purged of their gifts under the will. The association then moved to vacate that portion of the decree invalidating the disposition, arguing that the witnesses, whose maximum individual benefit from the bequest was $465, have renounced any benefit from the disposition to the fund.

Surrogate Czygier declined to modify the decree, noting that the renunciations, never filed with the court, are irrelevant. First, under New York case law, employees are the recipients of tips which are contributions by patrons to the wages that the employer should pay and therefore the beneficial disposition inures to the employer, and not only to the individual employees. Second, because the employee-witnesses renounced only their interest in the disposition, not in the entire fund, distributions which are in the hands of a committee creates the possibility of abuse. *Matter of Altstedter*, 53 Misc. 3d 477, 39 N.Y.S.3d 586 (Sur. Ct., Suffolk Co. 2016).

Testamentary Scheme Supports Gift by Implication

Testator and her spouse had eight children together with whom they raised two children from the spouse's prior marriage, but testator never adopted the stepchildren. Testator's will made bequests of $2,000 to each of the ten children, directed that property equal in value to the maximum amount that can pass free of federal estate tax be held in trust for the spouse and that on the spouse's death any remaining trust property be divided equally among the surviving children and the descendants of deceased children. The residuary estate was given to the spouse "absolutely." No provision was made for the spouse predeceasing the testator, which is what happened.

At testator's death the trust for spouse could not be funded because lifetime gifts made by the testator through testator's attorney-in-fact, one of her biological children who is also administrator of the testator's estate, had exhausted the applicable exclusion amount. The administrator's position was that because the will does not dispose of the residuary estate in the event the testator's spouse predeceased, the residuary disposition failed and the residue must pass by intestacy to the testator's eight biological children. One of the stepchildren then began a construction proceeding seeking a determination that the testator intended to give the residuary estate to all ten children. The administrator moved for summary judgment on the grounds that the petitioner lacked standing. Surrogate Wilhelm denied the motion as procedurally deficient and agreed with the petitioner that the testator intended to give the residuary estate to all ten children. The administrator appealed and the Appellate Division affirmed.

The court addressed the standing issue first and concluded that because the petitioner "plausibly argues" that the terms of the will show the testator's intent to benefit both the testator's biological children and stepchildren should the testator's spouse predecease, the petitioner raised a colorable argument that the petitioner was entitled to a share of the property affected by the construction proceeding, thus meeting the test for standing in a construction proceeding.

The court then concluded that Surrogate Wilhelm had correctly found a gift by implication of all of the residue to the testator's biological children and stepchildren. The only provision of the will that did not provide equal benefits for all 10 children was the outright gift of the residue to the testator's spouse—a gift which does not provide for the possibility that the spouse would die first. Indeed, nothing in the will suggests that the testator intended to exclude the stepchildren from the gift of the residue should the testator's spouse predecease. In these circumstances Surrogate Wilhelm correctly gave effect to the testator's "expressed general testamentary plan and purpose." *Matter of Warren*, 143 A.D.3d 1110, 39 N.Y.S.3d 282 (3d Dep't 2016).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Associate Dean for Academic Affairs and Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).

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

By Ilene Sherwyn Cooper

Attorney Disqualification

Before the Surrogate's Court, New York County, in *In re Christopher*, was a contested probate proceeding and a contested proceeding to remove the preliminary executor of the estate, in which the objectant, the decedent's brother, sought, *inter alia,* to disqualify three lawyers of the law firm representing the proponent of the Will and the preliminary fiduciary, as well as the firm itself, on the grounds of the advocate-witness rule codified in Rule 3.7 of the Rules of Professional Conduct. In pertinent part, Rule 3.7 prohibits a lawyer from acting "as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact…" or "another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client…."

The court opined that Rule 3.7 was not to be applied mechanically, but was designed to offer guidance as to whether disqualification in a given case was warranted. To this extent, a court is required to balance the appearance of impropriety or harm to a party if disqualification is denied against a party's right to retain counsel of his/her own choosing. The court observed that the party seeking disqualification has the burden of establishing that such a drastic remedy is necessary.

Notably, the record revealed that the petitioner's counsel had represented the decedent for many years prior to her death, counseled her with respect to estate planning, and drafted the instrument offered for probate. In his objections to probate, the decedent's brother alleged that the petitioner wrongfully took control of the decedent's assets, and was named her executor and principal beneficiary of her estate through the exercise of undue influence, while she was in a diminished state. Within this context, the decedent's brother alleged that two of the lawyers in the firm facilitated the petitioner's control of the decedent's financial affairs by permitting, amongst other things, his involvement in the decedent's will-drafting process. As to the third lawyer, who was serving as trial counsel, the decedent's brother alleged that his testimony about post-death events was necessary at trial.

The court observed that while the attorneys disputed the substance of the allegations made by the decedent's brother, they conceded that the two lawyers involved in the preparation of the decedent's Will would be called as trial witnesses and thus were not representing the petitioner in the proceeding. As a result, outside counsel was retained to assist the third lawyer in the firm with the litigation. Further, counsel alleged that disqualification of the firm would be prejudicial to the petitioner by depriving him of the firm's institutional knowledge of the decedent and her testamentary plan.

The court opined that there was no per se rule barring an attorney-drafter from representing a will proponent during the pre-trial stages of litigation. Moreover, the court found that there had been no showing that the attorney handling the litigation was a necessary witness at trial, or that any of the attorneys in petitioner's firm would be adverse to the interests of their client so as to require the disqualification of the entire firm. Accordingly, in light of the circumstances, the court denied the objectant's motion, without prejudice to renewal, should facts emerge that would shift the balance in favor of disqualification.

***In re Christopher,* N.Y.L.J., Aug. 18, 2016, p. 22, col. 3 (Sur. Ct., N.Y. Co.).**

Joint Bank Account

In *In re Asch,* the Surrogate's Court, Richmond County, denied the petitioner's motion for summary judgment determining that she was entitled to 50% of a bank account titled in the joint name of the decedent and the respondent.

The decedent's Will divided her estate equally between her two daughters, who were her sole surviving heirs. The instrument was admitted to probate by the court, and letters testamentary issued to the decedent's daughters, as the nominated co-executors of her estate. Thereafter, one of the co-executors commenced a discovery proceeding against her co-executor/sister seeking recovery of a joint bank account in the name of the decedent and the respondent. The petitioner then moved and the respondent cross-moved for summary judgment with respect to the issue of whether a valid joint account had been created.

The court found that the survivorship language on the bank documents triggered the statutory presumption that the account was a joint account with right of survivorship. Nevertheless, the court opined that the presumption could be rebutted by direct proof that no joint account was intended, or substantial circumstantial proof that the joint account was opened for convenience only. Further, the court noted that the validity of a joint account may be attacked for fraud, undue influence or lack of capacity, with the burden of proof resting on the party asserting such claims.

In support of her claim that the subject account was created as a matter of convenience, the petitioner alleged that the decedent was the sole depositor in the account, the creation of the joint account conflicted with the decedent's testamentary plan of dividing everything between her two daughters, and, with few exceptions, the account was used exclusively by the decedent. Nevertheless, the court found that the petitioner had failed to support these contentions with documentary proof or testimony from a person with first-hand knowledge as to the circumstances surrounding the creation of the account. In reaching this result, the court found it significant that no proof had been offered as to how the respondent treated the subject account during the decedent's lifetime, or how, if at all, she characterized her interest in the account on her tax returns, or to third parties. As such, the court held that the petitioner had failed to submit the requisite proof to rebut the presumption that the account was a validly created joint account.

On the other hand, the court found that the medical proof offered by the petitioner and the respondent created a question of fact as to whether the decedent possessed the requisite capacity to create the joint account. Indeed, while the records submitted by the petitioner indicated that the decedent was disoriented and suffered from decreased memory and orientation, the reports submitted by the respondent revealed that she was alert and oriented, fluent in her speech, and that her comprehension was intact. Accordingly, given the disparity in the decedent's mental capacity at or about the time the subject account was created, the petitioner's motion and the respondent's cross-motion for summary judgment were denied on the basis that there was an issue of fact as to whether the decedent had the capacity to convert the account in question into a joint survivorship account.

***In re Asch*, N.Y.L.J., Sept. 27, 2016, p. 28, col. 3 (Sur. Ct., Richmond Co.).**

Preclusion

In *In re Haimes*, the court granted an order of preclusion after petitioner's failure to comply with a disclosure order. The order directed that petitioner provide certain authorizations to the respondent sufficient to obtain certain information from the IRS. Petitioner failed to do so, resulting in the application by the respondent for dismissal of the underlying petition for a constructive trust, or preclusion.

The court opined that the nature and degree of the penalty to be imposed for failing to comply with disclosure is a matter within the discretion of the court. Generally, however, a party will not be precluded from offering evidence at the trial of a matter absent a clear showing that his/her conduct was willful, contumacious or in bad faith. Within this context, the court noted that it was the second time that petitioner had failed to comply with the specific discovery demands. Indeed, the court found it significant that the petitioner had failed to acknowledge that it was his burden, and not the respondent's, as the petitioner seemed to suggest, to provide the requested authorizations sufficient for the respondent to obtain the information sought.

Accordingly, based upon the foregoing, the court found petitioner's failure to comply with its discovery order to be willful, and directed that petitioner be precluded from offering any evidence at trial related to matters involving the IRS.

***In re Haimes*, N.Y.L.J., June 2, 2016, p. 28, col. 2 (Sur. Ct., Suffolk Co.).**

Protective Order

Before the court in *In re Ligreci* was a motion for a protective order quashing a subpoena served on the objectant in a contested accounting proceeding. The motion was supported by an affirmation of objectant's counsel, rather than an affidavit by the objectant. In view thereof, the court raised the issue of whether counsel had standing to seek a protective order.

The court opined that standing is a concept utilized to insure that a justiciable controversy is presented to the court. The requirement of standing is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation. Further, citing *In re Selesnick*, 115 Misc. 2d 993 (Sup. Ct., Westchester Co. 1982), the court observed that "a subpoena may only be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated."

Based on the foregoing, the court concluded that objectant's counsel lacked standing to challenge the propriety of the subpoena, since it was his client whose property rights or privileges may have been violated by its issuance. Additionally, the court held that inasmuch as the attorney's affirmation in support of the motion was not based on his personal knowledge, it had no probative or evidentiary value. Finally, and in any event, the court found that the information requested by the subpoena bore a reasonable relationship to the

issues raised by the objections to the petitioner's account.

Accordingly, the motion to quash the subpoena was denied, without prejudice.

***In re Ligreci*, N.Y.L.J., Mar. 21, 2016, p. 30 (Sur. Ct., Richmond Co.).**

Removal of Trustee

In *In re Gloria M. Smith Grantor Ten Year Retained Income Trust*, the court, after a hearing on the issue, removed the trustee of the trust and directed the successor co-trustees to wind up the affairs of the trust and make a distribution to its beneficiaries. The record revealed that although the trust had terminated by its terms, the respondent waited for fifteen years before distributing its assets to the remaindermen. Moreover, without authorization to do so, the trustee distributed the property to an LLC in which the beneficiaries had an ownership interest. The court determined that a trustee continuing to act despite the termination of the trust should be removed when the trustee fails to distribute trust assets in accordance with the trust terms. Moreover, the court found that as the subject of more than one bankruptcy proceeding, respondent's purported insolvency was sufficient for her permanent removal as a fiduciary (EPTL 7-2.6 (a)(2)).

***In re Gloria M. Smith Grantor Retained Income Trust*, N.Y.L.J., Apr. 14, 2016, p. 34, col. 2 (Sur. Ct., Suffolk Co.).**

Revocation of Letters

In *In re Carey,* the Surrogate's Court, New York County, denied a motion for summary judgment by the beneficiaries of the estate seeking removal of the executor.

The record revealed that the decedent died with an estate worth millions of dollars. Following his death, the decedent's brother, who was a domiciliary of Pennsylvania, and the respondent, who was a domiciliary of Connecticut, petitioned for letters testamentary and of trusteeship with respect to his estate. Although the respondent was not a citizen of the United States, he was identified in the probate petition as such. Subsequently, the decedent's brother petitioned to resign as co-executor and co-trustee, and in each of those applications, the respondent was identified as a citizen of the United States. Following an arbitration proceeding in which the respondent alleged that he was a citizen of Germany, the Attorney General commenced the subject removal proceeding, contending that the respondent was ineligible to serve pursuant to the provisions of SCPA 707(1)(c), which provides that a non-domiciliary alien "is ineligible to receive letters testamentary, except in the discretion of the court, and only with one or more co-fiduciaries, at least one of whom is a resident of the state." In addition, the petitioner claimed that the respondent's letters should be revoked on the grounds that they had been obtained by a false suggestion of a material fact, rendering him unfit to serve on the basis of dishonesty.

The respondent answered arguing, *inter alia,* that the work of the executors was near completion, and in addition, by challenging the constitutionality of SCPA 707(1)(c). Pending the return date of citation, the court suspended the respondent's letters testamentary and letters of trusteeship, and scheduled the matter for a hearing. Thereafter, the respondent filed an affidavit stating that he had become a domiciliary of New York. A motion for summary relief revoking the appointment of the respondent as fiduciary followed. The respondent opposed the motion.

Referencing the provisions of SCPA 713, the court noted that in a proceeding to revoke letters issued to a person who was ineligible at the time letters were issued, revocation is not mandatory. In exercising its discretion in this regard, the court stated that, under the circumstances, it was required to consider whether the respondent deliberately misled the court. Although the respondent also challenged the constitutionality of SCPA 707(1)(c), the court observed that it was "obliged to avoid constitutional questions to the extent possible." Given the issues regarding the respondent's possible deception, the court held that it was not required to consider the statute's constitutionality. Accordingly, the motion for summary judgment was denied.

***In re Carey*, N.Y.L.J., Sept. 15, 2016, p. 18, col. 6 (Sur. Ct., N.Y. Co.).**

Self-Incrimination

In *In re Koeppel,* the Surrogate's Court, New York County, was asked to consider whether the respondent could be compelled to answer questions asked of him during a hearing for criminal contempt, despite his assertion of the privilege against self-incrimination. More specifically, the court was asked to consider whether the privilege could be invoked within the context of a proceeding for criminal contempt, and if so, whether it was waived by the respondent when he filed an affidavit in opposition to the proceeding with the court.

Relying on a decision by the Supreme Court in *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418 (1911), the court held that the privilege could be asserted in the pending proceeding.

As to the second issue, the court held that while a respondent in a criminal contempt proceeding may waive his or her right to assert the privilege against self-incrimination, the statements by the respondent in his affidavit did not operate to do so. Rather, the court

found that the affidavit was in the nature of a pleading that denied the allegation that his disobedience of court orders was willful. The court noted that the filing of a pleading, even one which contains affirmative defenses, does not constitute a waiver of the privilege, so long as the information that it provides is not incriminating.

To this extent, the court observed that no incriminating evidence, other than perhaps knowledge of the orders themselves, was revealed in the affidavit. An assertion of innocence, or a denial of guilt, could not be considered incriminating. Indeed, the court found that the respondent could not afford to forgo the filing of the affidavit, as to do so would have placed him in jeopardy of a default.

Accordingly, mindful of the principle that "courts must indulge every reasonable presumption against waiver of fundamental constitutional rights" (citing *Bradley v. O'Hare,* 2 A.D.2d 436 [1st Dep't 1956]), the court found that respondent did not waive his right to invoke his privilege against self-incrimination, and overruled petitioner's objection to his assertion of his Fifth Amendment rights.

***In re Koeppel*, N.Y.L.J., Aug. 12, 2016, p. 30 (Sur. Ct., N.Y. Co.).**

Statute of Limitations

In *In re Coiro,* the court held that the statute of limitations in a discovery proceeding is the three-year period applicable to actions for replevin and conversion. However, the statute is subject to the tolling provisions of CPLR 210(c), which provides that "in an action by an executor or administrator to recover personal property wrongfully taken after the death [of a decedent] and before the issuance of letters. . .the time within which the action must be commenced shall be computed from the time the letters are issued or from three years after the death, whichever event first occurs." On this basis, the court denied the respondent's motion to dismiss the petition, finding that the action had been timely commenced two years after letters testamentary had issued, and less than three years after the decedent's death.

***In re Coiro*, N.Y.L.J., May 5, 2016, p. 23, col. 2 (Sur. Ct., Kings Co.).**

Summary Judgment

In *In re Rella,* the issue before the court was the timeliness of a motion for summary judgment, which had been made after the filing of a note of issue. The court observed that a motion for summary judgment must be made within 120 days after the filing of a note of issue, unless the court establishes a different deadline, or it is authorized by the court for good cause shown.

The court opined that in order to establish good cause, the movant cannot simply rely on the merits of the motion or the absence of prejudice to the adversary, but also must proffer a satisfactory explanation for the untimeliness. Within this context, the court found that the movant had failed to establish good cause for the delay in filing his motion, particularly in view of the fact that the note of issue was filed in 2005, and he had to defend the timeliness of a prior motion for summary judgment. Moreover, the court noted that absent a showing of newly discovered evidence or other sufficient cause, the practice of successive summary judgment motions in the same case is to be strongly discouraged. Finally, the court noted that a denial of summary judgment as unjustifiably late does not result in a forfeiture of the movant's position on the merits. Accordingly, the motion was dismissed.

***In re Rella*, N.Y.L.J., Nov. 4, 2016, p. 36 (Sur. Ct., N.Y. Co.).**

Suspension of Letters

Before the Surrogate's Court, Richmond County, in *In re LaForgia*, was a petition for, *inter alia*, a compulsory accounting filed by the decedent's son against his two sisters, who were the co-executors of the estate. The petition was joined in by the guardian ad litem appointed for a disabled grandchild of the decedent. The application was opposed by the co-executors, as well as the decedent's wife.

The record revealed that the decedent died, testate, survived by his wife and three children. The pertinent provisions of his will included numerous provisions for tax-savings mechanisms and estate planning, including testamentary trusts. The court noted that these provisions of the will were seemingly ignored by the fiduciaries, who, significantly, failed to fund the subject trusts, including one for the decedent's disabled grandson. In addition, the court observed that the executors paid approximately $750,000 in legal fees to various law firms, purchased an additional parcel of real property in excess of $2 million, and expended an additional $300,000 in unidentified administration expenses.

Most egregiously, the court found that the co-executors had willfully violated a temporary restraining order and had failed to fulfill their fiduciary obligations essentially since their appointment.

Opining that fiduciaries are required to conduct themselves with utmost loyalty and the "punctilio of honor," the court concluded that the co-executors, despite their representation by counsel, had evidenced an unfamiliarity with their duties to the estate and its beneficiaries, by failing to fund the trusts created under the decedent's will, liquidating a brokerage account in order to purchase a $2 million parcel of real property, incurring excessive administration expenses, and re-

moving funds from an estate account despite a court order restraining them from doing so.

Accordingly, in view of the foregoing, and in order to preserve the balance of the estate and to safeguard it from further depletion, the court, *sua sponte*, suspended the letters testamentary issued to the co-executors pending a hearing as to their continued eligibility to serve.

***In re LaForgia*, N.Y.L.J., Sept. 6, 2016, p. 29 (Sur. Ct., Richmond Co.).**

Three-Year/Two-Year Rule

In *In re Esposito*, the Surrogate's Court, Suffolk County, again had occasion to address the provisions of 22 N.Y.C.R.R. 207.27, and refused to direct the production of unexecuted wills or trust instruments outside the scope of the three-year/two-year period. Before the court in the underlying probate proceeding was a motion by the respondents, the decedent's three children, seeking, *inter alia*, an order compelling the petitioner, the decedent's surviving spouse, to produce documents responsive to their Notice for Discovery and Inspection. In pertinent part, the respondents' document demand sought originals and copies of executed and unexecuted wills and/or trust instruments, without limitation to the three year/two year period. Petitioner opposed the motion and cross-moved for a protective order.

Both petitioner and respondents relied on the decision in *In re Manoogian*, N.Y.L.J., Feb. 28, 2014, p. 22 (Sur. Ct., N.Y. Co.) for their respective positions. The court observed that in *Manoogian*, the court addressed the issue of production of prior wills beyond the scope of the three-year/two-year period, and held that because the production of a will can be compelled from any person, pursuant to the provisions of SCPA 1401, regardless of its date, prior testamentary instruments should be discoverable irrespective of 22 N.Y.C.R.R 207.27, unless there was some basis for issuing a protective order. Respondents asked that the holding in *Manoogian* be expanded to authorize discovery of all executed and unexecuted wills and trust instruments.

The court rejected the respondents' request, reasoning that the provisions of SCPA 1401 do not apply to unexecuted wills or trust instruments, and thus, no basis existed for directing the production of these documents beyond the three-year/two-year period. In view thereof, the court directed the production of wills, whether executed or unexecuted, within the three-year/two-year period, inasmuch as the petitioner alleged that she did not possess any trust instruments within that time frame.

***In re Esposito*, N.Y.L.J., Sept. 16, 2016, p. 40, col. 5 (Sur. Ct., Suffolk Co.).**

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

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Motion to Enjoin Use of Trust Assets

In this case, Clifford Abromats, as trustee, alleged that Phillip Abromats, as beneficiary, had unduly influenced their mother to make certain trust amendments. Phillip asserted that Clifford committed breaches of trust and that, under Florida law, the court should enjoin Clifford from using trust assets to litigate the case. Section 736.0802(10), Florida Statutes, allows the use of trust assets to pay for a trustee's attorney's fees, but when the trustee is alleged to have committed a breach, he or she must notify the beneficiaries of the intent to pay fees from trust assets. The beneficiary then has the right to move to enjoin the use of trust assets for that purpose; however, the court must deny the motion unless there is reasonable basis for the court to conclude preliminarily that there has been a breach. The burden on the beneficiary is made even higher by the fact that the court may deny the motion for good cause. Here, the court found that the record was rife with cross-accusations and that it was more proper to side with Florida's default rule allowing the trustee to use trust assets for his fees.

Abromats v. Abromats, 2016 WL 5941888 (S.D. Fla. Oct. 13, 2016)

No Lawyer-Client Privilege

This is a case of four siblings seeking to revoke probate of two wills on grounds that the decedent, their mother, was subject to undue influence by a fifth child. At a deposition of the estate planning lawyer who prepared the decedent's will, the lawyer asserted the attorney-client privilege and ethical duty of confidentiality and refused to answer questions related to the decedent's reasons for disinheriting the plaintiffs. The Third District Court of Appeal rejected his claim of privilege. Ordinarily, the privilege remains intact even after a client's death, but there is no privilege when "a communication is relevant to an issue between parties who claim through the same deceased client." Section 90.502(4)(b), Florida Statutes. The court similarly rejected the lawyer's claim that the questions were intended to disclose information that the lawyer was ethically barred from disclosing under the Rules Regulating the Florida Bar. In litigation, those rules of confidentiality take a backseat to the compulsion of evidence, and a lawyer may refuse to disclose only that which is shielded from discovery by the lawyer-client privilege.

Jonathan A. Galler

Vasallo v. Bean, 2016 WL 6249157 (Fla. 3d DCA Oct. 26, 2016) (not final)

Motion to Substitute Representative

The plaintiffs in this case appealed from a trial court order denying a motion to substitute parties after one of the defendants died. The motion to substitute sought to have the trial court appoint a representative for the decedent, who was the subject of a pending breach of duty claim. However, the trial court ruled that it had no authority to appoint a representative. Instead, it was up to the plaintiffs to seek to substitute the personal representative of the decedent's estate or, if there was no estate, to petition for administration as a creditor of the estate. On appeal, the Fourth District Court of Appeal noted that the order was non-final and held that it would not treat the plaintiffs' argument as a petition for writ of certiorari, seeing as there was no showing of irreparable harm not remediable on appeal. The fact that costs would be incurred by the plaintiffs in petitioning for administration is not irreparable injury.

Gomerz v. Fradin, 199 So. 3d 554 (Fla. 4th DCA 2016)

Compelling a Trust Accounting

This case presents the issue of whether an estate or a beneficiary of a revocable trust may compel the trustee, upon the decedent's passing, to render an accounting of the trust for the years when the decedent was alive. Thelma Coleman created a revocable trust of which she was the trustee, but of which she allowed her granddaughter to become successor trustee during her life. Upon her death, the granddaughter's co-personal representative and a beneficiary of the trust, Betty Hilgendorf, sought to compel an accounting of receipts and disbursements made during the settlor's lifetime. Both the trial court and Fourth District Court of Appeal held that such an accounting could not be compelled, particularly where: the trust did not require such accountings; the settlor never requested accountings during her lifetime; and there was no showing of any breach of fiduciary duty of the part of the trustee. The appellate court distinguished the case from others where, for example, an accounting had

been sought during the settlor's life or where breaches of duty to the settlor had been alleged.

Hilgendorf v. Estate of Coleman, 201 So.3d 1262 (Fla. 4th DCA 2016) (not final)

Slayer Statute

Maurice McGriff and Terry Rigby were domestic partners, and McGriff was named as a beneficiary of Rigby's life insurance proceeds. A physical altercation between the two resulted in the death of Rigby. The state prosecutor was unable to charge McGriff with Rigby's death because McGriff claimed it was an act of self-defense and there were no other witnesses to the incident. Florida's slayer statute provides that a life insurance beneficiary may not collect if he "unlawfully and intentionally kills" the holder of the policy. Section 732.802(3), Florida Statutes. McGriff himself died during the pendency of the lawsuit, and his personal representative was substituted in his place. Pursuant to the slayer statute, because McGriff was not convicted of causing Rigby's death, the statute would not apply unless the court determined by the greater weight of the evidence that McGriff killed Rigby unlawfully and intentionally. Because McGriff conceded that the killing was an act self-defense, it was unquestionably intentional. However, the totality of the evidence before the court did not prove that it was more likely than not that McGriff pushed Rigby. The slayer statute, therefore, did not preclude distribution of the proceeds to McGriff's beneficiaries.

The Prudential Ins. Co. of Am. v. Harding, 2016 WL 6568085 (M.D. Fla. Nov. 4, 2016)

David Pratt is the Chair of Proskauer's Private Client Services Department and the Managing Partner of the Boca Raton office. His practice is dedicated to estate planning, trusts and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan A. Galler is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation group and are admitted to practice in Florida and New York.

Section Committees and Chairs

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

Ad Hoc—Multi-State Practice
Darcy M. Katris
Hodgson Russ LLP
1540 Broadway. 24th Floor
New York, NY 10036
dkatris@hodgsonruss.com

Susan H. Accetta
Stern Keiser & Panken LLP
1025 Westchester Avenue, Suite 305
White Plains, NY 10604
saccetta@skpllp.com

Charitable Planning
Lisa Newfield
Murtha Cullina LLP
One Century Tower
265 Church Street 9th Floor
New Haven, CT 06510
Lnewfield@murthalaw.com

Susan Miller King
Miller King LLC
599 Gatehouse Road
Tully, NY 13159
susan.king@millerking.com

Continuing Legal Education
Sylvia E. Di Pietro
Law Office of Sylvia E. Di Pietro, Esq., LLC
55 West 14th Street, Suite 4H
New York, NY 10011-7400
femalelitigator@yahoo.com

Diversity
Lori A. Douglass
283 Woodlands Avenue
White Plains, NY 10607-2813
ldouglass@mosessinger.com

Elderly and Disabled
Ellyn S. Kravitz
Abrams, Fensterman, Fensterman,
Eisman, Formato, Ferrara & Wolf, LLP
630 Third Avenue, 5th Floor
New York, NY 10017
ekravitz@abramslaw.com

Jeffrey A. Asher
Law Offices of Jeffrey A. Asher, PLLC
43 West 43rd Street, Suite 72
New York, NY 10036
jasher@asherlawfirm.com

Estate and Trust Administration
Michael S. Schwartz
Curtis Mallet-Prevost Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
michael.schwartz@curtis.com

Estate Litigation
John G. Farinacci
Ruskin Moscou Faltischek PC
1425 RXR Plaza
East Tower 15th Floor
Uniondale, NY 11556
jfarinacci@rmfpc.com

Estate Planning
Paul S. Forster
P.O. Box 61240
Staten Island, NY 10306-7240
psflaw@aol.com

International Estate Planning
Nathan W.G. Berti
Hodgson Russ LLP
The Guaranty Bldg.
140 Pearl Street Suite 100
Buffalo, NY 14202
nberti@hodgsonruss.com

Law Students and New Members
Alexandra Blair Copell
Katten Muchin Rosenman LLP
575 Madison Ave, Floor 20
New York, NY 10022-2511
ali.copell@gmail.com

Hyun Jung Kim
Norton Rose Fulbright
666 Fifth Avenue
New York, NY 10103-3198
christina.kim@nortonrosefulbright.com

Legislation and Governmental Relations
Georgiana James Slade
Milbank Tweed Hadley & McCloy LLP
1 Chase Manhattan Plaza
New York, NY 10005
gslade@milbank.com

Life Insurance and Employee Benefits
David A. Pratt
Professor of Law, Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3494
dprat@albanylaw.edu

Membership and Relations with Local Bars
Megan Michelle Knurr
Citi Private Bank
153 East 53rd Street - 23rd Floor
New York, NY 10022
megan.knurr@citi.com

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

New York Uniform Trust Code
William P. LaPiana
New York Law School
185 West Broadway
New York, NY 10013-2921
william.lapiana@nyls.edu

Ira M. Bloom
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
ibloo@albanylaw.edu

Practice and Ethics
Brian P. Corrigan
Farrell Fritz PC
Grand Central Plaza, 37th Floor
New York, NY 10017
bcorrigan@farrellfritz.com

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

Surrogate's Court
Cora A. Alsante
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
calsante@hancocklaw.com

Taxation
Jessica Galligan Goldsmith
Kurzman Eisenberg Corbin & Lever, LLP
One North Broadway, Suite 1004
White Plains, NY 10601
jgoldsmith@kelaw.com

Kevin Matz
Kevin Matz & Associates PLLC
50 Main Street, Suite 230
White Plains, NY 10606
kmatz@kmatzlaw.com

Technology in Practice
Parth Chowlera
Greenfield Stein & Senior, LLP
600 Third Avenue, 11th Floor, 5th Floor
New York, NY 10016
PChowlera@gss-law.com

Executive Committee District Representatives

First District
Ian William MacLean
MacLean Law Firm, P.C.
60 East 42nd Street, 40th Floor
New York, NY 10165
ianwmaclean@mlfpc.com

Second District
William A. Cahill, Jr.
Anderson & Cahill LLP
255 Flatbush Avenue
Brooklyn, NY 11217-2444
wacahill@andersoncahill.com

Third District
Deborah S. Kearns
Albany County Surrogate's Court
Albany County Courthouse
16 Eagle Street
Albany, NY 12207
dkearns@nycourts.gov

Fourth District
Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

Fifth District
Mary C. King
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
mking@hancocklaw.com

Sixth District
Kathryn Grant Madigan
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902-0106
kmadigan@lgtlegal.com

Seventh District
Nancy E. Klotz
Tompkins Financial Advisors
179 Sully's Trail, Suite 200
Pittsford, NY 14534-3346
nklotz@tompkinsfinancial.com

Eighth District
Holly Adams Beecher
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
hbeecher@phillipslytle.com

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

Tenth District
Eric W. Penzer
Farrell Fritz P.C.
1320 RXR Plaza
Uniondale, NY 11556
epenzer@farrellfritz.com

Eleventh District
David N. Adler
125-10 Queens Blvd., Suite 12
Kew Gardens, NY 11415-1519
dnalaw@live.com

Twelfth District
Hon. Lee L. Holzman
Amy Holzman, Pllc
132 Larchmont Avenue, Suite 14
Larchmont, NY 10538-2843
llh2228@aol.com

Thirteenth District
Irini Nagy Bekhit
Richmond County Surrogate's Court
18 Richmond Terrace
Staten Island, NY 10301
ibekhit@courts.state.ny.us

Publication of Articles

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

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

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