NYSBA SUMMER 2009 | VOL. 42 | NO. 2

Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair


Ira Bloom

By all accounts, the Spring Meeting at Amelia Island Plantation was a huge success. The program, entitled "Estate Planning in Uncertain Times: Tax and Non-Tax Considerations," featured some of the most prominent speakers in the country, including Amy Beller, Prof. Susan Gary, Randy Harris, Carlyn McCaffrey, Prof. David Pratt, Jonathan Rikoon, Josh Rubenstein and Sandy Schlesinger. My thanks to Prof. Deborah Kearns, my colleague at Albany Law School, for serving and performing admirably as Program Chair. (Debbie also serves as Chair of the Tax Committee.) I also want to thank Surrogates Stephen Cass, John Czygier and John Riordan for attending the meeting. Especial thanks to NYSBA's President-elect Michael Getnick for joining us. Photos from the meeting are included on p. 28 in this *Newsletter*.

For those of you who were unable to attend the Amelia Island meeting, the program was **videotaped** and **audiotaped**. If interested in purchasing a DVD or CD (both will include the two-book program materials), you should call NYSBA's CLE Department at 800-582-2452.

Lobby Day

In late March, the Section conducted its annual Lobby Day in Albany. Several members, including Victoria D'Angelo (Vice-Chair, Estate and Trust Administration), John Morken (Co-Chair of Legislation and Governmental Relations Committee), Natalia Murphy (Vice-Chair, Estate and Trust Administration), and Josh Rubenstein (former Section Chair) trekked to Albany to meet with Assembly Judiciary Chair Helene Weinstein and her staff, Senate Judiciary Chair John Sampson and his counsel, and Jeff Pearlman, Assistant Counsel to the Governor. (Ron Kennedy, Director of NYSBA's Department of Governmental Relations, and I, who live in the Albany area, had mere commutes.) We came away hopeful that some, but not all, of our proposals would be enacted into law this session. The following are most promising for enactment: New

Inside

NYSBA

EPTL 2-1.6 (120-hour rule for simultaneous death matters); revisions to EPTL 2-1.11 (renunciation changes); EPTL 5-1.1-A (d)(2) (providing parity when exercising right of election in different situations); and EPTL 5-3.1 (exempt property reforms). Realistically, our proposed directed trusteeship statute and amendments to EPTL 11-1.5 (interest on legacies) will need more time for acceptance.

New Power of Attorney Legislation

As I discussed in the Spring *Newsletter*, new Power of Attorney legislation, originally scheduled to be effective March 1, 2009, will now be effective on September 1, 2009.

The POA legislation will dramatically change existing POA rules and practice. A new statutory short form must be executed, which requires signature by the agent(s) before it is effective. In addition, if a principal wants to authorize the agent to make virtually any gifts or make specified transactions, or both, a Statutory Major Gifts Rider must also be completed. The Major Gifts Rider must be signed and acknowledged by the principal **and** witnessed by two witnesses, similar to Will execution.

At the Amelia Island meeting, I created an ad hoc committee to study the new POA legislation and recommend legislative changes. The committee, consisting of Bob Freidman, Bonnie Jones, Debbie Kearns, Bill LaPiana, Ron Weiss and myself, diligently focused on the charge during the first weeks in April. Thereafter, I met several times with Rose Mary Bailly, Executive Director of the New York State Law Revision Commission, and Barbara Hancock, Counsel to the Commission, to discuss with them suggestions for various legislative changes. At this writing in early May, I am optimistic that some changes will be enacted before the legislative session ends in June. By the time you read this column, we will know if changes were made and what specific changes the legislature and the governor agreed upon. In any event, I will provide a POA update in the Fall *Newsletter*.

A couple of other matters concerning the new POA legislation: In August, I expect that our Section and the Elder Law Section will present a Webinar on the new POA legislation. I'll send an e-blast once the details of the Webinar become definite. Also, part of day two of our Section's Fall Meeting will be devoted to the latest developments in the POA area from both rules and practice perspectives.

I am pleased to announce that Marion Hancock Fish will be the Chair for the Fall Meeting, to be held on September 30 – October 3 in Syracuse at the Renaissance Syracuse Hotel. The meeting will feature a full second-day program. In addition to updates on the new POA, I am sure that Marion will also include a segment on any newly enacted federal estate, gift and GST tax legislation. Please mark your calendars for what should be an excellent meeting.

Just in case you missed the prior reminders, the Fall Meeting in Syracuse continues the Section's transition for 2009 and beyond. In future years, the out-of-state meeting will be in the Spring and the upstate meeting will be in the Fall. For 2010 the Spring Meeting will be in Chicago and the Fall Meeting will be in Rochester.

I hope you all have an enjoyable summer filled with "POA" (Plenty of Activities that are non-legal in nature).

Ira M. Bloom

Important Revision of EPTL 5-1.4: Extension of Revocatory Effect of Divorce

By Linda J. Wank

On July 7, 2008, Governor Paterson signed into law a bill[1] that extends the revocatory effect of divorce to non-probate dispositions of property and certain fiduciary designations of a former spouse. This article summarizes the provisions of the newly enacted law and outlines how it differs from the Uniform Probate Code Section after which it was patterned.[2]

I. Background and Impetus for the Bill

In recent years, the divorce rate among Americans has consistently risen, with second and even third marriages becoming more and more common. In 2007, for example, more than 55,000 marriages in New York ended in divorce or annulment, and 25% of these marriages had lasted fewer than five years.[3] At the same time, revocable trusts have become an increasingly popular estate planning tool, as practitioners and clients have come to understand the many advantages offered by such trusts.[4] And frequently, a significant portion of a client's overall net worth consists of non-probate assets that pass independently of a Will or revocable trust, such as life insurance, retirement plans and property held jointly with rights of survivorship.

The importance of updating an estate plan in the wake of a divorce should be apparent. But as divorcing couples struggle to reach an agreement on such pressing issues as child custody, visitation and support, estate planning is often put on the back burner. To be sure, the failure to implement changes after a divorce is rarely based on any lingering affection for a former spouse; most clients simply neglect to focus and take the necessary affirmative action. Fortunately, there has been a statutory "default rule" in New York for many years that addresses this situation, albeit in limited circumstances. The default rule is contained in Estates, Powers and Trusts Law Section 5-1.4. As originally enacted in 1967, Section 5-1.4 creates a conclusive presumption that divorce is deemed to revoke all dispositions in a Will to a former spouse (as well as fiduciary nominations of a former spouse), and the dispositions are treated as if the former spouse predeceased the testator.[5] Under other provisions of New York law, divorce also revokes the nomination of a former spouse as a health care agent[6] and the power of a former spouse to dispose of a decedent's remains.[7] And New York case law has long provided that divorce transforms a tenancy by the entirety into a tenancy in common.[8] Incongruously, however, the revocatory effect of divorce has never before been extended in New York to joint tenancies with rights of survivorship, or to the designation of a former spouse as an attorney-in-fact or as the beneficiary of non-probate assets.

II. The New Law

The proliferation of the use of revocable trusts (which are often the functional equivalent of Wills), coupled with the substantial growth in value of other non-probate property and the steady rise in divorce rates, presented a strong case for extending the revocatory effect of a divorce beyond a Will. Accordingly, the bill that was signed into law last July repealed existing Section 5-1.4 and replaced it with a new Section 5-1.4. The new Section 5-1.4 creates a consistent rule with respect to probate and non-probate transfers. Specifically, the new law provides for the revocation upon divorce of dispositions to or for the benefit of a former spouse by Will, revocable trust, security registration in beneficiary form (TOD), beneficiary designations in a life insurance policy and (to the extent permitted by law) beneficiary designations in a pension or retirement plan. It also provides for the revocation upon divorce of all nominations of a former spouse to serve in any fiduciary or representative capacity, including as executor, trustee, conservator, guardian, agent or attorney-in-fact. Finally, the new law provides that divorce severs the interests of former spouses in property held by them at the time of divorce as joint tenants with rights of survivorship, and transforms all such interests into tenancies in common (which, as noted above, had already been the case for property held in a tenancy by the entirety).

An important aspect of the new law is that it includes opt-out provisions for the expanded default rule, both for dispositions to a former spouse and fiduciary nominations[9] and for severances of a joint tenancy.[10] For circumstances in which a couple may wish not to have a disposition or appointment revoked or a joint tenancy severed, a client may elect out of the expanded default rule by expressly providing in the applicable "governing instrument" (as defined in the statute)[11] that divorce shall not revoke such dispositions to, nominations in favor of, or joint tenancies with a former spouse.[12]

III. Uniform Probate Code

Given that new EPTL 5-1.4 was patterned after Revised UPC § 2-804,[13] the two laws contain many similar provisions. For example, under both UPC § 2-804 and EPTL 5-1.4, dispositions to a former spouse that are revoked by divorce are revived by the remarriage of the former spouses to each other. And importantly, both laws protect payors or other third parties from liability (where, for example, payment is made to a former spouse designated in a governing instrument after a divorce has taken place), unless and until such payor or third party receives written notice of the divorce. Even after notice is received, the payor or third party has the option of discharging its liability by depositing the property in question with the court that has jurisdiction over the decedent's estate.

Despite many similarities, practitioners should be aware that there are certain substantive differences between the two laws. First, under UPC § 2-804 divorce simultaneously revokes dispositions not only in favor of a former spouse, but also, and more broadly, dispositions in favor of any relative of the former spouse who, as a result of a divorce, is no longer related to the testator by blood, adoption or affinity.[14] The draftspersons of the New York bill considered extending the scope of revocation to a divorced spouse's relatives, but ultimately decided to limit the application of new Section 5-1.4 only to former spouses. Second, UPC § 2-804 includes a provision designed to address its possible preemption by the Employee Retirement Income Security Act of 1974 (ERISA), which federalized pension and employee benefit law.[15] Section 514(a) of ERISA provides that Title I[16] and IV[17] of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.[18] The U.S. Supreme Court has held that, to the extent that a state law applies to employee benefit plans governed by ERISA, federal law preempts any state law that automatically divests the designation of a spouse as beneficiary of non-probate assets upon divorce.[19] In an effort to circumvent the ERISA issue, UPC § 2-804 directs that if any of its provisions are preempted by federal law, the person who received property to which he or she was not entitled is obligated to return such property or is personally liable to the person who would have been entitled to such property if there were no preemption. Defining which provisions of state probate law "relate to" employee benefit plans continues to be a difficult task for the federal courts.[20] Moreover, certain types of benefit plans, such as governmental plans, are exempt from ERISA.[21] In light of the foregoing, the New York bill did not attempt to override ERISA, and new Section 5-1.4 explicitly recognizes that pension and retirement plan benefits designated to a former spouse are revoked by divorce only to the extent permitted by law.[22]

IV. Effective Date

While the effective date provisions of new legislation are always important, the effective date section of the new statute deserves special attention. With respect to dispositions and nominations that take place only upon death, such as under a revocable trust, the revocation provisions apply to all testators who die after the effective date—July 7, 2008—even if the divorce was finalized prior to the effective date. For nominations of a former spouse in currently operative documents, however, such as powers of attorney, the revocation provisions apply only if the divorce is finalized after the effective date.[23] And keep in mind that the revocatory effect will not apply if a client dies during the course of matrimonial proceedings, but before a divorce is finalized. Therefore, it is imperative that clients who are contemplating a separation or divorce review their estate planning documents and consult with an attorney to evaluate whether interim changes should be made.

V. Conclusion

Although the expanded default rules contained in new Section 5-1.4 are designed to carry out the likely intent of clients in the vast majority of cases, they may not effectuate the desired outcome in every particular situation. Estate planning attorneys are encouraged to study the new Section 5-1.4 and to counsel clients on its application in the context of each client's individual circumstances.

Endnotes

1. Bill A.8858-A/S.5966-A was enacted at 2008 N.Y. Laws ch. 173 and is now N.Y. Estates, Powers and Trusts Law 5-1.4 (EPTL) (effective July 7, 2008).
2. Uniform Probate Code § 2-804 (1990) (UPC).
3. *See generally*, http://www.health.state.ny.us/nydoh/vital_statistics/2007/table48.htm & http://www.health.state.ny.us/nydoh/vital_statistics/2007/table51.htm.
4. *See* G. Warren Whitaker, *Revocable Trusts in New York: Why Not?*, N.Y.L.J., Sept. 22, 2000.
5. EPTL 5-1.4 (1967), "Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse." It should be noted that the provisions of EPTL 5-1.4 apply not only in the case of divorce, but in the case of a judicial separation or annulment of a marriage. For ease of reference, however, this article refers solely to divorce as the event that triggers revocation.
6. N.Y. Public Health Law § 2985(1)(e) (PHL).
7. PHL § 4201(5).
8. *Stelz v. Shreck*, 128 N.Y. 2631 (1891).
9. EPTL 5-1.4(a).
10. *Id.* at § (c).
11. *Id.* at § (f)(5) "'Governing Instrument' includes, but is not limited to, a will, testamentary instrument, trust agreement (including, but not limited to, a totten trust account under

[EPTL] 7-5.1(d)), insurance policy, thrift, savings, retirement pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment."

12. *Id.* at §§ (a) and (c).
13. UPC § 2-804 (1990) (*Revocation of Probate and Nonprobate Transfers by Divorce, No Revocation by Other Changes of Circumstances*). UPC § 2-804 was originally promulgated as U.S.C. § 2-580 and was revised in 1990 to extend its reach to non-probate assets favoring a former spouse.
14. See *Hermon v. Urteago*, 39 Cal. App. 4th 1525 (1995), for an interesting discussion of California's revocation on divorce statute (Probate Code Section 6122), which, like the New York law, does not revoke dispositions to relatives of former spouses.
15. ERISA, 29 U.S.C. §§ 1001-1461 (1988) (ERISA).
16. ERISA, Title I, *Protection of Employee Benefit Rights*, 29 U.S.C. §§ 1001, *et seq*. (1988).
17. *Id.* at Title IV, *Plan Termination Insurance*.
18. *Id.* at § 514(a), 29 U.S.C. § 1144(a) (1988).
19. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).
20. For example, in *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991), the court held that ERISA preempted an Oklahoma statute that resembled new EPTL 5-1.4 and UPC § 2-804 (Okla. Stat. Ann. Tit. 15, § 178 (West Supp. 1992)), which attempted to apply revocation-upon-divorce rules to ERISA-covered death benefits. Meanwhile, in *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329 (E.D.N.Y. 1989), the court denied ERISA preemption and applied EPTL § 4-1.6 (the so called "slayer rule") reasoning "state laws prohibiting murderers from receiving death benefits are relatively uniform and there is little threat of creating a patchwork scheme of regulation sought to be avoided by the enactment of ERISA."
21. *See* ERISA at § 1003(b)(1) (1988).
22. EPTL 5-1.4(a).
23. *See* 2008 N.Y. Laws ch. 173, § 2 ("This section shall apply only where the marriage of a person executing a disposition, appointment, provision or nomination in a governing instrument, as defined in EPTL 5-1.4(f)(5), such section as added by section one of this act, to or for the benefit of a former spouse ends in a divorce or annulment, as defined in EPTL 5-1.4(f)(2), on or after such effective date or, where such a marriage ends prior to such effective date, only where such a disposition, appointment, provision or nomination takes effect only at the death of the person who executes it and such person dies on or after the effective date of this act.") (Reproduced in the 2008 Amendments note in *New York Surrogate's Court*, Lexis Nexis, 2009 ed. (the "Green Book")).

Linda J. Wank is a partner in the New York City law firm of Frankfurt, Kurnit, Klein & Selz and is Chair of this Section's Committee on Estate and Trust Administration.

Sell It or Save It? Spell It Out

By Jennifer N. Weidner

As estate planning attorneys, we routinely draft Durable General Powers of Attorney for our clients. In Powers of Attorney, we often include broad powers for real estate transactions, and we often address limited gifting powers. It is also not a rare occurrence for our clients to include in their Wills bequests and devises of specific realty or personal property.

It is, therefore, easy to imagine the following situation in routine estate planning: a grandchild of an aging client of yours contacts you to let you know that your client has moved from her residence into a nursing home, and that your client is showing some signs of diminished mental capacity. Your client has significant wealth and is a private-pay resident at the nursing home.[1] The grandchild, who is agent for his grandmother pursuant to a Power of Attorney you prepared, would like to discuss selling his grandmother's residence as it is unlikely that his grandmother will return to the residence. He explains that there are expenses associated with maintaining the empty residence that will deplete the assets that would otherwise pass under the residuary clause of her Will. Your client's Will specifically devises the residence to the grandchild, and the grandchild is one of several residuary beneficiaries. The grandchild also proposes to give the tangible personal property located in his grandmother's home to the legatees of such property listed in his grandmother's Will, to the extent the Power of Attorney authorizes gifts to those individuals, or alternatively to sell the property at auction.

How would you advise the grandchild as agent for your client regarding these issues, assuming that your client's capacity has in fact diminished so that advising her directly is no longer an option, and you are satisfied that she will never be able to return to her home? If the grandchild sells the property, will the devise of the property to him adeem, causing the proceeds to pass under his grandmother's residuary estate? If he fails to sell the property, has he violated a fiduciary duty by wasting the principal's assets, to the ultimate detriment of the remainder beneficiaries?

If your client had been adjudicated an incompetent and a conservator or committee had been appointed for her under former New York Mental Hygiene Law (MHL) Articles 77 or 78, then Section 3-4.4 of the New York Estates, Powers and Trusts Law (EPTL) would apply to preserve the incompetent's general testamentary plan if faced with sales of specifically bequeathed property by the conservator or committee during the incompetent's lifetime.

EPTL 3-4.4 reads as follows:

> In the case of a sale or other transfer by a committee or conservator, during the lifetime of its incompetent or conservatee, of any property which such incompetent or conservatee had previously disposed of specifically by will when he was competent or able to manage his own affairs, and no order had been entered setting aside the adjudication of incompetency at the time of such incompetent's death, or the conservatorship continued through the date of the conservatee's death, the beneficiary of such specific disposition becomes entitled to receive any remaining money or other property into which the proceeds from such sale or transfer may be traced.

EPTL 3-4.4 has not been amended since the enactment of MHL Article 81, which replaced the former conservator statutes with a guardianship regime; however, EPTL 3-4.4 has been applied to situations in which guardians disposed of property during an incapacitated person's lifetime.[2] In addition, the implementing legislation to MHL Article 81 provides that when a statute uses the terms conservators or committees, "such statute shall be construed to include the term guardian . . . unless the context otherwise requires."[3] Therefore, even without amendment of EPTL 3-4.4 to refer to guardians as well as conservators and committees, it appears that if your client were adjudicated an incapacitated person, your client's guardian could sell your client's specifically bequeathed property and the traceable proceeds would be payable to the specific devisees or legatees through your client's estate.

It is not likely, however, that your client could lean on EPTL 3-4.4 to preserve the value of the specific bequest as to him if he were to sell his grandmother's residence as her attorney-in-fact after she moved to the nursing home. There are few cases considering the statute's application to sales or transfers of property by an attorney-in-fact during the principal's lifetime. In two of the three reported cases the author's research has found, the courts rejected the application of EPTL 3-4.4 to transactions performed by attorneys-in-fact.

In 1979, the Niagara County Surrogate's Court declined to apply EPTL 3-4.4 to a circumstance in which specifically devised real property was sold by a testator's attorney-in-fact during the testator's lifetime and alleged (but not adjudicated) incapacity.[4] The court based its determination on EPTL 3-4.4's reference to an "adjudication of incompetency" together with EPTL 1-2.9's definition of "incompetent" as "a person judicially declared to be incapable of managing his affairs."[5] Since the testator had never been judicially declared incompetent at the time of the transaction, the court concluded that the situation was outside the express terms of EPTL 3-4.4. The court explained that "the purpose and effect [of EPTL 3-4.4] is to preserve the testamentary intent against a contrary disposition made by the representative of a testator judicially disabled from making such disposition himself."[6] The court seemed to direct that without an adjudication of incompetency, we may not presume that a testator would be unable to change the terms of his Will to address lifetime transactions.

In 1993, the Appellate Division, Second Department, agreed with the holding of the Dutchess County Surrogate's Court that the doctrine of ademption applied when an attorney-in-fact sold property which had been bequeathed by the principal to her stepchildren under her Will.[7] The stepchildren of the deceased principal alleged that the Power of Attorney was unlawfully obtained and that the attorney-in-fact exercised it to convert assets of the principal to the attorney-in-fact's own benefit, including the proceeds of the sale. The court determined that because the subject property was conveyed during the lifetime of the principal, it was not part of her estate. Therefore, the bequest adeemed. The court did not specifically discuss EPTL 3-4.4, but cited several cases in support of its conclusion. Of the several cases cited, only one—*Estate of Kramp*—considered a transfer by an attorney-in-fact.

More recently, the Kings County Surrogate's Court reviewed, in what it called an "issue of first impression," the following set of facts: an attorney-in-fact requested the principal's broker to raise cash from the principal's investment account to meet the principal's expenses, and the broker sold stock which had been specifically bequeathed under the principal's Will.[8] The court determined that absent the application of EPTL 3-4.4 to the transfer of the stock by the attorney-in-fact, the bequest would adeem and therefore the transfer by the attorney-in-fact would inadvertently "destroy decedent's testamentary plan even though he was acting to protect her financial interests."[9] The court stated that EPTL 3-4.4 was a very narrowly drafted law; as such it

> provides an exception to ademption where the transfer was made by a committee or conservator during the lifetime of its incompetent. . . [T]he statute is silent as to transfers made utilizing a power of attorney by someone acting on behalf of an incompetent although not adjudicated an incompetent by a court of law.[10]

The King's County Surrogate's Court acknowledged that EPTL 3-4.4 was "meant to accommodate the competing interests of allowing a fiduciary to sell the property of an incapacitated person if necessary, while retaining so far as possible the testamentary plan of a person who had lost her capacity to change it."[11] The Court reasoned that it would be erroneous to assume that every principal whose attorney-in-fact sold specifically bequeathed property was mentally incompetent to change his or her Will. In conclusion, the Court opined that EPTL 3-4.4 was a "middle of the road approach between a strict identity theory of ademption and an intention theory."[12] Ultimately, the Court determined that it did not have to decide whether a specific bequest adeems when it is sold by an attorney-in-fact for a non-adjudicated incompetent individual, because in the instant case, the parties had entered into a stipulation of settlement regarding the proceeds of the property.

The language and considerations of the Kings County Surrogate's Court may suggest a basis for an argument that if your client's grandchild sold your client's home and contents under a Power of Attorney while your client was incompetent, the bequests should not adeem as to the specific legatees. The Court did not actually reach a point of conclusion, however, but merely articulated what the arguments could be if it had to make a determination. Thus, under the current statutory and case law, the sale of your client's home and contents by her attorney-in-fact would likely cause the bequests to adeem and the proceeds to pass under the residuary clause of your client's Will. So how then are we to advise your client's attorney-in-fact?

If the expenses of maintaining the home and personal property until your client's death are substantial, and your client would likely be found incompetent by a court of law, your client's grandchild may consider seeking an appointment as your client's Guardian. As your client's Guardian, he could sell the property and the bequest would not adeem, and he could then transfer the specifically bequeathed personal property (if not sold) to the specific legatees as gifts. If he sold the personal property, the traceable proceeds would be payable to the specific legatees through your client's estate. A risk in this approach beyond the expense, however, is that in light of your client having established advanced directives, the guardianship may not be deemed necessary. Courts do not grant guardianships capriciously, and there is an abundance of cases in which courts declined to grant guardianships where the alleged incapacitated person had executed advanced directives during his or her capacity and therefore had agents in place for any needed decisions or transactions.[13]

If your client's Power of Attorney authorized her attorney-in-fact to establish and fund trusts on her behalf, her grandchild could consider establishing a trust to receive the property. The trust could direct the sale upon the event the property becomes useless to the grantor. The trust could also direct that the proceeds be held in trust until the grantor's death, at which time the proceeds would be payable to the specific devisee or legatee named in the grantor's Will. However, since the establishment and funding of the trust would be for the purpose of preserving a devise or bequest to the agent, and therefore would benefit the agent, the agent may find himself being called upon to prove the activities were pursuant to the principal's wishes.

Obviously, if your client were competent to make a Will at this time, she could execute a Codicil directing that if any specifically devised or bequeathed property were sold during her lifetime, the traceable proceeds would pass to the specific devisees or legatees of such sold property. This would also avoid similar problems if any other property subject to one of the many specific bequests is sold.

It is time to consider amending EPTL 3-4.4 to include circumstances and factors under which an attorney-in-fact may sell a principal's property and hold the proceeds for distribution to the specific devisee or legatee in the principal's estate. In the meantime, consider obtaining your estate planning clients' directions for such an event and incorporate those provisions into the clients' advance directives and testamentary instruments.

Endnotes

1. Author's note: In this case study, the client can afford to privately pay her nursing home costs and is not concerned with Medicaid eligibility issues, and therefore Medicaid qualification and resource issues are outside the scope of this article. If the principal under the Power of Attorney was receiving Medicaid assistance or a Medicaid application was foreseeable in the future, the agent would have additional issues to consider, such as, for example, possible Medicaid ineligibility periods or transformation of protected assets into available resources.
2. *See Estate of Oppenheim*, N.Y.L.J., Jan. 29, 2007, p. 39, col. 3 (Sur. Ct., Suffolk Co.).
3. N.Y. Session Laws: 1992 N.Y. Laws ch. 698, § 4.
4. *Estate of Kramp*, 100 Misc. 2d 724, 420 N.Y.S.2d 80 (Sur. Ct., Niagara Co. 1979).
5. *Id.* at 82.
6. *Id.*
7. *LaBella v. Goodman*, 198 A.D.2d 332, 603 N.Y.S.2d 885 (2d Dep't 1993).
8. *In re Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See, e.g.*, *In re Isadora R.*, 5 A.D.3d 494, 773 N.Y.S.2d 96 (2d Dep't 2004); *In re Sol Lowe*, 180 Misc. 2d 404, 688 N.Y.S.2d 389 (Sup. Ct., Queens Co. 1999); *In re Guardianship of Albert S.*, 286 A.D.2d 684, 730 N.Y.S.2d 128 (2d Dep't 2001); *In re O'Hear* [*Rodriquez*], 219 A.D.2d 720, 631 N.Y.S.2d 743 (2d Dep't 1995).

Jennifer N. Weidner is an estates and trusts attorney with Harter Secrest and Emery, LLP in Rochester, New York. Ms. Weidner specializes in transfer tax planning and estate and trust administration and litigation. Her practice ranges from basic estate and health care directive planning to sophisticated planning techniques for high net worth clients. She is also the Chair of the Committee on Continuing Legal Education for the Trusts and Estates Law Section.

Fifth International Estate Planning Institute Is a Success

By G. Warren Whitaker

The Fifth International Estate Planning Institute, co-sponsored once again by the New York State Bar Association and the Society of Trust and Estate Practitioners, was held at the Westin Hotel in New York City on April 23 and 24. The diverse audience for the Institute hailed from New York and nearby states, other regions of the country, and at least half a dozen foreign countries. I was once again privileged to chair the Institute.

The first speakers, Stan Barg and Jon Grouf of Duane Morris LLP, gave an overview of many key international estate planning issues. They reviewed the rules applicable to determining whether an individual is a U.S. person for both income and estate tax purposes, as well as the U.S. taxation of non-U.S. persons. Later in the morning, Stan and Jon reviewed new developments, including the proposed Stop Tax Haven Abuse Act and other proposed legislation.

I followed with a talk on the new law that took effect on June 17, 2008 regarding the tax consequences of expatriation, i.e., the renunciation of an individual's citizenship or (after eight out of 15 years) green card status. I talked about which expatriates will come out ahead under the new law and which ones will be worse off as a result of it.

Marnin Michaels of Baker & McKenzie in Zurich then spoke about the accumulation distribution rules for foreign non-grantor trusts and planning techniques to minimize their severe impact, such as taking advantage of the differences between accounting income under local law and taxable income.

After a buffet lunch sponsored by Hottinger & Partners SA of Switzerland, which offered an opportunity for networking and renewal of acquaintances, the program resumed with a presentation chaired by Paul Sczudlo of Loeb & Loeb in Los Angeles on planning for the international athlete and entertainer. Paul presented a fact pattern involving a hypothetical Latvian soccer star named Cziszflam (pronounced CHEESEFLAME) and his wife, Bounny Coughttham-Counting, an American actress. Paul consulted advisors from four countries on what planning the couple could do to purchase a home in each country while avoiding worldwide taxation. Later, the same panel addressed pre-immigration planning if the couple chose to become residents in each of the countries. The panelists were Patrick Harney of Forsters in London for the United Kingdom, Michael Cadesky of Cadesky and Associates LLP in Toronto for Canada, Edgar Paltzer of Niederer, Kraft & Frey in Zurich for Switzerland, and Robert Dumont of Deloitte Tax LLP in New York City for the United States.

We then adjourned to a convivial cocktail reception sponsored by HSBC Private Bank, followed by an excellent speakers' dinner which, for the fifth consecutive year, was held at the Gramercy Tavern and sponsored by RBC Royal Bank of Canada.

Day Two began with reports from lawyers in four foreign jurisdictions. Fabiola Suwanto of Bryan Cave, who having come from Shanghai won the prize for the longest distance traveled, gave an interesting talk about planning for Chinese residents and for U.S. persons residing in China. She spoke about the many gray areas in Chinese law and practical ways to deal with them.

Sonia Velasco Menal of Cuatrecasas in Barcelona then addressed tax planning issues for U.S. citizens residing in Spain. Patrick Harney followed with a discussion of the new U.K. laws regarding taxation of domiciliaries and residents and their impact on U.S. citizens living in the U.K. Finally, Michael Cadesky gave an amusing talk about Canadian tax pitfalls for U.S. citizens residing there.

The Institute ended with a very timely presentation by William Sharpe of Sharpe & Associates in Tampa, Florida and my partner, Stanley Twardy of Day Pitney LLP in Stamford, Connecticut, on a subject that has been much in the headlines: how to deal with unreported offshore accounts, including the IRS's recent voluntary disclosure program and possible criminal tax fraud and contempt issues.

Throughout the two days, audience members took advantage of numerous opportunities to ask interesting questions and make valuable comments about the topics being discussed.

As always, we are very grateful to the sponsors who helped to make the program possible at a reasonable price. In addition to the three platinum sponsors of events mentioned above, the following were gold sponsors of the Institute: BNY Mellon Wealth Management; Christiana Bank and Trust Company; Christie's; Commonwealth Trust Company; Fiduciary Trust Company International; FMV Opinion, Inc.; Sotheby's; South Dakota Trust Company; and Trident Trust.

G. Warren Whitaker is a partner in the New York office of Day Pitney LLC, focusing on international and domestic estate planning. He is the former chair of the NYSBA Trusts and Estates Section.

Fiduciary Investing in a Challenging Economy

By Hon. C. Raymond Radigan and Raymond C. Radigan, J.D.

Background

Hon. C. Raymond Radigan

New York modernized the law governing fiduciary investing by enacting the Prudent Investor Act (the "Act"), which became effective on January 1, 1995.[1] The intent of the legislation was to incorporate "Modern Portfolio Theory" and other advanced concepts of portfolio management into the world of fiduciary investing. The Act was drafted as default legislation, meaning that it will apply to those investing in a fiduciary capacity except as otherwise provided by the express terms of the governing instrument.[2]

The prudent investor standard requires a trustee to consider many factors when investing on behalf of a trust, including the size of the portfolio, the estimated duration of the fiduciary relationship, general economic conditions, the possible effect of inflation or deflation, the expected tax consequences of investment decisions, the expected total return of the portfolio, and the needs of the beneficiaries.[3] The Act also specifies that each investment should not be evaluated in isolation, but the portfolio should be viewed as a whole, and that a fiduciary should be judged by a standard of conduct, not outcome or performance.[4]

Stated differently, a fiduciary should not be held liable merely because the value of the portfolio declined or because the portfolio did not perform as well as the appropriate benchmarks. Instead, the decisive factor is whether the strategy and the investment decisions made by the fiduciary were prudent at the time they were implemented. Furthermore, the portfolio needs to be reviewed regularly to ensure these investment decisions remain prudent, given current economic and market conditions, and if not, changes should be made accordingly. Therefore, it is critically important for a fiduciary to document every facet of the investment process in case these decisions are questioned in the future.

Specifically, a written document should be prepared outlining the investment goals and objectives of the trust and specifying why a particular investment strategy and asset allocation model is being utilized. Additionally, the trustee should memorialize in writing the reasoning behind the purchase and sale of every major security and document that the portfolio is being reviewed on a regular basis.

Raymond C. Radigan, J.D.

If a professional is hired to manage the trust investments, a document should be prepared outlining the qualifications of the manager or the firm and why it was chosen. Thereafter, the trustee should document the review of the investment performance at least annually.

Total Return

Even after the Act became effective, a trustee still could not invest to maximize total return because of the potential conflict between the income beneficiary and the remainderman. To illustrate, suppose a trust was created to distribute net income to X for life and when X dies, whatever is left in the portfolio would go to Y. Under prior law, the income beneficiary would only benefit from the current net income (e.g., interest and dividends) and all the capital growth or decline would eventually be distributed to Y, the remainderman.

Generally, the income beneficiary would prefer the trustee to construct a portfolio that maximizes income (e.g., all bonds) while the remainderman would want the trustee to maximize the growth potential of the portfolio (e.g., all stocks). A trustee, however, has a duty to treat all beneficiaries fairly. Therefore, the potential conflict between beneficiaries prevented the trustee from constructing a portfolio that was designed to maximize total return. Instead, the trustee would typically compromise under this scenario and create a balanced portfolio with a mixture of assets that generated both current income and potential growth of principal.

To fix this problem, New York eventually added provisions to the Act which now give a fiduciary the discretionary power to adjust funds between principal and income in certain trusts, based on what is fair and reasonable to all beneficiaries.[5] These new provisions became effective on January 1, 2002.

In other words, a trustee can now invest for total return and if the current net income is not sufficient, the trustee can exercise the "power to adjust" and take some funds out of principal and allocate them to the income beneficiary so that in the end, the income beneficiary receives a "fair" distribution. In fact, the "power to adjust" can work both ways, meaning that "excessive income" also could be allocated to corpus, if ever appropriate.

Alternatively, the trustee can provide the income beneficiary with a 4% unitrust distribution, meaning the income beneficiary receives an annual distribution equal to 4% of the value of the portfolio, regardless of the actual income generated in the account.[6] Either option now allows a trustee to invest for total return and treat all beneficiaries fairly.

Duty to Diversify

One of the most critical components of the Act is that a fiduciary has a general duty to diversify investments, unless it is in the interests of the beneficiaries not to do so, or circumstances prevent it.[7] Diversification is required because it can help minimize firm-specific risk (also known as "inherent risk") without sacrificing return. Firm-specific risk is when the price of a particular stock price declines due to an event that negatively impacts the company.

To illustrate, the value of Enron stock went from $90.75 in August 2000 to virtually zero by December 2001, due to fraudulent securities and accounting practices. In 1982, the overall market value of Johnson & Johnson declined by $1 billion due to the bottle tampering of one of its leading products—Tylenol. Both are examples of firm-specific risk. The point is, firm-specific risk can be triggered by malfeasance, negligence, or bad luck, but the result is the same—the stock price can decrease significantly.

Firm-specific risk can be minimized significantly by creating a diversified stock portfolio. In theory, a diversified portfolio will help protect the account from firm-specific risk because if an event negatively impacts the value of one stock, the other stocks in the portfolio can help offset the loss and help minimize the negative impact to the overall portfolio.

A diversified equity portfolio, however, cannot protect against market risk. Market risk can adversely impact an entire asset class or market, usually due to adverse economic conditions. To illustrate, suppose a trustee invested in 100 different large cap stocks on October 12, 2007. Chances are, the value of that portfolio was down significantly on March 27, 2009, because the S&P 500 Index was down 45.85% during that time period. In fact, the investment performance of the account would not necessarily improve if the trustee invested in 200 or 500 different large cap stocks during the same time period because diversification cannot protect against market risk.

One way a fiduciary can minimize the impact of market risk, however, is to use a strategic asset allocation model when constructing a trust portfolio.

Asset Allocation

Asset allocation is the cornerstone of a successful investment strategy because it involves the process of dividing an investment portfolio among different asset classes with different risk and return characteristics, based on the investor's goals, risk tolerance and time horizon. The goal of asset allocation is to maximize the investment return of a portfolio for a given level of risk.

Asset allocation is designed to reduce the volatility or the variability of returns by investing in different asset classes that perform differently in varying economic conditions. In the past, asset allocation was a relatively simple process. Most investors divided a portfolio among three asset classes—cash, domestic investment grade bonds (either corporate, Treasuries or municipal bonds) and large cap U.S. stocks.

Today, capital markets are increasingly complex as we now live in a virtual global economy. As a result, money managers have multiple asset classes to choose from including cash, various forms of fixed income (e.g., U.S., international, high yield, etc.), various forms of stocks or equities (e.g., U.S. large, mid and small cap, international, etc.), and even alternative investments, such as hedge funds, private equity, real estate and tangible assets.

The key to asset allocation is to blend asset classes that are not correlated to each other in an effort to generate a higher return while smoothing out the volatility of the portfolio. That is why many money managers may use 10 or more asset classes when investing a portfolio that exceeds $5 million.

To illustrate, suppose on January 1, 1999, a trustee is appointed to invest and administer a $5 million trust. Although most portfolios have a portion of funds allocated to cash, assume in this example that the trustee decides to invest 40% of the portfolio ($2 million) in high grade domestic bonds and 60% of the portfolio ($3 million) in US large cap stocks. Further assume that the portfolio is rebalanced at the end of each year to maintain the 60/40 asset allocation ratio. On December 31, 2008, the portfolio would be worth $6,389,173, as measured by the appropriate benchmark for each asset class.[8]

Alternatively, what if the trustee decided to use the following asset allocation model when constructing the $5 million trust portfolio:

Large Cap Equities	22%
Mid Cap Equities	3%
Small Cap Equities	2%
International (Developed)	10%
International (Emerging)	4%
TOTAL EQUITIES	41%
Investment Grade Bonds	27%
International Bonds (Developed)	4%
Global High Yield	4%
TOTAL FIXED INCOME	35%
Hedge Funds	10%
Private Equity	7%
Real Estate	4%
Tangible Assets	3%
TOTAL ALTERNATIVE INVESTMENTS	24%

The above asset allocation model is equally aggressive as the first model, only now the trustee is using 12 asset classes instead of two. In this example, the portfolio would be worth $8,397,286 on December 31, 2008, as measured by the appropriate benchmark for each asset class, or a $2 million improvement from the previous example.[9] The annual returns were also less volatile when the more comprehensive asset allocation model was used.

It is difficult, however, to use a comprehensive asset allocation model for small accounts. Nevertheless, even if an account is worth less than $1 million, the trustee can still invest in various forms of equities and fixed income. Additionally, it may be more efficient to invest the small accounts in mutual funds as opposed to individual holdings.

Alternative Investments

Some question whether it is ever prudent for a trustee to invest in alternative investments like hedge funds and private equity—even in a large trust account. Indeed, many forms of alternative investments have certain lock-up provisions, rendering them illiquid for a period of time and, in many instances, it is difficult to know the account holdings at any given time. In fact, critics have become more vociferous in light of our bad economy and the fact that many prominent investment advisors have recently been indicted for fraud and other criminal activity.

Nonetheless, despite these issues, a trustee should still consider investing in hedge funds and private equity in appropriate circumstances because these asset classes can help improve the level of diversification within a portfolio, resulting in higher returns with less variability. The key, however, is that a trustee must employ and document a rigorous due diligence process when selecting hedge fund and private equity managers.

Many hedge funds and private equity investments are offered as privately placed investments, meaning that they need not be registered under the Investment Company Act of 1940. So unlike registered investment products such as mutual funds, unregistered investment offerings are not required to (1) submit quarterly and annual financial filings with the SEC; (2) publicly disclose the portfolio composition; (3) comply with leverage limitations; (4) maintain a certain amount of liquidity; (5) invest in a diversified portfolio; and (6) register their advisors under the Investment Advisors Act.

The theory is that these privately placed investments need not be registered because they can only be offered to high net worth individuals or entities that are presumably sophisticated and do not necessarily need the same protection as the general public. In fact, certain funds can only be offered to "accredited investors," while other funds can only be offered to "qualified purchasers," as defined by the SEC. An "accredited investor," for example, can be a trust with total assets exceeding $5 million. A trust with assets exceeding $25 million can be a "qualified purchaser," or even a trust with a lesser amount, depending on the qualifications of the grantor, trustee and the beneficiaries.

There is now a proposal in Washington that would require a hedge fund or private equity fund of a certain size to register with the SEC and provide information on their trading activity and the composition of the portfolio. Additionally, it is proposed that a federal regulator would be appointed to monitor and assess systematic risk, whereupon this agency could force these firms to alter their business practices (e.g., reduce leverage) if they pose too much risk to the economy.

If alternative investments are appropriate, a trustee or designee needs to develop a rigorous due diligence process before selecting any individual investment or fund within this asset class. Furthermore, the trustee needs to fully understand the fund's investment strategy and make sure it has strong research capabilities, trading acumen, and risk-management practices. Once an alternative investment is selected, the trustee needs to monitor the investment performance on a regular basis to make sure the fund is performing well and continually adheres to its investment philosophy and strategy.

Hedge Funds

Today, hedge funds refer more to the investment structure rather than an investment strategy. Nevertheless, hedge fund managers engage in many nontraditional strategies including global macro, long/short directional, event driven, derivative or interest rate arbitrage, and the use of distressed securities. There is, however, a huge disparity of investment performance among hedge fund managers and many firms did not survive the recent economic crisis. Investing in hedge funds can pose many risks in addition to lack of regulatory oversight, including limited liquidity, lack of transferability, high fees, the increased chance of filing tax returns on extension, and the possible use of derivatives and leveraging techniques.

Private Equity

The private equity asset class is designed to achieve high potential return by investing long-term in private companies using strategies ranging from venture capital, leveraged buyouts and distressed debt investing. Private equity investments are typically designed to generate long-term capital gains but they pose certain risks, including long-term investment commitment, possible future capital commitments, lack of liquidity, and high fees.

International Investing

Another way for a trustee to further diversify a portfolio is by investing in international equities. Although developed foreign markets, like England, Japan or Germany, are more correlated to the U.S. markets than in the past, investing internationally broadens the opportunity to find worthwhile investments around the globe.

In fact, U.S. stocks constituted 47% of the world's equity market in 2000. By 2007, this had shrunk to 27.5%. On a positive note, this means there are now more investment opportunities outside the U.S. Going forward, why not invest in the best pharmaceutical company or automobile manufacturer, wherever it might be located? [10]

Investing in global emerging markets, such as China, India or Brazil, also offers tremendous opportunities, although the performance of these securities can be extremely volatile. Additionally, there are political and economic risks to consider when investing in international equities and these investments might trigger foreign taxation. Also, the financial reporting standards and regulatory oversight in many of these foreign countries might not be as rigorous as that in the U.S.

Current Market Conditions

Unfortunately, even a portfolio that used a comprehensive asset allocation model performed poorly recently because the value of virtually every asset class has declined significantly since October 2007. In 2008, the benchmarks measuring international equities, both emerging markets and developed countries, were down 53.18% and 44.06%, respectively. The S&P 500 Index was down 37.6% and the private equity and hedge fund benchmarks were down 24.3% and 20.68%, respectively. In fact, the only two major asset classes that generated positive returns in 2008 were cash (1.69%) and US investment grade bonds (5.24%).

Clearly we are in the midst of a sustained bear market, which could end shortly or endure for years. The question becomes—how should a fiduciary invest in a bad economy and still comply with the Prudent Investor Act?

One school of thought is to simply recognize that, at least historically, the stock market has been subject to long-term secular bull and bear cycles. If history is any indication, at some point the market should recover and eventually enter into a new bull cycle. Therefore, if the trust is to last long term, one approach is for the trustee to remain calm and continue to use a strategic asset allocation model and maintain a diversified portfolio.

Or maybe a trustee should make some modifications to the investment process when faced with adverse market conditions. For example, one study indicates that a money manager should rebalance portfolios more frequently in secular bear markets, but less frequently in bull markets to enhance returns.[11]

The study analyzed the secular bear market that lasted from 1966–1981. One portfolio was rebalanced every two years and the other was rebalanced annually. The portfolio that was balanced more frequently generated a 1.3% better annual return than the portfolio that was rebalanced less frequently. By rebalancing, the better performing asset classes are pared down and the excess is redeployed to the asset classes that have underperformed. The hope is that underperforming asset classes will rebound and perform better in the future. In essence, it adheres to the philosophy of "selling high and buying low."

Or maybe using Modern Portfolio Theory or adhering to the "buy and hold" investment philosophy is no longer the only answer. Maybe a form of tactical investing should be considered.

By using a tactical approach to investing, a money manager will invest in asset classes that provide the highest potential return in the current economy and avoid those asset classes that are expected to perform poorly in the short term. Although to a certain extent, there is an element of market timing when using a tactical investment approach, it has more to do with recognizing long-term trends rather than looking for short-term price anomalies.

Again, there have been extended periods of time when the stock market has performed well (secular bull market) and extended periods of lackluster growth or even declines (secular bear market). A tactical investor will assess current market conditions to determine which secular trend is in force. While it is virtually impossible to predict exactly when a bear market ends and when a bull market begins, at some point the secular trend will be apparent and the portfolio can be structured accordingly.

For example, in a sustained bear market, the goal might be to generate absolute returns, using a benchmark of zero, as opposed to some negative number.[12] This means the preferred asset classes might be cash, or short-term fixed income. Conversely, in a sustained bull market, the preferred asset classes might be equity, hedge funds or private equity.

Maybe a trustee can apply a tactical investment approach to a portion of the portfolio. For example, assume 70% of the portfolio is diversified among many asset classes and 30% is used for tactical investing. (Admittedly, it may be difficult or impossible to use this approach for smaller trust accounts.)

The trustee also needs to be sensitive to the portfolio's time horizon when investing in a fiduciary capacity. For example, what if the stock market is in the midst of a sustained bull market and the trust is expected to terminate within five years? One option is to keep the portfolio fully invested and hope the market rally continues. Another approach would be to increase the cash position so that the principal is more adequately protected. The risk to this strategy, however, is that the trust does not participate in the continuing bull market. Arguably, either approach can be defended, as long as the trustee can rationalize why he or she chose a particular strategy.

Conclusion

The capital markets have become more complex and volatile. As a result, a trustee now has an inordinate amount of responsibility when investing in a fiduciary capacity and could be held liable if it does not comply with the prudent investor standard. A trustee can either choose to be exclusively responsible for investing the trust assets or delegate these duties to a third party. Either way, imprudent investing can take many forms, including holding a concentrated position without special circumstances or investing exclusively in a risky asset class. That does not mean, however, that a trustee must adhere to one particular investment strategy to avoid liability. The Prudent Investor Act is designed to be flexible and does not necessarily adopt any one specific approach. It is essential, however, for the trustee to document the entire investment process in writing to help prove that its conduct was prudent throughout the duration of the fiduciary relationship.

Endnotes

1. N.Y. Estates, Powers and Trusts Law (EPTL) 11-2.3.
2. *Id.* at 11-2.3(a).
3. *Id.* at 11-2.3(b)(3)(B).
4. *Id.* at 11-2.3(b)(1) and (2).
5. *Id.* at 11-2.3(b)(5).
6. *Id.* at 11.2.4.
7. *Id.* at 1.2.3(b)(3)(c).
8. The high grade domestic bond portion of the portfolio was measured by the Barclays Capital Aggregate Bond Index. The U.S. large cap stocks were measured by the Russell 1000 Index.
9. The U.S. large, mid and small cap stock portions of the portfolio were measured by the Russell 1000 Index, the Russell Mid Cap Index and the Russell 2000 Index, respectively. The developed and emerging market international equities were measured by the MSCI EAFE index and the MSCI Emerging Markets Index, respectively.

   The U.S. investment grade, international and global high yield bond portions of the portfolio were measured by the Barclays Capital Aggregate Bond Index, the Citigroup World BIG Bond ex-U.S. Index and the Barclays Capital High Yield Bond Index, respectively.

   The hedge funds were measured by the HFRI Fund of Fund Index, private equity was measured by Venture Economic Private Equity Index, real estate was measured by the 50/50 NCREIF/NAREIT Blend Index, and the tangible assets were measured by the DJ-AIG Commodity Index.
10. *See* Opiela, "Global Forecast: Are We There Yet?," *Journal of Financial Planning*, April 2007.
11. *See* Crestmont Research at http://www.crestmontresearch.com.
12. *See* Mauldin, J., *Buy and Hope Investing*, Thoughts from the Frontline Newsletter, February 27, 2009 at http://www.2000wave.com/article.asp?id=mwo022709.

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

Raymond C. Radigan is a Fiduciary Business Development Officer at U. S. Trust, Bank of America, Private Wealth Management.

The Treatment of Joint Accounts in an Article 81 Guardianship Proceeding

By Anthony J. Enea

The existence of joint bank or brokerage accounts has become ubiquitous in 21st Century America. It is particularly common for married couples and seniors to have joint bank or brokerage accounts with their spouses, child(ren), sibling(s) or other third parties. There are numerous legitimate and logical reasons for the creation of joint accounts. For example, a joint account may have been created because the parties to the joint account contributed the funds or assets comprising the account or acquired said funds during their marriage. The parties may also want the account holders to have full and unfettered access to the account during their lifetimes (especially helpful if there is a subsequent disability) or upon the death of a joint tenant, irrespective of whether each account holder has made an equal contribution to the account. Joint accounts are also commonly recognized and utilized as an effective wealth transfer technique that permits the transfer of assets from one joint tenant to another upon the death of a joint tenant, without the probate of a Last Will & Testament or the creation of a trust. Joint accounts, "totten trusts," or what are known as "transfer on death accounts" for brokerage or security accounts, pass by operation of law to the surviving joint tenant(s), and in most instances only require the presentment of an original death certificate to the bank or financial institution by the surviving joint tenant(s) to allow them to have access to the funds in the account(s). Thus, joint accounts have become legion and commonplace.

Relevant Statutory Provisions for Joint Bank and Brokerage Accounts

Section 675 of the New York State Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is *prima facie* evidence that the depositor intended to create a joint tenancy, and that where such a deposit is made, the burden of proof is on the one challenging the presumption of joint tenancy. Under Section 675, three (3) rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (ii) that there has been a irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in said entire joint account upon the death of the other joint tenant.

Section 675(b) provides that the burden of proof is upon the one challenging the presumption of joint tenancy. In *In re Camarda*,[1] the Appellate Division, Fourth Department, held that the presumption of joint tenancy created by Section 675 may only be refuted by "direct proof or substantial circumstantial proof, clear and convincing and sufficient to support an inference that the joint account had been opened as a matter of convenience or by proving undue influence, fraud or lack of capacity."[2]

The right to receive by operation of law the joint account upon the death of a joint tenant, however, does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by Section 678 of the Banking Law. Section 678 provides that when a deposit of cash, securities or other property has been made or shares shall be issued in or with any banking organization or foreign banking corporation transacting business in New York State, in an account in the name of the depositor and another person, and in the form to be paid or delivered to either "for the convenience" of the depositor, the making of such deposit or issuance of shares shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person has no right of survivorship in the account.

Section 678 specifically gives the depositor the ability to have two signatories on an account who can withdraw funds from the account, while not making a gift of half of the funds in the account or bestowing any survivorship benefits upon the joint account title holder. As such, Section 678 is clearly contrary to the presumptions created for joint accounts under Section 675 of the Banking Law. In order for the provision of Section 678 to apply, however, the words "for the convenience" or "for convenience only" must appear on the title of the account. Otherwise, the presumptions created by Section 675 will be applied.

With respect to securities accounts or brokerage accounts in joint names, the Transfer on Death Security

Registration Act[3] permits joint securities and brokerage account holders to have the rights and choices that joint bank account holders have. The Transfer on Death Security Registration Act, enacted on July 26, 2005, and effective January 1, 2006, amended the EPTL by enacting a new part four to Article 13. Under EPTL 13-4.2, a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, evidence of its creation is the use of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" and "POD."[4] Under EPTL 13-4.4, however, evidence of the establishment of the account is the opening documentation that indicates that the beneficiary is to take ownership at the death of the other owner(s). This somewhat confusing and interconnected landscape of joint accounts is the setting in which challenges arise for joint accounts in guardianships.

Identifying the Joint Accounts in the Petition

Section 81.08(a)(8) of the New York Mental Hygiene Law (MHL) specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person in the petition for the appointment of a guardian. It is incumbent upon the petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his name alone or holds jointly with others or is the beneficiary of, and to disclose such findings in the guardianship petition.

In doing so with respect to any bank or brokerage accounts, the petitioner should specifically identify any jointly held bank or brokerage account(s), and whether or not said joint account(s) are joint accounts entitled to the presumptions of Section 675 of the Banking Law, or are "for the convenience" accounts under Section 678 or "transfer on death" accounts with respect to any brokerage account pursuant to the Transfer on Death Security Registration Act. The Petition should specifically identify any person who has an interest in the account, the extent of his or her interest and whether he or she has a right of survivorship in the account.

In most cases this should not be problematic, provided that the joint account holder is the spouse of the alleged incapacitated person (AIP), and he or she has a joint account with the AIP. If the joint account holder is a child of the AIP or a third party, the petitioner should obtain copies of the account signature cards and any other bank or financial institution record which may describe whether the account is a joint account with rights of survivorship that is entitled to the presumptions of New York Banking Law § 675 or is a "transfer on death" account under EPTL 13-4.1 through 13-4.12, or merely a "for the convenience" account under Banking Law § 678.

Potential Problems Caused by Joint Accounts in a Guardianship

Recently, it has been my experience that some courts in New York, when dealing with the existence of joint accounts in a guardianship proceeding under Article 81 of the New York Mental Hygiene Law (MHL), have not fully analyzed the ramifications of the use of a joint account(s) by the incapacitated person.

For example, some courts, as part of their practices and procedures, have in their proposed form for the Findings of Fact, Conclusions of Law and Judgment included an outright prohibition against the guardian maintaining any joint accounts as part of the guardianship estate. The taking of such a position by the court requires the attorney for the petitioner to be cognizant of such a position, so that he or she may seek the appropriate and necessary relief as to the joint account(s) in the petition. If the court maintains a policy that joint accounts cannot be held by the guardian, it will be necessary for the petitioner to assess how the one-half interest and rights of survivorship of the joint tenant(s) in said joint account(s) will be impacted by the appointment of a guardian of the property, and whether the joint tenant will lose his or her rights to access the funds in the joint account, as well as his or her survivorship interest.

Additionally, it requires an assessment and review of how and why the joint account(s) was created and who is entitled to notice of the relief being sought and his or her right to be heard. Irrespective of what the court's proposed form judgment states, the survivorship rights of a joint tenants(s) cannot and should not be terminated or modified without the joint tenant being given notice of the proposed change and an opportunity to be heard. To accomplish this, it is necessary that the petitioner undertake a thorough investigation of the account(s) in issue and specifically delineate what is being proposed with respect to the joint account(s).

Specifically Delineate Your Proposal as to Any Joint Account(s) in the Guardianship Petition

The guardianship petition should contain a clear and concise description of the relief sought by the petitioner with respect to any joint bank or brokerage account(s). If a transfer of the title of the joint account from the AIP to the other named joint account holder is being sought, it is necessary that such relief be delineated in the petition. The petition should also specifically identify each account by its account number, name of bank or brokerage firm, as well as the existing title on each account. The petition should also specify the title of the account to be created once the account(s) or any part thereof has been marshaled by the guardian, and state whether an apportionment of the account or outright transfer to the other named account holder is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the petition and your proposal with respect to each such interest.

If the potential exists that the AIP may need Medicaid (either nursing home or home care) and a transfer to the spouse or a blind or disabled child (exempt transfer(s) for Medicaid eligibility) of the assets in a joint bank or brokerage account is being sought, it is more likely that the guardianship court will approve a transfer of the AIP's interest in said account(s) to the other named title holder, without any apportionment to the AIP. This is also true if no other interested party to the guardianship proceeding objects to the proposed transfer and if the AIP's testamentary scheme as reflected in any Last Will and Testament or trust is consistent with the proposed transfer.

Obviously, complications can arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether the child, family member or friend contributed any of the funds in the joint account(s), and whether the proposed transfer will create the five-year look-back period and a period of ineligibility for nursing home Medicaid purposes (i.e., does it qualify as an exempt transfer to a spouse, blind or disabled child?). Also, the following issues arise: whether the other interested parties to the guardianship will consent to the transfer; if the proceeds of the account are to be apportioned by and between the account holders, how will title to each apportioned account be held; and what impact will the apportionment have on the survivorship interest of each joint tenant. The protection of the survivorship interest of each joint account holder must be addressed, regardless whether it is in the new guardianship account created or another account.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, it may be necessary that said account be held "in trust for" the incapacitated person. This could be problematic if the incapacitated person is a potential candidate for Medicaid and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event, it would be appropriate to title the account of the non-incapacitated party "in trust for" the SNT of the incapacitated party. Additionally, in order to protect the joint account holder's survivorship interest, it may be necessary for the guardianship account to be titled "X as Guardian for Y in trust for Z" so as to protect his or her survivorship interest.

Conclusion

There are a multitude of differing and complex scenarios that could arise when dealing with joint accounts within the context of a guardianship proceeding. However, irrespective of the scenario, it is necessary that the petition directly address the issue of the joint account(s) and clearly articulate the relief sought and the basis for the position being taken.

Endnotes

1. 63 A.D.2d 837, 406 N.Y.S.2d 193 (4th Dep't 1978).
2. *Id.* at 838; 196 (quoting in part *In re Coddington*, 56 A.D.2d 697, 391 N.Y.S.2d 760 (3d Dep't 1977); *see also Kleinberg v. Heller*, 38 N.Y.2d 836, 841, 345 N.E.2d 592, 593, 382 N.Y.S.2d 49, 50 (1976).
3. N.Y. Estates, Powers and Trusts Law 13-4.1-13-4.12.
4. *Id.* at § 13-4.5.

Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. Mr. Enea is the Immediate Past President of the Westchester County Bar Association, the Editor-in-Chief of the *Elder Law Attorney*, a quarterly publication of the Elder Law Section of the New York State Bar Association; the Secretary-elect of the Elder Law Section of the New York State Bar Association; the President-elect and a founding member of the New York Chapter of the National Academy of Elder Law Attorneys; a member of the Guardianship Court Advisory Committee for the Office of Court Administration; the former Co-Chair of the Guardianship Committee of the Elder Law Section of the New York State Bar Association; the former founding Co-Chair of the Elder Law Committee of the Westchester County Bar Association (1992-2006); a member of the Executive Committee of the Trusts and Estates Section of the New York State Bar Association as a Vice-Chair of the Committee on the Elderly and Disabled; and a member of the National Academy of Elder Law Attorneys.

Credit Shelters and the State Death Tax Deduction (I.R.C. § 2058): History Repeats Itself[1]

By Stephen C.F. Diamond

I. State Death Tax Credit—1997-2004

At one time, estate planners and administrators were required to take the State Death Tax Credit[2] into account in determining the maximum amount which could pass free of federal estate tax as part of a "credit shelter" bequest.[3] The State Death Tax Credit was repealed for persons dying after December 31, 2004, and was replaced by the State Death Tax Deduction.[4]

For example, from January 1, 1987, to December 31, 1997, the unified credit was $192,800, and the exemption equivalent was $600,000. All other factors being equal, with a federal taxable estate of $600,000, (i) there would be no federal estate tax, (ii) the New York estate tax would be $25,500, and (iii) the net credit shelter amount available for the beneficiaries would be $574,500 ($600,000 – $25,500).

By utilizing the State Death Tax Credit, however, the net credit shelter amount (free of federal estate tax) available for beneficiaries could have been increased from $574,500 to $614,380, at a cost of an additional New York estate tax of $2,545. If the credit shelter bequest were increased to $642,425, and all other factors being equal, by utilizing the State Death Tax Credit (i) there still would have been no federal estate tax, (ii) the New York estate tax would have been $28,045, and (iii) the net credit shelter amount would have been $614,380. Thus, the amount passing free of estate tax at the surviving beneficiary's death could have been increased by $39,880 ($614,380 – $574,500), at a cost of $2,545 of additional tax ($28,045 – $25,500), an effective tax rate of 6.4% ($2,545/$39,880).

While an effective tax rate of 6.4% seems like a bargain, draftspersons had to make a conscious determination whether instruments creating credit shelter trusts should utilize the State Death Tax Credit. If the determination were in the affirmative, the credit shelter language would include a phrase such as "including by reason of I.R.C. 2011"; if it were in the negative, a phrase such as "provided that the use of the State Death Tax Credit does not result in an increase in the state death taxes paid."

From 1998–2004 the federal exemption was gradually increased, and the State Death Tax Credit was phased out.

II. State Death Tax Deduction—2005-Present[5]

The State Death Tax Credit was replaced by a Deduction for State Death Tax actually paid,[6] effective for decedents dying after December 31, 2004.

A. 2004–2009

A common shorthand description of the operation of the new deduction is that the federal estate tax deduction on a $2,000,000 taxable estate is $99,600. This can be, but is not necessarily, accurate. It is still necessary for New York estate planners and administrators to determine whether to take the State Death Tax Deduction into account in planning the maximum amount which can pass free of estate tax as part of a credit shelter bequest.

Currently, New York imposes a tax on the transfer of the New York estate of a resident, equal to the maximum amount allowable against the federal estate tax as a credit for state death taxes (under section 2011 of the Internal Revenue Code[7] in effect on July 22, 1998).[8] The amount of the credit allowable, however, "shall not exceed the amount allowable as if the federal unified credit did not exceed the tax due . . . on a federal taxable estate of one million dollars."[9]

In 2005 (the first year in which the state death tax was allowed as a deduction instead of as a credit), the federal unified credit was $555,800 (credit equivalent of $1,500,000); in 2006–2008 the federal unified credit was $780,800 (credit equivalent of $2,000,000); and in 2009 the federal unified credit is $1,455,800 (credit equivalent of $3,500,000).[10]

In the years in which the credit equivalent was $2,000,000 (2006–2008), the New York estate tax (equivalent to the former state death tax credit) was $99,600. Here's where things got interesting.

(i) If the New York tax of $99,600 is paid out of the credit shelter amount, the net credit shelter amount would be $1,900,400 ($2,000,000 – $99,600).

(ii) If the credit shelter amount is not charged with the New York estate tax:

(a) The $2,000,000 remains intact.

(b) New York will assess a tax on the amount in excess of the $2,000,000 credit shelter used to pay the New York estate tax.[11] Initially the amount subject to the New York tax would be $99,600. The initial additional New York tax (at a marginal rate of 7.2%) on $99,600 would be $6,972; that amount itself would be subject to tax at the rate of 7.2%, upward in an interrelated diminishing spiral, until the final tax of $107,391 is reached (an increase of $7,791).

(c) If the credit shelter amount is grossed-up by an amount equal to the New York estate tax ($2,107,391), and if the New York taxes are charged against the credit shelter amount, the amount passing free of estate tax at the surviving beneficiary's death could be increased by $99,600, at a cost of $7,791 of additional New York tax (an effective tax rate of 7.8% ($7,791/$99,600)).

Thus, by paying the New York estate tax from assets outside the federal credit shelter amount, an additional $99,600 can pass free of all estate tax—federal and state—at the death of the surviving trust beneficiary(ies).

B. 2009

The results would be even more dramatic if the credit shelter amount in the year of death is $3,500,000 (as it is in 2009).

(i) The initial New York tax on $3,500,000 would be $229,200.

(ii) If the initial New York tax of $229,200 were paid out of the credit shelter amount, the net credit shelter amount would be $3,270,800 ($3,500,000 – $229,200).

(iii) If the credit shelter amount is grossed-up by the full amount of the New York tax, the total would be $3,754,911 ($3,500,000 + $254,911), and the New York taxes were charged against the credit shelter amount, the amount passing free of estate tax at the surviving beneficiary's death could be increased by $229,200, at a cost of $25,711 ($254,911– $229,200) (an effective tax rate of 11.2% ($25,711/$229,200)).

As above, by paying the New York tax from assets outside the federal credit shelter amount, an additional $229,200 can pass free of estate tax at the death of the surviving trust beneficiary(ies).

III. Suggested Language to Gross-up Credit Shelter Amount

Draftspersons must consider whether taking advantage of the "gross-up" option is appropriate for each client. What follows is suggested language for so doing.

"If my [spouse] survives me, I give to my Trustees an amount equal to the maximum amount by which my federal taxable estate (determined before giving effect to this Article and before giving effect to any disclaimer or renunciation that my spouse may make of any interests in property passing to him/her upon my death whether under this Will or otherwise) may be increased without causing an increase in the federal estate tax payable by reason of my death after taking into account all credits available against such tax, and including the deduction for state death taxes available under section 2058 of the Internal Revenue Code."

IV. Conclusion

History repeats itself. Practitioners should be aware of the possibilities available for managing the State Death Tax Deduction when drafting. And when preparing estate tax returns, practitioners should be mindful of the flexibility available where the credit shelter language of the Will is subject to interpretation.

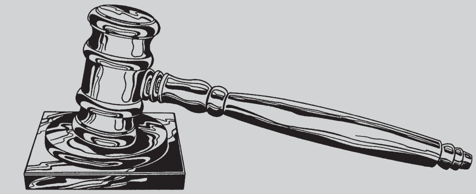
Endnotes

1. The author wishes to recognize and thank Tammy Acard, CPA, of Kirshon & Co., for her review of this article and her valuable comments.
2. 26 U.S.C. § 2011 (all references are to the Internal Revenue Code of 1986, as amended (I.R.C.).
3. This article assumes the reader has a general familiarity with estate tax planning, and does not define each and every term used herein.
4. I.R.C. § 2058.
5. This discussion is limited to the New York estate tax, in particular, and in general is limited to states which follow a "real federal estate tax" approach (and not to states, such as New Jersey, which follow a "hypothetical federal" tax approach).
6. I.R.C. § 2058.
7. N.Y. Tax Law § 952(a).
8. *Id.* at § 951(a).
9. *Id.*
10. The amount of property that passes free of federal estate tax is scheduled to be unlimited in 2010, when the tax is repealed. The tax is then scheduled to return in 2011, to the levels as they existed in 2001. The sunset provision was included to avoid the Byrd rule (which allows the objection of just one senator to defeat the passage of any law which will affect revenue for more than ten years).
11. On Schedule A of N.Y. form ET-706, the taxable estate for New York State (line 26) is determined by allowing deductions on the federal estate tax return *other than* the New York estate tax (Form 706, page 1, part 2, line 2).

Stephen C.F. Diamond is a trusts and estates attorney specializing in taxation, planning, administration and Surrogate's Court practice at Teahan & Constantino in Millbrook, New York. He has lectured in NYSBA Practical Skills Courses and the Dutchess County Guardian *Ad Litem* Training Program (primarily on the topic of accountings), and has also published in the field.

Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



Ira Mark Bloom

ADOPTION

Same-Sex Spouse Is Stepparent for Purposes of Adoption of Other Spouse's Child

Petitioner requested certification as a qualified adoptive parent under DRL § 115-d. The court was presented with a favorable pre-adoption home study which stated that petitioner is seeking to adopt her same-sex spouse's baby due to be born in about three months. Petitioner and the child's mother were married in Canada in 2007. Family Court held that, under existing precedents, the marriage is recognized in New York. Petitioner is therefore a stepparent who is not required to seek pre-certification under DRL § 115-d(8). The court also stated that petitioner could become the child's parent by a simple consent without the need for an adoption because, under DRL § 73, a child born by artificial insemination to a married woman is the child of her husband if the spouses consent. Nevertheless, because the petition was sufficient and the home study favorable, the petition for pre-certification was granted. *In re Donna S.*, 23 Misc. 3d 338, 871 N.Y.S.2d 883 (Fam. Ct., Monroe Co. 2009).

FIDUCIARIES

Executor Entitled to Commissions in Spite of Testator's Direction Where Beneficiaries Consent

Testator's Will directed that no executor receive compensation. Nevertheless, the executor petitioned for advance payment of commissions. The beneficiaries of the Will and the co-trustees of the trusts created by the Will all executed consents to the payment on account. The Surrogate granted the petition. Although this is apparently a case of first impression, the consents of those who will bear the cost of the commissions are a sufficient basis on which to authorize payment. *In re Ostrer*, 23 Misc. 3d 246, 869 N.Y.S.2d 894 (Sur. Ct., Nassau Co. 2008).

Non-New York Attorney-Executor Subject to SCPA 2307-a

Testator was a domiciliary of New York and her will was offered for probate in New York County. The nominated executor was a member of the New Jersey bar, not

William P. LaPiana

admitted in New York, who was also the draftsperson of the will. The Surrogate held that the attorney-executor was limited to one-half the statutory commission for failure to comply with the disclosure requirements of SCPA 2307-a. The statute says it applies whenever "an attorney prepares a will to be proved in the courts of this state" and therefore applies whenever an attorney prepares a Will for a New York domiciliary. *In re Deener,* 22 Misc. 3d 605, 867 N.Y.S.2d 912 (Sur. Ct., N.Y. Co. 2008).

Statute of Limitations on Trustee Accounting Begins to Run When Trusteeship Is Turned Over to Successor

The Court of Appeals has held that the statute of limitations on compelling a former trustee to account begins when the trustee turns over the trust to a successor, affirming Justice Cardozo's opinion in *Spallholz v. Sheldon*, 216 N.Y. 205, 110 N.E.431 (1915). The Court rejected the argument that the statute begins to run only when the former trustee is asked to account and refuses to do so, distinguishing the holding in *In re Barabash*, 31 N.Y.2d 76, 334 N.Y.S.2d 890, 286 N.E.2d 268 (1972), which involved an administrator who had not resigned before being sued for an accounting 17 years after the distribution of the estate. Because no successor fiduciary was involved in *In re Barabash*, the statute of limitations could begin to run only when the fiduciary openly repudiated the obligation to account. *Tydings v. Greenfield Stein & Senior, LLP*, 11 N.Y.3d 195, 868 N.Y.S.2d 563, 897 N.E.2d 1044 (2008).

Signature on Accountings Precludes Finding That Trustee Repudiated Its Obligations

Surrogate's Court of Delaware County denied trustee's motion to dismiss objections to its accounting based on running of the statute of limitations. The Appellate Division affirmed. Although the six-year statute of limitations begins to run with the open repudiation of the fiduciary obligation, the court held that the detailed annual accountings which the trustee submitted to the beneficiary indicate that the trustee did not repudiate its obligations because each accounting contained a sworn affirmation in which the trustee stated it was indeed acting as trustee. *In re Baird*, 58 A.D.3d 958, 871 N.Y.S.2d 755 (3d Dep't 2009).

MARRIAGE

Recognition of Out-of-State Same-Sex Marriage by Department of Civil Service Is Proper

The State Department of Civil Service announced that it will recognize parties to a same-sex marriage as spouses if the marriage was valid where it was solemnized. Taxpayers sued for a declaration that the Department's action was illegal. The Appellate Division affirmed the Supreme Court's grant of summary judgment for the Department. While the decision was unanimous, three justices joined in an opinion based on the "marriage recognition rule"—a marriage solemnized outside of New York will be recognized as valid in New York so long as doing so would not be abhorrent to the public policy of the state—and a finding that same-sex marriages do not fall into the same category as incestuous and polygamous marriages, which will not be recognized in New York. Two judges concurred in the result on the narrow ground that the Department's decision does not go beyond its broad authority to define family relationships for purposes of health insurance coverage. *Lewis v. New York State Dept. of Civil Service*, 60 A.D.3d 216, 872 N.Y.S.2d 578 (3d Dep't 2009), *lv. to appeal granted* by Court of Appeals.

POWER OF ATTORNEY

Propriety of Bank's Refusal to Turn Over Property to Trust Altered by Attorney-in-Fact Must Be Decided on All Facts

Decedent had two bank trust accounts, the beneficiary of which was her revocable trust. Her attorney-in-fact, who was also trustee, amended the trust to remove the decedent's heirs as primary beneficiaries and replaced them with herself. Surrogate's Court of Richmond County granted the trustee's petition for turnover by the bank, but the Appellate Division reversed and remanded. Because the bank has a duty to exercise good faith and ordinary care, a determination of the propriety of the bank's refusal to turn over the property requires a determination of whether the attorney-in-fact's amendment of the trust was improper self-dealing. *In re Carlson*, 59 A.D.3d 538, 873 N.Y.S.2d 669 (2d Dep't 2009).

TAX APPORTIONMENT

Exoneration of Specific Dispositions Prevents Apportionment Even When Residue Insufficient; Estate Taxes Properly Apportioned Against Donees for Gift Taxes Included in Gross Tax Estate

The tax apportionment clause of testator's Will directed that the taxes with respect to certain specific and general dispositions were to be paid from the residuary estate "without apportionment or reimbursement from any beneficiary." Other specific dispositions of far greater value were not exempted from apportionment under EPTL 2-1.8. In addition, the gross tax estate under EPTL 2-1.8 included more than $1.1 million of gift tax paid within three years of death based on I.R.C. § 2035(b). The residuary estate is insufficient to pay the estate taxes and the executors brought a proceeding to apportion estate taxes against all of the specific and general dispositions.

The Surrogate dismissed the petition. As a matter of construction, the language of the tax apportionment clause prevents apportionment against the exonerated dispositions. In addition, the Surrogate held that recipients of the gifts made within three years of death are responsible for paying "their ratable share of the estate tax" attributable to the gift taxes included under I.R.C. § 2035(b) because the taxes are part of the gross tax estate and therefore subject to apportionment under EPTL 2-1.8 *In re Rhodes*, 22 Misc. 3d 766, 868 N.Y.S.2d 513 (Sur. Ct., Westchester Co. 2008).

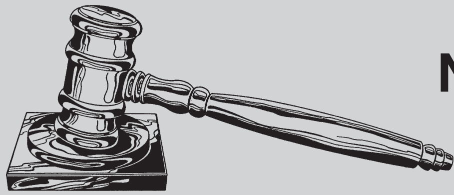
TRUSTS

Challenge in Guardianship Proceeding Violates *In Terrorem* Clause

Petitioner commenced a proceeding to compel an accounting by petitioner's sister as trustee of a trust created by their father. The Appellate Division affirmed the Supreme Court's dismissal of the proceeding. In the course of the Article 81 proceeding brought by the sister to have her declared guardian of her father, the petitioner asked the court to declare the trust null and void. The Appellate Division affirmed the lower court's determination that petitioner's action violated the provision of the trust prohibiting any beneficiary from "contesting" the trust "directly or indirectly." Having forfeited his interest in the trust the petitioner had no standing. *In re Tumminello*, 59 A.D.3d 727, 873 N.Y.S.2d 731 (2d Dep't 2009).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, *DRAFTING NEW YORK WILLS* (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Discovery of Assets

In *In re Neary,* the fiduciary of the estate moved for summary judgment in a turnover proceeding that had been instituted against the former estate administrators. The proceeding for a turnover demanded that respondents return to the estate, with interest, the advance commissions and distributions which the respondents had taken without prior court authorization. In granting the motion, the court found, in pertinent part, that there was no question of fact regarding the advance payments of commissions taken, and that while the language of SCPA 2307 is mandatory, commissions may, nevertheless, be denied an executor when the circumstances demonstrate that there has been a dereliction of duty, removal from office, and a failure to account in compliance with a court order. Moreover, the court rejected the argument by one of the respondents that he should not be held jointly and severally liable with his co-respondent, holding that once the assets of the estate come under the joint possession or control of the fiduciaries, it is the respective duty of each to see to it that the assets are utilized properly. When a fiduciary has the means to prevent waste of estate assets by his co-fiduciary, the fiduciary will be held personally liable for his conduct.

In re Neary, N.Y.L.J., Jan. 22, 2009, p. 41, col. 3 (Sur. Ct., Kings Co.) (Surr. Johnson).

Due Execution

In an uncontested probate proceeding, the court was presented with the issue of whether the irregular order of signatures on the instrument invalidated the instrument. After the dispositive provisions of the Will, and the appointment of the executrix, there appeared preprinted two lines intended for the date and the signature of the testatrix. Those lines, however, were blank. Below these two lines was a pre-printed attestation clause, to which the date and signature of attesting witnesses was appended. Following the attestation clause there appeared a preprinted affidavit of attesting witnesses containing the names, but not the signatures, of the attesting witnesses. Rather, on one of the lines for a witness, there appeared the signature of the testatrix.

In finding that the Will had been duly executed, the court opined that a testamentary instrument can be admitted to probate even if the procedure for execution and attestation do not take place in the precise order established by statute. In this regard, the fact that the signatures of the witnesses appear before the testatrix's signature does not invalidate a Will. Further, the court held that although the testatrix did not affix her signature immediately after the dispositive provisions of the instrument, but instead after the attestation clause and the preprinted affidavit of attesting witnesses, the signature of the testatrix nevertheless appeared "at the end" of the instrument as required by the provisions of EPTL 3-2.1. Indeed, the court noted that all dispositive provisions appeared before the testatrix's signature.

Accordingly, probate of the instrument was granted.

In re Mobley, N.Y.L.J., Mar. 20, 2009, p. 35, col. 3 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Gifts

In *Bader v. Digney,* appeal was taken from an Order of the Supreme Court, Onondaga County, which, *inter alia,* denied the defendant's motion for summary judgment dismissing the complaint.

The action was commenced by the plaintiff, the public administrator of the estate, to set aside a deed of real property given by the decedent to her son, the defendant. The decedent and the defendant continued to live at the subject premises until the decedent's death, during which time the decedent paid the taxes on the property. The decedent did not record the deed reflecting the transfer allegedly because she was concerned that her daughters would create trouble if they learned that the property had been transferred to the defendant. Moreover, the record revealed that the decedent executed the deed in the presence of the defendant and her attorney, and that upon doing so, it was handed to the defendant at the decedent's direction, and accepted by the defendant.

Based upon the foregoing, the Appellate Division concluded that defendant had established that an *inter vivos* gift had been made of the property in question, and that summary judgment should have been granted in his favor. Significantly, the court opined that the delivery of the deed to the defendant was not changed by the decedent's subsequent access to the deed or even her repossession of it. Nor was the fact that the decedent continued to pay taxes on the property inconsistent with the making of a present gift, in view of the decedent's continued residence at the property.

Bader v. Digney, 55 A.D.3d 1290, 864 NY.S.2d 606 (4th Dep't 2008).

Notice to Admit

In *In re Clark,* the court was confronted with, *inter alia,* a motion for a protective order and an order striking certain paragraphs in the petitioner's notice to admit. The movant refused to respond to eleven of the twenty-four numbered items on the grounds that they either sought the admission of legal conclusions and ultimate issues of fact or facts that were not reasonably within her personal knowledge. In concluding that certain of the items were improper, the court held that a notice to admit should be used to elicit admissions with respect to matters of fact to which there can be no substantial dispute, and which are easily provable, in order to eliminate those issues at trial. On the other hand, it may not be used to seek admissions with respect to material and ultimate issues, and legal conclusions on material issues. Further, the court held that a notice to admit could not be used as a substitute for existing discovery devices, or to seek information that was within the personal knowledge of the party requesting it.

In re Clark, N.Y.L.J., Feb. 2, 2009, p. 46, col. 1 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

Objections to Probate

In *In re Rabbitt,* the court granted the proponent's motion dismissing the objections to probate. The propounded instrument bequeathed the bulk of the decedent's estate to the proponent, who was decedent's friend and neighbor, and specifically disinherited the objectant, who was decedent's first cousin, twice removed. On the issue of testamentary capacity, the proponent offered the testimony of the attorney-draftsman who stated that the decedent was lucid and competent at the time the Will was executed. In addition, she offered the testimony of the attesting witnesses, one of whom was the decedent's primary care physician. This witness testified that while the decedent had experienced periods of confusion and disorientation, on the date the propounded instrument was signed she appeared to be "okay" and knew what she was doing. In addition, the second attesting witness testified that the decedent was lucid the day she signed her Will, and that she thanked her for serving as a witness. The court found that the evidence offered by the objectant in opposition to this proof was remote, self-serving, and constituted nothing more than vague and conclusory allegations.

With respect to the issue of due execution, the court held that none of the deficiencies relied upon by the objectant constituted requirements under EPTL 3-2.1. Further, contrary to the claims of the objectant, the court found that that the decedent acknowledged that the instrument that she had signed was her Will, and that despite the fact that one of the witnesses could not recall the details of the execution ceremony, this in itself was not a basis for finding that it had not been duly executed.

As to the issue of undue influence, the court noted that the objectant had not seen the decedent for over a year prior to the execution of the propounded Will, and admitted to having received heirlooms and stock from her prior to her death. On the other hand, the court found persuasive the close relationship between the proponent and the decedent which extended over many years, and the fact that the decedent was never prevented from receiving communications from the objectant or anyone else. Indeed, the court concluded that it was not unusual for the decedent to have bequeathed her entire estate to her friend who had provided care and companionship to her during the last years of her life, and to have disenfranchised the objectant whom she resented and disliked.

Finally, the court found that the objectant had failed to present any evidence of fraud.

In re Rabbitt, 21 Misc. 3d 1118(A) (2008), 873 N.Y.S.2d 236 (Sur. Ct., Kings Co.) (Surr. Lopez Torres).

Probate of Will Denied

In *In re Elkan,* the court denied probate to the propounded instrument, after trial, finding that the decedent lacked testamentary capacity on the date of the instrument's execution, and that it had been procured by the undue influence of an attorney who was a beneficiary of 50% of the estate. The objectant was a beneficiary under a prior Will of the decedent, and the daughter of a beneficiary under the propounded instrument.

The record revealed that the decedent had developed a long-lasting friendship with the attorney-beneficiary as well as the named executor under the propounded Will through business. Under his prior Wills, the decedent had named the attorney-beneficiary's mother as a beneficiary. In addition, the decedent had requested assistance in his financial affairs from the attorney-beneficiary's mother, and had added her name to some of his accounts.

The decedent was a chronic alcoholic, who had fallen and was placed in the hospital and then a nursing home prior to his death. The nursing home records revealed that the decedent received physical therapy while there as well as medication for depression and psychosis. The doctor at the nursing home opined, at his deposition, that the decedent suffered from some dementia, and that his ability to make financial decisions and render an informed consent varied from day to day. The social worker at the nursing home testified that the decedent was belligerent, and abusive, and that his short-term memory was better than his long-term memory.

While in the nursing home, the decedent learned of the death of the attorney-beneficiary's mother. According to the testimony, the decedent was allegedly delighted when the attorney-beneficiary volunteered to be substituted for her mother in taking care of the decedent's financial affairs. The decedent allegedly also wanted to substitute the attorney-beneficiary in place of her mother as his attorney-in-fact, as well as a beneficiary under his Will, which he asked her to draft. While counsel refused to draft this Will, he nevertheless conveyed the instructions for its contents, as well as the new power of attorney to the draftsman. The attorney-draftsman testified that without discussion with the decedent, he prepared the documents the attorney-beneficiary instructed him to prepare. On the date the Will was signed at the nursing home, the draftsman and nominated executor were present. According to the draftsman, the testator was surprised to learn the value of his assets, but neither he nor the nominated executor discussed with the decedent the manner in which his assets would pass under the instrument. Both the draftsman and the named executor testified that the decedent appeared to understand the contents of his Will, and was competent when he signed it.

The court, however, noted that when the decedent executed his prior Will under the supervision of the same draftsman, the draftsman had concerns about the decedent's capacity. Further, the court took issue with the fact that neither the attorney-draftsman nor the nominated executor was aware that the decedent suffered from dementia and psychosis for which he was receiving medication. The explanation that the decedent was "lazy" and therefore allowed others to handle his financial affairs was, the court found, at odds with the evidence. In addition, the court found it significant that a guardianship proceeding was commenced on the decedent's behalf the same month the Will was signed, and at the conclusion of the guardianship hearing, the court held that there was clear and convincing evidence that the decedent failed to understand the nature of his impairment and his inability to handle his personal and financial affairs.

Based upon the foregoing, the court held that neither the nominated executor nor the attorney-draftsman took any action that would show they had any interest in insuring that the decedent had the requisite capacity to execute the subject Will. Accordingly, in view of their testimony, the testimony of disinterested witnesses and the documentary evidence, the court concluded that it was highly unlikely that the testator possessed the requisite capacity to execute the propounded instrument, and the objections to probate on this ground were sustained.

In addition, the court sustained the objections based upon undue influence. In reaching this result, the court found that at the time the Will was executed, the attorney-beneficiary had a confidential relationship with the decedent, as evidenced by the fact that she previously had performed legal services for him, and began undertaking responsibilities as her attorney-in-fact. In addition, the decedent lacked the ability to consult with independent counsel of his own choosing, but instead signed a Will that was prepared at "record breaking speed" based upon instructions of the attorney-beneficiary. Consequently, based upon the inference that arose as a result of the confidential relationship between the parties, and the foregoing record, the court found that the Will had been procured by the undue influence of the attorney-beneficiary.

In re Elkan, N.Y.L.J., Feb. 27, 2009, p. 32, col. 1 (Sur. Ct., Bronx Co.) (Surr. Holzman).

Relief from Default

In an executor's accounting proceeding, the decedent's sons sought leave to file objections. The record revealed that although the sons had retained counsel, who filed a notice of appearance with the court, they failed to appear on the return date of citation, and the matter was marked for decree. Two months thereafter, a decree was submitted to the court with notice of settlement on the sons' counsel. An adjournment of the settlement date was agreed to on consent. Prior thereto, the sons' new counsel requested an adjournment which petitioner's counsel refused. Although an attempt was made by the sons' counsel to file objections to the account, they were returned by the court, and counsel was advised to move for relief. Counsel then filed an order to show cause requesting a stay of the decree, and leave to file objections.

Upon consideration of the circumstances, the application was granted. The court found that good cause existed for the filing of the objections, that the delay was brief, and that petitioner had not demonstrated any prejudice from the sons' failure to plead timely.

In re Thomajan, N.Y.L.J., Mar. 16, 2009, p. 29, col. 2 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Summary Judgment

In *In re Steger,* the objectant, in a contested accounting, moved for leave to reargue the court's decision which denied his motion for summary judgment. The objectant had asked the court to set aside transfers made by the decedent during his lifetime, to direct the executor to reimburse the estate certain monies used to pay estate taxes on assets that passed outside the estate, to deny commissions, and to prohibit the executor from paying his attorney's fees from estate assets. The court granted reargument of the motion regarding the pre-death transfers, and, upon reargument, granted the motion for summary relief on this issue.

In opposition to the motion, the respondent-executor claimed that the transfers had been made at the decedent's direction. In support thereof, respondent submitted his own affidavit, as well as affidavits from others who attested to the decedent's capacity. The court held that even if the respondent established decedent's competency to make the gifts, it did not establish by clear and convincing evidence that the decedent intended the transfers to be gifts. In view of the fact that the only evidence as to the decedent's intent and in opposition to the motion was the affidavit of the respondent, the court held that it was insufficient to preclude summary judgment. In reaching this result, the court opined that it was highly unlikely that respondent's statement of the decedent's donative intent would be admissible at trial, given the limitations of the Dead Man's Statute and the movant's expressed intent to invoke the statute at trial.

In re Steger, N.Y.L.J., Nov. 17, 2008, p. 20, col. 1 (Sur. Ct., Nassau Co.) (Surr. Riordan).

Summary Judgment

In a contested accounting proceeding, the fiduciaries of the estate of the decedent's post-deceased spouse (who had been the estate fiduciary and had accounted prior to her death) moved for summary judgment dismissing the objections with respect to certain *inter vivos* transfers made to her. The objectant maintained that the transfers in issue were the result of undue influence. The movants alleged that the transfers were consistent with the decedent's pattern of gift-giving to his wife. The record revealed that the objectant was aware of the subject transfers within months after they were made but raised no objection to them at the time. Moreover, during the course of his deposition, objectant admitted that at the time of the transfers the decedent's mental condition was "pretty good," and that he had not been privy to any conversations between the decedent and his spouse regarding the transactions. Further, while the transfers took place soon after the decedent executed his Will, the objectant did not file objections to probate.

In opposition to the motion, the objectant referred to his own conversations with the decedent (inadmissible under CPLR 4519), in which the decedent had purportedly stated that he had not made the transfers willingly, but rather had been pestered and nagged by the decedent. Objectant further relied on the fact that the decedent had not filed gift tax returns with respect to the transfers, although the court noted that he was not obligated to file such returns in connection with transfers to his spouse.

Additionally, the objectant relied on reports he allegedly received from the decedent's stockbroker and trusted secretary that the decedent was being harassed and berated by his wife to transfers the assets to her account. Further, the stockbroker allegedly stated that the transfers were unusual and inconsistent with the decedent's usual handling of his account. While not commenting upon the veracity of these statements, the court opined that the objectant had failed to provide affidavits from either witness, or an excuse for his failure to do so. Inasmuch as the statements were inadmissible hearsay, the court held that they could not be considered in opposition to the motion for summary judgment. Further, the court held that even if the statements could be considered, they lacked the specificity and detail necessary to raise a triable issue of fact.

Finally, the objectant alleged that the decedent's health was failing in the latter years of his life, that he had been caused to stop work, and had withdrawn from social and business activities, and was forced to rely upon and become dependent upon his wife. The court held that even if this were true, these allegations did not amount to or create a question of fact regarding objectant's claim of undue influence.

Accordingly, summary judgment regarding the propriety of the *inter vivos* transfers was granted and the objections as to this issue were dismissed. On the other hand, the court denied the motion with respect to the omission of a certain coin collection from the accounting, finding that there was a question of fact as to whether the coins were estate property.

In re Faggen, N.Y.L.J., Mar. 2, 2009, p. 30, col. 4 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Temporary Administrator

Before the court in *In re Walker* was an application by the decedent's sister for her appointment as administrator of her brother's estate. The decedent was survived by his mother and father. In connection with her application, the petitioner submitted a waiver and consent from her mother, and requested that her father be disqualified as a distributee. Objections to the application were filed by the decedent's father, who requested that he be appointed as administrator of the estate together with his son, the decedent's brother. In addition, the objectant maintained that the decedent's mother was operating under a disability and lacked the physical capacity to execute documents. A guardian *ad litem* was appointed on the mother's behalf.

In response, the petitioner filed an application requesting that she be appointed temporary administrator of the estate on the grounds that there were three rental properties that required administration, and alleging that neither her brother nor father was capable of doing so. Objections to the application were filed by the decedent's father and brother, who maintained that the petitioner was ineligible to serve on the grounds of dishonesty, improvidence and want of understanding. Thereafter, the guardian *ad litem* filed his report indicating that the decedent's mother was incapacitated and did not understand the nature of the proceedings.

The court held that appointment of a temporary administrator lies in the sound discretion of the court, and no class of persons is entitled to priority. Accordingly, given the serious and substantial allegations raised by the parties regarding the appointment of an appropriate administrator, and the need for the appointment of a fiduciary to administer the estate, the court determined it in the best interests of the estate to appoint the Public Administrator to serve as temporary administrator during the pendency of the proceeding.

In re Walker, N.Y.L.J., Mar. 6, 2009, p. 28, col. 3 (Sur. Ct., Kings Co.) (Surr. Johnson).

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

Trusts and Estates Law Section Spring Meeting
March 18-20, 2009 • Amelia Island • Plantation, FL

Chair Ira Bloom; Former Chair Phil Burke; and Warren Heilbronner, Vice-Chair, Elderly and Disabled

Former Chair Wally Leinheardt; Chair Ira Bloom; and Robert Wm. Johnson III, Vice-Chair, Surrogate's Court

Larry Keiser singing karaoke

Former Chair Wally Leinheardt with Chair Ira Bloom and his wife Margaret Roberts

Hon. John Czygier, Suffolk County Surrogate; Chair Ira Bloom; and NYSBA President-elect Michael Getnick

Peter Kelly, Vice-Chair Surrogate's Court; Lynn Riordan; Hon. John Riordan, Nassau Co. Sur.; Ira Bloom; and Larry Murphy

Warren Heilbronner and Jeff Abrandt, winners of the tennis tournament, flanking Chair Ira Bloom

Susan Kimmel; Carol Miller; Thomas Loizeaux, of Fiduciary Trust Company; and Steve Kimmel, of Thomson Reuters

Mickey Ordover; Loretta and Paul Golinski; Joan Stanke, Doyle N.Y.; and Joe Samulski, Vice-Chair, Estate & Trust Admin.

Section Committees and Chairs

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

Charitable Organizations
Ronni G. Davidowitz
Katten Muchin Rosenman LLP
575 Madison Ave., 21st Floor
New York, NY 10022
ronni.davidowitz@kattenlaw.com

Continuing Legal Education
Jennifer Weidner
Harter Secrest & Emery LLP
1600 Bausch and Lomb Place
Rochester, NY 14604
jweidner@hselaw.com

Elderly and Disabled
Lisa K. Friedman
Law Office of Lisa K. Friedman
232 Madison Avenue, Suite 909
New York, NY 10016
lf@lisafriedmanlaw.com

Estate and Trust Administration
Linda J. Wank
Frankfurt Kurnit Klein & Selz PC
488 Madison Avenue, 9th Floor
New York, NY 10022
lwank@fkks.com

Estate Litigation
Eric W. Penzer
Farrell Fritz PC
1320 RexCorp Plaza
Uniondale, NY 11556-1320
epenzer@farrellfritz.com

Estate Planning
Darcy M. Katris
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
dkatris@sidley.com

International Estate Planning
Richard E. Schneyer
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
schneyer@thshlaw.com

Legislation and Governmental Relations
Michael K. Feigenbaum
Ruskin Moscou & Faltischek PC
1425 RexCorp Plaza
East Tower, 15th Floor
Uniondale, NY 11556
mfeigenbaum@rmfpc.com

John R. Morken
Farrell Fritz PC
1320 RexCorp Plaza
Uniondale, NY 11556-1320
jmorken@farrellfritz.com

Life Insurance and Employee Benefits
Brian K. Haynes
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202-1355
bhaynes@bsk.com

Membership and Relations With Local Bar Associations
Robert W. Constantine
44 New Amsterdam Avenue
Buffalo, NY 14216
rwconstantine@gmail.com

Newsletter and Publications
Ian William MacLean
The MacLean Law Firm, P.C.
100 Park Avenue, 20th Floor
New York, NY 10017
ianwmaclean@maclean-law.com

Practice and Ethics
Ronald J. Weiss
Skadden Arps Slate Meagher & Flom LLP
Four Times Square, 28th Floor
New York, NY 10036
roweiss@skadden.com

Special Committee on Electronic Filings
Joseph T. La Ferlita
Farrell Fritz P.C.
1320 RexCorp Plaza
Uniondale, NY 11556
jlaferlita@farrellfritz.com

Surrogates Court
John G. Farinacci
Jaspan Schlesinger LLP
300 Garden City Plaza
Garden City, NY 11530-3324
jfarinacci@jshllp.com

Taxation
Deborah S. Kearns
Albany Law School
Law Clinic & Justice Center
80 New Scotland Avenue
Albany, NY 12208
dkear@albanylaw.edu

Technology
Gary R. Mund
Kings County Surrogate's Court
2 Johnson St., Room 212
Brooklyn, NY 11201-1802
garymund@aol.com

Ad Hoc Committee on Multi-State Practice
Andrea Levine Sanft
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
asanft@paulweiss.com

Executive Committee District Representatives

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

Second District
James H. Cahill, Jr.
Cahill & Cahill PC
161 Atlantic Avenue, Suite 201
Brooklyn, NY 11201
james.cahilljr@verizon.net

Third District
Thomas J. Collura
Tuczinski Cavalier Gilchrist
& Collura PC
54 State Street, Suite 803
Albany, NY 12207
tcollura@tcgclegal.com

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

Fifth District
Martin A. Schwab
Bond, Schoeneck & King, PLLC
One Lincoln Center, Suite 1800
Syracuse, NY 13202
mschwab@bsk.com

Sixth District
John G. Grall
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902
jgrall@binghamtonlaw.com

Seventh District
Timothy Pellittiere
Woods Oviatt Gilman LLP
700 Crossroads Boulevard
2 State Street
Rochester, NY 14614
tpellittiere@woodsoviatt.com

Eighth District
Lisa J. Allen
Harris Beach PLLC
726 Exchange Street, Suite 1000
Buffalo, NY 14210
lallen@harrisbeach.com

Ninth District
Charles T. Scott
Chief Clerk—Surrogate's Court
111 Martin Luther King Blvd.
19th Floor
White Plains, NY 10601
cscott@courts.state.ny.us

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

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

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

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

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

Publication of Articles

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

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge.

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

ISSN 1530-3896 (print) ISSN 1933-852X (online)

TRUSTS AND ESTATES LAW SECTION NEWSLETTER