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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Ilene Cooper

This message is my first since I assumed the position of Chair of our Section. I am proud indeed to be serving as Chair of the largest and, I daresay, most productive and financially sound Section of the New York State Bar Association. I thank you for the honor and am appreciative to all of you for your support in the coming year.

The year 2012 holds much in the way of programs and initiatives for our members and, in many ways, represents a continuation of the good work and efforts of our past Section Chair, Betsy Hartnett, and the Committee Chairs who worked so diligently during her stewardship. Congratulations are in order to Betsy and program chair Mary Anne Cody for a job well done on the program at the Annual Meeting, which brought hundreds of our colleagues together at the New York Hilton. Panelists Michael Stutman, Kenneth Joyce and James Spratt presented discussions on "Marital Issues of Trusts and Estates Lawyers (In Their Practice)," including recent changes in matrimonial law and income and transfer tax issues. The luncheon that followed was highlighted by the Nominating Committee's recommendation of the incoming slate of Section officers. For those who could not attend, this year's slate of officers was as follows:

Chair:	Ilene S. Cooper
Chairperson-Elect:	Carl T. Baker
Secretary:	Ronald J. Weiss
Treasurer:	Marion Hancock Fish
Fifth District:	Ami S. Longstreet
Ninth District:	Kevin G. Murphy

Inside

Members-at-Large:	Darcy M. Katris Eric W. Penzer Martin A. Schwab

Thank you to the Nominating Committee for a great job and to all of you for your support. Our gratitude also goes to Hon. Lee Holzman, who was the luncheon keynote speaker and shared a series of opinions with the audience regarding marital rights.

The Executive Committee meeting that followed the luncheon was a standing-room-only occasion. The room was filled with many of the Section's past chairs, including Arlene Harris, Clover Drinkwater, Michael Zuckerman, Hon. Eugene Peckham, Colleen Carew, Robert Taisey and Michael O'Connor, as well as newly added Committee Chairs and Vice-Chairs. Thank you all for joining us; your participation is always invaluable.

One of the focal points of the meeting was a presentation by the Director of Governmental Relations, Ronald Kennedy, and Carl Baker, who discussed the reporting and lobbying process for legislative initiatives of our Section and provided a step-by-step guide for securing their review by the NYSBA Executive Committee. Thank you, Ron, for taking time from your busy schedule to meet with us.

The Sixth Report concerning a Uniform Trust Code in New York also was a subject of discussion. Judge Radigan, as Chair of the Advisory Committee to the Legislature on the Estates, Powers & Trusts Law and Surrogate's Court Procedure Act, informed us that the Sixth Report was near completion and would soon be submitted to the legislature as a finalized draft subject to review and comment. Following that submission, it is contemplated that the work of Judge Radigan's committee will end, and a new Special Advisory Committee, chaired by Judge Radigan and John Barnosky, will continue in its place. Our Section's review of the Sixth Report will be spearheaded by Professor Ira Bloom, who, with the approval of the Executive Committee, will now chair a committee created for that purpose. Our gratitude to Judge Radigan and the Advisory Committee for their outstanding contributions and continuing efforts, and to Ira Bloom for devoting time to this task.

Our Law Students and New Members Committee also should be commended for its efforts in enhancing our membership by creating interest in our Section among law students and new associates. Over the last six months, Joseph La Ferlita, Meg Gaynor and I have spoken to trusts and estates classes at Touro, St. John's, Hofstra, Fordham and New York law schools and have recruited more than 15 new student members. The Committee Co-Chairs, Lauren Goodman and Michelle Schwartz, recently hosted a wonderful networking event for young associates, which afforded them the opportunity to meet some of our Committee Chairs and become involved in committee work. The importance of their work to our Section's future development and growth should not be underestimated. I am hopeful that they will continue in their endeavors and that our Committee Chairs will continue to support their goals. To the extent that any Committee Chairs have projects in need of assistance, please contact Lauren and Michelle for referrals. I know from personally meeting many of these young attorneys that they are very eager to become involved.

Our Section supports involvement by our members and has welcomed Lori Sullivan, Marcus Colagiacomo, Angelo Grasso and Lisa Newfield to serve as Vice-Chairs of our Committees on Estate Planning, Estate Litigation and Charitable Organizations.

On another front, the Prudent Investor Symposium held in September at Columbia Law School was a resounding success, thanks to the hard work of its Chairs, Micky Ordover and Charles Scott, and an impressive panel of experts in the field. The program is available on videotape.

Finally, I welcome you all to the Spring meeting of our Section to be held at The Willard Hotel in Washington D.C. from May 3-May 6, 2012. In addition to spectacular venues for cocktail receptions and dinners, the meeting will offer a morning and an afternoon of CLE chaired by John Morken and Joseph La Ferlita on the negotiation and settlement of an estate litigation. I hope to see many of you there!

Ilene Cooper

Editor's Message

The CLE program at our Section's upcoming Spring Meeting in Washington, D.C. will focus on the settlement of trusts and estates disputes. To complement the program, this issue of the *Newsletter* features two articles about the resolution of trusts and estates controversies. Laird Lile outlines the tax issues that practitioners should take into consideration when crafting a settlement agreement, including the extent to which payments in settlement of a probate litigation may be subject to income taxes or may qualify for the estate tax charitable or marital deduction. He also offers helpful advice on the practical aspects of developing settlements from a tax perspective. Jaclene D'Agostino discusses everything that a trusts and estates practitioner should know about stipulations of settlement, from the strict statutory requirements that must be met in order to create an enforceable stipulation to the circumstances in which a stipulation may be set aside, to the special issues that arise when an infant is a party to a stipulation.

Two other articles in this issue report on recent case law and legislative developments in the probate litigation area. Sandy Schlesinger and Ross Katz discuss Surrogate Glen's decision in *Matter of Rosasco*, which recognized duress as a separate and distinct ground apart from undue influence for invalidating a will. As Sandy and Ross note, the surrogate's analysis of this distinction was long overdue. Theresa Kraker and Marianna Schwartsman report on the recent amendments to the provisions of New York Estates, Powers & Trusts Law 3-3.5 and Surrogates Court Procedure Act 1404. These amendments were enacted to clarify the scope of pretrial examinations that may be conducted without triggering the provisions of an *in terrorem* clause in the wake of the New York Court of Appeals decision in *In re Schneider*.

The amendment of the statutory safe harbor provisions on pretrial discovery was just one of many important legislative changes in New York this past year that affect our practice, including the passage of the Marriage Equality Act and changes to New York's decanting statute (which we reported on in the Winter 2011 issue of the *Newsletter*). In this issue Sharon Klein discusses the New York and federal tax implications of these developments as well as recent New York guidance on various estate tax issues that arose in the wake of the 2010 federal estate and gift tax legislation. We will feature a detailed report on the implications of the Marriage Equality Act for trusts and estates practitioners in our next issue.

In the meantime, the editorial board is soliciting submissions for the Fall 2012 *Newsletter*. We welcome articles and columns, case reports 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 July 15, 2012.

Cristine M. Sapers

The Anatomy of a Settlement—Tax Aspects

By Laird A. Lile

Primum non nocere ("The first thing is to do no harm")

—attributed to Hippocrates

Just as the American Association of Anatomists says "[a]natomy is a vibrant and growing discipline,"[1] so too is probate and trust litigation. Unlike anatomy, probate and trust litigation often includes more art than science. Nowhere is this more true than while crafting a settlement. An aspect of a settlement where science and art combine, creating a thing both susceptible to calculation and beautiful to behold, is dealing with the tax issues.

I. Introduction

Tax issues should be identified and tax consequences should be considered when resolving disputes pertaining to trust- and estate-related matters. Whether the resolution is by judicial determination or by agreement, the tax impact should be given careful consideration. When the resolution is by judicial fiat, the ability to influence the tax impact of the outcome is more challenging and less certain (but not necessarily impossible!). In addition to the more widely acclaimed advantages of a settlement over a judicial resolution, another benefit of settling short of a judicial resolution is that the tax results may be better controlled.

By its nature, a settlement of a dispute provides the parties with much more control over the terms, conditions and even the tenor of the settlement. Through the settlement process, if the tax attributes are taken into consideration by both parties, a structure may be achieved that could increase all of the parties' economic interests, only at the expense of the fisc. If less than all of the parties to a dispute are aware of, and take into account, the tax ramifications of the settlement, then the tax-savvy advisors may achieve a superior result for their clients at the expense of the parties whose lawyers are not cognizant of the tax consequences.[2]

II. Which Taxes Matter

The scope of the taxes to be considered should be all-encompassing. The table below identifies the federal taxes that may apply to various parties.

In the settlement context, the estate or trust, the beneficiaries, the fiduciaries in their individual capacities and any entities involved, such as closely held corporations, partnerships, limited liability companies and the like, could experience income tax consequences. In addition, an estate, a trust or a beneficiary might also experience federal transfer tax ramifications from a settlement. In some cases, such as when a part of a settlement is structured as compensation for a beneficiary, employment taxes could also be affected.

In addition to federal tax issues, the ramifications of state tax laws should also be considered. The initial issue will be which state's laws might apply. The possibilities include the state where the decedent resided, particularly in a probate situation. The trustee's state of residence or where the trustee is doing business will generally be relevant in litigation regarding the administration of a trust. If the dispute involves an asset with a location or nexus with a particular state, then that state's transfer taxes may become an issue in a settlement. Lastly, but certainly not because of their relative importance, are the local tax issues related to the jurisdiction where the beneficiaries or other parties reside.

Once the relevant states have been determined, the taxes that might be imposed by those states include the same type of taxes that might apply on the federal level. In addition, many states apply *ad valorem* taxes or taxes based upon transfers of property interests which could apply in a settlement of a probate or trust matter.

	Income	Estate	Gift	Generation-Skipping	Employment
Estate	✓	✓	✓	✓	✓
Trust	✓	✓	✓	✓	✓
Beneficiary	✓	✓	✓	✓	✓
Fiduciary	✓				✓
Entity	✓				✓

Identification of the taxes that might apply is an important first step. With the dissecting table properly set, an examination of the substantive tax issues related to settlements of probate and trust matters is the next step.

III. Income Tax

An oft-cited decision involving income taxation of probate litigation settlements is *Lyeth v. Hoey*.[3] In that case, the taxpayer had sought to invalidate his grandmother's will and receive his intestate share. The grounds asserted by the taxpayer / grandson included lack of testamentary capacity and undue influence. Prior to a judicial resolution of the will contest, the parties agreed to a settlement. The terms of the settlement provided that the contested will would be admitted to probate and the taxpayer would receive a distribution of cash and securities in settlement of contest of the will. Finding that there was no question that the taxpayer would have been exempt from income tax on property received as an heir if he had successfully litigated his claim, the Supreme Court observed "…that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption."[4]

The taxpayer / grandson received property as part of the settlement in recognition of his status as an heir. Accordingly, the property was appropriately treated as acquired by inheritance for purposes of applying the tax laws and therefore excluded from gross income for federal income tax purposes.

Just two years after losing *Lyeth v. Hoey*, the Service attempted to draw a distinction between a settlement paid based upon an intestate heir claim and the settlement of a claim by a legatee under a prior will. In *Keller v. Com'r*,[5] the taxpayer excluded from her income the property she received from an estate that she received in a settlement of her claims as a beneficiary under a prior will. The taxpayer was not an heir of the decedent and accordingly she had no claim under intestacy. The court was not persuaded by the government's literal application of *Lyeth v. Hoey*. Instead, the court applied the overriding principle from the Supreme Court's decision and found that the amount that the taxpayer received was properly excluded from gross income for federal income tax purposes.

The converse of the origin-of-the-claim theory of *Lyeth v. Hoey* also applies: if the original claim would have generated taxable income had it been paid in due course (if it is, for example, a claim for compensation for services), the amount paid to settle the claim is also taxable.

In *Mariani v. Commissioner*,[6] the court held that the son of a decedent received property reportable as gross income upon receiving a payment under a settlement of his claim. The claim had three prongs: (i) the decedent had agreed to compensate his son for work on his father's ranch by leaving him a portion of the ranch; (ii) the claimant rendered services for which the decedent had agreed to pay, but had not done so; and (iii) work and labor performed by the claimant, which remained unpaid. The claim was objected to by the executor and a lawsuit was filed. The basis of the lawsuit was similar to that set forth in the claim. The son / claimant attempted to exclude the settlement amount from income under I.R.C. § 102. The court agreed with the IRS in holding that this amount was not excludible, as the settlement had nothing to do with being a son / heir, and everything to do with being a claimant, and that the claim was for compensation for services.

These principles do not create an "all or nothing" situation. In *Parker v. U.S.*,[7] the court allocated amounts received by the taxpayer between taxable income and a tax-free inheritance. As a prelude to making this allocation, the court observed "…because the settlement agreement itself made no specific allocation of the proceeds, the court unfortunately is deprived of the usual guidelines for determining a reasonable allocation." Accordingly, the tax allocation provisions of a settlement agreement may be helpful to a court when asked to rule upon the tax results of the settlement.

Of course, the settlement agreement will not be slavishly followed by a court. In a case involving an heir of the merchandiser giant Marshall Field, a detailed settlement agreement was given great attention by the court in *Tree v. U.S.*[8] In that case, where the taxpayer was the re-married widow (after a grueling five-month and one day marriage) of Henry Field (brother to Marshall Field III and grandson of *the* Marshall Field), the service considered, and then disregarded, the settlement agreement provisions that suggested that the widow's dower rights were converted to an annuitized income payment.

J. Ronald Getty was more fortunate than Ms. Tree. *Getty v. Com'r*[9] determined the tax results after J. Ronald Getty had sued and settled with the J. Paul Getty Museum. As a result of the settlement, Mr. Getty received a single $10 million payment from the Museum, which was the residuary beneficiary of the estate of Ronald's father, J. Paul Getty. The lawsuit, which was settled, included allegations that Ronald was to have received income interests in certain trusts promised to him by his father in order to remedy certain inequalities with the other children of J. Paul Getty. The court found that had the senior Mr. Getty "performed his promise to remedy the inequality, he 'probably' would have done so by a bequest of property." Based upon

this finding, the court held that the taxpayer met his burden of proof to result in a determination that the settlement should be excluded from income.

The form of Mr. Getty's settlement was likely influential in the favorable tax result. Contrast this situation to that in *Harte v. United States*.[10] In *Harte*, the taxpayer released her rights as an heir in return for monthly payments for life to be made from the dividends from certain stock held in a testamentary trust. The taxpayer was held to have received a bequest of income from property, which was subject to income tax.

Lyeth v. Hoey and its progeny set forth the principle that a taxpayer receiving property in a settlement of probate or similar litigation should characterize the receipt for federal income tax purposes by reference to the basis or nature of the underlying chose in action.[11]

The manner in which the underlying claim is set forth initially, how it is pursued through the litigation and the structure of any settlement can all influence the perceived nature of the claim and perhaps the tax result.

IV. Estate Tax

Estate tax issues in settlements of probate and trust related litigation often arise with respect to whether the estate is entitled to a charitable deduction, a marital deduction or a deduction for an expense of administration or a debt of the decedent. Not surprisingly, if the settlement resolves a bona fide dispute and has some reasonable basis under state law, the dispositions under the settlement will generally be given effect under the estate tax laws.[12]

The IRS (and the courts) are apparently more suspect when settlements are among family members who may not be truly "at war" and instead are angling for a better tax result than would be the situation under the estate plan left by the decedent. Accordingly, marital deduction cases are generally more problematic than charitable deduction situations.

A. Charitable Deduction

After enactment of the split-interest rules of I.R.C. § 2055(e) in 1969, the IRS adopted the position in Rev. Rul. 77-491[13] that a bona fide will contest cannot convert a disallowed deduction into an allowable one. Specifically, the Service refused to allow a deduction for an outright gift where the form of gift specified in the will, and upon which the charity's claim to assets rested, was in a non-qualified split-interest form. After a series of judicial defeats, including *Strock Est. v. United States*[14] and *Flanagan v. United States*,[15] the Service changed its position and issued Rev. Rul. 89-31,[16] indicating that it would no longer challenge deductibility solely on the ground that a payment was made in lieu of a non-deductible split-interest.

This later ruling involved a non-qualified testamentary split interest charitable remainder trust. The trust provided income payable to decedent's child for life with the remainder upon the child's death being payable to charity. The child, in good faith, contested the validity of the will. The settlement of the dispute included the estate making an immediate payment to the child and distributing the balance of the residuary estate to the charity. The ruling held that a charitable deduction is allowed for settlement of a bona fide will contest that resulted in transforming a defective split-interest trust into an outright distribution to charity. The Service cautioned that, notwithstanding its taxpayer-favorable position in the ruling, it will scrutinize settlements to assure that the settlements are not collusive attempts to circumvent the tax laws.

As proof of its promised vigilance, the IRS attacked the amount of an estate tax charitable deduction involving a settlement agreement that purported to provide the charity with an accelerated remainder far in excess of the actuarial value of the gifts provided for under the terms of the decedent's will. *Terre Haute First National Bank v. United States*[17] held that the estate was entitled to a deduction only to the extent that the charity had an enforceable right under properly applied state law. Accordingly, the amount of the deduction was reduced to the actuarial value of the remainder interest for the gifts provided under the will, i.e., the maximum amount the charity would have obtained if it had succeeded in litigation.

The distinction between a reformation and a construction may be significant to the arbiter of the tax issues in determining whether an estate is entitled to a charitable deduction. Generally, construing the original intentions of the decedent / grantor provides more flexibility than a reformation.

The Service succeeded in attacking the deductibility of a testamentary gift to charity at the trial court level in *Starkey v. U.S.*[18] The issue in *Starkey* was the meaning of the terms in the will stating that the residuary estate was to be held for "Lawndale Community Church in Chicago, Illinois… The Trustees are to manage the property of the Trust for the benefit of this beneficiary, missionaries preaching the Gospel of Christ, and Milligan College." The IRS expressed concerns about the reference to "missionaries." The estate, then represented by the decedent's son, a sole practitioner in Ft. Wayne, Indiana, attempted to take corrective action. (The court's opinion noted that the son / attorney was not a specialist in estate matters, saying "at no point did he claim to have any estate-planning expertise.") The trial court in the tax proceeding placed great significance upon the "reformation" nature of the state probate proceedings. The court reasoned that a reformation "can have no retroactive effect on a completed transaction with an entity that is not a party [the IRS]

to the trust agreement or the legal proceedings."[19] The trial court then disallowed the charitable deduction and the estate appealed.

The appellate court opinion reversing the lower court does not express any concern about retroactive application and does not even use the term "reformation."[20] Instead, the appellate court referred to the state court proceeding as a "construction" proceeding.[21] The court found that the state probate proceeding had construed an ambiguous provision, being the meaning of the reference to "missionaries." Based upon the construction of the state probate court, the appellate court in the tax proceeding held "[a]s so construed, the bequest to the trust qualifies for a charitable deduction."[22]

In *Oetting v. U.S.*,[23] the trustees modified the decedent's estate plan, in the process turning an otherwise non-deductible interest into an interest deductible as a charitable deduction. The decedent had created an estate plan that provided for $100 per month to be paid to each of three elderly ladies for their lives; upon their deaths the remainder would be distributed to certain charities. The estate plan was created while the advisor was under the impression that the testatrix's assets were less than $100,000. Upon her death, her estate was determined to actually total approximately $1.6 million. Rather than allow the entire estate to be held in a trust from which only $3,600 was to be distributed to the individual beneficiaries each year, the trustees petitioned the state court to terminate the trust after the purchase of annuities (at an aggregate cost of $23,000) to satisfy the obligations to the individual beneficiaries. The court did not characterize the state court proceeding as either a reformation or a construction proceeding. A reason offered by the trustees for taking this action was to eliminate the breach of fiduciary duty claim that the remaindermen might have against them.

In PLR 200027015,[24] a ruling was sought regarding the charitable deduction in the decedent's estate. In that situation, the decedent devised his residuary estate to a perpetual trust which was to distribute the income to the decedent's church. So far, so good. However, the trust instrument also required the church, before using the income for any other purpose, to "order, or cause to be ordered, from the Evans-Knost Floral Company, or other floral companies, six bouquets of high quality artificial flowers valued at $12.00 to $15.00 per bouquet (present day prices adjusted for inflation), for the decoration of" certain graves of friends and family members twice a year. Having concerns about the ability to obtain a charitable deduction for the substantial sums devised to this trust because of the private purpose required for a portion of the trust income, the trustee instituted an action that effectively severed the private and charitable purposes. The private purpose was satisfied by paying a set amount (only $43,000) to the local cemetery operator in exchange for perpetual care contracts for the specified graves. The balance of the assets were then held in a trust from which all of the income was to be used for the charitable purposes of the decedent's church. The proceeding by which the severance occurred was styled a "construction and reformation" in the state probate court. The Service ruled favorably, allowing a charitable deduction for the assets other than those used to purchase the perpetual care contracts, resulting in no estate tax being due.

The impact upon the charitable deduction goes both ways: if the settlement results in less property passing to the charity than otherwise would be the case, then the charitable deduction will be limited to the amount the charity receives. In *Sage v. Commissioner*,[25] an amount was paid to an heir of the decedent pursuant to a compromise agreement with the result that the amount passing to the charity named in the will was reduced; the Court held that the estate tax charitable deduction should likewise be reduced. This is in accord with Treasury Regulation § 20.2055-2(d). That the same principle would apply to transfers to a charity pursuant to a compromise agreement was established in *Dumont v. Commissioner*.[26]

The decisions and rulings described above are a sampling, not an exhaustive examination, of the results achieved in the area of charitable deductions.

B. Marital Deduction

The estate tax marital deduction involves essentially the same legal issues as the estate tax charitable deduction. The government has adopted this position by regulation, at Treasury Regulation § 20.2056(c)-2(d)(2). This regulation provides:

> If as a result of a controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to the surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest. However, such a decree will be accepted only to the extent that the court passed upon the facts upon which deductibility of the property interest depends. If the assignment or surrender was pursuant to a decree rendered by consent, or

> pursuant to an agreement not to contest the will or not to probate the will, it will not necessarily be accepted as a bona fide evaluation of the rights of the spouse.

In examining the nature of the dispute being settled, the courts (and the government) are sometimes seemingly more suspicious when a marital deduction is sought than with a charitable deduction. In determining whether a settlement is a "bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate," the courts review whether the agreement was made in good faith as the result of an arm's length transaction. One aspect of determining the existence of an arm's length transaction is whether the proceedings between the parties are adversarial. A petition filed in a state court, even if that court adjudicates the parties' property rights, is not necessarily adversarial in nature. Accordingly, the outcome of that proceeding is not necessarily binding for estate tax purposes. On the other hand, it is not essential that the controversy be fully litigated by the parties.

A taxpayer experienced the worst of all possible results in *DePaoli v. Commissioner*.[27] In this case, the decedent's will devised his estate to his son. The decedent's surviving spouse and the son/beneficiary entered into agreement that the son would only receive the amount that could pass to him free of any estate tax and that the excess would pass to the surviving spouse. The agreement recited that there had been a dispute between the son and the wife regarding the validity of the will, and that by agreement the parties had resolved these differences. The IRS disputed the substance of the agreement and argued that there were no valid claims that the wife would have had against the estate in an effort to set aside the will. The court agreed, finding that the petitioner failed to show any credible argument that would have supported invalidating the will. In addition, the court also agreed with the IRS when it assessed gift tax to the son for the property that passed to the wife as a result of the agreement.

In *Estate of Hubert v. Commissioner*,[28] the Service argued that the marital deduction should be limited to the lesser of the settlement amount paid to the surviving spouse or the amount that would have been distributed under the prior will. In taking this position, the Service contended that the amount that would have been received should be a "cap" on the amount of the deduction. The estate argued that a good faith compromise of a bona fide will dispute, involving uncontested provisions of state law, should be absolutely dispositive of the question of enforceable rights. In deciding whether a settlement agreement is a "bona fide recognition of enforceable rights of the surviving spouse in decedent's estate," the court looked to whether the agreement was made in good faith as the result of arm's length negotiations and also behind the agreement to ensure that the claim on which it was based was valid. The court found that while it was not bound by the settlement agreement, it must give it some consideration and look at the adversarial or non-adversarial nature of the proceedings. Taking all of the circumstances surrounding the settlement agreement into consideration, the court found that the interests received by the surviving spouse under the settlement agreement were in satisfaction of enforceable rights in the decedent's estate and the marital deduction should not be limited by the amount she would have taken under the prior will.

A marital deduction was not allowed in *Estate of Aranson*.[29] In this case, the beneficiaries attempted to recast the decedent's estate plan in a form that would qualify for the marital deduction. The state court considered a petition for "Construction and Reformation" of the decedent's will and granted the relief sought. The Tax Court decision indicates that the state court decree was "not a bona fide evaluation of the rights [of the surviving spouse] because there was not a 'genuine and active contest' in the Surrogate's Court—the decree was rendered by consent." In addition, the decision found that the Surrogate's decree "is more than a mere clarification; it is a substantial change." Not surprisingly, the Tax Court refused to give the state court decision effect and the marital deduction was not allowed.

If the surviving spouse would have received some property that is included in the gross estate, but as a result of a settlement, does not end up with that property, then a marital deduction is generally not allowed with respect to that property.[30] Like Treasury Regulation § 20.2055-2(d) noted above, Regulation § 20.2056(e)-2(d)(1) generally accomplishes the same result in the marital deduction context, i.e., prohibiting a deduction for an amount that actually passes to another person pursuant to a will contest.

However, if the surviving spouse is to receive an income interest in a trust that is subject to the "QTIP" election under I.R.C. § 2056(b)(7) and agrees to terminate the trust in favor of the remaindermen even before the estate tax closing letter has been received, the surviving spouse is considered as receiving the QTIP interest passing from the decedent and a marital deduction is allowed in the estate.[31] (Of course, a gift was then made under I.R.C. § 2519 when the QTIP trust was terminated and distributed to the remaindermen.)

As with the discussion of the charitable deduction authority, the decisions and rulings referred to in these materials are not comprehensive but instead representative of the previous outcomes.

V. Timing of Distributions

When settling an estate or trust controversy, consideration should be given to the timing of distributions. If the separate share rule does not apply, the timing of distributions might favor one beneficiary over another with respect to carrying out estate income. With the present, broad application of the separate share rule, the opportunities for planning (and the possibility of pitfalls) may be reduced.

In addition, other timing considerations related to the avoidance or minimization of taxes might apply when settling litigation. For instance, if, as part of a settlement, a distribution is being made from a Florida probate estate to a non-Florida beneficiary, the Florida intangible tax may be avoided if the distribution occurs prior to January 1.

VI. Uniform Basis Rules—*Cottage Savings* Application

When structuring a settlement of a probate or trust proceeding, consideration should be given to the uniform basis rules. Those rules, found in I.R.C. § 1001(e),[32] have received attention in connection with the so-called *Cottage Savings* ruling, PLR 200231011.[33] Barbara Sloan thoughtfully reviewed that ruling in her article "Consequences of PLR 200231011: Cottage Savings or Cottage Industry?"[34] *Cottage Savings Association v. Commissioner*[35] treats exchanges of interests as "materially different" when the legal entitlements are different in kind or extent. Once material different interests are exchanged, then gain or loss under I.R.C. § 1001 occurs. This was the result desired by the taxpayer in *Cottage Savings*. In PLR 200231011, the Service applied this result to a trust beneficiary who received certain interests in a trust in exchange for other interests in that trust. The Service ruled that these interests were materially different and therefore the gain and loss rules under I.R.C. § 1001 applied. Because the interests being exchanged were term interests as defined in I.R.C. § 1001(e), the taxpayer's basis in the interests was disregarded and the taxpayer was subjected to capital gains tax.

VII. Practice Pointers

The above review of legal authority identifies some of the relevant issues and provides examples of results (both good and not so good) that may be attained. The practical aspects of developing settlements from the tax perspective are discussed in this section.

A. Identify Relevant Taxes

1. As discussed above, the taxes that might be relevant should be carefully examined. The possibilities are broad. This issue should be considered at multiple times throughout the matter; i.e., review which taxes might apply at the outset of the litigation and then when negotiating the settlement. The list might be different, as new issues have surfaced or laws have changed or due to intervention of other unanticipated forces, such as extraterrestrial beings.
2. The possible taxes (federal and state) include:
   - Income
   - Estate
   - Gift
   - Generation-Skipping Transfer
   - Employment
   - Recurring *ad valorem* taxes
   - Non-recurring *ad valorem* taxes
   - Transfer taxes, such as documentary stamps.
3. The possible taxpayers include:
   - Estate
   - Trust
   - Fiduciary, individually
   - Beneficiary
   - Entity, such as a partnership, a LLC or a corporation

B. Involve Tax Return Preparer

1. At some point, the legal theories and the sophisticated posturing all give way to the most basic of issues: the preparation of the tax return. Consider involving the tax return preparer before the matter is finalized.
2. Determine who should prepare the tax return as the settlement terms are being decided.
3. If consistent positions are desirable, require tax returns for the parties to be prepared by a mutually agreed upon preparer (either identified or not in the settlement agreement).

C. More Taxes Later?

1. Some settlements of estate and trust controversies are concluded with a hope as to a particular tax result but without certainty at that particular point in time.
2. Consider a provision as to an escrow of a fund for taxes, so that all parties can know that the funds will be available if necessary.
   - Don't leave a "blueprint" for the IRS regarding the tax issues.

- The funds should be held in a manner that assures the parties of their availability. Transferee liability often exists, such that the IRS can collect from a party who might be insulated from liability under the settlement agreement.

D. Private Letter Ruling Requests

1. Request a private letter ruling when appropriate to eliminate (or at least reduce) some of the tax uncertainties that might otherwise exist.
2. Obtain a private letter ruling to eliminate state law claims against fiduciaries or others.
3. Many factors should be considered when determining if a private letter ruling should be requested. For example, are there other issues that might attract attention on an audit? What course of action is available if an adverse ruling is going to be issued? Is there another recourse available? Is the cost of achieving relative certainty worthwhile?

E. State Court "Record Building"

1. Separate counsel for parties
   - All parties should have their own counsel.
   - Even (or especially) for "friendly" litigation.
   - If clients resist (typically because of additional cost), the clients should acknowledge the recommendation for separate counsel, the rejection of the recommendation and that the client has been informed of how the matter may be perceived by the government. This acknowledgment should be obtained in writing, perhaps at multiple stages during the representation.
2. Hearings
   - For "agreed" orders of substance, consider holding a hearing rather than submitting an agreed order.
   - When avoidable, do not describe (title) the order approving a settlement as "agreed" without fully reciting the history of the conflict and the arduous path to the final settlement.
   - Consider whether transcripts of those hearings will be helpful or counter-productive.
3. Find areas of controversy and engage in "give and take" on those areas.
   - Even in the "friendliest" of situations, there are areas that can cause controversies and that can be compromised.
   - The cleverest of lawyers can find possibilities of causes of actions where none might otherwise exist.

F. When to Involve the Tax Nerd

1. Including the tax specialist earlier likely produces better tax results.
2. Additional expense.

G. Under-Promise and Over-Hope

VIII. Conclusion

Many estate and trust litigation issues are heavily focused on state law. State law determines the substantive rights that are sought to be enforced, the principles for construing governing documents and the evidentiary and procedural rules. However, federal tax laws can provide a significant opportunity for allowing another source of contribution towards the amount available for resolving disputes. If the tax cost of a certain disposition or transaction can be reduced, then the amount that otherwise would have passed to the government will be available for division among the parties, allowing the "pot to be sweetened" from the fisc. Or if the tax consequences among the parties can be shifted, one party may achieve results that would otherwise be unattainable.

When resolving the overall disputes among the beneficiaries and fiduciaries (and maybe even claimants or other creditors), consider the tax implications sooner rather than later and thoroughly rather than hastily.

Endnotes

1. http://www.anatomy.org.
2. "There are two systems of taxation in our country: one for the informed and one for the uninformed." Attributed to Judge Learned Hand.
3. 305 U.S. 188 (1938).
4. *Id.* at 188.
5. 41 BTA 478 (1940) (*acq.*).
6. 54 T.C. 135 (1970).
7. 573 F.2d 42 (Ct. Cl. 1978).
8. 55 F. Supp. 438 (Ct. Cl. 1944).
9. 913 F.2d 1486 (9th Cir. 1990).
10. 252 F.2d 259 (2d Cir. 1958).
11. See also *Tribune Publishing Co. v. United States*, where the court stated that "whether a claim was resolved through litigation or settlement, the nature of the underlying action determines the tax consequences of the resolution of the claim." 836 F.2d 1176, 1177 (9th Cir. 1988).
12. Some recognition should be given to the premise adopted in *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Federal estate tax liability often is dependent upon a state law determination of a property interest or right. The federal government is not bound by a determination by a state trial court. If the state's highest court has not ruled upon the matter,

then the federal government is charged with determining what it believes to be the state law after giving ''proper regard'' to relevant rulings of other courts of the state. Accordingly, a state court determination after a bona fide contest will not necessarily be governing for federal tax purposes. For a thorough and thoughtful discussion of the *Bosch* analysis and practical implications of *Bosch*, see Shirley Kovar's article "Adversity After *Bosch*," 28 ACTEC Journal 88 (2002).

13. 1977-2 CB 332.
14. 655 F. Supp. 1334 (W.D. Pa. 1987).
15. 810 F.2d 930 (10th Cir. 1987).
16. 1989-1 CB 277.
17. 91-1 USTC ¶ 60,070 (S.D. Ind. 1991).
18. 58 F.Supp.2d 939 (S.D. Ind. 1999).
19. *Id.* at 953.
20. *Estate of Starkey v. Comm'r,* 223 F.3d 694 (7th Cir. 2000).
21. *Id.* at 697.
22. *Id.* at 704.
23. 712 F.2d 358 (8th Cir. 1983).
24. July 10, 2000.
25. 122 F.2d 480 (3d Cir. 1941), *cert. denied*, 314 U.S. 699 (1941).
26. 150 F.2d 691 (3d Cir. 1945).
27. T.C. Memo 1993-577.
28. 101 T.C. 314 (1993).
29. T.C. Memo 2003-189.
30. *Estate of Frost v. Commissioner*, T.C. Memo 1993-94.
31. PLR 9434029 (May 31, 1994).
32. I.R.C. § 1001(e) CERTAIN TERM INTERESTS. —

    (1) In general.—In determining gain or loss from the sale or other disposition of a term interest in property, that portion of the adjusted basis of such interest which is determined pursuant to section 1014, 1015, or 1041 (to the extent that such adjusted basis is a portion of the entire adjusted basis of the property) shall be disregarded.

    (2) TERM INTEREST IN PROPERTY DEFINED.—For purposes of paragraph (1), the term ''term interest in property'' means—

    (A) a life interest in property,

    (B) an interest in property for a term of years, or

    (C) an income interest in a trust.

    (3) EXCEPTION.—Paragraph (1) shall not apply to a sale or other disposition which is a part of a transaction in which the entire interest in property is transferred to any person or persons.

33. August 2, 2002.
34. 29 ACTEC Journal 102 (2003).
35. 499 U.S. 554 (1991).

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Stipulations of Settlement

By Jaclene D'Agostino

Parties to a litigation may stipulate with respect to most aspects of the action or proceeding in which they are involved. Indeed, it has long been established that parties may "shape the facts to be determined at trial"[1] and "chart their own procedural course through the courts"[2] by making any variety of agreements. Hence, through stipulations, parties may grant each other extensions of time to respond to pleadings or motions, waive procedural defects and, of course, settle their dispute. This article reviews the strict requirements for creating a valid and enforceable stipulation of settlement and the various issues that may arise with respect to such agreements.

Stipulations of settlement are favored by courts and will not be lightly cast aside.[3] Nevertheless, a stipulation of settlement that fails to comply with the statutory requirements under the New York Civil Practice Law & Rules (CPLR) is not enforceable—a fact that would likely surprise and dismay parties who relied upon counsel to implement a failsafe agreement. Accordingly, it is essential that attorneys ensure that stipulations to which their clients are parties fulfill the requisite statutory elements and meet any additional requirements that may arise based upon the particular circumstances of the case.

I. Statutory Requirements

Courts will not enforce a stipulation that does not comport with the provisions of CPLR 2104 or the prerequisites of a valid contract; i.e., a meeting of the minds, fair and adequate consideration and a manifestation of all the material terms of the agreement between the parties.[4] Specifically, CPLR 2104 provides that a stipulation must be made in one of the following manners: (1) between counsel in open court; (2) in a writing subscribed by the party or his attorney; or (3) reduced to the form of an order and entered.[5] Although these requirements appear rather straightforward on their face, New York case law is replete with instances in which parties have argued that one of the requirements was or was not met, placing the validity of a stipulation into question. Further, even if a stipulation complies with the necessary requirements, there are certain—albeit unusual—situations in which it may be cast aside.

"…made between counsel in open court"

Most disputes as to whether a stipulation is valid and enforceable turn on the question of what exactly constitutes "open court." The Court of Appeals has defined "open court" as "a judicial proceeding in a court, whether held in public or private, and whether held in the court house, or a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business."[6] Further, "the proceedings in open court would always have some formal entries, if only in the clerk's minutes, to memorialize the critical litigation events."[7]

There are two elements essential to find that parties entered into a stipulation in "open court." First, a judge must be present for the consummation of the stipulation,[8] and second, a court reporter must be in attendance to record and provide a stenographic transcription of the proceedings.[9] Absent one of these elements, the stipulation will not be deemed to have occurred in "open court," thus failing to satisfy the requirements of CPLR 2104. For example, the Court of Appeals has opined that a stipulation entered into in a judge's presence during a conference in chambers was not made in "open court,"[10] but where a court reporter was also present to accurately record the agreement made in the judge's chambers, the elements of "open court" were satisfied.[11] However, a stipulation entered into in the presence of a law clerk, rather than a judge, fails to meet the "open court" requirement, even if transcribed by a court reporter.[12] Surrogate's Court practitioners should note that a different result has been reached where a stipulation was made in the presence of a court-attorney referee.[13]

The absence of a stenographic transcript is not necessarily dispositive on the issue of "open court." In such situations, courts will analyze the format of the recording of the stipulation on a case-by-case basis. Stipulations made in the presence of a judge absent a transcript may be deemed made in "open court," "but only if the terms of settlement are clear and recorded in the court's minute book or otherwise 'entered during formal court proceedings.'"[14] The notes of a judge or a court attorney regarding the stipulation are generally insufficient to satisfy this requirement[15] because they are typically too informal, vague or inadequate to memorialize the terms of the stipulation.[16] Where the terms of the stipulation are adequately transcribed, there appears to be no requirement that the parties sign the transcript, unless the Domestic Relations Law governs the action or proceeding.[17] This, of course, is generally not the case for trusts and estates practitioners.

Interestingly, New York's federal courts seem to interpret "open court" more liberally than the state courts when following the provisions of CPLR 2104. This was illustrated in *Pretzel Time, Inc. v. Pretzel International, Inc.*,[18] where a stipulation of settlement was upheld as an "open court" agreement despite being transcribed during a scheduled deposition in the absence of a judge. The Southern District explained its interpretation of the "open court" requirement of CPLR 2104 as follows:

> [T]he "open court" provision does not require that the settlement actually take place in a courtroom before a judge. Rather, settlements undertaken with less formality but with similar indicia of reliability have been held to meet this provision…. The importance of the "open court" requirement is to ensure that there are some formal entries…to memorialize the critical litigation events.[19]

Thus, the Southern District placed less emphasis on the presence of the judge at the time of the agreement and instead relied upon the formal transcription of events. The *Pretzel Time* decision went on to cite similar cases where stipulations were transcribed by court reporters at scheduled depositions, such as the federal decision in *Penn Columbia Corp v. Cemco Resources. Inc*.[20] and New York County Civil Court case *Hub Press v. Sun-Ray Lighting*.[21] Significantly, there was no judge present for the agreement made in either of those cases.

In *Hub Press*, the court's rationale for deciding that the subject stipulation had been made in "open court" was based on the fact that the examination at which the agreement had been made "was scheduled pursuant to statute and under the aegis of the court."[22] Accordingly, the court explained, "[e]ither party was free to obtain court rulings during the examination or to appropriately move the court regarding the conduct of the examination including a request that the court actually monitor the examination."[23] Still, it is only the federal courts that have relied upon *Hub Press* in recent years, which indicates that the more stringent decisions by the higher state courts will likely govern this issue.

Further, although certain federal courts, such as the Southern District in *Pretzel Time*, have cited to CPLR 2104 as the statute relevant to stipulations, the district courts are currently divided as to whether it is at all applicable in the federal forum. As the *Pretzel Time* decision indicates, many New York district courts enforce settlement agreements that do not comply with the state rule.[24]

Although some practitioners may view the strict requirements of the "open court" threshold imposed by the New York State courts as overly technical, the requirements do have a significant purpose. Aside from eliminating disputes regarding the essential terms of an agreement, these requirements serve "a cautionary function by tending to ensure that acceptance is considered and deliberate."[25]

"…in a writing subscribed by him or his attorney or reduced to the form of an order and entered"

It is only in cases where a stipulation is not in a writing subscribed by the party or his attorney, or reduced to the form of an order and entered, that one must consider whether it was suitably made in "open court" in accordance with the statute. One might assume that satisfying the requirement of a subscribed writing is a black and white question that would not generate litigation, but as is the case with any legal issue, there are always some gray areas.

Consider the Court of Appeals' decision in *Bonnette v. Long Island College Hospital, et al.*,[26] where the parties reached an oral, out-of-court settlement of a medical malpractice case against a doctor and hospital, but the hospital required that the agreement be formally finalized in writing. The hospital sent the requisite forms to the plaintiff with a cover letter stating, "enclosed are copies of closing documents required to effectuate [the] settlement."[27] The plaintiff signed and returned only one of the forms.

Months later, the hospital informed the plaintiff that it did not consider any settlement to exist because the agreement had not been finalized as required by CPLR 2104, even though it conceded that an oral agreement had been made. The plaintiff sought to enforce the settlement, relying on the hospital's letter forwarding the settlement documents as a writing sufficient to satisfy the statute. The Court of Appeals rejected this position, opining that the letter failed to comply with the statute because it did not incorporate all material terms of the settlement. The court similarly rejected the plaintiff's arguments of substantial compliance and equitable estoppel based upon partial performance, stating that "[i]f there are rare occasions when these doctrines can permit enforcement of a settlement agreement where the literal terms of CPLR 2104 are not satisfied (a question which we do not decide), this is not one of them."[28]

In some cases, a stipulation will be enforced on equitable grounds despite its failure to satisfy the statutory requirements. The decision in *Regolodo v. Neighborhood Partnership Housing Development Fund Co., Inc.*,[29] illustrates one such situation.

In *Regolodo*, equitable estoppel was invoked to enforce a stipulation that failed to meet the technical requirements of CPLR 2104. There, the defendants' counsel had made an offer of settlement during a telephone

call with plaintiffs' counsel, and the offer was accepted, also by phone. Thereafter, the defendants acknowledged plaintiffs' acceptance by an e-mail to plaintiffs' counsel. The plaintiffs subsequently obtained the consent of the New York State Insurance Fund to the settlement, and its agreement to accept approximately one-half of the worker's compensation lien that it had held against the injured plaintiff, in reliance upon the existence of a settlement.

As in *Bonnette*, the defendants conceded the facts surrounding the agreement but argued that it was not enforceable because it failed to meet the requirements of CPLR 2104. The court disagreed, explaining that "where there is no dispute between the parties as to the terms of the agreement, the courts will refuse to permit the use of [CPLR 2104] against a party who has been misled or deceived by the oral agreement to his detriment or who has relied upon it."[30] Applying the foregoing rationale, the court opined that the agreement and all of its material terms had been "clear, final and definite"[31] and that the plaintiffs had relied upon those terms to negotiate a compromise with the New York State Insurance Fund over its lien on the settlement proceeds. Accordingly, the settlement agreement was upheld despite its failure to meet the statutory requirements.

Regolodo raises another pertinent issue that has arisen in more recent cases as a result of our increasingly technologically based society—the validity of stipulating via e-mail. Although it was not the basis for the enforceability of the stipulation in *Regolodo*, e-mail has been relied upon as the sole subscribed writing in seeking conformity with CPLR 2104. Hence, in *Williamson v. Delsener*,[32] the First Department upheld a settlement agreement, opining that e-mails exchanged between counsel in which their names appeared at the end constituted signed writings pursuant to statute. Similarly, in *Brighton Investment, Ltd. v. Har-Zvi*,[33] the Appellate Division explained that "an exchange of emails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are sufficiently clear and concrete to establish such an intent."[34] Accordingly, modern courts have largely accepted e-mails as writings sufficient to satisfy CPLR 2104.

II. Vacating Stipulations of Settlement

Although stipulations are generally favored by courts, parties may be relieved of the consequences of such an agreement if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to its terms.[35] However, "only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved of the consequences of a stipulation made during litigation."[36] Even if a stipulation is voidable on one of these bases, a party who accepts the benefit of a stipulation will not be relieved of its consequences, as he will be deemed to have ratified the agreement.[37] Similarly, if a party is present when his attorney is stipulating on his behalf, and he remains silent, his silence will usually be deemed a ratification.[38] The passage of a considerable length of time before challenging an agreement may, in certain circumstances, amount to ratification.[39]

Consider *Weissman v. Weissman*,[40] where the parties in a divorce action, each represented by counsel, entered into a stipulation of settlement in open court. About a year later, the defendant moved to enter a judgment of divorce incorporating by reference the terms of the agreement. The plaintiff opposed the motion and cross-moved to vacate the stipulation on the grounds that it was only an outline of an agreement and that she lacked the mental capacity to understand and agree to its terms. She further argued that the agreement should be set aside as unfair, unconscionable and a product of overreaching. Dismissing the plaintiff's claims, the court held that the plaintiff failed to carry her burden of demonstrating that she was unable to understand and agree to the terms of the stipulation. Moreover, the court added that the plaintiff had ratified the stipulation by accepting the benefits of the agreement for more than a year.

A stipulation may also be set aside where agreed upon by an attorney who lacked the authority to stipulate on behalf of the client. However, it is often difficult for a client to prove that the attorney did in fact lack authority; a client may be bound by a stipulation that was signed by his attorney even where it exceeds the attorney's actual authority, if the attorney had the apparent authority to enter into the agreement.[41]

In making such a determination, courts analyze the attorney-client relationship as one of agent and principal. As explained by the Court of Appeals, "essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction."[42] In other words, only the client's own statements or conduct can give rise to the reasonable belief that his attorney has the authority to act on his behalf; "the agent cannot by his own acts imbue himself with apparent authority."[43]

It has also been recognized that "the existence of 'apparent authority, depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent."[44] However, "[a] party who relies on the authority of an attorney to compromise an action in his client's absence deals with such an attorney at his own peril."[45] When a question of fact exists as to whether an attorney had authority

to act on behalf of his client, an evidentiary hearing is required.[46]

The landmark case addressing the issue of an attorney's authority to enter into a stipulation of settlement is *Hallock v. State*.[47] There, the attorneys for the parties entered into a stipulation of settlement on the record at a pre-trial conference on the scheduled trial date. The plaintiffs later moved to vacate, alleging that their attorney had no authority to enter into the agreement. The Court of Appeals upheld the stipulation as valid and enforceable because (1) the attorney had represented the plaintiffs throughout the case and participated in prior settlement negotiations and (2) the rules of the court required attorneys to have authority to enter into binding settlements at pre-trial conferences.[48]

Following the rationale of *Hallock*, the Second Department recently rejected a motion to vacate alleging that an attorney lacked authority to enter into a settlement agreement. In *Wil Can (USA) Group, Inc. v. Shen Zhang*,[49] the attorneys for both sides had met in private sessions with a mediator in the presence of their respective clients in an attempt to settle the action. A settlement was ultimately reached, memorialized in writing and signed by the mediator and the attorneys for the parties. The plaintiff later moved to enforce the agreement, and the defendants cross-moved to vacate. Relying upon the attorney's longtime involvement in the litigation and representation of the defendants in prior settlement discussions, the court affirmed the order granting the motion to enforce the agreement.[50]

Contrast this result with *Koss Co-Graphics, Inc. v. Cohen*,[51] where the Second Department reversed an order of the Supreme Court denying the defendant's motion to vacate a stipulation of settlement. There, the Appellate Division held that counsel for the defendant lacked the apparent authority to settle the matter, predicating its determination on the facts that "the defendant vigorously defended the proceeding on the merits from the start,"[52] there had not been any previous settlement negotiations and the defendant promptly moved to vacate the stipulation upon being advised of its attorney's actions.

Practitioners should be especially cautious in this respect. Although an attorney may believe he has the authority to stipulate on his client's behalf, if a client contests that authority and the court upholds the stipulation based upon apparent authority, a legal malpractice action could ensue. Therefore, where possible, it is recommended that the attorney insist that the client be present when a settlement is being placed on the record in open court, so that the client can allocute as to his or her knowledgeable and voluntary consent to the settlement.

It should be noted that courts are divided with respect to who has the burden of proving that a party's attorney lacked authority to act on a client's behalf. Although some decisions have appeared to place the burden on the party seeking to enforce the action,[53] other cases have placed the burden on the party disaffirming it.[54]

Another basis upon which a stipulation may be vacated is if necessary parties are not notified or fail to consent to the terms of a stipulation.[55] In many instances, infants or individuals under another disability are among the necessary parties, but in such scenarios, the creation of an enforceable stipulation of settlement is substantially more complex.

III. Infants as Parties to Stipulations

Generally, where an infant or someone under another disability is a necessary party to an action, it is the parent or guardian of the property who represents the individual in that action. CPLR 1201 provides that if the disabled individual has no such guardian, then the court will appoint a guardian-ad-litem to represent his interests.[56] It is the parent or guardian who will have the authority to enter into a stipulation of settlement on behalf of the incapacitated individual, but he or she must seek court approval of the agreement by motion pursuant to CPLR 1207 prior to its becoming enforceable.

The corresponding procedure in Surrogate Court is very similar. Under New York Surrogate's Court Procedure Act 315 (SCPA), a competent adult party who has a similar economic interest to another necessary party who suffers from a disability (i.e., an infant) may represent the other party by virtual representation.[57] However, the statute restricts virtual representation to court proceedings and informal accounts, and thus it does not apply with respect to a typical out-of-court settlement. Instead, where an individual under a disability is a necessary party to a settlement agreement that falls outside of SCPA 315(8), the parties must file a compromise proceeding pursuant to SCPA 2106.

Although SCPA 2106 and CPLR 1207 provide means by which necessary parties under a disability can be bound by a settlement, these statutes create additional hurdles to creating enforceable stipulations. For example, the proposed agreement may be rejected by the guardian-ad-litem, his or her appointment may result in the filing of objections or the court may not find the agreement to be "just and reasonable."[58]

IV. Conclusion

Although the stringent requirements of CPLR 2104 must be satisfied for a stipulation of settlement to be valid and enforceable, what exactly constitutes compliance with the statute is constantly subject to interpretation. The foregoing case law demonstrates the more recent interpretations to date and provides some reassurance that principles of equity, such as ratification

and estoppel, may serve to enforce settlement agreements in the rare but appropriate case.

Endnotes

1. *Nishman v. DeMarco*, 76 A.D.2d 360, 368-369, 430 N.Y.S.2d 339, 346 (2d Dep't 1980).
2. *Stevenson v. News Syndicate*, 302 N.Y. 81, 87, 96 N.E.2d 187 (1950).
3. *Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Peralta v. All Weather Tire Sales & Serv., Inc.*, 58 A.D.3d 833, 873 N.Y.S.2d 130 (2d Dep't 2009); *Perrino v. Bimasco, Inc.*, 234 A.D.2d 281, 61 N.Y.S.2d 53 (2d Dep't 1996), citing *Galasso v. Galasso*, 35 N.Y.2d 319, 361 N.Y.S.2d 871 (1974).
4. *See Hevesi v. Pataki*, 169 Misc. 2d 467, 474, 643 N.Y.S.2d 895 (Sup. Ct., N.Y. Co. 1996).
5. N.Y. Civil Practice Law & Rules 2104 (CPLR).
6. *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 4-5, 334 N.Y.S.2d 833 (1972).
7. *Id.*
8. *See Diarassouba v. Urban*, 71 A.D.3d 51, 55, 892 N.Y.S.2d 410, 414 (2d Dep't 2009), citing *Kushner v. Mollin*, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't 1988).
9. *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 4-5, 334 N.Y.S.2d 833 (1972).
10. *Id.*
11. *Sontag v. Sontag*, 114 A.D.2d 892, 495 N.Y.S.2d 65 (2d Dep't 1985).
12. *See Conlon v. Concord Pool Ltd.*, 170 A.D.2d 754, 565 N.Y.S.2d 860 (3d Dep't 1991).
13. *See In re Winer*, N.Y.L.J., Sept. 15, 1995, p. 30, (Sur. Ct., N.Y. Co.).
14. *Bergassi, LLC v. Ikon Solutions, Inc.*, 21 Misc. 3d 1133(A), 875 N.Y.S.2d 818 (N.Y.C. Ct., 2008), quoting *Neiman v. Springer*, 89 A.D.2d 922, 453 N.Y.S.2d 771 (2d Dep't 1982); *see also Popovic v. New York City Health and Hospitals Corp.*, 180 A.D.2d 493, 579 N.Y.S.2d 39 (1st Dep't 1992).
15. *See Rivers v. Genesis Holding LLC*, 11 Misc. 3d 647, 649, 812 N.Y.S.2d 301, 303 (Sup. Ct., N.Y. Co. 2006), relying on *In re Estate of Janis*, 210 A.D.2d 101, 620 N.Y.S.2d 342 (1st Dep't 1994); *Berkeley Realty, LLC v. Hicks*, 7 Misc. 3d 130(A), 801 N.Y.S.2d 230 (Sup. Ct., Appellate Term, 9th and 10th Judicial Districts 2005).
16. *See Errico v. Davidoff*, 170 Misc. 2d 378, 382, 647 N.Y.S.2d 382 (Civ. Ct., Kings Co. 1998); *Zambrana v. Memnon*, 181 A.D.2d 730, 581 N.Y.S.2d 83 (2d Dep't 1992).
17. *See, e.g., Trapani v. Trapani*, 147 Misc. 2d 447, 556 N.Y.S.2d 210 (Sup. Ct., Kings Co. 1990).
18. 2000 WL 1510077 (S.D.N.Y. 2000).
19. *Id.*
20. 1990 WL 6555 (S.D.N.Y. 1990).
21. 100 Misc. 2d 1055, 420 N.Y.S.2d 443 (N.Y. Civ. Ct., 1979).
22. *Id.* at 1057.
23. *Id.*
24. *See e.g., Figueroa v. City of New York*, 2011 U.S. Dist. LEXIS 9433 (S.D.N.Y. 2011); *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78 (E.D.N.Y. 2006).
25. *Tocker v. City of New York*, 22 A.D.3d 311, 311, 802 N.Y.S.2d 147 (1st Dep't 2005).
26. 3 N.Y.3d 281, 785 N.Y.S.2d 738 (2004).
27. *Id.* at 284.
28. *Id.* at 285.
29. 25 Misc. 3d 1229(A), 906 N.Y.S.2d 775 (Sup. Ct., Kings Co. 2009).
30. *Id.* at *2, relying on *Smith v. Lefrak Organization, Inc.*, 142 A.D.2d 725, 531 N.Y.S.2d 305 (2d Dep't 1988).
31. *Id.* at *3.
32. 59 A.D.3d 291, 874 N.Y.S.2d 41 (1st Dep't 2009).
33. 88 A.D.3d 1220, 932 N.Y.S.2d 214 (3d Dep't 2011).
34. *Id.* at 1222.
35. *See Genesis Holding LLC v. Watson*, 5 Misc. 3d 127(A), 798 N.Y.S.2d 709 (App. Term, 1st Dep't 2004).
36. *Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, relying on *Estate of Frutiger*, 29 N.Y.2d 143, 324 N.Y.S.2d 36 (1971).
37. *See Weissman v. Weissman*, 42 A.D.3d 448, 839 N.Y.S.2d 798 (2d Dep't 2007).
38. *See 1420 Concourse Corp. v. Cruise*, 175 A.D.2d 747, 573 N.Y.S.2d 669 (1st Dep't 1990).
39. *Bouloy v. Peters*, 262 A.D.2d 209, 692 N.Y.S.2d 329 (1st Dep't 1999); *Suncoast Capital Corp. v. Global Intellicom Inc.*, 280 A.D.2d 281, 719 N.Y.S.2d 652 (1st Dep't 2001).
40. *Id.*
41. *Wil Can (USA) Group, Inc. v. Shen Zhang*, 73 A.D.3d 1166, 903 N.Y.S.2d 429 (2d Dep't 2010).
42. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
43. *Melstein v. Schmid*, 116 A.D.2d 632, 497 N.Y.S.2d 482 (2d Dep't 1986).
44. *Cornwell v. NRT NY LLC*, 31 Misc. 3d 1209(A) (Sup. Ct., N.Y. Co. 2011), relying upon *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
45. *Slavin v. Polyak*, 99 A.D.2d 466, 470 N.Y.S.2d 38 (2d Dep't 1984); *see also Feuerstein v. Feuerstein*, 72 A.D.2d 546 (2d Dep't 1979).
46. *See Suslow v. Rush*, 161 A.D.2d 235, 554 N.Y.S.2d 620 (1st Dep't 1990); *In re Sosinksy*, 9 Misc. 3d 1113(A), 808 N.Y.S.2d 920 (Sur. Ct., Nassau Co. 2005).
47. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
48. *See* 22 NYCRR § 202.26[e]; *cf.* 22 NYCRR § 202.12.[b].
49. 73 A.D.3d 1166, 903 N.Y.S.2d 429 (2d Dep't 2010).
50. *See also Suncoast Capital Corp. v. Global Intellicom, Inc.*, 280 A.D.2d 281, 719 N.Y.S.2d 652 (1st Dep't 2001).
51. 166 A.D.2d 649, 561 N.Y.S.2d 76 (2d Dep't 1990).
52. *Koss Co-Graphics*, 166 A.D. 2d at 650, 561 N.Y.S. 2d at 76.
53. *See Ford v. Unity Hospital*, 32 N.Y.2d 464, 472-473, 346 N.Y.S.2d 238 (1973); *In re Estate of Lagin*, N.Y.L.J., April 12, 2006 p. 20 (Sur. Ct., Nassau Co.).
54. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Allison v. Allison*, 41 A.D.3d 519, 838 N.Y.S.2d 168 (2d Dep't 2007).
55. *See Estate of Drake*, 278 A.D.2d 929, 718 N.Y.S.2d 767 (4th Dep't 2000); *Estate of Mohamed*, N.Y.L.J., Feb. 18, 1999, page 28, col. 4, (Sur. Ct., Bronx Co.); *Sohn v. Kong*, N.Y.L.J., Dec. 22, 1993, page 25, col. 2 (Civ. Ct., Bronx Co.).
56. CPLR 1201.
57. N.Y. Surrogate's Court Procedure Act 315 (SCPA).
58. SCPA 2106.

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Recent Federal and State Legislative Developments and Their New York Tax Impact

By Sharon L. Klein

When federal and state laws collide, it is typically the states that have to cope with the fallout. Although the consequences may have been unintended, significant tax developments have recently emerged as a result of the interplay between federal legislation and New York law.

I. Marriage Equality Act

The Marriage Equality Act (the "Act") took effect on July 24, 2011. It is the stated intent of the legislation that marriages of same-sex and different-sex couples be treated equally in all respects under the law. However, because same-sex marriage is not recognized for federal purposes under the federal Defense of Marriage Act (DOMA), same-sex spouses will continue to be treated differently for federal law purposes.

In light of the Act's passage, the New York State Department of Taxation and Finance issued two Technical Memoranda regarding the Act's implementation for New York tax purposes.

New York Estate Tax Guidance

TSB-M-11(8)M[1] provides that as a result of the Act, the term "spouse" includes both same-sex spouses and different-sex spouses for New York State estate tax purposes. Accordingly, for estates of individuals dying on or after the Act's July 24, 2011 effective date, the same deductions and elections allowed for different-sex spouses are allowed for same-sex spouses, whether or not a federal estate tax return is filed.[2]

Same-sex spouses may thus claim a marital deduction for New York estate tax purposes to the same extent different-sex spouses may do so for federal purposes, and a qualified terminable interest property (QTIP) election may also be made for New York purposes for property passing to a marital trust for the benefit of a surviving same-sex spouse. A federal pro forma return, prepared as if the marriage were recognized for federal estate tax purposes, must be filed with Form ET-706 (New York State Estate Tax Return). If the estate of an individual who died while married to a same-sex spouse is required to file a federal estate tax return, both the pro forma federal return and the actual federal return filed must be attached to Form ET-706.

Income Tax Guidance

TSB-M-11(8)C[3] provides that same-sex married couples must file New York personal income tax returns using married status, even if they have used a filing status of single or head of household on their federal returns because their marriage is not recognized for federal tax purposes. In addition, to compute their New York tax, they must recompute their federal income tax as if they were married for federal purposes. This will require the preparation of a pro forma joint federal return in order to calculate the state return data. Same-sex married couples who are married as of December 31, 2011, will be considered married for the entire year. They must file their returns using a married filing status starting in tax year 2011.

Effect on Estate Planning

Although a myriad of highly significant state rights are now accorded to same-sex spouses in New York, the effect of the Marriage Equality Act on estate planning for same-sex spouses will probably not be nearly so dramatic. Because DOMA supersedes state law, same-sex couples who marry in a jurisdiction recognizing same-sex marriage still will not qualify as spouses for federal law purposes. Thus, federal tax benefits extended to married couples, including the unlimited marital deduction, QTIP elections, gift splitting, etc., remain unavailable to same-sex married couples regardless of state recognition. Planning techniques long used for unmarried same-sex couples will therefore continue to be important, even in a jurisdiction that recognizes same-sex marriage.

In that regard, however, it is important to note that cases challenging the constitutionality of DOMA are currently being litigated in the courts. One such case, *Windsor v. United States*,[4] is pending in a New York federal district court. Due to lack of federal recognition of same-sex marriage, no marital deduction was allowed for a testamentary disposition to the surviving member of a same-sex couple whose Canadian marriage was recognized in New York. The *Windsor* suit alleges that DOMA violates the equal protection principles of the U.S. Constitution because it recognizes the marriages of heterosexual couples but not those of same-sex couples. On February 23, 2011, the Attorney General announced that the Department of Justice would no longer defend DOMA, the President having concluded that the application of DOMA to legally married same-sex couples is unconstitutional.

In light of this momentum, practitioners may want to consider planning with an alternate scenario approach, keyed to whether DOMA applies or has been declared unconstitutional. That approach might obviate the need to urgently revisit planning if DOMA falls.

II. Separate New York QTIP Elections

A potentially acute state-level dilemma has emerged due to the interaction between federal and state law, stemming from the fact that New York will allow an estate to make a separate QTIP election for New York estate tax purposes only if the estate is not required to file a federal estate tax return. After the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Federal Act"), portability of unused exemption amounts between spouses is allowed if a portability election is made on the federal estate tax return. This gives rise to the following question: If an executor files a federal estate tax return solely to make a portability election, will that filing preclude the executor from making a separate New York QTIP election?

Initial New York Guidance After Federal Estate Tax Repeal

New York law has no provision for a separate state QTIP election that is independent from the federal QTIP election. When the federal estate tax was repealed in 2010, it was not necessary or perhaps even possible to make a federal QTIP election. Accordingly, it became unclear whether a disposition by a decedent dying in 2010 to a QTIP trust could qualify for the marital deduction for New York estate tax purposes.

In TSB-M-10(1)M,[5] the New York State Department of Taxation and Finance provided guidance on this question and clarified that an executor can make a QTIP election for New York estate tax purposes *when no federal return is required to be filed*. TSB-M-10(1)M posited the absence of a federal filing requirement in two possible scenarios—(1) when there is no federal estate tax in effect, and (2) when there is a federal estate tax in effect but an estate is under the federal filing threshold. The tax authorities presumably did not anticipate the fact that an estate might be required to file a federal estate tax return even if it was under the federal filing threshold, which became the case under the portability provisions of the 2010 Federal Act. If a federal return is filed in order to elect portability for an estate that is below the federal filing threshold, there would be no reason to make a federal QTIP election. (Indeed, such an election would generally be avoided.) But if the estate exceeds the $1 million New York estate tax threshold, there would be an advantage to making a QTIP election for New York purposes. There is no provision, however, for making a New York QTIP election that is inconsistent with a position taken on a federal return.

The New York dilemma arises due to the conflict between the state requirement noted in TSB-M-10(1)M that a separate QTIP election can be made in New York only when no federal return is required to be filed and the federal requirement that a return be filed in order elect portability, even if the first spouse's estate would not otherwise have to file a return.

In order to effect consistency of treatment among estates, it might be logical to suggest that the ability of an estate below the federal filing threshold to make a separate state QTIP election should not depend on whether or not a portability election is made. However, that is not the position that has been taken by the New York tax authorities.

New York State Guidance After the 2010 Act

In TSB-M-11(9)M,[6] the New York State Department of Taxation and Finance took the position that even if a federal estate tax return is filed solely for the purpose of electing portability, any QTIP election reflected on the federal return must be made for New York estate tax purposes. If a QTIP election is not made on the federal return, it may not be made for New York purposes. As stated in the TSB-M-11(9)M: "Unless New York State laws provide otherwise, when an estate tax return is filed for federal purposes, the amounts used to compute the gross estate and any elections reported on the federal return are binding for New York State estate tax purposes."

As an example, the guidance discusses the estate of an individual dying in 2011 whose estate is below the federal filing threshold but whose executor files a federal estate tax return solely to make a portability election. According to the guidance, if the estate does not make an alternate valuation election or QTIP election on the federal return, a separate alternate valuation election or QTIP election cannot be made for New York State estate tax purposes. On the other hand, if a federal return is not filed because the estate is below the filing threshold or because the estate opts out of the estate tax regime for 2010, elections may be reported independently on a pro forma federal estate tax return attached to a New York State estate tax return.

This makes for a most difficult decision. If, for example, a federal return is filed solely to take advantage of portability, and that filing renders a state QTIP election unavailable, consider the immediate state estate tax consequence. A $4 million taxable disposition in New York would generate a state-level estate tax of approximately $300,000. That is a substantial current tax payment to pin on the hopes of portability, which is scheduled to sunset in 2013,[7] and could be problematic for an executor in light of the fiduciary duty to preserve assets.

But consider also the potentially competing interests that must be weighed, particularly in acrimonious situations. In a second marriage situation, for example, the surviving second spouse may be willing to incur a state estate tax payable from marital trust assets in order to gain her predeceased spouse's unused exemption amount to give to her children from another marriage. If the decedent's children will not benefit from a portability election, they might prefer to elect state QTIP treatment in order to defer a state estate tax until the death of the surviving spouse.

Many practitioners were hoping for a federal-level fix to this quandary. If, instead of requiring an executor to file Form 706, the IRS created a separate form to file in order to make the portability election, that filing might not be inconsistent with a separate state-level QTIP election. However, the final Form 706 and instructions for 2011 decedents, and recent IRS pronouncements and guidance, make it clear that Form 706 must be filed in order to take advantage of portability. That may put some New York executors in the difficult position of having to choose between portability and a state QTIP election.

In light of the fact that there will apparently be no relief at the federal level, state-level assistance would be welcome in order to obviate this potentially acute problem for New York executors. As noted above, New York State issued very helpful guidance in light of the passage of the Marriage Equality Act. Recall that TSB-M-11(8)M provides that, for estates of individuals dying on or after the Act's effective date, the same deductions and elections allowed for different-sex spouses are allowed for same-sex spouses, whether or not a federal estate tax return is filed. Importantly, the guidance expressly states that this is different from the general rule that when an estate tax return is filed for federal purposes, the amounts used to compute the gross estate and any elections reported on the federal return are binding for New York State purposes. Perhaps the Department might consider taking a similar position with respect to the ability to make a separate New York QTIP election and issue guidance that the filing of a Form 706 solely to elect portability will not preclude the making of a separate state QTIP election, or provide other relief.

III. IRS Announces Study of Decanting

As was reported in the last issue of the *Newsletter*,[8] legislation to liberalize and expand New York's decanting statute was signed by the Governor on August 17, 2011. The new law significantly updates and improves the scope of the statute's operation including, importantly, by eliminating the requirement that a trustee have absolute or unlimited discretion to invade the principal of the trust to be decanted. Four months later, the Treasury Department and IRS announced in Notice 2011-101 that they were studying the potential tax implications of decantings when there is a change in the beneficial interests in a trust and were considering ways to address the relevant tax issues in published guidance.[9]

While these issues are under study, the IRS will not issue private letter rulings with respect to transfers that change beneficial interests but generally will continue to issue PLRs in situations where there is no change in beneficial interests or in the applicable rule against perpetuities period.

In inviting comments from the public on this topic, the Treasury Department and the IRS identified 13 factors that might potentially affect the tax consequences of a decanting, including a change in a beneficiary's right to or interest in trust principal or income; the addition of new income and / or principal beneficiaries; and the addition, elimination or change in a beneficial interest (including any power to appoint income or corpus, whether general or limited, or other power). Written comments were encouraged to be submitted by April 25, 2012.

The full impact of the IRS's interest cannot be known until the study period has concluded and guidance is issued. In the interim, practitioners may be well advised to exercise extra caution when considering a decanting that could shift beneficial interests—whether under the amended New York statute or pursuant to provisions in a trust document—due to the potential risk that some actions may later be considered recognition events.

IV. Clarification of New York's Formula Clause Statute

On September 23, 2011, the Governor signed legislation to amend EPTL 2-1.13 and clarify its application in light of the passage of the 2010 Federal Act. EPTL 2-1.13 provides statutory rules for the construction of formula bequests by decedents who died in 2010 while the repeal of the federal estate tax was in effect. When the federal estate tax regime lapsed on January 1, 2010, many formula dispositions tied to federal tax concepts became distorted. In response, 20 jurisdictions, including New York, enacted legislation in 2010 in an attempt to prevent those distortions. Eighteen of those jurisdictions, including New York, generally provide for the construction of formula clauses with reference to the federal law as it existed on December 31, 2009 (when the federal exemption amount was $3.5 million).

At the time EPTL 2-1.13 was enacted, it was not known whether the estate tax would be retroactively reinstated for 2010; accordingly, the statute provided that its formula construction provisions would not apply if the federal estate tax "bec[ame] applicable"

before January 1, 2011. Instead, the 2010 Federal Act reinstated the estate tax for 2010 while allowing estates of decedents dying in that year to opt out of the estate tax regime and into the modified carry-over basis regime. That led to an anomalous result under the New York statute: if an estate chose to be subject to the default estate tax regime, the statutory construction rules would not apply, resulting in a formula credit shelter bequest of the $5 million exemption amount under the 2010 Federal Act. However, if an estate elected carry-over basis treatment (rendering the estate tax "inapplicable" to that estate), the statutory construction rules might apply, resulting in a bequest of the $3.5 million exemption amount under the tax law in effect on December 31, 2009.

The 2010 New York formula construction legislation also included a provision to enable certain interested parties to bring a judicial proceeding to construe a formula disposition. However, the deadline for commencing a judicial proceeding was within 12 months of the date of death, and time was running out (and indeed in some cases had run out) while many executors were still struggling to resolve these construction questions.

In an attempt to remedy these issues, clarifying legislation was signed into law in New York on September 23, 2011. Among the more significant changes to EPTL 2-1.13 are the following:

- The amendment clarifies that a formula clause in a testamentary instrument of a 2010 decedent is deemed to refer to federal laws applicable to decedents dying in 2010, regardless of any election to opt out of estate tax treatment. Accordingly, formula clauses should be construed to refer to a $5 million exemption amount, irrespective of whether an estate is subject to an estate tax regime or a modified carry-over basis regime.
- The new law clarifies that its formula construction provisions apply to all GST formula transfers.
- The new law clarifies that its formula construction provisions apply to wills, trusts and beneficiary designations.
- The time for bringing a construction proceeding is extended until the later of 24 months after the date of death of the decedent or 6 months following the date of enactment of the amending law. Estates of decedents who died in the latter half of 2010 thus still have time to bring a construction proceeding. The time for commencing a proceeding can be further extended, in the court's discretion, on a petition showing reasonable cause. Extrinsic evidence is admissible in a construction proceeding to determine whether the decedent intended that the instrument be construed otherwise than as provided in the construction statute.

V. Potential Liability for Both Estate Tax and Capital Gains Tax for 2010 Decedents

As noted above, the executor of an individual dying in 2010 can opt out of the federal estate tax regime and into a modified carry-over basis regime under the 2010 Federal Act. However, it is not possible to opt out of the New York State estate tax regime. This gave rise to the following question: if the estate of a 2010 decedent opts out of the federal estate tax regime but is liable for New York state estate taxes, will the estate assets be stepped up to date-of-death value for state capital gains tax purposes? Due to the way New York tax law interacts with federal law—adopting the Internal Revenue Code as of July 22, 1998 for estate tax purposes but adopting federal law as of the current year for income tax purposes—it appeared that *both* estate taxes and capital gains taxes might be payable.

In TSB-M-11(9)M, the New York State Department of Taxation and Finance confirmed that, although the date of death (or alternate) value must be used for purposes of the New York State estate tax, the New York State personal income tax is based on the information reported on the federal income tax return. As a result, when the assets transferred upon the individual's death are subsequently sold, the same modified carry-over basis used to report any capital gain or loss for federal income tax purposes must be used for New York State personal income tax purposes. Accordingly, both New York estate taxes and capital gains taxes may be payable with respect to the same property.

Legislation was introduced in New York in 2010 to provide relief from the potential double tax that would arise upon the sale of property inherited from a decedent whose estate was subject to the federal modified carry-over basis regime. Essentially, the proposed legislation provided that in the case of such a sale, the basis of the property for New York tax purposes would be recalculated by applying the federal step-up in basis rules in effect on December 31, 2009. The legislation did not pass.

Endnotes

1. N.Y.S. Dept. of Taxation & Fin., Taxpayer Guidance Division, Technical Memorandum TSB-M-11(8)M, "Implementation of the Marriage Equality Act Related to the New York State Estate Tax" (July 29, 2011).
2. Note that the guidance expressly states that this is different from the general rule that when an estate tax return is filed for federal purposes, the amounts used to compute the gross estate and any elections reported on the federal return are binding for New York State purposes.
3. N.Y.S. Dept. of Taxation & Fin., Taxpayer Guidance Division, Technical Memorandum TSB-M-11(8)C, 11(8)I, 11(7)M, 11(1) MCTMT, 11(1)R, 11(12)S, "The Marriage Equality Act" (July 29, 2011).

4. No. 1:10-cv-8435 (S.D.N.Y).
5. N.Y.S. Dept. of Taxation & Fin., Taxpayer Guidance Division, Technical Memorandum TSB-M-10(1)M (March 16, 2010).
6. N.Y.S. Dept. of Taxation & Fin., Taxpayer Guidance Division, Technical Memorandum TSB-M-11(9)M, "Supplemental Information on New York State Estate Tax Filing Requirements Related to the Federal 2010 Tax Relief Act" (July 29, 2011).
7. The Administration's Fiscal Year 2013 Revenue Proposals, released February 13, 2012, do contain a proposal to extend portability permanently, but currently that is just a proposal.
8. Joseph T. La Ferlita, "New York's Newly Amended Decanting Statute," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 44, No. 4 (Winter 2011).
9. 2011-52 IRB 932 (December 20, 2011).

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NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing directed to an attorney audience. This might take the form of an article for a periodical or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, NY 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Should Trusts and Estates Practitioners Stress Over Duress as a Ground for Invalidating a Will?

By Sanford J. Schlesinger and Ross S. Katz

Sanford J. Schlesinger

Ross S. Katz

In April 2011, Hon. Kristen Booth Glen, Surrogate of the New York County Surrogate's Court, issued a decision spotlighting an often overlooked objection to the probate of a will—duress. Trusts and estates practitioners are familiar with the four most common objections to probate: lack of due execution, lack of mental capacity, undue influence and fraud. Duress, however, does not commonly appear as a freestanding objection. Rather, it is generally combined with undue influence and set forth, in sum and substance, as follows: "The propounded instrument was the product of undue influence and / or duress exerted by the proponent or others."

In *In re Rosasco*,[1] the objectants cited a plethora of objections to the probate of the will of Mildred Rosasco, including that the will was the product of duress exercised by her great nephew, the nominated executor, John Cella. In its holding, the court challenged the longstanding practice of "New York State courts tend[ing] to blur the distinction between duress and undue influence"[2] by granting summary judgment to Cella on one objection, undue influence, and denying summary judgment on the other, duress. In so doing, the court pointedly reminded trusts and estates practitioners that the objection of duress is a viable objection to the probate of a will that should be independently considered.

In re Rosasco

Mildred Rosasco died on June 18, 2006 at the age of 93, leaving an estate valued at $2.8 million. During her life, Rosasco and her sisters, Lillian and Loretta, as well as Cella and his family, all lived in a building located at 45 Morton Street in Manhattan that was owned by a closely held family corporation controlled by members of the Rosasco family.

It was established that during Rosasco's lifetime, Cella's parents refused to allow him to continue living with them in their apartments at 45 Morton Street. Cella then moved into Apartment 2 at 45 Morton Street, which was owned but not occupied by his great aunt, Lillian. Lillian lived with Rosasco in Apartment 5. It was also established that prior to 1989, Rosasco gave Cella a key to the apartment she lived in.

In August of 1997, Cella accompanied Rosasco (along with her sisters) to a meeting with an attorney to discuss the terms of what ultimately became Rosasco's Last Will and Testament.

During that same year, according to the testimony, intra-family relations were extremely tense, as Cella grew increasingly angry because of financial support provided by Rosasco and her sisters to his sister, Kate. "He berated decedent and her sisters loudly and often. His anger incited him to violence. He testified at his deposition that, in 1997, on one of Kate's weekly visits to Apartment 5 to ask decedent and her sisters for money, he struck Kate and 'pushed' her to the floor."[3] According to Kate, Cella "punched her in the stomach" during an argument.[4] Cella's display of violence was apparently witnessed by the decedent and her sisters.[5]

Kate testified that Rosasco told her she was upset about having nominated Cella as executor of her estate but was too afraid of Cella to change the nomination. "She kept saying that if she did that, [Cella] would hurt her. Which I could believe because he intimidated her a lot over the years."[6] According to Kate, Loretta complained that Cella had stolen $10,000 from her. From the testimony, it appeared that Rosasco believed that whether Cella was the executor of her estate or not, he would find a way to "steal [her] money."[7]

The terms of Rosasco's will provided that the entire probate estate was to pass to her sisters, Loretta and Lillian, if they survived, and if not, then to Cella. Loretta and Lillian predeceased Rosasco. Four of Rosasco's nephews and nieces objected to the probate of the will, alleging that it was: (1) not genuine, (2) not duly executed, (3) executed by mistake, (4) executed without testamentary capacity, (5) the product of undue influence, (6) the product of duress exercised by Cella on the decedent and (7) procured by Cella's fraud. The court granted summary judgment to Cella dismissing all objections with the exception of undue influence and duress, which it considered separately.

The court then turned its attention to the claims of undue influence and duress. In the decision, the court did not place duress under the umbrella of undue in-

fluence. This careful delineation of duress as a separate, freestanding objection is a departure from prior decisions that have touched upon duress but did not clearly identify it as separate and apart from undue influence. The decision of *In re Kaufmann*[8] (to which the court cites) parsed out the differences between undue influence and duress without actually referring to duress by name. Rather, the *Kaufmann* court categorized one class of undue influence as "the insidious, subtle and impalpable"[9] type of undue influence that "subverts the intent or will of the testator"[10] and the other class as "the gross, obvious and palpable" type of undue influence that prevents the intent or will of the testator "from being exercised by force and threats of harm."[11] In the *Rosasco* decision, Surrogate Glen referred to the former class of undue influence as the "classic" type of undue influence and took the logical next step of categorizing the latter class of undue influence as duress.

The Rosasco objectants attempted to establish an inference of "classic" undue influence by demonstrating that the decedent was in a confidential relationship of trust and dependence with Cella. The court was not persuaded by their arguments. After setting forth a historical road map of undue influence and explaining the potential difficulties in proving its existence, the court granted summary judgment and dismissed the claim of undue influence.

In venturing into largely unchartered waters to tackle duress, the court recognized that there was little legal precedent on which to rely, noting that "[i]n the context of contested probate proceedings, New York State courts tend to blur the distinction between duress and undue influence. Indeed, the New York State Pattern Jury Instructions do not even mention duress as a ground, separate from undue influence, for contesting a will."[12]

Interestingly, the court relegated one of the last reported Surrogate's Court decisions that discussed duress, *In re Hermann*, to a footnote.[13] *In re Hermann* is related to the earlier decision of *Rollwagen v. Rollwagen*,[14] a decision that remains one of the foundations for the jurisprudence addressing undue influence. Both cases involved Magdalena Rollwagen Hermann. Magdalena was a young housekeeper who married her much older employer, Frederick Rollwagen. Frederick died testate, but his will was determined to be the product of undue influence exercised by Magdalena and was, therefore, denied probate. Magdalena, however, had already managed to amass considerable assets during her marriage to Frederick.

Between 1876 (the date of the *Rollwagen* decision) and 1912, the year of Magdalena's propounded will, Magdalena remarried and then divorced her subsequent husband, Hermann, before living out the remaining years of her life in relative seclusion. Without heirs, Magdalena's sizable estate attracted considerable attention from those in her employ. Not surprisingly, those who were not provided for under Magdalena's will objected to its probate. Ultimately, they succeeded.

In explaining the intricacies of undue influence, the *Hermann* court took pains to draw a distinction between undue influence and duress:

> Undue influence in a court of probate, although it may involve elements of fraud and duress, for it is protean in character, is nevertheless now an allegation or plea distinct from a plea of fraud or duress. Sir John Micholl's predication in William v. Gonde, 1 Hagg. at page 596, "that undue influence must be of the nature of fraud or duress," is, at the present day, inconclusive. Fraud, which includes misrepresentation, is always the subject of a separate plea in the modern English probate practice.…While it may be true that undue influence can be regarded as a species of the genus fraud, undue influence has become in probate law sufficiently differentiated to be regarded in the catalogue of wrongs as a distinct genus….The testamentary common law, which is undoubtedly a part of our common law by constitutional reservation…observes the distinction between undue influence and fraud or duress. Undue influence in this court, while it always imports moral coercion, is also distinct from "duress," as interpreted in the courts of common law and equity, where duress consists in menace or actual or threatened physical violence or imprisonment. Duress is a physical wrong; coercion, a moral wrong. Where duress is established in law or in equity, no consent of a testator at all is possible. Undue influence in this court differs from duress in many particulars. Duress is primarily a matter of legal cognizance.[15]

It appears that until the *Rosasco* decision, modern New York courts, on the whole, have not delineated the distinct objection of duress. In fact, as noted above, New York's pattern jury instructions still do not distinguish between undue influence and duress as grounds for contesting a will.

The *Rosasco* court addressed *Hermann* only to add historical perspective to its decision and not as a basis for its analysis. Once the court finished with the historical perspective, it examined duress as a disruption of

property rights: "A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made."[16]

The court then looked to the Restatement of Contracts as a basis for "fleshing out" the elements of duress. First, duress consists of an act that often involves, without more, a threat that the act will be repeated.[17] In other words, has a wrongdoer threatened to perform a wrongful act or actually performed a wrongful act, or has the testator witnessed a wrongful act that posed a future threat to the testator?

The second element of duress concerns whether the wrongful act subjectively induced such fear in the testator "as to preclude the exercise by [her] of free will and judgment."[18] Stated simply, was the testator actually afraid?

The motivation of the person charged with duress is irrelevant in this analysis.[19] It does not matter whether the wrongdoer intended to carry out a wrongful act or threatened a wrongful act. All that matters is what the testator perceived. For instance, if a wrongdoer threatened to hit a testator with a baseball bat unless the testator bequeathed a large sum of money to the wrongdoer, it is irrelevant that the wrongdoer never intended to follow through with his or her threat of violence—it matters only that the testator perceived the threat and was motivated to avoid the threatened action.

After examining these elements, the court concluded that the objectants established a prima facie case for duress:

> The evidence adduced by objectants, if believed by the trier of fact, could establish that: (1) To decedent, proponent's wrongful act—his violence towards Kate—posed a threat of repeated violence. (2) That threat induced fear in decedent. (3) Decedent feared that, if she were to make a new will that favored Kate, not only would proponent harm decedent, if he were to learn of the new will during decedent's lifetime, but also, more significantly, upon decedent's death, proponent would physically harm Kate (and convert for himself any assets intended for Kate). And (4) Such fear precluded decedent from exercising her free will and judgment and naming Kate, a natural object of her bounty, a legatee.[20]

Significantly, the court relied heavily upon Kate's deposition testimony in reaching its decision. While this testimony may have been sufficient to defeat summary judgment, it remains to be seen whether questions of admissibility ultimately preclude such evidence from being introduced at any potential trial on the question of duress.

Conclusion

It is premature to assess the impact the *Rosasco* decision will have on objectants seeking to contest the admission of a will to probate. However, the court's decision may change the way in which will contests are routinely handled. While it is unclear whether other surrogates will follow Surrogate Glen's lead, trusts and estates practitioners should keep a close eye on this issue. The surrogate's overdue analysis of the distinction between undue influence and duress as grounds for objecting to the probate of will and the court's bifurcated summary judgment decision lays the groundwork for objectants to highlight facts demonstrating duress and to object on this separate ground.

Endnotes

1. 31 Misc.3d 1214(A), 927 N.Y.S.2d 819, 2011 WL 1467632 (Surr. Ct., N.Y. Co. 2011).
2. *Id.* at *3.
3. *Id.*
4. *Id.*
5. *Id.* at *2-3.
6. *Id.*
7. *Id.*
8. 20 A.D.2d 464 (1st Dept. 1964), aff'd, 15 N.Y.2d 825 (1965).
9. *Id.* at 482-483.
10. *Id.*
11. *Id.*
12. *In re Rosasco*, 2011 WL 146732 at *7.
13. *In re Hermann*, 87 Misc. 476, 150 N.Y.S. 118 (N.Y. Co. Surr. Ct., 1914).
14. *Rollwagen v. Rollwagen*, 63 N.Y. 504 (1876).
15. *In re Hermann*, 87 Misc. at 481-482, 150 N.Y.S. at 123-124.
16. *In re Rosasco*, 2011 WL 1467632 at *7.
17. *Id.*
18. *Id.*
19. *Id.* at *8.
20. *Id.*

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Let the Contests Begin: Legislature Expands Safe Harbor Rules for Preliminary Examinations

By Theresa A. Kraker and Marianna Schwartsman

Theresa A. Kraker

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"*In terrorem*" or "no contest" clauses are typically used in wills to discourage beneficiaries from initiating litigation challenging a will's terms. Although New York courts strictly construe no contest clauses, they are enforceable.[1] When a will contains a no contest clause, beneficiaries must decide whether it is in their best interest to object to the will and risk forfeiting any benefit they might otherwise receive. Under sections 3-3.5 of the New York Estates, Powers & Trusts Law (EPTL) and 1404 of the Surrogate's Court Procedure Act (SCPA), beneficiaries faced with such a decision may examine certain individuals to determine, in light of the information gleaned from these examinations, whether objections to the probate of a will should be filed. In response to judicial expansion of the statutory provisions, EPTL 3-3.5 and SCPA 1404 were recently amended to clarify the scope of discovery permitted where a will contains a no contest clause.

Section 3-3.5(b)(3)(D) of the EPTL sets forth what is known as a "statutory safe harbor." This provision allows a beneficiary to conduct preliminary examinations under SCPA 1404(4) of certain specified individuals in order to evaluate the merits of potential objections without triggering a no contest clause. These provisions attempt to strike a balance between respecting a decedent's intention to ward off litigious beneficiaries and providing beneficiaries with an opportunity to explore whether a valid reason, such as fraud or undue influence, exists for objection to the decedent's will.

Initially, this statutory safe harbor only permitted a beneficiary to examine the attesting witnesses to a will.[2] In an attempt to further minimize will contests and promote the settlement of disputes, EPTL 3-3.5 was amended in 1992 and 1993. These amendments expanded the safe harbor to add three other categories of individuals who could be examined safely before trial without triggering punitive no contest provisions: the individual who prepared the will, the nominated executors and the proponents of the will. (SCPA 1404 was also amended accordingly.) By permitting examinations of these additional individuals, the legislature sought to provide potential objectants with a broader opportunity to educate themselves and make well-informed decisions before filing objections and venturing into risky and costly litigation.

Until recently, the New York courts were consistent in their interpretation and application of the safe harbor provisions. It was a well established principle in New York that where a no contest clause was involved, pre-trial examinations were limited to the individuals listed in EPTL 3-3.5 and SCPA 1404.

> *"Until recently, the New York courts were consistent in their interpretation and application of the safe harbor provisions."*

The most recent amendments to the safe harbor provisions of the EPTL and the SCPA, signed into law on August 3, 2011, were enacted in response to the Court of Appeals decision in *In re Singer*.[3] There, the Court of Appeals held that pre-trial discovery is not limited to the categories specifically provided for in EPTL 3-3.5 and SCPA 1404 and that the examination of a testator's prior attorney did not violate a no contest clause.[4] "Although the statutes include only a few particular groups," the court said, "circumstances may exist such that it is permissible to depose persons outside the statutory parameters without suffering forfeiture."[5]

In *Singer*, the decedent's will contained two no contest clauses. The first no contest clause applied to all of the beneficiaries of the will. It provided:

> If any beneficiary shall, in any manner, directly or indirectly, contest, object to or oppose, or attempt to contest, object to or oppose, the probate of or validity of this Will or the revocable trust agreement created by me, or any part of my estate plan or any gifts made by me, or any of the provisions of this Will or

> of the revocable trust agreement created by me, in any court or commence or prosecute any legal proceeding of any kind in any court to set aside this Will or the revocable trust agreement created by me or any part of my estate plan or any gifts made by me, then in that event, such beneficiary, and all of such beneficiary's issue, shall forfeit and cease to have any right or interest whatsoever under this Will or under the revocable trust agreement created by me, or in any portion of my estate, and in such event, I hereby direct that my estate and the trust estate under such revocable trust agreement shall be disposed of in all respects as if such beneficiary had predeceased me without issue.[6]

The second no contest clause applied only to the decedent's son. It directed that the decedent's son "not contest, object to or oppose" the decedent's will or revocable trust or any part of the decedent's estate plan.[7]

After the decedent's will was offered for probate, the decedent's son's attorney, in addition to examining the individuals listed in the statutory safe harbor, also examined the attorney who drafted the decedent's prior will. Based on the results of the preliminary examinations, the decedent's son decided not to file objections to the probate of the will. Thereafter, the decedent's daughter, as executor, initiated a construction proceeding in Kings County Surrogate's Court in which she asked the court to determine that by deposing an individual not listed in the statute, her brother violated the no contest clauses in the decedent's will.[8]

Both the Surrogate's Court and the Appellate Division held that the son violated the no contest clauses by examining an individual outside the statutory safe harbor.[9] The Court of Appeals granted leave to appeal and reversed. In its decision, the court conducted a two-prong analysis. First, the court considered whether the statutory safe harbor provisions are exclusive, and then it considered the testator's primary intent in including the no contest clauses.[10] The court held that the safe harbor provisions of the statute are not exclusive and that therefore "the crucial inquiry" was whether the son's "conduct violated the testator's intent." In this context the court concluded that under the circumstances and "construing the clauses narrowly," the son's deposing of his father's prior attorney "did not amount to an attempt to contest, object to or oppose the validity of the estate plan."[11] The court reasoned that the testator's wish was that the son not commence court proceedings against the estate plan, and the examination of the prior attorney did not violate this intent because it provided the son with information that resulted in his decision not to contest the will.[12]

The court's decision in *Singer* left many open issues.[13] Among other things, the court provided no clear standard as to the scope of discovery that might be allowed without triggering a no contest clause. Instead, the court made the analysis of a beneficiary's conduct in deposing an individual hinge on the testator's intent in including a no contest clause in his or her will. That intent, however, may only be construed in a construction proceeding, which, in turn, can happen only after a will has been duly admitted to probate and recognized as a valid instrument.

Thus, after *Singer*, a beneficiary could depose individuals outside the safe harbor but would then have to wait until after the will was admitted to probate and hope that the court would construe the no contest clause so as to permit the deposition. Any examination of individuals outside the safe harbor would be conducted at the beneficiary's own peril, since it would remain unclear whether the no contest clause was triggered until after the will was admitted to probate.

In *In re Baugher*,[14] the Nassau County Surrogate's Court faced the issue of how to follow the *Singer* decision in light of the long-standing principle that a will, including any no contest clause, can be construed only after it is admitted to probate.[15] Relying on *Singer*, the court in *Baugher* granted the respondent's motion for SCPA 1404 examinations of the nominated successor executor and drafter of the decedent's prior will. However, the court stated that it would not determine whether the examinations of such individuals triggered the no contest clause contained in the decedent's will prior to probate.[16]

In an effort to clarify the law in the wake of *Singer* and *Baugher*, the legislature amended EPTL 3-3.5 to provide that in addition to the list of specified individuals, "upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will"[17] may be examined without violating a no contest clause. Section 1404(4) of the SCPA was amended to mirror this provision.

By expanding the statutory safe harbor, the legislature attempted to clarify the scope of permitted pretrial examinations. However, what constitutes "special circumstances" and information "that is of substantial importance or relevance" is open to interpretation and, in all likelihood, will be determined on a case by case basis. What is clear is that surrogates are now charged with the difficult task of determining in advance whether the examination of an individual who is not

specifically listed in the statutory safe harbor is important or relevant enough to fall into this new category under the circumstances pertaining to the case at hand.

For now, practitioners will have to wait and see whether the new legislation reduces the amount of will contests or, instead, results in more litigation. The ball is now in the court's "court" to interpret the recent amendments, set parameters and provide guidance to potential objectants and trusts and estates practitioners. Let the contests begin!

"What is clear is that surrogates are now charged with the difficult task of determining in advance whether the examination of an individual who is not specifically listed in the statutory safe harbor is important or relevant enough to fall into this new category under the circumstances pertaining to the case at hand."

Endnotes

1. *See In re Fairbairn*, 46 A.D.3d 973, 846 N.Y.S.2d 779 (3d Dep't 2007).
2. In an early attempt to expand pretrial discovery, Nassau County Surrogate's Court in *In re Muller,* 138 Misc. 2d 966, 525 N.Y.S.2d 787 (Sur. Ct., Nassau Co. 1988), allowed for pretrial production of prior wills before objections were filed by the potential objectant. Surrogate Radigan held that the "hardship resulting from denial of inspection [of such documents] may go beyond the applicant's personal interest to a possible probate of an instrument procured by undue influence," because if the potential objectant is precluded from conducting an expanded pretrial examination at an early stage, he or she will most likely not proceed any further with the investigations, while if such broader discovery is allowed, "the self-regulating operation of the in terrorem clause will likely act to rule out all but those contests having real merit."
3. 13 N.Y.3d 447, 892 N.Y.S.2d 836 (2009).
4. *Id.* at 452.
5. *Id.*
6. *In re Singer*, 17 Misc. 3d 365, 366, 841 N.Y.S.2d 212 (Sur. Ct., Kings Co. 2007).
7. *Id.*
8. *In re Singer*, 13 N.Y.3d 447, 450-452 (2009).
9. *Id.* at 450.
10. *Id.* at 452.
11. *Id.* at 453.
12. *Id.* at 452.
13. A concurring opinion in *Singer* by Judge Graffeo suggested that testators could draft around *Singer* by prohibiting any pretrial examinations of individuals other than those enumerated in the statutory safe harbor. After the 2011 amendments, it is no longer clear that drafting around the safe harbor rules is a viable option.
14. 29 Misc. 3d 700, 906 N.Y.S.2d 856 (Sur. Ct., Nassau Co. 2010).
15. *Id.* at 704, citing *In re Martin*, 17 A.D.3d 598, 793 N.Y.S.2d 458 (2d Dep't 2005).
16. *Id.* at 704.
17. EPTL 3-3.5(b)(3)(D).

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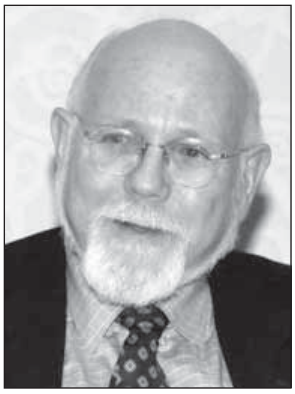
Recent Initiatives of the TELS Technology Committee: Redesigned Website, New Search Engine and Information on the Listserve

By David Goldfarb



The Technology Committee of the Trusts and Estates Law Section is focused on helping our members to practice law efficiently and smoothly through the use of technology. The Technology Committee addresses practice questions related to electronic forms, electronic filing and on-line legal research; it deals with issues of office automation and the use of computer hardware and software in the practice of trusts and estates law. The Committee helped develop the Section's home page on the New York State Bar Association website and the Section's listserve. As part of its continuing responsibilities, the Committee monitors the Section's home page and listserve and works on their continual development and improvement.

"I think you will be amazed at the wealth of information, including trusts and estates information, that is available and how powerful and intuitive the search engine is."

In an article in the Winter 2010 issue of the *Newsletter*, I updated Section members on the New York State Bar Association's website and the Section's home page.[1] Since then the website has been redesigned with a number of new features. The layout has been modernized by using a more horizontal orientation than the previous more traditional vertical orientation. Instead of the pictures of the Bar Association building, maximum content is now placed "above the scroll" and is available on first view. The member login box is highlighted and is available right on the homepage. There is better navigation to offer easier access to information (see for example the link to Special Services).

The site also now features a state-of-the-art search engine powered by Recommind. This new search tool provides instant access to content from NYSBA's website, newsletters, blogs and listserves. I suggest that you first log in before running a Recommind search. That way your search results will include messages from the lists to which you belong. Your search will also include members-only information from your sections, such as publications and minutes.

I think you will be amazed at the wealth of information, including trusts and estates information, that is available and how powerful and intuitive the search engine is. Click on "Search Tips" to find information on both simple and advanced searches. Also use the "smart filters" to refine your search by type of content (webpage, blog, listserve, product, event, etc.).

Some unique features on the Trusts and Estates Law Section's home page include a searchable membership directory, downloadable forms, legal links and status of relevant pending state legislation.

The Section listserve has become a valuable tool for many of our section members. The list is accessible from the web site via the link for "Forums/Listserves," or you can receive messages through your email. By going to "my account" on the Forums/Listserves page, you can set how you want to receive (or not receive) list messages.

Here are some general guidelines for using the listserve. Use common sense when you post. Remember that posts are not confidential. If you have a question about a current matter, remember that attorneys representing opposing parties may see your message. Avoid posting any material that might be considered privileged, confidential or sensitive. Err on the side of caution, as there is no way to retract a message that has gone out to the list. Note also that when you "reply" on the listserve, your reply goes only to the person who posted the message you are replying to. If you want the reply to go to the whole list, then you should use "Reply to All." Avoid posting to the list messages that just say "thank you" or "I agree," humorous replies or other extraneous, non-substantive communications. Consider emailing such messages directly to the intended recipient at his or her personal email address.

There have been long discussions on some lists as to whether members can discuss attorney fees and whether this violates antitrust laws. The NYSBA guidelines state:

> Messages which encourage or facilitate an agreement about the following subjects are not permitted: prices, dis-

counts, or terms or conditions of sale; salaries; profits, profit margins or cost data; market shares, sales territories, or markets; allocation of customers or territories; or selection, rejection or termination of customers or suppliers. Advertisements of any nature, including, but not limited to, job offers, real property sales or law firm promotions, and fees charged for services are not to be posted.

"When posting to the listserve, make sure your message contains an identifying "Subject" that will help readers identify the content of the message."

I would suggest staying away from any discussion of these areas altogether.

When posting to the listserve, make sure your message contains an identifying "Subject" that will help readers identify the content of the message. Headings such as "help needed," "basic question" or "off topic" are not helpful. Off-topic messages should also be avoided. If you are replying to a message but changing the topic, be sure to change the subject line. Also, identify yourself in all posts by including your full name, firm or company name, city, state and email address.

Remember, the listserve is not monitored. As the NYSBA guidelines state, "NYSBA online forums are intended to be self-monitoring groups, where all participants are encouraged to assist in assuring that these guidelines are honored. If a message is posted in violation of the guidelines, it is appropriate for another forum participant to remind the participant, courteously and professionally, about the guidelines."

You can find more information by going to the Listserve Guidelines page on the web site.

What's coming next? NYSBA is planning mobile apps to offer portable access to ethics opinions, CLE programs and products and more.

Endnote

1. David Goldfarb, "Message from the TELS Technology Committee—A Road Map to the Trusts and Estates Law Section Home Page," *NYSBA Trusts and Estates Law Section Newsletter*, Winter 2010, Vol. 43, No. 4, p. 32.

David Goldfarb is the Chairman of the Trusts and Estates Law Section Technology Committee.

Florida Update

By David Pratt and Jonathan Galler

David Pratt

CASE LAW UPDATE

Lapse of Beneficiary's Interest in Living Trust

Approximately five years after James Hughes and Martha Mayfield were married, they were shot and killed by Martha's adopted son from a prior marriage. Because the coroner was unable to determine who died first, the trial court held, pursuant to Fla. Stat. § 732.601(1), that James' property was to be disposed of as though he had survived Martha. James's living trust provided for the disposition of substantial assets to Martha, but the trust did not indicate what was to be done with those assets if he were to survive her. The Fourth District Court of Appeal held that neither the current nor previous anti-lapse statutes governed because the trust was executed prior to the effective dates of both statutes. Applying Florida common law instead, the appellate court held that Martha's beneficial interest had not vested upon the execution of the living trust. Her interests would have vested upon James's death, but instead they lapsed when the trial court entered the order deeming her to have predeceased James. Accordingly, Martha's estate was not entitled to the distributions from James's living trust.

Darian v. Weymouth, 76 So. 3d 15 (Fla. 4th DCA 2011).

Standing of a Lawyer-Beneficiary to Revoke Probate of a Will

In November 2009, Roger Brown was appointed as personal representative for the administration of the estate of Herbert Birck, and the decedent's 2009 will was admitted to probate. Shortly thereafter, Jon and Susan Agee filed a petition to revoke the probate of the 2009 will, alleging that the will was procured by undue influence. Florida's Probate Code provides that any "interested person, including a beneficiary under a prior will," may seek to revoke the probate of a will. Fla. Stat. § 733.109(1). An "interested person" is "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." Fla. Stat. § 733.201(23). The Agees claimed to be interested persons because they were the beneficiaries under the decedent's prior testamentary instruments. Brown moved to dismiss the Agees' petition for lack of standing on the grounds that the prior will was void

Jonathan Galler

because Jon Agee was the lawyer who had prepared that will, and the Rules Regulating The Florida Bar prohibit an attorney who is not related to a client from preparing a will for the client that includes a bequest to the lawyer or to a person related to the lawyer. The Fourth District Court of Appeal held that the fact that the bequest to the Agees might be found to be improper and void did not mean that the Agees, as beneficiaries under the previous will, were not interested persons or that they lacked standing. The appellate court further noted that Jon Agee might also be deemed an interested person by virtue of his designation as an alternate personal representative under the previous will.

Agee v. Brown, 2011 WL 5554833 (Fla. 4th DCA 2011).

Action to Register Judgment Against Estate of Ex-Husband

Thirty-five years after a New York trial judge entered a judgment dissolving the marriage of Carolyn and William Jackmore, Carolyn filed a motion to register the judgment in Florida and to enforce it against William's estate. She alleged that he had repeatedly refused to satisfy his alimony and child support obligations under the judgment. The trial court denied the motion on the basis that New York law governed and that its statute of limitations barred the claim. The First District Court of Appeal reversed, holding that Florida does not have any limitations period for enforcement of alimony or child support orders and that, pursuant to the Uniform Interstate Family Support Act, the law of the state with the longer limitations period (i.e., Florida) applies. However, the appellate court remanded the case and instructed the trial court to hold an evidentiary hearing to determine whether Carolyn's claim should nevertheless be barred by the equitable doctrine of laches or Florida's two-year statute of non-claim under Fla. Stat. § 733.710.

Jackmore v. Jackmore, 71 So. 3d 912 (Fla. 1st DCA 2011).

Breach of Fiduciary Duties of Ancillary Personal Representative

Wilson Charles Lucom died in the Republic of Panama. His will named as co-executors three individuals, including Richard Lehman, who was improperly ap-

pointed in Panama as the sole executor. Because the decedent had real property and a bank account in Florida, Lehman also was appointed as ancillary personal representative of the Florida estate. Following Lehman's later resignation as ancillary personal representative, the trial court denied his discharge, denied personal representative's fees, granted surcharge, voided transactions made by him and granted objections to his final accounting. The trial court found that Lehman (i) had no authority over the ancillary estate because his improper installation in Panama was *void ab ibnitio*; and (ii) had acted recklessly and in bad faith. The Fourth District Court of Appeal held that Lehman's installation in Panama was merely voidable, but determined that the crux of the matter before the trial court was Lehman's bad acts as ancillary personal representative. Ancillary administration is governed by Fla. Stat. § 734.102, which provides that expenses and claims against the estate must be paid before property is transferred or distributed to estate beneficiaries. Here, the assets of the ancillary estate were used instead to fund litigation over the Panama estate and for Lehman's personal business. The appellate court affirmed the trial court's judgment on the grounds that competent, substantial evidence existed to show misappropriation of assets of the ancillary estate.

Lehman v. Lucom, 2012 WL 385486 (Fla. 4th DCA 2011).

Application of Florida's Nonademption Statute

Harvey Strother, a Georgia domiciliary, devised a Florida condominium to Anne Melican. Before he died, Strother executed a contract to sell the condominium. The closing took place after his death, and Melican filed an action in Georgia probate court to collect the proceeds of the sale. Controlling case law in Georgia provides that a devise of real property is construed in accordance with the law of the state in which the land is situated. Accordingly, Florida law governed Melican's claim. Georgia's Supreme Court held in favor of Melican, pursuant to Florida's nonademption statute, Fla. Stat. § 732.606(2)(a), which provides that "a specific devisee has the right to the remaining specifically devised property and…[a]ny balance of the purchase price owing from a purchaser to the testator at death because of sale of the property." Because the proceeds from the sale of the condominium had not yet been paid to Strother at the time of his death, Melican was entitled to those proceeds as the specific devisee of the condominium under Strother's will.

Melican v. Parker, 289 Ga. 420 (2011).

Waiver of Spousal Rights

Jeffrey E. Steffens executed a will naming his second wife, Andrea, as a beneficiary. The couple subsequently contemplated separating and entered into a post-nuptial agreement waiving, with certain exceptions, all rights in each other's earnings, property and estate. They were still married when Jeffrey died. Because the post-nuptial agreement constituted a waiver by each party to the separate property of the other, Jeffrey's first wife, as parent and natural guardian of Jeffrey's two children, petitioned for a determination of the estate's beneficiaries. The trial court held, and the Fourth District Court of Appeal affirmed, that the post-nuptial agreement waived any benefits that would have passed to Andrea under the will. The appellate court emphasized that the language of the post-nuptial agreement tracked the language of Fla. Stat. § 732.702(1), which provides that the rights of a surviving spouse may be waived by a written contract that is signed by the waiving party in the presence of two subscribing witnesses. Although the post-nuptial agreement also provided that either party could transfer to the other party any property or interest, the appellate court held that the provision referred to transfers of property *after* the execution of the post-nuptial agreement and would not preserve Andrea's rights under the previously executed will. Accordingly, the appellate court held that the trial court had correctly determined that the children of Jeffrey's first marriage were the proper beneficiaries.

Steffens v. Evans, 70 So. 3d 758 (Fla. 4th DCA 2011).

Standing to Challenge Pre-Death Distributions from Revocable Trust

After the death of Dorothy Rautbord, certain of her beneficiaries sued her attorney-in-fact and the trustee of her revocable trust for breach of duty, alleging that improper trust distributions had been made during her lifetime. The distributions at issue included gifts to her employees, relatives and friends made at the request of her daughter who, under her power of attorney, had the power to make particular types of gifts. The challenged distributions also included expenditures for a birthday party, health expenses, the forgiveness of debts and the early funding of a trust for Mrs. Rautbord's sister-in-law. In a 2006 decision, the Fourth District Court of Appeal held that New York law governed the revocable trust for the time period at issue and that the beneficiaries had standing, under New York law, to challenge pre-death distributions that were made for purposes not authorized by the trust. On remand, the trial court held a preliminary hearing and determined that the challenged distributions were not at odds with the purposes authorized by the trust, and the beneficiaries thus lacked standing. The appellate court reversed, once again, on the grounds that the trial court misunderstood its prior opinion, had gone beyond the issue of standing and had instead summarily decided the substance of the claims without factual basis. The court held that the language of the trust, standing alone, did

not authorize distributions for the purpose of making gifts and that whether the trustee could rely on the power of attorney required a factual determination. The court remanded the case for a trial on the various claims and defenses of the parties.

Siegel v. JP Morgan Chase Bank, 71 So. 3d 935 (Fla. 4th DCA 2011).

Application of Florida's Homestead Exemption

Favio Grisolia Sanchez moved his wife and son to Florida after a kidnapping attempt on his son in Venezuela. Favio and his wife were registered aliens and were legally permitted to reside in the United States under their temporary visa. Favio's son was a United States citizen, born in Miami in 2001. In 2006, Favio purchased an apartment for the three of them in Sunny Isles Beach, Florida. He died in 2009. Following the filing of a petition for administration of his estate, Eric and Carla Pfeffer asserted a claim against the estate on the basis of a $500,000 loan made to Favio, which was memorialized by a promissory note. In response, the estate objected and filed a petition for determination of the homestead status of the Sunny Isles Beach apartment because Florida's constitution exempts a homestead from a forced sale. The trial court denied the petition, but the Third District Court of Appeal reversed. The appellate court held that, despite the decedent's immigration status at the time of his death, his intention to make the property his family's permanent residence, which is the key factor in determining homestead, was sufficiently established through the testimony of the decedent's widow. The appellate court also held that the decedent's failure to claim the apartment as a homestead tax exemption was not evidence that the property should not be deemed a homestead because the exemption from forced sale is different from the tax exemption.

Grisolia v. Pfeffer, 2011 WL 5864806 (Fla. 3d DCA 2011).

APPELLATE PROCEDURE UPDATE

Florida recently adopted a new rule of appellate procedure specifically designed to address appeals of probate and guardianship orders. The new rule is essentially an acknowledgment of the unique attributes of probate and guardianship matters as proceedings of equity where, due to the wide variety of filings and orders, the concept of "finality"—a critical concept in the appellate arena—has historically been far more ambiguous than in a typical case governed by the rules of civil procedure. For example, numerous orders of an otherwise "final" nature are often entered at multiple points in time during a probate or guardianship proceeding without judicial labor on other aspects of the proceeding actually coming to an end. Accordingly, new rule of appellate procedure 9.170 limits appeals of orders rendered in probate and guardianship cases to "orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code."

The rule sets forth a comprehensive, but nonexclusive, list of twenty such orders. Critically, any appeal of such an order must be made within 30 days of rendition of the order. The list includes orders that:

- determine a petition to revoke letters of administration or letters of guardianship;
- determine a petition to revoke probate of a will;
- determine persons to whom distributions should be made;
- remove or refuse to remove a fiduciary;
- determine a motion for enlargement of time to file a claim against an estate, strike an objection to a claim against an estate or determine a motion to enlarge the time to file an independent action on a claim filed against an estate; and
- approve settlement agreements.

Consistent with similar provisions governing other types of appeals, the new rule also provides that the court may "review any ruling or matter related to the order on appeal occurring before the filing of the notice of appeal, except any order that was appealable under this rule."

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RECENT NEW YORK STATE DECISIONS

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

CIVIL UNIONS

Trial Court Has Equitable Jurisdiction to Dissolve Civil Union

Plaintiff and defendant entered into a civil union in Vermont in April 2003. In November 2007, plaintiff, unable to meet Vermont's residency requirement for bringing an action to dissolve a civil union, began an action in New York to dissolve the civil union. The defendant defaulted, plaintiff moved for the relief requested and the Supreme Court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Appellate Division determined that the Supreme Court had subject matter jurisdiction over the dispute, holding that a New York court may recognize the civil union status of parties under the laws of another state as a matter of comity, but did not reach the issue of what relief, if any, could be granted. (*Dickerson v. Thompson*, 73 A.D.3d 52, 897 N.Y.S.2d 298 (3d Dep't 2010). On remittal, the Supreme Court granted the request for a declaration relieving the parties from all rights and obligations arising from the civil union but concluded that it could not dissolve the union in the absence of any New York legislation authorizing courts to dissolve civil unions entered into in another state. On appeal the Appellate Division reversed on the law, holding that dissolution of a civil union was within the Supreme Court's broad equitable powers. One justice concurred in the result, contending that the Supreme Court's decision was not wrong "on the law" but that dissolution was justified by the subsequent legalization of same-sex marriage in New York, which reflected a legislative intent supporting "judicial involvement in dissolving relationships of the nature implicated here." *Dickerson v. Thompson*, 88 A.D.3d 121, 928 N.Y.S.2d 97 (3d Dep't 2011).

CY PRES

Standing in *Cy Pres* Proceeding

Trustees of a lifetime trust that named as a remainder beneficiary a foundation established to support St. Clare's Hospital of Schenectady began a *cy pres* proceeding under EPTL 8-1.1(c) after the hospital surrendered its license to operate pursuant to a state mandate. The foundation was cited in the *cy pres* proceeding and objected, as did the attorney general, to the notice of appearance submitted by another hospital that had acquired St. Clare's assets and assumed its hospital services under an asset transfer agreement required by the state mandate. The Surrogate denied the objections and held that the other hospital did have standing to appear in the proceeding because its "unique, contractual relationship" with St. Clare's gave it a preference in the distribution of the subject trust funds. *In re Trustco Bank*, 33 Misc.3d 745, 929 N.Y.S.2d 707 (Sur. Ct., Schenectady Co. 2011).

William P. LaPiana

WILLS

Collection of Rare Books Does Not Pass under Specific Bequest of Tangibles

Decedent's will made a specific bequest of all tangibles expressly including "books" to his wife, who was also named executor. On both her intermediate accounting and the estate tax return she allocated the decedent's collection of rare books, prints and other printed materials to her as part of the specific bequest of tangibles. The widow was also the beneficiary of two-thirds of the residuary estate and the decedent's son the beneficiary of the other one-third. The son objected to the intermediate accounting, and the court sustained the objection, holding that neither party had the burden of proof and that given evidence that the decedent intended to divide the bulk of his estate between his wife and his son, the collection passed under the residuary clause. *In re Gourary*, 34 Misc. 3d 486, 932 N.Y.S.2d 881 (Sur. Ct., N.Y. Co. 2011).

Appointment as Executor Does Not Make Witness "Interested"

EPTL 3-3.2 provides that a witness to a will who receives a "beneficial disposition" or an appointment of property under the will is a competent witness, but the disposition or appointment of property to the witness is void if there are not two other available witnesses who did not receive a beneficial disposition or an appointment of property. The nominated executor of the decedent's will was one of two witnesses to the will, and objectants contended that the nominated executor could not serve because the executorial appointment was a beneficial disposition. The Surrogate held that the nominated executor was not precluded from serving, and the Appellate Division agreed, holding that nomination as executor is not a beneficial disposition or an appointment of property. *In re Marsloe*, 88 A.D.3d 1003, 931 N.Y.S.2d 414 (2d Dep't 2011).

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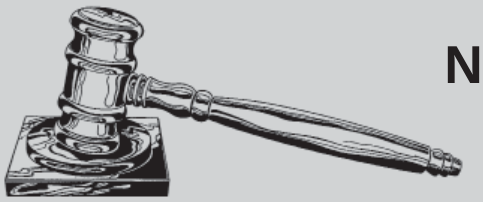

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Attorney-Fiduciary

In a probate proceeding, an issue arose as to whether the disclosure statement provided by the attorney-draftsman who was named as fiduciary complied with the provisions of New York Surrogate's Court Procedure Act 2307-a (SCPA). The disclosure statement contained the signature and stamp of a notary rather than a witness as required by the statute. Further, the notary was an attorney affiliated with the attorney-draftsman designated in the propounded will.

As to the first issue presented, the court held that the use of a notary rather than a witness did not affect the validity of the disclosure. The court opined that having a notary to act as a witness could further ensure the genuineness of the decedent's signature.

The second issue raised the more complex question as to the extent to which the witness may be affiliated with the nominated attorney-fiduciary, if at all, so as to avoid any appearance of impropriety. The court noted that the statute was silent on this question, but it recognized that in practical terms, requiring that someone unaffiliated with the attorney-draftsman serve as a witness could force a firm to seek a stranger to serve in this capacity—a requirement that was not only unwieldy but not set forth, either expressly or implicitly, in the statute.

Accordingly, the court concluded that the disclosure statement was in compliance with the provisions of SCPA 2307-a.

In re Beybom, N.Y.L.J., 9/28/11, p. 28 (Sur. Ct., Suffolk Co.).

Elective Share

The decedent's purported husband filed a notice of election against the decedent's estate and later died. The executor of the decedent's estate instituted a proceeding to determine the validity of the election. Jurisdiction was obtained over the husband's distributees, who opposed the relief requested by the executor. The executor moved for summary judgment, and the distributees opposed.

The executor maintained that the purported husband was not legally divorced from his prior wife when he married the decedent on January 12, 1996, and therefore his marriage to her was void. The documentary evidence submitted by the executor demonstrated that the divorce from the first wife did not become final until June 6, 1996.

The distributees conceded that the subject marriage took place prior to the judgment of divorce being issued but maintained that there might have been a subsequent marriage between the parties after the June 6 date. In support of this claim, the distributees offered evidence, including the decedent's death certificate and correspondence from the Veteran's Administration and Social Security Administration, stating that the decedent was married at the time of her death. In any event, the distributees argued that there was discovery yet to be had on the issue and that therefore summary judgment was premature.

The court opined that where there are competing claims as to whether a second marriage was valid at a given time, each supported by proof, there is a presumption that the second marriage is valid and that the prior marriage was dissolved. However, this presumption is rebuttable upon a proper showing. In this regard, the court noted that the distributees had conceded that the decedent's marriage took place at a time when the husband was still embroiled in a contested divorce. Further, the court noted that the accountant for the couple had submitted an affidavit stating that he had prepared their tax returns and listed their filing status as "single," as both had indicated to him on multiple occasions that they were not legally married.

Based on the foregoing, the court held that the executor had rebutted the presumption that a valid marriage existed at the time of the decedent's death. Further, the court concluded that the distributees had failed to create a genuine issue of material fact that a marriage was subsequently entered into by the parties. The court rejected such claims as based on nothing more than supposition, conjecture and self-serving statements that were insufficient to refute the uncontroverted documentary evidence in the record.

In re Newman, N.Y.L.J., 11/1/11, p. 26 (Sur. Ct., Suffolk Co.).

Judgment Notwithstanding the Verdict

In *In re O'Malley*, the Appellate Division, Second Department, explained the analysis required before relief may be granted under Sections 4404(a) and 4401 of the New York Civil Practice Law & Rules (CPLR). In *O'Malley*, appeals were taken from a decree of the Surrogate's Court, Queens County (Nahman, S.), which (i) denied the fiduciary's motion pursuant to CPLR 4404 to set aside the verdict of the jury as contrary to the weight of the evidence and for a new trial on the issue of the transfer of certain real property, (ii) dismissed, pursuant to CPLR 4401, that branch of the petition that asserted a claim for fraud against the respondent and (iii) granted the fiduciary's motion pursuant to CPLR 4401 for judgment as a matter of law directing the respondent to return certain cash withdrawals to the decedent's estate.

In affirming the decree of the Surrogate's Court, the Appellate Division opined that a trial court's grant of a motion pursuant to CPLR 4401 is appropriate only when the court finds that, upon the evidence presented, there is no rational basis upon which the trier of fact could render a finding in favor of the nonmoving party. The court instructed that the party opposing the motion must be afforded every inference that may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to that party.

The court concluded that the Surrogate's Court had properly granted the motion of the respondent dismissing the claim against him for fraud, finding that the evidence presented at the jury trial, viewed in the light most favorable to the fiduciary, failed to establish that the respondent had engaged in a misrepresentation of a material fact in connection with the subject transfer of real property.

The court further held that the Surrogate's Court had properly granted the fiduciary's motion for judgment as a matter of law on the issue of the cash withdrawals by the respondent from his parents' joint bank accounts. Viewing the evidence in the light most favorable to the respondent, the court found that there was no rational process by which the trier of fact could have found in his favor, particularly given his failure to satisfy his burden of establishing with contemporaneous records the legitimacy of the cash payments he allegedly made with the funds in issue.

Finally, the court concluded that under the particular circumstances of the case, the determination of the Surrogate's Court made after a nonjury trial was not inconsistent with the jury verdict.

In re O'Malley, N.Y.L.J., 9/21/11, p. 22 (A.D. 2d Dep't).

Partition

The provisions of SCPA 1901 authorize the Surrogate's Court to direct the "disposition" of a decedent's real property for the purposes set forth in SCPA 1902, including, but not limited to, the payment and distribution of shares in a decedent's estate. SCPA 1901(2)(i) includes within the meaning of the term "disposition" the authority of the executor or the administrator, upon application to the surrogate, to bring a partition action or to intervene in a pending partition action on behalf of an estate when the estate is the owner of an estate in common in real property. The statute has generally been interpreted as providing the means by which a fiduciary can seek court approval to participate in a partition action brought in a tribunal other than the Surrogate's Court, but not as a basis for the Surrogate Court's jurisdiction over such an action. In *Waggenstein v. Shwarts*, the Appellate Division, First Department, reached a different result.

Before the Court in *Waggenstein* was an appeal from an Order of the Supreme Court (Friedman, J.), which denied a motion to vacate a prior order of the court transferring a partition action to the Surrogate's Court. The record before the court revealed that the decedent had created an inter vivos trust during her lifetime for the benefit of her son and daughter. The trust assets consisted principally of the decedent's condominium and a securities account. On the death of the decedent, the trust terminated, and the assets were to be distributed to the decedent's children, who were also the co-trustees of the trust. The decedent's will also left all of her real and personal property to her two children.

Following the decedent's death, her daughter was appointed voluntary administrator of her estate. Thereafter, her son commenced an action in the Supreme Court seeking partition of the decedent's real property, or in the alternative, an order directing its sale and a division of the proceeds. The daughter interposed an answer and moved, pursuant to CPLR 325(e), to transfer the partition action to the Surrogate's Court on the grounds that the action was intertwined with issues relating to the administration of the decedent's estate. The action was thereafter transferred to the Surrogate's Court on consent. Approximately two years later, the son moved in the Supreme Court for an order vacating the transfer and retransferring the partition action to the Supreme Court, alleging that the Surrogate's Court lacked jurisdiction over the dispute between the parties regarding the distribution of the trust assets. The Supreme Court denied the motion, and the son appealed.

The Appellate Division affirmed, relying on the broad jurisdiction accorded the Surrogate's Court with respect to all matters pertaining to the affairs of a decedent and the administration of a decedent's estate. Further, the court noted those provisions of the SCPA that specifically grant the Surrogate's Court jurisdiction over lifetime trusts. The issues raised by the parties, involving claims of dishonesty, an alleged agreement regarding the distribution of trust assets and the carrying costs

of the realty, were found by the court to be within the scope of the Surrogate Court's authority. Significantly, the court reached this result despite the pendency of the partition action. Rather, the court found that the Supreme Court properly exercised its discretion in transferring the partition action to the Surrogate's Court so that all of the issues relating to the distribution of the decedent's assets, including the decedent's real property, could be determined by one tribunal. Notably, the court rejected the son's argument that the Surrogate's Court lacked jurisdiction over a partition action pursuant to SCPA 1901.

Wagenstein v. Shwarts, 82 A.D.3d 628 (1st Dep't 2011).

Pre-Action Disclosure

The petitioner, the co-executor of the estates of a deceased husband and wife, filed an application with the court requesting an order permitting pre-action disclosure pursuant to CPLR 3102(c). Specifically, the petitioner sought the deposition of the attorney-draftsman of the decedents' wills for ultimate use in a construction proceeding concerning the instruments. The petitioner further requested an order that neither the examination nor the construction proceeding would trigger the *in terrorem* clauses in the wills.

In support of the application, the petitioner alleged that the draftsman was 86 years old, and although he was in good health, his testimony might not be available at the time the construction proceedings were actually commenced. The court opined that pre-action disclosure is available despite the fact that the commencement of a proceeding may not be imminent. Accordingly, the court held that under the circumstances examination of the attorney-draftsman would be allowed.

However, the court declined to order that the examination would not trigger the *in terrorem* clause in the instruments, concluding that because the provisions of New York Estates, Powers & Trusts Law 3-3.5 create a safe harbor for construction proceedings, they implicitly permit any relevant discovery related to such a proceeding without triggering an *in terrorem* clause.

In re Estate of Spiegel, N.Y.L.J., 10/31/11, p. 30 (Sur. Ct., Nassau Co.).

Privilege Against Self-Incrimination

In a miscellaneous proceeding challenging the validity of certain trusts and transactions involving the decedent's assets that occurred shortly prior to his death, the petitioner, surviving spouse and limited administrator of the decedent's estate, sought an order directing the resumption of the respondent's deposition and compelling him to respond to certain questions.

The record revealed that during the course of the respondent's deposition, he was advised by counsel to refuse to answer certain questions posed to him on the basis of the Fifth Amendment privilege against self-incrimination.

The court noted that a witness's refusal to answer a question during a deposition is governed by § 221.2 of the New York Uniform Rules for State Trial Courts, which provides, in pertinent part, that a witness shall respond to all questions at a deposition, and an attorney shall not direct a witness not to answer a question, except as provided in CPLR 3115 or in order to preserve a privilege or right of confidentiality. The Rule further provides that if the witness does not answer a question, the examining party has the right to complete the remainder of the deposition.

The court observed that the privilege against self-incrimination exists under both the United States Constitution and the New York Constitution. The privilege will apply even when a resulting prosecution is possible, but not definite, and where the party's testimony may provide only a portion of the total proof necessary for prosecution of the witness. Nevertheless, the court opined that the availability of the privilege is not based simply upon a witness's declaration that an answer would be incriminatory. Rather, it is dependent upon the court's assessment of whether that claim is justified.

In opposition to the petitioner's application, respondent's counsel alleged that while the respondent did not fear criminal prosecution as a result of any response to the questions posed, he was concerned that the questions might elicit responses indicating a "scintilla of belief" that his conduct was inappropriate and thereby jeopardize his right to obtain a liquor license necessary to his business.

The court disagreed and refused to extend the privilege against self-incrimination to circumstances in which a party's response to a question posed during a deposition might reflect poorly on his conduct or affect his livelihood. Nevertheless, the court was sensitive to the respondent's concerns that a response might result in self-incrimination, and given the uncertainty of the situation, the court concluded that an *in camera* conference was appropriate. Accordingly, the respondent was directed to appear with counsel to testify, *in camera*, regarding the facts underlying his refusal to answer the questions presented by opposing counsel so that a determination could be made regarding the application of the privilege and the scope of his continued deposition.

In re Vescio, 9/27/11, File No. 355398/F, Dec. Nos. 27394, 27475 (Sur. Ct., Nassau Co.).

Summary Judgment

In a contested discovery proceeding, the executor of the estate sought repayment of alleged loans made by the decedent to her son, amounting to $375,000. The son died after his mother, and the fiduciary of his

estate moved for summary judgment dismissing the proceeding on the grounds, among other things, that the proceeding was barred by the statute of limitations and the doctrine of quasi-estoppel, and that the note purportedly evidencing the loans was unenforceable for indefiniteness.

The record revealed that when the decedent's son became seriously ill, she began to assist him in covering his expenses. Substantiation of this assistance was in the form of 117 canceled checks written by the decedent to her son, as well as a promissory demand note, which left the amount payable blank. Although the son's estate maintained that this note was not enforceable, the executor of the decedent's estate argued that he was not seeking to enforce the note, but rather to utilize the instrument as evidence of the decedent's intent, and the son's acknowledgment, that the transfers in issue were loans and not gifts.

In further support of his contention, the executor submitted the affidavit and deposition testimony of the decedent's nephew, an attorney who allegedly prepared the note at the decedent's request, and an affidavit from the decedent's sister, all attesting that the subject transfers were intended to be loans and not gifts.

The court opined that although the affidavits and deposition testimony were excludable at trial as hearsay, they could be considered on a motion for summary judgment if offered together with other admissible evidence to create a question of fact. Within this context, the court concluded that the promissory note and the canceled checks in combination with the hearsay statements of the witnesses were sufficient to deny summary relief to the son's estate.

Further, the court concluded that a triable issue of fact existed on the issue of quasi-estoppel. In this regard, the son's estate argued that inasmuch as the executor failed to include the alleged loans as an asset of the decedent's estate on the estate's federal and New York estate tax returns, the decedent's estate was estopped from claiming them as such in the instant proceeding. The court noted that the doctrine of quasi-estoppel, or estoppel against inconsistent positions, has been applied in a situation when a party asserts a position in court that is contrary to a position taken on a tax return. Nevertheless, the court held that inasmuch as the executor claimed that he did not know of the alleged loans at the time the tax returns were filed, a question of fact had been presented requiring that summary judgment on this ground be denied.

However, the court granted partial summary judgment on the issue of the statute of limitations holding that the claim for recovery of funds based upon checks pre-dating May 10, 2004, i.e., six years prior to the commencement of the proceeding, was time barred. The court reasoned that for purposes of computing the statute of limitations each transfer by check was a separate loan, payable on demand, and that the cause of action thereon accrued as of the date of the check.

In re Appleby, N.Y.L.J., 9/12/11, p. 32 (Sur. Ct., N.Y. Co.).

Testamentary Capacity

In *In re Haynes*, the issue of testamentary capacity was raised by the Surrogate's Court, Westchester County Court, on its own motion, pursuant to its duty to inquire into the validity of the propounded instrument before admitting it to probate.

Before the court was a contested probate proceeding in which the objectants moved for summary judgment. The decedent died survived by his wife of thirty-four years and by six children, five from a prior marriage and one from his marriage to his surviving spouse.

The propounded will, which was allegedly executed one month before the decedent's death, provided the decedent's wife with her elective share and left the balance of his estate equally to his six children. The attorney-draftsman of the instrument appeared on behalf of the nominated executrix, one of the six children, in seeking its probate. Preliminary letters testamentary issued to the nominated executrix but were not renewed due to her failure to comply with court orders.

Objections to probate were filed by the decedent's spouse and the child borne of her marriage to him. Thereafter, multiple discovery orders by the court issued, but the proponent failed to fully comply with them. After approximately one year of noncompliance, the objectants moved for summary judgment. The motion was unopposed by the proponent.

Significantly, before examining the issues raised by the motion, the court addressed the provisions of CPLR 3126, which authorize the imposition of penalties against a party for failure to obey an order for disclosure, including dismissal, striking a pleading or entering a default judgment. On this basis, the court held that the proponent's repeated disregard of its orders directing disclosure required dismissal of the probate proceeding. Nevertheless, the court opined that it had a duty to inquire into the genuineness of the instrument pursuant to the provisions of SCPA 1408. That statute requires a court to inquire particularly into all the facts and to be satisfied with the genuineness of a will and the validity of its execution before admitting the will to probate. The statute further requires that a will be admitted to probate if it appears that it was duly executed and that the testator at the time of execution was in all respects competent to make a will and not under restraint. (*See* SCPA 1408(1), (2)). The court therefore reviewed the probate petition and the documents submitted in support of the motion for summary judgment to ascertain the validity of the propounded instrument.

Based upon this review, the court determined that the decedent lacked testamentary capacity on the date of the will's execution. Although the court recognized that when a will is executed under the supervision of an attorney and contains an attestation clause there is an inference of due execution, it found that the conduct of the proponent and the attorney-draftsman negated any such inference and, in effect, constituted a refusal by the proponent to defend the validity of the will.

The court further concluded that the proponent's conduct vitiated the presumption of testamentary capacity that might otherwise be accorded in support of the instrument's probate. It found that the documents submitted by the objectants in support of their motion for summary relief demonstrated that the decedent was suffering from progressive dementia, hypertensive heart disease and cerebrovascular disease commencing in 2008 and continuing through the date the propounded will was executed.

Accordingly, the court held that the decedent lacked the mental capacity to execute a will, that the proponent had failed to establish with even a scintilla of evidence that the decedent was capable of making a will and that denial of probate was required.

In re Haynes, N.Y.L.J., 9/12/11, p. 20 (Sur. Ct., Westchester Co.).

Turnover

Before the court in *In re Estate of Llewellyn* was a discovery proceeding instituted by the preliminary executors of the estate seeking an order directing the decedent's former counsel to turn over certain property belonging to the decedent and to appear for a deposition regarding the identity and location of any other such property.

The property sought by the petitioners included legal files and documents amassed by counsel in connection with their representation of the decedent. Although counsel had also represented the decedent's wife, the petitioners stated that they were not seeking any documents regarding counsel's representation of the wife alone or any documents protected by the attorney-client privilege.

In considering the application, the court relied on the opinion by the Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 (1997), holding that, subject to narrow exceptions, upon termination of the attorney-client relationship, an attorney must afford the client presumptive access to the attorney's entire file on the represented matter. The court noted that the narrow exceptions referred to by the Court were documents that might violate a duty of nondisclosure owed to a third party or otherwise imposed by law, and a limited range of documents intended for internal office review and use, such as memoranda outlining an attorney's view of the client or tentative impressions of the subject matter of the representation.

Accordingly, counsel was directed to provide petitioners with all personal property in their possession or control within the limitations established by the Court of Appeals and to provide a privilege log for those items withheld. Further, the court directed that counsel appear to be deposed regarding the existence, identity and location of any property of the decedent not yet in petitioners' possession or control.

In re Llewellyn, N.Y.L.J., 10/31/11, p. 18 (Sur. Ct., N.Y. Co.).

Vacatur of Default

Before the court was a proceeding by a claimant against an estate seeking to create a reserve for the purpose of preserving the unliquidated claim pending the outcome of an action in the Supreme Court. The respondent, executor of the estate, failed to appear on the return date of the citation. She moved to vacate her default, alleging that she had erroneously assumed, upon receipt of the order to show cause and the petition, that it concerned one of the other pending matters in which her attorney had appeared on her behalf, and that he was consequently aware of the matter. Her attorney argued that his firm was not aware of the proceeding until after the order was issued and that the executor had a defense that should be heard on the merits.

In opposition to the motion, petitioner's counsel argued that the executor had failed to satisfy the requirements of CPLR 5015(a), by failing to establish a reasonable excuse for her default or a meritorious defense and by applying for relief by order to show cause rather than by notice of motion. The executor replied that petitioner had not asserted any prejudice would result if the motion were granted.

The court held that the executor's use of a notice of motion rather than an order to show cause was not fatal to her application, particularly since all parties had an opportunity to be heard with respect to the relief requested. Further, the court opined that in light of the strong public policy of resolving disputes on the merits, the brief delay by the executor in seeking vacatur of her default and the lack of prejudice to the petitioner, vacatur was warranted.

In re Betesh, N.Y.L.J., 11/4/11, p. 29 (Sur. Ct., Suffolk Co.).

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The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed (cmsapers@debevoise.com) or mailed on a 3½" floppy disk or CD (Cristine M. Sapers, Debevoise & Plimpton LLP, 919 Third Avenue, New York, NY 10022-3902) in Microsoft Word or WordPerfect. Please include biographical information. Ms. Sapers may be contacted regarding further requirements for the submission of articles.

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