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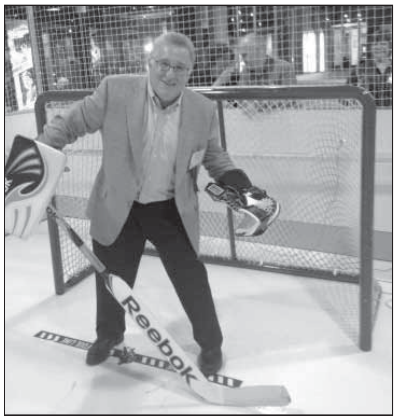
A Message from the Chair



Ronald J. Weiss

Coming to the mid-point in my year as Chair of the Section is a good time to reflect on what the Section has accomplished and what tasks lie ahead. First the accomplishments.

With thanks to the hard work of program chairs Victoria D'Angelo and Charlie Scott, and the indefatigable Ilene Cooper as course book editor, we had a great program at the Four Season's Hotel in Toronto. Not surprisingly, hearing that our illustrious group was at the Hotel, even the Brooklyn Nets basketball team joined us at the Four Seasons. While the social highlight of the program was Saturday night's trip to the Hockey Hall of Fame, sadly, as the photos in this issue attest to, it is the only time this year that New Yorkers will have the opportunity to pose with the Stanley Cup. (The Rangers will be back next year!)

On the legislative front, we had a good year. Several of the bills that we either proposed or supported have passed both the Assembly and the Senate and, as I write this, are awaiting the signature of the Governor. These are: (i) interest on delayed legacies (A.01185/S.04952); (ii) a technical correction to the decanting statute (S.7244/A.9757); (iii) correction of an erroneous cross reference in SCPA § 1724 relating to UTMA accounts (A.09055/S.07137); (iv) the removal of the requirement of court approval for a personal representative's renunciation of property to which the decedent became entitled to but did not receive before death (S.07144A.09355A); (v) heir-

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ship of posthumously conceived children (S.04779-B/A.07461A); and (last but not least) (vi) clarification of the law regarding finders agreements for unclaimed funds due to a decedent's estate (S.07077-A/A.09759).

As to the tasks to come, Professors Bill LaPiana and Ira Bloom have been working over the summer to coordinate and synthesize the work of our Section and the Committees of the City Bar on the draft of the New York Trust Code. Their goal is to have a report ready by October in order to move this important project forward. More to come on this herculean task as we approach our Annual Meeting in January.

On the power of attorney front, Bob Freeman and his ad hoc committee have been working diligently on proposed legislation to improve the execution and operation of the short-form power of attorney, including implementing some of the changes suggested by the Law Revision Commission back in 2012. And another interesting proposal that Jill Bier's Estate Planning Committee has been working on is to allow a custodian to convert an UTMA account into an I.R.C. § 2503(c) trust, a measure that so far has been adopted and is working successfully in 12 other states.

This past April's changes to New York's estate tax provisions and New York's taxation of resident trusts continues to be a topic of much discussion. We will be working with the State Bar's governmental relations team to address the many issues and inconsistences with this legislation. Our Fall Meeting on October 16-17 at the Hyatt Regency Hotel in Rochester will include a presentation and roundtable discussions on this new law and how to plan in light of its significant changes. That Thursday evening's social activities will be at the George Eastman House, the world's oldest museum dedicated to photography, and (I am promised) will include a recital on the House's acclaimed Aeolian pipe organ.

I look forward to seeing you all in Rochester.

Ronald J. Weiss

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Editor's Message

In his Chair's Message, Ron Weiss mentions our Section's recent successes in the realm of new legislation. The Co-Chairs of our Legislation and Governmental Relations Committee, Robert M. Harper and Jennifer F. Hillman, expand upon that subject in this *Newsletter* with an article containing a detailed overview of the bills that our Section either proposed or supported. Additionally on the topic of new legislation, the Chair of our Section's Taxation Committee, Susan Taxin Baer, co-authored an excellent article with Howell Bramson that thoroughly explains New York's 2014-2015 budget legislation—amendments to existing law that significantly alter New York estate tax and the income taxation of resident trusts.

Also appearing in this *Newsletter* is Spencer L. Reames' discussion of the enforcement of charitable pledges through the lens of a recent Kings County Surrogate's Court decision; Gary E. Bashian's explanation of potential ethical challenges and conflicts facing practitioners who represent estate fiduciaries; and Anthony J. Enea's primer on considerations when transferring a residence for elder law and estate planning purposes. Last but not least, Amy L. Altman's article addresses tax predicaments raised by a decedent's ownership of endangered collectables.

The remaining submission deadline for this year is December 5, 2014. Once again, a reminder to those who have contributed their writings and those who may be contemplating doing so—authors may earn up to 12 CLE credits per reporting cycle for legal research-based writing. For information about obtaining credits, please feel free to contact me directly.

The editorial board of the *Trusts and Estates Law Section Newsletter* is:

Jaclene D'Agostino Editor in Chief	jdagostino@farrellfritz.com
Wendy H. Sheinberg Associate Editor	wsheinberg@davidowlaw.com
Naftali T. Leshkowitz Associate Editor	ntl@leshkowitzlaw.com
Sean R. Weissbart Associate Editor	srw@mormc.com

Jaclene D'Agostino

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact the *Trusts and Estates Law Section Newsletter* Editor:

Jaclene D'Agostino, Esq.
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

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

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The Scope and Nature of Attorney Duty When Representing an Estate Fiduciary

By Gary E. Bashian

"In doing what we ought we deserve no praise, because it is our duty."

—Joseph Addison

Every practicing New York attorney knows clients are owed an absolute fiduciary duty of loyalty and care. However, though this principle both forms the foundation for the attorney-client relationship, and influences almost every aspect of the adversarial system, this seemingly straightforward rule is in many ways more nuanced, and more absolute, for Trusts and Estates practitioners (especially in a litigation context) than it may appear. Indeed, due to the unique relationship which exists between an attorney; an estate; an estate's fiduciary; and an estate's beneficiaries, the nature and scope of the fiduciary duties owed by counsel and to whom these duties are owed take on an often underappreciated complexity.

Typically, when a client retains an attorney, the professional judgment of a lawyer should be exercised, with the bounds of the law, solely for the benefit of the client and free of compromised influence or loyalty. When the attorney represents a client, it is implicit that the representation be executed competently, diligently, in "accordance with the highest standards of the profession," and with "an undivided loyalty uncompromised by conflicts of interest."[1] If there is a conflict that cannot be waived between current or former clients, the attorney cannot be engaged, and if the conflict arises or is later realized, the attorney must withdraw.

For Trusts and Estates practitioners who think their representation of a fiduciary is limited to an individual capacity like an ordinary client, they are entering a minefield of ethical challenges and potential conflicts. Most estate fiduciaries engage an attorney in their general capacity, as the representative of the estate itself, and not necessarily as individuals protecting their own individual interests, a subtle but important distinction which affects the whole of the representation.

The American College of Trust and Estate Counsel, or "ACTEC," has promulgated commentaries to the Model Rules of Professional Conduct specifically addressing the ethical and fiduciary duties incumbent upon Trusts and Estates attorneys, and in particular, the duties owed by an attorney who represents the fiduciary of an estate.[2] The ACTEC commentaries to Rule 1.2, "Scope of representation," help to explain the scope of this duty as they distinguish the frequently overlooked capacities in which the fiduciary of an estate can retain counsel. As stated in the commentary to Rule 1.2:

> A lawyer represents a fiduciary generally (*i.e.*, in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate.[3]

It is absolutely critical to recognize the difference between an estate fiduciary acting in a general (representative) capacity vs. an individual capacity prior to being retained. This distinction defines the standards and obligations upon which their own fiduciary duties of loyalty and care turn, and to whom these obligations are owed.

If the attorney is retained by the estate fiduciary in that fiduciary's individual capacity, the attorney's duty is (within the Rules of Professional Conduct) to the fiduciary individually "for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate."[4] In situations such as these, the attorney's duty to the estate is necessarily limited; the scope of his or her representation is narrow and focused on defending the estate's fiduciary personally, independent of the interests of the estate. Concomitantly, the attorney should notify the beneficiaries of the limited scope of his or her representation, and affirmatively indicate that he or she is not representing the interests of the estate.[5]

However, if the attorney is engaged by a fiduciary in a general or representative capacity, then he or she has been "retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate."[6] This poses a potential conflict as the attorney for the estate's fiduciary has a fiduciary duty that extends beyond the client individually, to the estate, and by extension its beneficiaries. In situations such as these, the attorney will owe the estate and its beneficiaries the same duty of loyalty and care as the executor/administrator (unless the written notice of the limited scope of representation is provided to the beneficiaries).

The ACTEC commentaries elaborate on the importance of this distinction, and the resulting duties, as follows:

> If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary of an estate, the lawyer represents the fiduciary in a representative and not an individual capacity—the ultimate objective of which is to administer the fiduciary estate for the purposes of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the Estate and, derivatively, the beneficiaries—not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the Estate.[7]
>
> * * * *
>
> The nature and extent of the lawyer's duties to the beneficiaries of a fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of the fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary….even though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary.[8]

The standard set forth in the ACTEC Commentaries—that the attorney for an estate fiduciary owes a fiduciary duty to the estate itself, and by extension the beneficiaries[9]—has long been recognized in New York State jurisprudence, and forms the conceptual basis of a number of Court of Appeals decisions, including *In re Clarke*;[10] *Wechsler v. Bowman*;[11] *In re People*;[12] and *In re Rothko*.[13]

In *Wechsler v. Bowman*, the Court of Appeals held that the attorney for an estate's fiduciary can be held liable for facilitating the wrongdoing of an executor, as the attorney's own duty of care and loyalty is connected to the estate itself, and the beneficiaries. The high Court further explained these duties in *In re Clarke* when it held that the attorney for an estate's fiduciary owes the same fiduciary duty to the estate and its beneficiaries, or "*cestui*," "as the Executor himself." Thereafter, in accordance with the principles found in *Wechsler* and *Clarke*, the Court further held in *In re Rothko*, *inter alia*, that a "passive wrongdoer" [attorney] can be held liable for ignoring the wrongdoing of the estate's fiduciary. In these cases, the Court of Appeals described standards of duty that govern agents for the estate fiduciary, including attorneys, clearly warning that "faithless malfeasance" damaging the estate will bring liability not just to the fiduciary, but to the agent as well.

The Court could not have made it plainer in defining the scope of this duty when it held that "an attorney for a fiduciary has the same duty of undivided loyalty to the *cestui* as the fiduciary himself."[14]

This standard, and the very nature of this fiduciary duty, is inflexible, as the Court of Appeals had previously held that:

> In our State, "uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions…" We have taken this unyielding position because of the belief that only thus can the "level of conduct for fiduciaries" be kept "higher than that trodden by the crowd," and we have stated that this higher level "will not consciously be lowered by any judgment of this court"; we should not lower it now, and thus make the first breach in a "tradition that is unbending and inveterate" (*In re People*, 303 NY 423, 433 [1952] [internal citations omitted]).

The "uncompromising rigidity" in the enforcement of this fiduciary duty is clearly necessary as both the estate's fiduciary and his or her counsel are empowered by statute with near absolute authority over an estate and its assets. By design, an estate cannot function without an appointed fiduciary, and unlike a corporation, the estate has no life, nor is afforded any protection independent of its fiduciary. Estate fiduciaries are commonly lay people without legal training completely reliant on counsel to guide them in the proper administration of the estate; it is with good reason that these fiduciary duties extend to estate's counsel in this manner. To that end, the estate's fiduciary and their attorney are both held to a strict liability standard if the estate is harmed during the period of their representation.[15] This liability cannot be avoided without counsel taking affirmative steps to limit the scope of representation, on clear written notice to the estate, the beneficiaries, and the court defining the exact capacity in which counsel represents the estate fiduciary, and to whom the attorney's fiduciary obligations are owed.[16]

Clearly, this brief article can only serve as an introduction to the concepts and jurisprudence that establish the nature and scope of an attorney's duties when representing an estate's fiduciary. However, it is vital that Trusts and Estates practitioners, litigators in particular, be aware of their fiduciary obligations in this context, and understand that the courts will hold both a fiduciary and attorney equally responsible for the estate and its *cestui* if they fail to appreciate the inherent conflict in this professional relationship, and fail to define and understand the identity of the client.

Endnotes

[1] New York Statement of Client Rights.

[2] ACTEC Commentaries to the Model Rules, Fourth Edition, 2006; located online at http://www.actec.org/public/CommentariesPublic.asp.

[3] ACTEC Commentary to Model Rule 1.2, section entitled General and Individual Representation Distinguished.

[4] *Id.*

[5] *See* ACTEC commentaries to Model Rule 1.2: Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, a lawyer who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer generally should not give up the opportunity to make such disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

[6] ACTEC Commentary to Model Rule 1.2.

[7] ACTEC Commentary to Model Rule 1.2, section entitled Representation of Fiduciary in Representative, Not Individual Capacity.

[8] ACTEC Commentary to Model Rule 1.2, section entitled Duties to Beneficiaries.

[9] Absent the limitations on the scope of representation discussed in endnote 5.

[10] 12 NY2d 183, 237 NYS2d 694 (1962).

[11] 285 NY 284, 34 NE2d 322 (1941).

[12] 303 NY 423, 103 NE 721 (1952).

[13] 43 NY2d 305, 401 NYS2d 449 (1977).

[14] *In re Clarke*, at 187.

[15] *See In re Rothko*, *supra*.

[16] *See* endnote 5, *supra*.

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a member of the Executive Committee of the New York State Bar Association's Trust and Estates Law Section. Mr. Bashian gratefully acknowledges the contributions of Irving O. Farber, a Senior Partner, and Andrew Frisenda, a Senior Associate, of Bashian & Farber, LLP, for their assistance in the composition of this article.

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New York Has at Last Updated Its Estate, Gift, and Trust Income Taxes—But Were These the Requested Changes?

By Susan Taxin Baer and Howell Bramson[1]

Effective April 1, 2014, the 2014-2015 budget legislation (the “Executive Budget”) makes significant changes to New York’s estate tax and the income taxation of certain trusts. But will these changes keep wealthier New Yorkers in New York? Stated another way, will the Executive Budget accomplish what Governor Cuomo verbalized frequently as one of his primary purposes in advocating sweeping changes in New York’s estate tax law: “to eliminate the incentive for older middle-class and wealthy New Yorkers to leave the State.”

These changes will have a major effect on estate planning for both New York residents and non-residents. Although these changes provide some tax relief for the moderately wealthy, wealthier New Yorkers will see little if any change, except under certain circumstances that will cause an increase in estate and income tax. *See* “Gifts” and “ING Trusts” below.

Background

Recognizing that New York’s estate “tax [was] woefully out of date” in December 2012, Governor Cuomo established the New York State Tax Reform and Fairness Commission (the “Fairness Commission”) to conduct a comprehensive and objective review of the State’s tax structure. Charged with modernizing the current tax system by increasing its simplicity, fairness, economic competitiveness and affordability, the Fairness Commission issued its final report on November 11, 2013. Its recommendations included:

- Raising the estate tax threshold from $1 million to $3 million;
- Eliminating New York’s GST tax;
- Reinstating New York’s gift tax; and
- Closing the resident trust “loophole,” *i.e.*, the exemption from tax for New York resident trusts.

It had been clear that lifetime gifting had been an effective means of reducing the estate tax. This was particularly evident in New York where there has been no gift tax since its repeal in 2000, and even more so since 2010 with the large number of tax free gifts that were made as a result of the significant increase in the federal exemption. Thus, the Fairness Commission sought reinstatement of the gift tax as an important complement to the estate tax. The Fairness Commission Report was then sent to the New York State Tax Relief Commission for its review and recommendations for the Governor’s 2014 State of the State message. The Tax Relief Commission issued its Report on December 6, 2013, in which it proposed (1) bringing the state exemption threshold up to the 2013 federal level of $5.25 million with indexing and (2) lowering the top estate tax rate from 16% to 10%. The Tax Relief Commission Report, however, did not even mention the following three significant recommendations that had been highlighted in the Fairness Commission Report: (1) reinstituting the gift tax, (2) closing the “resident trust “loophole” and (3) eliminating the GST tax.

Four days after the Final Report of the Tax Relief Commission had been released, the Governor announced his acceptance of its provisions and on January 6, 2014, issued a press release in which he proposed a phase-in of the changes. The Governor noted that “New York is only one of 15 states that impose an estate tax and [New York’s] current estate tax level is badly in need of reform.” He proposed reducing the top estate tax bracket to 10% and increasing New York’s estate tax threshold to $5.25 million over four years, so that beginning in 2019, the estate tax exemption in New York would equal the federal exemption, indexed for inflation. This change, the Governor claimed, “would exempt nearly 90% of all estates from the tax, restore fairness and eliminate the incentive for older middle class and wealthy New Yorkers to leave the State in favor of tax-favored jurisdictions.” While the Governor’s 2014-2015 budget bill, more commonly referred to as the “Executive Budget,” incorporates some of the Tax Relief Commission proposals, there is definitely a disconnect between the public relations surrounding the Governor’s press releases and speeches, on the one hand, and certain provisions written into the Executive Budget.

Estate Tax Exclusion Increased—but Only for Some

The Executive Budget increases New York’s basic exclusion amount ($1 million per decedent prior to April 1, 2014) to $2.0625 million per decedent as of April 1, 2014, with annual increases of $1.0625 million until April 1, 2017, when the basic exclusion amount will reach $5.25 million. Beginning January 1, 2019, and thereafter, it will be indexed for inflation, which should link New York’s basic exclusion amount to the federal exemption (currently $5.34 million, but also indexed for inflation). The basic exclusion amount is increased as follows:

Death on or After:	and Before:	Basic Exclusion Amount:
April 1, 2014	April 1, 2015	$2,062,500
April 1, 2015	April 1, 2016	$3,125,000
April 1, 2016	April 1, 2017	$4,187,500
April 1, 2017	January l , 2019	$5,250,000

Read on, however, because what appears to benefit New Yorkers does not really favor the very wealthy under what is referred to as the "cliff." Because of a quirk in the way New York calculates its estate tax, the basic exclusion amount is *rapidly phased out* once the value of a decedent's taxable estate exceeds the basic exclusion amount in the year of death *and is totally phased out* (*i.e.*, is not available) when the value of a decedent's taxable estate is greater than 105% of the basic exclusion amount.

The Executive Budget implements the exclusion by allowing a credit of the "Applicable Credit Amount" to be taken against the tax imposed by the statute as follows:

- If the New York taxable estate is less than or equal to the basic exclusion amount, the Applicable Credit Amount will be the amount of the tax so computed and, therefore, serves as a wash.
- If the New York taxable estate is up to 5% greater than the basic exclusion amount, the Applicable Credit Amount will be limited based on a formula, resulting in a rapidly increasing tax for each percent over the basic exclusion amount.
- If the New York taxable estate is greater than 105% of the basic exclusion amount, *no credit* is allowed.

By way of example of the first point above, suppose D dies on April 20, 2014, with a New York taxable estate of $2,062,500. Because $2,062,500 is the basic exclusion amount at the time of death, there will be no estate tax due.

The second two points describe the infamous "cliff" language in the statute, Section 952(c), which provides, in pertinent part:

> In the case of a decedent whose New York taxable estate exceeds the basic exclusion amount by an amount that is less than or equal to five percent of such amount, the applicable credit amount shall be the amount of tax that would be due under subsection (b) of this section if the amount on which the tax is to be computed were equal to the basic exclusion amount multiplied by one minus a fraction, the numerator of which is the decedent's New York taxable estate minus the basic exclusion amount, and the denominator of which is five percent of the basic exclusion amount. Provided, however, that the credit allowed by this subsection shall not exceed the tax imposed by this section, and no credit shall be allowed to the estate of any decedent whose New York taxable estate exceeds one hundred five percent of the basic exclusion amount.

In other words, if D's taxable estate is $2,165,625 (i.e., 105% of the basic exclusion amount), two tax calculations would be required: one on the applicable credit amount ("ACA") and the second on the taxable estate. The ACA is determined by multiplying the basic exclusion amount ("BEA") (currently, $2,062,500 through March 31, 2015), by one minus a fraction, the numerator of which is $2,165,625–$2,062,500 (the taxable estate minus the BEA), and the denominator of which is $103,125 (5% of the BEA). Once you compute the ACA, you must look at the table in section 952(b) to compute the tax on the ACA. Since the ACA is zero when the taxable estate is 105% of the BEA, the tax on the ACA (the first tax calculation) is zero. You must then compute the tax on the taxable estate, once again using the table in section 952(b). Finally, you subtract the tax computed above on the ACA from the tax computed on the taxable income to arrive at the net estate tax. In other words, D's estate would pay a New York State estate tax of $112,050, as reflected in Exhibit A:

Exhibit A

BEA =		$2,062,500						
		5%						
		$103,125						
Taxable Estate =		$2,165,625						
ACA =		$2,062,500	x	(1	-	$2,165,625	-	$2,062,500)
						$103,125		
		$2,062,500	x	(1	-	$103,125	)	
						$103,125		
		$2,062,500	x			$0	=	$0
	ACA		=					$0
Computation of Tax on ACA	$0		@			3.06%	=	$0.00
Computation of Tax on Taxable Estate		$2,165,625						
Tax on		$2,100,000	=			$106,800		
Tax on excess over $2,100,000 @	8.0%	$65,625	=			$5,250		
Tax before ACA						$112,050		
Less Tax on ACA			=			$0		
Tax on first	$103,125	above BEA	=			$112,050[2]		

A similar computation would apply if the taxable estate is less than 105% of the basic exclusion amount. Each percent above the basic exclusion amount (up to 4%) would reduce the applicable credit amount by an additional 20%, thereby rapidly phasing out the applicable credit amount, which, in turn, increases the tax due for such estates.

For example, if D's taxable estate is $2,124,375, which is 3% greater than the basic exclusion amount ($2,062,500 x 3% = $2,124,375), D's estate tax would be $77,200, computed as shown in Exhibit B:

Exhibit B

BEA =		$2,062,500							
		3%							
		$61,875							
Taxable Estate =		$2,124,375							
ACA =		$2,062,500	x	(1	-	$ $2,124,375	-	$2,062,500	)
						$ $103,125			
		$2,062,500	x	(1	-	$61,875	)		
						$103,125			
							)		
		$2,062,500	x	(1	-	0.6	=	40.00%	
	ACA		=					$825,000	
Computation of Tax on ACA	$825,000								
Tax on		$500,000	=			$15,300			
Tax on Excess Over $500,000 @	5.0%	$325,000	=			$16,250	=	$31,550	
Computation of Tax on Taxable Estate		$2,124,375							
Tax on		$2,100,000	=			$106,800			
Tax on Excess Over $2,100,000 @	8.0%	$24,375	=			$1,950			
Tax Before ACA						$108,750			
Less Tax on ACA			=			($31,550)			
Tax on First	$61,875	above BEA	=			$77,200[3]			

Now, suppose D's taxable estate is significantly greater than the basic exclusion amount, say $6,200,000, and *no credit* is allowed. This would bring the tax calculation into a higher tax bracket (*i.e.*, 12.8%), and D's estate would pay a New York State estate tax of $535,600 (tax on $6.l million = $522,800 plus $12,800 (12.8% on the excess of $100,000)). That is, taxable assets of slightly more than 200% of the basic exclusion amount (*i.e.*, $2,062,000 x 200.6% = $4,137,375) will cause D's estate to pay a New York estate tax of $535,600.

Estate Tax Bracket

The Governor's budget bill originally included a reduction of the estate tax bracket from 16% to 10%. The Executive Budget, however, keeps the top bracket at 16%.

Interestingly, the rates included in the Executive Budget only cover the period for a decedent dying on or after April 1, 2014, and before April 1, 2015. While this might have been an error that will require a technical correction, there is some question as to whether it is a time-limited compromise, test period or mandate reached during the budget negotiations.

Note that although the top bracket is still 16%, there has been a change in bracket structure. As a result, estates valued in excess of 105% of the basic exclusion amount will have the same tax they would have had under the old law.

Gifts

New York has not had a gift tax since 2000 when New York's gift tax was repealed. Consequently, a commonly used estate planning technique to reduce the size of a New York resident's estate tax was to make gifts within the allowable federal exemption. Not only was the donor able to make a completed gift without incurring gift tax liability in New York, but so long as she had not retained an interest in the gifted property, she was assured that the value of the gift would not come back into her estate for estate tax purposes. The Governor's budget bill proposed to close this loophole by including in one's New York taxable estate certain gifts made after April 1, 2014. The legislature limited this add-back to taxable gifts made within three years of death (if not otherwise includible in the federal gross estate), exclusive of gifts made (1) when the decedent was not a resident of New York, (2) before April 1, 2014 or (3) after December 31, 2018.[4] ("Taxable gifts" do not include annual exclusion gifts (currently $14,000 per donee) or payments made *directly* for tuition and medical expenses.) The add back, however, does not appear to exclude gifts of real or tangible personal property *outside* of New York State, which, if owned at a decedent's death, would not be subject to New York's estate tax. Let's say, for example, that D purchased a vacation home on the Atlantic Coast in Florida, which he has used every winter while visiting his son ("S"), who lives in Miami. In 2016, D decides to reduce his New York taxable estate and gives the vacation home to S. If D dies in 2018, the value of the vacation home will be added back to D's New York taxable estate. Had D not made the gift, the vacation home (real property in Florida), would not be included in D's New York estate.

Although the add-back provision under the new law is not nearly as onerous as originally proposed, gifts that are added back are not likely to be eligible for the state death tax deduction against the federal estate tax. This is because this deduction, as allowed under section 2058 of the Internal Revenue Code, must be paid "in respect of any property included in the [federal] gross estate…." Since gifts added back under the new law would *not* be a part of the federal gross estate, they would not likely be eligible for the state estate tax deduction for federal estate tax purposes.

The top estate tax rate on property included in decedent's federal and New York gross estate is 40% federal plus 16% New York. However, since estate taxes paid to New York on property includible in the decedent's federal gross estate are deductible in computing the federal estate tax, the top effective New York rate is 9.6% (*i.e.*, 16% - [16% x 40%] = 9.6%). Hence, gifts added back to the decedent's estate under the new law will be subject to an additional tax of 6.4% as compared to having the same property included in the decedent's gross estate. Deathbed gifts will thus rarely be tax efficient. Exhibit C below illustrates the effect of making deathbed gifts. The taxable estate for a New York decedent is assumed to be $7 million (For this purpose, assume all of the property is located in New York.) If no deathbed gifts are made, the New York estate tax would be $638,000 and the Federal estate tax would be $408,800 (reflecting a deduction for the entire New York estate tax), for a total estate tax of $1,046,800. If a deathbed gift of $1 million is made, the New York tax would remain the same $638,000, but the portion attributable to the gift add-back ($127,200) would not be deductible for Federal purposes. Thus, the Federal estate tax would be $510,800, resulting in an additional tax of $50,880.

Now let's assume that the $7 million estate includes the vacation home in Florida and that the deathbed gift is comprised of the vacation home. Had D not made the gift (or had he not made it within three (3) years of his death and before 2019), his New York taxable estate would be $6 million, the federal estate tax would be $445,268, based on an estate of $7 million, and the New York state estate tax would be $546,830. From a planning standpoint, elderly clients or clients in bad health (where death within 3 years is a strong possibility) should defer making large gifts until 2019, particularly if they are not planning to move out of state.

Exhibit C

New York Decedent (April 1, 2014–December 31, 2014)	
Taxable estate	$7,000,000
No gifts	
Federal Estate Tax	$408,800
New York Estate Tax	$638,000
Total Estate Taxes	$1,046,800
New York Decedent (April 1, 2014–December 31, 2014)	
Taxable estate	$6,000,000
Deathbed Gifts	$1,000,000
Federal Estate Tax	$459,680
New York Estate Tax	$510,800
Tax on New York Gift Add-Back[5]	$127,200
Total Estate Taxes	$1,097,680
Cost of Deathbed Gifts	**$50,880**

Furthermore, because the New York estate tax will be imposed on gifts that are no longer held in the estate, when drafting wills and revocable trust agreements it will be important for attorneys to consider and specify the estate assets that would be the best source against which to allocate the New York estate tax attributable to such gifted assets, particularly in those instances where the donee of the gift is not the beneficiary of the donor's estate at the donor's death.

Throwback Tax on Distributions of Accumulated Income

Under the Executive Budget, New York resident beneficiaries may be subject to a “throwback tax” on certain distributions they receive from trusts qualifying for the “New York Resident Trust Exception” (except an incomplete gift non-grantor or “ING” Trust—see below) as if the income earned in the trust had been subject to New York income tax during the year the income was accumulated. A trust qualifying for the “New York Resident Trust Exception” is one created by a New York resident (ergo, a “Resident Trust”) but is exempt in any given year from New York tax under Tax Law section 605(b)(3)(D) because (1) none of the trustees are domiciled in New York during that year, (2) no real or tangible trust property is located in New York, *and* (3) neither trust income nor gains are derived from New York sources. The throwback tax will apply if the exempt resident trust (1) accumulates income during a year in which it qualified as an “exempt trust” and (2) accumulated income is distributed in a later year to a beneficiary who is then a New York resident. The throwback tax will ***not*** apply to income of a non-resident trust nor will it apply to distributions of income of an exempt Resident Trust accumulated prior to (1) January 1, 2014 or (2) there being a New York resident beneficiary who was at least 21 years of age.

An earlier version of the throwback rules would have also taxed income accumulated before January 1, 2014 and trusts created by non-New York residents. Even as improved, though, the throwback tax provisions will cause burdens of record keeping not only on trustees but also on tax preparers.

ING Trusts

An ING Trust, referred to above, is an incomplete gift non-grantor trust created by a New York taxpayer in another state to avoid New York income tax on the income and gains from the assets transferred to the trust without current gift tax liability. Under the Executive Budget, effective immediately for tax years beginning on or after January 1, 2014, but excluding income earned by ING Trusts that are liquidated before June 1, 2014, an ING Trust created by a New York taxpayer will be treated as a grantor trust for New York purposes. As a result, the New York taxpayer who had been trying to avoid the New York tax will now be required to pick up all of the trust’s income on her income tax return. This, in turn, will cause a disconnect between the New York state and federal reporting of the same trust, because for federal tax purposes, the taxpayer would continue to report the income as derived from a non-grantor Trust.

Valuation

The valuation of an estate as of the decedent’s date of death or the alternate valuation date for New York estate tax purposes must be the same as for federal estate tax purposes. If a federal return is filed, New York must use the same values and valuation date as shown on the federal estate tax return. If no federal return is filed, the New York return must reflect the same methodology as would have been used had a federal return been filed (*e.g.*, no election to use alternate valuation may be made ***unless*** it will decrease the value of New York’s gross estate as well as the amount of tax).

Repeal of New York’s GST Tax

The Executive Budget has repealed New York’s generation-skipping transfer (“GST”) tax, which had been applicable to taxable distributions to “skip persons” and taxable terminations of trusts.

QTIP Election

Although the Senate version of the budget bill included a provision specifically allowing for a separate New York qualified terminable interest property (“QTIP”) election to be made where a federal estate tax return was required for purposes of electing portability, that provision did not make it to the final version of the Executive Budget. As a result, a New York QTIP election will ***not*** be allowed where (i) a federal estate tax return is required to be filed *and* (ii) a QTIP election is not made on that return. A New York QTIP election will, however, be allowed where no federal estate tax return is required to be filed.

Portability

Although the Assembly had expressed an interest in a provision for the unused New York exemption of the first spouse to die to be “ported” to the surviving spouse, who could then use the first spouse’s remaining exemption, and such a provision had been drafted and submitted to the Legislature, it was not included in the Executive Budget, most likely because of the difficulty in seeing it carried through in light of New York’s exemption cliff. This creates further issues for a New Yorker planning his or her estate. As a result, New Yorkers should continue to use credit shelter trusts as part of their estate planning since they will not be able to rely on portability to take advantage of an otherwise wasted exemption. Additionally, New Yorkers who expect that their estates will not exceed the then applicable federal exemption will need to weigh the benefits of (1) electing portability for federal estate tax purposes or (2) not filing a federal estate tax return in order to make a New York QTIP election. In making the decisions described above, consideration should also be given to the income tax rates vs. the estate tax rates and (particularly in the case of a first marriage) the benefits of outright dispositions to take advantage of income tax savings with portability, which could be costly in New York where there is no provision for portability.

To illustrate the interaction between the New York QTIP election and portability, suppose a married New York resident dies with an estate of $4 million at a time when the New York exemption is $2,062,500 and the decedent does not want assets to go outright to the surviving spouse. To avoid a New York tax, the credit shelter trust must be limited to the New York exemption amount. If no portability election is made, a New York QTIP election can be made for the balance of the estate. The entire $4 million will be exempt from estate taxation but, because no portability election was made, the balance of the decedent's exemption ($5,340,000 less $4 million) will be lost. Also, the assets in the credit shelter trust will not get a second tax basis step-up when the survivor dies. If, instead, a portability election is made, the full New York tax would be due on the decedent's death, because the QTIP election would not be available, but the full $5,340,000 exemption would be available to the survivor and there would be a full tax basis step-up upon the survivor's death.

Conclusion

As a result of the passage of the Executive Budget, estate planning for New Yorkers must still look to old tools such as the credit shelter trust to achieve estate planning goals. In addition, gift planning must be carefully considered. Unless section 2058 of the Internal Revenue Code (the state death tax deduction) will be determined to include gifts added back under the new law (which is not likely), careful consideration will have to be given to the loss of the full deduction in determining the benefits of making large gifts (*e.g.*, getting the income and appreciation on the gifted assets out of one's estate). The timing of making gifts must also be considered if one is moving into or out of New York. Due to the cliff and New York's keeping its top estate tax bracket at 16%, the wealthiest New Yorkers will be still incentivized to move out of the state to take advantage of more tax-favored jurisdictions.

Endnotes

[1] The authors gratefully acknowledge Jonathan Rikoon for all of his input and assistance.

[2] That is, a $103,125 increase in D's taxable estate will result in an estate tax increase of $112,050 (or a marginal tax rate of 108.65%).

[3] The result here shows that an increase of only $61,875 in D's taxable estate will result in an estate tax increase of $77,200 (or a marginal tax rate of 124.77%).

[4] The NYSBA Trusts and Estates Law Section, as well as the Estate and Gift Tax Committee and the Trusts, Estate and Surrogate's Court Committee of the New York City Bar, submitted comments in response to the proposed budget bill in which each explained the tax issues with what would have been essentially an unlimited add-back of gifts subsequent to 3/31/14, urging that the add-back be limited to deathbed gifts, if at all.

[5] The state estate tax deduction on a $7,000,000 estate (with no gifts) is calculated to be $638,000. The state estate tax deduction calculated on a $6,000,000 estate with a $1,000,000 deathbed gift is $510,800. The $127,200 difference between those amounts represents additional estate tax payable to New York when the deathbed gift is added back to the New York taxable estate.

Susan Taxin Baer is the principal attorney of her own firm, which she opened in 1993 with offices in White Plains and New York City. She is Chair of the Taxation Committee of the NYSBA Trusts and Estates Law Section, a Fellow of the American College of Trust and Estate Counsel, and a past Chair of the Estate and Gift Tax Committee of the ABA Real Property, Probate and Trust Law Section.

Howell Bramson is the Chair of the Corporate and Tax Department of the law firm of McCarthy Fingar LLP and also works in the firm's Trusts and Estates Department. He is currently Co-Chair of the Tax Section of the Westchester County Bar Association and is a past President of the Estate Planning Council of Westchester County. Mr. Bramson has received an "AV" rating from Martindale-Hubbell Law Directory, and has been selected for inclusion in the New York Super Lawyers—Metro Edition (Estate Planning/Tax and Corporate Business). He is admitted to practice in New York, Connecticut, and Florida, and before the U.S. Tax Court.

Art Law Part 1: From Eagles to Ivory, the Art of Lost Value

By Amy F. Altman

Does an eagle feather, rare by virtue of its endangered species status, retain its value if banned for sale by the U.S. government? The trade or sale of eagle feathers or parts is prohibited by two federal laws, a ban in effect for decades. The purpose of these laws is to protect the viability of the wild eagle population in the U.S. despite the fact that few people will likely encounter much less own an eagle feather. Now a federal ban has been proposed by the U.S. Fish and Wildlife Service on the sale or trade of ivory in an effort to protect endangered elephants. The issue of fair market valuation of endangered collectables has sometimes affected the tax owed by an estate. With the impending federal ban on the trade or sale of ivory, the issue has potential to affect many more estates.

How does one place a fair market value on an item banned from trade or sale, and thus has no resale value? That was the question facing the beneficiaries of the Estate of Ileana Sonnabend. A renowned art dealer, Ms. Sonnabend died in 2007 at the age of 92 leaving an estate worth a billion dollars, almost entirely comprised of artwork she had acquired. In the late 1950s, she became known for introducing Europe to American art, namely the pop art of Jasper Johns, Roy Lichtenstein, Andy Warhol and Robert Rauschenberg.

Among her numerous works of art, one was deemed her favorite, Robert Rauchensberg's 1959 piece entitled "Canyon." Labeled a combine, or mixed media work, it incorporates a black taxidermied bald eagle that sits on a plank of wood jutting out from the bottom of a canvas collage backdrop. Whether or not one enjoys Rauschenberg's artwork, it is undeniable that "Canyon" is a striking piece of art. Since it contains a taxidermied bald eagle, it is protected under federal laws (the 1918 Migratory Bird Treaty Act and the 1940 Bald and Golden Eagle Protection Act). These laws make it illegal to possess, sell, purchase, barter, transport, import or export wild eagles, dead or alive. In 1998 the U.S. Fish and Wildlife Service asked about the origins of the subject eagle. Mr. Rauschenberg signed an affidavit stating that the eagle was old enough to be legal. Apparently, an artist friend found the eagle, discarded in the hallway of her apartment building. She rescued it from the trash and gave it to Rauschenberg. The eagle belonged to an aged tenant who in his youth was a member of Teddy Roosevelt's Rough Riders. The eagle was acquired from the wild and taxidermied prior to 1940. Ms. Sonnabend was only allowed to retain ownership because it was continually an exhibit at a public museum.

The beneficiaries, a daughter and adopted son, had the piece appraised by Christie's auction house. With no resale value in the auction market, Christie's took a controversial position that its value was zero. In 2012, the Art Advisory Panel, a panel of art experts charged with reviewing appraisals on behalf of the IRS, took a vastly different view-valuing "Canyon" at $65 million and imposing on the Sonnabend estate a tax deficiency of $29.2 million plus $11.7 million in penalties.

Initiated in 1968, the Art Advisory Panel is comprised of well-known art curators, gallery owners and art moguls who evaluate on the IRS's behalf appraisals submitted by taxpayers as part of their income or estate tax returns. These experts presumably know whether the art is appropriately valued because of their experience in art markets. The goals of the IRS and the taxpayer are, of course, at odds. If the taxpayer is looking for an income tax deduction, he wants a high appraisal value to obtain a greater deduction. If the art is appraised for an estate tax return, a lower value would result in a lower estate tax. Artwork appraised at more than $50,000 triggers review by the Art Advisory Panel. The panel may agree or disagree with the appraisal. In fact, the panel's own statistics reveal that there is a 50-50 chance its review will increase the stated appraisal value. There is a further appeal process but the panelists, who volunteer to be part of this prestigious panel, are rarely overturned by the IRS.

The Sonnabend estate's attorney argued that, since it was illegal to sell "Canyon" due to its inclusion of the taxidermied eagle, the fair market value had to be zero. The Art Advisory Panel dismissed the idea that such a landmark piece in postwar modernist art could be valued at zero. The IRS acknowledged that the sale of "Canyon" was illegal, but further argued that there could be an underground market for it, for example, a reclusive billionaire in China who might purchase and hide it.

Ultimately, the IRS settled with the beneficiaries who were compliant taxpayers, dutifully paying more than $470 million in Federal and State estate taxes relating to their mother's art collection. The IRS agreed that if "Canyon" were donated to a museum no estate tax would be assessed. The beneficiaries gifted "Canyon" to the Museum of Modern Art in New York, which recently held an exhibition of selected artwork from Ms. Sonnabend's collection. It is not surprising that "Canyon" was the showing's central piece. Some sources in the auction world were disappointed that the Sonnabend case settled. Had it been litigated, a court might have determined whether a zero valuation is appropriate for items that have been prohibited from sale such as eagles and, now, ivory.

The issue of lost resale value is the same, but the proposed ban on ivory will affect many more individuals and estates. Recent excavations of the east African coastline have revealed that the ivory trade began as early as the 900s. Ivory has been utilized across various industries and can be found in artwork, musical instruments, chess sets, furniture, gun handles, pipes, piano keys, cutlery handles, tea sets, snuff bottles, dices, billiard balls and souvenirs, to name a few.

Issued in February 2014, the proposed ban by the U.S. Fish and Wildlife Service has not yet become a regulation. The proposal would prohibit the import or export and interstate sale of any items containing any amount of ivory unless certain criteria are met. Possession and intrastate sale of ivory would still be allowed. Since the directive might be changed before its implementation in June, major auction houses have been reluctant to place lots of ivory up for sale.

Although an exception has been carved out for the sale of legitimate "antiques," the definition of an antique has yet to be finalized. Thus far, an ivory owner would have to prove that the item was more than 100 years old and that it arrived in the U.S. through one of 13 American ports authorized to permit ivory goods. More troubling is the fact that these 13 ports did not have legal authority until 1982, making it nearly impossible to prove that an item, perhaps created or acquired centuries before, is a legitimate ivory antique. The chances of an antique owner having certification as to the age of an antique item are small. The draconian rules would apply to all ivory in the country and will prohibit millions from selling their ivory and obtaining a return on their investment. Since the directive, musicians have traveled less often for concerts overseas in fear that their prized musical instruments containing small amounts of ivory will be confiscated. Not surprisingly, the directive has caused an uproar by various industries, such as musical instrument manufacturers, gun manufacturers, piano dealers and auction houses.

A representative of a major auction house expressed dismay at the proposed ivory ban acknowledging that it is a very hot topic. Since the proposal is still in flux, auction houses hesitate to place ivory up for auction. Further, the representative told me that, if asked to appraise an item which cannot be legally imported, exported or sold via interstate commerce then her position will be the same as it was in the Sonnabend case, that the object has no fair market value.

Many question whether the ivory ban will accomplish the stated goal of U.S. Fish and Wildlife Service to slow the illegal hunting of endangered elephants. Some question how criminalizing aged ivory transactions in the U.S. will save more elephants. Though conservation of endangered creatures is a worthy goal, eliminating the resale of a Steinway piano with ivory keys created 90 years ago is unlikely to protect live elephants.

Looking ahead, estate lawyers, planners, and clients must ponder how the Art Advisory Panel will treat income and estate tax returns which include undocumented ivory collectables. If they have no market value, a deduction may be lost when a gift of an ivory collection is made to a public museum. Or, the panel may ignore the prohibition (as they did in the Sonnabend case) and issue an appraisal value based on what it deems to be the item's artistic value, even though that market has been eliminated. If so, the IRS will expect the taxpayer to pick up the tab. It may be that litigation of a test case will have to settle the issue.

Amy F. Altman is a senior associate at the New York office of Herzfeld & Rubin, P.C. She concentrates in probate, estate and trust administration, contested probate proceedings, estate planning and guardianship matters.

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Factors to Consider When Transferring a Residence for Elder Law and Estate Planning Purposes: A Primer

By Anthony J. Enea

I. Introduction

The decision to transfer one's residence raises a number of significant and complex issues and concerns for both the attorney and client. For example, every potential transfer raises estate and gift tax, capital gains tax, as well as Medicaid eligibility issues for the client, particularly a senior. A complete and thorough review of all available options should be made prior to making the transfer. The following is a review of the types of transfers of a residence that can be made, and their respective consequences.

II. Outright Transfer of the Residence Without the Reservation of a Life Estate

The outright transfer of a residence without the reservation of a life estate is perhaps the least desirable option available. The transferee of the property will receive the transferor's original cost basis in the property (original purchase price plus amount of any capital improvements made), and the outright transfer is a completed gift subject to gift taxes. Thus, a gift tax return will need to be filed and utilization of one's lifetime gift and estate tax credit ($5.34 million per person for 2014) may need to be used. For Medicaid eligibility purposes, the outright transfer of the residence would be subject to a 60-month look-back period (subject to exempt transfer rules), thus disqualifying the transferor and his or her spouse from nursing home Medicaid (not Medicaid home care) for 60 months.[1]

If Medicaid is needed within the 60 month look-back period, the period of ineligibility on the transfer would not commence until the applicant was receiving institutional care (in a nursing home), had applied for Medicaid, and would have been approved but for the transfer made.[2]

Additionally, from a tax perspective the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code (I.R.C.) § 121(a) principal residence exclusion for capital gains (income tax) purposes of $250,000 (single person) or $500,000 (married couple).[3]

With the federal capital gains tax rate with the Medicare surtax being approximately 24%, the income tax impact could be significant. For some clients, the combined state and federal income tax with the 3.8% Medicare surtax can exceed any applicable estate tax rates. Cost basis must be strongly considered before making an outright transfer of the residence. However, if the transferee owns and resides in the premises for two out of the five years after the transfer is made, he or she will be able to use said principal residence exclusion. Any Veteran's, STAR and Senior Citizen's exemptions would also be lost with an outright transfer. It will also be necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the federal gift tax credit utilized by the transfer. As can be seen from the above, the consequences can be financially significant.

III. Transfer of the Residence with the Reservation of a Life Estate

If the transfer was made within an existing Medicaid look-back period (60 months), the period of ineligibility would not commence until the applicant was receiving institutional care in a nursing home and was otherwise eligible for Medicaid, but for the transfer made. Thus, a transfer of real property by deed with a retained life estate will also require that the transferor not apply for Medicaid within the look back period to avoid a significantly onerous period of ineligibility for nursing home Medicaid.[4]

Pursuant to I.R.C. § 2036(a), the transfer of a residence with a retained life estate permits the transferee of the residence to receive a full step up in his or her cost basis in the premises upon the death of the transferor, to its fair market value on the transferor's date of death.[5] This occurs because the residence is includible in the gross taxable estate of the transferor upon his or her demise. This, of course, presumes the existence of an estate tax upon the death of the transferor. A "life estate" pursuant to I.R.C. § 2036(a) is the possession or enjoyment of, or a right to the income from, the property or the right, either alone or in conjunction with another, to designate the persons who shall enjoy the property or income thereof.[6]

The most significant problem resulting from the utilization of a deed with the reservation of a life estate occurs if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the step-up in cost basis, thus, subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and (b) the life tenant being entitled to a portion of the proceeds of sale based on the value of his or her life estate, pursuant to Medicaid rules. This portion of the proceeds may be significant and will be considered an available resource for Medicaid eligibility purposes, thus, impacting the transferor's eligibility for Medicaid.[7] The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored in great detail with the client if a deed with the reservation of a life estate is contemplated.

It may be advisable to make the gift an "incomplete gift" for gift tax and capital gains tax purposes; the reservation of a limited testamentary power of appointment by the grantor should be considered.

It should be remembered that I.R.C. § 2702 values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained.[8] Retention of a life estate falls within one of the exceptions of I.R.C. § 2702.[9] If the transfer does not fall within I.R.C. § 2702 or if one of the available exceptions applies (i.e., treated as a transfer in trust to or for the benefit of), calculation of the life estate is performed pursuant to I.R.C. § 7520, and the tables for the month in issue need to be consulted to determine the correct tax value of the remainder interest.[10] For Medicaid eligibility purposes, the Social Security Life Expectancy table is used to value the life estate and remainder interest.

Pursuant to I.R.C. § 2702, if the homestead is transferred to a non-family member, the use of a traditional life estate will result in a completed gift of the remainder interest.[11] It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion of $14,000 per donee for the year 2014.[12]

IV. Transfer to a Medicaid Asset Protection Trust a/k/a an Irrevocable Income Only Trust

In the author's opinion, the use of Medicaid Asset Protection (MAP) is the most logical option from a purely Medicaid planning perspective. As previously explained, irrespective of the fair market value of the residence transferred to the trust, the period of ineligibility will effectively be five years (60 months). However, the properly drafted MAP will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as the transferee can utilize the transferor's personal residence exclusion of $500,000 if married, and $250,000 if single. This can be accomplished by reserving in the trust instrument the power to the grantor(s) in a non-fiduciary capacity and without the approval and consent of a fiduciary to reacquire all or any part of the trust corpus by substituting property in the trust with property of equivalent value. The grantor(s) will be considered the owner of the trust corpus for income tax purposes.[13] Additionally, the transfer to the trust can be structured to allow the transferee to receive the premises with a stepped-up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the grantor.[14]

The tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax consequences, in the author's opinion, makes MAP an ideal option in most circumstances. The transfer of the residence to MAP is a taxable gift of a future interest with no annual exclusion available. The full value of the premises is reported on the gift tax return.

If a limited power of appointment is retained, the gift to the trust is incomplete.[15] No gift tax return is technically required; however, it is advisable to review with an accountant the filing of a gift tax return for informational purposes.

On the death of the grantor of the trust, the date of death value of all assets in the trust will be included in the grantor's taxable estate pursuant to I.R.C. § 2036(a), as a result of the life income interest retained by the grantor.[16]

Inclusion in grantor's estate will result in a full step-up in cost basis for all trust assets pursuant to I.R.C. § 1014(e), assuming an estate tax is still in existence at the time of the grantor's demise.[17]

V. Conclusion

In conclusion, it is most important that all of the aforementioned options and their consequences be thoroughly reviewed with the client prior to a transfer of real property being made. Just suggesting to the client to do a quitclaim deed to their children without a thorough explanation of the ramifications will inevitably lead to future problems.

Endnotes

1. *See* Pub. L. No. 109-17; Chapter 109 of the Laws of 2006 (N.Y.S.); NYS Dept. of Health Administrative Directive: 06 OMM/ADM-5.
2. N.Y.S. Department of Health, Administrative Directive, 06 OMM/ADM-5, pp. 10-11.
3. Internal Revenue Code § 121(a) (I.R.C.).
4. See Russo, Vincent J., and Marvin Rachlin, 14.31 *New York Elder Law and Special Needs Practice* (2013).
5. I.R.C. § 2036(a).
6. *Id.*
7. 18 NYCRR 360-1.4(f).
8. I.R.C. § 2702.
9. *Id.*
10. I.R.C. § 7520.
11. I.R.C. § 2702.
12. *Id.*
13. I.R.C. § 675(4).
14. I.R.C. § 2036(a).
15. Treas. Reg. § 25.2511-2(b).
16. I.R.C. § 2036(a).
17. I.R.C. § 1014(e).

Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. Mr. Enea is the Immediate Past Chair of the Elder Law Section of the New York State Bar Association. Mr. Enea focuses his practice on Elder Law, Wealth Preservation, Guardianships, Medicaid Planning and Applications, Wills Trusts and Estates.

In re Kramer and the Enforceability of Charitable Pledges

By Spencer L. Reames

Laypersons and legal practitioners alike may often take the enforceability of charitable subscriptions or pledges as a given. This assumption is well grounded in the case law in New York, which has historically and actively upheld charitable pledges as a public policy matter. Indeed, the weight of legal precedent is so firmly tilted towards charities that it is rare to find a case in which a charity cannot make a case for enforcement.[1] The recent Kings County Surrogate's Court decision in *In re Kramer*,[2] however, is one such case where a charity did not prevail. *Kramer* serves as a useful reminder that the enforcement of charitable pledges should not be taken for granted and is based upon the historical development of defined legal underpinnings. Despite the generally broad judicial policy favoring charities, a charity must demonstrate some adherence to the established legal framework in order to justify enforceability.

Enforcement as a Matter of Public Policy

Historically, the characterization and enforcement of charitable pledges in New York was unsettled and a "prolific source of controversy."[3] Courts struggled to reconcile promises, which were clearly motivated by the principles of gift-giving, with the strict elements of contract, most principally the requirement of consideration.[4] It was unlikely that the proponent of enforcement could show the requisite bargained-for exchange, or *quid pro quo,* that contract principles demand, and subscription agreements were consequently deemed void and unenforceable in early decisions.[5]

Over time, however, decisions shifted towards the benefit of charities, and defenses grounded upon lack of consideration came to be disfavored in the courts. Judge Cardozo, writing for the Court of Appeals in *Allegheny College v. National Chautauqua County Bank,* recognized that "[v]ery likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made,"[6] as judges subscribed to the belief that defenses against the enforcement of charitable pledges constituted breaches of faith towards the public. With this in mind, Judge Cardozo declared that decisions in favor of pledge enforcement "which are supported by so many considerations of public policy and reason" would not be overruled.[7]

The decision in *Allegheny* laid the foundation for the principles of charitable pledge enforcement as they exist today. The Court of Appeals further ratified and strengthened the public policy behind pledge enforcement in cases such as *I & I Holding Corporation v. Gainsburg*[8] and *Woodmere Academy v. Steinberg*.[9] As stated by the New York Surrogate's Court, judicial support of charitable pledges has been deemed important because "[t]he philanthropic work carried on by organized charities, made possible through voluntary subscriptions, is a distinguishing and distinguished feature of our free society. It is a demonstration of the human sympathy, mercy, consideration and good will borne by those more fortunately endowed towards their less fortunate fellowmen."[10]

A major step towards judicial support of the public policy in favor of voluntary charitable pledges came from a determination that parol evidence, or evidence outside the subscription agreement or pledge itself, would be admissible to prove consideration by the charitable donee.[11] Thus, a charity seeking enforcement may bring forward useful evidence for the purpose of demonstrating consideration, and to elaborate upon the transactions or acts surrounding the pledge.[12]

Weighing this admissible parol evidence, courts have utilized three legal theories to sustain the enforceability of charitable pledges, namely, the creation of a bilateral contract, the completion of a unilateral contract, and the equitable remedy of promissory estoppel.

Bilateral Contract

The bilateral contract theory is based upon the traditional contract principles of a mutual exchange. In such a case, the donor is found to have given the pledge in return for something of value from the charity. This usually arises in the case where the donor seeks a memorialization or remembrance as a condition of the pledge in the form of a named building, endowed scholarship, or the like. The key difference from a non-charitable contract is that the charity's return promise is often not spelled out, but, rather, is implied by the charity's very acceptance of the conditional pledge. Bilateral contract cases are typified by the Court of Appeals case of *Allegheny College* in which the donor pledged money to establish a memorial scholarship in her name. The Court found that, by accepting the pledge, and an advance payment on account, the college had made a return promise and created an obligation to the donor, albeit implied. This constituted consideration and created an enforceable contract.[13]

Unilateral Contract

Perhaps the most commonly utilized theory in the enforcement of charitable contracts is that of unilateral contract. This theory comes into use when the pledge is more gratuitous in nature, such as a contribution to a charity's general fund or for a fundraising campaign. Unlike a bilateral contract, a unilateral contract is not deemed to be binding at inception, but, rather, is an offer conditioned upon the charity performing some act at a future date, or within a reasonable time. If the charity performs, then the contract offer is deemed to have been accepted and the contract matures into an enforceable obligation. The Court of Appeals case of *I & I Holding* is an example and ratification of the unilateral contract rationale. In this case, the donor made a pledge to "aid and assist the Beth Israel Hospital Association in its humanitarian work."[14] The Court held that "[o]ur courts have definitely ruled that such subscriptions are enforceable on the ground that they constitute an offer of a unilateral contract which, when accepted by the charity by incurring liability in reliance thereon, becomes a binding obligation."[15] A request or invitation for a charity to go on with its charitable work, even if merely implied, was deemed a sufficient offer and was found to have been accepted, providing the requisite consideration.[16]

The theory of unilateral contract is often frequently invoked in cases involving fundraising campaigns, such as building campaigns. In these cases, even if the building project has not been completed or has been modified, courts will usually uphold the pledge as long as the charity has taken some action towards completion of the campaign.[17]

Promissory Estoppel

The promissory estoppel theory is based upon an equitable remedy rather than contract theory and supports enforcement of a charitable pledge where the charity has taken action in direct reliance on the promise of the donor. In these cases, the charity has incurred liability to its detriment and would suffer damages were the pledge not enforced. As noted in *Allegheny College*, the promissory estoppel doctrine was invoked by courts as a workaround to the failure of consideration defense before the Court of Appeals made clear that charitable subscriptions would be generally enforced as a matter of public policy.[18] Based upon the Court of Appeals' decision in *I & I Holding*, it seems that an appeal to promissory estoppel should only be utilized as a final resort when a charity cannot justify enforcement under a bilateral or unilateral contract theory.[19]

In re Kramer

In light of the favorable history and case law preceding *Kramer*, where did the charity go wrong? In short, the Kings County Surrogate's Court found that the charity had done next to nothing in reliance upon the pledge, and thus, consideration could not be found under any of the three rationales.

Kramer involved a motion by a charity, Educational Institute Oholei Torah-Oholei Menachem, for summary judgment dismissing objections to its petition to determine the validity and enforceability of its claim against the Estate of Isaac Kramer. The charity's claim was based upon a pledge card and promissory note, in the face amount of $1,800,000, allegedly signed by the decedent approximately a year and a half before his death, and ostensibly payable six months prior to the decedent's death. The pledge was allegedly given for the purpose of supporting a building campaign proposed by the charity to construct a new ritualarium, or mikveh, for use of the charity's members. No payment on the pledge had been made by the decedent or demanded by the charity prior to the decedent's death. Representatives of the charity claimed they consciously withheld demands for payment because of the decedent's illness shortly before his death.

Objections to the charity's petition were filed by the Kings County Public Administrator, as fiduciary of the decedent's estate, and four additional groups representing various purported testamentary legatees and distributees. The respective objections raised multiple theories for rejection of, and affirmative defenses against, the charity's claim including (i) forgery of the decedent's signature, (ii) lack of due execution, (iii) lack of consideration, (iv) lapse upon the decedent's death, (v) laches and unclean hands, (vi) expiration of the statute of limitations, (vii) fraudulent inducement, and (viii) the decedent's lack of capacity. Upon the charity's summary judgment motion, two of the respondents cross moved for summary judgment upon an additional theory of the charity's failure to demonstrate acceptance of the pledge by taking action in reliance thereon.

The Court granted the charity's motion for summary judgment concerning the objections based upon lack of due execution, laches, unclean hands, expiration of the statute of limitations, fraudulent inducement, capacity and forgery of the decedent's signature, because they were either unsupported or raised no triable issues of fact.

The defense of lack of consideration, however, turned out to be dispositive against the charity. The Court noted that since the pledge was ostensibly made in furtherance of a fundraising campaign, it must be examined under the theory of a unilateral contract. Thus, the pledge would not become binding until the charity has sufficiently acted upon the pledge so as to incur liability on the part of the donor.

Referring to the public policy history in this area of law, the Court stated that it has been the "noted policy of the courts to sustain the validity of subscription agreements whenever a counter promise of the donee can be sustained from the actions of the parties or it can be demonstrated that any legal detriment has been sustained by the promise in reliance upon the promised gift."[20] For instance, the Court noted that, charitable subscriptions have been deemed enforceable where the donee has made some substantive progress towards the charitable goal for which the pledge was made. This would include starting construction, employing architects and paying for plans, raising additional pledges based upon the disputed pledge, or taking on a construction loan for the project. The donor's partial payment of the pledge, whether alone or in conjunction with concrete action on the part of the charity, has also been deemed sufficient to indicate acceptance of the unilateral contract. The Court cited as examples, among other cases, the seminal Court of Appeals cases of *Allegheny College*,[21] *I & I Holding*,[22] and *Woodmere Academy*,[23] along with some other notable cases, including *In re Lord*,[24] *In re Lipsky*,[25] *In re Metz*,[26] and *In re Field*.[27]

Despite the broad policy in favor of enforcement, the Court found that the charity in *Kramer* was unable to meet the burden to show that it had meaningfully acted in reliance upon the pledge. Indeed, it was undisputed that no actual construction had begun on the proposed building project. Nor was there any specific date upon which construction was to begin, or any reasonable time frame for completion of the project. The Court characterized the construction project as more of a "hoped-for occurrence" than an actual plan.[28] Moreover, despite its claims to the contrary, the charity could not prove that it had expended any sums of money on any construction-related expenses, such as soil samples or architectural plans. Nor could the charity produce any contracts or engagement letters from architects, engineers, or contractors. There was also no proof of building permit or zoning applications. Finally, though the charity claimed to have used the decedent's pledge to solicit other pledges, no independent evidence of receipt or fulfillment of such additional pledges was offered.

In sum, the Court found that the charity had done nothing meaningful or substantive in reliance on the decedent's pledge. Thus, the charity's motion for summary judgment on the consideration issue was denied, and the cross-motions dismissing the charity's petition were granted. It is worth noting that the lack of any material reliance would have also foreclosed a claim under the promissory estoppel theory. Nor could the charity have proceeded under a bilateral contract theory, as the pledge was not conditioned on receiving something in return.

Endnotes

[1] "[R]ecovery upon subscription agreements has become the rule rather than the exception." *In re Lord*, 175 Misc 921, 923, 25 NYS2d 747 (Sur. Ct., Kings Co. 1941). *In re Lord* provides a useful and comprehensive overview of the history and case law in the area of charitable pledge enforcement.

[2] N.Y.L.J., April 21, 2014, p. 24 (col. 6) (Sur. Ct., Kings Co.).

[3] *Allegheny College v. National Chautauqua County Bank*, 246 NY 369, 372, 159 NE 173 (1927).

[4] *See In re Field*, 15 Misc 2d 950, 951, 181 NYS2d 922 (Sur. Ct., Suffolk Co. 1959).

[5] *See Allegheny College, supra*, at 372; *see also Matter of Lord, supra*, at 922-923.

[6] *Allegheny College, supra*, at 374.

[7] *Id.* at 375.

[8] 276 NY 427, 433, 12 NE2d 532 (1938). "We realize that the principles upon which courts of differing jurisdictions have placed their decisions sustaining subscriptions for charitable purposes are all subject to criticism from a legalistic standpoint. Nevertheless, we feel that we should follow the decisions of our own courts, extending, as they do, over a long period."

[9] 41 NY2d 746, 749, 395 NYS2d 434 (1977). "Preliminarily, we observe that, as a matter of public policy, pledge agreements calculated to foster eleemosynary enterprises are enforceable."

[10] *In re Lipsky*, 45 Misc 2d 320, 322, 256 NYS2d 429 (Sur. Ct., N.Y. Co. 1965).

[11] *See I & I Holding, supra*, at 432; *see also In re Lord, supra*, at 923.

[12] *See id.*

[13] *See Allegheny College, supra*, at 377-378.

[14] *I & I Holding, supra*, at 432.

[15] *Id.* at 433.

[16] *See id.* at 434.

[17] *See In re Metz*, 262 AD 508, 30 NYS2d 502 (1st Dep't 1941) (while the central building was not completed as originally planned, construction was completed on portions and, thus, there was no frustration of the project so as to relieve the donor of liability).

[18] *See Allegheny College, supra*, at 374.

[19] *See I & I Holding, supra*, at 434 ("it is only when a request or invitation [for the charity to perform] cannot be implied in fact that it is necessary to invoke that doctrine"); *see also In re Lord, supra*, at 926.

[20] *Kramer*, N.Y.L.J., April 21, 2014, p. 24 (col. 6).

[21] 246 NY 369, 159 NE 173 (1927).

[22] 276 NY 427, 12 NE2d 532 (1938).

[23] 41 NY2d 746, 395 NYS2d 434 (1977).

[24] 175 Misc 921, 25 NYS2d 747 (Sur. Ct., Kings Co. 1941).

[25] 45 Misc 2d 320, 256 NYS2d 429 (Sur. Ct., N.Y. Co. 1965).

[26] 262 AD 508, 30 NYS2d 502 (1st Dep't 1941).

[27] 15 Misc 2d 950, 181 NYS2d 922 (Sur. Ct., Suffolk Co. 1959).

[28] *See Kramer, supra*.

Spencer L. Reames is an associate in the trusts and estates litigation department at Farrell Fritz, P.C. in Uniondale, New York.

2014 Legislation Update

By Robert M. Harper and Jennifer F. Hillman

Each year, the Trusts and Estates Law Section (the "Section") advances legislative proposals in order to improve the law governing estates and trusts in New York. Due to the hard work and dedication of so many Section members, the 2013-2014 legislative year proved to be particularly productive for the Section's legislative initiatives. As discussed below, as of the legislative session's close, two of our Section's legislative proposals have passed both houses of the Legislature and await review by Governor Cuomo's office; two of the Section's other legislative proposals have passed the Assembly; and four of the Section's proposals have sponsors in the Legislature.

This article summarizes the legislative proposals for which our Section advocated on Lobby Day. In addition, this article discusses several Office of Court Administration Surrogate's Court Advisory Committee ("OCA") proposals that our Section supported. While there remains much work to do to advance our Section's legislative initiatives, the 2013-2014 legislative year has been a productive one for which we wish to update the Section's membership.

Trusts and Estates Law Section Proposals

- Delayed Legacies—A.1185/S.4952—Under the current version of EPTL 11-1.5, interest is not payable on a legacy unless the beneficiary makes a demand upon the fiduciary for payment before the beneficiary commences a proceeding to compel payment of the legacy; and, if interest is due, it generally accrues at the fixed rate of 6%, commencing seven months from the time that letters (including preliminary letters) are granted.[1] The Section has proposed amendments to EPTL 11-1.5 (and the enactment of EPTL 11-A-2.1) to promote greater fairness and certainty concerning the payment of delayed legacies.[2] Under the Section's proposal, interest would be payable from the residuary starting seven months after the issuance of letters (or, if no letters issue, seven months from the date of death), unless the governing instrument provides otherwise, and the interest rate would be set on the first business day of each calendar year at the federal funds rate less 1%, but in no event less than one-half of 1%.[3] The Surrogate's Court would retain authority to disallow interest or to surcharge a fiduciary, thus ensuring the Surrogate's Court's discretion to balance the sometimes conflicting interests of specific bequest beneficiaries, residuary beneficiaries, and fiduciaries.[4] As of the writing of this article, this proposal has passed both houses of the Legislature and awaits review by the Governor's office.
- Trustee Commissions and the Power to Adjust—Our Section has proposed amendments to EPTL 11-2.3(b)(5). The amendments are designed to reconcile trustee commission statutes (*i.e.*, SCPA 2309) with the more fluid, subsequently enacted Prudent Investor Act (the "PIA") (codified in EPTL 11-2.3) and the Uniform Principal and Income Act (the "UPIA") (codified in EPTL 11-A-1.2).[5] The PIA's power to adjust between principal and income permits a trustee to pursue an investment strategy that bridges the gap between the interests of the trust's current beneficiary and its remaindermen.[6] To the extent that a trustee makes adjustments from the income account to the principal account, or vice versa, the assets that are transferred should be re-characterized as income or principal for the purpose of calculating the trustee's commissions.[7] Such re-characterization—which is addressed in our Section's proposed amendment to EPTL 11-2.3(b)(5)—would be consistent with the total return investment regime that is inherent in the PIA and UPIA.[8] The proposal has not been introduced as a bill in the Legislature.
- Marriage Equality Act Amendments to the EPTL and SCPA—A.7100/S.7003—As the Marriage Equality Act legalized same-sex marriage in New York, the Section has proposed amendments to Articles 4 and 6 of the EPTL and Articles 10, 13, and 17 of the SCPA to include gender-neutral language that is consistent with the Marriage Equality Act's terms.[9] This proposal has passed the Assembly and recently was sponsored in the Senate, but has not yet been proffered for a vote in the Senate.[10]
- Exoneration Clauses in *Inter Vivos* Trusts—The Section has proposed amendments to EPTL 11-1.7, which provides that exculpatory clauses in testamentary instruments seeking to absolve executors and testamentary trustees from liability for the failure to exercise reasonable care are void as against public policy.[11] As EPTL 11-1.7 does not address exculpatory provisions in *inter vivos* trust instruments, courts have concluded that such clauses are enforceable, except to the extent that such exculpatory clauses seek to excuse trustees of lifetime trusts from liability for bad faith, self-dealing, gross negligence, and reckless indifference.[12] If enacted, the Section's proposal would amend EPTL 11-1.7 to provide that exculpatory clauses in both testamentary instruments and lifetime trusts are violative of public policy where they seek to absolve fiduciaries from lia-

bility for the failure to exercise reasonable care.[13] This proposal does not yet have a sponsor in either the Assembly or the Senate.

- Posthumous Annulment and the Spousal Right of Election—The Section has lobbied for amendments to EPTL 5-1.2, which enumerates the grounds upon which a surviving spouse may be disqualified from receiving an elective share of a decedent's estate.[14] While recent case law permits courts to disqualify a surviving spouse from taking an elective share based upon "equitable" grounds, the Section's proposal would allow a surviving spouse to be disqualified from receiving an elective share on the basis of a posthumous annulment of the surviving spouse's marriage to the decedent.[15] This proposal has not been introduced in either house of the Legislature.

- Technical Amendments to SCPA 1724—A.9055/S.7137—The Section has proposed amendments to SCPA 1724 to correct references contained therein to the Uniform Gifts to Minors Act ("UGMA"), which has been repealed.[16] Under the Section's proposal, the references in SCPA 1724 to UGMA would be replaced by references to the Uniform Transfers to Minors Act, which currently governs custodial accounts.[17] This proposal has passed both houses of the Legislature and awaits review by Governor Cuomo's office, as of the writing of this article.

- Technical Amendments to Mental Hygiene Law § 81.21—A.9054—The authority of an Article 81 guardian to transfer an incapacitated person's assets to another is derived from Mental Hygiene Law ("MHL") § 81.21.[18] While MHL § 81.21(c) references MHL § 81.07(d)(1) to specify the persons who are entitled to notice of an application that is brought under MHL § 81.21(a), it appears that the reference in MHL § 81.21(c) to MHL § 81.07(d)(1) is incorrect and, instead, should be to MHL § 81.07(e)(1).[19] The Section has proposed legislation to correct the errant reference in MHL § 81.21(c) to MHL § 81.07(d)(1). This proposal has passed the Assembly, but has not garnered a sponsor in the Senate.

OCA Proposals

- Technical Amendments to EPTL 10-6.6(s)(10)—A.9757/S.7244—EPTL 10-6.6, New York's decanting statute, allows a trustee who has authority to invade a trust's principal to exercise such authority by establishing a new trust, thereby permitting the trustee of an irrevocable trust to appoint the trust's assets to another trust.[20] While the inclusion of EPTL 10-6.6(s)(10) in a 2013 chapter amendment to the statute clarified that the grantor of the trust shall not be deemed to be a beneficiary based upon the trustee's power to take certain actions with respect to the trust's principal, the chapter amendment erroneously referred to EPTL 7-1.1.[21] This proposal, which has passed both houses of the Legislature and currently awaits review by the Governor's office, corrects the cross-reference in EPTL 10-6.6(s)(10) to EPTL 7-1.1 to refer to EPTL 7-1.11.[22]

- Inheritance Rights of Posthumously Conceived Children—A.7461-A/S.4779-B—OCA proposed—and our Section supported—legislation to address the inheritance rights of posthumously conceived children, which would amend EPTL 4-1.3 and add EPTL 11-1.5. Subject to certain notice, writing, and timing conditions, the proposal provides for posthumously conceived children to be treated as the distributees of their genetic parents and as beneficiaries of certain class gifts.[23] The proposal has passed the Assembly and Senate, and awaits review by Governor Cuomo's office, as of this article's writing.

- Renunciation of Property Interests—A.9355-A/S.7144—EPTL 2-1.11(d)(5) permits a fiduciary of a decedent's estate to renounce property in which the decedent had a beneficial interest, but did not receive before death, provided that the fiduciary receives authorization to do so from the court having jurisdiction over the decedent's estate.[24] OCA has proposed—and the Section has supported—amendments to EPTL 2-1.11(d)(5), which would eliminate the requirement that a fiduciary obtain court approval before renouncing on behalf of the decedent's estate.[25] This proposal has passed both houses of the Legislature and is subject to review by the Governor's office, as of the writing of this article.

- Finder's Agreements and Unclaimed Funds—A.9759/S.7077-A—Mindful that the New York State Comptroller's Office of Unclaimed Funds has adopted a new policy concerning abandoned property location service agreements, OCA has proposed—and the Section has supported—amendments to EPTL 13-2.3.[26] If enacted, the amendments will clarify the law concerning the filing of abandoned property location service agreements with the Surrogate's Court under SCPA 1310, and put an end to the practice of permitting a finder's agreement signed by a potential claimant to unclaimed funds to be filed with the Surrogate's Court, where there is no estate pending or fiduciary who has been appointed.[27] The proposal has passed the Assembly and Senate, and awaits review by the Governor's office, as of the time of this article's writing.

As the Co-Chairs of the Section's Legislation and Governmental Relations Committee, we wish to thank the members of our Section who worked to advance the Section's legislative initiatives during the 2013-2014 legislative session. We also wish to thank the OCA's Surrogate's Court Advisory Committee and the Surrogate's Association of the State of New York for their gracious support of several of our Section's legislative priorities. Through the hard work and dedication of our Section's members, among others, the New York State Bar Association has contributed to the development of New York's trusts and estates law. We look forward to working with the Section's exemplary membership on future legislative developments.

Endnotes

[1] NYSBA Memorandum Urging Approval of Delayed Legacies Bill (Apr. 4, 2013) (which is based upon the legislative memorandum prepared by Natalia Murphy).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] Jill C. Beier and Joseph T. La Ferlita, NYSBA Mem. in Support of Amendment to Section 11-2.3(b)(5) of New York's Estates, Powers and Trusts Law (2013).

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] Darcy M. Katris, NYSBA Mem. in Support of a Bill to Make Amendments to Articles 4 and 6 of the Estates, Powers and Trusts Law and Articles 10, 13, and 17 of the Surrogate's Court Procedure Act in Response to the Marriage Equality Act (2012).

[10] *See id.*

[11] *Matter of Knox*, 98 AD3d 300, 313, 947 N.Y.S.2d 292 (4th Dep't 2012).

[12] *Matter of Tydings*, 32 Misc 3d 1204(A), at 6, 932 NYS2d 763 (Sur. Ct., Bronx Co. 2011).

[13] Ilene S. Cooper and Robert M. Harper, NYSBA Mem. in Support of Proposal to Amend EPTL 11-1.7 (2012).

[14] Jennifer F. Hillman et al., NYSBA Mem. in Support of Proposal to Amend EPTL 5-1.2 (2012).

[15] *See id.*

[16] Jennifer F. Hillman et al., NYSBA Mem. in Support of Amendments to SCPA 1724 (2013).

[17] *See id.*

[18] Robert M. Harper et al., NYSBA Mem. in Support of Amendments to Mental Hygiene Law § 81.21 (2013).

[19] *See id.*

[20] N.Y.S. Assembly Mem. in Support of A.9757 (2013).

[21] *See id.*

[22] *See id.*

[23] Robert M. Harper and Jill C. Beier, NYSBA Mem. in Support of OCA Proposal to Amend EPTL concerning the Inheritance Rights of Posthumously Conceived Children (2013).

[24] N.Y.S. Assembly Mem. in Support of A.9355 (2014).

[25] *See id.*

[26] N.Y.S. Assembly Mem. in Support of A.9759 (2014).

[27] *See id.*

Robert M. Harper is a Co-Chair of the Section's legislation and governmental relations committee. Mr. Harper is an associate in the trusts and estates litigation department at Farrell Fritz, P.C. and a Special Professor of Law at Hofstra University's Maurice A. Deane School of Law.

Jennifer F. Hillman is a Co-Chair of the Section's legislation and governmental relations committee. Ms. Hillman is a partner at Ruskin Moscou Faltischek, P.C., where she concentrates her practice in estate and trust litigation.

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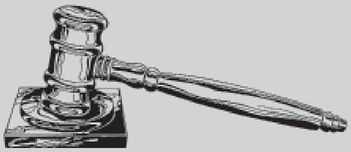


By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

CHARITIES

Descendants of Donors Cannot Enforce Charitable Trusts Created by Cemetery Perpetual Care Funds

The purchaser of a cemetery perpetual care contract and the descendants of deceased purchasers filed putative class actions alleging breach of the contracts by the cemetery. The Appellate Division affirmed the Supreme Court's dismissal of the descendants' action, holding that the general rule barring beneficiaries or potential beneficiaries of a charitable trust from suing to enforce the trust applied. They did not qualify under the exception for those with a "special interest" in the trust funds because as a group they were neither "sharply defined" nor limited in number. The donor, however, did have standing to enforce the trust under existing precedent, principally *Associate Alumni of General Theological Seminary v. General Theological Seminary*, 163 NY 417, 57 NE 626 (1900). The court upheld dismissal of claims for conversion, violation of General Business Law §§ 349 and 350 involving consumer protection and false advertising and noted that even if the factual allegations were sufficient to state a claim the statute of limitations had run. The court further reversed the Supreme Court's upholding of the donor's claim for breach of fiduciary duty because the duties are owed to the beneficiaries and not the donor, and are to be enforced by the Attorney General. *Lucker v. Bayside Cemetery*, 114 AD3d 162, 979 NYS2d 8 (1st Dep't 2013).

DOMICILE

Guardian of the Person Effectively Changed Incapacitated Person's Domicile

Decedent resided in Kings County for many years before her death, first in her home and then in a residential care facility. In 2008, five years before her death, she was admitted to a residential health care facility in Richmond County, where she died. The Public Administrators of both Kings and Richmond Counties sought and were granted letters of administration of her estate. Eventually, both officials agreed that the Richmond County Surrogate's Court would determine the decedent's domicile. The court held that the decedent had indeed been domiciled in Richmond County. The guardian of her person who arranged the move from the facility in Kings County to the facility in Richmond County had authority to do so because the move was in her best interest in light of her medical condition. In addition, the change in domicile from one county to another within New York State has no substantive effect on the administration of the estate. *In re Bonora*, 44 Misc 3d 171, 984 NYS2d 562 (Sur. Ct., Richmond Co. 2014).

William P. LaPiana

TENANCY BY THE ENTIRETY

Transfer by Spouse is Valid but Does Not Destroy Other Spouse's Survivorship Rights

Husband and wife took title to real property as "husband and wife," thereby creating a tenancy by the entirety under EPTL 6-2.2(b). Wife later transferred her interest to her brother. On her death her surviving spouse commenced an action in Supreme Court seeking a declaration that the deed was void. The court granted the husband's motion for summary judgment, declaring the deed void. The defendant brother appealed and the Appellate Division affirmed, but on different grounds. Under New York law a tenant by the entirety can convey his or her interest but the grantee takes subject to the survivorship rights of the other spouse. At the death of the grantor-spouse the surviving spouse became the sole owner of the property, the rights of the grantee having vanished. *Butt v. Malik*, 114 AD3d 716, 980 NYS2d 516 (2d Dep't 2014).

TRUSTS

Former Beneficiaries of IRA May Seek to Have a Constructive Trust Imposed on Proceeds of IRA Account

James inherited an IRA from his wife which he rolled over into a new IRA. He named his children beneficiaries of the new IRA. After he remarried he named his second wife, Jo Ann ("decedent"), as beneficiary of a second IRA and changed the beneficiary designation of the new IRA from his children to the decedent. On his death the account passed to the decedent and on her death seven months later the account passed to her daughter by a prior marriage. His children filed a claim against the decedent's estate alleging that the decedent and James had entered into an agreement under which he changed the beneficiary designation of the new IRA to the decedent in exchange for her signing a consent form allowing James to change the beneficiary of a second IRA from decedent to his children. However, decedent never signed the consent form. The claim was rejected and the children began a proceeding to impose a constructive trust on the proceeds of the new IRA. The Surrogate denied a summary judgment motion by decedent's executor and the Appellate Division affirmed, finding that the children's petition adequately stated a cause of action to impose a constructive trust: the marital relationship between James and the decedent provided the necessary confidential relationship, and the alleged promise and James's reliance thereon, if proven, mean that the decedent's daughter was unjustly enriched by receiving the new IRA from the decedent's estate. In addition, the children's status as previously designated beneficiaries of the new IRA gives them sufficient interest in the proceeds of the account to seek imposition of a constructive trust. *In re Harold*, 112 AD3d 929, 979 NYS2d 334 (2d Dep't 2013).

WILLS

Statutory Revocation on Divorce Does Not Apply to Gift to Ex-Spouse's Parent

Testator and her husband executed wills; hers left her estate to him and if he did not survive to his father. Together they purchased land in New York State which was awarded to her in their divorce. Testator died in New York. After her death her former father-in-law presented the will for probate and it was admitted over objections from her parents who had applied for letters of administration of her estate. The Surrogate dismissed the objections and a divided Appellate Division affirmed on the grounds that EPTL 5-1.4 revokes dispositions to a former spouse but not to anyone else, including relatives of the former spouse. The majority found that the statute is "clear and unambiguous" and declined to decide the case on equitable principles. *In re Lewis*, 114 AD3d 203, 978 NYS2d 527 (4th Dep't 2014).

Will Validly Executed in Canada Is Admissible to Probate in New York

Decedent, a domiciliary of New York, executed a will in Ontario, Canada, and died there four days later. The will was offered for probate in Kings County and objections were filed based on lack of due execution. The Surrogate dismissed the objections and the Appellate Division affirmed, holding that under EPTL 3-5.1(c) the will, in writing, signed by the decedent at the end and properly executed under the law of Ontario, was admissible to probate in New York. *In re Kramer*, 116 AD3d 698, 983 NYS2d 81 (2d Dep't 2014).

Exceptional Circumstances Exist to Allow Beneficiaries to Bring Action to Recoup Estate Property

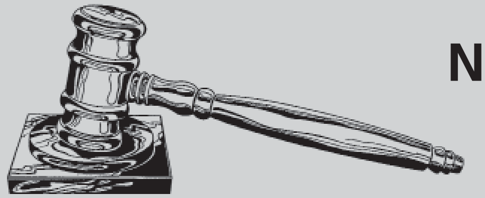
Beneficiaries of decedent's will, her children and grandchildren, brought an action in Supreme Court against the nominated executor, the decedent's sister, and the attorney draftsperson of the will, decedent's niece, alleging misappropriation of the decedent's assets by deceit, fraud, and undue influence; breach of fiduciary duty by the nominated executor was also alleged. The defendants moved to dismiss the complaint; the motion was denied and the defendants appealed. The Appellate Division affirmed, finding that this is one of the few cases where "extraordinary circumstances" exist thereby allowing beneficiaries to sue to recover estate property, a cause of action which usually can only be brought by the personal representative. Here the plaintiffs' pleadings set forth claims that may constitute the necessary exceptional circumstances and are definitely sufficient to withstand a motion to dismiss for failure to state a claim. *Lewis v. DiMaggio*, 115 AD3d 1042, 981 NYS3d 844 (3d Dep't 2014).

Specific Disposition of Realty Does Not Adeem Where Property Recovered for Estate

Testator devised her real property in equal shares to her two daughters, Brenda and Marcia, subject to a life estate in Brenda. Brenda became her mother's agent under a power of attorney and used her authority to transfer the property to herself a few months before her mother's death, after which Brenda mortgaged the property. Marcia began a turnover proceeding and the court found that the deed was voidable. Marcia then began a construction proceeding seeking a determination that the devise had adeemed. Marcia moved and Brenda cross moved for summary judgment. The Surrogate denied Marcia's motion and granted Brenda's, holding that because the deed was voidable the testator held equitable title to the property at her death and now that the property has been recovered for the estate the will can be carried out according to its terms. *In re Fitzsimmons*, 43 Misc 3d 483, 984 NYS2d 543 (Sur. Ct., Queens Co. 2014).

Ira Mark 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 co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).



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

By Ilene Sherwyn Cooper

Abandonment

In *Matter of Yengle,* appeal was taken to the Appellate Division, Third Department, from an order of the Surrogate's Court, Sullivan County (McQuire, S.), which granted the respondent's motion for summary judgment dismissing a petition seeking to disqualify the respondent as the decedent's surviving spouse.

The decedent died intestate, survived by his spouse and his sister. Although letters of administration had issued to the decedent's spouse, his sister commenced a proceeding to revoke her appointment on the grounds that she had abandoned the decedent prior to his death, and was thus disqualified from serving as fiduciary of his estate.

The record revealed that the respondent and the decedent resided together at the inception of their marriage, but that the decedent drank heavily, and abused the respondent, both physically and mentally, during this time to such an extent that police intervention was sometimes required. Ultimately, given the circumstances, the decedent, at the respondent's suggestion, began living at his vacation home, although he lived with the respondent on weekends. This arrangement continued until approximately 10 years before the decedent's death, when the parties no longer resided together at all. Thereafter, they communicated with each other occasionally, until several months before the decedent's death. Although respondent acknowledged that she had two affairs during the marriage, she claimed that the decedent knew of the relationships, and seemingly consented to them. Based upon the foregoing, the Appellate Division found that the respondent had met her burden of establishing that she did not abandon the decedent, that she lived apart from him with his consent, and that her absence was justified by his drinking and related abusive behavior.

However, the Court determined that petitioner had met her burden of raising a question of fact regarding the foregoing circumstances, thus precluding summary relief in respondent's favor. Specifically, the Court found that petitioner's testimony, as well as the testimony of several disinterested witnesses, was sufficient to create a triable issue with respect to the respondent's allegations that the decedent had an alcohol problem and that he was abusive. Indeed, the Court found it significant that respondent never pursued criminal charges against the decedent, or sought an order of protection against him as a result of his alleged abuse. Equally significant was the petitioner's testimony that she knew, through conversations with the decedent, that he wanted to be with the respondent, and respondent's admission that the decedent had asked her to return to him. In fact, the record contained cards from the decedent to respondent in which he expressed his love for her. Based upon this evidence, the Court found it could reasonably be inferred that the decedent did not consent to the respondent's absence from their home.

Accordingly, in view of the foregoing, and considering the evidence in a light most favorable to petitioner, the Court held that respondent's motion for summary judgment should have been denied on the grounds that material questions of fact existed with respect to whether it was the respondent who left the decedent, and if so, whether her leaving was justified and without the decedent's consent.

Matter of Yengle, 113 AD3d 918, 979 NYS2d 410 (3d Dep't 2014).

Motion to Quash

In a contested discovery proceeding pending in the Surrogate's Court, Queens County, the respondent, who was the decedent's former attorney-in-fact, moved to quash a subpoena served upon a non-party bank requesting the production of his personal banking information. The court held that although personal banking records are generally not subject to disclosure, where the information sought is material and necessary, and cannot be obtained from another source, disclosure will be warranted. The court opined that such a showing of necessity may be found in cases where a fiduciary is accused of self-dealing.

Accordingly, based upon the petitioner's unrefuted proffering of strong evidence that the respondent had breached his fiduciary duty to the decedent by engaging in acts of self-dealing, the court found that petitioner was entitled to the disclosures sought, and given the personal nature of the information, that they could not be obtained from any other source. The motion to quash was, therefore, denied.

In re Koch, N.Y.L.J., Oct. 4, 2013, p. 38 (Sur. Ct., Queens Co.).

Disclosure of Personal Income Tax Returns

Before the Appellate Division, Fourth Department, in *In re Monaco,* was an appeal of an order of the Surrogate's Court, Erie County (Howe, S.), which denied the motion of the decedent's estate to compel the petitioner to supply his personal income tax returns for the period 1980 to 1995, or alternatively, for authorization to obtain such records from the New York State Department of Taxation and Finance. Notably, the petitioner had voluntarily produced State records of his earnings for the period 1996 to 2009.

Pursuant to his Will, the decedent devised all of his real property to his daughter, while he left the petitioner, his son, a cemetery plot, a compressor, and a roll of electrical wire. At issue before the Surrogate's Court was whether the decedent had entered a verbal agreement with the petitioner that title to a single family residence, in which the petitioner had resided since the decedent purchased the residence in 1996, would be transferred to him when the mortgage was paid off, upon the petitioner's demand or decedent's death. In support of his claim, petitioner alleged that in reliance upon the decedent's promise, he gave the decedent $20,000 towards the down payment for the property, and paid all of the expenses attendant to its upkeep, including the mortgage, insurance, taxes and costs for its improvement. In order to determine whether petitioner had accumulated sufficient savings to satisfy the down payment in 1996, the estate sought an order requiring the petitioner to supply his income tax returns for the years in question.

The Surrogate's Court denied the application, and the Appellate Division affirmed, concluding that the estate had not made a sufficiently strong showing that the information contained in petitioner's income tax returns were indispensable to the litigation and unavailable from other sources, such as financial or business records. Indeed, the Court held that the respondent had failed to make any factual showing in this regard, finding , *inter alia,* the affirmation and exhibit in support of the motion were vague and conclusory, and respondent did not establish that it had sought the information from any alternate source.

In re Monaco, 117 AD3d 1593, 985 NYS2d 795 (4th Dep't 2014).

Discovery

In *In re Bernfeld,* the court defined the obligations of a party who fails to produce documents on the grounds that they are not within the party's possession, custody or control. The court acknowledged that a party cannot be compelled to produce information and documents which do not exist or which are not in the party's possession. However, relying upon the opinion in *WMC Mortgage Corp. v. Vandermulen,* 2011 WL 2586411 (Sup. Ct., Suffolk Co. 2011), the court held when a party claims that he does not have requested documents that he should otherwise have in his possession, an affidavit must be submitted stating the efforts made to search for the demanded documents, as well as to and from whom the party, or someone acting on his behalf, ever transferred possession, custody or control, directly or indirectly, of the documents. In other words, the affidavit must provide the court with a basis to find that the search conducted was a thorough one, or that it was conducted in a good faith effort to provide the records requested.

In re Bernfeld, N.Y.L.J., Apr. 10, 2014, p. 31 (Sur. Ct., Nassau Co.).

Discovery

In *In re Modell,* a contested accounting proceeding with respect to the trust created under the decedent's will, the decedent's surviving spouse, who was a co-trustee, income beneficiary and discretionary principal beneficiary of the trust, sought an order, *inter alia,* limiting the scope of her examination pursuant to SCPA 2211, and compelling the production of documents relating to the decedent's business, the primary asset of the trust estate.

With respect to that part of the motion that sought an order compelling the production of documents, the court directed production of information pertaining to the compensation of her co-trustee from the decedent's business, finding that the information was relevant, and was not ascertainable from other documents that had been produced to date. Further, the court directed production of documents relating to charitable donations made by the business, including but not limited to the amount of the donation, substantiation for the donation made, and the name of each donee. Finally, despite arguments to the contrary by the spouse's co-trustees, the court held that her motion to compel production in response to her Third Notice of Discovery and Inspection was not premature, and that an affirmation of good faith, otherwise required in the Supreme and County Courts, was not a prerequisite to seeking court intervention in the Surrogate's Court on an issue of discovery. Accordingly, the court granted the application of the spouse to the extent of directing the production of documents responsive to her Third Notice of Discovery and Inspection.

In re Modell, N.Y.L.J., Oct. 11, 2013, p. 44 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Motion to Dismiss

In a proceeding seeking the removal of the decedent's spouse as one of the three trustees of the testamentary trusts created under the decedent's will, the respondent moved the Surrogate's Court, New York County, for an order dismissing the petition for failure to state a cause of action.

The decedent died testate in 2002, survived by his spouse and an infant daughter. His will established several trusts for his benefit, and named his spouse, his attorney and his accountant and trustees. At his death, the decedent had an 89% ownership interest in a luxury car dealership on Long Island, which interest was to fund two of the trusts established under Article VI of the instrument. The trusts were not funded until 2009, and in the interim, the attorney-trustee resigned and was ultimately replaced by the petitioner.

Ongoing disagreements among the fiduciaries regarding administration of the trusts provoked the removal proceeding *sub judice*, which was joined in by the trustee/accountant, as well as a proceeding for removal by the decedent's spouse, and a request by her for a determination that the corporation's amended operating agreement removing her as sole managing member of the company was void *ab initio.* All three trustees were directed to account.

Before addressing the merits of the motion, the court noted that the movant failed to annex a copy of the petition to her pleadings. While recognizing that this defect could serve as a basis to deny the motion, the court held it would consider the motion nonetheless, instructing that the filing of a motion which requires the court to search its records for a pleading was not an advisable litigation strategy.

As to the merits, the court opined that on a motion to dismiss for failure to state a claim, the court must accept the facts as alleged in the pleading as true, accord petitioners every benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. Whether a petitioner can ultimately establish his allegations is not part of the calculus.

Within this context, the court held that the petitioner had established a claim for relief pursuant to SCPA 711. In significant part, the petition alleged that the respondent engaged in acts of self-dealing and interference with the operations of the business, which included paying her "personal" staff from the company, hiring her former husband as a marketing director at a salary of $300,000 per year when he had no marketing experience, and hiring an "unqualified friend" to oversee an $8,000,000 renovation to the dealership. The petition alleged that because of these acts and others, the trustees amended the company's operating agreement in order to remove the respondent as its sole managing member, and establish a Board of Managers to operate the business. Nevertheless, the respondent continued to interfere with the company, by refusing to recognize the agreement, and continuing to refer to herself to manufacturers and others as the company chairman. Other acts of improvidence alleged in the petition included claims that respondent had stated at a trustees' meeting that she viewed all the money in the company as hers, and hiring an accountant, who purportedly had a conflict of interest with the company, to sit on the company's Board of Directors and Audit Committee.

The court found that respondent's contentions that the petition failed to support a claim for breach of trust and fiduciary duty to be based on a "selective and self-serving characterization of the allegations" and unavailing. The court held that the petition clearly informed the respondent of the specific acts of misconduct that were at issue, which it deemed true for purposes of the motion.

Accordingly, the motion to dismiss was denied.

In re Terian, N.Y.L.J., Feb. 27, 2014, p. 25, col. 1 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Revocation of Letters

In *In re Clark,* the court issued an order revoking the letters testamentary of the estate executor, without a hearing, on the grounds that he had failed to account within the time and manner directed. The court held that the circumstances requiring removal were exacerbated by the executor's acknowledged statements and actions which demonstrated an apparent indifference to his fiduciary obligations and improper management of the estate.

In re Clark, N.Y.L.J., Jan. 31, 2014, p. 36 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Standing

Before the court in *In re Moloney* was a proceeding by the decedent's grandson against the trustee of a revocable trust and irrevocable life insurance trust created by the decedent seeking, *inter alia,* breach of fiduciary duty, negligence, fraud, tortious interference with trust benefits and an accounting. The trusts in issue held the decedent's business interests and life insurance, respectively. The respondents, the trustee of the trusts and officers and directors of the decedent's businesses, moved, by way of two separate motions, to dismiss the petition on the grounds that it failed to state a cause of action, the petitioner's lack of standing, and the documentary evidence required dismissal as a matter of law.

The petition before the court alleged that the trustee acquiesced in certain conduct by the officers and directors of the decedent's businesses which interfered with his obtaining a license as a funeral director and prevented him from becoming a full-time employee of the decedent's business. Further, the petitioner alleged that the subject trust instruments entitled a full-time employee of the decedent's business, who was also one of the decedent's issue, to, *inter alia,* distributions of income during the business' operation.

In support of his motion to dismiss, the respondents alleged that the complaint was essentially one for wrongful termination of employment, and thus was outside the scope of the court's subject matter jurisdiction. Further, the respondents maintained, based upon a reading of the terms of the trust instruments, that the petitioner lacked standing to seek the relief requested. Additionally, they claimed that the petitioner's interest in the subject trusts was too remote and indeterminate to accord him with a sufficient basis to compel an accounting.

The petitioner opposed the motions, arguing that the language of the trust instruments provided him with the requisite standing, and that regardless, he was entitled to an accounting.

Based upon a review of the record, and the documentary evidence, the court determined that the petitioner lacked standing to institute the proceeding, and that absent petitioner having a present interest in the trusts, the remaining claim for relief sounding in wrongful termination constituted a dispute between living persons that was beyond the purview of the court's jurisdiction.

Although the court found that the petitioner had a contingent, albeit remote, interest in both trusts, it noted that the occurrence of several layers of contingencies had to occur before his interest could vest. The court opined that while such an interest would theoretically provide petitioner with the requisite standing to compel an accounting, it concluded that it would not be in the best interests of the trusts to compel one at the present time, particularly given its determination with respect to the remaining relief requested by the petitioner. Significantly, in reaching this result, the court determined that the language of the trust instruments indicated that the trustee was not required to account unless specifically ordered to do so on the application of the trustee or a beneficiary of the trust or on the court's own motion. Finding that the term "beneficiary" meant current beneficiary, and therefore, did not include the petitioner, the court held that petitioner lacked standing to request an accounting.

Accordingly, the motions to dismiss were granted.

In re Moloney, N.Y.L.J., May 13, 2014, p. 27, col. 1 (Surr. Ct., Suffolk Co.).

Summary Judgment

In re Newbold

In *In re Newbold*, the court was confronted with a motion for summary judgment in the context of a probate proceeding.

The decedent died survived by five siblings. Pursuant to the pertinent provisions of her will, the decedent directed that the residue of her estate pour over into a revocable trust that had been executed simultaneously with the instrument. Prior to her death, the decedent amended the instrument twice. Objections to probate were filed by four of the decedent's siblings, who alleged that the will had not been duly executed, that the decedent lacked testamentary capacity on the date of its execution and that it had been procured by undue influence and fraud.

With respect to the issue of due execution, the court noted that when an attorney supervises the execution of a Will there is a presumption of due execution. Additionally, when a will contains an attestation clause and a self-proving affidavit, there is a presumption of compliance with the statutory requirements. In support of her motion for summary judgment, the petitioner submitted an affidavit of the attorney-drafter, together with his deposition testimony and the testimony of the attesting witnesses. From this proof, the court concluded that the petitioner had established a prima facie case of due execution, causing the burden to shift to the objectants to raise a triable issue of fact. Towards this end, the objectants submitted an unsworn report from a handwriting expert, who concluded, upon examination of the decedent's known signature, that the signatures of the decedent on certain "questioned documents" were not genuine.

However, the court noted that, in addition to the report of the expert being unsworn, it failed to identify the "questioned documents," or the documents relied upon for proof of the decedent's signature. The court opined that although an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation, where an expert is used to oppose a proponent's prima facie case, the opinion must be in admissible form and state with reasonable particularity that the signature at issue is not authentic. While evidence otherwise excludable at trial may be considered as a basis for denying a motion for summary judgment, the court found that because this was the sole evidence provided by the objectant in support of the request, it could not, standing alone, serve to raise a triable issue of fact. Indeed, the court noted that the objectants had failed to provide any particulars regarding their claim of forgery. Accordingly, the court held that there was no issue of fact regarding the due execution of the Will.

As to the issues of testamentary capacity, undue influence and fraud, the court found that the objectants had failed to submit any evidence to refute the petitioner's proof that the decedent had testamentary capacity, or in support of their claims that the Will had been procured by undue influence and fraud.

Accordingly, the court dismissed the objections to probate and granted judgment in the petitioner's favor.

In re Newbold, N.Y.L.J., Oct. 31, 2013, p. 32 (Sur. Ct., Kings Co.).

In re Mele

In *In re Mele,* the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Westchester County, dismissing the objections to probate. The decedent died survived by four daughters and two sons. Two of the decedent's daughters commenced the proceeding for probate of his will, which left his entire estate to them and disinherited his remaining children. The will execution was supervised by the attorney who drafted it, and the instrument was witnessed by the attorney's secretary and a businessman who occupied the office next door. Three of the decedent's four children who had been disinherited under the instrument filed objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence and fraud. After the completion of discovery, the petitioners moved for summary judgment, and the application was granted. On appeal, the Court found that the petitioners had established prima facie that the decedent possessed testamentary capacity and that the will had been duly executed. Specifically, the Court noted that the petitioners had satisfied their burden of proof on the issue of due execution through the deposition testimony of the attorney who drafted and supervised the execution of the will, together with the testimony of the attesting witnesses. Moreover, the Court opined that the instrument had an attestation clause and a self-proving affidavit which gave rise to a presumption of compliance with the statutory requirements. Finally, the Court held that the objectants had failed to submit any evidence, beyond conclusory allegations and speculation, that the will had been the product of undue influence or fraud.

In re Mele, 113 AD3d 858, 979 NYS2d 403 (2d Dep't 2014).

In re Congedo

In *In re Congedo,* the court denied the petitioner's motion requesting summary judgment on the issues of undue influence, but granted summary relief on the issue of due execution. The will execution was supervised by an attorney and therefore the petitioner was accorded a presumption of regularity that the will was properly executed in all respects. The court found that the objectant had offered nothing but conjecture that the will execution did not comport with the statutory formalities.

However, on the issue of undue influence, the record revealed that the petitioner had a fiduciary relationship with the decedent; that she or her husband made an appointment for the revision of the decedent's will; that the petitioner or her husband had paid for the revised will and that they accompanied the decedent to the draftsperson's office; and that the new will represented a significant change from the decedent's longstanding testamentary plan. In view thereof, the court held that there were factual issues presented precluding judgment in the petitioner's favor.

In re Congedo, N.Y.L.J., Feb. 28, 2014, p.25, col. 3 (Sur. Ct. Suffolk Co.).

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

TRUSTS AND ESTATES LAW SECTION

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Florida Update

By David Pratt and Jonathan Galler

David Pratt

CASE LAW UPDATE

Do After-Acquired Assets Pass by Intestacy in Absence of a Residuary Clause?

Yes. The Florida Supreme Court recently reviewed a case involving the use of a commercially available "E-Z Legal Form" for the preparation of a will. Because the will at issue contained no residuary clause, the Court had to determine the proper disposition of property that was acquired after the execution of the will. The Court held that the after-acquired property passes pursuant to Florida's intestacy statute and not to the sole remaining named beneficiary of several specific bequests under the will. The opinion affirmed the holding of Florida's First District Court of Appeal, which had certified the issue to the Supreme Court as a question of great public importance. The First District's initial holding was that Florida's statutory presumption against partial intestacy mandated that the after-acquired property pass to the remaining named beneficiary; however, upon rehearing, the First District withdrew its own opinion and held that the decedent's intent supersedes the presumption against partial intestacy. The Supreme Court agreed with the appellate court's latter opinion, and in a particularly interesting concurring opinion, one of the justices used the facts of the case "to highlight a cautionary tale of the potential dangers of utilizing pre-printed forms and drafting a will without legal assistance."

Aldrich v. Basile, 136 So.3d 530 (Fla. 2014).

Does a Guardian Have Right to Access Ward's Joint Brokerage Account?

Yes. Florida's Fourth District Court of Appeal recently held that the guardian of the property of a ward may be granted access by the court to a ward's joint brokerage account, not only during the ward's lifetime but also upon the ward's death for purposes of satisfying certain expenses related to the guardianship. The account at issue was titled in the name of the ward and his wife as a joint tenancy with right of survivorship. The wife, who had commenced divorce proceedings, objected to the use of the account by the guardian of the property without her authorization. Guided in large part by (a) the "overwhelming" public policy of guardianship law to protect the ward, (b) the broad powers granted to a guardian under Florida's Guardianship Code, and (c) the equitable powers of the probate court, the Fourth District held that the probate court was permitted to authorize the guardian of the property to access the joint account where necessary to pay authorized expenses, including the guardian's own compensation and the guardian's attorney fees. Further, the court held that even though *ownership* of the joint account passed to the wife upon the ward's death, the guardian retains *possession* of the account for the purpose of performing and paying for its statutory post-death obligations. The appellate court concluded its opinion with the suggestion that the legislature consider amending the Guardianship Code to bring additional clarity to this issue.

Jonathan Galler

Romano v. Olshen, 2014 WL 940700 (Fla. 4th DCA Mar. 12, 2014) (not yet final).

Is Adjudication of Paternity Akin to an "Adoption" Under Pretermitted Child Statute?

No. The elements for the determination of a pretermitted child under Florida law are codified in section 732.302, Fla. Stat. The statute is triggered only when the child (1) was omitted from the will; (2) was born or adopted after the making of the will; and (3) did not receive a part of the testator's property equivalent to a child's part by way of advancement. When these elements are met, such a child receives a share of the estate equal to that which the child would have received if the testator had died intestate, unless it appears from the will that the omission was intentional or the testator had at least one child when the will was executed and the testator devised substantially all the estate to the other parent of the pretermitted child and that other child survived the testator and is entitled to take under the will. Florida's Third District Court of Appeal recently reversed a trial court's determination of pretermitted status. The appellate court held that the child at issue was not omitted from the will because she stood to inherit under a class gift made for the decedent's "children." The court also held that the child was not deemed "born or adopted after making the will" even though the adjudication of the testator's paternity took place after the execution of the will. The court reasoned that adoption is the act of creating a parent-child relationship, whereas an adjudication of paternity is merely an acknowledgment of an existing relationship.

Estate of Maher v. Iglikova, 2014 WL 1386660 (Fla. 3d DCA Apr. 9, 2014) (not yet final).

Does Successor Personal Representative Have Standing to Sue Predecessor's Attorney?

Yes. Florida is one of a handful of jurisdictions in which it is clear that the *personal representative* of the estate is the lawyer's client, not the estate itself or its beneficiaries. *See* Comment to Rule Regulating the Florida Bar 4-1.7. That was an important principle underlying a case of first impression recently decided by Florida's Second District Court of Appeal. The issue in that case was whether a successor personal representative had standing to sue its predecessor's attorney for malpractice in connection with the administration of the estate. The defendant-attorney, having served as counsel to the original personal representative, argued that the successor personal representative lacked privity with him and could not sue for malpractice. The appellate court, however, expressly opted not to address the issue of privity and, instead, held that the successor personal representative had standing because the powers and duties granted to an original personal representative flow to the successor, under section 733.614, Fla. Stat. On that basis, the Court concluded that the successor personal representative could assert a legal malpractice claim on behalf of the estate as part of its general obligation to pursue all valuable assets and claims of the estate.

Bookman v. Davidson, 136 So.3d 1276 (Fla. 1st DCA 2014).

Are the Decedent's Ashes "Property" of the Estate?

No. In yet another case of first impression, Florida's Fourth District Court of Appeal recently addressed the question of whether a decedent's ashes are deemed "property" of the estate and, thus, subject to the judicial remedy of partition. The decedent, Scott Wilson, was killed in a car accident by billionaire polo mogul, John Goodman, who was charged with manslaughter. Goodman garnered his own attention in the trusts and estates world when he adopted his adult girlfriend, making her a beneficiary of an irrevocable trust created for his children. That adoption was vacated on appeal. The latest appellate opinion arising from this tragic death concerned a trusts and estates matter of a different sort. It centered around a dispute between Wilson's divorced parents, who are the co-personal representatives of his estate, over the disposition of their son's ashes. Wilson's father ultimately petitioned for partition, contending that the ashes are "property" of the estate. The trial and appellate courts disagreed, with the latter reaching as far back as 19th century English law for guidance on the issue, holding that human remains are not property of the estate. Although the appellate court did not address how the dispute over the ashes should be resolved, the trial court had earlier suggested that it may appoint a curator or other temporary administrator to dispose of the ashes as it sees fit.

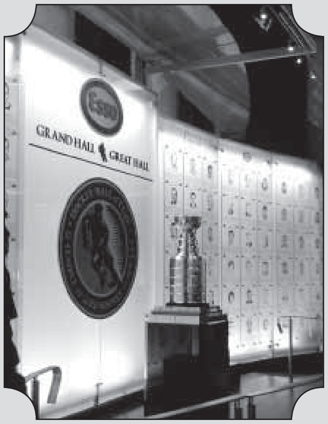
Wilson v. Wilson, 2014 WL 2101226 (Fla. 4th DCA May 21, 2014) (not yet final).

David Pratt is a Co-Chair of Proskauer's Personal Planning Department and the Managing Partner of the Boca Raton office. His practice is dedicated exclusively to the areas of estate planning, trusts, and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan Galler is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation Department and are admitted to practice in Florida and New York.

Scenes from the Trusts and Estates Law Section

SPRING MEETING

May 1-4, 2014 • Four Seasons Hotel, Toronto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Section Committees and Chairs

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Ad Hoc Committee on Multi-State Practice
William P. LaPiana
New York Law School
185 West Broadway
New York, NY 10013-2921
william.lapiana@nyls.edu

Charitable Organizations
Christine Woodcock Dettor
Bousquet Holstein PLLC
110 West Fayette Street
One Lincoln Center, Suite 900
Syracuse, NY 13202
cdettor@bhlawpllc.com

Mary Anne Cody
Mackenzie Hughes LLP
101 South Salina St., Suite 600
Syracuse, NY 13202
mcody@mackenziehughes.com

Continuing Legal Education
Frank W. Streng
McCarthy Fingar LLP
11 Martine Avenue, 12th Floor
White Plains, NY 10606-1934
fstreng@mccarthyfingar.com

Diversity
Ashwani Prabhakar
Chambers of
Hon. Margarita Lopez Torres
Surrogate's Court, Kings County
2 Johnson Street
Brooklyn, NY 11201
aprabhakar@courts.state.ny.us

Anta Cisse-Green
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
antac3@aol.com

Elderly and Disabled
Cora A. Alsante
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
calsante@hancocklaw.com

Estate and Trust Administration
Jill Choate Beier
Marymount Manhattan College
221 E. 71st Street
New York, NY 10021
jbeier@mmm.edu

Estate Litigation
Charles T. Scott
Greenfield Stein & Senior, LLP
600 Third Avenue, 11th Floor
New York, NY 10016-1901
cscott@gss-law.com

Estate Planning
Laurence Keiser
Stern Keiser & Panken LLP
1025 Westchester Avenue, Suite 305
White Plains, NY 10604
lkeiser@skpllp.com

International Estate Planning
Daniel S. Rubin
Moses & Singer LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
drubin@mosessinger.com

Law Students and New Members
Michelle Schwartz
Norton Rose Fulbright LLP
666 Fifth Avenue
New York, NY 10103
mschwartz@fulbright.com

Legislation and Governmental Relations
Jennifer F. Hillman
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
jhillman@rmfpc.com

Robert Matthew Harper
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556
rharper@farrellfritz.com

Life Insurance and Employee Benefits
Albert Feuer
Law Offices of Albert Feuer
110-45 71st Road, Suite 7m
Forest Hills, NY 11375-4962
afeuer@aya.yale.edu

Members and Membership Relations
Jennifer N. Weidner
Canandaigua National Bank and
Trust Company
1150 Pittsford-Victor Road
Pittsford, NY 14534
jweidner@cnbank.com

Newsletter and Publications
Jaclene D'Agostino
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

New York Uniform Trust Code
Ira M. Bloom
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
ibloo@albanylaw.edu

Practice and Ethics
Eric W. Penzer
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
epenzer@farrellfritz.com

Surrogates Court
Lisa Ayn Padilla
61 Broadway, Suite 2125
New York, NY 10006
lisa@eflm.com

Taxation
Susan Taxin Baer
Law Offices of Susan Taxin Baer
399 Knollwood Road, Suite 212
White Plains, NY 10603-1937
stbaer@baeresq.com

Technology
Gary R. Mund
P.O Box 1116
New York, NY 10002-0914
gmund@mundlaw.com

Executive Committee District Representatives

First District
Natalia Murphy
Citi Private Bank
153 East 53rd Street, 24th Floor
New York, NY 10022
natalia.murphy@citi.com

Second District
Michael Patrick Ryan
Cullen & Dykman LLP
44 Wall Street
New York, NY 10005
mryan@cullenanddykman.com

Third District
Stacy L. Pettit
State of New York
Appellate Division, Third Dept.
P.O. Box 7288, Capitol Station
Albany, NY 122224
spettit@courts.state.ny.us

Fourth District
Cristine Cioffi
Cioffi Slezak Wildgrube P.C.
2310 Nott Street East
Niskayuna, NY 12309-4303
ccioffi@cswlawfirm.com

Fifth District
Ami Setright Longstreet
Mackenzie Hughes LLP
P.O. Box 4967
Syracuse, NY 13221
alongstreet@mackenziehughes.com

Sixth District
Albert B. Kukol
Levene Gouldin & Thompson LLP
P.O. Box F-1706
Binghamton, NY 13902
akukol@lgtlegal.com

Seventh District
Barbara R. Heck James
Harris Beach PLLC
99 Garnsey Rd.
Pittsford, NY 14534
bjames@harrisbeach.com

Eighth District
Victoria L. D'Angelo
Damon Morey LLP
9276 Main Street, Suite 3B
Clarence, NY 14031-1913
vdangelo@damonmorey.com

Ninth District
Kevin H. Cohen
Law Offices of Kevin H. Cohen, P.C.
30 Glenn Street, 2nd Floor
White Plains, NY 10603
kcohen@estatelawny.com

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

Eleventh District
Mindy J. Trepel
Sweeney Gallo Reich & Bolz LLP
95-25 Queens Blvd, 11th Floor
Rego Park, NY 11374
mtrepel@msgrb.com

Twelfth District
Vacant

Thirteenth District
Irini Nagy Bekhit
Richmond County Surrogate's Court
18 Richmond Terrace
Staten Island, NY 10301
ibekhit@courts.state.ny.us

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Pierce McDowell
(605) 338-9170
piercemcdowell@sdtrustco.com

Al King
(212) 642-8377
alking@sdplanco.com

James Paladino
(212) 642-8377
jamespaladino@sdplanco.com

www.sdtrustco.com *www.directedtrust.com* *www.privatefamilytrustcompany.com*

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

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TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor
Jaclene D'Agostino
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

Section Officers

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

Chairperson-Elect
Marion Hancock Fish
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
mfish@hancocklaw.com

Secretary
Magdalen Gaynor
Law Offices of Magdalen Gaynor
10 Bank Street, Suite 650
White Plains, NY 10606
mgaynor@mgaynorlaw.com

Treasurer
Sharon L. Wick
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
swick@phillipslytle.com