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Trusts and Estates Law Section Newsletter

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

Inside

NYSBA

Table of Contents

Chair's Farewell Message

My farewell message is primarily one of gratitude. I have so many to thank for a truly rewarding chair year. Right at the top of the list are the people behind the scenes at our Bar office in Albany: Lisa Bataille, Kathy Plog, Kathy Heider and Adriana Favreau. The steady and capable work of these extraordinarily dedicated NYSBA women make it all happen. I know that now, more than ever. On behalf of the entire Section, thank you Lisa, Kathy, Kathy and Adriana for a full year of successful activities.

I'm also fortunate to have had the full backing of my partners at Hancock Estabrook, LLC in Syracuse, a law firm that has supported community and bar leadership from its beginning in 1889.

The 2015 highlights include three terrific Section meetings. Our hats go off to Carl Baker (Spring meeting at Kiawah); to Mary King, Nate Berti and Rob Reynolds (Fall meeting at the Turning Stone Resort); and to Susan Miller King and Lisa Newfield (Annual meeting, NYC) for their leadership in fulfilling perhaps our most important mission: to provide our members and all New York attorneys the very best in legal education opportunities, with a bit of fun mixed in, as always.

On the legislative front, with the leadership of Kate Madigan, Bob Freedman and Jill Choate Beier, we have advanced the debate on Digital Assets and Powers of Attorney, matters of critical importance to all New Yorkers. Under Meg Gaynor's watch, we will continue to advocate for the best legislative solutions possible on these matters and the long list of other legislative items.

So, it was my great pleasure on January 27, 2016, to pass the gavel, both figuratively and literally, to my good friend Meg Gaynor. As all who have served as Section officers can attest, one of the best fringe benefits of this job is making friends with great Trusts and Estates lawyers from across the State!

Marion Hancock Fish

Marion Hancock Fish

A Message from the Incoming Chair

It is an honor to serve as the Chair of our Section. In looking forward to the balance of 2016, I expect that the Section's focus will continue to be on legislation that is important to the New York Trusts and Estates Community. Work on an amendment to the Power of Attorney will continue. Professors Bloom and LaPiana spent last summer working on changing and coordinating trust law in New York and seeing to what extent the Uniform Trust Code can be adapted to be effective in New York. This will continue. The Section is hopeful that the legislation regarding a trustee's power to adjust between principal and income will move forward in the Legislature. This legislation is important given a trustee's duty to invest for total return and the diminishing amounts of interest and dividends earned on investments.

The Spring Meeting will begin on May 5, 2016, at The Boulders, a beautiful resort located on the outskirts of Phoenix, Arizona. The rooms are individual casitas. Some of the Section members are planning to combine the trip with a visit to the South Rim of the Grand Canyon. The area is perfect for stargazing and it is expected to have a long distance telescope and an expert at one of the receptions to identify constellations and answer any questions. The hotel boasts a well-known spa, hiking trails, tennis courts and two challenging golf courses.

The CLE Program for that meeting is in process and was not finalized at the time of this writing. Jill Choate Beier and Carl Baker are Chairs of the program. The details will be included in the brochure for the meeting. Make sure to reserve your casitas quickly as the hotel is a small venue. You can find out more on the hotel's website, www.Boulders.com.

Taking care of one of the New York State Bar Association's largest Sections often becomes a full-time volunteer job. On behalf of my fellow officers and the 4,000 plus members of the Section, I thank Marion Hancock Fish for all her work leading our Section over the past 12 months. She was constantly on top of the many issues that arise in the course of the year, guiding our committees, directing our work, and speaking for us at various gatherings (Bankers meetings and Surrogate's Associations) in different parts of the Empire State. Job well done, Marion. I am certain she is looking forward (as are her partners) to getting back to client matters.

Magdalen Gaynor

Editor's Message

As I begin another year as editor-in-chief, I'd like to thank the members of our Section, especially the Chairs and Vice Chairs of the Section Committees, for their continued participation through article submissions that create a quality *Newsletter* every quarter.

This edition of our *Newsletter* includes an article by Mark J. Altschuler on behalf of the Section's Estate and Trust Administration Committee addressing the possibility of commissions for individual trustees of wholly charitable trusts, and an article by Louis A. Cannizzaro on behalf of our Life Insurance and Employee Benefits Committee discussing "Top-Hat" retirement plans as another method of asset protection. We are also pleased to publish Paul S. Forster and Laurence Keiser's "Santa Clause" article, which proposes language to protect estates from New York State's new estate tax, an article from Nancy E. Klotz and Anthony T. Selvaggio on the popular topic of inheritance rights of posthumously conceived children under the new EPTL 4-1.3, and finally, an article by Anthony Enea addressing the long term care planning implications for couples who separate but never legally divorce.

Our next submission deadline is June 8, 2016 for our Fall 2016 issue.

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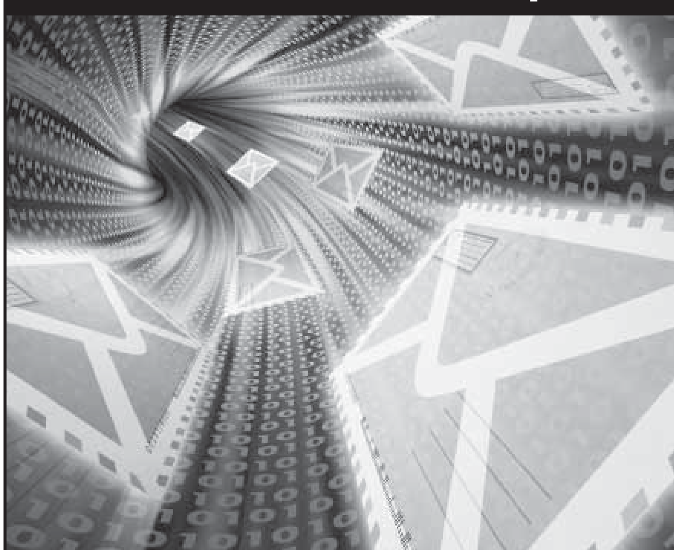

If you have written an article you would like considered for publication, or have an idea for one, please contact the *Trusts and Estates Law Section Newsletter* Editor:

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

www.nysba.org/TrustsEstatesNewsletter

Creditors' Rights to Top-Hat Plan Benefits

By Louis A. Cannizzaro

As more estate planning vehicles and financial products (such as pay-on-death accounts, joint accounts, revocable lifetime trusts, and various forms of retirement plans) become available and widely used, estates attorneys often find that the value of a decedent's assets that were individually owned or left to the decedent's estate (*i.e.*, the "probate assets") are greatly exceeded by the value of the assets that pass to a surviving joint owner or a named beneficiary by operation of law (the "non-probate assets"). As a result, the decedent's creditors cannot obtain full payment of their debts from the decedent's probate estate. Those creditors are often prevented from obtaining payment from the survivor benefits of the decedent, if any, in executive retirement plans, often called "Top-Hat Plans."

I. Introduction

Section 1811 of the New York Surrogate's Court Procedure Act establishes the following priority for the payment of debts from probate assets:

(1) First, funeral expenses, subject to the payment of administration expenses, which generally include attorney fees, executor's commissions, and estate and fiduciary income taxes.

(2) Second, any debts entitled to priority under relevant federal or New York law, such as unpaid federal personal income taxes.[1]

(3) Third, taxes assessed on property of the decedent prior to death.

(4) Fourth, judgments docketed and decrees entered against the decedent prior to death.

(5) Fifth, all other debts owed by the decedent, to be satisfied pro rata if the estate is insolvent.

No similar rules govern the priority of payments to creditors from non-probate assets, other than those that give priority to debts secured by such property, such as in the case of mortgages on real property passing by operation of law.[2]

Consider the following scenario: a New York resident passes away owning only a small bank account in her individual name, a modest amount of investments in her individual retirement account (IRA), and a much more valuable interest in an unfunded, nonqualified plan managed by her former employer primarily for the purpose of providing deferred compensation to a select group of management or highly compensated employees, often referred to as a Top-Hat Plan. Suppose the assets in the decedent's individual bank account are insufficient to satisfy the decedent's creditors.[3]

This scenario raises two issues. May a creditor of the decedent compel the Top-Hat Plan to pay the creditor the participant's survivor benefits? May the creditor garnish payments of plan benefits to the participant's beneficiary?

The responses depend upon which state's law controls the creditor's rights, which need not be New York if the Top-Hat Plan is subject to another state's law, as is often the case when a decedent worked in another state. This article will analyze the relevant case law and statutes as they apply to plans subject to New York law.

II. Applicable New York State Law

Several New York State laws may insulate interests in a Top-Hat Plan from the claims of a plan participant's creditors.

Perhaps the most prevalent New York statute governing protection from creditors in New York is Section 5205 of New York's Civil Practice Law and Rules (CPLR), which specifically provides that certain personal property is exempt from being applied to the satisfaction of money judgments. Civil Practice Law and Rules 5205(c)(1) provides, with limited exceptions, for the protection of "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Civil Practice Law and Rules 5205(c)(2) goes on to specify that such property held "in trust" under CPLR 5205(c)(1) includes all manner of "trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from" retirement assets that are established and maintained under specified provisions of the Internal Revenue Code of 1986, as amended (the "Code").

By tying the CPLR protections for retirement benefits to specific sections of the Code, without any specific reference to the Employee Retirement Income Security Act, as amended (ERISA), concerns about ERISA preemption are quelled. United States Supreme Court decisions discussed below held that specific references to ERISA in state statutes will cause the statutes to be preempted, regardless of the nature of the reference.

The Code provisions referenced by CPLR 5205(c) include Code §§ 401, 403, 408, 408A, and 457. Code §§ 401(a) (tax-qualified plans funded with trusts), 403(a) (tax-qualified plans funded with annuities), 408 (traditional IRAs funded with trusts, annuities or custodial accounts), and 408A (Roth IRAs funded with trusts, annuities or custodial accounts) require plans to be funded. Thus, those provisions are inapplicable to Top-Hat

Plans because by definition such plans are not funded. However, Code § 457 governs Top-Hat Plans sponsored by tax-exempt entities, such as many schools and hospitals, and by state and local governments and any of their agencies. It does not govern plans sponsored by taxable private entities, such as trades or businesses.

Civil Practice Law and Rules 5205(c)(2) provides specifically that benefits from a retirement plan "that satisfy[y] the requirements of section 457 of the Internal Revenue Code" are protected. Two sets of plans satisfy the requirements of Code § 457. The first are eligible deferred compensation plans under Code § 457(b), whose deferrals are subject to certain annual limits, similar to the contribution limits of tax-qualified plans.[4] The second are Code § 457(f) plans, which are deferred compensations arrangements that do not satisfy the Code § 457(b) requirements.

This debtor protection continues after death, as New York provides strong debtor protections for many testamentary substitutes. As illustrated by the Broome County Surrogate's Court decision in *In re Estate of King*, by virtue of either New York statute or case law:

> [V]irtually every type of retirement plan is exempt from the claims of a decedent's creditors. Anti-alienation applies to ERISA plans (29 USC § 1056 (b)), New York State employees' retirement plans (Retirement & Social Security Law § 110), New York State teachers' retirement plans (Education Law § 524), Individual Retirement Accounts (CPLR 5205 (c)), Federal Thrift Savings Plans (*Matter of Gallet*), and life insurance and annuities (*Matter of Clotworthy* and Insurance Law § 3212).[5]

Although the Court in *King* did not deal specifically with a Top-Hat Plan, it extended creditor protections to the decedent's Code § 403(b) retirement plan benefit at issue, which are not subject to CPLR 5205(c). That benefit may be regarded as derived from both an annuity contract and from a retirement plan. Thus, the Court held there was "no logical reason" why it should not be similarly exempt from the claims of the participant's creditors after death on either of those two grounds.[6] The Court found statutory support for this position in New York Estates, Powers and Trusts Law (EPTL) 13-3.2, which protects the beneficiaries of a participant's retirement plan or annuity plan from the claims of the participant's creditors.[7] One may argue similarly that a participant's survivor benefits from any Top-Hat Plan that is a retirement plan are protected from claims of the participant's creditors.[8]

There is an additional argument that may be used to protect both the participant and the beneficiaries of the participant's Top-Hat Plan from the participant's creditors even though the plan is not a Code § 457 plan. The purpose of CPLR 5205(c)(2) is to expand the types of assets that are considered to be "held in trust" for purposes of CPLR 5205(c)(1). It may be argued that some Top-Hat Plans are "held in trust" under subsection (c)(1) even though the plans are considered unfunded, and therefore protected from a debtor's creditors during the participant's life and after death.

While no New York courts appear to have considered whether CPLR 5205(c)(1) applies to Top-Hat Plans, a federal court has ruled on the application of the statute to trusts that are not tax-qualified retirement plan trusts.

In *In re Quackenbush*,[9] the Bankruptcy Court for the Southern District of New York was asked to rule whether a debtor's Code § 529 college savings plan was protected from his creditors by virtue of it being a plan held "in trust" within the meaning of CPLR 5205(c)(1). In finding that the plan benefits should be used to satisfy the debtor's creditors, the Court examined whether the account could be considered to be "held in trust" for purposes of the statute by examining the nature of the relationship between the debtor and the custodian of the 529 plan established by the Uniform Gifts to Minors Act (UGMA). The court noted that New York cases found that the relationship between a custodian and a Code § 529 plan beneficiary was not one of a fiduciary nature, and that such plans are essentially a statutory method of making inter-vivos gifts of securities or money to minors, who would become the legal and equitable owner of the plan upon their reaching the age of majority. Accordingly, the court found that such plan benefits were not protected by CPLR 5205(c)(1).

While the debtor's argument in *In re Quackenbush* failed, the decision does not preclude the argument that CPLR 5205(c)(1) is applicable if a separate trust (often called a "Rabbi trust"[10]) is established to partially fund the Top-Hat Plan. While Rabbi trusts, by design, do not operate to protect against claims of an employer's general creditors, the fiduciary relationship that such trusts establish between their trustees and plan beneficiaries would seem to provide a basis for the application of CPLR 5205(c), and therefore defeat the claims of a participant's creditors.[11] Such trusts are described more fully in Rev. Proc. 92-64, 1992-2 C.B.

III. Applicable Federal Law

Several federal statutes may limit the ability of a participant's creditors to obtain an interest in the participant's benefits from Top-Hat Plans.

Title III of the Federal Consumer Credit Protection Act (CCPA)[12] generally limits the garnishment of earnings in any workweek or pay period to 25 percent of disposable earnings.[13] Earnings are defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program."[14]

Using this broad definition, periodic payments from Top-Hat Plans appear to qualify as "earnings" for purposes of the CCPA.[15] Although there are no cases addressing payments from Top-Hat Plans, it appears that the statute may protect 75% of the distributions from such plans from garnishment.[16]

This protection, however, only applies to payments as they are paid from Top-Hat Plans, and does not provide protection to a participant's total interest in such plans. Accordingly, one must look elsewhere for further sources of potential protection at the federal level.

IV. ERISA

The primary federal legislation that governs entitlements to retirement benefits is the ERISA,[17] which was enacted by Congress to protect the interests of employees and their beneficiaries in employee benefit plans. The Code only determines the tax treatment of pension benefits, contributions, and plans, but not benefit entitlements. Plans that ERISA governs must disclose plan information to beneficiaries,[18] and plan fiduciaries must satisfy demanding standards of conduct.[19] One of the most important ERISA provisions is the requirement that pension plans that cover a broad cross section of employees, other than Savings Incentive Match Plans for Employees of Small Employers and simplified employee plans, must provide a participant's spouse with survivor benefits.[20] Such plans are thus often called Spousal Survivor Benefit Plans, which do not include Top-Hat Plans (which do not cover a broad cross-section of employees). Spousal Survivor Benefit Plans must prevent a participant from freely selling, transferring, or assigning her interest in the plan to another person.[21]

The ERISA preemption provision provides that ERISA shall supersede any state laws that "relate to" employee benefit plans that are governed by its terms.[22] Whether specific state laws "relate to" an employee benefit plan under ERISA, and would therefore be superseded, has been the subject of several United States Supreme Court decisions and many articles.

The Supreme Court discussed the rights of a participant's creditor to compel an ERISA plan to pay the participant's benefit to a creditor in *Mackey v. Lanier Collection Agency & Service, Inc.*[23] In particular, a collection agency sought to enforce an order issued by the Georgia state courts to compel a participant's ERISA vacation plan to pay the participant's debt on behalf of the participant when the plan would otherwise make benefit payments to the participant. The Court first found that ERISA preempted Georgia's state level garnishment provision that specifically referenced, and prohibited attachment of judgments to, ERISA employee benefit plans. The Court then found that ERISA did not preempt the more general provisions of Georgia's garnishment law (which did not specifically reference ERISA) from being used to enforce debts against the participant's interests in an ERISA plan that was not a Spousal Survivor Benefit Plan, such as the vacation plan at issue.

Mackey illustrates the Supreme Court's position that state laws that specifically reference ERISA plans "relate to" them for purposes of preemption, regardless of the state statute's actual effects on ERISA plans. The *Mackey* decision permitting state-law garnishments of an ERISA plan, however, is somewhat at odds with later decisions in which the Supreme Court found that ERISA's benefit entitlement provisions preempted state laws to the contrary. For example, in *Kennedy v. Plan Admin. of DuPont Sav. and Inv. Plan.*,[24] a decedent designated his wife as the beneficiary of his savings and investment plan, which was an "employee pension benefit plan" subject to ERISA. Following this designation, the couple divorced, and the wife's interest in the plan was "divested" pursuant to a state divorce decree. The decedent, however, failed to replace his wife as the plan's designated beneficiary. The decedent's daughter and executor argued that the wife's divestiture caused her beneficiary interest in the pension plan to be extinguished, which implied that under the plan terms the benefits were payable to the decedent's estate. The Court found that the decedent's plan, which was subject to ERISA, was required to pay benefits pursuant to its own terms, which did not provide for any such benefit extinguishment, and accordingly found that the plan proceeds were properly payable to the decedent's ex-wife.[25] The Court also ruled that federal common law did not supersede plan entitlements and declared it had previously held that conflicting state laws would also not supersede plan entitlements.[26]

The inconsistency between *Mackey* and *Kennedy* is best explained by the recognition that *Mackey* did not discuss the ERISA entitlement of participants to benefits pursuant to the terms of the plan. This was the focus of *Kennedy*, and discussed explicitly in the Court's earlier 1997 post-*Mackey* preemption decision of *Boggs v. Boggs*.[27] In *Boggs*, the Supreme Court held that ERISA preempted a Louisiana state law which would have allowed the decedent's first spouse, who predeceased him, to dispose of her community property interest in the decedent's undistributed pension plan benefits under her Will. The Court found that allowing a predeceased first spouse to dispose of the ERISA plan benefits of her husband, the participant, via Will, would directly conflict with "ERISA's solicitude for the economic security of surviving spouses."[28] Congress approved the Retirement Equity Act of 1984 (which modified ERISA) in order to improve the protection of surviving spouses in significant respects, including, among other things, ensuring a stream of income to surviving spouses through the qualified joint and survivor annuity provisions.[29] Accordingly, the state law was held to be preempted by ERISA.[30]

Moreover, the decision to find that ERISA preempts the explicit exemption of ERISA plans from the Georgia garnishment law is based on what some have argued is a flawed interpretation of prior Supreme Court case law.[31] Before *Mackey*, the Court had not held that a state law was preempted based solely on a mere reference to ERISA, yet the *Mackey* Court arguably misconstrued the holdings in certain cases (such as *Shaw v. Delta Air Lines, Inc.*[32]) to find that *any* explicit reference in a state law to an ERISA plan results in the preemption of that law, regardless of the law's actual effect on the plan itself.

Despite this, at least one federal court has applied to Top-Hat Plans *Mackey*'s holding that ERISA does not preempt the application of general state garnishment statutes to ERISA plans other than Spousal Survivor Benefit Plans. In *Sposato v. First Mariner Bank*,[33] the United States District Court of Maryland found that the defendant, a creditor of the plaintiff, could garnish the plaintiff's benefit payments from a Top-Hat Plan. It based its ruling primarily on the assertions that: (1) ERISA's anti-alienation provision does not apply to Top-Hat Plans; and (2) Maryland's general garnishment statute did not specifically reference ERISA, nor violate any of its other provisions. Accordingly, the court held that ERISA did not preempt the garnishment of the plaintiff's benefit payments from the Top-Hat Plan.

In *Sposato*, however, the defendant sought to use Maryland law to garnish benefits as they became due and payable to the plaintiff. However, the Court stated that the law allowed the collection of debts against Top-Hat Plan benefits prior to those benefits becoming due and payable. The court did not consider the ability to garnish survivor benefits under Maryland law, which would be more applicable in the context of estate administrations.

In light of this uncertainty regarding the application of federal law, it is useful to determine whether state law limits the ability to collect debts against a participant's Top-Hat Plan benefits. For example, under New York law, the results would be different. Under CPLR 5205 and EPTL 13-3.2, as discussed above, the participant's creditor likely could not garnish the survivor benefits of a Top-Hat Plan that is a retirement plan before or after the benefits become due and payable to a beneficiary. In contrast, as discussed above, the creditor during the participant's life may use a different state's garnishment law (such as the one in Maryland) to garnish the participant's lifetime benefits as they become payable to her.

V. Conclusion

Under New York Law, there is strong support for the conclusion that creditors may not generally obtain the participant's survivor benefits from a Top-Hat Plan that is a retirement plan. This is the case whether the participant's creditors seek to enforce a judgment against the plan itself, against the plan's benefit payments to the beneficiary, or against the beneficiary. There is similar and specific protection for the participant during the participant's life if the plan is sponsored by a tax-exempt private entity, or by a state or local government or an agency of such a government.

However, the extent of the debtor protection available for interests in Top-Hat Plans sponsored by private entities other than tax-exempt entities is quite ambiguous. The results may differ if laws from other states determine the creditor-debtor rights to the Top-Hat Plan benefits at issue, such as for a participant who worked in another state.

Endnotes

1. 31 U.S.C. § 3713(a)(1)(b).
2. *See generally*, Timothy M. Ferges & Dana L. Mark, *In the Red: Decedent's Creditors and Non-Probate Assets*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2015 at 4 (discussing the rights of a decedent's creditors to the decedent's non-probate assets).
3. As discussed below, IRA survivor benefits are not generally available to pay the decedent's creditors.
4. *See, e.g.*, I.R.C. § 401(a)(16), which governs plans qualified under I.R.C. § 401(a).
5. 764 N.Y.S.2d 519, 523 (Sur. Ct., Broome Co. 2003) (holding that creditors may not compel payment of their debts from non-probate assets that included a life insurance policy, a teacher's retirement system death benefit, and a 403(b) account).
6. *Id.*
7. *See id.* at 522. More specifically, N.Y. EPTL 13-3.2(a) provides that the rights of beneficiaries to receive distributions from all manner of trusts, retirement assets, annuities, etc. "shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy." This does not apply to transfers that were intended as an attempt defraud creditors, which is prohibited under Article 10 of the Debtor and Creditor Law (see EPTL 13-3.2(b)).
8. *See also* Timothy M. Ferges and Dana L. Mark, *In the Red: Decedent's Creditors and Non-Probate Assets*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2015 at 2 (discussing EPTL 13-3 more extensively).
9. 339 B.R. 845 (S.D.N.Y. 2006).
10. The name 'Rabbi trust' descends from a determination by the Internal Revenue Service concerning an irrevocable trust established for a rabbi by his congregation. *See* I.R.S. Priv. Ltr. Rul. 8113107 (December 31, 1980).
11. While there appear to be no reported decisions applying CPLR 5205 specifically to a Rabbi trust, its application in such instances is consistent with existing case law that Rabbi trusts are generally subject to the grantor's (*i.e.*, the employer's)

creditors in bankruptcy. *See, e.g.*, *Collins & Aikman Corp. v. Northern Trust Bank of Cal., N.A. (In re Collins & Aikman Corp.)*, No. 05-55927, 2006 WL 2310798 (Bankr. E.D. Mich Aug. 9, 2006).

12. 15 U.S.C. §§ 1671 *et seq*.
13. 15 U.S.C. § 1673(a).
14. 15 U.S.C. § 1672(a).
15. *See, e.g., United States v. Lee*, 659 F.3d 619 at 621 (7th Cir. 2011) (holding that 75% of 401(k) plan benefit payments are protected). *Cf. Sposato v. First Mariner Bank*, 2013 U.S. Dist. LEXIS 111824 at 13-14 (D. Md. March 29, 2013) (court asked parties to brief the issue).
16. *See, e.g., Lee*, 659 F.3d at 621-22.
17. The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 29 U.S.C.).
18. ERISA §§ 101-111.
19. ERISA §§ 401-414.
20. ERISA §§ 201 and 205.
21. ERISA § 206(d).
22. ERISA § 514(a).
23. 486 U.S. 825 (1988).
24. 555 U.S. 285 (2009).
25. *Id.* at 299-301.
26. *Id.* at 302-04.
27. 520 U.S. 833 (1997).
28. *Id.* at 843.
29. *Id.*
30. *Id.* at 843-844.
31. *See, e.g.*, Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. Marshall L. Rev. 145, 270-73 (Fall 2013), *available at* http://ssrn.com/abstract=2440008 (last visited December 28, 2015).
32. 463 U.S. 85 (1983).
33. 2013 U.S. Dist. LEXIS 45806 (D. Md. March 29, 2013).

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New EPTL 4-1.3 and Inheritance Rights of the Posthumously Conceived Child

By Nancy E. Klotz and Anthony T. Selvaggio

Gov. Cuomo signed into law Estates, Powers and Trusts Law (EPTL) 4-1.3 on November 21, 2014. This new statute addresses the inheritance rights of posthumously conceived children. While a seemingly niche issue, the new law creates a potential trap for trusts and estates practitioners and fiduciaries unaware of the provisions. This article begins with a brief history of this area of the law in New York, provides a summary of the new legislation, and concludes with examples of its applicability and practical planning considerations for attorneys.[1]

I. Background

New York inheritance laws in place prior to the adoption of the new EPTL 4-1.3 had been enacted long before posthumous conception was a reality. The decision to store human genetic material, such as sperm, ova or embryos, for use in connection with in vitro fertilization (IVF) and intrauterine insemination (IUI) gives rise to the possibility of a child conceived and born after the death of a genetic parent. Human genetic material stored via cryopreservation, the standard storage method used at fertility clinics, can be preserved in viable condition for decades.[2]

The use of assisted reproductive technology has increased dramatically during the past decade.[3] This past fall, Apple and Facebook made news by offering egg-freezing coverage to female employees as a benefit.[4] Some corporations already provide medical coverage for assisted reproductive technology and may follow the lead of Apple and Facebook to expand these benefits to include storage techniques as well. As a result of these developments, the opportunity for posthumous conception is also growing.

A. Statutory Law

Prior to the new EPTL 4-1.3, there was a split in New York regarding the inheritance rights of a posthumously conceived child under statutory law versus these rights under case law. New York intestacy statute, EPTL 4-1.1 (c) specifically provides that, "Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime." A posthumously conceived child by definition fails to satisfy the requirement of being conceived before the decedent's death, and therefore, was not considered a distributee under this section. Similarly EPTL 5-3.2, addressing the rights of a child born after the execution of a will, defines an after-born child as "a child of the testator born during testator's lifetime or in gestation at the time of the testator's death and born thereafter." Again, by definition, a posthumously conceived child is not in gestation at the time of the testator's death and so does not satisfy this definition.

B. New York Case Law

In contrast, *Matter of Martin B.*[5] is the only published opinion to address inheritance rights of a posthumously conceived child in the context of a class gift under a trust. In this case, the trustees of seven trusts asked for advice and direction regarding whether two children conceived and born after the death of their father, the deceased son of the grantor, were the issue and descendants of the grantor. The trusts referred to the grantor's issue and descendants in two respects. First, after the death of the grantor and during the lifetime of the grantor's surviving spouse, the trustees had discretion to sprinkle principal to and among the grantor's issue. Second, the grantor's surviving spouse had a power of appointment to appoint the trust assets among the grantor's issue or descendants at her death.

In reaching the conclusion that the two posthumously conceived children were issue and descendants for purposes of these trusts, the court reviewed the existing statutes. The court noted that the statute addressing the rights of after-born children, EPTL 5-3.2(b), applies to children of the testators themselves, not children of a third party, as in this case. In regard to future interests, EPTL 2-1.3(a)(2) provides that children conceived before, but born alive after a disposition becomes effective, are included in a disposition to issue, children, descendants, heirs, or similar terms. Although this statute would literally include a posthumously conceived child, it was enacted long before advances in biotechnology allowed for this possibility, so the Surrogate did not consider it controlling.

Instead, the court relied on the grantor's intent as determined from a sympathetic reading of the trust instruments. The Surrogate observed that when the grantor created these trusts in 1969 he may not have contemplated that a deceased child would have posthumously conceived children. However, that did not preclude the children from being included as members of the class. A sympathetic reading of the trusts resulted in the conclusion that the grantor intended to benefit his bloodline, including these two posthumously conceived children. The judge ended by imploring the New York legislature to adopt comprehensive legislation to address this issue.[6]

II. New EPTL 4-1.3

The result of this call to action is the enactment of EPTL 4-1.3. The new EPTL 4-1.3 addresses four broad areas. First, the law begins with applicable definitions.

Second, the law sets forth requirements in order for a genetic parent to provide consent to the posthumous use of stored genetic material. Third, the law creates notice and filing requirements regarding a potential posthumous child. Finally, the law creates time limits within which the child must be conceived and born.

A. Definitions

EPTL 4-1.3(a) defines key terms pertinent to interpreting the statute. First, the term "Genetic Parent" is defined as meaning either a man who provided sperm, or a woman who provided ova, that was subsequently used to "conceive a child after the death of the man or the woman." Next, "Genetic Material" is defined as the "sperm or ova provided by the genetic parent." Finally, "Genetic Child" is defined as the child of the "sperm or ova provided by a genetic parent, but only if and when such child is born." In each of these definitions embryos are absent from the possible types of stored genetic material, and the use of stored embryos has not been directly addressed by the statute.

While these definitions are simple, these new terms represent a significant change in the arena of estate planning. Prior to this legislation, attorneys had to be concerned with two categories of descendants: biological children and adopted children. With the new EPTL 4-1.3 attorneys and fiduciaries need to be alert for a third type of descendant: the "genetic child."

B. Consent to Posthumous Use and Appointment of Authorized Representative

A second, critical aspect of the new statute is consent. Pursuant to EPTL 4-1.3(b)(1), the genetic parent must execute a written instrument expressly consenting to the use of his or her genetic material for the purposes of posthumous reproduction. The written instrument must also authorize a specific individual to make decisions regarding the use and application of his or her genetic material after the genetic parent's death. EPTL 4-1.3(c) provides both the requirements for the execution of the written instrument demanded by EPTL 4-1.3(b)(1) and a statutory form to satisfy this requirement. This section of the statute enumerates four principles regarding this written instrument:

1. **Manner of Execution—**it must signed by the genetic parent in the presence of two adult disinterested witnesses who must also sign the instrument. The statute particularly precludes the authorized representative from serving as a witness.
2. **Revocation—**it may only be revoked by a written instrument executed in the same manner as the original written instrument. However, EPTL 4-1.3(b)(1) provides that the written instrument must be executed "not more than seven years before the death of the genetic parent" so instruments executed outside this time frame are no longer valid.
3. **Alteration or Revocation by Will Prohibited—**the statute expressly prohibits the ability to alter or revoke the written instrument by means of the genetic parent's Will.
4. **Provision for Successor Representative—**the statute allows the genetic parent to name a successor to his or her authorized representative who would act if the primary representative was unwilling or unable to act.

EPTL 4-1.3(c)(5) provides a sample statutory form which satisfies the written consent requirement. The statute notes that the written instrument "may be substantially in the following form." This indicates that attorneys will have some ability to alter this form, and customize it for specific circumstances. The sample form includes language stating that it will only remain in effect for seven years from the date of execution consistent with EPTL 4-1.3(b)(1), but presumably this time frame could be shortened.

C. Notice and Filing by Authorized Representative

Following the death of an individual who has satisfied the written consent requirements, the burden is placed on the deceased individual's authorized representative to fulfill certain notice and filing obligations. If the authorized representative fails to take these steps, a posthumously conceived child who satisfies all other requirements will not be treated as a child of the deceased genetic parent.

First, EPTL 4-1.3(b)(2) requires that the authorized representative must provide notice of the existence of the genetic material to either the personal representative of the genetic parent's estate or, in certain cases, to a distributee of the genetic parent. The notice to a personal representative must be made within seven months from the date of issuance of letters testamentary or administration. However, if letters have not been issued within four months after the genetic parent's date of death, then notice must instead be made to a distributee of the genetic parent within seven months of the genetic parent's date of death. No guidance is provided with regard to the specific distributee to receive notice, and there is no hierarchy among possible distributees discussed.

Second, EPTL 4-1.3(b)(3) mandates that the genetic parent's authorized representative must record the written instrument in the Surrogate's Court granting letters (or in the Surrogate's Court having jurisdiction over the genetic parent in the event no letters are issued) within seven months of the genetic parent's date of death.

D. Time Limits

Finally, EPTL 4-1.3(b)(4) creates time limitations. Pursuant to this section, the genetic child must be in utero no later than 24 months after the genetic parent's death or actually born no later than 33 months after the genetic parent's death.

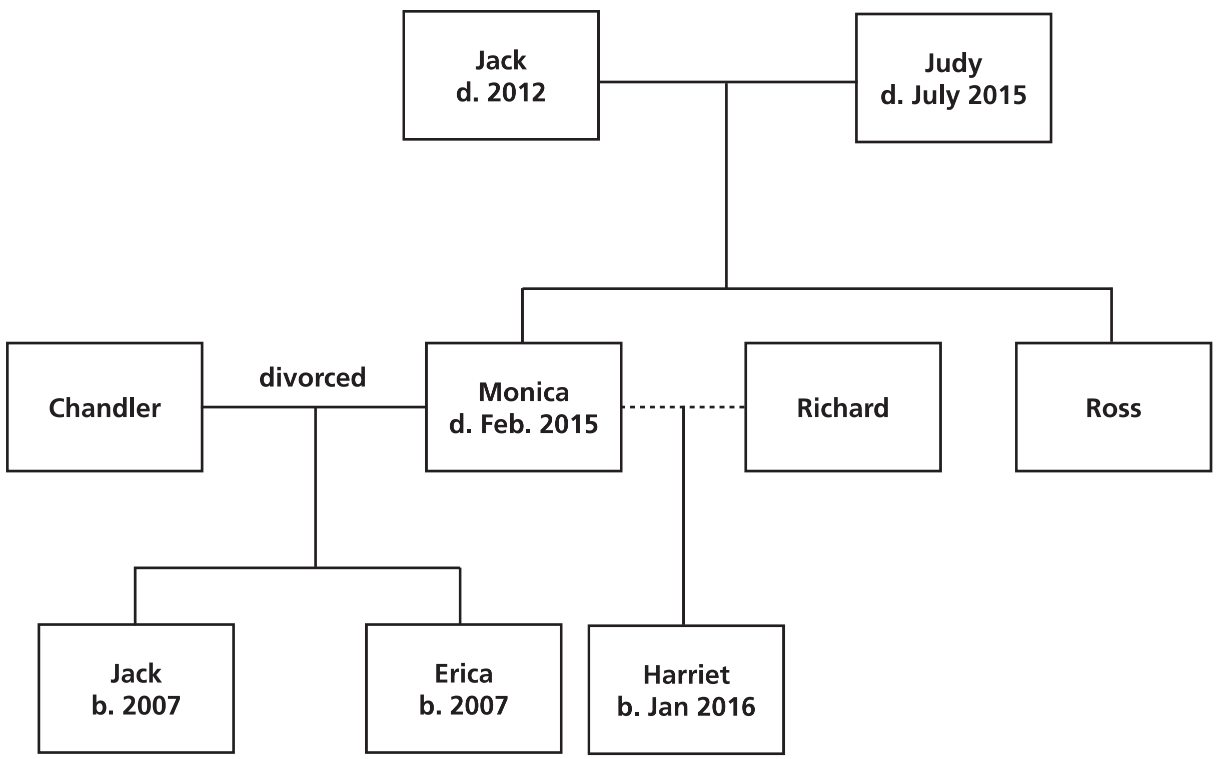
III. The Practical Impact of EPTL 4-1.3

EPTL 4-1.3 applies most immediately and directly to the estate planning concerns of a genetic parent. However, the impact of EPTL 4-1.3 is much broader in scope and potentially encompasses all testators, intestate estates and grantors of lifetime trusts. Accordingly, careful estate planning attorneys will consider how this statute may affect each client. The following section of this article illustrates the potential applicability of EPTL 4-1.3 to the estate planning of both the genetic parent and other individuals. This discussion demonstrates how EPTL 4-1.3 interacts, and in some cases overrides, other portions of the EPTL.

A. Examples of Applicability

It is easiest to understand the application of the statutory scheme in the context of hypotheticals. Consider, for example, the following set of facts as outlined in the diagram:

> **Monica, a genetic parent, dies in February 2015. Monica is divorced from Chandler and has twins, Jack and Erica, age 8. Although Monica had not remarried since her divorce, she had been living with Richard, and they had planned to have a child. Monica's Will leaves her residuary estate "to her issue, in equal shares, per stirpes." After Monica's death, Richard continues with their plan to have a child. In June 2015, the implantation of Monica's genetic material is successful and results in the birth of her third child, Harriet, in February 2016, just a year after Monica's death.**



For the purposes of the following paragraphs, it is assumed that all the requirements of EPTL 4-1.3 necessary to qualify Harriet as Monica's genetic child have been met. These include Monica's written consent to the use of her genetic material and the appointment of Richard as her authorized representative. Richard, as the authorized representative, has fulfilled the necessary notice and filing requirements. Finally Harriet has been born within 33 months of Monica's death, the time limit set by the statute.

B. Applicability to the Genetic Parent

1. Testate Estate

As noted earlier, prior to the passage of the new statute, EPTL 2-1.3 would have excluded Harriet from definition of Monica's issue. EPTL 2-1.3 addresses dispositions to adopted children and posthumous children as members of a class and requires that a posthumous child must be conceived before the disposition becomes effective. Because Harriet was not conceived before Monica's death, she would not have been included in the definition and only Jack and Erica would have been beneficiaries under Monica's Will. EPTL 4-1.3(b) expressly overrides this limitation of EPTL 2-1.3(a)(2) in the context of the genetic parent. The new statute includes a posthumously conceived child within the class of the genetic parent's issue. Thus, Harriet will now share equally in Monica's estate with Jack and Erica.

2. Intestate Estate

A different statute applies if the same fact pattern is altered so that Monica dies intestate. In this situation, prior law would have excluded Harriet from being classified as Monica's issue by the express terms of EPTL 4-1.1, the provision which governs intestate succession. Similar to EPTL 2-1.3, EPTL 4-1.1(c) specifically provides that a child must be conceived before a decedent's death and born alive thereafter in order to inherit as if born during the decedent's lifetime. Once again, EPTL 4-1.3(b) provides a specific override in the context of a genetic parent. This will allow Harriet to qualify as Monica's distributee and share with Jack and Erica in Monica's assets.

C. Applicability to Other Individuals

Estate planning for individuals other than the genetic parent raises similar questions. Most often, this class of people will include the parents or grandparents of the genetic parent who has now died. Parents of a deceased adult child often plan for grandchildren to inherit the share of their estate that would have been inherited by their child. The passage of EPTL 4-1.3 now has the potential to impact their estate planning, and the results may or may not be consistent with their wishes.

1. Testate Estate

Returning to the example of Harriet above, assume that Monica's mother, Judy, died in July 2015, just five months after the death of Monica. Following Monica's death, Judy had updated her estate planning, signing her Will in April 2015. However, this was before she was told about Richard's plan to use Monica's stored genetic material. Judy's Will leaves her entire estate in equal shares to her children and to the issue of any predeceased child. The Will clearly denotes that distributions to issue will pass *per stirpes*. Judy had two children, Ross and Monica.

Prior to the passage of EPTL 4-1.3, EPTL 2-1.3 would have technically included Harriet as the issue of her grandmother, Judy, because Harriet was conceived in June, before Judy's death in July and born alive in February of 2016. However, the statute was enacted long before posthumously conceived children were a possibility and thus it is problematic to argue that the legislature intended to include them as heirs. EPTL 4-1.3(f), however, clarifies that "for the purposes of Section 2-1.3 of this chapter, a genetic child who is entitled to inherit from a genetic parent under this section is a child of the genetic parent for the purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs at law, next of kin, distributees (or by any terms of like import) of the creator or of another." Accordingly, under the new law, Harriet will inherit from Judy's estate as her issue with Monica's twins, Jack and Erica.

2. Intestate Estate

Finally, again assume Monica dies in February 2015. Monica's daughter Harriet is posthumously conceived in June 2015 and born in February 2016. However, this time Judy, Monica's mother, dies intestate in March 2015. Judy is survived by her son, Ross, and Monica's twins, Jack and Erica, but Harriet is conceived and born after Judy's death. In this case, Harriet will not inherit from her grandmother's intestate estate and only Monica's twins, Jack and Erica, will be included along with Ross as distributees. EPTL 4-1.3(b) overrides the restrictions of EPTL 4-1.1 only in cases in which the genetic parent dies intestate. In order for Harriet to have been included as a distributee, she would have had to have either been born before Judy's death in March or have been conceived before Judy's death and born alive thereafter.

D. EPTL 4-1.3 and Impact on Trusts

The new statute affects trusts as well as Wills and may have unintended consequences for clients if attorneys fail to discuss the practical application of the new law. A few alterations to the original fact pattern illustrate the potential repercussions and unforeseen circumstances for clients.

1. Testamentary Trusts

Monica's father, Jack, died in 2012, several years before his wife, Judy. Jack's Will created a trust for Judy's benefit that terminated on her death in July 2015 in favor of his then living issue, per stirpes. His then living issue included his son, Ross, Monica's twins, Jack and Erica, and potentially, Harriet. In this case Harriet would be excluded from the definition of issue and would not be a remainder beneficiary of Jack's trust. This result is arrived at because EPTL 4-1.3(f) specifically limits its applicability to "the wills of persons dying on or after September first, two thousand fourteen." Thus, Harriet would not take from Jack's testamentary trust pursuant to these facts because Jack died in 2012. This is true even though the class of remainder beneficiaries did not close until Judy's death in 2015. However, if Jack's Will had given Judy a limited power of appointment to appoint the trust assets to or among their issue by her Will, Judy might have been able to exercise this power to include Harriet as a beneficiary.

It is important to note that the effective dates of EPTL 4-1.3(f) relate to the date of death of the decedent, not the date of execution of the Will, when determining the applicability of EPTL 4-1.3 to a testate estate. From a practical point of view, this means that existing irrevocable trusts created prior to the effective date will not benefit a posthumously conceived child, even if all other requirements of EPTL 4-1.3(b) are met. This result, however, could be circumvented by amending or decanting such irrevocable trusts, where possible, to add a provision which would include posthumously conceived children within the definition of issue.

EPTL 4-1.3(f) also applies to all lifetime instruments executed prior to September 1, 2014, but which were still subject to the grantor's power to revoke and amend on such date and to all lifetime instruments executed on or after such date. Accordingly, if Monica's mother, Judy, had used a revocable living trust which dated back to 1984, this would not change the result that Harriet would be treated as Judy's issue because the trust was subject to her power to revoke and amend on and after September 1, 2014.

2. Generation Skipping Trusts

One final fact pattern with additional changes will suffice to demonstrate the potential, and rather ominous, long term planning impact of the new legislation and issues which may arise for clients with generation skipping trusts. Assume in this case that Harriet's grandmother, Judy, dies in January 2015 and creates a trust for her children, Ross and Monica, under her Will. The trust benefits both of Judy's children and terminates on the death of the last of them to die. On termination, the trust distributes the remainder to Judy's "then living issue, per stirpes." Assume Harriet's mother, Monica, dies in 2018 and Harriet is subsequently born in 2019 from the preserved genetic material. As in all the previous examples, the requirements of EPTL 4-1.3 have been satisfied in order to qualify Harriet as Monica's genetic child. In 2048, Ross dies and the trust terminates.

Because Harriet is alive when the class closes (2048), she is a beneficiary of the remainder of this trust. This raises a number of practical issues and concerns. Is this result consistent with Judy's wishes? It is conceivable that Judy, or any client for that matter, may not want to benefit a child born to a surviving parent with a potentially tenuous family connection. It is possible for a client to choose to override the provisions of EPTL 4-1.3 via their estate planning documents. Some clients may well choose to do this, particularly when they consider the possibility that their child's posthumously conceived child may well be born to, and in the custody of, someone with whom they are unfamiliar or simply dislike.

Another concern which arises from this final fact pattern is the potential for fiduciary liability. Harriet is alive when the class closes, but how will the Trustee of the trust become aware of this fact? Certainly, Harriet or her surviving parent and guardian have a financial interest in making the fiduciary aware of it, but that could conceivably fail to happen for a variety of reasons. It is quite possible that the fiduciary could only become aware of it by means of reviewing the estate file of Harriet's mother.

IV. Conclusion

While carefully crafted to create minimal disruption to estate administration, the new statute creates potential traps for the uninformed and has broad and practical application to attorneys, fiduciaries and clients. Some of these potential traps and applications have been discussed, but the tentacles of EPTL 4-1.3 could potentially extend to areas beyond the traditional world of trusts and estates. For example, what impact will EPTL 4-1.3 have on the innumerable beneficiary designations on assets such as life insurance and retirement plans? What about the increasingly popular transfer on death (TOD) designation? These contractual relationships between consumers and their financial institutions have become ever more complex in recent years. Many beneficiary designation forms allow the consumer to select a *per stirpes* option when naming their children. Will a qualifying genetic child be able to make a claim against non-probate assets which are governed by these types of designations? Will financial institutions be held liable for not properly identifying heirs? At present, the answers to such questions have yet to be addressed, but one can trace the outline of the potential arguments that could be made and foresee the likely prospect of future litigation.

EPTL 4-1.3 may well strike some attorneys as an esoteric statute having little bearing on their day to day trusts and estates practice. The authors hope that this article demonstrates why such a conclusion is not only unwarranted, but potentially perilous. While the number of posthumously conceived children may be small at present, it will undoubtedly grow as time and technology inevitably progress. Trusts and estates attorneys are truly living in a brave new world.

Endnotes

1. The authors address EPTL 4-1.3 in the context of existing inheritance laws and do not discuss amendments to all EPTL sections, such as EPTL 11-1.5, which are beyond the scope of the article.
2. Ajay K. Nangia, Sacha A. Krieg, S. Samuel Kim, Clinical guidelines for sperm cryopreservation in cancer patients, Fertility and Sterility, Vol. 100, Issue 5, p. 1203-1205 at 1206, Note 51 (Nov. 2013), available at http://www.fertstert.org/article/S0015-0282(13)03020-3/fulltext; ABC News, Frozen sperm still viable decades later, http://abcnews.go.com/GMA/OnCall/story?id=7303722 (last visited June 6, 2015).
3. According to the Center for Disease Control annual report, in 2012 assisted reproductive technology resulted in the birth of over 65,000 infants. Centers for Disease Control and Prevention, Assisted Reproductive Technology (ART), http://www.cdc.gov/art/reports/index.html (last visited June 6, 2015).
4. Marketplace Business, The Cost of Freezing your Eggs, http://www.marketplace.org/topics/business/cost-freezing-your-eggs (last visited June 6, 2015).
5. *In re Martin B.*, 17 Misc. 3d 198, 841 N.Y.S.2d 207 (Sur. Ct., N.Y. Co. 2007).
6. *Id.*

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Charitable Commissions for Individual Trustees: Time for Change

By Mark J. Altschuler

New York adopted its version of the Prudent Investor Act, embodied in New York's Estate Powers and Trust Law ("EPTL") 11-2.3, on January 1, 1995.[1] The Prudent Investor Act provides that a trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Thus, the Prudent Investor Act accommodates modern portfolio theory and its attendant total return approach to investing. It encourages trustees, including trustees of charitable trusts, to diversify their investments and invest for total return. In furtherance of the policies underpinning the Prudent Investor Act, New York later adopted the power to adjust, codified in EPTL 11-2.3(b)(5).[2] This discretionary power better permits trustees to invest for total return by giving them a discretionary power to adjust receipts between principal and income to provide income beneficiaries with a fair return, without unduly focusing on traditional notions of fiduciary accounting income. The optional unitrust provision found in EPTL 11-2.4 is consistent with these principles and provides trustees with an additional tool to carry out their fiduciary duties with respect to trust investments.[3]

It is notable that New York trustees of wholly charitable trusts, whether classified as private foundations or supporting organizations under the Internal Revenue Code,[4] have these fiduciary investment powers. Further, the Internal Revenue Code has adopted a total return investment approach in that private foundations are required to distribute annually five percent of the foundation's net asset value in furtherance of its charitable purposes.[5] The above statutory schemes have one unifying theme—all discard traditional concepts of accounting income. Practitioners and academicians long ago realized that compelling trustees to invest in one or more asset classes, to not invest in one or more asset classes, or to earn a certain income yield on the trust corpus would not be in the best interests of the beneficiaries of the trust, whether current beneficiaries or future beneficiaries. Based on these observations, legislatures have modernized the law of trust investments to conform to these widely accepted views.

Regrettably, current New York law with respect to fiduciary commissions of individual trustees of wholly charitable trusts is inconsistent with the above principles. Trustee commissions generally are computed based on the market value of the trust corpus.[6] There is a sound reason for this general rule as it aligns the interests of the trust beneficiaries with those of the trustee in that all parties benefit if the trust corpus increases over time. As indicated above, with a total return investment approach, current beneficiaries also benefit as the value of the trust corpus increases. New York did away with income commissions for non-charitable trusts in 1948.[7] Yet, New York retains income commissions for wholly charitable trusts. New York's Surrogate's Court Procedure Act (SCPA) 2309(5)(a) and (b) provide that a trustee of a wholly charitable trust receive a six percent commission on income collected and no commission from principal. For corporate trustees, this rule has been inapplicable since 1984, as corporate trustees are entitled to reasonable compensation under SCPA 2312, without any exclusion for wholly charitable trusts.

Consequently, the concept of income commissions is inconsistent with the Prudent Investor Act and the total return investment philosophy that the Prudent Investor Act supports. It is important to realize that when the New York Legislature in 1948 retained income commissions for wholly charitable trusts, concepts such as prudent investor, total return, and the required five percent payout were not embodied in the law. At that time, rigid distinctions between principal and income existed, and there was a belief that the principal of a charitable endowment should never be touched. Scholarship during the ensuing years has repudiated this misguided concept, and the law has evolved to incorporate modern investment management theory, with limited exceptions, such as New York's retaining income commissions for wholly charitable trusts.

Moreover, income commissions can be a destructive influence on the behavior of trustees of New York charitable trusts, irrespective of the level of prevailing interest rates. In the current low interest rate environment, many individual trustees of charitable trusts have seen their trustee commissions decline greatly, thereby creating an incentive to increase trust income in order to sustain their commissions. Such investment changes may not be in the best interest of the trust beneficiaries. Given total return investment objectives, the Federal five percent distribution requirement, and the power to adjust under New York law, there is no sound policy reason for a trustee of a New York charitable trust to seek to generate a certain level of income for its own sake. Yet, there can be no doubt that such conduct is taking place, irrespective of the fact that trustees are subject to the Prudent Investor Act and such conduct may violate the prescriptions contained in that Act. Many charitable trusts have discretionary unnamed beneficiaries, thereby making the Charities Bureau of the Attorney General's office the only party in a position to safeguard the interests of the charitable beneficiaries against the personal interests of the trustee. Given the limited resources of the Charities Bureau, it is not in an effective position to monitor the daily investment activities of trustees.

It is noted that any attempt to eliminate income commissions and replace them with commissions based on market value will be interpreted by some as a misguided attempt to increase trustee compensation which will concurrently hurt the trust itself. This is a flawed interpretation, as the current statutory scheme in fact encourages investment behavior that ultimately will negatively impact the trust corpus. Notwithstanding the need for statutory changes, the author recognizes that it may be appropriate for trustees of charitable trusts to receive less compensation than trustees of similar size non-charitable trusts. The fact that reasonable people may disagree as to what constitutes an appropriate commission rate is not sufficient reason for retaining an antiquated commission scheme for individual trustees of wholly charitable trusts.[8]

For non-charitable trusts, SCPA 2309(3) provides a default rule to allocate trustee commissions two-thirds against principal and one-third against income. For wholly charitable trusts, commissions are allocated solely against income.[9] Although corporate trustees are entitled to reasonable compensation under SCPA 2312, such compensation is charged solely against income pursuant to SCPA 2312(3)(b). For purposes of consistency, the general New York allocation rule should apply to wholly charitable trusts. It is important to note that adoption of this rule will not reduce funds available for distribution to charitable beneficiaries, whether from private foundations subject to the federal five percent distribution requirement or other charitable organizations not subject to this requirement in light of the applicability of the power to adjust.

In summary, the current New York law concerning commissions for individual trustees of wholly charitable trusts is inconsistent with the Prudent Investor Act and encourages trustees to make investment decisions not necessarily in the best interests of the trust beneficiaries. The statute should be changed to align the interests of the trustee with those of the trust beneficiaries with respect to trustee compensation.

Endnotes

1. 1994 N.Y. Laws 609, effective January 1, 1995.
2. 2001 N.Y. Laws 243, effective January 1, 2002.
3. *Id.*
4. Internal Revenue Code § 509.
5. Internal Revenue Code § 4942.
6. SCPA §§ 2308 and 2309.
7. *See* N.Y. Surrogate's Court Procedure Act 285 (1948), repealed September 1, 1967.
8. Although there are many in the legal community who feel it appropriate that trustees of charitable trusts receive less compensation than their non-charitable counterparts, the author questions this proposition. In general, corporate trustees in New York apply their regular published fee schedule to charitable trusts. Moreover, when individual trustees retain service providers such as attorneys, accountants, investment advisory firms, and custodians, these professionals typically charge their standard fees. If there is a discount or reduced rate, it is usually based on the size of the relationship and not on the fact that a charity is involved. There are economies of scale involved in servicing larger accounts, which often explains a service provider fee schedule with declining marginal rates. A non-charitable trust typically would receive the same discount. This issue, admittedly controversial, is best addressed at another time.
9. SCPA 2309(5)(b).

Mark J. Altschuler is a member of the New York Bar, who, prior to retirement, dealt with trustees, charitable organizations and staff members of the New York Attorney General's Charities Bureau with respect to the issues raised in this article.

The *New* New York State Estate Tax Regime, a Trap for the Unwary

Proposed Will Language to Save Estate Taxes and Obtain Direct Pecuniary Benefit for Beneficiaries (Santa Clause)

By Paul S. Forster and Laurence Keiser

Chapter 59 of the New York Laws of 2014 (Part X) made significant amendments to the New York State estate tax effective for estates of individuals with dates of death on or after April 1, 2014. Prior to these amendments, the New York State estate tax was the maximum amount allowed on the federal estate tax return as a credit for state death taxes.

Among other things pertinent to this article, Chapter 59 increased the New York State estate tax return filing thresholds as follows: effective for decedents who died on or after April 1, 2014 ($2,062,500), effective April 1, 2015 ($3,125,000), effective April 1, 2016 ($4,187,500), effective April 1, 2017 ($5,250,000), and effective January 1, 2019 (the federal basic exclusion amount then in effect). The federal basic exclusion amount, insofar as presently is known, is $5,450,000 for decedents who die on or after January 1, 2016 and is subject to increases (indexed) thereafter based on inflation.

Under Chapter 59, the estate tax is computed based on the New York taxable estate using the following tax table:

If the New York taxable estate is	The tax is:
Not over $500,000	3.06% of taxable estate
Over $500,000 but not over $1,000,000	$15,300 plus 5.0% of excess over $500,000
Over $1,000,000 but not over $1,500,000	$40,300 plus 5.5% of excess over $1,000,000
Over $1,500,000 but not over $2,100,000	$67,800 plus 6.5% of excess over $1,500,000
Over $2,100,000 but not over $2,600,000	$106,800 plus 8.0% of excess over $2,100,000
Over $2,600,000 but not over $3,100,000	$146,800 plus 8.8% of excess over $2,600,000
Over $3,100,000 but not over $3,600,000	$190,800 plus 9.6% of excess over $3,100,000
Over $3,600,000 but not over $4,100,000	$238,800 plus 10.4% of excess over $3,600,000
Over $4,100,000 but not over $5,100,000	$290,800 plus 11.2% of excess over $4,100,000
Over $5,100,000 but not over $6,100,000	$402,800 plus 12.0% of excess over $5,100,000
Over $6,100,000 but not over $7,100,000	$522,800 plus 12.8% of excess over $6,100,000
Over $7,100,000 but not over $8,100,000	$650,800 plus 13.6% of excess over $7,100,000
Over $8,100,000 but not over $9,100,000	$786,800 plus 14.4% of excess over $8,100,000
Over $9,100,000 but not over $10,100,000	$930,800 plus 15.2% of excess over $9,100,000
Over $10,100,000	$1,082,800 plus 16.0% of excess over $10,100,000

Chapter 59 of the Laws of 2014 (Part X) also provides an applicable credit for certain estates.

New York State Department of Taxation and Finance Technical Memorandum TSB-M-14(6)M provides a summary of all of the amendments to the New York State estate tax effective April 1, 2014.[1] The applicable credit is allowed against the estate tax when a New York taxable estate (including gifts) is not greater than 105% of the basic exclusion amount and cannot exceed the tax imposed.

If the New York taxable estate is less than or equal to the basic exclusion amount, the applicable credit amount will be the amount of tax that is computed on the taxable estate. The applicable credit is phased out as the New York taxable estate approaches 105% of the basic exclusion amount and cannot exceed the tax imposed.

If the New York taxable estate is greater than the basic exclusion amount but not greater than 105% of the basic exclusion amount, then the applicable credit is equal to the estate tax that would be due on an amount computed by multiplying the basic exclusion amount by one minus a fraction.

The numerator of the fraction is the New York taxable estate less the basic exclusion amount, and the denominator is five percent (5%) of the basic exclusion amount. This requires careful parsing of the language in order to create the correct algebraic equation.

Pernicious Effect of the *New* New York Estate Tax Regime

The purpose of this article is to explain the pernicious effect of the new New York State estate tax regime as a trap for the unwary, and to suggest some language in the form of a "Santa Clause" to protect clients and their beneficiaries.

The following is an example of how the "credit" is applied, and how the "Santa Clause" language would favorably affect the amounts received by the beneficiaries.

Our example is based upon the estate of a decedent who dies between April 1, 2015 and March 31, 2016 with a taxable estate of $3,200,000. The applicable credit is available because the taxable estate exceeds the basic exclusion amount ($3,125,000) which applies during that period by an amount ($75,000) that is less than or equal to 5% of the basic exclusion amount ($156,250).

The credit against the tax is equal to the estate tax that would be due on an amount that is computed by multiplying the basic exclusion amount ($3,125,000) by one (1) less a fraction, the numerator of which is $75,000 ($3,200,000 less the basic exclusion amount of $3,125,000). The denominator of the fraction is five percent (5%) of the basic exclusion amount, or $156,250 (5% x $3,125,000).

In our example, the credit would be $75,925, calculated as follows:

($3,125,000 x (1-$75,000/$156,250)) = $3,125,000 x (1-.48) = $3,125,000 x .52 = $1,625,000. The credit would be the tax on $1,625,000, which is $75,925.

Accordingly, the estate tax on $3,200,000, for a decedent dying between 4/1/15 and 3/31/16 would be $124,475, calculated as follows:

Taxable estate	$3,200,000
Tax computed	$200,400
Credit	$75,925
Estate tax due	$124,475

But wait a minute—if the taxable estate is $3,200,000 and the tax is $124,475, the net estate distributable to the beneficiaries is only $3,075,525. If the taxable estate were only $3,125,000 there would be no tax due and the beneficiaries would get $3,125,000. With an estate that is $75,000 ***greater,*** they get $49,475 ***less***. How can this be? It is because the manner in which the credit is calculated phases out the credit in such a way as in our example the "marginal" rate is 1.66%, or greater than 100%.

During our April 1, 2015 to March 31, 2016 period, the credit phases out between a taxable estate of $3,125,000 and $3,281,250 (3,125,000 x 1.05%), a difference of $156,250. However, the estate tax at the upper boundary of the range is $208,200, as against an increase in the taxable estate of only $156,250, still a marginal rate of 1.33%.

It is not until the taxable estate reaches $3,338,717 that an increase in the taxable estate actually results in additional sums passing to the beneficiaries. Put another way, the beneficiaries of a taxable estate of $3,338,717, on which the estate tax is $213,717, end up getting only $3,125,000, which is the same amount that they would get on a taxable estate of $3,125,000 which would be exempt from tax. That means that the beneficiaries get no benefit of any portion of the additional $213,717.

In a more extreme scenario, because of the way the credit phases out, on estates between $3,125,001 and $3,338,716, the beneficiaries get ***less*** than $3,125,000, the so-called "exempt" amount.

For the estates of decedents dying between April 1, 2016 and March 31, 2017, the estate tax exemption amount is $4,187,500. The credit phases out between $4,187,500 and $4,396,875. It is not until the taxable estate reaches $4,526,014, however—$338,514 more than the exempt amount—that an increase in the estate will result in the beneficiaries getting more, and on estates between $4,187,501 and $4,526,013, as the credit phases out, the beneficiaries actually get ***less*** than $4,187,500, the so-called "exempt" amount.

Similarly, for the estates of decedents dying between April 1, 2017 and December 31, 2018, the estate tax exemption amount is $5,250,000. The credit phases out between $5,250,000 and $5,512,500. It is not until the taxable estate reaches $5,728,182, however—$478,182 more than the exempt amount—that an increase in the estate will result in the beneficiaries inheriting more, and on estates between $5,250,001 and $5,728,181, as the credit phases out, the beneficiaries actually get ***less*** than $5,250,000, the so-called "exempt" amount.

To paraphrase Senator Dirksen, at $213,717, $338,514, and $478,182 for the respective periods, you are talking real money!

The "Santa Clause"

All is not lost, however. It is proposed that the "Santa Clause" described below be included in all Wills or trusts in which the taxable estate is likely to fall within the respective ranges.

Put simply, the effect of a "Santa Clause" is to authorize the executor of an estate within the ranges to make a charitable gift of so much of the estate as will reduce the taxable estate to the exempt amount.

A proposed Santa Clause would read as follows:

"In the event my estate is taxable for New York State Estate Tax purposes, then, and in that event, I give, devise, and bequeath to: (choose one of following three (3) alternatives)

1. particular named charity (ies);
2. my executor hereinafter named to be distributed by him to, between, or among the following named charity (ies);
3. my executor hereinafter named to be distributed by him to, between, or among such charity (ies), distributions which are eligible to be deducted for estate tax purposes as may be designated by him;

the maximum portion of my estate as will result in a reduction of my New York State Estate Tax which equals or exceeds the amount so distributed.

Once the taxable estate exceeds the upper bounds described above during the pertinent periods, any such charitable distributions would exceed the tax imposed, and the "Santa Clause" would not apply, since there is no credit and the marginal rates applied would be 9.6%, 11.2% and 12%, respectively, which are only fractions of any amounts distributed."

Effect of Use of "Santa Clause"

Under examples 1, 2 and 3 of the proposed Will (or trust) clause above, in an estate of a decedent dying between April 1, 2015 and March 31, 2016, in which the taxable estate otherwise would be $3,200,000, a gift to charity of $75,000 would save the estate approximately $124,475.

The benefit to the beneficiaries ($49,475) is calculated as follows:

(A) Will as written:

Taxable estate: $3,200,000

Estate tax: ($124,475)

Net distributable: $3,075,525.

(B) Will with Santa Clause:

Charitable gift: $75,000

Taxable estate: $3,125,000 ($3,200,000-$75,000)

Estate tax: $0

Net distributable to non-charitable beneficiaries: $3,125,000.

The authors hope that this analysis sheds some light on this complicated subject and provides some helpful guidance to avoid the trap this estate tax regime lays for unsuspecting practitioners.

Endnote

1. This can be found at the Department's website (www.tax.ny.gov).

Separated but Not Divorced: The Long Term Care Planning Implications

By Anthony J. Enea

I recently read an article about Katherine Hepburn's illustrious acting career and life. The article described her longtime romance with fellow actor, Spencer Tracy. It was reported that Mr. Tracy was a devout Catholic who, in spite of his romance with Ms. Hepburn, refused to divorce his wife, an arrangement for which, I am willing to venture, Mrs. Tracy was handsomely compensated.

The following is an overview of the Medicaid and estate issues affecting those who are separated but not divorced. I suspect that there are thousands of people in New York who may one day suffer detrimental financial consequences because they have not legally finalized their divorce and have not adequately addressed Right of Election and Medicaid eligibility issues.

For purposes of Medicaid eligibility and pursuant to 18 N.Y.C.R.R. §360-4.3(f), the income and resources of "legally responsible relatives" are considered in determining the eligibility of the applicant for Medicaid. 18 N.Y.C.R.R. §360-1.4(h) defines the only "legally responsible relatives" to be:

(a) A spouse for the other spouse;

(b) A parent for a child under the age of twenty-one (21) years; or

(c) A step-parent for a step-child under the age of twenty-one (21).

Thus, a spouse that is separated but not divorced is included as a "legally responsible relative" whose income and resources are considered for Medicaid eligibility purposes. Although the separated spouse has the ability to execute a "spousal refusal" pursuant to §366(3)(a) of the Social Services Law, the "spousal refusal" will not relieve the spouse of the liability for the medical care paid for by the Medicaid program, and local department of social services can pursue recovery against a refusing spouse for the actual expenses paid to the Medicaid recipient to the extent of the resources in excess of the Community Spouse's Resource Allowance ($74,820 to $119,200 on a sliding scale for 2015).[1]

Medicaid can pursue recovery of assets against a separated spouse even if the spouse were separated from and living apart from the applicant prior to the applicant's institutionalization, although the separated spouse's refusal to divulge income and asset information will not affect the applicant's eligibility. In New York State, Medicaid's decision to pursue, or not pursue recovery against separated spouses, just like with married non-separated couples, often depends on how aggressive a particular County is in pursuing recovery.

Imagine, however, the surprise and shock separated spouses may experience when they learn that they may have financial responsibility for the medical care of spouses from whom they have been separated. It is not a situation one should ever allow him or herself to be placed.

Pursuant to the New York Estates, Powers and Trust Law ("EPTL") Section 5-1.1, the surviving spouse of a New York domiciliary who died on or after September 1, 1992, is entitled to a statutory elective share equal to the greater of $50,000 or one-third of the net estate (being the probate estate less certain debts and expenses) plus one-third of the testamentary substitutes, e.g.: joint accounts, certain trust accounts, retirement benefits, etc. EPTL 5-1.1-A provides a comprehensive description of the types of assets considered to be a "testamentary substitute" for the purposes of calculating a spouse's right of election.

It is clear that the right to an elective share may affect one's future eligibility for Medicaid, irrespective of the existence of a waiver of the right of election in a separation agreement, where one is separated, but not divorced from, their spouse.

Unless one is divorced at the time of the death of the first spouse, Medicaid will consider the surviving spouse to be entitled to an elective share for Medicaid eligibility purposes. Additionally, if one were to execute a Waiver of a Right of Election, it is treated by Medicaid as a non-exempt transfer of assets which creates a period of ineligibility for Medicaid. Further, the period of ineligibility is calculated not from the date the waiver was executed, but from the date of death of the spouse.[2]

For purposes of Medicaid eligibility an "available asset" includes any income or resources to which an individual is entitled but, because of any action or inaction on his or her part, does not receive.[3] Thus, for example, if a surviving spouse is already a Medicaid recipient, and he or she fails to exercise the Right of Election, Medicaid can discontinue his or her benefits. Procedurally, Medicaid must only send the recipient a notice requesting that the person exercise the Right of Election.[4] If the Medicaid recipient fails to do so, Medicaid will deem the person to have refused to accept an "available asset" and either discontinue or deny benefits.[5]

As can be seen from the above, there are some significant financial issues that those separated, but not divorced, will encounter. While this author is not advocating that every separated individual obtain a divorce, it may be critical for those who have separated to take the steps necessary to formalize a divorce if they wish to avoid the potential problems that may arise with respect to Medicaid eligibility and the Right of Election.

Endnotes

1. NY SSL 366(a).
2. See NYS Department of Health 96 ADM 8 (1996).
3. *Id.*
4. *Id.*
5. *Id.*

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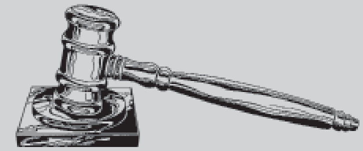
Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

ATTORNEYS

Beneficiaries of Lifetime Trust Lack Standing to Bring Malpractice Action

Decedent created a revocable trust with himself and his spouse as co-trustees. On his death the trust continued for the benefit of the spouse with the spouse as trustee and on the spouse's death the trust terminates and the trust property is distributable to named charities and the decedent's daughters by a previous marriage. After the decedent's death the decedent's daughters brought an action alleging that the attorney who drafted the trust committed malpractice by providing that the spouse would be co-trustee, thus giving the spouse the power to distribute trust property to herself. Such distributions would destroy the daughters' interest in the trust.

The trial court dismissed the action and the Appellate Division affirmed. The daughters lacked privity with the estate planning attorney and therefore have no cause of action in their own right, absent fraud or other malicious acts by the attorney, none of which are alleged here. In addition, the daughters did not plead sufficient facts from which damages caused by the alleged malpractice could be inferred. With regard to causes of action asserted with respect to the trust, damages are too speculative because no specific actions by the spouse are alleged. With regard to causes of action alleged on behalf of the decedent's estate, there were no facts alleged sufficient to support a claim that the estate suffered damages. *Rhodes v. Honigman*, 131 A.D.3d 1151, 16 N.Y.S.3d 324 (2d Dep't 2015).

MARRIAGE

Civil Union Is Not Equivalent of Marriage for Determining Marital Property on Divorce

In 2003, while resident in New York, the parties entered into a civil union in Vermont. In 2004, one of the parties bought with her own funds and titled in her own name a home in New York in which the couple resided. In 2006, the couple married in Canada and returned to their home in New York where their marriage would not be recognized until the Fourth Department's decision in *Department in Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (2008), approximately two years after the celebration of their Canadian marriage. In 2011 the spouse who is owner of the home began a divorce proceeding in New York seeking equitable distribution of the couple's marital property. The defendant then filed an action for divorce and counterclaimed for dissolution of the civil union.

William P. LaPiana

The court dissolved the civil union but held that the home was not marital property because the civil union was not a marriage under New York law and, therefore, property acquired while the parties were partners in a civil union but not married could not be marital property for purposes of equitable distribution on divorce. The court does imply, however, that property acquired after the 2006 Canadian marriage is marital property for purposes of equitable distribution without discussing the consequences, if any, of New York's lack of recognition of same-sex marriages valid where celebrated until 2008. *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d. 402, 19 N.Y.S.3d 689 (Sup. Ct., Monroe Co. 2015).

NON-PROBATE PROPERTY

Letter of Instruction Is Not Sufficient to Create a Transfer on Death Security Registration

Decedent owned a securities account which the brokerage firm turned over to the executors of decedent's will. Decedent's daughter objected to admission of the will to probate but did not prevail. Afterwards, daughter brought a breach of contract action in Supreme Court against the brokerage firm claiming that a notarized letter sent by decedent to the firm requesting that the account be made transferrable to the daughter in the event of decedent's death or disability was sufficient under New York's version of the Transfer on Death Securities Registration Act (EPTL 13-4.1 *et seq.*) to make daughter beneficiary of the account. The Supreme Court dismissed the action on the grounds that comity required that the court accept the decision of the Surrogate in admitting the will to probate.

The Appellate Division affirmed, holding that although the action was not barred by collateral estoppel or res judicata, the letter could not be a legally binding beneficiary designation under the statute; it was at most a unilateral request to the brokerage firm to register the account in beneficiary form on which the firm never acted, and because there is no independent common-law or contractual right "to compel distribution of the securities outside of probate," the judgment is affirmed. Justice Tom concurred on the ground that comity did prevent the Supreme Court from hearing the case. *Arroyo-Graulau v. Merrill Lynch Pierce, Fenner & Smith*, 135 A.D.3d 1, 19 N.Y.S.3d 212 (1st Dep't 2015).

RENUNCIATION

Valid Renunciation Avoids Possible Claim by Office of Victim Services

The sole beneficiary of decedent's will was her son who at the time of her death was incarcerated after being convicted of murder. Son filed a waiver and consent in the probate proceeding and then filed a renunciation under EPTL 2-1.11 of all but $7,500 of the decedent's estate. The court returned the renunciation to the son because it was neither accompanied by the required affidavit stating that no consideration had been received nor by the required notice of renunciation which must be served on the executor and the person who will take as the result of the renunciation (in this case, one and the same person). Two months later, the Surrogate's Court received a copy of an order to show cause issued by the Supreme Court in another county in a proceeding begun by the Office of Victim Services ("OVS") accompanied by a temporary restraining order directed to the son, the executor and the executor's attorney forbidding transfer of any portion of the estate. One month later the Surrogate's Court received a second renunciation executed by the son renouncing all of his interest in his mother's estate and accompanied by the required affidavit and notice, all dated less than two weeks after the date of the order to show cause.

After appearances by the father of the murder victim and OVS, the Surrogate heard the son's motion that his first renunciation be accepted for filing nunc pro tunc. The Surrogate decided that because the statute does not require simultaneous filing of the proof of service of the notice of renunciation and since any problems were cured before the running of the nine-month period after the decedent's death during which a renunciation must be made, the requirements of EPTL 2-1.11 were met before the filing of the Supreme Court action. That renunciation is valid as against creditors; there is no exception for claims by OVS and, in any event, there is no claim filed against the son let alone a judgment making anyone a creditor. In addition, the court rejected the argument that the son had a property interest at the time of decedent's death that could be subject to restraint and attachment which would prevent the court from accepting for filing the second renunciation of the son's entire interest in the estate. Because the son never accepted the disposition under decedent's will, the renunciation is valid and results in him having no interest whatsoever and cannot be a violation of the restraining order. *In re Grochocki*, 49 Misc. 3d 721, 16 N.Y.S.3d 689 (Sur. Ct., Broome Co. 2015).

TRUSTS

Trust Terms Giving Trust Property to Creator's Named Son and Daughter "Per Stirpes" Created Vested Remainder in Son Who Predeceased Creator

Decedent created a lifetime trust and executed and conveyed real property she owned outright to the trustee by a valid deed. On her death the trust property was to be distributed outright to her children Nancy and Tom "in equal shares, per stirpes." Tom predeceased decedent, intestate, without issue, leaving decedent as his sole distributee. Decedent's will disposed of her residuary estate in equal shares to her three grandchildren who are children of Nancy.

Nancy and the executor of decedent's will disputed the ownership of the real property held in trust. Nancy maintained that the gift to Tom in the trust failed when he died before decedent without issue, and that under EPTL 3-3.3 and 3-3.4, his share of the trust property passed to her as the sole surviving residuary beneficiary. The executor maintained that real property passed by operation of law to the trust beneficiaries when title passed to the trustee.

The Surrogate held that decedent's estate and Nancy were tenants in common in the real property. The trust terms created in Nancy and Tom vested remainders subject to divestment. The disposition of the remainder to persons identified by name without any indication that those persons must survive the creator to come into possession of trust property creates a vested remainder, and the addition of "per stirpes" means that if a named child does not survive the testator, his or her share of the trust property passes to his or her issue in a per stirpital distribution. Since Tom had no issue, he was not divested at his death; his interest in the trust remainder passed to decedent as his sole distributee, and through her will to Nancy's children. EPTL 2-1.15, the provision that makes the abolition of the "no-residue-of-a-residue rule" in EPTL 3-3.4 applicable to trusts, does not apply to a vested remainder and is irrelevant. As sole surviving trustee, however, Nancy has full authority to sell the real property held in trust because Tom's remainder interest is in the trust property as a whole, not in any specific property held in trust. *In re Wilder*, 49 Misc. 3d 1044, 16 N.Y.S.3d 378 (Sur. Ct., Nassau Co. 2015).

WILLS

In Terrorem Clause Does Not Apply to Contest Over Whether Specifically Disposed Property Is Probate Property

Decedent's will included an *in terrorem* clause revoking the interest under the will of any beneficiary who opposed probate of the will or who in any way acted "to impair, invalidate or set aside" the will or any provision of the will. The will included a specific disposition of certain businesses to decedent's daughter and brother if, at the time of the decedent's death, he "own[ed] and operate[d]" the businesses. After decedent's death, several issues related to the decedent's estate became subjects of litigation including his surviving spouse's claim that she owned the businesses disposed of in the will.

After the Surrogate determined that the businesses were assets of the estate and that the surviving spouse had violated the *in terrorem* clause, the surviving spouse appealed and the Appellate Division reversed the Surrogate's decrees. The court found that the surviving spouse had raised triable issues of fact on the question of whether the businesses were part of the estate. Because there are issues of fact regarding ownership of the businesses, the question of whether or not the surviving spouse violated the *in terrorem* clause by raising those issues cannot be determined until those issues are settled. If the surviving spouse is the owner of the businesses, the will does not dispose of them and her actions cannot be said to "impair, invalidate or set aside" a provision of the will. *In re Peters*, 132 A.D.3d 1250, 17 N.Y.S.3d 805 (4th Dep't 2015).

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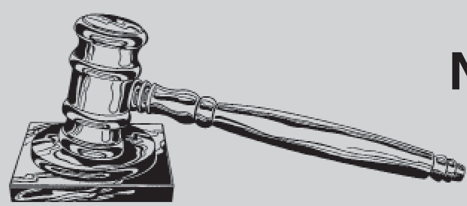

Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Common Law Spouse

In a contested accounting proceeding, objections were filed to the proposed distribution of the estate by the decedent's alleged common law spouse, who had also previously asserted her elective share. A hearing on the issue was held, at which the objectant testified that she had met the decedent in 1965. A year later, they moved to South Carolina, where they resided for 2½ years, and then, for a short time thereafter, they moved to North Carolina. Ultimately, the couple moved to Buffalo in 1974, where they resided together until the decedent's death in 2012. In all the years she and the decedent were together, the objectant had met only one member of his family, his mother, with whom he had an ongoing bitter relationship. The couple had also met several members of the objectant's family; however, most of them were deceased at the time of the hearing. Although the objectant claimed that when she and the decedent visited and stayed in a hotel or motel in South Carolina, the receipts were addressed solely in her name, and listed one occupant. Further, the couple filed separate tax returns, maintained separate bank accounts, and each paid one-half of the household expenses. A $3,000 death benefit owned by the decedent listed the objectant as a beneficiary, but described her as "companion." No witnesses, other than the objectant, testified at the hearing.

The court opined that New York will recognize a common law marriage validly contracted in a sister state. A common law marriage will be recognized by the State of South Carolina if two parties have expressed a present intent to enter into a marriage contract. While the intent to be married can be inferred from the circumstances, the court noted that South Carolina does not impose a marriage upon a couple merely because they intend to be together forever. Proof of common law marriage in South Carolina must be by clear and convincing evidence.

Based on the foregoing, the court found that there was no evidence of the parties' intention to be married in South Carolina. Indeed, the court noted that even the objectant was equivocal as to whether she and the decedent were husband and wife. Accordingly, upon the proof presented, the court found that the objectant had not met her burden of proving her status as the decedent's common law spouse. As such, the court held that her right of election could not be recognized, and dismissed her objections to the accounting.

In re Reeves, N.Y.L.J., Apr. 14, 2015, p. 34 (Sur. Ct., Erie Co.).

Due Execution

In *In re Keene,* the court denied probate to the will, finding that the petitioner had failed to satisfy the publication requirement, or establish that the testator had affixed her signature to the instrument in the presence of at least two attesting witnesses or acknowledged her signature to them. The testimony at trial revealed that the execution was not attorney-supervised. Further, it appeared that the subscribing witnesses signed the instrument offered for probate prior to the testator, because they could not wait for the testator to arrive. Although there was a notary public present, who testified that the statutory requirements were complied with, he had no specific recollection of whether the decedent said anything to him, or to anybody, on that day. Based on this testimony and the evidence adduced, the court held that there was insufficient proof that decedent declared or published the instrument as her last will and testament. Specifically, the court found that there was no evidence that there was some meeting of the minds between the testator and an attesting witness that the instrument to be signed was testamentary in character. Additionally, the court found that the testator had failed to sign the instrument in the presence of the witnesses, concluding that the testimony of the notary was not credible on this issue.

In re Keene, N.Y.L.J., Apr. 30, 2015, p. 33, col. 1 (Sur. Ct., Queens Co.).

Estoppel

Before the Surrogate's Court, Suffolk County, in *In re Lowe,* was an accounting by JP Morgan Chase Bank as executor and trustee of the trusts created under the decedent's will. Although objections to the account were initially filed by the decedent's spouse, his daughter, and his two grandchildren, after many years of litigation all the objectants, except the decedent's daughter, settled with the fiduciary.

The decedent died on February 23, 1986, and his will was admitted to probate on April 4, 1986. Ancillary probate was granted in California on the same date the will was admitted to probate in New York, and ancillary letters testamentary issued to the corporate fiduciary on June 6, 1986. The assets of the decedent's estate included a valuable parcel of real property located in California that was the subject of a long-term lease agreement, which expired on July 23, 2014.

Pursuant to the pertinent provisions of his will, the decedent created several trusts for the benefit of his wife, daughter and grandchildren. Significantly, the trust created for the benefit of the decedent's daughter provided for principal distributions to her in five equal installments at stated ages, commencing on December 27, 1989, and concluding on December 27, 2009.

The thrust of the objections asserted by the daughter were addressed to the fiduciary's failure to sell the real property located in California, which constituted a portion of the principal of the testamentary trust created for her benefit, as well as legal fees and commissions. More particularly, the objectant claimed that the fiduciary's retention of the realty constituted a breach of fiduciary duty, that the payments to the fiduciary's counsel were unreasonable, and that commissions or payments to the fiduciary relating to the rents or management of the subject property were excessive.

The fiduciary moved for summary judgment dismissing the objections, and any related claims for damages or surcharges, and the objectant opposed and cross-moved for summary relief in her favor.

With regard to the principal issue involving the California realty, the record revealed that offers had been made by a corporate purchaser to purchase the property as early as 2005, for a gross selling price of $41,330,000. Additional offers by the same purchaser were thereafter made, with the highest offer being $43,750,000. After the national decrease in value in the real estate market, a final offer by the purchaser, in January 2009, was to purchase the property for $34,000,000.

Despite the foregoing, none of the offers resulted in a sale of the property. Indeed, the court noted that although the fiduciary recommended to the beneficiaries that the property be sold, and although the decedent's spouse agreed to the sale, the decedent's daughter vigorously opposed any sale, and even threatened to bring a suit to enjoin any effort to bring a sale to fruition. The daughter's deposition testimony confirmed that she objected to any sale of the property and wanted to keep it in the family in order to preserve her father's legacy. The court found that since the daughter's individual interest in the property vested upon her attaining each of the ages set forth in the testamentary trust for a distribution of principal, she had the power, as a co-owner, to prevent its sale, and the fiduciary, under California law, lacked the authority to bind any of its co-tenants to a contract of sale.

Accordingly, based upon the foregoing, the court held, as a matter of equity, that the decedent's daughter could not hold the fiduciary responsible for its inability to sell the California property, when it was her obstructionist behavior that precluded its sale. The court therefore determined she was estopped from contending that the property should have been sold and granted the fiduciary summary judgment dismissing her objections on this issue.

On the other hand, the court denied the fiduciary's request for summary relief on the issue of legal fees, finding that the record was insufficient to determine their reasonableness.

Finally, the court granted summary judgment on the issue of commissions, concluding that the objectant had failed to demonstrate any basis for denying commissions in their entirety, or for not awarding same in the amount sought.

In re Lowe, N.Y.L.J., June 16, 2015, p.27, col. 3 (Sur. Ct., Suffolk Co.).

Right of Election

In *In re Cash,* the court addressed the validity of a right of election. The decedent died on May 29, 2014, leaving a will dated October 9, 2007, which was written during her marriage. On the same day the will was executed, the decedent's spouse executed a document entitled "Right of Election—Partial Waiver of Right of Election," in which he, *inter alia,* waived and released the partial interest that he had, pursuant to the provisions of EPTL 5-1.1(c), to elect against any share of his wife's estate, other than the share which he was provided in her will, dated October 9, 2007.

Article Seventh of the decedent's will provided her spouse "with the smallest portion of [her] estate, if any, required to be given to [him] under applicable law, after taking into account the aggregate value of any other property passing to him under the will or otherwise." Moreover, notwithstanding the foregoing, the decedent bequeathed her spouse a 25% interest in her 401(k) account, and made him the beneficiary of her life insurance policy.

After the decedent's death, the decedent's family, including her spouse, met to read the will, and also read the document in which he had waived his elective share. It was undisputed that the decedent's spouse admitted, at that time, that he executed the waiver. Thereafter, the will was admitted to probate, upon the consent of the decedent's spouse.

Nevertheless, following the probate of the will, the decedent's spouse executed an election to take against her estate, and the executor thereof instituted the subject proceeding to determine that the elective share was waived and the election was invalid. Objections were filed by the spouse alleging that the waiver was not executed in the presence of a notary public, and that his signed consent to probate was invalid on the grounds that he executed the document while he was in mourning and was unaware of what he was signing.

The executor moved for summary judgment seeking to dismiss the objections, contending that there was no issue that the decedent's spouse signed the waiver, and moreover, that since a certificate of acknowledgment signed by the notary public accompanied the waiver, there was a presumption that it was duly acknowledged. Further, the executor maintained that the decedent's spouse would be barred, pursuant to the Dead Man's Statute, from testifying at any trial of the matter as to the execution of the waiver, given his self-interest in the outcome of the proceeding.

In opposition to the motion, the court noted that the spouse submitted only his counsel's affirmation, which did not offer any factual averments or substantiation for the allegations in the objections, together with a memorandum of law. Further, the court found it particularly significant that the decedent's spouse conceded that "he [could not] produce adequate evidence to rebut the presumption of validity of [the notary's] acknowledgment to satisfy the Court." While the spouse claimed, amongst other things, that he did not understand the waiver at the time it was signed, that he did not have the opportunity to consult with counsel, and that the waiver was unconscionable and vague, the court found these allegations unavailing, as they were not otherwise pled in his objections to the petition, and were nothing more than conclusory statements insufficient to defeat a motion for summary judgment.

The court opined that a valid waiver of a right of election requires that it be (1) in writing, (2) subscribed by the maker thereof, and (3) acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property. In order for a conveyance of real property to be recorded, it must be duly acknowledged by the person executing the same. Within this context, the court found that the waiver had been validly executed, observing that at his deposition, the notary public on the document testified that while he did not remember the details of the execution of the waiver, the existence of his signature and notary stamp indicated that the decedent's spouse signed the instrument before him, and that he presented government identification to establish his identity.

Accordingly, based upon the foregoing, the executor's motion for summary judgment determining the validity of the waiver was granted. Further, the court granted the executor's motion for judgment dismissing the spouse's objection as to the validity of his consent to probate, finding that his claims were conclusory and unsubstantiated, and therefore, insufficient to overcome the presumption that a party signing a waiver and consent is presumed to understand what he signed, or to demonstrate any fraud, misrepresentation or coercion in the procurement of his signature.

In re Cash, N.Y.L.J., July 6, 2015, p. 31, col. 2 (Sur. Ct., Kings Co.).

Summary Judgment

In *In re Goodman,* the court denied the fiduciary's motion for summary judgment dismissing certain of the objections to his accounting with respect to a grantor trust. The objections in issue were addressed to the fiduciary's alleged failure to identify assets sold and the proceeds derived from such sales, maintain proper books and records, utilize the cost basis for assets in his accounting, and obtain the books and records and an accounting from his predecessor trustees. The court found that the fiduciary had failed to provide material and relevant financial information pertaining to the administration of the trust estate covered by his account, and thus was not entitled to judgment as a matter of law with regard to the foregoing issues. Specifically, the court held that whether a fiduciary has maintained adequate records is a question of fact precluding summary judgment, and that a fiduciary's failure to maintain and produce accurate records will result in all obscurities, presumptions and doubts being held against him.

On the other hand, the court held that the trustee exercised sound discretion and acted in good faith when he invaded trust principal in order to facilitate the grantor fulfilling his legal obligation to make alimony payments. The court noted that in making these payments the trustee did not deviate from the terms of the trust, which authorized an invasion of principal, in the trustee's discretion, "for the maintenance of the Grantor in comfort and good health and for any of his emergency needs."

In re Goodman, N.Y.L.J., Aug. 17, 2015, p. 26 (Sur. Ct., N.Y. Co.) (Sur. Mella).

Summary Judgment

In *In re Wechsler,* the preliminary executor of the estate instituted a turnover proceeding against the respondent, the decedent's wife, seeking the recovery of assets that she had purportedly converted from the decedent, through the re-titling of assets from the decedent's name alone, to ownership jointly with her, with right of survivorship. The decedent's wife moved for summary judgment, and the petitioner opposed the application, claiming that the decedent lacked the capacity, at the time of the transactions, to understand that they were inconsistent with his long-standing testamentary plan, and that they were the result of undue influence.

The record revealed that the decedent was in poor health and suffering, at various times, with lymphoma, atrial fibrillation, renal and heart disease and depression. Two weeks before the first of the transfers in issue, he had been hospitalized for renal failure. Once discharged from the hospital, he was admitted to a skilled nursing facility, where he remained until the last of the transactions had been completed. There was no dispute that the decedent executed all of the requisite transfer documents, or that the respondent was involved in each of the transfers, either by drafting the requisite letters, and/or by bringing the necessary documents to the decedent for signature, and then arranging for their processing.

The court found that the respondent had made a prima facie showing, through medical records, other documentary evidence, and deposition testimony, that the decedent had knowingly and voluntarily engaged in the transactions in issue. However, as to one of the transfers in issue, the court found the evidence conflicting as to the decedent's capacity, and thus, denied summary judgment as to this transaction. Notably, as to the remaining transactions, the court opined that the petitioner's submission of an affidavit from a medical expert, who never personally examined the decedent or spoke with his attending physicians, was not enough to create a question of fact, inasmuch as it failed, at a minimum, to have pointed to evidence of cognitive impairment in the record at the time of the subject transactions, and was, generally, the weakest and most unreliable evidence. Moreover, the court found the testimony of the petitioner, as well as of his son and daughter-in-law, to be unpersuasive, as neither saw the decedent during the relevant time periods of the transactions.

On the other hand, the court held that there was sufficient evidence in the record to create an issue of fact as to whether the transactions were the result of undue influence. Indeed, the court found that whether there was a confidential relationship between the decedent and the respondent was itself an issue warranting the denial of summary judgment. Significantly, the court observed that while close family ties may negate any presumption of undue influence, where the record shows that the family relationship is coupled with other factors, including the weakened and dependent state of the donor spouse, the participation of the donee spouse in the subject transactions for her benefit, and circumstances that raise doubt as to the voluntariness of the transfers, a summary rejection of the claim of undue influence would be inappropriate.

In re Wechsler, N.Y.L.J., June 31, 2015, p. 21 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Summary Judgment

In *In re Larragoity*, the court, in the context of a contested accounting proceeding, denied the co-administrator's unopposed motion for summary judgment to remove his co-fiduciary, without prejudice, but, based on the record, immediately suspended her letters of co-administration. The decedent died, intestate, survived by two sons, one of whom post-deceased him, and two daughters. Letters of administration issued to the surviving son, and one of the two daughters. In the proceeding for judicial settlement of his account, the decedent's son requested, *inter alia*, that his co-administrator be surcharged for failure to fulfill her fiduciary duties, resulting in increased costs to the estate. Objections were filed by the co-administrator/daughter who claimed, *inter alia*, reimbursement for undetailed administration expenses, together with full statutory commissions.

The petitioner moved for summary judgment dismissing the objections, and revoking her letters of administration, maintaining that his difficulty with her since the decedent's death had impaired the administration of the estate. Specifically, the movant claimed that the respondent and her son continued to reside in the decedent's cooperative apartment since his death, and refused to vacate or sell the premises until certain undisclosed demands were met. Moreover, although the apartment was eventually sold, it appeared that the respondent had failed to endorse the escrow check representing the proceeds of sale payable to the estate, rendering it uncollectible. The respondent also failed to collect the monies left on deposit in the decedent's bank accounts, though representing to the movant that she would do so. The movant maintained that as a result of the respondent's lack of cooperation, neglect and failure to wind up the estate, as well as her hostility towards him and the other distributee, the estate had incurred additional and unnecessary expenses for which the respondent should be surcharged and removed. The motion was unopposed.

The court denied the motion for summary judgment removing the respondent, without prejudice to renewal in a proper proceeding, finding that removal of a fiduciary cannot be sought by motion. Nevertheless, the court held that the undisputed contentions with respect to the respondent's continued occupancy of the decedent's apartment, interference with its sale, failure to collect the proceeds thereof, as well as the monies in the decedent's bank accounts, and refusal to communicate with the movant, sufficiently demonstrated a lack of understanding and impediment to the proper administration of the estate warranting her immediate suspension. The requested surcharge and denial of commissions was denied, without prejudice, and the respondent's objections to the movant's account were dismissed.

In re Larragoity, N.Y.L.J., June 4, 2015, p. 22, col. 3 (Sur. Ct., Bronx Co.).

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

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Presumption of Dependent Relative Revocation

Virginia Murphy died at the age of 107, having executed numerous wills prepared by her longtime attorney. Her final will left the bulk of her $12 million estate to her attorney and his legal assistant. Mrs. Murphy's second cousin, who had been named in prior wills, challenged that final will, alleging that it was the product of undue influence. After much litigation, including a trip to the appellate court and back, the probate court voided only the residuary devises of the final will. As a result, the will's revocation clause, revoking all of Mrs. Murphy's prior wills, remained valid, so that the bulk of her estate passed through intestacy. The appellate court reversed because the probate court failed to apply the presumption of dependent relative revocation. That doctrine provides that where, as here, a new will revokes a former will, and the new will later appears to be invalid, the old will may be re-established on the ground that the revocation was dependent upon the validity of the new one because the testator likely preferred the old will to intestacy, which the law abhors. The appellate court held that the presumption of dependent relative revocation applies when the provisions of the new invalid will are sufficiently similar to the former will. The court further held that this requires only a showing of broad or general similarity and that extrinsic evidence may be considered in making this determination.

In re Estate of Murphy, 2015 WL 6777216 (Fla. 2d DCA Nov. 6, 2015).

Appointment of a Curator

The decedent died leaving a will appointing his grandson as the personal representative of his estate. The grandson petitioned for administration and was appointed as the personal representative. The decedent's son, however, petitioned for revocation, claiming that the decedent was not domiciled in Florida, and that the probated will was invalid because the decedent lacked testamentary capacity and the will was the product of undue influence. The decedent's son also petitioned to remove the personal representative and to appoint a curator. Without an evidentiary hearing, and without temporarily or permanently removing the personal representative, the probate court appointed a curator. The appellate court reversed, holding that it is improper to have a curator and a personal representative simultaneously acting on behalf of the estate. A curator is statutorily defined as a person appointed by the court to take charge of the estate until letters of administration are issued, and a curator is most often appointed when there is a delay in the appointment of a personal representative. The appellate court held that an untenable situation was created when the curator was appointed to perform all of the functions of a personal representative while a personal representative was still in place.

Jonathan A. Galler

Gordin v. Estate of Maisel, 2015 WL 7566353 (Fla. 4th DCA Nov. 25, 2015).

Undue Influence Invalidates Pay-On-Death Accounts

The decedent had over $300,000 in an account that, under her testamentary instruments, was set aside for a church upon her death. However, a few days before her death, she executed a pay-on-death (POD) form, pursuant to which the assets would instead be disbursed to the decedent's paid caregiver (who was also appointed as the decedent's personal representative) and the caregiver's son, daughter and daughter-in-law. The probate court subsequently held that the POD designation was procured through undue influence and was thus invalid. The probate court also removed the personal representative and ordered her to refund the disbursed funds. The appellate court affirmed, rejecting the personal representative's contention that a POD designation may not be invalidated for undue influence. The court held that even though a POD account is governed by Florida's banking statutes, it functions as a will substitute. Accordingly, Florida's public policy against the abuse of fiduciary relationships, which applies to contracts, lifetime transfers, and testamentary transfers, is also properly applied to determine whether a POD designation has been obtained through undue influence.

Keul v. Hodges Blvd. Presbyterian Church, 2015 WL 7444212 (Fla. 1st DCA 2015).

Conjectural Creditor Versus Ascertainable Creditor

The question in this case was whether the appellant was a reasonably ascertainable creditor of the estate. The appellant filed her statement of claim after the expiration of the deadline that is applicable to creditors who are not reasonably ascertainable. That limitations period is triggered by publication of the notice to creditors. The appellant argued that her statement of claim should be deemed timely, or that she should be granted an extension of time, because she was a reasonably ascertainable creditor who should have been, but never was, personally served with a copy of the notice to creditors. The appellant argued that she was the victim of a misdemeanor battery at the hands of the decedent, for which the decedent was criminally charged, and that the appellant thus had a reasonably ascertainable potential civil claim against the decedent's estate. The probate and appellate courts, however, both found that the appellant was not a known or reasonably ascertainable creditor because the appellant's claim was merely conjectural and because no further diligence on the part of the personal representative would have revealed the existence of the appellant's claim. Appellant's statement of claim, therefore, was untimely and barred.

Soriano v. Estate of Manes, 2015 WL 5965203 (Fla. 3d DCA Oct. 14, 2015).

Creditors' Claims Period

The Florida Supreme Court has resolved a conflict among the appellate courts concerning the timeliness of claims filed by a reasonably ascertainable creditor who was not personally served with a copy of the notice to creditors. Siding with the minority appellate court view (and with the official position of the Real Property, Probate and Trust Law Section of the Florida Bar), the Florida Supreme Court held that the deadline for the filing of a claim by a reasonably ascertainable creditor does not begin to run until personal service of a copy of the notice to creditors is effectuated. Accordingly, a reasonably ascertainable creditor who was not personally served does not need to file a motion for extension of time to file a claim after the expiration of the deadline applicable to non-ascertainable creditors. So long as the claim is filed prior to the expiration of the two-year non-claims period, which is the outside time limit for all claims, a reasonably ascertainable creditor's claim will be deemed timely. The question of whether the creditor is reasonably ascertainable, however, is an issue of fact for the probate court to determine, as discussed in the above-summarized case of *Soriano v. Estate of Manes*.

Jones v. Golden, 176 So. 3d 242 (Fla. 2015).

Notarial and Nuncupative Wills

Five years before her death, the decedent executed a will in New York that complied with the formalities required for execution under both New York and Florida law. A few months later, she executed a second will in Argentina, where she was a citizen at the time. Upon her death in Florida, the beneficiaries of the New York will filed a petition to probate the New York will, and the beneficiaries of the Argentine will filed a competing petition to probate the Argentine will. The probate court held that the Argentine will complied with Florida law and had revoked the New York will. The appellate court reversed, holding that the Argentine will did not comply with Florida law because it was a nuncupative will. Florida law relaxes some of its strict formalities for the will of nonresidents; however, two types of wills are never recognized by Florida law—holographic and nuncupative wills. A nuncupative will is made by the verbal declaration of the testator, usually dependent merely on witness testimony for proof. The appellate court held that the Argentine will was a nuncupative will because it was orally declared by the testator to a notary in the presence of witnesses, and although the notary typed it up, neither the testator nor the witnesses signed it. The appellate court acknowledged that Florida does recognize foreign notarial wills (a will dictated to and written down by a notary), but it held that the prohibition on nuncupative wills bars notarial wills that are unsigned by the testator.

Malleiro v. Mori, 2015 WL 5714701 (Fla. 3d DCA Sept. 30, 2015).

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(l to r) Kathleen (Kathy) Doyle, Chairman and CEO of Doyle; Joanne Porrino Mournet, Executive Vice President of Doyle, and Magdalen (Meg) Gaynor, Chair of the NYSBA Trusts and Estates Law Section at the 2016 Trusts and Estates Law Section Annual Meeting Cocktail Reception, sponsored by Doyle New York.

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The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word or WordPerfect. Please include biographical information.

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