NYSBA SPRING 2007 | VOL. 40 | NO. 1

Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

Philip L. Burke

It is a privilege and an honor to be able to represent this Section in the coming year. I would like to thank and commend my predecessor, Colleen Carew, for a tremendous job during her tenure. Not only was the Fall Meeting in Philadelphia a smashing success, but under her leadership the Section was able to have five of its legislative proposals approved by the State Bar for submission to the Legislature (more on these below). While those individuals that sacrificed substantial amounts of "blood, sweat and tears" in preparing the legislation and various reports also deserve our thanks and gratitude (these individuals were thanked in the e-mail that the Section sent to all of its members back on January 30th), I am sure that Colleen's leadership had a great deal to do with the overall success of these proposals.

I would also like to thank and congratulate Ronni Davidowitz for an excellent Annual Meeting Program in New York City on January 24th. The presentations and the materials were first class from start to finish and the materials will continue to provide a valuable resource for those of us working in the charitable giving arenas.

There are still a great number of things that need to be done in the coming year. There are many legislative proposals that the Section is actively working on, several of which will be addressed with the Legislature at "Lobbying Day" in Albany. This should take place in the next month or two. We will report on the progress of these and other proposals in the coming months.

As indicated above, five of our legislative proposals were approved by the Executive Committee of the State Bar and/or the House of Delegates. These bills will now be presented to the Legislature for review and, hopefully, passage. To reiterate, these bills are as follows:

1. An Amendment to SCPA 2211 to provide for disclosure of documents prior to the pre-objection examination of an accounting fiduciary;

Inside

Use of the "Secret Trust" Doctrine to Effectuate a Decedent's Intent 3
(Eric W. Penzer and Frank T. Santoro)

New I.R.C. § 101(j) EOLI Rules: Important Planning Considerations 7
(Robert J. Adler)

Delegation 14
(C. Raymond Radigan)

The Irrevocable Income Only Trust (Medicaid Qualifying Trust): What Every Attorney Should Know 17
(Anthony J. Enea)

New Attorney Advertising Regulations 22

Recent New York State Decisions 31
(Ira Mark Bloom and William P. LaPiana)

Case Notes—New York State Surrogate's and Supreme Court Decisions 34
(Ilene Sherwyn Cooper)

Fourth Annual Sophisticated Trusts and Estates Law Institute 38

NYSBA

2. An Amendment to Article 81 of the Mental Hygiene Law providing that the Supreme Court does not have the authority to determine the validity of a Will as part of an Article 81 guardianship proceeding;
3. An Amendment to the Mental Hygiene Law regarding the turning over of assets by a guardian to the personal representative of the estate after the death of the incapacitated individual;
4. An Amendment to several adoption statutes substituting the term "birth parent" for "natural parent"; and
5. An Amendment to the Public Health Law to provide statutory provisions, codifying the common law, regarding the right to make a living Will.

Again, these provisions were also covered by the Section's e-mail to the members on January 30th.

I would also like to draw everyone's attention to the Annual Spring Meeting which will be held in Binghamton on April 19th and 20th. Beth Westfall, the Sixth District Representative, is putting together a program on real estate issues in estate planning and administration. This is an issue that deserves a lot of attention, but surprisingly has not, in and of itself, been a program topic in the past.

I also would invite you to mark your calendars for the Fall Meeting which will be held at the Hotel del Coronado in San Diego, California from October 10th through the 14th. We are still in the process of putting this program together and more information will be forthcoming. If you are not familiar with the "Del," I invite you to go to your local video store and rent a copy of *Some Like It Hot* which, in large part, was filmed at this grand old hotel (note: even though the scenes at the hotel are supposed to take place in Miami, the hotel *is* located in San Diego!). Seeing as the wind chill outside my office is below zero as I write this, the Fall Meeting can't come soon enough.

On a sad note, I am sorry to report the passing of two of our colleagues. Henry McCarthy, a 50-year Trusts and Estates Partner with the Bond Schoeneck & King office in Syracuse passed away at the end of January. Henry was a very active member of the Executive Committee and was also the recipient of the Russ Taylor Award in 1986. Also, Arthur Sederbaum passed away in January, prior to the Annual Meeting. Arthur was also very active in the Section and served as a mentor to many of the current members of the Executive Committee. Our condolences go out to their loved ones.

I look forward to the challenges and opportunities that the coming year presents and am eager to continue working with the incredibly talented people of this Section.

Philip L. Burke

Available on the Web
Trusts and Estates Law Section Newsletter

http://www.

www.nysba.org/Trusts&EstatesNewsletter

Back issues of the *Trusts and Estates Law Section Newsletter* (2000-present) are available on the New York State Bar Association Web site

Back issues are available in pdf format at no charge to Section members only. You must be logged in as a member to access back issues. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

***Trusts and Estates Law Section Newsletter* Index**

For your convenience there is also a searchable index in pdf format.
To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

Use of the "Secret Trust" Doctrine to Effectuate a Decedent's Intent

By Eric W. Penzer and Frank T. Santoro

This article discusses cases in which courts have analyzed the doctrine of "secret trusts." A "secret trust" is, in essence, nothing more than a species of constructive trust that may be imposed where a testator is induced either to make a will, not make a will, or not change an existing will, by a legatee's promise to use the legacy for a particular purpose.

A "secret trust," like a constructive trust, is a type of implied trust. As one jurist explained, the difference between express and implied trusts is that "[e]xpress trusts are those which are created in express terms in the deed, writing or will, while implied trusts are those which without being expressed are deducible from the nature of the transaction, as matters of intent; or which are super-induced upon the transaction, by operation of law, as matters of equity, independently of the particular intention of the parties."[1]

Claims seeking the imposition of implied trusts are common in estate litigation. A constructive trust—one type of implied trust—may be imposed where, for example, one either induces a decedent to make a will or prevents a decedent from making a will, and thereby wrongfully acquires property of the decedent's estate.[2] A constructive trust may also be imposed where a decedent breaches a contract to make a will.[3] The commonly cited core elements of a constructive trust are a confidential relationship, a promise made in the context of that relationship, a transfer of property in reliance of the promise, and unjust enrichment.

A "secret trust" has been held to result where a testator "is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose[.]"[4] That legatee is thereupon treated as a trustee of sorts. Such a trust also results where a decedent is induced not to make a will, in reliance on a promise that his or her assets will be put to a particular use by the legatee.[5] Cases addressing "secret trusts" bring to bear the characteristics of constructive trusts, of which all estate litigators should be aware.

Notable Cases

While not the earliest case in which a court of this State recognized a "secret trust,"[6] *In re O'Hara's Will,*[7] decided in 1884, is a seminal decision. There the testatrix bequeathed her residuary estate to three individuals—her lawyer, her doctor, and her priest—effectively disinheriting her relatives.[8] She executed a letter contemporaneous with the will directing that the legatees apply the estate to certain charitable purposes.[9] The Court held that, under the will, the residuary legacy was an absolute and unconditional gift. However, the testatrix's purpose was not to confer upon the legatees the beneficial use of the property, but instead to devote it to charitable uses, as evidenced by the letter of instructions.[10] The Court held that even in the absence of an express promise on the part of the legatees to abide by the testatrix's instructions, their silent acquiescence in permitting the testator to make a bequest to them to be applied for the benefit of others had all the force and effect of an enforceable, affirmative promise:

> If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor which equity will not endure. The authorities on this point are numerous.[11]

The Court of Appeals again analyzed the elements of the "secret trust" in *Trustees of Amherst College v. Ritch*.[12] There, the decedent died executing a will leaving a substantial portion of his estate to numerous institutions of higher education.[13] On the same day, the decedent executed a letter indicating that he was cognizant of a law existing at the time that prevented his disposition of more than one-half of his assets to charity.[14] In the letter the decedent also requested that his heirs allow his dispositions to be permitted notwithstanding the provisions of the law.[15] The will divided the decedent's residuary estate equally among the educational institutions that received general bequests under previous articles in the will.

Thereafter, the decedent seemed to lose faith in his heirs, and executed four successive codicils, the last of which was executed on the day of his death and which bequeathed the entire residuary estate to his legal advisors.[16] Evidence surrounding the execution of the codicils, including memoranda and letters, evidenced the decedent's intent that the educational institutions ultimately receive the bequests as set forth in his origi-

nal will.[17] Essentially, the testator sought to avoid the then-existing statutory prohibition on excess charitable contributions, by making large bequests to individuals who promised to give their bequests to designated charities.[18] Finding that the promise to distribute the residuary under the terms of the original will appeared so conclusively from the beneficiaries' conduct, letters, and statements to the testator, the Court held that the beneficiaries held their bequests as trustees for the educational institutions.[19]

The Court in *Ritch* provided careful reasoning to support its holding. It began its analysis by stating the obvious, to wit, that "while a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use."[20]

However, the Court explained that a trust may result from the intention of the testator coupled with a promise of the legatee. "[I]f the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise."[21] The Court clarified that the same rule would apply to legatees who induce a decedent not to make a will by promising to dispose of his or her property in accordance with the decedent's instructions.[22] Finally, it must be noted that the trust was imposed notwithstanding the prohibitive statute at the time, as the decedent's heirs had executed releases; thus, the trust could be deemed "lawful" as required for a secret trust.[23]

The doctrine was again applied—although it was not specifically called a "secret trust"—in *Estate of Campe*.[24] There, the decedent bequeathed part of his residuary estate to two individuals, one a friend and the other an attorney, neither of whom was named an executor of the decedent's estate. The testamentary provision stated that it was the decedent's "wish and desire that the beneficiary of the bequest . . . shall follow the instructions to be contained in a letter to be signed by me giving instructions with reference to the disposition of said bequest."[25] In a proceeding brought for the judicial settlement of the account of the sole surviving executor, a determination was sought regarding the validity and effect of the provision. The named legatees had made two payments to the individual named in the letter of instruction, but ceased making such payments when an issue arose concerning the validity of the testamentary provision.[26]

The *Campe* court began its analysis by stating that the initial issue for determination was whether the language of the bequest was "expressive of an intention to make an absolute gift to the legatees named in the will," in which case inquiry could then be made as to the operative effect of the decedent's letter of instruction.[27] On the other hand, if the testamentary provision constituted a mandatory direction that the legacy be disposed of in accordance with the letter of direction, the provision would be invalid "for the obvious reason that the true legatee is neither named nor identified in the will[.]"[28]

The court determined that the language constituted an outright bequest to the named legatees.[29] However, relying on *O'Hara*, the court stated that the letter of instruction constituted "evidence of testator's reliance upon the legatees named in the sixth article to comply with his request upon receipt of the legacy."[30] Thus, the court held that the named legatees were to receive the legacy as trustees of a constructive trust for the benefit of the individual named in the letter of instruction.[31]

Relatively recently—in 1976—the secret trust doctrine was raised by a litigant, in a unique litigation position. In *Will of Frank*,[32] the testator created an *inter vivos* revocable trust which upon his death split into two separate trusts, "A" and "B," both of which provided income for life to the testator's wife. The testator's wife had a power of appointment over trust "B," and the principal of trust "A" was payable upon her death to several charities.[33] The testator's will bequeathed the residue of his estate to the revocable trust.[34] The testator's son unsuccessfully challenged the trust in an effort to invoke former EPTL 5-3.3, which limited charitable bequests to one-half of a testator's estate, but which placed no limit on *inter vivos* gifts.[35]

The testator's son attempted to invoke the secret trust doctrine by alleging the existence of a trust that was void as violative of the law. The son alleged that the testator's wife promised the testator that she would exercise her testamentary power of appointment of trust assets entirely in favor of trust "B," in order to avoid the prohibition of EPTL 5-3.3.[36] The court rejected the son's challenge, but did not reject the concept of the secret trust. The court rather found that the revocable trust, even if executed in the context of a secret agreement between the husband and wife, was a permissible method of circumventing EPTL 5-3.3.[37]

Finally, in one of the more recent cases imposing a secret trust, *Estate of Naima*,[38] the testator executed a will leaving his entire estate to his sister, and made no provision for his twelve-year-old son. The will specifically stated that the bequest of his estate to his sister to the exclusion of his son was "for personal reasons and because he [was] otherwise provided for."[39] The *guardian ad litem* for the testator's minor son questioned the attorney-draftsman and the attorney-draftsman's law clerk, who acted as a witness to the will. The *guardian*

ad litem testified that both the attorney-draftsman and the witness told the *guardian ad litem* that there was an agreement that decedent's estate would be held in trust by his sister for the benefit of the decedent's son until his son reached the age of eighteen years old.[40]

However, the witness denied ever having told the *guardian ad litem* of such an agreement, and the attorney-draftsman appeared to some degree to recant his statements to the *guardian ad litem* concerning such agreement.[41] However, the attorney-draftsman testified that immediately prior to the will execution ceremony, conversations occurred between the witness and the testator which led him to believe that there was a secret agreement whereby the testator's sister would hold his estate in trust for his son until the boy reached the age of eighteen.[42] Based on the testimony of the attorney-draftsman, the testator had terminal cancer and feared that if his estate were to go to his son, his ex-wife would control it. While the testator's sister did not testify at trial, the court discussed her examination before trial, during which she was unresponsive and evasive as to the existence of an agreement, and during which she testified that the testator wanted her to hold the estate in trust for her parents.[43] Under these circumstances, citing the principles set forth in *Trustees of Amherst College v. Ritch*, the court imposed a secret trust on the assets of the decedent's estate passing to the decedent's sister for the benefit of the decedent's son.[44]

Practical Considerations

From a practical standpoint, certain evidentiary hurdles may present a challenge to a litigator attempting to establish this type of trust for the benefit of his client. However, at the outset, the Statute of Frauds has no application to a claim for a constructive trust.[45] Moreover, a court may be persuaded, through an appeal to its powers of equity, to disregard what, in another case, might be an obstacle to justice. There is ample authority for the courts using equity to cut away the strictures of statutory prohibitions to effectuate the intent of the decedent.

For example, in *Tebin v. Moldock*,[46] the court disregarded a will of the decedent, a conveyance of property by the decedent and the establishment of bank accounts by the decedent to impose what it described as a constructive trust based on a secret arrangement. Reiterating the general principle set forth in a long line of cases, the court stated as follows:

> In dealing with the problem of a secret trust or the breach of a confidential relationship the ordinary rules imposed by the Statute of Frauds, the Statute of Wills, the parol evidence rule, and that governing statements in derogation of title, are not applicable. Equity in this area has always reached beyond the facade of formal documents, absolute transfers, and even limiting statutes on the law side.[47]

In another illustrative case, *Estate of Blake*,[48] the Court invoked its equitable power to avoid the application of EPTL 13-2.1[a][2]. There, life partners executed wills wherein they left their respective estates to each other.[49] On the death of the survivor the estate was to be divided among all of their respective nieces and nephews.[50] However, the survivor, who received all of his companion's assets, subsequently executed a will excluding the nieces and nephews of his predeceased companion.[51] The court acknowledged that the nieces and nephews of the predeceased companion were without recourse to challenge the revocation of the prior will of the surviving companion pursuant to the provisions of EPTL 13-2.1[a][2], which provides, *inter alia*, that a contract not to revoke a joint will can only be established by an "express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a contract between the parties."[52] However, the court invoked its equitable powers, and despite the requirements of EPTL 13-2.1[a][2], held that the allegations supported a cause of action for the imposition of a constructive trust resulting in the same result as if the companions' joint wills had been construed as a contract for non-revocation between the parties.[53]

The practitioner should also take heed of the Dead Man's Statute; alleged statements of a decedent as to the existence of an implied trust may not be admissible.[54] But it is important to remember in this regard that the element of "promise" need not be shown by an express statement.[55] A promise may be implied or inferred from the confidential relationship and the transfer of assets.[56] As Justice Cardozo wrote in *Wood v. Duff-Gordon*, when considering whether there a promise could be inferred without an express statement "[t]hough a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed."[57] Thus, where there is no direct evidence of a promise, except that which would be barred by the Dead Man's Statute, an advocate must be able to make a presentation of the surrounding circumstances as cumulatively evidencing a promise sufficient to impose a constructive or secret trust.

Aside from a "promise," the remaining elements of the usual claim for the imposition of a constructive or secret trust—a confidential relationship, the transfer of assets in reliance on the promise and resultant unjust enrichment[58]—will often be supported by documentary evidence. For example, a confidential relationship between a testator and an attorney can be shown through a retainer letter, or as between a caregiver and patient,

through medical records. Moreover, the transfer of assets can be shown in the case of real property by a deed, or in the case of cash or securities by an account statement.

Conclusion

A court with equitable power can impose a secret trust where a testator is induced either to make a will, not make a will, or not change an existing will, by a legatee's promise to use the legacy for a particular purpose. The cases discussed herein illustrate the kinds of facts and circumstances that can be seized upon to pursue a claim for a secret trust and should be noted by practitioners.

Endnotes

1. *Brown v. Cherry*, 56 Barb 635 (Sup. Ct., N.Y. Co. 1868).
2. *See, e.g.*, *Latham v. Father Divine*, 299 N.Y. 22 (1949); *see generally* N.Y. Jur. 2d Trusts § 171 (discussing availability of constructive trust remedy).
3. *See, e.g.*, *Mofsky v. Goldman*, 3 A.D.2d 311 (4th Dep't 1957).
4. *Trustees of Amherst College v. Ritch*, 5 E.H. Smith 282, 323, 45 N.E. 876, 887 (1897).
5. *Id.*
6. The Court in *In re O'Hara's Will*, 50 Sickels 403, 95 N.Y. 403 (1884), noted that this particular species of trust doctrine had twice previously been applied in New York State. *Id.* at 413.
7. *Id.* 95 N.Y. at 403.
8. *Id.* 95 N.Y. at 410. It is also of interest that "(w)hile the testatrix was shown to have been superstitious, whimsical, blindly devoted to her church and its ecclesiastics, habitually under the influence of stimulants, and seriously dependent upon the advice of those who became her residuary legatees," the Court noted that "it is yet certain that there was no want of testamentary capacity." *Id.*
9. *Id.* 95 N.Y. at 404.
10. *Id.* 95 N.Y. at 404.
11. *Id.* 95 N.Y. at 413.
12. 5 E.H. Smith 282, 45 N.E. 876 (1897).
13. *Id.* 45 N.E. at 888.
14. *Id.* 45 N.E. at 888.
15. *Id.* 45 N.E. at 888.
16. *Id.* 45 N.E. at 888.
17. *Id.* 45 N.E. at 888.
18. *Id.* 45 N.E. at 888.
19. *Id.* 45 N.E. at 888.
20. *Id.* 45 N.E. at 887.
21. *Id.* 45 N.E. at 887.
22. Id. 45 N.E. at 887.
23. *Id.* 45 N.E. at 887.
24. 1 Misc. 2d 194 (Sur. Ct., N.Y. Co. 1955).
25. *Id.* at 195.
26. *Id*. at 195.
27. *Id.* at 196.
28. *Id.* at 196.
29. *Id.* at 200-201.
30. *Id.* at 199.
31. *Id.* at 201.
32. 52 A.D.2d 335 (4th Dep't 1976).
33. *Id.* at 337-338.
34. *Id.* at 337.
35. *Id.* at 338.
36. *Id.* at 339.
37. *Id.* at 340.
38. 3/29/89 N.Y.L.J. 27 (col. 5) (Sur. Ct., Nassau Co.).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Latham v. Father Divine*, 299 N.Y. 22 (1949); *Estate of Weisman*, 8/22/2002 N.Y.L.J. 19 (col. 2) (Sur. Ct., Westchester Co.); *In re Will of O'Rourke*. 160 Misc. 2d 640 (Sur. Ct., Nassau Co. 1994).
46. *Tebin v. Moldock,* 19 A.D.2d 275 (1st Dep't 1963).
47. *Id.* at 284-285 (*see also Bastien v. Bastien*, 84 A.D.2d 800, 801 (1st Dep't. 1981); *Estate of Blake*, 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.) .
48. 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. CPLR 4519; *Fischer v. Fischer,* 202 A.D.2d 331 (1st Dep't 1994); *Estate of Kaczyprk*, 7/19/2002 N.Y.L.J. 23 (col. 4) (Sur. Ct., Suffolk Co.).
55. *Wood v. Duff-Gordon*, 222 N.Y. 88 (1917); *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976); *see also O'Hara's Will*, 50 Sickels 403, 95 N.Y. 403 (1884).
56. *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976).
57. *Wood v. Duff-Gordon*, 222 N.Y. 88, 91 (1917); *see also Estate of Naima*, 3/29/89 N.Y.L.J. 27 (col. 5) (Sur. Ct., Nassau Co.), wherein the court expressly stated that "The law is clear that no express promise need be made. (citation omitted) In fact, when the testator notifies a named legatee of his desire that the bequest to the legatee be held in trust for another, the legatee is under a duty to speak up if he is unwilling to so hold for the benefit of the other and his silence will be deemed to give consent to a holding in accordance with the intention of the testator." (*citing* 5 Bogert, The Law of Trusts and Trustees, sec. 499 (rev. 2d ed.).
58. *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976); *Estate of Blake*, 3/7/2000 N.Y.L.J. 27 (col. 3) (Sur. Ct., N.Y. Co.).

Eric W. Penzer is Counsel and Frank T. Santoro is an Associate in the trusts and estates litigation department at Farrell Fritz, P.C., in Uniondale.

New I.R.C. § 101(j) EOLI Rules: Important Planning Considerations

By Robert J. Adler

On August 17, 2006, President Bush signed the Pension Protection Act of 2006 (PPA 06) into law. One of the more important changes involves the income tax treatment of employer-owned life insurance. This article examines these new rules and explores some of the planning considerations and potential tax traps they engender.

Background

Businesses buy life insurance for a variety of reasons, most commonly to protect against the death of key employees, to accumulate cash value for future funding of employee benefit plans, or to provide funding for a buy-sell agreement. Life insurance owned by a business has become known as COLI, or company-owned life insurance. Life insurance, in general, is unique as a savings vehicle, since the inside build-up of cash value is free of income taxes, as is the death benefit.

Prior to 1997 taxpayers often leveraged these benefits still further by financing policy premiums with loans against the policies and deducting the interest on the loans. Taken to its extreme, such an arrangement could effectively produce an annual net cash flow gain, through reduced corporate income tax, with no net cash outlay (after the initial policy load years). At some point along the way aggressive corporate CFOs realized that if the company can generate positive cash flow through leveraging the policies it held for otherwise legitimate business reasons (such as key man protection), why not multiply that tax savings benefit several-fold by insuring the lives of as many employees as possible. Large corporations could potentially save millions in taxes through leveraged coverage of hundreds of employees. Winn-Dixie Stores, Inc., a large public corporation, took such a course in 1993, insuring more than 30,000 employees! Through situations such as this, leveraged COLI programs were sometimes referred to as "janitor insurance."

Legislation in 1986 limited the interest deduction for loans against COLI policies, and the deduction was eliminated altogether in 1996. Although the interest leverage aspect of COLI policies was eliminated, the "janitor insurance" aspect was not. In other words, companies were still free to take out insurance policies on the lives of potentially thousands of employees and receive the death benefits completely tax-free. Several of such arrangements have been struck down in court cases. The insurance policies were ruled invalid under applicable state law on the grounds that the company did not have a sufficient insurable interest in a lower-level employee's life. Eventually this aggressive COLI practice attracted widespread negative publicity; the most offensive situations being those in which a corporation would effectively realize a cash windfall upon the death of a former employee, even decades after the individual had left the company. Moreover, the individual may not even have been informed by the company while he was employed there that it had purchased a policy on his life. It was these types of situations that eventually prompted Congress to act to discourage COLI abuse by adopting new § 101(j) as part of PPA 06. With a variety of broadly encompassing exceptions, all discussed below, § 101(j) requires income recognition for life insurance proceeds received by an employer upon the death of an employee (or former employee), to the extent that the policy proceeds exceed the aggregate premiums and other costs paid by the employer in connection with the policy.

General Rule of I.R.C. § 101(j)

Under new I.R.C. § 101(j) death benefits paid on an "employer-owned life insurance contract" (EOLI), in excess of the costs of the contract, are no longer tax-free under the broad death benefit exclusion principle of § 101(a), unless certain notice and consent requirements are met and the policy fits within one of the exceptions set forth.

I.R.C. § 101(j), added by the Act, states a simple general rule:

> In the case of an employer-owned life insurance contract, the amount excluded from gross income of an applicable policyholder [under § 101(a)(1)] shall not exceed an amount equal to the sum of the premiums and other amounts paid by the policyholder for the contract.

Though simple, this is a radical departure from the rule of § 101(a), under which all proceeds from a life policy are excludable from income. In effect, the new § 101(j) is consistent with the rule governing products such as annuities: only the investment in the contract is excludable.

Employer-Owned Life Insurance Contract (EOLI)

New Code § 101(j) applies to all "employer-owned life insurance contracts," which it defines as a life insurance contract which—

> (i) is owned by a person engaged in a trade or business and under which such person (or a related person described in subparagraph (B)(ii)) is directly or indirectly a beneficiary under the contract, and
>
> (ii) covers the life of an insured who is an employee with respect to the trade or business of the applicable policyholder on the date the contract is issued.

Thus, § 101(j) takes in every kind of life contract under which the insured is the employee of the owner-beneficiary—from the most abusive form of janitor insurance to the most legitimate and business-appropriate key executive coverage. The statute proceeds by carving out two sets of exceptions from this general rule of income inclusion and couples those exceptions to employee notice and consent requirements.

Where the notice and consent requirements are met, and an exception is applicable, the entire death benefit will be excluded from the beneficiary's gross income. Any one of several exceptions may apply, but the notice and consent requirements must be met in order for any exception to apply.

Notice and Consent Requirements

Section 101(j) requires that, in order for an exception to the income-recognition rule to be applicable, the employee must be notified in writing of the following, before the issuance of the insurance contract:

- notice that the applicable policyholder intends to insure the employee's life;
- notice that an applicable policyholder will be a beneficiary of any proceeds payable upon the death of the employee;
- notice of the maximum face amount for which the employee could be insured at the time the contract is issued.

Additionally, the employee must provide written consent to being insured under the contract and that such coverage may continue after the insured terminates employment.

Exceptions to the General Rule of I.R.C. § 101(j)

The exceptions (which describe when full exclusion of death benefits still applies) make provision for most, if not all, circumstances wherein the employer can be said to have a traditional insurable interest.

Key Personnel

The first situation one would wish to accommodate is that of key executive insurance. Amounts received as a result of the death of a key executive should, intuitively, remain fully excludable. Section 101(j) seeks to achieve this result (without using the term "key executive") with an exception for the following insured persons:

- one who was an employee at any time during the 12-month period before the insured's death; or
- one who is, at the time the contract is issued
  1. a director;
  2. a highly compensated employee within the meaning of section 414(q) (without regard to paragraph (1)(B)(ii) thereof); or
  3. a highly compensated individual within the meaning of section 105(h)(5), except that "35 percent" shall be substituted for "25 percent" in subparagraph (C) thereof.

(Under § 414(q) as applied here, an individual is a highly compensated employee (HCE) if he is a 5 percent owner during the tax year or the preceding year, or had compensation over $95,000 (in 2005—as indexed for inflation); under § 105(h)(5) as applied here, a person is a highly compensated individual if he is an officer, a 10 percent owner, or in the highest 35 percent paid bracket.)

The provisions in the second bullet point pretty well capture the employees we would intuitively think of as key.

The provisions in the first bullet point provide an exception if the insured was an employee at any time during the 12-month period before his death, a logical exception but not tied to notions of insurable interest. This still allows for "janitor insurance," but the death benefit exclusion applies only if the employee has received the required notice, consented to the arrangement, and dies no later than 12 months after termination of employment, requirements that did not apply under prior law. As a practical matter, state insurable interest laws, together with the loss of the income exclusion for the death benefit once the employee has been retired for more than 12 months, make "janitor insurance" a thing of the past.

Proceeds Going to Parties Other Than the Employer (The "Beneficiaries" Exception)

The second set of exceptions is straightforward, permitting full exclusion where parties other than the

employer are the policy beneficiaries (as when life insurance is a straightforward employee benefit), or where the policy proceeds are applied to funding a buy-sell agreement. Specifically, there is no income inclusion when the policy amount is paid to:

- any individual who is the designated beneficiary of the policy (other than the employer policyholder);
- a member of the family of the insured (per I.R.C. § 267(c)(4); this means brothers and sisters, spouse, ancestors, and lineal descendants);
- a trust established for the benefit of any such person; or
- the estate of the insured.

Finally, there is full exclusion when the policy amount is used to purchase "an equity (or capital or profits) interest" in the employer policyholder from any person described in the above exceptions. This will typically be the case in a buy-sell agreement.

Special Definitions

The statute contains two definitions. "Employee" includes officers, directors, and highly compensated individuals as defined by I.R.C. § 414(q). And "insured" is limited to United States citizens or residents (and covers both individuals under a joint insurance contract).

Effective Date

Section 101(j) is effective from the date of enactment, August 17, 2006, but it does not apply to a contract issued pursuant to a § 1035 exchange, for a contract issued before that date. Any "material increase in the death benefit or other material change" in a grandfathered contract after the effective date will be treated as a new contract subject to § 101(j). The Joint Committee on Taxation's Technical Explanation of H.R. 4 (the version of the bill passed by the House) states that certain increases in the death benefit—those resulting from the application of I.R.C. § 7702, or from the normal operation of the contract (e.g., when dividends are used to purchase paid-up additions), or from market performance or the contract design—are not material. Furthermore, certain changes in the contract, including administrative changes, changes from general to separate account, or changes due to the exercise of an option or right originally granted under the contract, are not material.

Reliance on the § 1035 Exchange Exception to the Effective Date Is Risky

Because a § 1035 exchange will almost always involve a "material increase in the death benefit or other material change" cautious advisors will counsel their clients to treat almost all exchanges of EOLI contracts as if the § 1035 exchange exception were not available (that is, they will counsel their clients to follow the new PPA 06 requirements even in the 1035 exchange context).

Reporting Requirements

PPA 06 adds a new § 6039I to the Internal Revenue Code establishing reporting requirements for owners of employer-owned life insurance (as defined in new § 101(j)). An applicable policyholder must report:

- the number of its employees at the end of the year;
- the number of such employees insured under employer-owned insurance contracts at the end of the year;
- the total amount of insurance in force at the end of the year under such contracts;
- the name, address, and taxpayer ID of the applicable policyholder and the type of business in which it is engaged;
- a statement that the applicable policyholder has a valid consent for each insured employee (or the number of insured employees from whom consent was not obtained).

Employers must keep records sufficient to demonstrate their compliance with these requirements.

Planning Considerations and Potential Tax Traps

Notice and Consent

Probably the most important new planning element that emerges from new § 101(j) is the need to obtain the consent of the insured party prior to the issuance of an EOLI policy. This is the case not only for lower-level employees, where the insurable interest might be questionable, but even for the highest level executives and key personnel, where there is no insurable-interest issue and the legitimate business reasons for the insurance are obvious.

Advisors should incorporate into the documentation leading up to the issuance of the insurance

contract a form designed to satisfy the § 101(j) notice and consent requirement. Such a form, which must be signed by the proposed insured prior to actual issuance of the contract, might read as follows:

[Note: The form below is for illustrative purposes ONLY. Contact the applicable issuer/carrier/life insurance advisor for all forms to be used in the application process.]

> *I, [name of insured], do hereby acknowledge that I have received notice that I am to be the insured party under a life insurance contract (policy) to be purchased and owned by [name of policyholder]. I have also been notified that (a) the maximum amount of insurance coverage under the aforementioned contract, as of the date of issuance, will be $_______; and (b) [name of beneficiary] will be the beneficiary of any policy proceeds payable upon my death.*
>
> *Having received notice, as stated above, I do hereby consent to being insured under the aforementioned insurance contract, and I do further consent to the continuance of such insurance coverage even after the termination of my employment or other relationship with the policyholder, [name of policyholder].*
>
> ___________ *[Print Name]* ______ *[Date]*
>
> _________________________ *[Signature]*

It should be noted that the exceptions to the income-inclusion rule of § 101(j), as summarized above (the insured's status exception (i.e., key personnel), the beneficiary exception and the buy-sell exception) *will not apply if the notice and consent requirements are not met.* Thus, the importance of having this notice and consent document signed *prior to the issuance of the insurance contract* cannot be overemphasized. Unless the IRS announces some form of hardship relief to the pre-issuance time deadline, consents executed after the date of issuance will be ineffective, and the policy death benefit (net of the cumulative costs of the policy) will be taxable to the policyholder.

In instances where a failure to timely satisfy the notice and consent requirement is subsequently discovered, the problem can presumably be cured by a cancellation of the original policy and reissuance of a new one following execution of the notice and consent by the insured. This will likely involve added costs, and potential income taxation if, at the time that the administrative slip-up is discovered, the surrender value of the original policy has grown to a level in excess of the cumulative costs of the policy. (A § 1035 tax-deferred exchange transaction runs a serious risk that the IRS would consider the date of the original policy as the operative date of issuance of the contract for purposes of § 101(j). This position is supported by the fact that policies issued in § 1035 exchanges for policies grandfathered from the new § 101(j) rules are treated as retaining the grandfathered status. On the other hand the grandfathering analogy would not be applicable if the exchange involved a "material increase in the death benefit *or other material change.*")

Potential Application of § 101(j) to Common Employee Insurance Arrangements

The application of the new § 101(j) to most typical EOLI situations is quite straightforward: if a business acquires a life insurance policy on the life of an employee, this is "employer-owned life insurance" within the definition of § 101(j)(3), and the death benefit is taxable unless the notice and consent requirements have been met and one of the exceptions applies.

There are, however, a variety of situations when life insurance is acquired in a business setting where the business itself is not the actual owner of the policy. Examples include policies owned by VEBAs, rabbi trusts, secular trusts, and business owners individually, under cross-purchase buy-sell agreements. In such situations, the question arises whether such a policy is technically an "employer-owned insurance contract" within the coverage of § 101(j).

Buy-Sell Arrangements

Life insurance is commonly utilized to provide funds to complete the buy-out of a business interest from the estate or heirs of a deceased co-owner, pursuant to a buy-sell agreement. Insurance-funded buy-sell arrangements may in some instances be impacted by new § 101(j). In situations where the business entity is the owner and beneficiary of the policy, this would be an "employer-owned life insurance contract" under § 101(j)(3) if the insured party was an employee or director of the policyholder entity (or of a related party to the policyholder). Thus, one of the exceptions under § 101(j) would have to be applicable in order to avoid taxation of the death benefit. In the vast majority of cases where insurance is purchased by a business to fund a buy-sell agreement, one or more of the exceptions will apply. Almost by definition, the § 101(j)(2)(B)(ii) exception would apply since the insurance proceeds would be used "to purchase an equity (or capital or profits) interest" in the policyholder company from the insured's estate or heirs. Additionally, the insured will most likely have been a material owner of the business [§ 101(j)(2), exception (A)(ii)]). However, again, the notice and consent requirements must be complied with

in order for any of the exceptions to apply, and the IRS reporting requirements would apply since an "employer-owned life insurance contract" is involved.

In the cross-purchase type of buy-sell arrangement, where the insurance policies are not owned by the business entity, but by the individual owners of the entity who are parties to the agreement, the analysis is different. An interesting technical question arises as to whether the policy falls within the definition of "employer-owner life insurance contract," which is a contract—

> owned by a person engaged in a trade or business and under which such person (or a related person described in subparagraph (B)(ii)) is directly or indirectly a beneficiary under the contract . . . [§ 101(j)(3)(A)(i)]

Subparagraph (B)(ii) describes "related persons" as those engaged in businesses having common control (within the meaning of Code § 52(a) or (b)) and persons having a relationship specified in Code § 267(b) or § 707(b)(1). In general, these sections cover family relationships and control relationships with corporations and partnerships. For example, an individual owning more than 50% of a corporation's stock would be a related person with respect to the corporation and vice versa. An individual and his brother would be "related persons."

In a cross-purchase buy-sell arrangement the policy is not owned by a person engaged in a trade or business (that "person" being the business entity—not the individual owners). Industry commentators have stated that a policy may be an employer-owned contract if it is owned by a person related to the business entity; for example, an individual who owns more than 50% of the company's stock. However, under a strict technical-grammatical reading of § 101(j) this appears incorrect.

Is There a Drafting Error in the I.R.C. § 101(j) Legislation?

The parenthetical "related person" clause in the above-quoted definition of "employer-owned life insurance contract" only applies with respect to the beneficiary, and not to the policyholder. While this may be technically and grammatically true, it appears that it may have been a drafting error in the § 101(j) legislation. One would think that the parenthetical clause referring to related persons should have been placed immediately after the phrase "a person engaged in a trade or business." Then it would be clear that even if a policy is not owned by the employer itself, if it is owned by a related person it will be considered an "employer-owned insurance contract" under § 101(j)(3)(A). It seems highly unlikely that the drafters actually intended to exclude policies owned by related persons; for example, a key officer policy purchased by the controlling shareholder of the business, rather than by the corporation itself.

Thus, until this is clarified in corrective legislation, regulations or other IRS guidance, it would be most prudent, in the planning context, to treat the "related person" clause as applicable to both the policyholder and the beneficiary. On the other hand, in a situation where a taxpayer has run afoul of § 101(j) by inadvertent failure to comply with the notice and consent requirements, or failure to file reports under new § 6039I, if the policy was not owned by the employer itself, a case based upon the current literal-grammatical reading of § 101(j)(3)(A)(i) might well prevail.

Returning to the analysis of insurance-funded buy-sell agreements, if the agreement is in the form of a cross-purchase arrangement, the "related person" issue comes into play, since the policies are not owned by the company itself. If we assume that the related person provision applies with respect to the policy owner, then if any of the cross-purchase agreement parties owns more than a 50% interest in the business, the policy held by that party will be subject to § 101(j) if the insured person was an employee of the business when the policy was issued.

Regardless of the fact that some insurance policies issued pursuant to cross-purchase buy-sell arrangements may not be subject to § 101(j), complying with the notice and consent and reporting requirements in all buy-sell situations is probably a better planning approach than establishing a groundwork for later contending that § 101(j) does not apply. If the notice and consent requirements are met, one or more of the § 101(j) exceptions is likely to apply in most buy-sell scenarios.

Nonqualified Deferred Compensation Trusts

Rabbi trusts are frequently used to hold assets set aside by an employer to fund a nonqualified deferred compensation arrangement. Because these trusts are subject to claims of the employer's creditors, the asset pool is considered owned by the employer, and neither employer contributions nor income generated in the trust is taxable to the employee-beneficiary. Thus, trust income is taxable to the employer. Life insurance is often purchased in rabbi trusts, providing tax-free build-up of the asset pool.

Is a life insurance contract owned by a rabbi trust to be considered an "employer-owned life insurance contract" under new § 101(j)? It is true that the trust is its own legal entity, technically separate from the employer; but it is a grantor trust, whose assets are deemed, for tax purposes, to belong to the employer.

For this reason it is likely that the IRS would not view the rabbi trust as a separate entity when looking at whether the insurance contract is or is not employer-owned. Accordingly, the § 101(j) notice and consent provisions should be complied with before the issuance of a life insurance policy in a rabbi trust.

Secular Trusts

If the trust established to fund a deferred compensation arrangement is a so-called secular trust, then the foregoing analysis does not apply. Unlike a rabbi trust, a secular trust is not a grantor trust. It is independent of the employer and not subject to the claims to the employer's creditors. An insurance contract acquired by a secular trust would not fall under the definition of "employer-owned life insurance" since the owner of the policy is not the employer. However, if the "related person" clause is deemed to apply with respect to the policyholder, the employer, as the grantor of the trust, would be considered a related person to the trust if the employer were also a fiduciary of the trust [see § 267(b)(4), as incorporated into § 101(j)(3)(B)(ii)]. This, of course would be avoided if the trust has an independent trustee.

VEBAs

A voluntary employee benefit association (VEBA) is a tax-exempt entity established to operate certain employee benefit programs. VEBAs sometimes acquire life insurance to fund benefits. If an insurance policy is held by a VEBA and the insured is an employee of a business sponsoring the VEBA, § 101(j) might come into play.

If the "related person" clause is deemed to apply with respect to the employer (a questionable conclusion, as discussed above), a policy owned by a VEBA could be deemed "employer-owned" by reason of the related-person provision of § 267(b)(9). This paragraph provides that an organization that is tax-exempt under Code § 501 is a related person with respect to a party who directly or indirectly controls the organization. A VEBA is such an exempt organization, under § 501(c)(9), and thus, the VEBA may be considered a related party to the business whose employees are participants in the VEBA. Again this analysis would apply only if the related-person clause is deemed to apply to the employer.

If a policy owned by a VEBA is ultimately considered to be an employer-owned insurance contract, and none of the exceptions under § 101(j) is applicable (e.g., due to failure to have obtained the insured's consent prior to issuance), the policy proceeds (in excess of costs) would be income, but it would not be taxable income because of the VEBA's tax-exempt status—unless it could be deemed unrelated business income, an unlikely stretch by the IRS. It should be noted, however, that even if the VEBA need not be concerned about income recognition under § 101(j), the employer would still be in the anomalous situation of having to file IRS reports under § 6039I if the insurance policy is deemed an employer-owned insurance contract.

Split-Dollar Arrangements

Split-dollar arrangements usually involve some form of sharing of interest in a life insurance policy between an employer and an employee who is the insured party. This is likely to bring new section 101(j) into play. The application of § 101(j) may depend upon the form in which the split-dollar arrangement is structured. In the so-called "endorsement" form of split-dollar the insurance policy is owned by the employer. In such a case the policy would clearly fall within the definition of "employer-owned life insurance contract" under § 101(j)(3)(A).

However, in the typical split-dollar arrangement, when the employee dies, the insurance proceeds are divided in such a way that the employer receives only a recovery of the cumulative premiums paid, and the excess is paid to the heirs or estate of the insured. If the employer receives none of the proceeds in excess of the policy costs paid, even though § 101(j) would be applicable (in cases where none of the exceptions apply), there would be no taxable income to the employer.

But what about the share of the proceeds going to the employee's beneficiary? In general, § 101(j) taxes proceeds received by an "applicable policyholder." This term is defined in § 101(j)(3)(B) as the person engaged in a trade or business (e.g., the employer) and related persons. Thus, the portion of the proceeds paid to the estate or heirs of the insured would not be taxable to them unless the recipient was a related person with respect to the employer. This could be a problem in a situation where the beneficiary with respect to the employee's share of the proceeds is a more-than-50% owner of the business. Additionally, if the insured decedent owned more than 50% of the business and that controlling interest passed to the same party (his estate, a trust, or a beneficiary), as was the recipient of the split-dollar insurance proceeds, that party would be a related person with respect to the employer-policyholder. In such situations the portion of policy proceeds going to the beneficiary might well be taxable under § 101(j) unless one of the exceptions is applicable and the notice and consent requirements were complied with.

The other form of split-dollar arrangement is referred to as "collateral assignment." Here the policy is owned by the insured employee. The employee names the beneficiary and collaterally assigns the policy to

the employer as security for post-death reimbursement for the premiums, which are paid by the employer. Under such an arrangement, the policy would not be an "employer-owned life insurance contract" unless the "related person" clause is applicable and the employee falls under one of the related-person categories discussed above (e.g., a more-than-50% owner of the employer). Here again, we have the question as to whether the "related-person" clause even applies with respect to the policy owner (discussed above under the heading "Is There a Drafting Error in the I.R.C. § 101(j) Legislation?"). However, it is quite possible that § 101(j) would be interpreted by the IRS to apply to a policy issued pursuant to a collateral-assignment split-dollar arrangement if the employee-policyholder fell within a "related person" category, the most commonly applicable being: more-than-50% owner of the employer.

Conclusion

The foregoing material has examined a variety of business situations in which insurance covering the life of an employee may or may not be subject to the provisions of new § 101(j). In situations where § 101(j) is applicable, the tax consequences can be quite serious—income taxation of policy proceeds (net of cumulative costs) at ordinary-income rates upon the death of the insured. However, because the § 101(j) legislation was aimed primarily at abusive situations (e.g., so-called "janitor insurance"), the exceptions to its application are intended to protect most legitimate and commonly utilized employer insurance arrangements.

In the planning context the following two very important points are paramount:

1) While many employee insurance situations may appear not to be covered by § 101 because the insurance contract is not owned by the employer, there is a serious risk that in some of these cases, the IRS will seek to apply the related-party clause, with the result that the policy would be treated as an "employer-owned life insurance contract" under § 101(j)(3)(A).

2) If § 101(j) is deemed applicable, most of the common employee insurance arrangements will qualify for one or more of the exceptions. Although the exceptions provided in § 101(j) will provide safe harbor in most situations, compliance with the notice and consent requirement is an all-important prerequisite—**failure to provide notice of coverage and obtain the employee's written consent prior to the issuance of the contract will effectively bar reliance on any of the exceptions. The policy will forever retain the taint and its death benefit (in excess of cumulative costs) will ultimately be taxed as ordinary income.** Thus, as a matter of prudence, until the IRS more clearly delineates those situations it considers outside the scope of § 101(j), notice and consent forms should become part of the routine paperwork executed prior to the issuance of any policy in which an employment relationship is involved.

It should be noted that even if notice and consent are timely given, and § 101(j) is considered put to rest because one of the safe harbor exceptions clearly applies, there still remains the annual reporting requirement under new § 6039I. (These are spelled out above under the heading "Reporting Requirements.").

Robert J. Adler is CEO of Advanced Planning Press, LLC, a publishing company located in Franklin Lakes, New Jersey. Previously he was in private practice specializing in family wealth transfer and succession planning, charitable giving, retirement distribution planning and estate administration. He can be reached at robert.adler@onlineaus.com.

Copyright 2006, Robert J. Adler. All Rights Reserved

Trusts and Estates Law Section

SPRING MEETING

April 19-20, 2007

Hyatt Regency • Binghamton, NY

Delegation

By C. Raymond Radigan

New York adopted its version of the Prudent Investor Act (EPTL 11-2.3) effective January 1, 1995. The New York Act was recommended to the legislature by the Advisory Committee to the Legislature on EPTL and SCPA through its third report. The committee incorporated basic principles of Restatement Third of Trusts, and the Uniform Prudent Investor Rule, as adopted and promulgated by the American Law Institute in 1992. The recommendation as enacted also drew from related state statutes, from testimony and writings of many experts in the field as well as the research undertaken by the National Conference of Commissioners on Uniform State Laws in drafting the Uniform Prudent Investor Act ("UPIA").

The New York Legislature deviated from some of the provisions of the UPIA and other state statutes when it enacted its own Prudent Investor Act. For example, the New York Legislature modified the provisions of Section 3 of the UPIA which provides that no particular kind of property or type of investment is inherently imprudent. The legislature was uncomfortable with that wording and provided under its version of the Act (EPTL 11-2.3(b)(4)(A)) that a trustee is to invest in any type of investment consistent with the requirements under the New York standard since no particular investment is inherently *prudent* or imprudent. Also, regarding delegation, Section 9, subdivision (c) of the UPIA provides "the trustee who complies with the requirements of subdivision (a) is not liable to the beneficiary or the trust for the decisions or actions of the agent to whom the function was delegated." Under Section 9(a), the trustee is to exercise reasonable care, skill and caution 1) in selecting the delegee; 2) in establishing the scope and terms of the delegation consistent with the purposes of the Trust; and 3) in periodically reviewing the agent's actions in order to monitor the agent's performance in compliance with the scope and terms of the delegation. Under EPTL 11-2.3(c)(1)(C), the trustee is to periodically review the delegee's exercise of the delegated function in compliance with the scope and terms of the delegation. Some proposed that once the trustee prudently selected a delegee, the trustee as delegor would no longer be responsible for the actions of the delegee. However, the New York Legislature, in authorizing delegation, insisted that there be constant monitoring of the delegee, somewhat similar to the Uniform Act.

In view of the modern portfolio theory, the Advisory Committee was convinced after its thorough review of all that was available that New York had to change its traditional position on fiduciary diversification and delegation. After much reflection, the Advisory Committee concluded that, generally, a trustee should be obligated to diversify unless the facts and circumstances require otherwise. In addition, the Committee was convinced that New York had to change its rules regarding delegation.[1] Prior to the new Act, there was a strong non-delegation rule in New York law and practice.[2]

A comment in the Third Report (Appendix 3-45) notes that the New York Principal Income Act overrides an exculpation clause dealing with delegation as well as an arbitration clause in a delegation agreement as a matter of public policy.

The justification for authorizing delegation under the New York Prudent Investor Act was to give to a trustee with limited expertise in the area of investment the ability to seek out aid from one who has such expertise and who would be accountable for its actions, similar to a trustee. To overcome the fears of the judiciary and the legislature concerning delegation, the New York Prudent Investor Act set forth rules and regulations regarding delegation, the trustee's responsibility concerning delegation and the delegee's obligations in assuming the role as a delegee.[3] In its deliberations, the Committee often referred to "Aunt Susie"—an inexperienced trustee overall and the corporate trustee that may lack expertise in investing in limited areas such as global markets. Accordingly, the Committee agreed that a delegation under the modern portfolio theory was necessary and guidelines concerning selection should be enacted.

The act provides that the delegee's credentials, experience, expertise and financial responsibilities are factors that a trustee must take into account in choosing a delegee and will be considered in determining the limits of the trustee's liability in making the selection and being accountable for the selection. Thus it directs the trustee to exercise care, skill and caution in choosing and instructing the delegee and in periodically reviewing the delegee's conduct. The fiduciary who fails to do so remains liable to the beneficiaries for the conduct of the delegee. The delegee in turn must comply with the scope and terms of the delegation and exercise the delegated function with reasonable care, skill and caution. An exculpation clause in a delegation agreement cannot reduce the standard of care, skill and caution imposed on the delegee.

The report further provides if the trustee is a party to a binding arbitration agreement, the trustee would be required to arbitrate its dispute with the delegee and be bound by the arbitration determination. The report states, however, such an arbitration determination

would not be binding on the trust beneficiaries because they would not be parties to the delegation agreement or the arbitration proceeding. The report further states that while a delegee is liable to the trustee and the Trust, it is not a necessary party to an accounting proceeding.[4] However, if there is a surcharge objection by beneficiaries involving the delegee, the delegee can be made a party to the proceeding. A delegee can also agree with the trustee as to a method for obtaining a discharge from its liability to the trustee and the Trust. If the trustee absolves the delegee for a violation of the delegee's duty, the trustee is liable to the beneficiaries for doing so.

When the Advisory Committee was studying the issue of delegation, it was aware of the federal statute governing arbitration and that would have to be dealt with by the courts if the Prudent Investor Act as proposed by the Advisory Committee was enacted.

In re Blumenkrantz,[5] decided by the Surrogate of Nassau County in a decision dated November 22, 2006, seems to be the first case to address the issue of delegation as set forth under EPTL 11-2.3(c)(3). The trustee petitioned for a voluntary account and the delegee was named as a respondent. The beneficiary filed objections alleging that the trustee and the delegee were responsible for the loss of more than 50% of the value of the Trust that was basically invested totally in mutual funds. The delegee moved to stay the accounting proceedings and compel arbitration. Under the terms of the delegation agreement, the parties, consisting of the trustee and the delegee, agreed that all disputes regarding the agreement were to be arbitrated. The trustee contended that under EPTL 11-2.3(c)(3), the Surrogate was to hear all disputes regarding management of the trust funds and that the statute supersedes the agreement to arbitrate. The beneficiary contended she was not a party to the agreement and not bound by the arbitration clause.

The Court found that the arbitration agreement involved interstate commerce and therefore was governed by the Federal Arbitration Act and the act could not be pre-empted by a New York statute. The Court held that if the New York statute was construed to require that disputes be resolved in a state judicial forum in conflict with an agreement to arbitrate, the statute would thus conflict with the Federal Arbitration Act and that would be impermissible. The Court noted that while the New York Act required the delegee to personally submit to the jurisdiction of the Court, the Court could not invalidate an agreement to arbitrate. Thus, the Court could direct the trustee and the delegee to arbitrate since it had jurisdiction over the delegee but it could not bypass the arbitration agreement itself. Therefore, the dispute between the trustee and the delegee had to be arbitrated pursuant to the agreement. The Court further found that there was no waiver by the delegee to arbitrate.

The Court also held that it had to determine whether the beneficiary as a non-signatory to the delegation agreement was bound by the arbitration provision. The Court found that if the objectant had a claim against the delegee for its breach as a fiduciary or otherwise as a result of the agreement and wishes to proceed against the delegee, she must be bound by the arbitration agreement. It noted that if the beneficiary could bring suit independently of the trustee, thereby avoiding the arbitration clause, it would violate New York's strong public policy favoring arbitration. The Court went on to question who would be the proper party to represent the estate in arbitration, the trustee or the beneficiary. The Court found that the trustee had a conflict of interest in that it was in his best interest not to arbitrate since he faced the possibility of an adverse ruling. The Court noted that the trustee could not be liable for failure to oversee management of the funds absent a determination by the arbitrator that the delegee is liable to the Trust for the loss incurred. Thus, it would not be in the interest of the trustee to pursue a claim against the delegee. The Court ruled that a finding of malfeasance against the delegee could result in a finding of liability against the trustee for failing to properly monitor the delegee as required under EPTL 11-2.3(c)(1)(C). If the trustee declined to commence such a proceeding in arbitration, the Court held the beneficiary should be given the power to pursue arbitration. Therefore, the Court went on to authorize the beneficiary to seek limited letters for the purposes of pursuing arbitration.

The Court also noted that the objectant lacked standing in the accounting proceeding to allege a breach of contract by the delegee. In the accounting proceeding, the beneficiary could object to the failure of the trustee to commence a proceeding against the delegee, but the objection could not result in a judgment in favor of the beneficiary against the delegee since the objectant individually had no cause of action against the delegee. It found that her only right to prosecute her claim against the delegee was derivative. Therefore, the Court held it would entertain a petition for limited letters to permit the objectant to represent the Trust in the arbitration proceedings. Accordingly, the Court concluded that the trustee and the beneficiaries of the Trust are bound by the arbitration provision in the agreement.

Query: What if the beneficiary asked for a hearing as to liability of the trustee to delegate and for alleged failure to properly oversee the management of the delegee and failure to seek redress against the delegee? Must she await a determination by the arbitrator concerning the dispute between the delegor and the delegee where the Court already held that if the arbi-

trator determines there is no liability on the part of the delegee, the objections under EPTL 11-2.3(c)(1) would be dismissed? What if the beneficiary, because of the expense involved in arbitration or other reasons, does not wish to pursue any relief against the delegee and only wishes to pursue her rights against the trustee?

May the beneficiary elect to forgo any cause of action she has against the delegee and only pursue her rights in the Surrogate's Court against the trustee? If she forgoes those rights, is she entitled to a determination on the issue whether it was prudent for the trustee to delegate at all, considering the relatively small size of the estate, and whether the trustee should have agreed to the arbitration clause? If there was no arbitration clause, all issues would have had to be decided in the Surrogate's Court, even the liability of the delegee.

It should be noted that when called upon to approve or review delegation agreements, Surrogates have been known to direct the deletion of an arbitration clause. Was the failure by the trustee to insist on the deletion of the arbitration clause itself imprudent? Further, it should be noted that the issues of liability vis-à-vis the trustee and the beneficiary are different concerning the delegor and delegee. The issue of the prudence of delegation may only be a dispute between the trustee and the beneficiary. In addition, that which is not delegated is still a matter for judicial review, concerning just the trustee and the beneficiary. As to the trustee's liability, it may be he would not be liable if he prudently delegated and monitored. As to the delegee, he is only responsible for that delegated. It should also be noted that if something adverse happens because of the delegee's actions between the interim periods of the trustee's periodic review of the delegee, the delegee would be liable and the delegor may not be.

It was the intention of the Advisory Committee's recommendation which is set forth in the legislative memo that it prepared that the trustee would be required to arbitrate its dispute with the delegee and be bound thereby if the agreement provided for arbitration, but the determination would not be binding on the trust beneficiaries since they would not be parties to the agreement or the arbitration proceeding. If that be so, and if the beneficiary wishes to forgo arbitration and therefore not seek any relief against the delegee, can the beneficiary pursue, in the Surrogate's Court, not only the issue of whether it was imprudent for the trustee to agree to the arbitration clause, but also the issue of whether the trustee was prudent in the handling of the delegation, particularly the requirement that the trustee must periodically review the delegee's exercise of the delegated function in compliance with the scope and terms of the delegation?

Clearly there are many open issues concerning delegation that require legislative and court review.

Endnotes

1. See Third Report comparisons of the Uniform Principal Income Act, Illinois Principal Income Act and the New York Prudent Investment Act, Warren's Heaton on Surrogate's Courts, Seventh Edition, Volume 13, Appendix 3-26 to 3-47.
2. Third Report comment, Appendix 3, page 3-78, Warren's Heaton.
3. See Warren Heaton's Seventh Edition Volume 3 re the Third Report, Appendix 3, page app. 3-21.
4. See page 3-22, Appendix 3, Warren's Heaton, Seventh Edition, vol. 13.
5. 14 Misc. 3d 462, 824 N.Y.S.2d 884 (Sur. Ct., Nassau Co. 2006).

C. Raymond Radigan is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He is also Chairman of the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.

Reprinted from *Warren's Heaton Legislative and Case Digest* with permission. Copyright 2007 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

Catch Us on the Web at
WWW.NYSBA.ORG/TRUSTS

The Irrevocable Income Only Trust (Medicaid Qualifying Trust): What Every Attorney Should Know

By Anthony J. Enea

Before discussing the intricacies of Irrevocable Income Only Trusts (Medicaid Qualifying Trusts) and the relevant drafting considerations, it is important to understand the enabling legislation which provides for such trusts and the major legislative changes that have had an impact on them.

I. Historical Perspective

A. COBRA 1985

Prior to 1985 and the enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 1985), Medicaid did not distinguish between trusts and other assets. The assets and income of a trust were treated like any other resource or income for Medicaid eligibility purposes.

COBRA 1985 changed this by authorizing the establishment of certain irrevocable *inter vivos* trusts referred to as "Medicaid Qualifying Trusts." A Medicaid Qualifying Trust was defined as an irrevocable *inter vivos* trust established by an individual, or by an individual's spouse, under the terms of which the trustee is granted discretion to make payments to the individual. For Medicaid eligibility purposes, full exercise of the trustee's discretion was presumed, irrespective of whether or not the trustee actually paid income or other trust resources to the individual. COBRA 1985 required the inclusion of unpaid income or other resources for purposes of determining Medicaid eligibility.

Although COBRA 1985 presumed full exercise of discretion granted by the trust, it did not expand discretionary trust provisions which were limited by language of the trust. For example, if the trust capped the trustee's ability to distribute income to $10,000 annually, then only $10,000 of income would be deemed available annually.

On April 7, 1985 New York enacted enabling legislation for Medicaid Qualifying Trusts (EPTL 7-3.1(c)). With this enabling legislation in place, New York Elder Law attorneys began drafting trusts that gave the trustee the discretion to distribute income to the beneficiary but not principal. Many attorneys pushed the envelope and started drafting trusts that authorized income and/or principal payments so long as the individual was "well and living in the community." These trusts were commonly known as "Trigger Trusts."

A "Trigger Trust" typically provides that if the beneficiary entered a nursing home, or if the beneficiary applied for Medicaid, the trustee's discretion would terminate and no further payments of income and/or principal could be made.

Under the specific terms of the trust, the trustee had no discretion to pay income and/or principal at the time a Medicaid application was made. Therefore, under the provisions of COBRA 1985, the assets of the trust were not available for Medicaid eligibility purposes.

New York's enactment in 1997 of EPTL 7-3.1(c) (and 18 N.Y.C.R.R. § 360-4.5) closed this loophole by treating as void any provision in an *inter vivos* trust created on or after April 2, 1992 that directly or indirectly suspended, terminated or diverted principal, income or any beneficial interest of the creator of the trust or the creator's spouse based on a Medicaid application or requirement of medical care.

B. OBRA 1993

With Congress's enactment of the Omnibus Budget and Reconciliation Act of 1993 (OBRA 1993), if the trustee of the trust had any discretion to distribute income and/or principal to the individual or the individual's spouse, then the entire amount of such income and/or principal would be considered fully available to the individual for Medicaid eligibility purposes. Even if the trust limited the trustee's discretion to pay only $100 per month of the trust's total monthly income of $500, all $500 of income was deemed available under ORBA 93.[1] The Federal mandates of OBRA 1993 were adopted by N.Y. in 1994.[2]

OBRA 1993 defined a trust for Medicaid purposes as a trust created by the individual, his or her spouse, a third person, or a court with authority to act on behalf of the individual or his or her spouse, or anyone acting at the direction of the individual or his or her spouse. By specifically including third parties or a court acting on behalf of the individual as potential creators of the trust, the provisions of OBRA 1993 removed any questions as to whether a court-ordered trust could avoid its provisions.

OBRA 1993 affected all trusts created or funded after August 10, 1993. OBRA 1993 also created a new 60 month "lookback" period for assets transferred to an irrevocable trust.[3] Thus, if the Medicaid applicant created an irrevocable trust, he or she would be required to provide Medicaid with his or her financial records for the 60 months prior to the date Medicaid was sought. Depending on the value of assets transferred to the trust, and the divisor (average nursing home rate) used by the

county of the applicant's residence, the transfer of assets to the irrevocable trust could create a 60 month period of ineligibility.

With careful planning, and by using a combination of outright transfers and transfers to an irrevocable trust, it is possible to transfer large sums and create only a 36 month period of ineligibility. After the enactment of OBRA 1993, the most commonly used Medicaid Qualifying Trust, the Irrevocable Income Only Trust, became one in which the individual or his or her spouse was entitled to all income from the trust, but not any principal of the trust.

II. Drafting an Irrevocable Income Only Trust

It is important to remember that the primary purpose of the Irrevocable Income Only Trust is to preserve assets for the purpose of eventually securing Medicaid eligibility. In drafting the terms of the trust, the attorney should scrupulously avoid any provisions which might jeopardize this asset protection purpose.

The drafter must understand the Medicaid, gift tax, income tax and estate tax ramifications of creating the Irrevocable Income Only Trust. While the trust may have other benefits, such as providing an asset with a stepped-up income tax basis upon the death of the grantor, it is important to make clients understand the trust's primary purpose.

The more complex the trust, the more difficult it will be for the client to understand it. Furthermore, the inclusion of certain kinds of provisions may create a risk that the trust principal will be deemed an available resource by Medicaid. For example, in recent years we have seen the inclusion of a limited power of appointment, the grantor's right to change the trustees, and the trustees' power to make loans subject to attack by Medicaid.

The following basic drafting considerations should be borne in mind:

1. The trust must be in writing, executed and acknowledged by the grantor and the trustee in the same manner required for conveyance of realty (EPTL 7-1.17(a)).

2. The trust must be "irrevocable." The grantor must relinquish the right to alter, amend, revoke or terminate the trust.

   A statement as to irrevocability should be made in the body of the trust, preferably at the very beginning. Additionally, the following form is often used to title the trust: "John Smith Irrevocable Income Only Trust."

3. The grantor should not be appointed as the trustee. Although there is no statutory prohibition, the draftsman should avoid the possibility of Medicaid challenging the trust because of grantor/trustee's discretionary powers.

4. The trust should contain a specific prohibition against invasion of the trust principal for or on behalf of the grantor or the grantor's spouse. The trust should also contain a prohibition of payments to third parties who are providing services to the grantor.

   However, if the grantor wishes, he or she can allow the trustee the discretion to invade principal for the benefit of third parties who are issue of the grantor, for example, the children or grandchildren of the grantor. This is often a touchy subject with seniors who may be reluctant to give their children access to the principal of the trust. However, if the provision is properly drafted, it will create greater flexibility, and a potential for limited access to trust principal.

   If a child of the grantor is selected as a trustee with the power to invade the principal for issue of the grantor, it is important to provide that the trustee is not permitted to invade the principal of the trust for his or her own benefit, but only for the benefit of the other issue of the grantor.

   The draftsman should avoid any provision granting the trustee/child a general power of appointment over the trust principal to avoid the possibility that the trust assets might be considered part of the child's estate upon the child's death.

5. Generally, the grantor will want to retain the right to receive all of the net income generated by the trust principal. Payments are typically required to be made at least quarter-annually or more frequently during the grantor's lifetime.

   Net income can be defined as "investment interest, dividends and rent, after all taxes, direct and indirect expenses chargeable to their production, such as bank charges, and accountant fees are deducted." The client should be made aware that net income does not include the appreciated value of trust assets or capital gains from the sale of trust assets.

   A problem commonly encountered in practice is that instead of paying the net income to the grantor the trustee reinvests it. If all net income is to be paid to the grantor, one way of insuring its payment is to have the financial institution where the trust assets are kept automatically sweep the net income on a regular basis, and arrange that payment be made automatically directly to the grantor or to an account for the grantor.

There is no statutory requirement that the net income be paid to the grantor, and the trust can provide that the net income be paid to the adult children of the grantor or to other individuals. However, from a practical perspective, in most cases the grantor will want to reserve the right to the income.

The draftsman should also consider granting the trustee the power to "hold, retain or convert any and all trust assets in non-income producing form." If the trustee is granted this authority, the trustee will have the option of converting the trust assets from income producing to non-income producing once the grantor is receiving Medicaid. It should be emphasized that Medicaid will be entitled to all net income produced by the trust once the grantor is receiving Medicaid, and it remains uncertain whether Medicaid would challenge a trustee who exercises this discretionary power.

III. Tax Considerations

The Irrevocable Income Only Trust is considered a simple trust for Federal income tax purposes, since it requires the distribution of all income to or for the benefit of the beneficiary each year. Income is taxed to the beneficiary whether or not it is actually distributed to the beneficiary. However, trust capital gains would typically be taxed to the trust. Therefore, it may be beneficial to structure the Irrevocable Income Only Trust as a "grantor trust" under I.R.C. § 677 so that such capital gains are taxed to the grantor and not to the trust.

In addition, if the income beneficiary of the Irrevocable Income Only Trust is not the grantor, and the trust is a grantor trust, the income generated by the trust will be taxed to the grantor at his or her individual tax rate—which may be important if the grantor is taxed at a lower income tax rate than the income beneficiary.

Compliance with I.R.C. grantor trust rules will occur if the trust contains one or more of the following provisions:

1. The grantor is given the power in a non-fiduciary capacity, and without the approval and consent of a fiduciary, to reacquire all or any part of the trust corpus by substituting other property of an equivalent value. The grantor will be considered the owner for income tax purposes (I.R.C. § 675(4)).

   This is of importance if an appreciating asset, such as the primary residence, which may be sold during the grantor's lifetime, is transferred to trust. By giving the grantor this power, the grantor will be able to use the personal residence exclusion for capital gains under I.R.C. § 121.

2. The trustee is given the power to distribute income to the grantor or the grantor's spouse, or to hold or accumulate income for future distributions to the grantor or the grantors' spouse, without the approval of an adverse party (I.R.C. § 677(a)).

3. The grantor is given the unrestricted power to remove or substitute trustees, and to designate any person, even one related to or subordinate to the grantor, as a replacement trustee (I.R.C. § 1.674(d)-(2)).

4. The grantor reserves a special or limited power of appointment under I.R.C. § 674 (a power to appoint trust assets to a limited class not including the grantor, the grantor's estate, the grantor's creditors or the creditors of the grantor's estate).

   For gift tax purposes, the retention of a special or limited power of appointment by the grantor will cause the gift or transfer of assets to the trust to be deemed an incomplete gift (I.R.C. Regs. § 25.2511-2(b), (c)). Thus, none of the grantor's credit against the Federal gift tax will be utilized if a special or limited power of appointment is reserved by the grantor.

   Also, if the grantor wants the option to be able to change the ultimate beneficiaries of the trust or the percentage the beneficiaries will receive, the reservation of the special power should be considered.

   However, the use of a special or limited power of appointment may not always be appropriate. In many cases there will be no gift tax exposure by virtue of the Federal gift tax credit (which shields the first $1 million of gifts from Federal tax) and repeal of the New York gift tax. The inclusion of a power of appointment may also further complicate an already complicated document. It could pave the way for a senior to become the victim of undue influence or fraud at a time when he or she suffers from diminished capacity if the senior is induced to execute a Will wherein the power's execution alters the original beneficiaries or percentages the beneficiaries were to receive under the terms of the trust.

   In addition, although there are presently no Medicaid restrictions on the use of a special/limited powers of appointment, in recent years there has been a string of fair hearing decisions which determined that by the retention of a special or limited power of appointment the grantor maintained sufficient control to make the trust principal an available resource.

Remember, not all grantor trust provisions are appropriate for an Irrevocable Income Only Trust. For example, allowing the grantor the power to revoke the trust would not be appropriate.

IV. Transfer of Primary Residence to Trust

For many seniors, the prospect of transferring their primary residence to a trust causes them great consternation. Properly drafted trust provisions that will give a senior a level of comfort in knowing that he or she cannot be forced to leave the residence are often critical to having the trust executed and the Medicaid planning undertaken.

The trust should have language that specifically allows the grantor the exclusive right to the use and possession of any real property constituting trust corpus during his or her lifetime. The grantor could also be given the right to veto any sale or lease. The trust should specifically reserve to the grantor the right to all real property tax exemptions which are available. The trustees should also have the ability to purchase or rent substitute property to be used by grantor.

The trust may provide that the grantor is not required to pay rent for the use and possession of the premises, but shall be responsible for and required to pay all of the expenses of the maintenance of the property, including, but not limited to, taxes, insurance, utilities, mortgage charges and normal costs of maintenance and upkeep.

It is important to advise the client to take steps to arrange that fire and liability insurance for the premises is changed to reflect ownership by trust and not the grantor. Depending on the insurance company, this may require that a separate policy for tangible personal property, such as furniture and jewelry, be obtained in the name of the grantor.

Pursuant to I.R.C. § 2036(a) and I.R.C. § 1014, the grantor's retention of the right to income from the trust, and the right to exclusive use and possession of any residence owned by the trust, will cause the fair market value of the assets comprising trust principal to be included in the grantor's estate for estate tax purposes. Thus, under existing Federal tax law, the remainder beneficiaries of an Irrevocable Income Only Trust will receive a stepped-up basis for the trust assets they receive equal to the full fair market value of the trust asset on the date of the grantor's death. However, it is important that the attorney advise clients that these income and estate tax rules are subject to legislative change, and a full step-up in basis may not be available in the future.

V. Other Considerations

A. EPTL 7-1.6(b)

EPTL 7-1.6(b) specifically authorizes a court having jurisdiction over a trust to order the invasion of principal and income to or for the benefit of a beneficiary for whom support or education is not being sufficiently provided. To prevent this from occurring, the Irrevocable Income Only Trust should specifically state that EPTL 7-1.6(b) will not apply, and thus prevent the court from authorizing any invasion of income and principal.

In *Tutino v. Perales*[4] the Court held that the principal of the trust created by a Medicaid applicant was a potentially available resource because the trust was silent as to the application of EPTL 7-1.6(b). Thus, Medicaid benefits were denied.

B. EPTL 11-2.4

The Irrevocable Income Only trust should have a provision opting out of EPTL 11-2.4 (Optional Unitrust Provisions) and its application to the trust.

If the provisions of EPTL 11-2.4 were applied to an Irrevocable Income Only Trust, Medicaid could argue that the trustee has the right to invade the principal of the trust for the grantor, and thus that trust principal is an available resource for Medicaid eligibility purposes. To prevent this, it is imperative to include a provision in the trust renouncing the provisions of EPTL 11-2.4.

C. EPTL 11-2.3(b)(5)

The Irrevocable Income Only trust should include a provision opting out of the application of EPTL 11-2.3(b)(5) (Prudent Investor Act) to the trust. Effective September 4, 2001, EPTL 11-2.3(b) gives the trustee the power to make discretionary allocations between income and principal. The statute specifies a number of factors the trustee should consider in making or declining to make a discretionary allocation between income and principal. These include:

(1) the intent of the grantor, as stated in trust;

(2) the assets held by trust;

(3) the extent a trust asset is actually used by a beneficiary; and

(4) whether an asset was received from the grantor or purchased by the trustee.

EPTL 11-2.3(b)(5)(B) prevents the trustee from exercising the power if, among other things, the trust is a Medicaid trust, and the adjustment power would result in additional income or principal being treated as available income or resources. Nevertheless, to foreclose any argument that the trustee failed to make an appropriate adjustment between principal and income and violated the Prudent Investor Act, it may be safer to renounce the statute's application to the trust.

D. Other Provisions

Some other provisions that might be included in the Irrevocable Income Only Trust include:

(a) Providing that the grantor or any third party can make additions to the trust;

(b) Providing for the contingency that ultimate remainder beneficiaries may be minors or persons under a disability.

For example, the trust could specify that the share of any disabled person is to be distributed to a supplemental needs trust created for such person's benefit, or that the distribution to the disabled person be deferred until such person is no longer disabled, or that such share be distributed to a guardian of the disabled person.

With respect to a remainder beneficiary who is a minor, the trust should provide that income and principal be distributed to the minor's custodian under the Uniform Transfers to Minors Act, be held in further trust for the minor until he or she reaches a specific age, or that payment of income and principal be made to the parent or guardian of the minor.

(c) Providing for the potential subsequent disability or incapacity of the grantor during term of trust.

The trust should provide that during the disability of the grantor, the trustee may (1) pay income directly to the grantor, (2) pay income to the grantor's guardian or committee, (3) pay income to the grantor's issue for the grantor's health, maintenance or support, or (4) use income directly for the grantor's care.

Conclusion

The preparation of an Irrevocable Income Only Trust requires the consideration and analysis of a host of complex and often competing issues. In the author's view, keeping the trust provisions as straightforward and as easy for the client to understand as possible is usually the safest course.

Endnotes

1. 42 U.S.C. § 1396p(b)(3)(B); Social Services Law § 360-4.5(b).
2. Social Services Law § 366(2)(b)(2)(ii).
3. Prior to OBRA 1993 there was a single 30 month look-back period for all transfers. OBRA 1993 also increased the look-back period to 36 months for all outright transfers.
4. 153 A.D.2d 181, 550 N.Y.S.2d 21 (2d Dep't 1990).

Anthony J. Enea, Esq., a member of Enea, Scanlan & Sirignano, LLP of White Plains and Somers, NY, is a member of the Executive Committees of both the Trusts and Estates Law Section (as Vice-Chair of the Committee for the Elderly and Disabled) and the Elder Law Section (as Co-Chair of the Guardianship and Fiduciary Committee) of the NYSBA. He is also Editor-in-Chief of the *Elder Law Attorney*, a publication of the Elder Law Section. Mr. Enea is a member of the National Academy of Elder Law Attorneys, is Certified as an Elder Law Attorney ("CELA") by the National Elder Law Foundation, and is Vice President of the Westchester County Bar Association.

South Dakota Trust Company, LLC

"Flexible, Cost Effective Trust Administration with All the Advantages of South Dakota"

- Working with investment advisors and custodians of the client's choice
- Administration of non-financial/illiquid assets
- Unlimited trust duration, lowest state premium tax, asset protection
- Pure, no income tax state
- Great statutes for International Clients
- Rated the top jurisdiction by 1/07 *Trusts & Estates* Magazine
- Best regulated private family trust company state (www.privatefamilytrustcompany.com)

Please Contact:

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

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

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

www.sdtrustco.com

(paid advertisement)

New Attorney Advertising Regulations

New attorney advertising regulations went into effect on February 1, 2007. The following documents are reproduced here:

- Press release issued by New York State Bar Association President Mark H. Alcott addressing the changes in the provisions of the Code of Professional Responsibility governing advertising by attorneys in New York
- Synopsis of the changes
- Redlined version of relevant Code provisions.

Carl T. Baker, a Vice-Chair of the Section's Committee on Practice and Ethics, is in the process of preparing a commentary on the new rules, which will appear in an upcoming issue of the *Newsletter*. Please forward to him (ctb@fmbf-law.com) any comments or questions you have concerning the new rules.

(I) Press release issued by New York State Bar Association President Mark H. Alcott addressing the changes in the provisions of the Code of Professional Responsibility governing advertising by attorneys in New York

January 4, 2007

New York State Bar Association President Applauds New Attorney Advertising Regulations Collaborative Process Results in Rules That Will Protect Public, Uphold Dignity of the Profession

New York State Bar Association President Mark H. Alcott applauded the new regulations on attorney advertising announced today by the New York State Unified Court System. Mr. Alcott also praised the courts for working with the legal profession in a collaborative process to alleviate concerns the Association had when draft rules were announced last year. The new regulations, which go into effect February 1, 2007, are designed to protect consumers from inappropriate, misleading, or overly-aggressive advertisements.

The new regulations are significantly different from the draft regulations and represent a final product that will provide a balance between protecting the lawyer's right to advertise and protecting the public from overly aggressive and salacious advertisements according to Mr. Alcott.

Mr. Alcott said, "I want to thank the four presiding justices of the appellate division for their collaboration throughout this process. When the draft regulations were announced, we had a number of very real concerns and they worked with the legal community and the public every step of the way. They were open and available to meet with us, and most importantly, they were willing to listen. As a result, I am extremely pleased to announce that most of issues we raised with the courts have been addressed."

Mr. Alcott continued, "We are proud that our association took an active role in initially urging the courts to adopt more stringent advertising rules and we are happy that the end result will indeed realize our goal—more protection for the public and more dignity for the profession. I want to commend the work of our Association's Task Force on Attorney Advertising, chaired by Bernice Leber (Arent Fox PLLC) and appointed by my predecessor A. Vincent Buzard (Harris Beach PLLC). The hard work of the Task Force, both in crafting recommendations and working with the courts to modify the draft proposal, were instrumental in this process."

Mr. Alcott noted that many key elements contained in the rules are the product of the Association's Task Force on Attorney Advertising, and reflect extensive consultations that the Association had with the Presiding Justices after the initial proposals were issued last fall. Some of these components include:

- New definitions of advertisement and solicitation to enhance the fair and effective enforcement of regulations in this area. The new definitions provide greater clarification and guidance as to what constitutes advertisements, and equally as important, this definition has been significantly narrowed from what the courts originally proposed.
- Application of the current 30-day moratorium on soliciting wrongful death or personal injury clients to both plaintiff's counsel and defense counsel, to "even the playing field" and protect families suffering loss from overly aggressive marketing or contact from either side.
- Limitations on the use of testimonials and dramatizations. Testimonials with respect to a pending matter are prohibited. Other testimonials must be factually supported and accompanied by a disclaimer that prior results do not guarantee a similar outcome. If a person has been paid to provide an endorsement or testimonial, that fact must be disclosed; similarly, if an advertisement utilizes dramatizations or use of actors, that fact must be disclosed.

In addition, Mr. Alcott pointed out that the Association was successful in convincing the courts to remove a rule originally in the draft regulations that would have extended New York disciplinary authority to non-New York lawyers practicing or soliciting legal services in New York. The Association objected on the basis that it was overbroad, and it was not included in the final version. Instead, a provision was added to the solicitation rule specifying that the anti-solicitation provisions apply to non-New York lawyers who solicit New York residents.

(II) Synopsis of the changes

Significant Amendments to the Code of Professional Responsibility:

- New definitions to provide greater clarification and guidance:

  "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. (Definitions, subdivision [k])

  "Solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. (DR 2-103[B])

- Limits on the use of testimonials and dramatizations. Testimonials with respect to a pending matter are prohibited. Other testimonials must be factually supported and accompanied by a disclaimer that prior results do not guarantee a similar outcome. If a person has been paid to provide an endorsement or testimonial, that fact must be disclosed; similarly, if an advertisement utilizes dramatizations or use of actors, that fact must be disclosed. (DR 2-101[C]-[E]).

- A requirement that advertisements other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical be labeled "Attorney Advertising." (DR 2-101[F]).

- A requirement that advertisements be pre-approved by the lawyer or law firm and retained for three years (one year in the case of computer-accessed communications). (DR 2-101[K]).

- Guidelines for the utilization of Internet domain names. A lawyer or firm may utilize a domain name that does not include the name of the lawyer or firm, provided (1) all web pages clearly and conspicuously include the actual name of the lawyer or firm, (2) the lawyer or firm does not attempt to engage in the practice of law using the domain name, (3) the domain name does not imply an ability to obtain results, and (4) the name does not otherwise violate a disciplinary rule. (DR 2-102[E]).

- New rules prohibit solicitation in personal injury/wrongful death cases for 30 days following the incident giving rise to the claim unless a filing must be made within 30 days of the incident, in which case no unsolicited communication may be made before the 15th day after the date of the incident. This provision limiting contact applies to lawyers or firms representing actual or potential defendants or entities that may defend and/or indemnify defendants. (DR 2-103[G], DR 7-111).

- A requirement that solicitations directed to predetermined recipients disclose how the lawyer learned the recipient's identity and need for legal services. (DR 2-103[H]).

- Amendment of the rules governing advancement of court costs and expenses to conform to newly-amended Judiciary Law § 488. Under the amendments, a lawyer or firm may now advance costs and expenses in litigation with repayment contingent on the outcome of the matter. (DR 2-101[P], DR 5-103).

- An expansion of the certification provision for pleadings (contained in Part 130 of the Rules of the Chief Administrator). Under the expanded provision, by signing a paper a lawyer or party certifies that, to the best of that person's knowledge, information and belief, the presentation of the paper is not frivolous and, where the paper is an initiating pleading, that the matter was not obtained through illegal conduct or, if it was, that the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing fees and that the matter was not obtained in violation of DR 7-111. (22 NYCRR 130-1.1-a[b]).

(III) Redlined version of relevant Code provisions

January 4, 2007 Amendments to Code of Professional Responsibility (22 NYCRR part 1200)

Additions are indicated by underlining; deletions are indicated by ~~strikethrough~~.

Definitions (22 NYCRR 1200.1)

(k) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(l) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

DR 2-101 (22 NYCRR 1200.6) ~~Publicity and a~~ Advertising.

(a) A lawyer ~~on behalf of himself~~ or ~~herself or partners or associates~~, law firm shall not use or disseminate or participate in the ~~preparation~~ use or dissemination of any ~~public communication or communication to a prospective client containing~~ advertisement that:

(1) contains statements or claims that are false, deceptive or misleading.

~~(b) [*Reserved*]~~

~~(c) It is proper to include information, provided its dissemination does not violate~~; or

(2) violates a disciplinary rule.

(b) Subject to the provisions of subdivision (a) of this section, an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by ~~the code of professional responsibility~~ this Part; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the ~~attorney~~ lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the exten~~d~~t permitted by section 1200.5-c of this ~~Title~~ Part and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by subdivision (~~l~~p) of this section; range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(~~d~~c) ~~Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant~~ An advertisement shall not:

(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of ~~the most appropriate counsel. Information other than that specifically authorized~~ counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with subdivision (e) of this section may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by subdivision (c)(1) of this section, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in subdivision (~~c~~d) of this section ~~that is consistent with these purposes may be disseminated providing that it~~ provided:

(1) its dissemination does not violate any other provisions of this rule. subdivision (a) of this section;

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome."

~~(e)~~ (f) Every advertisement other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to section 1200.8(a)(1) of this Part, shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer accessed communications, other than on the lawyer or law firm's own web site or other internet presence; or

(2) meta tags or other hidden computer codes that, if displayed, would violate a disciplinary rule.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be ~~delivered~~ available to the client at the time of retainer for any such service. Such legal services shall include all those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

~~(f) If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission~~

(k) All advertisements shall be pre-approved by the lawyer or law firm and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained ~~by the lawyer~~ for a period of not less than one year. ~~following such transmission. All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm that practices law in this State, shall also be subject to the following provisions:~~

~~(1) A copy of each advertisement shall at the time of its initial mailing or distribution be filed with the Departmental Disciplinary Committee of the appropriate judicial department.~~

~~(2) Such advertisement shall contain no reference to the fact of filing.~~

~~(3) If such advertisement is directed to a predetermined addressee, a list, containing the names and addresses of all persons to whom the advertisement is being or will thereafter be mailed or distributed, shall be retained by the lawyer or law firm for a period of not less than one year following the last date of mailing or distribution.~~

~~(4) The advertisements filed pursuant to this subdivision~~ A copy of the contents of any web site covered by this section shall be ~~open to public inspection.~~

~~(5) The requirements of this subdivision shall not apply to such professional cards or other announcements the distribution of which is authorized by section 1200.7(a) of this Part.~~

~~(g)~~ preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm ~~may~~ shall not charge more than the fee advertised for

such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm ~~may~~ shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(~~h~~m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this disciplinary rule in a publication which is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this rule in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(~~i~~ n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(~~j~~ o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(~~k~~ p) All advertisements of legal services shall include the name, office address and telephone number of the attorney or law firm whose services are being offered.

~~(l) A~~ that contain information about the fees charged by the lawyer or law firm ~~advertising any contingent fee rates shall, at the time of the fee publication, disclose:~~

~~(1) Whether percentages are computed before or after deduction of costs, disbursements and other expenses of litigation.~~

~~(2) That, in the event there is no recovery, the client shall remain liable for the expenses of litigation, including court costs and disbursements.~~ , including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

DR 2-102 (22 NYCRR 1200.7) Professional notices, letterheads, and signs.

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with section 1200.6 of this Part, including the following:

(1) A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under sections 1200.6(~~c), (d~~ b) or 1200.10 of this Part. A professional card of a law firm may also give the names of members and associates.

(2) A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to section 1200.5-b of this Part. It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under section 1200.10 of this Part.

(3) A sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to section 1200.5-b of this Part. The sign may state the nature of the legal practice if permitted under section 1200.10 of this Part.

(4) A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under sections 1200.6(~~c), (d~~ b) or 1200.10 of this Part. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other

than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "P.C." or such symbols permitted by law, the name of a limited liability company or partnership shall contain "L.L.C., " "L.L.P." or such symbols permitted by law, and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like, may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to section 1200.5-c of this Part to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate a disciplinary rule.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate a disciplinary rule.

DR 2-103 (22 NYCRR 1200.8) Solicitation and recommendation of professional employment.

(a) A lawyer shall not ~~solicit professional employment from a prospective client~~ engage in solicitation:

(1) by in-person or telephone contact, ~~except that a lawyer may solicit professional employment from~~ or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or ~~current~~ existing client; or

(2) by ~~written or recorded~~ any form of communication if:

(i) the communication or contact violates sections 1200.6(a), 1200.8(g) or 1200.41-a of this Part;

(ii) the ~~prospective client~~ recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining ~~an attorney~~ lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this section "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State, shall be subject to the following provisions:

(1) a copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English language translation.

(2) such solicitation shall contain no reference to the fact of filing.

(3) if a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) the provisions of this subdivision shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by section 1200.7(a) of this Part.

(~~b~~ d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by section 1200.5-c of this Part, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by section 1200.12 of this Part.

(~~c~~ e) ~~No~~ A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(~~d~~ f) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule;

(4) any bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

~~(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks services does so as a result of conduct prohibited under this disciplinary rule.~~

~~(f) Advertising not proscribed under section 1200.6 of this Part shall not be deemed in violation of any provision of this disciplinary rule.~~

(g) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(h) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(i) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(j) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(k) The provisions of this section shall apply to a lawyer or members of a law firm not admitted to practice in this State who solicit retention by residents of this State.

DR 5-103 (22 NYCRR 1200.22) Avoiding acquisition of interest in litigation.

(a) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses.

(2) Except as provided in section 1200.11(c)(2) or (3) of this Part, contract with a client for a reasonable contingent fee in a civil case.

(b) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

~~(1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.~~

~~(2) Unless prohibited by law or rule of court, a~~

(1) A lawyer representing an indigent ~~client on a~~ or pro bono ~~basis~~ client may pay court costs and reasonable expenses of litigation on behalf of the client;

(2) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

DR 7-111 (22 NYCRR 1200.41-a) Communication After Incidents Involving Personal Injury or Wrongful Death

(a) In the event of an incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law

firm, seeking to represent the injured individual or legal representative thereof in potential litigation or in a proceeding arising out of the incident before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) This provision limiting contact with an injured individual or the legal representative theoreof applies as well to lawyers or law firms or any associate, agent, employee or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

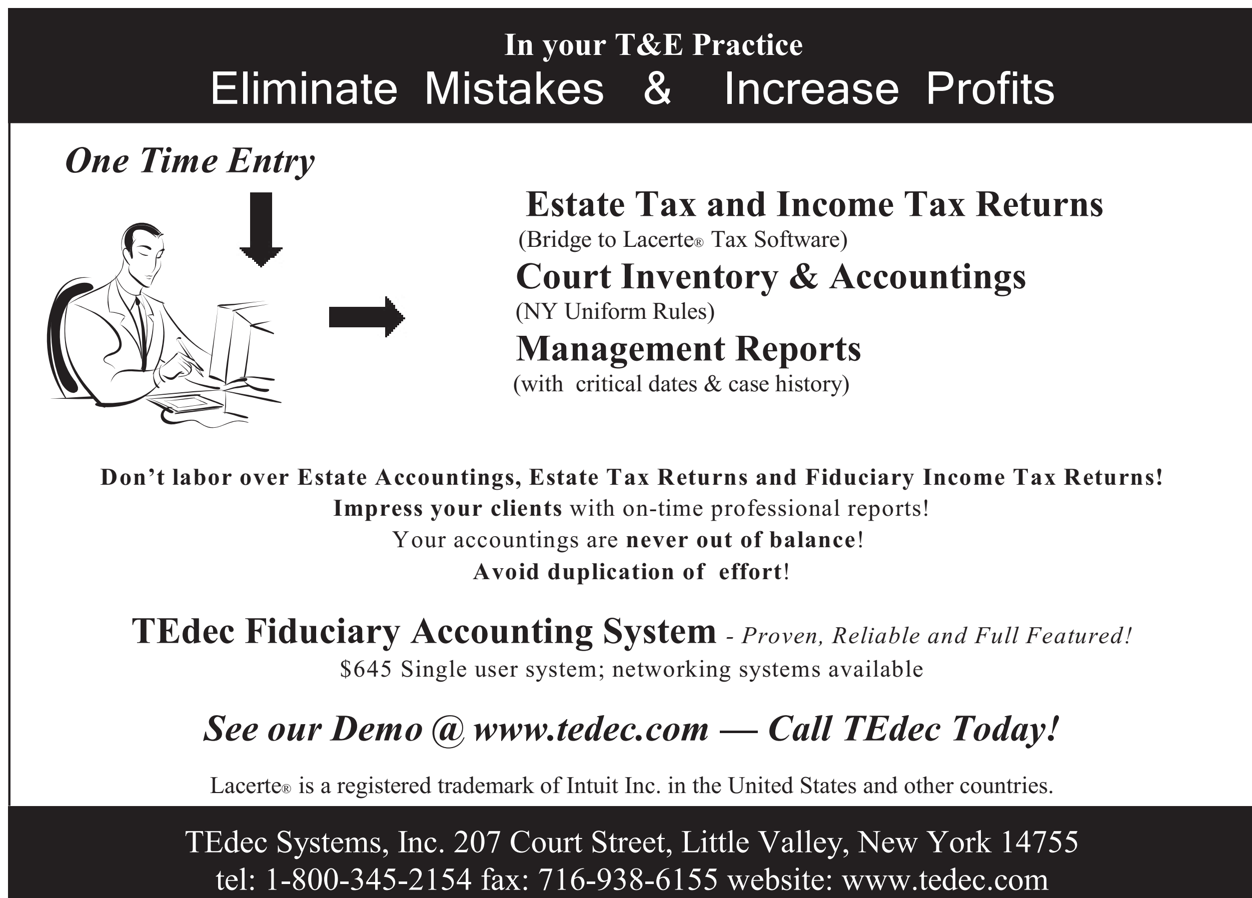
Amendment to Part 130 of the Rules of the Chief Administrator Section 130-1.1a Signing of papers.

(a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

(b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of this Subpart, and

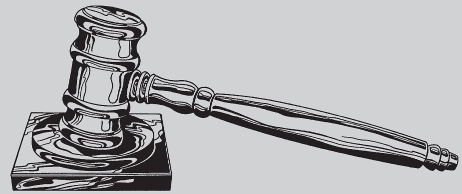
(2) where the paper is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom, and (ii) the matter was not obtained in violation of 22 NYCRR 1200.41-a [DR 7-111].



(paid advertisement)

Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



DESCENT AND DISTRIBUTION

Slayers; Conviction Given Collateral Estoppel Effect Even Though Appeal Not Perfected

Decedent's husband, her sole distributee, was convicted of her murder in the second degree. The husband filed notice of appeal and the court appointed a *guardian ad litem* to report on the status of the appeal. The guardian advised the court that the appeal had not been perfected and that in any event it was unlikely that it would be successful. In addition, the court received a letter from the husband stating that he had no interest in his wife's estate. The time to perfect the appeal then expired and although an application to extend the time to perfect can be filed, under these circumstances there is no reason to deny collateral estoppel effect to the conviction and there is no need for a hearing before disqualifying the husband as a distributee of the decedent. *Estate of Alexis*, 14 Misc. 3d 379, 823 N.Y.S.2d 886 (Sur. Ct. Nassau Co. 2006)

FIDUCIARIES

Executors; Disclosure Required by SCPA 2307-a May Be Waived by Beneficiaries of Estate

Testator nominated his brother and his lawyer as co-executors and included a statement acknowledging that the lawyer would be entitled to commissions and the lawyer's firm would be entitled to its fees. This acknowledgment did not comply with SCPA 2307-a and the lawyer would therefore be limited to one-half the commission to which he would otherwise be entitled. The residuary beneficiaries—the testator's five siblings—-each consented to the payment of a full commission to the attorney-executor in signed instruments annexed to the probate petition. The instruments would have fulfilled the requirements of SCPA 2307-a had they been signed by the testator. After considering the purpose of the statute the Surrogate held that the protections of the statute could be waived by the real parties in interest, the beneficiaries of the residuary estate, who bear the cost of the commissions. The probate decree therefore contained no limitation on the commissions of the attorney-executor. *In re Brokken*, 13 Misc. 3d 244, 820 N.Y.S.2d 419 (Sur. Ct. New York Co. 2006)

Executors; Disclosure Required by SCPA 2307-a Must Include Consequence of Non-Disclosure

Testator's will, executed February 4, 2006, nominated as co-executors a friend and the lawyer who drafted the will. The testator also signed a separate instrument acknowledging the disclosures required by SCPA 2307-a closely tracking the statutory model, except for the clause added effective November 16, 2004 which states that absent the execution of a proper disclosure the lawyer acting as executor is entitled only to one-half the commission otherwise payable. The Surrogate held that a disclosure statement that omits the consequences of non-disclosure does not substantially conform to the statutory model and is therefore inadequate. The attorney co-executor is limited to one-half the commission otherwise payable. *Estate of Tackley*, 13 Misc. 3d 818, 821 N.Y.S.2d 750 (Sur. Ct. New York Co. 2006)

GUARDIANS

Article 81; Guardian of Person May Require Accounting from Trustee of Ward's Revocable Trust

Petitioner had been appointed Article 81 guardian of the person of her aunt but not guardian of the property. The court determined that such an appointment was unnecessary because the aunt's property was in a revocable trust with a corporate trustee which was also the aunt's attorney-in-fact. The court, however, did give the guardian authority to direct the bank to pay for the aunt's care and maintenance after consulting with treating health professionals and examining all relevant circumstances, including financial resources. When the bank refused the guardian's request for financial information the guardian petitioned for a compulsory accounting. Supreme Court denied the requested relief and the Appellate Division reversed. Because the guardian needs the requested information to exercise the powers granted by the court it is immaterial that there is not a fiduciary relationship between the bank and the guardian and that the guardian is not guardian of the property. *In re Mary XX*, 33 A.D.3d 1066, 822 N.Y.S.2d 659 (3d Dep't 2006)

PROCEEDINGS

Probate; "Three and Two Rule" Applies Only Once Formal Objection to Probate Is Made, Special Circumstances Exception Applied

22 N.Y.C.R.R. 207.27 limits the scope of examinations before trial in a contested probate proceeding in which objections to probate are made to the three year period prior to the execution date of the propounded instrument and two years thereafter or to the date of the decedent's death, whichever is shorter, unless there is a showing of "special circumstances." In a dispute over a hearing under SCPA 1404, the Surrogate first determined that the "three and two rule" applies to SCPA 1404 examinations only after the filing of a formal objection to probate, disagreeing with former Surrogate Radigan's opinion in *Estate of Giardina*, N.Y.L.J., June 15, 1999, p. 34, that the rule also applies to pre-objection examinations. The Surrogate then considered whether the special circumstances exception to the "three and two rule" applied, since the first of decedent's three wills was executed three years and fifty-two days prior to the execution of the propounded will. Given the inconsistencies and contradictions in the provisions of the three wills, special circumstances for exempting the examination from the three year period were found. *Estate of Fiddle*, 13 Misc. 3d 827, 823 N.Y.S.2d 859 (Sur. Ct. Sullivan Co. 2006)

Probate; Original Probate Granted Where Foreign Jurisdiction Will Not Release Original Will

Decedent died domiciled in New York State. Her will had been executed in Ireland and was admitted to probate there. Petitioner, a resident of Ireland, requested letters testamentary for herself and a sister of the decedent who was a resident of New York. Petitioner presented documents showing that the will had been admitted to probate in Ireland but that the Irish court would not release the original. Given precedents holding that the will of a New York domiciliary may be admitted to probate in New York even if the will has been admitted to probate in a foreign court which will not release the original will, the Surrogate held that an authenticated copy of the decedent's will was entitled to original probate in New York. Letters of administration c.t.a. were ordered to issue to the petitioner and decedent's sister upon filing a bond and duly qualifying to act. *Estate of Carmody*, 13 Misc. 3d 907, 821 N.Y.S.2d 858 (Sur. Ct. Bronx Co. 2006)

Voluntary Administration; Limitation on Who May Serve Requires Formal Full Administration

The court had before it two intestate estates, both of which consisted of personal property valued at approximately $1,000. Representatives of both estates sought voluntary administration. In one instance the sole distributee lives abroad and designated a New York resident to act in her place, and in the other the sole distributee died after the decedent and the proposed fiduciary is the voluntary administrator of the deceased distributee's estate. SCPA 1303(a) limits appointment as voluntary administrator of an intestate estate to an adult, competent distributee of the decedent, or if none, the guardian of the property of an infant distributee or the committee or conservator of an incompetent distributee, and in default the public administrator. Neither the personal representative of a deceased distributee nor the designee of a distributee is among those included in the provision. Therefore, although voluntary administration is remedial and the statutory provisions are to be liberally construed (SCPA 1312), the court held that it nonetheless was bound by the statute. As a result, voluntary administration was not available in these estates so that full administration would be necessary under the circumstances. *In re Ortega*, 14 Misc. 3d 312, 823 N.Y.S.2d 884 (Sur. Ct. New York Co. 2006)

TRUSTS

Construction; Construction of Remainder Premature and Division of Trust Not Warranted

An income beneficiary of a lifetime trust created by her grandmother in 1950 petitioned Surrogate's Court for a construction of the remainder provision and a division of the trust into two separate shares. The trust provides for income to petitioner's mother for her life and then income to the mother's issue *per stirpes* until the death of the petitioner. Currently the income is paid to petitioner and her brother. The trust terminates on the death of petitioner and is to be distributed to the then living issue of petitioner's mother, *per stirpes*. The Surrogate granted the petition for division and held that on the petitioner's death the principal of her share is to pass to her issue and the principal of her brother's share is to pass to his issue. The Appellate Division reversed.

First, because the petition did not set forth an adequate reason showing a present need to construe the remainder provision, granting that part of the petition seeking construction was in error. Second, the construction of the remainder provision was incorrect. Under EPTL 1-2.14 a distribution "per stirpes" to the issue of a named individual must begin in the generation closest to that individual in which there are surviving issue. Therefore, if the petitioner's brother predeceases her the division of the trust property will begin in the next generation of their mother's descendants. If the petitioner's child and her brother's three children are living at that time, each will receive one-fourth of the trust property.

Finally, the Appellate Division held that the division of the trust pursuant to EPTL 7-1.13(a)(3), which allows a division "for any reason which is not directly contrary to the primary purpose of the trust," is limited "to the extent that the settlor's primary purpose in establishing the trust shall not be altered." Here the petitioner requested the division in order to insure that her child would receive one-half the trust on termination, to allow adjustments between principal and income to meet the petitioner's needs, and to permit the petitioner to seek a distribution of principal under EPTL 7-1.6(a). The requested division could distort the ultimate distribution of the remainder and would contradict the settlor's primary purpose to provide income to her daughter and her descendants until the death of her granddaughter. *In re Fussell*, 34 A.D.3d 164, 821 N.Y.S.2d 733 (4th Dep't 2006)

WILLS

Undue Influence; Circumstantial Evidence Not Sufficiently Substantial to Merit Trial of Undue Influence Claim

The Appellate Division granted summary judgment and ordered decedent's will admitted to probate, dismissing claims of undue influence and fraud. Decedent's will disinherited three of her children, explaining both in the will and in a handwritten statement attached to it that she took this action because the three children failed to heed her request to call off a proceeding they had brought in California to remove her eldest child and his wife as co-fiduciaries of the estate of the decedent's brother-in-law. (The three children were successful and the eldest son and his wife were removed and surcharged.) Although the decedent's action might be the result of the eldest son's misrepresentation of the merits of the California action, it could equally be the result of the decedent's displeasure at the "public airing of their family laundry." No inference of undue influence can be drawn where there is a contrary explanation. In addition, the eldest son testified that he did not know of the existence of the will, and there can be no inference of undue influence absent any evidence of the eldest son's involvement in the preparation of the will. The decedent's mental and physical condition did not support a claim of undue influence. Finally, the fact that the attorney who drafted the will was a friend of the eldest son did not create a triable issue of fact on undue influence. *In re Ryan*, 34 A.D.3d 212, 824 N.Y.S.2d 20 (1st Dep't 2006)

Construction; "Household Items" Includes Artwork Wherever Found in Home

Testator's will gave his sister "any and all household items which she desires to take" from decedent's principal residence. The testator's intent, expressed in the will, was that his sister could select those items that she wished to keep. The Appellate Division affirmed the Surrogate's determination the words "household items" included artwork found in the testator's home, whether on display or stored in closets, that the sister selected those items she wanted even though the selection was carried out by her son, and that items the sister gave away and the proceeds of items she sold must be returned to the estate. One justice dissented, maintaining that there should have been a full determination on the facts of whether the sister rather than her son actually selected the items sent to the sister's home. *Estate of Isenberg*, 35 A.D.3d 120, 823 N.Y.S.2d 381 (1st Dep't 2006)

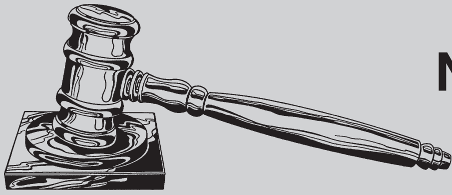
Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, DRAFTING NEW YORK WILLS (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).

Trusts and Estates Law Section

FALL MEETING

October 10-14, 2007

Hotel del Coronado • San Diego, CA



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

By Ilene Sherwyn Cooper

Arbitration Agreement

Before the court was an application by the preliminary executors for a determination that a controversy involving the estate of the decedent was not subject to arbitration.

The record revealed that at the time of death, the decedent owned a 1% general partnership interest and a 50% limited partnership interest in a partnership owning real estate. The decedent's son and daughter each owned a 24% limited partnership interest, and her son also owned a 1% interest as a general partner.

Pursuant to the terms of the decedent's will and codicils the decedent bequeathed her general partnership interest to a charitable foundation, and provided an option to purchase her limited partnership interest to her son and daughter. The decedent's son and daughter, who were respondents in the proceeding, alleged that the provisions of the decedent's will disposing of her general partnership interest to charity violated the terms of the partnership agreement entered by the decedent and others in 1980. In pertinent part, the agreement provided that no partner, without the written consent of all other partners, shall pledge, encumber, sell, mortgage, hypothecate or assign the whole or any part of his interest in the partnership, and that any such attempt to do so would have no effect. The agreement further provided that any claim or controversy arising out of or relating to the agreement or to its interpretation, breach or enforcement shall be submitted to arbitration.

Prior to the filing of the proceeding, the decedent's son and daughter served upon the preliminary executors a demand for arbitration and notice of intention to arbitrate. Thereafter, the preliminary executors instituted the subject proceeding requesting a stay of arbitration on the grounds that a dispute concerning the distribution of the decedent's estate cannot be subject to arbitration, and additionally, that the partnership agreement does not prohibit transfers by testamentary instrument and that the agreement terminated upon the death of the decedent.

The court held that the dispute between the parties concerned the construction and enforcement of the partnership agreement and therefore was subject to arbitration pursuant to the terms of the partnership agreement. Further, the court opined that while public policy precludes the arbitration of a dispute concerning the probate or construction of a will, this prohibition does not extend to all disputes which impact upon the distribution of a decedent's estate, including but not limited to those involving the termination of an agreement to which the decedent was a party.

Accordingly, the court concluded that the dispute between the parties was subject to arbitration.

In re Estate of Kalikow, 13 Misc. 3d 1222(A), 2006 WL 2944658 (Sur. Ct., Nassau Co. 2006).

Attorney-in-Fact

The decedent's children and co-administrators of her estate instituted a proceeding to invalidate two deeds executed by the decedent's niece as attorney-in-fact, which conveyed two parcels of real property to the respondent, the attorney-in-fact's mother, for no consideration.

In defense of the transfers, the respondent alleged, *inter alia*, that she cared for the decedent for many years prior to his death, and that it was his desire that she receive the subject properties.

At the trial of the matter, the petitioners introduced the deeds to the properties, and the power of attorney in question. Notably, the power of attorney did not confer gift-giving authority upon the agent.

Nevertheless, the attorney-in-fact testified that the decedent wanted nothing further to do with the properties, and that he wanted them out of his name. The respondent testified that she cared for the decedent in the latter years of his life, although she conceded that the petitioners did as well.

The court opined that a gift by an attorney-in-fact of the decedent's property to himself or a third party carries with it a presumption of impropriety and self-dealing which can only be overcome by a clear showing of intent by the principal to make a gift. The court concluded that the evidence at trial failed to

demonstrate this intent by the decedent, and noted, in particular, that the respondent's testimony, and that of the attorney-in-fact, was conclusory and not credible. Moreover, the court held that respondent's reliance on the Court of Appeals decision in *In re Ferrara*, 7 N.Y.3d 244, was misplaced inasmuch as the power of attorney in *Ferrara*, in contrast to the power conferred in the case before it, conferred gift-giving authority on the agent. Further, contrary to the respondent's contention, the court found that the Court of Appeals in *Ferrara* did not place the burden on the party challenging a gift to establish that it was not in the best interests of the principal, but rather, recognized long-established case law that imposed the burden upon the agent to establish the propriety of such a transfer.

Finally, despite respondent's claims that consideration was provided for the transfers, in the form of care provided to the decedent prior to his death, the court found it significant that respondent had testified that she had no expectation of compensation for the work performed, and thus had failed to rebut the presumption that such services are generally offered without an expectation of compensation where the parties are related.

Accordingly, the court granted the petition, and declared the deeds void.

In re Estate of Stancil, a/k/a Culbert, N.Y.L.J., November 1, 2006, p. 33 (Sur. Ct., Kings Co.).

Deposition of Opposing Counsel

In a proceeding seeking revocation of preliminary letters testamentary, the court was confronted, *inter alia*, with an application by the respondent to examine the petitioner's counsel, and counsel's cross-motion for a protective order. The respondent's motion was predicated upon two affidavits submitted by counsel, the substance of which she claimed made him a fact witness. In opposition, counsel maintained that his submissions were predicated upon the record before the court, and not independent factual knowledge of the assertions made. Moreover, counsel claimed that acceding to the respondent's request could result in his being called as a witness at the trial of the matter and cause him to be disqualified from any further representation of the petitioner.

The court opined that, despite the provisions of CPLR 3101(a)(4), where the non-party is opposing counsel, courts have made clear that their deposition should be had only in "rare and special circumstances" (*Giannicos v. Bellevue Hospital Med. Ctr.*, 7 Misc. 3d 403, 407), and where it is established that the information sought is necessary. The court concluded that respondent had failed to make such a showing.

Specifically, the court found that the first affidavit by counsel simply was a vehicle to put before the court documentary evidence that supported the allegations in the petition and to describe in narrative form the contents of these documents. The second affidavit was a response to the affidavit in opposition submitted by the respondent. Neither affidavit claimed to be based upon personal knowledge of counsel, but instead, each was based upon the record, thus removing counsel as a fact witness subject to examination. As to respondent's claims that without counsel's examination she would be forced to go to trial completely unaware of the facts in support of the proceeding, the court held that the petition was the operative pleading to be explored factually, and that ample discovery devices were available for that purpose.

Accordingly, respondent's application was denied, and counsel's cross-motion was granted.

In re Estate of Arrathoon, N.Y.L.J., October 2, 2006, p. 32 (Sur. Ct., N.Y. Co.).

Jurisdiction

By Order to Show Cause submitted to the Surrogate's Court, a creditor of a distributee sought to set aside an assignment by the distributee of his interest in the estate of the decedent to his wife as a fraudulent conveyance.

In refusing to entertain the application, the court held that it did not have jurisdiction over a dispute between a distributee of the decedent and a creditor of the distributee where the dispute would have no effect on the decedent's estate. The court found that even if the assignment were set aside, the estate of the decedent would not be augmented. Accordingly, the application was denied.

In re Estate of McKeon, N.Y.L.J., December 5, 2006, p. 23 (Sur. Ct., Westchester Co.).

Post-Nuptial Agreement

In a matrimonial action, the defendant husband moved for partial summary judgment declaring a post-nuptial Agreement invalid for lack for a proper acknowledgment.

During the course of his deposition, the defendant admitted that he had signed the Agreement before a notary. Further, in an affidavit, the notary stated that in his capacity as a notary public he had never signed any document without being shown photographic evidence satisfying him that the person signing the document was who he or she claimed to be. Further, he claimed he always asks the person signing the document whether he/she understands its contents and it

is accurate. Moreover, upon review of the Agreement, he provided an acknowledgment certificate, albeit after the fact.

In addressing the issue, the court turned to the decision in *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), and noted that the Court of Appeals squarely held that a failure to satisfy the requirements for an acknowledgment as set forth in the Real Property Law is fatal to the validity of an agreement within the scope of DRL § 236(B)(3). Moreover, despite plaintiff's arguments to the contrary, the court found that the First Department has specifically refused to give effect to an acknowledgment signed after the commencement of a divorce action. Finally, while the court recognized that cases under the Estates, Powers and Trusts Law have permitted proof of an acknowledgment through the testimony of the witness to the agreement, no such decisions existed in the matrimonial context.

Accordingly, the court held that the Agreement was invalid and unenforceable under DRL § 236(B)(3).

Kerner-Puritz v. Puritz, N.Y.L.J., September 25, 2006, p. 22 (Fam. Ct., N.Y. Co.).

Statute of Limitations

In a miscellaneous proceeding to set aside a revocable trust, the successor trustees, who were two of the decedent's six children, moved to dismiss the petition on the grounds of the statute of limitations.

The subject trust was created by the decedent in 1996, while she was a resident of the State of Florida. The terms of the trust essentially provided equally for the decedent's six children, and further directed that the instrument be construed and regulated in accordance with Florida law.

Approximately one year after the trust was executed, it was amended to delete one of the decedent's six children as a beneficiary. Subsequent to the decedent's death seven years later, that child petitioned to have the trust amendment declared invalid on the grounds of undue influence committed upon the decedent by his sister, who was named as one of the two successor trustees.

In support of the motion to dismiss, the respondent trustees alleged that because more than six years had passed between the making of the trust amendment and the filing of the proceeding, it was barred by the statute of limitations. In further support, respondents claimed that the petitioner should have known of the trust amendment no later than March, 2002, and therefore he had actual notice or inquiry notice of the cause of action at this time.

In opposition to the motion, petitioner argued that he could not have instituted the proceeding until the decedent died in 2004, and thus, it was not time barred.

As a preliminary matter, the court found that while the substantive law of Florida applied to the construction and administration of the trust, procedural issues, such as the statute of limitations, were governed by New York law. To this extent, CPLR 202 provides that where a cause of action accrues in favor of a resident of the state, the time limited by the laws of New York apply. Since the petitioner was a New York resident, the New York statute of limitations for fraud was, therefore, to be followed. Further, the court held that a proceeding concerning a revocable trust can only be instituted after the settlor's death.

Accordingly, the court concluded that since the statute of limitations for fraud in New York was six years, and the proceeding was filed one year after the decedent's death, it was timely, and the statute of limitations was not a bar to its commencement.

Petition of Henry H. Heumann, N.Y.L.J., October 30, 2006, p. 37 (Sur. Ct., Westchester Co.).

Subpoenas

A non-party attorney sought a protective order quashing subpoenas served upon him seeking the production of 30 categories of documents on the grounds of the attorney-client privilege.

Although the court held that the privilege did not apply, it nevertheless found the subpoenas facially invalid on the grounds that they neither contained nor were accompanied by a notice setting forth the reason why such disclosure was sought from a non-party. (CPLR 3101(a)(4).) Moreover, the court found there was no showing of special circumstances, given the numerous documents at issue, and the combined subpoenas appeared unduly burdensome.

Accordingly, the motion for a protective order was granted.

In re Magnor, N.Y.L.J., November 30, 2006, p. 25 (Sup. Ct., Nassau Co.).

Successor Trustee

Before the court was an application to reform the decedent's will in order to dispense with the requirement that a corporate fiduciary serve with the individual executor and individual co-trustees of two trusts created under the will.

The decedent's will directed that a corporate trustee serve at all times with respect to the estate and each

trust created under the will. The decedent further directed that in the event the named corporate fiduciary failed to serve, that a bank or qualified trust company be appointed by the individual executor or trustee then serving or by the court in its place and stead.

The petitioners claim that changed circumstances, i.e., the reduced value of the estate and the increase in the minimum fee requirements of corporate fiduciaries, have made a corporate fiduciary "effectively unavailable" to serve as fiduciary of the estate and trusts under the will.

The court denied the application. The court held that the decedent's intention to have a corporate fiduciary serve as executor and trustee of his estate was clear. Moreover, the court found that the decedent could not have been unaware of the increase in institutional fees, or the decrease in value of his administrable estate, inasmuch as he transferred assets outside the probate estate but nevertheless insisted that a corporate fiduciary be appointed. Finally, the court found that it was not impractical to appoint a corporate fiduciary, and that the two banks contacted by the petitioners had not refused to serve, but instead, merely refused to alter their minimum fee schedules.

Accordingly, the court denied petitioners' request to reform the will in regard to the appointment of a corporate trustee. However, it granted petitioners' request for reformation with regard to a corporate executor on the grounds that the estate administration was near completion, and that it would not serve the decedent's objective to pay full commissions to a corporate executor for the sole purpose of its turning assets over to the trustees.

In re Estate of David Skinner, N.Y.L.J., October 23, 2006, p. 37 (Sur. Ct., N.Y. Co.).

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

EMPIRE
VALUATION CONSULTANTS

When value matters, experience counts

Excellence in business valuation for 20 years

Quality business and partnership valuations help your clients avoid unnecessary tax audit risks.

As one of the nation's most respected independent valuation consulting firms, Empire's staff of over 45 professionals has handled thousands of IRS-related engagements since 1988. You can count on Empire to bring experience, excellence and integrity to the table, every time.

For more information, contact one of our offices listed to the side and **Experience Excellence.**

www.empireval.com

New York
Bill Lockwood
Scott Nammacher
Mark Shayne
Tony Paddock
212-714-0122

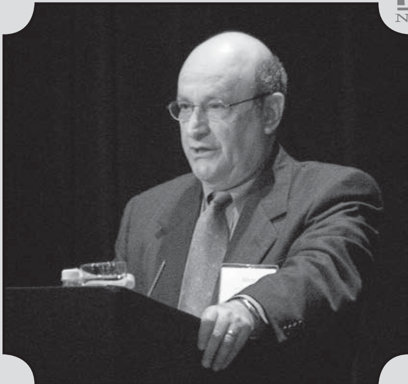
Rochester
Terry Griswold
Joe Eckl
Hugh Lambert
Greg Sullivan
Kevin Kane
585-475-9260

New England
Chuck Coyne
860-233-6552

(paid advertisement)

Fourth Annual Sophisticated Trusts and Estates Law Institute

Thursday and Friday, November 16-17, 2006
The Millennium Broadway Hotel • New York City



Section Committees & Chairs

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

Committee on Charitable Organizations
Richard P. Wallace (Chair)
Martin Shudt Wallace DiLorenzo & Johnson
P.O. Box 1530
Troy, NY 12181
dwallace@martinshudt.com

Ronni G. Davidowitz (Vice-Chair)
Katten Muchin Rosenman LLP
575 Madison Avenue, 21st Floor
New York, NY 10022
ronni.davidowitz@kattenlaw.com

Robert W. Sheehan (Vice-Chair)
Curtis Mallet-Prevost Colt & Mosle, LLP
101 Park Avenue
New York, NY 10178
rsheehan@cm-p.com

Committee on Continuing Legal Education
Marion Hancock Fish (Chair)
Hancock & Estabrook, LLP
1500 MONY Tower I, Box 4976
Syracuse, NY 13221
mfish@hancocklaw.com

John G. Farinacci (Vice-Chair)
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza
Garden City, NY 11530
jfarinacci@jshllp.com

Committee on Elderly and Disabled
Robert Kruger (Chair)
Robert Kruger, Esq.
225 Broadway, Room 4200
New York, NY 10007
robertkruger@aol.com

Anthony J. Enea (Vice-Chair)
Enea, Scanlon & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Robert M. Freedman (Vice-Chair)
Freedman Fish & Grimaldi LLP
521 Fifth Avenue, 25th Floor
New York, NY 10175
rfreedman@ffglaw.com

Lisa K. Friedman (Vice-Chair)
Law Office of Lisa K. Friedman
370 Lexington Avenue, Suite 1205
New York, NY 10017
lkleef@aol.com

Warren H. Heilbronner (Vice-Chair)
Boylan Brown et. al
2400 Chase Square
Rochester, NY 14604
whh@boylanbrown.com

Kathryn Grant Madigan (Vice-Chair)
Levene Gouldin & Thompson LLP
P.O. Box F-1706
Binghamton, NY 13902
kmadigan@binghamtonlaw.com

Committee on Electronic Filings
Wallace L. Leinheardt (Chair)
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza, 5th Floor
Garden City, NY 11530
wleinheardt@jshllp.com

Committee on Estate Litigation
Barbara Levitan (Chair)
Surrogate's Court, New York County
31 Chambers Street, Room 401
New York, NY 10007
blevitan@courts.state.ny.us

Karin J. Barkhorn (Vice-Chair)
Bryan Cave LLP
1290 Avenue of the Americas
New York, NY 10104
kjbarkhorn@bryancave.com

Gary E. Bashian (Vice-Chair)
Bashian Farber, LLP
235 Main Street, 6th Floor
White Plains, NY 10601
garybashian@aol.com

Hon. John M. Czygier, Jr. (Vice-Chair)
Surrogate Court of Suffolk County
320 Center Drive
Riverhead, NY 11901
judge@czygier.com

Alfreida B. Kenny
Law Office of Alfreida B. Kenny
225 Broadway, Suite 612
New York, NY 1007
abkenny@abkenny.com

Marilyn Ordover (Vice-Chair)
Cullen and Dykman LLP
177 Montague Street
Brooklyn, NY 11201
mordover@cullenanddykman.com

Committee on Estate Planning
Ian William MacLean (Chair)
The MacLean law Firm, LLC
100 Park Avenue, 20th Floor
New York, NY 10017
ianwmaclean@maclean-law.com

Susan Taxin Baer (Vice-Chair)
Law Offices of Susan Taxin Baer
399 Knollwood Road, Suite 212
White Plains, NY 10603
stbaer@baeresq.com

Philip A. DiGiorgio, Jr. (Vice-Chair)
Pierro & Assoc., LLC
20 Corporate Woods Boulevard, 3rd Floor
Albany, NY 12211
pdigiorgio@pierrolaw.com

Richard E. Schneyer (Vice-Chair)
Tannenbaum Helpern Syracuse
& Hirschtritt LLP
900 Third Avenue
New York, NY 10022
schneyer@tanhelp.com

Committee on Estate and Trust Administration
Linda J. Wank (Chair)
Frankfurt Kurnit Klein & Selz, P.C.
488 Madison Avenue, 9th Floor
New York, NY 10022
lwank@fkks.com

David J. Arcella (Vice-Chair)
Bessemer Trust
630 Fifth Avenue, 38th Floor
New York, NY 10111
arcekka@bessemer.com

Janet L. Blakeman (Vice-Chair)
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
jlblakeman@pbwt.com

Victoria L. D'Angelo (Vice-Chair)
Law Offices of Victoria L. D'Angelo
5888 Main Street
Williamsville, NY 14221

Ronald Finkelstein
Marcum & Kliegman, LLP
655 Third Avenue, 16th Floor
New York, NY 10017
rfinkelstein@mkllp.com

Natalia Murphy
Day Pitney LLP
875 Third Avenue
New York, NY 10022
nmurphy@dbh.com

Committee on Governmental Relations
Thomas J. Collura (Chair)
Tuczinski, Cavalier, Burstein & Collura, P.C.
54 State Street, Suite 803
Albany, NY 12207
tcollura@tcblegal.com

Thomas E. Dolin (Vice-Chair)
32 Swift Road
Voorheesville, NY 12186
tdolin1@msn.com

Michael K. Feigenbaum (Vice-Chair)
Ruskin, Moscou, Evans & Faltischek, P.C.
East Tower, 15th Floor
1425 Reckson Plaza
Uniondale, NY 11556
mfeigenbaum@rmfpc.com

Committee on International Estate Planning
Beth D. Tractenberg (Chair)
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022
beth.tractenberg@kattenlaw.com

Gerard F. Joyce, Jr. (Vice-Chair)
HSBC Bank USA
452 Fifth Avenue, 17th Floor
New York, NY 10018
gerard.joyce@hsbcpb.com

Michael Joseph Parets (Vice-Chair)
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, NY 10022
michael.parets@kattenlaw.com

Daniel S. Rubin (Vice-Chair)
Moses & Singer, LLP
405 Lexington Avenue
New York, NY 10174
drubin@mosessinger.com

Richard E. Schneyer (Vice-Chair)
Tannenbaum Helpern Syracuse
& Hirschtritt LLP
900 Third Avenue
New York, NY 10022
schneyer@tanhelp.com

Committee on Legislation
John R. Morken (Chair)
Farrell Fritz PC
West Tower, 14th Floor
Reckson Plaza
Uniondale, NY 11556
jmorken@farrellfritz.com

Richard J. Bowler (Vice-Chair)
10 Bank Street, Suite 650
White Plains, NY 10606
rjbowler@aol.com

Pamela R. Champine (Vice-Chair)
New York Law School
57 Worth Street
New York, NY 1001
pchampine@nyls.edu

Amy Karp (Vice-Chair)
Office of the Attorney General
NYS Department of Law Charities Bureau
120 Broadway
New York, NY 10271
ackarp@earthlink.net

Richard J. Miller, Jr. (Vice-Chair)
Morris & McVeigh, LLP
767 Third Avenue
New York, NY 10017
rjm@mormc.com

Eric W. Penzer (Vice-Chair)
Farrell Fritz, PC
1320 Reckson Plaza
Uniondale, NY 11556
epenzer@farrellfritz.com

Committee on Life Insurance and Employee Benefits
Elizabeth A. Hartnett (Chair)
MacKenzie Law Firm
101 South Salina Street, P.O Box 4967
Syracuse, NY 13221
ehartnett@mackenziehughes.com

Robert F. Baldwin, Jr. (Vice-Chair)
Baldwin & Sutphen, LLP
100 Clinton Square
126 North Salina Street, Suite 320
Syracuse, NY 13202
rbaldwin@baslaw.com

Amy J. Maggs (Vice-Chair)
The Shevy Law Firm
240 Washington Avenue Extension
Albany, NY 12205
amymaggs@shevylaw.com

Susan B. Slater-Jansen (Vice-Chair)
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020
sslater-jan@sonnenschein.com

Committee on Membership and Relations with Local Bar Associations
George E. Riedel, Jr. (Chair)
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202
griedel@lglaw.com

Committee on Newsletter and Publications
Austin T. Wilkie (Chair)
Holland & Knight LLP
195 Broadway
New York, NY 10007
austin.wilkie@hklaw.com

Michael S. Markoff (Vice-Chair)
Danziger & Markoff
123 Main Street, Suite 900
White Plains, NY 10601
mmarkoff@dmlawyers.com

Committee on Practice and Ethics
S. Jeanne Hall (Chair)
Fulton Rowe & Hart
One Rockefeller Plaza, Suite 301
New York, NY 10020
sjhall@fultonrowe.com

Carl T. Baker (Vice-Chair)
FitzGerald Morris Baker Firth P.C.
One Broad Street Plaza
Glens Falls, NY 1280
ctb@fmbf-law.com

Ralph M. Engel (Vice-Chair)
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, NY 10020|
engelesq@yahoo.com

Jerome L. Levine (Vice-Chair)
Loeb & Loeb
345 Park Avenue
New York, NY 10154
jlevine@loeb.com

Committee on Surrogates Court
Stacy L. Pettit (Chair)
Albany County Surrogate's Court
30 Clinton Avenue
Albany, NY 12207
spettit@courts.state.ny.us

Maureen A. Conley (Vice-Chair)
6 Pheasant Lane
Delmar, NY 12054
tdaley6112@aol.com

Staci A. Graber (Vice-Chair)
Peter S. Schram, P.C.
350 Broadway, Suite 515
New York, NY 10013
sgraber@mindspring.com

Robert W. Johnson, III (Vice-Chair)
Martin, Shudt, Wallace, DiLorenzo
& Johnson
P.O. Box 1530
Troy, NY 12181
rjohnson@martinshudt.com

Joseph T. La Ferlita
Farrell Fritz, PC
1320 Reckson Plaza
Uniondale, NY 11556
jlaferlita@farrellfritz.com

Committee on Taxation
Deborah S. Kearns (Chair)
Lavelle & Finn, LLP
29 British American Boulevard
Latham, NY 12110
dkearns06@aol.com

David A. Pratt (Vice-Chair)
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Andrea Levine Sanft (Vice-Chair)
Paul Weiss Rifkind Wharton
& Garrison LLP
1285 Avenue of the Americas, Suite 431
New York, NY 10019
asanft@paulweiss.com

Georgiana James Slade (Vice-Chair)
Milbank Tweed Hadley & McCloy, LLP
1 Chase Manhattan Plaza
New York, NY 10005
gslade@milbank.com

Committee on Technology
Gary R. Mund (Chair)
Kings County Surrogate's Court
2 Johnson Street, Room 210
Brooklyn, NY 11201
garymund@aol.com

David Goldfarb (Vice-Chair)
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118
goldfarb@seniorlaw.com

Ad Hoc Committee on Multi-State Practice
William P. LaPiana (Chair)
New York Law School
57 Worth Street
New York, NY 10013
wlapiana@nyls.edu

Amy B. Beller (Vice-Chair)
Miller & O'Neill
2300 Glades Road, Suite 400 East
Boca Raton, FL 33431
abeller@mandolaw.com

Philip G. Hull (Vice-Chair)
Pillsbury Winthrop, LLP
1540 Broadway
New York, NY 10036
philip.hull@pillsburylaw.com

Ronald S. Kochman (Vice-Chair)
Kochman & Ziska, PLC
222 Lakeview Avenue, Suite 950
West Palm Beach, FL 33401
rkochman@floridawills.com

Executive Committee District Representatives

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

Second District
Nora S. Anderson
Seth Rubenstein, PC
26 Court Street, Suite 1501
Brooklyn, NY 11242
rubensteinseth@yahoo.com

Third District
Thomas E. Dolin
32 Swift Road
Voorheesville, NY 12186
tdolin1@msn.com

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

Fifth District
John S. King
Scolaro, Shulmam, Cohen, Fetter
& Burstein, P.C
507 Plum Street, Suite 300
Syracuse, NY 13204
jking@scolaro.com

Sixth District
Beth E. Westfall
Coughlin & Gerhart, LLP
P.O. Box 2039
Binghamton, NY 13902
bwestfall@cglawoffices.com

Seventh District
Warren H. Heilbronner
Boylan Brown et. al
2400 Chase Square
Rochester, NY 14604
whh@boylanbrown.com

Eighth District
Robert W. Constantine
HSBC Private Bank
One HSBC Center, Suite 2300
Buffalo, NY 14203
robert.constantine@hsbcpb.com

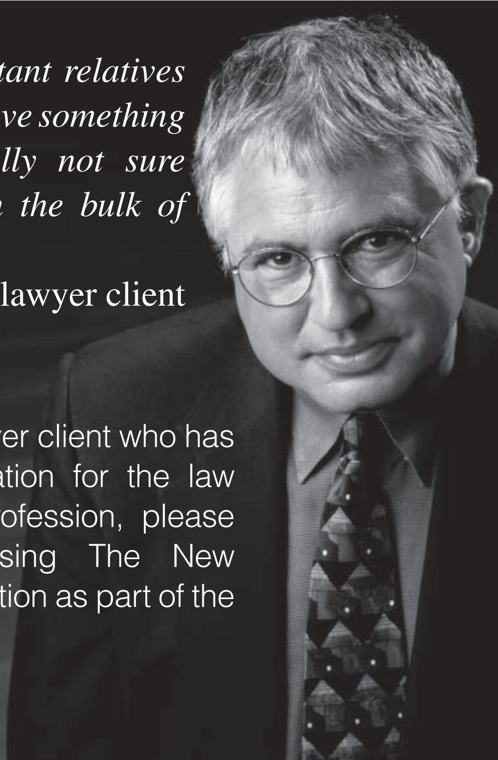
Ninth District
Frank W. Streng
McCarthy Fingar LLP
11 Martine Avenue, 12th Floor
White Plains, NY 10606
fstreng@mccarthyfingar.com

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

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

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

"I have a few distant relatives that I'd like to leave something to, but I'm really not sure what to do with the bulk of my estate."
— your lawyer client



If you have a lawyer client who has a deep appreciation for the law and the legal profession, please consider discussing The New York Bar Foundation as part of the estate plan.

The New York Bar Foundation is dedicated to aiding charitable and educational projects to meet the law-related needs of the public and the legal profession.

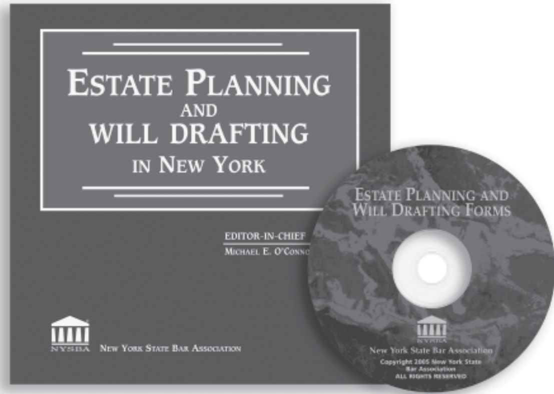
The Foundation is a not-for-profit organization that was established in 1950. Since then, it has awarded millions of dollars in grants to fund law-related projects throughout the State of New York.

To learn more about The New York Bar Foundation visit www.tnybf.org or call 518/487-5651

From the NYSBA Bookstore

Updated

Estate Planning and Will Drafting in New York



Editor-in-Chief:

Michael E. O'Connor, Esq.
DeLaney & O'Connor, LLP
Syracuse, NY

Estate Planning and Will Drafting in New York provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Each chapter has been brought completely up to date for the 2006 revision. Several chapters — including "New York Estate and Gift Taxes" and "Marital Deduction" have been totally revised for this update.

Written by practitioners who specialize in the field, *Estate Planning* is a comprehensive text that will benefit those who are just entering this growing area. Experienced practitioners will also benefit from the practical guidance offered by their colleagues, and use this book as a text of first reference for areas with which they may not be as familiar.

Contents At-a-Glance
Estate Planning Overview
Federal Estate and Gift Taxation: An Overview
New York Estate and Gift Taxes
Fundamentals of Will Drafting
Marital Deduction/Credit Shelter Drafting
Revocable Trusts
Lifetime Gifts and Trusts for Minors
IRAs and Qualified Plans—Tax, Medicaid and Planning Issues
Estate Planning with Life Insurance
Dealing with Second or Troubled Marriages
Planning for Client Incapacity
Long-Term Care Insurance in New York
Practice Development and Ethical Issues

Forms available on CD

Book Prices
2006 • 822 pp., loose-leaf
PN: 4095 (includes 2006 update)
NYSBA Members $125
Non-Members $160

2006 Update (available to past purchasers only)
PN: 50953
NYSBA Members $75
Non-Members $95

Book and CD Prices
2006 • PN: 4095C
NYSBA Members $175
Non-Members $210

CD Prices
PN: 60955
NYSBA Members $95
Non-Members $115

Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order.
Prices do not include applicable sales tax.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs Mention Code: PUB0049

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 as constituting substantive approval of the articles' contents.

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge. The views expressed in articles in this *Newsletter* represent only the author's viewpoint and not necessarily the views of the Editor or the Trusts and Estates Law Section.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

© Copyright 2007 by the New York State Bar Association.
ISSN 1530-3896 (print) ISSN 1933-852X (online)

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor

Austin T. Wilkie
Holland & Knight LLP
195 Broadway
New York, NY 10007
austin.wilkie@hklaw.com

Section Officers

Chair
Philip L. Burke
Woods Oviatt Gilman LLP
700 Crossroads Building, 2 State Street
Rochester, NY 14614
pburke@woodsoviatt.com

Chairperson-Elect
Wallace L. Leinheardt
Jaspan Schlesinger Hoffman LLP
300 Garden City Plaza, 5th Floor
Garden City, NY 11530
wleinheardt@jshllp.com

Secretary
Prof. Ira M. Bloom
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Treasurer
Gary B. Friedman
Greenfield Stein & Senior, LLP
600 3rd Avenue, 11th Floor
New York, NY 10016
gfriedman@gss-law.com

ADDRESS SERVICE REQUESTED

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