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A Message from the Section Chair

Wallace Leinheardt

A Call for a Commission to Study Elder Abuse Laws

Some recent cases I have become aware of point to the need for a thorough review of the laws pertaining to victimization of the elderly. As life expectancy has risen in the United States, so have the number of elder abuse cases. Financial benefit "prospectors" have discovered a new mother lode . . . the elderly!

In a case in which my firm is involved, Kings County Surrogate Diana Johnson held that the law did not permit her to consider voiding a marriage between an alleged incapacitated 99-year-old and his 47-year-old home care aide, alleged to have been procured by fraud, deception, coercion and undue influence, and which was never acknowledged during the Decedent's lifetime.[1] The Court held that the "widow" had a right under EPTL 5-1.1-A to claim an elective share against the Decedent's Will. Surrogate Johnson stated that

> whether [the decedent] lacked capacity or his consent was procured by force, fraud or duress, it does not disqualify petitioner from taking her elective share. While this may appear to be incongruous and seemingly invite a plethora of surreptitious "deathbed marriages" as a means of obtaining one-third of a decedent's estate immune from challenge, this is simply the state of the law. It is not for this Court to write disqualifications into EPTL 5-1.2 or alter DRL § 7 which makes a voidable marriage void from the time [its] nullity is declared, rather than from the time of the marriage.

In another situation, an 80-year-old gentleman is refusing to file a complaint with the District Attorney's office against his "assistant" who allegedly misappropriated in excess of $200,000 of his funds. The District Attorney's office indicates that its policy is not to pros-

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ecute a claim unless either the victim signs the complaint, or the victim has been found incapacitated and the guardian signs the complaint.

The number of cases reported to the Queens County District Attorney's office for possible prosecution of economic crimes against the elderly has risen from 179 reported in 2006 to 296 reported in 2007 to 173 for the first six months of 2008. I am told that the Queens' percentages are mirrored statewide.

Increasingly, attorneys are being used to assist exploiters in achieving their goals. The increased use of powers of attorney and trusts, in addition to Wills, is enabling individuals to "legally" gain access to the victims' funds during their lifetimes and to assure transfer after death.

Closer examination reveals that, in many instances, the elderly victims have become totally dependent upon their caregivers and will do anything the caregivers ask of them for fear of being "abandoned."

While local Adult Protective Services, when notified, will attempt to intercede and protect the elderly, in general their resources are so limited that they are unable to provide meaningful assistance except in crisis situations.

Sadly, recently I have been given to understand that a pending investigation involves an attorney who served as a Property Management Guardian and who is alleged to have misappropriated substantial funds from a number of his wards.

In a number of cases, even when guardians have commenced discovery and turn over proceedings, these proceedings may be terminated by the death of the incapacitated person, leaving the guardian with authority only to wind up the decedent's affairs. Increasingly, the Public Administrator is being called upon to recover property that previously belonged to the now deceased incapacitated person.

I believe that the time has come for a special commission to be formed, comprised of lawyers, judges, prosecutors, social workers, and others with experience in elder abuse, to study the existing laws and to recommend appropriate changes which will afford greater protection to the most vulnerable among us.

Endnote

1. *In re Berk*, N.Y.L.J., July 14, 2008, p. 19 (Sur. Ct., N.Y. Co.) (Surr. Johnson).

Wallace L. Leinheardt

Grantor Retained Annuity Trusts—Tax-Free Plan for Family Businesses

By Shelly Meerovitch

Introduction

Planning for a client with a family-owned business presents many unique challenges to the estate planner. The ultimate goal is to strike a comfortable balance between a client's need to maintain control of the family business and the client's wish to minimize transfer taxes and protect his or her successors. The use of grantor retained annuity trusts ("GRATs") has always been a popular method in achieving this resolution. Now more than ever, with interest rates at historic lows, the use of GRATs can minimize, or even eliminate, transfer taxation while permitting the client to maintain control over the family business. This article is intended to (1) present a brief overview of what GRATs are and how they operate, (2) discuss developments in the law pertaining to GRATs that every practitioner should be aware of and (3) provide a step-by-step illustration of how to use a GRAT to minimize taxation and maximize your client's control of a family business, while highlighting key considerations that should not be overlooked.

Grantor Retained Annuity Trusts—Background

What are Grantor Retained Annuity Trusts ("GRATs")?

GRATs are trusts by which, after an initial contribution of property, the grantor retains the right to receive a fixed annual amount from the trust for a fixed period (the "Distribution Period"). The Distribution Period can vary according to a number of factors discussed below. After the Distribution Period, the GRAT terminates and the remaining assets can either continue in further trust for, or be distributed to, beneficiaries other than the grantor.

Valuing the Gift to a GRAT

Generally, the value of property gratuitously transferred during a person's life is subject to a gift tax. However, where GRATs are utilized, because the grantor retains the "use" of the GRAT assets during the Distribution Period, the value of the gift to the GRAT's remaindermen (the individuals whose beneficial enjoyment of the property is deferred until the end of the Distribution Period) is not the fair market value of the assets at the time of contribution. Instead, the value of the gift to the GRAT's remaindermen is the present value of their right to receive the remaining GRAT assets at the end of the GRAT's term. In other words, the value is reduced by the present value of the grantor's right to "use" the GRAT assets during the Distribution Period. Ideally, property contributed to a GRAT will appreciate in value over the term of the GRAT sufficiently so that the value of the assets received by the beneficiaries after the Distribution Period will exceed the present value of their remainder interest calculated at the time of the transfer. Here is where the real benefit of this estate-planning tool can be realized. To the extent the assets appreciate in value during the distribution period at a rate in excess of present interest, this appreciation will not be subject to additional gift tax since the value of the gift is fixed on the date of the GRAT's creation.

> *"Now more than ever, with interest rates at historic lows, the use of GRATs can minimize, or even eliminate, transfer taxation while permitting the client to maintain control over the family business."*

Thus, the initial valuation of the remainder interest in the GRAT is critical to the GRAT's success. The value of the remainder interest is determined at the time of contribution according to the valuation principals set forth in § 7520 of the Internal Revenue Code[1]. The following three variables must be considered in valuing the remainder interest: the length of the Distribution Period, the § 7520 rate applicable in the month when the GRAT is created and the size of the guaranteed annuity that will be paid to the grantor.

The longer the term of the GRAT, the lower the § 7520 rate and the higher the retained annuity, the greater the reduction in the value of the gift. Consequently, the current historically low interest rates make GRATs a particularly attractive estate-planning tool.

Estate Taxation of a GRAT

If the grantor dies before the end of the GRAT term, some or all of the GRAT corpus will be included in the grantor's estate. Until recently, the Internal Revenue Service (the "IRS") has taken the position that, if the grantor dies before the end of the GRAT term, the entire trust corpus will be included in the grantor's estate under § 2039. However, in 2007, the IRS issued proposed regulations that would instead apply § 2036 to GRATs, providing that the portion of the GRAT includible in the decedent's estate would only be the portion of the trust corpus necessary to yield the annual payments applying the appropriate § 7520 rate.[2]

Whether the IRS applies § 2039 or § 2036, it is advisable to use a GRAT term that the grantor can be reasonably expected to survive. Usually, the GRAT will continue until the end of the term, paying the annuity to the grantor's estate if he dies before the end. Upon the expiration of the GRAT term, the property then on hand will be distributed in accordance with the provisions of the GRAT.

> *"As long as the family business has sufficient cash flow, zeroed-out GRATs can be utilized to eliminate the estate taxes on the value of the business at no tax cost, while allowing for the maintenance of voting control over the company."*

Zeroing Out the Gift to a GRAT

A zeroed-out GRAT is a GRAT in which the grantor retains an interest (i.e., annuity stream) that is equal in value to the value of the property contributed to the GRAT. This results in a taxable gift to the GRAT's remaindermen having a value of zero and consequently, upon the creation of the GRAT (or initial transfer of property), no gift tax will be due or Applicable Exemption Amount used. The IRS formerly took the position that it was never possible to zero-out a GRAT[3] in light of the possibility that the grantor will predecease the term of the GRAT. The IRS' position was that the continuing payments to the grantor's estate did not constitute the retention of a "qualified interest" under § 2702. Thus, the IRS ignored the continuing payments to the grantor's estate, reasoning that a grantor's right to receive an annuity for the shorter of his life or a fixed term was always going to be worth less than the grantor's right to receive the annuity for a fixed term.

However, in 2000, in *Walton v. Comr.*, 115 T.C. 589, the Tax Court formally rejected the IRS position. In *Walton*, the Court held that it is indeed possible to zero-out a GRAT because the annuity payments to the grantor's estate may be considered in determining the value of the retained interest in the case of a GRAT. Since *Walton*, the IRS has acquiesced to the Tax Court's position.[4]

Income Taxation of a GRAT

From an income tax perspective, the GRAT is a grantor trust and its income, including capital gains, is taxed to the grantor, whether or not it exceeds the annuity amount. The terms of the GRAT may authorize reimbursing the grantor for such tax payments.[5] If the grantor survives the GRAT term, there will be no further tax to the grantor on any continuing trust income unless the grantor's spouse is a beneficiary of the continuing trust or it is deliberately drafted to "flunk" the grantor trust rules.[6] In such case, the income of the trust will continue to be taxed to the grantor.

Use of GRATs to Plan for the Disposition of a Family Business—An Illustration

Generally

As a result of the *Walton* decision and the current historically low interest rates, the climate has never been better for GRATs to be incorporated in the estate plans of clients with income-producing family-owned businesses. As long as the family business has sufficient cash flow, zeroed-out GRATs can be utilized to eliminate the estate taxes on the value of the business at no tax cost, while allowing for the maintenance of voting control over the company.

The following is a brief illustration of the steps that could be taken to accomplish this goal. Assume a Husband and Wife each own 50% of a closely held family business ("Fam Co"). Assume further that Fam Co constitutes the lion's share of the value of Husband's and Wife's estates.

Step 1: An independent appraiser should appraise the value of Fam Co.

Step 2: Assuming Fam Co has 100 outstanding shares, Fam Co should then be re-capitalized so that each of Husband and Wife will own one voting share and 49 non-voting shares.

Step 3: Each of Husband and Wife should then create his / her own GRAT and contribute his or her non-voting shares to it. The term of the GRAT and the annuity payments will depend on the appraised value assigned to the spouses' respective interests in Fam Co. The value should be further discounted to reflect the fact that the contributed interests are minority non-voting interests in a privately held company. Note that during the term of the GRAT, Husband and Wife may continue to act as trustees of their respective GRATs. During the term of the GRATs, each of the grantors will receive a fixed annuity payment generated by the income earned by the Fam Co shares contributed to the GRAT. To the extent the income earned by Fam Co is insufficient to satisfy the annuity obligation in full, a loan arrangement can be entered into to leverage the Fam Co shares. It should be noted, however, that if access to the GRATs' property beyond the required annuity payments is desired (for example, to reimburse the grantor(s) for income taxes on the GRAT's income if it exceeds the annuity payment), an unrelated disinterested trustee who does not have a beneficial interest in the GRAT will need to be appointed.

Step 4: Since the remainder interests (if in further trust) in the two GRATs must differ if the reciprocal trust doctrine is to be avoided, upon the expiration of the term of the GRATs, it is recommended that (a) Wife become the sole beneficiary of the continuing trust under Husband's GRAT, and (b) Husband and children become the beneficiaries of the continuing trust under Wife's GRAT, or vice versa.

Step 5: Additional flexibility can be built in by giving each of Husband and Wife, upon their respective deaths, a limited power over the trust created by his or her spouse to modify the duration, etc., of the continuing trusts for the children. This option allows each spouse to make determinations in the future while ensuring that the children's beneficial interests are protected.

Income Taxation—Additional Planning Opportunity

As discussed above, each of Husband and Wife will be responsible for paying the income taxes on the income generated by their respective GRATs. While some states[7] allow for reimbursement from the GRATs for such payments, estate planners should make their clients aware of the benefits of not being reimbursed. First, if the grantor is not reimbursed by the GRAT for the grantor's payment of income taxes, the GRAT is effectively augmented by the grantor, to the extent of the value of the income taxes, without the grantor having to pay any gift taxes. Second, by paying the GRAT's income taxes the grantor is able to further reduce his or her estate for estate tax purposes.

Estate planners should pay careful attention when drafting the provision authorizing the grantor's reimbursement. In Revenue Ruling 2004-64 the IRS concluded that while a grantor's payment of income taxes generated by a grantor trust will not result in the grantor making an additional taxable gift to the trust, if the reimbursement of the grantor is mandated either by the trust agreement or by State law, all of the trust assets will be included in the grantor's taxable estate. If, however, the trustee only has the *discretion* to reimburse the grantor, the existence of such discretion in and of itself should not cause the trust assets to be includible in the grantor's gross estate. In the latter case, the presence of other facts, such as a pre-existing understanding or arrangement between the grantor and the trustee with respect to reimbursement may result in inclusion of the trust assets in the grantor's estate.

Thus, in order to ensure that the trust assets are not subject to estate tax in the grantor's estate, reimbursement provisions should be discretionary and, where State law makes reimbursement mandatory, the trust agreement should specifically opt out of such State law.

Estate Taxation—Providing for Death Before Expiration of GRAT Term

One Spouse Predeceases the GRAT Term—If either Husband or Wife does not survive the term of his or her GRAT, the interest in Fam Co will either revert to his or her estate or be disposed of pursuant to a retained power of appointment. To ensure that no estate taxes will be generated until the surviving spouse dies under such circumstances, Husband and Wife should consider leaving their residuary estate, or at least their contingent reversion in the GRAT, to the survivor. If this is done, no estate taxes will be generated because the gift will qualify for a marital deduction. Finally, the surviving spouse will have the opportunity to create another GRAT with the property she or he inherits, effectively creating a "second bite at the apple" to continue the estate planning begun by the grantor.

Both Spouses Predecease the GRAT Terms—Clients should be advised of the option of obtaining a term joint and survivor insurance policy to provide the survivor's estate with the liquidity needed to pay for the estate taxes that will be due should both of them predecease the term of their respective GRATs. Such a policy should be relatively inexpensive, as it is both a term and a joint survivor policy (meaning it has no cash surrender value and only pays out if both of the clients die). In order to ensure that the proceeds of this policy are not themselves included in the clients' estate for estate tax purposes, it is recommended that the trustees of an Insurance Trust purchase this insurance policy.

Effect of Creating Lifetime GRATs on Testamentary Plans

Where Fam Co comprises the majority of the clients' estates, if Husband and Wife survive the terms of their respective GRATs a substantial portion of their estates will be disposed of by the terms of the GRATs. Under such circumstances, additional tax planning can further reduce or even eliminate the estate tax that will become due on the couple's remaining assets (including the remaining voting shares in Fam Co not initially transferred to the GRATs) upon their death.

This can be achieved through the creation of a testamentary Charitable Lead Trust ("CLT") that will be funded with the surviving spouse's Fam Co voting shares and any of his or her remaining assets which are not specifically bequeathed. This will further reduce any estate taxes due on the survivor's death through the use of a charitable deduction. The charity named could be the Husband's and Wife's own family foundation and their children can act as the directors of the foundation. During the term of the CLT, an annuity or a unitrust amount will be paid to the charity of the Husband's and Wife's choosing and upon the expiration of a given term of years, the CLT's property will be distributed to the children.

> *"A good estate plan is one that not only minimizes transfer taxation but also successfully addresses a client's concerns about control and family needs."*

Conclusion

A good estate plan is one that not only minimizes transfer taxation but also successfully addresses a client's concerns about control and family needs. Striking a balance among these often-competing objectives is always a delicate task but when a client's estate is largely comprised of a family-owned business, the planning process becomes even more challenging. In light of recent developments in the law and with interest rates at historic lows, GRATs are now particularly useful in planning for estates with income producing family-owned businesses because they can enable clients to maintain control over their family-owned businesses while still minimizing transfer taxation.

Endnotes

1. Section 7520 of the Internal Revenue Code of 1986, as amended (hereafter IRC); Treas. Regs. § 20.7520-3(b) and § 25.7520-3(b).
2. Prop. Regs. § 20.2036-1(c)(2)(i).
3. Treas. Regs. § 25.2702-3(e) *Ex.* 5.
4. Notice 2003-72 and 2003-44 I.R.B.
5. Rev. Rul. 2004-64, 2004-27 I.R.B. 7.
6. *E.g.*, by giving the grantor the ability to substitute trust property under § 675(4) of the Code.
7. *See, e.g.*, New York Estate Powers and Trusts Law 7-1.11(a).

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Utilizing Mediation to Resolve Estate Litigation

By Leona Beane

Trusts and estates attorneys regularly encounter disputes among distributees, beneficiaries, relatives and business associates of the deceased, particularly when dealing with dysfunctional and / or non-traditional families and second and third marriages. That's an integral inherent aspect of the practice.

Family Probate Disputes

Let's consider the following scenario:

Uncle Joe died last month. His will was drawn up 20 years ago. He kept saying he was going to do a new will, but no new will or codicil has been located, and nobody knows if a later will was ever executed. Uncle Joe never had children. He left his entire estate to be divided equally among his six nieces and nephews.

The named executrix was Uncle Joe's wife (who died last year). The named substitute executor is Uncle Joe's brother, Bill (age 89). Bill doesn't want to take on the job of executor as he is getting on in years, and doesn't want to have to deal with the six nieces and nephews (two of whom are his own children) because they all have been arguing among themselves for years since they were kids.

Uncle Joe's probate assets include the house he lived in, which contains some antiques, and a stamp collection and coin collection. Jack, one of the nephews, claims that Uncle Joe promised he would leave the valuable stamp and coin collections to Jack.

Another asset is the upstate cottage on the lake. For the last ten years, Betty (niece) has stayed at the cottage with her children for the entire summer. Uncle Joe promised Betty she would always be able to spend her summers at the cottage, as he was including this in his will. Some of the others also stayed at the cottage at different times during the year.

For many years Uncle Joe owned and operated a clothing store. For the past ten years, Mary and Arthur (niece and nephew) had been working in and managing the store. Several years ago, Uncle Joe gave them each 10% of the shares in the corporation that owned the store, and promised that when he died the store would belong to both of them.

You were not the attorney who prepared the Will. There are no provisions in the Will relating to tax planning or tax apportionment; there are no trusts or life estates. There is no nominated executor eligible and willing to serve. Based on available information, it is believed that the probate estate will amount to $6 million, or more.

Uncle Joe also had an IRA valued at $500,000. The named beneficiaries are three of the nieces. Uncle Joe maintained several substantial bank accounts payable on death to several named individuals. Some of the beneficiaries of the accounts include some of the nieces and nephews, but not all. There are serious liquidity issues because the IRA and most of the bank accounts have named beneficiaries. There most probably are not sufficient liquid probate assets to pay the estate taxes.

Two of the nieces and a nephew come to you for advice. The other niece and a nephew contact another attorney. The remaining nephew retains his own lawyer. Thus, three attorneys represent the six nieces and nephews.

Jack insists Uncle Joe promised him the stamp and coin collections; he is not giving that up. Betty insists she wants to continue to stay at the cottage during the months of July and August and she refuses to agree for the cottage to be sold. Arthur and Mary claim they are entitled to the clothing store—they've worked and managed the store all these years receiving very low salaries, and Uncle Joe promised to leave them the store. They insist there must be another written document signed by Uncle Joe that leaves them the remaining 80% of the shares of stock in the clothing store corporation.

Some of the foregoing facts will presumably sound familiar—the names and property and amounts are different, but virtually all trusts and estates attorneys have at some time been faced with similar controversies among distributees, beneficiaries and other relatives.

A large family meeting is held among the six nieces and nephews (plus several spouses) and the three attorneys. After an hour, the meeting deteriorates into a screaming match. Another meeting of the three attorneys didn't last long either. They discussed who should file for probate—certainly any one of the six could petition for probate and request Letters of Administration CTA. None of the six wishes to give up the right to administer the estate. The attorneys know that the Surrogate's Court will not approve the appointment of six fiduciaries to act jointly. Perhaps the oldest should file for probate; anyone who doesn't consent will be served with a citation and then can file objections, and the Court will decide. Each of six is concerned with what will happen; they simply don't trust each other.

Probate Litigation

The probate litigation will be extensive since it appears that the six nieces and nephews don't want to agree with each other about anything. Even after an administrator is appointed, there will be recurring disputes when the administrator has to sell property in order to raise cash to pay the estate tax, administration expenses and creditors' claims, and distribute the probate assets "equally." The accounting proceeding will provoke additional litigation. All the extensive litigation will be extremely costly and time consuming. In the end, the parties will still be complaining because they don't trust each other and will continue to be frustrated no matter what the end result is. Why not think of mediation or some form of ADR instead?

"Arbitration has been effective in many different types of proceedings—it is less costly than traditional litigation; the hearings are generally completed in a much shorter timetable; it is private; it is confidential; it is more flexible."

Alternative Dispute Resolution

Mediation and arbitration are two different forms of alternative dispute resolution (ADR).[1] There are additional forms of ADR, such as early neutral evaluation, mini trials, and summary jury trials. However, arbitration and mediation are the most commonly utilized forms of ADR.

Arbitration

Arbitration[2] is a process (pursuant to agreement of the parties, or by statute or court rule) wherein a neutral third party (the arbitrator) renders a decision based on sworn testimony and evidence presented at a hearing. The rules of evidence are somewhat relaxed compared to the strict rules of evidence required at a court trial. There is generally very limited discovery. There is no jury, and no right to appeal. The arbitrator's decision (referred to as an "award") is binding on the parties.[3] Arbitration awards can be reviewed by a court, and sometimes (although very seldom) are vacated, but only on very limited grounds.[4] Arbitration has been effective in many different types of proceedings—it is less costly than traditional litigation; the hearings are generally completed in a much shorter timetable; it is private; it is confidential; it is more flexible. Also, it is possible to request the appointment of an arbitrator who has specific subject matter expertise in the area under dispute, along with other qualifications.

Mediation

Mediation is quite different from arbitration, although both are forms of ADR.

Mediation is a voluntary, confidential process wherein a neutral third party (called the mediator) assists the parties in reaching a resolution of their dispute.[5] The mediator does *not* render a decision, but rather assists the parties in resolving their dispute. It is crucial that parties with full settlement authority be present during the mediation. Without all parties with full settlement authority present, the mediation effort will be wasted. Mediation is extremely well-suited to resolving inter-personal disputes, such as probate, trust, estate and guardianship litigation.[6] All of these areas customarily involve a significant emotional component. Yet mediation has not been fully utilized by the trusts and estates bar in New York.

Advantages of Mediation

What are some of the advantages of mediation? It is confidential; it is voluntary; it is much less expensive than litigation, and thus more cost effective. The dispute is generally resolved in much less time; the process is not subject to court delays; there are no extensive depositions or discovery (the attorneys may agree to exchange certain limited documents before the mediation begins). It is private—there is no court file, thus no publicity. If an agreement is signed resolving the dispute, the agreement has the binding effect of a contract. If one party refuses to sign the agreement, then there is no agreement. No one is forced or pressured into signing.

Mediation in Estate Matters

In estate matters, there often is prior history of sibling rivalry, jealousy, animosity, and other emotional issues related to family dynamics. Sometimes disputes and animosity have been festering for years. This family history continues to inform the parties' actions, motives, and agenda in any dealings with each other, particularly while experiencing grief after the death of a loved one. Grief associated with the death of a loved one creates an extra tension.[7] After the estate matter is finally resolved, the family may still be involved with ongoing family disputes into the future. Mediation will assist them in mending fences (putting the prior negative relationships and disputes behind them) and setting a framework for resolving future conflicts. The family most probably will acquire better communication and problem-solving skills in mediation. This can promote harmony in future family dealings.

Mediation provides an opportunity for each of the participants to "vent" and voice his or her complaints.

There is a benefit and value to venting[8]—at least someone finally hears and listens to what a party has been complaining about all these years, and hopefully others will be able to better understand that party's complaints. Some members of the family are frustrated because none of their siblings and relatives ever listens to the other's complaints.

Each of the parties in mediation has the opportunity to participate in crafting the agreement. Not every party will necessarily be 100% happy with the end result, but each will have had an opportunity to provide input in formulating the end result. At the end of the day, the parties generally feel "satisfied"; after all, it is their agreement, nobody forced them to agree.

Professor Lela Love[9] explains the benefits of mediation for probate disputes:

> [E]xpressing and addressing the complex emotional issues involved in a family conflict, possibly improving the relationships and achieving family reconciliation; avoiding the adversarial frame that litigation places on disputes; developing a resolution that is uniquely responsive to individual preferences and priorities and family values; having family members work together to achieve a resolution, setting a precedent for future interactions; enhancing satisfaction levels of parties who actively participate in process and durability of agreed-upon resolutions; and maintaining privacy around family matters by avoiding a public forum.

Litigation or Mediation?

In litigation, the end result is crafted by a judge (or judge and jury) based on complicated rules of evidence.[10] Generally one person wins, and the other person loses. In the end, even the person who wins may not be happy when one considers the extensive litigation costs and the extensive personal time commitment (away from family and business) necessary to achieve the result.

During litigation, both the parties and their spouses and families are under a great deal of stress, aggravation and tension. Litigation affects the emotional well-being of the participants and their families, and takes a large toll on the litigants' lives. In addition to the day-to-day relationship with spouse and close family, litigation affects the parties' employment and business relationships—they can't fully concentrate because their thoughts are consumed by litigation. The emotional well-being of the client should be seriously considered and factored in when continuing with extensive litigation. We may not be able to place an actual price tag on the value of "emotional well-being," but it certainly does affect the parties.

In a court proceeding, a decision is made by a judge based on technical rules of evidence, and the applicable statutory and case law.[11] If one party is not satisfied with the result, that party has the right to appeal to a higher court, further prolonging the litigation, with more costs and more frustration and aggravation. In litigation, generally one person wins and one person loses—the Will is valid, or it's not.

"In mediation, it's possible for all parties to win."

In mediation, it's possible for all parties to win. A well trained mediator encourages the parties to consider creative options and solutions, to think "outside the box." Mediation allows for a broader range of solutions than does litigation, which is limited to traditional remedies. This means that creative solutions can be entertained during the mediation process. This is especially valuable in family disputes, where the parties have (or had) emotional ties, and these non-financial issues may be as important—or more important—than financial ones. In mediation, an apology or acknowledgment of past accomplishments can be a critical part of a settlement, as can the disposition of a sentimental item of property, like grandmother's blue teapot.[12]

Because there is the assurance of "confidentiality"[13] in mediation, attorneys and the parties can and will generally "open up" and reveal more. The parties to the mediation can also execute a more extensive "confidentiality" agreement. During the caucus,[14] the mediator may be able to identify additional underlying information, and whatever is of particular importance to each party. The additional information provided to the mediator may initiate additional ideas, options, alternatives and proposals for creative solutions based on the real interests provided by one of the parties (without the mediator revealing the confidence or source).

Often when a parent's (or other close relative's) death is unexpected, the resulting surprise creates great conflict. For example, Professor Gary[15] writes about two brothers, Ben and William Larson, who were involved in estate litigation that lasted four years. By the time the lawsuit ended, the winning brother was dead, and the other brother was bitter and estranged from the family of his only sibling. If both brothers had chosen mediation rather than litigation to resolve their dispute, both brothers most probably would have been able to compromise, and thus, a much better outcome would have been achieved.

The costs of litigation can be staggering. "Litigation can . . . polarize families into warring camps, sometimes for generations. . . . Most testators want to leave a richer legacy."[16]

> *"Once parties become embroiled in extensive and convoluted litigation, the spiraling legal fees could conceivably exceed the value of entire controversy involved (i.e., the entire estate assets)."*

Compared to Court Settlement Conference

What about a settlement conference in court? That is *not* the same as mediation. In a settlement conference, generally only the attorneys appear, and they are on guard not to fully reveal aspects of their case. In mediation, the parties themselves must be present in order for the mediation to be effective, and the parties are encouraged to fully participate. Often the attorneys end up taking a "back seat" in mediation. Remember, it's the parties' dispute. There are different advocacy skills for attorneys in mediation[17] as opposed to traditional litigation.

A settlement conference in court (which is an additional ADR tool of negotiation or neutral evaluation) provides assistance to the court in reducing the number of cases on the judge's docket. But, the settlement conference still does *not* provide all the benefits of mediation. Significant litigation costs may have already been incurred by the parties before getting to the court settlement conference.

Attorneys realize that the courts are extremely busy and may not have sufficient personnel to readily conduct extensive settlement conferences. A settlement conference with a Surrogate's Court Law Department Referee may last minutes, or perhaps somewhat longer,[18] but mediation sessions are always scheduled for at least a few hours duration, and many mediators insist the parties should reserve the entire day. Some mediators will continue to stay into the night in order to complete and finalize a mediated agreement. Once the momentum for settlement is present, a good mediator generally doesn't want to lose momentum by adjourning the mediation to another day.

Mediation is a voluntary consensual process—no party is pressured to settle. The mediator is concerned with fostering better communications between the parties and within the family.

Benefits of Mediation in Probate Matters

Often even a complicated probate matter can be fully resolved within a day or a few days of mediation, whereas litigation in such a case (with the scenario indicated at the beginning of this article) might last years, with extensive and expensive depositions and discovery, along with the possibility of multiple appeals.

Mediation can assist in contested probate or administration proceedings, contested estate construction proceedings, and contested accounting proceedings. Even if the mediation does not result in an agreement resolving all disputes, mediation is still generally beneficial, as often at least a few of the disputes are resolved. This will assist later resolution of the other disputed matters. Even if nothing is resolved, the benefits derived from the mediated sessions frequently assist in resolving the matter later as the parties will have a better understanding of the disputes.

It has been suggested that attorneys should include mediation clauses in their wills and trust documents, providing that in case of a dispute the parties agree to utilize mediation first before commencing litigation in court.[19] Revising the Uniform Probate Code to incorporate provisions encouraging mediation has also been considered.[20]

Conclusion

The following provides an example of how very expensive litigation can be. The Bank of Credit and Commerce International instituted a lawsuit against the Bank of England, which brought on 13 years of extensive litigation and cost approximately $196 million dollars in legal fees.[21] If the parties had proceeded with mediation, it is estimated that the matter would most probably have been resolved in a few days or weeks, or months at most, and the costs would only have been thousands, not millions.

Once parties become embroiled in extensive and convoluted litigation, the spiraling legal fees could conceivably exceed the value of entire controversy involved (i.e., the entire estate assets). What a waste of time, money and energy! When engaged in such a dispute, think mediation instead!

Endnotes

1. The common abbreviation for "alternative dispute resolution" is ADR, which includes several different processes to resolve disputes between the parties without litigating the dispute in court via trial.
2. Arbitration in New York State is governed by Article 75 of the CPLR; *see also* Federal Arbitration Act (F.A.A.).
3. See CPLR 7510 for application to confirm an arbitrator's award. A judgment may be entered on the confirmation (CPLR 7514). The court judgment has the same effect as any other judgment rendered by a court. Note that some arbitrations are specifically indicated to be non-binding.
4. See CPLR 7511(b) for very limited grounds to vacate an award, and CPLR 7511(c) for limited grounds to modify an award. *See also* F.A.A. (9 U.S.C. §§ 10, 11).

5. See Carbonneau & Jaeggi, Editors, Handbook on Mediation (American Arbitration Association 2006) for overview of the mediation process; see also Leona Beane, *"What Is Mediation and How Does It Work?"*, N.Y.L.J., October 29, 2007, p. 4 for explanation of the mediation process.

6. *See, e.g.*, Susan Gary, *Mediating Probate Disputes*, 13 Probate & Property 11 (July / Aug 1999); Susan Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397 (1997); Mary Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 Real Prop. Prob. & Tr. J. 601 (2000); Lela Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 Pepp. Disp. Resol. L.J. 255 (2001); Leona Beane, *Should Mediation Be Available as An Option to Reduce Litigation in Contested Guardianship Cases?* NYSBA Journal, Vol. 74, no.5 at 27 (June 2002); Catherine Jacobs, *Facilitative Mediation - A Good Option*, 22 Mich. Probate & Estate Plan. J. 4 (Fall 2002).

7. Susan Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. at 422. Professor Gary explains that a common by-product of grief is anger. Although anger may result from confronting the loss of the decedent, the survivor may attribute the anger to another cause, such as the actions of other family members, seen as unfair or greedy by the survivor. In the early stages of grief, a survivor may want to blame someone for the death, and may redirect feelings of anger toward family members or friends of the decedent. Further, the loss of an anticipated inheritance may be magnified by feelings of loss over the death of a loved one.

8. Venting of the parties is a positive aspect of the mediation process. It enables the parties to release their emotions, and then move on to more productive discussions relating to resolving the current disputes.

9. Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 Pepp. Disp. Resol. L.J. 255, 256 (2001).

10. For example, the deadman's statute and "hearsay" and other evidentiary rules come up frequently in trusts and estates litigation. How many trusts and estates attorneys know all the applicable exceptions? The parties don't understand all the technical rules, and don't understand why these rules have an effect on Uncle Joe's estate.

11. At times different judges in the same courthouse may rule entirely differently from each other. Thus, the result of litigation may be perceived as no more "just" than a toss of the dice.

12. Rosalyn L. Friedman & Erica E. Lord, *Using Mediation to Stem the Tide of Litigation in the Ocean of Family Wealth Transfers*, 59 Disp. Resol. J. 36, 38 (2004–5).

13. An integral aspect and advantage of mediation is the assurance of "confidentiality." All of the court programs and ADR provider organizations provide for confidentiality. The Model Standards of Conduct for Mediators (a joint collaborative effort of the American Arbitration Association, Association for Conflict Resolution, and the American Bar Association, rev. 2005) (hereinafter *Model Standards*) provide for confidentiality. *See* Standard V. Most mediation provider organizations adopt or utilize rules similar to the Model Standards. CPLR 4547 provides the general rule, that any evidence of compromise and offers to compromise as well as statements made and conduct during compromise negotiation is inadmissible as proof of liability or the amount of damages. Mediation has been considered the equivalent of settlement discussions, and thus, statements made during mediation are inadmissible. See also, to same effect, Federal Rule § 408.

14. The "caucus" is a series of private, confidential meetings between the mediator and each of the parties. Whatever is said during caucus is confidential, and the mediator agrees not to reveal these confidences to the other side unless authorized to do so.

15. Susan Gary, *The Greatest Heritage is the Love of a Family: the* Larson *Case and the Mediation of Probate Disputes*, 1 Pepp Disp. Resol.L.J. 233 (2001), referring to the *Larson* case, 700 P.2d 276 (Oregon 1985). When Gladys Larson died, she left a will that gave 7 / 8 of her estate to her son, William, and 1 / 8 to her son, Ben. Gladys depended on William for assistance in caring for her and her property, and Ben had moved far away. The Will also included an *in terrorem* clause. A mediator could have assisted the brothers in listening as well as talking and in trying to understand each other's concerns.

16. *See* Love, *supra* note 9, at 263.

17. Some attorneys handle an opening mediation statement as though they were opening to the jury, ready to argue, fight and litigate. By doing so, they are defeating the benefits of mediation. *See, e.g.*, Simeon Baum, *Top 10 Things Not to Do in Mediation*, N.Y.L.J., April 25,2005, p. S-4; Mort Irvine, *Some Do's and Don'ts of Mediation Advocacy*, Dispute Resolution J., Feb / Apr 2003, p. 12-14; Joel Davidson, *Successful Mediation: The Do's and Don'ts*, at p. 71 and other chapters contained in Carbonneau & Jaeggi Editors, Handbook on Mediation (American Arbitration Association 2006).

18. In a settlement conference, the judge (or referee) may put pressure on one or both of the parties and attorneys, even threatening not to approve attorneys' fees, so as to force a settlement. The judge may be primarily interested in clearing an additional case off the judge's docket. That approach violates one of the basic inherent fundamental principles of mediation, that of Self-determination, per Standard I of the Model Standards, which provides, in part: "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."

19. *See* Love, *supra* note 9, at 257. Professor Love includes a sample mediation clause at p. 265. "In keeping with my desire that our family remain strong and harmonious, any disputes arising under this will shall be resolved by mediation. The estate shall pay the cost of the mediation. I recommend the following mediators be considered: ____________."

20. Andrew Stimmel, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 Ohio St. J. on Disp. Resol. 197 (2002).

21. This was reported in *The Economist*, Feb. 3, 2007 at 62.

Leona Beane handles wills, probate, trusts, estate and guardianship matters. She is also an Arbitrator and Mediator for several different forums, and was previously chair of the ADR Committee at NY County Lawyers Association for four years. She is currently Vice Chair of the newly formed Dispute Resolution Section of the NYSBA.

International Estate Planning Institute Convenes in New York

By G. Warren Whitaker

The New York State Bar Association—together with the Society of Trust and Estate Practitioners—co-hosted the Fourth Annual International Estate Planning Institute, held at the Marriott Marquis Hotel in New York on May 27 and 28. As in past years the author chaired the Institute, which drew about 200 attendees from New York, the rest of the U.S. and around the world.

The conference opened on Tuesday afternoon with an introductory presentation on the U.S. rules relating to international estate planning, given by Michael Heimos of Mullin Dean & Heimos LLP in Denver, Colorado. Next, Evelyn Capassakis, of PriceWaterhouseCoopers in New York, discussed the complex reporting rules for U.S. persons who receive gifts from foreign persons or who create or receive distributions from foreign trusts, and related her personal experiences with unusual fact patterns and abatements of penalties. Dawn Goodman, of Withers LLP in London, followed with a talk on the different rules of the U.K. and other jurisdictions regarding divorce, including the effects of prenuptial agreements and the treatment of interests in trusts. Steve Trow, an immigration attorney with the firm of Trow & Rahal, P.C. in Washington, D.C., spoke on the requirements for U.S. citizenship and described many surprising fact patterns in which people residing outside the United States discovered that they were U.S. citizens. Gideon Rothschild, of Moses & Singer LLP in New York, then addressed the critical topic of international money-laundering initiatives and the gradual imposition of codes of conduct on attorneys.

After the program everyone gathered at a cocktail reception hosted by GAM. Speakers then went on to a speakers' dinner hosted by Royal Bank of Canada. The refreshment breaks for both days were sponsored by HSBC Private Bank.

The morning of the second day was devoted to a review of developments in four foreign jurisdictions. Geoffrey Dyer, of Bennett Jones LLP in Toronto, spoke about U.S.-Canadian planning, including the Third and Fifth Protocols to the U.S.-Canada Income Tax Treaty and their provisions regarding coordination of the U.S. estate tax and the Canadian deemed disposition at death. Claudia Caffuzzi, of JPMorgan Chase in New York, talked about the Mexican laws regarding offshore investments and planning techniques for Mexican residents. Mark Summers, of Speechley Bircham LLP in London, described the significant recent developments in the United Kingdom, such as higher taxation of U.K. resident non-domiciliaries and of trusts created by U.K. domiciliaries, and the new and complex laws regarding enduring powers of attorney. Finally, Jean-Marc Tirard, of Tirard, Naudin in Paris, discussed the French tax system and the treatment of trusts created by French residents.

Lunch followed, sponsored by Goldman Sachs Trust Company and included a timely talk on "Expatriation—An Informal History" given by Michael Pfeifer, a partner of Caplin & Drysdale in Washington, D.C., and formerly assistant counsel to the IRS. Michael discussed the new expatriation bill just passed by both Houses of Congress and due to be signed by the President.

In the afternoon, Donald Kozusko, of Kozusko Harris Vetter Wareh LLP in Washington, D.C., described recent rulings on Passive Foreign Investment Companies, including TAM 200733024. Dina Kapur Sanna, a partner at the law firm of Day Pitney LLP in New York, then described the complex U.S. intermediary rules with regard to foreign trusts and gifts in a talk entitled, "Just Pay It To My Brother." Stanley Ruchelman of New York spoke on the purchase and ownership of U.S. real property by foreigners, a more common occurrence with the recent decline of the dollar. Finally, Steven Cantor, of Cantor & Webb P.A. in Miami, described the Stop Tax Haven Abuse Act and other pending U.S. legislation.

The other sponsors for the event were: BNY Mellon, Christiana Bank & Trust, Christie's, Commonwealth Trust Company, Doyle New York, Fiduciary Trust International, FMV Valuation and Advisory Services, Sotheby's, South Dakota Trust Company, TridentTrust, and Wilmington Trust. Thanks are due to all of the sponsors and speakers for their contributions to making the Institute a success. Plans are already under way for next year's conference.

G. Warren Whitaker, a partner in the Individual Clients Department of Day Pitney LLP in New York City who focuses on international and domestic trusts and estates, is the former chair of the Trusts and Estates Law Section.

Trusts and the Taxation of Trusts in Israel: Filing Tax Reports and Reporting Duties for Trusts and Trustees

By Alon Kaplan, Lyat Eyal, Shai Dover and Yigal Harkavy

I. Introduction

Much has been published over the past few years in connection with the tax reforms passed by the Israeli Knesset (Parliament) relating to the taxation of trusts, which came into force on January 1, 2006. These have raised much interest with U.S. practitioners, seeing as they affect U.S. trustees, as well as many residents and non-residents of Israel.

The Trust Taxation Law (the "Law") has inserted certain new provisions into the Israeli Income Tax Ordinance ("ITO"). Until then, when it came to the taxation of trusts, Israeli statute was simply silent. The Law imposes obligations based on the taxpayer's role in connection with a trust (i.e., a trustee, settlor, beneficiary). However, even though the Law itself has been in force since January 1, 2006, owing to various drafting problems, as well as the absence of appropriate forms, reporting duties under the Law were effectively suspended for two-and-a-half years—as was, consequently, the taxation of trusts itself. The resulting uncertainty made it difficult to manage trusts from Israel. Israeli and foreign professionals alike had no choice but to wait for the Israeli Tax Authority to publish regulations clarifying the Law and appropriate forms.

On June 11, 2008 a new amendment to the ITO was passed, amending trust provisions inserted into it by the Law. On June 23 the forms necessary for compliance also came out. As for the due date for submission of relevant compulsory reports, in exercise of his power under the Income Tax Ordinance, the head of the Tax Authority has extended this to October 31, 2008. Along with publishing the forms, the Tax Authority announced a proposed arrangement for any trust already in existence at the beginning of 2006. This allows "surfing in," as it were, trust property into the new tax regime, by paying tax over trust capital at particularly low rates. Those seeking to take advantage of this arrangement must inform the Tax Authority of this by October 31, 2008. This article is a summary of recent developments in this area, in an attempt to clarify various uncertainties relating to reporting obligations under the Law.

II. The History of the Israeli Trust Law in Brief

The trust concept has been recognized under the Israeli legal system and government regulations for many years. The enactment of the Charitable Trusts Ordinance (1924) established the rules for public trusts. The law for private trusts was enacted by the Trust Law of 1979. During the intervening period, between the enactment of each of these, non-charitable private trusts were apparently recognized at common law in Israel—but not by statute.

III. The Taxation of Trusts in Israel

The tax system in Israel was revised with effect as of January 1, 2003, making Israeli residents subject to tax in Israel on their worldwide income. But the taxation of trusts was excluded from that revision. A "mini reform," as it were, confined to the taxation of trusts, was brought about by the Law, effective as of January 1, 2006.

The Law introduced certain innovative, advantageous provisions. These include:

1. The management of a trust from Israel is not, in itself, a sufficient reason to tax income of the trust in Israel.
2. A company incorporated in Israel may be used as an underlying company of a trust.

IV. The Taxation of Trusts in Israel and Tax Liability under the Law

The Law defines different types of trusts:

- A "foreign settlor trust" is a trust settled by a non-resident of Israel.

  This trust makes Israel attractive to foreign residents. Whether or not the trust is revocable, a foreign settlor trust is considered a foreign resident. Trust assets and income, held by the trustee, are viewed for tax purposes as belonging to the foreign resident settlor, and taxed accordingly. Thus, if trust profits are not derived from sources in Israel, they are not subject to tax or reporting. Distributions to beneficiaries are likewise tax free.

- An "Israeli resident's trust" is a trust, whether irrevocable or not, settled by an Israeli resident, where at least one of the beneficiaries is an Israeli resident.

  This is also the default category for trusts not falling within any of the others. Such a trust is taxable on its worldwide income, according to the laws of Israel and according to the tax rates applicable to individuals. Generally speaking, it is the trustee who is liable for the payment of taxes in Israel on trust income, and to make reports in respect of trust property and income. However, the recent amendment allows for an Israeli resident settlor to be so liable instead of the trustee (as "representative settlor"), where all trustees and settlors in a trust have given their consent to this, none of the trustees is resident in Israel, and the trustees have undertaken to keep the representative settlor fully informed with regard to trust property and income. Distributions to beneficiaries are made with no additional taxes payable, but notice in respect of the same must be entered (see below).

Where an existing trust *becomes* an Israeli resident trust, by virtue of one of its settlors becoming resident in Israel for the first time—qualifying a "new immigrant" under Israeli law—certain tax exemptions that apply to the foreign assets and foreign-source revenue of such a new immigrant would likewise apply to those of the trust.

- A "foreign beneficiary trust" is an irrevocable trust, settled by an Israeli resident for the benefit of non-resident beneficiaries.

  With such a trust, assets located outside Israel and income derived therefrom are not subject to tax or reporting in Israel.

- A "testamentary trust" is a trust settled by an Israeli resident in a will.

  Such a trust is treated for tax purposes as an Israeli resident's trust or a foreign beneficiary trust, as the case may be. Under the latest amendment, if falling within the former category, one of the trust's Israeli resident beneficiaries may be made "representative beneficiary" (liable to tax and to make reports instead of the trustee)—much like with the "representative settlor" seen briefly above (with appropriate changes).

V. Reporting Obligations According to One's "Role" in a Trust

A. Trustee

With an Israeli resident's trust or a testamentary trust for the benefit of an Israeli resident beneficiary, the trustee is required to report the trust's worldwide revenue as well as give details regarding the trust's settlors, beneficiaries, protectors and assets. An exception to this is where a representative settlor or beneficiary has been chosen (see above). For other types of trusts, only revenue derived from sources in Israel is to be reported. The residence of the trustee is immaterial for tax purposes. In addition, a trustee in any type of trust must file a mere notice (as opposed to the above reports) in respect of each of the following:

1. change of trust classification (i.e., a change from an Israeli resident's trust to a trust of foreign residents, and vice versa);
2. trust liquidation, where any of the following are concerned, namely an Israeli resident's trust, a testamentary trust deemed an Israeli resident's trust, or any other trust with some assets located in Israel on the date of liquidation;
3. settlement of a "testamentary trust" (meaning under the Law, one settled by an Israeli resident).

B. Settlor

What settlors may be under any reporting duties? Only Israeli residents, whenever they settle any property on a trust, or settlors who were not resident in Israel at the time of the initial settlement, but have since become so resident. What type of reporting is required? Provided that a settlor is not a "representative settlor," nor otherwise required by law to enter an annual report (for example, operating a business in Israel), it is a mere notice that must be entered in connection with the trust, not a full report.

In the case of an Israeli resident settling property on a trust, a notice of this sort should provide such information as the identities of trustees, beneficiaries, etc., as well as information over trust assets. In the case of a settlor who has become resident in Israel *subsequently* to the initial settlement, essentially the same notice as above must be entered. The only difference is that here, such notice need not make any reference to assets settled on the trust more than five years before the settlor's becoming resident in Israel.

C. Beneficiary

Similarly to the position with settlors, the new amendment established that it is only an Israeli resident beneficiary who may be under any reporting duty in the capacity of beneficiary, unless made "representative beneficiary." And, with the beneficiary as with the settlor, it is a mere notice that may be required—not a detailed report. Such notice must be entered over trust distributions received by the beneficiary (irrespective of whether taxable in Israel).

VI. Additional Amendments to the Reporting Obligations: No Annual Report for Foreign Trusts with Income in Israel—Only Notices

The recent amendment authorizes the Minister of Finance to relieve trustees from reporting on tax-exempt income derived from Israeli sources (regardless of whether any such trustee is a resident in Israel). This may be advantageous for trust income derived from certain types of investments in Israel, which would be tax exempt if earned by a foreign resident. In effect, the existing tax exemption from reporting duties—applying to individuals—may now be extended to foreign settlor and foreign beneficiary trusts.

VII. Conclusion

Reporting duties are in force in Israel as of June 11, 2008. Settlors, trustees and beneficiaries are now under a duty to submit all needed forms and reports within 90 days of the appropriate date (above). Any trust that was established before 2006 may submit a request to enter the settlement for pre-existing trusts by October 31, 2008. Tax would then only be payable in respect of trust capital, and at a particularly low rate.

Given the recent amendment and the forms, the Israeli trust taxation machinery is expected to be up and running within a short period of time, and quite smoothly so—allowing considerable growth to Israel's trust industry. That said, please note that the above article itself was written only a few short days after the above developments took place; it remains to be seen how all the Law and these developments will "play out," so to speak. For this reason as well as others, this article is no substitute for appropriate professional advice in individual cases.

Alon Kaplan, LL.M. (Jerusalem), TEP, a Tel Aviv-based lawyer focusing on trusts, is a member of the Israel and New York bars and licensed in Germany as a Rechtsbeistand. He formerly served as a council member of the London-based Society of Trust and Estate Practitioners (1999–2006) and is a founding member of STEP Israel, serving as chairman since its inception. He was a member of the Israeli public committee for the Taxation of Trusts and is a member of the Trust Committee and the Inheritance Committee of the Israel Bar Association. He edited *Trusts in Prime Jurisdictions* (2nd edition), published in 2006 by Globe Business Publishing.

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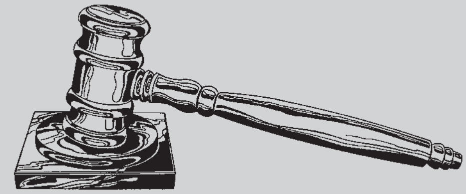
Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



ELECTIVE SHARE

Pension Benefits Payable Under Separation Agreement Not Subject to Elective Share

Decedent's decree of divorce from his first spouse incorporated a separation agreement which obligated decedent to name his infant daughter as beneficiary of his pension benefits until her emancipation. After decedent's death his second and surviving spouse maintained that the pension benefit in its entirety is subject to her right of election as a testamentary substitute. The Surrogate held that under the holdings and reasoning of *Rubenstein v. Mueller*, 19 N.Y.2d 228, 278 N.Y.S.2d 845, 225 N.E.2d 540 (1976), and *Kaplan v. Kaplan*, 82 N.Y.2d 300, 604 N.Y.S.2d 519, 624 N.E.2d 656 (1993), the father's contractual obligation to make his daughter the irrevocable beneficiary of his pension until her emancipation makes her a creditor of the decedent and her rights to the pension benefits payable before the date of her emancipation prevail over those of the surviving spouse. The benefits payable after the daughter's emancipation, however, are not payable in discharge of the decedent's obligation and are subject to the elective share rights of the surviving spouse. *In re Calligaro*, 19 Misc. 3d 895, 855 N.Y.S.2d 873 (Sur. Ct., Bronx Co. 2008).

MARRIAGE

Same-Sex Couple Married in Canada May Maintain Divorce Action in New York

The Supreme Court, New York County, has held that a marriage entered into in Canada by a lesbian couple and valid under Canadian law is valid under the law of New York, and the New York courts may therefore entertain an action for divorce brought by one of the spouses. Like the Fourth Department in *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008) (see case note on page 22), the court held that same-sex marriage is neither prohibited by New York law nor "abhorrent" to the public policy of the state and therefore is to be recognized as valid as a matter of comity. *Beth R. v. Donna M.*, 19 Misc. 3d 724, 853 N.Y.S.2d 501 (Sup. Ct., New York Co. 2008).

POWERS OF ATTORNEY

Clause in Power of Attorney Exonerating Attorney-in-Fact from Duty to Account is Void

Principal, age 98, executed a power of attorney that was drafted by the attorney-in-fact. The power of attorney granted unlimited gift giving authority to the attorney-in-fact, including the power to make gifts to himself and his family and also purported to exonerate the attorney-in-fact from any duty to account and from liability to anyone for acting or failing to act under the instrument.

After principal's death, her nephew, her sole distributee and administrator, began a discovery proceeding and obtained an order to examine the attorney-in-fact. The examination revealed that the attorney-in-fact had used his gift giving authority to transfer all of the decedent's liquid assets to himself and his family and had executed on decedent's behalf a "lifetime tenancy agreement" giving him, his mother and another person a lifetime tenancy with a joint right of survivorship in the principal's realty.

The attorney-in-fact moved to dismiss the discovery proceeding and the administrator moved for summary judgment. The Surrogate held first that the proceeding was timely, the attorney-in-fact having repudiated his fiduciary duty after the filing of the proceeding. The court then held that the clause exonerating the attorney-in-fact from all liability is contrary to the public policy of New York. In addition, the purported gift-giving authority could not authorize the attorney-in-fact's actions because the transfers could not possibly be in the best interests of the principal, who did not derive "even a scintilla of benefit" from them (citing *In re Ferrara*, 7 N.Y.3d 244, 819 N.Y.S.2d 215, 852 N.E.2d 138 (2006)). The Surrogate granted summary judgment to the administrator, setting aside all of the transfers made by the attorney-in-fact and voiding the tenancy agreement. Finally, the Surrogate addressed the purported exoneration from any duty to account and held it void as well as against public policy. *Estate of Francis*, 19 Misc. 3d 536, 853 N.Y.S.2d 245 (Sur. Ct., Westchester Co. 2008).

TRUSTS

Adopted Persons; Adopted Out Non-Marital Child Is Not Descendant of Income Beneficiary or 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 (38 A.D.3d 1235, 831 N.Y.S.2d 609 (4th Dep't 2007)). The Court of Appeals reversed the Appellate Division and reinstated the Surrogate's decrees.

The Court first held that the statutory law in effect at the time of the creation of the trusts did not create rights in adopted-out children to share in class gifts. The Court then held that the policy considerations identified in *In re Best*, 66 N.Y.2d 151, 495 N.Y.S.2d 345, 485 N.E.2d 1010 (1985), as requiring the exclusion of adopted-out children from class gift, are indeed relevant and require the same result in this case. In addition, allowing adopted-out children to take under class gifts created in pre-1964 instruments would pose enormous practical problems in identifying such persons and would threaten the finality of many existing court decrees and put into question existing property titles. The Court therefore concluded that where the grantor's intent cannot be discerned from the instrument and statutory intent is ambiguous, policy required exclusion of an adopted-out child from a class gift in an irrevocable trust executed before the amendment of DRL 117 on March 1, 1964. *In re Fleet Bank*, 10 N.Y.3d 163, 855 N.Y.S.2d 41, 884 N.E.2d 1040 (2008).

Beneficiaries Who Were Co-Trustees Cannot Object to Accounting Covering Period of Their Trusteeship

After the resignation of one co-trustee, two remaindermen were appointed co-trustees to serve with the remaining original co-trustee. The original co-trustees filed a final accounting covering the period both before and after the resignation of the original co-trustee and the appointment of the remaindermen as co-trustees. The remaindermen filed objections to the entire accounting, alleging violation of the diversification requirement of the Prudent Investor Act.

The Surrogate dismissed the objections as to the original co-trustee who had resigned but denied the motion to dismiss made by the continuing original co-trustee, who appealed. The Appellate Division held that because co-fiduciaries are one entity, and therefore in the absence of fraud or deceit, which was not alleged, the remaindermen could not maintain objections for the period in which they served as co-trustees. However, in absence of a showing that the remaindermen "had full knowledge or the facts and circumstances underlying the retention of certain assets and ratified the same" they are not estopped from objecting to the accounting for the period before their appointment as co-trustees. *In re Bloomingdale*, 48 A.D.3d 559, 853 N.Y.S.2d 92 (2d Dep't 2008).

Equitable Deviation Not Justified Where Changed Circumstances Not Unforeseen

Decedent, who died in 1928, created a residuary trust, the primary assets of which are two office buildings in Manhattan. On the death of his grandnephew, who is currently 92 years old, the trust will terminate and the trust assets are to be distributed to a corporation created by the decedent, the stock of which is to be distributed to the income beneficiaries who currently number approximately 100. There are some 200 contingent remainder beneficiaries. The will prohibits sale of the two office buildings "unless required by law" and expresses the wish that should the income produced be insufficient (an event which has not occurred) the income beneficiaries not be allowed to change investments to produce more income.

The trustee received an offer to purchase one of the properties and commenced a proceeding seeking reformation and construction to allow the sale of the property for which an offer had been received, and to allow the distribution of the trust property on termination to an LLC rather than to the corporation, and for advice on the sale of the second property.

The Surrogate refused to allow sale of either property. In the face of the absolute and unambiguous prohibition of sale it is doubtful that equitable deviation is possible. In addition, the trustee has not shown that purpose of the trust is endangered by retaining the properties nor has the trustee shown changed circumstances that might support deviation. All the trustee has shown is that it believes that acceptance of the offer to purchase is in the best interests of the beneficiaries, which is not enough to support a deviation. The Surrogate did grant the requested reformation authorizing transfer of the trust property on termination to an LLC. This change will eliminate double taxation (taxation at both the corporate level and the shareholder level) and is consistent with the testator's intent. *Estate of Smathers*, 19 Misc. 3d 337, 852 N.Y.S.2d 718 (Sur. Ct., Westchester Co. 2008).

Exoneration of Trustee of Lifetime Trust from Obligation to Account Void as Contrary to Public Policy

Beneficiary of a lifetime trust funded with proceeds of the settlement of a personal injury action brought by beneficiary petitioned for an accounting. The trust was funded as a condition of the settlement and was drafted by an attorney who described herself in the trust agreement as both grantor and trustee. The trust contained a provision excusing the trustee from any requirement to file a judicial accounting. Surrogate Roth held that the provision is void as contrary to public policy. There is nothing in the legislative history to indicate that considerations which led to the enactment of EPTL 11-1.7 do not apply to lifetime trusts, especially where the grantor is not the trustee. Here, although the trustee described herself as "grantor," the property funding the trust belonged to the beneficiary. The Surrogate removed the trustee and ordered her to account. *In re Kornrich*, 19 Misc. 3d 663, 854 N.Y.S.2d 293 (Sur. Ct., New York Co. 2008).

WILLS

Enforcement of an Alleged Contract to Make a Will Requires Proof of Specific Testamentary Intent

A will executed five days before the decedent's death was admitted to probate. It made a specific bequest of decedent's co-operative apartment to her niece and gave the residue to family members. Some eight months later a charity petitioned to vacate the probate decree, alleging the existence of newly discovered evidence suggesting that the will was the product of undue influence and that the charity had a contract with decedent obligating her to give the proceeds of sale of the co-op to the charity. Surrogate Preminger dismissed the petition and the Appellate Division affirmed (*American Committee for the Weizmann Institute v. Dunn*, 36 A.D.3d 419, 827 N.Y.S.2d 134 (1st Dep't 2007)).

The Court of Appeals granted leave to appeal and affirmed. The Court held that the evidence of the contract offered by the charity was insufficient to meet the standard of "indisputable evidence" of an agreement to make a will. The Court then held that the party seeking to vacate a probate decree on the grounds that the will was procured through undue influence must demonstrate facts which constitute "a substantial basis" for the challenge and show "a reasonable probability of success on the merits." Because the petition did not show "a long-standing and detailed testamentary plan to benefit" the charity, the decree cannot be vacated.

Judge Smith dissented, stating that given the fact of the execution of the will only days before death while the testator was being cared for in the home of her brother, the charity should be allowed to conduct discovery to try to find facts that would justify vacating the probate decree, especially because had the charity been entitled to notice of probate it would have been able to carry on such discovery as of right. *American Committee for the Weizmann Institute v. Dunn*, 10 N.Y.3d 82, 854 N.Y.S.2d 89, 883 N.E.2d 996 (2008).

Will Revoked by Subsequent Wills May Be Probated through Application of the Doctrine of Dependent Relative Revocation

Testator wrote five wills during her lifetime; the last was denied probate because it was not properly executed, and the two wills preceding it were denied probate because the originals which were last in the possession of the testator could not be found and were therefore presumed to have been destroyed with the intent to revoke. The originals of the first two wills (dated 1972 and 1974) survived. Both had been properly executed. All five instruments exercised a general power of appointment over a lifetime trust created by the testator's husband by appointing the trust property to her residuary estate, the primary beneficiary of which under all the instruments was her adopted son.

The two lost wills could not be probated because of the deemed revocation by physical act. The Surrogate determined that revocation of the 1974 will, however, was conditioned on the effectiveness of the final, improperly executed instrument. Since the disposition of the testator's estate in the 1974 will (three-fourths of the residue to her adopted son) was much closer to the disposition in the final instrument (all of the residue to her adopted son) than intestacy would be (one-half of the probate estate to each of her children but all of the appointive property to her birth daughter as taker in default) the Surrogate admitted the 1974 will to probate, applying the doctrine of dependent relative revocation, citing the leading case of *In re Macomber*, 274 A.D.724, 87 N.Y.S.2d 308 (3d Dep't 1949). *In re Sharp*, 19 Misc. 3d 471, 852 N.Y.S.2d 713 (Sur. Ct. Broome Co. 2008).

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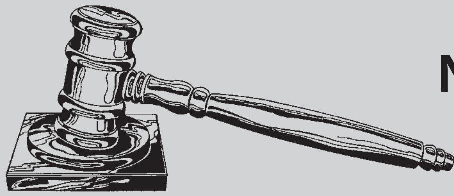

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Dead Man's Statute

In a *per curiam* opinion, the Court of Appeals held that the Dead Man's Statute does not bar an attorney from testifying in his own defense at a disciplinary hearing regarding an oral agreement he had with his deceased client. The court held that although the attorney was testifying in his own behalf or interest, he was not testifying against the executor, administrator or survivor of the decedent, but rather before the Disciplinary Committee. Hence, the court concluded that the Dead Man's Statute was not triggered.

In re Zalk, 2008 WL 2367490, June 12, 2008.

Eligibility of Fiduciary

Incident to a probate proceeding**,** application was made by the three executors named in the propounded Will for preliminary letters testamentary.

The record revealed that shortly before the execution of the propounded instrument, the decedent, an artist, suffered from one or more strokes. The record further revealed that soon after the propounded instrument was signed, the decedent suffered a massive stroke which left him completely aphasic. Thereafter, he was confined to various hospitals and nursing homes.

Approximately six months before the decedent's death on January 7, 2008, an action was commenced in Supreme Court on the testator's behalf by Ms. Stein, an owner of an art gallery, purportedly in her capacity as decedent's attorney-in-fact. Ms. Stein alleged that the decedent had revoked a prior power of attorney that had been given to the attorney-draftsman of his Will, on the grounds that he had mishandled the decedent's assets, and had refused to attend to his bills for medical and rehabilitative care. She stated that the decedent's mental faculties had not been affected by his stroke, and that her power of attorney had been fully read and explained to the decedent, and had been signed in the presence of a psychiatrist, who attested to the decedent's understanding of the document.

The attorney-draftsman disputed the validity of Ms. Stein's power of attorney, and denied that his own power had been revoked. He also claimed that Ms. Stein had assets of the decedent which she refused to turn over to him, and had harassed decedent with daily telephone calls and visits. He also rejected the allegations against him of misconduct.

The Supreme Court litigation was ultimately resolved pursuant to an agreement which, the Surrogate found, contained numerous and generous financial provisions for the benefit of Ms. Stein and the attorney-draftsman at the expense of the testator, including but not limited to provisions for payment of tens of thousands of dollars in legal fees for unspecified services performed by the attorney-draftsman, and the appointment of Ms. Stein as co-executor of the decedent's estate.

The testator died several days after the execution of the agreement, with an estate of approximately $30 million, and only one known distributee. The court noted that although the testator had made it clear to the attorney-draftsman that he wanted his estate to pass free of estate taxes, the propounded instrument as drafted failed to qualify for the charitable deduction contemplated by the decedent.

Pursuant to the pertinent provisions of the instrument, the named executors were the attorney-draftsman, and two other individuals, one of whom pre-deceased the testator, and the other of whom held an interest in and managed real estate in which the testator's estate was a minority shareholder. The successor named in the instrument was the attorney-draftsman's wife. The instrument directed that the executors retain the attorney-draftsman as their attorney, and the attorney-draftsman and his wife were authorized to appoint a co-executor or a successor executor. Finally, contrary to law, the executors were authorized by the instrument to pay themselves commissions without prior court approval.

The Will left the decedent's entire estate to a Lichtenstein foundation allegedly created by the testator, with the direction that it pay $400 per month to a friend of the decedent for life. The instrument further provided that in the event the foundation was not at least partially funded within a year from the executors' qualification, the residue of the estate would pass, in the discretion of the executors, to individuals and or organizations assisting Jewish settlors.

The record revealed that the estate was in need of the appointment of a preliminary fiduciary. However, based upon what it described as the troubling issues created by the circumstances, the court concluded that none of the named executors in the Will should be appointed to serve in that capacity. In pertinent part, the court questioned the validity of the propounded instrument, and found that the Supreme Court action raised serious questions regarding the qualifications of the attorney-draftsman and Ms. Stein, whom the attorney-draftsman had designated to serve as a third fiduciary. Moreover, while the court noted that the testator's business partner, the second named fiduciary, was not implicated in the preparation of the Will, given the facts surrounding the instrument, his appointment would have to be conditioned upon the posting of a bond, which would impose a significant expense to the estate. Additionally, and importantly, the court noted that his ability to manage the large and complex estate left by the decedent had not been established.

Accordingly, based upon the foregoing, the court held that the best interests of the estate required the appointment of a corporate fiduciary as temporary administrator, and appointed the Bank of New York to serve in such capacity.

In re Estate of Lurie, N.Y.L.J., June 4, 2008, p. 40 (Surr. Ct., New York County) (Surr. Roth).

Jurisdiction

In a proceeding brought by the co-executors of the estate pursuant to SCPA 2103, respondent moved to dismiss the petition on the grounds, *inter alia,* that the court lacked personal jurisdiction.

The basis for the proceeding was an alleged agreement between the decedent and respondent that provided for the decedent to perform financial services to respondent in return for a fee payable by the respondent based upon the net value under management. Petitioners instituted the suit in order to recover the balance of the fee owing by respondent to the estate.

The record revealed that the respondent, while living in Florida, contacted the decedent in New York to engage his services. Subsequently, the parties executed a Memo of Understanding setting forth the services to be performed and the fee arrangement. Thereafter, the parties conducted business by telephone, letters and intermediaries. The few times the decedent and respondent met were during visits by the decedent to Florida.

Respondent maintained that she never met with the decedent, nor any member of his firm, in New York, nor conducted business with them in this state, and that the engagement letter was signed by her in Florida. Consequently, she argued that the court lacked jurisdiction over her. Petitioners claimed that jurisdiction existed in New York inasmuch as the decedent signed the engagement letter in this state, that all investment services for the respondent were performed in New York, and that respondent's assets were on deposit in New York, thus satisfying the requirement that business be transacted in New York for jurisdiction to lie.

The court rejected respondent's contentions and found personal jurisdiction. The court opined that pursuant to the provisions of CPLR 302(a)(1), personal jurisdiction over a non-domiciliary will lie when the non-domiciliary, in person or through an agent, transacts any business within the state. The court further noted that the law requires some articulable nexus between the business transacted and the cause of action sued upon.

Based upon the foregoing, the court concluded that respondent had "projected herself" into this state by soliciting a New York financial adviser who performed services for her over a 10-year period and by transferring her assets to New York for management and investment by the decedent. Accordingly, respondent's motion to dismiss for lack of personal jurisdiction was denied.

In re Estate of Krefetz, N.Y.L.J., May 13, 2008, p. 34 (Surr. Ct., New York County) (Surr. Glen).

Notary

In *Edwards v. Rockaway Storage,* the Supreme Court, Queens County, denied the defendant-notary's motion for summary judgment, ruling that he could be held liable for failing to ask the individuals whose powers of attorney he notarized whether they swore or affirmed the signatures they affixed to the document as true. The action by the heirs of a decedent's estate was brought in connection with the alleged fraudulent sale of a home in Queens. Specifically, the heirs claimed that fraudulent powers of attorney were used to sell the home, and consequently, that the sale was invalid. The buyer in turn sued the notary and his employer, a real estate brokerage form, claiming that the notary failed to go to the State Department of Motor Vehicles site to verify the authenticity of the driver's licenses of the two persons who allegedly were impersonating the sellers when they sought to have their signatures on the powers of attorney notarized.

An affidavit submitted by the notary stated that he had asked the two persons who came into his office asking for a notary to produce their driver's licenses and that he had recorded them having done so in a log maintained by the office. The affidavit made no mention of the notary asking the persons to swear to the validity of the signatures. Consequently, the court ordered that a trial be held on this question. Notably, in reaching this result, the court rejected the claim that the notary had a duty to go onto the Department of Motor Vehicles web site to determine that the licenses were valid.

Edwards v. Rockaway Storage, N.Y.L.J., May 13, 2008, p. 28 (Sup. Ct., Queens County).

Paternity

In *In re Poldrugovaz*, the Appellate Division, Second Department, had occasion to examine the issue of the standard of proof to be applied in a pretrial request by a putative child of the decedent for posthumous genetic marker testing pursuant to the provisions of EPTL 4-1.2(a)(2)(C).

The record revealed that a petition for letters of administration was filed by an alleged non-marital child of the decedent. The decedent was never married and had no other children.

Objections to the petition were filed by the decedent's sole surviving sibling, his brother. The Office of the Medical Examiner had performed an autopsy to determine the cause of the decedent's death, and during the course thereof, extracted certain tissue samples from the decedent's body.

Following the filing of the petition for letters of administration, the petitioner moved to direct the Medical Examiner to send a portion of the tissue samples to a laboratory for testing so as to provide "clear and convincing evidence" of the decedent's paternity pursuant to the provisions of EPTL 4-1.2(a)(2)(C). In support of her application, the petitioner submitted additional evidence in support of her claim that she was the decedent's child, including photographs evidencing a familial relationship between herself and the deceased, affidavits of acquaintances who attested that the decedent acknowledged that he was the petitioner's father, and her own affidavit indicating that the decedent openly acknowledged that she was his child.

The application was opposed by the decedent's brother.

Relying on the decision by the Fourth Department in *In re Morningstar*, 17 A.D.3d 1060, the Surrogate's Court, Suffolk County, found that the petitioner had provided "some evidence" that the decedent had openly and notoriously acknowledged paternity, and granted the motion.

An appeal was filed by the decedent's brother, who argued that the opinion subsequently rendered by the Second Department in *In re Davis*, 27 A.D.3d 124 required that the petitioner's motion be denied absent clear and convincing proof that the decedent openly and notoriously acknowledged that the petitioner was his child.

In a lengthy decision analyzing the legal and public policy issues surrounding the rights of non-marital children, the Appellate Division affirmed the order of the Surrogate's Court, holding that to the extent its decision in *In re Davis* required a party seeking posthumous genetic-marker testing to prove acknowledgment of paternity by clear and convincing evidence, it should no longer be followed since it set too high of an evidentiary standard. Instead, the court opined that a party seeking an order directing posthumous genetic-marker testing need only provide some evidence that the decedent openly and notoriously acknowledged the non-marital child as his own, and establish that genetic-marker testing is practicable and reasonable under the totality of the circumstances, to wit, such factors as (1) whether the evidence presented demonstrates a reasonable possibility that the genetic-marker testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of the genetic testing; (3) whether there is a need to exhume the body or obtain the sample from a non-party; (4) whether appropriate safeguards were, or will be, taken to insure the reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and / or his family members. However, the court cautioned that its holding should not be interpreted as altering the standard of proof required under EPTL 4-1.2(a)(2)(C) to establish paternity; to wit, clear and convincing evidence of paternity together with proof that the decedent openly and notoriously acknowledged the child as his own.

In reaching this result, the court reasoned that the foregoing standard established a proper balance between the state's interest in the prompt administration of estates, respect for the privacy of the decedent and his family members and the rights of a non-marital child to relevant evidence needed to prove paternity. The court was further motivated by the legal trend in New York and in other states to enhance the ability of non-marital children to assert their rights of inheritance; the much-criticized restrictions imposed by the provisions of EPTL 4-1.2(a)(2)(D) upon use of DNA test results; the increasing legislative sensitivity to the inheritance rights of non-marital children; the significant segment of the population affected by paternity and inheritance rights issues; and the usefulness and reliability of DNA testing.

Based upon the foregoing, and a factual review of the record below, the court found that the affidavits submitted by the petitioner provided some evidence that the decedent openly and notoriously acknowledged the petitioner as his child, and that her request for posthumous DNA testing of the tissue samples obtained by the medical examiner was reasonable and practicable under the circumstances. Significantly, the court noted that the tissue samples were readily available for testing, were obtained in the regular course of business of the medical examiner, and exhumation was not required. Accordingly, the court concluded that the Surrogate did not err in granting the relief requested by the petitioner.

In re Poldrugovaz, 50 A.D.3d 117, 851 N.Y.S.2d 254, 2008 N.Y. Slip Op. 01152 (2d Dep't 2008).

Same-Sex Marriage

The Appellate Division, Fourth Department, recently recognized a same-sex marriage legally entered in Canada for purposes of according health benefits to a lesbian couple.

In *Martinez v. Monroe,* the court was confronted with an action brought by a community college employee seeking, *inter alia,* a declaration that the defendants' failure to recognize her valid foreign same-sex marriage for spousal health care benefits violated her rights under the Equal Protection Clause and the Executive Law. The Supreme Court granted the defendants' motion for summary judgment, declaring that employee's marriage was not entitled to recognition in New York, and the employee appealed. The Appellate Division reversed, finding that while a same-sex marriage cannot be legally contracted in New York, the law does not prohibit recognizing a same-sex marriage validly contracted in another jurisdiction.

The court held that while New York will generally recognize a validly contracted foreign marriage, it will not do so where such marriage is contrary to the express provisions of a statute or the prohibitions of natural law, i.e., a marriage involving incest or polygamy, or offensive to the public sense of morality. The court noted that in spite of these exceptions, New York has recognized marriages between an uncle and a niece by the half-blood, common law marriages valid under the laws of sister states, and a Canadian marriage between minors.

Assessed within this context, the court concluded that recognition of a same-sex marriage in New York was not precluded by either the "positive law" of New York or "natural law." The court rejected the defendants' argument that the decision by the Court of Appeals in *Hernandez v. Robles,* 7 N.Y.3d 338 required a finding that the same-sex marriage at issue was contrary to public policy, and held that the opinion, instead, stood for the proposition that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York. The court also noted that the Court of Appeals had indicated that the legislature may enact legislation recognizing same-sex marriages, thereby suggesting that such marriages were not contrary to the public policy of New York. Further, the court found it significant that New York had not chosen to enact legislation pursuant to the federal Defense of Marriage Act denying full faith and credit to same-sex marriages validly solemnized in another state.

Thus, the court held that the employee's same-sex marriage, valid in Canada, was entitled to recognition in New York in the absence of express legislation to the contrary, and that the defendants' refusal to recognize such marriage was in violation of the Executive Law. In light of its determination, the court did not address the employee's contention regarding the Equal Protection Clause.

Martinez v. Monroe, 50 A.D.3d 189, 850 N.Y.S.2d 740, 2008 WL 275138 (4th Dep't 2008).

Settlement Agreement

Before the court was an application by the decedent's children to vacate a settlement agreement in which they had withdrawn their cross-petition for letters of administration and consented to the decedent's spouse serving as administrator of the estate. The movants alleged that the decedent's spouse had failed to comply with its terms, including the requirement that she settle a decree and post a bond. The movants further alleged that the spouse dissipated estate assets, converted estate funds and used them for her own personal benefit, and was therefore unfit to serve as the administrator of the estate.

The court noted that while stipulations of settlement will not be lightly set aside, a party will be relieved of its terms where there is sufficient cause to invalidate a contract, such as fraud, collusion, overreaching, mistake, accident or some other compelling factor. Also to be considered is the prejudice that will result from vacatur.

Based upon the uncontroverted record, the court found that the decedent's spouse had failed to comply with the parties' settlement agreement and the court's decision, but had also failed to settle a decree, and to honor the terms of a subsequent agreement. Under the circumstances the court held that sufficient basis existed for vacating the settlement agreement and the court's decision, and issued letters of administration to the movants. In addition, the court directed the decedent's spouse to account, and to turn over all estate assets to the movants.

In re Estate of Benn, N.Y.L.J., May 30, 2008, p. 27 (Surr. Ct., Kings County) (Surr. Johnson).

Vacate Decree

In *In re Estate of Efros*, the court granted the motion of several charitable legatees under a prior Will of the decedent to vacate the probate decree admitting a later Will to probate.

Upon *vacatur* of the decree, the letters testamentary issued thereunder to the three named executors, a nephew, the spouse of a predeceased nephew, and JP Morgan were revoked. As a consequence, the issue arose as to which of the nominees were eligible to receive preliminary letters testamentary.

The court opined that preliminary letters may be denied to a named executor based upon bona fide allegations of undue influence or other wrongdoing. In view of the record presented, the court found the allegations against the decedent's nephew sufficient to deny his appointment, but insufficient to deny the issuance of preliminary letters to JP Morgan and the remaining named executor.

In re Estate of Efros, N.Y.L.J., March 27, 2008, p.24 (Surr. Ct., New York County) (Surr. Glen).

Workers' Compensation Law

In *Langan v. State Farm Fire & Casualty*, the Third Department held that a domestic partner was not entitled to death benefits under the Workers' Compensation Law as a surviving spouse, despite having entered a valid civil union with the decedent in Vermont.

In reaching this result, the court determined that the doctrine of comity did not require New York to recognize the claimant as the decedent's surviving spouse for death benefit purposes. According to the court, comity was not a mandate to adhere to another state's laws but, rather, an expression of one state's voluntary choice to defer to another state's policy. Moreover, the court opined that a decision to accord recognition to a civil union as a matter of comity does not require New York to confer upon the parties to that civil union all the legal incidents of that status recognized in the foreign jurisdiction that created the relationship.

Based upon the foregoing, the court further held that the deprivation of death benefits to the surviving party to a civil union does not violate the Equal Protection Clause of the U.S. Constitution. The court reasoned, in part, that the Workers' Compensation Law was enacted to encourage and protect the traditional family unit, and that while arguably a same-sex couple may be equally as capable of creating a family unit, the determination by the Court of Appeals in *Hernandez v. Robles* (7 N.Y.3d 338) established that the legislature's decision to limit marriage to opposite-sex couples was rationally related to a legitimate state interest and withstands rational basis scrutiny.

Langan v. State Farm Fire & Casualty, 48 A.D.3d 76, 849 N.Y.S.2d 105 (3d Dep't 2007).

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Last Will
and
Testament
of

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