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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Ira Bloom

As this year's Section Chair, I welcome the opportunity to serve our nearly 5,000 members.

The year 2009 portends to be busy, exciting and full of significant changes.

January's Annual Meeting Program addressed the timely topic of law firm succession planning, with kudos going to James Cahill, Program Chair, and to all the panelists and speakers, including Surrogate John Cyzgier for his timely and excellent presentation on the safekeeping and turnover of wills. Our luncheon speaker, Michael Mariani, Senior Vice President, Fidelity Trust Company International, gave an informative talk on planning opportunities during these challenging and uncertain times.

A major change, initiated this year, was to shift the season for the annual out-of-state meeting. Before 2009, the meeting was held in the Fall, including the very successful meeting that was held in September of 2008 at the Broadmoor Hotel in Colorado Springs. (Wally Leinheardt, the immediate past Chair, is to be commended on that excellent program, as is the Program Chair, Ilene Cooper, who is this year's Section Treasurer.) The change to the Spring was brought about because of weather concerns, prompted by Hurricane Katrina which necessitated changing the scheduled 2005 Fall Program from New Orleans.

By now, the Spring Program at the Amelia Island Plantation will have come and gone. I'm confident that it will have met expectations: a timely and highly educational program at a wonderful and accessible location. Indeed, it is hard to imagine how the program, entitled "Estate Planning in Uncertain Times: Tax and Non-Tax Considerations," could not have been successful as it featured some of the most prominent speakers in the country, including Amy Beller, Prof. Susan Gary, Randy Harris, Carlyn McCaffrey, Prof. David Pratt, Jonathan Rikoon, Josh Rubenstein and Sandy Schlesinger. My thanks to Prof. Deborah Kearns, my colleague at Albany Law School, for serving as

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Program Chair. (Debbie also serves as Chair of the Tax Section.) For those of you who were unable to attend the Amelia Island meeting, the program was videotaped. In the Summer Issue I plan to provide details on how to access the videotaped program.

New Power of Attorney Legislation

2009 has already seen a major legislative change. In late January, Governor Paterson signed into law new power of attorney legislation, which was sent to all members in early February by an e-blast. This legislation came as a big surprise to all. Although the Assembly passed the bill in June of 2008, the Senate did not approve the legislation until December 15 during an extraordinary session.

Our Section can be justifiably proud of its input in crafting the new power of attorney (POA) legislation. Ron Weiss, Warren Whitaker and many other section members worked tirelessly for years in trying to improve early drafts by the Law Revision Commission, which engineered the enacted legislation. The new POA introduces major, dramatic changes, including a new and significantly revised statutory short form, for which notarization is required, and an entirely new form for gift-making, which has to be witnessed. In this Newsletter, Rose Mary Bailly and Barbara Hancock provide a summary of the reasons for the new legislation and the major changes that we will all have to address shortly. A draft of the new POA appears on page 11 of this issue.

As signed into law by Governor Paterson, the POA legislation had a March 1, 2009 effective date. Our Section, the Elder Law Section and Ron Kennedy, Director of NYSBA's Department of Governmental Relations, actively worked to have the effective date extended. I am happy to report that these efforts were successful as Governor Paterson signed extender legislation into law as Chapter 4 of the Laws of 2009, which makes the new POA law effective on September 1, 2009.

The POA legislation will bring about major changes in how we do business in the area (and likely generate additional legal business as the complexities of the new law surely will warrant legal assistance in most cases). I am committed to our Section making substantial efforts to educate our members and other bar members, as well as New York lawyers and the general public about the POA legislation. Indeed, Jennifer Weidner, Chair of the CLE Committee, has advised that the May CLE programs around the state will include a segment on the POA legislation. In addition, the Fall Meeting to be held in Syracuse at the Renaissance Hotel on October 1 and 2 will include an educational component on the new POA legislation. Other educational programs and activities also will be planned during 2009.

In the Summer Issue I will report on the Section's Lobby Day efforts in Albany, including possible upcoming legislation, as well as other timely developments.

Last, but certainly not least, I want to express my gratitude to Wally Leinheardt, immediate past Chair of the Section. Quite simply, Wally did a tremendous job during his tenure. I particularly appreciated his patient and thorough advice in providing for my transition to Chair. I only hope that I can measure up to his tireless and effective stewardship of the Section.

Ira Bloom

The Sale of Assets to a "GDOT"—An Essential Estate Planning Tool for Sizable Estates

By Randall H. Borkus and Richard J. Shapiro

Introduction

Consider the following scenario: an ambitious attorney has worked hard in building her estate planning practice. She has mastered "foundational" planning, including the use of credit shelter trusts and life insurance trusts for estate tax planning. The attorney has developed a nice referral network of financial advisors and CPAs, and has developed a solid reputation in her community.

Out of the blue, the attorney receives a call from a financial advisor she knows from the Rotary Club. The advisor has referred a married couple that has never done any estate planning. They come in for their appointment, looking like the "typical" client—that is, until they hand the attorney their completed intake form showing total assets of $40 million. They tell the attorney that their objectives include avoiding probate, protecting the interests of the surviving spouse, and reducing or even eliminating estate taxes.

Playing it cool, the attorney has "Mr. and Mrs. High-net worth" sign the standard retainer agreement. The attorney follows her usual procedure and prepares an estate plan featuring revocable trusts for probate avoidance and incorporating credit shelter trusts for basic estate tax planning. For high-net worth clients, however—typically those with estates in excess of $5 million—a "foundational" estate plan that does not provide adequate estate, gift tax or asset protection planning leaves the clients and their estates exposed to creditor claims, as well as punishing estate and gift tax liability. Unfortunately, without doing more than a foundational plan, the attorney will have missed a huge planning opportunity and will have failed to meet her clients' planning objectives.

In order to design a comprehensive estate plan that will address the multitude of estate and gift tax issues inherent with a sizable estate, an attorney must "crunch the numbers" to analyze cash flows and projected asset values. High-net worth clients require a sophisticated level of planning that would take an attorney who regularly practices in the high-net worth area more than a few weeks to design, execute and fund. Depending on the asset complexity, the project could take a year or more to implement.

Given the stakes involved, an attorney who finds him or herself with a high-net worth case is well served to team-up with an attorney, financial advisor, CPA or other financial professional who practices regularly in the high-net worth arena. The team approach ensures the client that they will receive the expertise required to design a sophisticated and comprehensive wealth preservation plan. Collaboration is the key to working in the high-net worth arena.

Assuming an advanced planning team is put into the place—what now? There are a number of techniques available to address the complex estate-planning needs of high-net worth clients. We will describe a frequently used advanced planning technique—the sale of assets to a particular type of irrevocable trust that we call a "GDOT."

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GDOT Sales

One of the most popular strategies for high-net worth clients is the sale of assets to a grantor deemed owner trust (GDOT), also known as an intentionally defective grantor trust (IDGT). The mechanics of a GDOT are straightforward. The taxpayer creates an irrevocable trust for the benefit of his or her heirs. The trust is structured to be a grantor trust for income tax purposes by retaining one or more of the powers under Internal Revenue Code §§ 673 through 677. However, care must be taken when selecting which powers to use, because most of the powers under these sections would also cause the trust assets to be included in the grantor's estate at death under Internal Revenue Code § 2036(a)[1] and / or § 2038.[2] Many practitioners believe the safest power to use is a § 675(4) power to substitute assets of equal value. In 2005 and 2008 Private Letter Rulings,[3] the IRS ruled that retention of this power did not cause estate inclusion. Another option is found in § 675(2), which provides for the power to borrow without adequate security or interest.

Transfer Tax Benefit

After the GDOT is signed, the taxpayer sells assets to the GDOT that are expected to produce a high total return in exchange for an installment note paying the lowest interest rate permitted by law. This minimum interest rate is determined by using the applicable federal rate (AFR),[4] which is based on federal interest rates offered each month relative to the corresponding note term. The benefit of maximizing the gap between the return on the transferred assets and the interest rate paid by the trust on the installment note is that this excess represents a gift tax-free transfer from the grantor to the heirs. A critical component of the sale to a GDOT is that the value of the installment note payable to the grantor is "frozen," while it is typical that the assets sold by the taxpayer to the GDOT in exchange for the note will appreciate, often significantly. The transfer tax advantages are multiplied as the value leaving the estate (e.g., the assets sold to the GDOT) will exceed the value coming back into the estate (e.g., the amount of periodic interest payments).

"[N]o capital gain is recognized on the sale of assets to the GDOT."

In the past, there was a concern that the IRS might try to challenge the tax benefits by treating the income tax payments as taxable gifts from the grantor to the GDOT. The IRS looked at the issue and eventually rejected this argument.[5]

Additionally, a GDOT provides other important income tax benefits. Pursuant to a seminal Revenue Ruling,[6] the grantor (or seller) and the trust (the GDOT) are treated as the same taxpayer. Therefore, no capital gain is recognized on the sale of assets to the GDOT. Further, interest payments received from the trust by the grantor on the note are not treated as income to the grantor because the grantor is, in effect, merely making payments to oneself.

Example: Jack and Jackie sell $1 million of non-voting LLC units to a GDOT in exchange for an installment note. Their children are beneficiaries of the GDOT. The LLC generates taxable income of $125,000 each year. Because the trust is considered "defective" for income tax purposes, Jack and Jackie will report this income on their Form 1040 and pay the income tax due.[7] Assuming a 35% tax rate, the couple is able to effectively shift an additional $43,750 to the trust each year for the benefit of their children ($125,000 x 35%), while the $125,000 continues to grow in the GDOT and outside of Jack and Jackie's estate.

Structuring the Sale

Practitioners have also been concerned that the IRS could argue that assets sold to a GDOT are subject to estate inclusion under Internal Revenue Code §§ 2036(a),[8] 2701[9] and 2702.[10] Although the IRS held in at least one Private Letter Ruling that these sections did not apply to a sale to a GDOT,[11] the ruling was conditioned on the assumption that the note retained by the seller was a *bona fide* debt. Where there was an income or equity interest retained by the grantor in the transferred assets, the IRS warned that all three sections would likely apply.

To bolster the argument that the note qualifies as a *bona fide* debt, the transaction must be structured such that the trust's debt/equity ratio is reasonable. Many commentators believe that a 10% gift, or a ratio of 9/1, provides a safe harbor.[12] Typically, a GDOT will be funded with a gift approximately equal to 10% of the value of the assets to be sold to the GDOT. This gift component is referred to as the "seed gift."

Unfortunately, there has been no specific guidance from the IRS or the Tax Court regarding what constitutes the perfect seed gift, leaving tax professionals to speculate what amount is reasonable to ensure that a GDOT possesses "economic substance." The only case that we have found that addressed this issue is the 2003 case of *Karmazin v. Comm'r.*[13] In *Karmazin*—which was settled before going to trial—the IRS challenged a New Jersey taxpayer's sale of assets to a GDOT that included a seed gift equal to 10% of the assets sold to the trust.[14]

The IRS initially raised numerous arguments, but in agreeing to a settlement the IRS implicitly accepted the validity of the 10% seed gift, as well as the entire structure of the asset sale to the GDOT. Ultimately, the only adjustment to the estate tax return was a reduction in the valuation discount from 42% to 37% on the assets sold to the GDOT.

What we take from *Karmazin* is that the GDOT sale works when the transaction is properly structured and maintained. As this planning strategy becomes more popular, we may expect that, as with family limited partnerships, the IRS will be successful in attacking only those GDOT/asset sale arrangements that have been improperly created and maintained.

Care Must Be Taken When Seeding the GDOT

Getting sufficient seed money into a trust is not always easy. If the sale is a large one, or the seller has used up most of his or her applicable exclusion amount,[15] the seller could have a gift tax to pay when the trust is seeded. Some practitioners believe that this

problem can be solved by using beneficiary guarantees as a substitute for seed gift. In a 1995 Private Letter Ruling,[16] the IRS held that such a guarantee would suffice in the context of a private annuity sale, provided that the guarantor had sufficient personal assets to make good on the guarantee. So guarantees can work, provided everything is properly documented.

"Given the stakes involved, collaboration among a team of qualified professionals is essential to a successful outcome."

Conclusion

For many high-net worth clients, the GDOT/asset sale[17] may be one of the strategies of choice for large value transfers because of the combination of transfer tax, income tax and asset protection benefits. Notwithstanding the many potential benefits, the IRS's scrutiny of advanced estate planning techniques requires that the GDOT/asset sale is carefully structured—in conjunction with all other planning techniques—to ensure that "Mr. and Mrs. High-net worth" obtain the best planning results. Given the stakes involved, collaboration among a team of qualified professionals is essential to a successful outcome.

Endnotes

1. I.R.C. § 2036(a) General rule. "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—(1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."
2. I.R.C. § 2038(a) in general. "The value of the gross estate shall include the value of all property—(1) Transfers after June 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent's death."
3. In Priv. Ltr. Rul. 200842007 (Oct. 17, 2008), the IRS stated that a grantor's exercise of a fiduciary power to substitute assets of an irrevocable trust for assets of equivalent value would not cause the trust assets to be included in the grantor's gross estate under I.R.C. § 2033, § 2036, § 2038, or § 2039. The Private Letter Ruling further held that the exercise of that power was not a taxable gift, and that no gain or loss would be recognized by the grantor or the trust on the exercise of the power. The IRS relied on Rev. Rul. 2008–22, 2008–16 I.R.B. 796 (April 21, 2008), even though the grantor's power of substitution in that ruling was held in a nonfiduciary capacity; see also Priv. Ltr. Rul. 200603040 (Oct. 24, 2005).
4. <http://www.timevalue.com/afrindex.aspx>.
5. Rev. Rul. 2004-64.
6. Rev. Rul. 85-13, 1985-1 C.B. 184.
7. <http://www.inknowvision.com/education/articles/reporting.pdf>.
8. Priv. Ltr. Rul. 200842007 (Oct. 17, 2008), *supra* note 3.
9. I.R.C. § 2701 provides for special valuation rules in case of transfers of certain interests in corporations or partnerships.
10. I.R.C. § 2702 provides for special valuation rules in case of transfers of interests in trusts.
11. Priv. Ltr. Rul. 9535026; *see also* Hersch & Manning, *Beyond the Basic Freeze: Further Uses of Deferred Payment Sales*, 34 U. MIAMI INST., EST. PL., 1601.1 (2000).
12. Jerome Deener, *After Karmazin*, TRUSTS & ESTATES, 18, 25 n.4, Oct. 2006.
13. T.C. Docket No. 2127-03 (2003).
14. Deener, *supra* note 12.
15. I.R.C. § 2010. The applicable exclusion amount (formerly known as the unified credit) exempts a certain amount of gifts made during a person's lifetime from federal gift tax and exempts a certain amount of your estate from federal estate tax.
16. Priv. Ltr. Rul. 9515039 (Jan. 17, 1995); *see also* Hatcher & Manigault, *Using Beneficiary Guarantees in Defective Grantor Trusts*, 91 J. TAX'N 152 (2000).
17. For additional information about asset sales to a GDOT *see* <www.inknowvision.com/education/articles/gdot.html>.

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Changes for Powers of Attorney in New York

By Rose Mary Bailly and Barbara S. Hancock

On January 27, 2009, Governor David Paterson signed Chapter 644 of the Laws of 2008, amending the General Obligations Law to provide significant reforms to the use of powers of attorney in New York. Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association.

The power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. The power of attorney is also a simple document to create. It can be obtained from any number of Web sites on the Internet or in a stationery store, and its execution merely requires the principal's signature and its acknowledgment before a notary public. But this simplicity belies the extraordinary power that the instrument can convey, and its popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

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The instrument's power is also demonstrated by the potential authority the agent can hold. This can include power to transfer assets that pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds and retirement benefits.

The principal can delegate these sweeping powers to the agent without fully recognizing their scope (particularly if the principal executes the document without the benefit of legal counsel). The agent can act immediately, unless the instrument is a springing power of attorney, i.e., one that becomes effective upon the occurrence of a specified event such as the principal's incapacity. In all cases, the agent can act without notifying the principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the principal's incapacity, the agent acts without oversight when an incapacitated principal is no longer able to control or review the agent's actions – a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, the N.Y. General Obligations Law (GOL), which governs powers of attorney, has been silent as to a number of matters. These omissions include descriptions of the agent's fiduciary obligations and accountability, the manner in which the agent should sign documents where a handwritten signature is required, the limits of the agent's authority to make gifts to third parties and to himself or herself, the manner in which the principal can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney, and the effect on powers of attorney of the 2003 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding medical records. The statute's provisions have been ambiguous in other areas such as gift-giving authority and authority to make other property transfers.

Based on its study, the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and easy creation, the General Obligations Law's silence about several significant matters, and ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use. Chapter 644

The revised Power of Attorney Law has an original effective date of March 1, 2009. However, the effective date was delayed until September 1, 2009, after the extension was passed by the Senate (S.1728) on February 24 and by the Assembly (A.4392) on February 10. The bill was signed into law by the Governor as Chapter 4 of the Laws of 2009.

The New York State Bar Association supported this extension in order to provide practitioners with sufficient time to prepare for these significant changes.

For more information please visit our Web site, www.nysba.org.

This article is based on the New York State Law Revision Commission's *2008 Recommendation on Proposed Revisions to the General Obligations Law – Powers of Attorney*. The Commission's 2008 Recommendation, Chapter 644 and other material related to Chapter 644 can be found at the Commission's Web site: http://www.lawrevision.state.ny.us.

addresses these statutory gaps and clarifies the ambiguities to assist parties creating powers of attorney and third parties asked to accept them.

General Provisions

Chapter 644 creates a new statutory short form power of attorney. On or after the chapter's effective date, to qualify as a statutory short form power of attorney, an instrument must meet the requirements of GOL § 5-1513.[1] The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.[2] The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney and their signatures have been acknowledged.[3]

A power of attorney executed prior to the effective date of Chapter 644 will continue to be valid, provided that the power of attorney was valid in accordance with the laws in effect at the time of its execution.[4]

Major Gifts and Other Property Transfers

Chapter 644 requires that a grant of authority to make major gifts and other asset transfers must be set out in a major gifts rider to a statutory power of attorney, which contains the signature of the principal duly notarized and which is witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the same manner as a will.[5] In the alternative, the principal may grant such authority to the agent in a nonstatutory power of attorney executed in the same manner as a major gifts rider.[6] The creation of a major gifts rider or its alternative nonstatutory power of attorney allows the principal to make an informed decision as to whether the agent may make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a major gifts rider or a nonstatutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.[7] All statutory provisions relating to major gifts and property transfers have been located in a new GOL § 5-1514, rather than spread throughout the statute.

Powers of attorney often serve two very different purposes: management of the principal's everyday financial affairs and reorganization or distribution of the principal's assets in connection with financial and estate planning. The General Obligations Law has allowed the use of the statutory short form power of attorney for both purposes.

The former statutory language and statutory form made it difficult for a principal to make an informed decision about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions were scattered among other arguably more routine provisions. The statutory gifting authority was listed 13th (M) of 16 powers, and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth (F) and 12th (L) respectively; all of these could easily be overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allow the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal might have been thinking of more routine matters, such as the need for more insurance or a different type of insurance and might have been unaware that he or she had given the agent authority that could alter the estate plan or reduce his or her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or designate himself or herself as the beneficiary of the principal's insurance policies and retirement benefits.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. The statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries of insurance policies and retirement plans, did not require on their face that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might appear from a reading of the statute, that the agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. However, cases interpreting the statute appeared to hold that if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits, the principal must grant gifting authority in addition to authority over joint bank accounts, and insurance and retirement benefits.

Finally, the statute permitted modifications to the statutory short form to authorize significant transfers; but, like the powers listed explicitly on the form, they could be buried amid masses of legal text and could

fail to attract the principal's attention to the significance of these modifications.

HIPAA Privacy Rule

Chapter 644 adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in construction § 5-1502K,[8] so that an agent can examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule would prevent the agent's access to the records. This provision is applicable to all powers of attorney executed before, on or after the effective date of Chapter 644.[9] It does not change the law forbidding the agent from making health care decisions.[10]

The General Obligations Law has been silent as to the relationship between the power of attorney, an agent's authority to access medical records under New York law, and the Privacy Rule, a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA. The ambiguity about an agent's authority to access medical records under New York law arose out of several factors. Neither subdivision K on the statutory short form (power to access records), nor § 5-1502K, which construed the term "records," contained an express reference to medical records. Moreover, § 18 of the Public Health Law, which identifies qualified persons who are entitled to access to a patient's health records, does not include all agents acting pursuant to a power of attorney.[11] As a result, health care providers have refused to make records available to an agent seeking clarification of a medical bill, without the express language in the power of attorney document authorizing such release.

The ambiguity thus created is exacerbated by the HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an agent if the agent can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care."[12]

The General Obligations Law has limited the authority of the agent to financial matters, and expressly prohibits the agent from making health care decisions for the principal. The Public Health Law defines a health care decision as "any decision to consent or refuse to consent to health care."[13] "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[14]

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to § 2981 of the Public Health Law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the principal.[15] As a practical matter, payment issues are left to the principal or the principal's agent. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the agent.

Agent

Chapter 644 includes a statutory explanation of the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.[16] A notice to the agent is added to the statutory short form explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority.[17] If the agent intends to accept the appointment, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.[18]

Chapter 644 also requires that, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required.[19] In all transactions (including electronic transactions) where the agent purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument.[20] Chapter 644 allows for the principal to provide in the power of attorney that the agent receive reasonable compensation if the principal so desires.[21] Without this designation, the agent is not entitled to compensation.[22]

Both the durable and springing durable power of attorney permit the agent to continue to act after the principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an agent to act for the principal precisely at a time when the principal needs assistance, to permit the principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the principal's incapacity leaves the principal unable to monitor the agent's actions and to revoke the power if he or she is not satisfied with the agent's conduct. Thus an agent could take actions on behalf of the principal for months or years, without any supervision and not always to the benefit of the principal. Recognizing that the potential for financial exploitation was inherent in the delegation of

authority to an agent, public hearings in the early 1990s led to a two-pronged recommendation for reform—educating the principal and holding the agent accountable. Changes to the law regarding the principal's education were adopted but the statute was not revised to reflect the agent's accountability until now.

Principal

Chapter 644 adds a section to the statute that explains how the power of attorney can be revoked.[23] It expands the "Caution" to the principal so that the principal will be better informed about the serious nature of the document.[24] Chapter 644 also permits the principal to appoint someone to monitor the agent's actions on behalf of the principal,[25] and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal.[26] Such accountability is consistent with the common law requirement that where one assumes to act for another he or she should willingly account for such stewardship.

Third Parties

Chapter 644 provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause.[27] The basis for a reasonable refusal includes, but is not limited to, the agent's refusal to provide an original or certified copy of the power of attorney and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when he or she executed the document, or when acceptance of a nondurable power of attorney is sought on the principal's behalf.[28] When a third party unreasonably refuses to accept a power of attorney, the statute authorizes the agent to seek a court order compelling acceptance of the power of attorney.[29] Chapter 644 expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies[30] and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.[31] The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated.[32] A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.[33]

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the principal execute a document prepared by the institution. The enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document. In 1986, the General Obligations Law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form. Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

"An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office."

Other Major Provisions

Chapter 644 increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code.[34] It adds a provision allowing gifting to a "529" account, up to the annual gift tax exclusion amount.[35] These "529" accounts, authorized in the Internal Revenue Code at § 529, are popular tax-advantaged savings accounts for education expenses. Chapter 644 amends the provisions regarding gift splitting to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.[36]

Other Provisions

An attorney who has been instructed by the principal not to disclose the document to the agent at the time of the agent's appointment may do so without concern that it is already a legally effective document because the instrument does not become effective until the agent signs.[37] An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office.[38] In addition, the default statutory provisions regarding annual exclusion gifting will always be up to date with federal law.[39]

Financial institutions may demand an affidavit that the power of attorney is in full force and effect when they are asked to accept it.[40]

Investigative agencies and law enforcement officials can request a copy of the power of attorney and the records of the agent[41] and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.[42]

Additionally, the basis for termination and revocation of a power of attorney and resignation of an agent are described,[43] as are the relationships among co-agents and the initial and successor agents.[44]

Conclusion

With these changes, New York's law has been updated and refined to reflect the complexities that surround the use of powers of attorney in financial and estate planning matters.[45]

Endnotes

1. 2008 N.Y. Laws ch. 644, § 2, 5-1501B; § 19, 5-1513. All statutory references for amendments to the General Obligations Law are to the sections in Chapter 644.
2. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1).
3. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3).
4. 2008 N.Y. Laws ch. 644, § 21.
5. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(a), § 19, 5-1514.
6. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(b), § 19, 5-1514.
7. 2008 N.Y. Laws ch. 644, § 19, 5-1514(5).
8. 2008 N.Y. Laws ch. 644, § 12.
9. 2008 N.Y. Laws ch. 644, § 21.
10. 2008 N.Y. Laws ch. 644, § 12, 5-1502K(1).
11. *See* N.Y. Public Health Law § 18(1)(g) (PHL) (refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, Article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed).
12. 45 C.F.R. § 164.502(g)(2).
13. PHL § 2980(6).
14. PHL § 2980(4).
15. *See* PHL § 2987.
16. 2008 N.Y. Laws ch. 644, § 19, 5-1505.
17. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(2); § 19, 5-1513(n).
18. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(c); § 19, 5-1513(o).
19. 2008 N.Y. Laws ch. 644, § 19, 5-1507(1).
20. 2008 N.Y. Laws ch. 644, § 19, 5-1507(2).
21. 2008 N.Y. Laws ch. 644, § 19, 5-1506(1).
22. *Id.*
23. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
24. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(1); § 19, 5-1513(a).
25. 2008 N.Y. Laws ch. 644, § 19, 5-1509.
26. *Id.*
27. 2008 N.Y. Laws ch. 644, § 18, 5-1504.
28. *Id.*
29. 2008 N.Y. Laws ch. 644, § 19, 5-1510(2)(i).
30. 2008 N.Y. Laws ch. 644, § 2, 5-1501(5).
31. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(b)(1).
32. 2008 N.Y. Laws ch. 644, § 18, 5-1504(3).
33. *Id.*
34. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
35. *Id.*
36. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(2).
37. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3)(a).
38. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(a)(1).
39. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
40. 2008 N.Y. Laws ch. 644, § 18, 5-1504(5).
41. 2008 N.Y. Laws ch. 644, § 19, 5-1505(2)(a)(3).
42. 2008 N.Y. Laws ch. 644, § 19, 5-1510(1).
43. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
44. 2008 N.Y. Laws ch. 644, § 19, 5-1508.
45. In so doing, New York's law has come in line with the laws of many other jurisdictions and the recent amendments to the Uniform Power of Attorney Act, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

Rose Mary Bailly is the Executive Director of the New York State Law Revision Commission. Barbara S. Hancock is the Counsel to the Commission.

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Power of Attorney New York Statutory Short Form

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____, hereby appoint:
[name and address of principal]

_____ as my agent(s)
[name(s) and address(es) of agent(s)]

If you designate more than one agent above, they must act together unless you initial the statement below.

(___) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s): _____

_____
[name(s) and address(es) of successor agent(s)]

Successor agents designated above must act together unless you initial the statement below.

(___) My successor agents may act SEPARATELY.

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications".

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either (1) Initial the bracket at each authority you grant, or (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(___) (A) real estate transactions;
(___) (B) chattel and goods transactions;
(___) (C) bond, share, and commodity transactions;
(___) (D) banking transactions;
(___) (E) business operating transactions;
(___) (F) insurance transactions;
(___) (G) estate transactions;
(___) (H) claims and litigation;
(___) (I) personal and family maintenance;
(___) (J) benefits from governmental programs or civil or military service;
(___) (K) health care billing and payment matters; records, reports, and statements;
(___) (L) retirement benefit transactions;
(___) (M) tax matters;
(___) (N) all other matters;
(___) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
(___) (P) EACH of the matters identified by the following letters: _____

_____

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Major Gifts Rider.

_____

_____

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

(___) (SMGR) I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

I wish to designate _____, whose address(es) is (are) _____ as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications".

(___) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT: In Witness Whereof I have hereunto signed my name on _____ _____,20____.

PRINCIPAL signs here: ==>_____

(Acknowledgment)

[STATE OF)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record or all receipts, payments, and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT: It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I / we _____, have read the foregoing Power of Attorney. I am / we are the person(s) identified therein as agent(s) for the principal named therein.

I / we acknowledge my / our legal responsibilities.

Agent(s) sign(s) here:==>_____

(acknowledgement(s))

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public

STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

2008 N.Y. Laws ch. 644, § 19, 5-1513; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

Editor's Note: This form is a draft POA which is being distributed for comment/suggestions. If you have any comments/ suggestions, please e-mail them to Dan McMahon, NYSBA Publications Director at dmcmahon@nysba.org. A final version of the new POA form will be distributed once any necessary changes (if any) have been made. Final spacing has not been determined by the official publishers. Italics have been added to the portions of the new Statutory Short Form Power of Attorney and Major Gifts Rider that are instructional. Lines representing spaces and acknowledgments in brackets are illustrative only and have been added for clarity and convenience.

Power of Attorney New York Statutory Major Gifts Rider Authorization to Make Major Gifts or Other Transfers

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make major gifts or other transfers of your money or other property during your lifetime. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Major gifts or other transfers" are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(____) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.

(____) I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

_____

_____

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE MAJOR GIFTS OR OTHER TRANSFERS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(____) I grant specific authority for the following agent(s) to make the following major gifts or other transfers to himself or herself:

_____

_____

_____

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Major Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20____.

PRINCIPAL signs here:

_____

(acknowledgment)

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of major gifts.

_____	_____
Signature of witness 1	Signature of witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip code	City, State, Zip code

(g) This document prepared by: _____

2008 N.Y. Laws ch. 644, § 19, 5-1514; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

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Of Sound Mind, Yes, But Did She Understand the Tax Clause?

How much do clients really know about their own wills?

By Eve Rachel Markewich

Every lawyer knows the requirements of an enforceable will: the testator must have capacity, and the will must be validly executed. In fact, the general parameters of the process are so ingrained in our jurisprudence that, next to the necessity of *Miranda*[1] warnings, or proof "beyond a reasonable doubt," they are probably among the best known legal requirements in the non-lawyer's ken. And, like *Miranda* warnings and the criminal burden of proof, the subject of a will's validity is always ripe for fictional treatment movies, television and novels.[2]

The assumption is that once a will is admitted to probate, in all but the unusual case, that decree ends the disputes relating to distribution of assets. But should it be, and must it be? Do testators, even those of "sound mind," understand the effect of their testamentary provisions?

Execution and Capacity

Our law requires that certain formalities be observed in order to achieve a valid execution of a will. EPTL 3-2.1 provides, in relevant part: the will must be in a writing, signed at the end by the testator;[3] the signature must be affixed in the presence of at least two attesting witnesses, or acknowledged by the testator to each of them to have been affixed by her; the testator must declare to each attesting witness that the instrument is her will; the witnesses must make their attestations within a 30-day period; and the witnesses must sign at the testator's request.

These requirements are precise, and while litigation will often entail examination as to whether or not the statute is satisfied, the analysis is seldom complicated, and relies more on issues of credibility than analysis of legal standards. In fact, last year, the Appellate Division, First Department, provided what is essentially a primer in the simple steps a lawyer can take to ensure a finding of due execution. *In re Will of Falk*, 47 A.D.3d 21 (2007), *lv. to app. denied*, 10 N.Y.3d (2008).

In contrast to issues of due execution, the other requisite of an enforceable will—capacity—is a malleable standard. The statute states the bare minimum: a testator must be "of sound mind and memory." EPTL 3-1.1.[4] Case law has recited standards, and there is no argument that the best iteration of the standard, and the one most oft-cited, is *Matter of Kumstar*, 66 N.Y.2d 691 (1985), in which the Court of Appeals wrote:

> It is the indisputable rule in a will contest that "[t]he proponent has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them" (*Matter of Slade*, 106 A.D.2d 914, 915; see also, *Matter of Delmar*, 243 N.Y. 7). 66 N.Y.2d at 692.[5]

It has for centuries been regularly stated that the capacity for executing a will is the lowest in the law, and that capacity to make a will is far lower than capacity to contract:

> The same clearness of comprehension and ability of expression which is required to enable a man to enter into a contract need not exist to enable him to make a valid will. If it shall appear that, at the time the will was executed, he was possessed of sufficient comprehension to enable him to appreciate generally the extent of his property, to remember the persons who were dependent upon him, and to decide intelligently as to the propriety of his benefactions to them, the will which he makes is valid. *In re Seagrist's Will*, 1 A.D. 615 (1st Dep't 1896), *aff'd without op.*, 153 N.Y. 682 (1897); *see also In re Coddington*, 281 A.D. 143 (3d Dep't 1952), *aff'd*, 307 N.Y. 181 (1954).

The reasons for the low standard, it is understood, are based in our desire for testator autonomy, and a societal concern that we allow individuals to dispose of their assets as they wish, without requiring sophisticated business acumen. We are, as a society, apparently disinterested in systems that recall forced heirship or primogeniture.[6]

Nonetheless, New York, like all other states, does have in place a statute that provides for distribution of assets if one dies without a will. The intestacy statute

is designed to accommodate what are believed to be societal norms—taking care of one's spouse and children, or if dying without spouse or children, then distributing assets to siblings, parents and other relatives in ordered priority. EPTL § 4-1.1. We do not encourage escheat to the state.

The intestacy statute should provide comfort, in all but the grossest situations, that even if a will fails, the "right" disposition is effected. That, however, is not the case. We feel outraged and cheated if a decedent apparently goes to the trouble to create a testamentary plan and to reduce it to a written testament, and then it is thwarted.

In *In re Will of Khazaneh*, 15 Misc. 3d 515 (N.Y. Surr. Ct. N.Y. 2006), in which the author represents the petitioner in favor of probate, Surrogate Kristin Booth Glen analyzed the second prong of the capacity test—whether the testator knew the nature and extent of his assets at the time of execution—and referred to "the requirement of contextualization in applying the Kumstar test."

Following an analysis of the facts, including testimony from three SCPA § 1404 examinations, the Surrogate incorporated an analysis of Mental Hygiene Law Article 81 standards, which specifically require that guardianship powers be individually tailored to the needs of the incapacitated person. By extension, Surrogate Glen then concluded that an analysis of testamentary capacity "appropriately requires an individualized, contextualized investigation of the testator's task-specific functionality at the time her will was executed." *Khazaneh*, 15 Misc. 3d 515, 520.

The "individualized, contextualized" investigation specifically related to the task at hand is, of course, precisely what is necessary to actually give effect to our expectation that a testator's will reflects her particular intent. Even the contextualized investigation urged by Surrogate Glen, however, addresses the "task" of generally disposing of one's assets, but does not address the "task" of understanding the intricate interplay among a will's clauses, or the complex effect of individual "boilerplate" legalisms.

Thus, our current analysis of "capacity" does not fully ensure that will probate truly effectuates a testator's knowing and intentional distribution of her assets. To do so, the contextualized investigation would have to include an analysis of whether the testator understood at least the general effect of all clauses in the instrument including, but not limited to: tax clauses; executorial powers; trustee powers; rights of income beneficiaries versus rights of principal beneficiaries.

There is no willingness, however, for the courts to specifically address individual testamentary clauses when making a determination of capacity. Capacity to make a will, even capacity determined to exist after a jury trial and affirmance by two appellate courts, does not translate to a conclusion that the testator understood the actual provisions contained in the will, except in a very gross manner. For example, the testator may know that she left the house to Jane and "the rest" to John, but still have no comprehension that the tax clause directing all taxes to be paid by the residuary will result in Jane receiving a gift worth $2 million and John receiving a gift worth $1 million.

"Construction" Cases

SCPA § 1420 provides a vehicle for an interested party, or a personal representative, to seek a "construction" of a particular clause or disposition in a will, and to attempt to tease out the testator's actual intent. Will construction cases offer direction.

> [I]n construing a will, the intention of the testator must be our 'absolute guide' (*Williams v. Jones*, 166 N.Y. 522, 532, 60 N.E. 240; *see also*, *Haug v. Schumacher*, 166 N.Y. 506, 513, 60 N.E. 245 ['It is always the effort of the court to sustain, if possible, the will of the testator and to give force and effect to the scheme that he has devised for the benefit of those depending upon him']; *Matter of Selner*, 261 App. Div. 618, 622, 26 N.Y.S.2d 783, *aff'd. without opn.*, 287 N.Y. 664, 39 N.E.2d 287). That intent is to be ascertained 'not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed' (*Matter of Fabbri*, 2 N.Y.2d 236, 240, 159 N.Y.S.2d 184, 140 N.E.2d 269, *rearg. denied* 2 N.Y.2d 979, 162 N.Y.S.2d 618, 142 N.E.2d 652; *see also*, *Matter of Larkin*, 9 N.Y.2d 88, 91, 211 N.Y.S.2d 175, 172 N.E.2d 555; *Williams v. Jones*, 166 N.Y. at 532-533, 60 N.E. 240, supra). Thus, where the entire will manifests a general testamentary scheme, it is "the duty of the courts to carry out the testator's purpose, notwithstanding that 'general rules of interpretation' might point to a different result" (*Matter of Thall*, 18 N.Y.2d 186, 192, 273 N.Y.S.2d 33, 219 N.E.2d 397).

Matter of Bieley, 91 N.Y.2d 520, 525 (1998).

In *Bieley*, the testator's will directed that her estate go to her mother, if she survived, and then upon the mother's death to two close friends. The mother predeceased, and distant cousins of the testator ("laughing

heirs") argued that the gift to the friends was contingent upon survival of the decedent's mother, and that as a result of the mother predeceasing, the estate should pass to them by intestacy.

The Court of Appeals upheld the Surrogate's disposition and, to avoid intestacy, held that the testator's obvious intent was to benefit her close friends and not her distant relatives with whom she had no relationship; on that basis, the Court construed the will as not requiring the mother's survivorship. The Court, however, noted that the resolution of the case in a manner contrary to the instrument's clear words, was "one of those rare and exceptional cases where common sense and justice compel the reasoned application of the doctrine of gift by implication to redress a situation arising from obvious omission." 91 N.Y.2d 520, 526 (1998).

The SCPA §1420 analysis comes close to a framework for allowing an analysis of capacity with reference to specific clauses and dispositions but, although courts will use the construction proceeding to make equitable determinations regarding the testator's intent, the common construction proceeding relates to avoiding intestacy or partial intestacy, or addressing some type of a lapsed gift. *See Matter of Bellows*, 103 AD2d 594 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 906 (1985); *Matter of Fabbri*, 2 N.Y.2d 236 (1957). There are exceptions, such as *Matter of Doe*, 7 Misc. 3d 352 (N.Y. Surr. N.Y. Co. 2005), in which Surrogate Renee Roth held that a testator's exclusion of adopted children from a class should not be construed to also exclude children born as a result of in vitro fertilization. But those cases tend to be brought as a result of an "ambiguity" in the language of the instrument.

Construction cases do not, as a rule, address capacity. Moreover, there is reluctance in a construction case to resort to evidence extrinsic to the will. The courts are fond of stating that the analysis in a construction proceeding is "the search for the decedent's intent, and not for that of the draftsman." *Matter of Cord*, 58 NY2d 539, 544 (1983), citations omitted.

On the other hand, determinations of capacity always include inquiries outside the four corners of the instrument. In reality, however, the admission to probate of many wills is the admission of an instrument containing numerous clauses with effects never considered, let alone intended, by the testator—clauses inserted by the drafter. When those clauses arise in practice, is it not appropriate to try to determine the testator's intent, rather than that of the drafter?

Should these issues of understanding and intent be examined in the context of a construction proceeding? Capacity in that "context" could include the level of education and learning of the testator, as well as the circumstances surrounding execution of the will, including whether or not specific clauses were discussed with the testator. In *Khazaneh*, for example, the Surrogate specifically referred to certain issues that the drafting attorney had addressed in his discussions with the testator, and in his discussions with other attorneys at his firm who aided in drafting the instrument.

If analyzing capacity to make a valid will requires a contextual investigation of "task-specific functionality," it makes sense that construction of a will should include a similar contextual investigation regarding the testator's intent as to specific clauses. Such an approach is consistent with the courts' current willingness, in a construction proceeding to overtly ignore the "literal meaning" of a clause, in favor of an understanding consistent with the intent of the testator in the document as a whole. *See Matter of Fabbri*, 2 NY2d 236, 240 (1957).

Endnotes

1. *Miranda v. Ariz.*, 384 U.S. 436 (1966).
2. *See* Grisham, John, *The Testament* (Doubleday 1999); *Murder, She Wrote: It's a Dog's Life* episode (1984); *see also*, Dickens, Charles, *Bleak House* (while not exactly about a probate contest, certainly it conjures up the images of lawyers fighting over an estate).
3. The statute also provides a procedure for a person to sign "at the direction of the testator." EPTL 3-2.1(1)(C).
4. EPTL 3-1.1 also requires that the testator be at least 18 years of age.
5. In *Kumstar*, the Court of Appeals held that the testator had capacity to make a will, and by so doing overturned a jury verdict that had been affirmed by the Appellate Division. The case involved an 85-year-old woman who executed a will a week before her death. A treating physician testified as to her competence, but objections were submitted to the jury on the bases that: 1) the will included a bequest to a deceased brother, although the drafting attorney stated that he had inserted the identifier 'brother' and the testator conceivably meant a nephew by the same name; 2) the will failed to make a charitable bequest the decedent had several times stated she intended to make; and 3) the will created trust funds of "relatively small amounts."
6. However, New York does have in place a statutory construct that requires certain dispositions to be made, even if the testator wishes otherwise. Thus, the statute provides that a spouse is entitled to an "elective share"—the greater of $50,000 or one-third of the net estate. EPTL 5-1.1-A.

Eve Rachel Markewich is a member of Markewich and Rosenstock and represents the petitioner in *In re Will of Khazaneh,* which is discussed in this article. Isaac Tilton, an associate at the firm, assisted in researching this article.

Ethical Dilemmas—An Update

By Charles F. Gibbs and Gary B. Freidman

In a prior column we addressed the challenging ethical issues faced in representing multiple clients, a commonplace for trusts and estates practitioners who are frequently perceived as the "family lawyer" and who frequently represent co-fiduciaries and multiple beneficiaries. It is also commonplace for the attorney for a settlor or testator to represent the fiduciaries under the trust agreement or the will that the attorney drafted.[1]

Attorney Disqualification

We turn today to the disqualification of counsel, a not uncommon consequence of such multiple representations as seen through the prism of several recent decisions.

In *Matter of Ruth Harmon*,[2] the settlor of an inter-vivos trust sought to remove the trustees and obtain the trust's assets. The settlor then moved to disqualify the attorney for the trustees on the ground that he had been the settlor's attorney in drafting the trust indenture, citing DR 5-108. The trustees' attorney argued in opposition that following the creation of the trust the settlor had hired two other attorneys to set the trust aside, and that he had represented the trustees since inception without objection from the settlor.

The Surrogate began by setting forth the requirements for disqualification:

> A party seeking disqualification of opposing counsel must satisfy three (3) criteria in order for the court to conclude that there is an irrebuttable presumption of disqualification:
>
> (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and the former client are materially adverse.[3]

The court ruled that the settlor had failed to meet this test based on the papers submitted and scheduled a hearing "before summarily disqualifying a party's chosen counsel."[4]

In his August 27, 2008 decision in *Estate of Mary F. Harris*,[5] Surrogate Holzman ruled that the respondent-executor in a removal proceeding had established the foregoing three conditions for disqualifying the attorney for the petitioner beneficiary. In *Harris*, the beneficiary's attorney had represented the executor for the first year of the estate administration. The Court held that the executor had demonstrated that the prior representation of the executor in the probate proceeding and the administration of the estate by the beneficiary's current counsel in this removal proceeding "are substantially related to counsel's representations of the petitioner [the beneficiary] in the SCPA 711 proceeding as the executor's actions in administering the estate form the foundation for the removal proceeding."[6] Noting that the executor and his former attorney's new client are clearly antagonistic, the Court held that "the executor is entitled to be free from apprehension that counsel's prior representation of him will inure to the advantage of the petitioner in the SCPA 711 proceeding."[7]

In *Matter of Maurer*,[8] Surrogate Renee R. Roth of New York County issued a veritable tutorial on the complexities of disqualification. In *Maurer*, the objectant in a will contest moved to disqualify the proponents' attorney alleging conflict of interest and the necessity for the attorney's testimony at trial. The alleged conflict of interest was the objectant's stated intent to join the proponents' attorney as a defendant in a separate suit brought by objectant in Supreme Court for alleged tortious interference with her rights under a post-nuptial agreement with the deceased testator.

In approaching the motion for disqualification, Surrogate Roth set forth the governing principles:

> A determination of whether an attorney should be disqualified rests within the sound discretion of the court; In exercising such discretion the court must be mindful that a *party's right to be represented by counsel of his or her own choosing is a valued substantive interest which should not be interfered with absent a clear showing that disqualification is warranted*.[9]

Nevertheless, this valued substantive right to counsel of a party's choice may be "overridden where necessary, for example, to protect the integrity of the process by avoiding litigation tainted by unwaivable conflicts or to preserve the confidentiality of matters divulged by a prior client."[10]

The *Maurer* decision begins with the holding that the objectant lacked standing to seek the disqualification of the proponents' attorney because the attorney had never represented the objectant. But that was not the final disposition. The Court exercised its authority to *sua sponte* consider disqualification "if there is a conflict or impropriety which is profound enough to be unwaivable."[11] In such a case:

> the court must be satisfied that such motion [to disqualify] is not a disingenuous litigation tactic designed to

> interfere with the relationship between the attorney and his current client. Allegations of conflict or impropriety made by the party who lacks standing must, therefore, be serious enough to alert the court that there is a need for it to act sua sponte.[12]

Applying this test, the Court denied as premature, without prejudice to renewal, the claim of conflict of interest grounded on the objectant's stated intent to join the proponents' attorney as a co-defendant in her tortious interference suit.

In disposing of the objectant's second ground that the proponents' attorney would be a witness in the litigations, the Court set forth the tests where an attorney may testify on behalf of his clients:

> It must be established not only that the attorney is in possession of material information but that his testimony is likely to be necessary. Testimony may be relevant and even highly useful, but still not necessary.
>
> On the other hand, if a party seeks disqualification because he intends to call the attorney, vague and conclusory statements that the attorney's testimony will be adverse to his clients' interests are insufficient.[13]

Proponents asserted that they had no need for their attorney's testimony. And, as objectant failed to meet the test of "necessary" testimony, the Court refused to disqualify the attorney.

Attorney disqualification was also the subject of a recent decision in a probate contest from Suffolk County in *Matter of Piazza*.[14] There, the attorney for objectant had first had a meeting with decedent's three children with a view toward representing one of them in seeking to probate the will. After the meeting, the daughter who became the proponent in the probate proceeding informed the attorney that she was retaining different counsel. He then sent a letter to the children confirming that he would not be the "estate's attorney." Sometime later another daughter who was present at the initial consultation retained the lawyer to challenge the will. Proponent then moved to disqualify the objectant's attorney.

Here the issue was not the advocate witness rule under DR 5-102, but one of former representation under DR 5-108. The issue was whether the initial consultation was sufficient for a finding that the attorney had "represented" the proponent. Surrogate Czygier denied disqualification, holding that the initial meeting was just that, an initial consultation with a number of attendees, which ended before any confidences were imparted to the attorney. Since both proponent and objectant were at the meeting, it was fair for the Court to assume that no confidences or secrets were imparted during that meeting.

A recent decision from Bronx County, *Matter of Walsh*,[15] involved an interesting clash between an individual's fundamental right to represent him or herself and the ethical proscription against an advocate also being a witness in a proceeding (DR 5-102).[16] *Walsh* was an SCPA 2103 discovery proceeding commenced by the executor, an attorney who was representing himself as the petitioner. The respondent moved to disqualify the attorney because the respondent had consulted a lawyer friend about an issue in the proceeding and, through happenstance, the lawyer friend subsequently consulted the petitioner-lawyer who gave certain advice contrary to the position he was taking in the discovery proceeding.

In analyzing the issue the Court was required to balance the strong policy in favor of the right to counsel of one's choice and the right to represent oneself, against the Code's proscription against an advocate acting as a witness. The policy behind the advocate witness rule is that the roles of an advocate and a witness are inconsistent—as it is unseemly for the advocate / witness to argue his own credibility before the trier of fact. The Surrogate held that the policy behind the advocate / witness rule trumps the right of self-representation where the advocate is not a party in his / her individual capacity. Here, the attorney's only interest in the estate was as a fiduciary—the result may be different if the attorney-fiduciary was the sole or principal beneficiary of the estate.

In the estates field, advocate witness issues seem to arise most often in probate matters. The attorney who prepared the will is often retained by the nominated executor in the probate proceeding. The question facing the attorney-drafter when SCPA 1404 examinations are requested in a probate proceeding is whether or not the proponent is best served by the attorney's continued representation or whether independent counsel should represent the proponent for 1404 discovery. The authors view SCPA 1404 discovery as potentially determinative of the outcome of a probate contest and the attorney drafter can only do harm if he represents the proponent during SCPA 1404 discovery.

Our antennae must always be sensitive to potential disqualification issues. None of us wants to be a respondent in a disciplinary proceeding. Also, there is a growing body of case law that holds that where an attorney is disqualified for a violation of the Disciplinary Rules of the Code of Professional Responsibility, the attorney forfeits his or her fee.[17]

SCPA 2307-a

Last year the legislature again amended SCPA 2307-a[18] to clarify the nature of the disclosure that must

be made by the attorney-fiduciary. Prior to November 16, 2004, this section required disclosure (1) that not only attorneys can serve as executors; (b) that executors receive statutory commissions; and (c) that attorneys serving as executors can charge reasonable attorneys' fees in addition to receiving commissions. A fourth disclosure item was added effective November 16, 2004[19] requiring disclosure that if the attorney fails to make the requisite disclosure, the attorney's commissions as executor will be reduced by one-half. In 2007 the disclosure provisions were extended to a nominated executor who is an employee of the attorney-draftsperson or an affiliated attorney, as those terms are defined in the statute.

Two recent decisions apply the 2004 and 2007 amendments. In *Matter of Moss*,[20] Surrogate Roth held that where a testatrix had signed a SCPA 2307-a disclosure statement that complied with the then applicable disclosure requirements, her subsequent execution of a codicil following the 2004 amendment to 2307-a did not require the execution of a new disclosure statement. The changes made by the codicil did not involve a fiduciary appointment. Therefore, the Court stated that it would not have been an occasion for discussion of fiduciary compensation. Query whether the result would have been different if the codicil appointed an attorney as an additional fiduciary or substituted one attorney for another.

In *Matter of Hess*[21] (decided with *Matter of Moss*), Surrogate Roth held that a partner of the attorney-drafter cannot serve as a witness to an SCPA 2307-a disclosure statement. The Surrogate held that since the drafter and his partner are "affiliated" within the meaning of 2307-a's application to affiliated attorneys and employees, the partner is not disinterested in the transaction and therefore is ineligible to act as a witness. The Surrogate reasoned that:

> [a] nominated executor is identified with the draftsman if the two are "affiliated" (SCPA 2307-a[5]). In view of the affiliation between the nominated executor and the Partner, the Hess disclosure statement may reasonably be deemed to have been 'witnessed' not simply by the Partner, but, in effect and contrary to the purpose of the statute, by the nominee.

The cited section of the statute, subparagraph 5[22] also identities the attorney drafter with employees and, by parity of reasoning, employees could similarly be deemed ineligible witnesses. Query whether the Court will limit its holding only to partners of the attorney-drafter or whether this is a matter for clarifying legislation. The reality is that our partners, associates and employees are the persons whom we typically use as our attesting witnesses and 2307-a witnesses.

Endnotes

1. *See The Minefield of Conflicts Facing the Trusts and Estates Attorney*, N.Y.L.J., December 21, 2001, p. 3, col. 1.
2. N.Y.L.J., October 16, 2006, p. 46, col. 4 (Sur. Ct., Suffolk Co.).
3. *Id.* (citations omitted).
4. *Id.*
5. N.Y.L.J., August 27, 2008, p. 34, col. 5 (Sur. Ct., Bronx Co.).
6. *Id.*
7. *Id.* (*citing Decana, Inc.*, 27 A.D.3d at 207; *Nationwide Assoc., Inc. v. Targee St. Internal Med. Group P.C.*, 303 A.D.2d 728 (2d Dep't 2003); *Matter of Hof*, 102 A.D.2d, 591, 591 (2d Dep't 1984); *Matter of Lichtenstein*, 171 Misc. 2d 29 (1996) (Sup. Ct., Bronx Co.)).
8. N.Y.L.J., December 12, 2006, p. 31, col. 4 (Sur. Ct., N.Y. Co.).
9. *Id.* (citations omitted)(emphasis added).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (citations omitted).
14. N.Y.L.J., April 29, 2008, p. 35, col. 2 (Sur. Ct., Suffolk Co.).
15. 17 Misc.3d 407, 840 N.Y.S.2d 906, 2007 NY Slip Op 27343 (Sur. Ct., Bronx Co.).
16. Code of Professional Responsibility DR 5 -102 (22 N.Y.C.R.R. § 1200.21).
17. *See, e.g., Matter of Winston*, 214 A.D.2d 677, 625 N.Y.S.2d 927 (2d Dep't 1995) (attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered).
18. (Laws 2007, ch. 488) (effective August 1, 2007).
19. (Laws 2004, ch. 709).
20. N.Y.L.J., September 24, 2008, p. 40, col. 3, 2008 NY Slip Op 028338 (Sur. Ct., N.Y. Co.).
21. N.Y.L.J., September 24, 2008, p. 40, col. 3, 2008 NY Slip Op 028338 (Sur. Ct., N.Y. Co.).
22. This subparagraph provides:

    > Absent compliance with the requirements of subdivision 2 of this section, the commissions of an attorney, or an employee of the attorney who prepared the will or a then affiliated attorney, who serves as an executor shall be one-half the statutory commissions to which such person as executor would otherwise be entitled pursuant to sections 2307 and 2313 of this article.

    SCPA 2307-a(5).

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Editor's Note: Practitioners are respectfully advised that effective April 1, 2009, the New York State Rules of Professional Conduct replaced the New York Code of Professional Responsibility.

Guardianship and Elder Law Update

By Anthony J. Enea

Without question, the significant budgetary deficits being experienced in New York State will result in legislative changes and cutbacks to the Medicaid program in 2009. The disabled and seniors will likely suffer the most as a result of any benefit reduction, but changes are likely to impact our practices in elder law and trusts and estates more broadly. 2009 will likely be a time of significant and interesting developments in the Mental Hygiene Law (MHL) as we integrate changes to the law passed in 2008 regarding guardianships, especially relevant to the practice of trusts and estates law. This update focuses on three important amendments to Article 81 of the MHL and important, recent administrative decisions:

No Pre-mortem Probate

Article 81.29 (d) of the MHL relevant to the effect of the appointments made by an incapacitation person has been amended effective July 7, 2008. Section 81.29(d) authorizes the Court to amend, modify or revoke any previously executed appointment, power or delegation, contract, conveyance or disposition during lifetime or to take effect upon death, made by the incapacitated persons prior to the appointment of a Guardian by the Court, if the Court determined that said executed appointment, power, delegation, contract, conveyance or disposition was made while the person was incapacitated or if there has been a breach of fiduciary duty by the appointed agent and required the agent to account. In effect, section 81.29 (d) of the MHL permitted the Court to void and revoke a Last Will and Testament executed by an incapacitated person. The amendment to section 81.29 (d) of the MHL has added the following sentence: "The Court shall not, however, invalidate or revoke a Will or codicil of the incapacitated person during the lifetime of said person." Thus, effective July 7, 2008, the Court can no longer void or revoke the Last Will and Testament or any codicil executed during the lifetime of the incapacitated person.

Notice on Accountings and Payment of Emergent Charges

Section 81.34 (a) of the MHL relevant to decrees upon instruments approving an accounting has been amended effective January 3, 2009. Section 81.34 of the MHL pertains to the decree upon the approval of the accounting of the Guardian. The enacted amendment to section 81.34 (a) requires the Guardian to give notice of his or her petition seeking the approval of his accounting to the "Personal Representative" of the estate of a deceased incapacitated person. The amendment to section 81.34 (a) also provides that "upon the death of the incapacitated person, the guardian is authorized to pay the funeral expenses of the incapacitated person and, in the absence of a duly appointed personal representative of the estate, pay estimated estate and income tax charges as well as other charges of emergent nature." This amendment is intended to expand the authority of the Guardian to pay necessary expenses of the estate of a decedent in the event a personal representative has not been appointed.

"2009 will likely be a time of significant and interesting developments in the Mental Hygiene Law (MHL) as we integrate changes to the law passed in 2008 regarding guardianships, especially relevant to the practice of trusts and estates law."

Notices on Death of IP

Section 81.44 has been added to Article 81 of the MHL, effective January 3, 2009. Section 81.44 provides for the "Proceedings upon the death of an incapacitated person." The most important provision of section 81.44 requires that within 20 days of the death of an incapacitated person the Guardian for the incapacitated person serve a "Statement of Death" upon the Court Examiner, the duly appointed representative of the estate of the incapacitated person or, if no personal representative has been appointed, upon the person representative named in the decedent's Last Will or Trust, if known, and upon the public administrator of the chief fiscal office of the Courts in which the guardian was appointed. Additionally, section 81.44 provides that, within 150 days of the death of the incapacitated person, the Guardian shall serve on the Court Examiner and the others mentioned above a "Statement of assets and notice of claim," which delineates the nature and appropriate value of the guardianship property at the time of death, along with a statement of the claims, debts or liens (Medicaid and tax) and administrative costs due. If the Guardian fails to comply with the provisions of section 81.44, any persons entitled to notice of this proceeding may file a petition to (a) compel the Guardian to account, (b) suspend and/or remove the Guardian, and (c) take and state the Guardian's account.

Same-Sex Couples Medicaid Eligibility

On the elder law front there are also recent developments of significant importance. On August 20, 2008 GIS Memorandum 08MA/023 was issued by the New York State Department of Health (DOH) advising local departments of social services that legal same sex marriages performed in other jurisdictions (for example, Canada, Connecticut, California and Massachusetts) will receive full faith, credit and comity as all other legally married persons when a district makes any Medicaid eligibility and case decisions in New York State. Thus, same-sex couples will be entitled to spousal budgeting for purposes of Medicaid eligibility, and be able to utilize "spousal refusal" as an available option. Of course, they would also be subject to spousal support lawsuits.

Promissory Notes

In recent months, several new Fair Hearing Decisions in New York have again validated the strategy of utilizing a promissory note that complies with the provisions of Deficit Reduction Act of 2005 (DRA) for purposes of engaging in Medicaid crisis planning for an applicant for nursing home Medicaid. See *In re Norma De-Groat*, Fair Hearing Decision #50614594 (October 1, 2008). Thus, when one is in immediate need of long term Medicaid in a nursing home, but has assets in excess of the amounts permitted by Medicaid, he or she can engage in a crisis plan that involves utilizing a promissory note that complies with the DRA, along with a plan of gifting that will result in being able to protect approximately 45% to 50% of the applicant's assets.

Uncompensated Transfers (Gifts)

In *In re Fritz Wickert*, Fair Hearing Decision #503266Z (August 5, 2008), it was decided that two transfers made by the applicant for nursing home Medicaid were not uncompensated transfers that created periods of ineligibility and the five-year look back period for nursing home Medicaid. It was determined that the testimony that the applicant had a history of making gifts, and that it was not out of his nature to make gifts to his family, was credible. This, combined with the fact that the applicant was in good health at the time of the gift, and not engaging in Medicaid planning, led to the conclusion that the gifts were made exclusively for a purpose other than to qualify for Medicaid.

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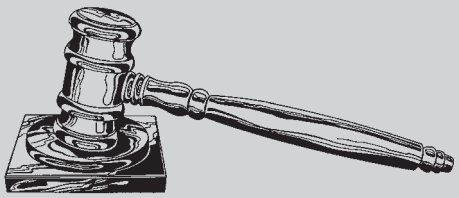
Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



ATTORNEYS

Prior Representation of Estate Disqualifies Attorney from Representing Legatee

Legatee commenced a proceeding under SCPA 711 to revoke the executor's letters and the executor moved to disqualify the petitioner's counsel. Counsel had represented the executor for a year before the executor terminated the representation. Counsel opposed the motion, arguing that he represented the estate, not the executor, and therefore there was no attorney-client relationship. Counsel did concede, however, that he advised the executor to make one payment to his present client.

The Surrogate granted the motion to disqualify, finding that the executor met the burden of showing the three requirements for disqualification: a prior attorney-client relationship, substantial relationship between the matters involved, and material adversity between the former and present clients.

It is well established that an attorney represents the executor and not the estate or the beneficiaries. Because the petitioner seeks the removal of the executor on the basis of the executor's actions in administering the estate the two matters are materially related. Finally, there is material adversity between the present and former clients since the petitioner is seeking the removal of the executor and the issuance to herself of letters of administration c.t.a. *In re Harris*, 20 Misc. 3d 239, 862 N.Y.S.2d 898 (Sur. Ct., Bronx Co. 2008).

ELECTIVE SHARE

Voidable Marriage Does Not Prevent Surviving Spouse from Claiming Elective Share

Decedent's children opposed surviving spouse's petition for decree enforcing her entitlement to an elective share on the grounds that discovery was necessary to establish whether decedent was competent to marry and whether the marriage was the result of fraud, duress or force.

The Surrogate granted summary judgment to the surviving spouse. Under DRL § 7(a) a marriage is voidable, not void, if one of the parties lacks capacity or the marriage was the result of fraud, duress or force. Thus, even if the marriage is annulled, it is void only from the time of the declaration of invalidity. Thus the right to the elective share was fixed at the decedent's death.

The Surrogate also held that the surviving spouse's keeping silent about the marriage did not work an equitable estoppel nor was there any duty to reveal the marriage to family members. In addition, a handwritten note produced by the children in which the surviving spouse stated that she would not take money from the family was not a common law renunciation under EPTL 2-1.11(h). Under common law only testamentary dispositions could be renounced and the elective share is a right created by statute. The note clearly does not satisfy the requirements for a waiver of the elective share under EPTL 5-1.1-A(e). *In re Berk*, 20 Misc. 3d 691, 864 N.Y.S.2d 710 (Sur. Ct., Kings Co. 2008).

Reduction in Amount Passing to Other Residuary Legatees Prevents Cancellation of Election

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

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

EPTL 5-1.1-A(c)(5) permits the court to cancel the surviving spouse's election so long as there is no resulting prejudice to the creditors of the spouse or other persons interested in the estate. Because the other residuary beneficiaries will receive less if the election is cancelled, they will be prejudiced and the petition to withdraw the election is denied. The surviving spouse must return the distribution she received to the estate.

In addition, the executor made an improper distribution when she distributed a share of the residuary estate to the surviving spouse before the court had ruled on the request to cancel the election. The executor is surcharged in the amount of the improper distribution, reduced by any repayment by the surviving spouse. *In re Oestrich*, 21 Misc. 3d 499, 863 N.Y.S.2d 531 (Sur. Ct., Broome Co. 2008).

MARRIAGE

Recognition of Same-Sex Canadian Marriage by the Comptroller Is Legal

In October 2004 the Comptroller of the State of New York indicated that the State Retirement System would recognize the same-sex marriage of a state employee entered into in Canada. The policy was challenged by taxpayers under State Finance Law § 1223-b as leading to an illegal expenditure of state funds.

The Supreme Court held that the Comptroller's action was legal, holding that recognition of Canadian same-sex marriages is a matter of comity. Neither exception to comity—the positive prohibition in New York of the type of marriage involved and the refusal to recognize polygamous and bigamous marriages—is involved. *Godfrey v. DiNapoli*, __ Misc. 3d __, 866 N.Y.S.2d 844 (2008).

SURROGATE'S COURT

Court Has Jurisdiction Over Lifetime Charitable Trusts.

EPTL 8-1.1(c)(1) provides that the Supreme Court has jurisdiction over charitable trusts and that the Surrogate's Court has jurisdiction "where the disposition is made by will." In an extensive opinion examining the authority and jurisdiction of the Surrogate's Court, especially the 1980 amendments to the SCPA giving Surrogate's Court jurisdiction over lifetime trusts, the Supreme Court has held that the Surrogate's Court has jurisdiction over lifetime charitable trusts and that the various amendments repealed by implication anything to the contrary in EPTL 8-1.1. *In re Fleet National Bank*, 20 Misc. 3d 879, 864 N.Y.S.2d 706 (Sup. Ct., Albany Co. 2008).

TRUSTS

Reformation to Create Supplemental Needs Trust Granted

Testator's Will created a trust for her disabled daughter with mandatory quarterly income payments and "absolute discretion" in the trustee to invade principal as deemed advisable for the beneficiary's "health, support, and maintenance." The remainder was given to the testator's other three children "share and share alike, *per stirpes*." These three children were nominated executors but the will did not nominate a trustee. The Will also contains language directing that the trust assets be used to supplement and not supplant government benefits.

One of the executors began a construction proceeding asking that the executors be made trustees and that the trust be reformed to meet the requirements of a third-party supplemental needs trust under EPTL 7-1.12. The guardian *ad litem* for beneficiary of the trust recommended granting the reformation and had concluded that the proposed trust meets the statutory requirements for a third-party SNT.

Although the trust beneficiary is not currently receiving government benefits, the New York State Department of Health was cited and appeared and opposed the proposed reformation.

After an extensive review of the precedents, the Surrogate granted the reformation. Although the execution of the Will came after the enactment of EPTL 7-1.12, the language of the Will clearly shows testator's intent that the trust assets be used to supplement and not supplant government benefits. The beneficiary has no power to dispose of the trust property and reformation will not alter the testator's dispositive plan. The opinion expressly declines to follow *In re Rubin*, 4 Misc. 3d 634, 781 N.Y.S.2d 421 (Sur. Ct., New York Co. 2004). *In re Rappaport*, 21 Misc. 3d 919, 866 N.Y.S.2d 483 (Sur. Ct., Nassau Co. 2008).

"Incontestability" Clause Does Not Bar Action to Enforce Terms of Trust

The Appellate Division has affirmed a Supreme Court decision determining that a trustee acted in bad faith in failing to carry out the terms of the trust and ordering proper distributions. The Appellate Division expressly rejected the trustee's contention that the action contravened the trust's incontestability clause. The action involved enforcing the express terms of the trust and did not question its validity. Nor was the trust's arbitration clause implicated because the action did not involve construction or application of the trust terms, which the Court described as unambiguous. *Boles v. Lanham*, 55 A.D.3d 647, 865 N.Y.S.2d 360 (3d Dep't 2008).

WILLS

Facts Show That Drafting of Will by Lawyer in Firm in Which Husband of Proponent Is a Partner Does Not Raise a Triable Issue of Undue Influence

The Appellate Division affirmed the Surrogate's decision that granted summary judgment dismissing

objections and admitting the will to probate. No triable issue of undue influence is created by the fact the husband of the proponent was a partner in the firm in which the draftsperson was senior counsel. The draftsperson testified that the partner was not involved in the drafting, that he spoke alone with the decedent who as far as he knew arrived at his office unaccompanied, that the will was drafted based on the then current will and on a list of assets the decedent brought to the meeting. In addition, the will was consistent with the "trend" evidenced by prior wills. *In re Dubin*, 54 A.D.3d 945, 864 N.Y.S.2d 528 (2d Dep't 2008).

Making of Codicil Does Not Require New SCPA 2307-a Disclosure Statement

Testator signed a SCPA 2307-a disclosure statement prior to the section's 2004 amendment requiring additional disclosure that by making such a statement, counsel's fees as executor would not be reduced. After the amendment, testator executed a codicil that did change the fiduciary appointments. She did not sign a new disclosure statement. The Surrogate held that under the circumstances a new statement was not required, with the result that the executor's fees were not reduced. *In re Moss*, 21 Misc. 3d 507, 863 N.Y.S.2d 588 (Sur. Ct., New York Co. 2008).

Partner of Nominated Executor Is Not Proper Witness of SCPA 2307-a Disclosure.

Testator's Will nominated a lawyer to serve as co-executor. A disclosure statement pursuant to SCPA 2307-a was signed by the testator. One of the witnesses to the statement, however, was the draftsperson who was a partner of the lawyer nominated as co-executor. The Surrogate held that because the witness and the nominated executor were affiliated, the disclosure statement should be deemed to have been witnessed by the nominated executor and therefore is ineffective. *In re Hess*, 21 Misc. 3d 507, 863 N.Y.S.2d 588 (Sur. Ct. New York Co. 2008).

Failure of Residuary Trusts Results in Intestacy

Decedent's will gave his residuary estate to his two children in equal shares, both shares to be held in trust until a child reaches 30 years of age. If a child dies before age 30 his or her trust passes to that child's issue and, if none, to the surviving sibling. Decedent died almost 30 years after executing the will. His daughter predeceased him, leaving two children who survived him, and his son survived, having reached 30 years of age long before.

Son argued that he should receive the entire residuary estate as the sole surviving residuary beneficiary. The Surrogate held that the residue passed in intestacy and the Appellate Division affirmed. The will contained no provision providing for disposition should the children not be 30 years of age or older at testator's death. Because the Surrogate was correct in finding that the decedent intended to leave his estate to his children in equal shares with the share of a deceased child going to that child's issue, the Surrogate was also correct in construing the residuary disposition to be completely ineffective with the result that the estate passed in intestacy. *In re Michella*, 54 A.D.3d 764, 863 N.Y.S.2d 494 (2d Dep't 2008).

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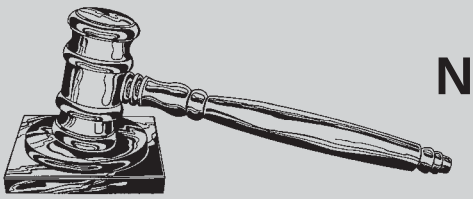

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Commissions

In an uncontested proceeding pursuant to SCPA 2311, the executor of the estate requested, *inter alia*, an order, without notice, awarding him a payment on account of executor's commissions, and dispensing with the filing of a bond. In support of the application, the petitioner alleged that the advance payment was necessary for income tax planning and potential income tax savings. The petitioner further alleged that all specific bequests under the Will had been satisfied, that the federal and state estate tax returns had been filed, and that while the tax had been partially deferred pursuant to I.R.C. 6166, the undeferred portion due had been paid.

The decedent's Will prohibited the payment of executor's or trustee's commissions for services rendered by any executor or trustee, including an attorney. Nevertheless, all the beneficiaries under the Will, and the trustees of the trusts created thereunder, had consented to the payment of the commissions requested.

The court opined that when the will of a decedent specifically provides that an executor is to serve without compensation, the executor has the option of either declining to serve, or serving without commissions. In the present case, however, the court found dispositive the fact that all interested parties knowingly consented to the advance payment sought. The court noted that while it had found no precedent governing such a situation, courts had allowed full commissions to an executor under SCPA 2307-a when all the beneficiaries have consented.

Accordingly, under the circumstances, the court granted the relief requested by the petitioner. *In re Goldberg*, N.Y.L.J., January 15, 2009, p. 28 (Sur. Ct., Nassau Co.) (Sur. Riordan).

Construction of Decedent's Will

The co-executors of the decedent's estate, two of whom were the decedent's sons, instituted a proceeding to apportion estate taxes against the beneficiaries of specific devises, general bequests and gifts made within three years of the decedent's death, and to sell real property in order to raise funds for this purpose. The application was opposed by the recipients of such property, as well as the guardian *ad litem* appointed to represent persons under a disability, some of whom also alleged that the executors, by the institution of the proceeding, triggered the *in terrorem* clause under the instrument.

In pertinent part, the subject Will contained a statement by the decedent explaining his reasons for leaving disproportionate shares of his estate to his sons, and a tax clause which specifically directed apportionment or non-apportionment of taxes against specified recipients of testate and non-testate property. More specifically, the decedent directed that the tax attributable to certain bequests be paid out of his residuary estate.

In addition, the federal estate tax return for the estate revealed that the decedent made numerous *inter vivos* gifts prior to death and paid in excess of $1 million in gift taxes.

In support of their application for apportionment, the petitioners maintained that the decedent's residuary estate, after payment of administration expenses, was insufficient to satisfy the estate tax attributable to the pre-residuary bequests that were exempted from tax. The court found that, even if a portion of these expenses were denied, the petitioners appeared to be correct in their assessment. Nevertheless, the respondents argued that, to the extent the residue was insufficient, the source for payment of the shortfall in estate tax was not their bequests but rather the bequest of the decedent's business interests to his two executor-sons.

The court opined that resolution of the issue required a determination of whether the decedent intended to exonerate the pre-residuary bequests in all events or whether he intended that, in the event of a shortfall, the otherwise exempt bequests be charged with the tax.

In concluding that the subject pre-residuary bequests were to be exonerated from sharing in the tax in all events, the court found relevant that the recipients of these bequests were the decedent's children, grandchildren and a close friend of the decedent. From a reading of the Will, the court stated that it did not appear that the decedent intended that these recipients receive less than the share he devised or bequeathed to them, but rather, he was unequivocal in his direction that they receive their interests without apportionment

or reimbursement. The court found that the words "or reimbursement" implied that the decedent foresaw his residuary estate being insufficient to satisfy estate taxes but nevertheless intended that the subject beneficiaries receive their interests intact. The court found it equally significant that the decedent did not specifically exempt the bequest of his business interests from tax, and mentioned in his Will that he had, after great thought, made disproportionate interests of his estate for various expressed reasons.

Accordingly, the court held that the shortfall in estate tax was to be borne by the recipients of the decedent's business interests and that, as such, there was no need to sell the specifically devised real property. Additionally, the court held that the donees of the gifts made within three years of the decedent's death were responsible for paying their ratable share of the estate tax attributable to the inclusion of the gift tax paid.

Finally, citing EPTL 3-3.5 (b)(3)(E), the court found that the petitioners had not triggered the *in terrorem* clause in the decedent's Will by instituting the subject proceeding.

In re Estate of Rhodes, N.Y.L.J., December 17, 2008, p. 32 (Sur. Ct., Westchester Co.) (Sur. Scarpino).

Disclosure Requirements Pursuant to SCPA 2307-a

In an uncontested probate proceeding, the issue before the court was whether the disclosure requirements of SCPA 2307-a were applicable to the proponent, an out-of-state attorney named as fiduciary.

The decedent's Will, which had been prepared by proponent, had been executed in New Jersey and named proponent's New Jersey firm as the executor. Pursuant to the terms of the instrument, the decedent left 20 percent of her estate equally to her brother and his wife and 80 percent of her estate in trust for the benefit of her daughter-in-law, with remainder to charity. Approximately two years after the execution of her Will, the decedent executed a codicil in which she named the proponent as fiduciary of her estate rather than the law firm.

In petitioning for probate of the decedent's Will, proponent failed to file a disclosure statement pursuant to SCPA 2307-a with the court. Hence, the question arose as to whether she was subject to the provisions of the statute.

In determining that the statute applied to non-domiciliary attorney-fiduciaries, the court examined its legislative history and noted that it was designed to curb the possible abuses that can be part of the drafting of a Will. Toward this end, the legislature mandated disclosure to the client concerning the choices available in the selection of an executor and the financial implications of naming an attorney to serve in such capacity. The court determined that there was nothing in the language of the statute which exempted out-of-state attorney / fiduciaries from the scope of its provisions. Rather, the court held that the statute apparently applies in any case in which the client for whom a Will is being prepared is domiciled in New York.

Accordingly, the court admitted the decedent's Will to probate and limited the commissions of the attorney-fiduciary to one-half the amount that would otherwise be allowable under SCPA 2307.

In re Estate of Deener, 2008 N.Y. Slip Op. 28470, Nov. 28, 2008 (Sur. Ct., N.Y. Co.) (Sur. Roth).

Fiduciary Liability

In a contested accounting by a corporate fiduciary, the objectants challenged the valuation of a parcel of realty located in Italy, as well as the failure of the fiduciary to timely marshal and sell a block of IBM stock.

With respect to the issue pertaining to the estate realty, the court opined that the accounting fiduciary has the burden of establishing that all estate assets have been accounted for and that the account is accurate and complete in all respects. This showing is typically made by the fiduciary's offering the account into evidence with sworn testimony by the fiduciary that the account is true and accurate. The burden then shifts to the objectants to show that the account is inaccurate or incomplete. Once established, the burden then shifts back to the fiduciary to show that the account is in fact accurate.

In support of their contentions, the objectants offered the testimony of an appraiser affiliated with a worldwide appraisal company, who examined the site and offered an opinion as to value which exceeded the value set forth in the fiduciary's account. Based upon this testimony, the court found the evidence sufficient to shift the burden back to the corporate fiduciary to present further evidence that the account was accurate as to the property's value. The corporate fiduciary failed to present any evidence in support of this burden. The court, therefore, determined that the fiduciary had misstated the value of the property as of the decedent's date of death and directed that it amend its account accordingly.

As for the additional block of IBM stock, the evidence revealed that the corporate fiduciary failed to discover this asset until almost four years after the decedent's death, and more than three years after its appointment as executor. This block was derived from a stock split, and the dividends were deposited automati-

cally into a custodial account held by Northern Trust in connection with a revocable trust created by the decedent with himself as trustee. Although an officer of the corporate fiduciary admitted that he knew of this stock as early as one year after the decedent's death, he conceded that he took no action to ascertain its status, and made no inquiries as to its ownership, assuming that it was not an estate asset. Indeed, a worksheet prepared by the fiduciary in connection with the estate's fiduciary income tax return disclosed dividend income in connection with this asset, and yet, the corporate fiduciary failed to engage in a further search for its existence. Thereafter, despite the fact that this block of stock may have been an estate asset, the corporate fiduciary corresponded with the estate beneficiaries informing them that all disclosed probate assets had been inventoried.

Based upon this evidence, the court found that the corporate fiduciary had failed in its duties to marshal all probate assets, and not merely those that had been disclosed. The court held that the fiduciary was obligated to do so promptly, even despite possible roadblocks, and that its delay and lack of prudence and diligence in this regard constituted a breach of duty.

In determining the amount of damages sustained by the fiduciary's negligence, the court determined that this block of stock should have been sold together with the rest of the estate's IBM stock within a year of the decedent's death. Hence, the court calculated damages at $797,921, based upon the income that would have been generated by the proceeds of the sale of the stock had it been sold within a year of death, reduced by the amount of income actually earned by the retained stock, together with interest at the statutory rate of 9%.

In re Adams, 20 Misc. 3d 1143A (Sur. Ct., Onondaga Co. 2008) (Sur. Wells).

Open Commission

Before the court in *In re Piecuch Family Trust* was a request by the objectants for the issuance of an open commission authorizing the service of a subpoena *duces tecum* upon non-party witnesses residing in Kansas. The application was opposed by the petitioner.

The underlying accounting proceeding involved an irrevocable trust which was to have been funded with a $1 million life insurance policy. The trust was never funded and a check for the cash surrender value of the policy was forwarded by the trustees thereof to the grantor.

According to the movants, information pertaining to the cash surrender value was in the possession of non-party, non-domiciliary witnesses, and thus, a commission was necessary. The petitioner opposed the relief maintaining that the court lacked jurisdiction over the respondents and that a New York subpoena could not be served outside the State of New York.

The court granted the application finding that the provisions of CPLR 3108 specifically authorized an appropriate remedy to be fashioned in order to obtain documentary evidence from an out-of-state witness. The objectants were therefore allowed to obtain an open commission appointing a Judge of the District Court in Kansas or other person authorized in the State to issue a subpoena *duces tecum* to the subject non-party witnesses for the production of certain documents concerning the trust, the insurance policy, and the funds received from the policy's cancellation.

In re Piecuch Family Trust, N.Y.L.J., November 19, 2008, p. 36 (Sur. Ct., Suffolk Co.) (Sur. Czygier).

Removal of Trustees

Before the court in *In re Brody* was an application by the decedent's son to, *inter alia*, remove his mother and sister as testamentary trustees of a trust for his mother's benefit based on their hostility towards him. The respondents-trustees moved to dismiss the petition for failure to state a cause of action, and the court converted it to a motion for summary judgment.

The trust in issue was created for the benefit of the decedent's spouse during her life, and was payable on her death equally to the decedent's three children, or their issue *per stirpes*. The basis of the alleged hostility between the parties was centered upon their ownership, both individually and through the trust, of a corporation holding a five-story industrial building located in Soho, New York. Apparently, at a meeting of shareholders, the petitioner's sister, both individually and as trustee of the trust, voted their shares to remove the petitioner as a director of the corporation. The following month, the petitioner commenced an action in Supreme Court for dissolution of the corporation. That proceeding was ultimately settled pursuant to a stipulation of settlement providing, *inter alia*, for the sale of the building and for the eviction of the petitioner from the apartment located at the site of the property. Thereafter, the petitioner brought an action to enforce the stipulation.

In support of the petition for removal, the decedent's son alleged that he was the subject of "illegal and oppressive" threats by the trustees to evict him from his apartment, that he was unjustifiably ousted from the board of directors of the corporation, and that the trustees failed to fully comply with the stipulation of settlement. The application was opposed by the trustees.

In denying the application for summary judgment, the court opined that every testator has the right to

determine the most suitable person to administer his estate and that such selection is not to be lightly disregarded by the court. While hostility may prove to be grounds for disqualifying a person from being appointed fiduciary, this result will only occur when the friction between such person and the beneficiary interferes with the proper administration of the estate. To this extent, the court held that the litigation between the parties pending in Supreme Court, albeit not involving the trust administration *per se*, was, nevertheless, relevant to the issue of whether the hostility between the parties resulting from that litigation improperly interfered with the proper administration of the trust estate. The court held that an assessment of that issue required an evidentiary hearing.

In re Brody, N.Y.L.J., October 17, 2008, p. 31 (Sur. Ct., Nassau Co.) (Sur. Riordan).

Statute of Limitations

The Court of Appeals affirmed a ruling of the First Department which sustained a cause of action for legal malpractice based upon counsel's failure to assert the statute of limitations as a defense to a compulsory accounting proceeding. In addition, the Court held that collateral estoppel did not prevent relitigation of the Surrogate's ruling inasmuch as it was an alternative basis for the trial court's decision, and was not addressed by the Appellate Division in its opinion.

The record revealed that the plaintiff served for several years as a trustee of a grantor trust before she resigned in 1997, and was succeeded by the grantor's brother. For more than six years after that the plaintiff rendered no accounting.

Thereafter, a compulsory accounting proceeding was instituted by the grantor against the plaintiff and the successor trustee. The plaintiff retained counsel to represent her in that proceeding, who appeared, but did not file an answer opposing the relief requested. The plaintiff filed an accounting, and in response to objections asserted by the grantor, moved to dismiss based upon the statute of limitations. The Surrogate denied the motion on two alternative grounds: 1) that plaintiff failed to show that the statute of limitations had expired before the proceeding to compel an accounting had been instituted and 2) that plaintiff waived the statute of limitations as a defense because it had been asserted too late. The Appellate Division affirmed the Surrogate's opinion, but on the second ground only, i.e., that the plaintiff had waived the statute of limitations defense because it had not been raised in response to the grantor's petition to compel an accounting.

As a result, plaintiff brought an action for legal malpractice against her former counsel, contending that the accounting proceeding against her would have been dismissed but for counsel's negligence in failing to assert, and thereby causing her to waive, the statute of limitations as a defense. Counsel moved to dismiss, claiming that plaintiff was bound by the Surrogate's alternative holding rejecting her statute of limitations argument, and the Supreme Court granted the motion. The Appellate Division reversed, holding that the Surrogate's ruling on the collateral estoppel issue should not be given effect. In reaching this result, the Appellate Division also rejected the Surrogate's reasoning and said that the statute of limitations began to run upon plaintiff's resignation as trustee and surrender of her trusteeship to a successor. The Appellate Division granted leave to appeal to the Court of Appeals on a certified question, and the Court affirmed.

In pertinent part, the Court held that principles of collateral estoppel do not apply to an alternative holding of a trial court when that holding is not considered by the appellate court in its review of the trial court's opinion. Moreover, the Court held that the statute of limitations defense, had it been asserted in the compulsory accounting proceeding, would have had merit and would have required dismissal of the accounting proceeding against the plaintiff had it been timely raised.

To this extent, the Court noted that the petition for a compulsory accounting had been brought more than six years after the plaintiff resigned as trustee of the subject trust, and was, thus, too late. The Court rejected, as impractical, counsel's argument that the statute does not begin to run until the former trustee is asked but refuses to provide an accounting, finding that such a rule could have the effect of delaying the start of the statutory period for years if the trustee was never asked to account. The Court also concluded that its rule was clearer and easier to apply than the rule supported by the Surrogate, to wit, that the statute should not begin to run on the beneficiary's right to an accounting until a reasonable time period has passed. The Court opined that the Surrogate's theory would be too difficult to apply as it would leave the courts with the problem of deciding what a reasonable time was to account.

In re Tydings, 868 N.Y.S.2d 563, 897 N.E.2d 1044, 11 N.Y.3d 195 (2008).

Timeliness of Objections

In a contested probate proceeding, the proponent moved to dismiss the objections on the grounds that they were filed untimely. The objectants cross-moved requesting their objections not be stricken.

The record revealed, *inter alia,* that prior to the filing of objections the parties entered a stipulation scheduling examinations pursuant to SCPA 1404. The stipulation specifically provided that objections were to be filed within 10 days after completion of the examinations. Objections to probate were timely served upon the proponent; however, they were not timely filed with the court, but rather, they were filed one day late.

The court noted that, unless the court, in its discretion, authorizes otherwise, a failure to timely file objections as set forth in SCPA 1410 may constitute grounds for their rejection. The exercise of the court's discretion in this regard requires consideration of whether the proposed, albeit untimely, objections raise valid concerns regarding the validity of the propounded Will. In addition, the court recognized that it was empowered to extend the time to file objections pursuant to the provisions of CPLR 2004.

In support of their cross-motion, the objectants maintained that the objections, while timely mailed, were untimely filed because the courts were closed on the filing date established by the stipulation of the parties. Hence, they were one day late. Moreover, the objectants argued that the proponent had not shown any prejudice by their delay.

Accordingly, the court granted the cross-motion, finding that the delay was not willful, did not cause any demonstrable prejudice to the proponent and the objections were not conclusory. However, the court found that the motion and cross-motion had cost considerable time and resources of the court and of the proponent that would not have otherwise been incurred had the objections been filed as required. Additionally, it noted that this was not the first time that the objectants failed to adhere to stipulated deadlines. Accordingly, the relief granted to objectants was conditioned upon objectants' counsel paying $500 to the proponent, together with the costs of the application.

In re Savino, N.Y.L.J., December 26, 2008, p. 34 (Sur. Ct., Kings Co.) (Sur. Lopez Torres).

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Scenes from the Trusts and Estates Law Section 2009 Annual Meeting

January 28, 2009
New York Marriott Marquis

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

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