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Trusts and Estates Law Section Newsletter

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of the New York State Bar Association

A Message from the Section Chair

It is an honor and privilege to be named Chair of the 5,219-member Trusts and Estates Law Section. The professionalism, collegiality and enthusiasm of our members makes this the greatest group of attorneys in New York State.

Betsy Hartnett

I want to thank outgoing Chair Gary Friedman for his strong leadership of the Section in 2010. Gary presided over some of the best programs I have ever attended from any CLE provider. The Spring meeting in Chicago and the Fall meeting in Rochester were well attended and well received.

Every incoming Chair's message gives a report on the Annual Meeting, usually discussing both program content and weather conditions. This year, the weather report was impressive with 19 inches of snow in Central Park and mad scrambling by out-of-towners to reschedule flights or rent cars to return home.

Undaunted by the weather, program chairs Andrea Levine Sanft and Ronald J. Weiss executed a flawless agenda. A lively panel of James B. Ayers, William T. Miller (who got the last plane out to return to Houston) and Neal B. Jannol provided bone-chilling predictions of life after *Schneider v. Finmann* and the loss of privity that had protected estate planning attorneys from malpractice claims in New York. Jim Ayers recommended to the Executive Committee that our Section develop forms and checklists to make a record of issues discussed, advice given and a client's decisions as part of the defensive practice of law that *Schneider* may require. I have asked our Estate Planning and Practice and Ethics committees to consider Jim's recommendation. If you wish to assist in this effort please contact Darcy Katris (atdkatris@sidley.com) or Michael Feigenbaum (atmfeigenbaum@rmfpc.com).

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NYSBA

Additional reflections on *Schneider* were presented by our luncheon speaker, the Hon. Nora Anderson. Judge Anderson, elected as Manhattan Surrogate in 2008, gave an insightful review of both *Schneider* and *Matter of Hyde* and their impact on our practice.

Rounding out the morning's theme of "Trusts and Estates Practice in the 21st Century" was a presentation by Prof. Mitchell M. Gans on trust protectors and a panel discussion of progressive litigation alternatives by Hon. Kristin Booth Glen, Surrogate of New York County, and Amy B. Beller. Amy provided an overview of estates practice and mediation in Florida. All of the program's participants were top rate, and we are very appreciative of their efforts.

Following the Annual Meeting, Kathleen Doyle greeted a convivial group at the reception sponsored by Doyle New York, Auctioneers & Appraisers, at the Links Club. The Links Club was founded by Charles B. Macdonald and friends in 1916. As we entered this stunning townhouse, there was a crackling fireplace to set the warmest of welcomes from Kathy and the Doyle team. The reception was held in the second-floor C.B. Macdonald Room. The room is dominated by life-size paintings of Macdonald and friends enjoying the game. The surroundings, the food and the friendship were savored by all in attendance.

The following morning some hearty souls braved the storm and attended committee breakfast meetings including meetings of Estate and Trust Administration, CLE, Estate Litigation, Estate Planning and Taxation. If you would like to participate in committee work, please contact any committee chair. Their names and contact information are at the back of this *Newsletter*. With modern technology, committee involvement is now very accessible for all members.

And, speaking of the *Newsletter*, welcome to Cristine Sapers, our new Chair of Newsletter and Publications Committee. If you would like to submit an article, please contact Cristine at cmsapers@debevoise.com. The *Newsletter* also encourages letters to the editor on timely subjects.

As you read this our Spring meeting, April 7-10 at Turnberry Isle, Florida, will be just around the corner and our thoughts will have turned to warm weather and sunny days. The program, chaired by Mike O'Connor and Ian Maclean, is entitled "TЯUSTS: Misteaks and Solutions," and features some of the most prominent speakers in the country. I hope to see you there.

Please also save the date for our Fall meeting, October 13 and 14 in Buffalo, New York. This will be a joint meeting with the Elder Law Section. Chairs Victoria D'Angelo and Laurie Menzies are working on the program, which will have an expanded format with additional CLE credits available Friday afternoon. While the program is not yet planned, the entertainment is underway. We will have dinner Thursday night at the Albright Knox Art Gallery. The gallery, housing abstract expressionism, pop art and art represented by the works of Pablo Picasso, Georges Braque, Henri Matisse, Joan Miró and others, has been called "small, intimate and seductive." On our short bus ride to the gallery we will journey along the famous Delaware Avenue, and docents will regale us with the stories behind the mansions on Millionaires' Row. Please plan on joining us in October.

I look forward to the challenges and opportunities that the coming year presents and am eager to continue working with the incredibly talented attorneys of the Trusts and Estates Law Section.

Betsy Hartnett

Correction

In "The Transfer for Value Tax Trap," by Robert J. Adler, in the Fall 2010 *Newsletter*, the discussion at page 15 regarding insurance policy transfers between spouses or incident to a divorce should have read as follows:

Policy Transfers Between Spouses or Incident to Divorce

Generally, the transfer for value rule does not apply to the transfer of life insurance policies between spouses as long as the transfer occurred after July 18, 1984 or, in the case of transfers after December 31, 1983 and on or before July 18, 1984, both spouses elect to have the nonrecognition rules of Code § 1041 apply. The transferee's basis in the policy is equal to the transferor's adjusted basis immediately before the transfer, regardless of whether or not any consideration was paid, and thus, the transfer falls within the "transferor's basis exception" to the transfer for value rule.

The transfer for value rule will also not apply in the case of life insurance policies transferred between spouses (or former spouses) pursuant to a divorce decree, as long as the divorce decree is entered into after July 18, 1984 or, in the case of decrees after December 31, 1983 and on or before July 18, 1984, the election is made to have the Code § 1041 nonrecognition rules apply.

Editor's Message

This is my first message as Editor of the *Trusts and Estates Law Section Newsletter*. I am delighted to take over the helm from Ian MacLean, who did a terrific job the last two years leading the *Newsletter* editorial board and filling these pages with timely, insightful commentary and analysis. I'm sure that Ian will continue to contribute to this publication and our Section in other ways.

As 2010 drew to a close, we finally saw new federal estate and gift tax legislation come out of Washington. Michael Kutzin discusses the new tax law in the lead article of this issue. This *Newsletter* also features a piece by Anthony Enea on some of the "best practices" estate planning attorneys should follow in the wake of *Schneider v. Finmann,* and an article by Gary Bashian with helpful advice to litigators representing proponents of contested wills. In "Trusts as Hedge Fund Investors," Andrea Levine Sanft reviews the securities law rules that apply to individuals, trusts and other family entities investing in hedge funds and private equity funds. Andrea's piece, which appeared recently in the *New York Law Journal*, is an excellent primer for any lawyer advising clients who are considering investing in private funds through their estate planning vehicles or making gifts of interests in private funds.

Of course, no issue of the *Newsletter* would be complete without the case reporting columns of Ilene Cooper and Professors Ira Bloom and William LaPiana. And be sure to read the Best of the Listserve—our latest installment includes a spirited exchange about drafting wills for out-of-state residents, which one poster likened to "a 'roundtable' discussion at a CLE session on Ethics."

As Sharon Klein reported in the Winter 2010 *Newsletter*, the New York Department of Taxation and Finance has imposed new reporting requirements on resident trusts that are not subject to New York State income tax. Trusts required to file a New York State income tax return under the new rules must attach to the return a Form IT-205-C, New York State Resident Trust Nontaxable Certification. The new form, which was not available at the time of publication, is reproduced on the following page.

The editorial board is soliciting submissions for the Fall *Newsletter*. We welcome articles and columns, alerts on pending legislation and materials from continuing legal education or other presentations (either original or adapted for publication here), as well as opinion pieces and letters to the editor. The deadline for submission is June 20, 2011.

Finally, I'd like to encourage all TELS members to participate in the Section Listserve. It is a collegial forum where you can find thoughtful advice on questions both legal and practical, not to mention lively debate and the occasional dose of humor. Please visit the Listserve and join the conversation—you may find yourself published in the *Newsletter* without even having to write an article.

Cristine M. Sapers

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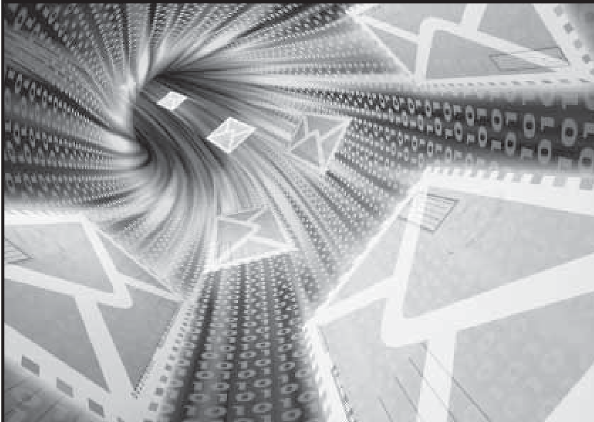
Request for Articles



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

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

www.nysba.org/TrustsEstatesNewsletter

New York State Department of Taxation and Finance

New York State Resident Trust Nontaxable Certification

Tax Law - Article 22, Section 605(b)(3)(D)

IT-205-C

To be filed with Form IT-205 when a trust meets the conditions of Tax Law section 605(b)(3)(D); see instructions (Form IT-205-I)

Name of trust	Employer identification number (EIN)

Mark an ***X*** for all that apply:

1 All of the trustees are domiciled in a state other than New York State .... **1.** ☐

2 The entire corpus of the trust, including real and tangible personal property, is located outside of New York State (it is the Tax Department's position that intangibles located in the state but that are not employed in a business carried on in the state are not located in the state for purposes of this rule) .... **2.** ☐

3 All income and gains of the trust are derived from, or connected with, sources outside of New York State, determined as if the trust were a nonresident trust *(see instructions)* .... **3.** ☐

Trustee identifying information

(Attach additional sheets if necessary. Follow the same format and include the name and EIN of the trust on each sheet.)

Trustee name			Identifying number (SSN or EIN)	Mark an ***X*** in the box if trustee is a nonresident: ☐
Mailing address *(number and street or rural route)*		Apartment number		
City, village or post office	State	ZIP code		
Trustee name			Identifying number (SSN or EIN)	Mark an ***X*** in the box if trustee is a nonresident: ☐
Mailing address *(number and street or rural route)*		Apartment number		
City, village or post office	State	ZIP code		
Trustee name			Identifying number (SSN or EIN)	Mark an ***X*** in the box if trustee is a nonresident: ☐
Mailing address *(number and street or rural route)*		Apartment number		
City, village or post office	State	ZIP code		
Trustee name			Identifying number (SSN or EIN)	Mark an ***X*** in the box if trustee is a nonresident: ☐
Mailing address *(number and street or rural route)*		Apartment number		
City, village or post office	State	ZIP code		

Signature of fiduciary or officer representing fiduciary	Printed name of person signing	Date

Please file this original scannable form with the Tax Department.

The Estate Tax Is Back, but with Some Twists—And Opportunities

By Michael S. Kutzin

After nine years of speculation about what would happen to the federal estate tax once its one-year "repeal" disappeared at the end of 2010, on December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"), which reinstated the estate tax for estates of decedents dying in 2010, expanded the exemption from estate and gift taxes, cut the maximum transfer tax rate and created significant planning opportunities to reduce or eliminate taxes during the two years while the new law is in effect.

Prior Law

In 2001, President Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), which raised the federal estate tax exemption from $675,000 to $1 million in 2001 and up to $3.5 million in 2009.[1] This meant, for example, that a husband and wife dying in 2009 could pass up to $7 million tax-free to their children, provided that each spouse had enough assets to take advantage of his or her $3.5 million exemption at death. If one spouse had less than $3.5 million in assets or left all assets to the surviving spouse, then the first spouse's unused exemption would be lost.

Under EGTRRA, the maximum marginal rate of taxation on estates declined from 55% to 45% between 2001 and 2009.[2] The federal estate tax was repealed for 2010, but EGTRRA was by its terms scheduled to sunset in 2011, with the result that for decedents dying in 2011 and beyond, the estate tax would return and the exemption would revert to $1 million (the amount to which it had been scheduled to increase under pre-EGTRRA law). Absent Congressional action, the maximum marginal tax rate was scheduled to revert to 55% in 2011, with the elimination of lower marginal tax rates for very large estates.[3]

While the federal estate tax exemption rose to $3.5 million under EGTRRA, the federal gift tax exemption increased to only $1 million.[4] (The amount of exemption that could be allocated for federal generation-skipping transfer ("GST") tax purposes increased uniformly with the estate tax exemption.) Thus, someone who made $3.5 million in taxable gifts during his or her lifetime would incur gift taxes on the excess over $1 million, while the same amount left at death by a decedent who died in 2009 would pass free of any federal transfer taxes.

The temporary repeal of estate taxes for a decedent "lucky" enough to die in 2010 came at the price of a limitation in the step-up in basis for assets inherited by the decedent's beneficiaries.[5] Under EGTRRA's modified step-up regime, the income tax basis of inherited assets for purposes of determining capital gain upon a subsequent sale would not be their fair market value at date of death. Instead, the decedent's executor would have up to $1.3 million in basis step-up to allocate among assets inherited by non-spouse beneficiaries and up to an additional $3 million in step-up to allocate among assets inherited by a surviving spouse.

New Law

A. Decedents Dying in 2010

The estates of decedents who died in 2010 will have a choice between two tax regimes. The general rule under the 2010 Act is that estates of persons dying in 2010 will be subject to the federal estate tax under the same rules that are in effect in 2011 (see discussion below), unless the executor elects to pay no federal estate taxes and receive only the modified step-up in basis.[6]

For the estates of decedents dying in 2010 with up to $5 million in assets, executors will not elect out of the federal estate tax (as none will be imposed) and will instead take advantage of the full step-up in basis to fair market value as of date of death. For estates in excess of $5 million, calculations will have to be made by the executor's attorneys or accountants to determine whether avoiding federal estate taxes or obtaining a full step-up in basis is more advantageous. Some of the factors that will have a bearing on this determination include the amount of built-in gain in the assets passing to the beneficiaries and whether the beneficiaries intend to sell those assets in the near future or to hold them for the long term. Executors who elect into the modified step-up regime will have to decide how to allocate the $3 million and $1.3 million basis step-ups among the assets passing to spousal and non-spousal beneficiaries, taking similar factors into account.

As part of the 2010 Act, estates of decedents dying prior to the enactment date were given nine months from December 17, 2010 to file estate tax returns or basis allocation forms and to make qualified disclaimers.[7]

B. Rules for 2011 and 2012

The 2010 Act is effective only through the end of 2012.[8] In 2011, the federal estate, gift and GST tax ex-

emption will be $5 million, and in 2012 it will be $5 million indexed for inflation.[9] The maximum marginal tax rate will be 35% in both years.[10] If the law is, in fact, permitted to sunset at the end of 2012, the exemption will return to $1 million and the marginal rate to 55%.

Aside from the highly advantageous exemption amount and reduced marginal tax rate, there are two other provisions of the 2010 Act that greatly benefit taxpayers: portability of the exemption between spouses and the ability to make taxable gifts up to $5 million in 2011 and 2012 free of gift taxes even if the $5 million exemption amount sunsets at the end of 2012.

1. Portability

If a decedent who dies in 2011 or 2012 has unused exemption (referred to in the new statute as the "deceased spousal unused exclusion amount"), the surviving spouse may take advantage of the unused exemption as long as the executor makes an election on the decedent's federal estate tax return allowing the surviving spouse to do so.[11] For example, suppose that husband dies with $2 million of assets in 2011, having never made any taxable gifts, and that he leaves his estate to his children instead of to his wife. If his executor makes the appropriate election on the federal estate tax return, the deceased spousal unused exclusion amount of $3 million ($5 million minus $2 million) will be available to the surviving spouse, either to make taxable gifts during her lifetime or to shelter assets from estate tax at death. (Portability does not apply to the exemption from the federal GST tax.) If wife then dies in 2012 without having made any taxable gifts during her lifetime, she could pass up to $8 million ($5 million plus the deceased spousal unused exclusion amount of $3 million, ignoring any potential indexing for inflation) free from federal estate tax. If husband instead left his entire $2 million estate to his wife, his deceased spousal unused exclusion amount would be the entire $5 million, and wife would have $10 million that she could transfer free of federal estate or gift tax before December 31, 2012.

What if the surviving spouse remarries and also survives the new spouse? Under the 2010 Act, the deceased spousal unused exclusion amount is limited to the lesser of $5 million and the unused exemption *of the last deceased spouse*, regardless of whether or not an election was made on an estate tax return to allow a (twice unlucky) surviving spouse to use a prior spouse's exemption.[12] For example, suppose that wife dies in 2011 and an election allows husband the use of her $4 million unused exemption. She leaves all her assets to husband, confident that he will pass those assets on to their children at his death. Husband remarries, signing a valid prenuptial agreement with his new wife under which neither will leave property to the other. New wife then dies in 2012, leaving her $4.5 million estate to her children from a prior marriage. Assuming no indexing for inflation, the most that husband can transfer to his children free of federal estate and gift tax is only $5.5 million—his $5 million exemption, plus new wife's unused exclusion amount of $500,000.

Needless to say, for well-advised, wealthier individuals, this could complicate the decision to remarry.

The IRS can examine the estate of the first spouse to die for the purpose of determining the deceased spousal unused exclusion amount claimed by the estate of the surviving spouse.[13]

Like the expanded exemptions and lower tax rate, portability is set to expire on December 31, 2012.

Prior to the enactment of the 2010 Act, good estate planning often focused on ensuring that each spouse had at least enough assets in his or her name to take full advantage of the exemption amount then in existence and to pass that amount to children, either outright or in trust. In order to build in flexibility to estate plans as the exemption amount grew over the past nine years, some couples wrote wills with "disclaimer trusts," leaving most or all of an estate to the surviving spouse but providing that the surviving spouse could disclaim some or all of the residue in order to take advantage of the then applicable exemption. The disclaimed property would pass to a trust that would benefit the surviving spouse (and possibly children) during his or her lifetime but would not be included in his or her estate for tax purposes, and upon the surviving spouse's death any remaining assets would pass to children. Other clients whose assets far exceeded the maximum $3.5 million exemption left the full exemption amount to a similar "credit shelter" trust for spouse and children and the residue to spouse.

Is there any role for disclaimer and credit shelter trust planning, or ensuring that each spouse has assets solely in his or her name, now that we have portability? The answer is *yes*. First of all, as discussed above, portability is scheduled to expire at the end of 2012. So unless both spouses die before 2012, no one can count on being able to take advantage of portability. Secondly, leaving assets to a disclaimer or credit shelter trust keeps future appreciation on the assets from being taxed in the surviving spouse's estate. In addition, state estate taxes must also be considered. For example, the New York State estate tax exemption remains at $1 million, and there is no concept of portability under New York law. Even if portability is made permanent, New York residents will still be well advised to try to pass at least $1 million in the estate of each spouse to the children of their marriage in order to minimize New York State estate tax.

Income tax considerations may also weigh in favor of funding a trust in the estate of the first spouse to die. A disclaimer or credit shelter trust under the will of a New York decedent may escape New York State income taxation of its income and gains if it satisfies the require-

ments of N.Y. Tax Law § 605(b)(3)(D), whereas the same income and gains would be subject to New York State income tax if the assets were held by a surviving New York-resident spouse.

Non-tax considerations—such as creditor protection and control over the disposition of assets after a surviving spouse's death—may also favor the creation of a disclaimer or credit shelter trust, just as they would have before the new tax law.

Between the impermanence of portability, the potential estate and income tax savings and non-tax considerations, it will still make sense for many couples to ensure that each spouse has assets in his or her own name and to continue to provide for disclaimer or credit shelter trusts in their wills.

2. Taxability of Gifts Made if 2010 Tax Act Sunsets and Opportunities Presented

One of the critical changes made by the 2010 Act was in reunifying the federal estate and gift tax systems and providing both higher exemptions from the taxes and a lower maximum rate. This will permit wealthier individuals to more fully take advantage of lifetime gifting without incurring current taxes. Estate planning techniques such as gifts of interests in family limited partnerships, gifts to GRATs and QPRTs and installment sales to intentionally defective grantor trusts can now be used to transfer much larger amounts because individuals can gift up to $5 million ($10 million for married couples) free of gift tax in the next two years.

If the 2010 Act is allowed to sunset, and the 55% rate and $1 million exemption amount return, taxable gifts made in 2011 or 2012 that were exempt from gift tax could become subject to federal estate tax in the estate of the donor at the 55% rate.[14] Even if there is such a "claw back" or recapture of tax on lifetime gifts, the tax will be deferred until death, and any appreciation of the assets gifted will escape taxation in the donor's estate. In addition, through the use of estate planning techniques such as family limited partnerships, which are designed to pass assets at discounted values for estate and gift tax purposes, more assets can be transferred during life and reduce the ultimate tax bill.

One potential drawback to making larger lifetime gifts is that assets that are gifted during lifetime will not receive a step-up in basis at the donor's death. A taxpayer considering major taxable gifts may therefore wish to consider making cash gifts or gifts of assets whose tax bases are close to fair market value.

Conclusion

The 2010 Act provides significant opportunities, especially for wealthy individuals and couples, to reduce or eliminate federal estate and gift taxes with appropriate planning. Because most of the substantive provisions of the 2010 Act are scheduled to sunset at the end of 2012, however, and because of state estate tax systems that do not reflect changes to the federal tax laws and other considerations, good estate planning still requires substantial flexibility and regular review.

Endnotes

1. 26 U.S.C. § 2010 (2010) (prior to amendment by Pub. L. No. 111-312) (references to the Internal Revenue Code are to 26 U.S.C. § 1, et seq., 1986, as amended (hereinafter "IRC")).
2. IRC § 2001(c) (prior to amendment by Pub. L. No. 111-312).
3. *See* Economic Growth and Tax Relief Reconciliation Act of 2001 (hereinafter "EGTRRA"), § 901(a)-(b) (Pub. L. No. 107-16) (prior to amendment by Pub. L. No. 111-312).
4. IRC § 2505(a) (prior to amendment by Pub. L. No. 111-312).
5. IRC § 1022(a) (prior to amendment by Pub. L. No. 111-312).
6. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (hereinafter the "2010 Act"), § 301(c).
7. 2010 Act § 301(d). Because the nine-month anniversary of the date of enactment falls on a Saturday, the actual extension is until September 19, 2011.
8. 2010 Act § 304, which amended the sunset provision in EGTRRA (§ 901) to December 31, 2012.
9. 2010 Act § 302(a).
10. *Id.*
11. 2010 Act § 303(a).
12. *Id.*
13. *Id.*
14. This could be the result under the calculations required to take into account post-1976 gifts, and the gift tax previously paid or deemed to have been paid on such gifts, when computing the estate tax on the Federal Estate and Generation-Skipping Transfer Tax Return (Form 706). New IRC § 2001(g) provides that in computing the gift tax deemed previously paid, the tax rates in effect at the date of the decedent's death are used instead of the rates in effect at the date of the gift. 2010 Act § 302(d). Under this method of computation, no additional tax would be imposed on gifts made in 2011 and 2012 to take advantage of the $5 million exemption even if tax rates later increase. Section 2001(g), however, is scheduled to sunset at the end of 2012 along with the rest of the 2010 Act. Some practitioners believe this was an oversight in the legislation and that it will be resolved through a technical legislative correction or a clarification on Form 706.

Michael S. Kutzin is a partner in the New York City and White Plains law firm of Goldfarb Abrandt Salzman & Kutzin LLP, a firm concentrating in trusts and estates and elder law. He is a Vice Chair of the Legislation and Governmental Relations Committee of the Trusts and Estates Law Section of NYSBA and a former Vice Chair of the Estate Litigation Committee of this Section. He is also a member of the Estate Planning Council of Westchester and an adjunct faculty member of the George H. Heyman, Jr. Center for Philanthropy and Fundraising at New York University, where he teaches the Law of Nonprofit Management.

The author gratefully acknowledges the contributions of Louise Ding Yang, an associate at Debevoise & Plimpton LLP, in the preparation of this article.

What Is an Estate Planner to Do Without the Protections of Strict Privity?

By Anthony J. Enea

Since the New York Court of Appeals decision in *Schneider v. Finmann,*[1] estate planners have been wringing their hands with concern as to what steps they can take to protect themselves from potential malpractice claims by the personal representative of an estate.

The Court of Appeals held in *Schneider* that "privity" (a contractual relationship) or a relationship sufficiently close to privity exists between the personal representative of an estate and the estate planning attorney. The court held that the personal representative of an estate should not be prevented from raising a malpractice claim against an attorney who caused harm to the estate. With very little fanfare the court made a significant dent in the decades-old requirement that there be "strict privity" between the third party alleging malpractice and the attorney, absent fraud, collusion, malicious acts or a special relationship with the attorney. As if this were not sufficiently worrisome for the practitioner, the court went on to make the troubling statement that "the attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional."[2] While the court may have been correct in making this observation with respect to the facts presented in the case before it, the ramifications of such a general and conclusory statement may go beyond what the court envisioned. It may have been incorrect for the court to assume that minimization of estate taxes is the "central task" in every estate plan. How many of us have had a client say something to the effect of, "Let the kids worry about the taxes, I am leaving them enough"?

The decision in *Schneider* affects all attorneys who prepare wills and trusts, not just those who prepare sophisticated estate plans for the wealthy. In states that have not had a "strict privity" requirement, the number of malpractice claims against estate planners and will drafters has been high. Any attorney who drafts wills and trusts will need to ensure not only that there is not only no malpractice in the preparation and execution of the documents but also that all potential estate tax issues have been thoroughly reviewed with the client. While the majority of estate planners take the necessary precautions, it does not hurt to periodically review one's practices, procedures and communications with the client to ensure that the best possible practices and procedures are followed.

The following are some of the steps attorneys should consider taking in order to avoid a potential malpractice claim by the personal representative of an estate:

1) Obtain specific and detailed information about the client, his or her family and assets. The attorney should consider sending the client a questionnaire to obtain information about the value of the client's assets, and to the title in which all of the client's assets are held; whether assets have named beneficiaries or will pass by operation of law upon the death of the client; and the owner, annuitant, insured and beneficiary of any IRAs, 401Ks, annuities and life insurance policies. A review of all of the client's account statements and beneficiary designations should be considered. It is not unusual for clients to be mistaken as to title and beneficiaries of their accounts.

2) Obtain copies of wills, trusts and other advance directives executed by the client. It is important to ascertain whether the proposed plan is a significant departure from the client's prior estate plan and whether the client has decided to exclude from his or her plan individuals who may potentially contest a new will or trust.

3) In those cases where federal and/or New York estate taxes may be imposed, memorialize in writing the advice to the client as to the potential for estate taxes and the anticipated impact of such taxes upon the clients' estate and the beneficiaries.

4) Memorialize the various estate tax minimizations techniques reviewed and recommended to the client. For example, if you reviewed with the client a plan of gifting (charitable and/or non-charitable), life insurance trusts, GRATS, family limited partnerships, QPRTs or other estate planning techniques, delineate these options in writing to the client and indicate whether or not the client has decided to use any of these techniques, and if not, why not. Consider having the client sign a memorandum or letter to confirm

that the client has been advised of these options and that the resulting estate plan accurately reflects his or her wishes. Such a statement could act as a potential deterrent to a claim by the estate's personal representative as it could be interpreted as a "waiver" by the client.

5) Memorialize the fact that the estate plan will result in certain assets being included in the client's gross taxable estate for estate tax purposes. For example, when an attorney prepares a deed with the reservation of a life estate or a revocable living trust, the client may incorrectly assume that because the asset is no longer titled in his or her name, it is not taxable in his or her estate for estate tax purposes. Again, consider having the client sign a letter or memorandum acknowledging that he or she was so apprised.

6) Memorialize that you have relied upon the information provided by the client to evaluate the potential for estate taxes. The client should be instructed to advise the attorney of any significant changes in the value of his or her assets.

7) Memorialize that you have personally reviewed all of the documents with the client and that the documents were the only documents the client asked you to prepare.

8) Create a checklist of the steps to be followed by associates and staff for the execution and assembly of will and trust documents. This should help reduce any potential errors at the time of execution and assembly of the documents. It is also advisable to create and follow consistent procedures for the review and modification of any draft will and trust documents.

9) Memorialize that your representation has terminated once your legal services to the client have concluded. This is usually confirmed in the correspondence sending either the executed original or copies to the client (if the representation was limited to the preparation of documents). The relevance of officially terminating the relationship is to commence the tolling of any statute of limitation for any claims of malpractice.

Commencing the tolling of the statute of limitations is of particular importance for attorneys who regularly communicate with clients after the conclusion of their representation to keep clients apprised of changes in the laws or of any other issues of interest. For such attorneys it may be advisable to include language similar to the following in their termination letter:

> I wish to confirm that we have terminated our representation. In the future you may periodically receive correspondence from us about developments in the law and other topics that may be of interest to you. This correspondence will be sent for informational purposes only and will not be the continuation of our representation.

Using all or some of these practice recommendations will not guarantee that you will never be subjected to a claim of legal malpractice. However, taking these steps should help minimize the potential for a claim. Clearly, the Court of Appeals has made a determination as to what our "central tasks" are as estate planning attorneys and has charged attorneys with the obligation to minimize negligence in addressing those tasks. The decision in *Schneider* will naturally result in attorneys taking numerous steps and precautions to avoid malpractice, which may result in higher legal fees to the client. I hope I am mistaken; however, this seems eerily familiar to what has happened in the case of the medical profession. We can only speculate as to what the courts will next determine to be a "central task" entrusted to the estate planning attorney.

Endnotes

1. *Schneider v. Finmann*, 15 N.Y.3d 306, 2010 Slip Op. 5281, N. Y. 2010.
2. *Id.* at 4.

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Trusts as Hedge Fund Investors—Accredited Investor and Qualified Purchaser Rules for Trusts and Other Estate Planning Vehicles

By Andrea Levine Sanft

Despite recent market conditions, hedge funds, private equity funds and similar alternative investments may continue to provide opportunities for fiduciaries seeking a well diversified portfolio. Other authors have considered whether, under modern portfolio theory, such investments are appropriate for trusts and private foundations. However, there is a more fundamental question: whether trusts, family entities and certain charitable organizations are permissible investors in a private investment fund. To answer that question, the trusts and estates lawyer is in unfamiliar waters—securities law.

Private investment funds generally are funds that are exempt from registration under the Securities Act of 1933[1] and the Investment Company Act of 1940.[2] To fall within applicable exemptions, private investment funds generally permit only those investors who are "accredited investors" (as defined in the 1933 Act) and "qualified purchasers" (as defined in the 1940 Act). This article analyzes whether trusts, family entities and certain charitable entities may qualify as accredited investors and qualified purchasers.

It is important to note that an investor generally must qualify as both an accredited investor and qualified purchaser at the time that the investor acquires interests from the fund. However, as discussed below, there are circumstances where it will be important to satisfy one test but not the other. For example, a trust that receives an interest via a gift, but that has ongoing capital obligations, must be a qualified purchaser at all times. In contrast, since the registration requirements of the 1933 Act apply only at the time that securities are issued, it may not be necessary for the donee to qualify as an accredited investor.

I. Accredited Investors

Under the 1933 Act, issuers of securities generally must file detailed registration reports made available to the public. Non-public offerings are exempt from these registration requirements.[3] The term "non-public offering" is not defined in the statute; however, Regulation D under the 1933 Act provides safe harbor rules for determining which offerings qualify as non-public.[4] Under the safe harbor provisions, a sale of securities to an unlimited number of "accredited investors" and no more than 35 non-accredited investors will be deemed a non-public offering.[5] Accredited investors include, generally, individuals and entities with a certain level of financial sophistication.

A. Trusts as Accredited Investors

A trust may qualify as an accredited investor in one of three ways: (1) the accredited investor status of an institutional trustee, (2) the trust's qualification as an accredited investor or (3) in limited circumstances, the accredited investor status of the grantor.

1. Institutional Trustee

A trust with a bank, savings and loan association or similar financial institution as trustee that controls investment decisions will qualify as an accredited investor.[6] It is not clear whether a trust company fiduciary will qualify for purposes of the accredited investor rules, since trust companies do not meet the definition of a bank under the 1933 Act.[7] However, given the policy reasons for affording bank trustees accredited investor status—substantial experience making sophisticated investment decisions—a trust company fiduciary should qualify under this provision.

2. Trusts with Assets Exceeding $5 Million

A trust also may qualify as an accredited investor if it has (1) total assets in excess of $5 million, (2) was not formed for the specific purpose of acquiring the securities offered and (3) has a sophisticated person direct the trust's purchase of securities.[8]

The specific purpose exception stems from the concern that non-accredited investors may try to qualify as accredited by pooling their assets.[9] In one No-Action Letter, the SEC listed several factors as relevant in analyzing the specific purpose requirement: (1) the entity's other investment activities, (2) whether the equity owners participate in management and (3) the relationship between the entity's investment in the securities and the entity's capitalization.[10]

The term "sophisticated person" is defined in Regulation D as one who has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment.[11]

3. Trusts with Accredited Investor Grantors

In limited circumstances, a trust may qualify as an accredited investor based on the status of the grantor.[12] A revocable trust of which the grantor is an accredited investor will be accredited.[13]

In addition, the SEC has indicated that certain irrevocable trusts may be accredited investors. In one No-Action Letter, a grantor retained annuity trust qualified as an accredited investor based on the following facts: (1) the trust was a grantor trust for federal income tax purposes, (2) the grantor was the sole source of funding, (3) the grantor had sole investment authority, (4) the grantor retained a significant economic interest in the trust and (5) the grantor's creditors could reach the trust assets.[14] In another No-Action Letter, an irrevocable trust was determined to be an accredited investor where the trust was a grantor trust for federal income tax purposes, the grantor's creditors could reach the trust assets and the trust had assets of $3.5 million and accredited investor trustees.[15]

B. Gifts and Resales

As mentioned earlier, the accredited investor rules apply when a trustee seeks to invest directly in a fund (since the registration requirements are triggered by the issuer's sale of securities) but not to gifts of securities to a trust.[16] In addition, a sale of securities by any person other than an issuer, underwriter or dealer (such as an intra-family sale) is exempt.[17]

C. Family Entities

A corporation, partnership or limited liability company with total assets in excess of $5 million will qualify as an accredited investor so long as it was not formed for the specific purpose of acquiring the offered securities.[18] In addition, an entity will qualify as an accredited investor if all of its equity owners are accredited investors.[19]

D. Charitable Entities as Accredited Investors

Any organization described in Section 501(c)(3) of the Internal Revenue Code will be an accredited investor so long as it has assets in excess of $5 million.[20] In addition, any charitable entity formed as a trust, which does not have assets exceeding $5 million, may still qualify as an accredited investor if it has a bank or similar institutional trustee that makes investment decisions.[21]

II. Qualified Purchasers

Under the 1940 Act, certain entities, defined as "investment companies," must register with the SEC and provide information regarding their investment policies.[22] In addition, the 1940 Act imposes significant restrictions on the activities of registered investment companies.

As with the accredited investor exception under the 1933 Act, Section 3(c)(7) of the 1940 Act provides an important exception. Under this exception, companies that sell securities in a non-public offering exclusively to persons who are "qualified purchasers" are excluded from the definition of investment companies subject to the 1940 Act.[23] Similar to accredited investors, qualified purchasers generally are individuals and entities with a certain level of financial sophistication.

A. Trusts as Qualified Purchasers

A trust will be a qualified purchaser if: (1) the trust has at least $5 million in investments and is for the benefit of certain family members, (2) the grantor and trustee are qualified purchasers, (3) the trust owns or manages at least $25 million in investments or (4) the grantor and trustee are knowledgeable employees.[24]

1. Family Trusts

A trust with at least $5 million in investments will be a qualified purchaser if it was established by, or for the benefit of, two or more persons who are related as siblings, spouses, descendants, aunts, uncles, nieces and nephews, estates of such persons and charitable organizations and trusts established by or for the benefit of such persons ("Family Members").[25]

2. Trusts with a Qualified Purchaser Grantor and Trustee

If the grantor and the trustee of a trust are qualified purchasers, the trust will be a qualified purchaser so long as it was not formed for the specific purpose of acquiring the offered securities.[26]

The grantor's status as a qualified purchaser must be determined at the time that the grantor contributed assets to the trust.[27] However, there may be other facts that demonstrate that the grantor is a qualified purchaser for purposes of a particular investment. For example, a trust was determined to be a qualified purchaser where the grantor was a qualified purchaser at the time of the trust's purchase of securities and the grantor had investment authority over the trust.[28] The trustee must be a qualified purchaser only at the time that the trustee acquires the securities.[29]

Similar to the analysis under the 1933 Act, whether a trust was formed for the specific purpose of acquiring the offered securities will depend upon the facts and circumstances.[30] The SEC has stated that although the percentage of an entity's assets invested in the securities is relevant, exceeding a specified percentage level is not determinative.[31]

3. Trusts and Trustees Owning/Investing at Least $25 Million

Any person or entity, acting for its own account or the accounts of other qualified purchasers, who owns

and invests at least $25 million in investments will be a qualified purchaser.[32] Any entity that seeks to qualify under this section must not have been formed for the specific purpose of acquiring the securities.[33] Under this rule, certain employee benefit plans with assets in excess of $25 million would be qualified purchasers.[34]

In addition, a trustee may qualify under this rule if the trustee owns and/or invests, in the aggregate, at least $25 million.[35]

4. Knowledgeable Employee Exception

The qualified purchaser requirements do not apply to knowledgeable employees. A trust may rely on this exception if a knowledgeable employee is the source of the funds and makes all decisions with respect to the trust's investments.[36] Knowledgeable employees include executive officers, directors, trustees, general partners, advisory board members and persons acting in a similar capacity.[37]

5. Transferees

Certain transferees who receive securities from a qualified purchaser will be deemed to be qualified purchasers, including: (1) the estate of a qualified purchaser, (2) donees of qualified purchasers and (3) any company established by a qualified purchaser exclusively for the benefit of the transferor and/or one or more persons described in clauses (1) and (2).[38] The term "donee" includes any person who acquires a security by gift, bequest or pursuant to divorce.[39]

The donee exception will not apply if the transferee is obligated to pay additional funds to the company, even if the transferor provides the transferee with sufficient assets.[40] For example, a transferee of an investment fund interest who is obligated to satisfy future capital calls will not be a donee under this rule.

B. Family Entities as Qualified Purchasers

A family partnership or LLC will be a qualified purchaser if the company has at least $5 million in investments and is owned by two or more individuals who are Family Members (as defined earlier).[41]

If any person other than those listed above owns an interest in the family entity, the entity may, nevertheless, be a qualified purchaser if it owns at least $25 million in investments.[42] In addition, an entity will be a qualified purchaser if all of its beneficial owners are qualified purchasers.[43]

C. Charitable Entities as Qualified Purchasers

A charitable entity organized as a trust will be a qualified purchaser if the grantor and the trustee are qualified purchasers and the trust was not formed for the specific purpose of acquiring the securities.[44] Additionally, the SEC stated that a charitable entity will be a qualified purchaser if (1) it was not formed for the specific purpose of acquiring the security, (2) all of the persons who have contributed assets to the entity are Family Members and (3) it has at least $5 million in investments.[45]

Conclusion

While the policies underlying the accredited investor exception under the 1933 Act and the qualified purchaser exception under the 1940 Act are similar, the two exceptions are not aligned. Careful analysis is necessary to determine whether a trust or other entity may participate in an investment fund under these rules.

Endnotes

1. Securities Act of 1933, 15 U.S.C.A. §§ 77a-77aa (1997 & Supp. 2008) (hereinafter the "1933 Act").
2. Investment Company Act of 1940, 15 U.S.C.A. §§ 80a-1-80a-64 (1997 & Supp. 2008) (hereinafter the "1940 Act").
3. 1933 Act § 4(2).
4. 17 C.F.R. §§ 230.501-230.508 (2008) (referred to hereafter by Rule number under Regulation D).
5. Reg. D Rule 506.
6. Reg. D Rule 501(a)(1).
7. The business of a trust company is not confined to "banking" within the meaning of Section (3)(a)(2) of the 1933 Act. *See* 9 C.J.S. Banks and Banking § 625 (2004).
8. Reg. D Rule 501(a)(7).
9. *See* Securities Act Release No. 6683, 52 Fed. Reg. 3015 (Jan. 16, 1987).
10. Hall, Moneytree Associates Limited Partnership I, SEC No-Action Letter, 1983 WL 29899 (November 3, 1983).
11. Reg. D Rule 506(b)(2)(ii).
12. Generally, an individual with a net worth of $1 million or annual income in excess of $200,000 will be an accredited investor.
13. Securities Act Release No. 6455, 1 Fed. Sec. L. Rep. (CCH) ¶ 2380 (March 3, 1983) at Question 30.
14. Herbert S. Wander, SEC No-Action Letter, 1983 SEC No-Act. LEXIS 3005 (Oct. 26, 1983) (hereinafter "Wander").
15. Trans-Resources, Inc., SEC No-Action Letter, 1997 WL 280674 (May 27, 1997).
16. *See generally* 1933 Act § 2(a)(3).
17. 1933 Act § 4(1).
18. Reg. D Rule 501(a)(3).
19. Reg. D Rule 501(a)(8).
20. Reg. D Rule 501(a)(3).
21. Reg. D Rule 501(a)(1).
22. *See* 1940 Act § 3(a)(1).
23. 1940 Act § § 2(a)(51) and 3(c)(7). Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996). The registration requirements under the 1940 Act are triggered at any time that a company is deemed an investment company. Therefore, to rely on the qualified purchaser exception, investors must be qualified purchasers at all times.
24. 1940 Act § 2(a)(51)(A) and Rule 3c-5.

25. 1940 Act § 2(a)(51)(A)(ii). *See* Meadowbrook Real Estate Fund, SEC No-Action Letter, 1998 WL 541510 (Aug. 26, 1998) (hereinafter "Meadowbrook") at n. 8.
26. 1940 Act § 2(51)(A)(iii). Generally, an individual with at least $5 million in investments or who is a knowledgeable employee will be a qualified purchaser.
27. American Bar Ass'n, SEC No-Action Letter, 1999 WL 235450 (April 22, 1999) (hereinafter "ABA") at Section C, Question 1.
28. Meadowbrook *supra* note 25 at n. 21.
29. ABA *supra* note 27 at Section C, Question 1.
30. *See, e.g.,* SCP Private Equity Partners II, LP No-Action Letter (June 6, 2006).
31. ABA *supra* note 27 at Section D.
32. 1940 Act § 2(a)(51)(A)(iv).
33. 1940 Act Rule 2a51-3.
34. *See, e.g.*, The H.E.B. Investment and Retirement Plan, SEC No-Action Letter, 2001 WL 533465 (May 18, 2001); Heitman Capital Management, LLC, SEC No-Action Letter, 2007 WL 789073 (Feb. 12, 2007).
35. McDermott, Will & Emery, SEC No-Action Letter, 2007 WL 2318041 (July 26, 2007).
36. ABA *supra* note 27 at Section A, Question 4.
37. 1940 Act Rule 3c-5.
38. 1940 Act Rule 3c-6(b).
39. 1940 Act Rule 3c-6(a)(1).
40. ABA *supra* note 27 at Section E, Question 2.
41. 1940 Act § 2(a)(51)(A)(ii).
42. 1940 Act § 2(a)(51)(A)(iv).
43. 1940 Act Rule 2a51-3.
44. 1940 Act § 2(a)(51)(A)(iii).
45. *See* Goldman Sachs Asset Management, L.P., SEC No-Action Letter, 2007 WL 1027885 (March 13, 2007) at n. 8.

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Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective

By Gary E. Bashian

A motion for summary judgment pursuant to N.Y. Civil Practice Law & Rules 3212 or 3211 (CPLR) is a powerful procedural tool that can end litigation immediately.

Summary judgment can deliver a swift and decisive victory on the outcome of a matter. It can limit the issues or award the broadest types of relief by ending all claims. When granted, it can avoid years of potential litigation and expense.

But for all its versatility, drafting a motion for summary judgment can be a daunting and complex undertaking. The facts (hopefully none in question) and the applicable law in any matter can make it difficult to identify issues with no triable issue of fact. Communicating the facts and the law clearly to the court so as to show that summary judgment should be granted is the challenge.

However, estate litigation can be surprisingly well suited to determinations based on summary judgment, which should not be forgotten by proponents who find themselves in a will contest. This is largely due to the fact that estate contests that reach the point of full-blown litigation are almost always based on one, a combination of or all of the familiar objections to testamentary validity: the failure to duly execute the instrument pursuant to N.Y. Estates Powers & Trusts Law 3-2.1 (EPTL), the testator's lack of testamentary capacity or the fact that the instrument was the product of undue influence or fraud.

Although summary judgment can be granted only if the movant makes a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,"[1] this is by no means an insurmountable task, even in matters where it appears that issues of fact dominate the proceeding. This is especially true in Surrogate's Court, where the traditional aversion to granting summary judgment has been eroded over the last several years.

Indeed, a probate petitioner in Surrogate's Court holds a number of procedural advantages over an objectant when making a motion for summary judgment to dismiss objections, several of which are described in greater detail below.

Due Execution

From a proponent's perspective, the issue of due execution is perhaps best suited for summary judgment. After all, the requirements for due execution are clearly articulated in EPTL 3-2.1 and are often complied with by even the most novice of draftsmen, making it a particularly attractive issue for summary relief where a failure to duly execute has been alleged.

It is well established that the initial burden of proof regarding due execution is on the proponent. The "party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator"[2] and that the instrument was duly executed.[3] To establish due execution, a proponent must show that: "(i) the testator signed at the end of the instrument; (ii) the testator either signed in the presence of at least two attesting witnesses, or acknowledged his/her signature to them; (iii) the testator declared to each of the attesting witnesses that the instrument was his/her will; and (iv) the witnesses signed at the testator's request."[4]

This is by no means a heavy burden for a proponent, as it must be proved only by a preponderance of the evidence.[5] Furthermore, a proponent is afforded a number of favorable presumptions regarding due execution. If the instrument was signed under the supervision of an attorney, it is presumed valid. In addition, where "a propounded instrument contains an attestation clause, it is inferred that the requisite statutory requirements were satisfied."[6] Finally, case law shows that only substantial, not strict, compliance with EPTL 3-2.1 need be present.

Accordingly, an alleged failure to comply with the strict and literal terms of the statute is not a basis for dismissing a petition for probate and is insufficient to make a showing that a will was not duly executed. The court may find that substantial compliance with the statute is in fact sufficient to establish due execution. Furthermore, compliance with EPTL 3-2.1's requirements may be found by inference from the conduct and circumstances surrounding execution of the will.[7]

Testamentary Capacity

When determining testamentary capacity, the court will consider the following factors: (1) whether the testator "understood the nature and consequences of ex-

ecuting a will"; (2) whether the testator "knew the nature and extent of the property" he or she was disposing of; and (3) whether the testator "knew those who would be considered the natural objects of his bounty and his relations with them."[8] When moving for summary judgment, it is the proponent's task to prove that as a matter of law, the testator was legally capable of executing the instrument.

As with due execution, the proponent has the burden of proving testamentary capacity by a preponderance of the evidence[9] but is also afforded the benefit of several presumptions. For example, until "the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will."[10] In addition, a testator's testamentary capacity is assessed at the precise time of the propounded instrument's execution.[11] Also, a testator need only a lucid interval of capacity to execute a valid will, and this interval can occur contemporaneously with an ongoing diagnosis of mental illness, including depression.[12] Moreover, courts have consistently recognized that the existence of self-proving affidavits executed by the attesting witnesses creates a presumption of testamentary capacity.[13] Each of these presumptions can be used with great effect to prove testamentary capacity and make the proponent's burden significantly easier to meet.

Undue Influence

Unlike due execution and testamentary capacity, which must be proved by the proponent of a will, undue influence must be proved by the objectant.[14] To establish that a testamentary instrument was procured by undue influence, an objectant must demonstrate by a preponderance of the evidence "that the influencing party had a motive to influence, the opportunity to influence, and that such influence was actually exercised."[15] This influence must have been so strong and pervasive that it subverted the true intentions of the testator at the time of execution to the extent that, but for the undue influence, the testator would not have executed the instrument. Clearly, this is a rather high standard to meet. At a minimum, the objectant must make a showing of actual acts of undue influence, including proof of "time and places when and where such acts occurred."[16]

It may come as no surprise that the actual exercise of undue influence is rarely proven by direct evidence; rather, it is usually established by circumstantial evidence of a substantial nature.[17] Among the factors the Surrogates consider when determining if undue influence prevents the probate of an instrument are: "(i) the testator's physical and mental condition; (ii) whether the attorney who drafted the propounded instrument was the testator's attorney; (iii) whether the propounded instrument deviates from the testator's prior testamentary plan; (iv) whether the person who allegedly wielded undue influence was in a position of trust; and (v) whether the testator was isolated from the natural objects of his bounty."[18] Often, an objectant will fail to offer evidence of any "actual acts" of undue influence at all, much less a single example raising an inference sufficient to meet the burden of proof to establish a *prima facie* case.

As illustrated in the matter of the *Will of Julia Elizabeth Taschereau*,[19] decided in 2010 by the New York County Surrogate's Court, actual and specific acts of undue influence can be difficult to establish. *Taschereau* discusses at length the nature of the evidentiary burdens an objectant alleging undue influence must meet, albeit in the context of a successful objection. In the *Taschereau* decision, Surrogate Webber provides a careful analysis of the facts of the case within the framework of the elements discussed above.

The case involved twin sisters battling over their mother's estate, whose primary asset was a co-op in Manhattan valued at approximately $475,000. The proponent lived near her mother, and the objectant resided in France. Both had a history of animus toward each other from the time they were children, a fact well known to the testifying witnesses. The proponent petitioned the court to probate the will one day after their mother's death. The propounded instrument left the testatrix's entire estate to the proponent, was signed at the proponent's insistence while the testatrix was recovering from an illness and contained significant changes from the prior will, which left her estate to her daughters equally.

The Surrogate's Court determined that shortly before her death, the testatrix had health problems which made her dependent on the proponent, who had power of attorney, managed the testatrix's finances and who herself increasingly depended on the testatrix for financial assistance. Testimony was also admitted into evidence showing that the proponent threatened to deny the testatrix visitation of the proponent's children, to whom she was devoted, when the testatrix provided financial assistance to the objectant or allowed the objectant to stay at the Manhattan co-op during her visits from France.

Circumstantial evidence, drawn from a long and detailed family history of strife between the sisters and their relationship with the decedent, formed the basis of a reasonable inference that undue influence had occurred. However, the lessons of *Taschereau* should not be lost on a petitioner seeking summary judgment in dismissing an objection based on undue influence. This is because the objectant's burden is set rather high. In *Taschereau*, this burden was met by an abundance of credible testimony from many close friends of the decedent, coupled with inconsistent and self-serving testimony from the proponent which, in the words of

the court, sought "to manipulate the record."[20] It is uncommon for objectants to have the favorable facts and wealth of multisource testimony that were present in *Taschereau*. Petitioners may be able to leverage to their advantage the absence of facts such as those present in *Taschereau* when moving for summary judgment to dismiss objections based on undue influence.

Fraud

The objectant also bears the burden of proof by clear and convincing evidence when seeking to establish a *prima facie* case regarding the exercise of fraud in the procurement of an instrument.[21] In order to state a claim for fraud and defeat a motion for summary judgment on that issue, the objectant must show that there is an issue of fact as to whether the proponent or a third party "knowingly made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement."[22] Evidence of actual misrepresentation is necessary; a showing of "motive and opportunity" to mislead is insufficient.[23] Importantly, "[m]ere conclusory allegations and speculation" are insufficient for an objectant to establish a *prima facie* case;[24] "[a]llegations must be specific and detailed, substantiated by evidence in the record."[25] Again, these can be very difficult allegations to substantiate. A petitioner should make clear in his or her motion the lack of specific examples offered by an objectant, as without such examples the objectant's argument must be dismissed.

Standing

Standing is an often overlooked avenue by which a petitioner may succeed on summary judgment. As with all litigated matters, the parties to contested probate proceedings must establish that they have the right to be heard before the court.

The Second Department decision in *Matter of Abady*[26] is a recent example of how a motion based on standing can benefit a petitioner. There, the objectant, who was the decedent's surviving spouse, filed objections to probate and notice of election. The petitioner moved for summary judgment pursuant to CPLR 3211(a), seeking dismissal on the grounds that the objectant had no standing due to her waiver of her right to any claims against the estate in two prenuptial agreements, one executed in 2001 and the other in 2006. The objectant sought to prove the prenuptial agreements invalid, arguing that they had not been properly acknowledged and that the execution of the 2001 agreement had been procured by fraud.

The Appellate Division, Second Department, determined that the execution of the 2001 prenuptial waiver "substantially complied"[27] with the standards set forth in the N.Y. Real Property Law and, by extension, the requirements of EPTL 5-1.1-A (e) (2), which provides that a waiver or release of a surviving spouse's right to an elective share of the deceased spouse's estate "must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of the conveyance of real property."[28]

As the *Abady* court noted, there "'is no requirement that a certificate of acknowledgement contain the precise language set forth in the Real Property Law. Rather, an acknowledgement is sufficient if it is in substantial compliance with the statute."'[29] Thus, the decedent's signature was not required on the waiver, as the objectant had argued, since the waiver was unilateral in form. Rather, both signatures would be required only if the waiver were bilateral in form pursuant to EPTL 5-1.1-A(e)(3)(C). In the end, the petitioner's motion for summary judgment to dismiss the objections was granted on the grounds that the 2001 waiver was properly executed and thus denied the objectant standing.

Conclusion

Estate litigators should bear in mind the foregoing key elements of summary judgment the next time they confront an objectant's claims. The presumptions in favor of a petitioner, and heavy burden of proof upon an objectant, make summary judgment a tactic that must be considered in counteracting many common objections. Some desperate objectants will attempt to present theories as factual questions, but mere speculation and conclusory allegations are not sufficient to raise triable issues of fact[30]—they are at most the "wailing and gnashing of teeth."[31]

Endnotes

1. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see generally Friends of Animals v. Associated Fur Mfs., Inc.*, 46 N.Y.2d 1065 (1979).
2. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876).
3. *Matter of Kellum*, 52 N.Y. 517 (1873).
4. *Matter of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.) (citing *Matter of Kellum, supra*).
5. *Matter of Pirozzi*, 238 A.D.2d 833 (3d Dep't 1997).
6. *Matter of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.).
7. *See Matter of Frank*, 249 A.D.2d 893 (4th Dep't 1998).
8. *In re Kumstar*, 66 N.Y.2d 691 (1985).
9. *See Estate of McCloskey*, 307 A.D.2d 737 (4th Dep't 2003).
10. *See Matter of Beneway*, 272 A.D. 463 (3d Dep't 1947).
11. *See Matter of Minasian*, 149 A.D.2d 511 (2d Dep't 1989).
12. *See Matter of Esberg*, 215 A.D.2d 655 (2d Dep't 1995).
13. *See Matter of Castiglione*, 40 A.D.3d 1227, 1228 (3d Dep't 2007).
14. *See Matter of Bustanoby*, 262 A.D.2d 407, 408 (2d Dep't 1999).
15. *Matter of Malone*, 46 A.D.3d 975 (3d Dep't 2007).

16. *Matter of Friedman*, 26 A.D.3d 723 (3d Dep't 2006); *see Matter of Fiumara*, 47 N.Y.2d 845 (1979).
17. *See Matter of Walther*, 6 N.Y.2d 49 (1959); *Matter of Burke*, 82 A.D.2d 260 (2d Dep't 1981).
18. *Estate of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.).
19. *Will of Julia Elizabeth Taschereau*, 11/17/2010 N.Y.L.J. 34 (col. 1) (Sur. Ct., N.Y. Co. 2010).
20. *Id.*
21. *Simcuski v. Saeil*, 44 N.Y.2d 442, 452 (1978).
22. *Matter of Evanchuk*, 145 A.D.2d 559, 560 (2d Dep't 1988).
23. *Matter of Gross*, 242 A.D.2d 333, 334 (2d Dep't 1997).
24. *Matter of Seelig*, 13 A.D.3d 776, 777 (3d Dep't 2004).
25. *Matter of O'Hara*, 85 A.D.2d 669, 671 (2d Dep't 1981).
26. *In re Abady*, 76 A.D.3d 525, 526 (2d Dep't 2010).
27. *Id.*
28. *Id.*
29. *Id. (*quoting *Weinstien v. Weinstien*, 36 A.D.3d 797, 798 (2d Dep't 2007)).
30. *See generally Matter of Seelig*, 13 A.D.3d 776 (3d Dep't 2004).
31. *Book of Matthew* 13:42.

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP in the preparation of this article.

Trusts and Estates Law Section

SPRING MEETING

Fairmont Turnberry Resort & Club
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www.fairmont.com/turnberryisle

April 7–10, 2011

SAVE THE DATES!

Join the Trusts and Estates Law Section at the 2011 Spring Meeting in sunny Florida!

The topic of this year's program is

TЯUSTS: *Misteaks and Solutions*

Drafting flexibility into trusts; repairing trusts that don't work; issues with Florida trusts; income tax aspects of early trust termination and protecting assets in trusts.

We have a group of nationally known speakers lined up. Ethics credit will be available through a panel of Surrogates discussing best practices in the Surrogate's Court. The program will provide up to 7.0 MCLE credits, including 6 credits in Professional Practice and 1.0 credit in Ethics.

The Section Executive Committee will meet on Thursday afternoon and a general reception will start at 6:00pm. Activities are planned for spouse/guests and attendees each day. For more information please visit the Section website at www.nysba.org/TESpring2011.

Scenes from the Trusts and Estates Law Section

ANNUAL MEETING

January 26, 2011

Hilton New York • New York City

Section Chair-Elect Betsy Hartnett and outgoing Chair Gary Friedman at the luncheon.

William T. Miller and Neal B. Jannol at the *Schneider* discussion.

Surrogate Nora S. Anderson (New York), the keynote speaker at the luncheon.

James B. Ayers leading the panel discussion on estate planning post-*Schneider*.

Prof. Mitchell M. Gans speaking about trust protectors.

Surrogate Kristin Booth Glen (New York) discussing mediation in the Surrogate's Court.

Effect of Separation Agreement on Subsequent Spouse's Elective Share

Subject: Elective Share vs. Separation Agreement

Date: Monday, December 13, 2010 8:32 a.m.

To: Trusts and Estates Law Section

Client enters into a separation agreement which requires him to leave his "estate" to his children. The term "estate" is not defined, although the agreement only requires that the former spouse be given a copy of any later Will. Client remarries and does not sign a prenuptial agreement.

This raises (at least) several questions, such as are assets transferred to a revocable trust or inter-vivos gifts a part of the decedent's "estate" and, thereby, subject to the terms of the separation agreement. The client's matrimonial lawyer is looking into those issues.

One issue that falls within our area is the interplay of the new spouse's elective share vs. the requirements of the separation agreement. Does the elective share trump the separation agreement so that the children receive 100% of the excess over the elective share? Or would/could the separation agreement be deemed to give the children the status of a creditor who would have to be "paid" before the elective share is computed?

Thank you.
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Subject: Re: Elective Share vs. Separation Agreement

Date: Monday, December 13, 2010 5:42 p.m.

To: Trusts and Estates Law Section

Michael:

Your question is rather complicated for anyone to address on the list, but here are a couple of research aids: See Section 3113 of the Insurance Law regarding how life insurance is impacted by situations such as the one you describe, and see also *Teachers Ins. v. Tedeschi*, 3 A.D.3d 671 [3d Dept 2004], 771 N.Y.S.2d 238.

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Subject: Re: Elective Share vs. Separation Agreement

Date: Tuesday, December 14, 2010 10:31 a.m.

To: Trusts and Estates Law Section

We had a case similar to this. We used the argument that a person can do whatever he likes with his assets during his lifetime, and thus the estate is whatever is left over at his death—there is definite case law on this point, especially if the term "estate" was never defined. The interesting issue is the new spouse's elective share (I am assuming that he didn't leave her one-third). I would think that her rights trump the rights of the children under the separation agreement. An elective share is statutory while the separation agreement will have to be construed.

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Request by Attorney-in-Fact for Original Will

Subject: Does PoA Entitle Someone to Original Will

Date: Thursday, January 13, 2011 12:55 p.m.

To: Trusts and Estates Law Section

Listmates:

We did a will several years ago for a client. We are located in New York City. Client's son has now contacted our office and advised us that his mother is in a nursing home in upstate New York, that he has her Power of Attorney and that he wants to come pick up her original will and other papers. Do we need to provide him with the original? Should we?

Thank you.
Ganine Gambale
358 St. Marks Place, Suite 3 West
Staten Island, NY 10301

Subject: Re: Does PoA Entitle Someone to Original Will

Date: Thursday, January 13, 2011 1:02 p.m.

To: Trusts and Estates Law Section

I am sure you will get a number of replies on this.

Personally, I would not do it. How do you know that the POA was not revoked immediately after it was signed?

I would insist on a Court order or I would offer to file it with the Court for safekeeping purposes.

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Subject: Re: Does PoA Entitle Someone to Original Will

Date: Thursday, January 13, 2011 1:22 p.m.

To: Trusts and Estates Law Section

Thinking this through—the first issue is what power is granted to the son under the POA. Is it specific or all encompassing—assuming it's general and in full force and effect (you should get an affidavit that it is in full force and effect and not revoked from the son). I would next look at the will and determine the son's status under the existing will—was he cut out? Does he get everything? If he is cut out, I think because the destruction of the will would change the testamentary scheme of the mother I would be more reticent about turning it over and perhaps then I would simply either file the will for safekeeping, commence a proceeding for instructions, or require the mother to personally instruct you to turn it over. Obviously the mother has the right to ask you for the original will, and if she called and told you to turn it over to the son who would bring you a writing to that effect you would do it—so why should her agent be any different? He is a fiduciary and has to act in a fiduciary capacity. In any event get a receipt for the original and keep a copy—just in case!

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Subject: Re: Does PoA Entitle Someone to Original Will

Date: Thursday, January 13, 2011 2:02 p.m.

To: Trusts and Estates Law Section

For various reasons, especially if the agent is engaging in estate planning (gifting) or Medicaid planning (if the POA is all encompassing, and assuming the principal may no longer be able to direct anyone), the agent would need to have a copy of the Will to try to follow the testamentary plan—or to at least be aware of it, as presumably the Will would indicate who the principal wants to benefit from the principal's assets. I don't know that the attorney has a right to give a copy of the Will to the POA unless the principal has approved—but it is counter to the purpose of the POA to have to go to court to get a copy of the Will. I think there are more problems to giving up the original Will—and would feel uncomfortable giving the original to the POA without a court order or some prior approval from the principal (if the principal is now incapacitated).

There are ethical and cost issues involved in giving a copy or original Will to the POA, and…I have heard in the past various answers, but nothing definitive.

Thanks
Karen
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Subject: Re: Does PoA Entitle Someone to Original Will

Date: Thursday, January 13, 2011 2:04 p.m.

To: Trusts and Estates Law Section

I am no longer in private practice, but I can tell you that when I was, our firm's position was that the Power of Attorney did not entitle the agent to the Will or even a copy of the Will. We would only turn over the Will to the client or at the client's explicit direction, in writing, to someone else. There is too much risk of it being destroyed and changes being made to it under the influence of the seemingly loving and caring child who is the agent.

I believe we also checked with the Surrogate Court in our County (Erie County in Buffalo) and that was their position as well for all wills that were kept in safekeeping there.

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Preparation of Will for Non-Domiciliary

Subject: NY Lawyer Preparing NJ Will

Date: Tuesday, December 14, 2010 5:02 p.m.

To: Trusts and Estates Law Section

Any problem with a NY lawyer preparing—and supervising the execution of—a Will for a NJ domiciliary.

Assuming full understanding of related NJ law and ancillary issues.

Eugene Riordan, Esq., CPA
50 Main Street # 1000
White Plains, NY 10606-1900
Phone: (914) 237-2003

Subject: Re: NY Lawyer Preparing NJ Will

Date: Tuesday, December 14, 2010 5:25 p.m.

To: Trusts and Estates Law Section

…Certainly you can do a NY will in NY for anyone who is a domiciliary of any state. Comity dictates that it be honored in any state (except maybe for Louisiana :)).

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Tuesday, December 14, 2010 5:51 p.m.

To: Trusts and Estates Law Section

Eugene,

There could be an argument to be made that this particular attorney who is not admitted in NJ is practicing NJ law without being duly licensed in NJ.

Perhaps a NJ admitted co-counsel is worth considering. Just a thought or two.

Kind regards,

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Tuesday, December 14, 2010 8:00 p.m.

To: Trusts and Estates Law Section

I do not think it is a problem as long as you are not soliciting business in NJ. There are only a few states that take a very hard-line approach prohibiting an out-of-state attorney from doing any work in the state (Florida, I think Arizona, and one other, I think). My understanding of the rule is that you are not practicing law without a license because you are in fact licensed in another state and are not pretending to be an attorney.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:03 p.m.

To: Trusts and Estates Law Section

Gene:

(As an avid reader of her posts, I can't believe I disagree with Lori.)

I am not familiar with New Jersey law, but if a layman prepared and supervised the execution of a Will in any state, would that layman not be practicing law without a license? While you may know the law of another state, the client's insurance agent and accountant may also know the law, yet none of you are authorized or licensed to practice law in that state. That would therefore prohibit any of you from preparing a Will. If your client is traveling to a jurisdiction in which you are admitted to have his Will prepared, then that begs the question as to whether your client knows that you are not licensed to practice law in his state, or whether the client believes that you are admitted there when in fact you are not. If you are not admitted to the state in which the client resides, you have not been certified as meeting the minimum competency for the practice of law in that state. How could you fulfill your ethical obligation to provide competent representation to your client if you have not met the minimum qualifications for practicing law in that other jurisdiction? It seems that there would be a presumption against you, although perhaps rebuttable, depending upon the law of that state.

Regards,
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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:17 p.m.

To: Trusts and Estates Law Section

Just for clarification purposes, I assumed that the client would be in New York to do the actual Will execution….

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:38 p.m.

To: Trusts and Estates Law Section

What all of you are missing is EPTL 3-5.1(c), which I understand has counterparts in most, if not all, other states and jurisdictions.

A Will made in New York, by a New York lawyer, as far as I understand, is valid elsewhere, wherever the testator is domiciled at execution or death.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 1:08 p.m.

To: Trusts and Estates Law Section

Paul:

Whether the will is valid and admitted to probate is immaterial. The issue is whether the act of preparing a will for a domiciliary of a state in which an attorney is not licensed constitutes the unauthorized practice of law in that state.

The fact that the seamless admission of such a will to probate reduces the likelihood that the unauthorized practice will come to light is another story.

Regards,
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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:33 p.m.

To: Trusts and Estates Law Section

I am always fascinated by discussions on this topic. It amazes me the difference of opinions on such a fundamental issue as what the unauthorized practice of law is. This is my two cents:

When a NY attorney prepares a will for an out of state person, even though it is valid for NY purposes and virtually every state would recognize it as valid, shouldn't you recognize that the Will you prepared will likely come under the jurisdiction of the probate court of the client's home state, and you then can be tripped up if the home state has particular quirks in its probate law that you don't know about.

For example, SC requires that the power to sell estate realty must be specifically granted in the will, otherwise permission from the court to sell is required. So if an out-of-state attorney prepares a will for a SC resident and does not know that requirement, the attorney is increasing the expense to the estate unwittingly. I imagine there are probably quirks in other state probate codes as well. This is the reason why I always tell people to see a probate attorney in their own state.

Interested to hear more opinions on this.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:44 p.m.

To: Trusts and Estates Law Section

You are absolutely correct. A NY attorney making a Will for a non-domiciliary and a non-domiciliary should be cognizant of EPTL 3-5.1(b)(1) which states that the devolution of real estate by intestacy or by Will is governed by the laws of the State where the property is located. Part of the proper drafting of a Will requires the attorney to ascertain the property on which the Will will act for a domiciliary or non-domiciliary.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:44 p.m.

To: Trusts and Estates Law Section

Chris,

Although I am confident when preparing a will for a client who may take it with him to another jurisdiction, I have cautioned clients who emigrate to check with a local lawyer on the validity issue.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 12:53 p.m.

To: Trusts and Estates Law Section

It is my understanding that if you prepare a will for use in a jurisdiction in which you are not admitted, you are the absolute guarantor that the will and all of its provisions comply with the laws and rules of the jurisdiction for which it has been prepared. While the execution may be valid in the other state (in this case, New Jersey) it is possible that some of the provisions may not be or may have a different interpretation than in New York. Unless you are thoroughly familiar with the laws and rules of such jurisdiction, you are risking future problems. Most states do not have a "privity" requirement for malpractice.

There are two separate issues—may you legally prepare such a will and *should* you prepare such a will?

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 4:05 p.m.

To: Trusts and Estates Law Section

I agree, Peter. We see this all the time here in Florida when a client's long-time estate planning attorney prepares an "exit Will" just before the client moves to Florida. The most common problems arise in naming the personal representative (where some in-laws are out-laws) and with the disposition of what will become the client's homestead in Florida. On occasions when I have been asked to prepare documents for a resident of another state, I have advised the client that I will be retaining local counsel to review and approve the document at the client's expense.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 1:05 p.m.

To: Trusts and Estates Law Section

Christopher—

I think your comments fall under the "should" you prepare a Will for an out-of-state resident rather than "can" you prepare a Will for an out-of-state resident.

I found a small blurb in an ethics opinion related to trademark practice that is of some relevance—I will keep looking to see if there is one more on point. I think the excerpt stands for the proposition that whether or not doing legal work for a non-resident is unauthorized practice of law depends on the law of the other jurisdiction. It does clearly state that lawyers licensed in one state may provide services to residents of another state. Again, the question is whether you are competent in terms of understanding the laws of the other state, and whether your malpractice carrier would cover you if you were not!

* *Services to Clients Outside New York*

> DR 3-101(B) provides that a lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction. Thus, whether a lawyer licensed only in New York may render legal opinions over the Internet to clients who reside outside of New York depends on whether the attorney's conduct constitutes the unauthorized practice of law in the other jurisdiction. That question is beyond the scope of this Committee's jurisdiction, though we note that lawyers licensed in one state may appropriately render legal services to clients resident elsewhere in many circumstances. N.Y. State 375 (1975). But see Birbrower, Montalbano, Condon & Frank v. Superior Court of

> Santa Clara County, 70 Cal.Rptr.2d 304, 306 (Cal.Sup.Ct. 1998) (New York firm that performed legal services in California engaged in the unauthorized practice of law in violation of California statute). We are similarly unable to opine on whether the limitation of the practice to federal trademark issues affects the applicability of state laws regarding unauthorized practice. See Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. Tex. L.J. 665 (1995).

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 1:11 p.m.

To: Trusts and Estates Law Section

Dear All,

An attorney preparing a Will for a person who resides in a state in which the attorney is not admitted is a *terrible* idea (a) for the reasons mentioned in other posts (i.e. the attorney has no idea as to the substantive law of the other jurisdiction which will govern the administration of the Will) and (b) the issue of whether or not such action constitutes the practice without a license is probably governed by the other jurisdiction about which the attorney hasn't a clue.

The mere fact that the Will may be valid because it was signed in NY in compliance with NY law is not the issue. I think it probably is alright to prepare such a Will if the client is sent a draft with a strongly worded letter that informs the client that prior to signing the document the client must seek local counsel to review the document.

John
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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 1:41 p.m.

To: Trusts and Estates Law Section

So…most everyone seems to agree that, regardless of the advisability of doing so, whether or not it is the impermissible practice of law in such jurisdiction is governed by the law of such jurisdiction.

I'm curious, do we even know for sure what is the law in NY? I.e., if an atty admitted say just in New Jersey or Florida, prepares a Will for a NY resident/domiciliary, is that atty impermissibly practicing law in New York? Does it make any difference if drafts were sent (mail or electronically) to the client in NY or only out of state? Does it make any difference if the Will is signed in the atty's office (NJ or FL) or if it is simply given or sent to the client and signed in the client's NY home or office or signed in another State altogether? Does it make any difference if the Will signing is supervised by a NY atty (whether in or out of NY) or not supervised by an atty?

As I said, I'm just curious.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 2:02 p.m.

To: Trusts and Estates Law Section

The "practice" issue is a canard.

If a NY attorney acts in New York, he is not "practicing" anywhere else.

The real issue, as has been pointed out, is whether, in practicing in New York, the attorney is practicing competently. That involves taking reasonable care that the instruments being prepared will have the effects intended by the client, without the client "buying" a lawsuit to get it done.

That goes for an attorney preparing a Will for a Florida domiciliary as well as for a Will for a NY domiciliary with property or interests outside of New York.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 2:08 p.m.

To: Trusts and Estates Law Section

The great thing about this forum is that there are so many good answers to a question like this. This series of emails is like a "roundtable" discussion at a CLE session on Ethics.

When it comes to professional conduct, satisfying the "letter of the law" is a good start, but giving the client reliable, useful advice and service requires much more.

If the only question is whether or not an attorney admitted to practice in NY is guilty of unauthorized practice of law, I think that the answer has to be "no" if all of the acts that the attorney performed took place inside the State of New York, and were not transmitted to another state, and the client, regardless of domicile, received the legal services inside NY. Everything else is a conflict of laws, legal ethics or legal malpractice question, which a NY attorney can legally (not necessarily competently) deal with.

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Subject: Re: NY Lawyer Preparing NJ Will

Date: Wednesday, December 15, 2010 2:54 p.m.

To: Trusts and Estates Law Section

Interesting how much angst this question has raised. For me, the answer is so obvious as to not warrant much discussion (except for giving the client names of several reputable attys in New Jersey!!!).

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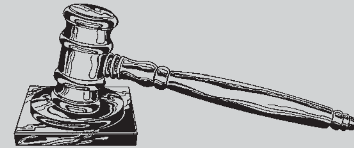
Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

Adoption

Adopted Child Surrendered for Re-Adoption after Decedent's Death Is Still a Child of Decedent for Purposes of Class Gifts

Decedent's will created a credit shelter trust for his issue and a marital trust distributable at the surviving spouse's death to decedent's then living issue, per stirpes. Decedent also created a lifetime irrevocable discretionary trust for his children, which on the eldest reaching 30 years of age is to be divided into a trust for each child terminating at age 40. Both the will and the trust expressly include adopted children in the definition of children. Decedent and his wife adopted Emily a year before decedent's death. Seven years later the surviving spouse surrendered Emily for re-adoption, and she was indeed adopted.

Emily's new parents filed petitions seeking to require the co-trustees of the testamentary and lifetime trusts and the executor of the decedent's will to account and moved for summary judgment. Surrogate Scarpino granted the requested relief compelling the accountings. The court held that Emily's status as a child of the decedent under the will and trust did not terminate on her re-adoption. Although Emily would not be treated as a child of the decedent under the general rule of N.Y. Domestic Relations Law § 117(2)(a), the section does not apply if the decedent expressed a contrary intent, which the court found: the express inclusion of adopted children in the documents was equivalent to naming Emily as a member of the class. In addition, the decedent clearly intended to provide for all of his children equally. Further, it is improbable that the decedent considered that his widow would surrender one of his children for adoption after his death. *Matter of Campbell*, 29 Misc. 3d 786, 907 N.Y.S.2d 419 (Sur. Ct., Westchester Co. 2010).

Dead Bodies

Right of Sepulcher Violated by Failure to Inform Next of Kin of Retention of Decedent's Brain for Further Examination

Decedent died in a motor vehicle accident. After autopsy, the decedent's body was released to the next

William P. LaPiana

of kin, who were not informed that the medical examiner had retained the decedent's brain for further examination. The next of kin sued the City of New York, which moved for summary judgment, and the motion was denied, the trial court finding that questions of fact existed as to whether the brain was lawfully retained for scientific purposes and whether the City unlawfully interfered with the right of sepulcher by failing to inform the next of kin that the brain had been retained. The City appealed, and the Appellate Division granted summary judgment on the question of lawful retention. However, the court affirmed, in a thorough discussion, the denial of summary judgment on the question of violation of the right of sepulcher, especially in light of N.Y. Public Health Law § 4215(1), which safeguards the right of the next of kin to receive all of the decedent's remains for burial. *Shipley v. City of New York,* 908 N.Y.S.2d 425 (2d Dep't 2010).

Fiduciaries

Executors; Disclosure Required by SCPA 2307-a Need Not Include Consequence of Non-Disclosure

Testator's will, executed on July 25, 2005, nominated as executor the lawyer who drafted the will. The testator also signed a separate instrument acknowledging the disclosures required by the substantive provisions of N.Y. Surrogate's Court Procedure Act 2307-a (SCPA) and closely tracking the statutory model except for the clause added effective November 16, 2004, which states that absent the execution of a proper disclosure, the lawyer acting as executor is entitled to only one-half the commission otherwise payable. The substantive provisions of the statute were amended effective August 31, 2007 to conform with the statutory model and require that the disclosure recite the consequences of non-disclosure. Declining to follow *Matter of Tackley*, 13 Misc. 3d 818, 821 N.Y.S.2d 750 (Sur. Ct., New York Co. 2006), Surrogate Gigliotti held that the disclosure executed by the testator substantially complied with the disclosure requirements in SCPA 2307-a(1) as it then read. *Matter of Riley*, 29 Misc. 3d 1059, 908 N.Y.S.2d 534 (Sur. Ct., Oneida Co. 2010).

Distribution of Trust Property to Three of Four Beneficiaries Breaches Trustees' Duty

Testator's will created a trust for the benefit of his wife and four children which was funded by the widow's renunciation of the condominium in which she and the decedent had resided and other real property (the family's "camp"). The widow and one of testator's daughters were co-trustees, and they were authorized to distribute principal to the beneficiaries if the trust income and their other resources were not sufficient for their "comfortable support, education and general welfare." The will also gave the co-trustees all of the powers testator would have if personally acting and made good faith decisions "conclusive." Ten years after testator's death the co-trustees decided that the trust should be terminated because of changes in the estate tax laws and distributed the condominium to the widow and the camp to three of the testator's four children. The excluded child wrote to his mother, raising no objection to the distribution of the condominium to her but objecting to being omitted from the distribution of the camp. Mother then wrote to her children, explaining that the fourth child was not included in the distribution of the camp because she had made "substantial monetary gifts" to him during the 10 years since testator's death.

When the widow died the omitted child petitioned for an accounting, objected to the account and moved for summary judgment. The Surrogate dismissed the objections and issued a decree approving the account. The Appellate Division modified the decree, holding that the distribution of the condominium was made in good faith because the trust was not generating any income and the widow was paying the expenses associated with the property. The court reinstated the objection to the distribution of the camp because the co-trustees failed to exercise the necessary care, diligence and prudence; although they acted in accordance with the widow's desire to treat her children "fairly," they were not authorized to do so. They could make principal distributions only if required for the children's support and general welfare. *Matter of Kalkman*, 77 A.D.3d 1287, 908 N.Y.S.2d 307 (4th Dep't 2010).

Powers of Attorney

Agent's Transferee Who Knew that Power of Attorney Did Not Give Agent Authority to Gift the Principal's Property Was Liable to the Principal

In 2006 the principal appointed his son agent under a statutory springing power of attorney under former N.Y. General Obligations Law § 5-1506 (GOL). The power of attorney did not give the agent the authority to make gifts. In 2008 the agent conveyed real property owned by the principal to his own creditor in satisfaction of a debt. The creditor then mortgaged the property. The county commissioner of social services brought an action on behalf of the incapacitated principal against the mortgagor and the mortgagee. The agent defaulted and the remaining parties moved for summary judgment. The court granted summary judgment for the mortgagee bank but against the mortgagor.

Surrogate Peckham first determined that under former GOL § 5-1506 neither the mortgagor nor mortgagee were required to receive the statement declaring that the contingency that sprung the power had occurred. As a result, their failure to receive the statement did not require them to review whether the agent had the authority to effectively gift the property to the mortgagor.

The mortgagor admitted that he knew the agent was paying his own debt with the transfer and should have known that the agent was breaching his fiduciary duty. In addition, a "simple examination" of the power of attorney form would have shown that the agent was not authorized to make gifts. Because the transferee/mortgagor had actual knowledge of the agent's fraud, he was liable to the principal for the value of the property. The mortgagee bank, however, had no reason to know of the fraud, did not have actual notice and was a bona fide purchaser for value. *Moon v. Darrow*, 30 Misc. 3d 187, 912 N.Y.S.2d 850 (Sur. Ct., Delaware Co. 2010).

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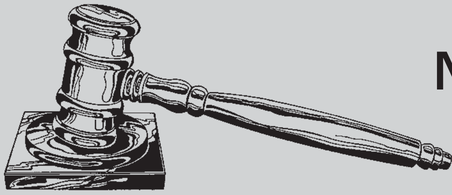

Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Attorney's Fees

In a contested accounting proceeding, the objectants moved to reargue the court's prior rulings of June 29, 2010 in favor of one of the trustees, which denied the objectants' requests that the fiduciary be denied legal fees, be denied commissions or at least annual commissions on principal and be directed to pay the legal expenses incurred by them in the litigation. The court had previously surcharged the fiduciary for losses sustained by the objectants as a result of the fiduciary's delay in distributing the principal of their respective trusts upon termination.

The court granted reargument but adhered to its original determinations. The court found that it had neither overlooked nor misapprehended the law with respect to the issue of the fiduciary's legal fees and costs and to his entitlement to annual commissions. The court held that the remaining issues required further discussion.

Insofar as the issue of objectants' legal fees was concerned, the court opined that New York courts adhere to the American rule, under which parties prevailing in litigation ordinarily may not shift their legal expenses to the losers. Although the court noted that the rule can at times undermine the financial value of a victory, it nevertheless continues to be applied, except under limited circumstances.

The court found it significant that one such circumstance involved the situation in which a fiduciary personally profits at the expense of the estate and is surcharged accordingly. In such instances, case law has sustained the fiduciary's liability for the litigation expenses incurred in pursuit of the surcharge. The court concluded that the case before it was distinguishable from this line of cases inasmuch as the fiduciary's breach of duty, attributable to his delay in distributing trust assets, was not apparent to him at the time it was committed. Indeed, the court noted that the fiduciary acted upon the advice of counsel, which, though not a defense, was relevant to the issue of whether his conduct was designed to achieve a self-serving purpose.

Accordingly, the objectants' request to reallocate litigation expenses was denied.

The court further held that precedent did not support objectants' request for denial of all commissions to the fiduciary. In pertinent part, the court found that the fiduciary did not evidence complete indifference to his stewardship or neglect the administration of the trusts subject to his charge. Rather, the court found it relevant that his decision to relinquish control to his co-fiduciary was at the request of his co-fiduciary and perhaps her adult sons, the objectants. Further, the court noted that his inaction at the time of distribution did not absolve him of liability but resulted in a significant surcharge. Under such circumstances, the court held that he should not bear the loss of commissions as well.

In re Lasdon, N.Y.L.J., Nov. 19, 2010, p. 36 (Sur. Ct., N.Y. Co.)(Surr. Glen).

Decanting

In *In re Tomasulo,* the petitioning trustee sought court approval pursuant to N.Y. Estates, Powers & Trusts Law 10-6.6(b) (EPTL) to appoint the principal of the trust for the benefit of the decedent's grandson to a new separate trust, under the authority of *Matter of Grosjean,* N.Y.L.J., Dec. 10, 1997, p. 35 (Sur. Ct., Nassau Co.). The court noted that the decision in *Grosjean* held that the statute was not limited to allowing invasions for generation-skipping transfer tax purposes.

The court concluded that the provisions of the testamentary trust give the trustee the sole and absolute discretion to invade the entire principal for the grandson's benefit. Further, it found that the proposed new trust did not alter the grandson's fixed income interest and maintained the interests of the trust remaindermen. Additionally, after consultation with the court, the petitioner modified the proposed new trust agreement to remove provisions that violated the limitations of EPTL 11-1.7.

Accordingly, the relief requested was granted.

In re Tomasulo, N.Y.L.J., Nov. 4, 2010, p. 26 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Eviction

Incident to a turnover proceeding, the preliminary executor of the estate moved to reargue the court's decision which allowed the alleged spouse of the decedent to remain in her co-op pending a determination of his spousal status and the validity of the propounded will. By its prior decision, the court held that if the respondent was determined to be the decedent's spouse, he would be entitled to an elective share against the estate,

and if he prevailed in the will contest, he would be entitled to sole ownership of the co-op. Nevertheless, in reaching this result, the court also held that as a condition to his remaining in the co-op, the respondent would be responsible for paying all expenses attendant to his occupancy, i.e. utilities, maintenance, insurance and upkeep. Further, upon proof from the fiduciary that the respondent was delinquent in satisfying these charges, the court directed that he post security and that if he failed to do so, he would be directed to vacate the apartment.

On reargument, the fiduciary requested that the court direct the respondent pay market rent on the property rather than the expenses of its maintenance and upkeep. After assessing the applicable case law on the subject, the court held that under the circumstances, given the equities involved (i.e., the fact that the respondent had previously co-habited the apartment with the decedent), it was appropriate to require the respondent to be responsible for the expenses attendant to his use of the premises rather than rent. However, the Court concluded that in the event the respondent was unsuccessful in the pending litigation, the fiduciary was not precluded from seeking damages against him attributable to the difference between the amount he was paying during the pendency of the proceedings and the amount he would be required to pay as rent as a tenant.

In re Trezza, N.Y.L.J., Nov. 1, 2010, p. 21 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Fiduciary Eligibility

Pending before the court were three proceedings—the first, by the decedent's son, requesting probate of his will; the second, a cross-petition by the decedent's daughter requesting letters of administration; and the third, by the son requesting, *inter alia,* an order revoking letters of temporary administration issued to the decedent's daughter.

The decedent's only distributees were his son and daughter. The son commenced the probate proceeding, and citation and supplemental citation issued to the daughter. Allegedly, the daughter could not be located, and the son obtained an order for substituted service upon her. Supplemental citations again issued to the daughter, but as of the date of the decision she had not yet been served.

In the intervening period, the daughter sought and obtained letters of temporary administration and thereafter served the decedent's son with a citation seeking a decree granting her permanent letters of administration. The son then commenced a proceeding seeking an order revoking the daughter's letters of temporary administration and a decree admitting the decedent's will to probate. The application was opposed by the decedent's daughter.

As an initial matter, the court denied the son's request for the admission of the decedent's will to probate on the grounds that jurisdiction in the probate proceeding remained incomplete. Nevertheless, the court noted that absent grounds for disqualification, a duly nominated executor is entitled to preliminary letters testamentary to provide for the immediate administration and protection of the assets of the decedent in instances where there may be a delay in probate. Accordingly, the court granted the son's request to revoke the letters of temporary administration to the decedent's daughter and held that preliminary letters would issue to the decedent's son, limited to prosecuting the causes of action for wrongful death and conscious pain and suffering. The daughter's application for letters of administration was held in abeyance pending the outcome of the probate proceeding.

In re Estate of Rullan, N.Y.L.J., Nov. 15, 2010, p. 19 (Sur. Ct., Bronx Co.) (Surr. Holzman).

Limited Letters

The decedent was survived by a daughter and two sons, one of whom later died. Pursuant to the terms of the propounded will, the decedent devised a one-half interest in certain real property to his daughter and the remaining one-half interest to his two sons. The instrument nominated the daughter as the executrix of the estate. A few weeks after the instrument was signed, the decedent purportedly transferred the one-half interest he had devised to his sons in the will to his daughter and his post-deceased son as joint tenants with rights of survivorship.

When the purported will of the decedent was offered for probate, objections were filed by his surviving son, who petitioned for the issuance to him of limited letters of administration in order to obtain the decedent's medical records and to commence a proceeding pursuant to N.Y. Surrogate's Court Procedure Act 2103 (SCPA) against the decedent's daughter in connection with the real property. The application was opposed by the daughter, who alleged that her brother was attempting a fishing expedition, and that, in any event, any claim for recovery of the real property was barred by the statute of limitations.

The court opined that limited letters of administration are issued pursuant to SCPA 702 in those instances where, as in the case before it, it is unlikely that the person who is a nominated or appointed fiduciary would pursue a claim either because it is against herself or against another party that the fiduciary would not be inclined to pursue. The court rejected the daughter's contention that any claim would be barred by the statute of limitations, holding that it was premature until such time as a pleading was filed. Further, the court noted that the issuance of limited letters to the son did not authorize him to utilize estate assets to prosecute his claims and that only in the event he succeeded in recovering assets for the estate would the court entertain an application by him to be reimbursed.

In re Leach, 2010 N.Y. Slip Op. 51015 (U) (Sur. Ct., Bronx Co.) (Surr. Holzman).

Pre-Action Disclosure

In *In re Kirkwood,* the executrix filed an inventory with the court, which provoked three of the estate beneficiaries, children of the decedent, to allege that the executrix, also a child of the decedent, had misappropriated funds of the deceased prior to his death, with the assistance of her husband.

At a conference on the matter, it was revealed that the fiduciary's husband had provided legal advice and counsel to the decedent for over four decades and was involved in the opening of a Smith Barney account, of which his wife was named the beneficiary, into which substantial assets were transferred shortly before the decedent's death. In addition, the husband admittedly witnessed the transfer of a 49% interest in two closely held businesses to his wife but maintained that he had no role in the transaction.

As a consequence of the foregoing, the court so-ordered a subpoena to obtain the deposition of the fiduciary's husband pursuant to CPLR 3106(b). The husband moved to quash or in the alternative for a protective order, arguing that the court had no jurisdiction to issue the subpoena since no action was pending.

The motion was denied. The court found that it had the authority to issue the subpoena despite the fact that no proceeding was pending, as it had jurisdiction over all matters relating to the administration of the decedent's estate, which remained open. Further, the court opined that it had jurisdiction under the CPLR to issue the subpoena pursuant to the provisions of CPLR 3102 (c), providing, *inter alia,* that before an action is commenced, disclosure to aid in bringing an action may be obtained upon order of the court. To this extent, the court noted that three of the estate beneficiaries had indicated that they were contemplating a proceeding to remove and surcharge the executrix, as well as a reverse discovery proceeding against her husband. Finally, the court found that the documents sought from the fiduciary's husband, particularly given his involvement in the decedent's affairs prior to death, were material and necessary to the administration of the estate.

In re Kirkwood, 2010 N.Y. Slip Op. 61532 (Sur. Ct., Dutchess Co.) (Surr. Pagones).

Probate

In a contested probate proceeding, the court held a bench trial on the issues of testamentary capacity and undue influence. The court had previously granted the proponent's request for summary judgment on the remaining issues.

The decedent was survived by five children, three of whom later died. The propounded will was executed in July 1986, about one year before the decedent's death at the age of 89. The proponent of the will was the administrator of her post-deceased son Richard's estate. The probate petition was not filed until twenty years after the decedent's death and three years after Richard's death.

Three sets of objections were filed to the will. The sole asset of the estate was the decedent's home, which she devised and bequeathed to Richard subject to certain conditions. The residue of the estate was devised and bequeathed in equal shares to the decedent's children.

The record revealed that the decedent suffered a stroke 10 years before her death that resulted in her partial paralysis, requiring the assistance of an aide for the rest of her life. The testimony also indicated that the decedent's children assisted in her daily affairs after the stroke and that she enjoyed a close relationship with all of them. The decedent resided in the top level of her two-family home until her death, and Richard occupied the lower level of the premises until his death.

The attorney-draftsman of the instrument testified that he had practiced law for 52 years, during which time he drafted and supervised the execution of over 1,000 wills. On the day prior to the execution of the instrument, he testified, Richard called him and provided him with instructions as to the dispositive provisions of the instrument, which he followed.

The following day, the attorney and his wife arrived at the decedent's home to serve as the attesting witnesses, admittedly without any knowledge of the decedent's competency. Nevertheless, the attorney stated that he read and explained each provision of the will to the decedent, and she acknowledged that she understood its terms. The decedent, when asked, provided the reason why she favored her son, Richard, over her other children. Although the attorney noted that the decedent had some difficulty in signing the instrument, she ultimately did so to the best of her ability. Thereafter, the attorney, his wife, and the decedent's aide signed as witnesses. The will had an attestation clause and, according to the attorney, was executed in accordance with the statutory formalities.

The attorney said he did not question the decedent as to her knowledge regarding the nature and extent of her assets because Richard had told him that the house was her sole asset. On cross-examination, the attorney conceded that it was unusual for him to receive the instructions for a will from its principal beneficiary. The attorney testified that he had never met Richard prior to the execution of the decedent's will.

The testimony of the attorney's wife was essentially the same as her husband's; the third witness did not testify at trial.

One of the attorney's children testified at trial that, *inter alia,* the decedent would not have understood the terms of the instrument when it was executed and could

not engage in any meaningful conversation. In addition, two of the decedent's grandchildren testified. One grandchild stated that she visited with the decedent twice a month and stayed with her at her home for approximately half a week. She stated that in her opinion the decedent had no knowledge of her assets and never left her home after her stroke. The decedent's children took care of all her personal needs and finances. Prior to the execution of the propounded will, Richard fired the decedent's long-time aide, and her condition markedly deteriorated. The witness testified that Richard prevented this aide from visiting the decedent and was controlling in other ways as well.

The second grandchild who testified stated that by 1985 neither she nor her mother could have lengthy conversations with the decedent and that any responses elicited from her were generally monosyllabic. This witness confirmed that the decedent's condition worsened after her long-time aide departed, and thereafter, she hardly spoke.

After a thorough examination of the applicable law on the issues of testamentary capacity and undue influence, the court concluded that the totality of the proof established that Richard controlled the decedent's life to a significant extent. This was as a result of his residing at the premises and was evidenced by his unilateral decision to fire the decedent's long-time aide, and thereafter, his refusal to let the aide visit with her, as well as his control over what food was delivered to the decedent. Moreover, the court found the evidence to be clear that the decedent was incapable of handling her financial and personal affairs and that Richard principally exercised control over these matters, as demonstrated by his selection of the attorney-draftsman of the will and his involvement with its terms and execution. Based on these circumstances, the court found that a confidential relationship existed between Richard and the decedent, which gave rise to an inference of undue influence. No explanation was provided by Richard as to why the decedent favored him over her other children, who apparently also had a close relationship with her, provoking the conclusion that the instructions given to the attorney by Richard were the result of his own dispositive scheme rather than the decedent's testamentary wishes.

Further, while the attorney-draftsman and his wife testified as to the decedent's apparent capacity, neither one had any dealings with her, either before or after the execution of the will, or was aware of the fact that she was unable to handle her financial affairs or instruct others regarding her personal needs. Additionally, the court found it troubling that the will was executed the day after Richard spoke with the draftsman, leaving the decedent no time to consider whether the will accurately reflected her wishes or to discuss the will and its provisions with others. Under the circumstances of the decedent's health and deteriorating condition, the court was not persuaded that the decedent's affirmative responses as to her understanding of the will and its terms was reflective of her testamentary capacity.

Accordingly, the court held that the proponent had not met his burden on the issues of testamentary capacity and undue influence, and denied probate of the propounded instrument.

In re Caesar, N.Y.L.J., Dec. 13, 2010, p. 22 (Sur. Ct., Bronx Co.) (Surr. Holzman)

Subpoena

In a contested probate proceeding, the preliminary executors moved to quash subpoenas issued to JPMorgan Chase requesting financial documents relating to an attesting witness, as well as to the attesting witness personally requesting that he appear and be examined and to produce all of his individual income tax returns and bank accounts, records authored by any doctor or home care attendant and all documents relating to the attorney-draftsman's representation of the decedent or her companion, who was named as a co-executor in the propounded will.

In support of the motion, the preliminary executors alleged that the subpoenas were overly broad and that the personal financial information of the witness, who received no benefits under the will, had no bearing on the objections to the validity of the instrument. Additionally, the movants alleged that the attesting witness had already been deposed and that if a further examination was requested, leave of court pursuant to SCPA 1404(6) was required.

Upon consideration of the subpoenas, the court held that they were too broad, inasmuch as they were not limited to a time frame related to the execution of the propounded will. Moreover, the court concluded that the objectant had failed to show a relationship between the witness's personal tax returns and the issues in the will contest. Although the objectant alleged that the information sought could be useful to him in a future discovery proceeding should he prevail in the will contest, the court opined that this did not serve to establish the relevance of the documents in the probate proceeding. The court also concluded that to the extent the subpoenas sought documents authored by medical professionals, they were on their face unreasonable, given the rules of confidentiality surrounding medical records, burdensome and lacking in specificity.

Accordingly, the court granted the motion.

In re Moles, N.Y.L.J., Nov. 4, 2010, p. 26 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Surcharge

Before the court in *In re Gourary* was a motion for summary judgment in a contested intermediate account-

ing by the executrix of the estate, the decedent's spouse. Objections to the accounting were filed by the fiduciary's son alleging, *inter alia,* omission of income tax refunds from the estate, use of estate funds to pay expenses attendant to the apartment in which the fiduciary resided, failure of the fiduciary to reimburse the estate for penalties and interest on late payment of estate taxes and use of estate funds to pay for secretarial assistance in the administration of the estate.

The court denied the motion in part and granted the motion in part. With respect to the income tax refunds, the record revealed that after the decedent's death the executrix filed joint income tax returns for her and her deceased husband and utilized estate funds to pay the tax. The tax was overpaid to the extent of $483,157, and a refund was issued, which the executrix retained for herself. The court held that the executrix could not claim those funds as her own, inasmuch as estate property was used to satisfy the liability. Accordingly, summary judgment was granted on this objection, and the executrix was surcharged for the amount of the refund, together with statutory interest.

The court also granted summary relief with respect to the use by the fiduciary of secretarial assistance. The court found that although the estate was large, its assets were not complex, and the fiduciary had failed to demonstrate why the estate's administrative needs were beyond her capacity to handle. Accordingly, the full amount of the fees paid was charged against the fiduciary's commissions.

Similarly, the fiduciary was surcharged for use of estate funds to satisfy the expenses of her apartment. The record revealed that the apartment had been specifically bequeathed to the fiduciary, although the shares had not been transferred to her until 15 months after the decedent's death. Nevertheless, the court opined that a specific bequest passes directly to the beneficiary thereof upon the testator's death, subject to the probate of the will and any need to sell the bequeathed asset to pay a valid administrative expense. The court concluded that the circumstances did not demonstrate any type of problem, such as a contest over title, or occupancy by a third party, that would require the estate to carry the apartment at its own expense. Accordingly, the fiduciary was directed to restore to the estate the monies used for the expenses of the apartment, together with statutory interest.

Finally, the court surcharged the fiduciary to the extent of the interest and penalties paid by the estate, together with statutory interest.

In re Gourary, N.Y.L.J., Nov. 16, 2010, p. 25 (Sur. Ct., N.Y. Co.) (Surr. Glen).

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