NYSBA FALL 2009 | VOL. 42 | NO. 3

Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

Ira M. Bloom

During the past few months, the Section has been actively involved with several legislative initiatives, with varying degrees of success. In this column, I'd like to bring you up to date on these initiatives and on our Section's latest CLE activities in connection with the new Power of Attorney legislation, which went into effect on September 1.

Affirmative Legislative Proposals

As discussed in the *Newsletter* last quarter, six bills were presented to the Assembly and Senate Judiciary Committees: enactment of a 120-hour rule to replace the existing actual simultaneous-death rule under EPTL 2-1.6; revisions to EPTL 2-1-11(renunciation section); providing parity when exercising the right of election under EPTL 5-1-1-A(d)(2); exempt property reforms under EPTL 5-3.1; interest on legacies amendment under EPTL 11-1.5(d), and a new directed trusteeship statute.

First, the ultimate success: The legislature passed, and on July 11 the Governor signed into law, the 120-hour rule under Chapter 92 of the Laws of 2009. As a result, the showing of actual simultaneous death will no longer be required, but an individual will be deemed to have predeceased a decedent if death occurs within 120 hours of the decedent under EPTL 2-1.6. (Our Section approved and recommended the 120-hour rule soon after 9/11 and in 2002 the "Big Bar" followed suit; we then lobbied for the legislation for several years. Less than a decade later, the 120-hour rule has become law!)

Assembly successes: Both the renunciation and the exempt-property bills were passed by the Assembly in June of 2009. The bills were forwarded to the Senate, which failed to act before its session ended.

Same-Sex Marriage Proposal

Our Section can justifiably take pride in its efforts over the years to secure equal rights for same-sex couples. Most recently, these efforts in the form of same-sex marriage legislation were spearheaded by the Estate Planning Committee under Ian W. MacLean

Inside

as former chair and Darcy Katris as current chair. In December of 2008, the Executive Committee adopted the Estate Planning Committee's comprehensive memorandum supporting passage and enactment of legislation that extends marriage rights to same-sex couples. Also approved was a draft resolution supporting same-sex marriage legislation for the State Bar Association's consideration (the "Big Bar").

Deferring to the request for delay by the Special Committee on LGBT People and the Law (the "Special Committee"), in April of 2009 our Section forwarded our same-sex marriage report and draft resolution to the Big Bar. In May of 2009, the Special Committee furnished its comprehensive report on marriage rights for same-sex couples (over 170 pages) to the Big Bar. Both reports were presented to the Big Bar's Executive Committee and House of Delegates at its Cooperstown meeting in June. Based on the persuasive presentations by our own Barbara Levitan and others, the reports were approved by both the Executive Committee and House of Delegates of the Big Bar. In effect, the New York State Bar Association has endorsed civil marriage legislation for same-sex couples. Furthermore, the Assembly has approved same-sex marriage legislation. Unfortunately, the fate of the legislation in the Senate is uncertain. As of this writing in mid-August, the Senate has adjourned without taking up the legislation.

Power of Attorney Update

As reported in the last issue of the *Newsletter*, I appointed an ad-hoc committee to study the new power of attorney legislation and recommend technical corrections for enactment before the law's September 1, 2009 effective date. The committee consisted of Ira Bloom, Bob Freedman, Bonnie Jones, Debbie Kearns, Bill LaPiana and Ron Weiss. Based on the committee's recommendations, I worked with Rose Mary Bailly, Executive Director of the Law Revision Commission, to develop technical corrections legislation, which was then forwarded to Helene Weinstein, Chair of Assembly Judiciary Committee. The bill wended its way through the Assembly, which on June 15 passed A.8392a, the POA technical corrections legislation, by a vote of 127-0. S. 5910, the Senate's companion bill, was introduced on June 18, but during the Senate impasse no action was taken. Although the impasse ended in July and the Senate came back into session in July and for one day in early August, S. 5910 was never put on the agenda!

As of this writing in mid-August, the Senate has adjourned and is not expected back in session before September 1. As a result, Chapter 644 will have come into effect on September 1 without the technical corrections that eliminated several glitches including those in the statutory short form and the statutory major gift rider. Assuming the Senate gets around to passing the technical corrections legislation and the Governor signs the bill, new forms, different from those that came into effect on September 1, will be required. Imagine the likely confusion.

On August 27, our Section, in conjunction with the Bar's Continuing Legal Education Committee, conducted a two-hour Webcast about the new POA legislation. Section members Bob Freedman, Ron Weiss and Rose Mary Bailly served as panelists; I served as moderator. In addition, the fall program in Syracuse, with Marion Fish as Program Chair, included a segment on the new POA legislation, including a presentation by former Chair Mike O'Connor. Most likely, the new POA legislation will also be discussed at the January 27 Annual Meeting in New York at the Hilton Hotel. (The Annual Meeting will no longer be at the New York Marriott Marquis.)

I hope that our Section's latest CLE efforts on the new POA legislation will be helpful. The new POA legislation was also part of the Spring CLE Program to be held in eight locations around the state. Special thanks to Jennifer Weidner, CLE Chair.

Please feel free to contact me (ibloo@albanylaw.edu) about your experiences with the new law, as another round of technical corrections seems inevitable. For now, look for an e-blast about the pending POA technical corrections legislation, if and when enacted.

Ira Bloom

Editor's Message

As Ira Bloom indicates in his Chairman's Message, the Section leadership has been busy and successful. The efforts of a handful of attorneys have helped pass legislation in several key areas and thereby contributed to improving the lives of New Yorkers. And we are on the verge of success in other areas, most significantly the initiative to bring equality under the laws of this state to same-sex couples who choose to marry.

I point this out, in part, because the recent, significant changes in form and substance to the statutory short form power of attorney and the creation of a statutory major gifts rider have been dominating a lot of commentary and attorney-time across the state. To be sure, these new documents, now and after the technical corrections that are inevitable, will change not only the practice of trusts and estates law and the gifting abilities of attorneys-in-fact, but will have an effect on real estate transfers, banking transactions and many other transactions typical in the lives of New Yorkers. The legal community has a legion task to help integrate these new forms into the expectations and lives of the populace. Included in this issue are a few articles on some aspects of the new law. I welcome other articles on this topic and am sure we will publish more in issues to come.

Beyond the power of attorney statute, however, there are other areas of trusts and estates law that need our attention and improvement. Cases on a plethora of topics bearing on the lives of the people of the State of New York—paternity, devises of real property, ademption, anatomical gifts, disposition of remains, survivorship, missing heirs, income and transfer taxation, validity of trusts, ownership of real estate, competing fiduciary duties, conflict of laws, accounting proceedings, etc.—are being argued, decided, settled and dragged out across the state. I encourage you to submit an article discussing a case or matter or issue that you are or have been recently involved in; perhaps it will be the springboard for an improvement in the laws of the state and the lives of people in your community.

Ian W. MacLean

Identifying and Locating Distributees

By Lori Perlman

You never know what you are going to find when you start looking for heirs. A colleague of mine started making a family tree and was unable to complete the tree because she kept coming up with different dates of birth for one of the distributees. The documents (birth certificate and marriage certificates) just didn't add up. My colleague finally hired a genealogist to finalize the family tree, and it turned out that there was nothing wrong with my friend's research skills. The woman in question, who had been married three times, apparently was somewhat vain about her age, and told each successive husband that she was a just a little bit younger than she really was. While it was for her an innocent white lie, it turned a simple project of finding and identifying distributees into a thorny and costly puzzle for the estate attorneys.

At some point in your career, you may be asked to represent the estate of a decedent who died leaving a sole distributee or only remote distributees, and you will be asked to prove that the decedent had no nearer relatives who have an interest in the estate and who must be cited. In other words, you will be asked to identify and locate the potential distributees of the decedent. But how do you go about doing so? How hard do you have to look? How do you draft an affidavit that shows the Court that you have made a diligent search and that the Court can proceed with administration? This article will give you some guidance on how to conduct a diligent search.

I. When Do You Need to Identify or Locate Distributees?

Sometimes it is easy to know when you have to look for a missing relative—for instance, when the surviving family and relatives of the decedent tell you that Uncle Harry has been missing since World War II, or there was a rumor that the decedent had an out-of-wedlock child. Even though the surviving family is "sure" that there are no missing heirs, some situations might require you to search for potentially missing heirs.

Affidavit of Heirship

When the decedent is survived by no distributees or only one distributee, or when the relationship of the surviving distributees to the decedent is remote—grandparents, aunts, uncles, first cousins or first cousins once removed, the Surrogate's Court rules require the petitioner to submit proof that establishes (i) how each distributee is related to the decedent, and (ii) that no other persons of the same or a nearer degree of relationship survived the decedent. Uniform Rule 207.16(c). The proof is usually in the form of an affidavit (called an affidavit of heirship) and is submitted together with the petition for probate or the petition for letters of administration. This affidavit, although somewhat similar to an affidavit of due diligence, has distinct requirements.

Unless otherwise permitted by the Court, if only one distributee survived the decedent, the affiant cannot be the alleged distributee's spouse or children. Uniform Rule 207.16(c). Other relatives (a sibling of the decedent, or a child's spouse) may prepare the affidavit. Where the surviving distributee is a close relative, or where the affiant has significant knowledge about the family relationship, the Court may not require that the affidavit recite that a "diligent" search was performed. As the relationship of the distributee(s) becomes more remote, it may be difficult to find someone who can swear that there were no other family members, and especially difficult to find someone who can swear that the decedent (or his or her issue) had no extra-marital children. In such cases, the Court will likely require a statement that a diligent search was performed to locate missing heirs. *See* Section III, *infra*. Accordingly, petitioner must search and attempt to identify and locate decedent's potential distributees and describe the search in the affidavit of heirship.

II. Identifying and Locating Distributees

When faced with an estate in which no close relatives are identified, or where there is no one who can provide an affidavit concerning the family relationships, you may have to do some digging in order to identify whether there are distributees and who they are. The scope of the search should generally be in proportion to the size of the estate—no one expects the estate to be exhausted in the search for missing heirs, but the Court will expect you or the proposed administrator to do a basic search for even modest estates. You or the proposed administrator may have to:

- Interview decedent's relatives, friends, neighbors, doormen, landlord, members of social clubs or religious organizations of which decedent was a member, and professionals who worked with the decedent (decedent's doctors, accountant, lawyer, etc.).
- If the decedent had an uncommon surname, attempt to contact persons with the same surname,

whether by phone or mail, to inquire whether he or she was related to the decedent.

- Review decedent's current and past address books and mail, and call or send letters to persons thus identified inquiring whether the person knew of any relatives of the decedent.
- Check to see if the decedent had a family Bible that contained a list of births and deaths on the front or back cover.
- Check the Surrogate's Courts for records of known deceased family members and check to see if other distributees may have been listed as interested parties.
- Check the following potential sources: birth and death certificates to see if they list the names of an individual's parents; marriage records; medical records that may list next of kin; church baptismal records that may list godparents who may have information; death notices in newspapers; if family has a relationship with a particular funeral director, funeral director's records; funeral "sign in" book; cemetery records (a relative may be paying for perpetual care of a grave) and tombstones of decedent's family; census records, and immigration records.
- Check forwarding addresses at former residences.
- Write a letter to the missing heir and send it to the Social Security Department, which will forward a letter prepared by an attorney to a missing heir to the last known address. DSS will not provide you with any information concerning the lost heir other than whether the individual is known to be dead. You should send a cover letter explaining your situation and including the missing heir's name, date of birth and Social Security number, and enclose the letter to the heir in an unsealed envelope.
- Write a letter to the Bureau of Vital Statistics and / or the Motor Vehicle Bureau asking for the missing heir's address or asking that they forward the letter to the individual's address.
- An inquiry to a branch of the armed forces may also be of use if you are aware of the branch in which the missing heir served.
- Search the Lexis-Nexis public data database for the location of distributees once you have the name of the individual. You can search through the People Pages library, Judgments and Liens library, Property Ownership library, etc. It is extremely helpful to try to obtain the lost or missing heir's date of birth and Social Security number, as many persons with the same or similar name may be located in a search.

If the above methods are not successful and the estate is substantial, private investigative search firms and genealogical experts can be hired to perform a search for heirs. Keep in mind, however, that the scope of a search should be commensurate with the size of the estate, and retaining a genealogist might not be realistic for all estates.

It is a good idea to keep copies of any correspondence you send, and keep notes concerning any persons you contact, as you may need such information to document the scope and diligence of your search.

Another thing to keep in mind: Although it is necessary to use diligence to identify all missing distributees, it is not necessary to locate distributees whose whereabouts or identity are unknown at the time the administration petition is filed, since service of process may be dispensed with upon such distributees under SCPA 1003(4). However, in order to dispense with service, a diligent search will have to be performed. Uniform Rule 207.16(d). For example, whenever the petition for probate or administration alleges that there are unknown distributees (i.e., the rumored non-marital child) or distributees whose names or addresses are unknown (i.e., the long-lost uncle), the Court will require an affidavit detailing the scope of the search. In addition to satisfying the Court that a search was made, the search has the additional benefit of conclusively establishing the identity of the distributees, a necessary step before the estate is distributed. If distributees are not found at the time of an accounting, process will have to be served upon the unknowns by publication (SCPA 307), and their share of the estate will likely have to be deposited with the Commissioner of Finance until the lost heir is found and can commence a proceeding to withdraw his or her share (SCPA 2223-2225).

III. Elements of the Affidavit of Due Diligence—Uniform Rule 207.16

Where a petition alleges that the identity or whereabouts of an individual who must be served with process is unknown, the application for letters must contain an affidavit showing that the affiant has used due diligence in endeavoring to ascertain the identity, names and addresses of all such persons. Uniform Rule 207.16(d). Success is not the goal; the true measure of due diligence is showing that the appropriate avenues of investigation have been pursued, with or without results.

The affidavit may be prepared by anyone who conducted the search—the petitioner, counsel to the petitioner, or a third party (i.e., a genealogist). The affidavit should attempt to indicate the names of the missing distributees, either first or last names, and their approximate ages, if available. Indicate specifically which avenues of investigation were pursued and the result of the search. To whom did the affiant speak? Where

did affiant look? To whom were letters of inquiry sent? What was the response? Consider attaching copies of any letters or search results to document the scope of your search. Indicate who provided the information on the missing heirs, and when and where the missing heir was last heard from, if at all.

Although compliance with the rule "is not intended to burden the estate with costly or overly time-consuming searches," as of October 3, 2000, Rule 207.16(d) has provided the parameters of a "diligent" search as follows:

Absent special circumstances, the affidavit will be deemed to satisfy the requirement of due diligence if it indicates the results obtained from the following:

(1) examination of decedent's personal effects, including address books;

(2) inquiry of decedent's relatives, neighbors, friends, former business associates and employers, the post office and financial institutions;

(3) correspondence to the last known address of any missing distributee;

(4) correspondence or telephone calls to, or Internet search for, persons of same or similar name in the area where the person being sought lived;

(5) examination of the records of the Motor Vehicle Bureau and Board of Elections of the state or county of the last-known address of the person whose whereabouts is unknown.

In probate proceedings, the Court may accept, in lieu of the above, an affidavit by decedent setting forth the efforts that he or she made to ascertain relatives.

IV. Additional Resources

An excellent guide to conducting a search is found in a *New York Law Journal* article prepared by former King's County Surrogate Bloom, among others, entitled "A Step-by-Step Guide to Conducting a Diligent Search." N.Y.L.J., Feb. 8, 1994, at 1, col. 1. A chart beginning on page 2 of the article provides contact information for several government agencies.

Some genealogical researchers who have been used by counsel to the Public Administrator in the past include:

Jaisan, Inc. in New York (http://www.jaisaninc.com);

Dennis Langel Investigations/Genealogy Research Corp. in Huntington, New York (www.findheirs.com);

Laurie Thompson in New York (490 West End Avenue New York, NY 10024, 212-724-1817).[1]

Online Resources

There are many resources for locating heirs on the web, some more successful than others. Most are able to locate addresses and telephone numbers, and some provide more detailed searches for free. Non-public information is not on the Web. Some sources for locating missing heirs (some free or partially free) include:

www.ci.nyc.ny.us and

http://home2.nyc.gov/html/records/html/vitalrecords/home.shtml (for a New York City decedent) and

www.health.state.ny.us/vital_records/ for New York residents outside of New York City;

www.ssa.gov (Social Security Administration online);

http://vitalrec.com (identifies where to search for vital records, with a link to Ancestry.com's search engine);

www.Ancestry.com (search for current address, Social Security death index, census, vital statistics and links to other sources);

www.superpages.com and

www.anywho.com (search for current addresses in U.S. and conduct reverse telephone directory searches);

www.knowx.com (public information search);

www.docusearch.com (offers many free searches and locate searches, DMV driver and vehicle searches, telephone record searches, financial and bank searches, and criminal and property record searches);

www.surnameweb.org/ (surname search, with a links to many other Web pages and About.com's genealogy page);

www.cyndislist.com/ (a list of genealogical Web pages);

www.gensource.com/ifoundit/ (another list of web pages);

www.semaphorecorp.com/wdtg/jump.html (provides ability to track people who have moved, changed their names, e-mail addresses or Web pages).

Endnote

1. The author has no personal knowledge of these genealogists and thus is not in a position to vouch for their performance.

Lori J. Perlman, a former Court Attorney Referee, serves as Of Counsel to the Law Office of Hugh Janow in Pearl River, NY, and as Special Counsel to Jill Miller & Associates in New York, NY. She serves as Vice-Chair of the Practice and Ethics Committee of the Trust and Estates Law Section of the New York State Bar Association, was past Vice-Chair of the Technology Committee, and has authored the *Administration of Estates* outline for the Association's Practical Skills Seminar on Probate and Administration of Estates since 2000.

Ademption and the Power of Attorney

By Jaclene D'Agostino

Substantial amendments to the New York General Obligations Law that significantly change the power of attorney statute became effective on September 1, 2009.[1] The state legislature implemented these modifications in an effort to mitigate the rampant financial abuses often committed by attorneys-in-fact of the elderly.[2] The new legislation is intended, in part, to inhibit an agent from potentially abusing his or her position by inappropriately selling or transferring to himself or herself assets belonging to the principal. At times these transfers have resulted in the ademption of intended bequests.

This article explores the limited number of cases addressing the treatment of the ademption doctrine where transfers were made by an attorney-in-fact, and how abuses of the fiduciary relationship in this context may be redressed. Highlighted is the distinct path courts have taken when confronted by *inter vivos* transfers to the attorney-in-fact by the attorney-in-fact, as opposed to pre-death sales by the fiduciary of the decedent's property.

I. Ademption—A Historical Perspective

a. Ademption Defined

Ademption is the "extinction or withholding of some legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke."[3] A bequest adeems when property that had been specifically devised no longer exists at the time of the testator's death.[4] This may occur in two circumstances: (1) the pre-death transfer or sale of the property,[5] or (2) the payment of money or transfer of property to be applied toward or in satisfaction of a testamentary bequest.[6] Ademption applies only to specific bequests, not to general, residuary or demonstrative dispositions.[7]

New York courts recognize ademption as a pure question of law.[8] Although under earlier law the issue of ademption was dependent on a testator's intent,[9] the current and longstanding rule is that ademption is one of the few estate law doctrines in which a testator's intent is irrelevant.[10] If intent is at all considered, its relevance is limited to interpreting the language of the bequest as to whether the testator intended an alternative legacy if the specifically bequeathed item no longer existed at the time of the testator's death.[11] Generally, however, "[t]he bequest fails and the legatee takes nothing if the article specifically bequeathed has been given away, lost or destroyed."[12] Thus, it is generally of no significance that the absence of an asset is not a result of the testator's voluntary act.[13]

Ademption does not necessarily result in a complete loss to a beneficiary; a bequest may partially adeem. Pursuant to EPTL 3-4.3,

> [a] conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it.[14]

In re Winfield[15] is a case often cited to demonstrate partial ademption. There, the decedent bequeathed her mink coat, but had it cut down to a stole prior to her death. Because the stole was not entirely inconsistent with the bequest of the coat, the legatee received what remained of the gift.[16]

In a situation where the testator acts independently, the result is straightforward. The testator may sell an item that had been specifically devised in his most recent will, or gift that item to someone else. Upon the testator's death, the bequest of that property simply adeems, and the previously named beneficiary receives no gift. Altering this scenario, consider that the same testator executed a power of attorney, and it is the attorney-in-fact who decides to sell or transfer the specifically bequeathed property prior to the testator's death. The question whether a bequest should adeem becomes more difficult to answer under these circumstances.

b. Statutory Exceptions to the Ademption Doctrine

In EPTL 3-4.4 and 3-4.5, the legislature established few and narrow exceptions to the ademption doctrine.[17] Pursuant to EPTL 3-4.4, a conveyance made by a committee or conservator, during the lifetime of its incompetent or conservatee, of property that had been specifically bequeathed in that individual's will, does not cause the bequest to adeem.[18] Instead, the intended beneficiary of the property is entitled to receive "any remaining money or the other property into which the proceeds from such sale or transfer may be traced."[19] Additionally, EPTL 3-4.5 provides that insurance proceeds paid after death on property that had been spe-

cifically devised are to pass to the intended beneficiary of the property. It must be emphasized that this section applies solely to proceeds paid after the testator's death.[20]

Moreover, EPTL 3-4.4 is limited to ameliorating the financial abuses by a guardian to an incapacitated person. Perhaps this is because the individuals protected by that section are those who have been judicially declared incompetent, and are more likely to be victimized by their agents' misconduct.[21] This rationale for the limited exception can be extended to the authority granted to attorneys-in-fact, who can just as easily abuse their authority. Restrictions on gifting powers imposed by the new power of attorney legislation seek to eliminate the potential for these problems.

Nevertheless, although these sections provide some relief from the otherwise stringent rules of the ademption doctrine, the statute contains no reference to the consequences of acts taken by a testator's attorney-in-fact that may improperly defeat the testator's testamentary plan.

Outside the scope of the aforementioned exceptions, courts have addressed a variety of circumstances in which the transfers by an attorney-in-fact appeared to cause the ademption of bequests. Notably, a dichotomy has emerged in the way courts have applied the ademption doctrine to cases of *inter vivos* transfers by an attorney-in-fact to himself, and situations in which the specifically devised property was sold by the same agent, who keeps the proceeds for himself. But it is not necessarily fair to deem a beneficiary without recourse simply because an attorney-in-fact improperly sold property prior to the testator's death instead of merely transferring it to himself or herself. It will be interesting to see how courts will address new cases in light of the new legislation.

II. The Dichotomy

a. Ademption and *Inter Vivos* Transfers by the Attorney-in-Fact

A somewhat recent decision on this topic is *Musacchio v. Romagnoli*.[22] In that case, the attorney-in-fact transferred funds from the testatrix's bank account into his own, and conveyed her home to himself for the remainder of the testatrix's life.[23] Upon the testatrix's death, the attorney-in-fact retained ownership of the assets, and the executor commenced an action for their return to the estate contending that the property had been improperly withheld.[24] In response, the attorney-in-fact asserted that the assets had adeemed. The court disagreed, stating that "nothing . . . indicates that ademption would apply to an invalid *inter vivos* transfer."[25]

Rejecting the ademption argument, the court explained that a power of attorney gives rise to an agency-like relationship that imposes a fiduciary duty on the attorney-in-fact requiring that he or she act "for the benefit of the principal."[26] The court further stated that "an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship."[27] In the event that such a transfer is made, a presumption of impropriety arises. The attorney-in-fact must rebut this presumption by clearly demonstrating that the principal intended to make a gift.[28]

In *Musacchio*, the attorney-in-fact failed to meet his burden of demonstrating either that a gift was intended or that the principal had been competent at the time of the transfer. Accordingly, the court directed the agent to return the assets to the estate for distribution in accordance with the terms of the testatrix's will.[29]

The Suffolk County Surrogate reached a similar conclusion in *Estate of Berry*.[30] There, the decedent executed a will after learning that she had mere weeks to live. In her will, she made specific bequests of percentages of the balance of a particular bank account to five individuals, four of whom were infants. The oldest of those five beneficiaries was the testator's attorney-in-fact. Utilizing that power, the attorney-in-fact withdrew a lump sum from the same account. He asserted that the testator instructed him to withdraw the funds to pay her bills.[31] Four days later, the testator died. Thereafter, the attorney-in-fact used some of the withdrawn funds to pay some estate bills, and allocated the remainder to his personal expenses.

The *guardian ad litem* for the infant beneficiaries argued that the funds withdrawn by the agent should be returned, minus any legitimate estate expenses, and that the specific legatees should receive their bequests in accordance with the percentages allocated by the will. The attorney-in-fact contended that his act of removing the funds upon instructions of the decedent effectively revoked the specific bequests from the account, and therefore the bequests adeemed.[32]

The Surrogate rejected this argument, opining that the payment of the decedent's bills would have involved withdrawing only specific amounts, not the lump sum that he took to "in effect, [make] a gift to himself."[33] Because the agent utilized his power to transfer the funds to himself, it was the attorney-in-fact's burden to rebut the presumption of impropriety and to make a clear showing that the testator had intended to make a gift. The court judged that he failed to do so and held that, except for the funds for which the attorney-in-fact could substantiate legitimate estate expenses, the bequest had not adeemed.[34]

Another noteworthy case is *In re Trotman*,[35] a contested accounting proceeding. *Trotman* involved a dispute over real property that had been specifically devised by the decedent, but was transferred to the attorney-in-fact by the attorney-in-fact just a few days before the decedent's death. The executor questioned the validity of the transfer and began a discovery pro-

ceeding in an effort to return title of the property to the specific devisee. The parties ultimately entered into a stipulation of settlement in which the attorney-in-fact agreed to re-convey her interest in the real property to the estate so that it could be distributed to the specific devisee.[36]

In light of the stipulation, the issue before the court was whether the attorney-in-fact was required to pay the real property taxes, utilities and homeowners insurance on the house for the period during which the property was in her name. The court held that the estate was entitled to the money expended for the property related expenses, pursuant to the terms of the agreement by which the attorney-in-fact had agreed to reimburse the estate for expenses incurred during the time she held title.

Even though the agreement by the agent to re-convey the property to the estate, and thus the specific devisee, may be interpreted as demonstrating the impropriety of the fiduciary's conduct, *Trotman* did not explicitly determine the issue whether the property had adeemed based upon the actions of the attorney-in-fact.

Nevertheless, as demonstrated by the more recent decisions of the *Musacchio* and *Berry* courts, when an attorney-in-fact makes an *inter vivos* transfer of a testator's assets utilizing a power of attorney, the ademption analysis mirrors that of assessing the validity of any *inter vivos* gift to an individual in a confidential relationship with the decedent. If the presumption of invalidity is not successfully rebutted by the fiduciary, the transaction becomes void.

b. Ademption and the Sale of Specifically Bequeathed Property

Interestingly, New York courts have not always treated cases in which the specifically bequeathed property was sold in the same manner.

In *LaBella v. Goodman*,[37] the contention was that the attorney-in-fact had converted to herself proceeds from the pre-death sale of the testator's real property, which had been specifically devised. The intended beneficiaries commenced a proceeding claiming that the attorney-in-fact had improperly obtained the power, breached her fiduciary duty, and sought to impose a constructive trust on the proceeds of the sale. The court did not address the issue whether the power of attorney had been improperly obtained, nor did it explore the validity of the sale. Instead, it affirmed the Surrogate's determination that because the property had been sold during the decedent's lifetime, the ademption doctrine extinguished any breach of fiduciary duty.[38] It further explained that once a devise adeems, "the court is not permitted to substitute something else for it."[39]

Absent from the *LaBella* opinion are most of the facts that were likely presented to the court. Thus, it is unclear whether the sale was effectuated by the attorney-in-fact, but one may infer as much from a reading of the decision. Despite any possible abuses of the power, the Appellate Division adhered to the strict nature of the ademption doctrine in reaching its result.

LaBella follows the rationale implemented in older cases, such as *Estate of Barnwell*[40] and *In re Kramp*.[41] In *Barnwell*, a court-appointed conservator sold the testator's real estate despite the fact that the property had been specifically bequeathed. In holding that the bequest did not adeem based upon the exception in EPTL 3-4.4, the court stated that the attorney-in-fact "wisely decided to seek court intervention . . . by applying for the appointment of conservator" rather than selling the property pursuant to a power of attorney.[42] The court stated also that if the sale had occurred pursuant to a power of attorney, a different result would have been likely.[43] This statement clearly implies that a sale by the attorney-in-fact would have resulted in ademption based on strict compliance with the statute, despite the fact that the decedent was incapacitated at the time of the sale.

In *In re Kramp*,[44] the attorney-in-fact sold the testatrix's real property before her death, and the specific devisee sought to recover the proceeds of the sale. In explaining why the conveyance did not fall within the realm of the exception of EPTL 3-4.4, and thus why the bequest had adeemed, the court noted that the testatrix had never been declared incompetent, nor was any committee or conservator ever appointed for her.[45] The court stated that the language of the statute shows "the clear legislative intent to restrict its application to cases in which incompetency has been judicially determined and established under the restraints and safeguards of due process," and went on to explain that the purpose and effect of EPTL 3-4.4 "is to preserve the testamentary intent against a contrary disposition made by the representative of a testator judicially disabled from making such disposition himself."[46] The purpose of the statute, as explained by *Kramp*, is why some courts, such as the Kings County Surrogate in the more recent *Estate of Crowell*,[47] may be inclined to stray from its strict language when confronted with a testator who had either been declared incapacitated, or was evidently incompetent, and whose property was sold by an attorney-in-fact.

Estate of Crowell[48] appears to be the most recent instance in which a New York court opined on ademption within the context of a sale of specifically bequeathed assets by an attorney-in-fact. In *Crowell*, the attorney-in-fact sold shares of the testator's stock, contending that the sale occurred to ensure that the testator's bills were paid.[49] Upon the testator's death, the specific devisees of the stock asserted a claim to the proceeds of the sale. The parties ultimately entered into a settlement agreement.

Although the *Crowell* court could not resolve the ultimate ademption issue, because of the settlement, the court did opine that some courts are able to implement the testator's intent by circumventing EPTL 3-4.4 and "manipulating the classification of devises as specific or general."[50] The court also noted that durable powers of attorney have recently become a more popular substitute for Article 81 guardianship proceedings, a condition precedent to the applicability of EPTL 3-4.4. These statements have been interpreted by some authorities as favoring an expansion of the statute to provide an exception where "the sale is made by the attorney-in-fact of a now-incapacitated testator, and the other criteria of the statue are met."[51]

Crowell is one of the few ademption cases to mention giving any attention to testamentary intent. Despite the general rule that the testator's intent is of no consequence in determining whether a bequest adeems, the Appellate Division has at least once implied that the language in a will may be considered. In *Estate of Ellsworth*,[52] the testator had bequeathed two parcels of land to a town to be used "insofar as legally practical as a recreation area for senior citizens."[53] The testator's wife was given the residue of his estate for life in the form of income from a trust, and the remainder upon her death was bequeathed to the town for development or maintenance of the parks established by the gifted parcels.[54]

Prior to the testator's death, his wife, pursuant to a power of attorney, entered into contracts to sell the two parcels that had been bequeathed to the town. The agreements were executory at the time of the testator's death.[55] Although the Surrogate concluded that the town was entitled to the proceeds from the sale of the parcels, the Appellate Division reversed.[56]

The town argued that because the contracts were still executory at the time of the testator's death, the parcels automatically passed to it on that date subject to the specific performance of the agreements. Consequently, the town asserted, it was entitled to the cash proceeds of the sale in place of the original gift. In rejecting that argument, the court held that the gift was conditional and that a construction of both the paragraph making the gift to the town, and the will as a whole, demonstrated the decedent's intent to benefit the town and senior citizens with specific parcels of land.[57] If the town did not accept the gift or stopped using the parcels for that purpose, it was determined that the testator intended a reversion to his wife or her heirs.[58] Thus, the court opined that there was "no reasonable construction of the decedent's will" to allow the town to receive proceeds of the sale of the parcels, as that result would not be consistent with the testator's testamentary plan.[59]

The *Ellsworth* decision demonstrates that, in some cases, a testator's overall testamentary plan may be considered in determining a specific devisee's rights to property improperly transferred or proceeds of property improperly sold by an attorney-in-fact. It should be noted, however, that the word "ademption" was never used in the *Ellsworth* decision, likely because the sale had not been completed at the time of the testator's death. This may explain the court's unusual consideration of the testator's intent.

III. The Impact of the New Legislation

The statutory short form power of attorney that existed at the time of the aforementioned decisions allowed the principal to give the agent extremely broad authority, particularly to make gifts up to the annual exclusion amount, alter title to joint accounts or Totten trust accounts, create, revoke or modify trusts, and to change the beneficiary of retirement plans or life insurance policies.[60] In addition, the procedure involved in the principal delegating such sweeping authority was highly disproportionate to its importance.[61] The new legislation has imposed restrictions that prohibit the grant of such wide-reaching authority absent a more formal procedure and more specific instructions in the power.

Specifically, gift giving authority has been eliminated from the new statutory short form with the exception of permitting the attorney-in-fact to continue a principal's history of making gifts not exceeding $500 per year per person or charitable organization.[62] The authority to make major gifts or other asset transfers must be established through a Statutory Major Gifts Rider (SMGR), or alternatively, through a nonstatutory power of attorney.[63] Regardless, the authority granted through the SMGR and the nonstatutory power of attorney must both be executed with the same formalities as a last will and testament.

Assuming an SMGR is used, it cannot stand alone, and must be signed simultaneously with the statutory short form. Most notable and relevant here is that the new statute requires an explicit statement on the SMGR if the principal wants to authorize the agent to make gifts to himself, and the fact that the principal may also name a monitor to receive financial information from the agent. [64] Further, the power of attorney will not be effective until it is signed by both principal and agent, although the signatures need not be simultaneous.

IV. Conclusion

These amendments to the power of attorney statute not only impose procedural requirements that emphasize the importance of the authority given, but also provide safeguards seeking to eliminate the all too common financial exploitation of the elderly. Regardless, despite the best efforts of our legislators, misconduct by attorneys-in-fact will undoubtedly continue, perhaps most frequently in the form of the sale of a principal's property when the agent lacks authority to make gifts

to himself or others. In any case, it will be interesting to see whether courts change the manner in which they address the issue of ademption as a result of these abuses.

The import of the foregoing case law provides only one clear answer to the issue of how to apply the ademption doctrine to transfers by attorneys-in-fact: *inter vivos* transfers by an attorney-in-fact to himself or herself may be voided and the doctrine of ademption may not apply if the fiduciary fails to rebut the presumption of impropriety and to demonstrate that the testator intended to forgo a part of his testamentary plan by making a gift.

The question becomes: What about pre-death sales of the testator's property occurring at the hand of the attorney-in-fact? Why no presumption of impropriety, especially when the fiduciary retained the proceeds of the sale? Older cases such as *Kramp* and *Barnwell* reflect a very strict adherence to the ademption doctrine, and its narrow exception pursuant to EPTL 3-4.4.

Notwithstanding these older cases, the court in *Estate of Crowell* suggested the possibility of leeway from such strict adherence. The *Crowell* court made the very relevant statement that individuals are now more frequently using durable powers of attorney as opposed to seeking Article 81 guardianship proceedings to acquire authority to administer the affairs an incompetent individual. In addition, it indicated openness to expanding EPTL 3-4.4 to apply to the sale of property by an attorney-in-fact. This implies that expanding the current statute for practical and / or equitable purposes may be more beneficial and provide a remedy to estate beneficiaries. It certainly seems consistent with the broad revisions to the power of attorney law that an attorney-in-fact who breaches his or her fiduciary duty by improperly selling a testator's assets and retaining the proceeds should not be permitted to profit at the expense of the decedent's testamentary plan. Moreover, a testamentary plan should not be frustrated by an attorney-in-fact's liquidation of property even for the decedent's benefit if the proceeds are not utilized by the date of the testator's death.

Alternatively, one may argue that pre-death sales of a testator's property by an attorney-in-fact should be analyzed in the same manner as *inter vivos* transfers. The same fiduciary relationship exists, and thus, the same presumption of impropriety may follow. Because the property has been sold to a third party, the sale cannot necessarily be voided in the same manner as an *inter vivos* transfer by the attorney-in-fact to himself or herself. Nevertheless, the proceeds thereof may be ordered to be returned to the estate and subsequently distributed to the specific devisees of the subject property. In all events, regardless whether the origin of the agent's authority is under the new power of attorney statute or its prior version, additional scrutiny should be imposed upon any individual receiving such a wide array of authorit.

Endnotes

1. N.Y. Session Laws: 2009 N.Y. Laws ch. 4 *amending* 2008 N.Y. Laws ch. 644.
2. *See, e.g.*, Jordan Linn, *Getting to Know New York's New Power of Attorney Law*, New York Trusts and Estates Litigation, at www.nyestatelitigationblog.com, February 19, 2009.
3. *In re Dittrich's Estate*, 53 Misc. 2d 782, 784, 279 N.Y.S.2d 657, 660 (Sur. Ct., Queens Co. 1967).
4. 12 Warren's Heaton on Surrogate's Court Practice § 204.01[1].
5. *In re Brann*, 219 N.Y. 263, 114 N.E. 404 (1916); *In re Wright's Will*, 7 N.Y. 2d 365, 165 N.E.2d 561, 197 N.Y.S.2d 711 (1960).
6. 39 N.Y. Jur. Decedent's Estates § 934 (2009).
7. 12 Warren's Heaton on Surrogate's Court Practice § 204.01[1].
8. *In re Wright's Will*, 7 N.Y. 2d at 367, 165 N.E.2d at 562, 197 N.Y.S.2d at 713 (1960).
9. *See In re Brann*, 219 N.Y. 263, 114 N.E. 404 (1916).
10. *See id.*; *cf. Estate of Ellsworth*, 189 A.D.2d 977, 592 N.Y.S.2d 506 (3d Dep't 1993).
11. *See* 12 Warren's Heaton on Surrogate's Court Practice § 204.01[4].
12. *See In re Wright's Will*, 7 NY2d at 367, 165 N.E.2d at 562, 197 N.Y.S.2d at 713 (1960).
13. *See Will of Baker*, 106 Misc. 2d 649, 652, 435 N.Y.S.2d 482, 484 (Sur. Ct., Westchester Co. 1980); *Estate of Spanos*, N.Y.L.J., May 3, 1994, p. 29, col. 6 (Sur. Ct., Nassau Co.).
14. N.Y. Estates, Powers & Trusts Law (EPTL) 3-4.3.
15. *In re Winfield*, 11 Misc. 2d 149, 172 N.Y.S.2d 27 (Sur. Ct., N.Y. Co. 1958).
16. *See id.*
17. *See Estate of Spanos*, N.Y.L.J., May 3, 1994, p. 29, col. 6 (Sur. Ct., Nassau Co.).
18. It should be noted that the words "conservator" and "conservatee" and "incompetent" and "committee" have been replaced by "incapacitated" and "guardian" since April 1, 1993, when Article 81 of the Mental Hygiene Law superseded Article 78 of the Mental Hygiene Law (*see In re Buckner*, N.Y.L.J., Feb. 26, 1993, p. 26, col. 2 (Sur. Ct., N.Y. Co.); *In re P.V.*, N.Y.L.J., June 5, 2009, p. 27, fn3, col. 1 (Sup. Ct., N.Y. Co.); 3-4.4 remains in the antiquated language.
19. EPTL 3-4.4.
20. *See* EPTL 3-4.5; *Will of Baker*, 106 Misc. 2d 649, 652, 435 N.Y.S.2d 482, 484 (Sur. Ct., Westchester Co. 1980).
21. *See* EPTL 3-4.4, Margaret Valentine Turano, Practice Commentaries (2003).
22. *Musacchio v. Romagnoli*, N.Y.L.J., June 16, 2006, p. 25, col. 3 (Sur. Ct., Westchester Co.).
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *Estate of Berry*, N.Y.L.J., Apr. 2, 1997, p. 31, col. 1 (Sur. Ct., Suffolk Co.).

31. *See id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *In re Trotman*, N.Y.L.J., May 13, 1998, p. 32, col. 2 (Sur. Ct., Nassau Co.).
36. *See id.*
37. *LaBella v. Goodman*, 198 A.D.2d 332, 603 N.Y.S.2d 885 (2d Dep't 1993).
38. *See id.*
39. *See id.* at 323.
40. *Estate of Barnwell*, 88 Misc. 2d 856, 859, 389 N.Y.S.2d 262, 264-65 (Sur. Ct., Erie Co. 1976).
41. *In re Kramp*, 100 Misc. 2d 724, 726, 420 N.Y.S.2d 80, 82 (Sur. Ct., Niagara Co. 1979).
42. *Estate of Barnwell*, 88 Misc. 2d at 859, 389 N.Y.S.2d at 264-65 (Sur. Ct., Erie Co. 1976).
43. *See id.*
44. *Matter of Kramp*, 100 Misc. 2d at 726, 389 N.Y.S.2d at 82 (Sur. Ct., Niagara Co. 1979).
45. *See id.*
46. *See id.*
47. *Estate of Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.).
48. *See id.*
49. *See id.*
50. *See id.*
51. *See* 12-204 Warren's Heaton on Surrogate's Court Practice § 204.01[10][b] (discussing *In re Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.)).
52. *Estate of Ellsworth*, 189 A.D.2d 977, 977-78, 592 N.Y.S.2d 506, 506 (3d Dep't 1993).
53. *See id.*
54. *See id.* at 978, 592 N.Y.S.2d at 506.
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.* at 979, 592 N.Y.S.2d at 506.
59. *See id.*
60. *See* Fish, Daniel G., *Understanding the Revised Power of Attorney Statute*, N.Y.L.J., Feb. 24, 2009, p. 3, col. 1.
61. *See* Radigan, C. Raymond & Schoenhaar David R., *Making Gifts and Property Transfers Under New Power of Attorney Law*, N.Y.L.J., Mar. 9, 2009, p. 3, col. 1.
62. *See* Fish, *supra* note 60.
63. *See* Bailly, Rose Mary & Hancock, Barbara S., *Changes for Powers of Attorney in New York*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2009, Vol. 42, No. 1, p. 7.
64. *See* Fish, *supra* note 60.

Jaclene D'Agostino is an associate at Farrell Fritz, P.C., where she practices in the trusts and estates litigation group. She is a graduate of Barnard College, Columbia University, and St. John's University School of Law.

What Every Attorney Should Know About the New Durable Power of Attorney Form

By Anthony J. Enea

At first glance the most obvious difference between the old statutory durable general power of attorney form and the new statutory short form power of attorney (the "New Form POA" or the "New Form")[1] that became effective on September 1, 2009 is the length of the new form—it is considerably longer than the old form. Then there is the addition of the Statutory Major Gifts Rider (SMGR).[2] Beyond these obvious differences, the major distinction, in my opinion, is that the New Form poses significant execution problems, especially for seniors and small firm or sole practitioners who have difficulty obtaining witnesses for the execution of documents. In their zeal to protect the elderly from financial abuse, the drafters may have created a document that is so complicated and difficult to execute that it may end up being underutilized.[3] For example, at a recent seminar a prominent attorney suggested that he is strongly considering recommending to his clients that they execute and fund a revocable living trust, thereby avoiding the complexities of the New Form and what are likely to be the continuation of problems associated with recognition and acceptance of powers of attorney by financial institutions and banks.

I will highlight for you what I believe are some of the most important aspects / provisions of the New Form which necessitate your attention:[4]

1. The New Form must be in at least 12-point size font.

2. If more than one agent is designated, they must act together unless the principal initials the box permitting the agents to act separately.

3. If successor agents are designated, they must act together unless the principal initials the box permitting the successor agents to act separately.

4. The execution of the New Form automatically revokes any and all prior powers of attorney executed by the principal, unless otherwise stated in the "modifications" section of the New Form. Arguably, this would include any banking and financial institution powers of attorney previously executed by the principal. Certainly, other types of preexisting powers of attorney would also be revoked. Practitioners are urged to address this issue with the principal, and provide for previously executed and existing powers of attorney in the "modifications" section of the New Form.

5. Part (f), entitled "Grant of Authority," lists the specific powers—lettered "A" through "P"—that the principal may grant to the agent. The principal may either initial each of the letters corresponding to the specific power he or she wants to grant or he or she may initial the letter "P" and can then list each of the specific letters for each power to be granted.

   Letter "M" of the old form, as you may recall, contained a gifting provision. No gifting provisions are contained within letters "A" through "P" of the New Form. The sole exception is that under letter "I," entitled "Personal and Family Maintenance," the agent may continue making gifts the principal made to individuals and charities prior to the POA being signed, in an amount not to exceed $500 per recipient in any one calendar year.[5]

   Letters "A" through "O" of the New Form should not be modified in any way, shape or form. I also believe that no additional lettered matters should be added in Part (f). For an explanation of each of the powers granted a thorough reading of GOL §§ 5-1502A through 5-1502O is a must.[6]

6. Part (g) of the New Form permits the principal to state any "modifications" to the authority granted in Part (f) and otherwise modify some of the other default provisions of the New Form. However, it is important to note that any "modifications" stated in Part (g) should not be provisions which allow the agent to make gifts of the principal's assets or change the principal's interest in property. Any gifting other than the minimal gifting provided for in letter "I" must be provided for in the SMGR. For example, in Part (g), the principal could provide that the execution of the New Form does not revoke a prior banking or financial institution POA. The principal can also define the "reasonable compensation" he or she would like the agent to receive or he or she may limit the powers of a "moni-

tor" (a newly created party under Part (i) of the New Form). Part (g) is also the section where many elder law planning techniques can be provided for, such as entering into a personal service contract. As long as the modifications do not involve gifts of the principal's assets or changes to his or her interest in property, it appears that a variety of modifications are permissible in Part (g).

7. If the principal wishes to allow the agent to make gifts in excess of the $500 provided for in letter "I" of the powers, he or she would need to initial both Part (h) of the form and complete and execute the SMGR.

8. Part (i) of the New Form allows the agent to appoint a "monitor" who may demand accountings by the agent, including records and documents of all transactions, and also obtain documents from third parties. Caution here. If we counsel a principal to appoint one family member as agent and another family member as monitor, we may be leading our clients down a slippery slope toward family power struggles that can detrimentally impact the agent's ability to act under the New Form. It may be wise to specifically delineate the monitor's authority and the extent that he or she can seek and demand records. For example, you may wish to limit the ability to demand for records to once or twice per year. This is so especially as monitors are also permitted to commence a lawsuit against the agent(s).[7]

9. Part (j) of the New Form provides that the agent may be reimbursed for reasonable expenses incurred on the principal's behalf. If the principal wishes to allow the agent to receive "reasonable compensation," he or she must initial the box in Part (j). If the principal wishes to limit or define "reasonable compensation" he or she should do so in the modification section, Part (g).

   As you can see, the number of times the principal is required to place his or her initials has significantly increased from the old POA form. For many seniors this will be another hurdle to executing the New Form.

10. Part (l) of the form concerns the revocation and termination of the authority of the agent. Of course, the New Form POA terminates when the principal dies or becomes incapacitated if the POA is not durable.[8] The New Form is durable unless the principal states otherwise.[9] Under the new law, as in the past, delivery of a written instrument to both the agent(s) and any third party who may have relied on the POA as to the revocation of a POA is sufficient notice of revocation.[10]

11. The new POA form must be dated and signed by the principal and acknowledged by the principal before a notary public.

12. Part (n) of the New Form provides the agent with a statement of his or her legal obligations, duties and liabilities as an agent. It clearly places a significant burden and responsibility upon the agent for record keeping.

    In my opinion, the agent under the New Form POA is now in a similar fiduciary position as the trustee of a trust. Part (n) also places the attorney representing the principal in the unenviable position of having to advise the agent that there may exist a potential conflict of interest, and that he or she may wish to seek separate legal counsel before executing the New Form. If the agent does not obtain separate legal counsel, it may be wise to obtain from him or her some written acknowledgement of the waiver of the potential conflict of interest and the decision not to retain counsel.

    I believe a significant number of prospective and named agents will decide that they don't want the responsibility of being an agent, once they have read the notice provisions of the New Form and consulted with an attorney.

13. The agent must sign and have their signatures acknowledged before a notary public in Part (o) of the New Form; the New Form POA is not valid until all of the agents have signed and had their signatures acknowledged before a notary public. Multiple agents, however, do not need to sign at the same time and do not need to sign at the same time as the principal.

14. The SMGR must be executed simultaneously with the POA form by the principal. When both documents have been fully executed, they will then be read as one document.

    Gifting under the SMGR is authorized only if the principal has initialed Part (h) of the New Form POA. Clearly, the SMGR is intended to alert the principal of the gravity and importance of granting gifting powers to the agent, particularly if the agent is to have the authority to gift to him or herself. However, when one analyzes both the execution requirements of the SMGR and the legislative provisions relevant to the powers enumerated in the "modifications" section—Part (b)—of the SMGR, there are enough ambiguities and contradictions, in my opinion, to devote

a full-day seminar. Nevertheless, here are highlights:

A. If the principal wishes to allow the agent to make gifts to others, not including him or herself up to the federal annual gift tax exclusion ($13,000 for 2009), he or she will need to initial the box in Part (a) of the SMGR.

B. Part (b) of the SMGR must contain any "modifications" or expansion of the gifting powers the principal wishes to give to the agent(s), and the box in Part (b) must be initialed by the principal. The Part (b) modifications relate to any expansion or modification of the power of the agent to gift beyond the annual exclusion amount ($13,000) to third parties. The powers in Part (b) *do not* include the powers to the agent to gift to him or herself (emphasis added). That authority must be provided in Part (c) of the SMGR. The gifting to third parties in Part (b) can be unlimited or gifts of a specific amount. Sample modifications of the gifting powers that can be inserted in Part (b) can be found in GOL § 5-1514(3). It does not appear that GOL § 1514(3) limits the modifications that can be made.[11] However, this seems to be another area of ambiguity.

C. Part (c) of the SMGR also has to be initialed by the principal if he or she wishes to grant the agent the authority to gift to him or herself, to the extent or limited as delineated therein.

   Thus, it appears that the boxes in Part (a), (b) and (c) of the SMGR will have to be initialed by the principal if he or she wishes to grant expanded gifting powers to the agent with respect to third parties and him or herself. The principal will also have to clearly state his or her modifications of these powers.

D. In Part (e), the SMGR must be dated and signed by the principal with his or her signature acknowledged before a notary public.

E. In Part (f), the SMGR must be witnessed by two people who are not *potential* recipients of gifts under the SMGR and the witnesses' statement must indicate that they observed the principal sign the SMGR.

F. And finally, Part (g) of the SMGR must state the name(s) and address(s) of the person or persons who prepared the SMGR.

Conclusion

This article is by no means an exhaustive review of the New Form POA and the SMGR that went into effect on September 1, 2009. More changes in the form of technical corrections are imminent, once the legislature is back in session. Hopefully, I have made the reader aware that the New Form POA and the SMGR have many complexities that must be carefully studied, understood and followed or modified depending on each client's situation. I wish you and your clients the best of luck in doing so.

Endnotes

1. 2008 N.Y. Laws ch. 644. On January 27, 2009, Governor Patterson signed into law Chapter 644 of the N.Y. Laws of 2008. *See* 2009 N.Y. Laws ch. 4. All statutory references herein are to the amendments to the N.Y. General Obligations Law §§ 1-1501, *et seq*., and are referred to for convenience and ease of use as GOL.
2. GOL § 5-1514.
3. The author wishes to acknowledge all of the hard work and efforts of the drafters of the new form and of all the sections and committees involved. He is hopeful that the statute and form are viewed as works in progress.
4. At the time this article was written, there were at least two bills pending—A.8392 and S.5589—that propose technical corrections to the New Form with respect to the revocation or termination of the POA. While these technical corrections address some of the concerns raised in this article, it was not likely that these amendments would be enacted before the New Form became effective on September 1, 2009.
5. GOL § 5-1502I.
6. *See* GOL §§ 5-1502A–5-1502O.
7. GOL § 5-1509.
8. *See* GOL § 5-1511.
9. GOL § 5-1501A.
10. *See* GOL § 5-1511(3).
11. *See* GOL § 5-1503.

Anthony J. Enea is a member of Enea, Scanlan and Sirignano, LLP, with offices in White Plains and Somers. Mr. Enea is a Past President of the Westchester County Bar Association; the Co-Editor-in-Chief of the *Elder Law Attorney*, a quarterly publication of the Elder Law Section of the New York State Bar Association; the Secretary of the Elder Law Section of the New York State Bar Association; the President-Elect of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA); and a member of the Council of Advanced Practitioners of NAELA.

Status Determinations: Evidentiary Considerations

By Anne C. Bederka

The ability to attack a will offered for probate depends, as a threshold matter, upon the status of the person seeking to mount the challenge. SPCA 1410 identifies the universe of people who may file objections to the probate of an instrument offered as a last will and testament; it grants objectant status only to those persons who would be adversely affected by the admission of the instrument to probate.[1] Among those persons entitled to object are the decedent's distributees, provided that their intestate share exceeds any bequest to them under the will.

The right of a person to challenge an instrument offered for probate may, in turn, be challenged on the basis that such person is not a distributee of the decedent with standing to mount a will contest.[2] Similarly, the status of a person claiming to be a distributee may be challenged in a proceeding in which he or she is seeking to be appointed as administrator of a decedent's estate. This article discusses some of the proof problems implicated in establishing one's status as a distributee and explores obstacles to the admission of relevant evidence establishing family relations.

Where a person's status is at issue, evidence must be introduced to establish the person's relationship to the decedent. The person seeking to establish his status as a distributee (as defined in EPTL 4-1.1) has the burden of proving, by a preponderance of the evidence,[3] the relationship between himself or herself and the decedent to the nearest common ancestor. Such a claimant must establish not only that he or she is related to the decedent, but also that there are no other persons of nearer degree of relationship to the decedent whose existence works to cut off the claimant's rights.[4]

Establishing family history, however, can be a difficult enterprise. While stories of family history may have been passed down from generation to generation and from relative to relative, living family members may not have first-hand knowledge of remote portions of the family tree. Under the so-called hearsay rule, living family members would be precluded from testifying about their deceased ancestors' statements to prove the truth of the statements' content.[5] To avoid the potential for injustice in these circumstances, out-of-court statements concerning "pedigree," or history of family descent,[6] are admissible as an *exception* to the hearsay rule. The pedigree exception recognizes that proof of ancestry is difficult to obtain from persons with first-hand knowledge of the facts, and relaxes the rules of evidence accordingly.[7] Under the pedigree exception, oral or written statements of a common ancestor or family member (the "declarant") are admissible to prove family relationships if: (i) the declarant is dead (or, arguably, unavailable);[8] (ii) the statement was made when the declarant had no motive to lie; and (iii) the declarant was related by blood or affinity to the family about whom he or she spoke.[9]

Where the declarant was someone other than the decedent himself, there must be proof—independent of the declarant's statements—of the relationship between the declarant and the family, but it need only be slight.[10] For example, genealogical research linking the declarant to the person about whom he or she spoke has been held to be sufficient independent proof of the relationship.[11] When the declarant was the decedent himself or herself, however, no independent proof of his relationship to the family is necessary.[12]

If the above foundational requirements are met, an aspiring objectant may testify in her own interest concerning conversations she had with the declarant that may help to establish the ancestral history of the decedent's family.[13] Even better, the declarant need not have spoken from personal knowledge. It is perfectly acceptable for the declarant to have heard the information imparted from other members of the family.[14] Where a potential objectant seeks to testify concerning declarations made by the *decedent*, however, another evidentiary problem arises. Under CPLR 4519—known as the Dead Man's Statute—persons with an interest in the outcome of a proceeding (such as a potential objectant) are prohibited[15] from offering testimony reflecting a personal transaction or communication[16] with the decedent if the testimony would be helpful to their position.[17]

In *In re Kelley*, the Court of Appeals has ruled that the Dead Man's Statute can successfully be asserted to thwart an interested party's testimony relaying a decedent's own communications and transactions concerning his purported marriage.[18] Other courts have, without extended discussion or analysis, similarly found (or stated in *dicta*) that a person seeking to establish his relationship to a decedent is rendered incompetent by the Dead Man's Statute to testify about his or her own communications with the decedent.[19]

Nevertheless, the Surrogate's Court in Bronx County has squarely held that the Dead Man's Statute poses no bar to the admission of such testimony.[20] In *In re Berlin*, the court reasoned that there is no rational basis for distinguishing between an objectant's testimony concerning conversations with other deceased persons,

which is clearly permitted under the pedigree exception, and testimony concerning conversations with the decedent whose estate is at issue.[21]

One obvious difference between *Kelley* and the typical status case is that the issue before the Court of Appeals—whether a decedent was married *at the time of his death*—did not implicate the usual proof problems of establishing decedent's ancestry. Obviously, a permissive evidentiary rule will, generally speaking, better serve the purpose of the pedigree exception.[22] The concern that an interested party may fabricate evidence relating to transactions or communications is no more pressing when he or she relates information obtained directly from the decedent than when the information originated from communications with other deceased persons. In both instances the trier of fact suffers from the same disadvantage of hearing untested, second-hand declarations relating to ancestry. Either way, the trier of fact is able to assess the credibility of an interested witness and examine corroborating or contradictory evidence, and to accord to the testimony the weight it deserves.[23] The fact that declarations concerning family ancestry are alleged to have come from the decedent himself, as opposed to another deceased family member, does not make such declarations inherently more valuable and thus deserving of heightened protection. Finally, as the *Berlin* court noted, self-serving testimony alone cannot win the day; to successfully establish his or her status as decedent's distributee, the objectant is also required to submit independent proof of the familial relationship.[24]

While testimony often focuses on oral declarations made by one family member to another, documentary evidence also will be necessary to prove one's pedigree.[25] Proof of pedigree may include public information such as birth, death and marriage records, probate court filings, federal census and naturalization records, church and cemetery records, obituaries, and Social Security records, as well as private family documents and property, such as family correspondence, an inscription on a gravestone, a name in a family Bible or an engraving on a piece of jewelry. The pedigree exception applies to all such documentary evidence.[26] Moreover, documentary proof, unlike oral testimony, does not implicate the Dead Man's Statute. CPLR 4519 prohibits only the introduction of testimonial evidence and does not apply to the introduction of documents written by the decedent.[27] Of course, as a practical matter, testimony by an interested witness necessary to authenticate the decedent's handwriting may be barred by the statute, thus requiring use of a disinterested or expert witness to authenticate the document.[28] A genealogist can be enormously helpful in identifying and gathering necessary documentation.

Presenting a convincing factual record—especially where an alleged distributee is relying upon his or her own testimony—is obviously made easier by application of the pedigree exception to the hearsay rule and the arguable inapplicability of the Dead Man's Statute in those cases where ancestry must be established. The lifting of otherwise applicable rules of evidence presents counsel with an opportunity to meet the stringent requirements of establishing a claimant's relationship to the decedent as an initial step to challenging the decedent's will or seeking appointment as administrator of the decedent's estate.

Endnotes

1. SCPA 1403, in contrast, sets forth those persons required to be cited as parties to the proceeding. The class of persons who are deemed necessary parties to a probate proceeding under SCPA 1403 may not be identical to the class of persons with standing to object to admission of the will to probate under SCPA 1410. Indeed, not all necessary parties will have standing to object to probate. A distributee whose intestate share is less than the bequest to him or her under the propounded instrument, for example, would not be adversely affected by the admission of the instrument to probate and thus would not be a proper objectant.
2. *See, e.g.*, *In re McCarthy*, 281 A.D.2d 773, 117 N.Y.S.2d 833 (3d Dep't 1953); *In re Teitler*, N.Y.L.J., Aug. 27, 1996, p. 23, col. 3 (Sur. Ct., N.Y. Co.); *In re Tumpeer*, N.Y.L.J., June 4, 2008, p. 39, col. 4 (Sur. Ct., N.Y. Co.); *In re of Esther T.*, 86 Misc. 2d 452, 382 N.Y.S.2d 916 (Sur. Ct., Nassau Co. 1976).
3. *In re Kuberka*, 22 Misc. 3d 1104A, 880 N.Y.S.2d 225 (Sur. Ct., Erie Co. 2008); *In re Williams*, N.Y.L.J., Jan. 6, 1993, p. 23, col. 2 (Sur. Ct., Bronx Co.); *In re Whalen*, 146 Misc. 176, 194, 261 N.Y.S. 761, 780 (Sur. Ct., N.Y. Co. 1932).
4. *In re Kuberka*, 22 Misc. 3d 1104A, 880 N.Y.S.2d 225 (Sur. Ct., Erie Co. 2008). To establish one's standing to file objections under SCPA 1410, a potential objectant need only establish that he or she is *a distributee* who would be adversely affected by admission of the will to probate. For purposes of effecting distribution of decedent's estate, however, a potential claimant must "close the class" of distributees, proving not only that there are no persons more closely related to the decedent who would cut off the claimant's rights to the estate, but also that the persons identified to the court constitute *all* of the decedent's distributees who have a right of inheritance. But see SCPA 2225.
5. Such out-of-court statements are considered inherently unreliable because the out-of-court declarant cannot be cross-examined to test his or her memory, perception, or veracity. *See, e.g.*, *Hasbrouck v. Caedo*, 296 A.D.2d 740, 745 N.Y.S.2d 294 (3d Dep't 2002); *Stern v. Waldbaum*, 234 A.D.2d 534, 651 N.Y.S.2d 187 (2d Dep't 1996).
6. The concept of pedigree "embraces such matters as relationship, descent, birth, marriage, and death." Richard T. Farrell, *Prince, Richardson on Evidence*, § 8-901 (11th ed. 1995).
7. As the U.S. Supreme Court has stated:

   > The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known to but few persons, it is

> obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion failure of justice.

Fulkerson v. Holmes, 117 U.S. 389, 397, 6 S. Ct. 780, 784, 29 L. Ed. 915, 918 (1886).

8. *See* Richard T. Farrell, *Prince, Richardson on Evidence*, § 8-904 (11th ed. 1995), observing that, while the law in New York remains unclear, the better rule would be to admit declarations of pedigree if the declarant is shown to be either dead *or* unavailable. *See also In re Strong*, 168 Misc. 716, 6 N.Y.S.2d 300 (Sur. Ct., N.Y. Co. 1938), *aff'd*, 256 A.D. 971, 11 N.Y.S.2d 225 (1st Dep't 1939).

9. *Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914); *In re Tumpeer*, N.Y.L.J., June 4, 2008, p. 39, col. 4 (Sur. Ct., N.Y. Co.); *In re Logue*, N.Y.L.J., June 19, 1998, p. 30, col. 3 (Sur. Ct., Westchester Co.).

10. *See Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914); *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901); *Layton v. Kraft*, 111 A.D. 842, 98 N.Y.S. 72 (1st Dep't 1906).

11. *In re Tumpeer*, N.Y.L.J., June 4, 2008, p. 39, col. 4 (Sur. Ct., N.Y. Co.).

12. *In re Teitler*, N.Y.L.J., Aug. 27, 1996, p. 23, col. 3 (Sur. Ct., N.Y. Co.).

13. *In re Tumpeer*, N.Y.L.J., June 4, 2008, p. 39, col. 4 (Sur. Ct., N.Y. Co.); *In re Kuberka*, 22 Misc. 3d 1104A, 880 N.Y.S.2d 225 (Sur. Ct., Erie Co. 2008); *In re Berlin*, 91 Misc. 2d 666, 398 N.Y.S.2d 334 (Sur. Ct., Bronx Co. 1977); *In re King*, N.Y.L.J., Jan. 4, 1993, p. 26, col. 5 (Sur. Ct., Westchester Co.).

14. *Eisenlord v. Clum*, 126 N.Y. 552, 27 N.E. 1024 (1891).

15. A failure to object to the admission of evidence otherwise barred by CPLR 4519 waives the protections of the statute. *See, e.g., In re Williams*, N.Y.L.J., Jan. 6, 1993, p. 23, col. 2 (Sur. Ct., Bronx Co.); *In re Esther T.*, 86 Misc. 2d 452, 456, 382 N.Y.S.2d 916, 919 (Sur. Ct., Nassau Co. 1976).

16. The term "personal transaction or communication" has been interpreted broadly to exclude an interested witness's testimony concerning "any knowledge which he has gained by the use of his senses from the personal presence of the deceased." *Griswold v. Hart*, 205 N.Y. 384, 387, 98 N.E. 918, 918-19 (1912). In fact, any testimony "which the deceased person if living could contradict or explain" is barred. *Id.* at 397, 98 N.E. at 922.

17. The protections of CPLR 4519 may only be invoked by a circumscribed class, which includes the fiduciary of the estate and any person deriving his or her interest from, through, or under the decedent. For an example of a court's refusal to apply the statute to a non-member of the protected class, see *Lancaster v. 46NYL Partners*, 228 A.D.2d 133, 651 N.Y.S.2d 440 (1st Dep't 1996).

18. *In re Kelley*, 238 N.Y. 71, 143 N.E. 795 (1924) (in a proceeding to revoke letters of administration on the ground that the administrator was not legally married to decedent, Court of Appeals held that self-interested testimony by alleged widow, on the one hand, and decedent's family members, on the other, as to decedent's residence during alleged marriage was barred by CPA 347, the predecessor to CPLR 4519).

19. See *In re King*, N.Y.L.J., Jan. 4, 1993, p. 26, co. 5 (Sur. Ct., Westchester Co.) ("a person seeking to establish or disprove kinship to a decedent is not competent to testify as to personal transactions or communications with him"); *Lancaster v. 46NYL Partners*, 228 A.D.2d 133, 140, 651 N.Y.S.2d 440, 445-46 (1st Dep't 1996) (in reversing lower court's exclusion, on CPLR 4519 grounds, of daughters' testimony that decedent openly and notoriously held them out as his children, court observed that testimony barred by the Dead Man's Statute "*may be* excludable at trial" but can always be considered for the purpose of defeating a motion for summary judgment) (emphasis supplied); *In re Tumpeer*, N.Y.L.J., June 4, 2008, p. 39, col. 4 (Sur. Ct., N.Y. Co.) (opining *in dicta* that objectant "may be incompetent to testify as to a personal transaction or communication with decedent"); *In re Esther T.*, 86 Misc. 2d 452, 382 N.Y.S.2d 916 (Sur. Ct., Nassau Co. 1976) (objectant's testimony concerning decedent's declarations of pedigree was admissible "subject to CPLR 4519 if there is objection"). *See also* Weinschenk, Fritz, *An Update on Kinship Proof in Surrogate's Court*, N.Y.L.J., Oct. 9, 1992, p. 1, col. 1 (asserting that CPLR 4519 prevents interested parties in kinship proceedings from testifying concerning their communications with the decedent); 6 *Warren's Heaton on Surrogate's Court Practice*, § 74.17[2][b][iii] [7th ed.] (same).

20. *In re Berlin*, 91 Misc. 2d 666, 398 N.Y.S.2d 334 (Sur. Ct., Bronx Co. 1977).

21. *Id.*; *see also In re Marks*, 16 Misc. 3d 334, 337, 837 N.Y.S.2d 531, 533 (Sur. Ct., Bronx Co. 2007) (assuming without deciding that objectant's testimony is admissible under a "pedigree exception to CPLR § 4519").

22. It should be noted that even if the objectant is permitted to testify to the decedent's statements to establish pedigree, that same objectant will, in the event of a probate challenge, be precluded from giving self-interested testimony challenging admission of the will to probate.

23. *See In re Esther T.*, 86 Misc. 2d 452, 456, 382 N.Y.S.2d 916, 919 (Sur. Ct., Nassau Co. 1976).

24. *In re Berlin*, 91 Misc. 2d 666, 669, 398 N.Y.S.2d, 334, 335 (Sur. Ct., Bronx Co. 1977); *In re Kuberka*, 22 Misc. 3d 1104A, 880 N.Y.S.2d 225 (Sur. Ct., Erie Co. 2008) ("[e]vidence of pedigree takes the form of oral testimony, with documentary evidence required to corroborate it").

25. *In re Kuberka*, 22 Misc. 3d 1104A, 880 N.Y.S.2d 225 (Sur. Ct., Erie Co. 2008); 6 *Warren's Heaton on Surrogate's Court Practice*, § 74.17[2][b][iii] [7th ed.].

26. *In re Whalen*, 146 Misc. 176, 189, 261 N.Y.S. 761, 775 (Sur. Ct., N.Y. Co. 1932).

27. *In re Callister*, 153 N.Y. 294, 47 N.E. 268 (1897); *In re Press*, 30 A.D.3d 154, 816 N.Y.S.2d 441 (1st Dep't 2006).

28. *See, e.g., Acevedo v. Audubon Mgmt., Inc.*, 280 A.D.2d 91, 721 N.Y.S.2d 332 (1st Dep't 2001) (Dead Man's Statute would bar interested witnesses from testifying as to the genuineness of decedent's handwriting).

Anne C. Bederka is a partner in the law firm Greenfield Stein & Senior, LLP.

Grantor Trust Basics

By Philip A. Di Giorgio

While all men (and women) may indeed be created equal, all trusts are not created equal, at least for tax purposes. In general, a trust is treated as a separate entity for income tax purposes from its grantor and as such the trustee is obliged to report the trust's annual income on an IRS Form 1041 Fiduciary Income Tax Return. However, the income, deductions and credits of some trusts are attributable to grantors and others as substantial owners under I.R.C. § 671. These trusts are known as "grantor trusts."

I. Some Motivations to Obtain Treatment as a Grantor Trust

There are a number of motivations which might inspire a grantor to structure a trust as a grantor trust. Such motivations include, but are not limited to, the following:

- One such motivation is avoiding the disparity between the tax rates for trusts and for individuals. In 2009, the top tax rate of 35% is applicable to married couples filing jointly with taxable income of $372,950 or more, whereas the top income tax rate of 35% applies to trusts with taxable income of $11,150 or more.
- Another motivation for structuring a trust as a grantor trust is to permit the assets of a trust to grow tax free for the benefit of the beneficiaries, with the income tax instead being borne by the grantor. This effectively enables a grantor to pass wealth to trust beneficiaries free of transfer taxation, making the grantor trust a powerful estate planning tool.
- Yet another motivation might be a grantor's desire to avoid the recognition of capital gains in transactions between the grantor and a trust established by the grantor.

II. Income Tax Filing Requirements for Grantor Trusts

In general, the trustee of a grantor trust must obtain an EIN for the trust and file an IRS Form 1041 Fiduciary Income Tax Return for the trust unless the trustee elects one of the optional filing methods.[1] Note, however, that in some cases where an optional reporting method is elected, it may not be necessary for the trust to obtain an EIN.[2]

The optional reporting methods are described in Treasury Regulation § 1.671-4(b) and in the instructions for Form 1041. Most trusts must file on a calendar year basis and the due date of a Form 1041 Fiduciary Income Tax Return for a calendar year trust is on or before April 15 of the year following the close of the calendar year.

III. Seven Statutory Triggers for Grantor Trust Status

1. Reversionary Interests in Excess of 5% of Principal or Income;
2. Power to Control Beneficial Enjoyment of Principal or Income;
3. Certain Administrative Powers;
4. Power to Revoke;
5. Income for Benefit of Grantor or Grantor's Spouse;
6. Person Other Than Grantor Treated as Substantial Owner; and
7. Foreign Trusts Having One or More U.S. Beneficiaries

These seven statutory triggers for grantor trust treatment are set forth in greater detail under I.R.C. §§ 673 through 679, and the regulations promulgated thereunder.

IV. Basic Categories of Grantor Trusts

There are many different types of trusts that may be classified as grantor trusts. For the purposes of this article, however, all grantor trusts will be broken into the following three basic categories: Revocable Trusts; Irrevocable Trusts Included in the Grantor's Gross Estate for Estate Tax Purposes; and Intentionally Defective Grantor Trusts (IDGTs) Excluded from the Grantor's Gross Estate for Estate Tax Purposes.

A. Revocable Trusts

All revocable trusts are classified as grantor trusts under I.R.C. § 676. Typically, the grantor retains complete control and access over the assets contributed to a revocable trust. Revocable trusts are commonly drafted in order to simplify the estate administration process to avoid probate or to provide for the ongoing manage-

ment of the grantor's assets by a successor trustee if and when the grantor becomes incapacitated.

Revocable trusts are grantor trusts as to both income and principal. It is generally accepted among practitioners in the trusts and estates field that transfers to revocable trusts will not trigger any capital gains or other income tax consequences for the grantor. The income, deductions and credits of grantor trusts are attributable to the grantor under I.R.C. § 671. Thus, for example, the sale of a residence by a revocable trust that triggers a capital gain will be attributable to the grantor, who also would be entitled to claim the I.R.C. § 121 exclusion from capital gain on the sale of that residence to the same extent that said exclusion would be available had the residence been sold directly by the grantor.[3]

All of the ordinary income and capital gains earned by revocable trusts are reported on the grantor's income tax return. A revocable trust typically uses the grantor's Social Security number as its tax identification number. A Form 1041 is not generally filed in connection with a revocable trust until after the grantor's death when the trust becomes irrevocable, and a separate identification number must be obtained for the trust.

Congress recognized that the relationship between a grantor and his or her revocable trust is more intertwined for tax purposes than other grantor trusts when, as a part of the Taxpayer Relief Act of 1997, it permitted trustees of trusts that were revocable until the time of the grantor's death to make an election under I.R.C. § 645 to have the trust treated as a part of the decedent's estate for a limited period of time.

B. Irrevocable Trusts Included in the Grantor's Gross Estate for Estate Tax Purposes

Several factors will cause a trust to be included in a grantor's gross estate for estate tax purposes. Many of these factors also trigger grantor trust status.

Some of the most common factors that would cause estate tax inclusion are:

- Grantor retains the right to possess or enjoy the transferred property for life;[4]
- Grantor retains the right to income from the transferred property for life;[5]
- Grantor retains the right to designate who will possess or enjoy the transferred property;[6]
- Grantor retains a reversionary interest in excess of 5% of the value of the transferred property as of the date of death;[7]
- Grantor retains the right to alter, revoke or amend the trust;[8]
- Grantor is deemed to have a general power of appointment over trust assets;[9]
- Grantor has retained an incident of ownership over an insurance policy transferred to a trust;[10] and
- Grantor transfers or otherwise relinquishes any of the aforementioned powers within three years of death.[11]

Grantor Retained Annuity Trusts (GRATs), Qualified Personal Residence Trusts (QPRTs), Charitable Lead Annuity Trusts (CLATs), and Retained Income Trusts are all examples of irrevocable trusts that may be designed as grantor trusts and that may be included in the grantor's gross estate, even if properly designed, in the event that the grantor does not survive the trust term. The inclusion would be automatic for GRATs and QPRTs under I.R.C. § 2036(a)(1). For CLATs, estate inclusion would only occur under limited circumstances where the transfer to the CLAT is deemed not to be a completed gift,[12] or the grantor was deemed to retain too much control over the charitable beneficiary.[13]

The advantage of estate tax inclusion is that the beneficiaries of the decedent's estate will be entitled to a stepped-up basis in the trust's assets for income tax purposes.[14] The disadvantage is that, depending on the size of the estate and the allowable deductions, estate tax may be due on such assets.

Treatment of GRATs as Grantor Trusts: A GRAT is treated as a grantor trust as to income because of the annuity payments that must be made to the grantor from income and, to the extent income is insufficient, from principal.[15] A GRAT is treated as a grantor trust as to principal if the grantor has retained a testamentary power to appoint accumulated capital gains.[16] In addition, the retention by the grantor of a reversionary interest having a value in excess of 5% of the value of the GRAT at the time of transfer will also cause the GRAT to be treated as a grantor trust.[17]

If a grantor is treated as the owner of a GRAT under the grantor trust rules, no gain will be recognized in connection with transfers between the grantor and the GRAT.[18]

The income generated by the assets of a GRAT that is treated as a grantor trust will be taxed to the grantor during the GRAT term, thereby generating additional estate tax savings to the grantor, while transferring additional wealth to the GRAT beneficiaries. If the grantor survives the GRAT term, the assets transferred to a properly designed GRAT will be excluded from the grantor's estate.

A GRAT is generally not a good planning vehicle for generation-skipping tax because the grantor's gen-

eration skipping transfer tax exemption cannot be applied to property transferred to the GRAT until the end of the GRAT term.

If the grantor fails to survive the GRAT term, "the portion of the trust's corpus included in the decedent's gross estate for Federal estate tax purposes is that portion of the trust corpus necessary to provide the decedent's retained use or retained annuity, unitrust or other payment (without reducing or invading principal) as determined in accordance with Treasury Regulation § 20.2031-7 (or Treasury Regulation § 20.2031-7A, if applicable). The portion of the trust's corpus includible in the decedent's gross estate under I.R.C. § 2036, however, shall not exceed the fair market value of the trust's corpus at the decedent's date of death."[19]

Treatment of QPRTs as Grantor Trusts: All of the income of a QPRT must be paid to the grantor.[20] Consequently, all QPRTs are grantor trusts as to income under I.R.C. § 677. As with GRATs, a QPRT in which the grantor has retained a testamentary power of appointment over principal or a reversionary interest in excess of 5% will be a grantor trust as to principal under I.R.C. § 674(a) or § 673(a), respectively.

Treatment of CLATs as Grantor Trusts: The grantor of a CLAT may only claim an income tax deduction for assets transferred to the CLAT if the trust is a grantor trust.[21] If the CLAT is treated as a grantor trust the income of the CLAT will be attributed to the grantor.[22]

Treatment of Retained Income Trusts: Where a grantor retains a non-qualified income interest for life, the trust would be treated as a grantor trust with respect to income under I.R.C. § 677. Such trusts are commonly used in connection with Medicaid planning. By granting the grantor a power to substitute property held by the grantor for property of equivalent value held by the trust, these trusts can also be made grantor trusts as to principal. [23] If the grantor retains a special power of appointment over the corpus of the trust, transfers to such trusts are incomplete gifts for gift tax purposes,[24] causing the trust corpus to be included in the grantor's gross estate under I.R.C. §§ 2036(a)(1) and 2036(a)(2).

C. Grantor Trusts That Are Excluded from the Grantor's Gross Estate

Such trusts are commonly known as Intentionally Defective Grantor Trusts, and typically referred to as IDGTs. The primary tax characteristic of an IDGT is that it has one or more provisions that trigger grantor trust status under I.R.C. §§ 673 through 679 for income tax purposes, but no provision that would trigger the inclusion of trust assets in the grantor's gross estate for estate tax purposes. Trusts commonly designed as IDGTs include, but are not limited to, Irrevocable Life Insurance Trusts (ILITs) and Dynasty or Generation-Skipping Transfer Tax (GST) Trusts.

In general, assets transferred to a grantor trust retain the same character and tax basis, for income tax purposes, as they had in the hands of the grantor just prior to the transfer.[25] A notable exception to this rule found in the case *Rothstein v. United States*.[26] However, in Rev. Rule 85-13,[27] the IRS indicated it will not follow *Rothstein*. What does this mean for taxpayers in the Second Circuit? Taxpayers may generally rely on Revenue Rulings published in the *Internal Revenue Bulletin* as long as the facts and circumstances at issue are substantially the same as those outlined in the ruling and the ruling has not been superseded, modified or revoked.[28] In addition, according to at least one commentator, the IRS decision not to follow the *Rothstein* case in Rev. Rul. 85-13 will be applied by the IRS even in the Second Circuit.[29]

The Treatment of ILITs: The ILIT is probably one of the most common IDGTs in use. The grantor typically creates an ILIT with the intention of transferring an existing life insurance policy or gifting cash to the ILIT to enable the trustee to pay the premiums on a new policy, or both. If properly drafted and maintained, the assets of the ILIT will be excluded from the grantor's estate. Many ILITs, at least at inception, have nothing in them but an insurance policy with little or no value. Typically, the grantor gifts to the trust cash sufficient to pay the premium due on the policy, usually about a month or so prior to the premium due date, and the trustee uses this cash to pay the premium.

As time goes by, however, the policies, other than straight term policies, often accumulate significant cash values, and may generate enough income to require the filing of a fiduciary income tax return. If the provisions of the ILIT do not include any of the grantor trust triggers, the ILIT must have a trust identification number assigned to it and pay taxes on the net income retained by the trust in any given year. Such an ILIT would not be an IDGT.

The ILIT as a Grantor Trust: If the terms of an ILIT permit any portion of its income to be applied toward the payment of premiums on life insurance policies on the life of the grantor, at the direction of the grantor or a non-adverse party, without the approval or consent of an adverse party, the grantor will be treated as the owner of that portion of the trust permitting its income to be so used.[30] The issue whether such a power held by the grantor in a fiduciary capacity would cause estate tax inclusion was answered in the negative in the case of the *Estate of Jordahl v. Commissioner*.[31] This is one way of making an ILIT a grantor trust.

Another provision commonly used to trigger grantor trust status in an ILIT is the retention by the grantor of a power to substitute property held by the grantor

for property of equivalent value held by the trust. This power must be held by the grantor in a non-fiduciary capacity.[32]

Until recently, the issue of whether or not the retention of such a power by the grantor, in a non-fiduciary capacity, would cause estate tax inclusion under I.R.C. §§ 2036 or 2038 was unsettled. In a recent ruling, however, the IRS addressed this issue as follows:

> A grantor's retained power, exercisable in a nonfiduciary capacity, to acquire property held in trust by substituting property of equivalent value will not, by itself, cause the value of the trust corpus to be includible in the grantor's gross estate under IRC § 2036 or § 2038, provided the trustee has a fiduciary obligation (under local law or the trust instrument) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are in fact of equivalent value, and further provided that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries.[33]

If the ILIT is a grantor trust under I.R.C. § 677(a)(3), § 675(4)(C), or any other provision of the I.R.C., all of the income of the trust will be taxable to the grantor.

A Note on Demand (Crummey) Powers: In order to qualify for the annual exclusion from gift tax, which is currently $13,000 per year per donee, the gift made by the grantor to the donee must be a gift of a present interest.[34] In order to enable the grantor to take advantage of the annual exclusion from gift tax for cash gifts made to the trust to cover annual insurance premiums, the ILIT typically grants each beneficiary the power to demand the withdrawal of the beneficiary's pro-rata share of any contribution made to the trust. This power is usually limited to the annual exclusion amount available to the grantor in respect to each donee in a given calendar year. To avoid having the lapse of such a demand power held by a beneficiary from being treated as a release (and therefore a gift) the amount of the beneficiary's power which may lapse in any calendar year should be limited to the greater of $5,000 or 5% of the trust corpus.[35]

The demand power described above would ordinarily make the beneficiary the owner, subject to the grantor trust rules, as to that portion of the trust over which the beneficiary has the power exercisable solely by himself or herself to vest the corpus or income therefrom in himself or herself.[36] However, I.R.C. § 678(a) will not apply if the grantor is already treated as the grantor of that portion of the trust for income tax purposes I.R.C. § 678(b).[37]

Exchanging or Transferring an Insurance Policy Held by an ILIT: If the goal is simply to retire an insurance policy that has outlived its usefulness in exchange for a policy of similar value that is more in tune with the current needs of the trust, an I.R.C. § 1035 exchange may be an appropriate way to avoid the recognition of a capital gain upon the exchange of the policy.

If the trustee wishes to transfer a policy which has accumulated a significant cash value, the trustee must consider the transfer-for-value rule under I.R.C. § 101(a)(2), which could require the recognition of income by the grantor upon the sale of the policy. In order to avoid this potential tax hazard, such trustee should consider the sale of the policy to a grantor trust. Such a transfer between two grantor trusts created by the same grantor will not trigger the transfer for value rule.[38]

Dynasty Trusts v. GRATs: The Dynasty Trust is a vehicle commonly used for generation-skipping transfer (GST) tax planning. Transfers of assets by gift or sale to a Dynasty Trust designed as an IDGT are similar to transfers to a GRAT in that both techniques belong to a category of estate planning techniques known as an "estate freeze." The estate freeze technique allows wealthy taxpayers to plan beyond the limitations of the lifetime exemption from gift tax, which is currently limited to $1,000,000, and the exemption from GST tax, which is currently limited to $3,500,000. The objective of an estate freeze is to transfer assets that are expected to appreciate in value to the grantor's heirs at their current value and with minimal gift tax consequences to the grantor, thereby "freezing" the value of the taxable estate.

An estate freeze is especially effective when interest rates are as low, as they have been of late, because the success of a GRAT is tied to the ability of the GRAT's assets to outperform the I.R.C. § 7520 rate in effect at the time of transfer; the success of a sale to an IDGT depends on the ability of the IDGT's assets to outperform the applicable federal rate (AFR) in effect at the time of transfer. When interest rates are low, it is more likely that assets will outperform the § 7520 rate or the AFR, resulting in greater amounts of wealth being transferred to the beneficiaries of a grantor trust free of transfer taxes. For this reason, when interest rates are low family Dynasty Trusts, and the use of note-sale / gift transactions, become very popular among taxpayers of significant wealth.[39]

A Dynasty Trust, like a GRAT, may be designed as a grantor trust for income tax purposes. If a Dynasty Trust is designed as a grantor trust, a sale by the grantor to that trust will not be recognized for tax purpos-

es.[40] Unlike a GRAT, however, a transfer to a Dynasty Trust designed as an IDGT can be used as an effective GST tax planning tool. In addition, if the grantor dies during the term of a note issued to the grantor in exchange for a sale to a Dynasty Trust, only the value of balance on the note, together with any accrued interest, will be included in the grantor's estate. Finally, unlike a GRAT, which is intended to last for a term of years that it is hoped the grantor will survive beyond, the Dynasty Trust, like most other IDGTs, is generally intended to last for the balance of the grantor's life and well beyond.

V. Other Considerations

A. Tax Basis of Assets Transferred to a Grantor Trust

Assets transferred gratuitously by a grantor to a grantor trust have the same tax basis in the hands of the trustee immediately after the transfer as they did in the hands of the grantor immediately before the transfer.[41]

B. Relieving the Grantor of the Income Tax Burden of Grantor Trusts

What happens if the grantor's estate is reduced so significantly during the grantor's lifetime that the income tax attributable from the IDGT or other grantor trust to the grantor becomes a burden? A release of a grantor trust power by the grantor can cause adverse tax consequences in certain circumstances, such as when the trust holds assets subject to debt in excess of basis.[42] A grantor trust can be designed, however, to grant a disinterested party, such as a trust protector, the power to toggle off the grantor trust provisions—so the trust is no longer a grantor trust and the income of the trust is no longer attributable to the grantor—without triggering adverse tax consequences.

One safe, although usually expensive, way to toggle grantor trust provisions back on once they have been toggled off, or add them where they previously did not exist, is through a trust reformation.[43] In the alternative, a disinterested trustee could be given the discretion to reimburse the grantor from trust assets for the amount of income tax attributable to the grantor from the trust. The payment of the tax by the grantor would not constitute a gift by the grantor because the grantor is liable for the tax; and the trustee's discretionary power to reimburse the grantor would not cause inclusion of trust assets in the grantor's estate.[44]

C. Income Tax Consequences of Notes and Termination of Grantor Trust Status

Release of Grantor Trust Powers During the Grantor's Lifetime: As previously discussed, the initial transfer of assets to a grantor trust by the grantor is disregarded for tax purposes. If the trust ceases to be a grantor trust, however, the grantor is no longer considered to be the owner of the trust. At that time, the grantor will be considered to have made a transfer for tax purposes of the assets previously transferred to the trust.

If the grantor sold assets to a trust in exchange for a note, for example, which was not recognized as a gain at the time of transfer because of the trust's status as a grantor trust, then upon the release by the grantor of the power that made the trust a grantor trust, the grantor would be deemed to have completed the transfer and will be required to recognize the gain.[45] The amount of the gain would be the difference between the grantor's adjusted basis in the property held by the trust and the outstanding balance of any debt deemed to be assumed by the trust at the time the trust ceased to be a grantor trust.[46] Therefore, the potential recognition of gain on termination of grantor trust status is a compelling reason not to extinguish grantor trust status prior to extinguishing the debt acquired by the trust at the time of transfer.

Termination of Grantor Trust Status as a Result of Grantor's Death: Commentators generally agree that a grantor trust ceases to be a grantor trust upon the death of the grantor. The tax consequences of the death of the grantor while a note is received in exchange for a sale to an IDGT are still unclear.

While most authorities specifically address the termination of grantor trust status during the grantor's life, there is no clear authority on whether gain must be recognized on the outstanding balance of a note held by a grantor trust on the grantor's death. The amount of gain that must be recognized by a deceased grantor's estate will likely be determined by the estate's basis in the trust's assets.[47] Some commentators maintain that the basis of the grantor's estate in the trust assets as of the date of death will be the same as the grantor's basis in the assets as of the date of transfer to the trust.[48] Other commentators, however, take a more aggressive position and argue that it may be possible for the grantor's estate to acquire a stepped-up basis in the trust assets as of the date of death.[49]

Given the uncertainty of the potential capital gains that may be triggered by the grantor's death, this practitioner agrees with the commentators who argue that the best approach is to make every effort to ensure that the note is paid off prior to the date of death.[50]

VI. Conclusion

The grantor trust is an essential estate planning tool. It offers practical and beneficial solutions to a wide variety of planning objectives, running the gamut from simple probate avoidance to asset protection to

complex tax planning and more. However, the income, gift, estate and generation skipping transfer tax implications will vary significantly depending upon the provisions of the trust and the actions taken by the trustee. Therefore, the attorney draftsman, the grantor and the trustee must give serious consideration to tax implications before implementing an estate plan that utilizes a grantor trust.

Endnotes

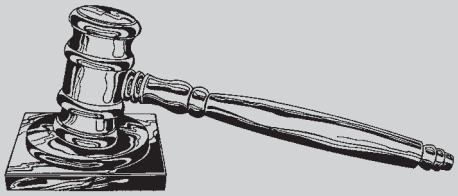
1. 26 C.F.R. § 1.671-4 (Treas. Reg.).
2. *See, e.g.*, IRS, Dep't of the Treas., Instructions for Form 1040, Optional Reporting Method 1, 12 (2008).
3. *See* 26 U.S.C. § 671 (IRC); s*ee also* IRS Priv. Ltr. Rul. 199912026.
4. I.R.C. § 2036(a)(1).
5. *Id.*
6. *Id.* at § 2036(a)(2).
7. *Id.* at § 2037(a)(2).
8. *Id.* at § 2038.
9. *Id.* at § 2041.
10. *Id.* at § 2042.
11. *Id.* at § 2035(a).
12. *See, e.g.*, IRS Priv. Ltr. Rul. 8051170; *see also* Rev. Rul. 77-275, 1977-2 C.B. 346.
13. *See Rifkind v. United States*, 54 AFTR 2d 84-6453 (Cl. Ct. 1984); *see also* I.R.C. § 2036(a)(2).
14. I.R.C. § 1014.
15. *Id.* at § 677; s*ee also* IRS Priv. Ltr. Rul. 200001013.
16. I.R.C. § 674(a).
17. *Id.* at § 673(a).
18. *See, e.g.*, IRS Priv. Ltr. Rul. 20001013; *see also* IRS Priv. Ltr. Rul. 9519209; Rev. Rul. 85-13, 1985-1 C.B. 184.
19. Treas. Reg. § 20.2036-1(c)(2).
20. *Id.* at § 25.2702-5(c)(3).
21. *See id.* at § 1.170A-6(c)(2); *see also id.* at § 25.2522(c)-3(c)(2).
22. I.R.C. § 671.
23. *Id.* at § 675(4)(c).
24. Treas. Reg. § 25.2511-2(c).
25. *See, e.g.*, Rev. Rul. 85-13, 1985-1 C.B. 184; *see also* Rev. Rul. 72-406, 1972-2 C.B. 462.
26. 735 F.2d 704 (2d Cir. 1984).
27. Rev. Rul. 85-13, 1985-1 C.B. 184.
28. *See* Treas. Reg. § 601.601(d)(2)(e); *see also Ford Motor Co. v. US*, 102 AFTR 2d 2008-6419, Oct. 2, 2008, Code § 7422; *Rauenhorst v. Commissioner*, 119 T.C. 157 (T.C. 2002).
29. *See* Ronald D. Aucutt, *Installment Sales to Grantor Trusts*, in ALI-ABA Course of Study, Planning Techniques for Large Estates, April 20–24, 2009, 1793–1797 (2009).
30. I.R.C. § 677(a)(3).
31. *Estate of Jordahl v. Commissioner*, 65 T.C. 92 (T.C. 1975).
32. *Id.* at § 675(4)(C).
33. Rev. Rul. 2008-22, 2008-16 I.R.B. 796.
34. I.R.C. § 2503(b)(1).
35. *Id.* at § 2041(b)(2).
36. *Id.* at § 678(a).
37. *See* IRS Priv. Ltr. Rul. 200729005; *see also* IRS Priv. Ltr. Rul 200730011.
38. *See* IRS Priv. Ltr. Rul. 200514002; *see also* Rev. Rul. 2007-13, 2007-11 I.R.B. 684.
39. A discussion of note-sale / gift transactions involving Dynasty Trusts is beyond the scope of this article.
40. I.R.C. § 671; *see also* Rev. Rul. 85-13, 1985-1 C.B. 184.
41. I.R.C. § 1015(a).
42. *See* Treas. Reg. 1.1001-2(e), example 5; *see also Madorin v. Commissioner*, 84 T.C. 667 (T.C. 1985); *Estate of Levine v. Commissioner*, 634 F. 2d 12 (2d Cir. 1980), *aff'g*, 72 T.C. 780 (T.C. 1979).
43. *See, e.g.*, IRS Priv. Ltr. Rul. 200848017.
44. *See* Rev. Rul. 2004-64, 2004-2 C.B. 7.
45. The rules involving installment sales and deferred recognition of gain are beyond the scope of this article.
46. *See* Treas. Reg. § 1.1001-2(c), example 5; IRS Tech. Adv. Mem. 200011005 (Nov. 23, 1999); *Madorin v. Commissioner*, 84 T.C. 667 (T.C. 1985); *Estate of Levine v. Commissioner*, 634 F. 2d 12 (2d Cir. 1980), *aff'g*, 72 T.C. 780 (T.C. 1979) *and* Rev. Rul. 77-402, 1977-2 C.B. 222.
47. *See* Dunn & Handler, *Tax Consequences of Outstanding Trust Liabilities When Grantor Status Terminates*, 95 J. TAX'N 49 (July 2001)(*Tax Consequences*).
48. *Id.*
49. *See* Blattmachr, Gans & Jacobson, *Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor's Death*, 97 J. TAX'N 149 (September 2002); *see also* Jeremiah W. Doyle IV, *Grantor Trusts* (Mar. 18, 2009) (materials prepared by Jeremiah W. Doyle IV for the Estate Planning Council of Eastern NY, Inc.'s conference entitled *Grantor Trusts: What They Are, How They Work and Practical Applications for Practitioners*).
50. *See* Akers, *Transfer Planning Including Use of GRATS, Installment Sales to Grantor Trusts and Defined Value Clauses to Limit Gift Exposure*, STATE BAR OF TEXAS, 32ND ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE (June 2008); *see also Tax Consequences, supra* note 47.

Philip A. Di Giorgio is a partner in the Pierro Law Group, LLC, located in Albany, NY, and is a Vice-Chair of the Estate Planning Committee of the NYSBA Trusts and Estates Law Section.

(paid advertisement)

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

ASSISTED REPRODUCTION

Disposition of Decedent's Stored Semen Governed by Agreement With Storage Facility

After decedent's death his parents as administrators of his estate sought to use semen samples stored by decedent during his life to conceive a grandchild using the services of a surrogate mother. After paying storage fees for some seven years, the administrators contacted the storage facility to ascertain procedures for turning over the samples. At that time the storage facility produced for the first time the agreement governing storage of the specimens which the decedent signed and on which he indicated that in the event of his death the semen samples were to be destroyed.

The Appellate Division affirmed the IAS court's denial of the administrators' motion for a preliminary injunction ordering the storage facility to preserve the specimens. The Appellate Division held that the agreement between the decedent was unambiguous and not subject to reformation. In addition, because the decedent was a depositor and not a donor, the decedent was not examined, screened and tested as donors must be. *See* 10 N.Y.C.R.R. §§ 52-8.1, -8.5, -8.6. To release the semen for use by a surrogate would violate New York public policy**.** *Speranza v. Repro Lab Inc.*, 62 A.D.3d 49, 875 N.Y.S.2d 449 (1st Dep't 2009).

DEAD BODIES

Cause of Action for Loss of Right of Sepulcher Accrues When Denial of Right Impacts on Next of Kin

Decedent's brother served a notice of claim more than five months after the decedent's burial in connection with a claim for damages for *inter alia* loss of the right of sepulcher. The defendants moved to dismiss the notice of claim for interference with the next of

William P. LaPiana

kin's right to bury the decedent, alleging it was barred by failing to file the notice of claim within 90 days of the burial.

In an extensive and learned opinion, which recounted at length the history of the right of sepulcher, the Appellate Division affirmed the Supreme Court's refusal to dismiss the action (19 Misc.3d 1129(A), 866 N.Y.S.2d 93) holding that the cause of action accrues when the actual injury occurs, that is, when the next of kin who have the right to bury the decedent become aware of the unlawful interference with the right. *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 877 N.Y.S.2d 300 (1st Dep't 2009).

DISTRIBUTION

Only Persons Entitled to Be Appointed Administrator or Interested in Estate May Open Safe Deposit Box of Intestate Decedent

Decedent's brother petitioned to open and examine the contents of safe deposit boxes in the names of the decedent and his wife, also deceased. Because wife died after her husband, his brother was not a distributee of either estate.

Alleged first cousins of the wife claim to be her distributees. The alleged cousins, of course, must present proof not only of their relationship to the decedent but also that the decedent was not survived by any closer relative or relatives entitled to inherit under EPTL 4-1.1.

Surrogate Holzman denied the husband's brother's petition, holding that in the circumstances only the Public Administrator (*see* SCPA 1001(8)) could petition to open the safe deposit boxes and that since the Public Administrator could do so and was so ordered, there was no need to hold a kinship hearing at this time on the status of the alleged first cousins. *In re Adelewitz*, 24 Misc. 3d 274, 876 N.Y.S.2d 627 (Sur. Ct., Bronx Co. 2009).

ELECTIVE SHARE

Surviving Spouse May Withdraw Election

Surviving spouse filed her right of election but then petitioned to withdraw it after realizing that the value of the testamentary substitutes she had received exceeded the value of the one-third of the net estate to which the election entitled her. Under the will the surviving spouse was one of 13 residuary beneficiaries who take in equal shares. If the spouse is allowed to cancel the election, the other 12 residuary beneficiaries will each receive slightly less of the probate estate because they will have to share with the surviving spouse.

In the meantime, after being served with the notice of the surviving spouse's attempt to withdraw the election but before the court acted on the petition, the executor distributed the residuary estate to the beneficiaries, including the spouse.

Although EPTL 5-1.1-A(c)(5) allows the court to cancel the surviving spouse's election, cancellation is predicated on its not having a prejudicial effect on the creditors of the spouse or on others interested in the estate. Based on that provision Surrogate Pechman denied permission to withdraw the election and ordered the surviving spouse to return the distribution she had received. *In re Oestrich*, 21 Misc. 3d 499, 863 N.Y.S.2d 531 (Sur. Ct., Broome Co. 2008, reported in the Spring 2009 issue of the *Newsletter*).

The Appellate Division reversed. Although the other 12 beneficiaries will now receive only 1/13 of the estate, that result leaves them "in exactly the same position they were in under the terms of the will as intended by the decedent." Absent a showing of a change of position by any of the 12 and given the fact that they will not be required to return any property since nothing of value has been distributed to them, it cannot be said that any prejudice will result from allowing the spouse to withdraw the election. In a footnote the court notes that the statute does not define "prejudice" but that in civil cases a finding of prejudicial effect often requires detrimental reliance or an added expense or burden.

The court agreed with the Surrogate that the executor acted imprudently in making distributions based on an assumption of how the Surrogate would rule, but that is a factor that "may be relevant" in allowing fees or commissions. *In re Oestrich*, 61 A.D.3d 1317, 877 N.Y.S.2d 754 (3d Dep't 2009).

GIFTS

New York Court Will Not Enforce Forced Heirship Provisions of French Law

Decedent's estranged son brought an action in Surrogate's Court seeking to enforce his forced heirship rights under French Civil Code Articles 724 and 913-930 against certain lifetime gifts made by decedent. Surrogate Roth dismissed the action on the grounds that French law did not apply to the decedent because she was not a domiciliary of France at the time of her death.

The Appellate Division affirmed, not only because of the domicile issue but also because 1) the action was time barred and 2) even if decedent were a French domiciliary, the validity of lifetime transfers of property located in New York is governed by New York law. It is well established that when a non-resident states that his or her will is to be governed by New York law, foreign forced heirship laws do not apply and the court stated that there is "no valid policy distinction" that would allow a non-resident testator to avoid forced heirship claims against probate property physically located in New York but not against property located in New York and transferred during life. *In re Meyer*, 62 A.D.3d 133, 876 N.Y.S.2d 7 (1st Dep't 2009).

GUARDIANS

Valid Power of Attorney Prevents Appointment of Guardian

The Appellate Division has reversed an order and judgment appointing a temporary guardian of an alleged incapacitated person. Although evidence at the hearing in Supreme Court indicated that the person may indeed be incapacitated, the person's daughter is her attorney-in-fact and there is no evidence to indicate that the principal was incapacitated when she created the agency, nor is there evidence of wrongdoing by the attorney-in-fact. In addition, the evidence at the hearing also established that the alleged incapacitated person had created a plan for carrying on her affairs and that she has sufficient resources. The Supreme Court therefore improvidently exercised its discretion in appointing a guardian and the temporary guardian is directed to return all property to the alleged incapacitated person. *In re May Far C.*, 61 A.D.3d 680, 877 N.Y.S.2d 367 (2d Dep't 2009).

JOINT ACCOUNTS

Section 675(a) of the Banking Law Applies to a Brokerage Account

One of decedent's four children brought a proceeding challenging the decedent's will, which led to a jury trial on the nature of four joint accounts to which decedent and her daughter were parties. The Surrogate granted a directed verdict for the daughter (respondent in the proceeding). On appeal by the petitioner the Appellate Division reversed.

First, as to a joint brokerage account, the Appellate Division held that Banking Law § 675(a) does apply to brokerage accounts, and because the account docu-

ments clearly indicated the joint-and-survivor nature of the account the burden was on petitioner to show that the account was actually a convenience account. The court cited extensive precedent supporting that holding and abrogated its decision in *In re Antoinette*, 291 A.D.2d 733, 738 N.Y.S.2d 452 (3d Dep't 2002) to the extent that opinion held to the contrary.

Second, the court reviewed the evidence and held that the grant of a directed verdict was in error because it cannot be said as a matter of law that there was no "rational process" by which a jury could find that the brokerage account was a convenience account. The facts cited in the opinion include the fact that the decedent had exclusive possession of the checkbook associated with the account, and that the respondent never received statements or withdrew funds from the account for her own use and was ignorant of where the funds would go on the decedent's death. In addition, the account represented more than half the value of decedent's property, and the provisions of the will treating the respondent and the petitioner equally are "arguably inconsistent" with giving the entire account to the respondent by right of survivorship.

Finally, because the signature card for one of the joint bank accounts lacks survivorship language, the burden is on the respondent to establish it as a joint bank account. Since there is no proof in the record as to the account, it was error to grant a directed verdict for respondent. *In re Corcoran*, 63 A.D.3d 93, 877 N.Y.S.2d 522 (3d Dep't 2009).

WILLS

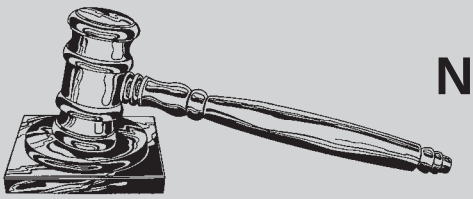
Tax Clause Makes Beneficiary of Insurance Policy an Interested Witness

The tax clause of decedent's will directed that all estate and inheritance taxes on both probate and non-probate property be paid as if they were debts, that is, from the residue and expressly exonerated recipients of property taxed from contributing to the payment of the taxes. One of the witnesses to the will, decedent's brother, was also the beneficiary of a life insurance policy on the decedent's life in the amount of more than $3.3 million.

In a case of first impression, Surrogate Glen held that the effect of the tax clause was the equivalent of a "beneficial disposition." The brother was therefore an interested witness under EPTL 3-3.2. Because his testimony was required to prove the will, he must be "purged" by paying the estate tax that would be apportioned against the insurance proceeds in the absence of the tax clause. *In re Wu*, 24 Misc. 3d 668, 877 N.Y.S.2d 886 (Sur. Ct., N.Y. Co. 2009).

Ira M. Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, *DRAFTING NEW YORK WILLS* (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Adoption Granted to Same-Sex Partner

In *In re Sebastian (Glen S.)*, the court had the opportunity to pass upon the novel question of whether the petitioner, the genetic parent of the child, and legally married to her same-sex partner, who was the child's gestational mother, could adopt the child. The record revealed that the petitioner and her partner were involved in a long-term relationship before they married in 2004 in the Netherlands. Thereafter, as a result of in vitro fertilization, utilizing the petitioner's ova and a donor's sperm, the petitioner's partner gave birth to a child. The birth certificate for the newborn, issued by New York City's Department of Health, reflected the petitioner's partner as the child's parent. Accordingly, and notwithstanding her marital relationship to the child's gestational parent, and her genetic relationship to the child, the petitioner sought to adopt the child.

In authorizing the adoption, the court indicated that there was no reported decision in New York, or other states, that had discussed or determined the parentage of a child's gestational and genetic mothers in a proceeding which involves no dispute between the parties. Hence, in its analysis the court examined the law with respect to recognition of foreign marriages, finding that while New York will recognize same-sex marriages validly contracted in sister states, other states in the country will not necessarily accord the same treatment to such relationships if the marriage violates the forum's public policy. To this extent, the court noted that currently there are explicit prohibitions against same-sex marriages in 44 states, and hence, the possibility exists that these states will deny recognition of same-sex marriages validly contracted elsewhere, as well as the legal rights, including parenthood, flowing from these marriages. As a consequence, the court found that absent some other means of establishing the child's parentage, adoption was the only means of establishing the parent/child relationship between the petitioner and the child, and protecting the rights and obligations incident thereto.

Further, relying upon Chief Judge Kaye's opinion in *In re Jacobs*, 86 N.Y.2d at 667, as well as the provisions of the Uniform Parentage Act §§ 106, 201, the court found that while no New York statute had dealt directly with the issue of whether the law should recognize both parties in a committed lesbian relationship, one of whom is the gestational mother, and the other of whom is the genetic mother of the child, the purpose of serving children's best interests by providing them with two responsible parents, rather than one, requires that paternity proceedings and acknowledgment of paternity be made available to lesbian genetic co-mothers.

Finally, the court concluded that while a gender-neutral acknowledgment of paternity was an important protection to afford a child born of a same-sex couple, it would not necessarily insure that courts of other states would grant full faith and credit to an order of filiation issued to a genetic mother in a same-sex relationship.

Accordingly, the court found that the best interests of the child would be served by granting the petitioner's request for adoption of the child, thereby guaranteeing recognition of both the petitioner and her partner as his parents throughout the country, and according petitioner all the rights and responsibilities appurtenant to the relationship.

In re Sebastian, N.Y.L.J., Apr. 15, 2009, p. 27 (Sur. Ct., N.Y. Co.)(Surr. Glen).

Attorney's Fees of Co-Fiduciaries

In a contested revocation proceeding by one co-trustee against another, the respondent co-trustee requested that he be authorized to pay counsel fees from the trust attributable to his defense in the proceeding. The application was opposed by the petitioner.

The court granted the motion, finding that when a proceeding is pending to revoke letters of trusteeship, the trustee is entitled to payment of counsel fees from the assets of the trustee in connection with the proceeding. Absent a determination of misconduct, the alleged wrongdoing of the trustee is no defense to the use of trust funds for this purpose. Accordingly, payment of the fees was authorized subject to reimbursement at the conclusion of the removal proceeding.

In re Celauro, Decided June, 19, 2009, File No. 353047 (Sur. Ct., Nassau Co.)(Surr. Riordan).

Copying Expenses

In *Moore v. Ackerman*, the court had the opportunity to address the issue of whether a retaining lien may be asserted with respect to the disbursements incurred by outgoing counsel for reproducing their former client's file, and found that, under the circumstances, counsel was entitled to reimbursement for these expenses.

In reaching this result, the court principally relied upon the holding of the Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997), and held that the implications of the decision would allow a client to be billed costs that are not advanced during and in furtherance of the representation, as well as costs incurred upon termination of counsel's representation. The court found further support for its conclusion in the Disciplinary Rules, which require a lawyer to retain certain documents in the client's file, including, but not limited to, bookkeeping records and copies of all retainers and compensation agreements, and prohibit a lawyer from delivering documents to a client in satisfaction of this obligation. In addition, the court noted that the Second Department requires, with respect to certain specified claims or actions, including those for personal injury, property damage or wrongful death, that the attorney preserve for a period of seven years virtually the entire file.

Based upon the foregoing, the court concluded that upon the termination of representation, under circumstances where the lawyer has not been discharged for cause, or has improperly withdrawn, the lawyer may fairly charge the client for the reasonable costs of complying with the client's request for the file. Moreover, the court opined that when the file includes material that the lawyer is required by ethical or other court rule to maintain, a reasonable cost for copying the files for the lawyer's records would not be inappropriate.

Within this context, the court held that because outgoing counsel in the pending case had been retained in an action for personal injury, he was required to retain virtually his entire file for a period of seven years and, therefore, could charge the cost of copying the file to his client. However, the court directed that a hearing be held with respect to the reasonableness of these charges, unless former and incoming counsel could resolve the question beforehand.

Moore v. Ackerman, N.Y.L.J., Mar. 19, 2009, p. 25 (Sup. Ct., Kings Co.)(Battaglia, J.).

Diversification of Assets

Before the court was an uncontested request for advice and direction by a corporate co-trustee of a trust created for the benefit of the respondent and co-trustee, as to the need to diversify the trust assets pursuant to the provisions of the Prudent Investor Act. The subject trust was created under the will of the respondent's father and provided him with income for life, remainder to his issue. The terms of the trust require that the trustees act in unanimity, and contain no provisions authorizing retention of specific assets. In support of its application, the petitioner indicated that the trustees have been unable to agree as to the diversification of trust assets, most particularly as a result of respondent's dual role as income beneficiary and co-trustee of the subject trust.

The court held that the Prudent Investor Act directs the trustee to diversify assets unless the trustee reasonably determines that it is in the best interests of the beneficiaries not to do so. Given the disagreement between the trustees, the court concluded that the respondent's refusal to diversify was lodged in his belief that it was in his best interest as well as in the interests of the remaindermen. The court concluded that this dilemma could be resolved by obtaining the consent of the beneficiaries to the course of conduct being contemplated. If a trust beneficiary assents to or concurs in the action of the trustee, or subsequently acquiesces or ratifies it, the beneficiary cannot later proceed against the trustee.

Accordingly, the court granted the petitioner's application and directed that the trust assets be diversified, unless all interested parties to the trust (1) agreed in writing to waive the co-trustees' obligation to diversify; (2) assented in writing and ratified the past and future retention of trust assets until the trustees agreed to the disposition of all or a part thereof; and (3) indemnified and absolved the petitioner from any and all liability for retaining the assets.

In re Carpenter, Decided June 10, 2009, File No. 159626 (Sur. Ct., Nassau Co.)(Surr. Riordan).

Electronic Production of Documents

In a contested accounting proceeding, the objectant moved for an order authorizing him to electronically produce documents requested in a demand for a bill of particulars. The petitioners cross-moved requesting the production of the documents in paper form, or for an order of preclusion at trial.

In granting the request, the court noted that a demand for a bill of particulars is not a discovery device and not an appropriate means to seek the production of evidentiary material. Nevertheless, the court noted that the objectant produced responsive documents to the demand, but in the form of referenced material on a CD-ROM.

The court noted that the law, to date, as to electronic discovery has focused on the production of electronic

evidence rather than the manner in which the documents are turned over. However, the court opined that while the provisions of CPLR 3122 do not explicitly authorize the production of documents by electronic means, it does not prohibit such production. Moreover, the state courts have authorized the discovery of electronic data, and pursuant to statute, electronic discovery has become common practice in the federal courts.

Accordingly, based on the foregoing, and applying the court's broad discretion to regulate the use of disclosure, the cross-motion was denied, and the objectant was authorized to produce documents by electronic files, provided that an index was supplied identifying each document produced in response to each demand and the electronic file in which the document was stored.

In re O. Winston Link Revocable Trust, N.Y.L.J., Apr. 24, 2009, p. 28 (Sur. Ct., Westchester Co.)(Surr. Scarpino).

Malpractice

In *Damone v. Levy*, the Supreme Court, New York County, granted in part and denied in part motions for summary judgment by the attorney and accountant allegedly retained by the fiduciary in connection with the administration of the decedent's estate.

In November, 1991, the decedent created a generation-skipping trust in which he named his son-in-law as trustee. The same day he created the trust, he executed his will in which he named his daughter the executrix of his estate. The attorney who created the trust and the will advised the decedent at the time the instruments were executed that assets placed into the trust would not be subject to probate or to estate taxes.

Subsequent to the decedent's death, his daughter, as executrix, contacted her accountant, concerning settlement and distribution of the estate. The accountant advised her that he was not familiar with trusts and estate matters, but would nevertheless meet with the family and arrange for their consultation with an attorney experienced in the field. The meeting with the accountant and an attorney selected by him took place shortly thereafter. Discussion revolved around whether the decedent's will had to be probated and whether estate tax returns were necessary. However, inasmuch as the trust agreement was not available at the time, counsel would not opine on the estate tax issue without reviewing the trust agreement first. Counsel advised the accountant as to the requirements for filing the return in the event one was due. The trust agreement was not left with counsel, nor was he asked by any member of the decedent's family to review the instrument.

Thereafter, the decedent's family met with another estate attorney, who was not retained. Instead, the decedent's daughter informed her accountant that she wanted to retain the first attorney she had met, and instructed him to inform counsel to do what was necessary to settle the estate. The decedent's daughter admitted, however, that she never followed up with this conversation, did not confirm whether counsel had been retained by her accountant, and did not retain him directly.

Ultimately, the trust agreement was faxed by the decedent's daughter to counsel, who advised the accountant that the trust was revocable, and that if the estate met the threshold value, estate taxes would be due. Counsel was not advised of the financial status of the estate until after the filing deadline had passed. Thereafter, the estate tax return was filed, and all subsequent conversations with the IRS were had with the accountant.

The decedent's daughter then sued counsel and her accountant for malpractice in the handling of his estate, and motions for summary judgment by the defendants were made.

In response to the motion by counsel, the court opined that in order to recover for legal malpractice, a party must establish (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney; (3) that the attorney's negligence was the proximate cause of the injury to plaintiff, and (4) that plaintiff suffered actual damages. In particular, the court noted that an attorney-client relationship can be established through the existence of a written retainer, or alternatively by the actions of the parties. To this extent, relevant factors are whether a written retainer or contract between the parties existed, whether a fee was paid, whether counsel actually represented the party in the matter, whether there was an informal relationship and the attorney represented the party gratuitously, and whether the party reasonably believed that the attorney was representing him or her.

Applying these criteria to the case, the court held that counsel had sufficiently established that no attorney-client relationship existed between himself and the plaintiff, and moreover, that plaintiff had failed to present any evidence that raised a question of fact on the issue. Accordingly, the court dismissed plaintiff's causes of action for legal malpractice. In addition, the court dismissed plaintiff's claims for breach of fiduciary duty and breach of contract, as the court found that they arose from the same facts and did not allege any distinct damages.

However, the accountant's motion for summary judgment was denied, despite his claims that he had

never been retained to represent plaintiff in connection with the trust. The court held that in order to recover on a claim for accounting malpractice, the threshold question is whether a duty of care existed as a result of the parties' relationship, i.e. whether they stood in a relation of privity with each other. Although the accountant argued that no such duty of care existed, the court held that there was a question of fact on this issue which precluded granting summary relief.

Damone v. Levy, N.Y.L.J., Apr. 30, 2009, p. 29 (Sup. Ct., N.Y. Co.)(Ling-Cohan, J.).

Motion to Dismiss

In an action for foreclosure and sale of real property, the defendant moved, *inter alia,* for an order staying the impending sale of the subject premises, and dismissal of the complaint on the grounds that plaintiff lacked standing to maintain the action due to its lack of ownership of the note and mortgage at the time suit was commenced.

In denying the motion, the court opined that the issue of a party's lack of standing is tantamount to a claim that the party lacks the capacity to sue. When a defendant does not challenge a plaintiff's standing, the plaintiff is not required, nevertheless, to demonstrate that it is the proper party to seek the requested relief. Instead, the plaintiff is relieved of this burden. The court held that the issue of a plaintiff's standing to sue must be raised by the defendant in its answer or in a pre-answer motion to dismiss. To the extent that the defendant fails to address the issue as such, the defense is waived pursuant to CPLR 3211(e).

Based upon the foregoing, the court found that the defendant had waived the defense of lack of standing, inasmuch as he had failed to raise it at the appropriate time.

Washington Mutual Bank NA v. Payne, N.Y.L.J., June 24, 2009, p. 29 (Sup. Ct., Suffolk Co.)(Whelan, J.).

Standing

In a probate proceeding, the decedent's son, Nicholas, moved to vacate the probate decree, and to examine the attesting witnesses pursuant to SCPA 1404. The decedent was survived by a spouse and four children, three sons and a daughter. The decedent's will left her entire estate to her spouse, who post-deceased her. Approximately four years prior to the making of the motion, the decedent's will was admitted to probate, and letters testamentary were issued to her son, George.

In support of the application, the movant claimed that he was never served with citation in the probate proceeding, and that he was entitled to process as a distributee of the decedent. In this regard, he alleged that his siblings knew that he had relocated to Greece at the time the probate petition was filed, and yet they served him at his former address in Florida.

In opposition to the motion, the executor alleged that citation was served upon the movant at his last known residence address, and it was not returned as undeliverable. He further maintained that the movant lacked the requisite standing to object to the will pursuant to a settlement agreement in which he waived all claims to the decedent's estate, his inheritance rights under the laws of intestacy, and the right to object to probate.

The court held that while the decision to vacate a probate decree rests in the discretion of the court, only a person who is a proper or necessary party to a probate proceeding has the right to seek *vacatur*. A will cannot be set aside by one who, despite the probability of success on the merits, cannot inherit from the estate. An interest to inherit, opined the court, must be pecuniary, and does not rest upon sentiment or sympathy.

Based upon the foregoing, the court denied the motion, finding that the movant had waived and/or assigned any interest he had in the estate of the decedent pursuant to the settlement agreement, as well as any right he had to object to probate. The court determined that if a party lacks standing to challenge a will during a probate proceeding, he or she similarly lacks standing to vacate a decree admitting the will to probate.

Estate of Sfouggatakis, N.Y.L.J., Apr. 14, 2009, p. 27 (Sur. Ct., Kings Co.)(Surr. Johnson).

Vacate Probate Decree

In *In re Balukopf,* the Surrogate's Court, Nassau County, vacated a probate decree issued four months earlier, finding that while the movant had failed to establish a sufficient basis for doing so, the "unique" circumstances presented in the record nevertheless required this result.

The record revealed that the decedent died, a widow and without any children, in June, 2007. Her live-in caretaker filed a petition for the probate of her will, in which she was named the sole beneficiary and fiduciary. In response to the court's request for an affidavit of family tree, the petitioner stated that she was not aware that there was any person who could prepare such information, but for two contacts the decedent had made during her lifetime, which she stated she did not believe were relatives.

Thereafter, various relatives of the decedent communicated with the court and indicated that the

decedent had a prior will that left her estate to her relatives and relatives of her late husband. Although they stated that they could not locate a copy of this instrument, they stated that they intended to object to the propounded instrument. The letter to the court also stated that the petitioner had committed perjury in the petition for probate inasmuch as she knew at the time it was filed that the decedent had six distributees, but nevertheless stated that she had none.

In response to the letter, the petitioner amended her petition to list the decedent's distributees. In addition, the amended petition stated that no beneficiary under the propounded will had a confidential relationship with the decedent. Thereafter, three of the decedent's distributees appeared by counsel. The petition was amended once again and the six distributees of the decedent were listed. Notice of the filing of this second amended petition was not provided to counsel who appeared for the distributees. Thereafter, a decree with notice of settlement was served upon counsel for the distributees. No objections to the decree were filed, and the propounded will was admitted to probate.

Soon thereafter, the distributees moved to vacate the decree and to file objections to probate. Upon consideration of the record, the court found that while the circumstances might have been sufficient to establish an excusable default by the movants in seeking to file late objections, the fact remained that counsel delayed four months before taking any action on behalf of his clients to object to probate. Moreover, the court held that even if an excusable default had been established, the movants failed to establish a reasonable probability of success on the merits.

Nevertheless, despite the deficiency of the movants' arguments, the court expressed concern with the underlying circumstances of the matter, including, but not limited to, the material misstatements of fact in the initial petition filed with the court pertaining to the existence of the decedent's distributees, the failure of the petitioner to disclose in her second and third amended petition that she was the decedent's live-in companion, and thus potentially stood in a confidential relationship with her; the fact that the propounded will was a radical departure from the decedent's prior will, and the fact that the propounded will had been inexplicably prepared and its execution supervised by an attorney who had not prepared and supervised the execution of the decedent's prior will.

Based upon the foregoing, the court held that it was no longer satisfied with the genuineness of the propounded will and vacated the decree admitting the instrument to probate.

In re Balukopf, N.Y.L.J., Apr. 9, 2009, p. 28 (Sur. Ct., Nassau Co.)(Surr. Riordan).

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

Agenda

THURSDAY, NOVEMBER 19 (Day One)

8:30 – 9:00 a.m. **REGISTRATION** (outside meeting room)

9:00 – 9:15 **INTRODUCTION AND OVERVIEW**
Speaker: Joshua S. Rubenstein, Esq.

9:15 – 10:00 **ESTATE PLANNING FOR CHRONIC ILLNESS**
Speaker: Martin M. Shenkman, Esq.

10:00 – 10:45 **UPDATE: DISCLAIMERS**
Speaker: Professor William P. LaPiana

10:45 – 11:00 **REFRESHMENT BREAK** (in the exhibit hall)

11:00 – 11:45 **ALTERNATE VALUATION – TIPS, TRAPS AND POSSIBLY FINAL REGULATIONS**
Speakers: T. Randolph Harris, Esq. and **Barbara A. Sloan, Esq.**

11:45 – 12:30 p.m. **ETHICAL RULES RELATING TO LAWYER IN TRANSITION**
Speaker: Hugh F. Kendall, Esq.

12:30 – 1:30 **KEYNOTE LUNCHEON SPEAKER: SIMILAR FACT PATTERNS CONTRASTED WITH DIVERSITY OF ISSUES IN THE SURROGATE'S**
(there is no MCLE credit for this segment)
Speaker: Honorable Lee L. Holzman

1:30 – 2:20 **CONCURRENT LECTURES: SET 1**
Lecture A: PRENUPS, POSTNUPS AND COHABITATION AGREEMENTS
Speaker: Judith E. Siegel-Baum, Esq.
Lecture B: FIDUCIARY LIABILITY
Speaker: Sharon L. Klein, Esq.
Lecture C: UPDATE: PLANNING FOR THE REAL ESTATE OWNER - BEYOND THE STANDARD TECHNIQUES
Speaker: Stuart J. Gross, Esq.
Lecture D: DOMICILE AND RELATED MULTISTATE TAX RISKS
Speaker: Paul R. Comeau, Esq.

2:30 – 3:20 **CONCURRENT LECTURES: SET 2**
Lecture A: PRENUPS, POSTNUPS AND COHABITATION AGREEMENTS
Speaker: Judith E. Siegel-Baum, Esq.
Lecture B: FIDUCIARY LIABILITY
Speaker: Sharon Klein, Esq.
Lecture C: UPDATE: PLANNING FOR THE REAL ESTATE OWNER - BEYOND THE STANDARD TECHNIQUES
Speaker: Stuart J. Gross, Esq.
Lecture D: DOMICILE AND RELATED MULTISTATE TAX RISKS
Speaker: Paul R. Comeau, Esq.

3:20 – 3:45 **REFRESHMENT BREAK** (in the exhibit hall)

3:45 – 4:45 **PLANNING IN A LOW INTEREST RATE ENVIRONMENT**
Speaker: Diana S.C. Zeydel, Esq.

4:45 p.m. **ADJOURNMENT**

5:00 – 7:00 p.m. **COCKTAIL RECEPTION**

FRIDAY, NOVEMBER 20 (Day Two)

8:30 – 9:00 a.m. **REGISTRATION** (outside meeting room)

9:00 – 9:45 **HOT TOPICS: YEAR IN REVIEW**
Speaker: Andrew M. Katzenstein, Esq.

9:45 – 10:30 **UPDATE: CHARITABLE PLANNING**
Speaker: Lawrence Brody, Esq.

10:30 – 11:00 **REFRESHMENT BREAK** (in the exhibit hall)

11:00 – 11:45 **UPDATE: INSURANCE PLANNING**
Speaker: Lawrence Brody, Esq.

11:45 – 12:30 p.m. **UPDATE: POWERS OF ATTORNEY**
Speaker: Professor Ira M. Bloom

12:30 – 1:30 **KEYNOTE LUNCHEON SPEAKER: HOT ISSUES IN DECANTING TRUSTS**
(There is no MCLE credit for this segment)
Speaker: Professor Kenneth F. Joyce

1:30 – 2:20 **CONCURRENT LECTURES: SET 3**
Lecture E: CHARITIES AND OPTIONS FOR BATTERED ENDOWMENTS
Speaker: Ronni G. Davidowitz, Esq.
Lecture F: CONFLICTS OF INTEREST IN ESTATE PLANNING, ADMINISTRATION AND LITIGATION
Speaker: Gary B. Freidman, Esq.
Lecture G: INCOME AND TRANSFER TAX OPPORTUNITIES OF CAPTIVE PROPERTY AND CASUALTY INSURANCE COMPANIES
Speakers: Louis C. Ciliberti, CFP, CLU, ChFC and **Claudio DeVellis, Esq.**
Lecture H: POWERS OF ATTORNEY
Speaker: Professor Ira M. Bloom

2:30 – 3:20 **CONCURRENT LECTURES: SET 4**
Lecture E: CHARITIES AND OPTIONS FOR BATTERED ENDOWMENTS
Speaker: Ronni G. Davidowitz, Esq.
Lecture F: CONFLICTS OF INTEREST IN ESTATE PLANNING, ADMINISTRATION AND LITIGATION
Speaker: Gary B. Freidman, Esq.
Lecture G: INCOME AND TRANSFER TAX OPPORTUNITIES OF CAPTIVE PROPERTY AND CASUALTY INSURANCE COMPANIES
Speakers: Louis C. Ciliberti, CFP CLU ChFC and **Claudio DeVellis, Esq.**
Lecture H: POWERS OF ATTORNEY
Speaker: Professor Ira M. Bloom

3:20 – 3:45 **REFRESHMENT BREAK** (in the exhibit hall)

3:45 – 4:45 **BASICS OF INTERNATIONAL ESTATE PLANNING**
Speaker: Dina Kapur Sanna, Esq.

4:45 p.m. **ADJOURNMENT**

13.5 TOTAL CREDITS

13.5 credit hours of practice management and/or professional practice

This **advanced-level** course may be used for New York MCLE credit by all attorneys, except those who are newly admitted (less than 24 months).

This program has been approved for MCLE credit by the **State Bar of California** in the amount of **11.5** hours, and by the **Pennsylvania CLE Board** for **11.5** credit hours of substantive law. All inquiries regarding MCLE credits may be directed to **(518) 487-5586**.

The New York State Bar Association's Committee on Continuing Legal Education has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York.

IMPORTANT NOTICE: PARTIAL CREDIT FOR PROGRAM SEGMENTS NOT ALLOWED. Under the New York State Continuing Legal Education Board Regulations and Guidelines, attendees at CLE programs cannot receive MCLE credit for a program segment unless they are present for the entire segment. Persons who arrive late, depart early, or are absent for any portion of the segment will not receive credit for that segment.

Section Committees and Chairs

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

Charitable Organizations
Ronni G. Davidowitz
Katten Muchin Rosenman LLP
575 Madison Avenue, 21st Floor
New York, NY 10022
ronni.davidowitz@kattenlaw.com

Continuing Legal Education
Jennifer Weidner
Harter Secrest & Emery LLP
1600 Bausch and Lomb Place
Rochester, NY 14604
jweidner@hselaw.com

Elderly and Disabled
Lisa K. Friedman
Law Office of Lisa K. Friedman
232 Madison Avenue, Suite 909
New York, NY 10016
lf@lisafriedmanlaw.com

Estate and Trust Administration
Linda J. Wank
Frankfurt Kurnit Klein & Selz PC
488 Madison Avenue, 9th Floor
New York, NY 10022
lwank@fkks.com

Estate Litigation
Eric W. Penzer
Farrell Fritz PC
1320 RexCorp Plaza
Uniondale, NY 11556
epenzer@farrellfritz.com

Estate Planning
Darcy M. Katris
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
dkatris@sidley.com

International Estate Planning
Richard E. Schneyer
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
schneyer@thshlaw.com

Law Students and New Members
Lauren M. Goodman
Katten Muchin Rosenman LLP
575 Madison Avenue, Room 2010A
New York, NY 10022
lauren.goodman@kattenlaw.com

Michelle Schwartz
Fulbright & Jaworski LLP
666 Fifth Avenue
New York, NY 10103
mschwartz@fulbright.com

Legislation and Governmental Relations
John R. Morken
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jmorken@farrellfritz.com

Michael K. Feigenbaum
Ruskin Moscou & Faltischek PC
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
mfeigenbaum@rmfpc.com

Life Insurance and Employee Benefits
Brian K. Haynes
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202
bhaynes@bsk.com

Membership and Relations With Local Bar Associations
Robert W. Constantine
44 New Amsterdam Avenue
Buffalo, NY 14216
rwconstantine@gmail.com

Newsletter and Publications
Ian William MacLean
The MacLean Law Firm, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
ianwmaclean@maclean-law.com

Practice and Ethics
Ronald J. Weiss
Skadden Arps Slate Meagher & Flom LLP
Four Times Square, 28th Floor
New York, NY 10036
ronald.weiss@skadden.com

Surrogates Court
Joseph T. La Ferlita
Farrell Fritz P.C.
1320 RXR Plaza
Uniondale, NY 11556
jlaferlita@farrellfritz.com

Taxation
Deborah S. Kearns
Albany Law School
Law Clinic & Justice Center
80 New Scotland Avenue
Albany, NY 12208
dkear@albanylaw.edu

Technology
Gary R. Mund
Kings County Surrogate's Court
2 Johnson Street, Room 212
Brooklyn, NY 11201
garymund@aol.com

Ad Hoc Committee on Multi-State Practice
Andrea Levine Sanft
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
asanft@paulweiss.com

Executive Committee District Representatives

First District
Jonathan J. Rikoon
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY 10022
jjrikoon@debevoise.com

Second District
James H. Cahill, Jr.
Cahill & Cahill PC
161 Atlantic Avenue, Suite 201
Brooklyn, NY 11201
james.cahilljr@verizon.net

Third District
Thomas J. Collura
Tuczinski Cavalier Gilchrist
& Collura PC
54 State Street, Suite 803
Albany, NY 12207
tcollura@tcgclegal.com

Fourth District
Bonnie McGuire Jones
Jones Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
bjones@jwplaw.com

Fifth District
Martin A. Schwab
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202
mschwab@bsk.com

Sixth District
John G. Grall
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902
jgrall@binghamtonlaw.com

Seventh District
Timothy Pellittiere
Woods Oviatt Gilman LLP
700 Crossroads Boulevard
2 State Street
Rochester, NY 14614
tpellittiere@woodsoviatt.com

Eighth District
Lisa J. Allen
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, NY 14210
lallen@harrisbeach.com

Ninth District
Charles T. Scott
Chief Clerk—Surrogate's Court
111 Martin Luther King Blvd.
19th Floor
White Plains, NY 10601
cscott@courts.state.ny.us

Tenth District
Stephen B. Hand
Jaspan Schlesinger LLP
300 Garden City Plaza
Garden City, NY 11530
shand@jshllp.com

Eleventh District
Howard F. Angione
80-47 192nd Street
Queens, NY 11423
angione@att.net

Twelfth District
Cormac McEnery
562 City Island Avenue
City Island, Bronx, NY 10464
cormac@cormacmcenery.com

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

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

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed (ianwmaclean@maclean-law.com) or mailed on a 3½" floppy disk or CD (Ian W. MacLean, The MacLean Law Firm, P.C., 100 Park Avenue, 20th Floor, New York, NY 10017) in Microsoft Word or WordPerfect. Please include biographical information. Mr. MacLean may be contacted regarding further requirements for the submission of articles.

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

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge.

ISSN 1530-3896 (print) ISSN 1933-852X (online)

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor

Ian W. MacLean
The MacLean Law Firm, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
ianwmaclean@maclean-law.com

Section Officers

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

Chairperson-Elect
Gary B. Freidman
Greenfield Stein & Senior, LLP
600 3rd Avenue, 11th Floor
New York, NY 10016
gfreidman@gss-law.com

Secretary
Elizabeth A. Hartnett
MacKenzie Hughes LLP
101 South Salina Street
P.O. Box 4967
Syracuse, NY 13221
ehartnett@mackenziehughes.com

Treasurer
Ilene S. Cooper
Farrell Fritz PC
1320 RXR Plaza, Foor–13 West
Uniondale, NY 11556
icooper@farrellfritz.com