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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Colleen F. Carew

Each January, during the New York State Bar Association Annual Meeting week, our interest in being active in the Association is rekindled. We meet one another for the first time, or see old friends and former colleagues. Our Section elects new district reps and at-large members as well as appoints new Chairs and Vice-Chairs of our 16 committees. During the program, the luncheon, the cocktail parties and the committee breakfasts, many ideas for projects, upcoming programs and legislation are bandied about. My goal this year is to bottle this enthusiasm and energy of State Bar week for use throughout the rest of the year when our interest begins to wane.

State Bar week began with a reception celebrating diversity in the Bar. The diversity reception provided a venue for attorneys to network and learn about the various opportunities that exist within the NYSBA. Michael Parets (Vice-Chair of the Committee on International Estate Planning) and I represented our Section at a table. The State Bar is dedicated to increasing diversity among its membership, an important objective our Section shares.

George E. Riedel, Jr., Chair of the Committee on Membership, has worked tirelessly with the State Bar to increase diversification among our membership. George needs help to meet our objectives. Any interested member should contact George and become involved in one of his projects.

The benefits of membership cannot be overstated and include reduced registration fees for our outstanding Continuing Legal Education programs, access to summaries of recent cases and E-blasts containing alerts of topical information. Visit our Section's webpage on the State Bar website (www.nysba.org/trusts) for a summary of the resources available when you become a member. An active member of the Section will have the opportunity to participate in shaping our practice. New attorneys will also find that the relationships made through Section activity can be like having hundreds of mentors.

On Wednesday of State Bar week, the Section's CLE program, devoted to Fiduciary Income Tax, was

Inside


G. Warren Whitaker


Terry L. Turnipseed


Elizabeth A. Hartnett


Sharon L. Wick


Carlyn S. McCaffrey

held. Elizabeth A. Hartnett (Chair of the Committee on Life Insurance and Employee Benefits), chaired the program, which was flawless in its execution. The presentations by Carlyn S. McCaffrey, Sharon L. Wick, Prof. Terry L. Turnipseed and G. Warren Whitaker (a former Chair) were instructive and reflected the high quality of our CLE programs.

A luncheon followed with over 800 attorneys in attendance. We honored C. Raymond Radigan (former Surrogate of Nassau County) with the Russell A. Taylor Award for his extraordinary contribution to our practice as the Chair of the EPTL-SCPA Advisory Committee. Gerald A. Rosenberg, Chief of the Charities Bureau of the Office of the Attorney General, educated us as to the function of his office and shared his thoughts on issues of mutual concern, protecting the elderly from abuse and maintaining the integrity of charitable organizations. We are grateful for the time and effort each speaker gave to our Section.


Russell A. Taylor Award recipient C. Raymond Radigan (l) and then-Section Chair Michael E. O'Connor


Gerald A. Rosenberg

The Section's Executive Committee meeting followed the luncheon at which two significant bills were addressed.

On February 3, 2006, Governor Pataki signed a bill which amends Public Health Law § 4201 to provide, among other things, for the authority of a domestic partner to carry out the decedent's wishes concerning burial or cremation. Prior to the bill being signed, Ian MacLean and Ilene Cooper engaged in extensive negotiations with the NYSBA liaison Glenn Lefebvre for the enactment of a chapter amendment to address the Section's concerns with the bill. Their collective effort should result in a final bill that achieves a milestone, the recognition of a domestic partner's right to honor his or her deceased partner's wishes.

The Executive Committee was also called upon to formulate a position on the proposed Family Health Care Decisions Act ("FHCDA"). Prior to the Executive Committee's meeting in January, an ad hoc committee chaired by Richard Rothberg was formed to review the proposal. After an engaging debate, the committee supported the bill, which also grants a domestic partner the authority to make health care decisions for his or her partner. Our primary concern with the bill was the establishment of a "pecking order" for those individuals authorized to make decisions.

Both legislative initiatives provide examples of the integral role our Section plays in the development of the law in our field. We could not perform this vital service without the active involvement of committed members such as Ilene, Dick and Ian (just to name a few members who serve on the Section's outstanding Executive Committee).

Former Chairs Joshua Rubenstein and Jonathan Blattmachr also participated at the Executive Committee meeting. Josh updated the group on the latest proposals concerning the New York State estate tax and Jonathan presented his proposal to address growing concerns with the inheritance rights of persons born through assisted reproduction. As he has done in the past, Josh will meet with representatives of the Governor's office and the Senate and Assembly to argue in favor of parity with the federal estate tax system. Jonathan has graciously agreed to chair, with Ilene Cooper, a sub-committee on biotechnology issues affecting our area. These and other issues were also addressed in late March when representatives from our Section met with members of the Senate, Assembly and their respective staffs.

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Editor's Message

In the course of his lunchtime remarks at the Section's January 2006 Annual Meeting in New York City, Gerald Rosenberg, Assistant Attorney General-In-Charge of the Office of the Attorney General's Charities Bureau, noted that his Office had developed an initiative to respond to instances of the misuse of funds of the elderly where such funds are otherwise earmarked for charity but diverted prior to death through the undue influence of an ostensible "friend" or caregiver. Unfortunately, in such situations a Durable Power of Attorney ("DPOA"), otherwise an invaluable estate planning tool to counteract an individual's incapacity or disability, may become the malefactor's best friend.

Many estate planning attorneys recommend that when signing a Will the client also execute a number of seemingly straightforward collateral documents, such as a Living Will, a Health Care Proxy, and a DPOA. The DPOA, of course, typically authorizes an agent selected by the client to act on behalf of the client over a wide range of matters in the event of the client's incapacity. With a single stroke of the pen, a DPOA obviates the need for ever bringing on a potentially time-consuming and costly Article 81 guardianship proceeding.

However, that a DPOA might ultimately boomerang to the client's detriment is an ever-present risk. Remember, while a proposed Article 81 guardian's fitness to serve will be scrutinized by the court, a healthy client, for whom the prospect of future incapacity may seem presently unreal, may give less consideration to the fitness of a proposed agent designated under a DPOA. And once appointed, the Article 81 guardian is required to report to the court annually, allowing the court to monitor the guardian's activities on an ongoing basis. An agent acting under a DPOA is not subject to any such reporting obligation or oversight.

A number of well-publicized recent decisions have highlighted the potential drawbacks of our current DPOA law, and invited a renewed attention to the plight of elder victims of undue influence and financial fraud.[1] For instance, in *The Salvation Army v. Ferrara*,[2] the estate's charitable residuary beneficiary sought to recover close to $1 million of decedent's assets transferred by decedent's agent to himself as a gift under a DPOA. More recently, in *In re Fischer*,[3] the court found that decedents' home health care aide had converted close to $1 million in the last years of decedents' lives, partly through the misuse of a DPOA.

While *Ferrara* and *Fischer* presumably represent the exception rather than the rule, some observers contend that instances of financial crimes against the elderly in fact remain dramatically underreported.[4] And there is reason to believe that in coming years financial fraud against the elderly may not abate. After all, according to preliminary data released by the National Center for Health Statistics, average life expectancy in the U.S. has now reached 74.8 years for men and 80.1 years for women. Moreover, men who have currently attained the age of 60 years (as the tip of the populous "baby boom" generation now has) can expect, on average, to live another 20.5 years, and women another 23.8 years. But in our increasingly mobile and transient society, we can less safely assume as we age that these extended final years will necessarily be spent exclusively in the company of trusted and true family and companions.

Proposed revisions to New York law governing DPOAs have been percolating for some years (as noted in several past *Newsletter* articles[5]), and even now various Committees of the Section are wrestling with how changes to our power of attorney law might be implemented to address the perceived shortcomings. It is more than a little ironic that a client's sophisticated testamentary estate plan, painstakingly devised by the client's attorney, usually over the course of many hours, may be undone in a matter of moments by an unscrupulous agent acting under a DPOA. And under current law, the prospect seems frighteningly possible.

Austin Wilkie

Endnotes

1. *See, e.g.*, Gibbs and Carew, *The Power of Attorney - Is There a Monster Lurking in the Form?*, N.Y. Law Journal, June 16, 2004.
2. 3 Misc.3d 944, 775 N.Y.S.2d 470 (Sur. Ct., Rockland Co. 2004), *aff'd*, 22 A.D.3d 578, 802 N.Y.S.2d 471 (2d Dep't 2005).
3. 2005 N.Y. Misc. LEXIS 3022 (Sur. Ct., N.Y. Co. 2005).
4. Johnson, *Financial Crimes Against the Elderly*, U.S. Department of Justice, Office of Community Oriented Policing Services (2003).
5. DiGiorgio, *A Summary of the New York State Law Revision Commission's Proposed Changes to the General Obligations Law in Relation to Powers of Attorney*, Spring 2004; Bailly and Hancock, *Proposed Changes to Powers of Attorney*, Summer 2004.

Brave New World: Ethical Issues Involving Surrogate Health Care Decisions

By Shari A. Levitan and Helen Adrian

It is well understood by the public that a person has the right to consent to a medical treatment. The doctrine of consent stems from the concept of battery. "At common law, even the touching of one person by another without consent and without legal justification was a battery."[1] This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. "Every human being of *adult years and sound mind* has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[2] The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.[3] In practice, a competent person will be asked to consent to medical treatment.

Although it is clear that a competent person may consent to treatment, most state statutes provide that a person who is incompetent cannot consent to medical treatment.[4] Incompetent persons are referred to in this article as either "patients" or "principals." Health care agents and/or proxies are referred to as either a "surrogate" or "decision maker." Although every state's definition may differ, a good working definition of competent might be:

> the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.[5]

A person may be incompetent for a variety of reasons and circumstances. For example, the person may be under the age of 18, unable to understand the health care decision, or unable to communicate a health care decision. For whatever reason, if a person is incompetent, he or she cannot consent to medical treatment.

If a person is incompetent and not able to consent for him or herself, then the only way for the person to consent to medical treatment is through a surrogate. A surrogate is a person who speaks for the incompetent and could be a family member, friend, spouse or health care provider.

But there are limits to the surrogate's decision making authority. Because of advances in science and medicine, the range of health care decisions that might have to be made by a surrogate far exceed the legal guidance available. The already difficult responsibility of the surrogate may well be complicated by the surrogate's own ethical response to new situations, as well as the medical community's ethical response and, possibly, that of family and the greater community.

The Law Regarding Surrogate Decision Making: What We Know

Surrogate decision makers can look to the law for guidance regarding their authority, for the standard on which they base decisions, and for the limits of their authority.

By What Authority?

Surrogate health care decision makers may derive their authority from statutes that create a health care proxy or from other sources when a proxy is not available.

Currently, all 50 states have a statute that creates a durable power of attorney for health care or a health care proxy.[6] Such statutes outline the requirements for the creation of a surrogate's authority, the execution formalities, and other details. Because of space constraints, this presentation will focus on the proxy statutes of Massachusetts, New York, California and Florida.[7]

Although it is common for estate planning professionals to draft a health care proxy for a client, less common is the circumstance when the proxy is actually used and there is conflict with other family members, a health care professional or an institution. In this situation, the professional may find him- or herself in an interesting ethical predicament illustrated by the following hypothetical:

> An attorney drafts estate planning documents, including a proxy, for his client, A. The proxy names A's son, B, as the surrogate decision maker. A becomes incapacitated, and B comes to the attorney with the proxy in hand and asks the attorney for assistance and representation. Can the attorney, who represented A, now represent B as he exercises the authority given in the proxy?

According to the American Bar Association's Model Rules for Professional Conduct, an attorney

who has formerly represented a client cannot thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, in writing.[8] Here, the attorney's former client, A, is not competent to give the written consent waiving the conflict. But is this representation materially adverse? The attorney may simply be carrying out the express wishes of his client, A, by assisting B in exercising the proxy power that A gave to him. This situation may be more analogous to representing a principal and then an agent in a business endeavor than it is to representing a ward and then the guardian in a proceeding to establish the guardianship.

In many circumstances, a health care proxy was never executed or could never have been executed. For example, the person in need of a surrogate may never have had the capacity to execute a proxy because that person has always been a child or has always been unable to understand health care decisions. When a proxy is not available to authorize a surrogate to act, the surrogate must look to other sources for authority.

One source of a surrogate's authority other than a proxy may be a statutory provision allowing a family member to make health care decisions for the incompetent person. For example, the Massachusetts statute provides that if no health care proxy has been executed, the health care provider may rely on the informed consent given by responsible parties on behalf of the incompetent patient to the extent permitted by law.[9] In other states, a parent may have authority as a health care surrogate without statutory authority.

Another source of a surrogate's authority other than a proxy may be a formal, court-supervised guardianship. In the well-known *Cruzan* case, the patient did not execute a proxy while competent and her parents became the co-guardians of her person with the authority to make health care decisions, although with some limitations.[10]

In New York, a parent of a child may have authority to make decisions. *In re AB* involved a child who was in a persistent vegetative state.[11] The child never had the capacity to execute a health care proxy. The child's mother as parent and natural guardian petitioned the court to remove life support. The Supreme Court of New York held that, as parent and natural guardian, the mother had the authority to consent to the removal of life support.

By What Standard?

In general there are two standards by which a surrogate decision maker may make health care decisions: substituted judgment and best interest.

Substituted judgment focuses on the patient's viewpoint:

> If a patient, while competent, expressed clear wishes regarding treatment, the standard for surrogate decision-making is substituted judgment (i.e., what the patient would have wanted, if competent.) In other words, if the patient's wishes are known or knowable, they are to be respected. The surrogate decision maker must endeavor to faithfully reflect the patient's wishes in making health care decisions.[12]

Some of the factors that a court might consider include the patient's expressed preferences; the patient's religious convictions and their relation to refusal of treatment; the effect on the patient's family; and the probability of adverse side effects and the prognosis with and without treatment.[13]

Best interest focuses on the decision maker's viewpoint:

> If an incompetent patient's prior wishes are not known or knowable, the standard for surrogate decision-making is best interest (i.e., what is best for the patient). The surrogate decision maker must carefully assess the benefits and harm of various treatment options (including the option of no treatment) and determine which of these options has the most favorable benefit-harm ratio.[14]

Some of the factors that a surrogate may consider include the patient's present levels of physical, sensory, emotional and cognitive functioning; the quality of life, life expectancy and the prognosis for recovery with and without treatment; the various treatment options; the degree of humiliation, dependence and loss of dignity resulting from the condition and treatment; the opinions of the family, the reasons behind those opinions, and the motivations of the family in advocating a particular course of treatment.[15]

Many state statutes require that surrogates make decisions based on a combination of the standards. For example, under the Massachusetts health care proxy statute, the agent makes health care decisions "(i) in accordance with the agent's assessment of the principal's wishes, including the principal's religious and moral beliefs, or (ii) if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests."[16] The laws of Florida and California similarly require the surrogate to first consider the patient's wishes before considering the

patient's best interests.[17] Under New York's health care proxy statute, the surrogate must first consult with a licensed physician, registered nurse, licensed psychologist, licensed master social worker or a licensed clinical social worker.[18] Then the surrogate must make health care decisions in accordance with the patient's wishes, including the patient's religious and moral beliefs or, if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests. The New York statute specifically states that the surrogate has no authority to decide to remove nutrition and hydration if the patient's wishes are not known.[19] Accordingly, an end-of-life decision may not be made based on the best interests standard.

What Limits?

Although it seems that a health care surrogate has broad powers, he or she may not have unlimited power and authority to make decisions regarding the patient's health. Generally, if a surrogate has authority based on a health care proxy statute, then the authority is quite broad. For example, the Massachusetts statute states that "an agent shall have the authority to make **any and all health care decisions** on the principal's behalf that the principal could make, including decisions about life-sustaining treatment, subject, however, to any express limitations in the health care proxy."[20] The term, "all decisions" has been interpreted broadly and includes decisions regarding mental health care and involuntary confinement, as well as the authority to consent to treatment and to refuse treatment, and the related issue of pain management.[21]

Although health care proxy statutes seem to provide broad powers, many proxy statutes expressly limit the authority of the agent to "health care decisions." For example, under the Massachusetts statute, "health care" means "any treatment, service or procedure **to diagnose or treat** the physical or mental condition **of a patient**."[22] The New York statute specifically states that a surrogate acting by proxy has no authority to make end-of-life decisions, absent evidence of a patient's wishes.[23] Therefore, some health decisions that a surrogate could be called on to make may not come within the definition of "health care decisions," and the surrogate may lack the authority to speak for the patient.

When the surrogate's authority is based on qualification as a guardian, the surrogate may still encounter limits to his or her authority to make health care decisions. For example, in the *Cruzan* case, the patient was in a persistent vegetative state and her parents became co-guardians.[24] The guardians did not consent to treatment on the patient's behalf. The guardians found that their authority to refuse to consent to treatment was limited by a Missouri law, upheld by the Supreme Court, which required the guardians to produce clear and convincing evidence of the patient's wishes regarding end-of-life decisions. Absent that evidence, the guardians were not able to make the desired surrogate health care decision.

Ethical Considerations Regarding Surrogate Decision Making: What We Don't Know

Given the limits on the scope of a surrogate's authority, there are many situations in which a surrogate finds that existing law provides insufficient guidance. Until the law catches up to scientific advances, resolving new and previously untested questions in these cases requires interpretation and extrapolation of existing law, with guidance from the ethical principles that helped shape existing law.

What Happens if the Patient Objects?

In some cases, a patient might object to the decision made by the surrogate health care decision maker. In the case of health care proxies, the authority of the surrogate decision maker is limited to circumstances in which the principal either cannot make, or is unable to communicate, medical decisions for him- or herself. Many proxy statutes address the conflict between the surrogate decision maker and the patient. In Massachusetts and New York, if the patient objects to a decision made by a surrogate under a health care proxy, then the patient's decision will prevail unless a court determines that the patient is incompetent to make decisions.[25] Similarly, in California, an agent is not authorized to make a health care decision if the principal objects to the decision.[26]

In *Cohen*, the patient gave her surrogate a health care power of attorney.[27] The surrogate made a decision under that authority that the patient should be confined to a mental health facility. The patient objected to the confinement, revoked the proxy, and filed a motion to dismiss the hospital's petition for involuntary commitment. The Massachusetts court held that although the broad language of the proxy includes mental health decisions, if the patient objects to medical treatment, then the decision is invalid unless a court determines that the patient is incompetent, and therefore cannot competently direct his or her medical treatment. In *Cohen*, the patient's objection functioned as a revocation of the proxy. Without authority under the proxy, the surrogate was forced to seek authority from the court to make health care decisions.

Mental illness poses unique challenges for the surrogate decision maker because treatment often produces substantial side effects, many patients do not appreciate the risks they pose to their own health and

well being during times of crisis, and the patient may resent the surrogate for exercising power regarding mental health treatment. A relatively new and untested Washington state statute specifically addresses mental health advance directives.[28] Under this statute, a person with a history of mental illness may execute a directive consenting irrevocably in advance to mental illness treatment through a surrogate decision maker. The directive is irrevocable by the patient during a subsequent period of incapacity.[29] If a patient objects to mental illness treatment during a period of incapacity, the advance directive would not be revoked by the objection, and, if an agent is appointed, the agent's authority to act would not be revoked. [30]

In some cases, if the patient objects but is found to be incompetent, the court will use the best interest standard when making a decision regarding health care. In *In re Storar,* the patient was an adult who had never had the mental competency to express his health case preferences and who suffered from terminal bladder cancer.[31] The health care facility determined that the patient needed regular blood transfusions; however, after several transfusions had taken place, the patient expressed discomfort and emotional stress. The patient's guardian decided to refuse to consent to further transfusions. The health care facility petitioned the court to override the patient's objection and the guardian's decision. The court held under the best interest standard that the treatments could continue because, although they were disagreeable to the patient, they allowed him to maintain his usual mental and physical activities such as feeding himself and taking walks.

In the case of a patient whose incompetence is solely due to age, there remains a question about whether his or her objection would be more persuasive to the court. Parents are the legal decision makers on health matters for their children, although their authority is not unlimited, and the state may challenge decisions made by the parent if not in the best interests of the child. Consider if the child were 17 years old, just on the cusp of being competent to consent to treatment, and she objected to her parent's consent to a particular treatment, such as an aggressive experimental treatment for cancer that would likely have devastating side effects. Would the court consider the patient's impending legal competency and consider her wishes? Would the court apply the same standards as if the parent had petitioned to be appointed the guardian of her person after she reached age 18?

What Happens if the Decision Benefits Someone Other Than the Patient?

A health care surrogate may be asked to make a health-related decision that benefits someone other than the patient. For example, the spouse of a patient in a persistent vegetative state might desire to have children with that person, which would require the surrogate health care decision maker to consent to the harvesting of gametic material from the patient, or consent to the use of previously stored gametic material. Arguably, this process would not benefit the patient's health (although, if the patient had previously expressed the wish and desire to procreate, there may be "benefit" to the patient, albeit not directly related to the patient's health); rather, in this example, it benefits the patient's partner. In another example, the surrogate may request experimental, aggressive treatment for the patient in lieu of conventional treatment, and the experimental treatment may have potentially severely debilitating side effects or an increased likelihood of fatality. The surrogate decision make may wish to include the patient in an experimental study for research purposes in which some of the participants may receive placebos instead of treatment and may require the disclosure of medical information unrelated to the particular illness. Participation in the experimental study may not benefit, and may actually harm, the patient, but may benefit society at large. In other situations, the surrogate may be asked to consent to the patient donating an organ, such as a kidney or bone marrow, to a family member, or, in a more extreme case, to consent to the storage of tissue or cells that may possibly be used to treat a child in the future, but for which there is no current need. This decision may not benefit the patient's health at all, but most certainly will expose the patient to unnecessary medical risk. The question remains whether a surrogate decision maker has the authority to make a decision that the patient may have made if competent, but that does not benefit the patient.

Decisions that benefit someone other than the patient are not decisions that a surrogate can make under the authority of a health care proxy. Under the language of most health care proxy statutes, a surrogate may make "health care decisions," defined as decisions for the diagnosis or treatment of the patient. See the above discussion, with the exception of California. Under the Uniform Anatomical Gift Act, adopted with variations in all states, designated individuals may consent to organ donation, provided the purpose of the donation is for transplantation, therapy, education or research.[32] It is not clear whether the health care surrogate may consent to organ donation, particularly if he or she is not a decision maker under the state statute. Even if such a decision will benefit the patient in some way as well as another person, the surrogate may not have the authority to consent to a procedure that does not diagnose or treat the patient, much less one that may result in harm to the patient, as in the case of an experimental study.[33]

Perhaps the most interesting ethical questions in this area arise when parents deliberately conceive another child in order to create a match for organ donation for an ill child. First, was the decision to conceive a child deliberately with the intention of donating an organ ethical, and, second, are the parents the appropriate persons to consent to the procedure when and if it is determined that the two children are an appropriate match for organ donation.

Even if the surrogate has authority as a court-appointed guardian, the surrogate may still be restricted in his or her ability to consent to a medical procedure that benefits someone other than the patient. In the *Strunk* case, the patient was an incompetent adult who had never had the capability to sign a health care proxy.[34] The patient's brother suffered from kidney disease and required a transplant, and the only family member who matched was the incompetent patient. The patient's guardians, his parents, thought it best to consent to the patient having one of his kidneys removed and donated to his brother and petitioned the court for authority to force the health care facility to comply. The Kentucky Court of Appeals held that it was in the best interest of the patient to donate a kidney to his brother because the patient was close to his brother, emotionally and psychologically dependent on him, and because his well-being would suffer more from the loss of his only brother than from the loss of one of his kidneys.

In contrast to the holding in the *Strunk* case, the Wisconsin Supreme Court found that guardians could not consent to the removal of a kidney for the benefit of a sibling. In *In re Guardianship of Pescinski*, the patient was an incompetent adult who existed in a catatonic state.[35] The patient was the only family member who provided an appropriate match for donating a kidney to another family member who would die without it. The court held that it was not in the best interest of the patient for the guardian to consent to such a procedure, noting that the patient was without understanding or ability to acknowledge the emotional and psychological benefits of having that family member continue to live. Therefore, the patient gained nothing from the donation and the procedure was not in his best interest.

While the subject of consent to organ donation during the patient's life is still a matter of debate, once the patient dies, the state statute, and the priority of decision makers thereunder, should apply. Under common law, the patient's next of kin has the right to make decisions concerning burial or cremation, organ donation and autopsy, subject to the overriding authority of the state to regulate those matters for the public safety.[36]

Once impossible, science has progressed to the point where it is possible for an incompetent person in a persistent vegetative state to have children, and the question becomes: Who has the right to consent to the removal of gametic material on behalf of the incompetent person? In many cases, no express consent to the removal was provided by the patient, nor was direction given for the permissible use of the sperm or ova. A surrogate acting under a health care proxy likely would not have the authority to consent because the removal of sperm or ova is not a procedure to diagnose or treat the patient, but such retrieval is occurring with increasing frequency, particularly if the treating physician is presented with some evidence of the patient's wishes, as is sometimes available in the case of an expected decline in health.[37] The Uniform Anatomical Gift Act, although applicable to bodily fluids, arguably does not apply, unless specific provisions are included in the particular state statute. For example, the New York statute specifically includes ova. In fact, many institutions are working to create guidelines for evaluating such requests for patients in a persistent vegetative state or post death.[38] If the courts have the authority to consent, which standard would they use, substituted judgment or best interest? And, even if the retrieval is accomplished successfully, it is not clear who has the authority to store the gametic material, nor is it clear who has permission to authorize its use, during the patient's life or following his or her death.[39] The scant case law that exists does not address post-mortem procurement of gametic material.

What Happens if Someone Other Than the Principal/Patient Objects?

If a person other than the patient objects to the health care decision made by the surrogate, some state statutes allow for a proceeding to challenge the surrogate's decision. For example, in Massachusetts and New York, the health care proxy statutes provide that a health care provider, guardian family member, or friend has the right to commence a special suit in court to override the surrogate's decision.[40] The petitioner must show that the surrogate's decision was made in bad faith or was not made in accordance with the standard established by law.[41] This type of proceeding is not as extensive as a guardianship proceeding and would likely only override a particular decision of the surrogate; the burden would be extremely heavy in any action to remove the surrogate. In a recent situation in Massachusetts, the hospital objected to the decisions of the surrogate decision maker who acted under a valid health care proxy, believing the proxy acted contrary to the patient's best interests. The surrogate decision maker disagreed, stating that she acted consistent with her mother's wishes. Although the probate court upheld the authority of the surrogate decision

maker, the court stated that the patient's expressed wishes could not have anticipated her current situation, and directed the surrogate to make future decisions based on the patient's best interests.[42] The hospital sometime later claimed that the patient's health had deteriorated further, and planned go to court again to seek removal of life support. The parties eventually came to agreement that terminating life support was appropriate, and that occurred in the summer of 2005.

In other cases, a person who objects to a surrogate's decision may institute a temporary or permanent guardianship proceeding to override the surrogate's authority to make health care decisions. For example, in the *Guardianship of Elma Mason*, the surrogate with authority under a health care proxy (the patient's son) and the temporary guardian (the health care facility) disagreed as to whether to enter a "do not resuscitate" order on the patient's chart.[43] The Massachusetts Court of Appeals held that the surrogate's authority to make health care decisions was terminated when the temporary guardian was appointed because the petition of the temporary guardian qualified as a proceeding under the Massachusetts statute described above.

In New York, the health care proxy statute specifically states that the guardian can override a decision made by a surrogate health care decision maker. "Every adult shall be presumed competent to appoint a health care agent unless . . . a committee or guardian of the person has been appointed for the adult. . . ."[44] The appointment of a guardian prevents the patient from executing a valid health care proxy and prevents any already-appointed surrogate from making any health care decisions.

In contrast, the Florida statute provides that the surrogate continue to make all health care decisions even after a guardian of the person has been appointed, unless the court has modified or revoked the power of the surrogate.[45]

For these reasons, many health care powers of attorney documents include a guardian nomination provision to name the designated agent to serve as guardian of the person of the principal, in the event a guardianship proceeding is required. But even if the surrogate decision maker is the guardian of the incompetent person, if a claim is made that the guardian is not acting in a manner consistent with the patient's wishes, or in her best interests, the court may intervene. For example, in the well-publicized *Schiavo* case, a woman in a persistent vegetative state had not created a health care proxy, nor a living will, while capable of doing so.[46] Her husband, serving as her court-appointed legal guardian, made the decision to remove her artificial life support. Her parents, and eventually the State of Florida, objected to the guardian's decision. After numerous court proceedings and an attempted state legislative intervention, the guardian's authority to act in a manner believed to be consistent with the ward's wishes was upheld, and artificial nutrition and hydration were removed.

In theory, having either a validly executed health care proxy or a court-appointed guardian should eliminate uncertainty and the need to resort to the courts. If there is conflict among family members, however, the court may serve as the ultimate decision maker.

What Happens if the Surrogate and the Person Financially Responsible Do Not Agree on the Health Care Decision?

In some circumstances, the surrogate decision maker and the person financially responsible for payment for the health care treatment may not be the same person, and the surrogate responsible for financial decisions may believe that a particular experimental treatment, which is not covered by insurance, is not a wise use of the patient's resources. The financially responsible person could be a conservator or guardian of the property, the heirs or spouse of the patient, or the health care facility. The bifurcation of decision making can make an already difficult decision even more so.

In a case arising in New York before the adoption of the health care proxy statute, the spouse of a patient consented to the removal of the patient's feeding tube.[47] The health care facility refused to honor the consent and petitioned the court to determine whether the life support should be removed. The court initially held that the spouse had not shown clear and convincing evidence of the patient's wishes to be free from life support, which was the appropriate standard at that time. Therefore, the patient remained on life support with the feeding tube. After the patient's death, the health care facility sued the spouse for payment of services relating to the time after the spouse had consented to the removal of life support. The New York Court of Appeals held that the facility rightfully refused to discontinue treatment because the burden to show the patient's wishes was on the spouse. The spouse had not met the burden, the treatment was appropriate, and the spouse was not excused from payment. Had the patient remained alive, it is not clear that she (or indeed anyone else with financial decision making authority) could have argued that the financial resources were inadequate to support the treatment. On the other hand, if the particular treatment were elective, the outcome might be different.

Conclusion

Health care proxy statutes and other sources of authority give the surrogate health care decision maker the power to make decisions, but statutes and case law have not kept pace with advances in medicine and science and new applications of existing science that blur the line between treatment of the patient and procedures that benefit others. Clients, surrogates, and the attorneys who advise them must consider ethics, as well as the law, to resolve the tough new questions that science presents.

Endnotes

1. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990).
2. *Id.* (emphasis added).
3. *Id.* at 270.
4. Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980.
5. Mass. Gen. Laws ch. 201D, § 1.
6. For a list of the state statutes and further discussion, see T.P. Gallanis, *Write and Wrong: Rethinking the Way We Communicate Health-Care Decisions*, 31 Conn. L. Rev. 1015, n.113 (1999).
7. *See* Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980; Cal. Prob. Code § 4701; Fla. Stat. ch. 765.201.
8. Model Rules 1.9(a).
9. Mass. Gen. Laws ch. 201D, §16.
10. *Cruzan*, 497 U.S. at 265.
11. *In re AB*, 768 N.Y.S.2d 256 (N.Y. App. Div. 2003).
12. Francoise Baylis, *Expert Testimony By Persons Trained in Ethical Reasoning: The Case of Andrew Sawatzky*, 28 J. L. Med. & Ethics 224, 225-26 (2000); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 423 (Mass. 1977) (refusal of treatment by parent-guardian).
13. *Woods v. Commonwealth of Kentucky*, 142 S.W.3d 24, 34 (Ky. 2004) (internal quotations omitted).
14. Baylis, *supra* note 12, at 226.
15. Woods, 142 S.W.3d at 35.
16. Mass. Gen. Laws ch. 201D, § 5.
17. Fla. Stat. ch. 765.205(1)(b); Cal. Prob. Code § 4714.
18. N.Y. Pub. Health Law § 2982(2).
19. *Id.*
20. Mass. Gen. Laws ch. 201D, § 5 (emphasis added).
21. See *Cohen v. Bolduc*, 760 N.E.2d 714 (Mass. 2002).
22. Mass. Gen. Laws ch. 201D, § 1 (emphasis added); *see also* N.Y. Pub. Health Law §§ 2980, 2982; *but see* Cal. Prob. Code § 4617, which does not limit by definition.
23. N.Y. Pub. Health Law § 2982(2).
24. *Cruzan*, 497 U.S. at 261.
25. Mass. Gen. Laws ch. 201D, § 6; N.Y. Pub. Health Law § 2983.
26. Cal. Prob. Code § 4689.
27. *Cohen v. Bolduc*, 760 N.E.2d at 714.
28. Wash. Rev. Code §§ 71.32.020 *et seq.*, effective July 27, 2003.
29. *See* Wash. Rev. Code § 71.32.070 (5).
30. *See* Nick Anderson, Notes & Comments, *Dr. Jekyll's Waiver of Mr. Hyde's Right to Refuse Medical Treatment: Washington's New Law Authorizing Mental Health Care Advance Directives Needs Additional Protections*, 78 Wash. L. Rev 795 (2003).
31. *In re Storar*, 420 N.E.2d 64 (N.Y. 1981).
32. Uniform Anatomical Gift Act, 8A U.L.A. 4 (Supp. 1991). *See also*, *e.g.*, Mass. Gen. Laws ch. 113, § 8; Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 St. Louis U. L.J. 451, 459, n.52 (2000).
33. Sandra Carnahan, *Promoting Medical Research Without Sacrificing Patient Autonomy: Legal and Ethical Issues Raised by the Waiver of Informed Consent for Emergency Research*. 52 Okla. L. Rev. 565, 582 (1999); *see also* Michael T. Morley, *Proxy Consent to Organ Donation by Incompetents*, 111 Yale L.J. 1215, 1245 (March 2002) (in which the author opines that parent-guardians have both the constitutional right and moral duty to consider the best interest of the entire family).
34. *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969).
35. *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975).
36. Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J. L. Med. & Ethics 347 (1999).
37. *Id.*; Carson Strong, Jeffrey R. Gingrich & William H. Kutteh, *Ethics of Postmortem Sperm Retrieval*, 15 Hum. Reprod. 739-745 (2000).
38. See *New York Hospital Guidelines for Consideration of Request for Post-mortem Sperm Retrieval*, reproduced on the Cornell University Department of Urology website at http://cornellurology.com/uro/cornell/guidelines.html.
39. *See* New York Hospital Guidelines, *supra* note 38.
40. Mass. Gen. Laws ch. 201D, § 17; N.Y. Pub. Health Law § 2992.
41. *Id.*
42. *In re Howe*, No. 03-P-1255, 2004 WL 1446057 (Mass. Prob. & Fam. Ct., Suffolk Div., March 22, 2004).
43. *Guardianship of Elma Mason*, 669 N.E.2d 1081 (Mass. App. Ct. 1996).
44. N.Y. Pub. Health Law § 2982(b)(1).
45. Fla. Stat. ch. 765.205(3).
46. *Schiavo v. Schindler*, 780 So.2d. 176 (Fl. Dist. Ct. App. 2001).
47. *Grace Plaza of Great Neck, Inc. v. Elbaum*, 623 N.E.2d 513 (N.Y. 1993).

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The United States as a Trust Jurisdiction for Foreign Persons

By G. Warren Whitaker

At one time non-U.S. persons would rarely consider creating a trust that was subject to the jurisdiction and governed by the substantive law of one of the fifty United States.[1] Trusts that are deemed to be U.S. trusts for federal income tax purposes are subject to U.S. income tax on their worldwide income. Because non-U.S. persons are taxed only on their U.S. source income, it would make no sense for them to expose their foreign income unnecessarily to U.S. income tax. And since the definition of what constituted a U.S. trust was at one time vague and amorphous, being a matter of facts and circumstances based on all of the relevant ties to the United States, it was not easy to determine whether a trust would be deemed to be "U.S." by the IRS or not. For instance, a trust created under U.S. law with a U.S. trustee and two non-U.S. trustees who held meetings in the United States might well be deemed a U.S. trust. In addition, previously there were not perceived to be significant substantive advantages to the trust law of the U.S. states that would warrant choosing the United States as a trust jurisdiction. Therefore, Rule One of international estate planning for foreign clients was for the clients to create trusts under the laws of a jurisdiction other than the United States.

This situation has evolved dramatically in recent years. Changes in U.S. tax law have made it possible to create a trust with a single U.S. trustee that is subject to U.S. court supervision and governed by the laws of a U.S. state, and still achieve all the tax advantages of a foreign trust. In addition, certain states have enacted substantive trust laws that are attractive for anyone who wants to create a trust, including non-U.S. persons. This article will review the tax changes and the substantive innovations that make the United States a viable jurisdiction in which foreign persons can create trusts.

Tax Law Changes

1. "U.S. Foreign Trusts"

Unquestionably the most important change that permits the U.S. to be used as a foreign trust jurisdiction is the revised definition of "United States Trust" enacted by Congress in 1996.[2] A two-pronged bright line test was created, and only trusts that meet both tests are considered to be U.S. trusts. Therefore it can be said with a high degree of certainty that trusts that do not meet both tests are foreign trusts for U.S. income tax purposes, regardless of their U.S. connections.

The two tests that must be met in order for a trust to be a U.S. trust are the following:

(a) A U.S. court must be able to exercise primary jurisdiction over the administration of the trust, **and**

(b) U.S. persons must control **every** substantial decision of the trust. A fifty-fifty split in control between U.S. and non-U.S. persons does not constitute U.S. control.

Therefore, if a trust is created (by a U.S. or a non-U.S. person) under the laws of one of the 50 U.S. states, a U.S. court may exercise primary jurisdiction over the trust, and a U.S. trustee controls nearly every substantial decision, but a foreign person controls (or has an equal vote) on only **one** substantial decision concerning the trust, the trust will be deemed to be a foreign trust for U.S. income tax purposes. In the eyes of the Internal Revenue Service the trust will be taxed only on its U.S. source income, in the same manner as any trust created and administered under the laws of Gibraltar, Mauritius, or Vanuatu. There will be no tax reporting to the Internal Revenue Service unless the trust has U.S. source income, holds U.S. assets, or makes distributions to U.S. beneficiaries—and of course, the same reporting would take place if the trust were created under the laws of another country but had the same U.S. connections.

Therefore, a wealthy Tibetan farmer with an entirely Tibetan family can contribute his Tibetan assets to a trust created under the laws of a U.S. state, retaining power over a substantial decision (such as the power to revoke the trust), and the entire trust structure will be treated as foreign for income tax purposes. (He will want to ensure that a Tibetan person will control a substantial decision after his death if he wishes the foreign status of the trust to continue.)

The full list of "substantial decisions," **all** of which must be held by U.S. persons to make the trust a U.S. trust, is as follows:

(a) Whether and when to distribute income or corpus.

(b) The amount of any distribution.

(c) The selection of a beneficiary.

(d) The power to make investment decisions. (However, if a trust has a foreign investment advisor who may be removed by the U.S. trustee at any time, investment decisions will not be considered to be controlled by a foreign person.)

(e) Whether a receipt is allocable to income or principal.

(f) Whether to terminate the trust.

(g) Whether to compromise, arbitrate or abandon claims of the trust.

(h) Whether to sue on behalf of the trust or to defend suits against the trust.

(i) Whether to remove, add or name a successor to a trustee.[3]

2. Asset Protection Trusts

Several states, beginning with Alaska in 1999 and now including Delaware, Nevada, Utah and most recently South Dakota, have passed asset protection trust legislation. These laws in effect overturn the Statute of Elizabeth (1571) which provided that a Settlor could not place assets into trust to defeat the claims of his future creditors. Under this asset protection legislation a Settlor may contribute assets to an irrevocable trust and remain a permissible beneficiary of the trust in the discretion of an independent trustee, and the trust assets will be protected from creditors whose claims arise after the trust is created.

What is the relevance of this concept to tax planning? The answer is that if a Settlor creates an irrevocable trust and relinquishes all other impermissible powers and interests under the Internal Revenue Code, but the trust is reachable by the Settlor's creditors under state law, the IRS views the transfer to the trust as incomplete and all the trust assets are includable in his estate at death.[4] Conversely, if the trust is not reachable by the Settlor's creditors (and he has no other impermissible power or interest) it is protected from U.S. estate tax.

Traditionally, foreign persons who wish to own U.S. situs assets (U.S. real property, shares of U.S. corporations, U.S. tangible personal property, etc.) would put those assets into a foreign corporation to protect them from U.S. estate tax. (The corporation might then be held via a revocable or irrevocable offshore trust, although it is the corporation rather than the trust that affords protection from U.S. estate tax at the Settlor's death.) However, the foreign corporation results in a variety of problems, including higher tax on capital gains on the sale of real property, FIRPTA withholding, and Controlled Foreign Corporation issues either during the Settlor's life or after his death if the trust has U.S. beneficiaries.

An alternative now presents itself: The foreign person can create an irrevocable trust under the laws of one of the U.S. jurisdictions mentioned above. (The trust might be made either foreign or domestic for U.S. income tax purposes, depending on the circumstances and the assets held.) This trust might hold shares of U.S. corporations and U.S. situs real property. The U.S. property is thus sheltered from U.S. estate tax on the death of the Settlor, and the problems of a foreign corporation are eliminated.

It should be noted that the U.S. asset protection trusts have not yet been the subject of I.R.S. rulings or federal court opinions confirming that their assets are not includable in the Settlor's estate for U.S. tax purposes. There is a risk that the I.R.S. will contend that the Settlor retained a life interest in the trust assets pursuant to an implicit understanding with the trustee, and therefore that the trust assets are includible in the Settlor's estate at death under I.R.C. Section 2036. To reduce the likelihood of such a result, the Settlor should consider naming multiple current permissible beneficiaries, such as the Settlor's spouse, descendants and parents, and perhaps make them a higher priority for distributions than the Settlor. A retained interest argument should be more difficult for the I.R.S. to assert if the Settlor never receives a distribution from the trust, or if distributions are made infrequently, for stated purposes only and not on a regular periodic basis.

3. Grantor Trust Rules

The rules regarding grantor trusts were also significantly amended in 1996. Prior to that date the grantor trust rules applied to non-U.S. persons in the same way as to U.S. persons, making it a fairly simple matter to make a non-U.S. person the grantor of a trust, for instance by making him or her a permissible beneficiary. Post-1995, a non-U.S. person will not be treated as the grantor of a trust except under the following limited circumstances: (1) if the trust is fully revocable by the grantor; (2) if the only permissible beneficiaries are the grantor and the grantor's spouse, and (3) if the trust is grandfathered (created before September 19, 1995 and not added to after that date).[5]

A non-U.S. Settlor will usually want any trust he or she creates to be a grantor trust if there are current or subsequent U.S. beneficiaries, in order to avoid

taxation of trust income to those beneficiaries, possibly together with accumulation penalties. If there will be no U.S. beneficiaries, grantor trust status is less significant, and the non-U.S. Settlor may not want to be treated as the grantor of the trust for disclosure or other purposes. Either of these results can be achieved in a U.S. trust, depending on which is more favorable given the particular circumstances of the Grantor. If the trust is fully revocable by the non-U.S. Settlor it will not only be a grantor trust but will also automatically be a foreign trust. If the non-U.S. Settlor and his spouse are the sole beneficiaries of the trust it can be made a foreign or a domestic trust, and the planner has the choice depending on the result desired.

4. Blacklists and Tax Haven Treatment

Certain countries, such as Venezuela, Brazil, Argentina and (until recently) Mexico, have lists of jurisdictions that are considered to be tax havens. Special reporting and tax requirements are imposed on local residents who hold assets in these jurisdictions. Other jurisdictions such as France and Switzerland do not have formal blacklists but may treat distributions from trusts in certain jurisdictions with particular suspicion and apply presumptions regarding tax treatment of these trusts. However, the United States is not on any of these blacklists or lists of suspected tax havens, and trusts created under its laws will not be subject to the negative presumptions that may apply to some other jurisdictions.

5. Treaties

Income tax treaties between the United States and certain other countries such as France provide rules to avoid double taxation that may make the use of U.S. trusts advantageous for residents of those countries. Non-U.S. persons residing in these treaty countries may be able to create and fund U.S. domestic trusts, have the income taxed at the potentially lower U.S. tax rates, and avoid higher income taxation in their home country. It seems likely that treaty benefits will only be available if the trust is a U.S. domestic trust for U.S. income tax purposes, and not if it is a U.S. situs trust that is treated as a foreign trust for U.S. income tax purposes.

6. Low Income Taxes

The income taxes of the United States on passive income have been dramatically reduced in recent years. These low rates include:

- Appreciation in the sale of securities held for more than 12 months is subject to the long term capital gains rate of 15%.
- Appreciation on the sale of real property held for more than 12 months is subject to long term capital gains tax at 15%.
- Most corporate dividends are taxed at a rate of 15%.
- Interest on municipal bonds is not subject to U.S. taxation.

With such low rates, it may be advisable for some foreign clients to create domestic U.S. trusts and have them taxed in the United States in order to avoid taxation in their home country.

If the U.S. estate tax is ever actually abolished (a big "if") this will be an even further impetus to creating structures in the United States, since structures will no longer need to be designed in part to avoid the U.S. estate tax on U.S. situs assets.

Substantive Advantages

In addition to the tax opportunities described above, several U.S. states have added substantive features to their trust laws that make them attractive for the creation of long-term trusts, whether or not the Settlor and his or her family have U.S. ties. These include:

1. No Rule Against Perpetuities

At present, 15 U.S. states have abolished the rule against perpetuities or extended substantially the maximum permissible trust term. (These include Alaska, Arizona, Colorado, Delaware, Florida, Illinois, Idaho, Maryland, Maine, New Jersey, Ohio, Rhode Island, South Dakota, Utah, and Wisconsin.)

While many advisors are uncertain of how long the trusts their clients create will actually continue in existence, the abolition of the rule against perpetuities is often attractive to clients with dynastic aspirations. It also simplifies the pourover from trusts in other jurisdictions that have longer rules against perpetuities than the traditional lives in being plus 21 years. Finally, abolition of the rule against perpetuities relieves lawyers from the burden of having to explain to their clients what the rule against perpetuities is, and of assuring them that the descendants of King George VI (a commonly used set of measuring lives in some jurisdictions) will not ultimately inherit the trust property.

2. Investment Advisor

Trustees have struggled for years with the question of how to hold trust assets that are not subject to their investment control without risking liability for investment decisions that go wrong. Various solutions have been proposed and their effectiveness in protecting trustees from liability has been much debated. The solution of such U.S. states as South Dakota and Delaware has been to provide for an Investment Advisor with sole responsibility for

investment management. When an Investment Advisor is appointed, the trustee has no authority over investment decisions and will not be held liable for them. Trustees of "directed" trusts that have an Investment Advisor should therefore be more willing to hold a wider array of assets for a lower fee since they do not bear significant risk.

3. Distribution Advisor

Some states such as Delaware exempt a trustee from liability if it makes discretionary distributions solely at the direction of a distribution advisor, who may be a co-trustee, protector or other advisor. This permits a foreign Settlor to name a U.S. trustee but appoint a local advisor to hold distribution power. Of course the tax consequences of granting this power must be carefully considered. If the distribution power is held by a non-U.S. person, an otherwise U.S. trust will be converted into a foreign trust. If a permissible beneficiary holds the distribution power and it is not limited by an ascertainable standard, the beneficiary may hold a general power of appointment over the trust property for estate tax purposes.

4. Protection From Forced Heirship

Many civil law countries have forced heirship laws which provide that the children of a decedent are entitled to inherit a specific share of his or her estate, regardless of any contrary provisions of the will. Similarly, the Sha'ria Law that applies in Muslim countries provides that fixed percentages of the decedent's estate pass to each child, and cannot be overridden by a will. Residents of these countries often set up trusts to avoid these rigid inheritance laws, and they want to be assured that the jurisdiction in which the trust is created will not recognize forced heirship claims that arise under the laws of the Settlor's domicile. Some states, including Delaware and South Dakota, have specifically provided that trusts created under their laws are not subject to forced heirship claims arising under the laws of foreign jurisdictions, including the law of the Settlor's domicile.

5. Private Trust Companies

Many substantial families today have discovered the attractiveness of creating a private trust company to act as trustee of the family's trusts. The private trust company is controlled by a Board comprised of both family members and outside advisors. This gives the family a large degree of control while allowing them to outsource specific functions to financial institutions as they deem appropriate. South Dakota, Wyoming, Delaware, and Alaska all permit the creation of private trust companies in various forms.

Summary: The United States is not and will never be the "only" or "preferred" jurisdiction for every foreign client who wishes to create a trust structure. Many of the advantages described above are available in foreign jurisdictions as well, and some clients will always want to steer clear of the U.S. for non-tax as well as tax reasons, including issues of perceived confidentiality, which may or may not have validity but nonetheless must be respected. However, the United States is an attractive alternative for international planners to consider, another arrow in their quiver that may fit the bill for clients who want to enjoy what the United States has to offer without subjecting themselves to unnecessary tax costs.

Endnotes

1. "Non-U.S. person" refers to an individual who is not a citizen of the United States and not a U.S. resident for either income or estate tax purposes.
2. I.R.C. Section 7701 (a)(30)(E), (31)(B).
3. Reg. Section 301.7701-7.
4. Rev. Rul. 76-103, 1976-1 CB 293.
5. I.R.C. Section 672(f).

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Of Hurricanes and Me

By Michael McAuley

Address to the Trusts and Estates Law Section of the New York State Bar Association
Friday, September 30, 2005

I am delighted to be here among you. I sincerely hope that you will not regret this thoughtful invitation for I have a number of unkind things to say about legal practice. I do not propose to tell you about my shotgun lest you think that I have it here with me. I do not. My shotgun is in New Orleans (and I hope always will be) on St. Ann Street in the French Quarter, along with lots of other pretty shotguns, camelbacks, and Victorian and Creole buildings. I do, however, propose to talk to you about the law, the trust, forced heirship, and why Louisiana and its civil law tradition are vital to you if you care about the law. I offer no apologies to those of you who may have heard some of these things before. It is time that you hear them again.

Let me first address the topic of the trust. It tells us a lot about ourselves and our sense of community.

A few months ago, I was asked to speak to a group of Peruvian lawyers who were visiting my law center at Louisiana State University. They wanted to know about the common law tradition, American practice and, in particular, the trust. I told them that I would tell them about the trust but that I intended to do something better. I would lead them to a greater understanding of the trust so that they might abandon any further consideration of its incorporation in their private law.

I have come to disbelieve in the trust. I have no time for its current—and let me stress this word—current formulations. Indeed, when I spoke to members of the ABA estate tax section in New Orleans some four years ago, I told them that I consider the trust a fraud on creditors, a fraud on the family, and a fraud on society at large. They gave me a gift. I have not seen them since.

Why do I now hold this view? I did not hold it when I practiced in Bermuda and before I came to Louisiana. I hold this view because I met a man.

Let me tell you about this meeting with a man—a hero of a man. His name is Robert Anthony Pascal—a man of broad culture and a jurist of mostly correct ideas. Bob Pascal is emeritus professor of law at Louisiana State University. I cannot say that Bob and I agree on all things, especially in the domain of close personal intimate relationships. However, there is one thing upon which we do agree—one of his big thoughts—a thought that has radically altered the course of my thinking on life, community, law and the trust. I will be forever thankful to him. This big thought is that wealth is for the living.

"I . . . propose to talk to you about the law, the trust, forced heirship, and why Louisiana and its civil law tradition are vital to you if you care about the law. I offer no apologies to those of you who may have heard some of these things before. It is time that you hear them again."

In this regard, here is what Professor Pascal has had to say about the trust.

Pascal believes that "indestructible trusts," "indestructible directions to accumulate income" and "spendthrift trusts," for example, are nothing short of "schemes" to permit "individual persons to be placed in partial and private economic dictatorships by other individual persons."[1] These devices, so he says, constitute an "insult . . . to human dignity."[2] Further, "[t]he harm is, after all, mostly of a kind which is not readily apparent; injury to personal dignity; lost opportunities for self expression and development of the individual beneficiary; and . . . unwholesome economic effects."[3] Pascal and I believe that the Anglo-American legal tradition has sacrificed the beneficiary, his dignity, and his self-expression. This immolation of individual dignity is clear, especially when one investigates the permitted duration of the trust.

On the topic of duration, therefore, let us consider perpetual interests. For the longest possible time perpetual interests were prohibited. The rule against perpetuities or the rule against remoteness of vesting, together with the rule against perpetual trusts, successfully prevented the entailing of property interests beyond a reasonable time. In the context of the trust, a life in being and 21 years seemed, over the course of several centuries, wise policy. This policy was born as the fruit of an enlightened understanding of the evils of feudalism. However, less

than 50 years ago the rule started to disintegrate—whether by the introduction of the "wait and see" rule; by the extension of the duration of the trust to a fixed period, for example 80, 100, or 125 years; or by the outright abolition of the rule.

Were the issue only to establish the duration of the trust as a fixed (and reasonable) number of years, I would have few qualms. Both common and civil law lawyers understand well that proprietary interests, less than ownership, can be conditioned and temporalized. However, today, with great alacrity we see that an increasing number of jurisdictions, by specific legislation, authorize the perpetual trust although, it would seem, not with respect to realty. Perpetual trusts are trusts that, at least in principle, live on from generation to generation unto the end of time.

"Absolute discretionary trusts are—let me be blunt—tools of high mischief."

Propelling ourselves into the future, what will we say to the burdened future generations of beneficiaries? Should we be concerned? Of course, we should. Does anyone deny this? What private social order are our lawmakers proposing for citizens? What are the lawmakers telling people about their life in the law, their juridical personality, and their inherent right of self-expression and self-determination?

And so you understand that topics such as the rule against perpetuities and the discrete decisions that legislative bodies make with respect to the holding of proprietary interests over time have much to do with the trust and very much more to do with human dignity.

The trust, as an institution classically understood as part of the law of property, was originally a vehicle for independent management and enjoyment free of the settlor's will. It was never originally contemplated that there would be no secure enjoyment by the beneficiaries. It was certainly not contemplated that the beneficiaries might be expressly deprived of their rights by legislation that exists in some offshore jurisdictions.

In this regard, for example, the absolute discretionary trust is an abomination. The trust documents tell a story of trustee independence, fiduciary duty, equity and measure. The reality is something else. Letters of wishes, directives, irrevocable instructions, and memoranda are secreted away in safes and in attorneys' drawers. Beneficiaries are misled. They are told that the trustee is independent and has been appointed to watch over their interests. In fact, the trustee is sometimes (although not always) a cashier and a simple minion. The settlor acts as the puppeteer. Absolute discretionary trusts are—let me be blunt—tools of high mischief.

The advent of trusts has, at least in the case of Louisiana, greatly disturbed and will, for other civil law systems, greatly disturb the central themes of their civil codes. The civil law of Louisiana, as originally conceived, was grounded in the firm belief that wealth is for the current citizenry, that is to say, wealth is for the living. No citizen should be prevented from owning his or her fair share of the economic benefits of society. The common law looks at things somewhat differently. We have only to examine the field of future interests in the common law of property. Napoleon wisely discarded future (or, in civil law terms, eventual) interests as part of the codified French law and prohibited the use of the only trust-like institution that the civil law knew, that is to say, the substitution. For the 19th century French, and for all those whom they have inspired and continue to inspire, wealth is for the living. Wealth is present ownership. Ownership is for the living.

Indeed, Portalis, one of Napoleon's codifiers, expresses the aspirations of ownership as follows: "By consecrating the precepts that are congenial to ownership, you will have inspired the love for law. You will not only have worked to promote the happiness of individuals, or of individual families. You will have created a public spirit. You will have set free the true sources of general prosperity. You will have prepared the happiness of all."[4]

Now that I have evoked the name of Napoleon, let me digress and let me disabuse you of any notion that you might have that Louisiana has Napoleonic law or the Napoleonic civil code. It has neither. It never had either. Even in Louisiana we forget our history. We forget that Napoleon took back the Territory of Orleans from the Spanish in 1803. He held the territory for one month before selling it to the United States. The law of the Territory of Orleans on the day on or before the day on which the Purchase occurred was Spanish law. Although there have been (and still are) academic fisticuffs about this, the better view is that it was the Spanish law that was codified in 1808 (and that was the foundation for the 1825 and 1870 codes) notwithstanding the French language of the 1808 and 1825 codes and the French style and form of all three codes. This fact is unknown even to many scholars. Many believe, for example, that Louisiana's community property regime comes from France in contrast to the community property system of the other original community states, seven in number,

which is derived from the laws of Spain. This is not true. Indeed, Louisiana has retained a community property system that is very closely aligned with its Spanish antecedents. If you leave this lunch today with only this bit of information, you should consider my remarks entirely worthwhile.

Now, let's return to the trust. On the whole, therefore, it seems to me that we must reinstate the trustee's independence of action. This will require us, and our friends on Capitol Hill, to rethink the revocable trust. At the fountain of the civil law at which, in private matters, Louisiana sometimes gulps and sometimes sips—to use a turn of phrase of a great French scholar—it has never been clearly understood how the private law can contemplate a divesting of interest in favor of a trustee but, at the same time, a retention of control by the settlor.

Let me now say that some of you may have lobbied for this tyranny but you would not be so clearly under its spell were it not for tax legislation. Tax legislation has become the motor of society. Notwithstanding what we may be taught in law school, tax legislation controls the private law and the private law is victimized by its choice considerations. Tax legislation is also largely responsible for the over-protection of the spouse and the under-protection of the child. It has distorted the natural distribution of wealth within the family.

It is tax legislation that is now doing much to prevent a thorough new examination of the merits of forced heirship—an institution of the private law that fosters economic protection of children and endorses self-expression and self-determination.

Let's move on to the topic of forced heirship, that is to say the distribution of a portion of a decedent's property to his children. Popular perceptions of forced heirship in North America and in civil law countries differ. The description of this heirship as "forced" is a prompt for statements that it is "imposed," "dictated," and "compulsory." Here in the United States, for example, with our peculiar and continued revolutionary zeal, we are rigorously dismissive of anything that is required of a citizen by the State (or, indeed, by the courts), especially in property matters.[5]

The critic looks at forced inheritance as protecting children who are consistently unworthy—seemingly no device or mechanic of disinheritance can release these brats from their claim. The English jurist known as Bracton, arguing against protection, states: ". . . for a citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives."[6]

When common lawyers look carefully and courteously at forced inheritance, they should note that the institution forms part of a larger picture of alimentary provision for the family, for example the spouse through community of property or as an heir-at-law, and the child and others as alimentary creditors. Birth, minority, protective supervision for minors, emancipation, marriage, divorce, childbearing and childrearing, and death—a stream of alimentary obligations penetrates these institutions. Although sometimes imperfectly achieved, the civil law and its codes endeavor to look at the person and her status both temporally (at any given time) and expansively (at all times). The focus of freedom in civil law countries is in the acquisition of status and the concomitant duties that each new level of status occasions.

Forced inheritance, therefore, cannot be easily divorced from this larger picture. Why do we not advance a model of alimentary support for children that survives death? The spouse, now an increasing transient in the life of a juridical person, is relatively well protected both before and after death. The situation of the child is alarmingly different.

Forced heirship was, at one time, a fine institution of the civil law of Louisiana. It has now been all but destroyed and reduced to an alimentary claim for young children and for the disabled. Children at large do not enjoy the same protection as the spouse does and children do not participate in the wealth of the testator. Yet, even where every argument against forced inheritance is countered, the notion remains that "full" testamentary freedom is sacrosanct. This is especially the case here in the United States. It is commonly asserted that the right to make a will is inviolable notwithstanding creditors, taxation, the elective share, revocable trusts, will substitutes, pensions, annuities, insurance, and other products of the "non-probate revolution." Consider, I ask you, this proposition: forced heirship endorses testamentary freedom after provision for alimentary obligations. Is this proposition true? Yes. Forced heirship endorses rights after satisfaction of duties, especially duties to one's family.

To my mind, untrammeled testamentary freedom is an invitation to be selfish. By like token, to my mind, perpetual trusts are just wrappers for the misguided ambitions of narcissistic settlors.

What can you and I do? We in New York and in Louisiana can put an end to this "virus of selfishness," to use Pascal's words. We can introduce protection for children. We can limit testamentary freedom. We can restrict the freedom of settlors to create trusts. We can re-instate or re-formulate a rule against perpetuities. We can start focusing on today,

looking at our neighbors, looking at the people in front of us.

Today, many people find human interaction difficult. Some of us prefer to cast our eyes and minds to the future and avoid the uncomfortable glances of those around us. We prefer to be removed from reality. Our fascination with celebrities and media wizards amply testifies to this fact. How can we rectify this situation—and we must—so that the citizens of the State of New York, and those of Louisiana and this nation, are given back a private law that is moral, that can be comprehended, and that will set out a useful plan for their lives? The answer to this lies partly in the expression of the law and partly in its substance.

"All that may be said of hurricanes and reconstruction, as you may now surmise, may also be said of the law."

A reform of the law is desirable and urgently needed in the common law. It has become unwieldy and, here in the United States, inaccessible to the public and increasingly byzantine even for the professional caste of jurists. As lawyers and as citizens, we must learn to channel our energies towards broad legal issues and away from everyday social and political commotion.

Instead of the tax men and the lawmakers telling us what we need, we must begin to tell them what we want. The American Law Institute should become a vehicle for popular reform of the law. I say "we" because I firmly believe that every man and woman, every lawyer, outside her law office and before his hearth, would rejoice in a simpler expression of legal rules. It is an amusing fact that senior practitioners—lawyers who are well skilled and wise in the law—cannot "find" the law. Only students can "find" the law because the law has become so vast in its written form and so intricate that only a mastery of every possible technological skill can save a man's life. Some of you might remember that very short-lived CBS television series, "First Monday." It was all about a Supreme Court judge, his female clerk, and fornication on, in or about the premises of the Supreme Court. Did you find it satisfactory that a Supreme Court judge commanded his clerk: "Find me a case," and that the clerk, after several attempts, did so? The Supreme Court judge himself was unable to "find" any textual authority to support his proposition. I ask again: is this satisfactory? Is this right? What message was the media portraying to the millions of viewers? Was the message: "The law is indecipherable. The law is unfathomable. The law cannot be found"? The message that should have been conveyed is: the law is manifest and should be rejoiced in.

Great events and great calamities prompt reflection. Katrina and Rita have given Louisiana much to ponder. As is now obvious to all, New Orleans was not attentive to its poor, to their housing and education, or to their health and security. It never was attentive, and I venture to say that it will fail to remedy these injustices, since remedial measures would require actions not of six or eight months, nor a plan of two or three years, but a plan a full generation in length. As Herodotus would have it, a generation is thirty-three years, and it will take at least one entire generation to eradicate the injustices that many generations have produced. New Orleans' levee system needs to be buttressed. However this might enable New Orleans to withstand another cat 3, cat 4, or cat 5 hurricane (by the way, how much more breath does it take to say "category"?) or weather other fierce winds, some say that it will do nothing to save New Orleans from being swamped entirely by the sea before the end of this century because of the destruction of the coastal wetlands. Does anyone alive today care about those living sixty or seventy years from now?

All that may be said of hurricanes and reconstruction, as you may now surmise, may also be said of the law. Does any lawyer alive today care about what the law will look like in sixty or seventy years?

When I asked my students for a list of topics that might interest you, they all suggested that I address a topic that we had discussed in class. That topic was "legal culture," and especially, the legal culture of lawyers. Lawyers, as Pascal would say, are "high priests" of the law. The law in motion is the law that we care to make. So, where lawyers live and work and how they think will very much influence the future of Louisiana law. What the Louisiana civil code commissioners Derbigny, Livingston, and Moreau-Lislet thought in 1823 about the purpose of the law and the method of its expression have been critical to Louisiana and to the preservation of its civil law heritage. In like manner, there is likely to be a great deal of legal work as a result of the reconstruction of a major city. Louisiana lawyers may be displaced to other states and never return. Out-of-state lawyers will likely draft contracts applicable to Louisiana situations and, thus, discretely import property and contract ideas foreign to the civil law system of the state.

One of my students believes (and I think that he must be right) that at the next scheduled gubernato-

rial election in the fall of 2007, when half of the Louisiana legislature will be replaced, there will be greater success for reform-oriented platforms. This may lead to new types of people being appointed, with different ways of framing legislation.

Yet another of my students is concerned for his career. Will he now have to leave Louisiana because New Orleans, after reconstruction, will be a much smaller city with a smaller economic base? Should he now take more "American" law courses? I think that he should. Yet, by doing so, the number of Louisiana's high priests that safeguard the civil law system will diminish. Over time, I fear, the state's legal tradition will be further assaulted.

Why is this important? It is important because Louisiana's civil law has a good message for all of us. It reminds us that law can be just, that law can be expressed elegantly and intelligibly, and that the law can have some overarching mission to establish and foster the vocation of a people. It reminds us that wealth is familial and that wealth is for the living. In this way, the civil law broadcasts loud and clear that every individual has a right of self-expression and self-determination and that no individual should be subject to the tyranny of another, especially the posthumous tyranny of a family member.

What is the law? Is it nothing more than a random system of principles, rules and standards? Or is it a complex of truthful ideas and moral propositions of ways to regulate and fashion the conduct of people? For all their calamity, hurricanes usefully prompt us to ask important questions about the law, about the community of mankind, about human dignity, about forced heirship and, of course, about the trust. This is a good thing.

Endnotes

1. *See* Robert A. Pascal, *Of Trusts, Human Dignity, Legal Science, and Taxes*, 23 La. L. Rev. 639, 654 (1963).
2. *Id.*
3. *Id.* at 655.
4. *See Presentation to the Legislative Body for the Proposed Law Pertaining to Ownership (trans. Nicholas Kasirer)* at Nicholas Kasirer, *Portalis Now, in* Le droit civil, avant tout un style? 28, 46 (Nicholas Kasirer, ed., 2003).
5. Part of the text of McAuley's comments on forced heirship has been published. *See generally* Michael McAuley, *Introduction and Pro portione legitima - A Polemic in Defence of Children as Heirs-at-law*, in Papers of the International Academy of Estate and Trust Law - 2001 243 (Rosalind F. Atherton, ed., Kluwer Law International, The Hague, 2002).
6. *2 H. Bracton, On the Laws and Customs of England 181*, cited in Deborah A. Batts, *I didn't ask to be born: The American law of disinheritance and a proposal for change to a system of protected inheritance*, 41 Hastings L. J. 1197 (1990) at note 128.

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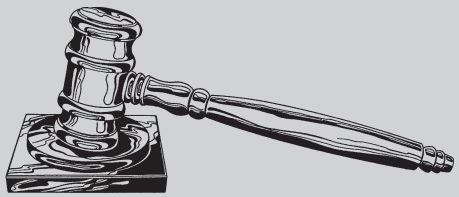
Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



ACCOUNTINGS

Sole Surviving Fiduciary May Not Account to Executors of Deceased Co-Trustee Absent Judicial Authorization; Present Income Interest May Not Virtually Represent Future Interest in Accounting

Decedent's will created three general power of appointment marital deduction trusts, the takers in default of each trust being one of the decedent's three children. The residue was divided into three trusts, one for the income benefit of each child and the widow. The trusts terminate twenty-one years after the death of the widow and the three children with the property passing to the issue of the child for whom the trust was created.

The widow has died and her will, which is the subject of a contest, purported to exercise her powers of appointment by appointing the trust property to the residuary trusts, two-thirds to the trust for the son and his family and one-sixth to each of the trusts for the couple's two daughters. The son is the only surviving co-executor (he served with his mother) and the sole surviving co-trustee, (his mother and his deceased uncle were his co-trustees). The son now seeks to account.

As co-executor and co-trustee the son cannot account to himself, and while he could account to an independent trustee, the court held that the executors of his uncle's estate do not have to fulfill that role. Unless the court grants the fiduciary of a deceased trustee the powers of the trustee pursuant to SCPA 2207(7) that fiduciary is responsible only for the property of the estate that comes into his or her possession.

Second, the decedent's two daughters cannot represent their infant children in the accounting under SCPA 315. The court found that a present income interest is not the same as a future remainder interest or income interest even if income can be distributed to a class that includes the future income and remainder interests. The court then exercised its discretion under SCPA 315(7) to appoint a guardian *ad litem* for the infants. *In re Zirinsky*, 802 N.Y.S.2d 923 (Sur. Ct., Nassau Co. 2005).

ADMINISTRATION OF ESTATES

Elective Share: Notice to Executor's Attorney Substantially Complies with Statute

Attorney for the nominated executor of decedent's will sent a letter to the attorney representing decedent's surviving spouse stating that all correspondence regarding the decedent's estate should be mailed to the attorney rather than to the executor. Letters testamentary were subsequently issued to the nominated executor and less than a month later the surviving spouse exercised the right of election, filed written notice with the Surrogate's Court and sent the notice to the executor's attorney.

EPTL 5-1.1-A(d)(1) requires that notice of exercise of the right of election be served on the decedent's personal representative. Following precedent, the Appellate Division affirmed that Surrogate's finding that in this case mailing the notice to the personal representative's attorney substantially complied with the statute. The significant facts included the instruction that correspondence regarding the estate be sent to the attorney; the uncontested fact that the executor had notice of the exercise of the right of election and the fact that the estate tax return in the decedent's estate included a deduction for the interest elected by the surviving spouse. *In re Colin*, 23 A.D.3d 824, 803 N.Y.S.2d 794 (3d Dep't 2005).

FIDUCIARIES

Administrator's Duties; Resistance to Claims of Alleged Non-Marital Children Does Not Require Removal

Decedent's alleged non-marital children sought and obtained an order for production of blood and tissue samples for DNA testing. *See In re Morningstar*, 17 A.D.3d 1060, 794 N.Y.S.2d 205 (4th Dep't 2005). Before the Surrogate's Court granted that order the alleged children also filed a petition seeking removal of the decedent's marital children as administrators. The Appellate Division affirmed the Surrogate's denial of that petition. The petitioners do have standing to seek removal. So long as their status has not been judicially determined they are persons "alleged-

ly entitled to share" in the estate as beneficiaries and therefore have standing under SCPA 711. However, while a fiduciary may be removed for misconduct including wasting the assets of the estate or if hostility between the fiduciary and persons interested in the estate jeopardizes the administration of the estate, the fiduciary also has the duty to protect the estate from improper claims. The administrators in this case are properly performing their duties by requiring the claimants to prove their status as children of the decedent. *In re Morningstar*, 21 A.D.3d 1285, 801 N.Y.S.2d 674 (4th Dep't 2005).

POWER OF ATTORNEY

Self-Dealing; Express Grant of Power to Make Gifts to Attorney-in-Fact Overcomes Presumption of Self-Dealing

The Appellate Division has affirmed the Surrogate's Court in *In re Ferrara* (3 Misc. 3d 944, 775 N.Y.S.2d 470 (Sur. Ct., Rockland Co. 2004)), in which the Surrogate held that a gift of the principal's property made by the attorney-in-fact to himself was authorized by language in the power of attorney specifically authorizing such gifts in accordance with GOL § 5-1503. The Appellate Division restated the well-accepted rule that an attorney-in-fact must act with undivided loyalty and may not make a gift to him or herself of the principal's property and that such a gift carries with it the presumption of impropriety and self-dealing which may be overcome only by a clear showing of intent on the part of the principal. The court stated that the language in the power of attorney signed by the decedent authorized gifts to the attorney-in-fact and that competent evidence adduced in the Surrogate's Court supported the contention that the decedent specifically authorized the distribution to the attorney-in-fact. *In re Ferrara*, 22 A.D.3d 578, 802 N.Y.S.2d 471 (2d Dep't 2005).

SLAYERS

Prima Facie Case Sufficient to Disqualify

The bodies of the decedent, Low, and her boyfriend, Romano, were found in the Westhampton home of the decedent where the couple resided. The police determined that Romano had killed the decedent and then taken his own life. Romano was a beneficiary of the decedent's will. The Surrogate granted summary judgment dismissing objections to the petition seeking to disqualify Romano's estate. The Appellate Division affirmed, stating that the *prima facie* showing that Romano had killed the decedent entitled those seeking disqualification to judgment as a matter of law. *In re Low*, 22 A.D.3d 666, 804 N.Y.S.2d 356 (2d Dep't. 2005).

TRUSTS

Trustee's Duties; Laches Bars Beneficiary's Claim

Linker created an irrevocable trust with himself and his two daughters as co-trustees. All income was to be paid to Linker during his life and on his death the principal and undistributed income was to be distributed to the two co-trustees. Any two of the three trustees could make investment decisions and bind the trust and the trustees could unanimously exercise discretion to distribute principal to Liner for his health and general welfare. The trust was to be funded with the proceeds of the sale of Linker's stock in a closely held corporation. The trust received a small amount of cash and a promissory note paying interest at 10% a year.

Three years after Linker's death one of the co-trustees filed a petition for a compulsory accounting. Her sister answered that although she had received the periodic payments and interest on the note, Linker had insisted that the funds be turned over to him personally. The Surrogate ordered the respondent to account, eventually turning the matter over to a Referee. Throughout the proceedings respondent argued that she had no control over the trust and that her sister knew that their father ignored the trust and treated the proceeds of the note as his own.

Respondent eventually argued that laches barred the action, but the Referee rejected the argument, finding that it had been waived by not being asserted earlier in the proceedings and that respondent had not shown that the petitioner had known that the trust had not been funded. In addition, the Referee found that the respondent had not explained the lack of documentation of her claims that Linker had diverted the trust to his own use.

Based on the Referee's report the Surrogate charged the respondent with an unaccounted balance of just over $700,000, one-half of which should have been distributed to respondent and directed judgment against respondent but denied petitioner's application for damages, prejudgment interest and a surcharge, finding that while laches did not bar the claim petitioner as co-trustee she should have done more to protect the trust.

The Appellate Division reversed, first noting that the respondent consistently claimed that the trust records had been turned over to Linker's executor and could not be produced. Had petitioner acted promptly as a trustee and as a litigant those records "may well have been available," and therefore petitioner's delay prejudiced the respondent and delay causing prejudice to an adverse party is the essence of laches. Finally, respondent's pleadings were ade-

quate to give notice both to the petitioner and the court that she was raising laches as a defense. *In re Linker*, 23 A.D.3d 186, 803 N.Y.S.2d 534 (1st Dep't 2005).

WILLS

Anti-Lapse Statute Applies to Express Gift for Adopted-Out Child Who Was Identified by Name in Will

Decedent executed her will in 1998, decades after re-establishing her relationship with her birth son who had been adopted by persons not related to the decedent. The will gave the son decedent's cottage, a general bequest of $8,000 and one-half of the residuary estate; the other half of the residuary estate was left to decedent's sister-in-law. The will also contained general bequests of cash, beneficiaries of which included two of the son's children and at least four other relatives of the decedent's sister-in-law. The son predeceased decedent by eleven months and was survived by four children who also survived decedent.

With Judge Read in dissent, the Court of Appeals reversed the Surrogate's Court and the Appellate Division (11 A.D.3d 947, 784 N.Y.S.2d 760 (4th Dep't 2004)), and held that the anti-lapse statute, EPTL 3-3.3, applies to the gifts in the will to decedent's son, thus giving the property to his children. The anti-lapse statute applies to gifts to issue and includes in the definition of issue adopted children to the extent they would be "issue" under DRL § 117(2). DRL § 117(2)(a) provides that adopted children and their issue are strangers to birth relatives for the purpose of interpreting or construing dispositions in any instrument absent the expression of a contrary intention or an express inclusion of the adopted individual by name or by reference to a classification not based on a parent-child or family relationship.

The Court held as a matter of statutory interpretation that the language of DRL § 117(2)(a) does not require that the issue of an adopted child must be expressly named in order to take under a will. To hold otherwise would put the adopted child in the same position as any non-relative named in the will. "Surely the Legislature did not enact § 117(2)(a) merely to state the obvious: that someone named in a will may inherit." In addition, the provisions of DRL § 117 applying to intestacy and to gifts in instruments are parallel as far as possible. The Court held in *In re Seaman*, 78 N.Y.2d 451 (1991), that the statutory provision allowing an adopted-out child to inherit under certain circumstances applies to the child's issue. Following the legislative parallel between intestacy and testate succession as closely as possible, therefore, requires that the statutory restoration of the son's status as the decedent's issue for purposes of interpreting her will also makes his issue his mother's issue.

The dissent offers a close reading of the history of the statute in an attempt to show that DRL § 117(2)(a) was meant to be only a technical correction to the statute originally offered to the legislature and also argues that the language of DRL § 117(2))(a) requiring a reference to "the individual" by name means that the issue of an adopted-out child would have to be referred to by name in order to take under a written instrument. *In re Murphy*, N.Y.2d __, N.E.2d __, N.Y.S.2d __, 2005 WL 2777565 (Oct. 27, 2005).

Mutual Wills; Mutual Wills Do Not Give Rise to Inference of Promise Not to Revoke

Decedent's niece brought an action to impose a constructive trust on her aunt's husband, claiming that her aunt and husband had promised each other not to change their mutual wills after the death of the first to die. The Appellate Division affirmed the Surrogate's grant of summary judgment for the defendant, holding first that the wills were mutual rather than joint wills principally because both wills were written in the first person singular rather than the first person plural. The court then dismissed the plaintiff's argument that because EPTL 13-2.1(b) requires that a contract not to revoke a joint will must be established by express statements in the will, a lesser standard of proof applies to proving a contract not to revoke mutual wills. The common law of New York requires that mutual wills contain "contractual language" in order to find a contract not to revoke; in other words EPTL 13-2.1(b) applies to joint wills the rule that applies to mutual wills under the common law. Because the mutual will executed by the defendant lacked a clear and unambiguous renunciation of his right of testation, the defendant was entitled to summary judgment. *Schloss v. Koslow*, 20 A.D.3d 162, 800 N.Y.S.2d 715 (2d Dep't 2005).

WRONGFUL DEATH

Status as Spouse: Survivor of Vermont Civil Union Cannot Recover as Spouse of Decedent

A divided panel of the Appellate Division has reversed the Supreme Court (196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct., Nassau Co. 2003)), and held that the survivor of a Vermont civil union entered into by two men cannot bring a wrongful death proceeding for the death of his partner. The majority held that because denial of marriage to same sex couples is not a violation of the equal protection guaran-

tees of the state and federal constitutions, excluding a surviving partner of a Vermont civil union from the class of people who may bring a wrongful death claim is equally constitutional. In addition, because a Vermont civil union is not a marriage under Vermont law and because the survivor never identified himself as married, theories of full faith and credit and of comity have no application.

The lengthy dissent found a constitutional violation in the refusal to treat the same-sex parties to a formal state sanctioned relationship creating mutual support obligations identically with heterosexual parties to a relationship creating identical obligations. With respect to the policy of the wrongful death statute the parties to a Vermont civil union and a married couple "stand in precisely the same position." Excluding the survivor of a Vermont civil union from the use of the wrongful death statute does not foster a legitimate governmental interest and therefore is a violation of equal protection. *Langan v. St. Vincent's Hospital of New York*, A.D.3d, 802 N.Y.S.2d 476 (2d Dep't 2005).

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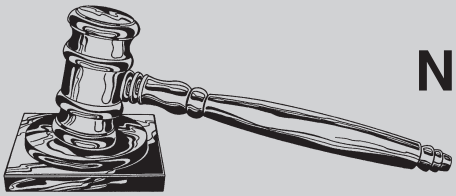
Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, *Drafting New York Wills* (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Attorney Work Product

In a contested child custody proceeding, the respondent father moved to quash a subpoena served by the petitioner mother seeking the records and reports of a psychologist retained by the respondent. The motion was opposed by the petitioner, who maintained that since the psychologist was court-appointed, he could not be considered respondent's representative or expert.

The court granted the motion holding that a mental health professional retained by an attorney is that party's representative for purposes of CPLR 3101(d)(2) dealing with material prepared in anticipation of litigation. Moreover, the court held the psychologist's records and reports constituted attorney work product or material prepared in anticipation of litigation within the scope of CPLR 3101(c) and 3101(d)(2), and his source of compensation was irrelevant to the question of immunity.

Finally, the court rejected petitioner's assertion that respondent did not have standing to assert the privilege, finding that because the information contained in the records concerned the respondent, the privilege belonged to him and not to the psychologist.

In re Lisa W. v. Seine W., N.Y.L.J., September 23, 2005, p. 18 (Family Ct., Kings Co.) (Judge Olshansky).

Bifurcation of Proceeding

In a contested accounting proceeding, the petitioner moved to bifurcate the liability and damages portion of the bench trial. The application was opposed by the objectants and the guardian *ad litem*. The issue for trial was whether the petitioner breached its duties as a fiduciary by allegedly failing to comply with the Prudent Investor Act.

The objectants and the guardian *ad litem* opposed bifurcation contending that the issue of whether the petitioner breached its duties was inextricably bound up with the issue of damages, so that a bifurcation would not result in a savings of time and court resources. The court agreed.

The court concluded that the matter did not involve distinct and severable issues which could be tried separately. Rather, the issue of whether the petitioner breached its duty as trustee was inextricably intertwined with the same issues which concern the assessment of damages. Bifurcation would thus not promote a clarification or simplification of issues and a fair and more expeditious resolution of the action.

Accordingly, the motion to bifurcate was denied.

In re Estate of Ayer, N.Y.L.J., November 10, 2005, p. 28 (Sur. Ct., Westchester Co.) (Surr. Scarpino).

Construction of Will

In a miscellaneous proceeding, the court was asked by one of the decedent's children, who was also a co-executrix of the estate, to construe the provisions of the decedent's Will which devised her real property to her three children, two daughters and one son, equally. The Will further directed that the decedent's son, or any one or all of the decedent's children be allowed to occupy the premises, and that the property not be sold until the death of the decedent's son, or in the event the decedent's son neglected the property, or upon the consent of all the decedent's children. At the time of the proceeding, one of the decedent's two daughters occupied the premises to the exclusion of her siblings.

In support of her application for construction, the petitioner alleged that the primary purpose of the decedent insofar as the realty was concerned was to provide for her son, and that due to the exclusive occupancy of her sister, that purpose has not been fulfilled. Although the respondent denied the allegations regarding her occupancy of the premises, the court found that to be inconsequential in view of the fact that neither the petitioner nor her brother had enjoyed the benefits of the property since 1996, the time when the respondent took possession.

Upon consideration of the terms of the Will, and the apparent intent of the decedent, the court concluded that her principal aim was to provide a home for her son to reside in if that was feasible, or if not, for the property to be sold and the proceeds divided equally amongst her children. The court found that

occupancy by the decedent's son was not feasible since he was financially incapable of maintaining the property. Moreover, the court found that the provisions of the Will regarding disposition of the property were internally inconsistent, and that resolution of that inconsistency required a construction which resulted in equality among the decedent's children.

Accordingly, the court directed that the property be sold and the net proceeds be divided among the three children of the decedent.

In re Estate of Lewis, N.Y.L.J., October 4, 2005, p. 19 (Sur. Ct., Nassau Co., Surr. Riordan).

Discovery Proceedings

In a proceeding pursuant to SCPA 2103, the fiduciaries and the residuary beneficiary of the companion estates of husband and wife sought a turnover of almost $1 million allegedly converted by the decedent's home health care aide. The respondent claimed that the monies in issue were either (1) used for the decedents' benefit; (2) gifts; and/or (3) salary.

The principal issue before the court was whether the asset transfers in issue were procured by the undue influence of the respondent. At the trial, the testimony revealed that the decedents' declining health and social isolation caused them to be wholly dependent on the respondent. Witnesses recalled that the couple suffered from poor memory, lethargy, repetitiveness in their conversation, which was often abbreviated, and periods of withdrawal. Some testified that they transformed from being well-groomed and coiffed, to slovenly and fetid.

Based on this record, the court concluded that by 1996, the couple lacked the capacity to handle or even monitor their financial affairs. Under such circumstances, any transactions between them and their caregiver were subject to strict scrutiny, with the burden upon the caregiver to prove the absence of an abuse of confidence or influence.

Upon consideration of the proof, the court held that the respondent had failed to sustain her burden of establishing that the transfers of assets between the decedents and the respondent were voluntary, and were either the result of gifts or the couples' increased expenses or changes in recordkeeping.

With regard to respondent's claim that a portion of the funds constituted salary, the court found, on the basis of *quantum meruit*, that the respondent was entitled to compensation based on 4 hours of work a day, 7 days a week, at the rate of $7 per hour.

Accordingly, the court found that respondent had converted approximately $956,000 from the decedents' estates and awarded that sum to the petitioner, together with interest at the statutory rate.

In re Estate of Fischer, N.Y.L.J., December 8, 2005, p. 31 (Sur. Ct., New York Co.) (Surr. Preminger).

Disqualification of Counsel

In a contested proceeding by the Article 17-A co-guardian, mother of the incapacitated child, to revoke the letters of co-guardianship issued to the child's father, the respondent moved to disqualify petitioner's counsel, on the grounds that he had represented him and the petitioner in the original guardianship proceeding, and therefore had a conflict of interest.

Petitioner's counsel opposed the application contending that he had a long-standing relationship with the petitioner for over twenty years, and that during that time he never had any business dealing with the respondent. Moreover, insofar as his representation during the original guardianship proceeding was concerned, counsel stated the respondent only served as an "accommodation party" in the proceeding and as such was not his principal client.

The court opined that a party seeking disqualification of counsel under DR5-108(a)(1) and 22 N.Y.C.R.R. 1200.27(a)(1) must prove (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) that the interests of the present client and [the] former client are materially adverse. Applying these criteria to the facts of the revocation proceeding, the court concluded that the respondent had established the necessary elements to disqualify petitioner's counsel.

Accordingly, the respondent's application was granted.

In re Estate of Larizza, N.Y.L.J., November 17, 2005, p. 34 (Sur. Ct., Westchester Co.) (Surr. Scarpino).

Guardianship

The daughter of the allegedly incapacitated person commenced a guardianship proceeding pursuant to Article 81 at the insistence of the nursing home where he was situated for rehabilitation. The nursing home refused to discharge their patient, the petitioner's father, or to permit the petitioner to see her father's medical records until such an application was made.

The petitioner argued that her father was not incapacitated, and in fact, offered proof that her

father had scored a 29 out of 30 on a mini mental examination. Additionally, the temporary guardian for the respondent found, after interviewing him, that he was competent and lucid, and wanted desperately to go home. These findings were confirmed by the medical doctor on staff at the home who admitted that there was no medical reason to keep the respondent at the facility. Further, a geriatric evaluator indicated that the respondent had a high level of capacity and function. When asked by the temporary guardian why the respondent was not being discharged, the nursing home responded that he was subject to an adult protective services investigation. However, upon further inquiry, the temporary guardian was subsequently informed that no such investigation was taking place and that the nursing home had never pursued such an investigation. Moreover, he ascertained that the home had never formulated a discharge plan for the respondent.

Based upon the foregoing, the court concluded that the respondent was a healthy 94-year-old man who had good mental faculties and was in reasonably good physical health. As such, the court held that there was no need to appoint a guardian for him. Further, the court, under the circumstances, assessed the nursing home with the legal fees of the petitioner, finding that its conduct was designed solely for its own financial benefit, rather than for the best interests of its patient.

In re Topa, N.Y.L.J., November 7, 2005, p. 19 (Sup. Ct., Queens Co.) (Justice Thomas).

Sale of Real Property—The Rights of a Life Tenant

In *In re Estate of D'Elia*, Surrogate Tomei addressed the issue of whether the petitioner's life estate in the subject premises extended to the whole thereof, or simply to the top floor of the building in which the decedent actually resided at death. A finding that the life estate was in the entire building would have supported the petitioner's request to evict her stepdaughter from her living quarters in the bottom portion of the property.

In pertinent part, the Will of the decedent granted to the petitioner "a life estate in the real property which I occupy as my primary residence at my death." The court construed this language as granting the petitioner only a life estate in the unit that the decedent occupied in the property and not in the entire property, reasoning that if the decedent had intended to give the petitioner a life estate in the entirety, he would not have further limited the disposition to the portion of the premises which he occupied at death.

Accordingly, the court held that while the petitioner, as life tenant, could lease the premises, sell her estate, or bring a summary proceeding pursuant to RPAPL, she could only take such action with respect to that portion of the premises to which her life estate extended. The petitioner's application was, therefore, denied.

In re Estate of D'Elia, N.Y.L.J., September 14, 2005, p. 19 (Sur. Ct., King's Co.) (Surr. Tomei).

Suspension of Letters

In *In re Estate of Liebert,* the court recognized the propriety of suspending a trustee's letters pending the hearing on revocation where the circumstances demonstrated the immediate need for the appointment of an independent fiduciary.

Before the court was an application by an elderly income beneficiary of the residuary trust created under the decedent's Will for revocation of her co-trustee's letters of trusteeship, and for disqualification of the co-trustee's mother as successor trustee, on the grounds, *inter alia*, that he had failed to distribute to her the accrued income from the trust since the decedent's date of death, as well as the principal thereof in accordance with the power granted to her under the terms of the decedent's Will. The record revealed that the petitioner was 96 years of age and the primary object of the decedent's bounty, and that while the decedent's estate was almost $1 million, the petitioner had not received any distributions therefrom until she commenced the proceeding.

In concluding that the respondent co-trustee's letters should be suspended and that an independent fiduciary should be appointed to serve, despite the provisions in the decedent's Will as to a successor, the court expressed serious concerns regarding the respondent co-trustee's inherent conflict of interest as a remainderman of the trust, opining that it might color his judgment to deal impartially with the income beneficiary as evidenced by the respondent's propensity to litigate questionable positions that, in theory, preserved the trust remainder at the income beneficiary's expense.

In view thereof, the court opined that the income beneficiary, given her age and poor health, could not afford to contend with further delays and disputes with the respondent, and that, as such, an independent fiduciary should be appointed pending the hearing as to revocation. Accordingly, the court, in its discretion, suspended the letters of trusteeship issued to respondent pending a hearing on his fitness to serve (*see* SCPA 711, 713, 719). In addition, the court refused to appoint the first successor trustee named in the Will, who was the respondent's mother, as his

successor, based, *inter alia*, upon her behavior in the courtroom. Instead the second alternate successor trustee named in the Will was appointed during the pendency of the proceeding.

In re Estate of Liebert, N.Y.L.J., November 18, 2005, p. 30 (Sur. Ct., New York Co.) (Surr. Roth).

Temporary Administrator

In an action arising out of an automobile accident in which the plaintiffs were passengers in defendant's taxicab, it was revealed after the jury had been sworn in and the trial had commenced that the defendant had died. It appeared that he had no assets and no family in the United States at the time of his death, and no administrator or executor of his estate. Defendant's counsel moved for a mistrial and plaintiffs opposed.

The court noted that the accident in issue had occurred 10 years ago and the plaintiffs, who were Pennsylvania residents, had come to New York for the litigation. Accordingly, under the circumstances, the court determined that a temporary administrator should be appointed for the limited purpose of completing the trial. As to whom the appropriate administrator of the estate should be, the court opined that since the plaintiffs only sought to recover the proceeds of the defendant's insurance policy, the suit was in actuality between the plaintiffs and the defendant's insurer. Accordingly, the court held that the insurer's attorney would be the most appropriate administrator. However, noting that a law firm is not eligible to serve as a fiduciary within the scope of SCPA 707, the court determined that the named partners of the firm should serve as the temporary administrators.

Biancono v. Pierre, N.Y.L.J., November 15, 2005, p. 19 (Civil Ct., Queens Co.) (Judge Nadelson).

Unitrust

The trustee of a 1956 trust petitioned the court for a direction that the unitrust provision applied to the trust as of January 1, 2005. Further, the trustee requested that its attorney's fees and costs be paid from the trust.

In determining whether the unitrust provisions of EPTL 11-2.4 should apply, the court assessed the relevant factors set forth in the statute. *See* EPTL 11-2.4(e)(5)(A). These factors, stated the court, point toward allowing the unitrust conversion. The terms of the trust revealed that it was designed to benefit the grantor's son with income, and that concerns with benefiting the remaindermen were secondary. The court further found that the unitrust conversion would provide greater annual income to the beneficiary, and given the size of the trust and the beneficiary's age, conversion would not lead to a quick depletion of the corpus. Further, the assets of the trust, i.e., marketable securities, bonds, cash and cash equivalents, did not make unitrust conversion impracticable.

As to the timing of commencement of the unitrust, the court found that the statute required that conversion apply as of January 1, 2006, however, due to the delay caused by a dispute regarding attorneys' fees, and the absence of opposition to the start date, the court authorized a conversion to begin as of January 1, 2005, using fair market values for the current year, as well as those for two prior years.

As to attorney's fees, the court found that while counsel's work was commendable, the matter involved few court appearances, and was ultimately resolved without extended discovery or a trial. Accordingly fees were reduced by $10,000, and costs were reduced by $1,828.66 in accordance with the court's decision in *In re Herlinger*, N.Y.L.J., April 28, 1994, p. 28.

In re Harkness, N.Y.L.J., November 2, 2005, p. 25 (Sur. Ct., N.Y. Co.) (Surr. Preminger).

Waiver of Attorney-Client Privilege

In a contested discovery proceeding to recover a parcel of real property as an estate asset, the respondent moved for summary judgment.

In support of the motion, the respondent submitted her own affidavit, the deed effectuating the transfer, and the deposition of the attorney who represented the decedent with regard to the conveyance. Respondent stated that she and the decedent had lived together for six years, and that during that time he conveyed the real property to himself and to her as "joint tenants" for "valuable consideration." The deed was subsequently recorded.

The attorney-draftsperson of the deed testified that the decedent had approached her about placing the respondent's name on the deed and that she had fully explained to him the implications of a joint tenancy. Thereafter, the attorney stated that she prepared a deed in accordance with the decedent's instructions and that he came to the office and executed it.

In opposition to the motion, the petitioner submitted the affidavits of the decedent's former wife and of his daughter, who stated that the decedent had told them prior to his death that he owned the property and that he was not happy with the respondent. Petitioner also cited excerpts from the attor-

ney's deposition transcript, and maintained that the respondent could not waive the attorney-client privilege and offer communications that the decedent had with his attorney against the decedent's estate.

In regard to the estate's claim of privilege, the court opined that a waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue, or where the invasion of the privilege is required to determine the validity of the client's claim or defense, or application of the privilege would deprive an adversary of vital information.

Based upon the foregoing, the court held that the petitioner could not simultaneously challenge the deed and yet seek to withhold the pivotal communications made between the decedent and his attorney on the subject. Under such circumstances, the court opined that the privilege was impliedly waived by the estate as such communications were central to the issue at hand.

Accordingly, considering the testimony of the attorney and upon all the other evidence presented, the court held that the petitioner failed to raise any issue of fact as to the validity of the deed, and that respondent was entitled to summary judgment dismissing the proceeding.

In re Estate of Puckett, N.Y.L.J., October 13, 2005, p. 20 (Sur. Ct., Nassau Co.) (Surr. Riordan).

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

A Message from the Chair

(continued from page 2)

It is fascinating to participate in the development of our law, beginning with an idea, followed by research, discussion and the drafting of a proposed bill and its final presentation to members of the New York State Senate and Assembly. Austin Wilkie, Editor of this *Newsletter,* has an interesting idea for a periodic column, "If I Were Governor: Legislation I Would Enact." Who knows, perhaps your idea first formulated in that column may one day become the law in our State.

We concluded the Wednesday program with an evening reception hosted by HSBC Bank USA. Gerard F. Joyce (Vice-Chair, Committee on International Estate Planning), Senior Vice President for Personal Trust, arranged a lovely reception at the bank's branch on Fifth Avenue. The evening was delightful—good food, drink and wonderful company. We are most appreciative of HSBC's hospitality.

On January 26, 2006, Michael E. O'Connor (the immediate past Chair), presented the Section's position on the FHCDA bill to the State Bar's Executive Committee, together with representatives of the Health Care Section. Ira Bloom (the Section's new Treasurer) also presented for approval a proposed bill, the Slayer Statute, which has now been approved by the State Bar and is in the capable hands of Glenn and Ron Kennedy to find sponsors in the Legislature.

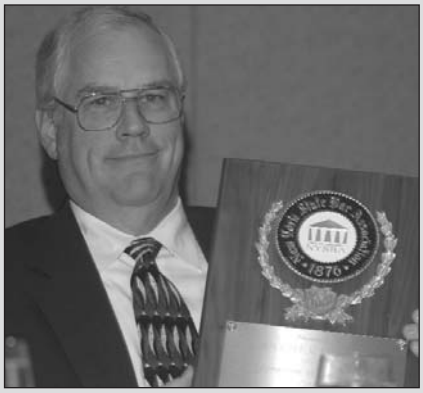
While the process of vetting proposed legislation can be arduous and time consuming, in the end the product reflects the integration of the various practices of law and our population. In other words, legislation sponsored by the New York State Bar Association seeks to be representative of the State's population.

I hope that if the reader has been on the fence about becoming more active in our Section, you have been convinced to give it a try by my summary of what we accomplished in January of this year. It is a pleasure to engage in the social activities with friends and colleagues and professionally satisfying to actively participate in shaping the law. To become active, all one has to do is join. Please do.

On a final note, on behalf of our Section I would like to thank my predecessor Michael O'Connor for his leadership, and personally for his kindness by making my transition so easy.

Colleen F. Carew

Scenes from the Trusts and Estates Law Section Annual Meeting, Reception and Luncheon



Wednesday, January 26, 2006 • New York Marriott Marquis

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Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed (austin.wilkie@hklaw.com) or mailed on a 3½" floppy disk (Austin Wilkie, Holland & Knight LLP, 195 Broadway, New York, NY 10007) in Microsoft Word or WordPerfect. Please include biographical information. Mr. Wilkie may be contacted regarding further requirements for the submission of articles.

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

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