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Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair


Gary B. Freidman

Greetings. As I write this article I am thinking about what I will need to pack for our Section's Spring Meeting in Chicago. The program, co-chaired by Colleen Carew and Anne Bederka, should be outstanding. It is titled "Maintaining Rational Relations: Advising the Family, the Fiduciary, and the Drafter." Our co-chairs have secured a distinguished panel: Surrogates Czygier, Glen, Howe, Pagones, Riordan and Scarpino; attorneys Charles Gibbs, Arlene Harris, John Morken, Donald Novick, Charles Scott, Georgiana Slade; and Professor Jeffrey Pennell. For this program we are offering two additional CLE hours by adding two "Breakfasts with the Surrogates." The topics will be "Mediation in the Surrogate's Court" and "Ethics in Surrogate's Court Practice—A Best Practices Approach." I hope you made it to Chicago for this excellent program.

As usual, members of our section have been quite busy in continuing our quest to improve the law. These efforts have borne much fruit in the first few months of 2010. As I previously reported, our section and the "Big Bar" were diligently working to remedy the issues that have arisen from the sweeping overhaul

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of the power of attorney provisions of the General Obligations Law. A technical corrections bill is pending in the Legislature—it initially passed the Assembly in April and was delivered to the Senate for consideration, but was then recalled and further amended by the Assembly. As of this writing, it is awaiting another vote in the Assembly. Space does not permit a detailed discussion of the corrections being made; suffice it to state that the bill adopts many, but not all, of the recommendations made by our association.

Perhaps through the efforts of our Tax Committee and those of other groups, the section of the Governor's Budget Bill A9710 that was introduced to eliminate the tax exemption for resident trusts with nonresident trustees (former Part G) has been stricken.

We created an "ad-hoc" committee, chaired by Laurence Keiser, which is charged with the responsibility of, among other things, studying whether legislation is needed to amend the EPTL so that language in testamentary documents would be construed with reference to the pre-January 1, 2010 Internal Revenue Code, or to permit fiduciaries or affected beneficiaries to bring construction proceedings to determine the decedent's intent. The committee has prepared a Legislative Report on bill A09857, which had been introduced by Assemblywoman Carrozza on this very issue. Following submission of our Report, on April 27, 2010 an amended version of the bill was introduced, which incorporated virtually all of the recommendations made by our committee. The amended bill (A09857c) has yet to be voted on.

There is a lot of other trusts and estates-related news from Albany, much of it resulting from the work of our colleagues. On March 30, 2010, the Governor signed our long-standing affirmative legislative proposal amending New York's renunciation statute (EPTL 2-1.11)—Laws 2010, Ch. 27. As you may recall, our original proposal had been vetoed in 2008 over a concern that its provisions would allow trustees to divert the receipt of funds from individuals receiving benefits from programs such as Medicaid. Working with the Governor's counsel's office, we revised the proposal and it is now the law. Among other things, the legislation broadens the definition of eligible dispositions that can be renounced and relocates to a more prominent place in the statute the warning that compliance with the provisions of the New York law does not necessarily mean compliance with the federal disclaimer provisions of IRC 2518. The law takes effect on Jan. 1, 2011.

I'm happy to report that on March 30, 2010, the Governor vetoed a bill (A2873/S2971) amending EPTL 5-1.1-A that would have required that a spouse be given "full and reasonable disclosure of the income, assets and financial obligations" of the other spouse in order for there to be an effective waiver of the right of election. Our section and the New York City Bar opposed this bill because it would have likely caused unnecessary litigation by replacing well-established common law standards with subjective statutory language. (2010, Veto Message No. 6).

Of great interest to many of our section members, on April 28, 2010 the Governor signed a bill relating to the proof of paternity through the use of genetic testing and the inheritance rights of non-marital children (A7899). (Laws 2010, Ch. 64). In sum, EPTL 4-1.2 (a)(2)(D) was repealed and EPTL 4-1.2(a)(2)(C) was amended to provide that the "clear and convincing evidence" of paternity may be satisfied by the results of a genetic marker test administered at any time to prove paternity. Under prior law, the test had to be administered prior to death.

Lastly on the legislative front, I expect that in a few weeks members of our Legislation Committee and others will be traveling to Albany for our later than usual "Lobby Day" meetings with representatives of the State Department of Taxation and Finance. We will meet with the chairs of the Senate and Assembly Judiciary Committees to discuss our affirmative legislative proposals and New York estate tax issues. On the current agenda are proposals concerning modernizing the law relating to commissions for charitable trusts; expanding the kinds of property that are subject to the family exemption under EPTL 5-3.1; authorizing directed trusteeships; mandating payment of interest on legacies; and limiting the time in which to file a Notice of Right of Election.

Once again, if you are interested in becoming more involved with the section, I urge you to contact me at gfreidman@gss-law.com. Our committees do interesting and important work and there's plenty for everyone to do.

If you have not done so, I suggest you join our section's group on LinkedIn.com. LinkedIn is a social networking site for business professionals. It can be another way for you to learn of section events, for us to stay in touch with one another and to discuss issues relating to our practices. The service is free. One important feature is a "Jobs Board" that will allow attorneys and firms who are looking to hire an attorney to post job listings which will only be seen by members of our section. Attorneys who are looking for employment (either full-time or part-time) in trusts and estates can also post their resumes on the Jobs Board. This service is also FREE to section members. The URL to join LinkedIn is: http://www.linkedin.com. Then search "Groups" for the NYSBA Trusts and Estates Law Section—and sign up!

Gary B. Freidman

Editor's Message

Welcome to your alternative Summer reading list. This issue of the *Trusts and Estates Law Section Newsletter* has ten excellent articles, two Best of the Listserve strings and the customary, superb case reporting columns of Ilene Cooper and Professors LaPiana and Bloom. The editorial board trusts that you will find time to read the *Newsletter* cover to cover, or at the least cherry pick your way through the fine contributions in this issue.

The editorial board is soliciting for the Fall *Newsletter* excellent articles and columns, alerts on pending legislation, outlines and transcripts from continuing legal education or other presentations, letters to the editor and opinion pieces, agenda and submissions from the various committees of the Section, CLE program updates and excerpts from articles related to trusts and estates issues in other publications. As in the past, I encourage you to submit an article discussing a case, matter or issue in which you are or have been recently involved.

The editorial board invites you to voice your opinion on pending legislation or existing laws, regulations and practices, and to otherwise get involved in the Section. Perhaps your ideas will be the springboard for an improvement in the way we all practice law, the laws of the state and the lives of the people in our community.

Ian W. MacLean, Editor in Chief

The editorial board of the *Trusts and Estates Law Section Newsletter* is:

Incorporation by Reference

By Darcy M. Katris and Sharon L. Wick

Darcy M. Katris

Revocable trusts, as estate planning instruments, have increased in popularity over the last several years. The common approach is to have the testator create a "pour over" Will, which provides that any assets in the testator's name at the time of her death will "pour over" to the revocable trust. In many cases, the Will does not contain any dispositive provisions other than the "pour over" provision. The trust agreement then provides in detail how the assets held in or received by the trust are to be distributed upon the Grantor's death. Because the trust agreement governs the distribution of the assets, it is often referred to as a "Will substitute."

One of the issues that the estate planning practitioner faces when using a revocable trust in a client's estate plan is how to address the possibility that the revocable trust may not be in existence at the time of the testator's death. If the revocable trust is not in existence on the testator's death, then any of the assets owned by the testator cannot "pour over" from the Will to the trust. If the assets cannot "pour over" and there are no alternate dispositive provisions in the Will, then the assets pass by intestacy. Given the presumption in New York against intestacy, this is not a good result.

Thirty-three states and the District of Columbia have adopted legislation to provide that a testator may incorporate by reference the terms of a trust into her Will so that in the event the trust is not in existence at the time of the testator's death, the dispositive provisions set forth in the trust agreement are still effective. In January 2010, the Executive Committee of the Trusts and Estates Law Section of the NYSBA considered whether to support proposed legislation to allow incorporation by reference in New York. The proposed legislation was more specific than that of other states in that it provided that the testator must expressly direct in his Will that a testamentary trust shall be deemed to be created under his Will if the *inter vivos* trust is revoked or terminated; and amendments made prior to the termination or revocation of the *inter vivos* trust would be included only if the testator's Will so directed. There was considerable debate among the Committee members, with the estate planning practitioners generally

Sharon L. Wick

in favor of the proposal and the litigators generally opposed. The voting members of the Committee voted 9 in favor and 9 opposed. As a result of the tie, the Chairman cast the deciding vote in opposition. The memorandum in support of the proposed legislation, in part, is set forth below.

Without incorporation by reference legislation, practitioners are faced with three alternatives.

1. Do not draft for the issue. In this case, the Will would provide that all probate assets "pour over" to the revocable trust, with no alternate provision in the event the trust is not in existence upon the testator's death. As a result, if the revocable trust is not in existence at the testator's death, then any assets owned by the testator will pass by New York law of intestacy.

2. Provide a statement in the Will that if the revocable trust is not in existence at the time of the testator's death, the terms of the trust are incorporated by reference into the Will. However, New York law is not clear on the effectiveness of such a provision, which may result in litigation. See the memorandum below regarding the discussion of the validity of the status of incorporation by reference in New York State under common law.

3. Draft into the Will the identical dispositive provisions of the revocable trust contingent upon the trust not being in existence upon the testator's death. If the revocable trust is not in existence at the time of the testator's death, the dispositive provisions will still be effective under the Will.

Incorporation by reference is an important issue. The Trusts, Estates and Surrogate's Court Committee of the New York City Bar Association is currently considering whether to support incorporation by reference legislation. In the meantime, the lack of such legislation raises issues for estate planning practitioners that are not going away soon.

MEMORANDUM[1]

IN SUPPORT OF AN AMENDMENT OF THE ESTATES, POWERS AND TRUST LAW IN RELATION TO POUR-OVER TRUSTS

Under EPTL § 3-3.7, a testator may direct his property under his will to a revocable or irrevocable inter vivos trust created by the testator or a third party. The trust acts as a receptacle for the property which is distributed according to the trust terms.

The increased use and popularity of the revocable trust as an estate planning device brings the need for the amendment of EPTL § 3-3.7 to the forefront. In most cases where a testator creates a revocable trust, the testator's will provides that his probate assets "pour-over" to the revocable trust upon the testator's death so that the trust acts as a will substitute. EPTL § 3-3.7 does not permit a testator to incorporate by reference the terms of an inter vivos trust into a will. As a result, where a testator creates a pour-over provision in his will and directs the distribution of his property under a revocable trust, the testator risks that such distribution will be ineffective if the trust is revoked or terminated prior to his death, defeating the benefit of this planning technique. The Amendment will prevent this situation by permitting the incorporation by reference of the trust terms into the will, if the testator so directs.

I. History of the Doctrine of Incorporation by Reference in New York

New York's longstanding rule against incorporation by reference with respect to testamentary dispositions prohibits the incorporation into a will of extrinsic, unattested writings which are of a testamentary nature.[2] This rule stems from generally accepted common law and was articulated as early as 1857 by the Court of Appeals.[3] The basis for the rule against incorporation by reference is "judicial distrust of extraneous writings" not executed with the formalities required for the execution of wills and a fear of the possibility of fraud.[4] Despite New York's rule against incorporation by reference, there have been many judicial exceptions. Most notably, bequests to revocable trusts have been approved notwithstanding the incorporation by reference doctrine because the trust structure provides adequate safeguards against fraud.[5] In *Matter of Fowles*, Justice Benjamin Cardozo stated that the rule against incorporation was a flexible one, "designed as a safeguard against fraud and mistake," and should not be taken to a "dryly logical extreme."[6] He advocated that each case be reviewed for its substance, while keeping in mind the "evils which [the rule] aims to remedy."[7] In *Matter of Rausch*, he upheld a pour-over provision, noting that the existing trust document, the identification of the trustee, and the subject matter of the trust addressed any concerns of fraud.[8]

Later courts struggled over the validity of a pour-over bequest to a pre-existing inter vivos trust, where such trust was amended after the execution of the will. In *Matter of Ivie*, the Court of Appeals resolved the issue when it upheld the validity of such a bequest.[9] The Court indicated that even if a trust document is modified subsequent to the will's execution, a pour-over to such trust would be given effect provided that "adequate safeguards are employed" to prevent fraud.[10] New York has since codified the pour-over exception to the rule against incorporation by reference in EPTL § 3-3.7 which provides that a testator may make a disposition to a trust if the trust instrument is identified in the will and executed prior to or contemporaneously with the will.[11] The statute provides further that pour-over bequests are valid even though the trust instrument is amendable or revocable, or both, provided that any amendments are made with the same formalities required for the execution of the trust.[12] Nevertheless, the statute does not permit the testator to incorporate the terms of the trust by reference into the will in the event that the trust is later revoked or terminated.[13]

Despite the legislature's enactment of EPTL § 3-3.7, the rule against incorporation by reference with respect to testamentary dispositions still stands. In a case before Surrogate Preminger in New York County, the court held that the testator's attempt to incorporate a separate dispositive instrument into the will must fail as being violative of the rule against incorporation by reference.[14] In that case, the testator made reference to unattested, unsigned pages attached to the will. Quoting *Matter of Fowles*, the Surrogate found that under the circumstances of the case it could not be said: "There is no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose."[15]

As a result, the state of the law is unclear. While the general rule in New York prohibits incorporation by reference, judicial exceptions permit incorporation when the document sought to be incorporated provides sufficient safeguards against fraud.[16] Nevertheless, these judicial exceptions do not provide a clear rule of law, and subject testators to uncertainty and heirs and claimants to the possibility of judicial determination.

II. Similar Legislation Is in Place in a Majority of Other States

Every state has adopted legislation regarding "pour-over" provisions in wills.[17] Such legislation has largely been guided by the Uniform Testamentary Additions to Trusts Amendment ("UTATA"). UTATA was originally drafted in 1960[18] and was subsequently revised in 1991.[19] Among the revisions made to UTATA in 1991 was the shift from language which prohibited incorporation by reference of the terms of a revoked or

terminated inter vivos trust into a will[20] to the inclusion of language which would permit such incorporation by reference to be valid.[21]

New York's provision regarding pour-over devices, EPTL § 3-3.7, was modeled after UTATA as drafted in 1960 and does not provide for many of the changes made to UTATA in 1991, including the change allowing incorporation by reference. The proposed Amendment will conform the law in New York to that of the law in 36 other states and the District of Columbia on this issue. [22] Moreover, the proposed Amendment improves upon the legislation in these 36 other states and the District of Columbia by providing a more explicit, and thus clearer, rule of law. Unlike most states' statutes (see footnote 21), the Amendment additionally requires that a testator expressly direct that the revoked or terminated trust shall be deemed to create a testamentary trust. The testator also must direct whether the terms of the trust to be incorporated in the will include amendments to the trust.

Therefore, the proposed Amendment works to not only bring New York law in line with the law in the majority of other states, but also provides a more clear rule of law on the issue of incorporation by reference.

III. Proposed EPTL § 3-3.7(e) Should Be Adopted in New York State

There are many reasons to adopt the Amendment.

The Amendment will provide practitioners and testators with a clear rule of law, avoiding the need for judicial determination.

Equally as important, the Amendment gives deference to the intent of the testator over the intestacy statute. Today, with the common use of pour-over wills, if a revocable trust is revoked or terminated, the pour-over provision lapses. If the will does not provide for an alternate disposition, the testator's probate estate passes by intestacy. This result is counterintuitive to the testator's estate planning efforts. The Amendment will prevent this unfortunate consequence by allowing the testator to incorporate the terms of the trust in his will.

Presently, the inability to incorporate by reference results in many practitioners reiterating the terms of the trust into the testator's will. This approach has three additional disadvantages. First, in amending the trust terms, the testator must also modify his will. Second, the reiteration of the trust terms in the will increases the possibility of errors in drafting. Third, the testator bears the cost of additional attorney time incurred in drafting the "reiteration." If the Amendment is adopted, a testator need only amend the trust, and he reduces the risk of drafting errors and attorneys' fees.

The Amendment safeguards against the risk of fraud or mistake raised in case law; the trust must be executed in accordance with EPTL § 7-1.17 and be in existence and identified by the will at its execution. [23] Therefore, the terms of the trust instrument are capable of validation, eliminating the opportunity for fraud.

The Amendment requires a testator's direction in order to incorporate by reference the terms of any inter vivos trust in his will. The testator must consciously choose incorporation by reference; it is not the default provision.

IV. Conclusion

The proliferation of the use of pour-over wills and revocable trusts brings to the forefront the need for a change to New York's longstanding rule against incorporation by reference. There are no clear guidelines to the judicially permitted exceptions to the rule thereby creating significant uncertainty for practitioners and their clients. Permitting a testator to direct incorporation by reference of the terms of an inter vivos trust (including a revocable trust) into his will furthers the intent of the testator in cases where such trust is later revoked or terminated.

Endnotes

1. This memorandum relies heavily on the memorandum previously submitted by the Trust and Estates Law Section in support of Assembly Bill A10719 introduced during the 2006-2007 Session.
2. *In re Fowles' Will*, 222 N.Y. 222, 118 N.E. 611 (1918).
3. *Langdon v. Astor's Ex'rs*, 16 N.Y. 9, 26 (1857).
4. 3 Warren's heaton on Surrogate's Court § 41-01 (Linda Hirschson et al. eds., Lexis Nexis Matthew Bender 6th ed. 2003); *Langdon*, 16 N.Y. at 26.
5. *See In re Fowles' Will*, 222 N.Y. 222, 118 N.E. 611 (1918); *In re Rausch's Will*, 258 N.Y. 327, 179 N.E. 755 (1932); *In re Snyder's Will*, 125 N.Y.S.2d 459 (Sur. Ct. 1953); *In re Ivie's Will*, 4 N.Y.2d 178, 149 N.E.2d 725 (1958). *But see President and Directors of Manhattan Co. v. Janowitz*, 260 A.D. 954, 21 N.Y.S.2d 232 (2d Dept. 1940).
6. *In re Fowles' Will*, 222 N.Y. at 233.
7. *Id.*
8. *In re Rausch's Will*, 258 N.Y. at 332.
9. *In re Ivie's Will*, 4 N.Y.2d at 182.
10. *Id.*
11. N.Y. Est. Powers & Trusts Law § 3-3.7 (McKinney 1998).
12. *Id.* at § 3-3.7(b)(1).
13. Query whether such incorporation by reference would be permissible under New York case law in light of the judicial exceptions carved out by Justice Cardozo and others as set forth above.
14. *Estate of Lew*, N.Y.L.J. Dec. 2, 2002 at 19, col. 3.
15. *Id.*
16. While execution formalities are necessary, improper execution may be excused when there are other indicators of authenticity. *See In re O'Brien*, 233 A.D.2d 561, 649 N.Y.S.2d 220 (3d Dept. 1996) (the court permitted a pour-over to a charitable trust even though the trust instrument was improperly acknowledged); *In re Klosinski*, 192 Misc. 2d 714 (Sur. Ct. 2002) (the validity of an

improperly acknowledged trust instrument was upheld where there was sufficient evidence of compliance with the statute); *Bullock v. Clarke*, 2002 WL 31119931 (N.Y. Sup.) (where there was no acknowledgment and no other indicator of authenticity, the trust was held invalid as a receptacle for the pour-over provision).

17. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.8 (1999).

18. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS AMENDMENT (1960).

19. UNIF. TESTAMENTARY ADDITIONS TO TRUSTS AMENDMENT (amended 1991).

20. "A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse." UNIF. TESTAMENTARY ADDITIONS TO TRUSTS AMENDMENT (1960).

21. "Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the device to lapse." UNIF. TESTAMENTARY ADDITIONS TO TRUSTS AMENDMENT (amended 1991).

22. ALASKA STAT. § 13.12.511; ARIZ. REV. STAT. § 14-2511; ARK. CODE ANN § 28-27-101; CAL. PROB. CODE § 6300; COLO. REV. STAT. § 15-11-511 (the Colorado statute incorporates a provision which states that "exhaustion of the trust corpus shall not constitute a lapse" and goes on to provide that testator direction in the will is necessary for the incorporation by reference to be valid); CONN. GEN. STAT. § 45a-260; DEL. CODE ANN. tit. 12, § 211; D.C. CODE § 18-306; 755 ILL. COMP. STAT. 5/4-4; IND. CODE § 29-1-6-1 (j); HAW. REV. STAT. § 560:2-511; IDAHO CODE ANN. § 15-2-511; MONT. CODE ANN. § 72-2-531; KY. REV. STAT. ANN. § 394.076; MD. CODE ANN., EST. & TRUSTS § 4-411; MICH. COMP. LAWS § 700.2511; MINN. STAT. § 524.2-511; MO. REV. STAT. § 456.021; MONT. CODE ANN. § 72-2-531; NEB. REV. STAT. § 30-3602; N.H. REV. STAT. ANN. § 563-A:1; N.J. STAT. ANN. § 3B:4-5; N.M. STAT. § 45-2-511; N.C. GEN. STAT. § 31-47; N.D. CENT. CODE § 30.1-08-11; OR. REV. STAT. § 112.265; PA. CONS. STAT. § 2515; R. I. GEN. LAWS § 18-14-2; S.D. CODIFIED LAWS § 29A-2-511; TEX. PROB. CODE ANN. § 58a; UTAH CODE ANN. § 75-2-511; VA. CODE ANN. § 64.1-73.1; WASH. REV. CODE § 11.12.250 (note that express revocation by the testator will prevent incorporation by reference, but if termination occurs for any other reason then terms may still be incorporated); W. VA. CODE § 41-3-8 WIS. STAT. § 701.08 (note that incorporation by reference will occur if trust has been terminated or revoked unless the testator was a necessary party to the termination or revocation); WYO. STAT. ANN. § 2-6-103.

23. Under EPTL § 7-1.17(a), proper execution requires that the trust be in writing, signed by the original creator and at least one trustee (unless the original creator is the sole trustee, and either have such signatures acknowledged in the same manner as a real estate deed or have two witnesses to the trust execution sign the trust).

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EXHIBIT A

AN AMENDMENT to amend the estates, powers and trusts law, in relation to pour-over trusts.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (e) of section 3-3.7 of the estates, powers and trust law such section as renumbered by chapter 472 of the laws of 1967, is amended to read as follows:

(e) A revocation or termination of the inter vivos trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition; provided, however, that the testator may, by express direction, provide that the disposition or appointment of all or part of his or her estate to such revoked or terminated trust shall be deemed to create a testamentary trust under and in accordance with the terms of such inter vivos trust at the time of the execution of the will or, if the testator so directs, including amendments made thereto prior to such revocation or termination, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such inter vivos trust are not recited in the will.

Section 2. This Amendment shall take effect immediately and shall apply only to the estates of decedents who shall have died on or after such effective date.

New York State Aspects of Federal Estate Tax Repeal

By Laurence Keiser

Federal estate tax repeal in 2010 has raised several unique New York estate and income tax issues. Questions such as the filing threshold for New York estates, whether alternate valuation can be elected for New York estates, whether a QTIP election may be filed for New York State purposes only, and how to interpret formula clauses in wills prepared prior to December 31, 2009 all became of real concern when the federal estate tax was allowed to sunset at the end of last year. New York lawmakers and tax officials have responded swiftly, however, and have provided guidance and proposed legislation to help ease the uncertainty for New York residents.

Estate and Income Tax Issues

Filing Threshold

The first issue presented by federal estate tax repeal is the filing threshold. Under NY Tax Law 951(a), the New York unified credit is defined as "*the Federal unified credit in effect at date of death, but not to exceed $1 million*."[1] If there is no federal unified credit in 2010, is this number "zero"? Must all estates now have to file a New York estate tax return and face an increased estate tax burden? This is a plausible interpretation, but probably will not be adopted.

At the time of this writing, there is pending legislation in New York to amend NY Tax Law § 951(a) to preserve the unified credit against the New York estate tax.[2] The bill would eliminate the reference to the unified credit in effect in the Internal Revenue Code on the decedent's date of death and fix the credit at $1 million. The memorandum in support of the bill states that without this change, the repeal of the federal estate tax "would vastly expand the number of individuals subject to the estate tax, and thereby expand the tax beyond anything that was ever intended." We assume that this legislation will be passed, and estates under $1 million would not be subject to New York State estate tax.

Alternate Valuation Election

Another issue presented by federal estate tax repeal is whether alternate valuation can be elected for New York estate tax purposes only. Early in 2009, the New York State Department of Taxation and Finance ("Department") issued NYT-G-09(1)M, discussing the availability of an alternate valuation election for New York estate tax purposes.[3] New York Tax Law § 954(a) provides that the New York gross estate of a deceased resident means his or her federal gross estate as defined in the Internal Revenue Code and cross references the alternate valuation provisions of Internal Revenue Code § 2032 (IRC). The statement concludes that the election can be made if a federal estate tax return is not required to be filed.

To make a New York alternate valuation election, the estate has to meet the other requirements of IRC § 2032. The election must reduce the New York gross estate and must also reduce the New York tax liability. The Department concludes that the election can be made if death occurs in a year in which there is no federal estate tax return required to be filed. The statement does not, however, address the situation where a federal return is required to be filed, but there is no federal tax.

For example, suppose that in 2009 a decedent had a gross estate of $4 million and $1.5 million was bequeathed to charity. A federal estate tax return is required to be filed (because the gross estate exceeds $3.5 million) although the charitable deduction reduces the taxable estate to $2.5 million. Election of alternate valuation could not be made for federal purposes because it does not reduce the federal estate tax (the tax is already zero). Can an alternate valuation election be made for New York estate tax purposes if it would reduce the New York tax? New York law is silent. Based on the logic of the TSB cited above, however, the election should be allowed. The New York gross estate is reduced and the tax liability is also reduced. It remains uncertain whether alternate valuation may be elected for New York estate tax purposes when a federal estate tax return is not required to be filed. The statement is silent and the Department has not issued a position.

QTIP Election

New York has no provision for a separate state QTIP election that is independent from the federal QTIP election.[4] Since there is no federal estate tax in 2010, it is not necessary and probably not possible to make a federal QTIP election. Accordingly, concern has been raised regarding whether a QTIP disposition in 2010 (in excess of the $1 million New York estate tax exemption) would be fully taxable for New York estate tax purposes.

In TSB-M-10(1)M issued on March 16, 2010, the Department clarified that an executor can elect QTIP treatment for New York purposes in 2010, even though no federal return is currently required to be filed in

light of the federal repeal of the estate tax. The election must be made on the pro-forma federal tax return Form 706 attached to the New York state return. TSB-M-10(1) provides also that the value of the QTIP property for which the election is made must be included in the estate of the surviving spouse.

A state-only QTIP election, such as the election available in Massachusetts, would have to be created by the legislature; in light of the likely negative revenue impact, such a law is unlikely in New York.

New York State Income Tax Basis

For income tax purposes, New York specifically follows federal tax law. New York Tax Law § 612 provides that New York adjusted gross income is equal to federal adjusted gross income with specified modifications. In the past, there have been modifications under NY Tax Law § 612 that would create disparate New York and federal income tax basis. Under the current provisions of NY Tax Law § 612, however, there is no modification to create a disparate income tax basis when alternate valuation is elected for New York-only purposes.

Furthermore, assuming federal carryover basis going forward, a decedent who dies in 2010 owning an asset with a cost basis of $200,000 and a value of $3 million will pay no federal estate tax but will have to pay a New York estate tax on the value of $3 million. Basis for federal purposes will be $1.5 million ($200,000 plus the $1.3 million step-up). Is this fair for New York purposes? Probably not, but this too would require a legislative change.

Drafting Issues

In addition to the New York tax issues presented by federal repeal, New York is also taking steps to cure the inadvertent disinheritance as a result of wills drafted before December 31, 2009 which use formula clauses. For example, a will which left the amount that can pass free of federal estate tax to the children and the residue to the spouse (or a charity) would essentially disinherit the spouse (or charity) if the death occurred in 2010. New York will join eight other states which have enacted similar legislation.

Formulaic Dispositive Provisions

On February 3, 2010, Assembly Bill No. A09857 was introduced. A09857 provides, in essence, that for decedents dying in 2010, a formula clause in a dispositive instrument providing for a bequest of the maximum amount that can pass free of federal estate or GST taxes shall be construed with respect to the law in effect for decedents dying on December 31, 2009. An amended version of the bill was introduced on April 27, 2010, and continues to provide for the construction of formulaic clauses based on the law as in effect on December 31, 2009. Among the more significant changes from the original bill are the following: (i) The language of the bill has been broadened to contemplate the various types of credit shelter funding language used in dispositive instruments, rather than limit the application of the statute to formula clauses that provide for a "bequest of the maximum amount of property that can be sheltered from estate tax by reasons of credits against such tax"; (ii) The original version of the bill was designed to prevent the inadvertent disinheritance of a surviving spouse. For the statutory provisions to apply in the credit shelter context, the previous version of the bill included a requirement for the decedent to be survived by a spouse. The requirement for a surviving spouse has been eliminated to account for other dispositions coupled with a credit shelter bequest; (iii) The amended bill provides that the statutory provisions will not apply to a will or trust that is executed or amended after December 31, 2009, or that manifests an intent that a contrary rule should apply if the decedent dies on a date on which there is then no applicable federal estate or GST tax, and (iv) An executor, trustee or other interested person may bring a proceeding to determine whether the decedent intended a formulaic disposition to be construed with respect to the law as it existed on the decedent's date of death, without regard to these statutory provisions. Extrinsic evidence is admissible to establish the decedent's intent. Such a proceeding must be brought within twelve months of death.

Endnotes

1. N.Y. Tax Law § 951(a) (emphasis added).
2. Assembly Bill Number A9710 (memorandum in support).
3. A NYT-G is an informational statement of the Department's interpretation of the law and regulations.
4. A few states, such as Massachusetts, allow a state-only QTIP.

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New York State Department of Taxation and Finance Office of Counsel

NYT-G-09(1)M
Estate Tax
January 14, 2009

Use of Alternate Valuation for the New York State Estate Tax Return When a Federal Estate Tax Return Is Not Required to be Filed

We received a letter asking whether an executor may elect to use alternate valuation as provided in Internal Revenue Code (IRC) § 2032 for purposes of calculating the New York gross estate when the date of death is after 2003 and no federal return is required to be filed.

Background

New York State estate tax conforms to the IRC with all amendments enacted on or before July 22, 1998. As a result, New York State estate tax does not incorporate the changes in the IRC brought about by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Among those changes was the increase in the federal filing threshold and the applicable exclusion amount (unified credit). For dates of death after 2003, the federal estate tax filing threshold and the applicable exclusion amount was increased above $1 million. Since the New York State estate tax filing threshold did not increase above $1 million, some estates are required to file an estate tax return for New York State but not required to file a federal estate tax return.

Analysis

Tax Law section 954(a) provides that "[t]he New York gross estate of a deceased resident means his federal gross estate as defined in the internal revenue code (whether or not a federal estate tax return is required to be filed)." Subdivision (c) of section 954 specifically cross-references the alternate valuation provision of IRC section 2032. We believe that these provisions indicate intent to allow the IRC section 2032 alternate valuation for purposes of calculating the New York gross estate in situations where no federal return is required to be filed.

We next turn to the requirements of IRC section 2032. That section allows an executor to elect alternate valuation under certain circumstances, but only if the election will decrease "(1) the value of the gross estate, and (2) the sum of the tax imposed by this chapter [estate tax] and the tax imposed by chapter 13 [generation skipping transfer tax] with respect to property includible in the decedent's gross estate (reduced by credits allowable against such taxes)." The concern is that, if a federal return is not required to be filed and there is no federal estate tax or generation skipping transfer tax liability, the second requirement cannot be met.

In the department's view, this is not the case. Although no federal return would be required to be filed under the IRC as it existed for dates of death after 2003, New York's estate tax is conformed to the IRC with all amendments enacted on or before July 22, 1998. See Tax Law § 951(a). The unified credit is the amount allowable based on the IRC in effect on the decedent's date of death, except that the credit "shall not exceed the amount allowable as if the federal unified credit did not exceed the tax due under [IRC § 2001] on a federal taxable estate of one million dollars." Id.

If the requirements for electing alternate valuation under IRC section 2032 (i.e., reduction of gross estate and reduction of estate and generation skipping transfer tax liability) are met applying the provisions of the IRC as it existed on July 22, 1998 (and applying the limitations on the unified credit in Tax Law section 951(a)), the executor may elect to use alternate valuation for purposes of calculating the gross estate on the New York estate tax return.

NOTE: An NYT-G is an informational statement of the Department's interpretation of the law, regulations, and Department policies and is usually based on a particular set of facts or circumstances. It is accurate on the date issued and is limited to the facts set forth therein. NYT-Gs are published to provide information and guidance to taxpayers, Department personnel, and tax professionals. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in Department policies could affect the validity of the information presented in an NYT-G.

New York State Department of Taxation and Finance

Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-M-10(1)M
Estate Tax
March 16, 2010

Qualified Terminal Interest Property (QTIP) Election for New York State Purposes When No Federal Return is Required

In certain cases, an estate is required to file a return for New York State estate tax but is not required to file a federal return. This may occur if there is no federal estate tax in effect on the decedent's date of death or if the decedent died while the federal estate tax was in effect but the value of his or her gross estate was too low to require the filing of a federal estate tax return. In either instance, and if applicable, the estate may still elect to take a marital deduction for Qualified Terminal Interest Property (QTIP) on a pro-forma federal estate tax return that is attached to the New York State estate tax return.

For dates of death on or after February 1, 2000, the New York State estate tax conforms to the federal Internal Revenue Code of 1986 (IRC) including all amendments enacted on or before July 22, 1998. Because the IRC in effect on July 22, 1998, permitted a QTIP election to be made for qualifying life estates for a surviving spouse (see IRC § 2056(b)(7)), that election may be made for purposes of a decedent's New York State estate tax return even if a federal return is not required to be filed. If no federal return is required, the election must be made on the pro-forma federal estate tax return attached to the New York State return. As provided in IRC § 2056(b)(7), once made, this election is irrevocable. In addition, the value of the QTIP property for which the election is made must be included in the estate of the surviving spouse. See: IRC § 2044 and New York Tax Law § 954.

How to make the election

The QTIP election is made for New York State estate tax purposes in the same manner as the election would have been made for federal estate tax purposes. Enter the amount of the deduction in Part A1 on Schedule M of federal Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, for the applicable date of death and complete the rest of the schedule.

Federal estate tax return for 2010 dates of death

If there is no federal estate tax for 2010 dates of death and an estate is required to file an estate tax return with New York State, use the federal return for 2009 dates of death, Form 706 (Rev. 9-2009) for the pro-forma federal estate tax return.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.

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Effect of Tax Apportionment Clauses on Nontestamentary Assets

By Patricia M. Sheridan

The tax apportionment clause in a will permits the testator to specify how the estate tax burden is to be shared among beneficiaries. Absent an effective provision, state law governs the payment of estate tax. EPTL 2-1.8(a) states that the amount of tax "shall be equitably apportioned" among the persons interested in the gross tax estate. EPTL 2-1.8(d) further provides that "any direction as to apportionment or non-apportionment of the tax, whether contained in a will or a non-testamentary instrument, relates only to property passing thereunder, unless such will or instrument provides otherwise." One of the principal purposes of the apportionment statute is to compel beneficiaries of nonprobate assets to bear an equitable share of the tax burdens that are increased by inclusion of such assets in the taxable estate.[1] The New York Court of Appeals has stated that there is a strong policy in favor of statutory apportionment.[2] Parties who seek to avoid apportionment bear the burden of proof, and the direction in the testator's will must be clear and unambiguous.[3]

In a tax allocation controversy, the text of the will is reviewed only to see if there is a clear direction not to apportion, and if such explicit direction is not found, construction of the text ceases because the statute states the rule.[4] In *Matter of Mills*,[5] the Appellate Division, First Department determined that the statute requires certainty of expression and not merely speculation as to the decedent's intent. Those who resist apportionment must be able to point to affirmative language in the will directing that taxes not be apportioned. In case of doubt as to what the will means on the subject of taxes, the statutory direction to apportion governs.[6]

This article examines which types of tax clauses specifically relieve nonprobate assets from the payment of estate taxes and discusses when a general direction against tax apportionment contained in a will extends to a decedent's nontestamentary assets. The article also explores whether the existence or absence of the nontestamentary assets at the time the will is signed has any bearing on the testator's intent.

Specific Exoneration of Nontestamentary Assets from Estate Tax

A central issue in many tax apportionment cases is whether the will contains a sufficient direction against apportionment that extends to nontestamentary assets. If the testator makes a clear and specific direction exonerating recipients of nonprobate assets from paying any portion of the estate tax, the statutory rule of apportionment will not apply to these assets. The testator's intent to relieve nontestamentary beneficiaries from the payment of taxes can be expressed in several ways. Where a testator directed that "all estate, inheritance or other taxes levied as the result of my decease be paid by and out of my estate and that no one who receives any assets as the result of my decease shall be called upon to contribute toward the payment of such taxes," the recipients of nontestamentary assets were specifically exonerated from the payment of estate taxes.[7] In *Matter of Olson*,[8] the testator provided that "all estate, inheritance, succession and other taxes which may become due and payable by reason of my death, with respect to any and all property passing on my death either under this my Last Will and Testament *or otherwise* [emphasis added] be paid out of my residuary estate." The court viewed this language as a clear direction against apportionment for both testamentary and nontestamentary assets because the words "or otherwise" indicated a broad intention to also include property passing outside the will.[9] Where a will stated that "all estate taxes payable by reason of my death shall be chargeable against and payable out of my residuary estate *without contribution by anyone* [emphasis added]," the court held that the direction precluded contribution for estate taxes by recipients of nontestamentary assets.[10] In *Matter of Myers*,[11] the will provided that "all inheritance, estate and transfer taxes…which may be imposed on all property passing by reason of my death, as well as upon all other property included in my taxable estate in any jurisdiction shall be paid from my residuary estate." The court concluded that this expansive language required that all estate taxes imposed upon testamentary and nontestamentary assets be paid from the residuary estate without apportionment.[12]

If a direction to pay estate taxes out of the residuary estate is qualified by language exonerating certain devisees and legatees named in the will from the payment of taxes, the intent to extend the direction against apportionment to nontestamentary assets cannot be

inferred. Where a will provided that "all transfer, succession and inheritance taxes be paid out of my general estate, so that the same shall not be chargeable to, or paid by, any devisee or legatee herein named," the court determined that testator intended to relieve only the named beneficiaries from the payment of tax.[13] Because there was no mention of beneficiaries receiving property outside of the will, the court held that apportionment of taxes was required as to nontestamentary property.[14]

These decisions indicate that if a will contains a tax exoneration clause utilizing words such as "without apportionment" or "without contribution by anyone" or a tax clause applicable to "property passing under this will or otherwise," the language precludes apportionment of estate taxes against nontestamentary assets. However, where the testator expresses an intention to exempt certain legatees and devisees named in the will from the payment of taxes, no intent to exonerate recipients of nontestamentary assets from the payment of estate tax is implied.

When Does a General Tax Exoneration Clause Apply to Nontestamentary Assets?

Construction of a tax exoneration clause is often necessary where the direction for the payment of taxes is broad in scope. If the will contains a sweeping, general direction that all estate taxes be paid from the residuary estate, the court must determine whether the testator intended to exonerate recipients of assets which pass outside the will from the payment of their pro rata share of estate taxes.

In *Matter of Greenwald*,[15] the testator directed that "all inheritance, transfer, estate and succession taxes be paid out of my residuary estate." The court held that the use of the word "all" absolved the beneficiaries of nontestamentary assets from the payment of estate taxes and stated as follows:

> Standing by itself the word means all and nothing less than all. Since…it is unrestricted by any other word or words, it constitutes a broad mandate by the testatrix to include the taxes upon every form of gift or transfer contained in the gross taxable estate, whether passing under the will or outside the will.[16]

Likewise, the court in *Matter of Halle*[17] determined that an unqualified general direction to pay "all" taxes out of the residuary estate exonerated recipients of nontestamentary assets from the payment of their pro rata share of estate taxes. The court stated:

> The directive in the will for the payment of taxes is as broad and comprehensive as would seem possible. It directs the payment of "all" estate, transfer and succession taxes as well as inheritance taxes. We do not consider that the intention of testator to include taxes on the bank account was made uncertain or rendered doubtful because broad and inclusive language was used.[18]

In contrast, where the language limits the direction against apportionment to all taxes imposed upon "my estate," courts have concluded that "my estate" refers only to the testamentary estate, so that recipients of nontestamentary assets must pay their respective portion of estate taxes.[19] In distinguishing a tax clause containing an unrestricted direction to pay "all" estate taxes out of the residuary from a clause limiting the nonapportionment to all taxes imposed on "my estate," the court in *Matter of Mills* stated as follows:

> The decision of this court in *Matter of Halle*…is not here applicable.… As we there said: 'The matter of intention is to be determined in each case upon a consideration of the language used in light of the surrounding circumstances.' In that case the decedent directed without any qualifying phrase or words that all inheritance, estate, transfer and succession taxes be paid out of my residuary estate. There the direction was unrestricted; there was no limitation such as that found in the will before us; viz., that the taxes so to be paid were only those imposed upon 'my estate', a phrase that had the uniform meaning throughout the will of the true or testamentary estate.[20]

Other cases have relied upon the reasoning in *Matter of Mills* and found that testator's use of the words "upon my estate" or similar language reflects an intention to limit the nonapportionment of taxes to the assets included in the testamentary estate. A provision in a will that "all inheritance or legacy taxes shall be borne and paid by my executors and shall be a charge against *my estate* [emphasis added]" overcame, as to property passing under the will, the rule of equitable apportionment.[21] The court in *Matter of Atkinson* found that although the testator's direction was precise, it could not, without ambiguity, be extended to encompass property outside the will. Referring to *Matter of Mills,* the court noted that the will did not specifically refer to nontestamentary property or any interv ivos transaction and stated that "at best the language of deceased can be said to be obscure. Nowhere does he say that apportionment of taxes is not to be made. Nowhere does he refer specifically to any inter vivos

transaction."[22] The court ruled that the recipients of the nontestamentary assets were required to pay their pro rata share of taxes.[23] In a proceeding to construe a tax clause providing "I direct my executors…to pay all of my just debts, funeral and administration expenses, including such estate and inheritance taxes as may be assessed against *my estate* [emphasis added]," the Appellate Division, Third Department found there was no direction against apportionment of estate taxes for nontestamentary transfers.[24] The court in *Matter of Leonard* reasoned that the need for clear and unambiguous direction against apportionment is even stronger in the case of taxable transfers outside the instrument in which the supposed direction is sought and that the language of EPTL 2-1.8(d) supports such a conclusion.[25] The court held that the will lacked the requisite clarity of direction against apportionment as to the nontestamentary dispositions.[26]

The cases show that an unrestricted direction that all estate taxes be paid out of the residuary exonerates the recipients of nontestamentary assets from paying any portion of the estate tax. These cases are distinguishable from those involving a tax clause that limits the nonapportionment direction to the taxes imposed on "my estate." This qualifying phrase is construed to reflect an intention to restrict the nonapportionment of taxes to the testamentary estate.

Existence or Nonexistence of Nontestamentary Assets at Time Testator Makes Will

As with the construction of all dispositions, the testator's intention governs the construction of tax exoneration clauses.[27] The matter of intention is to be determined in each case upon a consideration of the language used in light of the surrounding circumstances.[28] Each will construction, therefore, is to some extent unique.[29] In certain tax apportionment cases, courts have considered whether the existence of nontestamentary assets at the time the testator signed the will sheds light on the decedent's intent. These cases have determined that a broad direction to pay all taxes from the residuary estate can apply to nontestamentary assets acquired after the will was executed.

In *Matter of Staheli*,[30] the court analyzed a tax clause providing that "all transfer, estate, inheritance and succession taxes be paid out of my residuary estate" and held that the beneficiaries of nontestamentary assets were exonerated from the payment of estate taxes, even though the decedent did not own the assets when the will was made. The court stated that "in light of the comprehensive language employed by the testator, the fact that the bonds were acquired years after the execution of the will does not impress me as having any consequence."[31] The same issue was raised in *Matter of Bruce*,[32] where the executors appealed a determination precluding contribution for estate taxes by recipients of nontestamentary assets. The testator provided in his will that "all estate taxes payable by reason of my death shall be chargeable against and payable out of my residuary estate without contribution by anyone." The attorney who drafted the will contended that when the will was drafted, he was not aware of any nontestamentary assets owned by the testator. The court found these allegations were not relevant in light of the unambiguous language in the will, namely "without contribution by anyone," and found that the recipients of the nontestamentary assets acquired after the will was signed did not have to pay their pro rata share of estate taxes.[33]

In a proceeding to construe a tax clause providing that "all estate, inheritance, transfer, legacy, succession and other death taxes of any nature, payable by reason of my death shall be paid out of my residuary estate," the court in *Matter of Harmse* held that recipients of nontestamentary assets were relieved from paying any portion of the estate tax.[34] The executor in this case contended that the will failed to contain a clear and unambiguous direction required by EPTL 2-1.8(d) to exonerate the recipients of nontestamentary assets from paying their pro rata share of estate taxes. The executor attempted to distinguish the case from *Matter of Halle* on the grounds that the nontestamentary assets at issue in *Harmse*, unlike those in *Halle*, were acquired after the will was executed. The Surrogate stated that while the *Halle* court noted the nontestamentary assets existed at the time the will was made, there was no indication that this fact was a determinative factor in the court's decision. The court directed that estate taxes be paid from the residuary estate without apportioning any of the estate taxes against the assets that passed by operation of law.[35]

Conclusion

The tax exoneration clause is, arguably, one of the most important provisions in a will. A testator seeking to relieve recipients of nonprobate assets from the burden of estate taxes can specifically direct against apportionment for these assets. If a will contains a general and broad direction against apportionment, the clause may be scrutinized to determine if it embraces nontestamentary assets. In these construction cases, the courts have concluded that the existence or absence of the nontestamentary assets at the time of the will's execution is not necessarily a factor shedding light on the testator's intent. As a result, a broad direction against apportionment contained in a will exempts even future, unforeseen nonprobate assets from the payment of their pro rata share of taxes. Careful drafting of the tax apportionment clause is essential because taxes on unexpected nonprobate assets may inadvertently place an unfair tax burden on other beneficiaries.

Endnotes

1. *Matter of Durkee*, 183 Misc. 382, 386, 47 N.Y.S.2d 721, 724 (Sur. Ct. N.Y. Co. 1944).
2. *Matter of Pepper*, 307 N.Y. 242, 250, 120 N.E.2d 807, 811 (1954).
3. *Id*.
4. *Matter of Mills*, 189 Misc. 136, 141, 64 N.Y.S.2d 105, 110 (1946), *aff'd*, 272 A.D. 229, 70 N.Y.S.2d 746 (1st Dep't 1947), *aff'd*, 297 N.Y. 1012 (1948).
5. *Id*.
6. 189 Misc. at 140, 64 N.Y.S.2d at 109.
7. *In re Wheeler's Will*, 19 Misc. 2d 335, 337, 186 N.Y.S.2d 134, 136 (Sur. Ct. Westchester Co. 1959).
8. 77 Misc. 2d 515, 516, 353 N.Y.S.2d 347, 349 (Sur. Ct. Kings Co. 1974).
9. *Id*.
10. *Matter of Bruce*, 131 A.D.2d 670, 672, 516 N.Y.S.2d 748, 750 (2d Dep't 1987).
11. 7 Misc. 2d 664, 160 N.Y.S.2d 496 (Sur. Ct. Westchester Co. 1957).
12. 7 Misc. 2d at 665, 160 N.Y.S.2d at 497.
13. *Matter of Lemmerman*, 199 Misc. 49, 51, 104 N.Y.S.2d 665, 668 (Sur. Ct. Queens Co. 1951).
14. *Id*. *See also Matter of Pergament*, 29 Misc. 2d 334, 336, 218 N.Y.S.2d 831, 833 (Sur. Ct. N.Y. Co. 1961).
15. 186 Misc. 654, 655, 53 N.Y.S.2d 937, 939 (Sur. Ct. N.Y. Co. 1945).
16. 186 Misc. at 657, 53 N.Y.S.2d 937.
17. 270 A.D. 619, 61 N.Y.S.2d 694 (1st Dep't 1946).
18. 270 A.D. at 622, 61 N.Y.S.2d 694.
19. 189 Misc. 136, 64 N.Y.S.2d 105. *See also Matter of Schuchman*, 51 Misc. 2d 541, 273 N.Y.S.2d 548 (Sur. Ct. Nassau Co. 1966).
20. 272 A.D. at 234. *See also Matter of Israel*, 26 Misc. 2d 904, 208 N.Y.S.2d 58 (Sur. Ct. Bronx Co. 1960).
21. *Matter of Atkinson*, 4 Misc. 2d 992, 996, 156 N.Y.S.2d 589, 593 (Sur. Ct. Suffolk Co. 1956).
22. 4 Misc. 2d at 996, 156 N.Y.S.2d 589.
23. *Id*.
24. *Matter of Leonard*, 9 A.D.2d 1, 2, 189 N.Y.S.2d 422, 423 (3d Dep't 1959).
25. *Id*.
26. *Id*.
27. *Matter of Olson*, 77 Misc. 2d 515, 520, 353 N.Y.S.2d 347, 352 (Sur. Ct. Kings Co. 1974).
28. *Matter of Halle*, 270 A.D. 619, 620, 61 N.Y.S.2d 694, 696 (1st Dep't 1946).
29. *Matter of Rhodes*, 2008 N.Y. Slip Op. 28472, 868 N.Y.S.2d 513, 516 (Sur. Ct. Westchester Co. 2008).
30. 57 N.Y.S.2d 185, *aff'd*, 271 A.D. 788, 66 N.Y.S.2d 271 (2d Dep't 1946).
31. 57 N.Y.S.2d at 188.
32. 131 A.D.2d 670, 516 N.Y.S.2d 748.
33. *Id*.
34. *Estate of Margaret Harmse*, N.Y.L.J., May 13, 2004, at 30, col. 1 (Sur. Ct. Bronx Co.).
35. *Id*.

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"Death Bed" "Quickie" Marriages Held to Be Void *Ab Initio* by Appellate Division

By Gary E. Bashian and Michael Candela

Gary E. Bashian

Michael Candela

Elder abuse, including the financial exploitation of elderly individuals who have become mentally incapacitated, especially by non-family members, is an unfortunate and growing problem in our society. The unique vulnerabilities of those abused, the easily overlooked evidence of such abuse, and the sometimes invisible nature of the abuse itself, make this a difficult issue to both recognize and address, even by those closest to its victims. This abuse, compounded by individuals seeking to profit from their abuse and seemingly statutory loopholes allowing them to do so, beckoned judicial intervention.

It is no wonder that a series of recent First and Second Department cases have issued rulings seeking to bolster the rights of the elderly and their families. The recently decided *Campbell*,[1] *Berk*,[2] and *Kaminester*[3] cases illustrate a new and emerging trend in elder abuse involving situations where young caretakers providing health care and daily support for elderly patients, secretly marry the much older, and mentally incapacitated, individual, in an attempt to later claim the statutory right of election provided under the Estates, Powers and Trusts Law (EPTL) 5-1.1-A.[4]

This tactic cleverly avoids the disqualification provisions of EPTL 5-1.2,[5] as the abuser remains the legal "surviving spouse" as of the date of the sham marriage and is entitled to one-third of the decedent's estate despite it being the product of their abuse.

The judiciary has directly confronted this trend of elder abuse, and refused to allow it to take refuge behind the black letter of the law where it may try.[6] In these scenarios, the Courts have exercised their equitable power to prevent an unjust result where the evidence and circumstances so demand it. The Courts' mandate to use their discretion in situations such as these is the essence of the common law, and is a principle that is clearly alive and well.

Campbell v. Thomas

Campbell v. Thomas[7] involved a 72-year-old decedent who was diagnosed with terminal prostate cancer and severe dementia in 2000.[8] He required 24-hour supervision which was in turn undertaken by his daughter.[9] In February, 2001, his daughter took a one-week vacation and entrusted her father's care to the petitioner, a 58-year-old woman who had full knowledge of her patient's incapacity and many health issues.[10] During the daughter's one-week absence, the petitioner married the decedent and transferred approximately $150,000 of the decedent's assets into joint accounts and changed the decedent's $147,000 retirement plan, naming herself as the sole beneficiary.[11] The decedent died six months after the marriage in August, 2001.[12]

Upon the filing for the probate of the decedent's Last Will and Testament with the Putnam County Surrogate's Court, the petitioner filed her right of election.[13] The Court declined both parties' motions for summary judgment, which was subsequently appealed.[14] The Appellate Division granted the motion for summary judgment in favor of the decedent's children, stating that the decedent lacked the capacity to marry.[15] The Surrogate's Court entered said judgment declaring the marriage null and void due to the decedent's lack of capacity.[16] The petitioner appealed- this decision.[17]

The Appellate Division ruled that the petitioner "technically had a legal right to an elective share as a surviving spouse" under the EPTL.[18] The Court stated that when a marriage is annulled after a person's death on the grounds of mental incapacity, the statutory law requires that the decedent's spouse be treated as a "surviving spouse" with a right of election against the estate of the decedent.[19]

However, the Appellate Division, exercising their equitable powers, refused to enforce the petitioner's right to her elective share. The Court stated that EPTL 5-1.2[20] should not be read strictly if to do so "would be to ordain the statue as an instrument for the protection of fraud."[21] Doing so, the Court added, "would seemingly invite…a plethora of surreptitious deathbed marriages…."[22] The Court emphasized the fact that the caretaker knew of both the decedent's declining health and mental incapacity, and should be prevented from benefiting from her wrongdoings.

The Court invoked the equitable principle of "'[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime,'"[23] found in the famous case of *Riggs v. Palmer*,[24] wherein a grandson, who was named as a beneficiary in his grandfather's will, murdered his grandfather in an effort to obtain "speedy enjoyment" of his inheritance and to prevent his grandfather from making future alterations to his testamentary plan.[25] The Court, in refusing to allow Palmer to profit from his own wrongdoing, disinherited him. Although the conduct of the caretaker was not as egregious as that of Mr. Palmer, the Court applied the same equitable principles.

The Appellate Division further stated that in its determination that the caretaker had forfeited her right of election, the Court was not attempting to "displace legislative authority, but complement[s] it"[26] as it was not the intent of the legislature, when it passed EPTL 5-1.2, for such actions to be considered exceptions to the disqualification provision. The Appellate Division "was compelled to assert its equitable powers not only 'by the need to protect vulnerable incapacitated individuals and their rightful heirs,' but also protect the integrity of the courts."[27]

Matter of Irving Berk

The *Matter of Irving Berk*[28] involved an extremely successful businessman whose health began to fail as he aged. Mr. Berk suffered from memory loss and his physical condition had deteriorated to the point that he required a wheelchair and caretaker at all times. Accordingly, his family obtained the services of the petitioner, a then 40-year-old woman, who was hired as the decedent's live-in caretaker.

In June of 2005, after seven years of caring for Mr. Berk, petitioner, then 47 years old, took the 99-year-old decedent to the New York City Clerk's Office where they were married.[29] Approximately one year after the marriage, the decedent died. Neither the petitioner nor the decedent told anyone of their marriage during his lifetime.[30] While traveling to the funeral home, petitioner finally advised the decedent's two children of her marriage to the decedent.[31] Upon the offering of the decedent's Last Will and Testament for probate with the Kings County Surrogate's Court, the petitioner filed her petition to have the Court determine the validity of her right of election against the decedent's estate, which was in excess of five million dollars.[32]

The Kings County Surrogate's Court granted the petitioner's motion for summary judgment, declaring the petitioner's election against the estate, pursuant to EPTL 5-1.1-A, valid. The decedent's children appealed.[33]

In 2010, the Appellate Division, Second Department, reversed the Surrogate's Court decision.[34] Relying on the *Campbell v. Thomas*[35] case, the Court determined that the decedent's sons tendered enough evidence from which a trier of fact, being the Surrogate's Court, could properly determine if the petitioner forfeited her statutory right of election.[36] The Court determined that the petitioner, "knowing that a mentally incapacitated person was incapable of consenting to a marriage, deliberately took unfair advantage of the incapacity by marrying that person for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse at the expense of that persons' intended beneficiaries."[37]

The Court cited several instances in support of its decision, including that in April, 2005, during the time where the petitioner was serving as the decedent's live-in caretaker, the decedent was diagnosed with dementia by a physician who opined that the decedent's mental state was such that the decedent was "incapable of…enter[ing] into binding contracts."[38] In addition, the decedent's longtime primary-care physician, who added that the decedent was "incapable of properly managing his social affairs," confirmed this diagnosis.[39] Furthermore, a witness testified that at the civil ceremony, the decedent, although dressed in a tuxedo, did not appear to be "lucid or aware of his circumstances."[40]

The Court remanded the case, seemingly giving guidance to the Surrogate's Court by stating "[s]hould the trier of fact so determine, equity will intervene to prevent the petitioner from becoming unjustly enriched from her wrongdoing, as a court cannot 'allow itself to be made the instrument of wrong.'"[41]

Estate of Richard Kaminester

In the *Estate of Richard Kaminester*,[42] the decedent's daughter sought a determination as to the validity of the petitioner's right of election against her father's estate. The petitioner, who was the decedent's caretaker, married the physically and mentally ailing decedent in March, 2006, shortly after both a Texas and New York Court found the decedent to be incapacitated.[43] The caretaker, who was present at the Article 81 Hearing, pursuant to the Mental Hygiene Law of New York, concealed the marriage from the decedent's family as well as from the Court.[44]

It was discovered that shortly before their marriage Mr. Kaminester's caretaker transferred the beneficiary designation of the decedent's $1.6 million life insurance policy into her name, and shortly after their marriage the caretaker transferred the ownership of the decedent's $2 million house into both his and her name.[45] In May, 2006 the decedent died, his marriage to the caretaker remaining a secret.[46]

The Article 81 Court invoked Mental Hygiene Law § 81.29(d),[47] which states, in part, "[i]f the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed…contract, conveyance, or disposition during lifetime or to take effect upon death…if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated."

After the decedent's daughter filed a petition for probate, the caretaker filed her right of election.[48] The decedent's children claimed constructive fraud and equitable estoppel and sought to have the petitioner disqualified from making a right of election.[49] They relied on the posthumous decision of the Article 81 Court (brought by the decedent's daughter by order to show cause), which stated that the marriage was void due to the decedent's incapacity.[50] In response, petitioner claimed that under EPTL 5-1.2, her right to elect became "fixed and unalterable"[51] at the moment decedent passed, and could not be subject to posthumous annulment. Relying on the Article 81 Court's decision, the Surrogate's Court determined that the marriage was void *ab initio*, due to the decedent's incompetency to enter into the marriage contract.[52]

Conclusion

Together, *Campbell*, *Berk*, and *Kaminester* represent the confluence of both very old and very new issues affecting the Courts. On one hand, they deal with newly identified forms of elder abuse that neither the Court, nor the legislature, had directly contemplated before. On the other hand, they show the creativity in equity with which the Court will employ to remedy such issues, for example, by employing very old equitable principles to solve such new problems.

Endnotes

1. 2010 WL 969843 (N.Y.A.D. 2d Dep't 2010).
2. 2010 WL 979238 (N.Y.A.D. 2d Dep't 2010).
3. 26 Misc. 3d 227 (Surr. Ct. N.Y. Co. 2009).
4. N.Y. EPTL 5-1.1-A.
5. EPTL 5-1.2 states: (a) A husband or wife is a surviving spouse within the meaning, and for the purposes of §§ 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that: (1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died. (2) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof. (3) The spouse had procured outside of this state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of this state. (4) A final decree or judgment of separation, recognized as valid under the law of this state, was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died. (5) The spouse abandoned the deceased spouse, and such abandonment continued until the time of death. (6) A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.
6. The *Campbell v. Thomas* court stated that "[t]he equitable doctrine pursuant to which we find that Nidia (the decedent's caretaker) has forfeited her right to election does not displace legislative authority, but complements it. Our decision does not reflect an effort to avoid a result intended by the Legislature. Rather…it is clear to us that the Legislature did not contemplate the circumstances presented by this case when it enacted EPTL 5-1.2…. We are confident that the Legislature did not intend the statute to provide refuge for a person seeking to profit by means of a nonconsensual marriage." *Campbell,* at 5.
7. 2010 WL 969843.
8. 2010 WL 969843, at 1.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 4.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 8; *see also* EPTL 5-1.2.
19. *Id.*; *see also* EPTL 5-1.2.
20. EPTL 5-1.2.
21. *Id.* at 8.
22. *Id.*
23. *Id.*, *quoting Riggs v. Palmer*, 115 N.Y. 506 (1889).
24. 115 N.Y. 506 (1889).
25. *Id.* at 509.
26. *Id.* at 11.
27. *Id.* at 10.
28. 2010 WL 979238 (N.Y.A.D. 2d Dep't 2010).
29. *Id.* at 1.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 2.
35. 2010 WL 969843 (N.Y.A.D.2d Dep't 2010).
36. *Berk*, at 3.
37. *Id.*
38. *Id.* at 2.
39. *Id.*
40. *Id.*

41. *Id*. at 885, *citing Baldwin v. City of New York*, 43 A.D. 3d 841 (2d Dep't 2007).
42. 26 Misc. 3d 227 (Surr. Ct. N.Y. 2009).
43. *Id.* at 228.
44. *Id.* at 230.
45. *Id.*
46. *Id.* at 227.
47. If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.
48. 26 Misc. 3d 228 (Surr. Ct. N.Y. 2009).
49. *Id.*
50. *Id.* at 233.
51. *Id.* at 228.
52. *Kaminester*, at 236.

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Changes to Renunciation Statute and Veto of Changes to Waivers of Right of Election Highlight Legislative Activity

By Michael S. Kutzin

While the uncertainty surrounding the status of the Federal Estate Tax and the new Power of Attorney statute have taken center stage at recent gatherings of Trusts and Estates practitioners, this Section has quietly advocated for needed changes to New York State law and against amendments that would have unintended consequences.

Sometimes we even succeed.

Renunciation Statute. On March 30, 2010, Governor Paterson signed into law Chapter 21 of the Laws of 2010, which amends EPTL 2-1.11 effective January 1, 2011, to provide that a surviving joint tenant or tenant by the entirety may renounce the survivorship interest to the extent that he or she could make a "qualified disclaimer" of such interest under IRC § 2518.[1] Under the EPTL 2-1.11(b) prior to amendment, a beneficiary was precluded from renouncing any portion of a joint interest or entirety interest in property to the extent that any portion of the property was allocable to the contributions of the beneficiary.

As estate planners know, "qualified disclaimers" under IRC § 2518 have always been a useful tool to take advantage fully of a decedent's exemption from Federal Estate Tax. Since 2001, because of the increased exemptions from Federal Estate Tax through 2009, this tool had become more popular, as it afforded flexibility to testamentary schemes. A surviving spouse could disclaim property into a trust for his or her benefit, take advantage of some or all of the decedent's unused exemption and prevent the property from being included in the surviving spouse's estate.

If a disclaimer of property is a qualified disclaimer under IRC § 2518, then the disclaiming party is not deemed to have made a taxable gift.

In order for a disclaimer to be a qualified disclaimer, it must be irrevocable and unqualified, in writing, delivered to a specified person (usually the personal representative of a decedent's estate) within nine months of when the transfer creating the interest is made, the disclaiming beneficiary must not have accepted the property interest in question or any of its benefits, and it must pass either to the spouse of the decedent or to a person other than the disclaiming beneficiary without any direction on the part of the disclaimant.

Changes to Treasury regulations that were promulgated on December 30, 1997 and became effective in 1998[2] addressed the question of when transfers of survivorship interests in joint tenancies with rights of survivorship or as tenancies by the entirety needed to be made, and under what circumstances the disclaimers can be made.[3] The general rule under the regulations is that the disclaimer must be made no later than nine months after death regardless of whether the interest can be unilaterally severed under local law, and regardless of whether the disclaimant contributed any of the consideration for such property interest.[4]

By amending EPTL 2-1.11 to remove the prohibition on disclaimer of interests in joint tenancies to the extent that the survivor provided some or all of the consideration, and conforming the statute to the requirements for a qualified disclaimer under IRC § 2518, beneficiaries can now disclaim, for example, a survivorship interest in real estate to help fund a credit shelter trust.

While this is a significant change in law, and will assist practitioners and their clients to minimize taxes, a beneficiary will still not be able to take advantage of disclaimers to make tax-free qualified disclaimers of interests in joint bank accounts in New York. This is because the general rule set forth in Treasury Regulations does not apply to interests in joint bank, brokerage or other investment accounts unless the decedent had retained the right to regain the transferor's own contributions—and in any event the surviving joint tenant cannot make a qualified disclaimer of any portion of the joint account attributable to consideration provided by the survivor.[5] Since under Banking Law § 675, a joint tenant with rights of survivorship has an immediate one-half interest in the moiety, disclaimer of survivorship rights in joint tenancy bank accounts and similar financial accounts in New York cannot satisfy the requirements for a qualified disclaimer.

Veto of Changes to Waivers of Right of Election. To the surprise of many of us in the Section, a bill that had been considered, and believed to have been dead

and buried, not only was revived but was passed by both houses of the State legislature this year. Under that proposal (S.2971), EPTL 5-1-1-A(e) would have been amended to preclude enforcement against a surviving spouse where the surviving spouse could have proven that the decedent did not provide "fair and reasonable" disclosure of income, assets and financial obligations prior to the execution of the waiver. The amendment would have also provided the defense against the enforcement of a waiver of a right of election if the surviving spouse voluntarily and expressly waived, in the same manner as a waiver of the right of election, any right of disclosure, or the spouse had "sufficient knowledge" of the decedent's assets prior to the execution of the waiver.

This Section has repeatedly opposed this legislation. As the Committee on Legislation of this Section reported in 2005,

> [u]nder New York common law, all waivers of the right of election are presumed valid unless the surviving spouse proves that he or she was induced to execute the waiver because of fraud or overreaching on the part of the decedent. Evidence of overreaching includes the concealment of facts, misrepresentation or some form of deception. It has consistently been held that failure of a decedent to disclose the extent of his or her wealth to the surviving spouse prior to the execution of a waiver does not constitute overreaching. The proposed legislation would substantially change the common law in this respect.The Section also expressed concerns that the bill's requirement of "fair and reasonable disclosure" unless the surviving spouse had "sufficient knowledge" of decedent's wealth would engender additional litigation and go "well beyond the meaningful inquiry into whether there was in fact any fraud or overreaching."

In his veto message,[6] Governor Paterson stated that the legislation would have "little impact on pre-nuptial agreements" because disclosure is customarily made in pre-nuptial agreements, but that it would create a substantial change from existing practice for post-nuptial agreements. He also stated that he was persuaded by the arguments of the New York State Bar Association and the Association of the Bar of the City of New York to veto the legislation.

Change to Simultaneous Death Statute. As most Trusts and Estates practitioners know, EPTL 2-1.6 was amended in 2009, adopting the provisions of the 1993 version of the Uniform Simultaneous Death Act. Under the amended statute, where devolution of property depends on one person surviving the other, unless there is clear and convincing evidence that one person survived the other by 120 hours, the other person is deemed to have predeceased. Just as under prior law, this provision is a default provision, and can be overridden by will or other instrument.

Prior to amendment, EPTL 2-1.6 generally provided that where there was no evidence that persons died other than simultaneously, then the property was, absent a contrary testamentary, trust or other contractual provision, disposed of as if each decedent had survived the other.

Pending Proposals. This Section is not resting on the laurels of its most recent legislative successes. Aside from efforts to have the numerous difficulties created by the new Power of Attorney law remedied (and which, because it has been exhaustively written about by others,[7] is not included in this article), the following are this Section's priorities when representatives will meet with New York State legislators and the Governor's counsel:

Limiting Time to Exercise Right of Election. Clearly, questions regarding the ability to exercise or waive rights of election are of keen interest to practitioners. One only needs to look at recent case law,[8] and the recently vetoed legislation described above, to see how important an issue this is to the trusts and estates world. The Section has proposed that EPTL 5-1.1-A be amended to clarify that a Surrogate's Court's ability to excuse a default of a surviving spouse for failing to make a timely election would be limited to two years after the decedent's death. Under current law, the time for exercising the right of election is within six months of the issuance of letters, but no later than two years after decedent's death.[9] The Surrogate's Court that issued letters may grant an extension of time to make the election for another six month period, and if the surviving spouse fails to make a timely election, the court may excuse the default, provided that the court had not issued a decree settling the account and that 12 months had not elapsed since the time that letters were issued.[10]

The proposed amendment would tack on the provision that the time for excusing the default would further be limited, in any event, to two years after decedent's death, in order to make it consistent with the general time limitation of two years after death to make the election.

Mandatory Interest on Legacies. As most practitioners know, legatees are often kept waiting for substan-

tial periods of time for their inheritances, even though, unless there is a risk of abatement, there is no reason for payment of these bequests to be delayed beyond the time when the executor can safely make distributions without risk of personal liability to estate creditors—namely seven months after receiving letters.[11] In theory, a disgruntled legatee can obtain interest on the legacy as compensation for any delay so that residuary beneficiaries do not benefit from the opportunity to earn income on the legacy at the legatee's expense. However, the only way for the legatee to earn interest under current law is for the legatee to (a) demand payment, and then, if payment is not made, (b) commence an action.[12]

The interest that the legatee will receive, if the demand is made and the action is commenced, is the rate set in the Will, or if the Will is silent, 6% per year starting from the seven month anniversary from the time that letters are issued.[13] If a legatee can demonstrate that the delay was unreasonable, a court may instead set the rate at the judgment rate of CPLR 5004,[14] namely 9%.

As a practical matter, the requirement that the legatee needs to bring a proceeding simply to trigger an obligation to pay interest is onerous, especially where the bequest is relatively small. Further, the interest fixed by statute may be unduly high or low, depending on the interest rate environment at the time.

The proposed change would simply mandate payment of interest seven months after letters are issued without the need for a formal demand or court proceeding. The interest payable would no longer be a fixed rate, but would instead provide for variable interest based on the Federal funds rate less 1%, with the rate resetting monthly, and, in any event, would be no less than 1%.

Increasing Family Allowance. Under current law, a surviving spouse or, if there is no surviving spouse (or the spouse is disqualified from being treated as such[15]), children under the age of 21 are entitled to money and property worth up to $56,000, regardless of what the terms of decedent's will are or rights in intestacy, and such property is treated as passing outside of decedent's estate.[16] If any of the property listed in the statute is no longer in existence at the time of decedent's death, the surviving spouse or minor children do not receive any other property to make up the deficiency.[17] Moreover, the current law does not permit the surviving spouse or children to obtain the listed property if the property (such as an automobile worth $15,000) is worth more than the maximum by paying the difference.

The Section proposes an expansion of the family allowance to a potential total of $92,500 to take into account inflation and changes in the world since the law was last amended in 1992. For example, the proposal would increase the amount of money that would pass outside of the estate from $15,000 to $25,000, and would similarly increase the automobile allowance from $15,000 to $25,000. It would also permit the spouse or surviving children to pay the estate the difference between the amount of property exempt under the statute and any excess value.

The proposal also calls for distribution of cash up to $10,000 to a minor without the need for the appointment of a guardian.

Directed Trusts. The Section has proposed modernizing New York laws to permit a grantor or testator to appoint a fiduciary known as an "investment advisor" empowered to direct an "administrative trustee" regarding investment decisions.

The Prudent Investor Act as enacted by New York[18] permits a trustee to delegate investment management, provided that the trustee maintains oversight over the delegee, including controlling costs.[19] However, there is no statutory provision that would permit a grantor or testator to divide functions, such as the administrative and investment functions. While the Appellate Division, Second Department has approved such bifurcation,[20] this is not a sufficient level of comfort for fiduciaries, potential grantors or testators to rely upon to ensure that the fiduciary without investment responsibilities will not be held liable for any breaches of fiduciary duties by the fiduciary in charge of investments.

Thus, the Section has proposed codification of the Appellate Division authority in order to eliminate uncertainty on this issue and to ensure that New York remains competitive with other states for trust administration business.

Conclusion. This article only discusses a few of the legislative proposals that have been addressed recently in Albany or are under consideration. Reports by this Section, as well as by other bars, such as the Association of the Bar of the City of New York, are taken seriously by our legislators. Your participation in this Section makes a difference for the public and the profession.

Endnotes

1. EPTL 2-1.11(c), as amended.
2. T.D. 8744.
3. Treas. Reg. § 25-2518-2(c)(4).
4. Treas. Reg. § 25-2518-2(c)(4)(i).
5. Treas. Reg. § 25-2518(c)(4)(iii).
6. Veto Message—No. 6 (March 30, 2010).

7. See, e.g., *Diamond, With a Name Like SmuGgeR It Has to Be Good*, (NYSBA Trusts and Estates Law Section Newsletter, Winter 2009, Vol. 42, No. 4, at 4).
8. See, e.g., *Matter of Berk*, ___ N.Y.S.2d ___, 2010 WL 979238, 2010 N.Y. Slip Op. 02139 (2d Dep't 2010), rev'g 20 Misc. 3d 691, 864 N.Y.S.2d 710 (Sur. Ct. Kings Co. 2008), in which an attempted exercise of a right of election by the caretaker who married her ward at a time she knew he was incapacitated was voided post mortem on equitable grounds.
9. EPTL 5-1.1-A(d)(1).
10. EPTL 5-1.1-A(d)(2).
11. EPTL 11-1.5(a).
12. EPTL 11-1.5(c).
13. EPTL 11-1.5(d).
14. EPTL 11-1.5(e).
15. See EPTL 5-1.2.
16. EPTL 5-3.1.
17. EPTL 5-3.1(b).
18. EPTL 11-2.3.
19. EPTL 11-2.3(c).
20. *In re Rubin*, 172 A.D.2d 841, 570 N.Y.S.2d 996 (2d Dep't 1991).

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Critters in the Estate Plan

By Gerry W. Beyer

Shadow, Dolly, Spot, Lady, Ming, Trouble, Roxy, and Madam Shan are just a few of the pets that have received favored treatment in their owners' wills. Because of the foresight of their humans, these beloved companions lived out their lives in comfortable surroundings rather than meeting the Grim Reaper in the local animal shelter's death chamber.

Virtually all clients want to provide for their pets but few actually do. Why is this? For the most part, either they do not plan their estates, as is the case with most Americans, or their estate planning attorneys neglect to explain how they can make arrangements for their four-legged, feathered, or scaly friends.

Lawyers should, and may be ethically obligated to, inquire about their client's pets so that they can make certain their clients' pets are properly cared for when the client is unable to do so due to injury, illness, or death. This article provides information designed to assist estate planners to carry out the wishes of their pet-owning clients.

I. Introduction

Pet animals play an extremely significant role in the lives of many, if not most, of your clients. People own pets for a variety of reasons—they love animals, they enjoy engaging in physical activity with the animal such as playing ball or going for walks, and they enjoy the giving and receiving of attention and unconditional love. Research indicates that pet ownership positively impacts the owner's life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization, and improving concentration and mental attitude. Pet owners treat their animals as members of their families and are extremely devoted to their animal companions.

The number of individuals who own animals is staggering. As many as 43.5 million households in the United States own dogs and 37.7 million own cats. In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are 14.7 million households with fish, 6.4 million with birds, over 5 million with small animals such as hamsters and rabbits, and 4.4 million with reptiles. The love owners have for their pets transcends death, as documented by studies revealing that between 12% and 27% of pet owners include their pets in their wills or trusts.

Many famous and/or wealthy individuals have provided for their pets. Billionaire Leona Helmsley left $12 million in her will to a trust to benefit her white Maltese named Trouble. Singer Dusty Springfield's will made extensive provisions for her cat, Nicholas. The will instructed that Nicholas' bed be lined with Dusty's nightgown, Dusty's recordings be played each night at Nicholas' bedtime, and that Nicholas be fed imported baby food. Doris Duke, the sole heir to Baron Buck Duke who built Duke University and started the American Tobacco Company, left $100,000 in trust for the benefit of her dog.

II. History

The common law courts of England looked favorably on gifts to support specific animals.[1] This approach, however, did not cross the Atlantic. Attempted gifts in favor of specific animals usually failed for a variety of reasons such as for being in violation of the Rule Against Perpetuities, which traditionally limited how long a trust may last to a time period based on a human, rather than animal, life. Gifts for animals also failed because they lacked a human or legal entity as a beneficiary who would have the ability to go to court to enforce the trust.

The persuasiveness of these two traditional legal grounds for prohibiting gifts in favor of pet animals is waning rapidly under modern law. In at least 80% of the states, legislatures have expressly authorized pet trusts.

In 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring."[2] At least ten states have enacted this provision including Alaska,[3] Arizona,[4] Colorado,[5] Hawaii,[6] Illinois,[7] Michigan,[8] Montana,[9] North Carolina,[10] South Dakota[11] and Utah.[12] In addition, several other states have used the UPC provision as a model for their own enabling legislation.

Likewise, the Uniform Trust Code completed in 2000 provides that a "trust may be created to provide for the care of an animal alive during the settlor's lifetime."[13] At least twenty jurisdictions, including Alabama,[14] Arkansas,[15] District of Columbia,[16] Florida,[17] Kansas,[18] Maine,[19] Maryland,[20] Missouri,[21] Nebraska,[22] New Hampshire,[23] New Mexico,[24] North Dakota,[25] Ohio,[26] Oregon,[27] Pennsylvania,[28] South Carolina,[29]

Tennessee,[30] Vermont,[31] Virginia,[32] and Wyoming,[33] have already adopted this provision or have modeled their statutes after this provision.

Many other states have developed their own statutes, often using the uniform provisions as models. These states include California,[34] Connecticut,[35] Delaware,[36] Idaho,[37] Indiana,[38] Iowa,[39] Nevada,[40] New Jersey,[41] New York,[42] Rhode Island,[43] Texas,[44] and Washington.[45]

One state, Wisconsin,[46] authorizes trusts for the benefit of pets, but does not make them enforceable. In other words, in this state, the trust is merely honorary.

The remaining states have not yet legislatively authorized pet trusts.

III. Short-Term Planning Steps

The owner should take four important steps to assure that the animal will receive proper care immediately upon the owner being unable to look after the animal.

A. Animal Card

The owner should carry an "animal card" in the owner's wallet or purse. This card should contain information about the pet, such as its name, type of animal, location where housed, and special care instructions along with the information necessary to contact someone who can obtain access to the pet. If the owner is injured or killed, emergency personnel will recognize that an animal is relying on the owner's return for care and may notify the named person or take other steps to locate and provide for the animal. The animal card will help assure that the animal survives to the time when the owner's plans for the pet's long-term care take effect.

B. Animal Document

The owner should prepare an "animal document" which contains the same information as on the animal card and perhaps additional details as well. The owner should keep the animal document in the same location where the pet owner keeps his or her estate planning documents. The benefit of this technique is basically the same as for carrying the animal card, that is, an enhanced likelihood that the owner's desires regarding the pet will be made known to the appropriate person in a timely manner.

C. Door Sign

The owner should provide signage regarding the pets on entrances to the owner's dwelling. These notices will alert individuals entering the house or apartment that pets are inside. The signage is also important during the owner's life to warn others who may enter the dwelling (e.g., police, firefighters, inspectors, meter readers, friends) about the pets.

D. Power of Attorney

The owner should consider including special instructions pertaining to the pet in the owner's durable power of attorney. These instructions should authorize the agent to care for the pet and to spend the owner's money on the pet's care (day-to-day, veterinarian, etc.). The owner may also wish to grant the agent the power to place the pet with a long-term caregiver.

IV. Traditional Trust

The most predictable and reliable method to provide for a pet animal is for the owner to create an enforceable inter vivos or testamentary trust in favor of a human beneficiary (the pet's caregiver) and then require the trustee to make distributions to the beneficiary to cover the pet's expenses provided the beneficiary is taking proper care of the pet. This technique avoids the two traditional problems with gifts to benefit pet animals. The actual beneficiary is a human and thus there is a beneficiary with standing to enforce the trust and there is a human measuring life for rule against perpetuities purposes. Even if the owner lives in a state like New York, which enforces animal trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner's intent being carried out. For example, some states limit the duration of an animal trust to 21 years. If a long-lived animal (such as a parrot) is involved, the trust may end before the animal dies.

A wide variety of factors and considerations come into play in drafting a trust to carry out the pet owner's desires. This section discusses the issues which the pet owner should address.

A. Determine Whether to Create Inter Vivos or Testamentary Trust

The pet owner must initially determine whether to create an inter vivos trust or a testamentary trust. An inter vivos trust takes effect immediately and thus will be in operation when the owner dies, thereby avoiding the delay between the owner's death and the probating of the will and subsequent functioning of the trust. Funds may not be available to provide the pet with proper care if there is a delay after death because the trust is not already in place. The pet owner can also make changes to the inter vivos trust more easily than to a testamentary trust which requires the execution of a new will or codicil.

On the other hand, the inter vivos trust may have additional start-up costs and administration expenses. A separate trust document is needed and the owner must part with property to fund the trust. The inter vivos trust, could, however, be nominally funded. Additional funding could be tied to a nonprobate asset, such as a bank account naming the trustee (in trust) as the pay on death payee or a life insurance policy nam-

ing the trustee (in trust) as the beneficiary, to provide the trust with immediate funds after the owner's death. If appropriate, the pet owner could provide additional property by using a pour over provision in the owner's will. Inter vivos trusts will almost always be changeable and revocable until the pet owner's death.

B. Designate Trust Beneficiary/Animal Caregiver

The pet owner must thoughtfully select a caregiver for the animal. This person becomes the actual beneficiary of the trust who has standing to enforce the trust if the trustee fails to carry out its terms. Thus, the caregiver should be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.

It is of utmost importance for the pet owner to locate a beneficiary/caregiver who is willing and able to care for the animal in a manner that the owner finds acceptable. The prospective caregiver should be questioned before being named to make certain the caregiver will assume the potentially burdensome obligation of caring for the pet, especially when the pet is in need of medical care or requires special attention as it ages. The pet and the prospective caregiver should meet and spend quality time together to make sure they, and the caregiver's family, get along harmoniously with each other.

The pet owner should name several alternate caregivers should the owner's first choice be unable to serve for the duration of the pet's life. To prevent the pet from ending up homeless, the owner may authorize the trustee to select a good home for the pet should none of the named individuals be willing or able to accept the animal. The trustee should not, however, have the authority to appoint himself or herself as the caregiver as such an appointment would eliminate the checks and balances aspect of separating the caregiver from the money provider.

If the pet owner is unable to name a caregiver and does not want to leave the selection up to the trustee, the pet owner could appoint several individuals, such as veterinarians, family members, and friends, to an animal care panel which is charged with the responsibility of locating a suitable caregiver. The panel could use various means to locate a proper caregiver, such as advertising in a local newspaper and consulting with local animal welfare organizations. The panel would interview the prospective caregivers and select the person it felt would provide the best care for the pet under the terms of the trust.

C. Nominate Trustee

As with the designation of the caregiver, the pet owner needs to select the trustee with care and check with the trustee before making a nomination. The trustee, whether individual or corporate, must be willing to administer the property for the benefit of the animal and to expend the time and effort necessary to deal with trust administration matters. If the pet owner has sufficient funds, a set stipend for the trustee may be appropriate. Note that professional and corporate trustees typically charge for their services. The pet owner should name alternate trustees should the named trustee be unable to serve until the trust terminates. In addition, an alternate trustee may have standing to remove the original trustee from office should the original trustee cease to administer the trust for the benefit of the pet.

D. Bequeath Animal to Trustee, in Trust

The pet owner should bequeath the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caregiver. If the owner has left animal instructions in an animal card or document, the animal may actually already be in the possession of the caregiver.

E. Determine Amount of Other Property to Transfer to Trust

The pet owner should carefully compute the amount of property necessary to care for the animal and to provide additional payments, if any, for the caregiver and the trustee. Many factors will go into this decision, such as the type of animal, the animal's life expectancy (which sets out the life expectancies for dogs, cats, parrots, reptiles, amphibians, rodents, and some exotics), the standard of living the owner wishes to provide for the animal, and the need for potentially expensive medical treatment. Adequate funds should also be included to provide the animal with proper care, be it with an animal-sitter or at a professional boarding business, when the caregiver is on vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable to personally provide for the animal.

The size of the pet owner's estate must also be considered. If the owner's estate is relatively large, the owner could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for emergencies. On the other hand, if the owner's estate is small, the owner may wish to transfer a lesser amount and anticipate that the trustee will supplement income with principal invasions as necessary.

The pet owner must avoid transferring an unreasonably large amount of money or other property to the trust because such a gift is likely to encourage heirs and remainder beneficiaries of the owner's will to contest the arrangement. The pet owner should determine the amount which is reasonable for the care of the animals and fund the trust accordingly. Even if the owner has no desire to benefit family members, friends, or charities until the demise of the animal, the owner should not leave his or her entire estate for the animal's benefit. If the amount of property left to the trust is unreasonably

large, the court may reduce the amount to what it considers to be a reasonable amount.

It is often a good idea to state expressly in the trust that if a court determines that excess funds were placed into the trust, then such funds pass to a certain person who or charity that, in the pet owner's opinion, would be very unlikely to ever make a claim that the funds were excessive. Thus, an incentive to contest the amount is removed.

F. Describe Desired Standard of Living

The owner should specify the type of care the beneficiary is to give the animal and the expenses for which the caregiver can expect reimbursement from the trust. Typical expenses include food, housing, grooming, medical care, and burial or cremation fees. The pet owner may also want to include more detailed instructions. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee. If the pet owner elects to do so, the pet owner should seriously consider providing the caregiver with general guidelines to both (1) avoid claims that the caregiver is expending an unreasonable amount on the animal and (2) prevent the caregiver from expending excessive funds.

G. Specify Distribution Method

The owner should specify how the trustee is to make disbursements from the trust. The simplest method is for the owner to direct the trustee to pay the caregiver a fixed sum each month regardless of the actual care expenses. If the care expenses are less than the distribution, the caregiver enjoys a windfall for his or her efforts. If the care expenses are greater than the distribution, the caregiver absorbs the cost. The caregiver may, however, be unable or unwilling to make expenditures in excess of the fixed distribution that are necessary for the animal. Thus, the owner should permit the trustee to reimburse the caregiver for out-of-pocket expenses exceeding the normal distribution.

Alternatively, the owner could provide only for reimbursement of expenses. The caregiver would submit receipts for expenses associated with the animal on a periodic basis. The trustee would review the expenses in light of the level of care the pet owner specified and reimburse the caregiver if the expenses are appropriate. Although this method may be in line with the owner's intent, the pet owner must realize that there will be additional administrative costs and an increased burden on the caregiver to retain and submit receipts.

H. Establish Additional Distributions for Caregiver

The owner should determine whether the trustee should make distributions to the caregiver above and beyond the amount established for the animal's care. An owner may believe that the addition of the animal to the caregiver's family is sufficient, especially if the trustee will reimburse the caregiver for all reasonable care expenses. On the other hand, the animal may impose a burden on the caregiver and thus additional distributions may be appropriate to encourage the caregiver to continue as the trust's beneficiary. In addition, the caregiver may feel more duty bound to provide good care if the caregiver is receiving additional distributions contingent on providing the animal with appropriate care.

I. Limit Duration of Trust

The duration of the trust should not be linked to the life of the pet. The measuring life of a trust must be a human being unless state law has enacted specific statutes for animal trusts or has modified or abolished the rule against perpetuities. For example, the pet owner could establish the trust's duration as 21 years beyond the life of the named caregivers and trustees with the possibility of the trust ending sooner if the pet dies within the 21-year period.

J. Designate Remainder Beneficiary

The pet owner should clearly designate a remainder beneficiary to take any remaining trust property upon the death of the pet. Otherwise, court involvement will be necessary with the most likely result being a resulting trust for the benefit of the owner's successors in interest. The pet owner must be cautioned not to leave the remaining trust property to the caregiver because the caregiver would then lack a financial motive to care for the animal and thus might accelerate its death to gain immediate access to the trust corpus. The pet owner may wish to consider naming a charity which benefits animals as the remainder beneficiary.

K. Identify Animal to Prevent Fraud

The pet owner should clearly identify the animal which is to receive care under the trust. If this step is not taken, an unscrupulous caregiver could replace a deceased, lost, or stolen animal with a replacement so that the caregiver may continue to receive benefits.

The pet owner may use a variety of methods to identify the animal. A relatively simple and inexpensive method is for the trust to contain a detailed description of the animal including any unique characteristics such blotches of colored fur and scars. Veterinarian records and pictures of the animal would also be helpful. A professional could tattoo the pet with an alpha-numeric identifier. A tattoo, however, could later cause problems for the pet because a pet thief could mutilate the pet to remove the tattoo, such as cutting off an ear or leg, if the pet's primary function is breeding. A more sophisticated procedure is for the pet owner to have a microchip implanted in the animal. The trustee can then have the animal scanned to verify that the animal the caregiver is minding is the same animal. Of course, an enterprising caregiver could surgically remove the microchip and

have it implanted in another physically similar animal. The best, albeit expensive, method to assure identification is for the trustee to retain a sample of the animal's DNA before turning the animal over to the caregiver and then to run periodic comparisons between the retained sample and new samples from the animal.

A pet owner, however, may be less concerned with providing for the animals owned at the time of will execution, but rather wants to arrange for the care of the animals actually owned at time of death. In this situation, the owner may wish to describe the animals as a class instead of by individual name or specific description.

L. Require Trustee to Inspect Animal on Regular Basis

The owner should require the trustee to make regular inspections of the animal to determine its physical and psychological condition. The inspections should be at random times so the caregiver does not provide the animal with extra food, medical care, or attention merely because the caregiver knows the trustee is coming. The inspections should take place in the caregiver's home so the trustee may observe first-hand the environment in which the animal is being kept.

M. Provide Instructions for Final Disposition of Animal

The pet owner should include instructions for the final disposition of the animal when the animal dies. The owner may want the animal to be buried in a pet cemetery or cremated, with the ashes either distributed or placed in an urn. The cost for a pet burial ranges from $250 to $1,000 while pet cremations are significantly less expensive. A memorial for the pet may also be created for viewing on a variety of Internet sites.

N. Sample Provisions

Sample provisions are available at http://www.professorbeyer.com/Articles/Sample_Provisions.htm.

V. "Statutory" Pet Trust

With the enactment of Estates, Powers and Trusts Law 7-8.1 which took effect on June 18, 1996, New York joined the growing number of states which authorize statutory pet trusts.

Note that the use of the phrase "honorary trusts" in the title of § 7-8.1 is misleading. This statute authorizes *enforceable* statutory pet trusts, not merely unenforceable honorary trusts.

The New York statutory pet trust is a basic plan and does not require the pet owner to make many decisions regarding the terms of the trust. The statute "fills in the gaps" and thus a simple provision in a will such as, "I leave $1,000 in trust for the care of my dog, Fido" may be effective. As discussed in detail below, the statute would provide the following with respect to this bequest:

- The trust ends when Fido dies.
- The court may appoint a person to enforce the trust, that is, to make certain the $1,000 is actually used for Fido.
- Any individual or a trustee may ask the court to appoint a person to enforce the trust.
- If the settlor did not name a trustee or if the named trustee is unwilling or unable to serve, the court must appoint a trustee.
- The $1,000 may be used only for Fido's care unless the court determines that $1,000 is excessive. Any excess must be distributed according to the terms of the trust or, if none, through the pet owner's estate.
- When Fido dies, the remaining property (if any) will pass under the terms of the trust or, if none, through the pet owner's estate.

A. Authorization

The statute permits the pet owner to create a trust to provide for the care of "a designated domestic or pet animal." Thus it appears that the animal must be alive at the time of trust creation so that a statutory pet trust may not be created for animals that are not born until a later time.

B. Trustee

If the settlor failed to name a trustee or if no named trustee is willing or able to serve, the court must appoint a trustee.

C. Termination

The trust ends at the earlier of (1) the death of the animals for which the trust was created, or (2) 21 years from the date of trust creation.

A bill was introduced on February 23, 2009 which would remove the 21-year limitation. This amendment would allow pet owners to create statutory pet trusts for long-lived animals such as horses, parrots, and tortoises. 2009 N.Y. A.B. 5985 (referred to Judiciary on May 26, 2009).

D. Enforcement

In a traditional pet trust, the named beneficiary has standing to enforce the trust but a statutory pet trust may lack a human beneficiary. To make certain someone has standing to enforce the trust, the statute permits the settlor to appoint a trust enforcer.

Alternatively, if the settlor does not appoint an enforcer, the court may appoint someone upon application of an individual or a trustee.

E. Use of Property

1. General Rule

The property in the trust (both income and principal) may be used only for the care of the animal (not the trustee) unless one of the exceptions discussed below applies.

2. Exceptions

The pet owner may provide for other uses of trust property besides to benefit the covered animal.

If the court determines that the value of the trust property *substantially* exceeds the amount required for the care of the animals, the court may authorize trust property to be used in a different manner. The court may allow the excess property to be distributed as the settlor specified in the trust or, if no specification, through the estate of a deceased settlor. Note that the statute is silent about the use of excess funds if the trust instrument contains no instructions and the settlor is still alive.

F. Power of the Court

The court is granted the power to make whatever orders or determinations that are advisable to carry out the settlor's intent and the underlying purpose of this statute, that is, to benefit the designated animals.

VI. Consider Outright Conditional Gift

An outright gift of the animal coupled with a reasonable sum to care for the animal which is conditioned on the beneficiary taking proper care of the animal is a simpler but less predictable method. Both drafting and administrative costs may be reduced if the owner does not create a trust. Only if the pet owner's estate is relatively modest should this technique be considered because there is a reduced likelihood of the owner's intent being fulfilled as there is no person directly charged with ascertaining that the animal is receiving proper care. Although the owner may designate a person to receive the property if the pet is not receiving proper care, such person might not police the caregiver sufficiently, especially if the potential gift-over amount is small or the alternate taker does not live close enough to the caregiver to make first-hand observations of the animal.

If the owner elects this method, the owner needs to decide if the condition of taking care of the pet is a condition precedent or a condition subsequent. If the owner elects a condition precedent, the caregiver receives the property only if the caregiver actually cares for the animal. Thus, if the animal were to predecease the owner, the caregiver would not benefit from the gift. On the other hand, the owner could create a condition subsequent so that the gift vests in the caregiver and is only divested if the caregiver fails to provide proper care. The owner should expressly state what happens to the gift if the pet predeceases its owner. In the absence of express language, the caregiver would still receive a condition subsequent gift but not one based on a condition precedent.

VII. Consider Outright Gift to Veterinarian or Animal Shelter

A simple option available to the pet owner is to leave the pet and sufficient property for its care to a veterinarian or animal shelter. This alternative will not, however, appeal to most pet owners who do not like the idea of the pet living out its life in a clinic or shelter setting. The animal would no longer be part of a family and is not likely to receive the amount and quality of special attention that the pet would receive in a traditional home. Nonetheless, this option may be desirable if the owner is unable to locate an appropriate caregiver for the animal.

VIII. Consider Gift to Life Care Center

In exchange for an inter vivos or testamentary gift, various organizations promise to provide care for an animal for the remainder of the animal's life. The amount of the payment often depends on the type of animal, age of animal, and age of pet owner.

IX. Tax Concerns

A. Income Tax

Both the federal and state governments may impose an income tax on the income earned by property in a pet trust just as these entities do with regard to other trusts. Depending on how the trust is structured, the following individuals or entities may be responsible for the tax. If the pet owner retained the power to revoke the trust, then the pet owner is responsible for the tax on the income earned by the trust property. If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the beneficiary will be responsible for the income tax on trust distributions up to the amount of the trust's distributable net income for the year of distribution. If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the trust will be responsible for the income tax on trust income which is retained in the trust (i.e., not distributed to the beneficiary).

To avoid income tax concerns, the settlor could require that all trust investments be in municipal bonds which are exempt from the federal income tax and any applicable state or local income tax.

B. Gift Tax

If the pet owner creates an inter vivos pet trust, gift tax issues may arise. No gift tax will be imposed if the pet owner retains the power to revoke the trust because an irrevocable transfer has not occurred. Transfers to a pet trust rarely qualify for the annual exclusion.

Accordingly, the pet owner will be responsible for the gift tax imposed on the transfer. However, most transfers will be protected from gift tax liability by the pet owner's $1 million lifetime gift tax exemption.

C. Estate Tax

If the pet owner properly structured an inter vivos irrevocable trust, none of the property in the pet trust will be subject to estate tax upon the pet owner's death. However, if the pet owner created a revocable trust, the property remaining in the trust at the time of the pet owner's death will be subject to the federal estate tax, assuming there is one applicable to the pet owner's estate. For wealthy pet owners, the estate tax issue which may arise is whether the estate would be entitled to a charitable deduction if the remainder beneficiary is a recognized charity. Rev. Ruling 78-105 indicated that the answer is "no" unless the trust is void so that the entire corpus passed directly to a charity without ever being used for the pet. As recently as 2007, legislation was introduced in Congress, the Morgan Bill, which would allow charitable remainder pet trusts to enjoy the charitable estate tax deduction.

X. Conclusion

Estate planning provides a method to provide for those whom we want to comfort after we die and to those who have comforted us. Family members and friends can be a source of tremendous support, but they may also let you down in a variety of ways ranging from minor betrayals to orchestrating your own death. Pet animals, however, have a much better track record in providing unconditional love and steadfast loyalty. It is not surprising that a pet owner often wants to assure that his or her trusted companion is well cared for after the owner's death. By using a properly constructed traditional trust or a statutory pet trust, you may carry out your client's intent to protect his or her non-human family members.

Endnotes

1. *See In re Dean*, 41 Ch. D. 552 (1889).
2. Unif. Prob. Code § 2-907, cmt. (1990).
3. Alaska Stat. § 13.12.706 (2009).
4. Ariz. Rev. Stat. Ann. § 14-2907 (2010).
5. Col. Rev. Stat. Ann. § 15-1.5-110 (2010).
6. Haw. Unif. Prob. Code § 560:5-701.
7. 760 Ill. Comp. Stat. Ann. 5/15.2 (2010).
8. Mich. Comp. Laws Ann. § 700.2272 (2010).
9. Mont. Code Ann. § 72-2-1017 (2009).
10. N.C. Gen. Stat. Ann. § 36C-4-408 (2009).
11. S.D. Codified Laws § 55-1-21 (2009).
12. Utah Unif. Prob. Code § 75-2-1001 (2009).
13. Unif. Trust. Code § 408 (2000).
14. Ala. Unif. Trust Code § 19-3B-408 (2009).
15. Ark. Trust Code § 28-73-408 (2009).
16. D.C. Unif. Trust Code § 19-1304.08 (2010).
17. Fla. Trust Code § 736.0408 (2010).
18. Kan. Unif. Trust Code § 58a-408 (2009).
19. Me. Unif. Trust Code § 408 (2009).
20. Md. Estates & Trusts Code § 14-112 (2010).
21. Mo. Unif. Trust Code § 456.4-408 (2010).
22. Neb. Unif. Trust Code § 30-3834 (2009).
23. N.H. Unif. Trust Code § 564-B:4-408 (2010).
24. N.M. Unif. Trust Code § 46A-4-408 (2010).
25. N.D. Cen. Code Ann. § 59-12-08 (2009).
26. Ohio Rev. Code Ann. § 5804.08 (2010).
27. Or. Unif. Trust Code § 130.185 (2009).
28. 20 Pa. Consol. Stat. Ann. § 7738 (2010).
29. S.C. Trust Code § 62-7-408 (2009).
30. Tenn. Unif. Trust Code § 35-15-408 (2010).
31. Vt. Stat. Ann. tit. 14A § 408 (2009).
32. Va. Unif. Trust Code § 55-544.08 (2009).
33. Wyo. Uniform Trust Code § 4-10-409 (2009).
34. Cal. Prob. Code § 15212 (2009).
35. Conn. Gen. Stat. Ann. § 45a-489a (2010).
36. Del. Code Ann. tit. 12 § 3555 (2010).
37. Idaho Unif. Prob. Code § 15-7-601 (2010).
38. Ind. Trust Code § 30-4-2-18 (2010).
39. Iowa Trust Code § 633A.2105 (2010).
40. Nev. Rev. Stat. Ann. § 163.0075 (2007).
41. N.J. Stat. Ann. § 3B:11-38 (2010).
42. N.Y. EPTL 7-8.1 (McKinney 2010).
43. R.I. Gen Laws Ann. § 4-23-1 (2009).
44. Tex. Prop. Code Ann. § 112.037.
45. Wash. Prob. and Trust Law § 11.118.005 (2010).
46. Wis. Trusts Law § 701.11 (2009).

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The Ethical and Practical Considerations of Removing an Incapacitated Trustee

By Carolyn B. Handler

I. Introduction

In the State of New York, the process of removing a trustee with diminished capacity presents unique challenges. The removal statutes under the Surrogate's Court Procedure Act do not expressly refer to incapacity, whether physical or mental, as a basis for removing a trustee, and the definitions of incapacity and incompetence under the general provisions of the SCPA do not clearly apply to fiduciary removal.[1] Rather, in the case of a testamentary trustee, the standards for removal under the SCPA are purposefully broad, somewhat vague, and therefore may lack the protections provided under other relevant statutes, most notably, Article 81 of the New York Mental Hygiene Law.[2] *Inter vivos* trusts, which customarily may be administered without court supervision, may also require court intervention if the trust instrument fails to provide specific definitions and procedures for removing a trustee who is believed to be incapacitated.[3] The related question of whether there is a duty to remove an incapacitated trustee similarly raises prudence issues among co-trustees and ethical considerations for lawyers representing one or more fiduciaries under the recently adopted New York Rules of Professional Conduct.[4]

This article discusses the current rules and standards governing judicial removal of incapacitated trustees and raises the issue of whether the New York legislature should establish a more specific standard for determining the incapacity of a trustee. The article also suggests drafting considerations for *inter vivos* trusts and procedures in the case of suspected trustee incapacity, with an eye toward avoiding court intervention. Finally, the article discusses the duties among co-trustees to address an incapacity among their ranks and the related ethical responsibilities of a lawyer in the case of multiple or separate fiduciary representation where diminished capacity becomes an issue.

II. Judicial Removal of Incapacitated Trustees

A trustee may be judicially removed with notice to all interested parties under SCPA 711.[5] SCPA 711(1)-(9) enumerates several specific grounds for removing fiduciaries to whom letters of authority issue from the court. In addition, SCPA 711(10) and SCPA 711(11), respectively provide separate catchall grounds for removing testamentary trustees and lifetime trustees.[6]

Removal on the grounds of trustee incapacity is addressed in two specific sections of SCPA 711, albeit somewhat vaguely. SCPA 711(2) authorizes the Surrogate to remove a trustee upon a showing that he or she is unfit for the execution of the office of trustee by reason of a want of understanding. Similarly, SCPA 711(8) provides that a trustee may be removed "where he or she does not possess the qualifications required of a fiduciary by reason of want of understanding, or who is otherwise unfit for the execution of the office."[7] In addition to these specific grounds, the Surrogate may also consider incapacity as grounds for removal of a testamentary trustee under SCPA 711(10) or a lifetime trustee under SCPA 711(11) where it is shown that the trustee is unsuitable to execute the trust.

In New York, a person's competency is presumed[8] and the party alleging incapacity bears the burden of proving lack of capacity by clear and convincing evidence.[9] This is in keeping with the general rule that the burden of proof in removal proceedings is on the party seeking to revoke the fiduciary's appointment.[10] Similarly, removal proceedings under SCPA 711 may be brought, with notice to the allegedly incapacitated trustee, by a co-trustee, creditor, beneficiary, or a person on behalf of a minor or a surety on a trustee's bond.[11]

Courts have historically construed want of understanding under SCPA 711 to mean that the person fails to possess the requisite understanding of the duties and responsibilities of a trustee.[12] Although well-settled case law provides that want of understanding does not imply an entire lack of mental capacity,[13] it remains a slightly elusive and anachronistic formulation to apply, with the result that modern courts have tended to favor the broader, alternative standard of "otherwise unfit to serve" under SCPA 711(8) as grounds for removal in the case of alleged trustee incapacity.[14]

However, the "otherwise unfit to serve" standard, while purposefully broad,[15] is also somewhat vague and may operate, in certain cases, to deprive the allegedly incapacitated trustee of the opportunity to be evaluated in light of more developed standards and protections currently available under New York law in particular, those under Article 81 of the MHL.[16] Incapacity determinations based on clear statutory standards are particularly desirable in fiduciary removal proceedings since courts have typically granted the relief sparingly in deference

to the testator's or grantor's expressed wishes as to fiduciary appointments.[17]

Moreover, the question of whether a trustee no longer has the requisite capacity to administer a trust is similar to the question of whether a person is in need of a guardian for property management under Article 81 of the MHL.[18] Accordingly, courts should be encouraged to consider and apply the same functional criteria for determining trustee incapacity in removal proceedings. Although a detailed discussion of the provisions of Article 81 of the MHL is beyond the scope of this article, it is noted that in determining whether a person is incapacitated for purposes of needing a guardian for property management under Article 81, a court is directed to give primary consideration to a person's functional level, defined in MHL § 81.03(b) as the ability of the person with respect to property management. The court is similarly directed to consider the person's functional limitations, defined in MHL § 81.03(c) as the behavior or conditions of a person which impair the ability to provide for property management, and assess "the nature and extent of the person's property and financial affairs and his or her ability to manage them…including the extent of the demands placed on the person…by the nature and extent of that person's property and financial affairs."[19]

In order to encourage courts to consider the framework adopted in MHL Article 81 for determining the functional abilities and limitations of the trustee, the New York State Legislature might consider modifying SCPA 711 to provide an additional express basis for removing a trustee who is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute the duties of a trustee. Such a determination would be predicated upon a consideration by the court of the functional criteria for determining the trustee's ability to manage trust property as set out in Article 81.[20]

III. Reminders for Drafting Trustee Incapacity Provisions in Lifetime Trusts

Unlike testamentary trusts, properly drafted lifetime trusts need never see the inside of a courthouse in order to be properly administered. This desirable state of affairs can be seriously disrupted if the draftsperson has not given adequate consideration to setting out in the trust instrument the precise mechanisms and procedures for removing a trustee who is believed to be incapacitated.[21] The following drafting suggestions are offered to assist the practitioner in developing workable procedures:

1. Provide Specific Definition of Trustee Incapacity

Trust instruments sometimes contain a legal definition of legal disability or a definition of mental incapacity, or both, which typically govern the trust for all purposes, including determinations of whether a beneficiary is entitled to receive trust property in his or her own right, exercise certain powers of appointment, or possesses sufficient capacity to appoint or, in some cases remove, trustees under the trust instrument. Given the specialized rights and duties of the trustee, it may be preferable to have the trust instrument contain a separate definition or standard for determining trustee capacity. One possible formulation could be a determination that the trustee has suffered a clinically significant impairment of mental function that may interfere with his or her ability to make decisions concerning the proper administration of the trust in the best interest of the beneficiaries. Another possible formulation, patterned on the California statute discussed in footnote 20 above, could be a determination that the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office.[22]

2. Mechanisms for Determining Incapacity

Since the removal of a trustee on the grounds of incapacity presents both substantive and procedural challenges, with possibly stigmatizing consequences for the affected trustee and potential bottleneck issues for the efficient administration of the trust, the trust instrument should contain mechanisms which (a) give written notice to the affected trustee or certain of his or her family members that such trustee's capacity is being determined by a majority of the other trustees, (b) establish means for the affected trustee or such trustee's family members to identify for the other trustees, within a relatively short period of time after having received the notice described in subparagraph (a) above (within 5 to 10 days), one or more qualified physicians who will certify whether or not the alleged affected trustee is incapacitated, (c) provide channels for reporting determinations of incapacity to the other trustees and (d) provide for the automatic or deemed resignation of an affected trustee if a physician is unwilling to provide an incapacity certification or if the affected trustee for any reason refuses an examination for purposes of the certification or refuses to make the results of a certification known to the other trustees within a defined period of time (within 30

days) after having received the notice described in subparagraph (a) above.

One clear advantage of having an automatic resignation provision is to prevent gridlock in the administration of the trust if an affected trustee is unwilling to obtain the incapacity certification described above or if a physician is unwilling to provide such a certification because of privacy concerns under the Health Insurance Portability and Accountability Act (HIPAA)[23] One method to address potential HIPAA concerns is to have a trustee sign a HIPAA waiver as a requirement of serving as trustee. However, obtaining such a waiver may not be practical in all cases and will not cover the case of an affected trustee who refuses to be examined or to make the results of an examination known to his or her co-trustees. In such a circumstance, an automatic resignation provision would be a preferable alternative to commencing a costly and perhaps uncertain court proceeding to remove the affected trustee.

IV. Fiduciary and Ethical Duties

Although SCPA 711 expressly authorizes a trustee to petition for the removal of such trustee's co-fiduciary, it is not clear whether, in all instances, a trustee has an affirmative duty to seek the removal of a co-trustee who he or she believes is incapacitated. Rather, the question of whether there is such a duty appears to turn on the number of trustees serving and the potential or actual loss to be suffered by the trust if the allegedly incapacitated trustee is not removed.

EPTL 10-10.7 governs decision making among multiple fiduciaries, and requires that fiduciaries act by majority rule in discretionary (as opposed to ministerial) matters.[24] Thus, unless otherwise provided in the trust instrument, where two trustees are serving, they must generally act unanimously as to most matters of importance in the life of the trust. Under these circumstances, where the administration of the trust would come to a halt in the event of the incapacity of one of the two trustees, the other trustee has been held to have an affirmative duty to seek the removal of his co-trustee.[25] The duty to seek the removal of a co-trustee in the case of two trustees is similarly supported by SCPA 2309, which provides that in the case of two trustees, each is entitled to receive a full statutory commission service as a trustee. Even without other evidence of loss in the administration of the trust, the payment of compensation to a trustee during the period of his or her incapacity could properly be viewed as an avoidable loss to the trust, which the co-trustee with capacity arguably has a duty to prevent.

Where more than two trustees are serving, the law is not as clear that co-trustees have an unqualified duty to seek the removal of one of their number who is allegedly incapacitated.[26] In the absence of negligence in the handling of the trust estate or other loss to the trust, courts have been reluctant to find such a duty.[27] A lesser duty to seek removal in the case of more than two trustees is similarly supported by SCPA 2313, which provides that in the case of more than two trustees, generally no more than two commissions are allowed. The two commissions thus payable are to be apportioned among the trustees according to their respective efforts unless they otherwise agree in writing to a different allocation, provided that no trustee is entitled to receive more than one full commission.[28] Since the multiple commissions statute provides for the payment of two commissions whenever there are more than two trustees serving, the question of whether the incapacitated co-trustee is entitled to receive any portion thereof has been held to be an internal matter among the trustees and does not involve loss to the trust or negligence to the beneficiaries.[29]

Trustee incapacity and the potential need for removal also present ethical considerations for a lawyer representing one or more trustees. In the case of multiple representation, if one of the trustees shows signs of incapacity during the period of trust administration, it would likely not be ethically permissible for the lawyer to represent one client-fiduciary in a proceeding to remove the other and, if undertaken, would likely result in the lawyer's disqualification.[30] In order to avoid even the appearance of so-called "turncoat" representation, the lawyer is required in such a circumstance to withdraw from the dual representation under established ethical rules.[31] Although the current body of law interpreting the rules of attorney conduct in case of multiple representation of fiduciaries was largely developed under the prior New York Code of Professional Responsibility, the corresponding provisions of the recently adopted New York Rules of Professional Conduct (New York Rules), which took effect in April 2009, do not meaningfully depart from the established principles of the prior law.[32]

Where a lawyer represents a sole trustee or one of several trustees, other ethical considerations are presented under Rule 1.14 of the New York Rules, which provides a new substantive rule regarding a lawyer's representation of a client with diminished capacity.[33] Under the new rule, a client is considered as having diminished capacity when he or she is unable to make "adequately considered decisions in connection with a representation" due to "mental impairment or for some other reason."[34] If the lawyer "reasonably believes"[35] the client to have diminished capacity, the lawyer has a duty to maintain a conventional relationship with the client as far as reasonably possible. However, when the lawyer reasonably believes that the client is at risk of suffering substantial financial or other harm unless action is taken and the client cannot adequately act to protect his or her own interest, the lawyer may take reasonably necessary protective action to protect the client.[36] Protective action includes consulting with individuals or entities that have the ability to take action to protect the client.[37]

Although the general rules of confidentiality and attorney-client privilege apply in connection with the representation of a client with diminished capacity, Rule 1.14 (c) of the New York Rules contemplates the disclosure of certain information regarding the client's impairment in order to take appropriate protective action in a given circumstance.[38] Arguably, a client with diminished capacity who is serving as a trustee may suffer substantial personal liability in the form of surcharge by continuing in office and may not appreciate the necessity for his resignation or removal. Although the diminished capacity rule does not directly address the point, a lawyer's protective action in such a situation might properly include discussions with one or more interested parties, such as a co-trustee or beneficiary, to determine the timing and manner for seeking the client's resignation or removal from office.

V. Conclusion

Determining when an individual should be called upon to resign as a fiduciary is not always easy, particularly in the case of capacity, which is often on a continuum. The New York State legislature recognized this continuum with the dramatic revamping of its guardianship law in the mid-90s. However, the statutes under the SCPA governing fiduciary eligibility and removal have not been clearly harmonized with the provisions of Article 81 of the MHL, resulting in a lack of clarity as to the precise standards for making capacity determinations warranting removal. Accordingly, this article suggests that the legislature consider amending SCPA 711 to provide additional grounds for removing a trustee based upon the court's determination that the trustee is substantially unable to manage and invest the trust's financial resources or is otherwise substantially unable to execute the duties of a trustee. The court's determination would be premised upon a consideration of the transactional approach adopted by Article 81 of the MHL by focusing on the functional abilities and limitations of the affected trustee with respect to property management. Amending SCPA 711 along the lines proposed would have a dual benefit. It would focus the court's inquiry on the trustee's unique responsibilities and duties in administering the trust. In addition, the consideration of the trustee's functional abilities and limitations within an established statutory framework would provide a more consistent method for assessing whether those abilities have been compromised to the point where his or her removal is warranted.

Endnotes

1. The definitions section of the Surrogate's Court Procedure Act ("SCPA") provides that when used in the act, an "incapacitated person" means "any person who for any cause is incapable adequately to protect his or her rights, including a person for whom a guardian has been appointed pursuant to article 81 of the mental hygiene law." (SCPA 103(25)). Similarly, an "incompetent" is defined as "any person judicially declared incompetent to manage his affairs."(SCPA 103(26)). The definition and continued use of the term "incompetent" under the SCPA presents particular interpretive difficulties in view of the repeal, effective April 1, 1993, of Articles 77 and 78 of the Mental Hygiene Law ("MHL") (the former conservatorship and committee statutes) and their replacement with guardianships for personal and property management needs of the person under Article 81 of the MHL. Thus, while adjudications of incompetence under Article 78 (and the appointment of committees) are no longer made in New York, the SCPA continues to refer to incompetence as grounds for ineligibility for a person to receive letters initially (SCPA 707(1)(b)) and for his or her *ex parte* removal as a fiduciary (SCPA 719(6)). Article 81 of the MHL attempts to avoid some of these construction issues by providing that "[w]henever a statute uses the terms conservators or committees, such statute shall be construed to include the term guardian notwithstanding the provision of such article unless the context otherwise requires." (MHL § 81.01).
2. The SCPA contains two procedures for removing fiduciaries, including testamentary and lifetime trustees. SCPA 711 permits removal of a trustee on notice to all interested parties. SCPA 719, on the other hand, permits the Surrogate to remove a trustee *ex parte*, without notice to the allegedly incapacitated trustee. Under SCPA 719(6), a trustee can be removed *ex parte* where he or she has been judicially committed or has been declared an incompetent. New York commitment statutes are contained in Article 9 of the MHL. In particular, MHL Sections 9.13- 9.31 govern involuntary commitment. Involuntary commitment requires that "it must be demonstrated by clear and convincing evidence that the patient is mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to himself and/or others." New York Health and Hospitals Corp. v. Brian H., 51 A.D.3d 412, 415, 857 N.Y.S.2d 530, 533 (1st Dep't 2008). Since the repeal of Article 78 of the MHL effective April 1, 1993, it is unclear whether the standard for *ex parte* removal under SCPA 719(6) should be construed to be a determination of incapacity under Article 81 of the MHL rather than a determination of incompetence under repealed Article 78 of the MHL (pre-1993 adjudications of incompetency, for instance, continue to have full force and effect). In addition, SCPA 711(10) provides for an *ex parte* removal of a fiduciary where any of the facts provided in SCPA 711 are brought to the attention of the court.
3. 7-2.6 of the New York Estates Powers and Trusts Law ("EPTL") governs removal of trustees of lifetime trusts in the Supreme Court. It provides that on application of any person interested in the trust estate, the court may remove a trustee who for any reason is unsuitable to execute the trust. The Surrogate's Court has concurrent jurisdiction with the Supreme Court in matters relating to express trusts and in particular in removing lifetime trustees (EPTL 711(11)).
4. 22 NYCRR Part 1200. Effective April 1, 2009, the Appellate Division of the New York State Supreme Court replaced the prior New York Code of Professional Responsibility with the New York Rules of Professional Conduct, published as Part 1200 of the Joint Rules of the Appellate Division.
5. SCPA 711 (McKinney's 1994 & 2010 Supp.).
6. As mentioned above, the jurisdiction of the Surrogate's Court is concurrent with the New York Supreme Court in matters relating to express trusts.
7. SCPA 711(8) (McKinney's 1994 & 2010 Supp.).
8. Bender's New York Evidence-CPLR, § 11.13 [1] (2009) (citing People v. Silver, 33 N.Y.2d 475, 354 N.Y.S.2d 915, 310 N.E.2d 520 (1974), *In re* Nealon, 57 A.D.3d 1325, 870 N.Y.S.2d 578 (3d Dep't 2008) and People v. Gelikkaya, 197 A.D.2d 405, 602 N.Y.S.2d 372 (1st Dep't 1993)).
9. See, Warren's Heaton on Surrogate's Court Practice § 117.05[1][b] (Seventh Edition) ('Warren's Heaton").
10. Warren's Heaton § 117.05 [1] [a] (citing *In re* Krum, 86 A.D.2d 689, 486 N.Y.S.2d 522 (3d Dep't 1982)).

11. SCPA 711 (McKinney's 1994 and Supp. 2010).

12. *In re* Leland, 219 N.Y. 387, 114 N.E. 854 (1916).

13. *Id.* ("The Surrogate's Court should not…grant letters to an unadjudged incompetent, nor to one unable, by reason of incurable bodily disease, to understand the duties of a given trust sufficiently to safeguard the interest of the living." *Id.* at 394, 114 N.E. at 856.); *In re* Dolansky's Estate, 92 N.Y.S. 2d 678 (Sur. Ct. Schenectady Co. 1949) (quoting *In re* Phyfe's Estate, 115 Misc. 699, 703, 182 N.Y.S. 729, 731 (Sur. Ct. New York Co. 1920) ("'want of understanding'…is not a finding that the widow is insane, or a lunatic, or that she is generally incompetent. It is a ruling that [she] has not the requisite understanding of the duties and responsibilities that she would be called upon to exercise in administering an estate worth $150,000.").

14. *In re* Witkin, N.Y.L.J., Jan. 3, 2008 at 35, col.6 (Sur. Ct. N.Y. Co.) (severe dementia); *In re* Faust, N.Y.L.J, March 5, 2007 at 31, col. 3 (Sur. Ct. N.Y. Co.) (undenied allegations of Alzheimer's disease).

15. Warren's Heaton § 33.02 [6][e] (citing *In re* Piterniak, N.Y.L.J., Nov. 8, 2000, at 25 (Sur. Ct. Richmond Co.)).

16. As mentioned above, New York's guardianship law was entirely revamped by the enactment of Article 81 of the Mental Hygiene Law, made effective April 1, 1993. The legislation sets forth functional tests and criteria for determining incapacity, provides enhanced protections of the due process rights of an alleged incapacitated person and introduces the concept of the least restrictive form of intervention.

17. Warren's Heaton § 117.05[1][a] (citing *In re* Farber, 98 A.D.2d 720, 469 N.Y.S.2d 126 (2d Dep't 1983); *In re* Vermilye, 101 A.D.2d 865, 475 N.Y.S.2d 888 (2d Dep't 1984)).

18. Under MHL § 81.03(g), the term "property management" as used in MHL Article 81, means "taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs."

19. MHL § 81.02(c)(4). As described by a leading elder law commentator, for an individual to be incapacitated within the meaning of the statute, "the individual must be unable to provide for the personal needs and/or property management needs at issue and not adequately understand and appreciate the nature and consequences of that inability." Elder Law and Guardianship in New York, § 11:7 (2005 Thomson/West).

20. California amended its Probate Code relatively recently along similar lines. In 2006, § 15642 of the California Probate Code was amended to provide that in addition to removal on the grounds of a trustee being otherwise unfit to administer the trust (Cal. Prob. Code § 15642(b)(2)), removal may be directed:

> If, as determined under Part 17 (commencing with Section 810) of Division 2, the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office. When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources or otherwise execute properly the duties of the office may not be proved solely by isolated incidents of negligence or improvidence. Cal. Prob. Code §15642(b)(2) (West 1991 & 2010 Supp.)

21. Of course, a trust instrument often contains a provision authorizing the grantor, during his or her lifetime, or some other person or class of persons after the grantor's death (such as special Committee or Protector) to remove trustees for any reason, either with or without cause.

22. Cal. Prob. Code § 15642(b)(2) (West 1991 & 2010 Supp.).

23. Pub. L. 1104-91, 110 Stat. 1936.

24. Although EPTL 10-10.7 provides that a surviving trustee can generally act alone, the statute presupposes the prior death, resignation or removal of his or her co-trustee(s). EPTL 10-10.7 similarly provides in relevant part that "[a] fiduciary who fails to act through…disability…shall not be liable for the consequences of any majority decision, provided that the liability for failure to join in administering the estate or trust or to prevent a breach of trust may not thus be avoided." *Id.*

25. *In re* Julliard, 171 Misc. 661, 13 N.Y.S.2d 315 (Sur. Ct. Orange Co. 1939) (citing, *In re* Julliard, 169 Misc. 270, 7 N.Y.S.2d (Sur. Ct. Orange Co. 1938; Bascom v. Weed, 53 Misc. 496, 105 N.Y.S. 459 (Sup. Ct. Essex Co. 1907)); See, *In re* Faust, *supra*, and *In re* Witkin, *supra*.

26. *In re* Julliard, 171 Misc. 661, 13 N.Y.S.2d 315 (Sur. Ct. Orange Co. 1939), *supra*.

27. *Id.* ("A fiduciary should not be placed in the position of determining in every case at his peril the mental competency of his associate and be surcharged for ordinary and justifiable losses if it should be subsequently determined that his associate was mentally incompetent." *Id.* at 665).

28. SCPA 2313.

29. See, *id.* ("It is said that the estate of Trustee Julliard is not entitled to any commissions at all for the reason that he rendered no services…Whether any part of the commissions should be paid to the estate of the deceased [mentally incapacitated] trustee is a matter to be determined among the trustees themselves and does not concern the estate beneficiaries." *Id*. at 666).

30. *In re* Harris, 21Misc.3d 239, 862 N.Y.S.2d 898 (Sur. Ct. Bronx Co. 2008) (SCPA 711 proceeding to revoke letters testamentary); See, *In re* Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984) (action to disqualify an attorney who previously represented two co-fiduciaries, citing the Committee on Professional Ethics of the New York State Bar Association which "concluded that an attorney for two co-executors may not represent either of them in an accounting or other adversarial proceeding against the other and any departure from neutrality would require his withdrawal from further representation in connection with the estate." *Id.* at 596).

31. NYSBA Op. No. 512 (1979) (lawyer for two co-executors may not institute a proceeding to compel and accounting or otherwise represent one executor against the other). The Opinion cites former DR5-105 (a lawyer should not accept or continue multiple employment if the interests of one client may impair the exercise of his independent professional judgment on behalf of another), DR 5-107(A) (a lawyer shall represent his client with undivided loyalty) and DR2-110(B)(2) (implicitly requiring a lawyer to withdraw from employment where it appears that he can no longer serve a client with undivided loyalty).

32. See footnote 4, *supra*. Thus, the substance of DR5-105, DR5-107(A) and DR2-110(B)(2) are now generally respectively contained in Rules 1.7, 1.8 and 1.16(b)(1) of the New York Rules.

33. Rule 1.14 of the New York Rules.

34. Rule 1.14 (a) of the New York Rules.

35. Defined under Rule 1.0 of the New York Rules as denoting that the "lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

36. Rule 1.14 (a) and (b) of the New York Rules.

37. Rule 1.14 (b) of the New York Rules.

38. "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) [relating to confidentiality of information] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest." Rule 1.14 (c) of the New York Rules.

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Introducing the New Members Committee of the Trusts and Estates Law Section

By Michelle Schwartz and Lauren M. Goodman

The Committee

Michelle Schwartz

In 2009, the Trusts and Estates Law Section created a new committee, the New Members Committee, with the aim of attracting younger practitioners both to the New York State Bar Association (NYSBA) and to its Trusts and Estates Law Section. Not only do junior associates bring with them a fresh perspective on many of the issues the Section addresses, they also represent the future of trusts and estates practice in New York. We were named co-chairs of the New Members Committee of the Trusts and Estates Law Section, in part because we are members of that demographic of practitioners. We and our peers are excited by the prospect of participating in this new committee, the Trusts and Estate Law Section and the opportunity it gives us to learn more about the issues the Section is addressing, to attend the many relevant lectures offered by the Section and the Association and to meet a wider range of fellow trusts and estates lawyers.

As co-chairs of the Section's New Members Committee, our main goal is to get the word out to newer practitioners about the benefits of joining the Association and the Trusts and Estate Law Section. It is our opinion that once people are aware of all the benefits of membership, they will surely want to join and become involved members.

Another goal of this new committee is to provide events and programming that address the needs and concerns of the newer practitioners who are in the process of developing their practice. These two goals complement each other, as the more programming we develop for new attorneys, the more those attorneys will realize that the NYSBA is an organization they can turn to as their practice grows, and the more new members we attract, the more programming we can develop for them.

To attain these goals, we have created an exciting series of events designed to attract a wide variety of new members throughout the state.

Past Events

Lauren M. Goodman

Last Fall, the New Members Committee held its kick-off event at Whiskey Park in midtown Manhattan. Over 100 new attorneys (and even a few law students) joined several members of the executive committee and Suffolk County Surrogate John Czygier for cocktails, appetizers and a chance to network in a relaxed atmosphere. Surrogate Czygier offered a few words of advice for new lawyers. The attendees had varied backgrounds. Some were aspiring trusts and estates lawyers looking for their first job in the field. Some were practicing in other fields and looking to learn more about trusts and estates. Others had practiced in the trusts and estates field for several years and were looking to meet a wider range of peers. The event offered a wonderful opportunity for all who attended to network with one another and to learn more about the Association and the Trusts and Estates Law Section.

Future Events

Building on the success of the event at Whiskey Park, the New Members Committee—which has added three members since the Fall, all of whom were so energized by that event they sought us out—is planning several events for 2010. Networking events such as the kick-off event will be held every few months at various locations throughout Manhattan. The committee also plans to host a networking event in Rochester, as well as a follow-up event in Syracuse later in the year.

In addition to networking events, we have planned a career panel in which more experienced trusts and estates attorneys who have a variety of work experience in the field have been invited to join the panel. The goal of the event is to allow lawyers new to trust and estate practice to see the different career paths available to them within the field and to gain an understanding of what experience is required for each such position.

We are looking forward to organizing future events and to reaching more new trusts and estates attorneys.

Please contact either Michelle Schwartz (mschwartz@fulbright.com) or Lauren Goodman (lauren.goodman@kattenlaw.com) if you are interested in joining the committee, would like information about future events, or have suggestions for future events.

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Michelle Schwartz is an associate in the New York City office of Fulbright & Jaworski LLP., where she focuses on trusts and estates law. She recently co-authored an article "Modifying an Irrevocable Trust: The Art of Decanting," which appeared in the *New York Law Journal*. Michelle graduated from Fordham University School of Law in 2006.

The Family Health Care Decisions Act: A New Chapter in Health Care Decision Making

By Anthony J. Enea

The recent passage of the Family Health Care Decisions Act ("FHCDA") with the enactment of New York Public Health Law Article 29-CC[1] is the culmination of a legislative journey that commenced in 1993. The FHCDA in certain specified circumstances makes unnecessary the existence of a health care proxy and the resulting appointment of a health care agent.[2] The FHCDA establishes procedures and protocols for determining whether an adult patient in a nursing home or general hospital has the capacity to make health care decisions. If a determination is made by health care practitioners that an adult patient does not have the requisite capacity, then a surrogate will be appointed to make health care decisions from a list of individuals ranked in order of priority from family members to friends. As part of FHCDA, Article 29-CCC was enacted which makes technical amendments to the existing laws regarding "do-not-resuscitate orders."

The FHCDA does not apply to adult patients that have executed a health care proxy or who have a Court-appointed Guardian of the person under Article 17-A of the Surrogate's Court Procedure Act or Article 81 of the Mental Hygiene Law. With respect to whether the adult patient has the capacity to make decisions regarding his or her medical treatment, PHL Section 2994-C creates a presumption that every adult has the capacity to determine treatment unless the attending physician has determined otherwise, or there is a Court Order to that effect. If the patient is in a residential health care facility (nursing home) at least one other social service or health practitioner from said facility must concur with the attending physician. If the patient is in a hospital and the surrogate decision maker has decided against life sustaining treatment, similar concurrence from at least one social service or health care practitioner must be obtained. Additionally, hospitals are required to establish written policies for the training and credentials of the health care professional that will provide the concurring opinion.

In the event the patient has a developmental disability or mental illness, the concurring opinion must be provided by a health care professional with expertise or training relevant to patients with mental illnesses or developmental disabilities. Additionally, the FHCDA requires that if the patient with a mental illness or developmental disability has been determined to have the capacity to understand the information objects to the determination of incapacity, the appointment of a surrogate decision maker or the decision of the surrogate, the patient's objection will prevail unless the Court determines otherwise. The attending physician for the developmentally disabled or mentally ill patient must confirm the finding of incapacity before complying with the health care decision.

The most important and novel aspect of the FHCDA surrounds the creation of a prioritized list of surrogate decision makers for the adult patient who lacks the capacity to make health care decisions and has not executed a health care proxy. In order of priority they are a Court-appointed Guardian, the spouse, domestic partner, child over the age of 18, parent(s), sibling(s) or a close friend who is familiar with the patients personal, religious and moral views regarding health care.[3]

The surrogate is authorized to make all health care decisions that the patient could make if he or she had the requisite capacity to do so. In making health care decisions the surrogate is provided with access to all health care providers and the medical records needed to make decisions.

In the cases where the patient has no available family or friends, Section 2994-C allows the attending physician to make routine medical decisions. However, as to major medical decisions the attending physician is required to consult with the hospital staff involved in the patient's care and the physician selected by the hospital must agree with the attending physician. In the event the attending physician needs to make a decision about withholding or withdrawing life sustaining treatment one of two requirements must be satisfied. There must be review and approval by a Court that the decision of the physician satisfies the standards for surrogates relevant to withdrawing or withholding life sustaining treatment. The second requirement is if the attending physician determines no benefit will be derived from the life sustaining treatment because the patient will die immediately; and the life sustaining treatment violates acceptable medical standards and one other physicians concurs, then in that event, without a Court Order the life sustaining treatment may

be withdrawn or withheld. Frankly, I don't envy the physician(s) and court that are placed in the position of interpreting this provision of the Act and placed in this decision making position.

In conclusion, while there has been some speculation that the FHCDA obviates the need for a health care proxy, in my opinion, it best illustrates why a health care proxy should be executed. Simply stated, why would people place themselves in the position of a third party they did not select making health care decisions for them, when they could execute a simple document selecting an agent and could articulate their health care wishes? However, I do believe the FHCDA will play a valuable role in helping to obviate the need for a Court-appointed Guardian in those instances where family members are available to act as Surrogates.

Endnotes

1. N.Y. PHL Article 29 (effective June 1, 2010) (hereinafter PHL).
2. PHL Article 29-C.
3. PHL § 2994.

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The Case for Making Home Care the First Option for Seniors

By Anthony J. Enea

During the approximately twenty four (24) years I have been representing seniors I have yet to have a senior say to me, "Gee, Anthony, I just can't wait to go to the nursing home." More often than not, the mere mention of the potential admission to a nursing home creates a significant amount of angst and apprehension. Fortunately, New York State (NYS) has had a significant level of commitment to allowing seniors to "age in place" and, thus, remain in their homes. NYS has several home care programs, with differing services, providers and reimbursement rates. In the following pages I hope to highlight for you the various home care options available to seniors and their families.

In determining whether "home care" is a viable option, there are a number of issues that need to be preliminarily addressed. For example, (a) Can the clients be safely maintained and cared for at home? (b) How can the clients care be financed? (Is long term care insurance, private pay, Medicare, Medicaid or supplemental health insurance an option?); (c) What level of home care does the client require? (For example, does the client need assistance with all activities of daily living and does the client need any skilled care or is custodial care sufficient?); and (d) Which type of home care providers provide the required services, and will accept reimbursement from the available source of financing?

Unless the client has long-term care insurance or a significantly large pool of personal assets to finance the cost of home care, which averages $6,000 to $8,000 per month (for 12-24 hours per day) in the New York Metropolitan area, the primary funding sources remain Medicaid or private payment.

Before I review the three (3) categories of Medicaid home care services, I want to review some of the important distinctions and similarities between the Medicaid home care and Medicaid nursing home programs with respect to eligibility. First and foremost, it is important to remember that the transfer of asset rules do not apply to the Medicaid home care program. Thus, any gifts (uncompensated transfer) made by the applicant will not impact his or her eligibility. Additionally, "spousal refusal" is available in those home care cases where the spouse of the applicant has income and resources greater than the amounts permitted by Medicaid. Medicaid is a program which has both income and resource eligibility requirements, while Medicare only requires that you be 65 years of age and older, and have paid into the social security system. The spousal impoverishment rules permit the applicant to transfer his or her assets to his or her spouse, who can then refuse to contribute his or her resources and income toward the cost of the Medicaid applicant's care. Finally, in recent years an applicant for home care services has had the option of contributing his or her income in excess of the amount permitted by Medicaid to a "pooled trust" (administered by a not-for-profit) which will in turn pay the applicant's bills for various living expenses from the excess income contributed to the pooled trust. Because of the aforestated eligibility provisions, Medicaid home care has become significantly more accessible to a larger pool of potential applicants.

Generally Medicaid divides home care services into three categories: one, Personal Care Services (a custodial, not skilled level of care); two, Medical Home Health Services (skilled care); and three, Non-Medical Services (supportive services to keep the client at home).

1. Personal Care Services

Personal Care Services are divided into three (3) levels:

Level I services encompass the performance of "nutritional and environmental support functions." For example, Level I services would include (a) the making and changing of beds; (b) dusting and vacuuming; (c) light cleaning of kitchen, bedrooms, and bathrooms; (d) preparations of simple meals; (e) dishwashing; (f) shopping and laundry; (g) payment of bills and running errands.

Level I services can be authorized for a maximum of eight (8) hours per week, with an exception of up to twelve (12) hours per week if the client necessitates the preparation of meals.

In the counties outside of New York City, Level I is only offered in conjunction with Level II home care. In New York City Level I is provided as a stand-alone.

Level II of the Personal Care Services Program is commonly known as the Home Attendant or Personal Care (PCS) Program. PCS is a custodial level of care which requires the prior approval of Medicaid. It is not covered by Medicare. The applicant must need assistance with a minimum of two (2) activities of daily living (ADLs). ADLs commonly refer to feeding, bathing, toileting, ambulating, transferring and grooming. In addition to the performance of the Level I services described above, and the assistance with ADLs, the Level II

services would also include: (a) bathing the client in bed, tub or shower; (b) dressing the client or assisting with dressing; (c) grooming, including hair care and shaving; (d) toileting and assistance therewith; (e) assistance with walking; (f) assistance with transfer from bed to chair or vice versa; (g) preparation of modified diets (low salt, fat, or sugar); (h) administration of medication "by the client," including prompting of client to take medication; (i) assistance with the use of medical supplies and equipment. The hours of PCS care provided can be from 4 hours per day to around the clock (split shift) care.

In order to receive PCS, the home care patient's health and safety must be able to be "maintained in the home." This requires the patient's medical condition to be "stable" (not expected to suddenly deteriorate or improve), and does not require frequent medical or nursing judgments to determine change in the care plan. Additionally, the care needed is not a skilled level of care, however; assistance at home is needed to prevent a health and safety crisis from developing.

As can be seen from the above, both a significant and highly comprehensive form of home care can be provided to seniors and the disabled through the PCS program provided by Medicaid.

2. Medicaid Home Health Services

Skilled home health care is provided in New York by Certified Home Health Aide Services (CHHAs) and the Lombardi Long Term Home Health Care program (LTHHC or "Lombardi").

Unlike CHHAs a personal care aide, the home health aide performs health care tasks under the supervision of a registered nurse or licensed therapist, who may also assist with personal hygiene, housekeeping and other related supportive tasks.

The following are illustrative of some of the tasks performed by home health aides which cannot be performed by personal care aides:

(A) Preparation of meals in accordance with complex modified diets (only a nurse can add oral medication to food);

(B) Assist with tube feeding, including the assembly, cleaning and setting of equipment;

(C) Undertake daily monitoring of patient, taking temperature, weighing and testing for sugar level in urine;

(D) Apply topical medication to patient;

(E) Monitor vital signs.

It is important to note that CHAAs accept both Medicaid and Medicare. However, Medicaid requires that the home health services be provided pursuant to a physician's written plan of care. CHAAs do not require "prior approval" for Medicaid. They can be provided with the Medicaid application pending. With respect to the CHAAs services covered by Medicare, they will usually only cover the cost of services for about 45 days upon a person's discharge from a hospital.

3. Lombardi Program/LTHHC

Lombardi is strictly a Medicaid program which provides long-term skilled care in the home setting. The care provided is considered to be the equivalent of nursing home care at home for a chronically ill patient who would otherwise qualify for nursing home services. Lombardi provides both skilled and waivered services, along with personal care. It is often referred to as the "nursing home without walls program." Lombardi requires that the cost of all the services provided to the patient not exceed seventy-five (75) percent of the cost of nursing home care for the client. With Lombardi, nursing home budgeting and the spousal impoverishment rules are available. The community spouse can also execute a "spousal refusal." The transfer of asset rules do not apply to the Lombardi program.

The "waivered" services covered by Lombardi include, but are not limited to: (a) home maintenance tasks; (b) housing improvement; (c) transportation to social events; (d) respite care; (e) social day care; (f) social work services; (g) respiratory therapy and (h) nutritional counseling. "Waivered" services are originally covered by Medicaid, (not medical) however; the state has obtained a "waiver" from the federal government to provide them as part of a special package of services.

In conclusion, while the programs and services discussed above comprise the heart and soul of the Medicaid home care programs available to seniors and the disabled, there are still other programs available which perhaps will be the subject for discussion on another occasion. My goal was to provide a basic understanding of the scope and breadth of the home care programs and services available, and to illustrate that these programs and services make home care in many cases the first, and perhaps best, option available to seniors and the disabled.

Anthony J. Enea, Esq. is a member of Enea, Scanlan & Sirignano, LLP, in White Plains and Somers, New York. He is President of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA) and Vice-Chair of the Elder Law Section of the New York State Bar Association. He limits his practice to Elder Law, Guardianships, Medicaid Planning and Applications and Wills, Trusts and Estates.

The author wishes to acknowledge and thank Sara Meyers, Esq., an Associate with his firm, for her research and assistance in the preparation of this article.

Best of the Listserve

Comments on Keeping Clients' Executed Wills

Subject: Soliciting comments on keeping clients' executed wills
From: Alicia Klat <aliciajori@hotmail.com>
Date: Wed, 17 Feb 2010 21:14:34

Hello Listmates—

Curious about your thoughts regarding the pros and cons of maintaining our client's wills.

Also, do you have any suggestions regarding policies for what to do with the final will when a family has decided not to proceed with Probate.

Thank you, in advance.
Best regards,
Alicia Klat

Subject: Re: soliciting comments on keeping clients' executed wills
From: "Craig Miller" <ginsmill@verizon.net>
Date: Wed, 17 Feb 2010 16:24:55 -0500

Alice:

It is a client option entirely. I spell out the pros and cons of filing an original will with the court and maintaining and safekeeping the original Will in my fireproof safekeeping vault.

If the client opts to have me keep the original will I am duty bound to read the obituaries each day, which frankly is a burden, and as the number of wills increase I tend to want to file all wills with the Court to remove that burden.

Once I am informed from the death notices or by family members that my client has passed, if I am not contacted by an attorney representing the nominated executor for release of the will within a reasonable time (two weeks) I will file the will with the Court. My client, after all, was the testator, and it is my duty to see that his intentions are carried out. I can only safeguard those intentions by filing the will because I have no idea whether a new will was made, or that the new will may have been obtained by duress or undue influence, or after the testator no longer had capacity.

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Subject: Re: soliciting comments on keeping clients' executed wills
From: "Donald Hecht" <dshecht@verizon.net>
Date: Wed, 17 Feb 2010 16:43:01 -0500

Consider the situation where after many years of practice, you get out a general announcement to your clients (say, to advise them of your new office address) and receive back a significant number of announcements marked, "Moved—no forwarding address" and you are holding the wills of these "missing" clients. This prompted me to no longer hold clients' original wills.

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Subject: Re: soliciting comments on keeping clients' executed wills
From: Lori Perlman <loriperlman@yahoo.com>
Date: Wed, 17 Feb 2010 20:57:53 -0800 (PST)

Alicia and Craig,

A few comments. If you do decide to maintain client Wills and you are a solo practitioner, you should make sure that you have a Will in place that appoints an executor who is familiar with T&E practice and ethical obligations and who is directed to return all original Wills to their owner if possible. Ideally, you can team up with another attorney who is willing to take on this role and perhaps retain possession of original Wills where the owner cannot be located.

A client can maintain his or her own Will—the Will does not have to be filed in Court if it is not maintained by the drafting attorney. However, if the Will is maintained by the Decedent in his or her home and the original cannot be located at the time of death, there is a presumption that the Will has been revoked. This presumption is fairly hard to overcome. It is also not a great idea for clients to place their Will in their own safe deposit box since a Court order is required to search the safe deposit box. I advise clients to leave an original Will with a family member or in a family members' safe deposit box, or to purchase a fireproof box for their home (available for $40 at Staples and it cannot be easily misplaced).

As I see it, the real benefit to maintaining the Will in your office is that you will presumably be contacted by the Decedent's family in order to obtain the original Will, and could perhaps get the probate business.

Craig—I have never heard of any requirement or ethical regulation that would obligate an attorney to review obituaries to determine whether a client has died. I think you may be doing way more than is ethically required of a T&E attorney.

I also do not believe that an attorney's general obligation to support the Will of a decedent requires an attorney to file a decedent's Will in Court whenever the attorney learns that the client has died. Filing the Will in Court without filing for probate does nothing to forward the Decedent's testamentary intentions. I personally do not think that an attorney's ethical obligation to support the Will that they drafted arises until the attorney has actual knowledge that a later Will that has been offered for probate is in fact the producer of undue influence, duress, etc. or was drafted at a time when the Decedent lacked capacity. I think that only at that point is the attorney obligated to come forward to support the Decedent's last true testamentary expression.

Personally, I would never, ever file a Will in Court for no reason. Filing the Will in Court creates legal rights in the nominated fiduciaries and proposed beneficiaries of the filed Will, as they must be cited in any probate proceeding. If the Decedent did in fact execute a subsequent Will, the filing of a prior Will in Court could result in providing standing to an objectant who would otherwise not have standing to object to the Decedent's ultimate Will. By filing the Will, you are exposing yourself to potential liability if there is a Will contest that was caused by your actions.

These are, of course, just my thoughts, and I am sure that different people have different practices.

Subject: RE: trusts-estates digest: February 16, 2010
From: "Michael E. O'Connor" <oconnor@delaneyoconnor.com>
Date: Thu, 18 Feb 2010 08:59:46 -0500

We keep possession of almost all original wills. I think the responsibility is to keep them safe and not lose them. I would never advise filing with the Court, because there is no central registry (that I am aware of) for another court to find the will when the time comes, even though the client dies in NY. What if he dies out of state? Would the court release the original to a named executor who is not appointed anywhere?

We keep all estate planning client data in a database so we can retrieve information based upon criteria such as: size of estate, attorney executor, will provisions like SNT, credit trust, disclaimer plan, GST trust, charitable trusts, life insurance trusts, QTIP, client second marriage, QDOT, GRAT, GRIT or GRUT, and anything else which might require finding clients based on circumstances.

Does this create a responsibility on our part to do something? I am not telling the client that we will do anything, and the data is to serve our own needs as well as the client. It allows us to communicate with specific clients when there is a law or tax change without having to remember them.

Michael E. O'Connor
DeLaney & O'Connor LLP
Syracuse

Subject: Re: soliciting comments on keeping clients' executed wills
From: "Diane M. Lowenberger, Esq." <lowenbergerlaw@nyc.rr.com>
Date: Thu, 18 Feb 2010 14:36:37 -0500

I inherited several hundred original Wills which were kept by my father and his partner, and then another few dozen when another attorney passed away and whose wife then sent them to us. Every few years, I send out a mailing to these clients to ask if their situation has changed such that an updated Will is necessary, or if a subsequent Will has been prepared, in which case, I ask the client to advise whether to return to them (or to someone else) the prior Will I have on file. I usually enclose pre-printed postcards with a response for the client to check off and mail back to me.

Despite efforts to keep up with these clients, some of the mailings come back as unable to be forwarded at which point, if I have enough information on hand to be meaningful, I check the client's status on ancestry.com. If that research shows the client has passed, I mark the file accordingly, but I still assume I have to keep the will as sometimes the need for probate does not make itself clear immediately upon death and I have been contacted in some instances several years after the date of death to determine if I have a Will on file. From the notes that I have, some of the clients I cannot locate would be over 100 years old if they were in fact alive today. Nonetheless, it is not clear to me how long I have to keep the original Wills for those clients that departed many, many years ago, so I continue to keep them.

I know that in each case the client was given a copy of the Will with the name and address of the firm clearly indicated. Since the number for my father's firm is still active, I have on occasion been contacted by the named fiduciary's attorney, or the family to retrieve the Will, and in some instances, obtained the probate matter for handling.

Going forward, knowing how cumbersome it can become, while I offer the client the option to leave the original Will with my office, I do not do so enthusiastically.

On the flip side, most recently, I was contacted about a year after the date of death to handle an administration proceeding, it having been assumed that there was no will when in fact I had one on file from 1989. There are no probate assets except a lawsuit in which the decedent was a plaintiff and so requires a fiduciary to go forward. (There is suspicion that one of the daughters made off with the client's copy of the Will that left everything to the surviving spouse and never mentioned it so she could receive her distributive share to which she, in the presence of the Will, is not entitled. And it was the spouse's sheer luck that I was eventually contacted to handle the matter so that the original could be offered for probate rather than do an administration proceeding for this purpose. Considering this daughter's behavior during the probate proceeding, I assume she would have destroyed the original had she found it. After all, who would be the wiser, and if they were, what proof could have been offered that the testator did not destroy it himself? So in this case, leaving the Will with my father's firm was a blessing to the spouse, who is now afraid of the daughter for other reasons.)

So it is definitely a mixed bag, how to handle this.

I assume there is no definitive length of time that must pass when it can be safely assumed that an original Will can be destroyed where I have determined the testator passed say, over a decade ago. Does anyone know of any rule to the contrary?

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Subject: Re: soliciting comments on keeping clients' executed wills
From: "Sandra M. Rodriguez-Diaz, Esq." <smrtax@gmail.com>
Date: Thu, 18 Feb 2010 20:49:51 -0500

Hi! Thanks to all for your great comments on this subject.

Actually, NYSBA's Ethics Opinion 724-11/30/99 provides, among other things, that if a lawyer keeps custody of a client's original will, absent agreement, the lawyer does not have an obligation to take steps to learn of the client's death (e.g., no ethical obligation to agree to read death notices, etc.).

It is worth reading.

* * *

Mediation in the Surrogate's Court

Subject: Probate/Trust/Elder Mediation
From: Jeanne Bonney
Date: Wed, 17 Mar 2010 20:38:00

Does anyone have any experience with or thoughts about probate/trust mediation, elder mediation, resources, whether or not it works and where it's being tried, if anywhere, in NYS?

I just returned from a training in Sausalito in elder mediation and two speakers were estate attorneys and a third was a family business consultant who consulted with families and mediated issues in inherited family businesses.

Thanks,
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Subject: Re: Probate/Trust/Elder Mediation
From: Lori Perlman
Date: Wed, 17 Mar 2010 21:03:00

Jeanne,

There is an attorney in NY, Leona Beane, who has been doing mediation for a long time, although I am not sure how much of her mediation practice is devoted to T&E. Mediation in T&E matters (mandatory or voluntary) has been a matter of discussion among some members of the bar and some bar committees for a long time—over 10 years. The feeling of some members of the bar (including the Courts, as I recall) is that the law departments in many of the Surrogate's Courts function along similar lines as mediators, and so mediation is not as necessary in Surrogate's Court matters as it might be in other matters. I don't think that analysis is 100% correct, since court attorneys are not trained in mediation and also, once they have made up their mind about a case, they tend to push a settlement towards one side based on what they believe the Court will likely decide rather than really mediating the dispute in an impartial manner. Regardless of whether the analysis is true or not, I have never personally come across a Surrogate's Court matter that was mediated.

I am not sure if Leona still follows this listserve. If you want to get in touch with her and ask her more about her experience with T&E mediation, here is her website: http://www.mediate.com/beane/pg1.cfm.

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Subject: Re: Probate/Trust/Elder Mediation
From: Jeanne Bonney
Date: Wed, 17 Mar 2010 21:48:00

Lori:

Thanks for your quick response. I was surprised California and Florida mandate mediation before you can get a trial date in an estate matter. What an interesting perspective here that Surrogate judges are viewed as mediator types or that their law clerks are. The court is an adversarial [sic] venue. It can't function as a mediation forum and you are right. A law clerk is not a mediator.

From what I learned in California, a skilled mediator can shift a case towards a sensible resolution, esp in high conflict family estate disputes, and that what happens in the court room is worlds different.

I heard more stories from litigators and the attorney/mediators out there about how successful mediation can be in litigated estate cases.

The mediators I trained under are part of a community of mediators (all seemed to be lawyers) who mediate cases like international disputes between countries, complex corporate cases, family business issues, (Napa Valley intergenerational family businesses) and T and E cases. Cases where the stakes are very high.

I come out of a family law background and maybe it's my lens, but it seems many estate disputes are the other end of the family dispute spectrum (siblings fighting like children, hurt feelings, who was appointed executor, Mom loved you more, etc...trust issues with trusts....), and from the academic literature I've started reading, I'm not far off. Mediation is an optimum setting for these cases. Not to mention, it seems hundreds of thousands of dollars in legal fees can be spent on discovery and motion practice hashing out old family issues in Surrogate's court. All a court can deal with is the "stuff," not with what's driving the fight.

I recently spoke to an associate at Holland and Knight in Boston who clerked for a probate judge. He said litigated estate cases with family members [sic] were a nightmare, he didn't like them, the judge didn't care for them and there wasn't much discussion of sending them to mediation. He sounded like they were as necessary as root canal. Just litigate them. It's easier. Less messy.

I'll follow up on your lead. Thanks for filling me in on the bar's perspective. I wonder if NY will become more progressive, like California and Florida, when more of us are impacted by the issues, or, if it's demographically unique to areas with wealthy retired folks.

Thanks, again. I'm interested in any other thoughts or info you or anyone else may come across.

Jeanne Bonney
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Subject: Re: Probate/Trust/Elder Mediation
From: Bruce Steiner
Date: Wed, 17 Mar 2010 22:42:00

I've been involved in three cases where mediation worked. Each of them involved a decedent who was survived by a wife and two children. In one case, the children disagreed as to whether to exercise a put option over an interest in a closely-held business. In the other two, the issue was what was income and what was principal in a QTIP trust. Two settled after court proceedings were filed, and one settled before a court proceeding was filed.

In one case, in a Florida estate, the children agreed upon a neutral lawyer for their father's estate, who hosted a meeting with both children and their separate counsel, at which the parties reached a settlement. In the second case, in New York, the parties agreed to let a cousin mediate, and they accepted his recommendations. In the third case, in Connecticut, the judge asked the parties to allow a probate judge in another town to mediate, and he gave them his views, after which the parties worked out a settlement.

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Subject: Re: Probate/Trust/Elder Mediation
From: Jeanne Bonney
Date: Wed, 17 Mar 2010 23:09:00

Bruce;

Why do you think it worked in those cases?

Have others not worked?

Jeanne Bonney
jbonney@jeannebonneylaw.com

Subject: Re: Probate/Trust/Elder Mediation
From: Bruce Steiner
Date: Thu, 18 Mar 2010 11:23:00

Those were the only 3 I was involved in where the parties used a mediator, and all 3 were settled.

It's hard to generalize from 3 cases, but perhaps people who are willing to go to a mediator want to try to reach a settlement.

Bruce Steiner

Subject: Re: Probate/Trust/Elder Mediation
From: Gerald C. Tobin
Date: Thu, 18 Mar 2010 11:53:00

I believe that further use of mediation in estate matters would be good. Though the Surrogate's Courts, through their law assistants, do try to help the parties reach settlement, they have limited time and patience. In a recent meeting with a law assistant involving a will challenge, the law assistant, after a couple of conferences with the parties, stated that "he did not have all day for this and so either wrap it up or go to litigation." I do not think a mediator would take that position.

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Subject: Re: Probate/Trust/Elder Mediation
From: Peter Aronson
Date: Mon, 22 Mar 2010 14:26:00

Jeanne:

I can suggest [sic] a few places: Family and Divorce Mediation Council of NY, 212-978-8590; I was told they were going to branch out into elder law matters.

SafeHorizon: Elena Bayrock, at 212-577-1740, ext. 124

I have not used either, but they may be able to help you.

Good luck.

Peter Aronson
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Subject: Re: Probate/Trust/Elder Mediation
From: Joy Rosenthal
Date: Thu, 25 Mar 2010 10:02:00

There has been some interest and discussion around getting mediation into Surrogate's Court at the NYS Dispute Resolution Assn, and at the NYC Bar Assn Dispute Resolution Committee. I believe there is a pilot program in Rochester, and there is talk of one starting in Manhattan.

We are, as was pointed out on the thread, way behind other states. Surrogate's and probate Courts have programs in Georgia, South Carolina, Florida, Texas, California, Hawaii, Washington, and Utah. In all of those states, mediation is strongly suggested, if not required before litigation.

Leona Beane has written some great articles about the use of mediation in disputed probate cases. I expect and hope that NYS will get up to speed soon.

Elder mediation addresses issues that arise in dealing with aging parents, particularly among the caregivers, balancing independence and safety. The Family & Divorce Mediation Panel just did an advanced training in NYC for elder mediation—there are only a few of us who practice in NYC. It is also a fledgling field.

Both situations are perfect for mediation as they involve family members with long-standing relationships that will last way beyond the issues at hand, and involve family decision-making and reorganization of relationships. The mediations are often complex because they involve many parties with different interests, perhaps sophisticated estate-planning principals, and issues of capacity of the elder. I'd be glad to speak to anyone offline!

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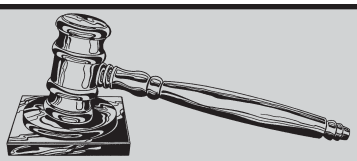
* * *

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

EXECUTORS

Beneficiary's Objection to Executor's Account Barred by Ratification of Executor's Actions

Almost thirty years after the division of decedent's artwork between decedent's two children, one of the children brought a petition to compel an accounting by the executor who was the other child. The will divided the residue equally between the two children but included no instructions on how the division was to be made. Works of art included in the residuary estate had been distributed by having the two children make alternate selections. A trial was held after the petitioner narrowed his objections to the distribution of three works of art that had gone to the executor. The Surrogate settled the account and the Appellate Division affirmed, holding that in the circumstances the objectant had ratified or acquiesced in the distribution of the three works. Communications outlined outstanding issues in the estate made to the executor by the objectant's then attorney eleven years after decedent's death did not mention the works of art and during the more than 25 years that passed before the objections were made the objectant had sold the works of art that had been distributed to him, making restitution and any attempt to value the property at the time of distribution impossible. *Matter of Levy*, 69 A.D.3d 630, 893 N.Y.S.2d 142 (2d Dep't 2010) .

Hostility Between Beneficiary and Executor's Attorney Grounds for Requiring Executor to Secure Different Representation

Objectant to probate moved to disqualify the executor nominated in the will on the grounds that the nominated executor had selected as her counsel an attorney with whom the objectant had a hostile relationship stemming from a prior conservatorship proceeding. The Surrogate granted the motion and the Appellate Division reversed. Not only did the record lack any evidence that the nominated executor was unqualified or had committed misconduct but it also showed that the objectant was the source of hostility between himself and the nominated executor and her counsel. However, given the objectant's hostility to the attorney, the executor should obtain new counsel. *Matter of Venezia*, 71 A.D.3d 905, 896 N.Y.S.2d 452 (2d Dep't 2010).

William P. LaPiana

POWERS OF ATTORNEY

Agreement with Finder's Service Cannot Be Filed Because Not a Valid Power of Attorney

Executor entered into a contract with a corporation making it the executor's agent for the collection of funds held in the decedent's name by the Comptroller. The Comptroller directed the corporation to record the agreement in the Surrogate's Court in accordance with EPTL 13-2.3. The Surrogate refused the request to record the agreement. First, although the agreement, executed after the effective date of the amendments to the GOL dealing with powers of attorney, clearly met the definition of a power of attorney under new GOL § 5-1501(10) it did not conform to the statutory requirements. The agent's signature was not acknowledged (GOL § 5-1501B(1)(c)) nor did the instrument include the required language addressed to the agent (GOL § 5-1501B(1)(d)). In addition, the agreement did not conform to the requirements of the Abandoned Property Law § 1416 limiting the fees charged by an agent collecting property held by the Comptroller. *Matter of Kelley*, 26 Misc.3d 621 , 891 N.Y.S.2d 870 (Sur. Ct., Westchester Co. 2009).

TAX APPORTIONMENT

General Disposition to Issue at End of QTIP Trust Passes Free of Tax

Decedent's will directed that all estate taxes be paid "without apportionment" from the residuary estate. The will made a general pre-residuary disposition of $20,000,000 to the decedent's issue with the residue passing to charitable lead annuity trusts (CLATs) if his wife predeceased him. If she did not, which was the case, the general disposition was not made and the entire residuary estate passed into a QTIP trust. At the spouses' death, $20,000,000 of trust property passes to the decedent's issue and the rest to CLATs. In both cases the CLATs were structured so that the remainder passing to private individuals had zero value. After the surviving spouse's death the trustees of the QTIP trust

brought a construction proceeding with regard to the tax apportionment clause as applied to the tax to be paid from the trust. Held, the trust property passing to the CLATs pays the estate tax in the surviving spouse's estate. The decedent's intent that the $20,000,000 pass free of tax should his wife predecease also applies should his wife survive, as she did. In addition, well established principles require that the division of the "residue" between a pecuniary gift and "everything else" makes the non-pecuniary gift the "true residue" and the direction against apportionment means that the true residue must bear the tax even if it is passing to charity. *Matter of Feil*, 27 Misc.3d 274, 894 N.Y.S.2d 837 (Sur. Ct., Nassau Co. 2009).

TRUSTS

Trust Is Valid Despite Delay in Funding

In August of 1998 creator executed an instrument creating a QPRT which identified shares in a co-operative housing corporation as the trust property. The shares and the interest in the proprietary lease were conveyed to the trust in January of 1999 and the co-op's approval of the transfer was obtained in March of 1999. After the creator's death one of her children challenged validity of the trust on the grounds that it was not funded when created and asked that a constructive trust be imposed on the property. The Surrogate granted a motion to dismiss the petition and the Appellate Division affirmed, finding "no support" for the contention that the trust was invalid because the trust property was not conveyed to the trustee until six months after the trust was created. *Matter of Doman*, 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).

VOLUNTARY ADMINISTRATION

Increase in Statutory Limit Is Retroactive

L. 2008, ch. 300 increased the maximum value of estates consisting wholly of personal property which qualify for voluntary administration under SCPA Article 13 from $20,000 to $30,000. The amendment became effective January 1, 2009. Decedent died in 1998. At that time no administration was had because the distributees were not aware of the existence of any probate property. Some years later decedent's niece learned of assets held in the Abandoned Property Fund worth approximately $22,000. The niece sought to qualify as voluntary administrator after the effective date of the 2008 legislation. The Surrogate accepted the application, holding that the increase in maximum value was retroactive because the amendment had no express provision for an applicable date and it is remedial and presumed to be retroactive so long as no vested rights are impaired, which is the case here. *Matter of Garrick*, 26 Misc.3d 789, 894 N.Y.S.2d 836 (Sur. Ct., N.Y. Co. 2009).

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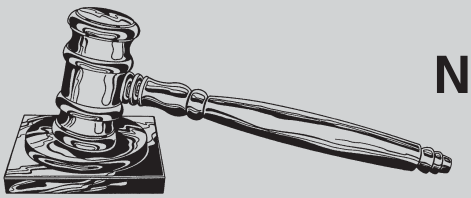
Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, DRAFTING NEW YORK WILLS (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Attorney-Client Privilege

In *In re Wang*, the court found an implied waiver of the attorney-client privilege and directed the production of documents regarding the preparation of a letter agreement between the petitioner and the decedent. The underlying circumstances of the case revealed that the petitioner alleged that she and the decedent maintained a domestic partnership for 30 years, and that the decedent had orally agreed to establish funding sources for her benefit in consideration for her commitment to remain in a relationship with him. Petitioner argued that the decedent partially performed the agreement during his lifetime as evidenced by his making certain lump sum and annual payments to her. The decedent's estate maintained that any such arrangement was barred by the statute of frauds, and, in any event, was waived by the petitioner pursuant to a letter agreement she had with the decedent. When petitioner sought all drafts and correspondence pertinent to the letter, for the purpose of ascertaining the decedent's intent in connection with its preparation, the estate invoked the attorney-client privilege. The court rejected the estate's position, holding that the estate could not rely upon the letter agreement as a defense to the petitioner's claim, and simultaneously assert the attorney-client privilege in order to shield information which could be vital to a determination of that claim.

In re Wang, N.Y.L.J., Mar. 5, 2010, p. 28, col. 3 (Sur. Ct., Westchester Co.) (Surr. Scarpino).

Attorney-Client Privilege and Work-Product Doctrine

Before the court in *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, was an application by the plaintiffs for return of purportedly privileged documents which plaintiffs alleged had been inadvertently produced to the defendant by a third-party witness, who plaintiffs claimed had been retained by them as their "representative" in the litigation.

The court held that the burden of establishing the applicability of the attorney-client privilege is on the party asserting it. Once established, the privilege will apply to communications between a client, or his representative, and his or her counsel, which are intended to be maintained in confidence, and undertaken for the purpose of obtaining legal advice.

Within this context, the court found that plaintiffs had failed to meet their burden of demonstrating that the third-party to whom counsel's communications were made was a representative or agent acting on their behalf. Significantly, the court noted that plaintiffs provided no explanation of why a third party was even made privy to the subject communications, other than a perfunctory statement that he had knowledge of the underlying facts of the case and was necessary in order for counsel to provide them with informed legal advice. The court held that inclusion of a third party in otherwise privileged communications for the purpose of providing counsel with a greater factual base was insufficient, in itself, to bring that party within the purview of the attorney-client privilege.

Moreover, the court found it significant that although served with a subpoena for the documents in issue, they did not object to the requests made or indicate to the defendant that the documents they sought might be subject to a claim of privilege. In fact, the court noted that plaintiffs waited five months before informing the third party that the documents subpoenaed might be protected from disclosure.

Accordingly, the court held that plaintiffs had failed to provide any grounds for a return of the subject documents on the basis of the attorney-client privilege.

Further, the court rejected plaintiffs' claim that the documents were protected by the work-product doctrine, concluding that plaintiffs had failed to provide an adequate explanation of why it was necessary to share the documents with a third party, who was likely to be a material witness in the litigation, and subject to disclosure by plaintiffs' adversary. To this extent, the court noted that plaintiffs may have waived the privilege by insisting that defendant seek the subject documents from the third party witness.

Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc., N.Y.L.J., Feb. 9, 2010, p. 28, col. 3 (S.D.N.Y.) (Cote, J.).

Charging Lien

In an action to recover damages for personal injuries, counsel appealed from so much of an Order of the Supreme Court, Kings County (Lewis, J.) which, *inter alia,* denied, with prejudice, his motion to fix his legal fees based upon his contingency fee agreement, and to impose a charging lien in the amount of such fees.

The appellant, the attorney of record for the plaintiffs in an action to recover for property and economic damages sustained by the corporate plaintiff, and for personal injuries sustained by the individual plaintiffs resulting from an automobile accident, conceded that at no time did he enter a written retainer agreement with the plaintiffs or file a contingency fee agreement with the Office of Court Administration pursuant to 22 NYCRR 691.20. In view thereof, the Court held that counsel was not entitled to recover a contingency fee. Nevertheless, the Court concluded that he might be entitled, in a separate plenary action, to recover in quantum meruit for the reasonable value of his services, and therefore modified the Order of the Supreme Court accordingly.

Micro-Spy, Inc. Res, v. Marietta Small, Etc., N.Y.L.J., Jan. 19, 2010, p. 32, col. 5 (2d Dep't) (Mastro, J.P., Balkin, Belen, and Chambers, J.J.).

Disqualification of Counsel

In an action for damages relating to losses incurred in a real estate transaction, the defendants moved to disqualify plaintiffs' counsel, asserting that one or more attorneys from the firm were likely to be called as witnesses in the case.

The court opined that disqualification of counsel in order to forestall an ethical violation rests within the sound discretion of the court. In assessing whether and to what extent such discretion should be exercised, the court opined that the client's right to counsel of his or her own choosing must be balanced against the court's duty to maintain the highest standards for the profession. Nevertheless, disqualification motions are viewed with disfavor, and as such, a party seeking disqualification must satisfy a heavy burden in order to prevail. To that extent, the court noted that while state disciplinary rules may serve as guidance as to whether that burden has been satisfied, they are not dispositive.

The court noted that New York's Rules of Professional Conduct, effective April 1, 2009, addressed the situation raised by the subject motion, i.e., the circumstances in which an attorney may act both as an advocate and witness before a tribunal. So too did the predecessor to these Rules, as evidenced by the provisions of 22 NYCRR 1200.21. The import of the advocate-witness rule is to avoid the unseemly situation of an attorney advocating his own credibility, and opposing counsel vigorously cross-examining a lawyer-adversary.

However, despite the foregoing, the court recognized that the rule does not necessarily require that the attorney-witness be disqualified other than at the trial of the matter. Towards that end, plaintiffs conceded that they never intended for their counsel to represent them other than during the pre-trial phase of the case. Although defendants' counsel maintained that disqualification was nevertheless immediately required, citing the possibility of motion practice in which the court might have to assess counsel's credibility, or confusion by the jury if counsel were seen in the dual role of an examiner and a witness, the court discredited both arguments, concluding that any taint or confusion could be cured by means less drastic than disqualification. Moreover, and in any event, counsel represented to the court that it would not participate in any depositions.

Accordingly, subject to the foregoing, defendants' motion to disqualify plaintiffs' counsel was denied.

Amusement Industry Inc. v. Stern, N.Y.L.J., Oct. 16, 2009, p. 2, col. 39 (S.D.N.Y.) (Gorenstein, J.).

Due Execution

In *In re Hart,* summary judgment was granted denying probate based on the lack of due execution of the propounded instrument. The subject will bore the purported signature of the testatrix as well as an attestation clause and the signatures of two attesting witnesses. This was followed by a signed and notarized affidavit of attesting witnesses. Nevertheless, an affidavit of one of the attesting witnesses revealed that although his signature appeared on the instrument, he was not in fact present when it was executed. Instead, he stated that he was asked to sign some documents by the attorney-draftsman/nominated co-executor and beneficiary under the instrument after the decedent had apparently signed them and was assured by counsel that it was proper to do so. There was no notary present at the time; indeed, the witness affirmed that he never saw or met the notary who allegedly notarized his signature. He further averred that his sister was not present when he signed the documents, nor when the decedent signed them. Accordingly, based upon the foregoing, and the absence of opposition to the motion, summary judgment denying probate to the propounded Will was granted.

In re Hart, N.Y.L.J., Jan. 22, 2010, p. 31, col. 4 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Guardianship Under Article 17-A

Before the court was an application for the petitioners' appointment as guardians of their 22-year-old son. Incident to the relief requested, the petitioners sought the power to sell their son's artwork and make charitable contributions with the proceeds on their son's behalf.

In feeling compelled by the confines of the statute to deny the additional relief requested by the petitioners, the court expressed frustration and dissatisfaction with the restrictive provisions of SCPA Article 17-A, most certainly as compared to the provisions of Article 81 of the Mental Hygiene Law. Indeed, the court noted that "Article 17-A is a blunt instrument which allows for none of the 'tailoring' that characterizes our adult guardianship statute, MHL Article 81." In particular, the court found it pertinent that Article 81 specifically authorizes the court to allow the guardian of the property to make gifts from the funds of the incapacitated person.

As a consequence, the petitioners withdrew their petition in favor of commencing a proceeding under Article 81.

In re John H., N.Y.L.J., Mar. 15, 2010, p. 19, col. 1 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Legal Malpractice

In a suit for legal malpractice, plaintiff sought to amend his complaint in order to allege a cause of action for attorney misconduct and to seek treble damages pursuant to the provisions of Judiciary Law Sec. 487.

The gravamen of the cause of action for malpractice related to work performed by counsel on plaintiff's behalf in connection with a trust created by his late mother. This work included proceedings involving the trust in the State of Hawaii. According to plaintiff, counsel failed to arrange for his appearance in Hawaii on three occasions, resulting in his being removed as trustee of the trust and being directed to pay the legal fees of his brother, who was also a party to the proceedings. Additionally, as a result of defendant's alleged negligence, plaintiff allegedly failed to make a distribution of the trust, as required by the court and the terms of the instrument, and to sell trust securities, also in accordance with the instrument, causing plaintiff to be surcharged for interest on the amount of the unpaid distribution, and for the losses sustained with respect to the securities.

Based upon the foregoing, plaintiff sought to amend his complaint in order to allege counsel's failures to act or act properly, withholding of information with respect to the trust and the court proceedings in Hawaii, and acts of deception and false representations and statements, as evidenced by two letters to the presiding judge in the matter. The damages asserted included those originally alleged, as well as treble and punitive damages attributable to counsel's "chronic and extreme pattern of legal delinquency" pursuant to Judiciary Law Sec. 487.

The court opined that in the absence of prejudice or surprise, a complaint in an action for legal malpractice may be amended unless the proposed amendment is patently devoid of merit. Although defendant asserted prejudice and surprise in opposition to the motion, the court found that claim unavailing. The court also rejected the defendant's opposition based on the statute of limitations.

More problematic, however, was the defendant's contention that the provisions of Judiciary Law Sec. 487 applied only to the conduct of New York attorneys in connection with proceedings pending in New York courts, and thus, were inapplicable to his purported conduct in connection with the Hawaiian proceedings. In analyzing the issue, the court, on the one hand, reviewed decisions of the Second Circuit and New York Civil Court, both of which supported the claim of the defendant, and on the other hand, the statute and its legislative and judicial history, which provided for no such limitation in its scope. Indeed, as noted by the court, the general purpose of the statute, as recognized repeatedly in the appellate opinions, was to provide redress for attorney deception and overreaching regardless of whether a judicial proceeding was pending.

Accordingly, the court found no basis for curtailing the application of Judiciary Law Sec. 487 to judicial proceedings pending in New York, concluding that a New York court has sufficient interest in supervising the conduct of attorneys admitted to its bar, and protecting resident clients who have been harmed by any such conduct falling within its scope. Plaintiff's application to amend his complaint was, therefore, granted.

Cinao v. Reers, N.Y.L.J., Jan. 22, 2010, p. 25, col. 3 (Sup. Ct., Kings Co.) (Battaglia, J.).

Retainer Agreements

Retainer agreements, and the entitlement of counsel to fees in the absence of a retainer, were the subject of an opinion by the Appellate Division, First Department in *Nabi v. Sells.* Before the Court was an appeal from an Order of the Supreme Court, New York County (O. Peter Sherwood, J.), which granted the defendant-law firm's motion to dismiss its former client's claim that the firm forfeited its right to a legal fee pursuant to a contingency fee arrangement by reason of its noncompliance with the provisions of 22 NYCRR 1215.1.

In concluding that the defendant law firm was entitled to legal fees for services rendered, the Court held that noncompliance of the retainer agreement with the provisions of 22 NYCRR 1215.1 did not bar counsel from recovering in quantum meruit. In reaching this result, the Court reasoned that while a client had the right to discharge an attorney at any time, and for any reason, regardless of a retainer agreement, this right did not entitle the client to be unjustly enriched at the attorney's expense, by avoiding the payment of fees for services rendered, except in the case when the attorney's discharge was for cause. Hence, in the absence of proof that the defendant law firm was discharged for cause, the Court held that its recovery was limited to quantum meruit in a fixed dollar amount, which could be more or less than that provided in the rescinded contingency fee agreement. Nevertheless, despite the nullity of that agreement, the Court opined that it could be utilized as a "guide" in determining the fair value of counsel's services, together with such other factors as the time spent by counsel, the difficulty of the case, the amount involved, and the results achieved.

Nabi v. Sells, N.Y.L.J., Dec. 22, 2009, p. 25, col. 3 (1st Dep't) (Sweeny, J.P., Buckley, Catterson, Acosta and Freedman, J.J.).

Paternity

Following the Second Department's decision in *Matter of Poldrugovaz,* the Surrogate's Court, Bronx County was confronted with the novel issue of whether the decedent's alleged posthumous non-marital child was entitled to posthumous DNA testing, utilizing tissue already in the possession of the New York City Medical Examiner, in order to establish his right to inherit pursuant to the provisions of EPTL 4-1.2 (a)(2)(C). The movant alleged that she was not proceeding under the provisions of EPTL 4-1.2(a)(2)(D) for relief, on the grounds that appellate courts had previously rejected posthumous applications for DNA testing under this section. The case presented the court with the opportunity to examine preexisting case law on the question, and more particularly, whether, if at all, the movant would be required, under the circumstances, to establish that the decedent openly and notoriously acknowledged the child as his own. In reviewing the opinions in both *Matter of Morningstar* and *Matter of Poldrugovaz,*, the court opined that while the Second Department had relied upon the provisions of EPTL 4-1.2(a)(2)(C) for its result, it would have preferred to have applied the provisions of EPTL 4-1.2(a)(2)(D) for its holding, and laid the foundation for subsequent cases to interpret subdivision (D) more expansively to include posthumous testing when the testing does not involve disinterment of the decedent and is reasonable under the circumstances. With this in mind, the court concluded that the *Morningstar* rule was the better rule to be applied in the context of pretrial discovery motions and that DNA testing should be ordered without requiring a showing of open and notorious acknowledgment. In reaching this result, the court relied upon the fact that the tissue needed for the testing was in the continuous possession of the New York City Office of the Chief Medical examiner since the decedent's death, the movant agreed to be responsible for the cost of the testing, and the alleged child was posthumously born. Thus, the court found that there would be no undue hardship for other members of the decedent's family. Further, and alternatively, the court concluded that even if some evidence was required of an open and notorious acknowledgment, the affidavit submitted by the alleged child's mother was sufficient for this purpose.

In re Williams, N.Y.L.J., Dec. 14, 2009, p. 26., col. 1 (Sur. Ct., Bronx Co.) (Surr. Holzman).

Statute of Limitations

In *In re Benenson,* the decedent's grandson filed a petition to compel the sole surviving trustee of the subject trust of which he had a vested life estate, and the personal representative of the deceased co-trustee's estate, to account for their administration. Respondents moved to dismiss the application on the basis of the statute of limitations as well as release. In support of their motion based on the statute of limitations, the trustees' argued (1) that the statute of limitations began to run with respect to the deceased trustee from the date he was discharged by the income beneficiary of the trust; and, alternatively (2) that it began to run from the date the subject trust was terminated. As to the first contention, the court held that when beneficiaries do not know of the discharge of a trustee, the rule is that the statute of limitations does not begin to run until the trustee openly repudiates his obligation to account. Inasmuch as the petitioner claimed that he did not know of the deceased trustee's discharge, and the respondents produced no proof to the contrary, the court denied the motion on this theory. Similarly, the court denied the motion on the second ground asserted by the trustees. The court held that when an express trust terminates pursuant to the provisions of the trust, no act of repudiation or renunciation is required. The rationale, stated the court, is that the parties entitled to take upon the trust's termination will normally know that the trust has terminated. When, however, a trust terminates based upon an act of the trustees, the statute of limitations does not begin to run until the taker of the next estate knows or should have known of the termination. Inasmuch as the trustees were unable to demonstrate that the petitioner knew or should have known that the trust was terminated, the court

held that the statute of limitations was not a bar to the proceeding.

On the other hand, the court granted the motion to dismiss the petition based upon the stipulation of settlement that had been entered by the petitioner, which released the trustees from any claims the petitioner might have against them, whether or not known, suspected or claimed, including a demand for an accounting. The court held that a party will not lightly be relieved of a stipulation of settlement, and absent a finding of fraud, duress, illegality or mutual mistake, a general release will not be set aside.

In re Benenson, N.Y.L.J., Oct. 30, 2009, p. 26, col. 3 (Sur. Ct., Kings Co.) (Surr. Johnson).

Three Year/Two Year Rule

In *In re Provenzano*, the court expanded the scope of discovery under circumstances which revealed that the petitioner and his spouse assisted the decedent with her financial affairs until her death, that the name of petitioner's spouse was added to the decedent's bank accounts, that petitioner and his spouse received money from the decedent, and that petitioner and his spouse moved into the decedent's residence. The court found that taken together the record created an issue of a confidential relationship between the decedent and the petitioner and/or his spouse, which, when considered with the continuing course of fraud and undue influence alleged, was sufficient to constitute special circumstances to justify a deviation from the general three year/two year rule.

In re Provenzano, N.Y.L.J., Jan. 27, 2010, p. 41., col. 3 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

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

Scenes from the Trusts and Estates Law Section

SPRING MEETING

May 13-16, 2010

Renaissance Chicago

"Rocko and Louie"

Surrogate James Pagones (Dutchess)

Surrogate John Czygier (Suffolk) with Leigh and Surrogate Anthony Scarpino (Westchester)

Faith Carter, Ross Katz, Amy Beller, Yoshi Smith and Brian Corrigan

Frank Streng, Brandon Sall and Bob Damast

Surrogate John Riordan (Nassau), Barbara Levitan and former Section Chair Wally Leinheardt

Susan Porter, Magdalen Gaynor and Prof. Bill LaPiana

Mindy Trepel with John and Debbie Morken

Susan and Steve Kimmel

Susan Taxin Baer

Lonya A. Gilbert with her mother Rita Gilbert

Arlene Harris and Susan Litwer

Anne Bederka, Section Chair Gary Freidman and Colleen Carew

Magdalen Gaynor and Deb Robinson

Surrogate Barbara Howe (Erie) and Donald Novick

Surrogate Kristin Booth Glen (New York), Colleen Carew, Joseph Abbate and Rich Bowler

Happy guests, including Lance Corporal Adam Freidman

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

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