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Trusts and Estates Law Section Newsletter

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

A Message from the Chair

Marion Hancock Fish

One of the hallmarks of our Section is that we have an extraordinarily engaged membership. As I can attest, the Section leadership is the recipient of many calls and emails from members about better ways to do our work, as well as new ideas and projects—so many, of course, that we can't follow up on all fronts.

However, Past Chair Gary Freidman's suggestion to broaden the scope of our Technology Committee is one that I jumped on immediately. Over the past several years, Technology Committee Chairs Gary Mund and David Goldfarb have worked to keep the Section up to date on technology. Recent projects include e-filing and changing the NYSBA website. Gary and David have embraced the suggestion to expand their Committee's role and are now considering new projects, some oriented toward member education and practice management, including:

- analysis and review of software;
- demonstrations of selected applications;
- membership survey of technology use;
- use of social media;
- ethical concerns in use of technology;
- cloud computing and internet security; and
- educating members through use of NYSBA's website and community.

In addition, the Technology Committee plans to host roundtable discussions at the upcoming Annual Fall Meeting to be held at the Turning Stone Casino and Resort in Verona, New York on October 29 and 30. Incidentally, the Roundtables will be offered on Thursday, October 29, from 2:00 to 5:00. Thanks to David and Gary for their willingness to take on these new initiatives, to Gary Freidman for encouraging us to move in this direction, and to Tom Collura and Parth Chowlera for agreeing to lend their help.

An increased emphasis on technology is also being promoted by the Big Bar. Recognizing the critical

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NYSBA

importance of competence with technology to the successful practice of law, NYSBA President Dave Miranda is making technology a major focus of his year. TELS Chair-Elect Meg Gaynor attended the annual Section Leadership Conference on May 14, and reported back with the same message that all of the Sections should be up to date on technology with special attention to how the new generation of lawyers are using technology.

E-filing is a great example of how technology is impacting all New York "T&E" practitioners. There are currently 18 Surrogate's Courts that have implemented e-filing, which, not surprisingly, are in smaller and upstate counties: Allegany, Cattaraugus, Cayuga, Chautauqua, Cortland, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Queens, Seneca, Steuben, Tompkins, Wayne, Wyoming and Yates. E-filing is mandatory in Cayuga, Chautauqua, Erie, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates. Under Lisa Padilla's leadership, the E-filing subcommittee is working with OCA to develop a robust e-filing system that will mirror the federal system in terms of helping the courts manage caseloads and calendars more efficiently, reduce the need for duplicative data entry, and save trees. We hope to see continued expansion of e-filing in the next year.

One more word on technology. By now, all of you who have used the TELS list serve are aware that we have transitioned to the NYSBA's "Community" platform. Indeed, some of you may be reading this issue of the *Newsletter* on the Section's Community. It is our expectation that the Community will become a versatile and user friendly way of keeping us connected and up to date on the latest developments. If you have questions or need assistance, you can always contact the NYSBA Member Resource Center at 800-582-2452 or email Brandon Vogel at bvogel@nysba.org.

There are also updates to report on the Powers of Attorney matter. Following the presentation of proposals from our Section and the Elder Law and Special Needs Section (ELSNS) to the NYSBA Executive Committee this past Spring, the Executive Committee appointed a group to review these proposals and the POA statute with the objective of gaining consensus on what, if any, changes to the GOL should be promoted. The Powers of Attorney Task Force Working Group is Chaired by Ellen Makofsky and includes representatives from TELS (Kate Madigan and Bob Freedman), ELSNS (David Goldfarb and Richard Weinblatt), as well as members from the Business (Jay Hack), Real Property (Jerry Antotomaso), and Health (Kathleen Burke and Peggyanne Cooke) Law Sections. As of this writing, it seems that our Section's proposal to limit changes to "technical" amendments is not widely embraced. On the other hand, ELSNS's proposal to expand the law to include sanctions of those who refuse to accept the statutory forms continues to be resisted. I believe there is common ground somewhere in between, and thank Kate Madigan and Bob Freedman again for continuing to be our voices in this important discussion.

This year's Fall Meeting at the Turning Stone Resort and Casino in Verona, New York will be focused on real estate in the trusts and estate practice, including dealing with second homes, asset preservation planning and real estate entity valuation. Program Chair Mary King together with Vice Chairs Rob Reynolds and Nate Berti have also arranged a great line up of Roundtables on Thursday afternoon. We hope to see many of you there.

Very best,

Marion Hancock Fish

Save the Dates!

Trusts and Estates Law Section

2015 Fall Meeting

October 29-30, 2015

Turning Stone Resort Casino, Verona, NY

Editor's Message

Included in this edition of our *Newsletter* is Kameron Brooks' explanation of assisted reproductive technology in light of the new EPTL 4-1.3—which allows posthumously conceived children to be considered distributees of their genetic parents—and estate planning options in this context, Lydia Beebe's discussion of Medicaid planning by attorneys-in-fact, and Andrew Katzenberg's overview of real property transfer taxes and planning strategies to avoid them. Also in this issue, Jeffrey Gorak explores approaches for an incapacitated surviving spouse to exercise his or her right of election, Hillary Frommer outlines the types of experts often utilized in Surrogate's Court proceedings, and Raymond C. Radigan thoroughly explains the use of New York trusts for asset protection purposes.

Our next submission deadline is December 7, 2015.

Jaclene D'Agostino

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NEW YORK STATE BAR ASSOCIATION

2016

ANNUAL MEETING

January 25-30, 2016

Hilton New York Midtown

1335 Avenue of the Americas

New York City

TRUSTS AND ESTATES LAW SECTION PROGRAM

Wednesday, January 27, 2016

Planning for the New Biology—Assisted Reproductive Technology (ART) Children in Light of EPTL 4-1.3

By Kameron Brooks

I. Introduction

Estate planners are constantly at work keeping up with ever-shifting societal norms. In this context, we are now faced with the following question: what do we do about ART children born after the genetic parent's death?

What Is Assisted Reproductive Technology?

ART in its simplest terms involves the handling of gametes (sperm or ova) outside of the human body in order to result in a pregnancy. The most common forms of ART are assisted insemination, in vitro fertilization (IVF) and gestational carriers. Assisted insemination transfers sperm to a woman's uterus or cervix. With IVF, sperm and ova are extracted and used to create a pre-embryo in a laboratory. The third method is as it sounds; the services of a third-party woman are enlisted to carry the child to delivery. The process is sometimes used with the IVF method creating a pre-embryo with the couple's gametes, which is then implanted into another woman, the carrier. Or, the partner's sperm may be used directly to impregnate the carrier "surrogate" mother.

II. Early History

The Uniform Parentage Act, and before it the Uniform Status of Children of Assisted Conception Act, provided that children produced by this new biology, either during the donor's life or post-mortem, were *not* legal offspring of the genetic material provider. The federal case of *Gillette-Netting v. Barnhart* embraces that result.[1]

But two similar early state law cases determined, for Social Security survivor benefit purposes, that children of this new technology, conceived post-mortem, may be classified under state law as children of a decedent who provided the genetic material.[2] These two cases were among the first to stretch the concept of post-mortem conceived children as issue (children) of a decedent. Both courts determined that the decedent was the legal father for purposes of the children's claims for Social Security survivor benefits. In *Woodward v. Comm'r of Soc. Sec.*, a Massachusetts Court required that there be a paternity judgment and that a two part test be satisfied: the "donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child."[3] In *In re Estate of Kolacy*, a New Jersey Court was less precise in its decision but also stressed the first factor: the decedent "created the possibility of having long-delayed after-born children."[4]

As technology advances, people will take advantage of it for the perceived benefits. This now includes the ability to reproduce beyond the grave. As such, there is an argument that the failure of states to address inheritance rights of ART children will result in the unjust denial of rights and privileges of children who clearly were intended to inherit or benefit with respect to the estate of the deceased parent.

The clearest and also the most authoritative example of this predicament is the May 21, 2012, unanimous decision of the United States Supreme Court in *Astrue v. Capato ex rel. B.N.C.*[5] A summary of the facts is as follows: Robert and Karen Capato married, and shortly thereafter, Robert was diagnosed with cancer. He was told that his chemotherapy treatments might make him sterile. Because he and Karen wanted children, Robert deposited semen in a sperm bank where it was frozen and stored. Before he died, Robert and Karen had a child who was conceived through historically usual means involving low light, soft music and wine (author's imagination added). They wanted their child to have a sibling; however, Robert's health deteriorated several months after their first child was born and he died shortly thereafter. After Robert's death, Karen began IVF procedures, conceived ten months after Robert's death, and eighteen months later, gave birth to twins. The case was to determine whether the posthumously conceived twins were entitled to receive survivors' benefits under the Social Security Act. The Court ruled that a child must qualify as a child for intestacy purposes under applicable state law. Because Florida law did not allow posthumously conceived children to inherit through intestate succession, the twins were not entitled to benefits. Had Robert and Karen lived in California (which did allow intestate succession rights to children who are in utero within two years of a deceased parent's death), or had Florida adopted the ART provisions contained in the 2008 amendments to the Uniform Probate Code, the twins would have been entitled to receive survivors' benefits.

III. New York State's History

Over 40 years ago, in *In re Adoption of Anonymous*,[6] Surrogate Nathan R. Sobel addressed one of the earliest legal problems created by the use of artificial insemination as a technique for human reproduction. A husband sought to adopt a child that his wife had conceived during her prior marriage through artificial insemination with the sperm of a third-party donor. The question before Surrogate Sobel was whether the former husband had standing to object to the adoption. Surrogate Sobel predicted that artificial insemination would become increasingly common and would inevitably also complicate the legal landscape in areas other than adoption. He

specifically forecasted that as a result of such technological advances, "[legal] issues…will multiply [in relation to matters such as] intestate succession and will construction."[7] Surrogate Sobel noted, however, that there was at that point a dearth of statutory or decisional guidance on questions such as the one before him. That was in 1973.

In 2006, an amendment to N.Y. Estates, Powers & Trusts Law 5-3.2 (EPTL) made it very clear that, as applied to a New York decedent's estate, for an "after-born" child to be included as a beneficiary of the estate, he or she *must* be in gestation at the time of the decedent's death and born thereafter. However, on November 21, 2014, New York enacted legislation by adding EPTL 4-1.3 and amending EPTL 11-1.5 to treat posthumously conceived children as distributees of their genetic parents and as beneficiaries of certain class gifts, with some qualifications.[8]

New EPTL 4-1.3 contains four requirements for a genetic child to be considered a child of the genetic parent for inheritance purposes:

1. The genetic parent donor must sign a writing in which he or she expressly consents to the use of that sperm or ova ("Genetic Material") for posthumous reproduction *and* authorize a person ("Authorized Person") to make decisions about the use of the Genetic Material after the death of the genetic parent.[9]
2. The Authorized Person must give notice of the existence of the Genetic Material to the personal representative of the deceased genetic parent's estate. This must be written notice and given within seven months of the genetic parent's death.[10] If no personal representative (or executor or any of the various administrators provided for in the Surrogate's Court Procedure Act) has received letters within four months of the genetic parent's death, then such notice is to be given to a distributee of the genetic parent within seven months of the genetic parent's death.[11]
3. The Authorized Person must also record the writing from the donor in the Surrogate's Court that granted the letters, or if none were granted, in the Surrogate's Court having jurisdiction to do so.[12]
4. Last, the genetic child then must be in utero within twenty-four months *or* born within thirty-three months of the genetic parent's death.[13]

So, the statutory requirements stack up like this: The genetic parent must 1) make a deposit; 2) expressly consent by a signed writing to allow his or her Genetic Material to be used for reproductive purposes; and 3) authorize a person (presumably over the age of 18) to make decisions for the Genetic Material's use. The Authorized Person must then 4) pay attention to the genetic parent's date of death, appointment or lack of appointment of an executor or various types of administrators; 5) determine what has been done within the statutorily prescribed periods; 6) give written notice to the appropriate person (*i.e.*, personal representative, distributee); and 7) record the writing in the appropriate Surrogate's Court. Once the above hurdles have been overcome, the Authorized Person must then 8) consent to the use of the Genetic Material to allow the genetic child to be in utero within twenty-four months of the genetic parent's date of death or to be born within thirty-three months thereafter.

IV. Future Interests

What about "future interests" (*i.e.*, a remainder beneficiary of a trust for another person's life)? How does EPTL 4-1.3 work here? A fairly recent New York County Surrogate's Court case is recited in the legislative Memo to the N.Y. State Bill as identifying a problem that EPTL 4-1.3 is intended to address. The court in *In re Martin B.* entertained an uncontested application for advice and direction in connection with seven trust agreements.[14] The novel question posed was whether, for the interpretation of these instruments, the terms "issue" and "descendants" included children conceived by means of IVF with the cryopreserved semen of the grantor's son, James, who had died several years prior to conception, but whose ART offspring (born three and five years later) were alive at the time the trustees were contemplating principal distributions to "issue" or "descendants" of the grantor of the trust. In its analysis of the law, the court noted that EPTL 6-5.7(a) provides, "Where a future estate is limited to children, distributees, heirs or issue, posthumous children are entitled to take in the same manner as if living at the death of their ancestors." In addition, EPTL 2-1.3(a)(2) provides that a posthumous child may share as a member of a class if such child was conceived before the disposition became effective. The statutes read literally would allow post-conceived children—who are indisputably "posthumous"—to claim benefits as biological offspring. The problem, however, is that these statutes were enacted long before anyone anticipated that children could be conceived after the death of the biological parent. After further analysis of other states' laws and certain provisions of the Uniform Parentage Act, Surrogate Roth concluded,

> As can clearly be seen from all the above, the legislatures and the courts have tried to balance competing interests. On the one hand, certainty and finality are critical to the public interests in the orderly administration of estates. On the other hand, the human desire to have children, albeit by biotechnology, deserves respect, as do the rights of the children born as a result of such scientific advances.

Surrogate Roth ultimately concluded that the two posthumously born sons of James were "issue" and "descendants" for the purposes of the trusts.

However, new EPTL 4-1.3 would only come to the same conclusion as Surrogate Roth in the case of wills of persons who die on or after September 1, 2014, or for lifetime instruments executed before that date, if they can be revoked or amended thereafter. Even so, given the same facts that Surrogate Roth faced, the answer to the question would now be different under EPTL 4-1.3. The Martin grandchildren were born three and five years after James' death—long after the permissible time period of the new statute. Plus, EPTL 4-1.3 is not applicable to any irrevocable instrument that existed prior to September 1, 2014.

V. How to Deal with This Issue—Keep It Simple or Make It Complex…Your Client's Choice

The most basic form of any document addressing ART children should define when a parent-child relationship exists between a person and another person who was created with that person's gametes (sperm or eggs). Depending on the person's preferences, the document can limit the class of descendants to those who are born within the context of a traditional marriage between a man and a woman, or the class can be expanded to include children of a genetic parent who is single or who is married to a person of the same gender in a jurisdiction that recognizes same-sex marriages, or who is a party to a non-marital relationship that has legal status under state law such as a civil union, domestic partnership, or a substantially similar legal relationship (regardless of the gender of the other party to the legal relationship).

Those who want the ultimate degree of simplicity in their estate plan documents, yet want to deal with the possibility of ART children, may provide that children who are placed in gestation after a genetic parent's death will be excluded from the definition of descendants altogether.

For those who want to include an ART child as a beneficiary, deadlines on birth are advisable in order to avoid keeping administration of the estate or trust open for an extended period of time. This will not be a concern if the trust continues on as a sprinkling trust for a class of descendants, so that as descendants are born (whether or not as a result of ART), they automatically become members of the class of beneficiaries. But if the will or trust instrument provides for division of assets among descendants or classes of descendants, either upon the client's death or upon the occurrence of some future event, far more complicated provisions are necessary if the client does not want to exclude ART children who might be born after the event which triggers the division.

VI. The Significance of It All

A report issued jointly by the Society for Assisted Reproductive Technology and the RAND Corporation estimates that there were 396,526 embryos held in storage in the United States as of April 11, 2002.[15] The report noted that nearly 100% of clinics required the patient or couple to sign a consent form before the embryos were frozen. In almost all cases, the form asked the patient to indicate what was to be done with the frozen embryo in case no one was able to make a decision. Virtually all consent forms provided options to donate unwanted embryos to other patients, to be used for research, or to be destroyed. Approximately *88% of the preserved embryos were stored with the intention to be used to produce children*. Slightly over two percent were awaiting donation to another patient, and about the same percentage were designated to be discarded. About five percent were held for various other reasons such as lost contact with the patient, patient death, divorce, or abandonment. Approximately three percent were designated for research. As of May 2012, there were in excess of 600,000 embryos in cryogenic storage.[16]

Endnotes

1. 231 F. Supp. 2d 961 (D. Ariz. 2002) *rev'd and remanded*, 371 F.3d 593 (9th Cir. 2004).
2. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257, 435 Mass. 536 (2002); *In re Estate of Kolacy*, 332 N.J. Super. 593 (Ch. Div. 2000).
3. 760 N.E. 2d 257, 269 (2002).
4. 332 N.J. Super. 593, 605 (Ch. Div. 2000).
5. 132 S.Ct. 2021 (2012).
6. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct., Kings Co. 1973).
7. *Id.* at 99.
8. 2014 N.Y. Laws ch. 439, §§ 1-3.
9. N.Y. Estates, Powers & Trusts Law 4-1.3(b)(1).
10. EPTL 4.1.3(b)(2).
11. *Id.*
12. EPTL 4-1.3(b)(3).
13. EPTL 4-1.3(b)(4).
14. *In re Martin B.*, 17 Misc. 3d 198, 841 N.Y.S.2d 207 (Sur. Ct., N.Y. Co. 2007).
15. Hoffman, Zellman, Fair, Mayer, Zeltz, Gibbons, & Turner, Cryopreserved Embryos in the United States and Their Availability for Research, FERTILITY AND STERILITY, Vol. 79, No. 5, May 2003. A copy of the report is available online at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Selected_Articles_from_Fertility_and_Sterility/cryoembryos_may2003.pdf.
16. Pamela Brown, *Controversial Embryo Adoptions on the Rise* (May 1, 2012, 7:52 PM), http://www.wjla.com/articles/2012/05/controversial-embryo-adoptions-on-the-rise--75501.html.

Kameron Brooks is a partner at Brooks & Brooks, LLP in Little Valley, NY, whose practice is limited to higher level estate and asset protection planning, business succession and tax planning and Trust and Estate administration. He is a member of the ABA, NYSBA and Cattaraugus County Bar Association, as well as a frequent lecturer on various planning topics.

Protecting an Incapacitated Surviving Spouse's Right of Election

By Jeffrey Gorak

Introduction

The concept of testamentary freedom—the principle that a person is free to dispose of his or her property in any manner by will—is one of the hallmarks of the laws governing wills. There are, however, certain limits on a person's freedom of disposition, the most significant of which is that a person may not disinherit his or her surviving spouse. In New York, the law provides that, in cases of spousal disinheritance, a surviving spouse is given a personal right to elect against a share of the decedent's estate. A problem arises, however, when a surviving spouse is incapacitated and unable to assert that right. In the event of incapacity, and without prior planning, only certain fiduciaries may apply to the court for the authority to assert the right of election on behalf of the surviving spouse. Critically, if the incapacitated surviving spouse dies prior to exercising that right—or having a fiduciary or agent do so on his or her behalf—the right is lost forever. This article examines the different approaches to exercising the right of election for an incapacitated surviving spouse, strategies for expediting the granting of authority to a fiduciary, and the remedy available when fraudulent conduct interferes with an attempt to exercise that right.

New York's Right of Election Statute

New York's Right of Election statute, Section 5-1.1-A of the Estates, Powers and Trusts Law (EPTL), provides that a surviving spouse is entitled to the greater of $50,000 or one-third of the decedent's net estate.[1] There are, however, two conditions precedent to a surviving spouse's exercise of the right to elect against an estate. First, the surviving spouse must have been the lawful spouse at the time of death.[2] Second, the surviving spouse must not have forfeited the right of election through the execution of a renunciation or waiver. If these conditions are met, a surviving spouse may exercise the right to elect against an estate by filing a notice of election within six months from the date of issuance of Letters of Testamentary or Administration.[3]

Under EPTL 5-1.1-A(a), the surviving spouse's right to elect against a decedent's estate is personal and, as such, it must be exercised by the surviving spouse during his or her lifetime; accordingly, a fiduciary for a post-deceased spouse may not assert the right of election. However, EPTL 5-1.1-A(c)(3) provides that when a surviving spouse is under a disability, including incapacity, certain fiduciaries may, when authorized by court, elect on behalf of that incapacitated spouse. These fiduciaries include the guardian of the property of an infant spouse, the committee of an incompetent spouse or a conservator of a conservatee spouse,[4] the guardian ad litem for the surviving spouse, and a guardian under Article 81 of the Mental Hygiene Law (MHL). The focus of this article is the last two categories of fiduciaries, which are guardians who may be appointed for incapacitated persons.

Guardians ad Litem

A guardian *ad litem* for a surviving spouse may exercise the right of election for his or her ward when authorized by the court having jurisdiction over the decedent's estate. Under the Surrogate's Court Procedure Act (SCPA), a guardian *ad litem* may be appointed for persons under a disability not appearing by a guardian, committee or conservator.[5] A person under a disability includes, *inter alia*, an incapacitated person,[6] defined as any person who is incapable of adequately protecting his or her rights.[7]

In appointing a guardian *ad litem* for an incapacitated person, the Surrogate's Court must first secure jurisdiction over that person. In the Surrogate's Court, jurisdiction is established by service of process, which traditionally includes service of a citation or an order to show cause on the incapacitated person. Although the Surrogate's Court is empowered pursuant SCPA 311 to appoint, either on motion[8] or *sua sponte*, a designee for the incapacitated person for service of process, it is insufficient to serve only the designee; the incapacitated person must be served with process as well.[9]

The appointment of a designee offers a procedural safeguard to assure that someone other than the incapacitated person is aware of the proceeding.[10] The designee is expected to protect the incapacitated person's best interests, which, in the case of a disinherited surviving spouse, necessarily includes an examination of the advisability of asserting the surviving spouse's right of election. An appointed designee has the same powers and duties as a guardian *ad litem* and typically is later appointed as such. The appointment of the same person as designee and guardian *ad litem* allows for continuity of representation and affords expediency. Specifically, it enables the designee, prior to the return date of the incapacitated person's citation, to prepare an application for the authority to assert the surviving spouse's right of election so that no time is lost. As a result, the designee will be prepared to file

such application once he or she has been formally appointed as guardian *ad litem*.

The EPTL does not identify a governing standard for courts to reference in deciding whether to grant authority to a guardian *ad litem* to exercise the right of election on behalf of an incapacitated surviving spouse. However, case law dictates that the court must determine whether exercising the right of election is in the best interests of that spouse, based on the facts of each particular case.

For example, in *In re Lestrange*,[11] the Surrogate's Court held that asserting the right of election was in the best interests of the surviving spouse because failure to do so would disqualify that surviving spouse from further Medicaid payments. In *In re Kapchan,*[12] the Surrogate's Court held that forgoing the right of election was in the best interests of the surviving spouse where all or most of the elective share would be subject to a money judgment against the surviving spouse and such spouse's nursing home costs were met by the Veteran's Administration with no requirement to repay. In *In re Slader*,[13] the Surrogate's Court held that asserting the right of election is in the best interest of the surviving spouse when that spouse understands and desires it; the court noted that the incapacitated person's expressed desires, when known, should be given great weight. In *In re Pflueger*,[14] the Surrogate's Court adopted MHL § 81.21(e)—which applies to property management powers, including the right to elect against an estate in guardianship proceedings—as a governing standard, and determined that forgoing the right of election was in the best interests of the surviving spouse in light of the substantial benefits to which the spouse would be entitled for forgoing such right as part of a settlement agreement.

As evidenced by the various considerations taken into account by the Surrogate's Courts in these cases, the governing standard for granting authority to a guardian *ad litem* to exercise the right of election on behalf of an incapacitated surviving spouse provides the court with significant flexibility, making the outcomes less than predictable.

Article 81 Guardians

A guardian appointed under Article 81 of the MHL also may exercise the right of election on behalf of an incapacitated spouse, when authorized by the court that appointed the guardian. An Article 81 guardianship case begins with the filing of an Order to Show Cause and Verified Petition, and a hearing must be held within four weeks of the signed Order to Show Cause. If, after the hearing, there is a finding of incapacity, a guardian will be appointed. The guardian may be authorized to, among other things, exercise the powers necessary to manage the property and financial affairs of the incapacitated person,[15] including the power to exercise the right of election against the estate of the incapacitated person's deceased spouse.[16] Importantly, under MHL § 81.29, the incapacitated person for whom a guardian has been appointed retains all of the powers and rights not specifically given to the guardian. Therefore, in order for a guardian to be able to assert the right of election on behalf of an incapacitated surviving spouse, the order and judgment appointing the guardian must specifically include that power.[17]

Article 81 also includes a provisional remedy which enables the Supreme Court, upon request and under extreme circumstances, to appoint an immediate temporary guardian with limited powers.[18] MHL § 81.23 provides that the court may appoint a temporary guardian, "[a]t the commencement of the proceeding… upon showing of danger in the reasonably foreseeable future to the health and well-being of the alleged incapacitated person…or loss of the property of the alleged incapacitated person."[19] Although this section has traditionally been employed to protect an incapacitated person from physical abuse and financial exploitation, or both, another logical application of this section would be to protect the incapacitated surviving spouse's right of election, as the failure to do so could be deemed the danger of loss of property. Although the MHL does not define loss of property, the loss of an incapacitated person's right of election could certainly result in a loss of property to which that person was rightfully entitled.

The governing standard for granting guardianship powers is set forth in MHL § 81.21(e), as was applied by the Surrogate's Court in *In re Pflueger*.[20] As mentioned above, MHL § 81.21(e) applies to property management powers, including the right to elect against an estate in guardianship proceedings. In determining whether to grant guardianship powers:

> [t]he court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:
>
> 1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;
>
> 2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and

3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

Unlike the governing standard for granting authority to a guardian *ad litem* to exercise the right of election on behalf of an incapacitated surviving spouse, the above standard is much stricter and more clearly articulated, giving the court less flexibility than in guardian *ad litem* cases.

Attorneys-in-Fact

An attorney-in-fact, a type of fiduciary not enumerated under the elective share statute, may also assert the right of election on behalf of an incapacitated surviving spouse, as articulated by the Rockland County Surrogate's Court decision in *In re Lando*.[21] In *Lando*, the Petitioner argued that the right of election could not be asserted by one's attorney-in-fact, as that fiduciary was not identified as one of the fiduciaries authorized to do so under EPTL 5-1.1-A(c)(3). The court disagreed, noting that court authorization is not required for agents appointed by means of a power of attorney and that a "durable general power of attorney grants the attorney-in-fact full authority to act in the place and stead of the principal, which is not the case with court appointed guardians."[22]

In arriving at this conclusion, the *Lando* court recited the relevant portions of General Obligations Law (GOL) § 5-1502G, which is the construction provision for powers of attorney relating to estate transactions. Under GOL § 5-1502G(7), an attorney-in-fact appointed under a properly executed power of attorney[23] is authorized "to execute, to acknowledge, to verify, to seal, to file and to deliver any…election…which the agent may think useful for the accomplishment of any of the purposes enumerated in this section." Moreover, under GOL § 5-1502(G)(10), an agent has the authority "to do any other act or acts, which the principal can do through an agent, with respect to the estate of a decedent…in…which the principal has, or claims to have, an interest." In light of this, the court ruled that an attorney-in-fact may elect on behalf of an incapacitated surviving spouse without court authorization even though the EPTL does not include attorneys-in-fact in the enumerated list of fiduciaries.

The appeal of having a power of attorney in place granting the attorney-in-fact the authority to assert the right of election for the incapacitated surviving spouse is that it removes the necessity for court authorization, thereby expediting the process for asserting that right. This is critical in instances where an incapacitated surviving spouse faces imminent death because once the right is properly asserted, it is preserved and can be pursued by the fiduciary for the post-deceased spouse. Moreover, using a power of attorney allows the principal the freedom to choose his or her agent, which helps ensure that the agent will be acting in the principal's best interests.

Constructive Trusts as Equitable Relief

A fiduciary for a post-deceased spouse may not assert the right of election against a decedent's estate. However, in cases of fraudulent conduct by the executor of the predeceased spouse, such a fiduciary is not without a remedy. The New York State Surrogate's Courts, functioning as courts of both law and equity, have the power to provide relief to parties, as a matter of fairness, when following the strict letter of the law would allow an individual to be rewarded for his or her deceitful conduct. One such equitable remedy is the constructive trust, which is premised upon proof that "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[24]

A constructive trust may be an appropriate remedy in situations where an executor personally benefits by preventing a surviving spouse from exercising his or her right of election. For example, in the Surrogate's Court case of *In re Wurcel*,[25] the nominated executor was also a beneficiary of the estate and stood to lose a portion of his beneficial share if the surviving spouse elected against the estate. The *Wurcel* court held that a nominated executor whose interests conflicted with an unrepresented incompetent post-deceased spouse, and whose actions included a purposeful delay in probating the decedent's will, falls within the class of cases where a constructive trust can be imposed.[26]

The *Wurcel* court did not determine whether fraud had actually occurred, and accordingly, did not opine as to the appropriate measure of damages in cases where a constructive trust is imposed to avoid unfairly depriving the post-deceased spouse of the right of election. The measure of damages for a broken promise expressed in a mutual will is the value of the property promised to be bequeathed by the testator.[27] By analogy, the measure of damages for a nominated executor's fraudulent conduct, which prevents a surviving spouse from exercising his or her right of election, should be the value of the post-deceased spouse's right of election against the decedent's estate.

Conclusion

The elective share statute identifies several fiduciaries who may, when authorized, assert the right of election on behalf of an incapacitated surviving spouse. Alternatively, although not enumerated in the list of fiduciaries in the elective share statute, a duly authorized attorney-in-fact for an incapacitated surviving spouse may assert the right of election on the spouse's behalf and, because this approach obviates the need for court involvement, it allows for more expediency in asserting such right. In any event, it is imperative that the right of election be asserted during the incapacitated spouse's lifetime; otherwise, it will be lost forever.

Endnotes

1. Under EPTL 5-1.1-A(a), the net estate includes the decedent's probate assets, assets passing by intestacy and testamentary substitutes, reduced by the value of these interests passing absolutely to the spouse or renounced by the spouse, by debts, administration expenses and reasonable funeral expenses, except that taxes are disregarded.
2. *See* 15-08-2010 Warren's Heaton on Surrogate's Court Practice 082010–1. Prior marriages by either spouse, if any, must have ended in a valid divorce. Furthermore, the surviving spouse must not have been disqualified to assert the right of election under EPTL 5-1.2.
3. A spouse may, prior to the expiration of the filing requirement, apply for an extension of up to six months per application. If the spouse defaults, the Surrogate may relieve him or her upon a showing of good cause (e.g., investigating assets). In any event, the spouse must exercise the right of election within two years of the decedent's death, unless the surviving spouse is an infant or incompetent in which case it may be filed at any time until the first judicial accounting decree. *See* Turano, McKinney Practice Commentary, EPTL 5-1.1-A (1999).
4. Article 81 of the New York Mental Hygiene Law replaced conservatorship and committee proceedings effective April 1, 1993.
5. *See* N.Y. Surroage's Court Procedure Act 403(2).
6. *See* SCPA 103(40).
7. *See* SCPA 103(25).
8. The request for a designee may be made by a party to the proceeding or by a person interested in the welfare of the incapacitated person.
9. *See In re Bergen*, 149 Misc. 2d 702, 567 N.Y.S.2d 355 (Sur. Ct., Rensselaer Co. 1991) (service may only be dispensed on an incapacitated person when there is a judicial declaration of incapacity, which then allows service on the guardian).
10. *See id* at 706.
11. No. 348091, Dec. No. 50 (Sur Ct., Nassau Co. 2008).
12. 2010 NY Slip Op 33692(U) (Sur. Ct., Nassau Co.).
13. N.Y.L.J, Jan. 18, 2007, p.31, col. 7 (Sur. Ct., N.Y. Co.).
14. 181 Misc. 2d 294 (Sur. Ct., N.Y. Co. 1999).
15. *See* N.Y. Mental Hygiene Law § 81.21(a).
16. *See* MHL § 81.21(a)(9).
17. *In re Oringer*, 8 Misc. 3d 746, 799 N.Y.S.2d 391 (Sup. Ct., N.Y. Co. 2005).
18. The elective share statute makes no distinction between the types of guardian that can, when authorized, assert the right of election on behalf of an incapacitated spouse, so long as the guardian is appointed under Article 81. As such, it can be presumed that a temporary guardian may elect when authorized.
19. MHL § 81.23(a)(1). The authority of a temporary guardian begins upon issuance of the commission to the temporary guardian (MHL § 81.27), which occurs when the temporary guardian has filed his or her designation (MHL § 81.26) and met any necessary bonding requirements (MHL § 81.25). The Order to Show Cause can provide that the Order to Show Cause shall serve as the commission.
20. *Supra* at n12.
21. 11 Misc. 3d 866, 809 N.Y.S.2d 901 (Sur. Ct., Rockland Co. 2006).
22. *Id.* at 867.
23. The power of attorney must grant the agent the authority to act in the subject of estate transactions (or alternatively to each of the powers listed on the power of attorney, which includes estate transactions).
24. *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (1919).
25. 196 Misc. 2d 796, 763 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2003).
26. *Id.*
27. *See* ¶ 13-2.1[6] Establishment of Joint and Mutual Will and Mutual Reciprocal Wills.

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The Trusts and Estates Expert Witnesses—Who Are They?

By Hillary A. Frommer

We expect certain expert witnesses to appear and play pivotal roles in certain types of cases. For example, a valuation expert often takes center stage in a business divorce matter. A physician expert witness is required in a medical malpractice action. In the trusts and estates arena, however, there is not one particular expert witness who must or will always testify. From planning to administration to litigation, trusts and estates matters involve a wide range of issues, which can lead to the utilization of almost any type of expert, such as appraisal experts, physicians, attorneys, scholars, and accountants, to name a few. This article discusses some of the most commonly utilized expert witnesses in trusts and estates litigations.

Psychiatric Experts

Psychiatric experts are frequently utilized (either by giving testimony or submitting affidavits) in proceedings where the testator's capacity is at issue. It is very common for an objectant in a probate proceeding to present expert psychiatric testimony to establish that a testator lacked testamentary capacity at the time a will was executed. Similarly, petitioners in discovery and/or turnover proceedings under Article 21 of the Surrogate's Court Procedure Act (SCPA) often present psychiatric experts to show that a decedent lacked the capacity to make a particular gift, or execute a contract or a deed.

Such expert testimony was critical in *In re Clines*,[1] and *In re Pashad*,[2] both SCPA Article 2103 proceedings. In *In re Clines*, the Appellate Division was persuaded by the expert testimony of the decedent's treating psychiatrist that the decedent was not competent when he purportedly made gifts to the respondent totaling $250,000.[3] Finding that the respondent failed to rebut that evidence, the court held that the special referee should have ordered that the subject assets be returned to the decedent's estate.

The Surrogate's Court in *In re Pashad* found that the expert testimony of the decedent's attending physician established that the decedent "was not competent to understand and appreciate the nature of the transaction that took place at his bedside," in which the decedent executed a deed transferring his home to the respondents.[4] Because the respondents failed to come forward with any expert rebuttal evidence, and relied instead on only the testimony of lay witnesses that the decedent was "alert" and "responsive," the court granted the petitioner's motion for summary judgment and declared the deed at issue "invalid, null and void."[5]

Not all psychiatric experts carry the day, however. Often, the expert opinion comes from professionals who never actually treated the decedent, but rather formed their expert opinions by reviewing medical records. It is well-settled in New York that the courts afford very little, if any, weight to such expert testimony, and the decisions in this regard are legion.[6] One such case is *In re Swain*,[7] a contested probate proceeding in which the Surrogate's Court was reversed because it admitted this type of expert testimony at a jury trial. The decedent's treating physician testified in support of the propounded will that the decedent was lucid and rational each time he saw her. The objectant then presented testimony from an expert psychiatrist that the testator was impaired by a stroke and could not have known the nature and extent of her assets or the natural objects of her bounty. The jury rendered a verdict that the decedent lacked testamentary capacity, and the Surrogate's Court subsequently entered a decree denying the decedent's will to probate. The petitioner appealed, and the Appellate Division reversed. It found the objectant's expert had never treated the decedent, nor consulted with anyone who had treated her, and based his opinion on reviewing the medical records. Thus, the opinion was purely speculative and "entitled to no weight."[8]

Handwriting Experts

Handwriting experts are frequently utilized in probate proceedings where the genuineness of a testator's signature on a will is at issue. For example, in *In re Halpern*,[9] the petitioners produced a handwriting expert to authenticate the signatures of the decedent and supervising attorney on the will offered for probate. In fact, a handwriting expert can be a key witness in contesting a will based on due execution. In *In re Sylvestri*,[10] to refute the testimony of the attesting witnesses, the objectant presented a handwriting expert who compared the signature on the propounded will to signatures that were undisputedly those of the testator, and opined that the signature on the propounded will was not that of the testator. The Court of Appeals upheld the Surrogate's Court jury verdict which denied probate based on that expert's testimony.[11]

A handwriting expert was also a critical witness in *In re Grancaric*,[12] a probate proceeding, where the Appellate Division affirmed the decree declining to admit the will to probate after a jury determined that the decedent's will was not properly executed in accordance with EPTL 3-2.1. At the trial, the proponent established a presumption of due execution by offering the testimony of the attorney who supervised the will execution and the three witnesses who signed the will, who

testified that there were "indications" that the decedent signed the will.[13] The objectant rebutted that presumption by presenting a handwriting expert who opined, based on comparing the propounded will with other original documents known to have been signed by the decedent, that the signature on the will was not the decedent's. The jury was free to credit or disregard the expert's testimony, and apparently found it persuasive, which was not against the weight of the evidence.

Investment Experts

Financial investment experts commonly testify in contested accounting proceedings as to whether a fiduciary complied with the prudent investor rule, which provides that "[a] trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard."[14] The prudent investor standard requires a trustee "to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument."[15] In *In re Rowe*,[16] for example, a bank was appointed the trustee of a charitable lead trust which was funded solely by IBM stock. The respondents objected to the fiduciary's accounting of the trust on several grounds, including that the fiduciary imprudently managed the trust's assets. They presented a seasoned investment manager and CFA (chartered financial analyst) as an expert to testify how the fiduciary's failure to diversify the trust's assets was imprudent. Notably, the same expert testified in *In re Janes*,[17] the frequently cited Court of Appeals case in which the Surrogate's Court had found that the fiduciary had acted imprudently by failing to diversify the estate's high concentration of Kodak stock. In that seminal decision addressing the prudent investor rule, the Court of Appeals affirmed the finding of liability, but reversed the Surrogate's calculation of damages based "lost profits."[18]

An expert testifying as to a fiduciary's prudency need not necessarily be an "investment" expert. Just about anyone can testify as an expert witness so long as he or she satisfies the standard and possesses the "requisite skill, training, education, knowledge or experience from which it can be assumed that the…opinion rendered is reliable."[19] Regardless of his profession, an expert must have the appropriate background and experience necessary to persuade the trier of fact of his position. In *In re Kopec*,[20] an estate accounting proceeding, the objectant put forth expert testimony of a financial planner to support his theory that the executor was liable for losses the estate sustained due to the post-9/11 stock market decline. The objectant relied heavily on his expert's testimony that cash was the proper investment method of a short-term investment, and that the executor breached the Prudent Investor Act by maintaining stocks rather than selling them "immediately" and converting them to cash.[21] The executor's rebuttal expert was an attorney "with considerable experience in representing fiduciaries of estates."[22] That lawyer ultimately proved to be the better choice for an expert witness on the issue. The court found that the objectant's financial expert lacked credibility because "he sought to apply his idea of prudent liquidation time lines for brokers and financial planners to an estate relationship. [The executor's] expert, on the other hand, was addressing prudence solely with respect to estate administration, and as such his testimony is more relevant and due more weight."[23] In fact, the court found the financial planning expert to be a "poor witness overall," and disregarded his testimony.[24]

Foreign Law Experts

Experts in the laws of foreign countries are commonly utilized in various Surrogates' Court proceedings, where the court must apply a foreign law in determining property or distribution rights. That was the situation in *In re Monsen*,[25] a construction proceeding, where the decedent was a New York domiciliary and resident of Norway, and had executed a will which purported to dispose of property located in New York, Norway, and England. The effectiveness of the will to dispose of the New York property was established through an affidavit of an expert in Norwegian law.

Experts in Swiss law were critical in *In re Schneider*,[26] an accounting proceeding, where the decedent was a naturalized American citizen of Swiss descent, a New York domiciliary, and owned real property in Switzerland. The decedent's will purported to dispose of the real property in a manner contrary to Swiss internal law. The New York court was called upon to determine property rights and whether the decedent had the power to dispose of the property in Switzerland under his will.

Conclusion

The foregoing is only a small sampling of the types of experts who are utilized in trusts and estates matters. Litigants have utilized many other types of expert witnesses, including experts who seem out of the ordinary for Surrogate's Court proceedings. Consider the following two cases: *In re Friedman*,[27] a SCPA Article 2103 proceeding in which three experts testified as to the regular method of dealing between artists and art dealers; and *In re Post*,[28] where an expert in the field of nursing testified as to changes in the profession where relief was sought under the *cy pres* doctrine concerning the decedent's will. Indeed, the various issues that can arise in Surrogate's Court proceedings can allow for just about any type of testifying expert witness, so long as the individual's knowledge, skill, and expertise in a particular area will assist the trier of fact.

Endnotes

1. 226 A.D.2d 269, 641 N.Y.S.2d 277 (1st Dep't 1996).
2. 2012 NY Slip Op. 51126(U) (Sur. Ct., Schenectady Co. June 5, 2012).
3. *Clines*, 226 A.D.2d 269.
4. *Pashad*, slip op. at 4.
5. *Id.*
6. *In re Chiurazzi*, 296 A.D.2d 406, 744 N.Y.S.2d 507 (2d Dep't 2002) (affirming the Surrogate Court's decision admitting the will to probate following a non-jury trial, the court noted that the objectants put forth testimony of an expert psychiatrist who had never treated the decedent, but concluded that such testimony was not entitled to weight on the issue of capacity); *In re Tracy*, 221 A.D.2d 643, 634 N.Y.S.2d 198 (2d Dep't 1995); *In re Callahan*, 155 A.D.2d 454, 547 N.Y.S.2d 113 (2d Dep't 1989); *In re Buchanan*, 245 A.D.2d 642, 665 N.Y.S.2d 980 (3d Dep't 1997) (stating that the psychiatric expert was a long-time acquaintance of the testator's but had never treated him); *In re Estate of Bogen*, No. 32844[U], slip op. (Sur. Ct., N.Y. Co. Nov. 14, 2014).
7. 125 A.D.2d 574, 509 N.Y.S.2d 643 (2d Dep't 1986).
8. *Id.* at 576.
9. 76 A.D.3d 429, 906 N.Y.S.2d 253 (1st Dep't 2010).
10. 44 N.Y.2d 260, 405 N.Y.S.2d 424 (1977).
11. *Id.*
12. 68 A.D.3d 1279, 890 N.Y.S.2d 685 (3d Dep't 2009).
13. *Id.* at 1281.
14. N.Y. Estates, Powers & Trusts Law 11-2.3(a).
15. EPTL 11-2.3(b)(3)(C).
16. 274 A.D.2d 87, 712 N.Y.S.2d 662 (3d Dep't 2000).
17. 90 N.Y.2d 41, 659 N.Y.S.2d 165, 681 N.E.2d 332 (1997).
18. *Id.*
19. *Matott v. Ward*, 48 N.Y.2d 455, 459, 423 N.Y.S.2d 645 (1979).
20. 25 Misc. 3d 901, 885 N.Y.S.2d 401 (Sur. Ct., Monroe Co. 2009).
21. *Id.* at 903.
22. *Id.* at 908.
23. *Id.* at 909.
24. *Id.*
25. 204 Misc. 245, 123 N.Y.S.2d 358 (Sur. Ct., N.Y. Co. 1953).
26. 198 Misc. 1017, 96 N.Y.S.2d 652 (Sur. Ct., N.Y. Co. 1950).
27. 64 A.D.2d 70, 407 N.Y.S.2d 999 (2d Dep't 1978).
28. 2 A.D.3d 1091, 769 N.Y.S.2d 332 (3d Dep't 1991).

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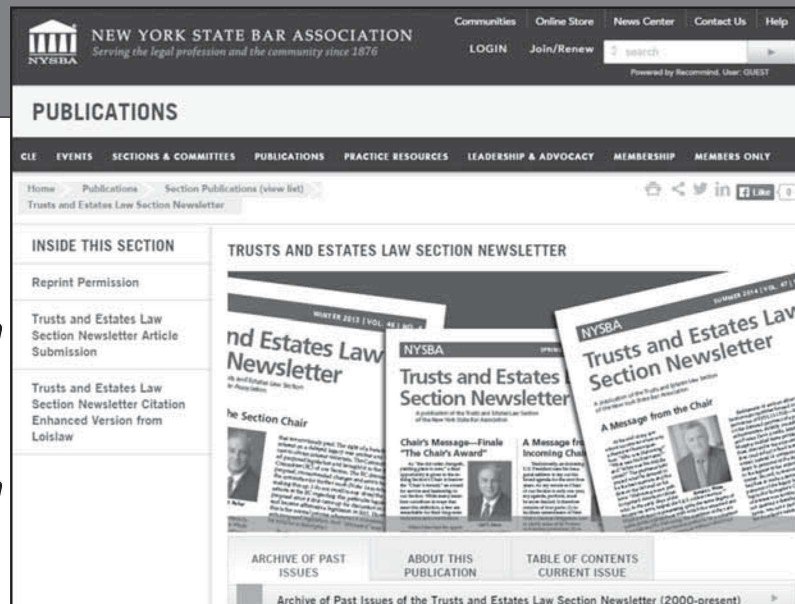

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Are New York Real Property Transfer Taxes for Real?

By Andrew S. Katzenberg

As estate planners, we frequently find ourselves advising clients on wealth transfer strategies involving real property, as it is often the asset over which a client is most willing to relinquish control. Accordingly, real property such as a vacation home or an investment property can become the subject of a gift, utilizing a client's federal estate and gift tax exemption, or a sale to a family trust, intended to transfer the future appreciation on such property and avoid gift and estate tax. When advising a client with respect to transferring real property situated in New York State and/or New York City, it is imperative to consider the attendant transfer tax consequences.

I. New York State and New York City Real Property Transfer Tax

New York State and New York City both impose real property transfer taxes on the conveyance of real property situated in the State and City of New York, respectively. New York State imposes a tax of $2 for every $500 of consideration (*i.e.*, a .4% transfer tax) on the transfer of any type of real property.[1] In addition, New York State imposes a 1% tax on the conveyance of *residential*[2] property if the consideration is $1,000,000 or more.[3] This is commonly referred to as the "mansion tax."

New York City imposes a tax of 1% on transfers of residential property where the consideration is $500,000 or less and 1.425% where the consideration is greater than $500,000.[4] Real property that is not characterized as residential is taxed either at 1.425% or 2.625%, depending on whether the consideration is more than $500,000.[5] If the consideration is more than $500,000, the higher tax rate is applied to the entire conveyance not just the excess amount over $500,000.[6]

Make no mistake that these taxes can have a real economic impact. The average sales price for a residential property in Manhattan is $1,650,000.[7] Therefore, the sale of the average New York City residence would generate the sum of $46,612.50 in combined New York State and New York City transfer taxes. Obviously, this tax is magnified with more expensive residences. For example, the sale of a $10,000,000 New York City residence would generate $282,500 in combined New York State and New York City transfer taxes. These transfer taxes hinder the use of real property, residential or otherwise, in wealth transfer planning, but we can greatly benefit our clients by understanding when these taxes are imposed and how to minimize or avoid them.

II. Avoiding Real Property Transfer Taxes

Both New York State and New York City exempt from transfer taxes transfers of real property made without consideration.[8] Therefore, gifts or bequests of real property are exempt from transfer taxes of this nature.[9] However, clients who have already used part or all of their federal exemption and wish to avoid the federal gift tax may have to resort to strategies such as a sale to a trust in exchange for a promissory note and/or cash, which is a transfer subject to the real property transfer tax. Note that while a sale of real property to a grantor trust avoids gift and capital gains taxes, it is not exempt from real property transfer taxes. One approach to avoid the New York transfer taxes is to turn the real property into intangible property through the use of a wrapper (*e.g.*, a limited liability company (LLC), a limited partnership or a corporation).

A. New York State Rules

The New York State real property transfer tax and mansion tax are imposed on the transfer of an interest in real property or a *controlling interest* in any entity holding an interest in real property.[10] For this purpose, "controlling interest" means a 50% or greater interest in the entity that owns real property.[11] The regulations further provide that a transfer of a controlling interest occurs when a person or group of persons *acting in concert* transfer or acquire a 50% interest in such entity.[12] Persons will be deemed "as acting in concert when the unity with which the sellers or purchasers have *negotiated and will consummate* the transfer of ownership indicates they are acting as a single entity" (emphasis supplied).[13]

Therefore, where there are multiple transfers or acquisitions, such transfers will be aggregated to determine if a controlling interest was transferred.[14] However, separate transfers or acquisitions occurring three years apart will not be combined unless the transfers were so timed as to avoid the real property transfer tax.[15] The regulations provide an example of an impermissible tax avoidance plan: purchasing a 40% interest in an entity owing real property and simultaneously contracting to purchase another 20% interest in such entity three years and one day later.[16] Two important inferences can be drawn from this example regarding the aggregation of transfers more than three years apart. First, the later transfer must be so closely timed to the three-year exception as to imply that the date was not arbitrarily chosen but specifically planned. Second, the purchaser must have bound himself by contract to acquire a controlling interest giving certainty to that fact which triggers the tax.[17]

Placing real property into an LLC, for example, and transferring less than a 50% interest (a "non-controlling interest") will not trigger the New York State real property transfer tax. If additional transfers of non-controlling interests in the same LLC occur, which when aggregated would be equal to or greater than a 50% interest in the entity, the real property transfer tax will not be triggered if (i) the dates of the transfers are not so closely

timed as to imply a tax avoidance plan and (ii) no party is bound to make the additional transfer(s).

B. New York City Rules

The Rules of the City of New York (RCNY) impose a real property transfer tax on any transfer of an interest in real property[18] or a controlling economic interest in real property.[19] New York City has the same definition of "controlling interest" as New York State (*i.e.*, a 50% or more interest in an entity).[20] However, New York City's aggregation rule for multiple transfers is much broader than the State rule. Aggregation is triggered on any "related" transfers.[21] The term "related" is not defined in the RCNY, but there are several examples and illustrations in the regulations which provide guidance.

Transfers made within three years of each other are presumed to be related, but this presumption can be rebutted.[22] Therefore, the contrapositive should also be true - transfers outside of three years are presumed not to be related, but this presumption can also be rebutted.

Also, transfers made *pursuant to a plan* are deemed related.[23] The following illustrations from the RCNY are examples of plans which are deemed related.

> X Corporation owns real property in New York City. A, B and C each own 1/3 of X's outstanding stock. A and B, *acting in concert*, each sell their entire interest in X Corporation to D. B's sale occurs four years after A's sale. The transfers made by A and B are related (*emphasis added*).[24]
>
> A owns 4% of the outstanding stock of X. B, C, D, E, F, G, H and I each own 12% of the outstanding stock of X. J *enters into agreements* with A, B, C, D and E to purchase their interests in X over a five year period. All of the transfers to J are related (*emphasis added*).[25]

Though these illustrations help to clarify what New York City will deem to be related transfers, they also leave much unanswered. Exactly what is a plan? Could something less than a binding contract between parties be characterized as a plan? More importantly, can the same parties not be considered as "acting in concert" or "pursuant to a plan" regardless of the facts at the time of the later transfers?

Similar to New York State law, placing real property into an LLC and transferring less than a 50% interest in such entity will not trigger the real property transfer tax under the RCNY. As for additional transfers of non-controlling interests, the New York City Department of Finance may argue that there is a plan to transfer additional non-controlling interests when the parties to both transfers are the same, and that the transfers are therefore related and subject to aggregation. This argument is overly broad and with little merit.[26] It is neither supported by the rule, which is focused on whether there is a plan in place at the time of the first transaction, not whether the parties are the same, nor any of the illustrations under the RCNY. Therefore, additional transfers of non-controlling interests should not be subject to the transfer tax as long as the facts support that the transactions are not related, meaning there is no agreement or plan in place requiring the later transfer(s). A transferor with the right to transfer his remaining interest to any third-party prior to an additional transfer should meet this requirement. Similar to New York State law, to avoid being subject to the New York City transfers tax, the later transfer(s) *must* occur outside of the three-year window. The longer the time period between the transfers, the stronger the presumption that they are not related pursuant to a plan and the greater likelihood that the New York City Department of Finance will not challenge this presumption.

III. Conclusion

When advising clients on multiple transfers of an interest owning real property located in New York State but outside of New York City, one can take comfort in the New York State three-year safe harbor rule[27] to avoid the transfer tax.

However, regarding an entity owning real property located in New York City, the only certainty is that if multiple transactions fall outside the aggregation rules under the RCNY, then those same transactions will fall outside the scope of aggregation rules under New York State law. Therefore, the analysis should focus on whether the aggregation rules under the RCNY apply to additional transfer(s) of an interest in an entity owning real property.

Unfortunately, unlike New York State law, there is no safe harbor under the RCNY, and there will always be a tax risk associated with making additional transfers. Practitioners can determine the level of that risk based on the facts and circumstances and advise clients to enable them to make informed decisions.

Endnotes

1. N.Y. Tax Law § 1402. *See also* N.Y. Comp. Codes R. & Regs. (N.Y.C.R.R.) tit. 20 Section 575.2 (2014).
2. Residential real property means the following premises that are or may be used in whole or in part as a personal residence at the time of conveyance: a one-, two-, or three-family house; an individual condominium unit; a cooperative apartment unit. N.Y. Tax Law § 1403(a).
3. *Id. See also* 20 N.Y.C.R.R. 575.3. The 1% tax is imposed on the entire conveyance, not just the amount over $1,000,000.
4. N.Y.C. Admin. Code §§ 11-2102a(9)(i) and Rules of the City of New York (RCNY) tit. 19 § 23-03(b)(9). *See also* N.Y.C. Admin. Code §§ 11-2102b(1) and RCNY tit. 19 § 23-03(c)(3) (tax rate applied to transfers of economic interests in residential real property).
5. N.Y.C. Admin Code §§ 11-2102a(9)(ii) and RCNY tit. 19 § 23-03(b)(10). *See also* N.Y.C. Admin. Code §§ 11-2102b(1) and RCNY tit. 19 § 23-03(c)(4) (tax rate applied to transfers of economic interests in real property other than residential real property).
6. 19 RCNY § 23-03(b)(10) and 23-03(c)(4).

7. Citi Habitats, Manhattan Residential Sales Market Report, Fourth Quarter 2014, http://www.citi-habitats.com/media/pdf/Q4_2014_Sales_Manhattan.pdf.
8. N.Y. Tax Law § 1405(b)(4) and RCNY tit. 19 § 23-03(j)(1). *See also* N.Y.C. Admin. Code §§ 11-2101 (only applies to transfers for considerations).
9. N.Y. Tax Law § 1405(b)(4) and RCNY tit. 19 § 23-03(j)(1). New York City also specifically excludes a conveyance of an economic interest in real property as a gift from the transfer tax. RCNY tit. 19 § 23-03(j)(1). Whereas, New York State does not include the conveyance of an interest in an entity with an interest in real property as exempt from real property transfer taxes. TL §§ 1401(e) and 1405(b)(4).
10. N.Y. Tax Law § 1402 (a) and § 1401(e).
11. N.Y. Tax Law § 1401 (b) and 20 N.Y.C.R.R. 575.1(b).
12. 20 N.Y.C.R.R. 575.6(a). It should be noted that the "acting in concert" language in the regulation does not modify the three-year rule and applies only to a group of persons, not the same parties in multiple transactions, making transfers or acquiring a 50% interest in an entity. This is a divergence from the New York City rule, as discussed below.
13. 20 N.Y.C.R.R. 575.6(b).
14. 20 N.Y.C.R.R. 575.6(d).
15. *Id.*
16. *Id.*
17. Even if there is no binding contract but a plan, the application of the "step transaction" doctrine is unlikely since the later transaction would not occur until over three years after the original transaction.
18. N.Y.C. Admin. Code §§ 11-2102a and RCNY tit. 19 § 23-03(a)(1).
19. N.Y.C. Admin. Code §§ 11-2102b(1) and RCNY tit. 19 § 23-03(a)(2)(i).
20. N.Y.C. Admin. Code §§ 11-2101(8) and RCNY tit. 19 § 23-02 - Controlling Interest (1).
21. RCNY tit. 19 § 23-02 - Controlling Interest (1).
22. 19 RCNY § 23-02 - Controlling Interest (2). Where multiple interests in an entity are transferred, the aggregation rule may apply to part, and not all, of the transfers. 19 RCNY § 23-02 - Controlling Interest (2) - Illustration (iv).
23. *Id.* The following is an illustration of transfers not pursuant to a plan: "X Corporation owns real property in New York City worth $3,000,000. A, B and C each own 1/3 of X and are unrelated. In 1987, A loses a lawsuit related to her business and transfers her 1/3 interest in X in satisfaction of a $1,000,000 judgment. In 1989, pursuant to a separation agreement, B transfers his 1/3 interest in X to his spouse. The transfers by A and B are not related." 19 RCNY § 23-02 - Controlling Interest (2) - Illustration (xi).
24. 19 RCNY § 23-02 - Controlling Interest (2) - Illustration (i).
25. 19 RCNY § 23-02 - Controlling Interest (2) - Illustration (viii).
26. The "step transaction doctrine" could be applied; however, all of the transactions contemplated in this article require over three years between them, thereby diluting its application. *See also Matter of GKK 2 Herald LLC*, New York City Tax Appeals Tribunal, Administrative Law Judge Division, TAT(H) 13-25(RP), April 1, 2015 (applying the step transaction to two transactions which occurred on the same day).
27. The three-year rule under New York State law essentially acts as a safe harbor since the exception to it is so limited. *See* 20 N.Y.C.R.R. 575.6(d).

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Using New York Trusts for Asset Protection

By Raymond C. Radigan

The federal estate tax exemption has soared to record heights—increasing to $5,430,000 for individuals dying in 2015. Logically, fewer estates will actually have to pay a federal estate tax as the federal estate tax exemption keeps increasing. This has shifted the focus of estate planning in many cases to implementing strategies that will help 1) minimize state estate taxes; 2) minimize current and future income taxes; and 3) protect assets from future and unexpected creditors.

The purpose of this article is to focus on using New York trusts as a means of protecting assets. The fact is, we live in a litigious society and the divorce rate remains high in the State of New York, especially since the passage of the no-fault divorce provisions that became effective on October 13, 2010. As a result, assets are now more vulnerable to general creditor claims as well as claims for child support and alimony. Certain trusts, however, can be used to potentially protect assets against the claims of the beneficiary's creditors.

I. Self-Settled Revocable and Irrevocable Trusts

In New York, an individual cannot protect assets from creditors by creating either a revocable trust or an irrevocable trust for his or her benefit.

New York law provides that where a creator retains the right to revoke the trust, he or she remains the absolute owner of the property so far as the rights of creditors are concerned.[1] Therefore, a revocable trust is not an effective asset protection device because the creator retains a beneficial interest and has too much power and control over the trust assets. In fact, assets held in a revocable trust will be included in the creator's estate at death because the creator can revoke or amend a revocable trust and will have complete access to the trust assets until death.[2] In other words, if a creator has full access to the trust property, so too will a creditor, thereby allowing a creditor to levy against the trust assets to satisfy a claim.

The same result would occur if the creator established an irrevocable trust in New York for his or her benefit. Suppose, for example, an individual creates an irrevocable trust in New York for his or her benefit and names an "independent" individual or bank as trustee. Further assume the trustee has complete discretion to invade the trust income and principal for the benefit of the creator and the creator's family. In this scenario, the trust assets would not be protected against creditor claims because Estates, Powers & Trusts Law 7-3.1 (EPTL) clearly provides that "[a] disposition in trust for the use of the creator is void against the existing or subsequent creditors of the creator." This principle was first codified in 1787 and has been the firmly established law in New York State ever since.[3]

To illustrate, in *Vanderbilt Credit Corp v. Chase Manhattan Bank*,[4] a woman created an irrevocable trust in New York and named her brother as trustee. The trust provided that the trustee shall pay the net income to the creator and if the income was insufficient, the trustee had complete discretion to invade principal for her benefit. The trust included a spendthrift clause that prevented the creator from transferring her beneficial interest in the trust to a third party.

After the trust was funded, a judgment creditor brought an action seeking to attach the trust assets to satisfy a debt it had with the creator. The court referred to EPTL 7-3.1 and held that neither the income nor principal is exempt from the claims of the judgment creditor. The court noted that when a person creates a trust for his or her own benefit, the creditors can reach the maximum amount which the trustee could have paid to the beneficiary, even though no discretionary principal invasions were previously made. In this case, the trustee had the power to invade the corpus to pay the entire principal to the creator/beneficiary and thus the creditor was allowed to reach the corpus to satisfy the debt. Furthermore, there was no need for the creditor to prove that the transfer to the trust was a fraudulent conveyance because it is against public policy to permit someone "to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it."[5]

Accordingly, in New York, assets held in both a revocable trust and a self-settled irrevocable trust will not be shielded from creditor claims of the creator.[6] It is possible, however, for a third party to create a trust for someone else's benefit so that part or possibly all of the trust assets are beyond the reach of the beneficiary's creditors. These are referred to as "third party trusts."

II. Third Party Trusts

A. Mandatory Income and Principal Distributions

To illustrate, suppose a mother creates an irrevocable trust for the benefit of her daughter. Daughter is to receive all the net income and at age 30, she is entitled to a distribution equal to one-half of the trust corpus and at age 40, she receives the balance outright. Daughter is currently 29 years old.

First, the trust assets should be beyond the reach of the mother's creditors assuming the transfer to the trust is not deemed a fraudulent conveyance.[7] The

more interesting question, however, is: to what extent are the trust assets protected from the daughter's creditors?

1. The Income Interest

As a general rule, in New York State, all trust property held in a trust created by someone other than the beneficiary is beyond the reach of the beneficiary's creditor.[8] Furthermore, an income interest in a trust cannot be transferred or assigned unless the trust agreement specifically allows the income beneficiary to do so.[9] This will generally prevent the income beneficiary from encumbering or pledging the interest to someone else, including a creditor.

Notwithstanding this general prohibition, an income beneficiary is allowed to voluntarily transfer any amount of annual net income in excess of $10,000 to designated relatives, unless the instrument provides otherwise.[10] Furthermore, an income beneficiary may transfer or assign any part or all of the income for the benefit of persons whom the beneficiary is legally obligated to support.[11]

It is possible, however, that part of the income interest could be vulnerable to creditor claims. For example, a judgment creditor can attach up to 10% of the income that is available to the beneficiary as a means of satisfying a money judgment.[12] Therefore, if a creditor is seeking to levy against an income interest held in a trust, it is important to determine whether the beneficiary is receiving either a mandatory or discretionary distribution of income. This will not only determine the amount of the potential attachment, but an income interest is not subject to attachment if the trustee has complete discretion whether or not income distributions will be made.

In *Matter of Sands*,[13] a testamentary trust was created for the benefit of a nephew who owed a debt to a judgment creditor. The trust provided that the trustee was to pay the income directly to the nephew or apply the income for the benefit of the nephew or his descendants. The court had to determine what income was due and owing to the nephew so that the creditor could then attach a percentage of the income as allowed under prior law.[14]

The court held that the nephew was entitled to all of the income, whether it was paid directly to him or applied for his family's benefit. In essence, this meant that the nephew was entitled to a mandatory income distribution so that the judgment creditor was allowed to attach a percentage of the entire income interest in the trust.

New York law further specifies that if there is no valid direction to accumulate income, then the income in excess of the sum necessary for the education and support of the beneficiary is subject to the claims of the beneficiary's creditor.[15] Presumably, the creditor in this scenario would have the burden of proving how much income is not needed to support the beneficiary.

For better protection, consider drafting a trust with a "forfeiture provision" so that a beneficiary would forfeit his or her interest in the trust if the beneficiary's creditor attempts to initiate a proceeding to enforce a money judgment.[16] This would demonstrate the creator's intent that the trust is strictly for the benefit of the beneficiary and that the beneficiary's creditors should not have access to the trust fund.[17]

2. The Principal Interest

Interestingly, unlike the rules governing the assignment of an income interest, a beneficiary's interest in trust principal may be freely assigned or transferred unless such assignment is specifically prohibited in the trust agreement.[18] This is why many estate planners will maximize asset protection by adding a "spendthrift provision" that specifically prevents the beneficiary from assigning either the income or principal interest in the trust. This language is designed to shield the assets from the risk of creditors and protect the beneficiary against his or her own improvidence.

In the above example, the daughter receives an outright distribution of one-half the corpus at age 30 and the balance at age 40. These distributions are not discretionary which means the daughter has a legal right to them when she reaches the indicated ages. This may be problematic if the daughter is not fiscally responsible to receive these distributions or if she is subject to creditor claims because a creditor can reach a principal distribution once it is paid to the beneficiary. Therefore, it may be advisable to add language to the trust that gives the trustee the power to" hold back" the distribution if the beneficiary is threatened by creditor claims or if it is simply in the best interest of the beneficiary to delay or postpone the payment of an outright distribution.[19]

B. Discretionary Trusts

A discretionary trust created by someone other than the beneficiary offers the greatest protection for trust assets in New York. In a discretionary trust, the trustee has complete and absolute discretion to distribute the trust assets to or for the benefit of any beneficiary to the exclusion of others, or not to make a distribution at all. Stated differently, in a discretionary trust, the trustee has discretion regarding the amount to distribute, the timing of the distribution, whether to make any distributions at all, and which beneficiaries, if any, will receive a distribution.[20] A discretionary trust may provide that:

> So much, all, or none of the income and/or principal may be paid to any, all or none of the beneficiaries at

any time or from time to time, as the trustee, in his or her sole, absolute and unfettered discretion may determine.[21]

The goal is to make the beneficiary's interest sufficiently tenuous in a discretionary trust so that the beneficiary cannot demand or enforce a distribution unless the trustee abused his or her discretion.[22] If drafted correctly, a beneficiary of a discretionary trust has no property rights in the trust because the beneficiary has no ability to compel distributions. In turn, the beneficiary's creditor cannot demand payment from a discretionary trust because a creditor has no more right to the trust property than does the beneficiary. A creditor, however, may institute a proceeding to satisfy a money judgment once a beneficiary receives a distribution from a discretionary trust.

Although New York has no statute that defines the extent to which assets are protected in a discretionary trust, there is case law that provides "when there is a discretionary trust, the law is clear that a creditor of a beneficiary who is not the settlor, cannot compel the trustee to pay any part of the income or principal to the beneficiary."[23] In fact, the IRS cannot attach a lien on the delinquent taxpayer's interest in a discretionary trust because the beneficiary does not have a property interest in the trust.[24]

What if the creator wanted a beneficiary to be the sole trustee of a trust whereby the trustee would have complete discretion to make distributions for his or her benefit? This would cause two problems. First, New York law provides that property covered by a presently exercisable general power of appointment would be subject to the creditor claims of the power holder (*i.e.*, the trustee in this example) and it is immaterial whether this power was created by the power holder or some other person.[25] Second, this would ordinarily give the trustee a general power of appointment, as defined under the Internal Revenue Code, because the trustee would have full discretion to make distributions to him or herself.[26] The retention of this power will cause the trust property to be included in the trustee's estate, thus possibly triggering transfer tax liability.

Interestingly, under New York law, a trustee of an irrevocable trust does not have the power to make discretionary distributions to himself or herself unless the power is limited to an ascertainable standard, such as health, education, maintenance or support, or the trust instrument makes express reference to the statute and provides otherwise.[27] The purpose of the statute is to prevent the inadvertent inclusion of the trust property in the trustee's taxable estate. Therefore, if someone creates a third party discretionary trust and names a beneficiary as sole trustee, the statute would require the court to appoint another trustee who would then have the power to make discretionary distributions to the beneficiary.

C. Discretionary Ascertainable Standard Trusts

Consider a third party trust where the trustee would have complete discretion to make distributions limited to an ascertainable standard, such as the beneficiary's health, education, maintenance, and support. One potential problem is that an ascertainable standard may not provide adequate creditor protection if a beneficiary is entitled to certain distributions. This creates a property right subjecting the trust assets to potential creditor claims.

To avoid this, the trustee should not be required or compelled to make a distribution to a particular beneficiary. In fact, it might be safer to name multiple potential beneficiaries allowing the trustee to have complete discretion to make or not make such distributions to any beneficiary, to the exclusion of others. This should protect the trust assets from the beneficiary's creditor claims because the beneficiary no longer has an enforceable right to receive a distribution. In turn, a creditor could not compel the trustee to make a distribution to satisfy a claim.

As previously indicated, it is possible for a trustee of a third party trust to have the power to make distributions for his or her own health, education, maintenance and support. These powers may be broad, but they are not unlimited. The trustee would not have the complete power to independently decide whether to make a distribution for any reason.[28] Instead, these distributions are limited to certain categories—namely health, education, maintenance or support. Without full discretion, the trustee does not have a general power of appointment over the trust property so that the trust assets will not be included in the trustee's taxable estate at death.[29]

The question then becomes, "are the trust assets subject to the creditor claims of the trustee/beneficiary because the beneficiary is also acting as trustee?" Ordinarily, New York law provides that property covered by a power that is exercisable solely for the trustee/beneficiary's support, maintenance, health and education is not subject to claims of the trustee/beneficiary's creditors.[30] An issue could arise, however, if the trust instrument requires a trustee to make a certain distribution but the trustee abuses his or her discretion and refuses to do so. It would appear that the creditor could then seek court relief to force the trustee to make the distribution in order to satisfy the claim.

D. Third Party Supplemental Needs Trusts

A supplemental needs trust is a variation of a discretionary trust which is created for a disabled beneficiary and is designed to supplement, not impair or diminish, governmental benefits, such as Medicaid. A third party supplemental trust is simply a trust created by a family member or someone other than the beneficiary. Bear in mind, however, that the beneficiary's

spouse can create a testamentary supplemental needs trust for the benefit of a disabled spouse, but not a lifetime supplemental needs trust.

New York recognized the third party supplemental needs trust in *In re Escher*[31] where father created a discretionary trust for the benefit of his disabled daughter who ultimately ended up living in a psychiatric center. The trust provided that the principal was only to be invaded for health related emergencies. The State argued that the trustee abused his discretion by not invading the entire corpus to help pay for her cost of care. The Court of Appeals affirmed the Surrogate's decision that the assets were protected against the State's claim because the requested invasion was contrary to the father's intent. Thus, *In re Escher* stands for the proposition that if drafted correctly, the assets in a third party supplemental needs trust cannot be used to reimburse the State for certain governmental programs.

In 1993, *In re Escher* was codified under EPTL 7-1.12. This statute defines a supplemental needs trust as a discretionary trust established for the benefit of a person with a "severe and chronic or persistent" disability. The trust document should prohibit the trustee from expending or distributing trust assets which may impair the beneficiary's right to receive certain governmental benefits and to ensure that the beneficiary's interest is not deemed an available resource for the purposes of Medicaid.

The statute includes sample language that may (but is not required) to be used to qualify as a supplemental needs trust. Although the statutory language need not be followed, a supplemental needs trust should provide evidence of the creator's intent to supplement, not supplant or diminish, governmental benefits or assistance which the beneficiary may already be receiving or may be eligible to receive in the future.

E. Support Trusts

A support trust typically indicates that the trustee "shall" or "may" make distributions for the beneficiary's health, education maintenance and support. In turn, only so much of the trust income or principal will be paid as is needed to support a beneficiary in these categories. Many times, the language that creates a support trust is mandatory so that the trustee "shall" make or is required to make certain distributions. If the direction is mandatory, then the trustee only has discretion as to the timing, or manner or size of the distribution—not whether a distribution should in fact be made.[32]

Such was the case in *Magavern v. United States*,[33] where a mother created a testamentary trust for the benefit of the family group that consisted of her husband, her son and her son's children and grandchildren. The trust provided that the trustee "shall pay… whatever part or all of the net income or principal…to the individual members of said family group."[34] The son was deficient in his federal tax payments and the IRS was seeking to satisfy an outstanding tax assessment by levying the son's interest in his mother's testamentary trust.

The Surrogate initially held that based on the terms of the trust, the trustee has discretion to withhold distributions and as a consequence, the son had no property rights in the trust and the tax levy was denied. Meanwhile, the trustee commenced an action in Federal District Court seeking to enjoin the enforcement of the levy.

The District Court held that it was not bound by the Surrogate's decision and determined that the mandatory language in the trust required the trustee to pay at least some income to each beneficiary, including the son. The U.S. Court of Appeals affirmed the District Court's decision.

The U.S. Court of Appeals held that the trustee was bound to distribute some income to each of the beneficiaries for their "comfortable support, maintenance and or education."[35] In fact, the beneficiary had a property right subject to attachment because under New York law, a beneficiary could enforce this distribution right of the trust if the trustee refused to make any distributions.[36] Therefore, the taxpayer had an identifiable property interest that was subject to the federal tax lien.[37] The court also concluded that the IRS had the right to reach the trust assets because the payment of taxes is to be included within the definition of "support."

F. Alimony and Child Support Claims

Can a trust be drafted so that the trust assets are beyond the reach of the beneficiary's alimony or child support claims?

Although property held in a third party trust is generally beyond the reach of the beneficiary's creditors, New York law specifically provides that it shall not impair any rights an individual has under a qualified domestic relations order or under a court order for the payment of "support, alimony or maintenance."[38]

This issue was raised in *Matter of Knauth*,[39] where mom created a spendthrift trust and the son was to receive the entire income interest in the trust. The son voluntarily assigned a portion of his income interest to his ex-wife, even though the instrument stated that the trust property was "free and clear from the control of (his) debts." The funds were used to support his ex-wife and children. The Court of Appeals held that such an assignment was valid and noted that other courts have gone so far as to uphold a "wife's right to an *involuntary* transfer"[40] of a husband's future income interest in a spendthrift trust when the funds are used for spousal support.[41]

Other cases have forced a beneficiary to involuntarily transfer an interest in a trust to help pay child support. In *Matter of Chusid*,[42] a father created a spendthrift trust for the benefit of his son. The trustee had complete discretion to distribute the income to his son and his children. The son also was given the absolute cumulative right to withdraw 5% of the principal each year, commencing when he reached age 35. At the time of the court proceeding, the son was 42 years old and therefore entitled to 35% of the trust principal (5% x 7 years). The son would receive this distribution once the trust is funded and the assets are liquidated.

The son's estranged wife brought a proceeding requesting the court to direct the trustees to pay her a portion of the income and the vested principal for the support of the three infant children. The court agreed and ordered the trustee to pay two-thirds of the income and principal to the spouse for child support whenever these payments are made. Although the unvested principal was not subject to the attachment, the court noted that "[p]ublic policy has recognized the right of a wife and dependent children to reach the income and on occasion the principal of a spendthrift trust."[43] Arguably, the unvested principal in a trust could be subject to alimony or support claims because there is nothing in the statute that exclusively limits the recovery to trust income or vested principal.

A trust is frequently created to preserve wealth within the family lineage. One option is for a parent to create a trust providing the trustee with complete discretion to make distributions to the children and their descendants. The trust might state, however, that the property is not subject to alimony claims. Here, the funds are available for the benefit of the family, including satisfying child support claims. But are the proceeds beyond the reach of alimony claims?

On one hand, an argument can be made that a court should adhere to the trust language exempting the trust property from alimony claims because a creator of a trust should have the right to dispose of the trust property as he or she sees fit, including not benefiting the descendants at all. In fact, in this example, the trust funds can be used for child support as a means of protecting the dependent children. Interestingly, the court in *Matter of Chusid* noted that the public policy is stronger protecting the rights of dependent children (particularly where they may become a public charge) when compared to protecting spousal rights.[44] Furthermore, if one of the children is delinquent in paying alimony, that would be the beneficiary's obligation—not that of the trust creator. Finally, each spouse voluntarily enters a relationship with the possible understanding that the recovery of alimony claims may be limited against assets held in a spendthrift trust. Certainly this logic would not apply to minor children who are born into the family and have no choice in the matter.

On the other hand, although the general rule under New York law is that assets held in a third party trust are protected from the claims of the beneficiary's creditors, the law shall not impair the rights an individual has under a court order for the payment of alimony. Therefore, given the wording of the statute, there is certainly no guarantee that a court will honor this language or even limit the recovery for alimony, but at least it clarifies the creator's intent.[45]

III. Conclusion

A self-settled revocable or irrevocable trust offers no creditor protection for the creator. A trust created by someone for the benefit of another that requires mandatory income or principal distributions offers a great deal of protection against creditor claims, but up to 10% of the income and income not needed for the beneficiary's support could be vulnerable. The third party discretionary trust offers the greatest protection of trust assets in New York, as does a third party trust that gives the trustee the complete discretion to make distributions for the beneficiary's health, education, maintenance and support. Additionally, if drafted correctly, the assets in a third party supplemental needs trust will not be deemed available resources for Medicaid purposes. A "support trust," however, could be vulnerable to creditor claims, especially if distributions are required to be made under certain circumstances. Finally, at the very least, a beneficiary's interest in income and vested principal may be reachable to satisfy alimony and child support claims.

Endnotes

1. N.Y. Estates, Powers & Trusts Law 10-10.6.
2. *See* I.R.C. §§ 2036, 2038 (2006).
3. *See* Turano, McKinney Practice Commentary, EPTL 7-3.1 (2002).
4. 100 A.D.2d 544, 473 N.Y.S.2d 242 (2d Dep't 1984).
5. *Id.* at 546.
6. There are currently 15 states that allow for the creation of the self-settled asset protection trust. If drafted correctly, the trust assets will be beyond the reach of most of the beneficiary's creditors, even though the beneficiary created the trust for his or her own benefit. Further discussion of these trusts is beyond the scope of this article.
7. *See* N.Y. Debtor and Credit Law art. 10.
8. N.Y. Civil Practice Law & Rules § 5205(c) (CPLR).
9. EPTL 7-1.5(a).
10. EPTL 7-1.5(b).
11. EPTL 7-1.5(d).
12. CPLR 5205(d).
13. 270 N.Y. 281 (1936).
14. N.Y. Civil Practice Act 684.
15. EPTL 7-3.4. *See also In re Vogel*, 16 B.R. 670 (Bankr. S.D. Fl. 1982).

16. Daniel S. Rubin, *Irrevocable Trusts Under Attack: The Domestic Relations Angle*, A.B.A., at (p. 6) (April 2009).
17. *Id.*
18. *See In re Vought*, 25 N.Y.2d 163, 303 N.Y.S.2d 61 (1969).
19. *See* Radigan, *Wealth Preservation for Future Generations: Utilizing Lifetime Trusts*, N.Y.L.J., July 9, 2010.
20. Robert S. Barnett and Rebecca K. Richards, *Assets Protection Trusts*, NYSSCPA Nassau County Newsletter, Jan. 2013, p. 10, http://www.nysscpa.org/chapters/nassau/Newsletter_Jan13.pdf.
21. *Id.* at 10.
22. Rubin, *supra* note 16.
23. *Vanderbilt Credit Corp v. Chase Manhattan Bank*, 100 A.D.2d 544, 546, 473 N.Y.S.2d 242 (2d Dep't 1984); *See Hamilton v. Drogo*, 241 N.Y. 401 (1926).
24. Mark Merric, Michael J. Bland and Mark Monasky, *Beware of Federal Super Creditors*, Trusts and Estates, July 2010.
25. EPTL 10-7.2.
26. I.R.C. § 2041 (2006).
27. EPTL 10-10.1
28. Anthony F. Vitello and Daniel B. Kessler, *The Fully Discretionary Ascertainable Standard*, Trust and Estates, Mar. 2010.
29. I.R.C. § 2041(b)(1)(A).
30. EPTL 10-7.2.
31. 94 Misc. 2d 952 (Sur. Ct., Bronx Co. 1978), *aff'd* 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1st Dep't 1980), *aff'd* 52 N.Y.2d 1006, 438 N.Y.S.2d 293 (1981).
32. *See* Dennis M. Sandoval, *Drafting Trusts for Maximum Asset Protection from Creditors*, NAELA Quarterly, Fall 2004.
33. 550 F.2d 797 (2d Cir. 2007), *cert. denied*, 434 U.S. 826 (1977).
34. *Id.* at 801.
35. *Id.* at 803.
36. *Id.*; *see also U.S. v. Taylor*, 254 F. Supp. 752 (N.D. Cal. 1986).
37. *See* TAM 0017665.
38. CPLR 5205(c)(4).
39. 12 N.Y.2d 259, 240 N.Y.S.2d 1 (1963).
40. *Id.* at 264 (emphasis added).
41. *Id.* at 264.
42. 60 Misc. 2d 462, 305 N.Y.S.2d 289 (Sur. Ct., Kings Co. 1969).
43. *Id.* at 464.
44. *Id.* at 465.
45. *See* Daniel S. Rubin, *When Your Child's Marriage Goes Bad, So Might Your Child's Trust: Spousal and Child Support Exceptions to Spendthrift Trust Protections*, Asset Protection Journal, June 2002.

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Medicaid Planning Under Power of Attorney: Is it in the Best Interest of the Principal?

By Lydia H. Beebe

With the baby boomer generation aging and the need for long-term care increasing, the question arises: how does Medicaid planning fit within an agent's duty under a power of attorney to act in the best interest of the principal?

The New York General Obligations Law requires an agent to act in the principal's "best interest."[1] In *In re Ferrara*, the New York Court of Appeals expanded this duty and made it clear that the standard included any gift giving, *i.e.*, that if an agent makes gifts on behalf of the principal, this must also be in the principal's "best interest."[2] The subsequent 2009 revisions to the power of attorney law addressed abuse and misuse of the power of attorney, and additionally reinforced the "best interest" principal by introducing the statutory gifts rider, which now must be executed if a principal wishes his or her agent to have the authority to make gifts of his or her property.[3]

Any gifting under a valid statutory gifts rider is assumed to be fulfilled in the principal's "best interest." There is no question that the "best interest" standard also includes paying a principal's bills, managing his or her property, handling banking transactions, and so on, assuming the principal has given the agent full authority to conduct these transactions. But how does the "best interest" standard comport with an agent undertaking Medicaid planning for a principal, which would effectively impoverish the principal in order to qualify them for public benefits?

Long-term skilled nursing care, which will only become more necessary as this population continues to age, costs tens of thousands of dollars a month. This is not something that the average middle-class American can afford for very long, if at all. As a result, Medicaid planning has become an important aspect of many people's estate plans. The use of irrevocable trusts and gifting to protect and spend down assets are common, and if done correctly, are legally recognized ways to qualify someone for Medicaid. As stated by the Court of Appeals in *In re Shah*

> the complexities [of the law]…should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else for any reason or for no reason […]no agency of government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive but absolutely essential, medical treatment.[4]

It is clear that planning through the use of irrevocable trusts or gifting is an accepted form of preserving one's assets and qualifying for Medicaid. But many questions remain as to how Medicaid planning is viewed in regards to the "best interest" standard. What are the implications if an agent undertakes Medicaid planning for a principal under a valid power of attorney? May an agent gift away a principal's assets in order to qualify them for Medicaid? Is impoverishing a principal to qualify for government benefits in the principal's "best interest?" Should an incapacitated person who has a valid power of attorney and statutory gifts rider with full gifting authority not be afforded the ability to preserve their assets in the same way as someone who has capacity? As stated by the Queens County Supreme Court, a court should not "penalize an incapacitated person for the very incapacity [the] Court is charged with protecting."[5] However, this question has not yet been addressed directly by our courts or by our legislature.

Many attorneys and laypeople alike would surely argue that Medicaid planning is in the principal's "best interest." But perhaps it is improper to assume that everyone would want their agent to qualify them for Medicaid by spending down or preserving their assets. As the Ulster County Supreme Court recognized, "many completely competent people believe they should pay their own medical bills, if able, and not call on the taxpayers to do so."[6] It is a compelling argument. A "best interest" standard, while most of the time is very obvious, can also be very subjective. Moreover, the current statutory power of attorney does not include Medicaid planning as a specifically enumerated power that may be undertaken by an agent.

Until the New York Courts or Legislature clarify that Medicaid planning is, in fact, either explicitly included in the powers granted under a power of attorney, or included in the definition of acting in a principal's "best interest," it is important to have a discussion about Medicaid planning with your clients. If a client wishes his or her agent to have the ability to undertake Medicaid planning on his or her behalf, it would be prudent to specifically include Medicaid planning as a modification to the power of attorney, to explicitly delineate the principal's wishes and ensure that his or her interests are protected.

Endnotes

1. N.Y. General Obligations Law § 5-1505(2)(a)(1).
2. *In re Ferrara*, 7 N.Y.3d 244, 819 N.Y.S.2d 215 (2006).
3. GOL § 5-1514(1).
4. *In re Shah*, 95 N.Y.2d 148, 711 N.Y.S.2d, 824 (2000).
5. *In re Miller*, N.Y.L.J., July 18, 2008, p. 28, col. 1 (Sup. Ct., Queens Co.).
6. *Appointment of a Guardian, Jean Rose*, N.Y.L.J., Oct. 22, 2013, p. 35 (Sup. Ct., Ulster Co.).

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Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

ATTORNEY AND CLIENT

Delay in Moving to Disqualify Attorney Justifies Denial of Motion

Decedent's mother and daughter have been engaged in complex will litigation involving the disposition of certain real property located within the borders of the Tonawanda Seneca Nation Territory to his daughter and his brother, real estate which the mother claims is hers under tribal law. Decedent died in August 2011, the will was offered for probate in September 2011, and litigation over the will began in earnest in December 2011. In January 2013, mother moved to disqualify daughter's attorney, who had been acting for daughter since November 2011, on the grounds of conflict of interest, because the attorney had represented mother and decedent in an action relating to the ownership of the real property at issue. The Surrogate denied the motion, and on appeal the Appellate Division for the Fourth Department affirmed.

The conflict was properly established: mother showed that she had an attorney-client relationship with the daughter's attorney, the issues in the prior and the current litigation are substantially related, and her interests are adverse to her daughter's. Mother, however, knew of the conflict since late 2011, and actively participated in the litigation for more than a year while knowing the identity of daughter's attorney and the potential conflict of interest. Given the delay in making the motion and the hardship that would have been inflicted on daughter and the estate should she have to find new representation in the midst of complex litigation, the court found that the motion was made as "an offensive tactic" to secure "tactical advantage," and should be denied on the basis that the conflict has been waived. *In re Peters*, 124 A.D.3d 1266, 1 N.Y.S.3d 604 (4th Dep't 2015).

LIFE ESTATES

Life Tenant's Intentional Failure to Pay Property Taxes and Maintain Hazard Insurance Constituted Waste and Justified Extinguishing Life Estate

Life tenant refused to pay the property taxes on the real estate and the premiums on hazard insurance on the property. The taxes and premiums were then paid by the remainder beneficiary who sought to recover the payments from the life tenant on the basis of unjust enrichment, and also sought to extinguish the life estate. The Supreme Court denied the remainder beneficiary's motion for summary judgment, and on appeal, the Appellate Division for the Second Department reversed.

William P. LaPiana

The court held that the remainder beneficiary had demonstrated a *prima facie* case for the recovery of damages, having shown the life tenant's intentional failure to pay the taxes and insurance premiums, a refusal amounting to waste. The life tenant was unjustly enriched by the remainder beneficiary's payment of these expenses, and in these circumstances, equity warrants ending the life estate. *Mani Omni Realty Corp. v. Matus*, 124 A.D.3d 604, 1 N.Y.S.3d 319 (2d Dep't 2015).

MARRIAGE

Real Estate in Name of Husband and Wife Is not Probate Property Even If Second Marriage Not Valid

Decedent, who died intestate, was survived by her spouse and her daughter by a previous marriage. Thirty years before her death, decedent and her spouse took title to residential real property as tenants by the entirety. After her mother's death, daughter instituted an action for partition of the real property on the grounds that her mother's marriage was void because her marriage to daughter's birth father had never been dissolved. The Supreme Court granted summary judgment to surviving spouse, and the Appellate Division for the Second Department affirmed.

A ceremonial marriage is presumed valid, and where two such marriages are at issue, the second is presumed valid absent strong evidence to the contrary. Daughter was not able to rebut this presumption of validity and therefore surviving spouse was entitled to judgment as a matter of law. The court noted that even if the second marriage were invalid, the surviving spouse would still be entitled to the property. The property was conveyed to surviving spouse and decedent, "his wife." Under EPTL 6-2.2(d), even if the parties were not married, the conveyance created a joint

tenancy with right of survivorship. *Joseph v. Dieudonne*, 124 A.D.3d 601, 1 N.Y.S.3d 250 (2d Dep't 2015).

WILLS

Transfer to Limited Partnership of Real Property Specifically Devised in Will Results in Ademption

Testator's will specifically devised three parcels of real property to his daughter who resided on one of the parcels. Three years after executing the will, testator transferred the three parcels to a family limited partnership in which he held a 99% limited partnership interest and his son held a 1% interest and was general partner. The son was also executor of testator's will. After testator's death, the will was admitted to probate and daughter began a proceeding under SCPA 2012 seeking, among other relief, an order directing the executor to transfer the real property transferred to her. The executor argued that the property was no longer part of the probate estate because it had been transferred to the limited partnership. The Surrogate held that the property was part of the probate estate and therefore must pass to daughter under the will. The executor appealed. The Appellate Division for the Third Department reversed, holding that the disposition in the will had adeemed. Under New York law, the intent of testator in transferring the real property out of the probate estate is irrelevant, and under Partnership Law § 121-701, a partner in a limited partnership has no interest in specific partnership property. *In re Braunstein*, 125 A.D.3d 1267, 4 N.Y.S.3d 663 (3d Dep't 2015).

Gift to Nieces and Nephews Per Capita on Death of Income Beneficiary Without Issue Is Class Gift Requiring Survival to Vesting in Possession

Decedent's will divided his residuary estate that included a trust for his surviving spouse and their daughter, Ruth, of which ¾ of the income was to be paid to the spouse and ¼ to daughter, with all of the income payable to the survivor. On the death of the survivor, the trust property is to be distributed to Ruth's descendants "*per stirpes* and not *per capita*," and if Ruth dies without descendants, the trust property is to be distributed "among my nieces and nephews of my own blood, *per capita.*" Ruth survived her mother by 29 years, but Ruth died without issue. The trustee filed a petition seeking construction of the language creating the remainder which it believes requires distribution of the trust property to the estates of the 16 nieces and nephews who were alive at decedent's death. Fifteen of those nieces and nephews predeceased Ruth and the estate of the sixteenth, Agnes, claims the entire trust property on the theory that the language requires the nieces and nephews to survive to the termination of the trust.

Surrogate Scarpino first noted that because there is no ambiguity in the language creating the remainder, extrinsic evidence is therefore inadmissible, and the matter must be resolved solely by reference to the language of the will. Because general bequests to the testator's siblings were conditioned on their surviving him, they would not benefit their children if they predeceased the testator. Therefore, the testator intended to benefit his nieces and nephews only if Ruth died without issue. In addition, this is a class gift rather than a gift *nominatum*; the gift is made to those members of the class alive at a future time; and the gift is made *per capita*, which implies survivorship of the last income beneficiary. Finally, the language of the will is analogous to the "divide and pay over rule," which, while disfavored, has not been abandoned by the courts and applies when a gift of money to a class of persons is to be divided and paid at a future time and requires that the recipients be alive at the time of distribution. Therefore, the trust property is distributed to the estate of Agnes, the only niece or nephew who survived Ruth. *In re Rice*, 47 Misc. 3d 481, 2 N.Y.S.3d 862 (Sur. Ct., Westchester Co. 2014).

Rule Against Perpetuities Violated with Respect to Trusts for Life Beneficiaries Born After Testator's Death; Age Contingency Reduced

Decedent's will created two trusts, one for each of his children, Jane and Arthur, both of whom survived him. On the death of Jane the trust property is to be held in further trusts, one for each of her children (all of whom were living at decedent's death), who are to receive all the net income and the principal in stages from the age of 50 to the age of 65. Should a child of Jane die before her leaving issue who do not survive or die before complete distribution of his or her trust, the trust is to be held in further trust for the child's issue, the testator's great-grandchildren, with the same provisions as the trust for their parent—net income to the beneficiary and a staged distribution of trust principal. There is, however, no provision for the distribution of a grandchild's trust should the grandchild die without issue. The trust for Arthur is divided on his death, 1/3 to a trust for his widow and 2/3 to Jane's living issue on the same terms as the trusts created for them from their mother's trust, but without explicit provision for disposition of the property of any trust created for a grandchild of the decedent who dies before age 65.

In 2011, Arthur died without issue, survived by his wife. In 2012, Jane's daughter Margaret died before reaching age 65, survived by her husband and three children, one of whom, Deidre, was born after decedent's death.

The corporate trustee now seeks permission to resign, approval of its accounting, and a construction of the language of the will to determine the disposition of the trust for Margaret derived from her uncle's trust, whether the trusts for the great-grandchildren violate the Rule Against Perpetuities, whether the age contin-

gencies applicable to the trusts for great-grandchildren are based on their own ages or the ages of their parents, and the disposition of the property of a trust for a grandchild who dies before Jane without surviving issue.

Surrogate McCarty held that the overall scheme of the will requires that the trusts for grandchildren derived from Arthur's trust should be subject to the same provisions as those derived from Jane's trust, and therefore, the trust for Margaret derived from Arthur's trust is divided into trusts for her children who each receive the income of his or her trust with staged distribution of principal.

Second, the trust for any grandchild of Jane born after decedent's death violates the rule against the undue suspension of the power of alienation (EPTL 9-1.1(a)). The will does not make the interest of any trust beneficiary alienable and therefore the power of alienation is suspended until a beneficiary reaches age 65, which, in the case of a beneficiary born after the decedent's death, could occur long after 21 years after the death of a life in being at the decedent's death in 1991. However, EPTL 9-1.2 directs the reduction of any age contingency in excess of 21 years to 21 years if doing so will prevent a perpetuities violation. The provision is applied to individual members of a class, and therefore, the trust for Deidre derived from her mother's trust derived in turn from Arthur's trust is to be distributed to her now because she has already reached 21. The reduction in the age contingency applies only to a trust for a grandchild of Jane born after decedent's death. The age contingencies in the trusts for the decedent's great-grandchildren are based on their own ages and, finally, because all of the interested parties are before the court, the court agrees to answer the question of what happens to the trust for a grandchild of the decedent who dies without issue even though that event has not occurred. Given the overall scheme evidenced by the will, the court adopts the trustee's suggestion and adds language to the will to give the share of trust property of any of Jane's issue who predecease her without surviving issue of their own, to Jane's issue *per stirpes*, subject to the trusts created by the other provisions of the will. *In re Dorie*, 47 Misc. 3d 825, 2 N.Y.S.3d 757 (Sur. Ct., Nassau Co. 2014).

Failure to Establish Due Execution of Will Justified Denial of Probate

The Appellate Division sustained Surrogate Guy's decision to deny probate to a purported will because there was no competent evidence that the document expressed the decedent's intention.

The will was drafted by an attorney who never met the decedent but who worked from a document written by decedent's spouse, proponent of the purported will, which she maintained recorded the decedent's wishes. The document, however, could not be found after the decedent's death. In addition, on oral argument of the appeal, the lawyer maintained that although his secretary typed the will, he had never reviewed or approved it. The witnesses to the execution, neither of whom are attorneys, testified that the will was read to the decedent who then signed it, but one of the witnesses admitted that the decedent did not affirmatively state that the will "was his own." Because the lawyer never met with the decedent, the fact that no one from the lawyer's office was present at the execution, the inability to produce the notes from which the will was supposed to have been written, and the uncertainty surrounding the execution ceremony, the court "declined to disturb" the Surrogate's decision to deny probate. *In re Walker*, 124 A.D.3d 970, 2 N.Y.S.3d 628 (3d Dep't 2015).

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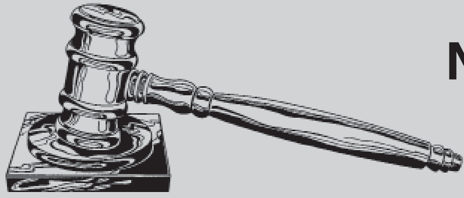

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Due Execution

In *In re Yen*, the Third Department affirmed an Order of the Surrogate's Court, Tompkins County (Cassidy, S.), which granted summary judgment to the objectant denying probate to the propounded instrument on the issue of due execution.

Following the decedent's death, her granddaughter petitioned for probate of her will, which bequeathed to her the decedent's entire estate, and named her the executor. Objections to probate were filed by the decedent's son (the petitioner's father), alleging, *inter alia,* lack of due execution. Subsequent to the examination of the attesting witnesses, the objectant moved for summary judgment. The Surrogate's Court granted the motion, and petitioner appealed.

The Appellate Division opined that the statutory requirements for due execution require that a testator sign his will in the presence of, or acknowledge his signature to, at least two attesting witnesses, as well as declare to each witness that the instrument is his will. Moreover, while an attestation clause generally creates a presumption of due execution, the Court noted that it will not suffice to satisfy the petitioner's burden of proving due execution by a preponderance of the evidence if affirmative proof reveals that the required elements of due execution are otherwise lacking.

Considering the record in this context, the Court observed that the subject will was signed while the decedent was residing in an assisted living facility. The signatures of three attesting witnesses appeared on the instrument, two belonging to employees of the facility, and the third belonging to a resident there. According to the testimony of one of the employee-witnesses, the decedent approached him in a hallway and asked him to sign a document that she stated was her will. This witness further recalled that at the time he affixed his signature to the instrument, it was folded in such a way that the only page that he saw was the page that he signed. He testified that he signed the document while standing in the hallway, did not look at any other part of the document, and did not know whether the decedent had signed it before he did. Based on this testimony, and more specifically, the fact that the decedent neither showed her signature to the witness, nor signed in the presence of the witness, the Court held that the signature of this witness failed to satisfy the statutory criteria for due execution.

The second witness, who resided in the nursing facility, also testified that she met the decedent in the hallway, and that the decedent had asked her to sign a paper. She stated that she did not know that the instrument was the decedent's will. This witness did not recall seeing the decedent's signature on the document, or hearing the decedent state that she signed it. Instead, she testified that the only page she saw when she affixed her signature to the document was the page for the witnesses signatures. Accordingly, in view of the fact that the decedent did not tell the second witness that the instrument was her will, and the witness did not see the decedent's signature, the Court held that the signature of the second witness also failed to meet the requirement for due execution.

The Court found that petitioner's proof in opposition to the motion for summary judgment consisted solely of affidavits from individuals who were not present when the will was signed, which addressed issues unrelated to the issue of due execution, such as the quality of the decedent's relationship with the objectant, and her intent to make a new will. The Court held that this evidence failed to raise an issue of fact as to whether the propounded instrument was duly executed, and failed to reveal that there was any evidence available that would or could demonstrate due execution. Thus, the Court determined that summary judgment had been properly granted in objectant's favor.

In re Yen, 2015 N.Y. Slip. Op. 03228 (3d Dep't 2015).

Right of Election

In *In re Estate of Mason,* the Surrogate's Court, Kings County, was confronted with a proceeding instituted by the decedent's surviving spouse to determine the validity of her exercise of her right of election against his estate. The executor moved for summary judgment dismissing the petition on the grounds that the spouse had waived her right of election pursuant to a post-nuptial agreement with the decedent, and for an award of sanctions, costs and fees pursuant to 22 NYCRR § 130-1(c).

The decedent died on March 7, 2011, survived by his spouse, the petitioner, and two adult daughters. His will was admitted to probate in January 2012, and two years later, the subject proceeding was instituted. The record revealed that the decedent and the petitioner were married on July 21, 2005, and in June 2006, they entered into a post-nuptial agreement. Each of the parties signed the

document before a notary public, and both signatures were accompanied by a written acknowledgment by each notary. Both parties were represented by separate counsel.

The court concluded, upon the record presented, that the executor had met her burden of proving that, as a matter of law, the agreement was in writing, subscribed by the parties, and properly acknowledged in compliance with the statutory requirements of EPTL 5-1.1-A(e)(2). Nevertheless, the petitioner maintained that the agreement was defective because the language referring to the waiver of the elective share was ambiguous, the agreement was not "certified," the decedent did not initial the exhibit page containing the list of the petitioner's assets, and the list of the parties' assets appeared after the signature page, instead of before the signature page.

The court found, despite petitioner's characterization, that the agreement clearly manifested the unambiguous purpose and intent of the parties to mutually waive their right to marital property and their spousal right of election. Further, the court opined that the agreement was not legally defective because the word "certification" did not appear in the acknowledgment by the notaries. Indeed, the court noted that the subject acknowledgment contained the required elements endorsed by the Court of Appeals, to wit, (1) that the signor made an oral declaration to the notary public that he or she in fact signed the document; and (2) that the notary or other official either actually knew the identity of the signor or secured satisfactory evidence of identity ensuring that the signor was the person described in the document. Accordingly, the court granted summary judgment in the executor's favor, and dismissed the petition.

With respect to the executor's request for sanctions, the court observed that it had the discretion to award costs or sanctions against a party or an attorney who engages in frivolous conduct. Pursuant to the provisions of 22 N.Y.C.R.R. 130-1(c)(1), conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." Considered in this regard is whether the conduct at issue was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel. Notably, to this extent, the executor maintained that although she had informed petitioner's counsel that his claims regarding the post-nuptial agreement were incorrect and misinformed, he nevertheless had instituted the subject proceeding. The executor further maintained that the petitioner's position in the proceeding was baseless. The court agreed, finding the petitioner's arguments to be wholly without merit or basis in law. Accordingly, under the circumstances, the court awarded attorney's fees to the executor in the sum of $500.

In re Mason, N.Y.L.J., Mar. 9, 2015, p. 26, col. 6 (Sur. Ct., Kings Co.).

Statute of Limitations

In *In re Thomas,* the Appellate Division, Fourth Department, was confronted, *inter alia,* with an appeal from an order of the Surrogate's Court, Monroe County, dismissing a petition seeking the imposition of a constructive trust on certain real properties and stock that petitioners claimed were assets of the decedents' estates.

The record revealed that the decedents, husband and wife, died testate, survived by four children, each of whom were named beneficiaries of their residuary estates. Shortly after the decedents' deaths, the petitioners, two of the decedents' children, instituted a proceeding against their sibling, who was the executor and trustee under both decedents' wills, challenging numerous real estate transactions between respondent and the decedents, as well as respondent's failure to identify, as assets of the decedents' estates, the shares of stock in a company that had been founded by their father, and which respondent claimed had been transferred to him.

More specifically, according to the petitioners, the respondent exploited his close relationship with the decedents by inducing them to transfer the realty to him, with the promise that he would either pay for or reconvey the parcels to the decedents or his siblings. The petitioners alleged that respondent failed to do either. Moreover, petitioners alleged that respondent failed to produce any records reflecting the transfer of the stock from their father or any records reflecting respondent's payment for the stock.

Petitioners sought, *inter alia,* the imposition of a constructive trust related to the real properties and stock in issue, and the respondent moved to dismiss the proceeding on the grounds that the petition failed to state a cause of action and was time-barred.

In concluding that the petition stated a cause of action, the Appellate Division opined that in order to assert a claim for constructive trust, a petitioner must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise and unjust enrichment. Further, the Court noted that inasmuch as a constructive trust is an equitable remedy, the elements thereof are not rigidly applied, and have been invoked under circumstances where the promise, is not express, but may be implied based on the relationship of the parties and the nature of the transaction between them.

Accordingly, the Court held that the Surrogate erred in dismissing the petition on this ground. Significantly, to this extent, the Court found that the petition and corresponding affidavits had alleged that the respondent's father had believed he owned the company until the day he died, and that respondent had made promises to allow all of his siblings, *i.e.*, the decedent's children,

to share in the company. Indeed, the Court noted that while the petition lacked allegations of an express promise between the parties, even if a petition fails to allege facts sufficient to support one of the elements of a constructive trust, a constructive trust may nevertheless be imposed.

On the other hand, the Court modified the order of the Surrogate's Court on the issue of the statute of limitations, holding that the Surrogate's Court had correctly dismissed the claims with respect to the real estate, but had erred when it determined that the claim with respect to the shares of stock was untimely. The Court opined that a claim for the imposition of a constructive trust is governed by the six year statute of limitations of CPLR 213(1), which begins to run at the time of the wrongful conduct or event giving rise to restitution. Referring to the allegations in the petition, the Court noted that petitioners claimed that the respondent had promised to share the stock in issue with his siblings upon the death of the decedents, which had occurred in 2012. In view of the fact that the proceeding seeking its recovery was instituted in 2013, the Court held that the claim for a constructive trust with respect to the shares of stock was not time-barred.

However, the Court held that the statute of limitations with respect to the real properties in issue began to run when the promised payments for same were due and owing. In the case of one of those properties, the promised payments were due between 1989 and 1992, and in the case of the second, payments were due in 1994 and again in 1998. Accordingly, the Court found that under any such circumstance, the proceeding for a constructive trust was untimely.

Finally, the Court rejected petitioner's contention that their claim for a constructive trust could nevertheless be maintained as an equitable remedy for other causes of action, holding that an equitable remedy is not available to enforce a legal right that is, itself, barred by the statute of limitations. Additionally, the Court held that petitioners' claims based upon equitable estoppel lacked merit, concluding that there was no evidence that the decedents were lulled into inactivity with respect to the real property in question until after the statute of limitations had expired.

In re Thomas, 124 A.D.3d 1235, 1 N.Y.S.3d 598 (4th Dep't 2015).

Strike Pleadings

Before the Surrogate's Court, New York County in *In re Seltun* was a motion by the administrator of the estate to strike the answer of the decedent's father for failure to comply with court-ordered discovery. In the underlying proceeding, the petitioner, the decedent's mother, sought court approval of a settlement reached by her in connection with litigation commenced in the Supreme Court for the decedent's personal injuries and wrongful death. In addition to this relief, the petitioner requested that the decedent's father be disqualified as a distributee of her estate on the grounds of abandonment and failure to support. The decedent's father filed an answer objecting to the relief, and a discovery order was issued.

Thereafter, petitioner's counsel served respondent with interrogatories and a document demand. No response to these requests was ever received, despite follow-up letters to respondent's counsel. Ultimately, respondent's counsel assured the court and petitioner's counsel that his client's responses would be served. Nevertheless, no responses were forthcoming.

As a consequence, petitioner's counsel moved to strike respondent's answer. In response to that motion, respondent's counsel moved to be relieved, maintaining that without his client's cooperation he was unable to defend the motion. On the return date of the motion, counsel for both parties appeared and reported that respondent continued to be uncooperative. Accordingly, noting that its discovery order did not provide for any sanctions in case of a party's failure to comply, the court issued a conditional order granting the motions to dismiss and to be relieved as counsel, unless respondent provided responses to both the interrogatories and document demand within 30 days of personal service upon him of the court's decision and order.

In re Seltun, N.Y.L.J., Dec. 19, 2014, p. 35 (Sur. Ct., N.Y. Co.).

Summary Judgment

In *In re Shearer,* a probate contest, the court granted summary judgment to the proponent, finding that a question of fact had not been raised as to the issues of due execution, testamentary capacity or undue influence. The propounded instrument divided the decedent's estate among three friends and two charities, and left nothing to her descendants, including the objectant, who were the children of a predeceased sibling. Initially, although the objectant claimed that discovery was incomplete and thus the matter was not ripe for summary relief, the court found the record was devoid of any effort by the objectant to enforce her rights to discovery, and objectant's counsel did not identify any particular discovery requests which would reveal facts essential to her opposition as required by CPLR 3212(f).

On the issue of testamentary capacity, the court noted that although the attestation clause of the instrument was silent as to testamentary capacity, both attesting witnesses swore in affidavits that the decedent appeared to be of sound mind, memory and understanding, competent to make a will, and not under any restraint. Further, statements from the witnesses, one of whom was the attorney-draftsperson, also indicated that the decedent was aware of her assets, her relatives, that she had provided the instructions for the propounded instrument, and that she was aware that she was executing a will and the scope of its dispositive provisions. Additionally,

the testimony revealed that the decedent was able to hold a conversation on the date the will was executed, was not confused or disoriented, and was able to follow along on the original will when the instrument was read aloud to her. In opposition to this proof, the objectant simply relied on her own affidavit and the affidavit of her attorney, neither one of which indicated that they saw or spoke to the decedent at or near the time the propounded instrument was signed. The court held that the fact that the decedent was elderly, was hospitalized two days after executing the will, and died two months thereafter, was insufficient to raise a question of fact on the issue of capacity.

The court found that the proponent had satisfied her burden of proof on the issue of due execution, based upon the fact that the will execution was attorney-supervised, the will had an attestation clause, and the sworn affidavits of the attesting witnesses indicated that the formalities of execution had been complied with. The court found objectant's claims as to lack of due execution in the face of this proof to be unavailing. Equally so, the court held that objectant had failed to present any evidence of her claim of undue influence. The court opined that it was not unnatural for a testator to disinherit family members with whom she had no close relationship. Further, the court noted that objectant's claim of undue influence was undermined by the fact that the decedent's prior will also made no provision for her descendants. Objectant's remaining assertions were found to be based on mere speculation, and accordingly, the objection was dismissed.

In re Shearer, N.Y.L.J., Aug. 11, 2014, p. 21 (Sur. Ct., N.Y. Co.).

Summary Judgment

In *In re Harmon 2003 Trust,* the court addressed the validity of an *inter vivos* trust in the context of a motion and cross-motion for summary judgment. The decedent died on November 27, 2012, survived by only one distributee, who had no beneficial interest in his estate. Pursuant to the terms of the decedent's will, the residue of his estate poured over into the subject trust, dated January 27, 2012. The decedent's will was admitted to probate, without objection. Thereafter, the petitioner, who described herself as a close and trusted friend of the decedent and adversely affected by the terms of the trust, instituted a proceeding to declare the trust invalid on the grounds of fraud, undue influence, lack of capacity, and lack of due execution. Notably, the instrument was executed ten days after the decedent had suffered a stroke, and was residing in a nursing home. The respondent was the decedent's godson, who, together with his wife, received the bulk of the decedent's estate pursuant to the terms of the subject trust.

Upon completion of discovery, the respondent moved for summary judgment, claiming that the decedent had given instructions for the document to his attorney before he had suffered his stroke, and that, as evidenced from the medical records and recollections of his care givers, the decedent was competent on the day he executed the instrument. Moreover, respondent maintained that the mere fact that the decedent had suffered a stroke was not proof of his incapacity, and that decedent was handling his own financial affairs and discussing matters with his financial advisor until shortly before his death.

In opposition to the motion, petitioner maintained that respondent was in a confidential relationship with the decedent, and that, as a result, he had the burden of proving that the instrument was free of undue influence. She further alleged that the decedent was suffering from depression and memory loss well before the execution of the subject trust, and moreover, that the instrument was not duly acknowledged in compliance with the provisions of EPTL 7-1.17.

Based upon the evidence submitted, the court granted respondent's motion for summary judgment on the issues of fraud, undue influence and due execution, denied the motion on the issue of capacity, and denied petitioner's cross-motion in its entirety. The court held that the statutory requirements for execution had been complied with in light of the testimony of the notary and social worker, who were present in the room at the time of execution, that the decedent was the individual whose name was subscribed on the subject trust, and that the decedent was aware of the instrument he was signing. Further, the court determined that a confidential relationship did not exist between the respondent and the decedent as a matter of law. Specifically, the court held that although the respondent was the decedent's attorney-in-fact, that, in and of itself, did not establish a confidential relationship between the parties. In addition, the court noted that the respondent was unaware of the dispositions made in the subject trust, nor did he use the power of attorney until after the instrument was executed. The court also held that the record was devoid of any proof that the subject trust was the result of fraud, or undue influence. Rather, the court determined that the changes to the decedent's dispositive plan were made prior to his stroke, and the respondent's increased involvement in his affairs.

On the other hand, the court concluded that triable issues of fact had been raised with respect to the decedent's capacity to execute the trust, and more particularly, whether he fully understood its terms. While the respondent argued that the decedent's medical records presented overwhelming proof of capacity, the court noted that the testimony and proof submitted by the petitioner presented a picture of an aging man in decline for a number of years.

In re Harmon 2003 Trust, N.Y.L.J., Jan. 22, 2015, p. 29, col. 1 (Sur. Ct., Suffolk Co.).

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

Florida Update

By David Pratt and Jonathan Galler

David Pratt

LEGISLATIVE UPDATE

Assessing Attorneys' Fees and Costs for Estates and Trusts

Florida recently enacted amended statutes governing the assessment of attorneys' fees and costs for estates and trusts. Under the amended statutes, if a court assesses fees or costs to be paid from an estate or trust, the court may direct from what part of the estate or trust such fees or costs are to be paid and may direct that they be assessed against one or more persons' shares in the proportions that the court deems just and fair. Further, the amendments provide a non-exclusive list of factors that the court may consider in assessing fees and costs. These include: the extent to which a person whose part of the estate or trust is to be assessed actively participated in the proceeding; the relative strength or weakness of the merits of the claims, defenses or objections asserted by someone whose part of the estate or trust is to be assessed; and whether the person to be assessed was a prevailing party. In response to a few recent appellate decisions, the amendments also specifically provide that the court need not find that the person whose share is to be assessed engaged in bad faith, wrongdoing or frivolousness. *See* §§ 733.106, 733.6171, 736.1005, 736.1006 and 736.1007, Fla. Stat.

Qualifications of Personal Representative

Florida also enacted amended statutes relating to objections to administration, including those relating to the qualification of a personal representative. Under the amended statutes, an interested person is no longer limited to three months within which to object to the appointment of a personal representative when such objection is based on the personal representative's failure to meet his or her required statutory qualifications. Rather, the personal representative's failure to meet those qualifications at the time of his or her appointment is the basis for mandatory removal at any point prior to discharge. The amendments also provide that a personal representative who knows that he or she was not qualified at the time of appointment must immediately resign. If a personal representative becomes unqualified subsequent to his or her appointment, he or she must provide notice to interested persons, who then have 30 days within which to remove the personal representative on that basis. The amendments also provide for corresponding revisions to the statutes that set forth the particular information and deadlines that must be included in a notice of administration. *See* §§ 733.212, 733.2123, 733.3101 and 733.504, Fla. Stat.

Jonathan Galler

Estate Tax Apportionment

Florida also enacted an amended estate tax apportionment statute. *See* § 733.817, Fla. Stat. The amendment, which makes both substantive and non-substantive revisions, is the first significant change to the statute since 1997. By way of an example of a substantive change, the existing statute provided that the tax apportionment language in a will governs even if a trust with conflicting apportionment language was executed at a later date. Under the amended statute, however, if the tax apportionment language in the governing instruments are in conflict, the tax apportionment language in the last executed instrument governs. By way of another example, the amended statute provides that the tax imposed on protected homestead, exempt property, and the family allowance is to be apportioned against the property of the estate and revocable trust. Under the existing statute, that was true only for the tax imposed on protected homestead. Some of the non-substantive changes include (i) updating references to reflect changes in the tax code (for example, eliminating any reference to the state death tax credit, which was eliminated in 2005 in favor of the state death tax deduction) and (ii) clarifying various ambiguous provisions in the prior statute.

DECISIONS OF INTEREST

Trust Reformation to Conform to Settlor's Intent

Section 736.0415 of the Florida Trust Code authorizes the court to reform a trust if it is proved by clear and convincing evidence that the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law. In this case, the settlor created a revocable trust of which she was the sole beneficiary during her lifetime. The trust assets were to be divided upon her death between the beneficiaries listed in a "Schedule of Beneficiaries." However, no such schedule was ever prepared. Upon the settlor's death, one of her children brought an action to declare the trust void for lack of beneficiaries. The other two children counterclaimed for judicial reformation, offering evidence of the settlor's intent to name them as sole remainder beneficiaries, along with an affidavit of the drafting attorney acknowledging his oversight in failing to prepare a Schedule of Beneficiaries. The trial court held that the trust was void for lack of any beneficiaries. But the Second District Court of Appeal reversed, holding that the trust did not, in fact, lack "any" beneficiaries given that the settlor herself was the designated lifetime beneficiary. The appellee argued, in the alternative, that reformation is unavailable

except to correct simple scrivener's errors. The appellate court disagreed, holding that Florida has a liberal policy of reforming instruments to conform to the intentions of the parties and that section 736.0415 is similarly broad in scope. Moreover, the appellate court noted that distinguishing a simple matter from a complex one would be subjective and, thus, an inappropriate test.

Megiel-Rollo v. Megiel, 2015 WL 1740365 (Fla. 2d DCA Apr. 17, 2015) (not yet final).

Will Contest on Ground of Undue Influence

Richard Blinn married his fourth wife at the age of 82. The following year, he executed a will under what the Fourth District Court of Appeal characterized as "suspicious circumstances." Two lawyers were involved but neither took responsibility for advising Mr. Blinn or developing the estate plan. The will devised the entire estate to his wife, whereas his prior two wills left his estate to his daughter or, alternatively, his granddaughter. Upon his death, Mr. Blinn's daughter successfully challenged the will, alleging undue influence on the part of the wife. In Florida, a presumption of undue influence generally arises when a beneficiary of a will shared a confidential relationship with the testator and actively procured the beneficial interest. However, where the beneficiary is a spouse, it is often difficult to prove undue influence. In fact, the presumption is not triggered in such a situation because it would not necessarily be unusual or nefarious for a spouse to play a role in developing an estate plan from which he or she benefits. Nevertheless, the appellate court affirmed the trial court's finding of undue influence in this case, deferring to the trial court's detailed judgment and evaluation of the evidence. The trial court found that the wife had preyed on the decedent's mental infirmity to alienate him from his family. Commenting on a recording of the wife screaming at the decedent, the court noted that "[i]t is rare in a case like this to have such a glimpse into an abusive marital relationship."

Blinn v. Carlman, 159 So. 3d 390, 391 (Fla. 4th DCA 2015).

Trustee's Attorney Does Not Owe Duty to Beneficiaries

Seldom do issues of great relevance to trusts and estates lawyers play out in federal court. A recent Eleventh Circuit Court of Appeals case, however, addressed the issue of whether "under Florida law, an attorney retained to represent only the trustee also owes a fiduciary duty to the beneficiaries of the trust." In this case, the beneficiaries of a trust sued the trustee's attorney for breach of fiduciary duty despite acknowledging that no attorney-client relationship existed between the parties. The lawsuit was filed in federal court based on diversity jurisdiction. The plaintiffs alleged that the trustee's attorney owed them a duty to prepare a proper trust accounting. The trial and appellate courts held that the trustee's attorney has no fiduciary duty to the trust beneficiaries. Quoting the Florida statute on the fiduciary lawyer-client privilege, the court held that Florida law provides that "only the person or entity acting as a [trustee] is considered the client of the lawyer." Section 90.5021(2), Fla. Stat. The Court also cited the comments to the Rules Regulating the Florida Bar, which provide that "the personal representative is the client rather than the estate or the beneficiaries." Rule 4-1.7 cmt. Notably, though, the court declined to address the separate but similarly important question of when a trust beneficiary may have standing to sue as a third-party beneficiary of a legal services contract between the trustee and the trustee's attorney.

Bain v. McIntosh, 597 Fed. Appx. 623, 624 (11th Cir. 2015).

Homestead Proceeds Exempt From Creditor Claims

It is axiomatic under Florida law that the proceeds of a voluntary sale of a homestead are exempt from the claims of creditors, just as the homestead itself is exempt, if the seller can demonstrate a good faith intention prior to and at the time of the sale to reinvest the proceeds thereof in another homestead within a reasonable time and the proceeds have not been commingled with other assets. *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201 (Fla. 1962). With that backdrop, a recent decision by the Fourth District Court of Appeal addressed the question of whether the proceeds from the sale of a homestead will remain protected if the judgment debtor uses those proceeds to purchase securities. The trial court ruled that the proceeds remained protected, and the appellate court affirmed, holding that "[t]he investment was not so inconsistent with the purposes of homestead that the funds lost their protected status." Non-cash proceeds of a sale may be eligible for creditor exemption so long as they serve the same function as cash proceeds do—namely, to be reinvested in a new homestead with a reasonable time. Because homestead exemption laws are to be liberally construed so that "the family shall have shelter and shall not be reduced to absolute destitution," the courts should not encourage excessive speculation with the proceeds of a sale. Here, because there was no evidence that the securities were particularly risky and remained separate from the judgment debtor's other funds, the creditor protection was not lost.

JBK Assoc., Inc. v. Sill Bros., Inc., 160 So. 3d 94 (Fla. 4th DCA 2015).

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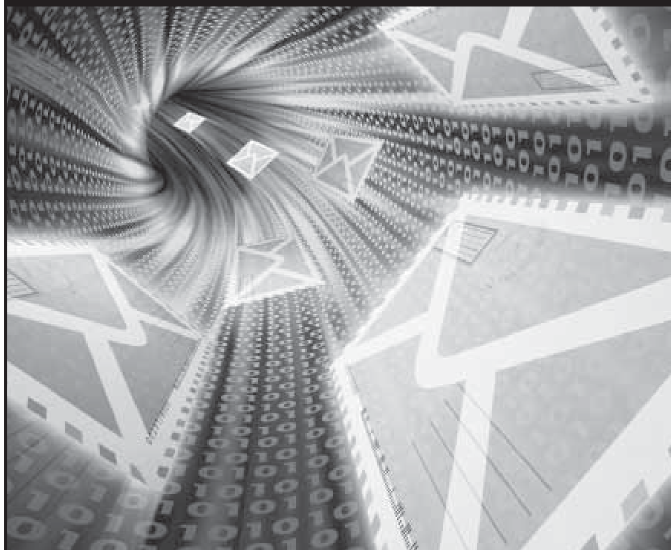

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