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Trusts and Estates Law Section Newsletter

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

Inside

- Mediation Clauses in Wills and Trusts
- Use the Wealth Gradient in Mortality to Negotiate Lower Costs for High Net Worth Clients
- Pitfalls in Effectuating the Transfer of Cooperative Shares
- The Uniform Adult Guardianship and Protective Proceedings Act
- Are We Now ABLE to Forget About Special Needs Trusts?

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Table of Contents

Page

A Message from the Chair ... 4
Sharon L. Wick

Editor's Message ... 5
Jaclene D'Agostino

Fair Is Fair: Mediation Clauses in Wills and Trusts ... 6
Michael A. Burger

Seeking Improved Policy Performance? Use the Wealth Gradient in Mortality to Negotiate Lower Costs for High Net Worth Clients ... 10
David Buckwald and Steven Zeiger

Pitfalls in Effectuating the Transfer of Cooperative Shares ... 12
Paul S. Forster

The Uniform Adult Guardianship and Protective Proceedings Act ... 14
Edward D. Loughman, III

Are We Now ABLE to Forget About Special Needs Trusts? ... 18
Robert P. Mascali

Recent New York State Decisions ... 22
Ira M. Bloom and William P. LaPiana

Case Notes—New York State Surrogate's and Supreme Court Decisions ... 24
Ilene Sherwyn Cooper

Florida Update ... 29
David Pratt and Jonathan A. Galler

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Message from the Chair

Since 2011, the Section has been making grants to the New York Bar Foundation to fund Trusts and Estates Law Section Fellowships. The Fellowship program provides students an opportunity to experience trusts and estates law practice. The ultimate goal of the Fellowship is to create a network and forge relationships among trusts and estates law attorneys throughout the State of New York. We had an excellent candidate pool this year. I am pleased to announce that the following fellowships were awarded:

- Chambers of the Hon. Robert Giganti—Jenna Canciglia
- Chamber of the Hon. Barbara Howe—Nicole Mutignani
- Chambers of the Hon. Peter Kelly—Santorini Rivera
- Chambers of the Hon. Vincent Versaci—Bradley Murray

A special thank you to the Surrogate Judges who have volunteered to host this year's fellows.

Given our Section's membership, we have the good fortune of having four regular delegates to serve on the Bar Association's House of Delegates. This year, our regular delegates are Richard J. Bowler, Nicole L. Clouthier, Deborah S. Hearns and Laurence Keiser. The alternate delegate is Victoria D'Angelo.

At the March meeting of the Executive Committee of the Bar, two pieces of proposed legislation presented by our Section were approved. The first is a technical correction to EPTL 5-1.1A which clarifies the method by which an electing spouse must notify the personal representative or nominated executor of a decedent's estate that he or she intends to exercise his or her right of election. The second would amend the CPLR and the EPTL to provide that a beneficiary of a trust shall not be considered the creator of a trust solely by reason of the lapse, release, or waiver of the beneficiary's right to withdraw trust property. We are optimistic that these proposals will be passed by the New York legislature this year.

Our Section has posted on its website a sample statutory form power of attorney for several years. In addition, the posting includes proposed language to be added to the "Modifications" section of the power. We recently added suggested language to be added to the "Modifications" section to specify the powers that an agent has with respect digital assets.

The Section's Spring meeting was held in New Orleans, Louisiana from May 11 to May 14, and was a success. The continuing legal education program, "The Never Ending Story: Planning for Couples Before, During and at the End of Marriage," covered a variety of planning issues including the right of election, non-citizen spouses, same-sex couples and pre- and post-nuptial planning. Surrogate Judges Hon. Barbara Howe (Erie County), Hon. Peter J. Kelly (Queens County), Hon. John M. Owens (Monroe County) and Hon. Margaret C. Reilly (Nassau County) participated in a panel discussion entitled "What Weren't They Thinking?" All of the Surrogate judges are former New York State Supreme Court Judges, which gave them a unique and broad perspective in sharing the insights and challenges that they have seen in estate planning issues. Thank you to all of our speakers and the Judges for your participation in the program. In addition, thank you to the co-chairs, Marion Fish, Esq. and Darcy Katris, Esq. for developing and delivering an excellent program.

I must note that my last Chair's Message, published in the Spring 2017 issue, erroneously omitted Robert Friedman, Esq. from the list of officers and positions elected at the Annual Meeting in January. Robert was elected as a member at large. My apologies for the oversight.

Remember to save the dates for the Fall meeting which will be in Buffalo, New York on September 14 and 15, 2017.

Sharon L. Wick

Message from the Editor

In this edition of the *Newsletter*, Michael A. Burger explores the topic of mediation clauses in wills and trusts, David Buckwald and Steve Zeiger urge the use of the wealth gradient in mortality to lower life insurance costs for clients, and Paul S. Forster reports on a recent decision that highlights the importance of proprietary lease and cooperative corporation by-laws in the estate planning context.

Also in this issue, Edward D. Loughman, III provides an overview of the Uniform Adult Guardianship and Protective Proceedings Act, and Robert P. Mascali addresses the Achieving a Better Life Experience Act for the benefit of disabled beneficiaries.

Our next submission deadline is September 8, 2017.

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Fair Is Fair: Mediation Clauses in Wills and Trusts

By Michael A. Burger

At the 2016 Fall Meeting, the Estate Planning Committee luncheon featured in depth discussions about thorny tax issues, trust selection, valuation, drafting and decanting strategies, a survey of local and historical practices, cutting edge legislation, and inside baseball anecdotes about the development of the Surrogate's Court bar. Acronyms and statutory section numbers proliferated like bullets in an action movie firefight. Navajo code talkers would have been impressed by the impenetrable lexicon.

All of the thoughtful practice considerations we discussed will undoubtedly facilitate clients' estate planning, but most had only occasional application. Each of the legal and taxation issues discussed, taken separately, was unlikely to frustrate a client's plans as frequently as potential strife among the client's eventual heirs or creditors.

As a trusts and estates litigator, I see the effects of postmortem litigation and the planners and heirs who call me are uniformly in distress about the prospect of a fight in Surrogate's or Supreme Court. Avoiding confusion and litigation is as much part of the estate planning practitioner's code of honor as it is a secret of their unique and ancient guild. Yet, we all wondered aloud why mediation clauses have not been employed in wills or trusts, even when carefully crafted *in terrorem* or no contest clauses increasingly proliferate.

Historically, Surrogates and their staff have ably performed a mediator-like function, albeit with the implicit threat of an adverse ruling against a recalcitrant party. In some jurisdictions they still do, but with mixed success and delays tied to calendar congestion. Some Surrogates frown on mediation due to the cost of engaging a mediator and the risk that the parties, left to their own devices, may conspire to pervert the testator's intent. But at the Spring Meeting, a panel of esteemed Surrogates discussed mediation as a dispute resolution mechanism in Surrogate's Court and all but one generally approved of the process.

A. The Pros and Cons of Mediation

Nearly all Surrogate's Court cases settle out of court. This is a powerful bit of knowledge for litigants and their counsel. If a case is statistically likely to settle eventually, why not do so as early as possible, before spending time and money on court battles? A litigation war chest can also fund a tailored, creative and even mutually beneficial compromise.

More importantly, litigants have an inherent sense of what is fair. We all do, really. Studies show that even toddlers have an innate sense of fairness.[1] As lawyers, we are primarily trained to funnel disputes over fairness into the court system. And of course Surrogate's Court, a court of equity, is uniquely oriented towards a fair result, not just a legally correct one. Still, clients are frequently disappointed by both the process and the outcome of litigated disputes, which is the reason for appellate courts. But even the smartest judges in the land, sitting on the highest courts, are not always able to agree on a fair outcome, sometimes dividing along partisan lines. Plus, the result is often a zero sum game. A "winner" and a "loser" are declared, in cold legal rhetoric.

If our clients know what is fair, why are we so quick to turn over their disputes to judges who do not know our clients or their families? In part, litigants yearn for a wise and impartial mind to resolve their troubles for them—even to vindicate them. Judges offer a keen understanding of the law and an impartial desire to see justice prevail that we naturally trust. But judges are also constrained by the contours of the matter before them, regardless of the intangible goals or overall family dynamic.

Yes, mediation involves an additional cost. But trials and appeals come at an even greater cost. Years of litigation, subpoenas, motions, depositions, hearings, trials, appeals, briefs and tens of thousands of dollars (or more) in fees. To say nothing of the emotional toll, health effects, and family turmoil attendant to a congested and procedure-laden process.[2]

The court process is, of course, a necessary and carefully constructed mechanism for producing justice, and we are fortunate to have the best and most independent judiciary in the world, but the court system is slow, expensive and necessarily limited by the rules of evidence, standing, ripeness and justiciability. And a decision by a third party—even an impartial and independent one—is no substitute for self-determination and empowerment.[3]

Independence and impartiality are essential for a neutral judge to be respected as unbiased. But with independence comes a detachment and distance from the dispute stemming from a lack of familiarity. From

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the standpoint of familiarity with the nuances of the dispute, including the intangible goals, and goals within goals, that make a possible result fair from the standpoint of a particular family—a significant and decisive factor in a court of equity. No one knows family like the family itself.

B. The Testator's Sacred Intent

What happens to the expressed intent of the testator when the parties negotiate privately, with or without a mediator?

Surrogate's Court litigation is arguably even more complex and uncertain than other litigation because there is essentially another "silent" party whose interests are paramount: the decedent or trust settlor. One of the Surrogate's solemn duties is to protect and enforce the testator's wishes. To be sure, a well-timed scowl from a wise jurist can help resolve a case.[4]

Mediation is not a substitute for the Surrogate but rather a ready and flexible supplement; an additional tool at the disposal of the Court and the litigants. If a court conference resolves a festering issue then mediation will not be necessary. But many cases soldier on past the best judicial efforts at brokering settlement.

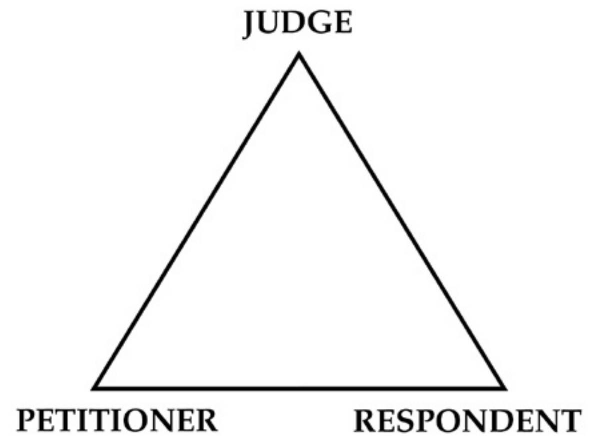
Working with seasoned counsel, the parties may find solutions not available to the Surrogate, while still scrupulously safeguarding the testator's intent. If the parties attempt to corrupt the testator's intent then the Surrogate, who will review any proposed decree, would understandably reject such a proposed decree.

Even with able and experienced counsel assisting each of the parties, common ground can be hard to find and impasse always looms as a possibility. In part, the fog of war can curtail settlement efforts, especially early on when they are most valuable. Posturing and jockeying for legal position can obscure weaknesses and hazards of litigation as counsel walk a tightrope between client relations and effective advocacy.

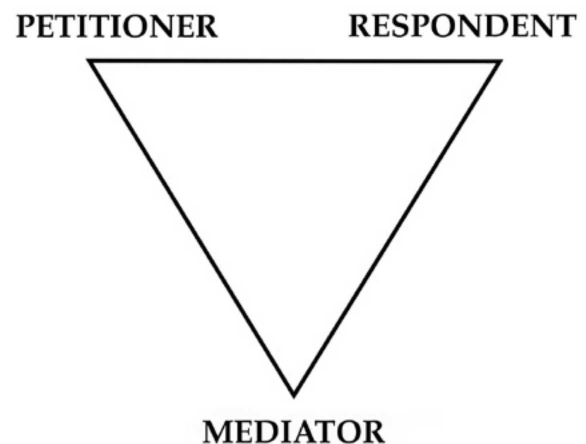
A seasoned mediator with trusts and estates experience will often be a helpmate in this regard, guiding the parties away from resolutions that will not pass judicial muster.

C. Maintaining Party Control: The Nonbinding Neutral

If we graphically display the court system as an equilateral triangle, with the Surrogate at the top point and the litigants at the bottom points, we can appreciate the power dynamics of a court-imposed result: the parties hand up the evidence and arguments supporting their opposing visions of a fair outcome, and the Surrogate hands down a mandated result.



Mediation turns this triangle paradigm on its head, allowing the litigants to fashion a mutually acceptable outcome which they dictate, subject to Surrogate approval, to the trained trust and estates mediator who helps facilitate the discussion towards the zone of possible agreement.



D. Mediation Clauses Are Valuable and Flexible Tools

Efforts to micromanage an outcome of a dispute from beyond the grave can frustrate the well-laid plans of even the most prescient testators. Mediation rewards compromise and ingenuity. And, if mediation begets impasse, litigation remains as an alternative, with mediation still available as the case progresses.

The value of earnest attempts at mediated compromise is increasingly recognized by both scholars and courts alike.[5] Early mediation has become mandatory in some courts,[6] and other courts have empaneled mediators to be available to the parties on an *ad hoc* basis.[7]

Through artful drafting the estate planning practitioner may require mediation as a condition precedent to a legacy. Together, counsel and the testator or settlor may preserve assets or corpus and empower heirs, legatees and beneficiaries to explore solutions beyond

those apparent at the time of drafting and execution. For instance, a mediation clause might be co-extensive with the safe harbor rules,[8] and be required prior to the filing of objections to a will or to an accounting.

Other essays have examined sample draft language.[9] This essay is not intended to promote a one-size-fits-all template for drafters, but rather as an informative guide to assist a drafter in tailoring dispute resolution mechanisms to the client—and the client's family. As planners who also eventually hope to assist the survivors in administering the estate, mediation also offers opportunities to foster client continuity and satisfaction.

With the foregoing primer on the mediation process, there is nothing mysterious about drafting a mediation clause. A plain vanilla mediation clause might read:

> **MANDATORY MEDIATION**: I direct that any dispute concerning my [will/trust] or [estate/trust] administration first be the subject of mandatory mediation between or among the parties to such dispute, with a trained, private neutral mediator. Only in the case of good faith mediated impasse, as determined by the mediator, may the parties seek judicial intervention. Every disposition and fiduciary appointment herein is expressly conditioned upon compliance with this directive. Any noncompliant party's appointment and/or legacy shall be deemed a nullity. The costs of the mediator shall be borne by the party or parties invoking mediation.

It is of course most advisable for the estate planning practitioner to confer with her client and craft language to meet her specific goals. One common consideration concerns the "teeth" inserted into a mediation clause, including, but not limited to, mediator selection and party recalcitrance. Some drafters may leave such possible eventualities to the sound discretion of the Surrogate, while others may wish to dictate specific remedies that are most likely to motivate those involved.

E. Contrary Views

Detractors may say that mediation is an invitation to the unscrupulous, or that the Surrogate can perform this function for free, or that the testator's intent will be frustrated. This may be so at times, and no solution is perfect. Counsel and the courts must consider the particular case, the personalities and the size and liquidity of the estate. However, a few related considerations:

- The unscrupulous contestant can also be managed with a carefully drawn *in terrorem* clause setting milestones delimiting the mediation time frame, or shifting its cost.
- The Surrogate and her staff have limited time and resources and are prone to reality testing that carries the court's imprimatur. Counsel cherish the glimpses into the fact-finder's viewpoint but simultaneously acting as a mediator and the ultimate finder of fact has its challenges.[10]
- If the Court is perceived as having a point of view as to the settlement terms, the parties' power of self-determination is curtailed. This may not be problematic from a legal point of view, but where value is placed upon preserving a relationship or encouraging the parties to take ownership of a tailored result of their own design, the "recommendation" of the ultimate finder of fact may not be ideal. Many a family fight has been resolved at the proverbial kitchen table. Perhaps as it should be.
- Where probate is at issue, the Surrogate will ultimately examine any proposed compromise anyway. This requires the parties to be thoughtful about protecting the testator's intent. A seasoned trusts and estates mediator will be watchful for this and help build safeguards into the mediation memorandum resolving the dispute. On the rare occasion that a judge rejects a proposal, the framework of a compromise remains and as the saying goes, where there is a will there is a way.
- Finally, where the dispute concerns the fiduciary's account mediation holds the prospect of a voluntary settlement of such account, thus avoiding further judicial intervention by way of a judicial settlement under the Surrogate's Court Procedure Act (SCPA) article 22. However, some accounts may require judicial intervention even where there is consensus (e.g., wrongful death *Kaiser* issues, attorney's fees under SCPA 2110, infant settlements, absent heirs, guardian ad litem recommendations, etc.).

F. Impasse Is Impermanent

Mediation is a fluid process. A good trusts and estates mediator will stay involved past the initial plenary sessions and caucuses. Additional and future shuttle diplomacy can be by telephone or separate meetings, to fit the case. Sometimes a more observant transformative process may carry the day, whereas in others gentle reality testing or decision tree analysis may be more effective. Above all, allowing the parties to be heard has profound benefits.[11]

The "top down" dynamics of a court-facilitated setting are not always suited to litigants who may be able

to resolve the matter themselves with the aid of a little humor, compassion, some food or just an alternative viewpoint.

As a trusts and estates mediator, steeped in the intricacies of Surrogate's Court practice, I have found that a litigant's opportunity to speak and be heard and feel the control of his or her own destiny can sometimes even turn an inevitable unpleasant result into a palatable one. But more often, the parties find mutually beneficial solutions that a court could not and would not order—and at far lesser cost to the parties.

Endnotes

1. *See Babies know what's fair*, 23 Psychological Science 196 (Association for Psychological Science Feb. 2012) (available online at https://www.sciencedaily.com/releases/2012/02/120218134639.htm).
2. *See* Robert D. Steele, Leona Beane, Kevin Murphy, Jill Teitel & Barbara Levitan, *The Benefits of Mediation and Arbitration for Dispute Resolution in Trusts and Estates Law*, NYSBA Dispute Resolution Law Section (Jan. 2011) (available online at https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Trusts_estateswhitepaper12-21-2010_pdf.html).
3. *See, e.g.*, Joseph M. Lauria & Sharon S. Townsend, *A Decade of Reform in the New York State Family Courts*, N.Y. St. B.J. 46 (Jan. 2008).
4. *See* Chief Justice John Roberts, 2015 Year End Report on the Federal Judiciary, at 7.
5. *See* Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 Cardozo J. Conflict Resol. 237 (2008).
6. *See, e.g.*, United States District Court for the Western District of New York Alternative Dispute Resolution Plan at 4 (June 24, 2011) (available online at http://www.nywd.uscourts.gov/sites/default/files/ADRPlanRevisedJune242011.pdf).
7. *See, e.g.*, Commercial Division, Supreme Court, New York County Rules and Procedures of the Alternative Dispute Resolution Program, at Rule 3 (available online at https://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRCD.rulesprocs22016.pdf).
8. *See* SCPA 1404(4); *see also* EPTL 3-3.5(b)(3)(D).
9. *See* Steele et al., *supra* note 2.
10. *See* Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 Brook. J. Int'l L. 827, 843-44 (2015).
11. *See generally* James A. Beha II, *Mediation in Commercial Cases Can Be Very Effective for Clients*, N.Y. St. B.J. 10, n.1 (Sept. 2002).

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Seeking Improved Policy Performance?

Use the Wealth Gradient in Mortality to Negotiate Lower Costs for High Net Worth Clients

By David Buckwald and Steven Zeiger

As an Estate Planning Attorney or Investment Advisor, you know it is an important key to growing and protecting investment assets over the long term. But what about life insurance costs? For many, the cost of insurance (COI) is a neglected piece of the financial management puzzle, especially for high-net-worth (HNW) clients. But data show that the superior life expectancy of high earning, high asset individuals can be used to your clients' advantage to negotiate lower costs with the carrier and, ultimately, significantly increase the performance of life insurance policies.

James Smith, senior economist at the research group RAND, makes the connection between wealth and longevity clear: "Those who have less wealth will have fewer years to live than those with more wealth." This correlation is so widely accepted that researchers have given it a name: the Wealth Gradient in Mortality (WGM). Why the increased longevity? HNW individuals and their families enjoy more than the obvious benefits of wealth: fine dining, exclusive clubs, private jets, custom tailors, luxurious travel, expensive jewelry, and more. In fact, access to a single category, better health care, may be the greatest benefit of all by giving them more years to enjoy their wealth and all the luxuries it affords.

If you're looking for ways to deliver more value to HNW clients, this research is great news. The reason? Like many things in life (and certainly in business), costs can be negotiated. The concept is simple: every dollar that doesn't have to go to internal policy costs is a dollar the policyholder doesn't have to pay in premium. This means the lower the internal costs of the policy, the better the performance and the more money that remains for the death benefit and cash value of the policy.

This significant impact of internal costs on both premiums and performance means that when it comes to purchasing life insurance, the less expensive option is almost always the better choice. It's a matter of basic math. The "cost of insurance charges" that are added to policy premiums to cover claims typically account for more 75% of the total premium. But that cost varies considerably based on age, policy age, premiums, and earnings. This means that the real cost of life insurance is not the premium itself, but rather the amount that is subtracted from the premium. This subtracted amount includes (1) the total cost of policy expenses, (2) premium loads, (3) COI charges, and (4) subaccount fees.

To understand how dramatically these costs can impact the cost and performance of a specific life insurance policy, let's look at two policies, each designed for a 53-year-old male in preferred plus health and with an identical $10 million death benefit:

1. *Costs for an average "benchmark" policy:*
   According to Veralytic, a provider of life insurance pricing and performance research, an average benchmark $10MM policy would present the following characteristics:

   Weighted-average annual cost of insurance $154,027; weighted-average annual fixed expense $9,438; weighted-average annual premium load 7.5% of premium.

2. *Costs for a policy designed using the Wealth Gradient in Mortality:*
   In contrast, Veralytic data show that the same policy designed using Wealth Gradient in Mortality would present much different characteristics:

   Weighted-average annual cost of insurance $91,174; weighted-average annual fixed expense $9,127; weighted-average annual premium load 5.45% of premium.

While the policies are designed for the same policyholder with the same $10 million death benefit, the lower internal charges of policy #2 results in lower premiums and potentially higher cash values. The difference in the weighted-average annual cost of insurance: $62,853.

It's a shocking number, but it's far from uncommon. Tillinghast Towers Perrin and Veralytic both have reported that there can be as much as a 40% deviation between the "best available" and "average" rates for life insurance policies. There's also a 40% swing between average pricing and poorly priced products. That means together, there swing in total costs for a given life insurance policy can be as high as 80%. With such a large spread, tracking, managing, and negotiat-

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ing life insurance premiums are a mandatory process in your mission to serve in the best interests of your clients.

Negotiating Costs Using Wealth Gradient in Mortality

Clearly, internal costs matter, and the Wealth Gradient in Mortality offers a significant opportunity for advisors to achieve meaningful cost reductions inside life insurance policies for HNW clients. Even better, this negotiation can be useful in many types of permanent life insurance, including universal life, indexed universal life, variable life, and private placement.

Of course, life insurance companies don't offer special pricing based purely on concept. Any pricing advantage must be earned. But as Peter Fleming wrote in his article "Scoring Points,"[1] years of collected claims data and lapse experience prove the reality of the Wealth Gradient in Mortality, and that reality justifies lower pricing for affluent clients. As a result, advisors have successfully approached life insurance product manufacturers with an intriguing opportunity. What the data illustrates is that wealthy individuals consistently exhibit superior experience in four areas at the heart of life insurance product design and pricing:

1. Wealthy individuals have an average mortality of 21% more than that of the general insured public (they lived longer primarily because of access to the best health care).
2. Wealthy individuals purchase larger amounts of insurance by an average of 7 times greater than the general insured public (which created efficiencies via lower unit costs for the insurers).
3. Wealthy individuals keep their policies in force for longer periods of time (because they purchased life insurance for a specific need and had the resources to pay the premiums).
4. Wealthy individuals lapse their policies 60% less frequently than the general insured public (because they have the assets to maintain premium payments).

Based on these characteristics, it was argued that these clients deserved to be treated differently by being offered products that are specifically priced to reflect these advantages. Using the data as proof, the life insurance companies have been able to justify special pricing. Improved mortality means fewer death claims and lower insurer costs. Lower lapse rates mean that policies remain in force longer, so insurers have more time to recoup initial expenses. And because higher face amounts create economies of scale (the cost to service a $10 million policy isn't all that different from servicing a $1 million policy) the total cost of insurance is reduced. The result: a growing number of carriers agree that HNW policyholders can share in these benefits.

While past experience is no guarantee of future performance, the principles for negotiating premium prices for HNW clients using Wealth Gradient in Mortality are solidly in place. To date, the HNW risk pool has experienced *53 cost decreases* and *no increases*. From receiving beneficial pricing of the product at the outset, to reducing premiums as the result of careful in-force policy management, estate planning attorneys and investment advisors have an opportunity to save HNW clients thousands of dollars in premiums annually and establish a greater level of client advocacy that delivers very real value to HNW clients and the firms who serve them.

Endnote

1. Peter Fleming, *Scoring Points*, Private Wealth Magazine, January 27, 2015, available at http://www.fa-mag.com/news/scoring-points-20580.html.

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Pitfalls in Effectuating the Transfer of Cooperative Shares

By Paul S. Forster

A recent decision by the New York Court of Appeals,[1] affirming a split decision of the Appellate Division, First Department,[2] allowing the transfer of cooperative shares to the decedent's children over the objections of the cooperative board, should be a cautionary tale to estate planning practitioners.

The purpose of this article is to alert practitioners to the importance of examining the documents pertinent to effectuating testamentary bequests of cooperative apartments to family members, primarily the proprietary lease and cooperative corporation by-laws, prior to drafting a putative dispositive instrument.

Helen Del Terzo was the mother of plaintiffs Michael Del Terzo and Julius Robert Del Terzo. Helen died in 2010. Following Helen's death, Michael and Julius inherited the shares appurtenant to her cooperative apartment. Michael, as Executor of Helen's estate, sought permission from the board of 33 Fifth Avenue Owners Corp. (the "Board") to transfer Helen's shares in the apartment to her sons, pursuant to the terms of her Will. The Board refused and the fiduciary, Michael, and Julius sued, alleging that the Board's refusal constituted a breach of the proprietary lease. They also sought attorneys' fees.

The Del Terzo family had resided in the building since 1955, before Michael and Julius were born. In 1986, shortly after the building was converted to cooperative ownership, Helen and her husband purchased shares, becoming proprietary lessees. Both sons lived in their parents' apartment throughout their childhood, and Julius moved back with his own family in 2004. Helen, who was predeceased by her husband, remained living in the apartment until her death.

In rejecting the sons' transfer application, the Board gave Julius six months in which to vacate the premises. Although the letter did not explain the Board's denial, the deposition of the Board treasurer offered some insight into its reasoning.

First, the Board was apparently concerned that the proposed number of residents would exceed the occupancy limit for the apartment. Since the application was on behalf of two separate families, their children (three total), and one nephew, the Cooperative Board believed occupancy would exceed the number of people who are permitted to live in a single apartment at any one time, even though the application indicated that Michael did not intend to live in the apartment. In addition, the Board disfavored non-primary, or pied-à-terre, occupants as lessees, and Michael did not intend to make the apartment his primary residence. In addition, the Board concluded that only Michael met its financial guidelines.

Both parties appealed the decision of the lower court, which directed the Board to consent to the transfer of the shares and the proprietary lease to the Plaintiffs, but denied the Plaintiffs' request for attorneys' fees.

The primary issue on appeal was whether the Board violated the terms of the proprietary lease by unreasonably withholding consent to an assignment of the lease and shares thereto to a member of a lessee's family. The Appellate Division agreed that the Board violated the proprietary lease.

The Appellate Division opined that in general, and in the absence of illegal discrimination, a cooperative board is not restricted in withholding its consent to a proposed transfer. However, the Appellate Division found that there was an express contractual provision in the subject proprietary lease that extended more favorable rights to a family member of a deceased lessee. The proprietary lease provided that consent should not be unreasonably withheld to an assignment of the proprietary lease and shares to a financially responsible member of the lessee's family. In the view of the Appellate Division's decision, this provision clearly was included to more easily allow an existing lessee to devise or gift his or her cooperative apartment to family members. The Appellate Division rejected the Board's contention that its decision to deny the transfer was protected by the business judgment rule. The Appellate Division stated that the business judgment rule generally insulates a cooperative board from attacks on its decisions, provided the board acted for the purposes of the cooperative corporation, within the scope of its authority and in good faith. The Appellate Division ruled that the pertinent paragraph of the proprietary lease concerning testamentary share transfers to family members imposed a heightened standard of reasonableness on the Board, and that the lower court correctly had held that the Board did not meet that standard.

The Appellate Division noted that Michael and Julius, as co-lessees, were jointly and severally liable for any financial obligations pertaining to the apartment. The Appellate Division noted that Michael had offered

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to personally guarantee payment of those obligations and would agree to further guarantees requested by the Cooperative Board. Thus, the Appellate Division found little financial risk to the cooperative corporation in agreeing to the transfer. The Appellate Division acknowledged that a prospective shareholder's finances were a legitimate area of concern and, in fact, the proprietary lease made financial responsibility an express condition of obtaining consent to an intra-family transfer. However, the Appellate Division held that Board's reliance on Julius' financial qualifications alone as a reason to deny the transfer application was misplaced. The Appellate Division found that by failing to consider the joint application as a whole, refusing to consider Michael's offer to guarantee his financial obligations to the Board, and requiring that each co-applicant be individually financially qualified to meet the carrying expenses of the apartment, the Board unreasonably withheld its consent to the transfer.

The Appellate Division also found that the Board's concerns about the likelihood of an overcrowded apartment were completely speculative and did not form a reasonable basis for denial of the applicants' request to a transfer of the decedent's shares. In fact, the Appellate Division noted, this position was inconsistent with the Board's separate concern that Michael would not be living in the apartment full time. The Appellate Division further noted that, if at some future time it actually happened that the apartment was overcrowded, the Board could pursue other remedies.

The Appellate Division also held that the lower Court erred in denying plaintiffs' claim for attorneys' fees and costs. Where a residential lease provides that the landlord may recover legal fees incurred in an action resulting from the tenant's failure to perform a covenant in the lease, Real Property Law § 234 provides the tenant with an implied reciprocal right to recover attorneys' fees incurred as the result of the failure of the landlord to perform any covenant or agreement under the lease.

The Appellate Division's decision was affirmed in all respects in a summary decision by the New York Court of Appeals.

It is hoped that this recitation will be useful in guiding attorneys who may consider drafting a provision whereby shares in a cooperative apartment are transferred at death to family members.

Endnotes

1. *In re Del Terzo*, 28 N.Y.3d 1114, 45 N.Y.S.3d 362 (2016).
2. *In re Del Terzo*, 136 A.D.3d 486, 25 N.Y.S.3d 154 (1st Dep't 2016).

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The Uniform Adult Guardianship and Protective Proceedings Act

By Edward D. Loughman, III

The Uniform Adult Guardianship and Protective Proceedings Act (hereinafter "the Act") became effective April 12, 2014.[1] Its purpose is to ameliorate the problem which arises when multiple states[2] exercise jurisdiction over the same allegedly incapacitated person or incapacitated person. The Act sets forth uniform rules to determine which state has "Home State" or "Significant Connection" jurisdiction, to effectuate communication between different jurisdictions and to allow transfer of jurisdiction. Although the Act is particularly helpful in "granny snatching" cases in which one relative removes an elderly person to another state, it is also helpful in less contentious matters such as "snowbirds" who spend significant time in two states such as New York and Arizona,[3] or incapacitated persons who own property in more than one state. The Act applies not only to Article 81 Guardians but also to Guardians under Article 17-A of the Surrogate's Court Procedure Act, and Guardians or Conservators appointed in other states or countries.

The Uniform Law Commission of National Conference of Commissions on Uniform State Laws drafted the Act in 2007. Since then, 42 States, the District of Columbia and Puerto Rico have adopted it. In addition, three states, Louisiana, Georgia, North Carolina, and the Virgin Islands have introduced legislation to adopt it this year. Only Florida, Kansas, Michigan, Texas and Wisconsin have not acted.

Uniform legislation is required because Guardianship, like child custody, is not entitled to full faith and credit and does not have *res judicata* affect.[4] It is no surprise that this act bears similarity to Uniform Child Custody Laws. Conceptually, it bears some similarities with Ancillary Probate in Surrogate's Court, but its application is easier.

JURISDICTION (Mental Hygiene Law § 83.17)

The Court has jurisdiction to appoint a Guardian or issue a protective order[5] if it is the "Home State," a "Significant Connection" state or in certain other situations.

Home State

"Home State" jurisdiction is defined in Mental Hygiene L. § 83.03(c). Essentially, a new state has jurisdiction of the proceeding if the person has been there for six or more months before the proceeding is commenced. If the person has moved or has been moved into the state less than six months before the proceeding was commenced, the previous state has Home State jurisdiction. The court having Home State jurisdiction has primary jurisdiction for the Guardianship. Once a Guardian has been appointed or protective order has been issued, under Mental Hygiene Law ("MHL") § 83.17, that court has exclusive and continuing jurisdiction[6] until the Home State court terminates it. Despite having a basis for Home State jurisdiction, the court may nevertheless decline jurisdiction because it finds that another state is a more appropriate jurisdiction[7] or if it finds that jurisdiction was obtained by "unjustifiable conduct."[8] If unjustifiable conduct is found the court may issue sanctions.[9]

Significant Connection State

Significant Connection State is defined in MHL § 83.03(M). The state does not fit the definition of "home state" but there exists "significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available." "Significant connection factors" are found in MHL § 83.13. The court can assert jurisdiction if there is no home state or if the Home State has declined jurisdiction as a less appropriate forum and there is no petition pending in Home State, no objection to jurisdiction filed and the court determines that it is an appropriate forum under MHL § 83.23.

The court may also assert jurisdiction if there is no other alternative. A court lacking jurisdiction under MHL § 83.17 can nevertheless intervene via Special Jurisdiction.[10] Under Special Jurisdiction, the court can appoint a temporary emergency guardian for up to 90 days, for an AIP physically present in the state in an emergency situation[11] or pending transfer to a Guardianship in another state.[12] It can issue a protective order regarding property in the state.[13] If, however, the court having Home State jurisdiction requests, the court having only Significant Connection jurisdiction, shall dismiss.

INTERSTATE TRANSFERS

Guardianship can be transferred into[14] or out of New York.[15] It is a three-step process involving a provisional order of transfer in the transferor state, a proceeding in the transferee state to accept the transfer and then a final order of transfer in the transferor state.

Transfer Out

The Guardian of the Person or Property may petition the court to transfer the Guardianship to another

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state.[16] Notice must be given to the same people who must be given notice of application to appoint a Guardian under Article 81 of the MHL.[17] If New York is not the Home State, notice must be given to those persons entitled to notice in the Home State.[18] Provided the proper proof is shown, the court need not hold a hearing unless one of the parties, entitled to notice, so requests.[19]

Transfer of Guardianship requires proof that:

1. The person is physically present in or reasonably expected to move permanently to the transferee state.
2. Reasonable and sufficient plans for care and services in the transferee state are in place to transfer a Guardianship of the Person or that adequate arrangements will be made for management of the protected person's property.
3. No objection to transfer has been made or that the "objection has not established that the transfer would be contrary to the interest of the person subject to the guardianship of the person."[20]

There are not yet any reported New York decisions on this, but it is submitted that if the protected person has already moved, the proof should evidence the new residence, such as deed, lease or affidavit of a representative of the facility. If not yet removed to the new state, the plan should be explained and contracts or other proof of the proposed new residency should be provided.

The plan of care and services or plan for management of the property should also be set forth in detail. If a geriatric care manager, nurse, doctor or other health care provider has been selected in the transferee state, they should be identified and perhaps proof provided that they have been retained. Similarly, if a lawyer, accountant, investment adviser or banker has been retained, or even selected, similar proof should be provided.

If the IP's consent to transfer has been given, show proof. If persons entitled to notice have been uninvolved, let the court know. If objection has been made, let the court know but set forth proof why the transfer is in the best interests of the protected person (not just the convenience of the Guardian).

If the court makes the prior three findings, it shall issue a provisional Order of Transfer of Guardianship and direct that the Guardian petition the court in the transferee state.[21] After the transferee state has accepted the transfer from New York, the Guardian comes back to the New York court. Once the Guardian produces a certified copy of the provisional order[22] from the transferee state and "the documents required to terminate a guardianship of the person or property in the state,"[23] the court shall issue a final order confirming the transfer and terminating the New York Guardianship.[24]

Transfer In

The Guardian of the Person or Property in another state may petition the court of his or her state to transfer the Guardianship to New York. Once the order is obtained in the other state a petition can be made in New York pursuant to Article 81 of the MHL or Article 17-A of the Surrogate's Court Procedure Act ("SCPA"). "The petition must include a certified copy of the other state's provisional order of transfer."[25]

Notice must be to those persons entitled to notice in either state.[26] Notice must be given in the form required under MHL § 81.07.[27]

A hearing will be held if the Guardian, the IP, or "other person required to be notified of the proceeding" requests, or on the court's own motion.[28]

Unless the Guardian is ineligible[29] or an "objector establishes that transfer of the proceeding would be contrary to the best interest of the incapacitated or protected person" the court will issue an order provisionally granting the petition.[30] After receipt of a final order from the transferor state effecting the transfer, the court issues a final order.[31]

Within 90 days of issuance of the final order, the court will determine whether the guardianship needs to "be modified to conform to the law of this state."[32]

The granting of the petition recognizes the order of the transferor state including the determination of incapacity and appointment of Guardians.[33] The denial of the petition does not preclude an application pursuant to article 81 of the MHL or 17-A of the SCPA.[34]

PROVISIONAL REMEDIES AND STAYS

Pending resolution of the proceeding, the court can appoint a Temporary Emergency Guardian for up to 90 days,[35] issue protective orders with respect to real or tangible personal property,[36] or appoint a Guardian subject to a pending Guardianship.[37] The protective orders could enjoin the removal of tangible personal property, block the sale or encumbrance of real estate or act as a restraining notice on bank accounts. The Temporary Guardian could be given powers needed to protect the IP's person.

A stay is available even if the court intends to decline jurisdiction because of a less appropriate forum[38] or because of unjustifiable conduct.[39] The court may stay the proceeding until a petition is brought in a state having more appropriate jurisdiction.

INTERSTATE ACTION

In addition to transferring Guardianship from one state to another, Article 83 contains features making Article 81 Guardianships easier in this or another state.

Under MHL § 83.09, the court may request a sister state hold an evidentiary hearing, order depositions or the production of evidence, direct an evaluation or assessment of the AIP, order any appropriate investigations, forward a certified transcript, evidence and evaluation already conducted in another state, order the testimony of a witness in that state or order the release of confidential information.[40] The court may admit any such evidence into evidence in the New York proceeding.[41]

The New York court may also cooperate with a sister state if it asks for similar relief.[42]

The New York court may allow testimony by deposition, telephone, audiovisual or other electronic means and the production of evidence from another state.[43]

Finally, Guardianship[44] and related orders from sister states[45] can be registered in New York. By so doing the judgment or order has virtually the same effect as if it were a New York judgment or order.[46]

CONCLUSION

The Uniform Adult Guardianship and Protective Proceedings Act, as codified as Article 83 of the New York Mental Hygiene Law, is a useful tool to facilitate Guardianship issues arising in more than one state. It essentially adds full faith and credit status to Guardianship matters. It significantly broadens the use of out-of-state evidence in a New York proceeding and vice versa. Time will tell how sister states co-operate but it should alleviate multi-state proceedings and prevent inconsistent results.

Endnotes

1. Mental Hygiene Law, Article 83, L. 2013, c. 427.
2. In addition, the court may treat a foreign country as a sister state for most of the provisions of Article 83. MHL § 83.05.
3. I would have said Florida except that Florida is one of five states which have not enacted the statute or introduced legislation to enact it. Interestingly, the Nassau Surrogate Court nevertheless approved the transfer of an SCPA Article 17-A Guardianship to Florida. *Matter of Guardianship of Louise D.*, 47 Misc. 3d 716, 3 N.Y.S.3d 918 (Sur. Ct., Nassau Co. 2015).
4. Nevertheless, some states like Florida allow for the "domestication" of an out-of-state Guardianship, essentially giving it full faith and credit.
5. A protective order is defined as an order appointing a conservator guardian of the property or other order related to management of an adult's property. MHL § 83.03(i).
6. MHL § 83.21.
7. MHL § 83.23.
8. MHL § 83.25. Unjustifiable conduct is not defined but presumably would include surreptitiously moving the person out of state against his or her wishes, hiding his or her whereabouts, or denying proper parties access.
9. *Id.*
10. MHL § 83.19.
11. MHL § 83.19(A)(1).
12. MHL § 83.19(A)(3).
13. MHL § 83.19(A)(2). This might be particularly helpful if assets outside of the Home State were being stolen or if assets had been taken out of the Home State to another jurisdiction.
14. MHL § 83.33.
15. MHL § 83.31.
16. MHL § 83.31(A).
17. MHL § 83.31(B). Section 81.07 of the MHL requires notice to the person alleged to be incapacitated, his attorney, if known, the Court Evaluator, if any, the AIP's spouse, parents adult children, adult siblings, persons with whom the AIP resides, presumptive distributees, anyone holding power of attorney or health care proxy, anyone with a genuine interest in the AIP, DSS (if the AIP receives Medicaid), the Chief Executive Officer of any facility in which the AIP resides, Mental Hygiene Legal Services, if the AIP resides in a mental hygiene facility and such other person as the Court may deem based upon the recommendations of the Court Evaluator.
18. MHL § 83.27.
19. MHL § 83.31(c).
20. MHL § 83.31(d & e).
21. *Id.*
22. Although the statute does not specifically require a certified copy, it does read "issued under provisions similar to section 83.33 of this article." MHL § 83.31(f)(1). Section 83.33 requires a certified copy of the order of the transferor state in order to accept a transfer in. *Matter of B.A.M.W. (C.M.W.)*, 44 Misc. 3d 465, 988 N.Y.S.2d 456 (Sup. Ct., Dutchess Co. 2014).
23. MHL § 83.31(f)(2).
24. MHL § 83.31(f).
25. MHL § 83.33(a).
26. MHL § 83.33(b).
27. MHL § 83.33(b).
28. MHL § 83.33(c).
29. Surrogate's Court Procedure Act § 707.
30. MHL § 83.33(d).
31. MHL § 83.33(e).
32. MHL § 83.33(f).
33. MHL § 83.33(g).
34. MHL § 83.33(h).
35. MHL § 83.19(a)(1).
36. MHL § 83.19(a)(2).
37. MHL § 83.19(a)(3).
38. MHL § 83.23(b).
39. *Id.*
40. MHL § 83.09(a).
41. MHL § 83.09(b).
42. MHL § 83.09(c).
43. MHL § 83.11.
44. MHL § 83.35.
45. MHL § 83.37.
46. MHL § 83.39.

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Are We Now ABLE to Forget About Special Needs Trusts?

By Robert P. Mascali

I. Introduction

NO!...but the decision whether to fund an account under the Achieving a Better Life Experience (ABLE) Act[1] and/or to utilize a special needs trust now requires an in-depth analysis of many factors when planning is being considered for a person with a disability. In addition, the recent enactment of the Special Needs Fairness Act[2] now expands considerably the ability for competent disabled beneficiaries to establish their own special needs trusts.

In December 2014, the ABLE Act was signed into law by President Obama. The Act authorizes the states to adopt individual ABLE programs. The ABLE Act allows contributions to be made to tax-advantaged ABLE Act Internal Revenue Code (IRC) § 529A accounts to pay for qualified expenses for individuals who are disabled. Many states are working toward implementation, as the Internal Revenue Service has encouraged states to quickly establish their ABLE programs. As of the writing of this article, there are 17 states that have implemented ABLE programs and most of them allow deposits from out-of-state residents. An updated list and comparison of the various programs can be found at http://www.ablenrc.org.

II. The Basics of the ABLE Account

In general, ABLE accounts are similar to the tuition accounts allowed under IRC § 529, except that they are limited to individuals with disabilities that manifested themselves before the individuals reached the age of 26. *Take note that the account does not need to be set up before age 26. The requirement is only that the disability began before that age.* There can only be one ABLE account for a beneficiary. Under current law, the maximum amount that can be deposited into such an account during any year is $14,000 and the overall maximum amount is the ABLE account state's cap for the traditional § 529 Plan. The funds accrue income-tax free and can be used for a range of expenses related to the disability of the beneficiary, such as transportation, housing, education, assistive technology and basic living expenses. For a beneficiary receiving Supplemental Security Income (SSI), if the account exceeds $100,000, there will be a suspension of his or her SSI. However, there is no effect on benefits under the Medicaid program, even if a beneficiary is also on SSI that is suspended because the account exceeds the $100,000 limit. Upon the death of the beneficiary or termination of the account, there is a payback required for benefits received under the Medicaid program, regardless of whether the funds were deposited by the beneficiary or came from a third party.[3] Furthermore, the money in the ABLE account does not count against the person's eligibility for SSI, Medicaid, Supplemental Nutrition Assistance Program (SNAP or "food stamps"), Section 8 housing, and other means-tested public assistance programs.

III. The Basics of Special Needs Trusts

A. Pooled Special Needs Trusts

There are two different types of pooled trusts: (1) the first party pooled trust permitted under federal law 42 U.S.C. § 1396p(d)(4)(C) and funded with assets—usually cash—belonging to the individual with a disability, and (2) the third party pooled trust, which has no predicate in federal law but essentially has the same characteristics except that it is funded with assets belonging to someone other than the beneficiary—usually a family member or close friend. Other than the source of funds which then dictates the disposition of the funds that remain upon termination, both the first and third party pooled trusts are for the benefit of a person with a disability and otherwise share similar characteristics, briefly summarized as follows:

(1) The funds are administered by a non-profit organization according to the terms of a Master Trust with the assistance of a financial institution for the management and investment of the funds;

(2) The funds are pooled together for investment and efficiency but each beneficiary has a separate sub-account;

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(3) The funds are disbursed by the administrator for the benefit of the beneficiary, almost always to third party vendors and service providers;

(4) The administrator fulfills reporting requirements to public agencies that provide benefits to the beneficiaries;

(5) The administrator provides periodic accountings to the beneficiaries; and

(6) The administrator distributes the funds remaining upon termination in an appropriate fashion:

(a) In the first party pooled trust, the remaining funds are either retained by the nonprofit for the benefit of other disabled individuals or, to the extent that they are not so retained, the remaining funds are used to satisfy any payback required by the state Medicaid program or programs if the beneficiary received services from different states. (Note, while New York currently permits all of the remaining funds to be retained by the nonprofit, other states have different rules and requirements as to a possible payback for Medicaid from the pooled trust remainder funds.)

(b) In the third party pooled trust, since there is no requirement for a payback for Medicaid because the funds came from a third party, the remaining funds are disbursed according to the terms agreed upon by the nonprofit and the grantor at the time the trust was established.

For a list of the various pooled trusts, visit http://www.specialneedsalliance.org/pooled-trust-directory.

B. First Party Special Needs Trust

This type of trust is authorized by federal law found at 42 U.S.C. § 1396p(d)(4)(A) for a person with a disability as defined by the Social Security Law[4] who is less than 65 years of age. Unlike the pooled trust under 42 U.S.C. § 1396p(d)(4)(C), which contains no age restriction and which is governed by the terms of a Master Trust, this type of trust requires the assistance of counsel in preparing the trust document. The document must contain the required elements of the federal statute, the most important of which being that the funds must be used solely for the benefit of the disabled beneficiary and that the trust must contain a provision requiring that any funds remaining upon termination of the trust must first be used to satisfy any Medicaid payback. While practitioners are free to include many other provisions in the trust, care must always be taken to ensure that the trust will not run afoul of the requirements for Medicaid and, if applicable, the Social Security Administration, for those beneficiaries who are receiving SSI. For this reason, some practitioners prefer to utilize the trust contained in *In re Morales*[5] with some modifications to comport with the current provisions of the New York State Estates, Powers and Trusts Law (EPTL) 7-1.12 and applicable regulations. Until recently, this type of special needs trust could only be established by the parent, grandparent or guardian of the individual with a disability or through a court proceeding, but as a result of the enactment of the Special Needs Fairness Act[6] the trust may now also be established by the individual provided he or she possess the requisite capacity.

C. Third Party Special Needs Trust

This type of trust has no corresponding federal statute mandating the required terms of the trust. In New York State, the concept of a third party special needs trust has existed since 1978 when Bronx Surrogate Gelfand, over the objections of the New York Attorney General, approved a testamentary trust established by a parent for a child who was then a 77-year-old resident of Rockland State Psychiatric Hospital.[7] The trust that was approved provided for totally discretionary distributions for the benefit of that child during life with the remaining funds being distributed to other beneficiaries. This case and others gave rise to the New York statute EPTL 7-1.12, which originally dealt with only third party trusts, but is also now applicable to first party trusts.[8] Other than the general terms of the statute, there are no specific requirements for this type of trust and care must again be taken to ensure that the terms of the trust will not impair the beneficiary's ability to receive public benefits. The third party trust is either created *inter vivos* by the third party (although funding may be immediate or delayed to a future date), or the special needs trust can be testamentary and funded through the testator's probate estate. In either event, since the funds that are deposited into the trust are not funds to which the beneficiary is otherwise entitled, there is no requirement for a payback to Medicaid and the grantor/testator is free to direct the remainder to beneficiaries of his or her choosing.

IV. Considerations When Deciding Whether to Use an ABLE Account or a Special Needs Trust…or Both

A. Age

Clearly, the determinative factor is going to be the age of onset of the disability of the prospective beneficiary, as ABLE accounts are limited to those individuals who became/become disabled prior to age 26. It is important to reiterate that the age consideration is *not* how old the individual is at the time of the establishment of the ABLE account, but rather it is the age when the disability presented itself. As for the different types of third party special needs trusts and the pooled first party special needs trust, there are no age restrictions,

but the first party special needs trust cannot be established for a beneficiary over the age of 64.[9]

B. Disability

For ABLE accounts, the law requires that the person for whom the account is set up must either be receiving certain public benefits because of blindness or disability, or the person will need to be able to provide a written signed documentation from a licensed physician certifying blindness or a physical or mental impairment which results in severe functional limitations or other specified conditions.[10]

The federal statute that permits a special needs trust under either 42 U.S.C. § 1346p(d)(4)(A) or (d)(4)(C) requires that the beneficiary of the trust must be disabled according to the definition contained in the Social Security Act.[11]

The requirement for a disability under either a pooled or non-pooled third party trust is not quite as definitive. Often these third party trusts are utilized for an individual who is, or may be, receiving benefits now or possibly in the future, someone who is borderline-disabled, or an individual who might transition on and off public benefits based upon their physical or mental condition at the time. If the qualitative tests for "disability" cannot be satisfied for an ABLE account or a first party pooled or individually established special needs trust, then the only option may be a third party special needs trust.

C. Who Can Establish and Fund the Account or Trust?

An ABLE account can be established by the beneficiary of the account or by a beneficiary's parent, legal guardian or agent acting pursuant to a power of attorney. The funds can come from either the account beneficiary or any third person (including an individual, trust, estate, partnership or corporation), but the annual limit is a total of $14,000 from whatever source.

A third party special needs trust or pooled special needs trust can be established by any person other than the intended beneficiary and it can be funded by any third party, with no monetary limitation. However, in New York, a special needs trust cannot be funded directly or indirectly by a person with a legal obligation of support to the beneficiary or by someone with a financial obligation to the beneficiary at the time the beneficiary is receiving or applying to receive public assistance.[12]

As a result of the recent enactment of the Special Needs Fairness Act, either the pooled or non-pooled first party special needs trust can now be established by the beneficiary, a parent, grandparent, legal guardian or a court—also, with no monetary limitation. As mentioned above, there is still a distinction between pooled and non-pooled special needs trusts in that there is no age limitation on the beneficiary under 42 U.S.C. § 1396p(d)(4)(C), but under § 1396p(d)(4)(A), the special needs trust beneficiary cannot be age 65 or older.

"An ABLE account can be established by the beneficiary of the account or by a beneficiary's parent, legal guardian or agent acting pursuant to a power of attorney."

D. What Types of Expenses Can Be Paid?

The ABLE Act lists certain "qualified disability expenses" that can be paid, and, while the list is not exhaustive, the expenses must be related to the disability of the beneficiary. To the extent that expenses are paid that are found to be "non-qualified," they will be subject to federal income tax and a 10% penalty.

Both the third party and first party special needs trusts and pooled trusts offer some more flexibility as to permissible expenses since there is no specific requirement that the expenses be "related" to the disability of the beneficiary. That being said, disbursements are for goods and services that will enhance the quality of life of the beneficiary while protecting public benefits. In all first party trusts, the expenses must be for the sole benefit of the beneficiary.

E. What Happens to the Funds in the Account or Trust upon Termination?

As mentioned at the outset of this article, one of the most significant, if not the most significant, aspect of the ABLE account is that upon the termination of the account, there is a required payback for Medicaid received by the beneficiary, but the payback is limited to the time the account was established. Additionally, there is no distinction made as to the source of funds, and, unlike the third party trusts, the payback is from all funds remaining regardless of the source.

In the third party special needs trust and pooled trusts, there is no Medicaid payback and the grantor is able to designate the remainder beneficiaries. Some of the third party pooled trusts have provisions providing for the retention of some portion of the remaining funds. Inquiry of the pooled trust administrator as to the policy on remainder funds is always recommended.

In the first party special needs trust, there must be a provision requiring a payback to Medicaid for benefits received by the beneficiary during lifetime—not merely from the time the trust is established.[13] As for the first party pooled special needs trust, the remainder funds can be retained by the nonprofit administrator of the pooled trust for the benefit of other disabled individuals, but the policies differ among the various states and, once again, inquiry is always recommended.

V. Some Practical Advice

A major benefit afforded to individuals with disabilities under the ABLE Act is the treatment it affords disbursements for shelter expenses, including rental payments. Under the SSI program, when payments for rent and other shelter expenses are paid by a third party, the SSI recipient's monthly SSI payment is reduced by an amount up to one-third of the monthly amount. However, payments for rent and other shelter expenses from an ABLE account are considered payments by the individual, regardless of the source of the funds that went into the ABLE account. In other words, if a parent paid the rent for a child on SSI, the monthly SSI benefit would be reduced. However, if the parent deposits the same funds into the ABLE account and the child or other permitted signatory on the ABLE account uses those funds in that same month to pay rent, there is no reduction of SSI or other income tax implications. Similarly, if the payments into the ABLE account come from a trust, there would be no reduction. Therefore, coordination between a special needs trust and an ABLE account can be a very helpful planning device and all attorneys should consider including provisions in their trust documents that permit disbursements into an ABLE account. (Although not germane to the topic of this article, practitioners should also consider similar language allowing transfers to ABLE accounts when drafting powers of attorneys and other documents for parents or loved ones who are planning for an individual with a disability.)

Similarly, using an ABLE account in marital support matters so that payments are made to the ABLE account by the parent/spouse can also afford the beneficiary the same level of monetary protection against a SSI reduction in the monthly amount.

Some practical concerns when considering an ABLE Account in lieu of a special needs trust are as follows:

(1) The requirement for a Medicaid payback even where the funds come from a third party;

(2) There can be only one account per beneficiary and there are annual and lifetime limits;

(3) The potential for over-funding of the account by generous but uninformed family members and friends leading to income tax issues for the beneficiary;

(4) Ensuring that distributions from the ABLE account are for "qualified disability expenses" and that all distributions are properly documented; and

(5) Depending upon the particular individual, there may be the possibility of fraud, undue influence and exploitation.

VI. Conclusion

As can be seen from the above discussion, the availability of ABLE accounts has drastically changed the special needs planning landscape for individuals with disabilities and provides many new opportunities and challenges. However, it is also clear that there continues to be a need for special needs trusts—individually established and as part of pooled trusts—and practitioners should be alert to the differences and cognizant of the interaction of all of these planning devices to ensure the best overall and coordinated plan for their clients and loved ones.

Endnotes

1. 26 U.S.C. § 529A; Pub. L. No. 113-295.
2. 42 U.S.C. § 1396p(d)(4)(A); Pub. L. No. 114-255.
3. Social Security Administration Program Operations Manual System SI 01130.740.
4. 42 U.S.C. § 1382c(a)(3).
5. N.Y.L.J., July 28, 1995, p. 25, col. 1 (Sup. Ct., Kings Co.).
6. 42 U.S.C. § 1396p(d)(4)(A); Pub. L. No. 114-255.
7. *See In re Escher*, 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Sur. Ct., Bronx Co. 1978).
8. *See* EPTL 7-1.12(a)(5); N.Y. Social Services Law § 366.
9. Note that a number of states do assess a penalty for transfers to a pooled trust by an individual over the age of 65.
10. Social Security Administration Program Operations Manual System, *supra* note 3.
11. 42 U.S.C. § 1382c(a)(3).
12. EPTL 7-1.12.
13. *In re Abraham* XX, 11 N.Y.3d 429, 900 N.E.2d 136 (2008).

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

FIDUCIARIES

Deficient Accounting Justifies Surcharge to Pay Objectant's Legal Fees but Not for Reimbursement of Taxes and Fees on Real Property Devised to Objectant

Decedent's will, which named her daughter Tedesco as executor, made the following dispositions: specific devises of real estate to Tedesco, specific dispositions of a condominium, bank accounts and timeshares to her other daughter, Nilan, and the residue to be divided equally between Tedesco and Nilan. Tedesco refused to deliver possession of the real estate and the timeshares to Nilan who began a proceeding to compel distribution. Tedesco then began a proceeding to settle her account and Nilan filed numerous objections. After trial, Surrogate's Court concluded that there were numerous deficiencies in the accounting, directed Tedesco to deliver deeds to Nilan for the real property and timeshares given her under will, and directed Tedesco to pay Nilan's attorney's fees in full. Tedesco appealed.

The Appellate Division affirmed by restating several schedules of the accounting. The opinion noted that many of the errors in the account came from Tedesco's use of estate funds to pay expenses of the real property devised to her and sometimes using estate funds to pay the expenses of the real property and timeshares given to Nilan, and sometimes requiring Nilan to pay those expenses. Contrary to the Surrogate's Court, the court held that Nilan and Tedesco are separately responsible for the fees and expenses related to the property given to them under the will and therefore vacated the surcharge for reimbursement of taxes and fees paid by Nilan for the real property devised to her. However, Tedesco's actions in withholding property from Nilan and the deficiencies in the account mean that Surrogate's Court did not abuse its discretion in surcharging Tedesco for the counsel fees and costs incurred by Nilan. *Matter of Jewett*, 145 A.D.3d 1114 42 N.Y.S.3d 443 (3d Dep't 2016).

NON-PROBATE PROPERTY

Divorce Revokes Designation of Beneficiary of Death Benefits under State Retirement Plans

William P. LaPiana

Decedent designated decedent's then spouse as beneficiary under the New York State and Local Employees' Retirement System. The most recent designation was dated May 14, 1982. On August 30, 1999, decedent and the spouse entered into separation agreement that was eventually incorporated into, but not merged with, a judgment of divorce issued on May 28, 2004. After decedent's death on October 20, 2009, the ex-spouse sought to receive the employment benefits. The ex-spouse failed to prevail in administrative proceedings and then commenced an Article 78 proceeding in Supreme Court, which found that the designation of the now ex-spouse as beneficiary was revoked under EPTL 5-1.4 dealing with revocation on divorce. On appeal, the Appellate Division reversed and remanded so that the State could be jointed as a necessary party. That being done by stipulation, Supreme Court again dismissed the Article 78 proceeding.

The ex-spouse again appealed and the Appellate Division affirmed, finding that EPTL 5-1.4 did indeed revoke the revocable designation of the then-spouse as beneficiary of the employment benefits and that applying the statute does not give it retroactive effect because the disposition did take effect until the decedent's death, which occurred after the statute's effective date. In addition, the ex-spouse had affirmatively and unambiguously waived any right to the death benefits under the terms of the separation

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agreement. *McCauley v. New York State*, 146 A.D.3d 1066, 46 N.Y.S.3d 262 (3d Dep't 2017).

PRACTICE

Examination of How Successor Trustees Were Nominated and One Renounced Beyond the Scope of SCPA 2211, but Not the Right of Beneficiaries to Examine Trustee Relating to Administration

Trustee of a revocable living trust sought judicial settlement of the trustee's account. Beneficiaries of the trust sought to examine the trustee and another person as to "the manner" in which they were nominated as successor trustees and the other person renounced the appointment. Surrogate's Court granted the trustee's motion for a protective order under CPLR 3103, vacating the notice of deposition and settled the account.

On appeal the Appellate Division reversed the decree, but granted the trustee's motion for a protective order to the extent it sought to examine the trustee as to the manner of nomination as successor trustee and the renunciation of the other nominee. Those issues "exceed the scope of SCPA 2211(2)," and therefore the protective order was proper to that extent. However, also under SCPA 2211(2), on a proceeding to voluntarily settle an account, the beneficiaries are entitled to examine the trustee under oath "as to any matter relating to his or her administration of the estate." The protective order was therefore over-broad and the matter must be remitted to Surrogate's Court so that the beneficiaries may exercise their statutory right to examine the trustee under SCPA 2211(2). *In re Jane D. Ritter Revocable Living Trust*, 147 A.D.3d 757, 46 N.Y.S.3d 219 (2d Dep't 2017).

WILLS

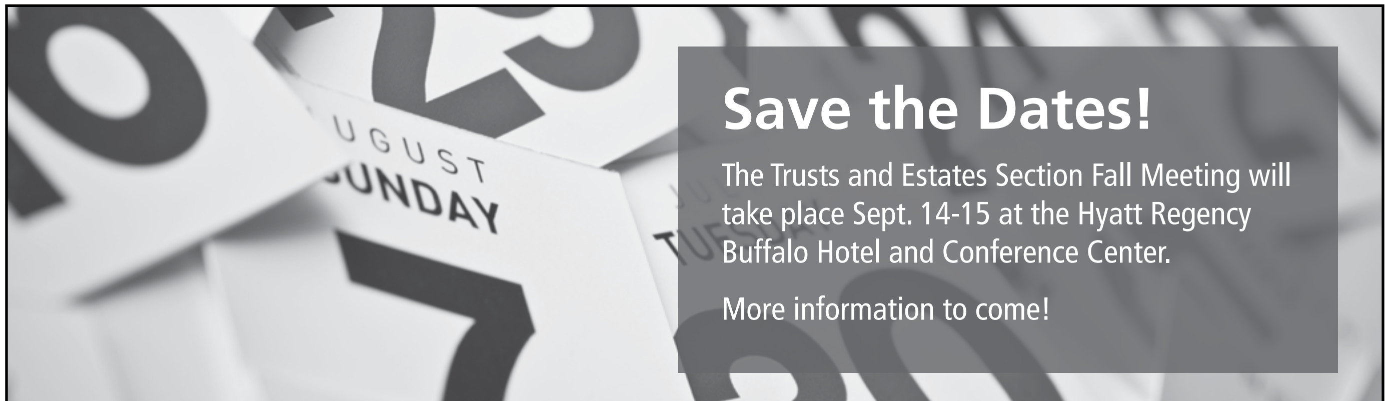
Agreement to Renounce Appointment as Executor in Return for Payment Is Void as Against Public Policy

Child is administrator of parent's estate and as administrator brought suit against child's cousins seeking damages for breach of oral agreements to pay the decedent a specified sum of money, in exchange for the decedent's renunciation of his appointment as executor of the will of the decedent's sister. Surrogate's Court granted the cousins' motion to dismiss for failure to state a cause of action and the Appellate Division affirmed on the administrator's appeal. The allegation of the agreement, even if true, and even giving child, as plaintiff, "the benefit of every favorable inference," cannot be the basis of a cause of action for its alleged breach because an agreement to renounce appointment as fiduciary in exchange for consideration is contrary to public policy. *Cherofsky v. Cherofsky*, 145 A.D.3d 850, 43 N.Y.S.3d 521 (2d Dep't 2016).

WRONGFUL DEATH

Attorney's Fees for Work in Connection with Wrongful Death Settlement Allocated to Estate

Decedent died intestate. The estate, which included some assets, faced numerous creditor's claims, including for unpaid state and federal taxes. Decedent's distributees retained counsel who obtained a wrongful death settlement in federal court. Surrogate's Court approved the administrator's allocation of half the recovery to the estate and half to the distributees. The question before the Surrogate's Court was the approval and payment of the fees of the attorneys representing the estate. In what it describes as a case of first impression, the court directed the payment of part of the fees of the attorneys for the administrator from the fee awarded to litigation counsel by the federal district court that represented work done in relation to the wrongful death claim. The rest of those attorney's fees were to be paid from the estate. The court deemed the federal district court's failure to comply with EPTL 5-4.6(a)(2), requiring that attorney's fees in a wrongful death proceeding not be paid until the trial court is presented with proof of the filing of a petition for allocation and distribution with the Surrogate's Court, to be insufficient to require return of the fees. *In re Haag*, 55 Misc.3d 324, 43 N.Y.S.3d 870 (Sur. Ct., Broome Co. 2016).



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

By Ilene Sherwyn Cooper

Administrator cta

Before the Surrogate's Court, Kings County, in *In re Waxman,* was an application pursuant to the provisions of SCPA 1418, for letters of administration cta by the decedent's sole distributee, who had been specifically disinherited under the propounded Will. Seven of the eight residuary beneficiaries under the instrument renounced their right to serve and consented to the relief requested by the petitioner.

Objections to the application were filed by the Public Administrator, who had previously been appointed temporary administrator of the estate, alleging that the petitioner was ineligible to serve since (a) she was not a beneficiary under the propounded Will, and therefore, was not a person interested in the estate, as required by the provisions of SCPA 1418(1)(c); and (b) she had failed to obtain the consent of all those beneficially interested in the estate, pursuant to SCPA 1418(6). The petitioner moved to dismiss the objections, which motion was converted to one for summary judgment.

In support of her application, the petitioner maintained that despite her disinheritance, she was a "person interested" in the estate, and, thus, qualified to serve pursuant to SCPA 1418, since she would be entitled to a share of the decedent's estate if the propounded Will were denied probate. In addition, she claimed that the interest in the estate of the beneficiary whose consent she had not obtained was de minimis, and in any event, that beneficiary had defaulted in the proceeding. In opposition, the objectant contended, *inter alia,* that the petitioner was not a "person interested" in the estate, as defined in SCPA 103(39), and that the provisions of SCPA 1418 expressly required the consent of *all* beneficiaries of the estate in order for the petitioner to be appointed.

The court agreed with the objectant, finding that the petitioner was not a "person interested" in the estate "entitled or allegedly entitled to share as a beneficiary" thereof, and thus, was not entitled to letters of administration cta, pursuant to the provisions of SCPA 1418(1) (c). The court rejected the petitioner's argument that as an intestate distributee she was a "person interested," concluding that while her status would entitle her to object to probate, it would not qualify her as a "person interested" for purposes of SCPA 1418, which required the fiduciary to have an interest in the property to be administered.

Moreover, the court noted that although petitioner could, in its discretion, be appointed administrator cta, the exercise of that discretion was dependent upon her filing acknowledged consents of all the beneficiaries. The court found that the absence of one such consent was fatal to the petitioner's application.

Accordingly, letters of administration cta were issued to the Public Administrator, pursuant to the provisions of SCPA 1418(2).

***In re Waxman,* N.Y.L.J., Dec. 9, 2016, at p. 35 (Sur. Ct., Kings Co.).**

Attorney-Client Privilege

In *Stock v. Schnader Harrison Segal & Lewis*, the Appellate Division, First Department, held that the attorney-client privilege also applies between attorneys of a firm who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm client. The court opined that disclosure of such communications was protected under the fiduciary exception to the attorney-client privilege, and thus need not be disclosed to the client, because, for purposes of the in-firm consultation, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's "real clients."

***Stock v. Schnader Harrison Segal & Lewis*, 142 A.D.3d 210, 35 N.Y.S.3d 31 (1st Dep't 2016).**

Construction—Gift by Implication

In *In re Warren,* the Appellate Division, Third Department, affirmed an Order of the Surrogate's Court, Greene County (Wilhelm, S.), which granted an application to construe the decedent's Will in favor of her children and stepchildren.

The decedent died survived by eight children, and two stepchildren, who were the children of her

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spouse's prior marriage. Her spouse predeceased her. Pursuant to the pertinent provisions of her Will, the decedent bequeathed $2,000 to each of the 10 children who survived her and created a credit shelter trust for her spouse, for life, and upon his death, directed that the trust principal be divided among "those of his 10 children" who survive him, or their descendants. The Will further devised and bequeathed the decedent's residuary estate to her spouse, and named him the executor. The instrument failed to address the disposition of the residue in the event that the decedent's spouse failed to survive her.

Upon admission of the decedent's Will to probate, the decedent's son, who had been appointed fiduciary of her estate, claimed that, given the lack of an alternate residuary beneficiary under the instrument, the residue of the decedent's estate passed in intestacy to her eight biological children. (Notably, there were no assets remaining with which to fund the credit shelter trust due to inter vivos gifts made prior to death.) As a result, a construction proceeding was instituted by one of the decedent's two stepchildren seeking a determination that she intended to leave her residuary estate to them *and* her biological children. The fiduciary answered and moved for summary judgment dismissing the petition for lack of standing. The Surrogate's Court, *inter alia,* granted the petition, finding that the decedent intended to bequeath her residuary estate to all 10 children. The fiduciary appealed.

In affirming the Order of the Surrogate's Court, the Appellate Division held that the petitioner had standing to institute the proceeding, concluding that petitioner had a colorable argument that he was entitled to share in the property affected by the construction of the Will. Moreover, the court found that the circumstances required implying a gift of the residue to the decedent's 10 children. In reaching this result, the court noted that while the doctrine of gift by implication was rarely invoked, it was pertinent in cases where a reading of the entire Will revealed that the testator intended to dispose of his [or her] property in a certain manner, but through error or omission failed to do so. To this extent, the court concluded that while the residuary clause of the decedent's Will was silent as to what would happen if the decedent survived her spouse, all of her other testamentary provisions evinced a desire to equally divide her assets among her 10 children, whether or not her spouse survived her.

***In re Warren*, 143 A.D.3d 1110, 39 N.Y.S.3d 282 (3d Dep't 2016).**

Eligibility of Fiduciary

In *In re Srybnik,* the petitioner, the decedent's spouse and preliminary executor of the estate, sought admission of the decedent's will to probate, but objected to letters testamentary issuing to the respondent, the co-executor nominated under the instrument, on the grounds of "want of understanding," pursuant to SCPA 707(1)(e). Alternatively, the petitioner sought an order directing an independent medical evaluation of the co-executor or an immediate hearing on his eligibility. The respondent was the decedent's brother and lifetime business partner.

Following the filing of the probate petition, the petitioner, individually and ex parte, requested the issuance to her of preliminary letters testamentary. In support of that application, the petitioner's counsel alleged, upon information and belief, that the respondent was ineligible to serve as fiduciary on the grounds that he was 99 years of age, infirm, and lacked the requisite understanding to fulfill his duties. Although the respondent subsequently sought the revocation of the petitioner's preliminary letters, that application was later withdrawn.

Depositions of both the petitioner and respondent were directed, and thereafter, petitioner moved for summary judgment.

The court noted that the phrase "want of understanding" has been defined as a lack of intelligence sufficient to understand the nature and extent of fiduciary duties, rather than a lack of information, business experience or legal knowledge. That is, disqualification on this contemplates that the fiduciary is likely to jeopardize estate assets and put the interests of the beneficiaries at risk.

Because the testator's selection of a fiduciary is entitled to great deference, the burden of proving ineligibility rests with the party asserting the claim. To that extent, the court found that the petitioner had satisfied, prima facie, her entitlement to summary judgment, based upon the respondent's videotaped deposition, together with the affidavit of a physician who reviewed the tape and transcript. Nevertheless, the court concluded that the respondent had raised an issue of fact as to his eligibility to serve, based upon the affidavit of a physician and counsel's affirmation, both of which called into question the medical opinion of the physician retained by petitioner.

Accordingly, the court denied petitioner's motion for summary judgment, and scheduled a hearing in order to fully develop the record before it determined whether the respondent was capable of understanding and performing his duties as fiduciary.

***In re Srybnik*, N.Y.L.J., Jan. 23, 2017, at p. 29 (Sur. Ct., N.Y. Co.) (Mella, S.).**

Eligibility of Fiduciary

Before the Surrogate's Court, New York County, in *In re Jacobs,* was a contested proceeding in which the petitioners sought permission to resign as co-trustees

of the trust created under the decedent's Will, and to appoint the principal beneficiary's siblings in their place and stead. One of the proposed successors was nominated in the instrument, and the second was designated by the co-trustees pursuant to their authority under the instrument.

Objections to the application were interposed by the beneficiary, who appeared pro se, and who alleged that her family had been abusive toward her, and that she had had no contact with one of her siblings for at least 15 years. The remaining beneficiaries of the trust, including the guardian ad litem appointed for the infant beneficiaries, consented to the application.

The court acknowledged the general rule that accorded respect for the testator's choice of fiduciary, noting, as well, that the principle extended to the selection made by a person authorized by the testator to select a successor. With this in mind, the petitioners' application was granted.

Specifically, the court found that the objectant had failed to demonstrate any misconduct on the part of the proposed successor trustees that would endanger the trust, and opined that alleged hostility is not grounds for disqualifying an otherwise eligible fiduciary. Moreover, the court found it significant that the proposed successors were family members who were familiar with the needs of the beneficiaries, and who agreed to serve without compensation.

***In re Jacobs*, N.Y.L.J., Apr. 5, 2016, at p. 22, col. 5 (Sur. Ct., N.Y. Co.) (Mella, S.).**

Gift

In *In re Albert,* the Appellate Division, Second Department, addressed the issue of gifts within the context of a contested accounting proceeding, in an appeal from an Order of the Surrogate's Court, Dutchess County (Pagones, S.), which, *inter alia,* dismissed an objection to the executors' accounting that had alleged that two IRA accounts, valued at approximately $900,000, should have been included as estate assets. Notably, in affirming the opinion below, the court discussed principles underlying a claim of undue influence, and the role of the court in assessing the credibility of witnesses at trial.

The objectant, the decedent's sister, and beneficiary of one-half of his residuary estate, alleged that the designated beneficiary of the IRA accounts exercised undue influence on the decedent in order to obtain his signature on the beneficiary designation forms. Alternatively, the objectant claimed that the signature on one of the designation forms was a forgery.

The court observed that undue influence requires a finding that a person was restrained from acting independently, or was constrained to do that which was against his or her free will and desire. While, generally, the burden of proving undue influence rests with the party making the assertion, the court noted that where a confidential relationship is established, the burden shifts to the beneficiary to show that the transaction was fair and free from influence.[1]

Proof of a confidential relationship requires evidence of circumstances that demonstrate inequality between the parties, with control by one party over the other as a result.

Within this context, the court found the proof insufficient to establish a confidential relationship between the decedent and the beneficiary of the IRA accounts, and held that the objectant's claim of undue influence was based on nothing more than conclusory allegations and speculation.

Moreover, on the issue of forgery, while the objectant offered the testimony of an expert who opined that the signature on one of the beneficiary designation forms was not that of the decedent, the court concluded that there was no basis in the record for rejecting the opinion of the Surrogate's Court crediting the testimony of the executors' expert, who concluded that the decedent had signed both of the designation forms at issue. In reaching this result, the court held that in reviewing a determination after a nonjury trial, it had the power to render a judgment warranted by the facts, bearing in mind, that in a close case, deference would be accorded to the trial court which had the opportunity to see the witnesses and hear the testimony.

***In re Albert*, 137 A.D.3d 1266, 30 N.Y.S.3d 121 (2d Dep't 2016).**

Gift

In *In re Jordan,* the Appellate Division, Fourth Department, reversed an Order of the Surrogate's Court, Jefferson County, denying the motion of the respondent for summary judgment in a proceeding for recovery of the proceeds in an investment account, of which she was the sole beneficiary.

Upon review of the record, which consisted of sworn statements of two disinterested witnesses, who stated, *inter alia,* that they were close friends of the decedent, that he was of sound mind, and that he fully intended to transfer the subject account to respondent, as well as an envelope from the investment firm with respondent's name and the words "Happy Birthday" on it, the court held that the respondent had established, as a matter of law, that the decedent had made a gift of the account to her. The court found petitioners' opposition unavailing, finding that the affidavit submitted by their counsel was based on nothing but conjecture and surmise, and the report of their expert had no probative value, since he did not examine the dece-

dent prior to his death, did not reference any medical records during the relevant time period, and relied to a great extent on hearsay statements from unspecified witnesses for his conclusion.

***In re Jordan*, 144 A.D.3d 1630, 41 N.Y.S.3d 850 (4th Dep't 2016).**

Paternity

In *In re Oscarsson*, the court found that paternity had been established pursuant to EPTL 4-1.2(a)(2)(C). Before the court was an accounting proceeding in which the determination of the decedent's distributees, and more particularly, the status of an alleged posthumous child of the decedent, was at issue. A guardian ad litem was appointed for the infant marital child of the decedent, as well as for an alleged non-marital child of the decedent. At a hearing of the matter, DNA evidence was offered based upon genetic testing of the decedent's girlfriend, who was the mother of the child, as well as his father and sister. The court noted that inasmuch as the provisions of EPTL 4-1.2(a)(2)(D)[2] required that the genetic evidence of paternity be derived from the father during his lifetime, that section was inapplicable and the provisions of EPTL 4-1.2(a)(2)(C) had to be satisfied for paternity to be proven.

The court opined that pursuant to that section, DNA evidence could be considered to establish that prong of the statute requiring clear and convincing evidence of paternity. To that extent, testimony was offered from an expert witness regarding the DNA test performed, and its probable accuracy. In addition, the decedent's friends and business associates, as well as his girlfriend, testified regarding the decedent's acknowledgment of his girlfriend's pregnancy with his child. Based on the record, the court concluded that the evidence unequivocally demonstrated that the decedent openly and notoriously acknowledged the infant/posthumous child as his own. In addition, as to the second prong of the statute requiring clear and convincing evidence of paternity, the court credited the testimony of the decedent's girlfriend that she was in an exclusive relationship with the decedent and that he was the only possible father of the child. Although the guardian ad litem for the marital child argued that DNA test results should have been obtained from the decedent in order to satisfy this prong of the statute, the court held that such results were not required in order to establish paternity by clear and convincing evidence. Accordingly, the court found that the posthumous infant child was the legitimate child of the decedent.

***In re Oscarsson*, N.Y.L.J., June 15, 2016, at p. 26, col. 5 (Sur. Ct., N.Y. Co.).**

Power of Attorney

In *In re Batlas*, the Appellate Division, Second Department, affirmed an Order of the Surrogate's Court, Queens County (Kelly, S.), which granted the petitioner's renewed motion for summary judgment, finding that the power of attorney executed by the decedent was invalid.

The decedent had executed a short-form power of attorney many years before his death in favor of the appellant. Two months before the decedent's death, the appellant used the power of attorney to designate herself as the sole beneficiary of the decedent's annuity account, which was later distributed to her.

Following the decedent's death, the petitioner, the ancillary administrator of the decedent's estate, commenced a turnover proceeding against the appellant seeking recovery of the funds in the account. The fiduciary moved for summary judgment on the petition, contending that the subject power of attorney was invalid because it had not been properly acknowledged. The motion was opposed by the appellant, who argued that it was premature, to the extent that the sole distributee of the estate had not yet been deposed. The Surrogate's Court granted the petitioner's motion, determining that the power of attorney had been improperly executed and, therefore, could not be utilized to effect a change of beneficiary of the decedent's annuity.

The Appellate Division found that the petitioner had established his prima facie entitlement to judgment as a matter of law by demonstrating that the power of attorney was not duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. Although the power of attorney contained what purported to be the decedent's signature, the Court noted that the notary simply applied his stamp to a space beneath the decedent's signature on the "Affidavit as to Power of Attorney Being in Full Force," which was dated one month after the decedent allegedly signed the power of attorney, and failed to provide any affirmation or confirmation that the decedent came before him and demonstrated that he was who he purported to be. Accordingly, the power of attorney was invalid and could not be used to effect a change in the designated beneficiary of the annuity account.

The court held that the appellant had failed to raise a triable issue of fact in opposition to petitioner's motion, and determined, further, that petitioner's motion was not premature, as appellant had failed to demonstrate that discovery requested might lead to relevant evidence or that the facts essential to oppose the motion were exclusively within the knowledge and control of the party sought to be deposed.

***In re Batlas*, 144 A.D.3d 791, 41 N.Y.S.3d 110 (2d Dep't 2016).**

Undue Influence

In *In re MacGuigan*, the Appellate Division, First Department, affirmed an Order of the Surrogate's Court, New York County (Mella, S.), which granted proponent's motion for summary judgment dismissing the objection based on undue influence. Citing *Children's Aid Socy. of City of N.Y. v. Loveridge*,[3] the court opined that the kind of influence sufficient to invalidate a will was not the result of "affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices" but rather amounted to coercion, or the exercise of power over the testator in the making of the will and its provisions.

Within this context, the Appellate Division found that the Surrogate had properly determined, based on the testimony of the decedent's financial advisor and his treating physician, that the proponent, the decedent's long-term girlfriend, did not exert undue influence over him in the making of the propounded instrument. The court observed that the financial advisor had stated that the decedent's girlfriend was reluctant to affect his investment decisions or to receive a power of attorney on his behalf, and his physician had indicated that he suffered only mild memory loss at the time the Will was executed. Further, the record reflected that the attorney who prepared the Will, as well as the attesting witnesses, believed that the decedent's testamentary plan was the result of his own free will. The court noted that the objectant, the decedent's sister, conceded that she had limited contact with him over the years, that their relationship was distant, and that she did not challenge the decedent's decision to provide proponent with his power of attorney and health care proxy.

Finally, the court held that the Surrogate's Court properly rejected objectant's claim that the proponent and decedent were in a confidential relationship, opining that there was no showing that the proponent had control over the decedent, and, concluding, in any event, that the bequest to her was explained by the evidence of "longstanding ties of affection" between her and the decedent.

***In re MacGuigan*, 140 A.D.3d 625, 34 N.Y.S.3d 42 (1st Dep't 2016).**

Endnotes

1. *See, e.g., In re Boatright*, 114 A.D.3d 856, 858, 980 N.Y.S.2d 554 (2d Dep't 2014); *Hearst v. Hearst*, 50 A.D.3d 959, 962, 857 N.Y.S.2d 596 (2d Dep't 2008); *In re Connelly*, 193 A.D.2d 602, 602–03, 597 N.Y.S.2d 427 (2d Dep't 1993).
2. The provisions of EPTL 4-1.2(a)(2)(C) had not been amended and the provisions of EPTL 4-1.2(a)(2)(D) had not been repealed at the time of the decedent's death. Hence, both provisions were considered by the court in its decision.
3. 70 N.Y. 387, 394–95 (1877).

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

REQUEST FOR ARTICLES

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

Jonathan A. Galler

DECISIONS OF INTEREST

Irrevocable Trust Not Subject to Equitable Distribution

In this case, a former wife appealed the trial court's final judgment of dissolution of marriage to her former husband. The trouble, according to the former wife, was the trial court's characterization of a California home as a marital asset subject to equitable distribution. The California house was purchased in the names of both the husband and wife, but they had then transferred it to an irrevocable trust and named the wife as trustee. Accordingly, the appellate court found that the house was not subject to equitable distribution because it had become an asset of the trust and not an asset of the parties. Further, the court found that the irrevocable trust had not been subject to judicial modification pursuant to Section 36.04113, Florida Statutes, because neither the trustee nor the beneficiary had so requested. Moreover, the court found that the irrevocable trust was not subject to common law modification, pursuant to the statute and *Peck v. Peck*, 133 So. 3d 587 (Fla. 2d DCA 2014), because not all of the beneficiaries had consented to modification as they were not all before the trial court.

Nelson v. Nelson, 206 So. 3d 818 (Fla. 2d DCA 2016).

Personal Representative's Discovery Not Permitted

This was a petition by non-party, United States Sugar Corporation, to quash a probate court's order allowing discovery. The order overruled United States Sugar's objections to a subpoena served by the estate of a decedent who died while on United States Sugar's property. The discovery sought reports, statements and photographs relating to United States Sugar's investigation of the fatal accident that led to the decedent's death. Although United States Sugar was a non-party to any estate proceeding, the estate argued that it had a duty to investigate the matter, as there may have been grounds for a wrongful death action. The appellate court quashed the probate court's order. It found that although Probate Rule 5.080 permits serving discovery, even in non-adversary proceedings, United States Sugar was not a party to the estate proceeding, and any wrongful death suit could not be brought in the estate proceeding. The case is also notable for the additional point that as a non-party, even had the subpoena not been quashed, no privilege log would have been necessary in state court.

United States Sugar Corp. v. Estate of Mullins, 2017 WL 363141 (Fla. 4th DCA Jan. 25, 2017) (not yet final).

Liability of Estate Prior to Issuance of Letters

The decedent's daughter, in this case, was driving the decedent's car when she collided with Mr. Depriest's car. Mr. Depriest's car had been disabled after he had collided head-on with an oncoming vehicle, killing the other driver. Mr. Depriest sued the decedent's estate as being vicariously liable for the injuries he suffered under the doctrine of dangerous instrumentality. Although the decedent had died a month earlier, an estate had not yet been opened for him and letters of administration had not yet been issued. The decedent's stepson was the nominated personal representative, and he opened the estate shortly thereafter. Mr. Depriest argued that the daughter was using the car with the implied consent of the stepson, as personal representative, prior to his appointment. The appellate court held that a finding of implied consent by the personal representative, prior to issuance of letters, would improperly confuse a personal representative's *authority* to adopt his pre-issuance conduct with a *duty* to do so. The court held that the legislature intended to shield the personal representative from liability in the period between death and the issuance of letters.

Depriest v. Greeson, 2017 WL 672155 (Fla. 1st DCA Feb, 21, 2017) (not yet final).

Consent Agreement to Pursue Estate's Insurer

A Coblentz agreement is a negotiated settlement in which the defendant agrees to a consent judgment and assigns, to the injured party, any cause of action the defendant had against the defendant's insurer. *See Coblentz v. Am. Sur. Co. of New York,* 416 F.2d 1059 (5th

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Cir. 1969). In this case, the appellate court held that a Coblentz agreement between plaintiff and an estate allowed plaintiff to proceed against the estate's insurer, even though plaintiff had not filed a claim in the probate proceedings and the time for doing so had passed. After plaintiff filed its bad faith claim against the insurance company, pursuant to the Coblentz agreement, the insurance company moved to intervene in the probate proceedings, and moved for summary judgment against plaintiff in the civil action. The appellate court held that (i) motions to intervene were not permitted in probate proceedings in the absence of an adversary proceedings, and (ii) summary judgment was improper because the insurance company could have raised earlier the issue of plaintiff's failure to file a claim in probate. The opinion had a lengthy dissent and arguably represents an end-run around Florida's hard-and-fast rule that to proceed against an estate, one must always file a claim in the probate proceedings.

Reyes v. Infinity Indemnity Ins. Co., 2017 WL 192019 (Fla. 3d DCA Jan. 18, 2017) (not yet final).

Determination of Beneficiaries Not *Res Judicata*

In 2007, Edward John opened an estate for a woman he called his wife. He did not serve her children with any pleadings or orders, and the estate was closed in 2009. Later that year, he petitioned to reopen the estate to pursue a medical malpractice claim against the decedent's treating physician. This time, the petition was served on the decedent's four children. One of the children petitioned the court to determine intestate beneficiaries, alleging that the children had not been served with the original notice of administration and claiming that they were entitled by law to 50% of the estate assets or, if Mr. John was unable to produce a valid marriage certificate, to 100% of the estate assets. Mr. John argued, and the trial court held, that the issue of whether he was married to the decedent had already been decided in the medical malpractice action and was *res judicata*. The appellate court, however, disagreed. Because the children were not invited participants in the medical malpractice action, and because the facts and evidence to prove the children's claim were different from those required to prove the malpractice claim, the doctrine of *res judicata* did not apply and the probate court would have to revisit the issue of whether Mr. John and the decedent were ever married.

Bryan v. Fernald, 2017 WL 694578 (Fla. 2d DCA Feb. 22, 2017) (not yet final).

Section Members Gather for Spring Meeting in New Orleans

From left to right, Marion Hancock Fish, former chair and Spring Meeting Program co-chair; Natalia Murphy, Chair-Elect; Sharon Wick, Section Chair; Claire Gutekunst, NYSBA President; Cristine Cioffi, Section Secretary; Magdalen Gaynor, Immediate Past Section Chair; and Darcy Katris, Spring Meeting Program co-chair.

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The following individuals joined the Trusts and Estates Law Section since Jan. 1, 2017:

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