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Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

Philip L. Burke

It's hard to believe that my term as Chair of this Section is more than half over. As the saying goes, "Time flies when you're having fun."

While the first half of the year has been very busy, it has also been extremely fulfilling. I have had the opportunity to interact with a lot of great people across the state in hopes of furthering the Section's legislative agenda, continuing legal education goals as well as developing Trusts and Estates practice.

One of the more enjoyable tasks has been working with Linda Wank and Carl Baker, who are the Co-Chairs of the Section's Fall Program to be held at the Hotel Del Coronado in San Diego from October 10 through the 14. Registration materials will be sent out shortly. The program is titled "Going Bi-Coastal: The Future of Trusts and Estates Practice." Speakers will address topics including representing "multi-state" clients, the uses of wills versus revocable trusts, jurisdiction and ancillary probate, DNA and genetic testing concerns, ethical and unauthorized practice of law considerations in multi-state representations, a "View from the Bench" from a few of our Surrogates, community property issues and other "California" concerns, and, on a lighter note, a "futurist" will discuss how science and technology will be changing our lives in the future.

Social events at the program will include the usual golf and tennis, and will also include a guided tour of the *USS Midway* (a World War II era aircraft carrier), trips to the San Diego Zoo or Balboa Park (if you are not familiar with Balboa Park, I urge you to go to www.balboapark.org and check out the 15 museums and other venues located there), not to mention the beach and other sightseeing activities available in the Greater San Diego area. This is shaping up to be a great program and we hope to see you there.

Getting back to business, on the legislative side as of this writing the Governor has signed two bills

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relevant to our area of practice. The first (Assembly Bill 3583) amends SCPA 1750-b to authorize a family member of a mentally retarded or developmentally disabled individual for whom a guardian has not been appointed to make decisions regarding life sustaining treatment. Family members eligible for this role would be chosen from a prioritized list to be established by the Commissioner of the Office of Mental Retardation and Developmental Disabilities. This list is to be developed in conjunction with parents, family members and advocates. Second, Senate Bill 4036 was signed by the Governor on June 4. This bill amends Section 1726 of the SCPA and now provides that when appointing a Standby Guardian the Court may, in its discretion, dispense with the hearing and may also, in its discretion, appoint a Guardian ad Litem to determine whether the appointment of the Standby Guardian is appropriate.

At this point in time there are a few other bills of interest to this Section that have been passed and submitted to the Governor, but no action has yet been taken. Of course, as you know, you can visit the New York State Bar Association website, sign in and go to the Trusts and Estates Law Section page (www.nysba.org/trusts) to check on the status of pending legislation.

By the time this *Newsletter* is in your hands, summer will be nearly over. Hopefully, it was an enjoyable time for all of you and, again, we look forward to seeing you in San Diego in October.

Philip L. Burke

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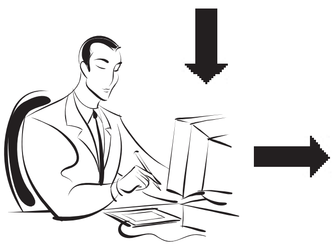

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Will State Farm Be There? Often Overlooked Property and Casualty Insurance Aspects of Common Estate Planning Transactions

By Michael S. Arlein and Timothy O'Brien

Introduction

A number of the most common estate planning techniques recommended by practitioners involve the transfer of a client's personal residence to an entity such as a limited liability company, limited partnership or trust. Estate planning attorneys recommend such transfers for a number of reasons, including protection from creditors, avoidance of probate, facilitating gifting of fractional interests in a residence and providing a mechanism for the management of property owned by multiple individuals or families. Transferring residential property to a qualified personal residence trust also remains a popular and effective strategy for gifting.

When implementing these "bread-and-butter" estate planning techniques, practitioners often neglect a crucial aspect of the transaction—restructuring the property and casualty insurance that is in place to reflect the transfer of ownership of the residence to an entity. In the event of a loss, the failure to address this issue could have unintended and potentially devastating consequences. This article focuses on the need to structure properly homeowner insurance policies, which are commonly used to protect residences that are transferred to an entity.

Property and Casualty Insurance 101

Many practitioners operate under the logical but false premise that a policy insuring a residential property—a homeowner policy—covers the actual home. In fact, the party that receives the benefit of coverage is the named insured. The following is a common definition for named insured in a homeowner policy:

> *Insured means you and residents of your household who are your relatives, or other persons under the age of 21 and in the care of any person mentioned above.*

A homeowner policy generally offers the named insured protection from two important categories of loss—property damage and liability. Coverage for property damage protects the insured from damages to a residence and its contents caused by perils such as wind, fire, water and theft, while liability coverage protects the insured when their actions or omissions cause losses to others, including bodily injury and property damage.

The broad liability coverage that is provided by a homeowner policy is often overlooked, yet serves as a critical form of asset protection by covering loses the insured incurs anywhere in the world. In addition, regardless of the merits of any lawsuit brought against the insured, liability protection also obligates the insurance carrier to provide the insured with a legal defense.

Since the contract language used in homeowner policies was developed when individuals, not entities, owned homes, a traditional homeowner insurance policy does not convey any contractual benefits to any party other than an individual. Given this background, it is evident that if residential property is transferred from an individual to an entity and no adjustments are made to coverage, the unfortunate and unintended consequence is that the insurance coverage that protected the individual who previously owned the property may not be available to protect the new entity-owner. Especially in instances where asset protection is among the primary reasons for transfer of property, the potential absence of important insurance protection is especially ironic and problematic.

Tailoring Insurance Protection to Meet Need

To avoid gaps in coverage, attorneys must ensure that insurance policies are structured to protect the interests of all parties who have an insurable interest—that is, something to lose—in the event of a property or liability claim. These may include a number of different individuals and entities, for example: the trust, limited liability company or limited partnership that owns the residence; the trustee, manager, general partner or other fiduciary of the entity; and the individuals who occupy the residence, who are often the beneficiaries or owners of the entity.

Given the complex nature of negotiating appropriate insurance coverage, attorneys should seek assistance from an experienced, independent insurance agent to assess coverage requirements, which will depend on several different factors, but most particularly, how a residence will be used. In determining coverage requirements, the following questions should be considered:

- Who will occupy the residence?
- Is any business conducted on the premises?

- Has the trust, limited liability company or other entity been created for purposes other than ownership of the residence?
- Does the entity own other property?
- Who are the parties to the trust, limited liability company or other entity?
- Are there other forms of liability protection covering the property?

By way of example, consider the following fact pattern that describes a common risk profile for an entity-owned residence: (i) a trust, limited liability company or limited partnership is formed in order to hold a family residence; (ii) the family who has transferred ownership of the residence to the new entity continues to live in the residence; (iii) the family retains personal ownership of the furniture, furnishings and other contents of the home; and (iv) the family occupants are closely connected to the entity—as grantors, trustees and beneficiaries, in the case of a trust, or as managers, general partners, members or limited partners, in the case of a limited liability company or limited partnership. The table below identifies the insurable interests of each party for this common risk profile and illustrates the wide range of coverage needs:

Party with Insurable Interest	Coverage Requirements
Entity (Trust, LLC or LP)	Dwelling—owned by the Entity Other Structures—owned by the Entity Premises Liability—Entity can be named in a suit
Fiduciary (Trustee, Manager, General Partner)	Premises Liability—Fiduciary can be named in a suit
Occupants	Contents—Owned by occupants Additional Living Expenses (loss of use)—occupants would incur costs to reside elsewhere after a covered loss Liability—Occupants' negligence may cause them to be named in a suit; coverage required for this location and elsewhere

Unfortunately, many insurance carriers find it challenging to understand and underwrite the risks associated with entity-owned residential property and have been reluctant to offer comprehensive insurance to entities, particularly liability coverage. Even in the case of the common risk profile described above, most insurance carriers do not offer adequate coverage for all parties with insurable interests. The endorsement most commonly used by carriers—*Residence Held In Trust HO 05 43*—covers only a residence held in a trust. However, a select group of carriers that specialize in meeting the residential coverage needs of high-net-worth clients—AIG Private Client Group, Chubb Group of Companies, and Fireman's Fund Insurance Companies—offer a range of endorsements which, when properly structured, can provide coverage in virtually any situation.

Below is an example of an "additional insured" endorsement that can be used to structure coverage to protect the insurable interests of each of the parties in the common risk profile described above:

Additional Insured—Residence Premises

Name and address of person or organization:

The definition of insured in this policy includes the person or organization named above with respect to:

Coverage for Damage to Your Property

Dwelling and Other Structures; and

Coverage for Liability and Medical Payments to Others

The person or organization named above is covered for Liability and Medical Payments to others but only with respect to the residence premises and only where the person or organization is held liable for an act or failure to act by any insured.

Insurance Protection Should Not Be an Afterthought

Attorneys generally exercise great care in structuring estate planning transactions to avoid exposing their clients to unintended tax consequences. However, an informal survey of practitioners who routinely recommend estate planning techniques involving the transfer of residential property to entities indicates that many attorneys are not exercising the same care when it comes to protecting their clients from exposure to liability for uninsured losses. In many cases, it may not be sufficient for an attorney to merely advise their client to have his or her coverage reviewed by their local insurance agent. Many agents do not have the requisite resources or experience to adequately identify and address the coverage needs of all parties with an insurable interest. Consequently, it is important for attorneys to develop their own relationships with property and casualty insurance professionals who specialize in servicing high-net-worth clients—and who can provide substantive risk management advice when needed.

In conclusion, the take-home message is that attorneys should avoid approaching property and casualty insurance protection as an afterthought in the estate planning process. Instead, such insurance should be viewed as an important tool for protecting and preserving a client's estate.

Mr. Arlein is a senior associate in the Personal Planning Group of Patterson Belknap Webb & Tyler LLP, a law firm of nearly 200 lawyers delivering a full range of services in such areas as tax, trusts and estates and litigation. Mr. O'Brien is Director of Private Client Services at Cook, Hall & Hyde, Inc., an insurance brokerage firm that offers property and casualty solutions for the high-net-worth marketplace.

This article originally appeared in *The Practical Tax Lawyer*, Summer 2007, and is reprinted with permission.

How to Integrate Property and Casualty Risk Management Into the Estate Planning Process

- Consider the benefits of working with an independent insurance broker who is licensed to represent the buyer, as opposed to a direct agent who is contractually aligned to represent the interests of a single carrier.
- To better understand the scope of risk management services that are available, explore the Independent Insurance Agents and Brokers of America web site, http://www.iiaa.org. This site also offers guidance on choosing and identifying an independent agent or broker.
- Research and identify the carriers that offer the type of coverage your clients need.
- Contact the branch office of the carriers whose coverage your clients may want and ask the branch manager to recommend a broker who has the specific skills and experience you seek.
- Interview two or three brokers to determine if their approach to risk management meets your and your clients' expectations. In addition, discuss their expectations, ask for specific examples of the expertise they can provide, and request references from professionals they have assisted.

Catch Us on the Web at
WWW.NYSBA.ORG/TRUSTS

Third International Estate Planning Institute Is Another Success

By G. Warren Whitaker

On May 3 and 4 the Third International Estate Planning Institute was held in New York City. Co-sponsored by the NYSBA and the worldwide Society of Trust and Estate Practioners, the Institute drew over 200 attendees to hear some of the leading experts from around the world discuss current topics of interest in the increasingly important field of international estate planning. The audience came not only from the New York area, but from across the United States, and there were also several dozen professionals from other countries including Canada, the United Kingdom, Switzerland, the Bahamas, New Zealand and Hong Kong.

Christopher Byrne, G. Warren Whitaker and Martin Hall

Michael Galligan

I had the pleasure of chairing the Institute for the third year.

The opening speaker on Day One was Michael Galligan of Phillips Nizer LLP in New York, who gave an introductory talk on U.S. estate, gift and GST taxation of non-U.S. persons and property. Next Robert Colvin, of Houston, spoke about planning for non-U.S. people who intend to immigrate to the United States. (Hopefully these people get advice from someone like Bob before they become U.S. residents, and not afterward.) Christopher Byrne of Wealth and Tax Advisory Services in New York discussed the opposite situation, of the U.S. person who wishes to leave the United States and either give up his U.S. citizenship or surrender his green card. Chris discussed the recent proposals to change the expatriation rules that were nearly passed by Congress this spring. Martin Hall of Ropes & Gray LLP in Boston then addressed the special problems that arise in marital deduction planning for the non-citizen spouse. Martin, who is himself a non-citizen spouse, had a number of interesting insights in this frequently encountered area.

Martin Hall

Timothy Duholke

After lunch the audience split up to attend breakout sessions. One continuous track for the afternoon covered U.S.-Canadian estate planning in depth, and explored the issues confronted by Canadian residents who own U.S. assets and Canadian estates with U.S. beneficiaries. The track was chaired by Michael Cadesky of Toronto and included Timothy Duholke of Sheinin & Company in Vancouver, British Columbia; Edward Northwood (who splits his time between Buffalo and Toronto); Stanley Barg of Duane Morris LLP in Philadelphia; and Lawrence Heller of Bryan Cave LLP in Santa Monica, California.

Stanley Barg

The other track included speakers from three countries who talked about their local laws as they affect international planning. John Riches, of Withers LLP in London, discussed the recent changes in the UK concerning the taxation of trusts. Miguel Jauregui of Jauregui, Navarrete y Nader, S.C. in Mexico addressed the changing Mexican laws regarding the taxation of offshore assets. Deborah

Christopher Byrne

Robert Colvin

Annells of Azure Trustees Limited in Hong Kong outlined the considerations involved in planning for the Far Eastern client.

Refreshment breaks for the Institute were sponsored by HSBC Private Bank. At the end of Day One the audience gathered at a convivial cocktail reception hosted by GAM USA Inc. This was followed by a splendid speaker's dinner at the Gramercy Tavern, hosted by Royal Bank of Canada Global Private Banking.

Michael Cadesky

Day Two started with a talk by Jon Grouf of Duane Morris LLP in New York about the differences in the U.S. tax treatment of various entities: corporations, partnerships and pass-through entities. He also discussed the use of the "check-the-box" regulations to change the status of entities. Next Dina Kapur Sanna of Day Pitney LLP spoke on the important topic of planning for foreign grantor trusts when the grantor dies and the beneficial tax effects of grantor trust status disappear. She emphasized the need for advance planning to protect U.S. beneficiaries in this situation.

John Riches

Miguel Jauregui Rojas

Steve Sokic of Royal Bank of Canada in the Island of Jersey discussed some of the practical issues that arise in the administration of foreign trusts. Brian Simms of Lennox Paton, in Nassau, the Bahamas, then described attacks on asset protection trusts in offshore jurisdictions, citing relevant examples from well-known cross-border litigations in which he has been involved. Finally, Shan Warnock-Smith and Andrew De La Rosa, both London barristers, gave an interesting and enlightening talk on the Moslem Sharia law of inheritance as it contrasts to common law principals in a conflict-of-law situation. Andrew described in detail the recent and scandalous Al Bassam multinational inheritance contest in which he participated.

The Institute offers an opportunity for everyone to brush up on U.S. international tax issues, be exposed to developments around the world, and to cross-pollinate with a multinational audience and roster of speakers. Plans are already underway for next year's Institute.

Our thanks go to the many sponsors who supported the Institute this year. In addition to HSBC, GAM, and Royal Bank of Canada, they included: Christiana Trust, Citigroup Trust, Commonwealth Trust Company, Doyle New York, Fiduciary Trust International, Sotheby's, South Dakota Trust Company and Trident Trust.

Lawrence Heller

Deborah Annells

Edward Northwood

A User's Guide to the Trusts and Estates Law Section Forum

By Gary R. Mund

In early February 2007 the Trusts and Estates Law Section launched its website forum, commonly referred to as a "listserv," designed to allow Section members to communicate, initiate and respond to queries, and exchange information on an *ad hoc* basis in an email-style setting. While this new system does not replace the discussion site (accessible from the Trusts and Estates Law Section page), it is much more flexible and has proved substantially more popular in its brief appearance than the chronically under-utilized discussion site.

If you have not yet logged into the forum, you should give it a try—especially if you have a burning trusts or estates question that seemingly defies traditional research methods. Chances are, someone else in the Section has had a similar issue in the past, and can offer useful guidance. Let's get started!

The Basics

If you have never used the State Bar website, you need to create an account. Log into the home page at <http://www.nysba.org> and follow the directions to establish your account. Among other things, you will need to create a user name and password which you will use to access your account each time you log in.

> *"If you have not yet logged into the forum, you should give it a try—especially if you have a burning trusts or estates question that seemingly defies traditional research methods."*

Once your account is established, you can log in from the home page. This gives you access to all general members-only areas of the website, as well as access to the areas of each section which you have joined. Access to the forum is available either through the section page ("Sections/Committees" button on the box upper border) or directly ("Forums" button on the same border). However, you will need to link the forum to an email address before being able to access it. To do this, enter the section page ("Sections/Committees") and select "Trusts and Estates Law Section" at the top of the page, and enter your preferred email address. Once this address is confirmed by the system administrator, you're a full-fledged member!

Navigating the Forum

To visit the Forum, click on "Forums." If everything was set up properly, a new page appears, indicating that a related email address was found (hopefully, the one you supplied at registration). Click "submit" and you are automatically logged in. Select "trusts-estates" under forum name (more than one name will appear on the list if you have joined more than one forum), and you are ushered into the "messages" page of the list manager. From here, it is possible to review all messages which have been posted to the forum.

In general, messages are arranged by the subject of the original message ("thread"), with all related responses and follow-up messages grouped together. On this page, you can view all message threads, as well as the number of replies to each original message, the identity of the original posting author, and the date and time of posting. The display columns can be re-sorted, both ascending and descending, by clicking the small arrows at the right of each column header. Initially, messages are sorted by date and time, in reverse chronological order (most recent at the top).

Clicking on a particular subject displays all messages within that thread. Clicking on the number of replies displays a breakdown of the original and all reply messages in the thread, by date, subject, and author. Clicking on the author displays information about the individual who posted the message, including a plain-English translation of his or her identity.

There are several additional controls on this page. Along the bottom are four buttons labeled "previous," "next," "show less," and "show more." By default, ten postings are shown on each page. Clicking "next" brings up the next ten (earlier in time, because of the reverse chronological sort) postings in sequence. Similarly, "previous" displays the previous ten (later) postings. "Show more" and "show less" allow you to expand or contract the list by 100 postings for each click.

To start a new posting, simply click the "create new message" button on the upper right side of the messages page. A "new message" page is displayed, allowing you to type a subject and a message body. The subject line will appear in the listing on the messages page. Once your message is complete, click "ok," and you're done. Having second thoughts? Click "cancel," and it's gone.

Responding to a posting is equally simple. Once you have selected a posting to read by clicking on the subject line, a new "read messages" window appears displaying the entire thread of that posting. Each new message appears in a separate gray box, with the original message in the top box and the replies appearing chronologically below. To add your reply, simply click the "reply" button at the bottom of the gray box, and a "reply" window appears, similar to an original message window except that the subject is already filled in. One caveat: you can click "reply" on any of the gray boxes. However, when your reply message appears, that new box will also contain copies of all prior messages which were in the gray box you clicked "reply" on. These exponentially expanding reply boxes become very difficult for users to navigate once there are more than one or two responses. Thus, unless you are responding to a particular reply, it is best to click the "reply" button in the original posting box, so that your response will contain only your message and the original posting.

There are several options for returning to the messages window after posting your reply. You can click the "messages" tab at the top of the window. However, this will return you to the topmost (most recent) message page. If you would rather return to the page you were working from, you should use the "back" button on your browser instead.

There are several other useful tabs at the top of the window. The first is "search," which allows you to quickly search through all messages for a particular word or phrase. The "advanced search" tab (below the search box) allows you to further refine your search criteria by restricting the breadth of the search or excluding certain words.

The other important tab is "My Account." This page allows you to change several parameters of your user account, including your name, email address, membership type, and preferred language (actually, your only choice of language is English—if you want your postings translated into Spanish, Mandarin, or Swahili, you're on your own).

Membership type is an important parameter, and will be dictated by your personal preference in using the listserv. Thus far, we have only explored usage of the listserv through the website. However, there are also several email options which many users find more convenient and attractive for their needs. Choices include receiving an email of each message as it is posted, one daily email of all messages posted that day, one daily email of subject lines for all messages posted that day, or no email participation at all. Selecting one of the email options causes a copy (or summary, depending on the option selected) of every posting to be sent to the email address you specified at registration. You should be aware that choosing to receive all messages by email can quickly fill an in-box. Many users who choose this option dedicate a separate email address for this purpose, to segregate listserv messages from their other emails. Also, remember that clicking "reply" to a particular email message sends your response to all participating members, not just the sender. If you wish to reply privately, use the "forward" option to the specific sender instead.

> *"Because the Trusts and Estates listserv is a professional forum, it operates largely unmoderated, relying on its users to exercise intelligence and restraint, and to 'play by the rules.'"*

To exit the listserv from the list manager page, click the "My Forums" tab, which returns you to the forums page, or the "NYSBA List Manager" title, which returns you to the NYSBA website.

Etiquette

Because the Trusts and Estates listserv is a professional forum, it operates largely unmoderated, relying on its users to exercise intelligence and restraint, and to "play by the rules." Mostly, it's just a matter of common sense, but here are some usage guidelines to help keep things on track.

Sign your postings. It is much easier to identify a poster by his or her actual name, affiliation, and contact information than trying to figure out who "tanderus12345" really is.

Stay on topic. The Trusts and Estates listserv is intended as a forum to discuss substantive trusts and estates and related issues. All replies should be on point, and should contribute substantively to the discussion. In general, other areas, such as referral-seeking or non-trusts and estates queries, should be avoided. As a cautionary note, some topics (such as discussions about fees and fee schedules) are completely out-of-bounds, and any such posts brought to the attention of the system administrator must (and will) be removed.

Recognize diverse levels of knowledge. Because trusts and estates is such a specialized area of practice, different participants will have widely varying degrees of experience and expertise. Especially for less experienced practitioners, a bit more detail or explanation in a response can mean the difference between their fully understanding a concept and their total frustration.

Avoid "flame" wars. Nothing throws a listserv into utter chaos faster than an all-out online feud. This can even stem from a purely innocent remark stated inartfully or inappropriately, or perhaps a statement misinterpreted by the reader. In short order, the rhetoric escalates into a full-blown war of words, blocking out legitimate users and seriously reducing the usefulness of the listserv altogether. If you must vent anger or frustration, send a private email or, better yet, do it offline.

Make certain your computer and network are (and remain) germ- and pest-free. It is possible to infect the listserv with viruses, worms, and other nastiness, and spread all that goodness around to other unsuspecting participants. It is up to each of us to avoid introducing them into the system in the first place. Similarly, effective and current antivirus software is necessary to help protect you in the event something does manage to slip into the listserv and seek a new home in your computer.

Finally . . .

If you've already tried using the Trusts and Estates listserv, you know what a great resource it is. If you haven't yet tried it, you should sign up now, and see what you've been missing. Surely, someone in the Section will have just the right solution to douse the flames of that burning question!

Gary R. Mund is the Probate Clerk of the Kings County Surrogate's Court. He currently chairs the Committee on Technology, and is a member of the Electronic Communications Task Force.

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Supercharging the Grantor Retained Annuity Trust for Multi-Generational Planning

By Jonathan J. Rikoon, Naftali T. Leshkowitz and Liora Brener

In recent years, the grantor retained annuity trust (GRAT) has become a favorite strategy among estate planners to transfer wealth from one generation to another. A properly structured GRAT is expressly authorized by the Internal Revenue Code (Code) and related regulations, and can be designed to have little or no gift tax risk. The GRAT's appeal is enhanced by today's low-interest rate environment and clients' reluctance to pay gift taxes given the uncertain future of the estate tax system.

Despite its advantages, it is general lore that the GRAT's efficiency is limited to passing wealth down only one generation, and many practitioners consider it an inappropriate vehicle for multi-generational planning, or generation-skipping transfers (GSTs). This article will discuss creative techniques which challenge the mainstream view and suggest that GRATs may be effective for GSTs.

Background

A GRAT is a trust that pays an annuity to the trust creator (the grantor) for a fixed term and thereafter pays the trust balance to the remainder beneficiaries, usually the grantor's children or trusts for their benefit. So long as the annuity payable to the grantor is a "qualified interest" under Code § 2702, the value of the annuity (determined under Code § 7520) reduces the value of the grantor's gift to the remainder beneficiaries.

In 2000, the Tax Court in *Walton v. Commissioner*[1] confirmed that a GRAT may be "zeroed out" so that the taxable gift value of the remainder interest is zero. In general, this is accomplished by designing the annuity to repay to the grantor both the full initial value of the property transferred to the GRAT and the Code's mandated interest component. If the GRAT assets appreciate by more than the interest assumption, the excess appreciation passes to the remainder beneficiaries free of gift tax. When the implicit interest factor is low, the likelihood is greater that the appreciation will exceed the mandated interest and leave assets to pass to the remainder beneficiaries. Similarly, where the value upon transfer of closely held GRAT assets is reduced by applicable valuation discounts that will not be factors if the assets are sold before the GRAT terminates, the GRAT's likelihood of success increases.

GRATs' efficiency in estate planning stems from their ability to transfer wealth with little tax or financial risk. There is no risk of unexpected gift tax even if valuation is challenged, if a formula annuity is used. If the GRAT assets do not appreciate sufficiently, the grantor is no worse off than having made no transfer because, in that case, the entire value of the GRAT is returned to the grantor in the form of the annuity payments. If that happens, if the grantor believes there is a possibility of future appreciation, the grantor may roll over the assets from the annuity to a new GRAT and try again.

One disadvantage of a GRAT is mortality risk because if the grantor does not survive the GRAT term, some or all of the GRAT assets will be includible in the grantor's estate. The advantages, however, often outweigh this risk (which may be reduced substantially by using a shorter term GRAT or purchasing term life insurance as a hedge), which has led to the meteoric rise in popularity of GRATs as an estate planning tool.

The GRAT's utility in transferring wealth would be enhanced if it also could be used to make GSTs. The main barrier to using GRATs for GSTs is the estate tax inclusion period (ETIP) rules under Code § 2642(f). The ETIP rules disallow application of GST exemption to any transfer if the transferred property would be includible in the transferor's estate if the transferor died immediately after the transfer.

The ETIP rules apply to GRATs because if a grantor dies during the GRAT term, the GRAT assets are includible in the grantor's estate. Consequently, the GRAT term is an ETIP and the grantor may not apply GST exemption to the GRAT remainder until the term expires. In a successful GRAT, however, the assets will have appreciated significantly during the GRAT term and the GST exemption would not be well-leveraged at that point. The key to using a GRAT for GSTs is to avoid application of the ETIP rules either by fitting within exceptions to the rules or by employing strategies that do not require application of GST exemption. Both approaches are described below.

GSTs Within the ETIP Rules

Commentators have focused recently on an exception under the ETIP rules that may shelter a significant number of GRATs from their application.[2] Treasury Regulations § 26.2632-1(c)(2)(ii)(A) provides that in the process of determining whether an ETIP exists, "the value of transferred property is not considered as being subject to inclusion in the gross estate of the transferor

. . . if the possibility that the property will be included is so remote as to be negligible." The section elaborates that "[a] possibility is so remote as to be negligible if it can be ascertained by actuarial standards that there is less than a 5 percent probability that the property will be included in the gross estate."

In the GRAT context, the GRAT assets are included in the grantor's estate only if the grantor dies during the GRAT term. Under this exception, if the probability of the grantor's death during the GRAT term is "so remote as to be negligible," or less than 5 percent, then there should be no ETIP. A long-term GRAT created by a relatively young grantor or a short-term GRAT created even by an older grantor may fit easily within the exception since the Internal Revenue Service actuarial tables predict that the probability of these grantors dying within the GRAT term is less than 5 percent. If the GRAT is not subject to an ETIP due to the remoteness of possible estate tax inclusion, the grantor is free to allocate GST exemption to the GRAT remainder at inception (when its value is negligible and uses up little, if any, GST exemption) so that its inclusion ratio would be zero.[3]

Despite the clarity of this ETIP exception, the IRS may try to challenge its application by arguing that a particular GRAT does not fit within the exception, that it is against public policy or that the grantor did not apply sufficient GST exemption. To improve the taxpayer's position, the annuity may be engineered so that there is a small, non-zero value to the remainder to enable the allocation of a definite amount of GST exemption to the transfer.

If the IRS succeeds in applying the ETIP rules to a GRAT, the application of GST exemption during the GRAT term would be invalid. If the remainder beneficiary is a skip person individual or trust,[4] the distribution of the GRAT remainder will incur GST tax. If the remainder beneficiary is a non-skip person trust (i.e., a trust which has both skip and non-skip person beneficiaries), that trust will be subjected to GST tax upon any subsequent taxable distribution or taxable termination.[5] If the IRS instead establishes that the GST exemption allocated to the GRAT was insufficient, the remainder would have a mixed inclusion ratio, also yielding some GST tax.

Given the uncertainty, it may be wise in the first place to name a non-skip person trust as the GRAT remainder beneficiary so that the potential imposition of GST tax is delayed to a later time, perhaps until after the statute of limitations on the gift has expired. Indeed, the GST tax would be avoided entirely if the trustee distributes the remainder trust's assets to its non-skip person beneficiaries (if permitted by the trust's terms).

Possible Technique

Another possible technique for effecting a GST through a GRAT involves a gift or sale of the GRAT remainder to a transferee that is two or more generations below the GRAT grantor. A number of practitioners have considered this method in recent years,[6] which is as follows: Grantor creates a GRAT and names her adult child, A, the remainder beneficiary. After independent contemplation and professional advice, A gives or sells her remainder interest in the GRAT to her child, B, or to a trust for the benefit of B (and possibly also A's spouse and B's descendants).

Arguably this technique avoids application of the ETIP rules altogether because the grantor will not be applying GST exemption. Instead, A, the remainder beneficiary, takes advantage of the remainder's low (or zero) value when the GRAT is created and applies her own GST exemption to the transferee—and there is certainly no ETIP for the remainder beneficiary, unlike the grantor.

Gift or Sale? The GRAT remainder could be transferred by gift or sale. A gift may have several advantages over a sale. First, a gift is simple and straightforward. Second, a gift requires the transferor to file a gift tax return, which starts the statute of limitations running on any IRS challenge. Third, if the transferee is a trust that benefits the transferor's grandchildren or more remote descendants, a gift provides a clearer opportunity for allocating the GRAT remainder beneficiary's GST exemption to the transfer.

Fourth, if the remainder beneficiary makes a gift, she fits squarely within the definition of "transferor" for purposes of chapter 13 of the code. Treasury Regulations § 26.2652-1(a)(1) defines a transferor as "the individual with respect to whom property was most recently subject to federal estate or gift tax." If the remainder beneficiary makes a taxable gift of the remainder interest, she is the "transferor" because she is the person with respect to whom the remainder interest was most recently subject to federal gift tax. That should make it more difficult for the IRS to challenge the technique's validity (by treating the grantor as the transferor) than if the remainder beneficiary did not satisfy this definition.

However, a disadvantage of a gift compared to a sale is that if the remainder has value, the transferor may incur gift tax liability or use up lifetime credit.

Alternatively, the remainder interest may be sold to the transferee. The key in any sale is to ensure that the transferor receives full and adequate consideration for the remainder interest so that no portion of the transaction is deemed a taxable gift. Basing the price on an independent appraisal of the remainder interest is an important step toward satisfying this standard, but the IRS can still challenge value and claim a partial gift.

A sale of the remainder interest for full value means that there is no gift and, accordingly, no requirement to file a gift tax return. On the other hand, the gift value of the remainder is usually quite small, and it may be better to file a gift tax return anyway, even on a sale, to allocate GST exemption and to start the statute of limitations period.

Risks vs. Rewards There are two primary risks associated with giving or selling a GRAT remainder interest. First, the IRS may apply the step transaction doctrine to collapse the GRAT and the subsequent transfer of the remainder into one generation-skipping transaction.

The IRS took essentially this position in a somewhat analogous situation in Private Letter Ruling 200107015. In this ruling, the taxpayer proposed to make a gift of his remainder interest in a charitable lead annuity trust (CLAT) created under the will of his parent (the decedent) to his children and sought a determination that the eventual distribution from the CLAT to his children would not be subject to GST tax because he, and not the decedent, would be treated as the transferor of the remainder interest.

The IRS noted that the purpose of Code § 2642(e) was to impose a GST tax on GSTs via a CLAT, which would otherwise be exempt from such tax, and to permit the proposed transaction would be contrary to this purpose. To prevent this result, the IRS ruled that there would be two transferors in the proposed transaction: the remainder beneficiary to the extent of the present value of his remainder interest (which was very small), and the decedent with respect to the balance of the trust. Although the IRS did not invoke the step transaction doctrine specifically, its ruling that the decedent would be the principal transferor is based on the implicit conclusion that the child's transfer of the remainder interest would be aggregated with the decedent's transfer creating the CLAT.

Even though this ruling involves a CLAT, its position arguably applies in the GRAT context given the similarities between CLATs and GRATs. Nonetheless, a number of practitioners have criticized this ruling as technically flawed[7] because the IRS did not correctly apply its own definition of "transferor" for purposes of chapter 13. Under the definition, the remainder beneficiary, by making a gift of his remainder interest, should have been deemed the transferor. If this is true, the IRS's position in the ruling that the decedent was the principal transferor is inconsistent with its regulations. In addition to the ruling not being technically cohesive, a taxpayer considering this technique might take into account that private rulings are not binding on other taxpayers and that the IRS has issued no subsequent rulings or additional authority regarding this technique in the context of a GRAT.

Another risk involves the valuation of the GRAT remainder interest. While valuation risk is present in many estate planning strategies, the risk here is exacerbated by the difficulty in valuing a GRAT remainder, particularly when transferred long after the GRAT is created (which may be important to avoid a step-transaction argument). If an IRS challenge to valuation is sustained there could be gift tax or use of lifetime credit. The best way to minimize this risk is to obtain a well-supported "qualified" appraisal from a reputable appraiser.

In sum, several strategies are available to use GRATs for GSTs. Their large potential benefits coupled with their untested nature make them candidates for wealthy clients who have a reasonably robust tax risk tolerance and wish to make GSTs without incurring gift or GST tax.

Endnotes

1. 115 T.C. 589 (2000).
2. Edward M. Manigault & Milford B. Hatcher Jr., "GRATs and GST Planning: Potential Pitfall and Possible Planning Opportunity," 20 Probate & Prop. 28, November/December 2006.
3. "Inclusion ratio" is defined in Code § 2642(a).
4. Code §§ 2613(a)(1), (a)(2).
5. Code § 2612(b).
6. Richard A. Oshins & Arthur D. Sederbaum, "Generation-Skipping and the GRAT: Sale or Gift of the Remainder," Estate Planning, June 2003; Michael D. Mulligan, "The Reinvigorated GRAT: Is a Sale to a Defective Trust Still Superior?" Estate Planning, Aug. 2002; Schiff Hardin & Waite, "Gift or Sale of GRAT Remainder to Dynasty Trust," Estate Planning, Sept. 2001.
7. Oshins & Sederbaum, *supra* note 6; Mulligan, *supra* note 6; Jonathan E. Gopman et al., "Ruling on Assignment of Vested Remainder Interest May Have Reached Wrong Conclusion," 26 Tax Mgmt. Estates, Gifts & Trusts J. 203 (2001).

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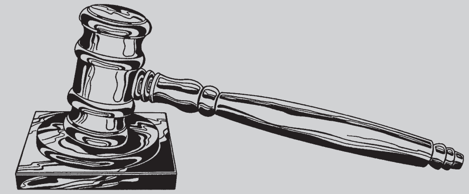
Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



DOMESTIC PARTNERSHIPS

Enforcement of Agreements; Property Settlement on Dissolution of Relationship Is Enforceable Despite Invalid Marriage

Plaintiff and defendant, a male couple, are New York domiciliaries. During their relationship defendant made gifts to plaintiff, including title to a ski house. In 2005 the parties were married in Massachusetts. The relationship then deteriorated, the parties separated and in September of 2005 they executed a "Separation Agreement" drafted by defendant's attorney which divided the couple's real and personal property and provided for a payment of $780,000 by defendant to plaintiff.

In January 2006 plaintiff sued for divorce and defendant moved for summary judgment dismissing the action and for a declaration that the agreement is void as a matter of law and that plaintiff must return property transferred pursuant to the agreement.

The Supreme Court dismissed the divorce action and upheld the separation agreement. First, the purported marriage was invalid. Because New York does not permit same-sex marriage, the "marriage" is invalid under Mass. Gen. L. ch. 207 § 11, which prohibits non-residents of Massachusetts from contracting a marriage which would be invalid under the laws of the state in which they reside. The court then upheld the agreement. It is not against public policy, there was adequate consideration, and it is unaffected by the invalidity of the marriage. *Gonzalez v. Green*, 14 Misc. 3d 641, 831 N.Y.S.2d 856 (Sup. Ct., N.Y. Co. 2006)

GIFTS

Requirements; Document Referring to Investment to Be Made from Proceeds of Future Sale Is Not Donative

Putative donee sued decedent's estate to enforce gift allegedly made by testator. The Appellate Division affirmed dismissal of the cause of action. The agreement relied on by the plaintiff refers to anticipating the decedent's "investment" to be made from proceeds of a future sale of real property. The document therefore lacks present donative intent and because the transfer of the money was dependant on the successful completion of a future transaction, there was no delivery of the subject of the gift. *Widom v. Mittman*, 39 A.D.3d 374, 833 N.Y.S.2d 502 (1st Dep't 2007)

GUARDIANSHIP

Article 81 Proceedings; Summary Disposition Not Proper Where Evaluator Finds Overreaching

Alleged incapacitated person opposed child's petition for appointment as guardian. The court evaluator concluded that there was no medical, psychological, or other evidence that a guardianship was needed. The evaluator did note, however, that the alleged incapacitated person did not seem to understand his estate planning documents, which had been drafted by a lawyer selected by the child with whom AIP was living, and that AIP had been subject to overreaching and undue influence by that child. The evaluator also moved to inspect the AIP's medical records and if necessary to retain independent medical evaluations. An affidavit by the attorney who had created the AIP's and his spouse's former estate plans also alleged undue influence by the child. The Supreme Court summarily dismissed the petition, finding that the estate planning documents met the AIP's needs.

The Appellate Division reversed, holding that the Supreme Court erred in dismissing the petition without discovery and a hearing. The evaluator's report and the affidavit were sufficient to raise a genuine factual question about the validity of the estate planning documents and the Supreme Court incorrectly concluded that the guardianship proceeding was not an appropriate forum in which to entertain challenges to those documents. The report of the evaluator and affidavits presented also raised issues about the AIP's capacity and the evaluator's motion should have been granted. *In re Daniel TT*, 39 A.D.3d 94, 830 N.Y.S.2d 827 (3d Dep't 2007)

PARENT AND CHILD

Artificial Insemination; Strict Compliance with DRL § 73 Not Necessary to Husband's Paternity

Husband and wife began proceeding for an uncontested divorce based on a separation agreement which among its provisions was a statement that the child born to wife as the result of a mutually agreed upon "course of artificial insemination" was not the child of husband and that husband would not be financially responsible for child. A law guardian was appointed for the child who recommended that the husband be held responsible for child support. The Supreme Court agreed, holding first that strict compliance with DRL § 73, which requires the husband's consent in writing to be the father of a child born to his wife as the result of artificial insemination, is not necessary and that facts of the case show the husband's clear and convincing consent to the artificial insemination. The child is therefore the child of the marriage and husband is responsible for child support payments. In addition, principles of equitable estoppel apply to prevent the husband from denying his responsibility. *Laura G. v. Peter G.*, 15 Misc. 3d 164, 830 N.Y.S.2d 496 (Sup. Ct., Delaware Co. 2007)

PROCEEDINGS

Probate; Conclusory Statement that Distributee Did Not Understand Meaning of Waiver and Consent Will Not Support Revocation of Probate

Testator's daughter brought an action seeking revocation of her waiver of process and consent to probate of her father's will, contending that she did not understand that her execution of the waiver and consent would prevent her from contesting the will. The Appellate Division affirmed the Surrogate's dismissal of the petition. The record shows that the petitioner is a certified public accountant and holds a master's degree in business administration and that she was provided with a copy of the will before executing the document. Under the circumstances her allegations that she did not understand the significance of the waiver and consent is not sufficient to allow revocation of probate. *In re Titus*, 39 A.D.3d 1203, 834 N.Y.S.2d 412 (4th Dep't 2007)

RIGHT OF ELECTION

Waiver; Waiver Contained in Separation Agreement Voided by Couple's Reconciliation

Husband and wife executed a separation agreement which included a waiver of rights in each other's estates and which stated that it could not be invalidated without a subsequent writing. They never divorced and seven years after the execution of the separation agreement, they reconciled and lived together as husband and wife until husband's death nine years later. Wife then filed notice of her exercise of her right of election, and husband's executor challenged the validity of the notice, alleging that the absence of a writing invalidating the agreement meant that the waiver of elective share rights remained in force. The Surrogate dismissed the executor's action and the Appellate Division affirmed. The couple's reconciliation voided the separation agreement and the requirement that the agreement could only be invalidated by a writing was therefore of no effect. *In re Britcher*, 38 A.D.3d 1223, 833 N.Y.S.2d 332 (4th Dep't 2007)

TRUSTS

Adopted Persons; Adopted Out Non-Marital Child Is Descendant of Income Beneficiary and Entitled to Share of Remainder

Non-marital child of the income beneficiary of two trusts created in 1926 and 1963 and who had been adopted out shortly after birth intervened in the accounting proceedings by the trustees of trusts created by her birth grandmother. Both trusts terminated on the death of the income beneficiary and are to be distributed to the income beneficiary's descendants. The Appellate Division reversed the Surrogate's decrees, which ratified the exclusion of intervenor from sharing in the trust property.

The court concluded that the policy considerations and reasoning of *In re Best*, 66 N.Y.2d 151, 495 N.Y.S.2d 345, 485 N.E.2d 1010, did not apply because the trusts in question were created before amendments to DRL § 117 in 1964 and 1966, which excluded adopted out children from inheriting from their birth families and which made clear that the 1964 amendments did not apply to wills or lifetime trusts. While there is nothing in the trust agreements themselves or the facts and circumstances surrounding the creation of the trusts which can give meaning to the term "descendants" as used the by the grantor, the law in effect at the time of the creation of the trusts did not exclude adopted-out children from class gifts in wills and trusts. The intervenor is therefore not excluded from the class of her birth mother's descendants because of the adoption.

Second, the statutes in effect at the time the trusts were created did recognize that non-marital children could be included in the class of children of their parents in at least some circumstances. The intervenor, therefore, is not excluded from the class of her birth mother's children because the creator of the trusts is presumed to know the law in effect at the time of the creation of the trusts. *In re Fleet Bank*, 38 A.D.3d 1235, 831 N.Y.S.2d 609 (4th Dep't 2007)

WILLS

Capacity; Testator Need Not Know Precise Value of Assets

Testator's estranged son objected to probate, alleging that although testator was not incompetent, the prong of the test for testamentary capacity that requires the testator to know the nature and extent of his property is separate from mental competency and requires that the testator must know the actual monetary value of the estate. In an extensive opinion examining cases and discussing the contextualized meaning of capacity, Surrogate Glen holds that the testator is not required to know the precise value of the property disposed of by will. *In re Khazaneh*, 15 Misc. 3d 515, 834 N.Y.S.2d 616 (Sur. Ct., N.Y. Co. 2006)

Construction; Similarity in Names of Charities Does Not Create a Latent Ambiguity

Testator gave 10% of his residuary estate to "The Audubon Society of New York State." Both "The Audubon Society of New York State, Inc." and "National Audubon Society, Inc." claimed the bequest. The Surrogate found that the description embodied a latent ambiguity and admitted extrinsic evidence in the form of an affidavit by the drafter of the will stating that in spite of the testator's identification of the state organization as the beneficiary of his will, the testator intended to benefit the national organization and then construed the will to refer to the national organization.

The Appellate Division reversed, holding that the failure to include the abbreviation "Inc." in the will did not render the disposition ambiguous. The Court also rejected the argument of the national association and the Attorney General that the existence of numerous charities using the phrase "Audubon Society" rendered the will ambiguous. In addition, the state and national organizations carry out similar activities and there is no reason to choose between them based on the testator's evident desire to make a gift to support the conservation of wildlife. *In re Scale*, 38 A.D.3d 983, 830 N.Y.S.2d 618 (3d Dep't 2007)

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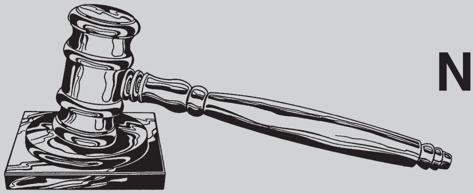

Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Abatement of Divorce Action

The administratrix of the decedent's estate sought advice and direction on the distribution of the net sale proceeds derived from the disposition of property she held with him as tenants by the entirety. Prior to the decedent's death, the fiduciary and the decedent were in the midst of a divorce, and the subject property was sold. The fiduciary distributed one-half of the sale proceeds to herself as and for her individual interest in the property.

As for the other one-half of the sale proceeds, the court held that upon the sale of the premises, the tenancy by the entirety was converted to a tenancy in common such that each party became entitled to full use and possession of his or her share of the proceeds.

Accordingly, the court held that one-half of the sale proceeds was payable to the decedent's estate, subject to a set-off pursuant to EPTL 5-3.1, and possible creditors' claims.

In re Estate of Schmitt, Jr., N.Y.L.J., May 8, 2007, p. 24 (Sur. Ct., Dutchess Co.) (Surr. Pagones)

Discovery of Matrimonial Records

In a contested discovery proceeding, the petitioner moved, *inter alia*, for an order compelling the respondent to produce net worth statements she executed in her pending matrimonial action. Respondent claimed that the documents were irrelevant to the Surrogate's Court proceeding and therefore were not subject to disclosure.

The subject matter of the discovery proceeding were numerous items of personal property, including jewelry, silver, china, furnishings and crystal, that petitioner claimed belonged to the decedent's estate. The respondent answered the petition by alleging that she was unaware of the existence or whereabouts of a number of items, and that other numerous items were given to her as gifts. The movant maintained that respondent's net worth statement would possibly demonstrate the provenance of the disputed property or constitute inconsistent statements.

The court noted that limited disclosure of matrimonial documents has been allowed as long as the material sought was relevant to the proceeding at issue. In view of the subject matter of the discovery proceeding, the court concluded that the demand for production was relevant, but allowed the respondent to redact any items in the net worth statement that she deemed not relevant or otherwise were not claimed by her to be a gift, with the understanding that she would be precluded at trial from claiming a gift as to any items so redacted.

In re Estate of Shepard, N.Y.L.J., April 23, 2007, p. 41 (Sur. Ct., Suffolk Co.) (Surr. Czygier)

Letters Testamentary Granted

In a contested probate proceeding, the preliminary executrix sought, *inter alia*, admission of the decedent's will to probate and her appointment as the executrix of the decedent's estate. The petition was opposed by the decedent's daughter, who cross-petitioned for the appointment of an independent fiduciary as administrator c.t.a. to pursue a wrongful death action against the decedent's spouse and a claim against her for the loss in value of the decedent's real property and additional expenses incurred by the estate.

The decedent's spouse had pled guilty to manslaughter in the first degree, a class B felony, for causing the death of the decedent. She was sentenced to a definite term of incarceration of six years plus five years post-release supervision.

The will of the decedent left his entire estate to his spouse, and named his daughter as contingent beneficiary. In addition, it named his spouse as executrix, and the petitioner in the proceeding as alternate. The decedent's spouse renounced her appointment as executrix, and the petitioner was issued preliminary letters testamentary. While the decedent's daughter alleged that she did not oppose the admission of the decedent's will to probate, she objected to the appointment of the preliminary executrix as executrix on the grounds of a potential conflict of interest with the estate given her friendship with the decedent's convicted spouse.

The court held that a potential conflict of interest between a fiduciary and a party interested in the estate does not warrant the denial of letters to or the removal of a fiduciary. Rather, it is actual misconduct, and not conflict of interest, that justifies removal. The court's authority to remove or refuse to appoint a named fiduciary is limited to the grounds specified in SCPA 707 and SCPA 711.

Within this context, the court found that the decedent's daughter had failed to provide any probative facts to declare the preliminary executrix ineligible to serve, and her objections were therefore dismissed. The court concluded that any issues relative to the wrongful death action or claims against the decedent's spouse could be revisited at the time the fiduciary filed her account.

In re Estate of Guldbrandsen, N.Y.L.J., May 15, 2007, p. 23 (Sur. Ct., Dutchess Co.) (Surr. Pagones)

Motion to Preclude

In a contested probate proceeding, the petitioner moved to preclude the objectant from offering evidence at trial for failure to give particulars in response to a demand for a verified bill of particulars served. In addition, the sole residuary legatee cross-moved for summary judgment dismissing the objections to probate.

The court granted the motion for summary judgment in proponent's favor as to the issues of due execution, testamentary capacity, fraud and forgery. As to the issue of undue influence, the objectant referred to numerous allegations of undue influence by reason of threats and acts of violence exercised upon the decedent and others by the sole beneficiary. In his verified bill of particulars he sought the names of the individuals who were so victimized or who witnessed the acts of undue influence.

Accordingly, the court denied the motion for summary judgment on the issue of undue influence and held that the objectant's bill of particulars was sufficient.

In re Estate of Jozefiak, N.Y.L.J., April 20, 2007, p. 32 (Sur. Ct., Kings Co.) (Surr. Seddio)

Preliminary Letters Testamentary

In a pending probate proceeding, the decedent's niece, who was the alternate executor named in her will, and the named executor under the will, each petitioned for preliminary letters testamentary.

In support of her application, the decedent's niece alleged that the named executor was duplicitous, lax and dishonest. She further alleged that he conspired with his brother to isolate the decedent from family and friends and deprive her of her property. In this latter regard, the record revealed that the named executor's brother had been the decedent's attorney-in-fact, and in that capacity transferred title to the decedent's residence to himself, his daughter and the named executor.

In opposition to the assertions by the decedent's niece, the named executor denied the allegations against him, and stated that he intended to fully investigate and discover the assets of the decedent's estate.

The court held that a testator's wishes regarding the appointment of a fiduciary, even a temporary one, will be honored unless there are serious and bona fide allegations of misconduct or wrongdoing. Where there is a clear showing of undue influence, the court can decline to appoint the named executor as preliminary fiduciary on the grounds of dishonesty pursuant to SCPA 707.

Based on the foregoing, the court directed that preliminary letters testamentary issue to the named fiduciary, on the grounds that the decedent's niece had failed to demonstrate good cause or serious wrongdoing that would nullify the testator's choice of fiduciary. Nevertheless, based on the circumstances and the allegations made by the decedent's niece, the court issued limited letters of administration to her for the purpose of her pursuing a discovery proceeding pursuant to SCPA 2102 and SCPA 2103.

In re Estate of Hoelzer, N.Y.L.J., June 4, 2007, p. 19 (Sur. Ct., Nassau Co.) (Surr. Riordan)

Revocation of Letters Denied

In a contested proceeding to revoke letters testamentary, the court concluded, after an evidentiary hearing, that the petitioners had failed to establish grounds for removal and denied the relief.

In support of their application, the petitioners alleged, *inter alia,* that a waiver and consent to probate was forged by the executor, that the estate property had been mismanaged, that an estate account had never been opened, that an estate tax return and fiduciary returns for the estate had never been filed, that an estate inventory had not been filed, and that no steps had been taken to complete the administration of the estate. At the hearing of the matter, the executor testified that he collected rents on estate property, and paid the expenses attendant thereto, but had deposited and expended the monies from an account he held individually with one of his brothers. Moreover, he admitted that he failed to file an estate inventory or fiduciary report, and failed to file fiduciary income tax returns. However, he stated that he had attempted to keep the estate property rented, and to repair the property to bring it up to code, although this latter effort had not been possible due to insufficient funds in the estate to do so. The testimony of the petitioners revealed that this insufficiency in funds was, in part, attributable to their refusal to pay rent on the property on the grounds that the executor's appointment had been fraudulently procured. Nevertheless, the executor testified that he was prepared to wind up the estate once the subject property was sold.

Based on the foregoing, the court held that the petitioners had failed to satisfy the statutory grounds for removal of the fiduciary. In addition, it opined that it was loath to remove an executor where the administration of an estate is close to being completed.

Accordingly, the petition was denied.

In re Estate of McHayle, N.Y.L.J., May 21, 2007, p. 44 (Sur. Ct., Kings Co.) (Surr. Seddio)

Revocation of Letters Granted

In *In re Estate of Jones,* a petition was filed by the decedent's niece and nephew seeking to have the letters testamentary issued to the executor under the decedent's will revoked, and to have the named executor in the will appointed in his place and stead.

Pursuant to the provisions of his will, the decedent bequeathed specified personal property to his nephew, Robert, and devised and bequeathed the residue of his estate in four equal shares to his sister, his two nephews, of which Robert was one, and his niece. The instrument was admitted to probate on March 15, 2006, and letters testamentary were issued to Robert as the named executor.

The decedent's estate consisted, in part, of a residential parcel of real property. The uncontradicted proof revealed that the executor lived at the premises rent-free since his appointment. In support of their application, the petitioners' alleged that the executor should have leased the premises or attempted to sell it on the open market, and that he had failed to maintain the premises, but for his own use and benefit. In response to the petitioners' claims, the executor contended that he was awaiting the court's approval for a sale of the subject property.

The court found the executor's defense unavailing inasmuch as the provisions of the decedent's will gave him the unfettered right to sell the property on such terms and conditions as he deemed to be in the best interests of the estate. Moreover, the court noted that the executor had failed to adequately address the accusations against him of self-dealing. Further, the court found that the executor had failed to file an inventory in compliance with UCR § 207.20, and, as a result, was subject to having his letters revoked.

Accordingly, based upon the foregoing, the court found that the petitioners had met their burden of proof for removal. In view of the record, the Court held no hearing was required as a precursor to granting the relief requested, and the letters testamentary previously issued to the executor were revoked.

In re Estate of Jones, N.Y.L.J., May 22, 2007, p. 23 (Sur. Ct., Dutchess Co.) (Surr. Pagones)

Standing to Pursue a Discovery Proceeding

In a proceeding to set aside a deed, the defendant moved to dismiss the action pursuant to CPLR 3211(a)(10) on the grounds that the plaintiff failed to join a necessary party.

The decedent died on July 27, 2003, survived by two daughters. One of the decedent's daughters sought probate of her will. Prior to the probate of the instrument, the daughter, in her individual capacity, instituted an action against her sister to invalidate the subject deed.

The court granted the defendant's motion to dismiss the complaint not only on the ground that the plaintiff had failed to join the estate of the decedent as a necessary party, but also on the ground that the plaintiff lacked standing in her individual capacity to bring the action. The court held that a nominated executor, charged with the duty of recovering property of the estate, has no independent cause of action for the recovery of such property.

In re Estate of McMahon, N.Y.L.J., March 29, 2007, p. 31 (Sur. Ct., Queens Co.) (Surr. Nahman)

Summary Judgment Granted on Issues of Due Execution, Testamentary Capacity and Fraud

In a contested probate proceeding, the petitioners moved for summary judgment dismissing the objections to probate of the propounded instrument.

The will offered for probate was undated and nominated the decedent's three siblings as executors. In pertinent part, the objectants, who were the decedent's children, maintained that because the document was undated, it was a nullity. In addition, they alleged that the will was not duly executed, that the decedent lacked testamentary capacity on the date of its execution, and that it was procured by the fraud and undue influence of the decedent's parents and siblings.

On the issue of due execution, the objectants alleged that the decedent failed to properly subscribe the document in the presence of the attesting witnesses or acknowledge to those witnesses that the instrument was his will. The objectants also claimed that while the witnesses to the instrument provided affidavits as to when the instrument was executed, they failed to state where it was executed. Further, they pointed to the fact that the draftsman of the document was the decedent's brother, that the decedent's father was in the room at the time of execution, and that the execution of the instrument was supervised by a paralegal.

The petitioners argued that the testimony of the supervising paralegal and witnesses confirmed that the instrument was duly executed, and that the only allegations raised to counter that conclusion were that the instrument was not read aloud, that it was not bound at the time of its execution, and some speculation that the decedent failed to wear reading glasses when he signed the document.

The court held that because the execution of the instrument was not supervised by an attorney, there could be no presumption accorded to the due execution of the document. Nevertheless, the court found that the testimony of the witnesses revealed that the decedent signed the instrument at the end thereof, in their presence, and declared the document to be his will, all in accordance with the statutory formalities. Moreover, regarding the objectants' allegations that the will was not stapled when signed, the court found that the paralegal who supervised the execution had testified that she had stapled the instrument prior to its signing, that the instrument appeared in a logical sequence, and that only slight evidence is needed to demonstrate that the document was fastened in some permanent form. Accordingly, summary judgment on the issue of due execution was granted.

The court also granted summary relief on the issue of testamentary capacity. While the evidence revealed that the decedent was quite ill, mentally and physically, in the weeks prior to his death and the execution of the document, the hospice care personnel who attended to his care, and the attesting witnesses, all testified that he was lucid and alert at the time the will was signed. Specifically, the attesting witnesses stated that the decedent possessed the requisite capacity to execute the document.

The court opined that less capacity is required to execute a will than any other legal instrument. As such, infirmities, such as those suffered by the decedent, did not, standing alone, suffice to establish a person's inability to make a will. Further, although objectants argued that the decedent lacked capacity because he was under the impression that he did not own a parcel of property that had been mortgaged, the court found that a testator is only required to have a general understanding of his real and personal property at the time he executes his will.

Finally, the court held that the objectants failed to support their claim that the propounded document was the result of fraud and granted summary judgment on this issue in the petitioners' favor as well.

However, the court concluded that summary judgment was not warranted on the issue of undue influence given the fact that the decedent was suffering from end-stage cancer at the time the will was signed, he had recently moved into his parents' home, the will was executed in close proximity to the decedent's death, and his brother prepared the document which represented a change from a prior testamentary scheme.

In re Estate of Spataro, N.Y.L.J., March 19, 2007, p. 38 (Sur. Ct., Suffolk Co.) (Surr. Czygier)

Summary Judgment Granted

The decedent died survived by three children. At the time the propounded will was executed, there were two children of a pre-deceased son then alive, namely, the objectant and his sister. In that will, the decedent provided for $10,000 bequests to the objectant and his sister, or the survivor of them. Objectant's sister subsequently died. Other than these bequests and a few non-family and charitable bequests, the propounded will left her entire estate equally to her three daughters and named one of them as well as her son-in-law as co-executors.

The objections to probate alleged lack of due execution, lack of testamentary capacity, undue influence and fraud. The petitioners moved for summary judgment.

In support of the due execution of the instrument, the petitioners submitted the affirmation of the attorney-draftsman, who stated that he supervised the will execution, and, together with his wife, witnessed the signing of the document at the decedent's request. Further, the attorney's affirmation stated that the instrument was executed in accordance with the statutory formalities. The court opined that where an attorney supervises the execution of a will there is a presumption of due execution. Inasmuch as the objectant had not submitted any proof to rebut this presumption, summary judgment on the issue of due execution was granted.

In support of the decedent's testamentary capacity, the petitioner offered the affidavits of the attesting witnesses, which were executed contemporaneously with the will, and which stated that the decedent was of sound mind. In addition, one of the proponents submitted an affidavit detailing entries made in the decedent's diary at or about the time the will was executed, which reflected her ability to manage her schedule, pay her own expenses, and handle complex financial transactions. Moreover, the decedent's checkbook at this time revealed that she was aware of her family members, and the natural objects of her bounty, inasmuch as she had written checks as gifts to her children and grandchildren, including the objectant and his children. Finally, the decedent's housekeeper of eleven years submitted an affidavit wherein she stated that the decedent was alert, totally conversant and in charge of all her family, social, medical and financial affairs.

In sharp contrast to the foregoing, the objectant failed to offer a scintilla of evidence that the decedent suffered any mental impairment that would jeopardize his capacity to execute the propounded will.

Similarly, on the issue of forgery, the court found that the objectant failed to produce any competent evidence from an expert or other person familiar with the decedent's handwriting that would indicate that the signature on the subject will was not that of the decedent.

Finally, as to the issues of fraud and undue influence, the objectant maintained that the decedent was mistaken at the time of her death as to the value of the family business in which her husband and predeceased son were involved, and more specifically, because she thought it was successful, she did not leave anything in her will for her son or his family. Further, the objectant claimed that the will was the result of undue influence because the attorney-draftsman thereof was well-known to the proponents.

The court held that when mistake is alleged, probate will be denied when it is of such a character as to affect the decedent's testamentary intentions, and reflects the intentions and acts of the influencing party. Within this context, the court found that the objectant's contentions regarding the decedent's mistake as to the value of the business were speculative and insufficient to sustain his claim of undue influence. Furthermore, as to the issue of the attorney-draftsman, the evidence revealed that the attorney was a good friend of the family, that her husband previously used him for legal matters, and that he had been selected because the attorney who had drafted the decedent's prior will was very ill at the time the propounded will was prepared and executed, unable to practice law, and died shortly thereafter. Moreover, the court found it significant that at the time the will was executed, the proponents were in Florida. Accordingly, the court dismissed the objections as to fraud and undue influence.

In re Estate of Greene, N.Y.L.J., October 19, 2006, p. 33 (Sur. Ct., Kings Co.) (Surr. Torres)

Witness-Beneficiary

At issue in an uncontested probate proceeding was whether the disposition to the decedent's sister was void on the grounds that she was one of the two attesting witnesses to the execution of the propounded instrument.

In order to salvage the bequest, the petitioner requested the court to determine that the attorney who notarized the self-proving affidavit annexed to the will be treated as an attesting witness. In support thereof, the petitioner relied on "notary cases," which hold that where a proposed attesting witness signs a will as a notary public, inquiry should be made to determine whether the notary signed merely in that capacity or as a witness to the execution of the document at the request of the testator.

In response to these opinions, the court took the testimony of the second attesting witness and the attorney. While the testimony of the witness regarding the execution of the instrument was vague, the attorney was clear that the testator did not ask that he serve as a witness to the execution of her will, and that he only signed the instrument as a notary public.

Based upon the foregoing, and the provisions of EPTL 3-2.1(a)(4), the court held that the testimony of the decedent's sister was needed to prove the propounded instrument. Accordingly, the court declared her bequest under the will void pursuant to the provisions of EPTL 3-3.2, and limited her interest in the estate to her share in intestacy.

In re Estate of Margolis, N.Y.L.J., February 23, 2007, p. 32 (Sur. Ct., N.Y. Co.) (Surr. Roth).

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