NYSBA FALL 2002 | VOL. 35 | NO. 3

Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

The Trusts and Estates Law Section has always been one of the largest and most active and productive Sections of the New York State Bar Association.

The NYSBA is celebrating its 125th year of providing professional, social, political and technological support to the legal community. What better way could there be to meet and exceed the goals and objectives of the NYSBA than to answer the challenge by bringing new members into our Section and encouraging them to work on our committees? The Chair of our Membership Committee is George E. Riedel, Jr., and he is always looking for new ideas and ways to attract new members to our Section. Please contact George or any of the officers if you have any suggestions or questions. I am pleased to advise all our members that David Goldfarb, our Technology Chair, is working on a new Web site for our Section which is an exciting project.

Our committees work diligently on, among other things, legislative proposals. I would like to highlight one bill, which was proposed by the Association of the Bar of the City of New York and supported by our Section, which passed both the Senate and Assembly for the first time this spring and has been sent to the governor for signature. The bill preserves the attorney-client privilege when representing a fiduciary (S. 2784 and A. 5658). The bill adds a new paragraph 2 to CPLR section 4503(a) to provide that for purposes of the attorney-client privilege, if the client is a "personal representative" as defined in the bill, and the attorney represents the "personal representative" in that capacity, the existence of a fiduciary relationship between the "personal representative and a beneficiary of an estate will not by itself give rise to any waiver of the privilege for confidential communications." The bill further provides that no beneficiary of the estate shall be treated as the client of the attorney solely by reason of his or her status as beneficiary. Our Estate Litigation Committee, chaired by Gary B. Freidman, worked diligently to support passage of this bill.

Inside

Editor's Message..3

Final IRA Distribution Rules Expand and Clarify Opportunities for Tax Savings...4
(Lee A. Snow)

Charitable Aid, Recovery and Empowerment Act of 2002 11
(Blanche Lark Christerson)

Arbitration and Engagement Letters...................................14

Recognizing Value for Estate Planning Purposes: Case Studies in Appraisal and Auction Services 16
(Joanne Porrino Mournet)

The Effect of Recent Federal Estate Tax Legislation on the New York Estate Tax...19
(Philip L. Burke)

Recent New York State Decisions 27
(John C. Welsh)

Case Notes—Recent New York State Surrogate's and Supreme Court Decisions...31
(Ilene Sherwyn Cooper and Donald S. Klein)

Section Committees & Chairs 37

NYSBA 125 Years

We are always planning for the future, and would like to devote the January program at the Annual Meeting to the Principal and Income Act elections, new developments and the ethical problems facing the attorney-fiduciary and recent issues relating to attorney's fees. Anyone interested in speaking or contributing to the program materials, please let me know.

I would like to extend a warm and cordial invitation to all Trusts and Estates attorneys to attend our gala Fall Weekend in Boston with their spouses and children, from October 3 through October 6, 2002. An interesting and informative program is planned with an expert panel of speeches on difficult estate and trust administration problems, chaired by Gary B. Freidman and Barbara Levitan, with a coursebook assembled by Ilene S. Cooper. On Friday night we will have a reception at the JFK Memorial Library with a tour of the facilities. Saturday night's festivities include a short motor coach trip to the famous Boston Museum of Fine Arts to have a private tour of the collection and a cocktail reception and dinner. In addition, tennis and golf tournaments will be held at famous Boston sites.

I "summon" all Trusts and Estates attorneys and their families, to answer the roll call, file their "brief" registration form in time, match my "plea," and second my e "motion" to make Boston the largest turnout in the history of the New York State Bar Association (just like Binghamton set new records of attendance for a Spring Meeting).

Arlene Harris

"it's the IRS on line two... something about that business valuation..."

Do you and your clients really need this kind of worry?

Empire Valuation Consultants can help you avoid unnecessary tax audit risks related to valuations of closely held businesses and business interests. We specialize in business valuations and have a fully trained, accredited staff of over 30 people. We provide your clients with thorough, accurate, timely and on-budget reports that meet all applicable IRS standards for estate or gift tax related appraisals.

EMPIRE
VALUATION CONSULTANTS

Specialists in Business Valuations for:

- Estate & Gift Taxes
- Buy/Sell Agreements
- Recapitalizations
- ESOPs
- Redemptions
- Acquisitions/Sales
- Purchase Price Allocation
- Corporate Planning
- Fairness Opinions
- Litigation

William Lockwood, ASA
Scott Nammacher, ASA
New York, New York
(212)714-0122
Lockwood@Empireval.com
ScottN@Empireval.com

Terry Griswold, ASA
Rochester, New York
(716)475-9260
TGriswold@Empireval.com

(paid advertisement)

Editor's Message

If it is the fall season, then this Section is on the move for its out-of-state meeting. We travel to Boston in early October and a great program is planned. Hopefully, I will see many of you there.

This issue contains a variety of topics. Lee Snow has allowed us to republish his article on final IRA distribution rules and it is included in this issue. Another contributor, Blanche Christerson, has written on the CARE Act which at the time of publication was working its way through Congress.

This issue also includes information on engagement letters which the Practice and Ethics Committee of this Section wrote for the benefit of our membership. The final entry in this issue is an interesting and well-photographed article on the importance of knowing the value of tangible property. I appreciate Doyle New York taking the time to provide this.

During the summer, the American Red Cross requested help in reaching the representatives of WTC estates. It was preparing to issue flat gift payments of $45,000 to each of the estates of those killed as a result of September 11 attacks and asked for a notice to be sent to those who could provide the information the American Red Cross needed to reach the estates of those killed in the attacks. There was a good response from our Section but there are more estates that need to be counted. So I am including the request again.

Specific information about the executors/executrixes and/or representatives of these estates can be sent by mail, telephone or e-mail to:

Daniel Zellman
Financial Assistance Program
American Red Cross
100 Varick Street
New York, NY 10013
zellmand@usa.redcross.org
(212) 875-2019

Magdalen Gaynor

Notice

The IRS has instituted a toll-free number for taxpayer inquiries on the status of Form 706 filings, including claims and amended returns, extensions, etc.

The estate and gift personnel at Cincinnati Service Center will staff this telephone.

The number is (866) 699-4083.

Final IRA Distribution Rules Expand and Clarify Opportunities for Tax Savings©

By Lee A. Snow

On April 17, 2002, the IRS issued final and temporary regulations[1] concerning the required minimum distributions from individual retirement accounts (IRAs), qualified retirement plans, deferred compensation plans under Internal Revenue Code § 457, and § 403(b) annuity contracts. The new rules generally follow the proposed regulations issued by the IRS in January 2001,[2] which made substantial changes to and greatly simplified the outdated and overly complex minimum distribution proposed regulations first issued by the IRS in 1987. The final regulations generally increase the ability of IRA owners and qualified retirement plan participants (and the beneficiaries of both groups) to minimize their taxes by, in most cases, reducing the amounts of their required minimum distributions. The new rules provide new life expectancy tables, offer needed clarification concerning separate accounts and spousal rollovers and better coordinate the date on which an IRA owner's "designated beneficiaries" are determined with the date on which such beneficiaries are required to commence receiving distributions. This article provides an overview of the new rules (focusing on how they apply to IRA owners and their beneficiaries), illustrates with several examples the mechanics of how the new rules work, and highlights a few of the open issues on which further guidance is still needed.

Effective Date. All taxpayers must use the new rules to determine their required minimum distributions for calendar years beginning on or after January 1, 2003. For calendar year 2002, taxpayers have the choice of using the new rules, the 2001 proposed regulations, or the 1987 proposed regulations. Taxpayers may use whichever set of rules results in the most favorable (*i.e.*, minimum) distribution amount.

Who May Use the New Rules. Beginning in 2003, plan participants in qualified retirement plans, IRA owners, *and* beneficiaries of deceased plan participants and IRA owners, regardless of when the plan participant or IRA owner died, must use the new rules to determine their required minimum distributions. In 2002, all such persons may elect to use such rules. Although the 2001 proposed regulations stated that those rules applied to "taxpayers," such regulations were unclear as to whether they could be used by beneficiaries of deceased IRA owners.[3] In contrast, the 2002 rules expressly provide that (1) the designated beneficiary of a deceased IRA owner, regardless of when the IRA owner died, must be redetermined in accordance with the provisions of the new rules; and (2) the applicable distribution period must be reconstructed for purposes of determining the beneficiary's required minimum distributions for calendar years beginning on or after January 1, 2003.[4]

Lifetime Distributions. Under the new rules, the 2001 regulations and even the outdated 1987 proposed regulations, an individual must begin receiving distributions from his or her IRA or qualified retirement plan no later than his or her required beginning date.[5] The required beginning date is generally April 1 of the year following the calendar year in which the IRA owner attains age 70½. (In the case of qualified retirement plans but not IRAs, the required beginning date is the later of April 1 of the year following the calendar year in which the plan participant attains age 70½ or April 1 of the year following the calendar year in which the participant retires, unless the participant is a 5% or more owner of the business sponsoring the qualified retirement plan, in which case the April 1st following the age 70½ date applies.)

The new rules continue the basic structure and method of the 2001 proposed regulations concerning lifetime distributions to IRA owners. As was the case under the 2001 proposed regulations, almost all IRA owners may use a single uniform table to calculate their required minimum distributions. IRA owners calculate their required minimum distributions by simply dividing their IRA account balance valued at December 31 of the year prior to the year for which the distribution is being determined by the relevant factor taken from the uniform table. The factor provides the distribution period for the IRA owner based upon the IRA owner's age at his or her birthday in the year for which the required minimum distribution is being determined.[6]

Age of the Employee	Distribution Period
70	27.4
71	26.5
72	25.6
73	24.7
74	23.8
75	22.9
76	22.0
77	21.2
78	20.3
79	19.5
80	18.7
81	17.9
82	17.1
83	16.3
84	15.5
85	14.8
86	14.1
87	13.4
88	12.7
89	12.0
90	11.4
91	10.8
92	10.2
93	9.6
94	9.1
95	8.6
96	8.1
97	7.6
98	7.1
99	6.7
100	6.3
101	5.9
102	5.5
103	5.2
104	4.9
105	4.5
106	4.2
107	3.9
108	3.7
109	3.4
110	3.1
111	2.9
112	2.6
113	2.4
114	2.1
115 and older	1.9

The uniform table factors are based upon the joint and last survivor life expectancies of an individual and a hypothetical beneficiary ten years younger than the individual. The uniform table contained in the final regulations has been updated to reflect longer, current life expectancies pursuant to the mandate given to the IRS by Congress in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) to update the IRS life expectancy tables.7 The longer joint life expectancies result in slightly smaller annual required minimum distributions than under the 2001 regulations table and, therefore, greater tax deferral for IRA owners.

Example. Michael was born on August 5, 1930, and reached age 72 on August 5, 2002. His IRA was valued at $1,000,000 on December 31, 2001. If Michael elects to use the new rules for 2002, his 2002 required minimum distribution will be $39,063, determined by dividing Michael's December 31, 2001, $1,000,000 account value by the 25.6-year distribution period factor taken from the new uniform table. If Michael uses the 2001 regulations uniform table to compute his 2002 required minimum distribution, his 2002 distribution will be $40,984 ($1,000,000 ÷ 24.4), or $1,921 more than under the 2002 table.

Virtually all IRA owners, even those who designate their estates as beneficiaries or who fail to designate a beneficiary, can use the uniform table to calculate their required minimum distributions. The only IRA owners who would not use the uniform table are those who have designated their spouse as their sole beneficiary where the spouse is more than ten years younger than the owner. Such IRA owners may use the actual joint and survivor life expectancy of the owner and the owner's spouse to determine their required minimum distributions.[8] Here also, new tables are provided in the 2002 rules, pursuant to the EGTRRA mandate.[9]

Example. Richard and his wife, Dalia, are, respectively, 74 years old and 60 years old in 2002. Dalia is the sole beneficiary of Richard's IRA. Richard's IRA was valued at $1,000,000 on December 31, 2001. Under the revised joint and survivor life expectancy table, Richard's 2002 required minimum distribution is $37,594, determined by dividing his December 31, 2001, $1,000,000 account value by the 26.6-year joint life expectancy of a 74-year-old and a 60-year-old. If Dalia were not Richard's sole beneficiary or if Dalia were not Richard's wife and Richard elected to use the new rules for 2002, his 2002 required minimum distribution would be $42,017 ($1,000,000 ÷ 23.8) where 23.8 is the applicable factor for a 74-year-old under the revised uniform table.

The 2002 rules further simplify the calculation of required minimum distributions by making certain simplification assumptions regarding an IRA owner's marital status. Under the 2001 regulations, in order to use the more favorable actual joint and survivor life expectancy table, an IRA owner who had designated his spouse more than ten years younger than he as his sole beneficiary had to be married during the entire calendar year with respect to which the distribution was being determined. Under the 2002 rules, the account owner's marital status is determined on January 1 of the calendar year. Thus, if the account owner is married on January 1, he will be considered as married for the entire calendar year even if the account owner and/or his spouse die during the year or they divorce during the year.[10] Morever, if an IRA owner changes his beneficiary designation as a result of the death of his spouse, the change will not be recognized for minimum distribution purposes until the year after the year of the spouse's death.[11] However, if an IRA owner changes his beneficiary designation as a result of his divorce, the change will be recognized in the year the change is made, according to one of the IRS authors of the final regulations.

Distributions After Death. The 2002 rules also generally follow the structure of the 2001 regulations regarding post-death minimum distributions to beneficiaries of deceased IRA owners. Under the new rules, a beneficiary of a deceased IRA owner generally may receive distributions over his or her life expectancy. The beneficiary's life expectancy is determined using the age of the beneficiary at his or her birthday in the year following the year of the IRA owner's death. For a beneficiary who is not the IRA owner's surviving spouse, such life expectancy is then reduced by one for each subsequent year. This beneficiary life expectancy rule applies, however, only to "designated beneficiaries," i.e., beneficiaries who are individuals, as opposed to entities, such as an estate or a charity.

Example. Sylvia designated her daughter, Lisa, as the beneficiary of Sylvia's IRA. Sylvia died in 2001 when Lisa was 36. The December 31, 2001, value of Sylvia's IRA is $500,000. Under the life expectancy rule, Lisa may receive distributions over her life expectancy based upon Lisa's age at her birthday in 2002. Such distributions must commence no later than December 31, 2002. Lisa's 2002 life expectancy is 46.5 years (the single life expectancy factor applicable to a 37-year-old person under the revised single life expectancy table). Lisa's 2002 required minimum distribution is therefore $10,753 ($500,000 ÷ 46.5). If Sylvia's IRA is valued at $495,000 on December 31, 2002, Lisa's 2003 required minimum distribution will be $10,879 ($495,000 ÷ 45.5).

The new rules make a significant change regarding the date on which the IRA owner's designated beneficiary is determined. Under the 2001 regulations, the designated beneficiary was determined on December 31 of the calendar year following the year of the IRA owner's death, and distributions to a nonspouse designated beneficiary had to commence by that same December 31 date under the life expectancy rule. A nonspouse designated beneficiary could therefore encounter some practical difficulties effectuating his or her initial required minimum distribution. Under the 2002 rules, the designated beneficiary is determined on September 30 of the year following the year of the IRA owner's death.[12] Thus, a nonspouse beneficiary will have at least 3 months to make arrangements to receive his or her initial required minimum distribution, which still must be received no later than December 31 of the year following the year of the IRA owner's death.

Another significant development under the 2002 rules concerns the situation where a beneficiary survives the IRA owner but dies prior to the date on which the owner's designated beneficiary is determined (September 30 of the year following the year of the owner's death, as indicated above). The 2001 rules were not clear as to whose life expectancy would be used in such an event. The new rules now provide that if the beneficiary dies without disclaiming his or her interest in the IRA during this gap period, the remaining life expectancy of the deceased beneficiary may still be used for minimum distribution purposes even if the IRA is payable to a successor beneficiary as a result of the primary beneficiary's death.[13] The IRA would be payable in such event presumably to a successor beneficiary named either by the IRA owner or the primary (now deceased) beneficiary or, if no successor beneficiary is so named, as provided in the IRA custodian agreement or by state law (generally, to the deceased beneficiary's estate).

Example. John died on November 30, 2001, survived by his daughter, Andrea, and his grandson, Danny. John had named Andrea as the beneficiary of his IRA and had not named a contingent beneficiary. After John's death, Andrea named Danny as the successor beneficiary to John's IRA. Andrea died on June 20, 2002, without disclaiming her interest in the IRA. Andrea will be considered John's designated beneficiary notwithstanding her death prior to September 30, 2002 (the date on which John's designated beneficiary is determined). As a result of Andrea's naming Danny as the successor beneficiary, the IRA will be payable to Danny over Andrea's life expectancy, based upon Andrea's age at her birthday in 2002 and reduced by one for each subsequent year. The result would be the same if John's beneficiary

designation provided that Danny would be the successor beneficiary if Andrea died prior to receiving John's IRA.

As was the case under the 2001 proposed regulations, where an IRA owner designated multiple beneficiaries, the post-death distribution period is determined based upon the life expectancy of the designated beneficiary whose life expectancy is shortest.[14] Thus, if Dave designated his three children, Barry, Tim, and Jane, as the beneficiaries of his IRA, the distribution period for all three children after Dave's death would be based upon the life expectancy of the oldest child. Alternatively, if Dave had designated his three children and a charity as his beneficiaries, then, following Dave's death, the three children would not be able to utilize any of their life expectancies as the distribution period because where an IRA owner designates a person other than an individual as his or her beneficiary, the IRA owner will be treated as if he or she had no designated beneficiary even if there are also individuals designated as beneficiaries.[15]

To avoid results such as these, the 2002 rules allow the beneficiaries of a deceased IRA owner to implement some post-mortem estate planning measures. For example, if a beneficiary has his, her, or its interest paid out in full on or before September 30 of the year following the year of the IRA owner's death, then that beneficiary is not taken into account in determining the designated beneficiary for minimum distribution purposes. Similarly, if a beneficiary disclaims his or her interest in the IRA prior to that same September 30 and the disclaimer meets the requirements of IRC § 2518, then that beneficiary is also not taken into account for designated beneficiary determination purposes.[16]

Finally, if separate accounts are established with respect to the multiple beneficiaries, each beneficiary may determine his or her required minimum distribution based upon his or her individual life expectancy as opposed to using the life expectancy of the beneficiary whose life expectancy is shortest. (The separate accounts will be recognized for required minimum distribution purposes only after the later of the year of the IRA owner's death or the year in which the separate accounts are established.[17]) The 2002 rules allow the separate accounts to be established as late as December 31 of the year following the IRA owner's death. However, the author believes that it would be prudent to establish separate accounts by the date on which the designated beneficiary is determined, i.e., by September 30 of the year following the IRA owner's death.

If separate accounts are established, the separate accounting for such accounts must allocate all post-death investment gains or losses for the period prior to the establishing of the separate accounts on a pro rata basis on a reasonable and consistent basis among the separate accounts for the different beneficiaries. The separate accounts must also allocate any post-death distributions to the separate accounts of the beneficiaries receiving such distributions.[18]

Death After Required Beginning Date. If an IRA owner does not have a designated beneficiary because, for example, the account owner designated his or her estate as the beneficiary and the IRA owner dies on or *after* reaching his or her required beginning date, the post-death distribution period is the IRA owner's life expectancy calculated in the year of death and reduced by one for each subsequent year.[19]

A favorable change made by the 2002 rules applies when an IRA owner dies and leaves a designated beneficiary who is older than the deceased IRA owner. Under the new rules, if the IRA owner dies on or after his or her required beginning date and the beneficiary is older than the deceased IRA owner, the beneficiary's distribution period will be the longer of the life expectancy of the beneficiary (determined in the year after the year of the IRA owner's death) or the remaining life expectancy of the IRA owner (determined at his or her birthday in the year of death and reduced by one for each subsequent year).[20] As a result of this change, the older beneficiary's required minimum distributions will be smaller.

Death Before Required Beginning Date. A somewhat different set of rules applies when the IRA owner dies *before* reaching his or her required beginning date. In this case, if the owner leaves a designated beneficiary, the required distribution period will again be based upon the beneficiary's life expectancy at his or her birthday in the year following the year of the IRA owner's death. If, however, the IRA owner does not leave a designated beneficiary or if the designated beneficiary elects not to use the life expectancy rule, then the IRA must be completely distributed by the end of the calendar year that contains the fifth anniversary of the IRA owner's date of death.[21] For example, if the IRA owner dies on January 1, 2002, prior to his or her required beginning date without leaving a designated beneficiary, the entire IRA must be distributed no later than December 31, 2007.

The new rules also provide a transition rule that may help beneficiaries of certain IRA owners who died after 1997. Under the 1987 regulations, if an IRA owner died prior to reaching his or her required beginning date, the IRA generally had to be completely distributed to the IRA owner's beneficiary by December 31 of the calendar year that contained the fifth anniversary of the IRA owner's death, unless

the beneficiary was the owner's surviving spouse or the IRA custodian agreement provided that the beneficiary could utilize the life expectancy distribution rules. In other words, this 5-year rule was the normal or "default" rule applicable to nonspouse beneficiaries of IRA owners who died prior to their required beginning date. As a result, many beneficiaries of such deceased IRA owners were not able to, and did not, commence receiving distributions under the life expectancy rules. The new transition rule provides that beneficiaries subject to the 5-year rule may switch to the life expectancy rule as long as all amounts that would have been required to be distributed under the life expectancy rule are distributed by the earlier of December 31, 2003, or the end of the 5-year period following the year of the IRA owner's death.[22]

Example. Joe died on March 15, 1998, at age 66. His son, Jim, is his beneficiary. Under the 1987 regulations in effect when Joe died and the terms of Joe's IRA custodian agreement, the 5-year rule applied to Jim. Under this rule, Joe's IRA had to be completely distributed to Jim no later than December 31, 2003. Under the 1987 regulations, Jim was not required to, and did not, take any distributions for 1999, 2000, 2001 or 2002. Under the new transition rule, if Jim receives by December 31, 2003, an amount equal to the total of the amounts he would have been required to take under the life expectancy rules for calendar years 1999 through 2003, Jim may switch over to the life expectancy distribution rule. In such case, the IRA will not have to be completely distributed to Jim by December 31, 2003.

Spouse as Beneficiary. The 2002 rules generally retain the many favorable options available to a spouse as the beneficiary of a deceased IRA owner. For example, if an IRA owner dies *prior* to his or her required beginning date and had named his or her spouse as the sole beneficiary, distributions to the surviving spouse need not commence until the later of (1) the end of the calendar year immediately following the calendar year in which the IRA owner died or (2) the end of the calendar year in which the deceased IRA owner would have attained age 70½.[23] Alternatively, the surviving spouse may roll over the IRA to an IRA in the surviving spouse's name or elect to treat the IRA as his or her own. In either such case, distributions need not commence until the surviving spouse's required beginning date. The surviving spouse may elect to treat the IRA as his or her own by retitling the IRA in her own name, failing to take a required minimum distribution determined as if the spouse were a beneficiary, or, if permitted, contributing an additional amount to the IRA.[24]

Example. Bill died in April 2002 at age 66½ and had named his wife, Donna, as the sole beneficiary of his IRA. Donna was born on November 2, 1938, and was thus age 63 at the time of Bill's death. Because Bill died prior to his required beginning date, Donna is not required to begin receiving distributions from Bill's IRA until the later of December 2003 (the calendar year after the year of Bill's death) or December 2006 (the calendar year in which Bill would have attained age 70½). Donna may alternatively roll over the IRA to an IRA in Donna's name or elect to treat the IRA as her own. If Donna elects either of these options, distributions need not commence until Donna's required beginning date, April 1, 2010 (the calendar year after the year in which Donna will attain age 70½).

If the IRA owner dies on or *after* reaching his or her required beginning date and had named his or her spouse as the sole beneficiary, the surviving spouse must commence receiving distributions no later than the end of the calendar year immediately following the calendar year in which the IRA owner died, roll over the IRA to an IRA in the surviving spouse's name, or elect to treat the IRA as the spouse's own in the same manner as described above.

If the surviving spouse chooses to receive distributions over his or her life expectancy, his or her distribution period will initially be calculated based upon the spouse's age at his or her birthday in the year following the year of the IRA owner's death. The spouse's life expectancy will then be recalculated in each subsequent year in which the spouse is alive. If the IRA has not been fully distributed to the spouse by the time of his or her death, distributions may continue to be made to his or her successor beneficiary (named either by the IRA owner or by the spouse) for years after the death of the surviving spouse. The distribution period with respect to the successor beneficiary will be equal to the surviving spouse's life expectancy, determined at the surviving spouse's birthday in the year of his or her death and reduced by one for each subsequent year.[25]

If a surviving spouse elects instead to treat the IRA of the deceased spouse as the surviving spouse's own IRA, the new rules make clear that the required distribution, if any, for the year of the IRA owner's death either must have been paid to the deceased IRA owner or must be paid to the surviving spouse as beneficiary.[26] Such required minimum distribution is calculated as if the IRA owner had lived throughout the entire calendar year in which his or her death occurred. In addition, if the surviving spouse is himself or herself past his or her required beginning date, then, beginning with the year immediately fol-

lowing the year of the IRA owner's death, a distribution must be made to the surviving spouse with respect to the deceased spouse's IRA. This distribution is calculated under the uniform table applicable to the surviving spouse as owner and not under the single life expectancy table applicable to the spouse as beneficiary.

Example. Frank, age 75, died in July 2002, survived by his wife, Joan, age 74, who is the sole beneficiary of Frank's IRA. In September 2002, Joan elects to treat Frank's IRA as her own by retitling it in her own name. In order for Joan to treat Frank's IRA as her own, Frank's required minimum distribution for 2002, determined by dividing the December 31, 2001, account value by the 22.9-year uniform table factor applicable to Frank in 2002, must either have been distributed to Frank before he died or, to the extent it was not so distributed, be distributed to Joan by December 31, 2002. Because Joan is herself past her required beginning date, beginning in 2003, Joan must commence receiving minimum distributions from the retitled IRA under the uniform table factor applicable to Joan as the IRA owner.

Trust as Beneficiary. The 2002 rules also continue the rules established in the prior regulations under which the life expectancy of the beneficiary of a trust may be taken into account for minimum distribution purposes where the trust is designated as beneficiary, provided that certain requirements are satisfied (i.e., the trust must be a valid trust under state law, the trust must be irrevocable or become irrevocable upon the account owner's death, the beneficiaries of the trust must be identifiable and certain documentation requirements must be satisfied). The documentation requirements will be satisfied if a copy of the trust or a certified list of the trust beneficiaries is provided to the IRA trustee, custodian, or issuer.[27]

The 2002 rules provide that where post-death distributions to a trust are being made by reference to the trust beneficiary's life expectancy, the documentation requirements must be satisfied by October 31 of the year following the year of the IRA owner's death, rather than by December 31 of such year, as was provided for under the 2001 regulations.[28] The 2002 regulations provide transition rule relief in this regard. Under a transition rule, if the date for providing the documentation is before October 31, 2003, the documentation will be considered as having been timely provided if it is provided to the IRA trustee, custodian, or issuer no later than October 31, 2003.[29]

Where an IRA owner has designated a trust for the sole benefit of his or her spouse (who is more than ten years younger than the owner) as the beneficiary, the terms of this trust are such that the spouse is considered as the IRA owner's sole beneficiary for minimum distribution purposes, and minimum distributions to the IRA owner are being determined based upon the IRA owner's and spouse's actual joint life expectancy, then the author believes that the trust documentation requirements should be satisfied by the later of the IRA owner's required beginning date or the date on which the trust is designated as the IRA beneficiary.

Miscellaneous Points. The 2002 rules retain the 2001 regulations rule that all beneficiaries of an IRA owner, including contingent beneficiaries, must be taken into account in determining who is the IRA owner's designated beneficiary. The 2002 rules also continue the exception to this rule: Namely, if a beneficiary is entitled to any portion of an IRA owner's benefit only if another beneficiary dies before the entire benefit to which that other beneficiary is entitled has been distributed, the subsequent beneficiary will not be considered a beneficiary.[30] Thus, if Jack designated his daughter, Debra, as his sole beneficiary, Debra began receiving distributions by the end of the calendar year following the year of Jack's death over her life expectancy, and Debra designated her husband, Jerry, as her beneficiary in the event she were to die prior to Jack's account being fully distributed to her, Jerry would not be considered a beneficiary of Jack's for purposes of determining who is Jack's designated beneficiary. The result would be the same if Jack had designated Debra as his primary beneficiary and Jerry as his contingent beneficiary.

However, the above exception does not apply to a person who has any right (including a contingent right) to receive part of the primary beneficiary's benefit beyond being a mere potential successor to the primary beneficiary's benefit. For example, if Jack designated a testamentary trust as beneficiary of his IRA and, under the terms of such trust, the income is payable to Debra for her life and upon her death, the trust principal is payable to her husband, Jerry, Jerry *would* be considered a beneficiary of Jack's for designated beneficiary determination purposes. Thus, if Jerry were older than Debra, his life expectancy and not Debra's would be used to determine the period over which the IRA would be payable to the testamentary trust. If, instead, upon Debra's death, the trust were distributable to Debra's children and a charity, then Debra, her children, and the charity would all be considered Jack's beneficiaries for designated beneficiary determination purposes. Because a charity as an entity has no life expectancy, Jack would not be considered to have a designated beneficiary for life expectancy purposes.

The 2002 rules also retain the prior rule that the required minimum distribution from one IRA of an IRA owner is permitted to be distributed from anoth-

er IRA. Under IRC § 1.408-8, Q/A-9, required minimum distributions must be calculated separately for each IRA of an IRA owner. The separately calculated amounts may then be totaled and the total distribution taken from one or more of the IRA owner's IRAs. Generally, only amounts in IRAs that an individual holds as the IRA owner may be aggregated. Amounts in IRAs that an individual holds as a beneficiary of the same decedent and which are being distributed under the life expectancy rule may also be aggregated, but such amounts may not be aggregated with amounts held in IRAs that the individual holds as the IRA owner or as the beneficiary of another decedent. Distributions from qualified plans will not satisfy the distribution requirements from IRAs, nor will distributions from IRAs satisfy the distribution requirements from qualified plans.

The 2002 rules also contain temporary and proposed regulations that revise the rules concerning required minimum distributions under defined benefit plans and annuity contracts. The IRS has solicited comments on these new temporary and proposed regulations.

IRA Reporting Requirements. The IRS has dropped the proposed requirement that IRA custodians report the amount of the required minimum distribution to the IRS, the IRA owner, and the IRA beneficiaries, as was provided for under the 2001 proposed regulations. Instead, beginning with the 2003 year, IRA custodians must notify IRA owners when a required minimum distribution is due and advise them that the custodian will compute the amount of the required minimum distribution for the owner upon request.[31] The new rules do not require IRA custodians to notify IRA beneficiaries that a required minimum distribution is due.

Beginning in 2004, IRA custodians must also report to the IRS when a minimum distribution is due with respect to an IRA. However, the regulations do not require the IRA custodians to report to the IRS the amount of the required minimum distribution.

Conclusion. The 2002 final regulations generally benefit IRA owners and their beneficiaries. The new rules allow all taxpayers to calculate their required minimum distributions under the revised, longer life expectancy tables, simplify calculations with new assumptions, and provide needed clarification regarding certain of the rules provided in the 2001 proposed regulations. Some additional clarification is still needed and further changes may be forthcoming. IRA owners and beneficiaries and their advisors would be well served to follow closely the latest pronouncements of the IRS in planning their 2002 and subsequent-year IRA distributions.

Endnotes

1. 26 CFR Parts 1, 54 and 602, TD 8987, RIN 1545-AY69, 1545-AY70, Required Distributions from Retirement Plans (4/17/02) revising Proposed Regulations §§ 1.401(a)(9)-0 through 1.401(a)(9)-9 and Proposed Regulations §§ 1.408-8 and 54.4972-2. The new regulations are hereinafter referred to as the "final regulations," the "new rules," or the "2002 rules." The January 2001 proposed regulations are hereinafter referred to as the "2001 proposed regulations" or the "2001 regulations."
2. REG-130477-00 and REG-130481, 66 FR 3928 (1/17/01).
3. Revisions to the IRS publications on pension and annuity income and IRAs (Publications 575 and 590) made after the 2001 proposed regulations were released indicated that the 2001 regulations could be used by beneficiaries of deceased IRA owners to determine their required minimum distributions.
4. Section 1.401(a)(9)-1, Q/A-2(b)(1).
5. Section 1.401(a)(9)-2, Q/A-1.
6. Section 1.401(a)(9)-5, Q/A-1.
7. PL 107-16 (6/7/01).
8. Section 1.401(a)(9)-5, Q/A-4(b).
9. Section 1.401(a)(9)-9, Q/A-3.
10. Section 1.401(a)(9)-5, Q/A-4(b)(2).
11. *Id.*
12. Section 1.401(a)(9)-4, Q/A-4.
13. *Id.*
14. Section 1.401(a)(9)-5, Q/A-7.
15. Section 1.401(a)(9)-4, Q/A-3.
16. Section 1.401(a)(9)-4, Q/A-4.
17. Section 1.401(a)(9)-8, Q/A-2.
18. Section 1.401(a)(9)-8, Q/A-3.
19. Section 1.401(a)(9)-5, Q/A-5(c)(3).
20. Section 1.401(a)(9)-5, Q/A-5(a).
21. Section 1.401(a)(9)-3, Q/A-1.
22. Section 1.401(a)(9)-1, Q/A-2(b)(2).
23. Section 1.401(a)(9)-3, Q/A-3(b).
24. Section 1.408-8, Q/A-5.
25. Section 1.401(a)(9)-5, Q/A-5(c)(2).
26. Section 1.408-8, Q/A-5(a).
27. Section 1.401(a)(9)-4, Q/A-5.
28. Section 1.401(a)(9)-4, Q/A-6.
29. Section 1.401(a)(9)-1, Q/A-2(c).
30. Section 1.401(a)(9)-5, Q/A-7(b) and (c).
31. Notice 2002-27, IRB 2002-18, 814.

Lee A. Snow is a partner and head of the Trusts and Estates Department at Krass, Snow & Schmutter, P.C. in New York City. He is also an adjunct professor of taxation at the Pace University Graduate School of Business. This article originally appeared in the August 2002 edition of *Estate Planning*, Volume 29, Number 8 and is reprinted with permission.

Charitable Aid, Recovery and Empowerment Act of 2002

By Blanche Lark Christerson

CARE Act progresses. The Charity Aid, Recovery and Empowerment Act of 2002 (H.R. 7), also known as the CARE Act, is making slow but steady progress in Congress. Senate Majority Leader Tom Daschle (D-S.D.) has said that it's now likely the bill will be addressed when the Senate returns from its August recess. This bill, which is designed to spur charitable giving, has had different incarnations, and what finally passes may look different from the bill that the Senate Finance Committee reported out in mid-July. Nevertheless, we thought it might be interesting to focus on two of the bill's provisions, namely, deductions for non-itemizers and tax-free gifts of IRAs to charity. In particular, we wanted to address how appealing it might be for potential donors to give their IRA to charity.

Deduction for non-itemizers. This is a provision to let taxpayers who don't itemize their deductions take an income tax deduction for charitable contributions. While it sounds good, it won't make the soup fat: the provision only permits a deduction for "direct" charitable contributions that exceed $250 but do not exceed $500—in other words, a maximum deduction of $250 (married taxpayers can get a maximum deduction of $500 for contributions that exceed $500 but do not exceed $1000). The deduction would apply for charitable gifts made in 2002 and 2003. Why such a short period of time? Because the Treasury Department is supposed to complete a study by the end of 2003 that addresses how much this provision increases charitable giving and whether taxpayers are fudging their contributions to take advantage of this deduction. (The bill refers to this latter concern by its more formal name, "taxpayer compliance.") What's magic about requiring that the contribution exceed $250? Because contributions over $250 require written substantiation from the charity, and therefore can be verified.

Tax-free distributions from IRAs. This is a provision that would permit tax-free distributions of IRAs in a "qualified charitable distribution." A qualified charitable distribution is a distribution from an IRA either to charity or to a "split-interest entity." You'd have to be 70.5 to distribute your IRA directly to charity (70.5 is when you're supposed to start taking IRA distributions anyway), and 59.5 to distribute your IRA to a split-interest entity (59.5 is when the 10% early withdrawal penalty no longer applies). A split-interest entity refers to a charitable remainder trust, pooled income fund or charitable gift annuity. If you make the distribution, none of the IRA would be includible in your gross income and none of it would qualify for a charitable income tax deduction. If you're distributing it to a split-interest entity, there are a few additional rules:

- ***charitable remainder trusts (CRTs):*** CRTs funded with an IRA could only consist of the IRA (in other words, you couldn't contribute the IRA to an existing CRT that had been funded with something other than qualified charitable distributions); also, all distributions from CRTs funded with IRAs would be treated as ordinary income, despite the "tiered" income rules usually applicable to CRTs.
- ***pooled income funds:*** such funds would have to separately account for the IRA distribution, and all of the fund's distributions to the beneficiary would be treated as ordinary income.
- ***charitable gift annuities:*** no part of the charity's annuity distribution to the beneficiary would be treated as an investment in the contract—in the other words, the entire annuity distribution would be treated as ordinary income.

With all three of these split-interest entities, you, your spouse and charity are the only ones who can have an income interest in the split-interest entity.

Only IRAs funded with pre-tax dollars appear to be eligible for qualified charitable distributions, although the relevant provisions of the bill (and the accompanying report from the Senate Finance Committee) are not models of clarity on this point. ("Pre-tax" IRAs could be those funded with deductible contributions or rollover contributions from something like a 401(k) or pension or profit-sharing plan.) What if your IRA was funded with deductible and nondeductible contributions (also known as pre-tax and after-tax dollars)? A special rule regarding such mixed-bag IRAs, in effect, aggregates your deductible contributions and makes them eligible for this special treatment. What if your entire mixed-bag IRA went directly to charity? Presumably the part of it that represents your nondeductible contributions would be eligible for an income tax deduction. What if your entire mixed-bag IRA instead went into a split-interest entity—would the nondeductible portion of it queer the treatment of the deductible por-

tion and thereby subject it to income tax? Or would you simply be wasting part of that nondeductible portion, since all distributions from a split-interest entity would be treated as ordinary income? The answer is unclear.

Despite this uncertainty, charities have good reason to rejoice about the bigger picture—namely, Congress's willingness to permit tax-free IRA distributions to charity. After all, with the declining stock market, charities' endowments have been shrinking and donors have been cutting back on their gifts. Anything that encourages charitable giving will surely be welcome. Yet how attractive is this provision for potential donors, and how likely are they to take advantage of it if it passes?

> *"[W]ith the declining stock market, charities' endowments have been shrinking and donors have been cutting back on their gifts."*

Direct IRA gifts to charity. For instance, when might you want to give your IRA directly to charity? One answer could be that you want to make good on a *current* charitable pledge and you do not have other assets readily available for this purpose. Or you might be looking for a way to currently fund your private foundation. Again, if other assets are not readily available, using the IRA could be a good way to achieve your goal. But if you do that, what might you be giving up?

The first thing, of course, is access to your IRA. If you are truly convinced that you will never need it because you have sufficient other assets, this is really not an issue. But given that many older people worry about outliving their assets, one can't help wondering if they would truly be comfortable giving up this tax-deferred vehicle, regardless of how wealthy they are.

The second thing you'd be giving up is the possibility for your heirs to take distributions from your IRA over their respective life expectancies once you are gone. You don't have to be a rocket scientist to realize the power of tax-free compounding over many years. Even relatively small IRAs can produce a steady income stream for your heirs years after your demise. Thus, assuming there are sufficient other assets with which to pay estate taxes when you and your spouse are gone, leaving your IRA to your heirs can be a valuable legacy.

The third thing you would be giving up is a current income tax deduction—which is not surprising, given that the bill would exempt the distribution from your taxable income. (It is hardly likely that Congress simultaneously would give you an income tax exemption *and* a deduction.) How valuable is that potential deduction? That depends, of course, on your overall tax picture. Yes, you can only deduct cash gifts to public charities (such as the Red Cross) up to 50% of your adjusted gross income (AGI), with a five-year carryforward for the rest of the deduction. And yes, your itemized deductions (which include your charitable contributions) may be subject to a haircut. This year, that haircut means that your itemized deductions are reduced, though not more than 80%, by 3% of your AGI in excess of $137,300. So yes, again: Although your charitable income tax deduction is never a dollar-for-dollar offset against tax, it is still worth something. And given how loath many people are to paying even one extra penny of tax, they may be reluctant to part with this potential deduction.

The fourth thing you're giving up is your potential estate tax deduction. But does that really matter? Probably not. That is, if you wait to give your IRA to charity until you're gone, you get a 100% deduction for the gift, thereby reducing your taxable estate. Your taxable estate would be equally reduced if you gave away the IRA while you are alive. So in that sense, it's a wash. But nevertheless, why give up potential access to something while you're alive, when it can disappear for transfer tax purposes if you simply give it to charity when you're gone?

IRA gifts to split-interest entities. What about qualified charitable distributions to "split-interest entities?" Will donors be likely to contribute their IRAs to a charitable remainder trust, pooled income fund or for a charitable gift annuity? There are some real reasons not to. For starters, all of these vehicles entail *deferred* gifts to charity—in other words, charity won't get anything until you are gone. The compelling logic of being able to make a *current* gift to charity is therefore absent. Although you will eventually benefit your favorite charity, you are currently giving up some important benefits.

First, even though you are not totally parting with your IRA, as with the direct gift to charity described above, you are still giving up unfettered access to it, an important advantage. After all, if you didn't still want and need an income stream from your IRA, you would simply give it away. If that's the case, why trade the ability to fully draw down your IRA for something that limits your access to principal?

Second, what about the income tax consequences when you receive distributions from your CRT, pooled income fund or charitable gift annuity? As

mentioned above, all distributions from these vehicles will be treated as ordinary income. While that is the normal treatment for distributions from a pooled income fund, it is a departure from how distributions from a CRT or charitable gift annuity are usually taxed. That is, regular CRTs have a "tiered" income system, so that you are first treated as receiving the most expensive type of income first. That means that when the trust sells the low-basis property you contributed to it, there is a pool of built-in long-term capital gains. Assuming you invest the trust so that it throws off very little ordinary income, most of your distributions from the CRT will be treated as long-capital gains and therefore subject to a lower federal income tax rate. If you fund a regular CRT with an IRA at your death, however, that "testamentary" CRT has a built-in pool of ordinary income to distribute out—something that may not be completed within the beneficiary's lifetime, depending on how long he lives, the trust's growth rate and the size of the payouts. Thus, the proposed income-tax treatment of CRTs funded with pre-tax IRAs may not be so different from the actual treatment of distributions from testamentary CRTs funded with IRAs.

"[I]f the IRA is the only available asset you have for a charitable gift, its use may make sense."

The income tax treatment of a regular charitable gift annuity is a little different: If you give cash to a charity in exchange for a charitable gift annuity, part of your distributions will be tax-free because they represent a return of your investment in the contract; if you give appreciated securities in exchange for such an annuity, you are deemed to have made a "bargain sale"—meaning that part of your investment in the contract will instead be treated as long-term capital gain (assuming you held the securities for more than a year). Although the balance of your distribution will be treated as ordinary income, you are still getting beneficial income tax treatment.

Then there's the loss of the income tax deduction. As mentioned above, you'd be eating your cake and having it too if you could claim an income tax deduction for dollars that have never been taxed. As also mentioned, the value of the deduction depends on your tax situation. But it *is* worth something. To illustrate, suppose you put your $500,000 IRA into a CRT for you and your spouse. You're both 66, and the trust will pay you 6% of its annual value on a quarterly basis. If you had funded the trust with something other than a qualified charitable distribution, your charitable income tax deduction would be about 30% of what you put into the trust—a significant deduction to forgo.

As to your estate tax deduction, you should still get it. The value of your interest in the CRT, pooled income fund or charitable gift annuity will be includible in your estate, but there should be an offsetting deduction for what then passes to charity.

Are there any advantages to giving your IRA to a split-interest entity? One comes to mind, at least as to the charitable gift annuity. Charitable gift annuities can pay some attractive annuities, something that can be quite appealing in this time of declining portfolios. For example, using the tables approved by the American Council on Gift Annuities, if you're 66 and give your IRA to a charity in exchange for an immediate charitable gift annuity, your annual annuity should be 6.8% of the IRA. In other words, if you give your $500,000 IRA to charity, you should get an annual distribution of $34,000 for the rest of your life. If you exchange the IRA for an annual annuity for you and your spouse (who's also 66), your annual annuity should be 6.4%, or $32,000 for the rest of your lives. Even though you'll be paying ordinary income tax on this distribution, you may take comfort from knowing it is reliably going to be there. You will have traded the potential market upside (and downside) in your IRA for a steady income stream, something that could certainly make sense in the right context and for the right donor.

Conclusion. While a provision permitting donors to make tax-free distributions of their IRAs to charity sounds appealing, it may not be as widely used as Congress and charities hope. Because of the control you can maintain over your IRA and the current tax benefits you'd be giving up, the IRA does not seem to be the best asset to give to charity—at least while you're alive. On the other hand, if the IRA is the only available asset you have for a charitable gift, its use may make sense. But donors would still do better to give cash or appreciated securities to charity instead.

Blanche Lark Christerson is a director in the Wealth Planning Strategies Group of Deutsche Bank Private Banking.

This article appeared in *Tax Topics* Volume 2002-15, a publication of Deutsche Bank and is reprinted with permission.

Arbitration and Engagement Letters

There are two recent rules affecting the practice of law generally and, consequently, trusts and estates practices. Both have to do with legal fees.

Arbitration

Effective as of January 1, 2002, part 137 of the Rules of the Chief Administrator of the Courts provides a private mechanism (arbitration) to address fee disputes. The rule requires all fee disputes to be submitted to arbitration, if the client so requests. While easy to state, the rule may be a bit harder to apply. Not clearly defined is what is a "fee dispute" that activates the rule. Further, the rule only applies to relationships that commence after the effective date of January 1, 2002. Consequently, it does not apply to ongoing relationships. But when does an ongoing relationship with a client cease and a new one begin?

> *"One step that all attorneys must take is to be sure to amend the* Statement of Client's Rights *that is required to be posted in all offices."*

There are exceptions to the rule at 137.1(b) which make the rule inapplicable to fees set by statute or rule, contingent fee cases, criminal matters and "claims involving substantial legal questions including professional malpractice or misconduct." Perhaps the most significant exception is that the rule only applies to fee disputes between $1,000 and $50,000. Clearly, questions may arise as to these fee amounts and when they are exceeded such that the rule is activated, or in substantial matters, de-activated.

The rule in its entirety can be found at http://www.courts.state.ny.us/part137.html, and forms for implementation of the rule are available at http://www.courts.state.ny.us/feegov/model_Forms_11_21_01.pdf.

Of special interest to estate practitioners is the potential impact of this new rule on SCPA 2110, which directs, in part, that the Surrogate's "court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested . . .". Since this section of the SCPA is not specifically excepted, nor addressed, by the new rule, we can only speculate as to the interplay. Presumably, if a petition is brought under section 2110 by the fiduciary or other person, that is essentially an election not to arbitrate. But what if the attorney is the petitioner? Could the client still insist on arbitration regardless of section 2110? Does not the Surrogate's Court have inherent authority to review and set attorney's fees in estate matters?[1] If so, will the Surrogate be able to review and alter a fee determination set under the new rule by arbitration? Only time and experience, or perhaps future amendments of the rule, will answer these questions.

One step that all attorneys must take is to be sure to amend the *Statement of Client's Rights* that is required to be posted in all offices. Rule 1210, which requires the posting of the *Statement of Client's Rights*, now additionally requires that the statement include a reference to the client's right to arbitrate.

Engagement Letters

The second rule, part 1215 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R. 1215) effective March 4, 2002 (and already amended as of April 3, 2002), seeks to reduce the instances of fee disputes by requiring that all clients be provided with "a written letter of engagement." This rule can also be found at http://www.courts.state.ny.us.

Adopted by the Administrative Board of the Courts, the rule defines both the matters requiring an engagement letter, and the critical contents of the letter.

As affects New York trusts and estates practitioners, the letter is only required for those matters where the fee will exceed $3,000 and that commence after March 4, 2002. An additional exception exists "where the attorney's services are of the same general kind as previously rendered to and paid for by the client."[2] Presumably, a long-standing estate planning client will not need to be provided with an engagement letter, nor will new clients who require minor planning services. On the other hand, all estate settlement matters, most Medicaid and elder law engagements and significant new planning matters will require that the letter be provided.

At a minimum, the letter must explain the scope of services to be provided, the fees and expenses to be charged, the attorney's billing practices and that the client may have a right to arbitrate any fee disputes (see Rule 137 above).

While the rule is mandatory, there is no apparent penalty for failing to supply the required letter. Pre-

sumably, in a dispute that goes to arbitration or is taken to the court system, the attorney's failure to have provided the required fee documentation would impair the attorney's claim. More importantly, the rule makes practical sense and could be viewed as a codification of a "best practices" objective. Clients have a right to know how and when they will be billed, what the fees may be, and what services the attorney has agreed to perform. While all of this can be verbally communicated, it is certainly a better practice, for all involved, to have the terms of the engagement memorialized in a written form. Further, and aside from the practical aspects of potentially avoiding fee disputes by defining the scope of the engagement, providing engagement letters to clients in all matters may have the direct beneficial effect of malpractice insurance savings.

The new rule specifically provides that "a signed written retainer agreement" that covers the required matter is acceptable. Query: Will a firm brochure or standard handout describing billing practices be acceptable? Presumably, if such materials address all of the required matters for the particular engagement, the answer would be "yes."

A "Sample Letter of Engagement" has been prepared by the New York State Bar Association and can be found at http://www.nysba.org/whatsnew/letterofengagement.htm. While this sample letter is meant to act as a basic form for all legal matters, it would be better practice to develop standard form letters for the most common types of trusts and estates work that your office performs. Each of these "form" letters should then be tailored to the particular engagement at hand.

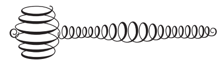
In future issues of the *Newsletter*, the Practice and Ethics Committee of this Section will be presenting form engagement and retainer letters for various aspects of the estate planning practice (planning and document drafting, settlements, elder law advice, etc.). We welcome reader comments, suggestions and forms for inclusion in these reports. If you have a form that you would like to submit for inclusion in a future issue, please mail it to M. Anne O'Connell, 331 Madison Avenue, 3rd floor, New York, NY 10017 or fax your form to (212) 818-9257.

Endnotes

1. *See Stortecky v. Mazone*, 85 N.Y.2d 518, 626 N.Y.S. 733 (1995)).
2. *See* § 1215.2.

This article was prepared by the Practice and Ethics Committee of this Section.

DOYLE

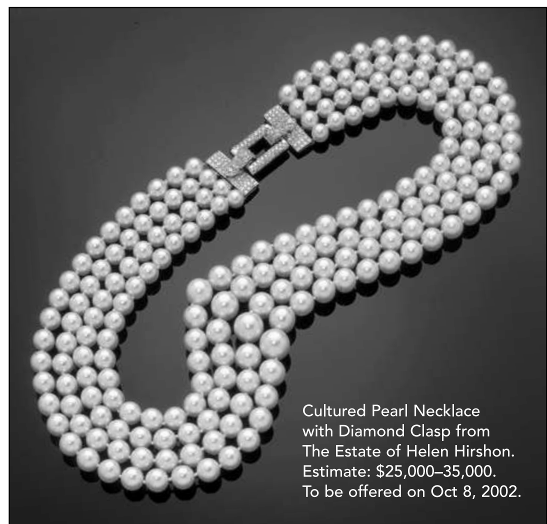


NEW YORK

WHY TRUST *and* ESTATE ATTORNEYS RECOMMEND DOYLE NEW YORK

For almost forty years, DOYLE NEW YORK has worked closely with the Trust and Estate community delivering comprehensive auction and appraisal services to clients. We understand the complex issues that attorneys and executors encounter. Our ability to rapidly respond to clients' needs with integrity, expertise and personal service enables us to meet our goal of achieving maximum value for property.

For information on our full range of services, please call Joanne Porrino Mournet, Executive Vice President, Estate and Appraisal Services at 212-427-2730 ext. 227.



Cultured Pearl Necklace with Diamond Clasp from The Estate of Helen Hirshon. Estimate: $25,000–35,000. To be offered on Oct 8, 2002.

INTEGRITY • EXPERTISE • SERVICE

DOYLE NEW YORK | AUCTIONEERS & APPRAISERS
175 EAST 87TH ST | NY, NY 10128 | 212-427-2730
DOYLE NEWYORK.COM

(paid advertisement)

Recognizing Value for Estate Planning Purposes: Case Studies in Appraisal and Auction Services

By Joanne Porrino Mournet

The first question to arise when we introduce this topic is "What does Doyle New York, a fine art and antique auction house, have to do with estate planning?" The answer is that we are a fundamentally research-based business and work closely with estate planning attorneys, executors and family members to value property and assist in its disposition.

Accessing Expertise in Appraisal and Auction Services

Doyle New York is called for fair market appraisals for a variety of reasons. Clients often wish to convert tangible personal property into liquid assets, either for their own use or when planning for equitable division among heirs. Accessing expertise at any stage of estate planning is essential for tax planning purposes and to avoid mistakes that can result in significant loss of proceeds.

Ideally, the decision to access appraisal and auction services is early in the estate planning process. An example of this is an estate we handled with a well-written will, thorough in the treatment of tangibles, with the bulk of the assets donated to the surgical unit of St. Lukes/Roosevelt Hospital. After appraising the collection, Doyle New York sold the tangible personal property at auction, achieving a world auction record price of $2.53 million for a painting by 18th century French artist Jean Baptiste Chardin. This comprehensive, well-managed approach to estate planning resulted in meeting the philanthropic goals of the collector, minimizing taxes, and supporting St. Lukes/Roosevelt Hospital.

Jean Baptiste Simeon Chardin
Fish, Vegetables, Pots and Cruets on a Table
Sold for $2.53 million
A WORLD AUCTION RECORD

Appraisals: The Value of a Comprehensive Record of Estate Property

People of all ages sometimes forget. Many people lose assets every year by overlooking or forgetting about safe deposit boxes. Working with the state, Doyle New York conducts auctions of the contents of abandoned safe deposit boxes twice a year. We rarely encounter an item worth more than a thousand dollars, and the vast majority of these items are of nominal value. In the course of appraising and organizing a sale our jewelry expert was surprised to encounter a spectacular Tiffany pin, forgotten for many years in a safe deposit box. The 10-carat emerald was surrounded by twelve diamonds in a classic setting dating from the 1920s. It was sold as part of our Estate Jewelry sale for $633,000. The net proceeds of the sale were sent to the bank, where by law they would revert to the state if not claimed. Fortunately, the huge amount of publicity surrounding the pin flushed out the owner, who apologized for forgetting about the safe deposit box. She was quite pleased to accept the proceeds but this drama might have been avoided if she had been advised to have a comprehensive estate appraisal documenting the value and location of her property.

Tiffany Diamond and Emerald Brooch
Sold for $633,000

Identifying Intrinsic Value

Appraisals require extensive knowledge of collecting categories and variables that can affect value. Within certain categories, valuations can be quite high. Jewelry does not need emeralds and diamonds to have significant value. In one of our sales last year we included a Versace Machine Age flower necklace that was made in Italy in 1988. An elaborate construction of enamel, crystal and lacquer flowers set on wire and strings, it looked magnificent but con-

tained no precious stones or metals. However, our specialists understood that the demand for this level of design and artistry would attract considerable interest at auction—the necklace achieved $10,925.

Versace Machine Age Flower Necklace
Ugo Correani, Italy, 1988
Sold for $10,925

Recognizing Market Trends

In the collectibles market it is not unusual for mainstream items that were originally of marginal value to develop widespread appeal that can dramatically increase present value. An example of this is Bakelite—the versatile plastic which was used extensively in the 1930s for telephones, cutlery handles, toys, games and jewelry. Prices for Bakelite jewelry ranged from a few cents to several dollars for the better pieces. In today's market Bakelite jewelry sells for hundreds, and sometimes thousands, of dollars. Doyle New York now includes Bakelite jewelry in our costume jewelry auctions. Recently, we sold a brooch of a soldier courting under an apple tree for $6,037.

Bakelite Brooch
Depicting a Soldier Courting Under an Apple Tree
Height 2¼ inches
Sold for $6,037

The Benefits of Research: Achieving Value

Formal, written appraisals enable clients to move quickly in an organized manner into the auction process and realize the value of the property. For clients interested in selling only a few items, we provide complimentary informal appraisals from the hundreds of photographs we receive each year. In addition we conduct regional appraisal days throughout the Eastern seaboard and weekly "walk-in" appraisals—similar to "Antiques Roadshow"—to help clients understand the elements that comprise value, including the provenance, condition, history and craftsmanship.

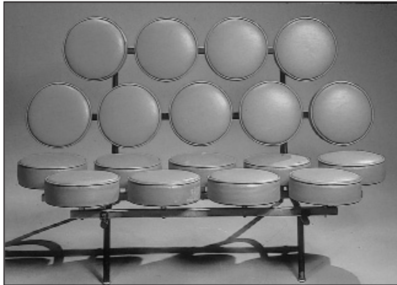
Although the majority of the property we offer at auction is from estates, we are occasionally surprised by the property that "walks" in from these informal appraisals. Recently a young man brought in a small painting by John Frederick Kensett to be evaluated on behalf of his mother. After meeting with our paintings specialist they agreed to offer it in a sale last December where it achieved $258,625.

John Frederick Kensett (American, 1816-1872)
LILY POND, NEWPORT, RHODE ISLAND
Signed with conjoined initials and indistinctly dated
JF.K./186...,
Oil on canvas, 10 x 18 inches
Sold for $258,625

A year ago a young woman met with us to determine if some clothes she had inherited from her grandmother might be appropriate for our Couture and Textiles auction. Among the things she had used as a child for "dress up" was an 1886 velvet cut court gown with a 10-foot train designed by the world's first couturier, Charles Frederick Worth. Our specialist recognized it as the only known court gown by Worth. Museum curators and collectors vied for the piece and it achieved the world auction record price of $101,500.

Charles Frederick Worth
Court Gown and Train, circa 1888
Sold for $101,500
A WORLD AUCTION RECORD

Our 20th century design specialist received a call from a woman who had seen a photograph of a Marshmallow Sofa by George Nelson that we had sold at Doyle New York. She and her daughter had picked up a similar sofa off the side of the road after it failed to find a buyer at a tag sale. The daughter had intended to use it in her dorm room. Our specialist suggested instead that they consign it to auction where it brought $18,100.



George Nelson
Painted Steel Upholstered Marshmallow Sofa
Designed circa 1956
Manufactured by Herman Miller
Length 51½ inches
Sold for $18,100

The unknown former owner of a 1950s ball gown made a costly mistake when she donated it to a thrift shop where it was priced at $15. Our couture specialist noticed it when she was called to the shop to examine an extensive group of clothing that had been recently donated. Recognizing the gown as one of the rare examples of formal wear by the famous American designer Charles James, the specialist convinced the thrift shop to consign it to auction where it achieved the world auction record price of $49,450. The thrift shop was thrilled but no doubt the family that inadvertently donated it would have appreciated either the appropriate tax deduction or the proceeds of the sale.

Charles James
Black Satin Evening Gown,
1948
Sold for $49,450
A WORLD AUCTION RECORD

Expertise: The Bottom Line

Many clients have property that may hold greater value than realized. This can create a range of problems in the planning and dispersion of estates. Accessing experts in appraisal and auction services as part of the estate planning process can help clients achieve true market value and enable executors to direct the proceeds as intended.

Joanne Porrino Mournet is Executive Vice President of Doyle New York.

Visit Us on Our

Web site:

http://www.nysba.org/trusts

The Effect of Recent Federal Estate Tax Legislation on the New York Estate Tax

By Philip L. Burke

This is the first of a two-part article on the recent changes to the federal estate tax laws and the effect of these changes on New York filing requirements and calculation of New York estate tax.

The passage of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) was intended to relieve wealthier taxpayers from the burden of federal estate taxes. Whether or not the intended result has been achieved is being hotly debated not only in Washington but in the capitals of almost every state in the Union.

EGTRRA was signed into law by President Bush on June 7, 2001, and is effective for the estates of decedents dying on or after January 1, 2002. As indicated below, one of the major changes that came about as a result of EGTRRA is the acceleration of the increase in the federal estate tax exemption. The 1997 changes to the federal estate tax provisions (effective beginning in 1998) replaced the prior unified credit "exemption equivalent" of $600,000 with the "applicable exclusion amount" of $625,000 in 1998, $650,000 in 1999, and provided for further increases up to $1 million in 2006. EGTRRA condensed this schedule so that the $1 million exclusion amount is available for 2002 and 2003, and also provides for further increases over the next several years, finally reaching $3.5 million in 2009. As everyone knows by now, EGTRRA goes a step further and repeals the estate tax in its entirety for decedents dying in 2010. Unfortunately, the repeal is short-lived, as the legislation reinstates the estate tax in 2011 and also provides for the exclusion amount to revert to $1 million (the same as available in 2002–03).

Those provisions of EGTRRA that affect state death taxes are of particular importance in New York State. As you know, New York had its own state death tax for decades. The calculation of this separate tax resulted in the payment of New York estate tax in an amount greater than the amount of the credit allowed against the federal estate tax. Thanks largely in part to the Trusts and Estates Section of the New York State Bar Association, this separate tax was repealed, effective for individuals dying on or after February 1, 2000, and was replaced with a "SOP" tax. The "SOP" tax collected by New York equaled the amount of the credit available to offset the federal tax. This put New York on the same estate tax footing as the majority of other states in the Union.

The New York estate tax changes were based on the federal estate tax structure in place at that time (that is, the tax structure under the 1997 legislation effective as of January 1, 1998, which was obviously prior to the passage of EGTRRA). As indicated above, under the 1997 legislation, the previous $600,000 unified credit equivalent had been increased and was scheduled to continue to increase until it reached $1 million in 2006. As part of the repeal of the old New York estate tax and the implementation of the "SOP" tax, New York adopted the same schedule of increasing estate tax exemptions. In other words, New York's estate tax system mirrored the federal system with regard to those estates that would be subject to the payment of estate taxes and those that would not.

The changes to the New York estate tax structure required affirmative conforming legislation. Unlike some other states, New York estate tax law does not automatically conform to changes in the federal estate tax laws. As a result, the passage of EGTRRA, with its increase in the federal estate tax exemption to $1 million this year and next (instead of in 2006 as previously legislated) and the scheduled increases over the next several years (up to $3.5 million in 2009) once again put New York out of "sync" with federal estate tax law.

This has led to some confusion with regard to estate tax filing requirements in New York for estates of decedents dying on or after January 1 of this year. Under New York's current version of the estate tax (which references the increasing "applicable exclusion amount" under the 1997 federal legislation), there is an argument that the "exemption" for 2002 is $700,000, not the $1 million provided for under EGTRRA. Because of this discrepancy, some practitioners have been of the belief that an estate of $700,000 or more requires the filing of a New York estate tax return even if no federal return is necessary (for example, if the value of the estate is $700,000 or greater, but less than the $1 million federal estate tax filing threshold).

Fortunately, the New York State Department of Taxation and Finance has determined that the provisions of Tax Law § 951 (which sets forth the unified credit provisions for the New York estate tax) allows

New York to take advantage of the current federal estate tax exemption of $1 million for this year and next. Following this article is a copy of the Notice from the Department of Taxation and Finance ("Office of Tax Policy Analysis, Technical Services Division, #TSB-M-02(2)M, March 21, 2002"). This Notice not only clarifies that estates of under $1 million do not need to file New York estate tax returns (or potentially pay New York estate taxes) for decedents dying in 2002 or 2003, but also clarifies how the credit for state death taxes is to be computed for those estates that are subject to estate tax.

The calculation of the state death tax credit (the "sop" in the "SOP" tax) was also changed by EGTRRA. Under EGTRRA, the amount of the state death tax credit (which reduces the amount of federal estate tax paid) is reduced by 25% this year (2002), by 50% in 2003, by 75% in 2004 and is eliminated in 2005. From that point forward, and up until 2009, the former "credit for state death taxes" will be replaced by a "deduction" against the federal estate tax. However, for New York State purposes, the amount of the tax that is payable to New York is still calculated under the "Credit for State Death Tax" tables in effect for decedents dying in 2001. As a result, under the current system, New York will collect more tax than will be allowed as a credit to offset the federal tax. As indicated in the Notice, these calculations will be included in a revised ET-706, "New York Estate Tax Return," which has been issued by the Department of Taxation and Finance (see "3/02" version of the ET-706).

In conclusion, as a result of the changes to the federal estate tax exemption amount, and New York's adoption of the $1 million exemption for 2002 and 2003, the filing of New York estate tax returns will not be required for estates of less than $1 million for decedents dying in these years. For estates that do need to file and pay tax, the calculation of the state death tax credit needs to be looked at carefully since the amount of the credit available to offset any federal tax will not be the same as the amount of tax owed to New York. The revised ET-706 contains detailed instructions and tables that can be used to make sure the calculations are correct.

The discrepancy between New York's exemption and the federal exemption becomes more problematic in 2004 when the federal exemption increases to $1.5 million while New York's remains at $1 million. This will obviously result in the payment of New York estate tax in some estates where no federal return is required. Hopefully, by that time the New York State legislature will address this difference in a meaningful way.

The next installment of this article will address some of the calculations that need to be made for those estates required to file and pay both federal and New York estate taxes, including how the changes to the federal credit for state death taxes can actually result in the payment of more estate tax.

Philip L. Burke is a partner in the Rochester law firm of Woods Oviatt Gilman, LLP and is Chair of this Section's Committee on Taxation.

Upcoming Meetings of Interest

October 3–6, 2002	New York State Bar Association Trusts and Estates Law Section. Fall Meeting. Boston, Massachusetts.
October 29–30, 2002	"Probate and the Administration of Estates" New York State Bar Association. Seven locations throughout the state. It is an evening program running from 5:30–9:30 p.m. each day.
September 11–14, 2003	New York State Bar Association Trusts and Estates Law Section. Fall Meeting. Victoria, British Columbia.
October 2004	New York State Bar Association Trusts and Estates Law Section. Fall Meeting. Savannah, Georgia.

New York State Department of Taxation and Finance

Office of Tax Policy Analysis
Technical Services Division

TSB-M-02(2)M
Estate Tax
March 21, 2002

Effect of the Federal Economic Growth and Tax Relief Reconciliation Act of 2001 on the New York State Estate Tax for Tax Years 2001 through 2003

On June 7, 2001, President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law No. 107-16, the "Act"), amending the federal Internal Revenue Code ("IRC") for various federal taxes, including the estate tax. New York State Estate Tax Law currently conforms to the IRC of 1986, with all amendments enacted on or before July 22, 1998. The following highlights some estate tax provisions of the Act and describes their impact on the computation of the New York State estate tax.

The Act increases the federal estate tax filing threshold from $675,000, for estates of those who died in 2001, to $1 million for estates of those who die in 2002 and 2003. This exempts the estate of an individual who dies in 2002 or 2003 from filing a federal estate tax return when the sum of the gross estate, adjusted taxable gifts, and specific exemption is $1 million or less, provided the decedent was a resident or citizen of the United States at the time of death.

The federal maximum unified credit for estates of those who die in 2002 and 2003 is also increased to $345,800 under the Act. This amount is equal to the federal estate tax on a taxable estate of $1 million, and is also referred to as the exemption equivalent.

For New York State, section 951(a) of the Tax Law (as amended by Chapter 389 of the Laws of 1997 and applicable to dates of death on or after February 1, 2000) specifies that the amount of the unified credit allowed against the federal estate tax is the amount allowed under the applicable federal law in effect on the decedent's date of death, provided the amount of the unified credit does not exceed the tax on a federal taxable estate of $1 million.

Accordingly, the estate tax return filing threshold and the maximum unified credit are the same for federal and state purposes for estates of those who die in 2002 and 2003.

(New York State Tax Law section 951(a))

The Act lowers the maximum federal estate tax rate from 55% to 50% for estates of those who die in 2002, and to 49% for estates of those who die in 2003. These reduced tax rates affect taxable estates that exceed $2.5 million for those who die in 2002, and taxable estates that exceed $2 million for those who die in 2003.

The Act also reduces the maximum credit for state death taxes allowable to estates of those who die after 2001 by lowering the federal rate schedule used in computing the credit. The rates that apply to estates of those who died in 2001 are reduced by 25% for estates of those who die in 2002, by 50% for those who die in 2003, and by 75% for those who die in 2004. The Act eliminates the credit for state death taxes for estates of those who die after 2004.

To determine the estate tax for New York State, estates must use the rate schedules set forth in the Internal Revenue Code of 1986, with all amendments enacted on or before July 22, 1998, in computing the federal gross estate tax and the applicable credit for state death taxes. These are the same rates that would apply to estates of those who died in 2001.

The applicable federal tax rate table and rate table for computing the maximum credit for state death taxes will be provided as part of Form ET-706, *New York State Estate Tax Return*, along with a schedule to make the adjustments and recalculations needed to determine the New York State estate tax.

(New York State Tax Law sections 951(a) and 952(a))

The IRC provides an election to exclude from the federal gross estate a portion of the value of land subject to a qualified conservation easement. For estates of those who died on or after January 1, 2001, the Act broadens this exclusion to include any qualified land located in the United States or a United States possession. The Act also clarifies the date for determining the value of the qualifying conservation easement that is to be excluded from the value of the land.

For New York State estate tax purposes, the land must meet the requirements that apply to estates of those who died before 2001. These requirements are contained in that part of the instructions on New York Form ET-418, *Computation of Qualified Conservation Easement Exclusion*, that was applicable to estates not required to file a federal return. If the land does not meet these requirements, the land does not qualify for exclusion, and the amount deducted from the gross estate on the federal estate tax return must be added back when computing the New York State estate tax.

A schedule will be provided as part of Form ET-706, *New York State Estate Tax Return*, to make any adjustments and recalculations needed to determine the New York State estate tax.

(Internal Revenue Code Section 2031(c) as amended through July 22, 1998 and incorporated in New York State Tax Law)

For office use only

New York State Department of Taxation and Finance

New York State Estate Tax Return

ET-706 (3/02)

For an estate of an individual whose date of death is on or after February 1, 2000

Check here if this is an amended return ☐

Decedent's last name	First name	Middle initial	Social security number (SSN)
Address of decedent at time of death *(number and street)*			Date of death — Check box if copy of death certificate is attached *(see inst.)* ☐
City, village, or post office	State	ZIP code	County of residence

On the date of death, decedent was a: ☐ Resident of New York State ☐ Nonresident of New York State *(attach completed Form ET-141, New York State Estate Tax Domicile Affidavit)*

Employer identification number (EIN) of the **estate** | Name and EIN of any **trusts** created or funded by the will

Executor – If you are submitting *Letters Testamentary* or *Letters of Administration* with this form, indicate in this box the type of letters. Enter ***L*** if regular, ***LL*** if limited letters. If you are not submitting letters with this form, enter ***N***.

Surrogate's court – If a proceeding for probate or administration has commenced in a surrogate's court in New York State, enter county.

Attorney's or authorized representative's last name / First name / MI	Executor's last name / First name / MI
In care of *(firm's name)* — Check box if POA is attached ☐	If more than one executor, check box *(see instructions)* ☐
Address of attorney or authorized representative	Address of executor
City, village, or post office / State / ZIP code	City, village, or post office / State / ZIP code
SSN or PTIN of attorney or authorized rep. / Telephone number ( )	Social security number of executor / Telephone number ( )

If the decedent possessed a cause of action or was a plaintiff in any litigation at the time of death, check this box and complete Schedule 3 on page 2 *(see instructions)* ☐

Installment payments of tax for closely held business.
Do you elect to pay the tax in installments as described in IRC section 6166 (NY Tax Law section 997)? If *Yes*, attach Form ET-415 in duplicate. ☐ Yes ☐ No

If releases of lien are needed, attach Form(s) ET-117 *(see instructions)* and enter the number of counties here.

a Is a federal estate tax return (either federal Form 706 or 706-NA) required? *(See instructions)* ☐ Yes ☐ No
If *Yes*, **attach a copy.**

b Taxable estate for New York *(from Schedule A, line 24, on page 3 or Schedule B, line 43, on page 4)*

c Gross estate tax *(from Schedule A, line 33, on page 3 or Schedule B, line 56, on page 4)*

Tax computation

1	Credit for state death taxes *(from Schedule A, line 38, on page 3 or Schedule B, line 59, on page 4)*	1
2	Estate tax or inheritance tax payable to another state(s), allowable as a federal credit *(if none, skip lines 3, 5, 6, and 12 through 19, enter zero on line 7, and enter the amount from line 1 on line 8)*	2
3	**Residents:** enter amount from Sch. 1, line 14, on page 2 **Nonresidents:** enter amount from Sch. 2, line 19, on page 2	3
4	Federal gross estate for New York State *(from Schedule A, line 22, on page 3 or Schedule B, line 41, on page 4)*	4
5	Divide line 3 by line 4 *(round the decimal to four places)*. The result should not be greater than 1.0	5
6	Multiply the amount on line 1 by the decimal on line 5	6
7	Limitation *(enter the **smaller** of line 2 or line 6, if any; otherwise, enter "0")*	7
8	New York State estate tax *(subtract the amount on line 7, if any, from the amount on line 1)*	8
9	Prior tax payments, if any *(attach a schedule of dates and amounts)*	9
10	If line 9 is less than line 8, subtract line 9 from line 8. This is the **amount you owe**	10
11	If line 9 is greater than line 8, subtract line 8 from line 9. This is the amount to be **refunded to you**	11

If an attorney or authorized representative is listed above, he or she must complete the following declaration:
I declare that I am *(check one or more)*: ☐ an attorney; ☐ a certified public accountant; ☐ an enrolled agent; or ☐ a public accountant enrolled with the New York State Education Department; and agree to represent the executor for the estate, and I am authorized to receive tax information regarding this estate.

Signature of attorney or authorized representative | Date

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge. Furthermore, I/we, as executor(s) for this estate, authorize the person, if any, named as my/our representative on this return to receive confidential tax information regarding this estate.

Signature of executor	Date	Signature of co-executor	Date
Signature of preparer other than executor			Date
Address of preparer	City	State	ZIP code

Mail your return and payment (if any) to: **NYS ESTATE TAX, PROCESSING CENTER, PO BOX 5556, NEW YORK NY 10087-5556**

Schedule 1 - Resident

List below each item of real and tangible personal property **located outside New York State.** Include the item number, the schedule of federal Form 706 on which it was reported, and the reported value of the property.

Item number	Description	Value	

Line			Value	
12	Total value of property listed above	12		
13	Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)*	13		
14	Subtract line 13 from line 12; enter the result here and on line 3 on the front of this form	14		

Schedule 2 - Nonresident

Line			Value	
15	Federal gross estate for New York State *(from line 4 on the front of this form)*	15		

List below each item of real and tangible personal property **located in New York State.** Include the item number, the schedule of federal Form 706 or 706-NA on which it was reported, and the value reported.

Item number	Description	Value	

Line			Value	
16	Total value of property listed above	16		
17	Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)*	17		
18	Add lines 16 and 17	18		
19	Subtract line 18 from line 15; enter the result here and on line 3 on the front of this form	19		

Schedule 3 - Description of litigation or cause of action

In the area provided, describe any litigation in which the decedent was a plaintiff, or litigation that is pending or contemplated on behalf of the decedent. Include the actual or estimated values of such litigation (see *Litigation information* on page 3 of Form ET-706-I, *Instructions for Form ET-706, New York State Estate Tax Return*).

This return must be filed within nine months after the date of death unless an extension of time to file the return has been granted.

If you use **any** private delivery service, address your return to: JPMorgan, NYS Government Tax Processing, 12 Corporate Woods Blvd-4th Floor, Albany NY 12211-2524.

For additional information refer to Form ET-706-I, *Instructions for Form ET-706, New York State Estate Tax Return.*

Reminders: Sign this return. If there is an amount due on line 10, make check payable to the ***Commissioner of Taxation and Finance.*** Also, if you must file a federal estate tax return, attach a copy of your completed federal return along with any accompanying schedules and supplementary information.

Schedule A or B filing requirements

Purpose of Schedules A and B — Since New York State estate tax does not conform to the reductions in the federal estate tax rates, the reduction in the federal credit for state death taxes, or the amendments to the *Qualified Conservation Easement Exclusion* provided for by the federal Economic Growth and Tax Relief Reconciliation Act of 2001, certain estates must adjust the amounts reported on their federal estate tax return to determine the correct New York State estate tax. Schedules A and B are provided as part of Form ET-706, along with Table A, *Unified rate schedule*, and Table B, *Computation of maximum credit for state death taxes*, so the preparer can make the adjustments applicable to the New York State estate tax.

Estates of those who died after 2001 may have to adjust the federal estate tax (using Table A) and/or the credit for state death taxes (using Table B). Some estates of those who died after 2000 must also increase the federal gross estate and taxable estate when the *Qualified Conservation Easement Exclusion* does not qualify for New York State.

Estates filing federal Form 706 must complete Schedule A below unless:

1. The date of death was before January 1, 2002, and the estate either did not elect the *Qualified Conservation Easement Exclusion* (federal Schedule U) or, if elected, the property qualified for the exclusion under the federal Internal Revenue Code before amendment by the Economic Growth and Tax Relief Reconciliation Act of 2001; or
2. The date of death was on or after January 1, 2002, and the estate either did not elect the *Qualified Conservation Easement Exclusion* (federal Schedule U) or, if elected, the property qualified for the exclusion under the federal Internal Revenue Code before amendment by the Economic Growth and Tax Relief Reconciliation Act of 2001, and the amount on federal Form 706, page 1, Part 2, line 14, is zero.

Estates filing federal Form 706-NA must complete Schedule B on page 4 unless:

1. The date of death was before January 1, 2002, and the estate either did not elect the *Qualified Conservation Easement Exclusion* (federal Schedule U) or, if elected, the property qualified for the exclusion under the federal Internal Revenue Code before amendment by the Economic Growth and Tax Relief Reconciliation Act of 2001; or
2. The date of death was on or after January 1, 2002, and the estate either did not elect the *Qualified Conservation Easement Exclusion* (federal Schedule U) or, if elected, the property qualified for the exclusion under the federal Internal Revenue Code before amendment by the Economic Growth and Tax Relief Reconciliation Act of 2001, and the amount on federal Form 706-NA, page 1, Part II, line 8, is zero.

Refer to Form ET-706-I, *Instructions for Form ET-706, New York State Estate Tax Return*, for additional information.

Schedule A - Computation of federal estate tax and maximum credit for state death taxes for estates filing federal Form 706. Please note that references to lines on federal Form 706 are to the November 2001 version.

Line	Description				
20	Amount from federal Form 706, page 3, Part 5, line 10			20	
21	If the *Qualified Conservation Easement Exclusion* qualifies for exclusion for New York estate tax, enter the amount from federal Schedule U, reported on federal Form 706, page 3, Part 5, line 11			21	
22	Federal gross estate for New York State *(subtract line 21 from line 20; also enter this amount on line 4 on the front of this form)*			22	
23	Total allowable deductions *(from federal Form 706, page 3, Part 5, line 23)*			23	
24	Federal taxable estate for New York State *(subtract line 23 from line 22; enter here and on item b on the front of this form)*			24	
25	Adjusted taxable gifts *(from federal Form 706, page 1, Part 2, line 4)*			25	
26	Add lines 24 and 25			26	
27	Tentative tax on amount on line 26 *(from Table A on page 4 of this form)*			27	
28	If line 26 exceeds $10 million, enter the lesser of line 26 or $17,184,000. If line 26 is $10 million or less, skip lines 28 and 29 and enter "0" on line 30	28			
29	Subtract $10,000,000 from line 28	29			
30	Multiply line 29 by 5% (.05)			30	
31	Total federal tentative tax *(add lines 27 and 30)*			31	
32	Total federal gift tax payable *(from federal Form 706, page 1, Part 2, line 9)*			32	
33	Gross federal estate tax *(subtract line 32 from line 31; enter here and on item c on the front of this form)*			33	
34	Maximum unified credit *(for dates of death in 2001, enter $220,550; for dates of death in 2002 and 2003, enter $345,800)*			34	
35	Adjustment to unified credit *(from federal Form 706, page 1, Part 2, line 12)*, if any			35	
36	Allowable unified credit *(subtract line 35 from line 34)*			36	
37	Subtract line 36 from line 33 *(do not enter less than zero)*			37	
38	Credit for state death taxes *(from Table B on page 4 of this form). (Do not enter more than line 37; enter here and on line 1 on the front of this form.)*			38	

Schedule B - Computation of federal estate tax and maximum credit for state death taxes for estates filing federal Form 706-NA. Please note that references to lines on federal Form 706-NA are to the September 1999 version.

Line	Description		
39	Amount from federal Form 706-NA, page 2, Schedule B, line 1		**39**
40	If the *Qualified Conservation Easement Exclusion* **does not** qualify for New York, enter the amount from line 20 of federal Schedule U *(Rev. November 2001)*		**40**
41	Federal gross estate for New York State *(add amounts on lines 39 and 40; enter here and on line 4 on the front of this form)*		**41**
42	Total allowable deductions *(from federal Form 706-NA, page 2, Schedule B, line 7)*		**42**
43	Federal taxable estate for New York State *(subtract line 42 from line 41; enter here and on item b on the front of this form)*		**43**
44	Total taxable gifts *(from federal Form 706-NA, page 1, Part II, line 2)*		**44**
45	Add lines 43 and 44		**45**
46	Tentative tax on amount on line 45 *(from Table A below)*		**46**
47	If line 45 exceeds $10 million, enter the lesser of line 45 or $17,184,000. If line 45 is $10 million or less, skip lines 47 and 48 and enter "0" on line 49	**47**	
48	Subtract $10,000,000 from line 47	**48**	
49	Multiply line 48 by 5% (.05)		**49**
50	Total federal tentative tax *(add line 46 and 49)*		**50**
51	Tentative tax on amount on line 44 *(from Table A below)*	**51**	
52	If line 44 exceeds $10 million, enter the lesser of line 44 or $17,184,000. If line 44 is $10 million or less, skip lines 52 and 53 and enter "0" on line 54	**52**	
53	Subtract $10,000,000 from line 52	**53**	
54	Multiply line 53 by 5% (.05)	**54**	
55	Tax on amount on line 44 *(add lines 51 and 54)*		**55**
56	Gross federal estate tax *(subtract line 55 from line 50; enter here and on item c on the front of this form)*		**56**
57	Unified credit *(enter the smaller of line 56 amount or maximum allowed; see* Note for line 57 *below)*		**57**
58	Subtract line 57 from line 56 *(do not enter less than zero)*		**58**
59	Credit for state death taxes *(from Table B below). (Do not enter more than line 58; enter here and on line 1 on the front of this form.)*		**59**

Note for line 57: Refer to federal *Instructions for Form 706-NA* for applicable unified credit amount. Any amount previously allowed as a unified credit against the federal gift tax will reduce, dollar for dollar, the unified credit allowed the estate.

Table A — Unified rate schedule

Column A Taxable amount over	Column B Taxable amount not over	Column C Tax on amount in Column A	Column D Rates of tax on excess over amount in column A
			(Percent)
0	$10,000	0	18
$10,000	20,000	$1,800	20
20,000	40,000	3,800	22
40,000	60,000	8,200	24
60,000	80,000	13,000	26
80,000	100,000	18,200	28
100,000	150,000	23,800	30
150,000	250,000	38,800	32
250,000	500,000	70,800	34
500,000	750,000	155,800	37
750,000	1,000,000	248,300	39
1,000,000	1,250,000	345,800	41
1,250,000	1,500,000	448,300	43
1,500,000	2,000,000	555,800	45
2,000,000	2,500,000	780,800	49
2,500,000	3,000,000	1,025,800	53
3,000,000	....	1,290,800	55

Table B worksheet

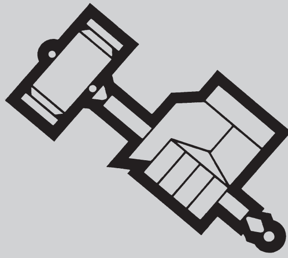
Federal adjusted taxable estate for New York State

1. Federal taxable estate for New York State *(from line 24 of Schedule A or line 43 of Schedule B)* $________
2. Adjustment 60,000
3. Federal adjusted taxable estate for New York State. Subtract line 2 from line 1. Use this amount to compute maximum credit for state death taxes in **Table B** below. ________

Table B — Computation of maximum credit for state death taxes

(Based on federal adjusted taxable estate for New York State computed using the worksheet above)

(1) Adjusted taxable estate equal to or more than —	(2) Adjusted taxable estate less than —	(3) Credit on amount in column (1)	(4) Rate of credit on excess over amount in column (1)	(1) Adjusted taxable estate equal to or more than —	(2) Adjusted taxable estate less than —	(3) Credit on amount in column (1)	(4) Rate of credit on excess over amount in column (1)
			(Percent)				(Percent)
0	$ 40,000	0	None	2,040,000	2,540,000	106,800	8.0
$ 40,000	90,000	0	0.8	2,540,000	3,040,000	146,800	8.8
90,000	140,000	$ 400	1.6	3,040,000	3,540,000	190,800	9.6
140,000	240,000	1,200	2.4	3,540,000	4,040,000	238,800	10.4
240,000	440,000	3,600	3.2	4,040,000	5,040,000	290,800	11.2
440,000	640,000	10,000	4.0	5,040,000	6,040,000	402,800	12.0
640,000	840,000	18,000	4.8	6,040,000	7,040,000	522,800	12.8
840,000	1,040,000	27,600	5.6	7,040,000	8,040,000	650,800	13.6
1,040,000	1,540,000	38,800	6.4	8,040,000	9,040,000	786,800	14.4
1,540,000	2,040,000	70,800	7.2	9,040,000	10,040,000	930,800	15.2
				10,040,000	--------	1,082,800	16.0



RECENT NEW YORK STATE DECISIONS

John C. Welsh

WILLS

CONSTRUCTION—SECURITIES EARNINGS AFTER DEATH

Testatrix left to a family foundation a share of her residuary estate equal to one-half of the value of certain marketable securities subject to pro rata reduction for administration expenses and income taxes. The Surrogate agreed with the Attorney General that one-half of the dividends and interest from the securities produced after decedent's death accrued to the benefit of the foundation. The argument of the estate that the gift covered only specific stock was inconsistent with the testamentary instructions that all charitable deductions for tax purposes should accrue to the benefit of the foundation. If all of the dividends and interest were distributed under the terms of the residuary clause, exclusive of the foundation gift, there was no possibility of a charitable deduction for estate income tax purposes. Testatrix' failure to set a time for distribution of the securities indicated that income generated after death was to be included in the gift to the foundation. *In re Estate of Putnam*, 190 Misc. 2d 350, 739 N.Y.S.2d 223 (Sur. Ct., Schoharie Co. 2001).

DESCENT AND DISTRIBUTION

ISSUANCE OF LETTERS OF ADMINISTRATION TO FIRST COUSINS

Upon the death of the decedent intestate, he was survived by five maternal first cousins and one paternal first cousin. By statute, the estate was divided equally between the paternal side and the maternal side. Consequently, the paternal first cousin took the largest share (50%) and was entitled to preference in the issuance of letters of administration. The five maternal first cousins consented to the appointment of the Public Administrator who received temporary letters pending resolution of the dispute on entitlement to permanent letters. These letters were immediately superseded when, by stipulation, temporary letters were jointly issued to B, the paternal cousin, and G, a maternal cousin. In ruling that B was the sole person entitled to permanent letters, the court rejected G's claim that SCPA 1001(1)(f) provided for judicial discretion in these circumstances. *In re Estate of Pearsall*, 191 Misc. 2d 66, 740 N.Y.S.2d 605 (Sur. Ct., Nassau Co. 2002).

ADMINISTRATION OF ESTATES

PRUDENT SALE OF COOPERATIVE APARTMENT

When the final accounting of the Public Administrator was filed, estate beneficiaries objected to the sale of decedent's cooperative apartment as imprudent. The Appellate Division affirmed the dismissal of the objections by the Surrogate. Before approving a cash sale of $775,000, the Public Administrator was aware of: (1) an appraisal made two years prior in the amount of $750,000; (2) affidavits filed by two interested parties in prior proceedings valuing the apartment at $700,000; (3) lack of interest in purchasers when the apartment was listed at $1 million; (4) a current independent appraisal valuing the apartment at $790,000; (5) advice from a reputable real estate broker that it was unlikely that another prospective purchaser would offer to purchase on terms more favorable than those offered. Objectants relied on an appraisal obtained three years after the sale showing a value of $1,760,000. Facts as they existed at the time of the sale were deemed to be controlling. An act by a fiduciary is not deemed to be imprudent merely because, in hindsight, another plan would have been more beneficial. *In re Estate of Vale*, 291 A.D.2d 353, 739 N.Y.S.2d 21 (1st Dep't 2002).

HOMICIDE—JOINTLY HELD ASSETS

Following decedent's death under mysterious circumstances, he was survived by his second wife, their two young children and an adult son from his first marriage. Several weeks after discovery of his body, his widow was indicted for his murder. Decedent's assets included a residence held in joint tenancy with his wife and various savings and investment accounts of substantial value. After letters of administration were issued to the Public Administrator, the court granted his motions to restrain withdrawals by the widow from the jointly owned accounts and to restrain her from placing any encumbrances on the residence where the children continued to live pending resolution of the criminal charges. Although the widow would own a one-half interest in a true joint

account, the Public Administrator urged that the widow's right of withdrawal, upon conviction, was limited to her contributions under EPTL 4-1.6 and would not exist as to any accounts created for convenience only irrespective of conviction. These potential estate funds were preserved for the benefit of the children. The widow's right in the residence was limited to a one-half interest for life with a forfeiture of any right of survivorship if wrongdoing was established. The restraint on the encumbrances protected the value of the children's interests and the younger children's rights of possession. *In re Kiejliches*, __ A.D.2d __, 740 N.Y.S.2d 85 (2d Dep't 2002).

VIOLATION OF NO-CONTEST AGREEMENT

The Appellate Division affirmed the Surrogate's determination that two legatees had forfeited their legacies as set forth in the will of their grandmother which contained a no-contest provision. The legatees had engaged in litigation concerning the will and their right to challenge it. Issues had been raised by the legatees upon the earlier death of their grandfather. In settling those matters, the legatees agreed to accept a share in a trust funded by their grandmother in exchange for waiving their rights to challenge that will and any future rights to challenge the will of their grandmother upon her death. *In re Cagney*, __ A.D.2d __, 740 N.Y.S.2d 448 (2d Dep't 2002).

REFEREE'S FEES

The Appellate Division found that the fee claimed by the referee in a probate case and fixed by the Surrogate at $160,000 was excessive. There appeared to be no justification for expending 501 hours in the preparation of the report and the fee was reduced to $60,000. Legal fees fixed by the Surrogate were deemed proper. However, these legal fees incurred by the executors, in part because of unwarranted litigiousness by the objectants, could not be charged to the objectants because the testamentary estate was exhausted. Substantial non-testamentary assets were available. *In re Sall*, 292 A.D. 2d 195, 739 N.Y.S.2d 363 (1st Dep't 2002).

TRUSTS

OBJECTIONS TO ACCOUNT BARRED BY ESTOPPEL

In 1973, L became a beneficiary of a testamentary trust established under the will of her late brother. Some time after L's death in 1992, the trustee filed an accounting and L's son filed objections asserting that certain assets that should have been used to fund the trust were omitted from the 1973 accounting. The Appellate Division affirmed the Surrogate's decision that objectant was estopped from questioning the contents of the 1973 accounting since L had attested to the accuracy of the contents at the time of its filing and expressly consented to its settlement. *In re Rudin*, __ A.D.2d __, 739 N.Y.S.2d 154 (1st Dep't 2002).

ACCOUNTING—WITHDRAWAL OF WAIVER

A corporate testamentary co-trustee began a proceeding to settle its first intermediate account after the death of its individual co-trustee. Initially, decedent's granddaughter, for whom the trust was created, executed a waiver and consent to the account but later sought to withdraw her approval and object on the basis of imprudent management of the stock holdings. It appeared that the trustee had sent the investment officer for this trust to California with a proposed waiver, an investment summary and a financial report to deliver to the beneficiary personally since contact between them had been difficult. Execution of the waiver was obtained without explanation of its import or detailed disclosure of the underlying facts. The beneficiary was a competent, educated adult who made no inquiry. The Surrogate found that the fiduciary relationship between the parties placed the burden on the co-trustee to negate any fraud or other misconduct. Since the trustee had superior knowledge and benefited by the execution of the waiver, it had an obligation to disclose all material facts and circumstances to the beneficiary. Here the beneficiary was asked to sign the waiver prior to being given an opportunity to review the account. Consequently, the Surrogate allowed the waiver to be withdrawn and objections to be filed. The proposed objections were likely to have merit since other litigation found that the bank had imprudently held Eastman Kodak stock during a period where its value dropped substantially. *In re Estate of Hunter*, 190 Misc. 2d 593, 739 N.Y.S.2d 916 (Sur. Ct., Westchester Co. 2002).

CONSTRUCTION—DESCENDANTS SHARE AND SHARE ALIKE

At testator's death in 1937, his will created a trust to pay the income to his wife for life, then to his daughter for life. Upon the daughter's death, the entire trust was to be distributed to her descendants, share and share alike. Similar wording appeared in an alternative gift to take effect if the daughter left no descendants and in the distribution plan for a second trust created in the will that had previously terminated. The daughter was survived by four children, six grandchildren and four infant great-grandchildren. There were no deceased children or grandchildren. Since both life interests had terminated, the corporate trustee brought a construction proceeding to identify the proper beneficiaries. The four children urged that the trust created a gift to the daughter's issue *per stirpes* and that each of them would take a one-fourth share. In support of that position, the children relied on Dec. Est. Law § 47-a in effect in 1937 and continued in 1967 as EPTL 2-1.2(a), providing a rebuttable pre-

sumption that the creator of a gift to issue intends that they take *per stirpes*. Some case law supports that "issue" and "descendants" are to be treated as equivalent terms in this statutory context. The *guardian ad litem* for the infant great-grandchildren asserted that Dec. Est. Law § 47-a was limited to gifts to "issue" and, if not, the use of "share and share alike" manifested an intention for a per capita distribution among all fourteen members of the class of descendants. The Surrogate found that although the presumption of a per stirpital distribution was applicable, the presumption was rebutted by the repeated use of "share and share alike" in various alternative distributions for the two trusts. *In re Estate of Goodwin*, 190 Misc. 2d 601, 739 N.Y.S.2d 239 (Sur. Ct., Greene Co. 2002).

BREACH OF FIDUCIARY OBLIGATIONS

As part of a complex estate plan, L created several limited partnerships in which he retained a 99% limited partnership interest. The general partner and owner of the remaining 1% was D Co., a new corporation formed by L in which L retained 67 of the 100 shares issued. The remaining 33 shares were issued to B., the long-term caretaker and companion of L. B and L were the only directors of D Co. Under disputed circumstances B claimed to have become the owner of L's 67 shares through a sale where he paid less than fair market value. The court found that the clear fiduciary relationship between L and B placed the burden upon B to prove by clear and convincing evidence that the sale of stock to him was fair, open, voluntary, and well understood. While L was on his deathbed, B used L's power of attorney to him to effectuate the transfer. Funds were produced from an account jointly in the names of B and L where L had contributed some of the money. The price paid was inadequate and the sale was declared void. A living trust created by L was found to be the owner of the stock as a result of an earlier assignment of the shares by L, a transfer that was registered by D Co. B was also directed to return $200,000 to the living trust that was removed without proper authorization. *Hill v. Bolden*, __ Misc. 2d __, 742 N.Y.S.2d 486 (Sup. Ct., Putnam Co. 2002).

MISCELLANEOUS

CONSTRUCTION—STRUCTURED SETTLEMENT

In litigation resulting from the death of decedent's mother in 1995, her daughter (who was then a minor) and her husband executed a structured settlement agreement providing for specific payments to the daughter in 2000, 2004 and 2009. Upon the daughter's death in 1999, her father was appointed administrator of her estate as her sole distributee. The settlement agreement provided that payments not made prior to the daughter's death should go to her "heirs." The daughter died as a result of injuries sustained in a one-car accident involving a car that she owned. A second occupant was also killed in that accident. The identity of the driver is not clear in the record. The wife of the second decedent brought a wrongful death action against the daughter's estate and sought to have the proceeds of the structured settlement reserved for the benefit of his distributees. Although the Surrogate treated "heirs" as equivalent to "estate," the Appellate Division disagreed and found that "heirs" was a legal category for a class of persons to be identified at death. Under EPTL 13-3.2(a), annuity payments due from an insurer to a designated payee or beneficiary are not subject to laws governing transfers by intestacy. As designated beneficiaries, they do not take through the estate of the daughter and the annuity payments are not subject to the debts of her estate. *In re Estate of Clotworthy*, __ A.D.2d __, 742 N.Y.S.2d 168 (3d Dep't 2002).

NO INTENTION TO MAKE AN *INTER VIVOS* GIFT

After obtaining legal advice regarding redemption of savings bonds owned by decedent, his daughter, who was also his attorney-in-fact, retrieved 46 bonds from his safe deposit box approximately five months before decedent's death. After her father endorsed the bonds, he directed her to redeem them and deposit the proceeds in a bank account in their joint names. The funds were to be used to pay his expenses as required with the balance to be kept by her upon his death. After expending about $40,000 for her father's benefit, shortly before his death, the daughter withdrew $53,711 and deposited this amount to her individual account. Following decedent's death, his son, as the administrator of the estate, was allowed to recover the withdrawn funds from the daughter. The Appellate Division found that decedent's transfer was testamentary in nature and not a valid *inter vivos* gift. Decedent failed to relinquish dominion and control over all or part of the money during his lifetime. Apparently, the presumption creating a true joint account with the right of survivorship was rebutted by the testimony. A possible objection to testimony of the attorney as privileged was waived by the daughter. *In re Estate of Clouse*, __ A.D.2d __, 739 N.Y.S.2d 470 (3d Dep't 2002).

VALIDITY OF *INTER VIVOS* GIFT IN JOINT FORM

After decedent's death, her last will leaving her residuary estate to E., her niece by marriage, was denied probate because of E's undue influence. Upon probate of an earlier will, the executor sought to discover the estate's interest in two investment accounts held in the names of decedent and E as joint tenants with the right of survivorship. These accounts were opened one week after the execution of the voided will. The Appellate Division refused to apply the doctrine of collateral estoppel because the creation of the investment account involved different participants

and was a transaction separate and distinct from the will execution. The jury found that E had not exerted undue influence upon decedent in the establishment of the investment accounts in joint form. Although the lower court erred in applying the joint tenancy presumption under Banking Law § 675 to the investment accounts, the evidence independent of the presumption indicated that decedent intended to create a joint tenancy with the right of survivorship. *In re Estate of Antoinette*, 291 A.D.2d 733, 738 N.Y.S.2d 452 (3d Dep't 2002).

TOTTEN TRUST ACCOUNTS—REVOCATION

During his marriage to W, H created several Totten trust bank accounts in his name in trust for W. The parties formally separated after 20 years of marriage and later divorced. By the terms of the separation agreement, the parties asserted that all bank accounts not specifically mentioned in the agreement had been previously distributed in an equitable manner. The Totten trust bank accounts were continued in the original form. Since these accounts were not revoked by the specific references required in EPTL 7-5.2, W was entitled to the balances upon H's death. *Eredico v. Chase Manhattan Bank*, __ A.D.2d __, 739 N.Y.S.2d 175 (2d Dep't 2002).

John C. Welsh is a professor at Albany Law School, Union University, Albany, N.Y.

Your Business Is About Helping People. Ours Is About Helping You.

Whether you're a LAWYER or an ACCOUNTANT, your work is about people. Your day-to-day client service has very little to do with the complexities of running a business.

But today, to achieve the financial STABILITY you want, you need to understand those complexities; issues like deferred compensation, executive bonuses, and estate preservation for you and your family.

John Hancock can help. We offer an array of products designed to BENEFIT you and meet the financial needs of your business. Needs such as:

- Business continuation
- Estate preservation
- Retirement planning, pensions and profit sharing
- Executive compensation, selective benefit plans, nonqualified plans.

Financial planning from John Hancock. Because your business is about helping people. And ours is about helping you.

To learn more, call or write us TODAY.

(516) 794-9696

Bruce L. Birnbaum, J.D., LL.M.
1900 Hempstead Tpke., Ste. 206
East Meadow, NY 11554
(516) 794-9696 (718) 470-9088

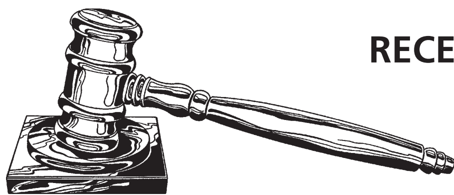
John Hancock

USA

OFFICIAL LIFE INSURANCE SPONSOR
1994/1996 U.S. OLYMPIC TEAMS

John Hancock Mutual Life Insurance Company and affiliated companies, Boston, MA 02117

(paid advertisement)



CASE NOTES— RECENT NEW YORK STATE SURROGATE'S AND SUPREME COURT DECISIONS

Ilene Sherwyn Cooper and Donald S. Klein

Attorney/Fiduciary—Duty of Out-of-State Attorney Named as Fiduciary

In a case of first impression, the Court was caused to address the issue of whether the requirements of SCPA 2307-a should be waived in the case where an out-of-state attorney, who drafted a will that named him as alternate executor, failed to comply with the disclosure requirements of the statute. The decedent's spouse, who had been named as the primary executor under the will, predeceased him.

In an affidavit to the Court, the attorney-draftsman indicated that, although the decedent died a domiciliary of New York, at the time the will was drafted, he was residing and was domiciled in Connecticut. Counsel further stated that he had an ongoing relationship with the decedent for approximately 30 years, and that because he was admitted to practice exclusively in the state of Connecticut, he was unaware of the disclosure requirements in New York State for attorney/fiduciaries. According to counsel, Connecticut had no statute which was comparable to the provisions of SCPA 2307-a. Nevertheless, counsel stated that it was his practice to discuss the costs of administering an estate, including attorney's fees, with a client for whom he was drafting a will.

Affidavits from each of the residuary beneficiaries of the estate indicated that they were aware that the attorney/fiduciary could receive fees as executor as well as for legal services rendered, and that they consented to same without a hearing, including the payment of a full commission to the attorney/fiduciary.

Based upon the foregoing, the Court determined that good cause existed for waiving the requirements of SCPA 2307-a. In reaching this result, the Court emphasized the fact that at the time the will was drafted, the attorney/fiduciary did all that was required of him according to Connecticut law. The Court reasoned that if New York's choice-of-law rules provide for the validity in New York State of a will executed in accordance with the local law of the jurisdiction in which the will was executed, so too should it follow that if an out-of-state attorney did all that was required by his jurisdiction, and the will was not prepared to be proved in New York, and the out-of-state attorney would have no reason to be aware of the laws of New York, good cause exists for the waiver of the disclosure provisions. *In re Estate of Newell,* N.Y.L.J., June 6, 2002, p. 28 (Sur. Court, Suffolk Co., Surr. Czygier).

Collateral Estoppel/*Res Judicata*

Incident to litigation transferred from the Supreme Court to the Surrogate's Court, the co-executor and his former and present counsel moved to dismiss the complaint that charged them with breach of fiduciary duty, malpractice, violation of disciplinary rules, and intentional infliction of monetary and emotional damages on the grounds of *res judicata*, collateral estoppel, failure to state a claim, and lack of personal jurisdiction.

Prior to the commencement of the Supreme Court action, an accounting proceeding was instituted in the Surrogate's Court, and objections thereto were filed addressed to a myriad of issues respecting the estate's administration. Following several adverse rulings in that proceeding, the objectants commenced a Supreme Court action which raised issues virtually identical to those raised in the accounting proceeding.

Specifically, the Court found that all of the issues raised in the Supreme Court action were tried and expressly determined in the accounting proceeding, and all of such determinations were affirmed on appeal. The Court found that the complaint failed to raise cognizable claims which were independent from those which were already decided. The Court thus found that plaintiffs were barred from relitigating the issues under the doctrine of collateral estoppel. This is so, stated the Court, despite the differences in legal theories and remedies sought.

As to the issue raised in the Supreme Court regarding malpractice on the part of estate counsel, the Court found that this issue was also barred by principles of collateral estoppel, inasmuch by fixing and allowing attorneys' fees in the accounting proceeding, the Court necessarily determined that there was no legal malpractice.

Finally, as to the claim that the co-executor was liable for failing to pursue the claim for malpractice, the Court held that it was barred on grounds of *res judicata*. In this regard, the Court found that while an accounting decree is *res judicata* only as those items "disclosed" by the fiduciary's pleadings, the rule requires refinement when it is applied to matters already known to the respondents at the time they receive notice of the

accounting. In such cases, the respondents failure to object bars them from relitigating the issue once the accounting decree is entered.

In the case presented, the Court found that all parties to the accounting were independently familiar with the facts underlying the claim for malpractice. Hence, although the accounting schedules did not refer to the claim, such omission constituted an unambiguous expression of the fiduciary's position that he did not recognize the claim as an asset of the estate. The respondents failure to object under such circumstances, and the entry of an accounting decree thereon precluded the respondents from litigating the issue further.

Accordingly, the complaint was dismissed in its entirety. *Seth Grossman v. Brandon R. Sall*, N.Y.L.J., April 8, 2002, p. 21 (Sur. Court, New York Co., Surr. Preminger).

Construction—*Cy Pres*

In a construction proceeding, the petitioning executor requested the Court to terminate the bequests to two charitable beneficiaries which could not be located and to distribute these bequests among the remaining nine legatees. The petition was opposed by entities who claimed to be successors to the two organizations, which apparently had been dissolved.

The Court found that the *cy pres* doctrine was inapplicable, inasmuch as the testator's expressed intent was not a general, charitable one, but an expressly stated intention to benefit certain designated organizations.

The Court referred to the provisions of section 1005 of the Not-for-Profit Corporation Law which provides for the distribution of the assets of a not-for-profit corporation, including those held for a charitable purpose, where the corporation has been dissolved. Accordingly, the Court ordered distribution of the bequests to the organizations named in the judicial orders of dissolution as successors to the charitable entities named in the decedent's will. *In re Estate of Philip B. Thurston*, N.Y.L.J., May 31, 2002, p. 23 (Sur. Court, Westchester Co., Surr. Scarpino).

Dependent Relative Revocation

In a contested probate proceeding, the issue before the Court was whether the doctrine of dependent relative revocation could be invoked in order to afford a party standing to contest the propounded will. The propounded instrument was dated October 2, 1997. Objections were filed by the decedent's daughter, and by his long-time companion. The companion claimed status by virtue of a prior will, dated February 26, 1997, that provided her with a substantial legacy. That will was not filed with the Court, and was allegedly torn in two at the time the propounded will was executed. The torn pieces were retained in the files of the decedent's attorney.

The proponents of the October 1997 will moved to dismiss the objections of the companion on the grounds that the instrument under which she claimed an interest was revoked by the decedent. The motion was opposed by the companion who alleged that any revocation of the February will was a conditional act, dependent upon the presumed validity of the October will. Accordingly, if the October will were to fail, then the February will could be probated.

The Court denied the motion to dismiss based upon the theory of dependent relative revocation. The Court found that under that doctrine, it is presumed that the intention to revoke the will in question is a conditional act, and where that condition is not satisfied, the act of revocation is deemed ineffective and the instrument may be admitted to probate. Generally, while the doctrine is applied in situations where the revocation of a prior will is contemporaneous with the execution of a new will, the Court held that where the revocation is not simultaneous it may nevertheless be construed as dependent where, from the circumstances, it appears equivocal in nature. The Court also found that the fact that a prior will under which standing is claimed is not on file with the Court does not divest a party with the right to object to probate. A person adversely affected by the propounded instrument may object to its probate. Finally, the Court declined to exercise its jurisdiction to hold a preliminary hearing concluding that such a hearing under the circumstances would be a waste of estate resources. *In re Estate of Klingele*, N.Y.L.J., April 25, 2002, p. 23 (Sur. Court, Nassau Co., Surr. Riordan).

Distribution of IRA Proceeds

At the time of her death, the decedent had an IRA account at the Dime Savings Bank. According to a computer-generated record of the account, its proceeds were to be distributed to the decedent's three grandchildren such that the three were to each receive 25% of the monies, and one of the three was to receive an additional 2.5% thereof. The executor of the estate, who was also the mother of the named grandchild with the largest percentage, maintained that her child was to receive 50% of the IRA account rather than 27.5%. The *guardian ad litem* appointed on behalf of the grandchildren supported the executor's position. The application was opposed by the mother of one of the other named grandchildren, who claimed that the 22.5% in issue should be distributed to the decedent's estate, to be equally divided amongst the decedent's four children.

The bank was only able to produce three records regarding the account in issue; a copy of the signature card opening the account, a replacement copy of a designation of beneficiary, showing the executor as the named beneficiary of the account, and the computer-generated card showing the three grandchildren as beneficiaries.

Based on the evidence, the Court concluded that the decedent wanted the IRA monies to pass outside her estate. However, it was unclear as to what proportions the decedent desired these proceeds to pass. To this extent the burden of proof was on the executor to demonstrate that the decedent favored one beneficiary over another. Faced with the maxim that equality is equity, and its prior holdings, in the case of general legacies, that priority will not be accorded any of them unless the decedent's intent to create a preference is clearly and unequivocally demonstrated, the Court found that the decedent only intended that one of her three grandchildren be favored to the extent of 2.5% of the proceeds, and directed a distribution of the 22.5% monies in issue amongst all three grandchildren accordingly.

With respect to the guardian *ad litem*'s request that the bank be held liable for the costs of the litigation, the Court held that while it could not assess attorney's fees against the institution, it could direct that the fee of the guardian *ad litem* be payable "from any other party" for good cause shown (SCPA 405(1)(c)). The Court concluded that had the bank had better records regarding the beneficiary of the account, the litigation regarding its distribution could have been avoided. Accordingly, the Court held that the bank would be responsible for the fees of the *guardian ad litem* as determined by the Court upon the filing of an affidavit of legal services and any opposition thereto. *In re Estate of Adrienne Payton*, N.Y.L.J., May 29, 2002, p. 24 (Sur. Court, Nassau Co., Surr. Riordan).

Gift of Real Property

In an action transferred from the Supreme Court, the Court addressed the validity of a transfer of real property. The plaintiff, who was the decedent's daughter, alleged that the realty had been transferred to her brother, the decedent's son, as a result of undue influence committed by the decedent's son and his caretaker, who was the decedent's sister-in-law.

After the completion of discovery, the decedent's son moved for summary judgment. The record revealed that simultaneous with the execution of the deed to the real property in issue, the decedent had executed his will. An affidavit from the attorney-draftsman of the will indicated that at the time he met with the decedent, he was accompanied by his son and caretaker to his office. Counsel met with decedent in a private office and asked him whether anyone was pressuring him to change his will. The decedent was emphatic that no one was pressuring him and that his decision to change his will in order to favor his son was voluntary. The affidavit of the decedent's son described his life-long residency on the subject real property due to his incapacity.

In opposition to the motion, plaintiff submitted affidavits which asserted that the decedent's son and caretaker isolated him from plaintiff and created unjustified suspicion of the decedent in her trustworthiness. She alleged that this situation caused the decedent to transfer the real property and to execute a new will. She also alleged that the decedent was taking morphine at the time the transfer was made.

The Court found that there is a presumption in favor of due execution of formal instruments and "the recording of a deed raises a presumption that it was recorded by the grantee and is thus presumptive evidence of delivery" of the deed by the grantor to the grantee. In order to successfully void the deed it must be established that it was procured by fraud, duress and/or undue influence.

If a confidential relationship exists between the grantor and grantee, a presumption of fraud and undue influence arises, shifting the burden to the grantee to demonstrate that the conveyance was fair and voluntary. However, the Court concluded that there was no confidential relationship between the parties, and that in fact, the grantee was dependent upon the grantor. Moreover, the decedent's attorney established that on the date the deed was executed, the decedent was alert, oriented, and in charge of his faculties.

Based upon the foregoing, the Court concluded that a valid *inter vivos* gift of the subject real property had been established. Specifically, the Court found that the transfer of realty was part and parcel of the decedent's dispositive scheme aimed at providing for the care of his incapacitated son, who for his entire life had occupied the premises in question. The conclusory assertions of interference and overreaching were held insufficient to establish a triable issue of fact. Accordingly, the motion for summary judgment was granted. *Crane v. Desgro*, N.Y.L.J., June 10, 2002, p. 36 (Sur. Court, Suffolk Co., Surr. Czygier).

Joint Account

In a contested discovery proceeding, the respondent moved to reargue the Court's prior ruling that the lack of words of survivorship on a bank account's signature card precluded a presumption under Banking Law § 675 that a joint tenancy had been created. Although the Court granted respondent's motion to renew and reargue, it adhered to its original decision. The Court rejected the respondent's argument that the First Department's holding of the Court in *Sutton v. The Bank of New York*, 250 A.D.2d 447 changed the law and permitted the Banking Law presumption to be applied even in the absence of survivorship language. The Court found that such a result would adversely impact numerous other opinions rendered by the First Department, and sharply contrasts with the rule adopted by the Third and Fourth Departments as well as by the Court of Appeals in *In re Fenelon*, 262 N.Y. 308. *In re*

Estate of Nathan S. Ancell, N.Y.L.J., May 2, 2002, p. 28 (Sur. Court, Westchester Co., Surr. Scarpino).

Paternity

In a contested proceeding to revoke letters of administration, the Court addressed the issue as to the evidentiary significance of posthumous DNA test results.

The petitioner in the proceeding was an alleged non-marital child of the decedent who was claiming his intestate share of the decedent's estate. The respondent was the decedent's daughter. Respondent moved to dismiss the proceeding on the grounds that the petitioner was not the decedent's biological child. There was no evidence that the decedent was married except for his death certificate which identified the petitioner's mother as the decedent's wife. The petitioner's birth certificate identified a third party as his father.

The Court granted the petitioner's application to administer a DNA test on blood samples collected after decedent's death and retained by the Office of the Medical Examiner after conducting an autopsy, despite respondent's objections that posthumously obtained DNA results are not admissible to support a paternity claim.

The test results were definitive in excluding the decedent as the petitioner's biological father. As a consequence, the petitioner requested a hearing on the issue of paternity. The Court disagreed.

The Court recognized that the provisions of EPTL 4-1.2(a)(2)(D) have been construed to require DNA tests to be administered during the decedent's lifetime. At the same time the Court recognized that post-death genetic marker tests might be admissible under the provisions of EPTL 4-1.2(a)(2)(C). The Court found that there was no basis in law or logic to exclude the results of posthumously conducted DNA tests on a decedent's genetic material from the category of "clear and convincing" evidence under EPTL 4-1.2(a)(2)(C), particularly where the material is available without the need for exhumation, comes from a reliable source, and is amenable to accurate testing. Accordingly, the Court held the results of the posthumous DNA testing to be admissible as relevant to the question of paternity under this provision of the statute. This being the case, the Court determined that petitioner had failed to refute the DNA test results, and denied the petition. *In re Estate of Bonanno,* N.Y.L.J., April 22, 2002, p. 21 (Sur. Court, New York Co., Surr. Preminger).

Probate of Will—Due Execution

In an uncontested probate proceeding, a seven-page instrument was offered for probate in which the last two pages were fastened out of order. As a result, issue was raised by the Court on its own motion as to whether the testator and witnesses signed at the end of the will as required by EPTL 3-2.1.

Examination of the instrument revealed that each of the pages was numbered on top, and that the testator signed her name in the margin of each page. The page numbered seven contained the attestation clause and the names and addresses of the witnesses. The page numbered six contained two non-dispositive clauses, followed by the signature of the testator, the date, and the signatures of the same witnesses who signed page seven. The attorney who supervised the execution of the instrument submitted an affidavit indicating that the instrument was inadvertently stapled in the wrong order.

Based upon the foregoing, the Court found that the signature of the testator and of the three witnesses were at the end of the will, after all the dispositive provisions. Accordingly, probate was granted. *In re Estate of Viscuso,* N.Y.L.J., February 6, 2002, p. 20 (Sur. Court, Kings Co., Surr. Feinberg).

Probate of Will—Summary Judgment

In a contested probate proceeding, two of the residuary beneficiaries moved for summary judgment denying probate to a codicil which contained a substantial preresiduary bequest. A will and four codicils of the decedent were offered for probate. Under the will and three of the codicils, the decedent made some minor preresiduary bequests and bequeathed 90% of her residuary estate to her niece and nephew, and to a charitable institution. These instruments were prepared by an attorney who supervised their execution.

The contested codicil was executed approximately 10 weeks before the decedent died, and was a one-page typewritten instrument, labeled "Codicil." Pursuant to its terms, the sum of $300,000 was left to the decedent's caretaker. Although the decedent signed the instrument, it was witnessed by only one person, who was designated as the executrix under a provision of the penultimate codicil. This witness stated that she prepared the codicil pursuant to the decedent's instructions, and that the decedent had informed her that the bequest was to be a bonus to her caretaker.

The individual residuary beneficiaries moved for summary judgment on the ground that the codicil had not been properly executed in accordance with the provisions of EPTL 3-2.1, since only one witness had signed the instrument. The proponent acknowledged the deficiency in the instrument, but nevertheless maintained that it could be cured by her husband, who was present in the room at the time the codicil was executed. Proponent requested that her husband sign the instrument as a witness, albeit after the decedent's death.

The Court denied the application, and granted judgment in the movants' favor, finding that a witness

cannot effectively subscribe a will after the testator has died. Such principle is designed to prevent fraud. Furthermore, the Court found that the second attestation proposed would be unavailing since it would not occur within the 30-day period prescribed by the statute. *In re Estate of Gabrielle Lederman,* N.Y.L.J., May 22, 2002, p. 19 (Sur. Court, New York Co., Surr. Roth).

Probate of Will—Summary Judgment

In a contested probate proceeding, the proponent moved for summary judgment seeking dismissal of the objections alleging that the will was not duly executed, that the testator lacked capacity on the date of execution, and that the will was the product of fraud and undue influence. The Court granted summary judgment on the issues of due execution, undue influence and fraud, but denied judgment with respect to the issue of testamentary capacity.

The evidence in support of capacity on the date of execution came from the testimony of the attorney-draftsperson and the three attesting witnesses. The Court found that the testimony of the attesting witnesses was not very persuasive inasmuch as they had no personal relationship with the decedent and were only in her presence for a few minutes. On the other hand, the Court found the testimony of the attorney-draftsperson to be persuasive on the issue, and useful in providing an explanation for the decedent's dispositive plan. Additionally, the general capacity of the decedent was supported by affidavits of several friends and relatives of the decedent.

Nevertheless, the Court found that the affidavits in opposition submitted by the objectant to be sufficient to create a question of fact. In particular, the Court pointed to the affidavit of the decedent's treating physician, which, in pertinent part, stated that the decedent's medical condition required her to take pain-killing narcotics at or about the time the propounded will was executed, and that as a result, she did not have the mental capacity, concentration, problem-solving ability or emotional stability to comprehend the nature of her actions.

Accordingly, finding more than a scintilla of evidence in the record tending to prove incompetency, the Court determined the issue of testamentary capacity to be one for the jury to decide. *In re Estate of Estelle Lyons,* N.Y.L.J., May 16, 2002, p. 24 (Sur. Court, Nassau Co., Surr. Riordan).

Separation Agreement—Ineffective Acknowledgment

The Court held a separation agreement to be void *ab initio* on the grounds that the proper acknowledgment was not utilized. The Court found that the form of acknowledgment that was utilized at the end of the separation agreement did not comply with the statutory requirements of Real Property Law § 309, which became effective September 1, 1999. Instead, the clause complied with the form prior to the amendment of the law. Citing the Court of Appeals decision in *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), the Court found the formality of acknowledgment to be indispensable. "A bright-line rule requiring an acknowledgment in every case is easy to apply and places couples and their legal advisors on clear notice of the prerequisites as to a valid nuptial agreement." *Matisoff*, at 136. *Paul v. Paul*, N.Y.L.J., April 23, 2002, p. 18 (Sup. Ct., Kings Co., Sunshine, J.)

Withdrawal of Attorney

In a miscellaneous proceeding, counsel for the petitioner moved to withdraw. Petitioner, who was the administratrix of the estate, retained counsel to commence an action for conversion. Subsequent to the commencement of the action, petitioner filed a grievance against counsel. Although the grievance was subsequently dismissed, counsel maintained that the filing of the grievance made it difficult to continue his representation of the petitioner. Furthermore, one of the named respondents in the action for conversion sought to depose counsel as a witness. The petitioner opposed counsel's application to withdraw claiming that it would be difficult if not impossible to find another attorney who would represent her on a contingency fee basis. Additionally, she claimed that the grievance against counsel was dismissed largely at her request due to the progress counsel was making in the handling of her case.

In granting counsel's application to withdraw, the Court reasoned that an attorney may withdraw as counsel only upon a showing of good and sufficient cause, and if withdrawal can be accomplished without materially affecting the interests of the client. Good and sufficient cause has been found to exist where the client challenges counsel's loyalty and professional integrity, as in the case where the client files a complaint with a professional disciplinary body against her lawyer. Absent some extraordinary circumstances, a lawyer should not be required to continue to represent a client who has filed a grievance against the attorney.

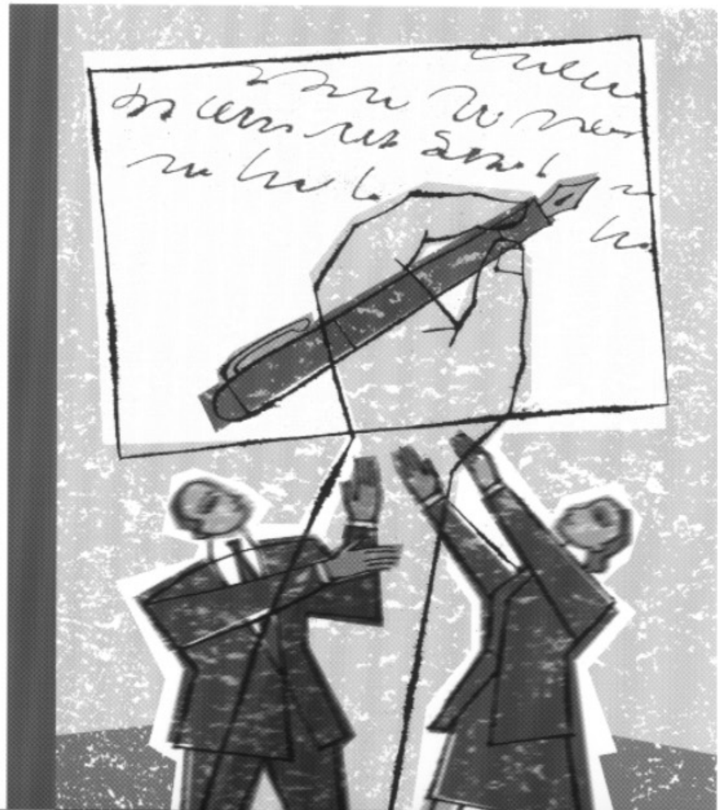
Accordingly, based upon the foregoing, and the fact that counsel was to be called as a witness for the respondents, the application to withdraw was granted. *In re Estate of Shannon*, N.Y.L.J., May 2, 2002, p. 26 (Sur. Court, Nassau Co., Surr. Riordan).

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

Donald S. Klein—Donald S. Klein, P.C., White Plains, New York.

GLENMEDE

You'll come to appreciate what's truly valuable.



GLENMEDE.

SPECIALIZED WEALTH MANAGEMENT.

For some, the most important things in life are measured by the value of relationships. At Glenmede, we partner with you to provide a broad range of wealth advisory services to your most valued clients. Let's collaborate, employing the sophisticated strategies available under Delaware law, to preserve, enhance, and transfer your clients' wealth.

Glenmede: for over 45 years, a stable, private wealth advisory firm that specializes in wealth preservation.

Call Geoffrey M. Rogers at 1-302-552-2200 or visit our Web site at www.glenmede.com.

(paid advertisement)

Section Committees & Chairs

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

Committee on Charitable Organizations
Robert W. Sheehan (Chair)
101 Park Avenue
New York, NY 10178

S. Jeanne Hall (Vice-Chair)
One Rockefeller Plaza, Suite 301
New York, NY 10020

Committee on Continuing Legal Education
Richard P. Wallace (Chair)
279 River Street
P.O. Box 1530
Troy, NY 12181

Stephen B. Hand (Vice-Chair)
300 Garden City Plaza
Garden City, NY 11530

Committee on Elderly and Disabled
Warren H. Heilbronner (Chair)
2400 Chase Square
Rochester, NY 14604

A. Robert Giordano (Vice-Chair)
235 Mamaroneck Avenue, Suite 205
White Plains, NY 10605

Robert Kruger (Vice-Chair)
225 Broadway, Room 4200
New York, NY 10007

Gloria S. Neuwirth (Vice-Chair)
330 Madison Avenue, 35th Floor
New York, NY 10017

Committee on Estate Litigation
Gary B. Freidman (Chair)
600 Third Avenue
New York, NY 10016

Karin J. Barkhorn (Vice-Chair)
245 Park Avenue
New York, NY 10167

Gary E. Bashian (Vice-Chair)
235 Main Street, 6th Floor
White Plains, NY 10601

Hon. John M. Czygier, Jr. (Vice-Chair)
320 Center Drive
Riverhead, NY 11901

John R. Morken (Vice-Chair)
West Tower, 14th Floor
EAB Plaza
Uniondale, NY 11556

Marilyn Ordover (Vice-Chair)
177 Montague Street
Brooklyn, NY 11201

Committee on Estate Planning
Denise P. Cambs (Chair)
5701 West Genesee Street, Suite 100
Camillus, NY 13031

Susan Taxin Baer (Vice-Chair)
399 Knollwood Road, Suite 212
White Plains, NY 10603

Louis W. Pierro (Vice-Chair)
21 Everett Road Extension
Albany, NY 12205

Richard E. Schneyer (Vice-Chair)
405 Lexington Avenue, 8th Floor
New York, NY 10174

Linda J. Wank (Vice-Chair)
488 Madison Avenue, 9th Floor
New York, NY 10022

Committee on Estate and Trust Administration
Anne Farber (Chair)
100 Park Avenue, 12th Floor
New York, NY 10017

Janet L. Blakeman (Vice-Chair)
1133 Avenue of the Americas
New York, NY 10036

Ilene S. Cooper (Vice-Chair)
West Tower, 14th Floor
EAB Plaza
Uniondale, NY 11556

Victoria L. D’Angelo (Vice-Chair)
5888 Main Street
Williamsville, NY 14221

Susan Greenwald (Vice-Chair)
345 Park Avenue
New York, NY 10154

Committee on Governmental Relations
Thomas E. Dolin (Chair)
16 Eagle Street
Albany, NY 12207

Thomas J. Collura (Vice-Chair)
90 State Street, Suite 1011
Albany, NY 12207

Michael K. Feigenbaum (Vice-Chair)
East Tower, 15th Floor
190 EAB Plaza
Uniondale, NY 11556

Committee on International Estate Planning
Gerard F. Joyce, Jr. (Chair)
452 5th Avenue, 17th Floor
New York, NY 10018

Michael W. Galligan (Vice-Chair)
666 Fifth Avenue
New York, NY 10103

Davidson T. Gordon (Vice-Chair)
78 Elmwood Avenue
Rye, NY 10580

Richard E. Schneyer (Vice-Chair)
405 Lexington Avenue, 8th Floor
New York, NY 10174

Committee on Legislation
Ronald J. Weiss (Chair)
Four Times Square, 28th Floor
New York, NY 10036

Richard J. Bowler (Vice-Chair)
10 Bank Street, Suite 650
White Plains, NY 10606

Lenore W. Tucker (Vice-Chair)
233 Broadway, Suite 915
New York, NY 10279

Committee on Life Insurance and Employee Benefits
David A. Pratt (Chair)
80 New Scotland Avenue
Albany, NY 12208

Robert F. Baldwin, Jr. (Vice-Chair)
100 Clinton Square
126 North Salina Street, Suite 320
Syracuse, NY 13202

Edward Falk (Vice-Chair)
4 Times Square, 23rd Floor
New York, NY 10036

Committee on Membership and Relations with Local Bar Associations
George E. Riedel, Jr. (Chair)
42 Delaware Avenue, Suite 300
Buffalo, NY 14202

Robert W. Johnson, III (Vice-Chair)
279 River Street
Troy, NY 12181

Committee on Newsletter and Publications
Magdalen Gaynor (Chair)
10 Bank Street, Suite 650
White Plains, NY 10606

Michael Stephen Markhoff (Vice-Chair)
123 Main Street, 9th Floor
White Plains, NY 10601

Glenn M. Troost (Vice-Chair)
114 West 47th Street
New York, NY 10036

Committee on Practice and Ethics
M. Anne O'Connell (Chair)
331 Madison Avenue, 3rd Floor
New York, NY 10017

Carl T. Baker (Vice-Chair)
One Broad Street Plaza
P.O. Box 2017
Glens Falls, NY 12801

S. Jeanne Hall (Vice-Chair)
One Rockefeller Plaza, Suite 301
New York, NY 10020

Jerome L. Levine (Vice-Chair)
345 Park Avenue
New York, NY 10154

Bonnie McGuire Jones (Vice-Chair)
Executive Woods, Suite 180
855 Route 146
Clifton Park, NY 12065

Committee on Surrogates Court
Hon. Cathryn M. Doyle (Chair)
16 Eagle Street
Albany, NY 12207

Maureen A. Conley (Vice-Chair)
16 Eagle Street
Albany, NY 12207

Donald S. Klein (Vice-Chair)
10 Bank Street, Suite 650
White Plains, NY 10606

Stacy L. Pettit (Vice-Chair)
16 Eagle Street
Albany, NY 12207

Committee on Taxation
Philip L. Burke (Chair)
700 Crossroads Building
2 State Street
Rochester, NY 14614

Edward Falk (Vice-Chair)
4 Times Square, 23rd Floor
New York, NY 10036

Georgiana James Slade (Vice-Chair)
1 Chase Manhattan Plaza
New York, NY 10005

Committee on Technology
David Goldfarb (Chair)
350 5th Avenue, Suite 1100
New York, NY 10118

Ad Hoc Committee on Multi-State Practice
Ira M. Bloom (Chair)
80 New Scotland Avenue
Albany, NY 12208

Pamela R. Champine (Vice-Chair)
47 Worth Street
New York, NY 10013

Philip G. Hull (Vice-Chair)
One Battery Park Plaza
New York, NY 10004

Ronald S. Kochman (Vice-Chair)
222 Lakeview Avenue, Suite 950
West Palm Beach, FL 33401

Executive Committee District Representatives

First District

Colleen F. Carew
350 Broadway, Suite 515
New York, NY 10013
(212) 896-3310

Second District

Gary R. Mund
2 Johnson Street, Room 210
Brooklyn, NY 11201
(718) 643-5201

Third District

Stacy L. Pettit
16 Eagle Street
Albany, NY 12207
(518) 487-5391

Fourth District

Michael R. Suprunowicz
1430 Balltown Road
Niskayuna, NY 12309
(518) 374-3399

Fifth District

Elizabeth A. Hartnett
4 Clinton Square, Suite 106
Syracuse, NY 13202
(315) 476-0532

Sixth District

John G. Grall
P.O. Box F 1706
Binghamton, NY 13902
(607) 763-9200

Seventh District

Nicole M. Marro
P.O. Box 31051
Rochester, NY 14603
(585) 263-1396

Eighth District

Robert I. Jadd
1720 Liberty Building
420 Main Street
Buffalo, NY 14202
(716) 854-3807

Ninth District

Richard J. Bowler
10 Bank Street, Suite 650
White Plains, NY 10606
(914) 993-0936

Tenth District

Ilene S. Cooper
West Tower, 14th Floor
EAB Plaza
Uniondale, NY 11556
(516) 227-0736

Eleventh District

Mindy J. Trepel
95-25 Queens Boulevard, 6th Floor
Flushing, NY 11374
(718) 459-9000

Twelfth District

Kate E. Scooler
851 Grand Concourse
Bronx, NY 10451
(718) 590-3623

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted to Magdalen Gaynor, 10 Bank Street, Suite 650, White Plains, NY 10606. Authors should submit a 3½" floppy disk (preferably in Microsoft Word or WordPerfect) along with a printed original and biographical information. Please contact Ms. Gaynor regarding further requirements for the submission of articles.

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

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor
Magdalen Gaynor
10 Bank Street, Suite 650
White Plains, NY 10606

Recent Decisions Editor
John C. Welsh
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Section Officers

Chair
Arlene Harris
425 Park Avenue
New York, NY 10022

Chair Elect
Timothy B. Thornton
75 State Street
Albany, NY 12207

Secretary
G. Warren Whitaker
126 East 56th Street, 17th Floor
New York, NY 10022

Treasurer
Michael E. O'Connor
One Lincoln Center, Suite 275
Syracuse, NY 13202

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge. The views expressed in articles in this *Newsletter* represent only the author's viewpoint and not necessarily the views of the Editor or the Trusts and Estates Law Section.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

© 2002 by the New York State Bar Association.

ISSN 1530-3896

Trusts and Estates Law Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

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