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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

Betsy Hartnett

Greetings. From all reports our sun-filled Spring meeting at the Turnberry Isle Resort and Club in Miami was a success. My heartfelt thanks for the efforts of our Co-Chairs, Mike O'Connor and Ian MacLean, the course book editor, Ilene Cooper, the topic coordinator for the Surrogate panel, Colleen Carew, tennis chairs Wally and Claire Leinhart and golf chair Meg Gaynor. The meeting theme—"TЯUSTS: Misteaks and Solutions"—was superbly addressed by our nationally recognized speakers. Their presentations represented the highest quality CLE available anywhere. We again asked several surrogates to address ethical dilemmas posed by a series of fact patterns. Surrogate John Czygier as moderator lead a lively panel including Surrogates Nora Anderson, Barbara Howe and Ava Raphael. We are so appreciative of their participation in Section activities. A last thank you to our sponsors and exhibitors, many of whom have been loyal and constant supporters. If you have an opportunity to work with these exhibitors or sponsors, please thank them for their support: Bonhams Auctioneers & Appraisers, Christie's, Diabetes Research Institute Foundation, Doyle New York, Empire Valuation Consultants, LLC, FMV Opinions, Inc., Gurr Johns, Inc., InterActive Legal, Management Planning, Inc., Sotheby's, TEdec Systems, Thomson Reuters (ONESOURCE Trust & Estate Administration), U.S. Trust, Bank of America Private Wealth Management, WealthCounsel, LLC, Beller Smith, P.L. and Christiana Trust.

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NYSBA

I hope all of you will mark your calendars for our 2012 Spring meeting, which will be held in Washington, DC on May 3-6, 2012 at the Willard Intercontinental Hotel. Ilene Cooper is already planning some very exciting tours and events. Stay tuned for more details.

This Fall we meet at the Adams Mark Hotel in Buffalo, New York on October 13-15, 2011. This meeting will be a joint meeting with the Elder Law Section chaired by Victoria D'Angelo and Laurie Menzies. Their program will provide an expanded one and a half days of CLE targeted at how our practices intersect as we counsel the aging Baby Boomer generation. Thursday evening we will be treated to cocktails, dinner and a docent tour of the Albright-Knox Art Gallery. Art historian Thomas Hoving described the museum as "small, intimate, and seductive," with "one of the most thumping modern and contemporary collections in the world." Those of you who ride our buses to the museum will also enjoy an architectural tour of the mansions in the Delaware Avenue Historic District and a trip past the Darwin Martin House by Frank Lloyd Wright.

Our committees continue to work on legislative proposals and practice aids to enable our Section members to advance their careers. An article in this *Newsletter* by members of our Legislation and Governmental Relations Committee describes the proposed legislation that is pending this year. If you have an interest in any specific legislative proposal and want to provide input, you can contact John Morken or Ian MacLean, the Co-Chairs of the Committee.

In response to the *Schneider v. Finmann* decision, which allows the executor of an estate to bring malpractice claims against the decedent's estate planning attorney, a joint subcommittee of Estate and Trust Administration and Practice and Ethics has been formed. One goal of the subcommittee is to compile sample forms for attorneys. It is intended that these samples will be available for discretionary use by practitioners but are not intended to create a standard. The sample forms will include engagement letters, letters with advice to clients regarding estate planning techniques, estate planning checklists, will execution checklists and termination or continuous representation letters. Your help to collect samples of these forms will be appreciated. Please contact those committee chairs if you can help.

The Membership Committee is revising our award program. Please consider nominating a Section member for the awards listed on page 34.

In April representatives from the Elder Law, Trusts and Estates Law and Real Property Law Sections' joint Expanded Estate Recovery Task Force went to Albany and discussed our concerns with regard to the recent changes to N.Y. Social Service Law § 369 with representatives of the Department of Health. These changes include a provision expanding Medicaid estate recovery based on Department regulations. As of the date I write this, the regulations have not yet been formulated. We are working proactively to deal with the issues raised by the recent amendment. I want to thank Ian MacLean (from the Trusts and Estates Law Section), Ami O'Connor, David Goldfarb and Lou Pierro (from the Elder Law Section) and Joseph DeSalvo (from the Real Property Law Section) for attending that meeting. We will continue to keep you informed on developments in this important area.

I am very proud to announce that University at Buffalo Law School student Claire H. Fortin of Amherst, New York, and Lauren L. Morales of Melville, New York, a student at Touro College Jacob D. Fuchsberg Law Center, have been chosen as the recipients of the inaugural Trusts and Estates Law Section Fellowships. Administered by The New York Bar Foundation, the awards are available to second-year students attending a law school in New York to work in trusts and estates law positions in the public sector in the State of New York during the summer of 2011. As the winners of the $5,000 Fellowship awards, Ms. Fortin will work this summer in the Chambers of the Honorable Barbara Howe, Erie County Surrogate's Court, Buffalo, and Ms. Morales will work in the Chambers of the Honorable John M. Czygier, Jr., Suffolk County Surrogate's Court, Riverhead. We trust they both will gain professional skills and competencies that will help to shape and attain their professional goals. The Section is proud to provide funding to the Foundation for these exceptional Fellowships.

Once again, if you are interested in becoming more involved with the Section, I urge you to contact me (ehartnett@mackenziehughes.com) or any officer or committee chair. Our committees do interesting and important work, and there's plenty for everyone to do. Also, you should consider joining our Section's group on the LinkedIn social networking site for business professionals. We now have nearly 400 LinkedIn members. As membership increases, the site will be another way for you to learn about Section events and to discuss issues relating to our practices with your colleagues. The service is free. I would expect that the Section's "Jobs Board" would be of interest to many. Attorneys and firms who are looking to hire an attorney can post job listings, which will be seen only 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. The URL is http://www.linkedin.com. Then search "Groups" for the NYSBA Trusts and Estates Law Section—and sign up!

Betsy Hartnett

Editor's Message

As Betsy Hartnett noted in a recent piece in the *State Bar News*, our Section has been at the forefront of proposing significant legislation that has advanced the trusts and estates law in New York. This issue of the *Newsletter* highlights some of the Section's important work in this regard—both past and present—and identifies areas that may be ripe for future efforts.

Victoria D'Angelo reports on the recent amendment to New York's exempt property statute, a long-overdue update enacted in August 2010. Ian MacLean and Robert Harper outline the legislative proposals that are pending this year, including proposals to permit directed trusteeships, make the state's decanting statute more flexible and allow incorporation by reference in wills and trusts with respect to tangible personal property. In their article about the Surrogate's Court decision in *In re Estate of Wu*, Jill Choate Beier, Theresa Kraker and Joseph La Ferlita discuss the potentially problematic implications of the decision and suggest possible legislative solutions. And in "The Digital Estate," Ken Strutin makes a compelling argument that in the age of Facebook and Twitter—when not just social interactions but many of life's daily transactions are increasingly conducted online—the legal system must develop comprehensive rules for the disposition of digital assets.

Our committees continue to advance new legislation in response to changes in the federal estate tax law. As Laurence Keiser reports in this issue, an amendment has been proposed to clarify the application of N.Y. Estates, Powers & Trusts Law 2-1.13 in light of the 2010 estate tax law. (This New York statute was itself enacted last year to address will construction issues that arose during the temporary federal estate tax repeal.) Laurence also discusses other ways in which the 2010 tax law affects New York estates.

In "Advising the Collector," Austin Wilkie reviews the gift, estate and income tax rules that apply to lifetime and testamentary transfers of art to individuals and charitable organizations. Austin's comprehensive article is a great resource for any lawyer advising clients who own valuable artworks or other collectibles.

Finally, in this issue of the *Newsletter* we introduce a new feature, "The Liability Reporter." This column was the brainchild of the Trusts and Estates Law Section subcommittee that is studying responses to *Schneider v. Finmann*, the case that opened the door to malpractice claims by an executor against a decedent's estate planning attorney. Michael Ryan will report periodically on malpractice cases from around the country so that we can all learn how liability arises in the estate planning area. As Michael reminds us, "forewarned is forearmed."

The editorial board is soliciting submissions for the Winter *Newsletter*. We welcome articles and columns, case reports, opinion pieces and letters to the editor, as well as materials from continuing legal education or other presentations (either original or adapted for publication here). The deadline for submission is September 19, 2011.

Cristine M. Sapers

Advising the Collector

By Austin T. Wilkie

The existence of significant art or collectibles ("artwork") in a client's estate creates both tax issues and non-tax issues. As in all areas of estate planning, the client's legal advisor must be in a position to provide the client with a comprehensive evaluation of planning opportunities and pitfalls and to assist in implementing the client's intentions, using the most tax efficient means possible.

It is essential that the advisor be sensitive to the presence of artwork of any significant value early in the planning process. The client may not automatically volunteer this information, and it is therefore incumbent on the advisor to seek it out. If the advisor learns of the existence of a client's artwork only after the client's death, the advisor may have overlooked valuable planning opportunities and unwittingly created otherwise avoidable difficulties in the estate administration.

I. Type of Property

At the outset, the advisor must identify whether the client's artwork is properly characterized as "capital gain" property or as "ordinary income" property.

If the client is considered a "collector" for tax purposes, that is, one who acquires artwork for pleasure, the artwork will ordinarily be considered capital gain property. As a result, upon the collector's sale of such artwork, if held for more than one year, any appreciation in value will be taxed to the collector as long term capital gain.[1] For federal income tax purposes, long term capital gain on artwork and other "collectibles"[2] is taxed at a rate of 28% under current law.[3]

Artwork that is either (i) held in inventory by a dealer, (ii) created by the taxpayer, (iii) received as a gift from the creator or (iv) owned for one year or less will be considered ordinary income property.[4] Any appreciation in value on the sale of ordinary income property will be taxed to the taxpayer at ordinary income rates, as high as 35% under current law.

The distinction between characterizing a collector's artwork as either capital gain property or ordinary income property is not only important when such property is sold. It also has consequences when considering gratuitous transfers of such property to noncharitable and charitable beneficiaries (discussed below).

II. Noncharitable Transfers

Inter Vivos

Future estate tax liability can be reduced where the collector makes completed lifetime gifts of artwork, thus removing the artwork from the collector's eventual estate. A lifetime gift to a noncharitable beneficiary will not incur gift tax so long as the transfer comes within the collector's lifetime gift tax exclusion (currently $5 million per individual) or within the annual gift tax exclusion (currently $13,000 per donee). Even if the collector's lifetime gift tax exclusion has already been exhausted, the fact that the computation of the gift tax is tax exclusive, while the estate tax is tax inclusive, provides a further economic advantage to lifetime gifts.

A lifetime gift ensures that post-transfer appreciation in the value of the artwork in the hands of the donee will not be subject to estate tax in the donor's estate. From the donee's perspective, however, the income tax consequences of a lifetime gift may not be ideal, since the donee will take the property at the donor's basis, which may be negligible if the artwork was created by the donor or received by the donor as a gift from the creator. In addition, artwork that does not qualify for capital gain treatment in the hands of the donor because it was created by the donor or received by the donor as a gift from the creator will likewise not qualify for capital gain treatment in the hands of the inter vivos donee.[5] In comparison, the donee of a testamentary gift of artwork will take the property at a basis stepped-up to the artwork's estate tax value in the donor's estate, regardless of whether the artwork was capital gain property or ordinary income property.[6] Furthermore, the artwork will generally be considered capital gain property in the hands of the testamentary donee (unless some other exclusion from capital asset status applies) even if it was considered ordinary income property in the hands of the donor.[7] The advisor should always attempt to quantify and compare the apparent estate and income tax advantages and disadvantages before recommending any lifetime gift of artwork.

Aside from tax considerations, noncharitable lifetime gifts of artwork may have other advantages. The transaction is conducted in private, rather than through a public probate process. Presumably the collector will enjoy the lifetime satisfaction of the donee's acknowledgement of the donor's generosity. The donee's behavior following the transfer may provide the donor with a basis to evaluate whether the donee would responsibly handle further lifetime or testamentary transfers of artwork.

In lieu of an outright gift to the donee, the lifetime transfer of artwork to an entity such as an LLC, followed by gifts of LLC units to the donee, may also be considered. A collector can more easily transfer LLC units than fractional interests in artwork. The governing terms of an LLC may be structured to provide valuation discounts in determining the value of interests in the underlying artwork transferred. The use of an LLC may also provide a mechanism for centralized management and control of a collection, which may continue even after units of the LLC are transferred to donees. Finally, the use of an entity may serve to minimize the potential for conflict that may otherwise arise where artwork is owned outright by several co-owners.[8]

Testamentary

At death, artwork forming a part of the collector's estate will be subject to federal and state estate taxes, and estate tax may be payable depending on available tax credits and deductions. For income tax purposes, the collector's heirs will take the property at a basis stepped-up to the estate tax value of the artwork in the collector's estate.

III. Charitable Transfers

The benefits of transferring artwork to charity, either during the collector's lifetime or upon the collector's death, should be carefully considered, as the strategic use of such transfers can play a crucial role in the collector's planning.

Inter Vivos

When contemplating a transfer of the collector's artwork to a charitable donee during the collector's lifetime, it is important to verify the charitable status of the prospective donee entity and to determine whether the entity is a *public* charity or a *private* charity. Public charities include museums, schools, hospitals, churches and other publicly supported organizations and certain private foundations (such as private operating foundations). Most other exempt organizations, including most private foundations other than private operating foundations, are considered private charities.

An income tax charitable deduction is allowed for the contribution of an artwork that is *capital gain* property, and that meets the "related use" rule (see below), to a *public* charity to the full extent of the fair market value of the property on the date of transfer.[9] The charitable deduction allowed in the year of transfer and thereafter is limited to 30% of the taxpayer's contribution base (adjusted gross income).[10] Any amount that exceeds the 30% limitation may be carried forward for five years.[11]

The related use rule provides that where artwork that is capital gain property is contributed to a public charity, the use of the artwork by the donee charity must be related to the organization's charitable purpose or function.[12] If the use is unrelated, the value of the taxpayer's deduction is reduced from the artwork's fair market value to the taxpayer's basis in the property (although the extent of the annual deduction allowable is increased from 30% to 50% of the taxpayer's contribution base). The benefits of capital gain property treatment may also be lost if the gifted artwork is sold or otherwise disposed of by the donee charity within three years of the date of the gift.[13] The collector can rebut this disallowance by obtaining certification from the charity that the intended use of the artwork was related at the time of the gift and that the artwork was later disposed of because the intended use became impossible or unfeasible.[14]

An income tax charitable deduction is allowed for the contribution of artwork that is *capital gain* property to a *private* charity only to the extent of the taxpayer's basis in the property, irrespective of the related use rule, but not in excess of 20% of the taxpayer's contribution base.[15] A five-year carryforward period is allowed.

An income tax charitable deduction is allowed for the contribution of an artwork that is *ordinary income* property to a charity, public or private, only to the extent of the taxpayer's basis in the property.[16] The charitable deduction allowed in the year of transfer and thereafter is limited to 50% of the taxpayer's contribution base, in the case of a public charity, and 30% of the taxpayer's contribution base, in the case of a private charity.[17] A five-year carryforward period is allowed.

If the collector wishes to maximize the benefits of the income tax charitable deduction, the collector should select appreciated artwork that is capital gain property and make inter vivos transfers only to public charities, making sure that the gifts will satisfy the related use rule.

Private Operating Foundation

From the collector's point of view, the major tax advantage of making a gift of artwork to a private operating foundation[18] ("POF") is that the collector is treated in the same manner as if the collector's gift were made to a public charity; i.e., the full fair market value of the gift can be deducted, provided the usual requirements for a gift to a public charity are met.

In order to qualify as a POF, the foundation must operate an active charitable program, by loaning artwork to museums and other institutions, or must itself operate a museum. The collector can act as the president of the POF and thereby retain a large degree of control over its operations, while at the same time obtaining an income tax deduction for the full value of the collector's gift. After the collector's death, the collector's family can continue to administer the POF and keep the collector's charitable vision alive in perpetuity.

A POF is, however, subject to strict IRS rules concerning its administration and typically must spend virtually all of its income on projects directly related to the foundation's stated purpose. A POF faces stiff excise taxes if it engages in any transaction that personally benefits the donor, a trustee or their family members. In establishing a POF, the collector is well-advised to construct a comprehensive plan for the ongoing financial support of the POF and for the responsible oversight of its activities.

Testamentary

The collector may wish to retain possession of his artwork during life and bequeath it to charity only upon the collector's death. The collector's estate will be entitled to an estate tax charitable deduction for the artwork's full fair market value at the time of death. For outright testamentary transfers, so long as the beneficiary is a qualified charity it does not matter whether it is a public charity or a private charity, and there is no related use requirement. However, a testamentary transfer provides no income tax benefits.

In some situations, it may be wise to bequeath artwork to a surviving spouse, with the understanding that the spouse will in turn contribute the artwork to charity during the spouse's lifetime. The bequest to the spouse will qualify for the estate tax marital deduction, eliminating any estate taxation, and the spouse's subsequent contribution of the artwork to charity will generate an income tax charitable deduction for the spouse's benefit.

IV. Partial Interest Transfers

Fractional Interest Gift

At one time, gifts of valuable artwork to museums were commonly made in fractional installments, both to avoid generating an unnecessarily large income tax charitable deduction in any one year and to accommodate the collector's wish to retain some personal use of the artwork. Typically the donee museum would take possession of the donated artwork for the portion of each tax year represented by its fractional ownership share (although some authority provided that the possession test could be met if the donee museum had merely the unrestricted right to take possession of the artwork, even if the donor actually retained possession).

However, the Pension Protection Act of 2006 ("PPA") made significant changes to the rules governing charitable contributions of fractional interests in artwork. Under the PPA, after the initial fractional gift, the donor's charitable deduction for any further fractional gift made in a subsequent year is based on the *lesser* of the fair market value of the applicable share of the artwork as appraised for the purpose of the first fractional gift or as appraised at the date of the subsequent fractional interest transfer.[19] In other words, the value of the artwork, and hence the value of future charitable gifts, is frozen at the fair market value of the artwork at the time of the initial gift, despite any later appreciation.

Furthermore, if the donor does not contribute all of the donor's remaining fractional interest in the artwork to the donee museum within the earlier of ten years of the initial fractional interest donation or the donor's death, or if the donee museum fails to take annual physical possession of the artwork for the appropriate time period of its fractional entitlement, all tax benefits generated by earlier fractional interest gifts will be recaptured, and an additional tax of ten percent of the amount recaptured will be imposed.[20]

In the view of most advisors, the PPA's imposition of these additional requirements now severely limits the benefits of fractional gifts of artwork to charity.

Charitable Remainder Trust

A charitable remainder trust[21] ("CRT") is a form of split-interest trust which distributes a specific amount at least annually to the grantor or to another noncharitable beneficiary for a term of years (or for the grantor's lifetime). At the conclusion of the term, the CRT remainder passes to charity. At the time a lifetime CRT is created, the grantor may claim an income tax charitable deduction equal to the present value of the charitable remainder.

Using artwork to fund a CRT can be problematic, because artwork is not typically an income-producing asset and does not generate the liquidity necessary for the CRT to satisfy its annual distribution obligation.[22] Furthermore, the Code provides that in the case of a gift to charity of a future interest in tangible personal property, no income tax charitable deduction is allowed until the expiration of all intervening interests in the property, such as the term of years interest in the CRT of the noncharitable beneficiary.[23]

The terms of the CRT may authorize the trustee to sell the artwork soon after the creation of the CRT and reinvest the proceeds in income producing property. This will provide a source of funds for the satisfaction of the annual distribution obligation and enable the grantor to claim an income tax charitable deduction for the gift of the CRT remainder. (Since the trust no longer owns an interest in the artwork, the charity no longer owns a future interest in tangible personal property.)

However, the CRT's sale of the artwork makes compliance with the related use rule impossible,[24] and the extent of the donor's charitable deduction will therefore be limited to that portion of the donor's basis in the artwork as is actuarially allocable to the charitable remainder, rather than to that portion of the artwork's fair market value.

Still, because a CRT is a tax-exempt entity, it does not pay capital gains tax on any appreciation realized upon the sale of the artwork by the CRT. Thus, this full appreciation, unreduced by the 28% capital gains tax, is available to the CRT to generate additional income with which to satisfy its annual distribution obligation. Under the right circumstances, a CRT funded with appreciated artwork may be advantageous to the charitably minded collector.

Charitable Lead Trust

A charitable lead trust[25] ("CLT") is a form of split-interest trust which distributes a specific amount at least annually to a charitable beneficiary (the charitable "lead" interest) for a term of years (or for the grantor's lifetime). At the conclusion of the term, the CLT remainder passes to a noncharitable beneficiary. While the actuarial value of the charitable lead interest will qualify for a gift tax deduction if the CLT is created during the donor's lifetime, or an estate tax deduction if the CLT is created at the donor's death, the present value of the remainder interest passing to the noncharitable beneficiary will be subject to gift or estate tax.

As with a CRT, the terms of the CLT may authorize the CLT trustee to sell the artwork soon after the creation of the CLT and reinvest the proceeds in income-producing property in order to provide a source of funds for the satisfaction of the annual charitable distribution obligation.

A CLT may be an effective arrangement if over the term of the trust the CLT corpus grows at a rate that exceeds the rate assumed under the Code for the purpose of determining the actuarial value of the charitable lead interest. This increase in value will pass to the noncharitable remainder beneficiary free of transfer tax.

If a lifetime CLT is structured as a grantor trust, at the time the CLT is created the grantor may claim an income tax charitable deduction equal to the present value of the charitable lead interest over the trust term. However, as a grantor trust, all income subsequently earned by the CLT will be taxed to the grantor, and for this reason a CLT is rarely established to take advantage of the income tax charitable deduction.

Bargain Sale

The collector may wish to make a simultaneous sale and charitable gift of an artwork by selling the artwork to charity at a bargain price—that is, for something less than the artwork's actual fair market value. The collector will receive an income tax deduction for the difference between the artwork's fair market value and the bargain price (i.e., the gift portion). The collector must allocate the collector's tax basis between the sale portion and the charitable gift portion of the transaction to calculate the collector's gain on the sale, if any. Any portion of the gain allocable to the gifted portion of the artwork is not taxed to the collector.

V. Valuation

Correctly ascertaining the value of a collector's artwork is essential in order to assess the tax effect of any transfer or disposition of the artwork, whether during the collector's lifetime or at death.

For income, estate and gift tax purposes, the relevant valuation standard is "fair market value," i.e., "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[26]

The most persuasive indication of fair market value is an actual contemporaneous sale of the artwork in question, which might, within a reasonable period of time, precede or follow a gift or testamentary transfer. Absent such a fair market indicia, value would typically be established by appraisal.

For inter vivos gifts of artwork to charity that exceed $5,000 in value, the collector must fulfill extensive substantiation requirements for an income tax deduction to be allowed.[27] For instance, the collector is required to obtain a "qualified appraisal" from a "qualified appraiser" and file a completed Form 8283 with the tax return on which the deduction is claimed.[28] Neither a qualified appraisal nor a qualified appraiser is technically required for gift tax purposes in the context of a noncharitable transfer, or for any gift or estate tax purposes.

Generally, if an artwork has a claimed value of $50,000 or more, it is referred to the IRS Art Advisory Panel, a body of art industry experts charged with reviewing and evaluating the acceptability of artwork appraisals submitted by taxpayers in support of the claimed fair market value.[29] The determination of the Panel becomes the position of the IRS. To promote objectivity, the Panel is not informed whether a particular artwork is being valued for income, gift or estate tax purposes.

If no resolution of an artwork's fair market value is reached at the audit or appeals level, the Service has historically shown great willingness to litigate the question with the taxpayer.[30]

The Service is vigilant in attempting to ensure that transfers of artwork are not overvalued (to increase the available income tax charitable deduction) or undervalued (to reduce the gift or estate tax consequences). Accurately valuing artwork and complying with the IRS valuation procedures is critical, as the Service has the authority to assess confiscatory penalties against taxpayers and appraisers who fail to do so.

VI. Estate Administration

Upon learning of the death of a client who was a collector of artwork, the legal advisor should immediately ascertain the location of the artwork and whether the pieces are secure: Is any artwork on loan? In the process of being framed or restored? In transit?

An itemized inventory should be compiled as soon as possible, and arrangements made for the appraisal of the artwork. It may be advisable to arrange for photographs of the artwork. All records concerning the acquisition and provenance of the artwork should be located. These records may also show whether the decedent held less than 100% outright ownership in any artwork. The adequacy of existing insurance coverage should be reviewed and updated, as required.

The administration of a collector's estate may be facilitated by the collector designating in the Will an "art executor," an individual who is knowledgeable in the art world and who may have expertise in the marketing and sale of artwork. However, it should be made clear in the Will whether the art executor is to function merely as an advisor to the regular executors or is to have all the powers of an executor, acting exclusively with respect to the administration of the estate's artwork.

If a collection is valuable and is bequeathed to non-charitable beneficiaries, the estate may face significant estate tax liabilities. Unless the collector has accurately anticipated and otherwise provided for estate taxes, the sale of a portion of the collection to generate funds to satisfy such taxes may be unavoidable. Since the estate tax is due within nine months following the collector's death, the time frame within which to coordinate an orderly sale of those artworks that the estate fiduciary intends to convert to cash is limited.

If artwork is to be sold by the estate, the choice of whether to sell by auction or through one or more private dealers should be considered. Ideally, both the prospect of sale by auction and sale by a private dealer should be evaluated and compared.

Placing artwork for sale with a private dealer provides for greater confidentiality to the estate. The collector's surviving family members may be sensitive to the publicity and loss of privacy that may result from a public sale of the artwork at auction. Those who purchase valuable artwork also often prize the ability to do so outside of public scrutiny and may prefer to work with a private dealer than to buy at auction. A reputable private dealer with an established clientele may be able to quickly match the artwork with one of the dealer's regular customers.

On the other hand, consigning the artwork to an auction house may provide greater certainty that the artwork will be sold in the near future, which may be critical if the proceeds of sale are to be used to satisfy estate obligations. The publicity surrounding a public auction exposes the artwork to a wide range of possible buyers, and the auction's environment of competitive bidding promotes the likelihood that the artwork will realize its true fair market value upon sale.

While consideration of the full range of issues that must be resolved when negotiating an auction house consignment agreement is beyond the scope of this article, the estate fiduciary must be prepared to consider such elements as the time and manner of sale, the presentation and description of the artwork in the auction house catalogue, whether the auction house will undertake any specific advertising or marketing efforts, the seller's commission and who is to bear ancillary expenses.[31] An auction house can often provide indispensable services to the estate, such as providing appraisals of a decedent's tangible personal property for tax purposes, arranging for the bulk sale of less valuable property that the auction house declines to offer for auction, and even emptying and broom sweeping the decedent's residence.

VII. Conclusion

All too often the legal advisor may conclude that the exercise of planning for and administering the client's tangible personal property, while necessary, is unfortunately disproportionate to the property's worth: "Two percent of the value, but thirty percent of the effort." However, this is rarely true where valuable art or collectibles are involved. On the contrary, significant financial consequences may be at stake in planning for and administering artwork, and the legal advisor must be prepared to formulate creative solutions to complex problems. Such opportunities should be welcomed.

Endnotes

1. A collector who also qualifies as an "investor" may deduct certain art-related expenses under IRC § 212 and certain losses on the sale of artwork under IRC § 165. The distinction between owning artwork for pleasure (the collector) and for investment (the investor) is discussed in *Wrightsman v. U.S.*, 26 AFTR 2d 70-5132, 428 F.2d 1316 (1990).
2. IRC § 408(m).
3. IRC § 1(h).
4. IRC § 1221(a).
5. IRC § 1221(a)(3)(C).

6. IRC § 1014. Except as otherwise specifically noted, this article focuses on transfer tax principles in effect under current law. For decedents dying in 2010, the estate fiduciary may "elect out" of the federal estate tax and generation-skipping transfer tax. Such an election would eliminate the federal "step-up" in basis of assets inherited from a decedent's estate in 2010, which would alter some of the planning principles described in this article.
7. IRC § 1221(a)(3)(C).
8. As with any inter vivos transfer of an interest in an entity to a family member, the special valuation rules of IRC Chapter 14 should be considered.
9. IRC § 170(a)(1), Reg. 1.170A-1(c).
10. IRC § 170(b)(1)(C), IRC § 170(b)(1)(G).
11. IRC § 170(b)(1)(C)(ii).
12. IRC § 170(e)(1)(B)(i). A taxpayer may treat a contribution as meeting the related use rule if the taxpayer (i) establishes that the artwork is not in fact put to an unrelated use by the donee charity, or (ii) at the time of the contribution it is reasonable to anticipate that the artwork will not be put to an unrelated use by such organization. Reg. 1.170A-4(b)(3).
13. IRC § 170(e)(7).
14. *Id.*
15. IRC § 170(b)(1)(D).
16. IRC § 170(e)(1)(A).
17. IRC § 170(b)(1)(A), IRC § 170(b)(1)(B).
18. IRC § 4942(j)(3).
19. IRC § 170(o).
20. *Id.*
21. IRC § 664(d).
22. The CRT can, however, be structured so that the annual amount payable to the noncharitable beneficiary is limited to the lesser of a stated percentage of the value of the CLT and the net income of the CLT. IRC § 664(d)(3). Such a CLT owning artwork need make no distribution to the noncharitable beneficiary until the artwork is sold and income is earned on the reinvested proceeds of sale.
23. IRC § 170(a)(3).
24. *See* Priv. Ltr. Rul. 9452026.
25. IRC § 2055(e)(2)(B); IRC § 2522(c)(2)(B).
26. *See, e.g.*, Treas. Reg. 20.2031-1.
27. Notice 2006-96.
28. Treas. Reg. 1.170A.
29. IRS Memorandum SBSE-04-0111-008.
30. *See, e.g.*, *Estate of Smith v. Commissioner*, 57 T.C. 659 (1972), *aff'd*, 510 F.2d 479 (1975); *Calder v. Commissioner*, 85 T.C. 713 (1985); *O'Keefe Estate v. Commissioner*, T.C. Memo 1992-210, *Scull Estate v. Commissioner*, T.C. Memo 1994-211.
31. E.g., charges for insurance, packing and shipping, catalog photography, framing and restoration, tests to verify authenticity, special advertising and promotional efforts.

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How the 2010 Tax Act Affects New York Estates

By Laurence Keiser

Last year, I reported in the Summer issue of the *Newsletter* on how the federal estate tax repeal affected the distribution of New York estates as well as the filing of estate tax returns in the state of New York for 2010 and future years.[1] This article updates that guidance in light of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"),[2] which was enacted on December 17, 2010 (after 11½ months of Congressional inaction).

I. Will Construction Legislation

The repeal of the federal estate tax as of January 1, 2010 had an unfortunate impact on wills and other testamentary documents executed by New York testators who died in 2010 if those documents used a formula bequest tied to the federal estate tax law. Consider a common formula: "I leave to my children the amount that can pass free of federal estate tax, and I leave the excess over that amount to my spouse." As a result of the federal estate tax repeal, the amount that could pass free of estate tax became the entire estate, and as a result, the surviving spouse was inadvertently disinherited under wills using such a formula. (The same situation could happen if the excess over the exclusion amount was left to a charity: the charity would be disinherited.)

To prevent this unintended result, New York (and some 20 other states) passed clarifying legislation during 2010. New York enacted Estates, Powers & Trusts Law 2-1.13 (EPTL). Under this new provision, the EPTL was modified to construe certain formula bequests or other dispositions of property (such as in trusts or beneficiary designations) as if they were made pursuant to the Internal Revenue Code as in effect on December 31, 2009.[3] The intention was to protect the surviving spouses of decedents who had thought there would always be an estate tax exclusion and never considered that the estate tax could, indeed, be repealed. The new statute was made effective for decedents dying after December 31, 2009 but also provided that it would not apply if the federal estate tax became applicable before January 1, 2011.

As a result of the 2010 Act, the federal estate tax became applicable again, retroactive to the beginning of 2010. However, the 2010 Act permitted an executor to make an election not to have the federal estate tax apply for a decedent who died during 2010. (Such an election would also cause Internal Revenue Code § 1022, the modified carryover basis rule, to apply to the assets included in such estates.)

For estates that do not elect out of the federal estate tax, it is clear that the federal estate tax applies for purposes of EPTL 2-1.13. But if an election out is made, is the federal estate tax considered "applicable" for 2010? Could it be argued that in this situation, a formula bequest of the maximum amount that can pass free of federal estate tax would be $3.5 million (the exclusion amount in effect on December 31, 2009) because the federal estate tax is not considered "applicable" to this particular estate, or would the formula result in a $5 million credit shelter bequest? Obviously, the election out option was not contemplated by the New York legislature at the time EPTL 2-1.13 was enacted.

Example: A 2010 decedent owns $6 million worth of highly appreciated securities. The decedent's will left "the amount that can pass free of federal estate tax" to his children from a prior marriage and the excess to his second spouse outright.

Under the 2010 Act, absent an opt out election, the estate will pay no federal estate tax because of the $5 million exclusion and the $1 million marital deduction, and the estate beneficiaries will get a full step-up in basis for all the securities. Of the $6 million, $5 million will pass to the children from the prior marriage and $1 million will pass to the second spouse.

However, if the executor opts out of federal estate tax, will EPTL 2-1.13 construe the exclusion amount as $3.5 million? If so, $3.5 million will pass to the children and $2.5 million will pass to the spouse. There still will be no estate tax, but there also will be no step-up in basis, except to the extent allowed by the modified carryover basis provisions. If this is the result, then the surviving spouse will get $1.5 million more than if the executor had not made the election, and the decedent's children will get $1.5 million less. Furthermore, there may be additional capital gains tax when the assets are sold.[4]

Most practitioners do not believe that this is the correct result. Instead, the consensus is that formula clauses in the wills of all decedents dying in 2010 should be interpreted to provide for an exclusion amount of $5 million.

A modification to EPTL 2-1.13 is necessary to clarify this ambiguity. Indeed, a modification has been proposed so that formula clauses for 2010 decedents will result in a $5 million exclusion without regard to an election out by the executor.[5] This modification has the support of the Trusts and Estates Law Section of the New York State Bar Association and the Association of the Bar of the City of New York.

II. Will Drafting in Light of the New York Estate Tax

Portability of Estate Tax Exclusion

For the remainder of 2011 and all of 2012, the federal estate tax exclusion amount is $5 million and the exclusion is "portable" between spouses. Portability allows the unused portion of the first spouse's exclusion amount to be used by the surviving spouse if the first spouse's executor makes an election to do so.

Portability can be a blessing primarily because it will provide relief for married couples who own their assets inefficiently from an estate planning perspective. For example, if wife owns $10 million of assets and husband owns zero, and husband dies first, his estate cannot take advantage of the ability to pass $5 million free of federal estate tax. Portability will come to the rescue (at least for 2011 and 2012) and save the couple significant estate taxes (and may save their estate planning attorney from a malpractice case) by allowing the surviving wife to use the husband's exclusion at her later death.

Does the availability of portability mean that married couples with total estates of $10 million or less should simply leave their entire estates to each other? Not necessarily, at least in New York. There is no portability for purposes of New York estate tax. Thus, if a couple's wills leave all assets to the survivor with the intent of relying on portability, the amount that can pass free of New York estate tax will be wasted. Everyone, at all wealth levels, should at least take advantage of the $1 million New York exclusion.

Beyond that, should married couples leave the excess over their New York exclusion outright to their surviving spouse? Most estate tax practioners agree that couples with moderate wealth should not do so and should instead continue to use "credit shelter trust" planning to fully utilize the federal estate tax exemption of the first spouse to die. As reported in the Spring 2011 issue of the *Newsletter*,[6] there are a number of reasons why:

- There is no guarantee that federal portability will be extended past 2012.
- Consider the effect a remarriage by the surviving spouse may have on portability. Portability only allows the surviving spouse to use the unused exclusion of his or her *last* deceased spouse. Thus, the remarriage of a spouse (and subsequent death of the new spouse) can cause him or her to lose the unused exemption of the first spouse.
- If the executor of the first spouse elects portability, the statute of limitations for auditing the estate of the first spouse is extended, at least for purposes of computing the unused exemption amount of the first spouse.
- Trusts may provide asset protection which would not exist if the assets were in the direct name of the spouse. If the surviving spouse has a judgment against him or her, the assets in the trust will generally be protected from creditors.
- If all the assets are transferred outright to the surviving spouse, they will be included in his or her taxable estate at their fair market value at the time of the surviving spouse's death. All of the appreciation since the first spouse's death will be subject to estate tax, subject only to the portable exemption which will not "appreciate" with inflation. (Of course, there will also be a corresponding step-up in basis to the fair market value at the surviving spouse's death.) On the other hand, assets held in a credit shelter trust will not be included in the taxable estate of the surviving spouse and all of the appreciation in the value of such assets likewise will be excluded.

Another factor relevant to this analysis is the New York estate tax paid on the first spouse's death versus the total New York tax that will be due from both spouses' estates. Funding a credit shelter trust in the full amount of the federal estate tax exemption in the estate of the first spouse to die—and paying New York estate tax on that bequest—can lower the total amount of New York taxes paid from both estates.

Example: Husband and wife each expect to have taxable estates of $5 million at their deaths. They have wills that leave all assets to the survivor. At the first death, there is a full marital deduction and portability is elected. There is no federal or state tax at the first death. The New York State estate tax at the second death will be $1,067,600.

Had there been a $1 million credit shelter trust in the first estate, there still would have been no federal or state tax at the first death and the New York tax in the second estate would have been $916,400. Had $5 million gone into a credit shelter trust at the first death, there would be a New York tax in each estate of $391,600, for total state estate taxes of $783,200. Of course, in the latter case, the surviving spouse would have lost the $391,600 of investable capital between the two dates of death.

Flexibility continues to be important in drafting documents where there is a surviving spouse. The use of disclaimers (as well as more complex structures, such as Clayton QTIP trusts) should be considered in most situations.

New York QTIP Election

Most states, including New York, have no provision for a separate state QTIP election that is independent from the federal QTIP election. When the federal estate tax was repealed for 2010, it was no longer necessary to file federal returns for decedents dying in that year. On the other hand, the New York estate tax exclusion remained at only $1 million, and a QTIP election would be required for marital trusts in estates larger than $1 million to escape New York estate tax. A question arose as to whether a QTIP election in New York in 2010, made purely for New York estate tax purposes, would be accepted.

In March of 2010, the New York State Department of Taxation and Finance released TSB-M-10(1)M, advising that a separate QTIP election can be made in New York any time *a federal return is not required to be filed*. As written, the relief did not seem to be limited to 2010.

TSB-M-10(1)M discusses the separate New York QTIP election in the absence of a federal filing requirement under two scenarios: (1) when there is no federal estate tax in effect or (2) when there is a federal estate tax in effect, but an estate is under the federal filing threshold. Unfortunately, the 2010 Act adds a third possibility: when the federal estate tax is in effect, but the executor of a 2010 estate makes an election to opt out of the federal estate tax altogether.

The Department of Taxation and Finance recently provided additional guidance.[7] It reaffirmed that TSB-M-10(1)M applies to all situations when no federal estate tax return is required and said this includes when an estate elects not to come under the federal estate tax for 2010 (even though a return might have to be filed to opt out of the tax).

Example: A 2010 decedent has an estate worth $10 million, all in bank accounts. The decedent's will left $1 million to a credit shelter trust and the excess to a trust for the surviving spouse which qualifies for the QTIP election. The executor, the surviving spouse and the family's financial advisors agree to opt out of federal estate tax, which makes a federal QTIP election unnecessary. Nevertheless, the executor can still make a New York QTIP election even if a federal return is "required to be filed" in order to make the opt-out election.

At this time, it is not clear how a portability election will have to be made for federal purposes. What will happen if an estate has to file a federal estate tax return to make a portability election? A filing requirement for an estate below the filing threshold solely for the purpose of making a portability election was not anticipated by the Tax Department. If a federal return is required to be filed solely to elect portability, there would still be no reason to make a federal QTIP election if the estate is below the federal filing threshold. (Indeed, such an election would generally be avoided.) However, there is no provision in New York law for making a New York QTIP election that is inconsistent with a position taken on a federal return.

Many practitioners are hopeful that instead of requiring an executor to file Form 706, the IRS will create a simpler form to file in order to make the portability election if the sole purpose of filing is to elect portability. If such a form is issued by the IRS, it may clarify state-level QTIP guidance that is contingent on the absence of a federal estate tax filing requirement. However, no simpler form has yet been issued, and this remains an open question.

New York Alternate Valuation Election

In January of 2009, the Department of Taxation and Finance issued NYT-G-09(1)M dealing with the use of an alternate valuation election (an election to postpone valuation of assets until six months after the decedent's death) for New York State purposes. The Department interpreted New York law as allowing an alternate valuation for purposes of calculating the New York gross estate in situations where no federal return is required to be filed.

Again, this ambiguous language creates uncertainty in the situation where a federal return is required to be filed, but there would be no federal estate tax liability.[8]

Example: A 2010 decedent owns real property worth $4 million on date of death and $2 million in bank accounts. Six months after date of death, the real property is worth $3 million. Decedent's will leaves $3 million to charity and $3 million to decedent's friend. The gross estate is over the filing threshold, but no tax will be paid because of the $3 million charitable deduction. Will New York allow an alternate valuation election? The logical answer is yes, but this circumstance is not addressed by NYT-G-09(1)M.

III. Conclusion

The 2010 Act has raised appreciable issues for New York domiciliaries and their professional advisors. Most of the issues arise because New York conforms to the Internal Revenue Code as it existed on July 22, 1998. A New York decedent with a $5 million taxable estate does not pay federal estate tax through the end of 2012. However, as noted above, that estate will pay $391,400 of New York estate tax—and obviously, the tax becomes more onerous as the marginal NYS estate tax rate increases to 16%.

Is it time for a change in New York?

As a practitioner, this author can report that many long-time New Yorkers are choosing to move out of New York State to avoid the estate tax. They are fleeing to states that will not collect a separate levy upon death. (The fact that the weather in that state may be better than New York experienced this winter is merely icing on the cake.)

Albany's response is that the state budget always has a significant deficit and that New York cannot afford to lose the revenue that is collected through the estate tax. What Albany fails to see is the revenue lost by taxpayers moving out of New York State. Taxpayers moving out of New York State no longer shop here, no longer do their banking here and no longer employ New York accountants and lawyers.[9]

Many of us remember that prior to July of 1998, New York recognized this logic and reduced its estate tax to become a "pick up" state. It is again time for New York to get in line with the states that conform to the federal estate tax regime.

Endnotes

1. Laurence Keiser, "New York State Aspects of Federal Estate Tax Repeal," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 43, No. 2 (Summer 2010).
2. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, 124 Stat. 3296, H.R. 4853 (Dec. 17, 2010).
3. This assumes the decedent had not intended the dispositions that would result under application of the 2010 Act. The statute also included a provision allowing for a judicial proceeding to determine the decedent's intent.
4. Consider the dilemma for the executor who has to choose between a step-up in basis and getting an additional $1.5 million to the surviving spouse.
5. Report on Legislation by the Joint Subcommittee of the Trusts, Estates and Surrogate's Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association (March 2011).
6. Michael S. Kutzin, "The Estate Tax Is Back, but with Some Twists—And Opportunities," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 44, No. 1 (Spring 2011).
7. Facsimile from Jacqueline Trembley, Tax Regulation Specialist 1, Miscellaneous Tax Instructions and Interpretations, NYS Dep't of Taxation and Fin. (March 1, 2011) (on file with author).
8. To make an alternate valuation election under IRC § 2032, the election must reduce both the gross estate and the estate tax liability. IRC § 2032(c).
9. Curiously, they will abandon their lawyers in a heartbeat, but they will not give up their doctors.

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2011 Legislation Update

By Ian W. MacLean and Robert M. Harper

Ian W. MacLean

Each year, this Section spearheads efforts to effectuate trusts and estates-related legislative reforms. In past years, some of the more newsworthy examples included the acceptance of DNA testing as proof of paternity (N.Y. Estates, Powers & Trusts Law 4-1.2 (EPTL)), adoption of a simultaneous death statute (EPTL 2-1.6), sweeping overhauls to the General Obligations Law power of attorney provisions (GOL § 5-1501 *et seq.*) and clarification that a lifetime trust must be executed by a person establishing such a trust but who need not be the "creator" (EPTL 7-1.17).

This year is no different. Currently, there are pending legislative proposals to modify the estate tax laws codified last year in EPTL 2-1.13; to clarify the payment of interest on legacies in EPTL 11-1.5; to provide for incorporation by reference concerning tangible personal property in wills and trusts; to permit directed trusteeships; to codify the common law slayer rule; and to make the state's trust decanting statute, EPTL 10-6.6, more flexible. This article outlines in detail these proposals.

I. Estate Taxes

The New York City and State Bars are proposing legislation to amend EPTL 2-1.13 and clarify its application[1] in light of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Act").[2]

Section 2-1.13 provides statutory rules of construction for the interpretation of certain formula bequests in testamentary documents of decedents who died while the temporary repeal of the federal estate tax was in effect—namely, by providing that such bequests are to be construed as if made in accordance with the Internal Revenue Code of 1986, as amended and in effect on December 31, 2009.[3] The objective of this provision was to preserve the presumed intention of testators to fund credit shelter trusts with the maximum amount permitted under prior law and leave the balance of their estates to surviving spouses, even if the testators had not updated their wills to reflect the repeal of the estate tax in 2010.

As Laurence Keiser explains in his article on pp. 10-13 in this issue,[4] it is unclear how a formula credit shelter bequest should be interpreted under EPTL 2-1.13 when the executor elects out of the federal estate tax (and into the modified carry-over basis regime) for the estate of a decedent dying in 2010, as is now permitted under the Act. In particular, it is unclear whether such a formula is subject to the $3.5 million federal exemption amount under the tax law in effect in 2009 or the new $5 million exemption under the Act.[5] Because of this potential confusion, the City and State Bars are urging the legislature to enact clarifying amendments.

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Most notably, the proposal is to modify EPTL 2-1.13 "to effect consistency in the interpretation of formula clauses (whether an estate is subject to an estate tax or a modified carry-over basis regime), and clarify that formula clauses will be interpreted with reference to a $5,000,000 federal estate and GST tax exemption amount."[6]

Additionally, in the context of generation skipping transfers, the proposal includes the removal of a reference to direct skips to natural persons in EPTL 2-1.13(a)(2) so that 2-1.13 applies to all GST-type transfers.[7] The "direct skip to natural persons" language is superfluous and unnecessary, as EPTL provisions should apply to all GST-type transfers, not just those involving direct skips to natural persons.

Finally, the proposed amendments to EPTL 2-1.13 include the extension of the deadline for commencing a judicial proceeding concerning the rules of construction from 12 months after the testator's or grantor's death to the later of 24 months after death or 6 months from the amended statute's enactment.[8] Without such an amendment, the fiduciaries of estates of decedents dying early in 2010 may be precluded from bringing such a proceeding, as the time to do so may have already expired.[9]

These amendments to EPTL 2-1.13 are needed to avoid unwanted and improper consequences of the statute as currently written and will clarify the purpose and proper application of that statute in construing formula bequests and dispositions.

II. Interest on Legacies

Under EPTL 11-1.5, interest is not payable on a legacy unless the beneficiary makes a demand upon the fiduciary for payment before the beneficiary commences a proceeding to compel payment of the legacy.[10] Unless the testator's will provides otherwise, the interest rate is fixed at 6%, commencing seven months from the time that letters, even preliminary and temporary letters, are granted.[11] Estates, Powers & Trusts Law 11-1.5 authorizes the Surrogate's Court "to award interest at the legal or judgment rate [of 9%] set forth in the CPLR if [the fiduciary's] delay in paying legacies [is] unreasonable."[12]

Reasons for amending EPTL 11-1.5 abound. Most notably, the 6% interest rate set forth in EPTL 11-1.5 fails to account for the time value of money. To the extent that interest on legacies is paid from the residuary, the statute's 6% rate inequitably diminishes the shares of residuary beneficiaries during difficult economic times, such as these, when interest rates are unusually low.[13] When the economy is booming and interest rates are high, the 6% figure also unfairly penalizes legatees who are not properly compensated for the delay in distributions.[14] Former Surrogate Roth recognized this problem in *In re Schwartz*, when she wisely characterized "any fixed numerical rate as insufficiently flexible to be fair over time."[15]

Moreover, courts have reached conflicting conclusions concerning EPTL 11-1.5's application.[16] On the one hand, some surrogates have held that interest may be awarded even in the absence of a proceeding to compel its payment.[17] On the other hand, surrogates have found that interest may not be paid unless a legatee makes a demand for interest before commencing a proceeding to compel payment.[18] Still other surrogates have held that there is no need for such a demand.[19] Additionally, the surrogates are not even in agreement on whether the payment of interest is discretionary or mandatory[20] or whether the residuary beneficiaries or fiduciaries are responsible for paying the interest.[21] Legislative action is required to resolve these discrepancies.

This Section has proposed legislation to amend the EPTL (by revising 11-1.5 and enacting 11-A-2.1), which would promote greater fairness and certainty concerning the payment of interest on legacies.[22] Under the proposal, "interest [would] be paid [from the residuary] starting seven months from the date of issuance of either preliminary or permanent letters, or if letters are not required, seven months from the date of death or other date a beneficiary is entitled to receive a legacy," unless the governing instrument provides otherwise, regardless of whether the estate is liquid or illiquid and regardless of whether a demand is made.[23] The interest rate would be "set (or reset) on the first business day of each calendar year and fixed for that calendar year at the Federal funds rate less 1%, but in no event less than ½ of 1%."[24] In addition, the Surrogate's Court would retain authority to disallow interest or surcharge a fiduciary, thus protecting the sometimes conflicting interests of specific bequest beneficiaries, residuary beneficiaries and fiduciaries.[25]

This proposal will ensure greater fairness and uniformity for beneficiaries, fiduciaries and the courts, as they address administration issues involving interest on legacies. For these reasons, the proposal should be enacted.

III. Incorporation by Reference

In many states, extraneous documents may be incorporated by reference into wills "if the reference is distinct and if the writing is identified."[26] Under New York law, however, incorporation by reference generally is not permitted.[27] As the Court of Appeals explained long ago, "[i]t is unquestionably the law of this state that an unattested paper, which is of a testamentary nature, cannot be taken as a part of the will, even though referred to by that instrument."[28] The underlying rationale is to avoid the potential for fraud or mistake in relying upon a document not executed in accordance with the statutory formalities for testamentary instruments.[29]

Despite the general prohibition against incorporation by reference, however, there are limited exceptions, as "not all extraneous writings are to be distrusted."[30] For example, under EPTL 3-3.7, a testator may dispose of all or part of his estate to a trust, provided that the trust instrument is executed in compliance with EPTL 7-1.17, prior to or at the same time that the testator's will is executed, and the trust is identified in the will.[31]

Against this backdrop, a proposal is pending to amend the EPTL (to include 3-3.10 and amend 7-1.17) to permit incorporation by reference concerning tangible personal property into wills and trusts.[32] The proposal, which is based upon Uniform Probate Code 2-513 (UPC), would permit a dated, signed written statement or list to be treated as part of a will or trust instrument, if the writing is signed by the testator and it describes the items and the devisees with reasonable certainty.[33] The writing could be treated as such whether prepared before or after the will or trust's execution, and even if altered after the instrument's preparation.[34] Additionally, the writing would have no import other than its effect upon the bequests made in the will or distributions called for in the trust instrument.[35]

The potential benefits of this proposal are many. Most notably, the proposal, if enacted, would allow testators and grantors to adjust their intentions through written statements or lists, without incurring the time and expense of executing new will and trust instruments.[36] By requiring that the statements and lists be dated and signed, the risk of fraud or mistake would increase only marginally.[37]

The proposal for incorporation by reference of tangible personal property will balance sometimes conflicting goals of convenience and economy for testators and grantors versus a public policy to avoid fraud in wills and trusts. Insofar as the proposal satisfies these concerns, it is worthy of enactment.

IV. Directed Trusteeships

A trustee generally is accountable for all aspects of trust administration and must maintain continuing oversight over a trust.[38] Although a trustee may delegate investment authority under EPTL 11-2.3, the trustee is not necessarily absolved of liability when doing so.[39] Generally speaking, under New York law a trustee may delegate but not abdicate investment authority.

That the trustee may face liability for investment decisions even after delegating authority for them gives rise to a number of problems, not the least of which is that it deters corporate fiduciaries from administering trusts in New York.[40] This is bad for New York State in that it contributes to the loss of trust business (law, accounting and bank related), tax revenue and jobs to states that have more trust-friendly laws.[41] Those more trust-friendly states have enacted directed trust statutes to balance the desire of corporate fiduciaries not to be liable for the poor investment decisions of others charged in trust instruments with making them, the grantors' desire that someone other than the trustee make the investment decisions and the right of beneficiaries to seek redress for damages arising from poor investment decisions.[42]

A directed trusteeship involves the appointment in a trust instrument of an investment advisor to exercise responsibility for trust investments and an administrative trustee to supervise all other aspects of trust administration.[43] The concept is not novel, and several courts, perhaps most notably Surrogate Radigan in *In re Rubin*, have recognized it.[44]

In *Rubin*, the testator's will named his daughter and son as co-executors.[45] The will further provided that to the extent the executors disagreed on an estate administration matter, they should consult two advisors whose decision would be binding upon the executors.[46] In rendering a decision on a dispute concerning the son's exclusive right to manage the testator's real estate holdings, the advisors noted that the son was intimately involved in doing so during the testator's life.[47] The advisors also determined that the son could sign business checks himself, but that the signatures of both executors would be required for estate checks.[48] The daughter objected, asserting that as co-executor, she had an equal right to supervise the administration of the estate.[49]

In ruling for the son, Surrogate Radigan reiterated the maxim that a "grantor or testator may give his gift subject to any terms and conditions he chooses, unless the terms are contrary to public policy or some such restriction applies."[50] Thus, the grantor or testator can withhold certain powers from the principal fiduciary and grant them to an advisor or co-fiduciary.[51]

Consistent with those principles, Surrogate Radigan explained that the advisors selected by the testator were akin to fiduciaries, "somewhat in the nature of…cotrustee[s]" and went on to say:

> Since the relationship between the fiduciary and advisor is that of a cotrustee, with the advisor having controlling power, the fiduciary is justified in complying with the directives and will not generally be held liable for any losses unless the instructions given him are improper or in violation of fiduciary duties owing to the beneficiaries.[52]

Accordingly, the Surrogate held that the testator's designation of the advisors to make controlling decisions with respect to the co-executors was a valid limitation of the co-executors' authority.[53]

A proposal is pending that would codify Surrogate Radigan's well-reasoned decision in *Rubin* by authorizing the bifurcation of trustee investment responsibilities. If enacted as EPTL 11-2.2A, the proposal would provide that the trustee charged in an instrument with administering the trust but not with making investment decisions would be absolved of liability for the imprudent investments of the advisor nominated in the trust. The liability would be reserved for the investment advisor. This is fundamentally fair, as the fiduciaries would only incur liability for their own decisions.

Additionally, the proposal specifies that the investment advisor would be entitled to "such compensation as may be reasonable." Depending on whether the administrative trustee is an individual or corporation, the administrative fiduciary would be entitled to commissions under Surrogate's Court Procedure Act 2312 or 2309 (SCPA).

This proposal should be enacted because it represents a codification of existing case law, will clarify the duties and potential liabilities of trustees and investment advisors nominated in trust instruments and will make New York State a more attractive jurisdiction for those wishing to create and administer trusts.

V. Slayer Statute

As articulated by the Court of Appeals in *Riggs v. Palmer*, the so-called "slayer rule" provides that "[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."[54] Although *Riggs*'s maxim is most often applied in cases concerning the intentional or reckless killing of another, its application is anything but straightforward,[55] resulting in a rich and sometimes conflicting body of case law.[56]

Riggs and its progeny have resulted in the forfeiture of, among other things, the killer's right to receive the proceeds of a victim's life insurance policy,[57] to benefit as a legatee under the victim's will or as an intestate distributee of the victim[58] and to take sole title to property that was held jointly with the victim with right of survivorship.[59] Conversely, it is now settled law that forfeiture will not arise when the killer acts in self-defense,[60] by accident[61] or under a disability that negates any culpable mental state, i.e., insanity.[62]

However, the issue of the extent to which killings that fall short of voluntary manslaughter will result in forfeiture remains open,[63] as does the question of whether an intentional or reckless killer forfeits all interests (or just those that pass due to the killing) in property held with the victim as tenants-by-the-entirety.[64] Courts have reached conflicting conclusions on these issues.[65]

In order to "synthesize the rich body of New York case law addressing…the 'homicidal heir' problem," this Section has proposed legislation that would codify the notion that one who intentionally and feloniously kills another should not benefit from the victim's estate.[66] Based upon UPC § 2-803, the proposal would treat all types of dispositions, including those under wills, intestate distributions, life insurance proceeds, revocable trust distributions and jointly held property, similarly,[67] thereby remedying discrepancies between the treatment of dispositions under *Riggs* and, for example, EPTL 4-1.6.[68] The proposal also would delineate the rights of third parties, including payors and bona fide purchasers, affected by forfeiture and would vest the Surrogate's Court with discretion to decide issues that are not specifically addressed in the statute.[69]

If enacted, the proposal will ensure greater consistency in the disposition of property in cases involving intentional homicide while still protecting the rights of estate beneficiaries who do not intentionally and feloniously kill the decedents. And it will preserve the discretion of Surrogate's Court to resolve these matters in the most equitable manner possible. Accordingly, the proposal should be enacted into law.

VI. Decanting

Decanting is the process of transferring all or part of a trust's assets into a new trust with different terms.[70] Under New York's current decanting statute, EPTL 10-6.6, a trustee who derives "absolute power [through either a will or trust instrument] to invade principal for the benefit of an income beneficiary may exercise the power by creating a new trust for the beneficiary,"[71] provided that the exercise of this discretion "does not reduce any fixed income interest of any income beneficiary of the trust," "is in favor of the proper objects of the exercise of the power" and "does not violate the [exoneration] limitations of [EPTL] 11-1.7."[72] Although the statute was originally intended to aid in generation-skipping transfer tax planning,[73] it has been used to appoint trust principal to supplemental needs trusts,[74] to avoid real property transfer taxes[75] and to minimize liabilities.[76]

To have "absolute discretion" under EPTL 10-6.6, a trustee's authority to invade must be unrestricted; the trustee must be bound only by the implicit duties of good faith and reasonableness.[77] If the trustee's power to invade is subject to an ascertainable standard (such as health, education, maintenance or support), it is not absolute and EPTL 10-6.6 does not authorize decanting.[78] Instead, the trustee must adhere to the testator or grantor's expressed wishes.[79]

In conjunction with the Office of Court Administration's Surrogate's Court Committee and several committees of the New York City Bar Association, this Section has joined in supporting a proposal that would make New York's decanting statute more flexible.[80] If enacted, the proposal would be codified as EPTL 10-6.6-A, which would replace EPTL 10-6.6.

Under the proposed legislation, a trustee would have the authority to decant trust principal to another trust, even if the trustee lacks absolute discretion to invade principal, or the instrument contains a spendthrift provision or proscribes its amendment or revocation.[81] Conversely, the trustee would not face any liability under the amended statute for failing to decant.[82] Among other provisions to protect beneficiaries, the proposal requires that all trust beneficiaries with vested rights receive notice of the trustee's intention to exercise any decanting power. Although the beneficiaries' consent would not be required for the trustee to be able to decant, their interests would be protected through the right to compel the trustee to account and to object to the trustee's accounting.[83]

The proposal should be enacted into law. It increases flexibility of trustees to address circumstances that the testator or grantor did not foresee while respecting the intentions of testators and grantors and protecting the rights of vested beneficiaries. Furthermore, it will bring New York State in line with more popular trust jurisdictions and thereby enhance New York as a situs for trusts.

VII. Conclusion

The proposals discussed above are six of the legislative reforms that are being supported by this Section. If enacted, these proposals will advance New York's trusts and estates laws and enhance New York's stature as a desirable trust jurisdiction. You can lend your support by contacting your state senator and assemblyman and by getting active in the Section.

Endnotes

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4. Laurence Keiser, "How the 2010 Tax Act Affects New York Estates," *Trusts and Estates Law Section Newsletter*, Summer 2011, p. 10.
5. N.Y. City Bar Joint Committee Report, *supra* note 1.
6. *Id.*
7. *Id.*
8. *Id.* Under the proposed amendment, Surrogate's Courts would retain discretion to extend the filing deadline, much like they do in EPTL 2-1.11.
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11. *Id.*
12. New York State Bar Association Trusts and Estates Law Section Estate and Trust Administration Committee, Memorandum re: Proposal to Change New York Law with Respect to Interests on Legacies (Feb. 26, 2011) (hereinafter "Estate and Trust Administration Committee Memorandum").
13. *Id.*
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20. *Park-Montgomery*, *supra* note 17; *In re Lancaster*, N.Y.L.J., Dec. 27, 1996, p. 27, col. 5 (Sur. Ct., Suffolk Co.).
21. *In re Goodman*, N.Y.L.J., May 19, 2000, p. 29, col. 2 (Sur. Ct., New York Co.); *In re Bozzi*, N.Y.L.J., Mar. 31, 1999, p. 36, col. 6 (Sur. Ct., Nassau Co.).
22. Estate and Trust Administration Committee Memorandum, *supra* note 12.
23. *Id.*
24. *Id.*
25. *Id.*
26. 3 Warren's Heaton on Surrogate's Court Practice, "Wills That May Be Propounded In Surrogate's Court," § 41.01.
27. *In re O'Brien*, 233 A.D.2d 561, 562, 649 N.Y.S.2d 220, 222 (3d Dep't 1996).
28. *Booth v. Baptist Church*, 126 N.Y. 215, 247-48 (1891).
29. *In re Klosinski*, 192 Misc.2d 714, 720, 746 N.Y.S.2d 350, 356 (Sur. Ct., Kings Co. 2002); *see also In re Lew*, N.Y.L.J., Dec. 2, 2002, p. 19, col. 3 (Sur. Ct., N.Y. Co.) (refusing to incorporate by reference attachments to the decedent's will).
30. *In re Murphy*, 70 Misc. 2d 516, 518-19, 334 N.Y.S.2d 13, 16 (Sur. Ct., Kings Co. 1972); *In re Ivie*, 4 N.Y.2d 178, 181-82 (1958); *In re Rausch*, 258 N.Y. 327, 332 (1932); *In re Fowles*, 222 N.Y. 222, 232-33 (1918).
31. EPTL 3-3.7.
32. Janet L. Blakeman, Memorandum in Support of a Proposed Statute Providing for Incorporation by Reference in Wills and Inter Vivos Trusts to a List Disposing of Tangible Personal Property (May 28, 2003).
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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
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42. *Id.*
43. *Id.*
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45. 143 Misc. 2d at 303-08.
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47. *Id.*
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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889).
55. *In re Wright*, 20 Misc. 3d 648, 859 N.Y.S.2d 864, 866 (Sur. Ct., Westchester Co. 2008).
56. New York State Bar Association Trusts and Estates Law Section Executive Committee, Memorandum in Support of Proposal for Comprehensive Legislation on the Effect of Homicide on Property Rights (Jan. 2006) (hereinafter "Executive Committee Memorandum").
57. *In re Barrett*, 224 A.D.2d 415, 416, 637 N.Y.S.2d 751 (2d Dep't 1996).

58. *In re Covert*, 97 N.Y.2d 68, 74 (2001); *In re Murphy*, N.Y.L.J., June 23, 1999, p. 31, col. 5 (Sur. Ct., Kings Co.).

59. *In re Pikul*, 192 A.D.2d 259, 260-64, 601 N.Y.S.2d 113 (1st Dep't 1993).

60. *Barrett*, 224 A.D.2d at 416.

61. *In re Savage*, 175 Misc. 2d 880, 881, 670 N.Y.S.2d 716, 717 (Sur. Ct., Rockland Co. 1998).

62. *In re Wirth*, 59 Misc. 2d 300, 303, 298 N.Y.S.2d 565 (Sur. Ct., Erie Co. 1969).

63. *Compare Savage*, 175 Misc. 2d at 881-82 (holding that a husband convicted of his wife's reckless killing forfeited his right to benefit from the wife's estate) *with In re Wolf*, 88 Misc. 433, 440-42, 150 N.Y.S.2d 738, 741-43 (Sur. Ct., N.Y. Co. 1914) (finding that the husband could inherit from his wife's estate, as he intended to kill his wife's paramour, but mistakenly took his wife's life).

64. *Compare Cardozo v. Wlasiuk*, 3 Misc. 3d 1060, 1062-63, 777 N.Y.S.2d 615 (Sup. Ct., Chenango Co. 2004) (holding that the killer did not forfeit his entire interest in property held as tenants-by-the-entirety with his victim wife, but was entitled to a life estate in one-half of the property or the value of such a life estate) *with Murphy*, *supra* note 58, n.1 (opining that the killer might forfeit her entire interest in jointly owned property); *Citibank, N.A. v. Goldberg*, 178 Misc.2d 287, 290-91, 679 N.Y.S.2d 237, 239-40 (Sup. Ct., Nassau Co. 1998).

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71. *In re Barkman*, N.Y.L.J., May 20, 2003, p. 23, col. 3 (Sur. Ct., Nassau Co.); EPTL 10-6.6.

72. EPTL 10-6.6.

73. *In re Mayer*, 176 Misc. 2d 562, 564, 672 N.Y.S.2d 998, 1000 (Sur. Ct., N.Y. Co. 1998).

74. *In re Grosjean*, N.Y.L.J., Dec. 10, 1997, p. 35, col. 6 (Sur. Ct., Nassau Co.).

75. *In re Riese*, 164 Misc. 2d 1028, 1031, 627 N.Y.S.2d 232 (Sur. Ct., N.Y. Co. 1995).

76. *In re Kaskel*, 163 Misc. 2d 203, 206-08, 620 N.Y.S.2d 217 (Sur. Ct., N.Y. Co. 1994).

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80. Report by the New York City Bar Association's Committee on Trusts, Estates and Surrogate's Courts and the Committee on Estate and Gift Taxation in Support of Proposed Amendment to Section 10-6.6(B) of the Estates, Powers and Trusts Law and Restatement of the Statute as Section 10-6.6-A (May 2010); Memorandum from the New York State Bar Association Decanting Subcommittee (Sept. 27, 2010) (jointly hereinafter "Decanting Report and Memorandum").

81. Decanting Report and Memorandum, *supra*, note 80.

82. *Id.*

83. *Id.*

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The Digital Estate

By Ken Strutin

Social media is an exciting and creative way to connect, share information and build communities. And the Internet is becoming predominant as the marketplace where the daily transactions of life are conducted. Still, one of the neglected ensigns of Internet citizenship is advanced planning. When people die, there are virtual secrets that follow them to the grave—the last refuge of privacy in a transparent society. Courts and legislatures have only begun to reckon with the disposition of digital assets when no one is left with the knowledge or authority to conclude the business of the cyber afterlife.

For the price of an email address and a uniquely crafted password, anyone can become vested in the online world. Cloud computing and web-based data transactions offer access to a variety of host sites, whether a bank, a credit card company, a vendor, an online auction house or a social networking site. These are the tools of our time, and every generation from now on will be leaving well concealed digital tracks. Therefore, the most important long-term consideration is who can access a person's online life after they have gone or become incapacitated?

When it comes to digital assets, the rights of executors, beneficiaries and guardians are muddy. Drafting a will or advance directive should include a harvest of the testator's email addresses, passwords and log in identifications.[1] But the majority of state laws make no specific provisions for information assets such as those stored in the cloud.

For example, New York has an estate exemption for immediate family members, N.Y. Estates, Powers & Trusts Law 5-3.1(a) (EPTL), which includes among other items: (1) "electronic and photographic devices" and (2) "computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices.…"[2] But what happens to Flickr photo albums, Facebook profiles, YouTube videos and Twitter accounts residing in cyberspace and locked behind passwords and security settings?

Oklahoma has become one of the first states to enact specific estate planning legislation that recognizes the social media portion of the cloud.[3] Section 269 of Oklahoma Statute Title 58 Probate Procedure reads: "The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites."[4]

Yet this important first step leaves issues unresolved. Foremost is the need to define a person's virtual footprint that will encompass all the activities to be administered posthumously or in the event of physical incapacity.

Digital Estates

Attorney James D. Lamm in his insightful analysis of virtual estate planning begins with a definition of "digital property" that includes "data, Internet accounts, and other rights in the digital world, including contractual rights and Intellectual property rights."[5] Blogs, domain names, eBay accounts and gaming sites are just a few of the types of property that Lamm considered in addition to e-mail, social media and electronically created records.

No doubt there will be contentious fights over the right to inherit ownership or access to someone's Facebook account, which might reveal a treasure trove of sentimental value or marketable assets. Such concerns might inspire the creation of virtual wills and advance directives, or enlisting the services of companies that provide for a smooth transition of online content to designated legatees.

"Websites like Legacy Locker and Asset Lock have been created and act as e-undertakers, locking away information like assets, documents, legacy letters and passwords."[6]

Some social networks already make provision for the afterlife: "Facebook profiles have become such a big part of our personal lives that the social network decided to give options if a user passes away. The profile will remain untouched, unless family members decide to memorialize the account, which prevents anyone from logging into it in the future, but still lets friends and family leave posts on the profile Wall in remembrance. Sensitive information like contact info and status updates are removed, and only confirmed friends can see the page."[7]

This online information will not always be easy to collect since it will be distributed across third party websites and a growing array of iPhones, iPads, flash drives and the like. Moreover, an increasing number of personal technologies, which may be the sole repositories of critical data, use biometric encryption[8] and other security measures to protect against identity theft,[9] further complicating estate administration. Finally, the records hidden in archive sites, backups, cache, metadata, Neoprint or other byproducts of online activities may also have to be considered.

There's no dead man's switch for cyberspace. Much of it can go on with little or no human effort. It is conceivable, for example, that through the direct depositing of paychecks and automatic bill paying, a human being's physical presence could become superfluous for some time—until they stopped showing up for work.

Likewise, significant and irreplaceable records can be effaced through routine computer operations.

About five years ago, the wife of an elderly New York man had passed on, and his sole comfort was in listening to her outgoing phone message every day.[10] However, when their telephone company, Verizon, upgraded its voicemail system, the message was erased. There seemed to be no recourse. But we are learning that nothing is ever truly erased and anything created or posted in the digital world has a kind of virtual immortality. By dint of effort, Verizon was able to recover the message from their archives and restore the voice of the dearly departed.

This story also shows the inevitable problem of preserving digital assets individually and by society at large. Are computer records being recopied into updated formats? Is the software needed to read legacy data being downloaded along with the originals? What steps are and should be taken to assure that electronic media will endure and be readable in another generation or so?[11]

A Town Called Rosetta

A cautionary tale of what happens when a society neglects to safeguard the path to deciphering its writings is the Rosetta Stone.[12] Carved in 196 B.C., the stele was a document detailing the accomplishments of Ptolemy V in three distinct languages: hieroglyphic, demotic and ancient Greek. For 15 centuries, the meaning of hieroglyphs had been lost. But in A.D. 1799, fortune smiled when a Napoleonic soldier accidentally discovered the triptych in the Egyptian town of Rosetta (Rashid). It would be another 20 years before Jean-François Champollion recalled to life the language of the ancient Pharaohs.

We need more than serendipity to preserve the data of our lives beyond our lifetimes. Client records are already migrating to the cloud, and attached to the lawyers' use of cloud computing is the responsibility for confidentiality and retention of those files.[13]

Equally important is the need to assure that only correct information about clients is maintained in third-party databases. Therefore, vetting must precede preservation.

Database Cleaning

Government agencies and private entities are required by law or by virtue of business needs to collect and preserve client data, e.g., offender registries, criminal histories and credit bureau reports. However, some of this information might be incorrect or recorded in error or need to be removed. Recent corrective litigation highlights an important aspect of preservation, i.e., assuring that the information saved is accurate, complete and whether it should have been recorded or revealed in the first place.

The respondents in *Los Angeles County v. Humphries*[14] had been accused of child abuse but were later exonerated. Nevertheless, their names became a fixture in California's Child Abuse Central Index, which did not provide a mechanism for challenging inclusion. The U.S. Supreme Court held that the respondent's section 1983 lawsuit seeking a prospective remedy, i.e., injunctive and declaratory relief, ultimately depended on their ability to show that the government's "policy or custom" violated their due process rights.

In *Doe v. Fankhauser*,[15] a county clerk inadvertently posted online information that included the identity of a minor and sex abuse victim. The District Court held that this conduct was immune from liability, since it was not evidence of a "policy or custom" by the governmental entity responsible for handling the records.

On the other hand, Judge LaMarca in *Bursac v. Suozzi*[16] found in favor of the plaintiff whose DWI arrest information had been posted on the county's "Wall of Shame" web page. The online profile violated due process in part because of the permanency and global nature of Internet information:

> It is the judgment of the court that the County Executive's actions, in publishing and maintaining the petitioner's name, picture and identifying information embedded in a press release on the County's Internet Web site, which results in *limitless and eternal notoriety*, without any controls, is sufficient to be the "plus" in the "stigma plus" due process analysis in the case at bar. The court finds that the petitioner's due process rights have been violated. [Emphasis added].

This "limitless and eternal notoriety" will have implications for long range litigation practices and case investigations. Database records of human metrics, such as fingerprints, iris scans and DNA samples, might be subject to removal or sealing depending on the outcome of a case. The definition of "newly discovered" evidence will take on additional meaning as virtual archives are mined for exonerating or mitigating proof, just as they are now being used to solve cold cases.[17]

Clemency applications and actual innocence motions will also come to rely on the data squirreled away in the cloud. Revelations from witnesses who did not come forward or confessions by guilty third parties might be unearthed post-mortem. And there's no telling what might be discovered by the executor of a digital legacy.

Bare-all social media profiles and online confessionals hint at the possibilities:

> At least two dozen [confession] sites are active, many launched in the past few months [2007].… What they have in common is their focus on unthinkable deeds, abhorrent acts or secret longings that likely involve sex or relationships, embarrassing moments or inner demons. Some of the revelations verge on the indecent. Others are outright illegal.[18]

Computer and communication technologies are swiftly transforming society into an information-drenched culture. It is a place where personal data is stored in a virtual superstructure, a kind of smart library, outstripping the conventions and confines of home and office-based computing.[19] And in this virtualized world, the governance of a super-information utility will hinge on the evolution of laws addressing human needs.

Conclusion

As people invest more of their living knowledge and data into digital media, the legacy of that virtual life becomes increasingly important.

The principal concern today is the passing on of passwords, divvying up social media contents and protecting virtual assets. But five minutes from now, those social media sites will include life logged metrics with excruciating details about our health, activities and collective experiences. They will be more intimate and vivid than any handwritten personal journal or photo album. And they will demand clear and comprehensive rules to oversee their final disposition.

This information generation lives in manifold realities, each of which must be addressed to protect the rights and interests that society has come to recognize as enduring. The lesson of the Rosetta Stone teaches us that there is no present tense that can long survive the fall and rise of languages and modes of recordkeeping.

After his spirited and humanizing journey, Ebenezer Scrooge resolved: "I will live in the Past, the Present, and the Future!" Our virtually augmented life makes that possible. But short of carving ones and zeroes into stone tablets, our legal system must develop far reaching guidelines for passing on an accurate, accessible and intact digital legacy.

Endnotes

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4. Okla. Stat. tit. 58, § 269 (2010).
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15. No. 5:09CV2938 (N.D. Ohio, Nov. 12, 2010).
16. 22 Misc.3d 328 (Nassau County Sup. Ct. 2008).
17. *See* Greg Cergol, "Facebook Helps Cops Revive Nassau Cold Case," NBC News, Nov. 12, 2010.
18. *See* Sharon Jayson, "Confession Is Just a Keypad Away," USA Today, Nov. 29, 2007.
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Defining Beneficial Dispositions Under EPTL 3-3.2: Should Tax Non-Apportionment Clauses Count?

By Jill Choate Beier, Theresa A. Kraker and Joseph T. La Ferlita


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New York State has a long history of law governing dispositions made under a will to attesting individuals ("interested witnesses"). A recent decision by the New York County Surrogate's Court has arguably expanded the reach of New York's interested witnessed rule in a way many practitioners find problematic. This article discusses the decision in *In re Estate of Wu*,[1] its implications for trusts and estates practitioners and possible solutions to resolve the issue.

I. History of New York's Interested Witness Rule

New York's current statute governing testamentary dispositions to interested witnesses is set forth in N.Y. Estates, Powers & Trusts Law 3-3.2 (EPTL), which provides as follows:

> (a) An attesting witness to a will to whom a beneficial disposition or appointment of property is made is a competent witness and compellable to testify respecting the execution of such will as if no such disposition or appointment had been made, subject to the following:
>
> (1) Any such disposition or appointment made to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition or appointment thereunder.
>
> (2) Subject to subparagraph (1), any such disposition or appointment to an attesting witness is effective unless the will cannot be proved without the testimony of such witness, in which case the disposition or appointment is void.
>
> (3) Any attesting witness whose disposition is void hereunder, who would be a distributee if the will were not established, is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will, such share to be recovered as follows:
>
> (A) In case the void disposition becomes part of the residuary disposition, from the residuary disposition only.
>
> (B) In case the void disposition passes in intestacy, ratably from the distributees who succeed to such interest. For this purpose, the void disposition shall be distributed under 4-1.1 as though the attesting witness were not a distributee.
>
> (b) The provisions of this section apply to witnesses to a nuncupative will authorized by § 3-2.2.

Based on the current statute, a "beneficial disposition or appointment of property" made to an attesting witness is void unless there are at least two other disinterested attesting witnesses at the time of the execution and attestation of the will. However, if the testimony of the interested witness is necessary to prove the will at probate, the mere existence of two disinterested witnesses may not be sufficient to preserve the disposition to the interested witness.[2] Further, where the interested witness is also a distributee of the testator, the interested witness is entitled to that portion of the disposition under the will that does not exceed his intestate share.[3] In other words, an interested witness who would otherwise be a distributee is effectively entitled to receive the lesser of his intestate share or the disposition under the will.

Under the common law, a beneficiary under a will was prohibited from testifying as a witness to prove that will at probate. The concern was that the possible receipt of a benefit under the will would induce an interested witness to give false testimony in support of the will.[4] The potential for such fraud was addressed by simply barring the testimony of the interested witness. If the will could not be proved with the testimony of two other disinterested witnesses, then the will was void.[5] Although the application of the common law rule eliminated the potential for fraudulent testimony, the rule proved problematic for cases in which the testimony of the interested witness did not result in fraud. In such cases, voiding the will frustrated the testator's wishes if the will could not be admitted to probate without the testimony of the interested witness.[6]

As the law evolved in New York, it became possible to save a will and not void it entirely. This concession was made at the expense of the interested witness. Under an early statute in New York, the legislature sought to resolve some of the hardship caused by the common law interested witness rule by permitting the testimony of the interested witness, but voiding the disposition to the interested witness.[7] While the new law saved many wills from failure, it created a new dilemma for a particular interested witness, namely, an interested witness who was also a distributee of the testator (the "distributee-interested witness"). Under the new law, the distributee-interested witness would forfeit his disposition if he testified in favor of the will, leaving the distributee-interested witness with nothing. However, if he failed to testify, the will could not be admitted to probate, but the distributee-interested witness could receive his intestate share. Thus, the statute saved the will but left the distributee-interested witness in an economically worse position and potentially created a disincentive for the distributee-interested witness to testify in favor of the will.

In an attempt to eliminate the hardship caused by the common law and early legislation, an 1830 statute preserved for the distributee-interested witness an amount equal to the lesser of his intestate share or the disposition to him.[8] That statute, which was codified in New York as the Decedent Estate Law § 27 in 1909 and later amended in 1942, restored the competency of an interested witness to provide testimony in a probate proceeding.[9] Pursuant to the statute, the will could be admitted to probate with the testimony of the distributee-interested witness, subject to the limitation that the distributee-interested witness would receive his intestate share not in excess of the disposition provided for him under the will.[10] By revising the law, the New York legislature sought to strike a balance between perceived injustices suffered by interested witnesses and preserving the goal of guarding against fraud in the preparation and execution of wills.[11] Former Decedent Estate Law § 27 was later reenacted as EPTL 3-3.2.[12] Under the current New York statute, where the testamentary disposition to the interested witness is greater than the intestate share of the interested witness, the interested witness receives his intestate share regardless of whether the will is proved. The interested witness is, therefore, free from inducement to testify fraudulently in support of or against the will. However, in circumstances where the testamentary disposition is less than the potential intestate share, the safeguard against fraud is ineffective because the interested witness will receive a smaller portion of the estate if the will is admitted to probate than if it is deemed void.

As the courts heard cases involving the testimony of an interested witness, the application of the statute evolved. For example, in *In re Estate of Morea*,[13] the court upheld the disposition to a testator's friend who was one of three attesting witnesses, even though one of the two alternate attesting witnesses was also a child of the testator and a beneficiary under the will. One reason the court upheld the bequest was because the son's legacy under the will was less than his intestate share. The court further found that the testator's son qualified as a disinterested witness for the purpose of upholding the bequest to the testator's friend. The court examined the meaning of the word "beneficial," defined in Webster's Dictionary (New Twentieth Century Unabridged Second Edition) as "advantageous." The court found that the attesting witness who would receive a bequest under the will smaller than his intestate share was effectively disinterested for purposes of the statute: the disposition was not "beneficial" to him but actually adversely affected him. Under this reasoning, the court held that the allegedly interested attesting witness' disposition under the will was not void under EPTL 3-3.2.[14]

The progression of statutory revisions in New York law reflects the legislative intent to strike a balance between preventing fraud and carrying out the testator's intent. Amendments to the New York statute were made in accordance with the public policy of preserving the formalities surrounding the execution of wills while imposing measures necessary to protect against fraud and undue influence. In interpreting the statute, many courts,[15] including the *Morea* court, have looked to the legislative purpose behind its enactment, which is to preserve the testamentary scheme by rendering all witnesses competent while "preserving the integrity of the process of will executions by removing the possibility that attesting witnesses who receive a disposition under the will might give false testimony in support of the will to protect their legacies."[16]

II. The *Estate of Wu* Decision

In the April 27, 2009 decision of *In re Estate of Wu*, a case of first impression in New York State, the New York County Surrogate's Court held that a tax non-apportionment clause in a will constituted a "beneficial disposition" within the meaning of EPTL 3-3.2, thereby rendering that beneficial disposition void where the interested witness' testimony was essential to proving the will.[17] The result reached by the court's interpretation of EPTL 3-3.2 likely creates a trap for the unwary because many practitioners do not think of a benefit derived under a tax clause as a disposition under a will as such term is defined in the EPTL. In addition, the court's interpretation may frustrate the intent of the testator.

In *Wu*, the decedent's will contained a tax clause that directed the payment of all estate taxes on probate and non-probate property from the probate estate, without apportionment. The executor of the decedent's will sought an order directing Harry Wu, the decedent's brother and the beneficiary of two life insurance policies on the decedent's life valued at over $3.3 million (which were included in the taxable estate), to pay his ratable share of federal and New York State estate taxes. Harry was not a distributee, nor was he the beneficiary of any bequest, legacy or devise under the will. Any benefit he derived from the will was attributable solely to the tax clause. Harry was one of two attesting witnesses to his sister's will, which prompted the executor to argue that EPTL 3-3.2 rendered the tax clause ineffective as to Harry.

Harry argued that when he witnessed the will, he was unaware of his designation as beneficiary of the decedent's life insurance policies. He also argued that EPTL 3-3.2 was inapplicable to him because he did not receive a "beneficial disposition" within the meaning of that section. What he did receive, he argued, was at most an "indirect benefit,"[18] whereas a "beneficial disposition" relates to the transfer of title to "actual property." Finally, he argued that the application of EPTL 3-3.2 in such a case would produce too harsh a result, particularly since he claimed to be unaware, at the time he witnessed the will, of his designation as beneficiary of the insurance policies.

EPTL 2-1.8 governs the apportionment of federal and state estate taxes in the absence of a direction in the testator's will for the payment of such taxes. The court pointed out that, absent the application of the tax clause in the will, Harry would be liable for the estate tax attributable to the insurance policies under EPTL 2-1.8(c)(1), and the proceeds he received would be reduced accordingly. The court concluded that if the tax clause was effective, the tax liability attributable to the insurance policies "would be satisfied by a disposition from the residuary estate."[19] Having linked the tax liability to a disposition, the court deemed "such disposition *on behalf of* [Harry]—in discharge of what would otherwise be his obligation—as tantamount to a disposition *to* [Harry]," and found that the tax provision constituted a "beneficial disposition" within the meaning of EPTL 3-3.2(a).[20] Based on this analysis, the court held that the tax clause was void as to Harry and that he was obligated to pay his pro rata share of estate tax.

The court acknowledged that the outcome seemed unduly harsh, but stated that it was constrained to interpret the statute in light of clear legislative intent to prevent fraud or undue influence by preventing a witness to a will from receiving a benefit from that will. The court reasoned that "[t]he policy animating the invalidation of a legacy to a person whose testimony is required for probate is equally applicable to a benefit conferred by a tax clause."[21] Moreover, the court stated that Harry's lack of knowledge about his status as beneficiary of the life insurance policy was irrelevant and he was, just as a legatee would be, subject to the strict construction of the statute.

Significantly, the court pointed out the increased likelihood for harsh applications of EPTL 3-3.2 in the context of a tax non-apportionment clause:

> The Court is mindful that when a will is executed the identity of beneficiaries of non-testamentary assets is not readily apparent, whereas beneficiaries of testamentary gifts are ordinarily named in the will or can be ascertained fairly easily. *Any forfeiture resulting from unwitting use of a non-testamentary beneficiary as an attesting witness will most likely arise, as here, in the context of a tax non-apportionment clause covering assets passing outside of the will.* It behooves any drafter using such clause to be fully informed of the testator's non-probate assets to avoid unintended consequences, some of which may have even greater potential for frustrating the testator's intent.[22]

III. *Estate of Wu*'s Application of EPTL 3-3.2 Is Problematic

Central to the court's application of EPTL 3-3.2 is the term "beneficial disposition." Article 1 of the EPTL provides definitions for many commonly used terms that are referenced in EPTL 3-3.2. For example, EPTL 1-2.4 defines a "disposition" as "a transfer of property by a person during his lifetime or by will." The term "property" is defined by EPTL 1-2.15 as "anything that may be the subject of ownership, and is real or personal property."

An analysis of EPTL 3-3.2 in conjunction with the definitions provided in Article 1 suggests that the application of EPTL 3-3.2 made by the court in *Estate of Wu* is problematic in two respects. First, it is questionable whether the non-apportionment of taxes qualifies as a "transfer by will"[23] of something "that may be the subject of ownership, and is real or personal property."[24] Further, the application of EPTL 3-3.2 set forth in the decision can create a trap for the unwary in the context of tax non-apportionment clauses and will likely frustrate the intent of testators.

In arriving at its decision, the court used the tax apportionment rule of EPTL 2-1.8 as a framework and viewed the direction by the testator to pay all taxes from the residuary estate (i.e., non-apportionment) as a *transfer* of *property* by the decedent to the beneficiary of the amount of cash that the beneficiary would have needed to pay the estate taxes had there been no such direction in the testator's will. The court assumed that the estate tax liability attributable to the life insurance policies was essentially Harry's—even with the non-apportionment clause. Based on the direction in the will, however, Harry's liability did not have to be satisfied by Harry, but rather by the residuary estate. Thus, the residuary estate "discharged" Harry's liability. According to the court, it was this act of discharging the debt that constituted a disposition to Harry. However, it is arguable that EPTL 2-1.8 is irrelevant and should not play a role in characterizing the terms of the will given the existence of the tax non-apportionment clause. By its very terms, EPTL 2-1.8 does not apply "where a testator directs [the non-apportionment of taxes] in his will."

Moreover, it is not clear that the non-apportionment of estate taxes is something "that can be the subject of ownership" as contemplated in EPTL 1-2.4. Ownership connotes some form of control and the exercise of dominion over property. But consider the situation in which the testator does not expect his estate to be responsible for estate taxes because the value of his estate is below the threshold for taxation. Most practitioners would include a tax clause of some kind even though no estate tax is anticipated. Has the testator conferred a benefit on anyone or exercised (or transferred) control over any property through the tax non-apportionment clause? What if, after the testator's death, his estate becomes responsible for estate taxes? At what point was the benefit conferred? The testator certainly has no control over the tax laws. For these reasons, it is conceptually problematic to assign any ownership of property to the testator (or transfer of ownership to the beneficiary) when a benefit is derived from a tax non-apportionment clause.

Second, by the Court's own admission,[25] its application of EPTL 3-3.2 can create a trap for the unwary in the context of tax non-apportionment clauses, more so than in other contexts. Legal commentators have acknowledged the issue and expressed concern regarding the court's application of EPTL 3-3.2 in the context of tax non-apportionment clauses.[26] As demonstrated by the situation in *Estate of Wu*, it can be problematic with respect to identifying beneficiaries of non-probate assets. Many practitioners have experienced a situation in which a client did not disclose every asset that comprised the client's taxable estate. Assets such as a long-forgotten whole life insurance policy that no longer requires premium payments or an abandoned retirement account at a previous employer are just two examples. Practitioners have also encountered the scenario where a client devises an estate plan and later acquires non-probate assets but fails to notify his attorney that he has done so. Even the most diligent lawyer is vulnerable in these scenarios. A will drafted with a broad tax non-apportionment clause could result in the payment of estate taxes on the value of the forgotten or after-acquired asset from the client's residuary estate. Moreover, with the ever-changing federal tax laws, it may be difficult to predict whether an estate will even be subject to estate tax at the testator's death so as to accurately determine whether the attesting witness is also an interested witness.

IV. What Can Be Done?

Some commentators believe that the interested witness rule should be abolished outright. It should be noted that at least 19 states that follow the Uniform Probate Code (UPC) have abolished the interested witness rule. UPC § 2-505 (b) provides: "The signing of a will by an interested witness does not invalidate the will or any provision of it." Unlike the current law in New York, under the UPC the fact that a witness is interested does not cause the gift to such witness to be invalid or result in forfeiture of the gift.

According to the commentary to § 2-505 (b), the UPC approach is not to "foster the use of interested witnesses in execution of wills" but to ensure that the "rare and innocent use of a member of the testator's family" as a witness to a "home-drawn" will does not result in such person being penalized. The commentary notes the proposition that a substantial devise or bequest to a person who witnessed the will could always be challenged on the ground that such person exerted undue influence over the testator. The commentary also observes that the rule requiring a disinterested person to witness the will does not necessarily prevent fraud and undue influence, because in those cases where there is fraud or undue influence the person exerting the influence is usually careful to have disinterested individuals witness the will. A proposal to abolish the disinterest witness rule, however, may be too radical a departure from the firmly entrenched common law principles in New York State and from the legislative purpose behind the enactment of the statute to protect testators.

Other commentators believe that the introduction of a rebuttable presumption concept would be a favorable "middle ground" between complete abolishment of the interested witness statute and making no change at all. A few states currently provide that an interested witness to a will must overcome the presumption that the bequest to the interested witness was obtained through fraud, duress, coercion or undue influence.[27] If the interested witness successfully rebuts the presumption, then the bequest under the will is valid and effective. The rebuttable presumption concept provides the "innocent" attesting witness the opportunity to demonstrate that a benefit derived under the will was not obtained by any illicit means.

The rebuttable presumption concept could also be used narrowly to apply only to individuals who derive a benefit from a tax non-apportionment clause. If the attesting witness could successfully rebut the presumption that the benefit was obtained through fraud, duress, coercion or undue influence, then the tax non-apportionment clause would be valid and effective. This application of the rebuttable presumption would put the practitioner on notice that the non-apportionment of estate taxes confers a benefit upon beneficiaries of non-probate assets, such that the rules of EPTL 3-3.2 would be triggered.

The rebuttable presumption approach would respect New York's long-standing common law concept that a benefit received by an interested witness should be subject to forfeiture. At the same time, this approach would address the potential trap for the unwary by providing an escape route for interested but innocent attesting witnesses.

Finally, another solution would be simply to overrule the decision in *Estate of Wu* by amending EPTL 3-3.2 to specifically exclude from the definition of a beneficial disposition a benefit derived from a tax non-apportionment clause. Like the rebuttable presumption approach, this alternative would serve to eliminate the potential trap for the unwary and also prevent frustration of the testator's intent.

Whichever solution is deemed best, it is time to consider a change in New York's treatment of interested witnesses.

Endnotes

1. 24 Misc. 3d 668, 877 N.Y.S.2d 886 (Sur. Ct., N.Y. Co. 2009).
2. EPTL 3-3.2(a)(2).
3. EPTL 3-3.2(a)(3).
4. *In re Walter's Estate*, 285 N.Y. 158, 162, 33 N.E.2d 72, 74, *remittitur amended*, 285 N.Y. 412, 35 N.E.2d 19 (1941).
5. *In re Dwyer*, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920); *In re Smith*, 165 Misc. 36, 38, 300 N.Y.S. 1057, 1059 (Sur. Ct., Westchester Co. 1937), *aff'd*, 253 A.D. 731, 300 N.Y.S. 919 (2d Dep't 1937).
6. *Dwyer,* 192 A.D. at 76, 182 N.Y.S. at 66.
7. For a description of the statute, *see Jackson v. Denniston*, 4 Johns. 311 (1809).
8. New York Revenue Statute, 1830, pt. 2, c. 6, tit. 1, art. 3, § 51.
9. N.Y. Dec. Est. Law, 1909 N.Y. Laws, ch. 18, § 27; 1942 N.Y. Laws, ch. 622 (current version at EPTL 3-3.2 (McKinney 1967)).
10. *Dwyer*, 192 A.D. at 76, 182 N.Y.S. at 66.
11. Earlier statutory attempts in both England and America allowed the testimony of all witnesses to a will but rendered entirely void the disposition to the witness provided for under the will. While remedying concerns of fraud and inequity to such witnesses, these early statutes created an alternative problem by giving witness-beneficiaries who would otherwise have inherited a larger intestate share an incentive to testify fraudulently against the will.
12. EPTL 3-3.2 (McKinney 1967).
13. 169 Misc. 2d 415, 645 N.Y.S.2d 1022 (Sur. Ct., Bronx Co. 1996).
14. *Morea*, 169 Misc. 2d at 417, 645 N.Y.S.2d at 1023.
15. *See Dwyer*, 192 A.D. 72, 182 N.Y.S. 64 (4th Dep't 1920) ("…if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."); *In re Margolis*, N.Y.L.J., Feb. 23, 2007, p. 32, col. 3 (Sur. Ct., N.Y. Co. 2007) (holding that the interested witness forfeit her bequest and settle for her intestate share after the notary who signed the self-proving affidavit denied that the decedent had asked him to sign as a witness); *In re Roberts*, N.Y.L.J., Aug. 6, 2007, p. 28, col. 4 (Sur. Ct., Kings Co. 2007) (explaining that surviving spouse did not forfeit his legacy under the will because as a distributee, he was permitted to receive the lesser amount of his share under intestacy or his legacy under the will, and he would therefore be counted as a disinterested witness); *In re Williams*, 176 Misc.2d 586, 672 N.Y.S.2d 1019 (Sur. Ct., Bronx Co. 1998) (holding that the New York statute, requiring that a will be attested to by two witnesses not receiving any disposition under the will, did not apply to wills executed in other states); *In re Sutton*, N.Y.L.J., Nov. 23, 1993, p. 33, col. 2 (Sur. Ct., Bronx Co. 1993) (demonstrating the statute's creation of the conclusive presumption that a beneficiary under a will who also served as an attesting witness is dishonest and coercive, except to the extent that he is related to the decedent as a distributee); *Estate of Fracht*, 94 Misc. 2d 664, 405 N.Y.S.2d 222 (Sur. Ct., Bronx Co. 1978) (recognizing that where a beneficial disposition had been made in the propounded instrument to all of the attesting witnesses, such legacies were void, but such fact did not constitute a bar to admission to probate); *In re King's Estate*, 68 Misc. 2d 716, 328 N.Y.S.2d 216 (Sur. Ct. N.Y. Co. 1972) (stating that legacy was forfeited where one of two attesting witnesses was not a distributee); *In re Flynn's Will*, 68 Misc. 2d 1087, 329 N.Y.S.2d 249 (Sur. Ct., Westchester Co. 1972) (holding that where testator devised real estate to his half-brother and half-brother's wife who was a subscribing witness to the will,

voiding of devise to the wife resulted in vesting of the entire interest in the husband).

16. *Morea*, 169 Misc. 2d at 416, 645 N.Y.S.2d at 1023, *citing In re Walter's Estate*, 285 N.Y. 158, 33 N.E.2d 72 (1941); *Fracht*, 94 Misc. 2d at 664, 405 N.Y.S.2d at 222.
17. *Wu*, 24 Misc. 3d 668, 669, 877 N.Y.S.2d 886, 887 (Sur. Ct., N.Y. Co. 2009).
18. Affirmation of Jerry M. Iannece, dated January 9, 2008 (attorney for Harry Wu).
19. *Wu*, 24 Misc. 3d at 669.
20. *Id.* (emphasis in original).
21. *Id.* at 670.
22. *Id.* (emphasis added).
23. *See* EPTL 1-2.4.
24. *See* EPTL 1-2.15.
25. *See supra*.
26. *See, e.g.*, Lee A. Snow, "Bequests to Will Witnesses—A Trap for the Unwary?," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 43, No. 3. (Fall 2010).
27. Currently, California, Washington and Wisconsin each have an interested witness statute with a rebuttable presumption.

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Success in Updating Family Exemption Statute

By Victoria L. D'Angelo

On August 30, 2010, Governor Paterson signed into law Chapter 437 of the Laws of 2010, which amended N.Y. Estates, Powers & Trusts Law 5-3.1 (EPTL) effective January 1, 2011. The statute enumerates certain items of a decedent's property that vest in a surviving spouse (or children under the age of 21 years, if there is no surviving spouse) and are exempt from the claims of creditors.[1] The amendment increases the monetary value of the exempt property that is set off to the surviving spouse or children from $56,000 to $92,500. The amendment also expands some of the categories of personal property treated as exempt, addresses the distribution of cash to a minor and clarifies that the court has the power to issue documentation to facilitate the transfer of exempt assets. These changes are important for many families of the recently deceased who rely on these provisions to help them get by while the decedent's estate is being administered.

The provisions of the exempt property statute were last updated in 1992, when the total potential set off was increased from $26,150 to $56,000. The latest amendment was made in light of inflation and the increased value of the articles of personal property included in the statute, which include, among other things, an automobile, computers, appliances and farm machinery. The automobile neatly illustrates the need for updating the exempt amounts: the prior law allowed an automobile valued at no more than $15,000 to be set off to the spouse or children. Therefore, if the automobile was worth $20,000, and the spouse or children wanted the automobile to qualify as their "exempt" automobile, they would need to pay the estate $5,000 to receive it. The amendment increases the exempt value of the automobile to $25,000, and only if the value exceeds that amount would an extra payment of the difference be required.[2] The statute continues to give the surviving spouse or children the right to elect to receive cash equal to the value of the automobile instead of the automobile itself.

The amount of cash that the spouse or children are entitled to keep has also been increased from $15,000 to $25,000.[3] This increase gives family members more money to cover immediate expenses such as food, shelter and medical expenses while the will is probated or an administrator is appointed.

Other items whose set-off value has been increased by the amendment include: (i) furniture, clothing, computers and other household items (from $10,000 to $20,000); (ii) books, family pictures, DVDs, CDs, discs and software (from $1,000 to $2,500); and farm animals and tractors (from $15,000 to $20,000).[4] Jewelry is also now considered exempt unless specifically bequeathed in the decedent's will.[5]

The amended statute preserves the right of any specific legatee under a will to recover any excess value paid to the estate by a spouse or children who acquired the legatee's specific article by virtue of this statutory provision (e.g., for an automobile valued at more than $25,000).[6]

In the event that there is no surviving spouse, the amended statute clarifies how a distribution of cash to a minor is to be handled. In accordance with N.Y. Surrogate's Court Procedure Act 2220, up to $10,000 may be distributed to the competent adult with whom the minor lives without the need for a guardianship proceeding.[7] If the cash distribution exceeds $10,000, the excess over $10,000 will be released to the child upon his or her reaching the age of 18 years unless a guardian is appointed. If a guardian is appointed, the guardian may access and apply the funds for the child's benefit during the child's infancy, and the child would receive any funds remaining at age 18. A child between the ages of 18 and 21 would receive all of the cash provided in the statute outright, and if there is more than one child, the cash amount would be apportioned among them. The statute does not provide for children over the age of 21, so cash would not be payable to any child over that age.

The amendment eliminates "other personal property" from the section dealing with cash and adds language better describing cash and cash equivalents.[8] The initial intent of this section of the statute was to provide liquid assets to the surviving spouse or children to pay immediate expenses. By eliminating the confusing and misleading phrase of "other personal property," the amended statute introduces needed clarity.

The prior statute did not address the documentation required to transfer the cash, automobile or other articles of personal property from the decedent to the surviving spouse or children. The amended statute resolves this by authorizing the court to issue whatever documentation is necessary to effectuate the transfers.[9] The specific type of documentation was deliberately left open so that each court could decide what was appropriate in a given situation.

The exempt property statute, as amended, is an important tool in preserving the rights of surviving family members before and during the administration of an estate. Trusts and estates practitioners should also consider these provisions when formulating an estate plan, especially where specific bequests are included.

Endnotes

1. Other than claims for reasonable funeral expenses. *See* EPTL 5-3.1(a)(6).
2. EPTL 5-3.1(a)(5).
3. EPTL 5-3.1(a)(6).
4. EPTL 5-3.1(a)(1)-(3).
5. EPTL 5-3(a)(1).
6. EPTL 5-3(a)(4).
7. EPTL 5-3.1(a)(7).
8. *See* EPTL 5-3.1(a)(6).
9. EPTL 5-3(a)(8).

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N.Y. Estates, Powers & Trusts Law § 5-3.1
Exemption for benefit of family

[Effective January 1, 2011]

(a) If a person dies, leaving a surviving spouse or children under the age of twenty-one years, the following items of property are not assets of the estate but vest in, and shall be set off to such surviving spouse, unless disqualified, under 5-1.2, from taking an elective or distributive share of the decedent's estate. In case there is no surviving spouse or such spouse, if surviving, is disqualified, such items of property vest in, and shall be set off to the decedent's children under the age of twenty-one years:

(1) All housekeeping utensils, musical instruments, sewing machine, jewelry unless disposed of in the will, clothing of the decedent, household furniture and appliances, electronic and photographic devices, and fuel for personal use, not exceeding in aggregate value twenty thousand dollars. This subparagraph shall not include items used exclusively for business purposes.

(2) The family bible or other religious books, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices, including but not limited to videotapes, used by such family, not exceeding in value two thousand five hundred dollars.

(3) Domestic and farm animals with their necessary food for sixty days, farm machinery, one tractor and one lawn tractor, not exceeding in aggregate value twenty thousand dollars.

(4) The surviving spouse or decedent's children may acquire items referred to in subparagraphs (1), (2) and (3) of this paragraph, in excess of the values set forth in such subparagraphs by payment to the estate of the amount by which the value of the items acquired exceeds the amounts set forth in such subparagraphs. If any item so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate for such item shall vest in the specific legatee.

(5) One motor vehicle not exceeding in value twenty-five thousand dollars. In the alternative, if the decedent shall have been the owner of one or more motor vehicles each of which exceed twenty-five thousand dollars in value, the surviving spouse or decedent's children may acquire one such motor vehicle from the estate, regardless of the fact that the decedent may also have been the owner of another motor vehicle of lesser value than twenty-five thousand dollars, by payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars; in lieu of receiving such motor vehicle, the surviving spouse or children may elect to receive in cash an amount equal to the value of the motor vehicle, not to exceed twenty-five thousand dollars. If any motor vehicle so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars shall vest in the specific legatee.

(6) Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, not exceeding in value twenty-five thousand dollars, reduced by the excess value, if any, of acquired items referred to in subparagraphs (1),(2),(3) and (5) of this paragraph. However, where assets are insufficient to pay the reasonable funeral expenses of the decedent, the personal representative must first apply such money to defray any deficiency in such expenses.

(7) Any set off to a child under the age of twenty-one years not exceeding ten thousand dollars shall be covered by the provisions of section twenty-two hundred twenty of the surrogate's court procedure act as if the child were a beneficiary of the estate. Any excess amounts shall be governed by the guardianship statute, if applicable.

(8) The court shall have the authority to issue such documentation as necessary to effectuate the transfer of any items under this section.

(b) No allowance shall be made in money or other property if the items of property described in subparagraph (1),(2),(3) or (4) are not in existence when the decedent dies.

(c) The items of property, set off as provided in paragraph (a), shall, at least to the extent thereof, be deemed reasonably required for the support of the surviving spouse or children under the age of twenty-one years of the decedent during the settlement of the estate.

(d) As used in this section, the term "value" shall refer to the fair market value of each item, reduced by all outstanding security interests or other encumbrances affecting the decedent's ownership of said item.

The Liability Reporter

By Michael P. Ryan

Miranda: *How beauteous mankind is!*
O brave new world
That has such people in't

Prospero: *'Tis new to thee.*

There you have it: the clash of innocence and experience in an exchange between a naive daughter and her cynical father, as represented in Shakespeare's valedictory play, *The Tempest*. While New York trusts and estates attorneys rarely will be accused of being naive, it may also be true that they have yet to assimilate the extent of the changes wrought to their professional lives by last year's Court of Appeals ruling in *Schneider v. Finmann*[1] and thereby become as cynical as old Prospero.

After *Schneider*, estate planners in New York no longer enjoy immunity from liability once their clients die. The bulwark of this immunity, the rule of privity, has long since been abolished to varying degrees in most states, and estate planners practicing in those states face a significant risk of being sued for malpractice. California, for example, led the nation in the assault on privity, and its expansive privity rule has had a significant impact on trusts and estates practitioners, as James B. Ayers and Lucy Kats inform us in an article published for the 2011 Annual Meeting of the Trusts and Estates Law Section:

> As far back as 1985 when the California relaxed privity rule was only 25 years old, it was estimated that 60% of legal malpractice claims in that state involved wills or trusts, and malpractice insurance premiums for estate planning attorneys were already in the highest classification, along with corporate securities work.[2]

The purpose of this article is two-fold: first, to provide the bar with an interim report on the work of a joint subcommittee of the Trusts and Estates Law Section that was formed to study the impact of *Schneider* and to recommend to the bar means of self-protection; and second, to inaugurate a continuing series of articles that will compile cases from New York and around the country in order to show practitioners how liability arises in the estate planning area. But first, a brief summary of the current state of the law is in order.

Until June 17, 2010, New York was one of the few states to require a showing of contractual privity between a plaintiff-client and a defendant-attorney in a legal malpractice suit. In *Schneider v. Finmann*,[3] the Court of Appeals held that a relationship sufficiently approaching privity existed between an estate's personal representative and the attorneys who allegedly increased the estate's estate tax liability. The Court noted that this is a limited exception to the privity rule, because it does not extend to the beneficiaries of the estate who may have been harmed by alleged acts of malpractice. Of course, this is only superficially true since those same beneficiaries, under proper circumstances, could obtain limited letters of administration to pursue a discovery proceeding premised on malpractice or object to a fiduciary's account for failure to commence just such a suit.

Before discussing the response of the Trusts and Estates Law Section to *Schneider*, let us consider the general framework of professional liability. At common law, there are four elements to a claim for professional malpractice: the existence of a duty; the breach of that duty; said breach being a proximate cause of damages to the plaintiff; and the amount of those damages.[4]

California has the longest established case law on this topic. In *Biakanja v. Irving*,[5] the California Supreme Court ruled that a variety of factors are relevant to the finding that an estate planner is liable to remote parties. These factors included:

> [T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[6]

In *Lucas v. Hamm*,[7] the court revisited the issue and dispensed with the notion of "moral blame" and substituted another factor, one that weighs the imposition of liability against the burden it would place on the legal profession. *Lucas* relied more heavily than did *Biakanja* on the determination as to whether the "main purpose" of the legal services provided to the testator was to benefit the plaintiff.[8] The *Lucas* decision is interesting for several reasons. It holds that beneficiaries have standing to sue attorney drafters for malpractice. (New York in *Schneider* has not gone so far, limiting standing to the personal representative.) That holding aside, it is comforting to note that the court nonetheless affirmed the dismissal of the allegations against the drafter for malpractice. The alleged malpractice was the drafting of a testamentary trust that violated the rule against perpetuities. The testamentary trust was to terminate five years after the order of the probate court distributing the property to the trustee. This could have caused the trust to be invalid only because of the very remote possibility that the order of distribution would be delayed for a period longer than a life in being at the creation of the interest plus the relevant statutory time. The trust beneficiaries settled with other family members who stood to gain should the trust be declared invalid, thereby reducing the funds available to fund the trust by $75,000. The beneficiaries, in turn, brought suit against the drafter for these damages. Noting that the rule against perpetuities has long perplexed the courts and the bar, the court held that an attorney of ordinary skill and expertise acting under the same circumstances might well have failed to recognize the potential perpetuities issue and that this type of mistake in a "dangerous" area did not constitute negligence. One wonders whether a New York surrogate would have been as forgiving. But this does suggest a topic that will be the subject of future articles—the standard of care to be applied in these cases.

The common law rule with respect to an attorney's standard of care in this area was stated in *Lucas v. Hamm.*[9] An attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake. Hence, the attorney is not liable for every mistake he or she may make in his or her practice and is not, in the absence of an express agreement, an insurer of the soundness of his or her opinions or of the validity of an instrument that he or she is engaged to draft. The attorney is also not liable for errors as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.

Clearly, the common law standard raises more questions than it answers. Will an attorney who specializes in estate matters be held to a higher standard? Is there a bright line that separates the specialist from the generalist? Will such a demarcation result in a *de facto* certification process? When does representation end for purposes of a statute of limitations? In coming issues, we will explore these and other questions as they arise in the case law.

Finally, some consideration must be given to the Trusts and Estates Law Section's response to *Schneider*. Diligent efforts are underway to study the implications of the Court of Appeals opinion in *Schneider*. A joint subcommittee was formed, drawing membership from the Estate Planning, Practice and Ethics and Estate Litigation committees. The subcommittee's task will begin with surveys of practice in other states and requests for information from malpractice insurers as to their suggestions for New York practitioners. Other areas of study will include the expanded importance of engagement letters, documentation of the planning choices suggested to the client and the importance of final letters to the client (e.g., will they serve as disengagement letters or will they serve to establish a "continuous representation" for purposes of the statute of limitations?). More information on the subcommittee's progress will follow in coming issues.

By informing the Section membership regularly of malpractice cases and those situations in which liability has—or has not—been found, this column will operate on the guiding principle that "forewarned is forearmed," or, as those of you who benefitted from high school Latin will remember, *praemonitus praemunitus.*

Endnotes

1. 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010).
2. James B. Ayers, Lucy Kats, "The Citadel of Privity Has Been Breached: What Now?," NYSBA Annual Meeting, Trusts and Estates Law Section coursebook (2011).
3. *Id*.
4. *Peeler v. Hughes & Luce*, 909 S.W.2d 575, 577 (Tex. 1995).
5. 49 Cal. 2d 647, 320 P.2d 16 (Cal. 1958).
6. *Id*. at 650, 19.
7. 56 Cal. 2d 583, 364 P.2d 685 (Cal. 1961).
8. *Id*. at 588, 688.
9. 56 Cal. 2d at 591, 364 P.2d at 689 (Cal. 1961).

Michael P. Ryan is a partner in the Brooklyn office of Cullen and Dykman LLP and a member of the Schneider subcommittee of the Trusts and Estates Law Section.

Nominate Your Peers

By Thomas J. Collura

Each year, the New York State Bar Association recognizes those attorneys who make exceptional contributions to the public, the profession, the Association and the Trusts and Estates Law Section. Without nominations from members of the profession, the Association's task of identifying those who deserve recognition would not be possible. If you have been privileged enough to work with an attorney or firm who you believe deserves any of the following awards, please take a few minutes and submit a nomination:

The Section Chair's Award (formerly the Russell A. Taylor Award). This award is given by the Trust and Estates Law Section to a person who makes exceptional contributions to the Trust and Estates Law Section and the Bar. Please submit your nomination to Tom Collura at tcollura@tcgclegal.com before **September 30, 2011**.

The President's Pro Bono Service Awards. These awards, sponsored by the Association's President's Committee on Access to Justice, are given to those members of the profession who are committed to providing free legal services to low-income, disadvantaged and/or disabled New Yorkers. Award categories include individual lawyers from each of the 13 judicial districts, young lawyers, small law firms, midsized law firms, large law firms, law students, law school groups, in-house and government lawyers and senior lawyers. The annual nomination deadline for these awards is **March 31** each year.

The Gold Medal Award. Since 1952, this Association-wide award has been given to an attorney or judge in recognition of distinguished service in the law. There is no nomination deadline for this award.

The William J. Carroll Distinguished Service Award. This Association-wide award is given to recognize an individual who has rendered extraordinary service on behalf of the Association, has displayed exceptional commitment and made significant contributions to enhancing the Association's goals and purposes. The nomination deadline for this award varies from year to year.

The Honorable Lewis A. Friedman Award and The Annual Charles W. Shorter Award. These awards are given by the General Practice Section to recognize New York attorneys who have made significant contributions to improve the daily practice of law and who participate in Association activities. The nomination deadline for these two awards is in **November** each year.

The Empire State Counsel Award. This award is given to those attorneys who have voluntarily provided in a calendar year 50 or more hours of legal services at no fee to persons of limited financial means or to not-for-profit, governmental or public service organizations operating for the purpose of addressing the legal and other basic needs of persons of limited financial means. The nomination deadline for this award is **December 31** each year.

The Trailblazer Award. This award is given to honor individuals who demonstrate a commitment to helping enhance diversity in the profession. The nomination deadline for this award is in **November** each year.

The Root/Stimson Award. This award is given to honor an attorney who is actively involved in volunteer community service work other than providing pro bono legal representation. The nomination deadline for this award is in **April** each year.

The Award for Attorney Professionalism. This award is given to an Association member who exhibits a dedication to client service and a commitment to promoting respect for the legal system through exemplary ethical conduct, competence, good judgment, integrity and civility. The nomination deadline for this award is in **November** each year.

The Franklin P. Gavin Memorial Award. This award is given to recognize individuals who have provided assistance to lawyers and judges affected by substance abuse. The nomination deadline for this award is in **January** each year.

Award-specific nomination forms and requirements can be obtained by contacting the Association at **(518) 463-3200** or by clicking on "About NYSBA" at the bottom of the Association's homepage at **http://www.nysba.org**, followed by clicking on "NYSBA Awards and Competitions."

Thomas J. Collura is a principal of Tuczinski, Cavalier, Gilchrist & Collura, P.C., in Albany. He is a Co-Chair of the Members and Membership Relations Committee of the Trusts and Estates Law Section.

Testamentary vs. Revocable Trusts

Subject: Testamentary Trusts

Date: Wednesday, February 23, 2011 1:33 p.m.

To: Trusts and Estates Law Section

Dear Listmates:

PC is a single mom with a 21-year-old adopted daughter. She wants to leave everything to her daughter in trust. She owns long term care insurance, so her concern is not Medicaid planning, but to keep her daughter from getting the inheritance until she turns thirty-five. PC's concern is that her daughter is not responsible with money. PC is not interested in a stand alone trust since she feels they are too expensive to establish. I believe a testamentary trust would accomplish her goal but I would like some feedback. Thank you.

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Subject: Re: Testamentary Trusts

Date: Wednesday, February 23, 2011 2:41 p.m.

To: Trusts and Estates Law Section

Problem with a testamentary trust is: who will be the personal representative of the estate? The daughter? If Mom is worried about the daughter handling money, the daughter will blow through the estate funds before the trustee can get to it to protect it (seen it happen).

Also, when Mom gets old, who is going to handle her financial affairs? The spendthrift daughter?

Sure, a trust now will cost some money, but it is money well spent.

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Subject: Re: Testamentary Trusts

Date: Wednesday, February 23, 2011 3:05 p.m.

To: Trusts and Estates Law Section

There are several additional benefits to a lifetime trust versus a testamentary trust:

A testamentary trust does not come into existence until the Will has been probated and probably does not get funded until the estate administration has been substantially completed. A lifetime trust is already in existence and can begin making payments on behalf of, or distributions to, the beneficiary immediately after the mother's death, as long as sufficient funds are retained to pay any estate taxes and administration expenses.

Unless provided to the contrary in the trust agreement, if all of the decedent's assets are in the trust at the time of death, the trustee's annual commissions cover the work in administering the estate and can be substantially less than an executor's commissions would be.

The likelihood of a contest probably is greatly reduced because: no citation would be sent out asking people to contest the validity of the trust agreement and providing them a ready forum to do so; and the trust would have been in existence for (hopefully) a number of years while the settlor was still competent, giving a certain amount of additional legitimacy to it.

Legal fees at the time of death would also be reduced, since there would be no probate.

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Subject: Re: Testamentary Trusts

Date: Wednesday, February 23, 2011 3:33 p.m.

To: Trusts and Estates Law Section

These facts appear to call for a revocable living trust—adopted child, spendthrift concerns, single parent. There is a lot more discovery to do to come up with the "right" planning for this person. It would be too expensive not to do the planning.

Kind regards,
Ian
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Subject: Re: Testamentary Trusts

Date: Wednesday, February 23, 2011 5:59 p.m.

To: Trusts and Estates Law Section

I'll swim against the tide and recommend a Will with a testamentary trust—assuming no lost or unknown heirs, Mom is clearly competent (no Will contest is likely), Mom has close friend or advisor to serve as Executor and then Trustee (Daughter can't blow through it during administration; Exec/Trustee could always make periodic advances as necessary for D's needs prior to final estate wind-up). Revocable trust lower cost—maybe, but I doubt it; pay me now (for trust, pour-over will and helping with all asset transfers, deeds, transfer tax returns, new account openings, etc.) rather than later; usually some assets aren't properly transferred such as cars, personal property, checking account, etc. or some beneficiary changes (to trust) not properly made; still must probate the pour-over Will (saving $1,250 in probate fees at most, even in small administration); same estate tax returns, if any; generally, I see very little real savings when all is said and done. I see and have had to "clean up" too many mistakes with revocable trusts—many attorneys set them up, get paid up front, send nice instruction letter with invoice saying now transfer all your properties, accounts, change beneficiaries, etc.—many clients put "instructions" in drawer with other documents, and never understand that they or someone has to actually do it, otherwise their assets go through full blown probate, then transfer to trust—double cost, double commissions in addition to the up front trust costs.

I only do revocable trusts in special circumstances which cry out for them—lost or unknown heirs, out of state real property (and then I just use it for that real property), or sophisticated, anal clients who understand it and will do it all right from the beginning and not get sloppy about assets in future years.

In summary, KIS.

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Subject: Re: Testamentary Trusts

Date: Wednesday, February 23, 2011 6:19 p.m.

To: Trusts and Estates Law Section

…There was nothing in the facts presented that would indicate that there was any reason for this particular client to create a revocable trust (or an irrevocable trust). Her concern was that she did not want her daughter to control her inheritance until age 35. The main event here is to see to it that the daughter gets control at age 35, and to select the appropriate person(s) to have control until then.

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Subject: Re: Testamentary Trusts

Date: Thursday, February 24, 2011 11:58 a.m.

To: Trusts and Estates Law Section

I would agree that if there is no serious effort to fund the revocable trust, then there is no great advantage to doing one. But if the law firm is committed to doing the funding, then I do believe the revocable trust is the better planning tool. The primary advantage is for lifetime disability planning, with the trust setting forth the mechanics for determining the grantor's incapacity, as well as the appointment of designated disability trustees. While all competent attorneys use powers of attorney as part of a will-based plan, we know that they are sometimes rejected by financial institutions, while trusts rarely seem to be questioned. Of greater concern to me is that there is no mechanism with a POA for removing the principal's authority to act. If the principal is acting irrationally (e.g., giving large cash gifts to the home health aide), the only solution may be a guardianship. With a revocable trust, the grantor would be replaced by the successor trustees upon the determination of incapacity, which can be triggered by a "disability panel" consisting of family members, physicians, etc.

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Subject: Re: Testamentary Trusts

Date: Thursday, February 24, 2011 12:19 p.m.

To: Trusts and Estates Law Section

I cast my ballot on Richard's side of the equation. I think a revocable living trust has benefits over a testamentary trust, if funded during lifetime. And it should be funded and all beneficiary designations and changes of ownership should be done while client(s) are alive. Among other benefits, it also allows quick action by successor Trustee after death of Grantor(s) in the event of a quick downturn in equity or other markets. Of course that may not be an issue in this stable politico-social-economic world we live in. :-)))) Most of Andrew's criticism of revocable living trusts deals with improper formation, funding and management of trusts. To that extent, I agree that if it isn't done right in the first place, you are better off not doing it at all—but that's true of most important things we do in this life.

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Anatomical Gifts

Subject: Anatomical Gifts

Date: Thursday, March 24, 2011 8:32 p.m.

To: Trusts and Estates Law Section

Dear List,

Client in his will wants to donate his body to science.

I'm reviewing the Public Health Law which seems to allow such gifts, but was wondering if anyone has dealt with this situation or could recommend any special language in the will.

Thanks, as always

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Subject: Re: Anatomical Gifts

Date: Thursday, March 24, 2011 9:13 p.m.

To: Trusts and Estates Law Section

If someone wants to donate their body to science, it is best to contact a specific program (e.g., local medical school) and have the testator execute the agreement provided by the program and then provide a copy of that executed agreement to the executor/executrix. It is also good to tell immediate family members to help ensure there are no delays in contacting the program upon his death and to make sure the wishes are honored since these arrangements are generally finalized before the will is probated—or even located.

In case the person dies away from the program that agreed to take the body, it is good to make a general statement in the will about the desire to donate to science and mention the program that arrangements have been made with, but note that if that program cannot accept the body at that time, reasonable efforts should be made to transfer the body to another program.

In case your client is not aware of it, tissues can also often be taken from older patients for transplant purposes (e.g., eyes and bones). If he is interested in considering that, he should contact the local organ procurement organization (New York Organ Procurement Network in NYC) and/or tissue bank to help facilitate such a gift upon his death.

It is also recommended that he sign the back of his license or other card indicating that he wishes to donate his body to science and carry that in his wallet.

The NYS Department of Health has a donor registry program—mostly aimed at organ and tissue donation for transplant purposes, but not exclusively. Signing up there can help ensure his wishes are honored—but it is best if specific advance arrangements are made and the family notified.

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Subject: Re: Anatomical Gifts

Date: Thursday, March 24, 2011 10:12 p.m.

To: Trusts and Estates Law Section

Client may want to specify that his body be used for teaching, and that it not be disposed of for profit. Sadly, I believe that some institutions do sell body parts for profit. Not sure how to word that though. You may want to contact a medical college and ask whether they have language that they recommend.

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Subject: Re: Anatomical Gifts
Date: Friday, March 25, 2011 8:58 a.m.
To: Trusts and Estates Law Section

Since a will does not ordinarily get opened until after the funeral (long after the body donated to science will not have happened since the body is buried or cremated) the better course is to put this on the health care proxy. I have been a donor for more than 40 years (and happily not needed yet) and I have this on my health care proxy, which I keep in my wallet. For clients, I prepare 4 original health care proxies and then I also have one reduced to 1/4 of a page and then fold it; put the edges in scotch tape and the client puts it in her/his wallet. Anyone who looks in the wallet—which is what families do first—will see it if they don't already know about it, and if there is an accident then the police will find it. There is also a space on the back of the driver's license.

Lorraine Coyle
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Bronx, NY 10471

Subject: Re: Anatomical Gifts
Date: Friday, March 25, 2011 12:28 p.m.
To: Trusts and Estates Law Section

A client of mine has decided to donate her body for medical research. She obtained a wallet card from the specific teaching hospital she wants to give her body to which specifies the person who should be contacted to pick up her remains after her death.

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Subject: Re: Anatomical Gifts
Date: Friday, March 25, 2011 12:58 p.m.
To: Trusts and Estates Law Section

There is also the "appointment of agent to control disposition of remains" form in NYS. You can print it off of the NYSDOH web site. I have all my clients execute that as well.

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Recovering Wrongly Paid Insurance Proceeds

Subject: Improperly Paid Death Benefit
Date: Tuesday, February 15, 2011 11:01 a.m.
To: Trusts and Estates Law Section

My client is the husband. No children, so the wife's will left everything to her siblings and her brother is the executor. My client has filed for his elective share. However, the wife's insurance policy was improperly paid to the siblings. The original beneficiary designation giving the insurance proceeds to the siblings was amended ten years ago to give the proceeds to the husband. The insurance company is saying sorry for the mistake but you will have to go after the siblings.

My question is what is the best way to handle this. Through the Surrogate's Court since there has not been a final accounting for the estate or with a separate lawsuit against the siblings?

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Subject: Re: Improperly Paid Death Benefit
Date: Tuesday, February 15, 2011 11:21 a.m.
To: Trusts and Estates Law Section

David, I would say sorry to the insurance company and tell them to pay and they can attempt to recover from the siblings. Their problem, not your clients'.

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Subject: Re: Improperly Paid Death Benefit
Date: Tuesday, February 15, 2011 11:28 a.m.
To: Trusts and Estates Law Section

David:

Either way you look at this, the life insurance is not a probate asset, so I wouldn't bring the action in Surrogate's Court, unless I sought to go after the siblings' testate shares as an offset to the wrongly paid life insurance. However, I would research this issue further to determine if there were any applicable remedies in Surrogate's Court before I disregarded this option. It is also my opinion that the insurance company is on the hook for wrongly paying the siblings. I would commence an action in Supreme Court naming the insurance company as well as the siblings as defendants. If the insurance company wrongly paid, that's their problem as well as yours. Make sure you have proof that the beneficiary designation was changed according to policy requirements, or at least that there was "substantial compliance" with policy requirements for changing the beneficiary to your client. These things are fact driven, to the nth degree. I have some experience litigating changes of beneficiaries on life insurance policies, so let me know if you would like cites to a few seminal cases.

No chance of settlement? Do the siblings agree they were wrongly paid? You may consider some action to make sure the proceeds in the hands of the siblings are not dissipated prior to resolution of your claim.

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Subject: Re: Improperly Paid Death Benefit

Date: Tuesday, February 15, 2011 11:58

To: Trusts and Estates Law Section

I wouldn't bring in the siblings. Why expand the suit? The insurance company has enough money to pay. In an ordinary case, generally you would follow the money, but here you only would be making more work.… The insurance company would bring in the siblings anyway.

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Subject: Re: Improperly Paid Death Benefit

Date: Tuesday, February 15, 2011 1:57 p.m.

To: Trusts and Estates Law Section

As an independent insurance broker who works with numerous companies when there is a beneficiary change, a form showing the change goes to the policy owner as well as the insurance agent. I am sure the company has a record of the notification showing the change of beneficiary.

Ruvin Levavi
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Subject: Re: Improperly Paid Death Benefit

Date: Tuesday, February 15, 2011 2:21 p.m.

To: Trusts and Estates Law Section

A note of caution—which may or may not be necessary depending on your legal experience. As this is developing into a recommendation to proceed in Supreme Court, in an action that may or may not require serving the insurance company and the individual beneficiaries of the life insurance policy with service of a summons and complaint with multiple alternative causes of action, followed by discovery, a trial and if successful, the need to enforce a judgment against individuals who may not cooperate with the collection process (i.e., if they have spent most of the money by the time the proceeding is over), you may want to consider whether this is a part of the representation that you should be handling yourself, or whether you should bring on a litigation attorney as co-counsel, or refer this portion of the representation to another attorney. Although at first glance it sounds like estate related litigation, it really isn't.

Also, since the money is in the hands of individuals, you may want to request as part of the relief that the fund in question be deposited with the Court until it is determined who is the proper owner of the funds, or that the property be subject to an order of attachment (if appropriate) or that a TRO issue to the beneficiaries directing them not to further dispose of the insurance proceeds pending the outcome of the litigation.

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Subject: Re: Improperly Paid Death Benefit

Date: Tuesday, February 15, 2011 2:26 p.m.

To: Trusts and Estates Law Section

Provisional remedies rarely are granted in an action for money only and when rarely granted generally require the posting of a bond.

Again, I suggest, going after the siblings is not the elegant way to proceed.

One would assume the insurance company has enough money to pay twice.

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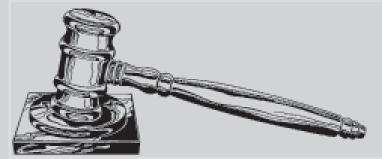
Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

Dead Bodies

Improper Release of Decedent's Body Gives Cause of Action for Loss of Right of Sepulcher

After the decedent's siblings identified their brother's body at the New York City medical examiner's office, the body was improperly released to a funeral home out of state, where the decedent was buried. After the error was discovered, the body was exhumed and returned to the decedent's family in New York, but because of the passage of time, cremation was required. The decedent's mother sued the City of New York and obtained a jury verdict in the amount of $800,000 for emotional pain and suffering arising from loss of sepulcher. On appeal by the city, the Appellate Division decided that the $800,000 award materially deviated from what would be reasonable compensation. A new trial on the amount of damages was ordered unless the plaintiff accepted a reduction in the award to $400,000. *Jones v. City of New York*, 80 A.D.3d 516, 915 N.Y.S.2d 73 (1st Dep't 2011).

Guardians

Court May Use Substituted Judgment to Approve Gift on Behalf of Article 17-A Ward

Surrogate Holzman held that the Surrogate's Court has the power to use the doctrine of substituted judgment to approve gifts or tax savings transactions proposed by guardians appointed under N.Y. Surrogate's Court Procedure Act Article 17-A, thus rejecting Surrogate Glen's opposite conclusion in *In re John J.H.*, 27 Misc. 3d 705, 896 N.Y.S.2d 662 (Sur. Ct., New York Co. 2010). Surrogate Glen's decision was based on the distinction in English common law between a "lunatic" who once had capacity and an "idiot" who never had capacity to handle his or her own affairs. In Surrogate Glen's opinion, substituted judgment could not be used on behalf of a person who was never able to form a judgment. The use of substituted judgment under New York law for "idiots" was therefore possible only under statute, specifically N.Y. Mental Hygiene Law § 81.21 (MHL).

Surrogate Holzman rejected that conclusion because long before the enactment of Article 81 of the

William P. LaPiana

MHL, New York courts approved the use of substituted judgment for all incapacitated persons. Mental Hygiene Law § 81.21 codified New York's then existing common law; even assuming that § 81.21 somehow abrogated or enlarged New York common law, the court would nevertheless have the authority to use the factors listed in MHL § 81.21(d) to determine whether or not to approve the making of a gift on behalf of an Article 17-A ward. *In re Joyce G.S.*, 30 Misc. 3d 765, 913 N.Y.S.2d 910 (Sur. Ct., Bronx Co. 2010).

Inheritance

Survivor of Valid Same-Sex Marriage Is Deceased Spouse's Sole Distributee

Decedent and his same-sex partner were married in Canada. After decedent's death, his surviving spouse and nominated executor of his will filed a probate petition identifying himself as the decedent's sole distributee. After issuance of the decree admitting the will to probate, Surrogate Glen issued an opinion finding that the surviving spouse was indeed the decedent's sole distributee and that citation need not issue to anyone. Decedent's brother then petitioned to reopen the probate proceeding, alleging that the court lacked jurisdiction to admit the will to probate because citation had not issued to the decedent's siblings, who would be distributees were the decedent not survived by a spouse, and arguing that the decedent's marriage violated the public policy of New York. Surrogate Glen denied the petition, finding that the Fourth Department in *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008) had considered and rejected the public policy argument against applying the marriage recognition rule to same-sex marriages.

The Appellate Division affirmed the Surrogate, explaining that failure to enact a statute cannot be an expression of public policy and that absent an express statutory prohibition, "legislative action or inaction does not qualify as an exception to the marriage recognition rule." *In re Estate of Ranftle*, 81 A.D.3d 566, 917 N.Y.S.2d 195 (1st Dep't 2011).

Perpetuities

Rule Against Perpetuities Does Not Apply to Options to Renew Leases

The Court of Appeals decided that New York's Rule against Perpetuities (N.Y. Estates, Powers & Trusts Law 9-1.1(b) (EPTL)) does not apply to options to renew a lease. The court reasoned that such options are valid under the American common law version of the Rule, which is the law of New York, and also further the policy goals of the Rule. Judge Read concurred in an elaborate opinion arguing that the majority misread the authorities that all options to renew a lease are not subject to the Rule, but would have upheld the options in question on the grounds that the option was appurtenant to the lease. Judge Graffeo, agreeing with Judge Read's view, dissented on the grounds that the option was not appurtenant to the lease. *Bleecker Street Tenants Corp. v. Bleeker Jones LLC*, 16 N.Y.3d 272 (2011).

Options to Purchase Land Are Not Saved by Statutory Saving Rule (EPTL § 9-1.3)

Landowner and builder entered into a contract to sell lots in a subdivision. Builder made a down payment and executed a purchase money note and mortgage to the landowner. Landowner signed deeds and mortgage releases for the lots, which were held in escrow by landowner's counsel and released to the builder as each newly built home was sold. As part of the contract, landowner gave builder the sole option to purchase additional lots in the subdivision. The options were exercised three times, but four years after the last exercise, the landowner commenced an action seeking a judgment declaring that it owned legal and record title to the remaining lots because the options violated the Rule against Perpetuities (EPTL 9-1.1).

The Supreme Court granted defendant builder's motion to dismiss on the grounds that EPTL 9-1.3, which enacts a presumption that the occurrence of any specified contingency on which vesting of an estate depends will happen within twenty-one years of the effective date of the instrument creating the estate, prevented the options from violating the Rule.

The Appellate Division reversed, reasoning that the statutory provision was a rule of construction and did not allow courts to rewrite instruments that violate the Rule. The construction and sale of a home was not a specified contingency of the sort contemplated by the statute because these events were within the control of the builder. In addition, there was no time limit for the builder's construction and sale of homes, which meant the contract provisions could last indefinitely. *TDNI Properties LLC v. Saratoga Glen Builders, LLC.*, 80 A.D.3d 852, 914 N.Y.S.2d 746 (3d Dep't 2011).

Trusts

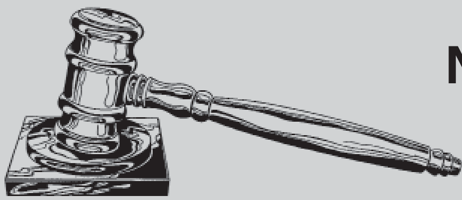
Agent Under Power of Attorney May Not Amend Irrevocable Trust Using EPTL 7-1.9(a)

Father created an irrevocable insurance trust naming his brother as trustee and his accountant as successor trustee. At his death the trust property, consisting of the insurance proceeds, were to be paid in equal shares to the decedent's three children. On April 20, 2010, father executed a statutory short form power of attorney naming his daughter as his agent, granting all of the statutorily defined authority, and a Statutory Major Gifts Rider. One month later, the daughter, as agent, executed an amendment to the trust removing the trustee and successor trustee, appointing her son as trustee and naming a successor trustee. The three beneficiaries of the trusts executed consents to the amendment satisfying the requirements of EPTL 7-1.9(a) for the amendment of an irrevocable trust. Father died on June 3, 2010, never having personally executed the trust amendment.

The trustee named in the amendment moved for an order directing the original trustee and successor trustee to produce all records relating to the trust and to account. The original trustee moved for an order vacating the amendment, which the Supreme Court granted. The court held that the power to revoke or alter an irrevocable trust provided by EPTL 7-1.9(a) is personal to the creator of the trust and cannot be exercised by an agent under a power of attorney unless the trust so provides (citing *In re Goetz*, 8 Misc. 3d 200, 793 N.Y.S.2d 318 (Sur. Ct., Westchester Co. 2005)). In addition, the statutory power of attorney grants no authority to amend existing estate planning devices; all of the authority is "forward looking" and involves creating new trusts and other estate planning devices. *Perosi v. LiGreci,* 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011).

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

Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).



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

By Ilene Sherwyn Cooper

Due Execution

In *In re Demis*, the objectants moved for summary judgment denying probate of the propounded will and its duplicate original on the grounds of lack of due execution.

The record revealed that the testator died survived by his spouse, who offered the instruments for probate, and eight children, who objected to probate alleging, among other things, lack of due execution, fraud, duress and undue influence. Examinations were held under N.Y. Surrogate's Court Procedure Act 1404 (SCPA) of the attorney-draftsman/witness to the will, as well as his law office assistant, who was the second witness, and a third person, who was a document preparer in the draftsman's office.

The court noted that while the self-proving affidavit affixed to the instrument recited all the essential elements necessary to establish due execution, upon examination by the proponent, the witnesses and scrivener both testified that they had not seen the purported wills before. In fact, they each stated that the instruments were in a font that was not used in their law office, that the font did not match the font used on the attestation page or the self-proving affidavit and that the documents offered for probate were not the wills that were prepared and executed in their office.

Although the proponent argued that the witnesses' memories were faulty and could not be relied upon for summary relief, the court disagreed, finding that the witnesses were clear in their recollection and testimony that the wills being offered for probate were not the documents they attested to and witnessed. The court quoted from the testimony of the scrivener, who noted that the dispositive language contained in the instruments had never been used by him when drafting a will. Moreover, the court noted that the attestation clause was on a separate page from the documents submitted and had nothing to link it to the wills offered for probate.

While the genuineness of the testator's signature was not an issue, the court nevertheless held that the proponent had failed to satisfy the elements of due execution, and granted summary judgment in the objectants' favor.

In re Demis, Index No. 2008-397, 12/15/10 (Sur. Ct., Albany Co.) (Surr. Doyle).

Discovery

In a contested probate proceeding, appeal was taken from an Order of the Surrogate's Court (Glen, S.) which denied objectants' motion to extend the end date for disclosure and to delete limitations on the number and identity of the persons to be deposed. The Appellate Division affirmed.

The court found that appellants, who asserted that trial preparation, particularly with respect to the issue of undue influence, required extensive discovery, were on a fishing expedition. Indeed, the court noted that appellants had over a year to examine some of the many witnesses they now sought to depose, but took no steps to do so. Accordingly, the court concluded that the restrictions placed by the Surrogate's Court on disclosure were reasonable.

Probate Proceeding, Will of Rocky H. Aoki, N.Y.L.J., 11/6/10, p. 28 (A.D., 1st Dep't).

Gift

In a proceeding to determine ownership of the decedent's real property, the petitioner moved for a preliminary injunction barring the Public Administrator from selling the property or continuing a proceeding to evict petitioner pending determination of the petition.

The real property was owned by the decedent at death. She lived in an apartment on the second floor and rented out the first floor apartment. The Public Administrator was appointed the administrator of the decedent's estate and thereafter sought to evict the petitioner. The petitioner claimed the premises were a gift from the decedent and instituted a proceeding pursuant to Article 19 seeking to determine his right to the property.

The petitioner alleged that soon after he began living in the apartment, the decedent's health deteriorated and as a result he began to provide assistance to her in her household chores. He claimed that, in return, the decedent refused to accept any rental payments from him. He further claimed that the decedent told him that she had no close relatives and offered to give him her house. Thereafter, she purportedly gave him the deed to the premises, together with insurance papers and the original contract of sale. The petitioner stated that he agreed to allow the decedent to reside in the property until her death.

In opposition to the petitioner's application, the Public Administrator attached as an exhibit a verified claim by the petitioner in which he asserted that he was entitled to be paid for his services rendered to the decedent and that the decedent intended to compensate him out of her estate. The affidavit also stated that the decedent appointed petitioner as her agent and custodian of the property, and that his services in this regard were part of the claim.

The court held that the petitioner failed to establish that the decedent had made a completed gift to him prior to her death. The court found that delivery of the deed to the property and the related documents did not satisfy petitioner's burden, but rather were consistent with petitioner's role as the decedent's agent in managing the premises. Further, the court found it significant that the petitioner's affidavit in support of his claim never alleged that the decedent had made a gift to him of the premises.

Accordingly, the petitioner's motion for a preliminary injunction was denied.

In re Goldberg, N.Y.L.J., 12/27/10, p. 29 (Sur. Ct., Kings Co.).

Removal of Trustee

In a contested miscellaneous proceeding, the respondent, successor trustee of the testamentary trust created under the decedent's will, moved for summary judgment dismissing the petition of the decedent's son, the sole income beneficiary of the trust, who sought, among other things, removal of the trustee, or in the alternative, a direction that additional monthly distributions be made to him from the trust. The trustee was the only child of the petitioner's first marriage, and the principal of the trust was to be paid to her upon the petitioner's death. The terms of the subject trust granted the trustee invasion powers and directed the trustee to liberally construe those powers on the petitioner's behalf.

The record revealed that after the appointment of the respondent as successor trustee, the petitioner became dissatisfied with the income that the trust was earning. As of December 2000, the trust income was approximately $45,000 on a corpus of $2.3 million. In 2001, the trustee and petitioner, represented by separate counsel, entered into an agreement providing for the payment of an increased amount of income to the petitioner. The agreement further provided for a release of the trustee by the petitioner "of and from any and all claims" he may have had against the trustee with respect to any acts done or omitted to be done in her capacity as trustee, and from any acts thereafter done or omitted to be done pursuant to the terms of the agreement.

For approximately nine years after the execution of the agreement, the petitioner was able to sustain himself on the trust distributions as agreed to. However, due to failing health and medical issues that subsequently arose, the petitioner, who was in his late 80s, claimed that his expenses exceeded the trust income by $25,000 per year and that he needed an additional invasion of principal to remedy the situation.

In opposition, the trustee claimed that she had fully complied with the agreed-upon distributions due to the petitioner, and that pursuant to the terms of their settlement the petitioner had agreed to accept the distributions therein set forth in lieu of any future claims relating to the amount of distributions from the trust. Finally, the trustee maintained that the petitioner failed to substantiate his need for an additional invasion of principal.

The court noted that effectively the settlement agreement between the petitioner and trustee constituted a modification of the testamentary trust, which the law did not otherwise sustain under the circumstances. The court held that the modification agreed to by the parties could not be the basis for relieving the trustee of her responsibility to exercise her discretion in determining whether trust principal should be invaded for the petitioner's benefit in accordance with the trust terms. The court found that the trustee's interest in principal could not properly influence her decision as to whether to provide petitioner additional trust funds.

Moreover, the court held that the trustee could not be relieved of her duty to comply with the provisions of the trust respecting principal invasions based upon waiver, estoppel or ratification.

Finally, as to the issue of whether the trustee's denial of the requested invasion constituted an abuse of discretion, the court opined that the exercise of discretion by a trustee, no matter how broad, must nevertheless be in good faith and in accordance with the standard the trust imposes. The court concluded that it could not determine on the papers presented whether the trustee's denial of the requested invasions was an abuse of discretion and held that petitioner was entitled to her day in court on the issue. Summary judgment was, therefore, denied.

In re Adelson, N.Y.L.J., 11/15/10, p. 26 (Sur. Ct., Bronx Co.).

Standing

In a contested trustee's accounting proceeding, a motion was made to dismiss the objections of the remainder beneficiary. These objections were directed to the petitioner's proposed payment of counsel fees to the attorney for the beneficiary in connection with litigation involving the estate of the income beneficiary, as well as to the poundage fees of the sheriff.

The record revealed that counsel had been awarded fees in a proceeding pursuant to SCPA 2110. Thereafter, pursuant to N.Y. Civil Practice Law & Rules 603(1) (CPLR), the Clerk of the court furnished a transcript of the order to counsel, which was then filed with the New York County Clerk. Counsel arranged for the city marshal to levy upon the remainder interest of the beneficiary in the trust, which resulted in the poundage fees in issue.

The beneficiary objected to the proposed payment of fees to counsel, alleging that it failed to credit him with fees previously paid. The court opined that this claim was essentially seeking a construction of the court's order in the SCPA 2110 proceeding, a determination that was unavailable in the trustee's accounting proceeding. The court held that the beneficiary's remedy was to seek a clarification of the court order in connection with the estate in which it was rendered.

Further, the court held that the accounting proceeding was not the proper forum to settle counsel's claims against the beneficiary for fees. Although both counsel and the sheriff were served with citation in the proceeding, the court found that they were not proper parties inasmuch as counsel's status as a creditor of the beneficiary was not sufficient to provide him with standing to object. Similarly, the court held that the payment of poundage fees to the sheriff was not a proper issue to be raised in the accounting.

Accordingly, the court, on its own motion, dismissed the petitioner's request for approval of the poundage fees, dismissed the motion of counsel for lack of standing and dismissed the objections of the beneficiary as moot.

Matter of the Third and Final Account of Proceedings of JP Morgan Chase Bank, N.A. et. al., N.Y.L.J., 1/28/11, p. 26 (Sur. Ct., N.Y. Co.) (Surr. Glen).

Vacate Decree

Before the Court in *Matter of Kelsall* was an appeal by the executor of the decedent's estate from an Order of the Surrogate's Court, Essex County (Meyer, S.), which, among other things, granted the executor's application for preliminary letters testamentary, with limitations, and partially granted the application by the decedent's brother for discovery.

The decedent died in March 2008, leaving a will that had been executed in March 1994. The affidavit of attesting witnesses to the instrument was executed three years later, in May 1997. The instrument left the decedent's entire estate to the petitioner and named him as the executor. Although the decedent's brother received a copy of the will prior to its probate, he did not file objections, and the instrument was admitted to probate in December 2008.

Thereafter, the executor instituted a proceeding against the decedent's brother to set aside a deed to the brother purportedly conveying to him one of the principal assets of the decedent's estate. In connection with that proceeding, counsel for the brother reviewed the decedent's legal files and allegedly found documents and obtained information that cast doubt on the validity of the probated will. As a consequence, the brother moved by order to show cause for vacatur of the probate decree, permission to file objections and obtain discovery. Pending the return date, the authority of the executor was temporarily suspended. Petitioner cross-moved for an order vacating his temporary suspension and for an order of protection suppressing all documents obtained by respondent's counsel.

The Surrogate's Court granted the brother's motion insofar as it sought discovery regarding the propriety of the execution of the will but reserved decision as to whether to vacate the decree. The executor's motion for an order of protection was denied, but the Court granted his application for preliminary letters testamentary with limitations.

On appeal, the executor maintained that the Surrogate erred in granting discovery prior to vacatur of the probate decree. The Appellate Division agreed, holding that while SCPA 1404(4) does not explicitly provide that a decree of probate must be vacated prior to allowing discovery, the statute has been clearly interpreted to require vacatur as a prerequisite. Accordingly, the court held that the brother's motion for discovery should have been denied pending a determination of whether the brother was entitled to an order vacating the probate decree. In view of the discretionary nature of this relief, the court remanded the matter to the Surrogate's Court for a determination of this issue. Further, the court held that the Surrogate's determination to issue limited preliminary letters was a proper exercise of its discretion.

Matter of Kelsall, __ N.Y.S.2d __, 2010 N.Y. Slip Op. 08839 (3d Dep't).

Vacate Decree

In a contested probate proceeding, the decedent's former spouse moved to vacate the decree admitting his will to probate and requested probate of a later instrument.

The decedent's will, dated 1989, left his entire estate of $4.9 million to his son, whom he named as the executor. Almost three years after the instrument was admitted to probate, his former spouse petitioned for vacatur of the probate decree and requested probate of an instrument dated June 2005. That document was one page and left the decedent's entire estate in trust for his son but made no provision for the remainder. The decedent's former wife was named trustee of the trust.

The decedent's son opposed the relief requested, alleging that the later instrument was invalid on the grounds, among other things, of lack of due execution. At the conclusion of the non-jury trial of the matter, the son moved to dismiss the proceeding, alleging that the petitioner had failed to establish a prima facie case for due execution.

The court granted the motion, concluding that due execution of the 2005 instrument had not been established. In reaching this result, the court referred to the testimony of the attesting witnesses of the instrument, one of whom was the draftsman of both the 1989 will and the 2005 will. Notably, the court found that the draftsman did not testify as to any discussions with the decedent as to why he wanted to change his will, nor did he inquire of the decedent as to his reasons for naming his former wife as trustee. Further, the court noted that the testimony failed to establish whether the draftsman made any effort to determine decedent's intention as to the disposition of his estate if his son predeceased him, or what property was subject to disposition by the instrument. Finally, he had no independent recollection of the information he might have relied on in drafting the will and had no notes in connection with the decedent's consultation.

On the date of the will execution, the decedent was in the hospital, and according to the testimony of the draftsman, appeared to be sick. While he stated that the decedent signed the instrument in his presence, he did not testify that the decedent read the instrument or that anyone read the instrument to him. Further, he did not state that the decedent acknowledged the instrument as his will.

The second witness to the will testified that he saw the decedent sign the instrument, and, as compared to the draftsman, stated that the decedent appeared to be in perfect condition at the time. This witness also testified that he did not see the decedent read the will or anyone read the will to him. Although he testified at trial that he heard the decedent declare the instrument as his will, the Court noted that this testimony was contradicted by deposition testimony months earlier. Neither the draftsman nor the second witness could identify whether they signed the instrument as witnesses before or after the decedent.

Based upon the foregoing, the court held that the petitioner had failed to establish that the 2005 will was executed in accordance with the statutory formalities. Although recognizing that the failed recollection of witnesses will not necessarily deprive a will of probate, the Court opined that this was more likely the case when the witnesses were strangers to the decedent rather than, as in the instant case, familiar with the decedent and his family members.

Accordingly, the petition for probate of the 2005 will was denied.

In re Estate of Yuster, N.Y.L.J., 12/16/10, p. 41 (Sur. Ct., N.Y. Co.) (Webber, S.).

Ilene S. Cooper is a partner at Farrell Fritz, P.C., in Uniondale, New York.

Upcoming Section Events

Save the Dates

Symposium on Prudent Investing for Trustees in Light of the Recent Financial Downturn

Friday, September 23, 2011

Columbia Law School
New York, NY

The Trusts and Estates Law Section, in conjunction with Columbia Law School, is sponsoring a day-long symposium to revisit the precepts of the prudent investor rule in light of the financial debacle of 2008.

The theoretical underpinnings of the change from the prudent person rule, with its focus on avoiding speculation and evaluating one investment at a time, to the prudent investor, with its emphasis on diversification and view of risk as based on historic volatility, were modern portfolio theory and the efficient market hypothesis.

Thoughtful voices have been raised questioning the soundness of these theories, and a reconsideration of what constitutes prudent investing for a trustee is in order.

The participants in the symposium, to be held at Columbia on Friday, September 23, 2011, include professors Rob Sitkoff of Harvard Law School, Max Schanzenbach of Northwestern Law School, Joel Dobris of UC Davis Law School, Stewart Sterk of Cardozo Law School and Ken Joyce of Buffalo Law School.

Joining the discussions on the financial side will be Stephanie Luedke and Mackin Pulsifer of Fiduciary Trust; Scott Clemons of Brown Brothers Harriman; David A. Levine, formerly of Sanford Bernstein; Eugene Maloney of Federated Investors; Jim Garland of The Jeffrey Company; Rob Arnott of Research Affiliates; Don Wilkinson III of Wilkinson O'Grady; Barbara Tarmy of Neuberger Berman; John Campbell, who chairs the Harvard Economics Department and is a founder of Arrow Street Capital; and James Montier of GMO.

There will be CLE credit and no charge for admission. Hold the date! If you would like to attend, save a place by email to mordover@cullenanddykman.com.

* * *

Trusts and Estates Law Section 2011 Fall Meeting

(Joint Meeting with Elder Law Section)
October 13-15, 2011
Adam's Mark Hotel
Buffalo, NY

* * *

Trusts and Estates Law Section 2012 Spring Meeting

May 3-6, 2012
The Willard Continental
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For details and reservation information contact: Ilene S. Cooper: (516) 227-0736.

For updates, go to www.nysba.org/trusts and click on "Upcoming Events"

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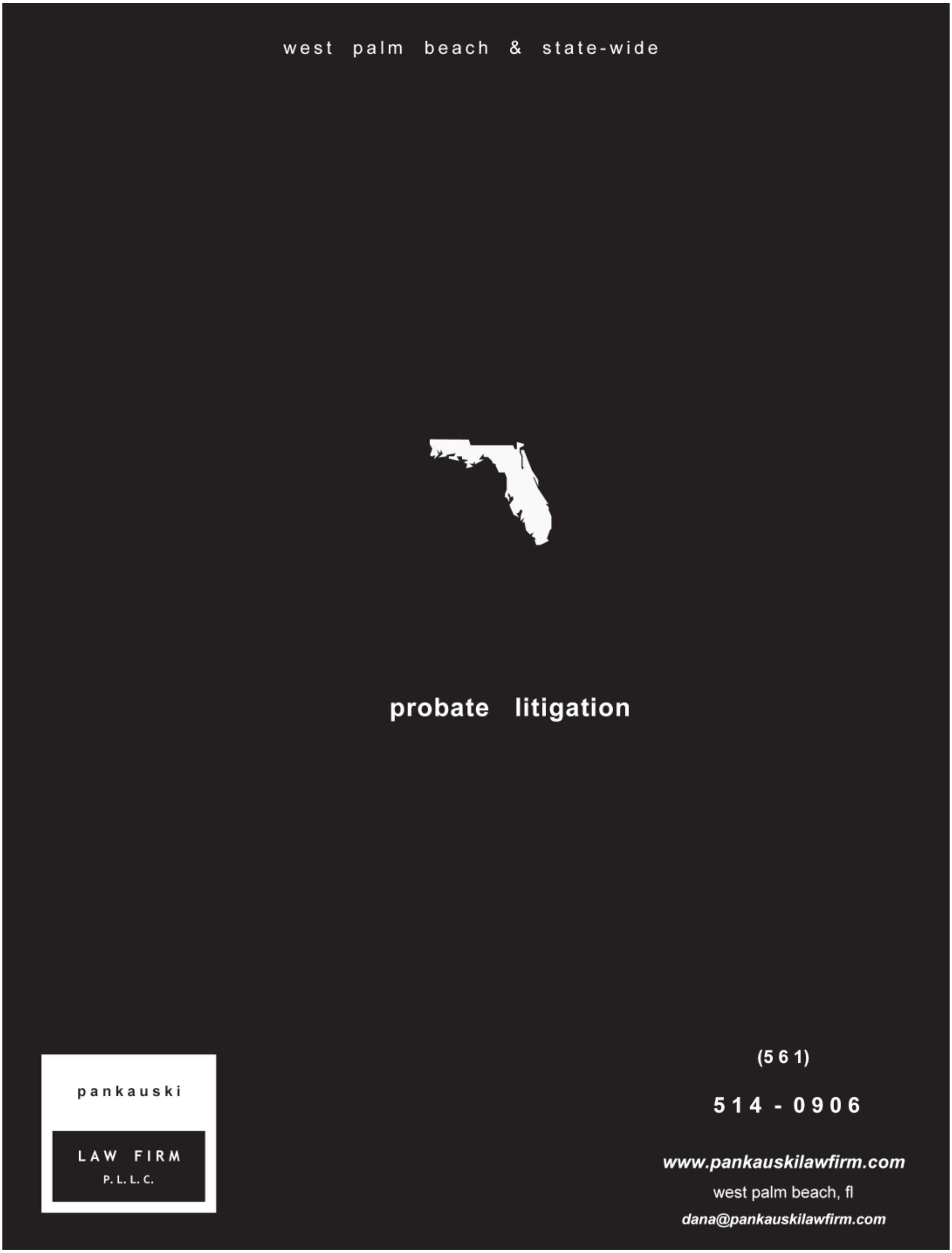

(paid advertisement)

Section Committees and Chairs

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

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

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