NYSBA SUMMER 2012 | VOL. 45 | NO. 2

# Trusts and Estates Law Section Newsletter

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

## A Message from the Chair

Since the writing of my last message, our Section has been busy working on legislation, CLE programs, networking events and, of course, its Spring and Fall meetings.

Ilene Cooper

On March 2, the Executive Committee convened. Of significance on the agenda was the Sixth Report and the Section's New York Uniform Trust Code Committee. The Chair of that Committee, Professor Ira Bloom, reported that the members of his committee were: Joseph T. La Ferlita, Darcy Katris, Natalia Murphy, Marion Fish, Linda Wank, Michael Ryan, Phil Burke, Sandy Schlesinger, Professor Melanie Leslie, Nancy Wood and John Morken.

New delegates were approved to serve as our representatives to the Bar Association's House of Delegates. Our delegates now are: James Ayers, Thomas Collura, Robert Harper and Stacy Pettit, with Jennifer Hillman as alternate.

The Surrogates Court Committee, with Joseph La Ferlita as Chair, succeeded in having two pieces of proposed legislation approved by the Executive Committee. The first would amend New York Estates, Powers & Trusts Law 5-1.2 (EPTL) in order to address the issues raised in the opinions in *Matter of Berk* and *Campbell v. Thomas* concerning the availability of the right of election to a surviving spouse who procured his or her marriage through undue influence. The second would amend EPTL 11-1.7 in order to make its provisions on exoneration clauses applicable to inter vivos trusts.

Lobby Day took place on March 6, with Ian MacLean, Robert Harper, Joseph La Ferlita and Natalia

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NYSBA

Murphy representing our Section's bills regarding interest on legacies and the effect of income adjustments on trustees' commissions. Thank you all for your efforts on the Section's behalf.

Thank you, as well, to Lawrence Keiser, Natalia Murphy and the other members of the Taxation and Estate and Trust Administration committees for their tremendous efforts with the NYSBA Tax Section in preparing a very comprehensive report on trust decanting in response to a request for comments by the Treasury and the IRS.

Kudos also to Lori Perlman and the Practice and Ethics Committee for doing a great job tackling the response from our Section to the proposal by the ABA Commission on Ethics 20/20 to amend the Model Rules of Professional Conduct to permit non-attorneys to be partners of law firms. Bonnie Jones crafted a survey to our membership, the results of which indicated that the Section was not in favor of the proposal.

Other Committees busy at work include Charitable Organizations, which has been working on a project addressing not-for-profit corporations; International Estate Planning and our CLE Committee, which created a full schedule of CLE programs for the Spring and Fall including "What You Need to Know as a Guardian ad Litem" and "Dealing with Your Client's Retirement Assets." Our Law Students and New Members Committee has also been hard at work planning networking events and activities to welcome and promote relationships with our members. The Law Students and New Members Committee hosted a cocktail reception at Rare 650 on Long Island and planned a second reception in New York City at Fresco on the Go. In addition, our Diversity Committee hosted a CLE program and reception in the Spring, and the Dispute Resolution Section, in conjunction with our CLE Committee, hosted a program on mediation in May.

My next message will include a full report on our Spring meeting in Washington, D.C., which was a resounding success. In the meantime, I look forward to seeing you at our Fall meeting, October 11-12, in Saratoga Springs.

**Ilene Cooper**

(paid advertisement)

# The New York Marriage Equality Act: Navigating the Estate Planning Landscape

By Lindsay H. Brown and Jaclyn G. Feffer

Lindsay H. Brown

On June 24, 2011, New York became the seventh jurisdiction in the United States to legalize same-sex marriage. While the passage of the Marriage Equality Act has been celebrated by many same-sex couples, the legal landscape for same-sex married couples still remains quite different from the landscape for other married couples. These differences are due to inconsistent laws in the 50 states as well as the differences between the federal law under the 1996 Defense of Marriage Act and the various state laws. This article summarizes the federal and New York law regarding same-sex marriage and highlights areas of particular concern with respect to estate planning and related issues for same-sex married couples residing in New York or seeking marital recognition in another state. Where possible, we have included suggestions on how to navigate what can best be described as a rocky and constantly changing landscape.

## I. The Defense of Marriage Act

The Defense of Marriage Act (DOMA) was signed into law by President Bill Clinton on September 21, 1996.[1] Under DOMA, each state and political subdivision of the United States is allowed to deny full faith and credit to same-sex marriages solemnized in another state. DOMA also prohibits the federal government from recognizing same-sex marriages as valid. On February 23, 2011, United States Attorney General Eric Holder said the Justice Department would no longer defend the constitutionality of DOMA but would continue to enforce the law.[2] In response to Attorney General Holder's pronouncement, Speaker of the House John Boehner took steps to defend the constitutionality of DOMA in place of the Justice Department; to that end, on October 4, 2011, the House's Bipartisan Legal Advisory Group approved an increased budget to defend lawsuits attacking DOMA's constitutionality.[3] More recently, President Obama endorsed the legalization of same-sex marriage, and on May 31, 2012 and June 6, 2012, respectively, the First Circuit Court of Appeals and the Southern District of New York ruled that the provisions of DOMA that bar federal recognition of same-sex marriages and deny benefits to same-sex spouses are unconstitutional and violate the Equal Protection Clause of the Fifth Amendment.[4] The next step is likely an appeal by Congress to the U.S. Supreme Court, and it is expected that the Court will agree to hear the case, perhaps as soon as this fall.

Jaclyn G. Feffer

There are now seven United States jurisdictions recognizing same-sex marriage, including New York.[5] Five other states recognize civil unions.[6] The majority of states do not recognize same-sex marriage: 38 states have a statutory or constitutional ban on either recognizing same-sex marriage in their states or recognizing same-sex marriages performed in other states.[7] These are often called "mini-DOMA" jurisdictions. This article provides guidance on advising clients regarding the legal disconnect among the various jurisdictions and between state and federal law. The discussion below focuses on the impact of these legal inconsistencies on same-sex married couples residing in New York with respect to their estate and family planning.

## II. The New York Marriage Equality Act and Guidance from the New York State Department of Taxation and Finance

New York enacted the Marriage Equality Act (the "Act") on June 24, 2011.[8] The Act went into effect on July 24, 2011 and has a significant impact on tax and estate planning for New York residents entering into same-sex marriages.

The Act amends New York's Domestic Relations Law to grant same-sex couples the ability to enter into civil marriages in New York.[9] By its language, it emphasizes that same-sex and different-sex couples are treated equally "in all respects under the law."[10]

The Act provides that a marriage between parties of the same sex is valid in New York.[11] Significantly, the Act also provides that an application for a marriage license cannot be denied on the grounds that the applicants are of the same or different sex.[12] In addition, it provides that same sex couples and different-sex couples who are married in New York are entitled to the same governmental treatment and legal status, rights, benefits, privileges, protections and responsibilities relating to marriage, whether deriving from statute,

administrative or court rule, public policy, common law or any other source of law.[13] At the same time, the Act confirms that religious institutions and benevolent organizations cannot be required to perform same-sex marriages.[14]

On July 29, 2011, the New York State Department of Taxation and Finance issued Technical Memorandum TSB-M-11(8)M, entitled "Implementation of the Marriage Equality Act Related to the New York State Estate Tax." The Technical Memorandum provides that:

1. Deductions and elections allowed for different-sex spouses are allowed for same-sex spouses, regardless of whether a federal estate tax return is filed. In particular, estates of same-sex spouses may claim marital deductions, as provided for different-sex spouses in Internal Revenue Code ("IRC") § 2056, for New York State estate tax purposes. Such estates may also make a qualified terminable interest property ("QTIP") election.
2. One-half of the value of qualified jointly held property is includable in the gross estate of the same-sex spouse.
3. Gifts made after July 24, 2011 by one spouse to a third party may be considered made one-half by the donor and one-half by the donor's same-sex spouse for New York State purposes, in the same manner provided in IRC § 2513 (the provision of the IRC permitting "gift splitting" between spouses). While New York State does not have a gift tax, this provision may affect whether the assets of a donor's estate reach the filing threshold for New York State estate tax purposes.
4. A separate pro forma federal estate tax return (based on the federal Form 706) must be filed with the New York Form ET-706 within nine months of the date of death, even if the decedent's estate will not file a federal return. In addition, if the estate of an individual who died while married to a same-sex spouse is required to file a federal estate tax return, both the pro forma federal return and the actual federal return must be filed. A pro forma federal gift tax return must also be attached to the New York Form ET-706 if the same-sex couple split gifts.

The Department of Taxation issued another Technical Memorandum on July 29, 2011, entitled "The Marriage Equality Act," discussing the effect of the Act on the personal income tax and reiterating the estate tax application described above.[15] Under this Technical Memorandum, same-sex married couples must file New York personal income tax returns as married even though their marital status is not recognized for federal purposes. To compute the New York State income tax due, such couples must compute their federal income tax as if they were married for federal purposes. Same-sex couples who were married as of December 31, 2011 will be considered married for the entire year. The Act is not retroactive, however, and same-sex couples who were married in another jurisdiction prior to July 24, 2011 (the effective date of the Act), will not be considered married for New York tax purposes until July 24, 2011, and thus cannot use married filing status for tax years prior to 2011.

## III. The Act's Impact on New York Estate and Family Planning

The Act contains provisions that will have a significant impact on estate and family planning for same-sex married couples residing in New York. Below is a summary of some of the likely effects of the Act.

### Intestacy and Right of Election

The New York Estates, Powers & Trusts Law (EPTL) contains several provisions that grant certain rights to surviving spouses. For example, EPTL 4-1.1 provides rights in intestacy for the surviving spouse of an individual who dies without a will, allowing the spouse to receive the entire deceased spouse's estate if there are no surviving issue, or $50,000 and one-half of the estate if there are surviving issue. EPTL 5-1.1A provides a right of election to a surviving spouse, allowing the spouse to elect against the will of a deceased spouse to receive approximately one-third of the deceased spouse's assets. Under the Act, these rights now apply to same-sex married couples in New York.[16] A same-sex spouse's status as an intestate heir is significant because only those who would inherit in the absence of a will have standing to object to the will under New York law. Thus, a surviving same-sex spouse now has standing to object to a deceased spouse's will. Same-sex couples who are contemplating marriage must now consider whether they wish such rights to apply to their marriage or whether they prefer to waive such rights through a prenuptial agreement or other waiver. In addition, the estate planning documents for same-sex married couples should clearly indicate their preferences with respect to these issues.

### Marital Deduction, Spousal Gifts and Estate Taxes

The Act will have an effect on both New York and federal estate taxes for same-sex married couples. As noted above, the Act does not change the restrictions set forth under DOMA. Under DOMA, same-sex married couples cannot benefit from the federal estate tax advantages that different-sex spouses enjoy (e.g., there is no gift-splitting between same-sex spouses and no marital deduction for property passing to a surviving same-sex spouse, whether outright or in a trust that would otherwise qualify for the marital deduction).

However, under New York law, a surviving same-sex spouse is entitled to a full New York marital deduction for property passing to a same-sex spouse.[17] Thus, for New York State purposes, a decedent's estate can deduct from the value of his or her taxable estate the value of all property passing (whether outright or in a qualified trust) to his or her same-sex spouse if the spouse is a U.S. citizen. In addition, the estate can exclude 50% of the value of property held jointly with the decedent's spouse, since the presumption of equal investment by spouses in joint property now applies to same-sex spouses for New York estate tax purposes.[18]

To address the disparity between New York and federal law, the TSB-M-11(8)M requires that a pro forma federal estate tax return and pro forma federal gift tax return be filed with the New York State estate tax return (Form ET-706), as noted above. Surviving spouses of same-sex marriages should discuss these tax filings with their attorney or accountant. While a marital deduction can be taken for New York State estate tax purposes at the death of the first spouse, it may not always be the most economically efficient choice. The decision of whether to make an election to qualify for the marital deduction should take into account not only the family's overall economic circumstances, but also the ultimate beneficiaries of the decedent's estate as well as the flexibility built into the decedent's testamentary instruments.

When a federal gift or estate tax return is filed for a same-sex spouse, estate planning advisors should consider making a protective claim for a refund with respect to property that would qualify for a marital deduction if DOMA were to be repealed. By doing so, the donor spouse (or his or her estate) would be reserving the right to a refund of taxes if DOMA is subsequently repealed and the federal marital deduction becomes available.

We also recommend that same-sex spouses utilize, to the extent possible, their federal gift tax exemption amount to make gifts to one another, as there is no federal gift tax marital deduction for same-sex spouses. In 2012, the federal gift tax exemption amount is $5,120,000; this provides a great opportunity for financially able individuals to make large gifts to same-sex spouses with no federal gift tax. It may be wise to consider making such gifts in trust rather than outright, especially if there are children (or grandchildren) of the same-sex couple and the couple wishes to provide a benefit to future generations as well. When making gifts in trust, same-sex couples can use the same sophisticated estate planning techniques as married couples, including grantor retained annuity trusts, family limited partnerships, charitable lead trusts and charitable remainder trusts. In addition, same-sex couples can use grantor retained income trusts (GRITs), an estate planning structure not available for use between different-sex spouses.[19]

Same-sex spouses may also want to consider obtaining life insurance to provide liquidity for the payment of estate taxes. Such life insurance may be owned outright or by an irrevocable life insurance trust. The advantage of an irrevocable life insurance trust is that if the insurance policy is purchased by the trust, or if an existing insurance policy is transferred to the trust and the insured survives for three years from the date of transfer, the value of the life insurance will not be included in the insured's gross estate for state or federal estate tax purposes.

### Disclaimer Planning

Under IRC § 2518, an individual cannot disclaim property into a trust of which he or she is the beneficiary. There is an exception allowing a decedent's spouse to disclaim into a trust for the spouse's benefit. Disclaimer planning is appropriate for couples who want to take a "wait and see" approach—i.e., those couples with small- or medium-size estates whose assets may or may not warrant funding a credit shelter trust in the estate of the first spouse to die. However, because federal law does not recognize same-sex marriage, the exception under IRC § 2518 will not apply to a disclaimer by a same-sex surviving spouse; thus, if the surviving spouse disclaims an interest into a trust for his or her own benefit, it will be taxed in the first spouse's estate and will also be a deemed gift by the surviving spouse. Same-sex married couples, therefore, should not structure an estate plan to include a disclaimer trust. The best structure for same-sex spouses who wish to utilize a trust as part of their estate plan while retaining flexibility as to the estate tax treatment is to create a trust that can qualify for the marital deduction (i.e., a QTIP trust) and authorize the executor to determine whether to elect the New York State marital deduction upon the first spouse's death.

### Health Insurance, Disability and Other Benefits

Since the Family Health Care Decisions Act of 2010, New York has extended to domestic partners the same level of priority as spouses to make medical decisions on behalf of their partners.[20] Under New York law, absent a health care proxy stating otherwise, a partner or spouse has the first priority to make these decisions on behalf of the incapacitated partner or spouse.[21] It is nevertheless advisable for a same-sex married couple to execute a health care proxy affirmatively naming each spouse as health care agent in the event the couple is in a state that does not recognize same-sex marriage, in which case New York's default rules will not apply.

The Employee Retirement Income Security Act (ERISA) is a federal law that governs employer-provid-

ed benefits. ERISA contains a savings clause that provides that it does not preempt state insurance laws.[22] Thus, employee benefit plans that offer coverage (such as health, dental vision, etc.) through an insurance contract subject to the laws of New York will apply to same-sex couples just as they do to different-sex couples.[23] The savings clause, however, does not cover companies that are self-insured (i.e., subsidized by the employers' own assets and not through insurance companies), and such companies are not required to follow the Act with respect to the treatment of same-sex couples. Further, employee insurance plans outside of New York are not obligated to cover same-sex spouses even if the insurance plan covers New York residents.

For different-sex married couples, employer-paid health benefits for spouses are not subject to income taxes and employees can use pre-tax dollars to pay premiums. Conversely, for same-sex married couples, the benefits are taxable and premiums must be paid with after-tax money. One ramification of the disconnect between the Act and DOMA is that employer-paid health benefits for New York same-sex spouses are taxable for federal income tax purposes but not for New York State income tax purposes. Some employers will reimburse employees for the tax difference resulting from federal taxation of the spousal benefit.[24]

For needs-based disability and medical care such as Medicaid, the federal prohibition on same-sex marriage may be helpful, because to the extent the couple's assets are in the name of one (presumably healthy) partner, those assets would not be considered an available resource when the other partner applies for a needs-based program. It seems logical that while DOMA is enforced, this should not change; however, it is possible that by marrying, a same-sex couple could lose this "advantage" for qualifying for needs-based resources if DOMA is repealed or if states follow guidance issued by the Obama administration in June 2010 regarding Medicaid coverage.[25]

### Retirement Assets and Pension Funds

Under federal law, a surviving spouse is entitled to receive, as primary beneficiary, 50% of a decedent's qualified death benefits under a retirement or tax-deferred annuity plan covered by ERISA (or the required amount under the institution's spousal policy) unless a spousal waiver has been executed.[26] Because DOMA precludes the application of ERISA rules to same-sex married couples, there is no obligation for same-sex spouses to leave retirement benefits to one another. This is one area where same-sex married couples may benefit from the disconnect between federal and state law and enjoy some added flexibility in choosing how to dispose of their assets. On the other hand, because a same-sex spouse is not considered a spouse by default, a beneficiary designation form must be completed naming the spouse as beneficiary if that is the intended result.

While same-sex spouses are still unable to provide for a spousal rollover of an IRA or a 401(k), which among other things allows the surviving spouse to defer distributions until age 70½,[27] the Pension Protection Act of 2006 provides that a non-spouse (as defined for federal purposes) beneficiary of a qualified retirement plan can roll over retirement benefits to an "inherited IRA" through a trustee-to-trustee transfer.[28] The inherited IRA must be titled in the deceased participant's name for the benefit of the beneficiary. This will allow the beneficiary of the inherited IRA to stretch the required minimum distributions from the IRA over his or her life expectancy.

### Parental Rights

The legal disconnect between DOMA and interstate recognition of same-sex marriage may have its greatest impact on parental rights.

It is advisable for New York same-sex spouses to complete the process of a second-parent adoption whenever one spouse is a biological parent. This is so even with the New York presumption that if a married woman conceives a child using assisted reproductive technology (e.g., *in vitro* fertilization), it is presumed that the woman's spouse is the other parent.[29] Without an order of adoption, jurisdictions outside of New York may not give full faith and credit to New York's presumption of parentage. For example, if the nonbiological parent of a New York same-sex married couple is with the couple's minor child in a jurisdiction that does not recognize same-sex marriage (and that parent has not adopted the child formally), that parent may be prohibited from making decisions for the child reserved exclusively to parents and legal guardians. It should be emphasized to same-sex spouses that parental rights do not attach to the nonbiological parent without a second-parent adoption, regardless of what a birth certificate may state.

Another distinct problem arises for same-sex spouses who wish to adopt a child who will be born in a jurisdiction (domestic or foreign) that prohibits adoptions by same-sex couples. A married same-sex couple, by virtue of that status, may be at a disadvantage if trying to adopt in one of these jurisdictions. For adoptions of children born in such jurisdictions, it is recommended that one parent adopt the child in the birth jurisdiction and the second parent finalize the adoption in New York. Same-sex couples who intend to marry and adopt children in the near future may wish to consider adopting a child first and then solemnizing their marriage in New York. Otherwise, in order for the couple to adopt easily, they may be forced to consider taking such drastic measures as disavowing their mar-

riage through divorce in order to be eligible candidates in some jurisdictions.

### Real Property Ownership

Under New York law, only married couples may own real property as "tenants by the entirety." With the passage of the Act, the advantages of this form of ownership are now available to same-sex spouses. When spouses own property as tenants by the entirety, both spouses have the right to enjoy the entire property, but the entire property is also protected from the reach of each spouse's separate creditors if one spouse files for bankruptcy. Before retitling property to take advantage of this form of ownership, however, we suggest that same-sex spouses carefully consider their options. For example, if a same-sex married couple owns a cooperative apartment as tenants by the entirety (which is technically personal property rather than real estate) and then moves to a non-recognition state while continuing to own the apartment, it is possible that the non-recognition state's laws will apply to the property, risking probate or creditor problems in that jurisdiction if the tenancy by the entirety is not respected. In this scenario, a couple may consider using revocable trusts or a limited liability company to hold the property in order to avoid having the property pass through probate in the other state; a limited liability company may provide some creditor protection as well.

Same-sex couples should also take into account the source of funding when acquiring property. If one spouse provides all of the funding for the purchase of the property (or owns it individually prior to the marriage), then taking title as tenants by the entirety will result in a taxable gift to the other spouse and will still be fully includable in the funding spouse's estate for federal estate tax purposes.[30] This issue will not arise if the spouses each contribute equally to the purchase of the home, provided they can prove their relative contributions. Otherwise, the better way for the spouses to take title to the home is as tenants in common, which will not avoid a taxable gift on the part of the spouse providing more than 50% of the funding, but will avoid estate inclusion of the percentage deemed given during life. That way, the spouse whose funds are used to purchase the property will still make a taxable gift of half of the value of the property, but at least the gifted portion will not also be included in his or her estate. Finally, regardless of how title is held, same-sex couples should keep accurate financial records relating to the purchase and contribution of expenses for the property.

### Divorce

After passage of the Marriage Equality Act, the New York City tourism industry, as well as Mayor Michael Bloomberg, looked forward to New York City becoming a destination wedding location for out-of-state same-sex couples. These "wedding tourists" should be aware of the potential pitfalls of marrying in New York if they will be residing in a mini-DOMA state (as should New York residents who subsequently move to a mini-DOMA state). If the marriage falters and the non-New York couple wishes to obtain a divorce, they will possibly be left in a "marital no-man's land," as will New York residents who marry and subsequently move to a mini-DOMA jurisdiction. Mini-DOMA states do not recognize same-sex marriage, so the couple cannot file for divorce there; New York's residency requirement for divorce may preclude couples without the funds or flexibility to move (or return) here from divorcing under New York law.[31] New York resident couples who were married in other jurisdictions that recognize same-sex marriages can obtain divorces in New York. Civil unions entered into in other states can also be dissolved in New York.[32]

Even if a same-sex married couple is able to obtain a valid divorce, another issue that may arise is the equitable distribution of property. Whether the couple's state of residence recognizes same-sex marriages may alter the result of how the couple's property is to be divided. In light of this ambiguity, same-sex couples should consider executing a prenuptial agreement prior to entering into marriage. The prenuptial agreement would set forth each party's property rights during marriage and in the event of separation or divorce. We note that in many jurisdictions, the consideration for the prenuptial contract is the pending nuptials; however, if a couple resides in a jurisdiction that does not recognize same-sex marriage, additional consideration may be required in order to enter into the contract because marriage is not allowed in the jurisdiction and thus cannot serve as consideration.

When divorcing, same-sex couples are at a disadvantage from a gift tax perspective. Because the federal government will not recognize a qualified domestic relations order for a same-sex divorce, the division of assets pursuant to a divorce will likely result in taxable gifts between the former spouses. Prenuptial agreements between same-sex couples should therefore contemplate not only the division of assets but also the gift tax ramifications of the division.

### Disposition of Remains

New York law sets forth a list prioritizing those individuals who have the right to control the disposition of remains of a decedent.[33] This list includes, in descending priority, an individual designated as the agent, the surviving spouse, a registered domestic partner and so forth. Thus, assuming no alternate agent has been designated, a same-sex surviving spouse now has the right to control the disposition of remains of his or her decedent spouse.

## IV. New York Income Taxation

Under New York law, a married couple must file state income tax returns in the same manner as they file their federal income tax returns. Because same-sex marriages are not recognized for federal purposes under DOMA, same-sex married couples cannot file joint federal returns. To ameliorate this inconsistency, the Department of Taxation issued the guidance discussed above, which requires same-sex married couples to file personal income tax returns as married couples, even though they cannot file federal income tax returns on this basis. This New York provision provides state income tax benefits to same-sex married couples such as pooling and splitting income and tax deductions and lower tax rates for some married couples. We strongly recommend that same-sex married couples consult with a certified public accountant with respect to New York income tax issues.

## V. Conclusions and Recommendations

Same-sex married couples must consider a host of open issues in structuring their estate plans. The current system has many pitfalls and requires legal counsel and careful planning to help clients achieve their goals (or at least the closest possible results). Unfortunately, this means that clients without funds to expend on professional advisors can be at a significant disadvantage. At a minimum, we suggest the following:

1. Same-sex couples should not marry in multiple states. This can create confusion as to the marriage's effective date and complicate an eventual divorce. Same-sex couples also should not have both a civil union and a marriage in the same state or in multiple states. Prior to marrying in New York, they should terminate all prior civil unions and marriages. This, of course, does not limit their ability to have multiple marriage celebrations in different locations.

2. "Portability" of a same-sex marriage from one state to another is a significant concern for couples having ties to more than one jurisdiction. Couples considering moving to or purchasing property in a jurisdiction that does not recognize same-sex marriage should consult with an attorney and proceed with caution.

3. All same-sex married couples, regardless of means, should have estate planning documents because if they move to a state where their marriage is not recognized, they cannot take advantage of certain rights determined under local law (such as inheritance under intestacy and the spousal right of election). Same-sex married couples should be explicit in their estate planning documents about their intended beneficiaries and other matters and should not rely on state law to fill in the gaps. For example, care should be taken in defining terms such as "spouse" and "children" in their documents (especially if one spouse is the adoptive parent and one spouse is not). Couples residing in New York should direct that New York law apply to their estate planning documents and select New York probate. Couples should consider appointing their same-sex spouse as their agent in their powers of attorney, health care proxies, HIPAA releases and burial instructions even though the same-sex spouse might otherwise be automatically designated as the agent under New York law.

4. Life insurance is even more important for same-sex married couples with significant assets because of the greater need for liquidity to pay federal estate taxes on the first spouse's death.

5. Where appropriate, same-sex married couples should create trusts for each other that may qualify for the marital deduction. At a minimum, such trusts will allow the couple to obtain a New York estate tax marital deduction, and if federal law allows for same-sex marriage at some future date, such trusts may potentially qualify for the federal marital deduction as well.

6. To avoid probate and ancillary probate (especially in states that do not recognize same-sex marriage), it is advisable to create and fully fund revocable trusts.

7. When acquiring or dividing assets, same-sex couples should consider the potential gift tax consequences. Ownership of property with rights of survivorship (e.g., bank accounts and real property) may result in unintended gifts.

8. Same-sex couples should take advantage of the federal annual gift tax exclusion amount to transfer assets to the less wealthy partner or spouse, as well as the federal unlimited gift tax exemption for qualifying medical expenses and tuition payments (made directly to the medical provider or school).

9. Same-sex couples with substantial means should also consider utilizing the $5,120,000 federal gift tax exemption available during 2012. It is a significant estate planning opportunity for same-sex couples and may no longer be available after December 31.

## Endnotes

1. 1 U.S.C. § 7 and 28 U.S.C. § 1738C.
2. DOJ, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, 2/23/11, <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.
3. House General Counsel Kerry Kircher agreed to pay private attorney Paul Clement a sum not to exceed $750,000 to defend DOMA, but this cap may be raised to $1.5 million under written notice.
4. *See Massachusetts v. U.S. Dep't of Health & Human Services*, 2012 WL 1948017 (1st Cir. May 31, 2012); *Windsor v. United States*, 2012 WL 2019716 (S.D.N.Y. June 6, 2012). The First Circuit's ruling was issued by a unanimous three-judge panel.
5. The jurisdictions include Washington, D.C. and six states: Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont. In February 2012, Washington and Maryland both passed laws legalizing same-sex marriage, but now both statutes are subject to referendums later this year. (Washington's law otherwise would have taken effect on June 7, 2012 and Maryland's law in January 2013.) Further, on February 7, 2012, in *Perry v. Brown*, Nos. 10-166696, 11-16577, 2012 WL 372713 (9th Cir., Feb. 7, 2012), a federal appeals court declared California's ban on same-sex marriage (known as Proposition 8) unconstitutional.
6. These states are Delaware, New Jersey, Rhode Island, Illinois and Hawaii. In addition, on February 16, 2012, West Virginia introduced a bill allowing civil unions. In January 2012 and February 2012, New Jersey and Rhode Island, respectively, introduced bills to legalize same-sex marriage. New Jersey Governor Chris Christie subsequently vetoed the bill, which will likely be put to a referendum.
7. This tally includes Hawaii and Illinois, which do not allow same-sex marriage but do allow civil unions.
8. N.Y. Marriage Equality Act (McKinney 2011).
9. § 2 of the Act.
10. *Id.*
11. § 3 of the Act.
12. § 4 of the Act.
13. *Id.*
14. § 5 of the Act.
15. This Technical Memorandum includes TSB-M-11(8)C, TSB-M-11(8)I, TSB-M-11(7)M, TSB-M-11(1)MCTMT, TSB-M-11(1)R and TSB-M-11(12)S.
16. We have been advised that an ad hoc committee of the New York State Bar Association will suggest that references in the EPTL and the Surrogate's Court Procedure Act (SCPA) be made gender neutral in light of the Act.
17. N.Y.S. Dep't Tax & Finance, TSB-M-11(8)M.
18. For federal estate tax purposes, the rule applicable to unmarried joint owners continues to apply to same-sex spouses because of DOMA. Under this rule, 100% of jointly owned property is included in the estate of the first owner to die, except to the extent that the surviving joint owner can prove his or her contribution to the purchase price. See discussion, *infra*, under "Real Property Ownership." For a discussion of the effect of DOMA on couples with ties to community property states, see Timothy J. Vitollo, *The DOMA Disparity: Transfer Taxation of Same-Sex Spouses in Community Property and Common Law States*, 26 Probate & Property 11 (2012).
19. The tax rules governing the valuation of certain transferred interests in trust for "family members" make GRITs, with limited exception, unavailable to different-sex spouses. DOMA, of course, precludes the IRS from asserting the application of these rules to same-sex spouses. If DOMA is repealed, it remains to be seen how existing GRITs would be treated. An open issue is whether a GRIT would become void if DOMA is repealed during the term of the GRIT.
20. Chapter 8 of the Laws of 2010, adding Public Health Law (PHL) Ch. 29-CC and 29-CCC (eff. June 1, 2010).
21. Form Health Care Proxy, N.Y. Consolidated Laws, Chapter 45, Article 29-C, §§ 2980–2994.
22. ERISA § 514(b)(2)(A).
23. Same-sex spouses covered by an insurance plan issued in New York should be eligible for state continuation benefits under COBRA-equivalent coverage.
24. For example, in October 2011, Bank of America widely publicized the fact that they would be doing so. <http://www.williamsinstitute.law.ucla.edu/press/bofa-to-remiburse-gay-employees-for-extra-health-taxes/>.
25. <http://www.cms.gov/smd1/downloads/SMD11-006.pdf>. Under these guidelines, states can offer same-sex domestic partners the same protection afforded to different-sex spouses. If a state follows the guidelines, then it does not have to impose liens on a Medicaid recipient's home if that recipient's domestic partner or same-sex spouse lawfully resides in the home.
26. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).
27. A spousal rollover also allows the surviving spouse to treat the deceased spouse's account as his or her own, which means the survivor can designate his or her own beneficiaries, who can then take distributions from the IRA over their own life expectancies after the death of the survivor. This permits a longer deferral of income taxation than in situations in which retirement accounts are not rolled over.
28. Pension Protect Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).
29. Thus, a nonbiological parent who is the same-sex spouse of the biological parent can now be recited on the birth certificate without a legal proceeding. *Debra H. v. Janice R.*, 14 N.Y.3d 576, 930 N.E.2d 184 (2010).
30. While the estate of the spouse who provided the funding will receive a credit for gift taxes paid, the estate will still owe estate tax on all of the property's appreciation.
31. Under the N.Y. Domestic Relations Law (DRL), there is a one-year residency requirement for at least one spouse in order to obtain a divorce in New York.
32. *Dickerson v. Thompson*, 88 A.D.3d 121, 928 N.Y.S.2d 97 (2011).
33. N.Y. PBH Law § 4201.

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# Exoneration Clauses in Inter Vivos Trust Instruments

By Ilene S. Cooper and Robert M. Harper

Exoneration clauses excuse fiduciaries, most notably executors and trustees, from liability for the failure to exercise reasonable care.[1] Although exoneration clauses in testamentary instruments are void as against public policy under New York Estates, Powers & Trusts Law 11-1.17 (EPTL), there is no analogous statutory prohibition concerning the enforceability of similar provisions in inter vivos trusts. The absence of such statutory guidance has left courts to reach divergent views concerning the enforceability of exoneration clauses in lifetime trust instruments. In order to create uniformity in terms of the duties that fiduciaries owe (whether they be executors, trustees of testamentary trusts or trustees of inter vivos trusts), EPTL 11-1.7 should be amended to provide that exoneration clauses in inter vivos trust instruments are void as against public policy.

## I. History of EPTL 11-1.7

Estate and trust fiduciaries owe a duty of undivided, absolute loyalty to the beneficiaries whose interests they protect.[2] This "inflexible" duty of fidelity is akin to the highest standards of honor, not just honesty alone.[3] It obligates fiduciaries to administer an estate or trust for the benefit of the beneficiaries, with undivided loyalty and without regard to self-interest.[4] The legal responsibilities arising from that fiduciary status generally cannot be divested by agreement or other means.[5]

Despite that duty, however, testators and grantors have attempted to insulate their fiduciaries from liability for breaching their obligations.[6] These attempts come in the form of exoneration clauses, which purport to exculpate fiduciaries for breaching the duty of undivided loyalty and failing to account.[7] These provisions are not universally enforceable.

More than a century ago, in *Crabb v. Young*, the Court of Appeals first addressed the issue of whether exoneration clauses are enforceable.[8] In *Crabb*, the decedent's will exempted the trustees of a testamentary trust from liability for "any loss or damage…except [that which occurred due to] their own willful default, misconduct or neglect."[9] When the trust suffered investment losses, the beneficiaries sought to be reimbursed by the trustee.[10] Although both the trial court and intermediate appellate court ruled that the trustee had an obligation to replace the amount lost, the Court of Appeals reversed, relying upon the exoneration clause contained in the will.[11] In doing so, the court explained that the decedent "had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done."[12] Since there was no evidence of willful default, misconduct or negligence on the trustee's part, the exoneration clause required that the fiduciary be excused from liability for the losses.[13]

Subject to the requirement that fiduciaries act honestly and in good faith, the rule in *Crabb* prevailed for more than five decades until the Great Depression,[14] when the New York State legislature enacted Decedent Estate Law § 125 (DEL) in 1936.[15] DEL § 125 proscribed the enforcement of exoneration clauses that purported to excuse estate and testamentary trust fiduciaries from liability for failing to exercise reasonable care.[16] In passing DEL § 125, the legislature restricted the freedom of testation, which is strongly favored as a matter of public policy.[17]

DEL § 125 was necessitated by the "increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in…fiduciaries almost unlimited powers, with a minimum of obligations."[18] As the legislative history reflects, the legislature believed this practice was "a serious potential menace…to the rights of…all persons interested in estates,"[19] and that "[t]he primary duties of ordinary care, diligence and prudence and of absolute impartiality among…beneficiaries [were] of the very essence of a trust, and any impairment of these or similar obligations of a fiduciary contrary to public policy."[20]

The same policy-based reasons governed thirty years later, when the legislature enacted DEL § 125's successor, EPTL 11-1.7.[21] Under EPTL 11-1.7, a testator is prohibited from exculpating the executor or testamentary trustee nominated in a will from liability for failing to "exercise reasonable care, diligence and prudence."[22] Will provisions that purport to do so are void as against public policy and have no import.[23] As explained in *In re Stralem*, "the attempted exoneration of the fiduciary [of an estate or testamentary trust] for any loss, unless occasioned by 'willful neglect or misconduct' is a nugatory provision amounting to nothing more than a waste of good white paper."[24]

Examples of cases in which courts have reached the same conclusion that the court did in *Stralem* abound.[25] For example, in *In re Lubin*, the decedent's will provided that the executor of his estate would be relieved of liability "for any loss or injury to the property…except…as may result from fraud, misconduct or gross negligence."[26] Describing that provision as a "toothless tiger," the court held that it was unenforceable as against public policy.[27]

Another noteworthy case is *In re Allister*, in which the decedent's will authorized her testamentary trustee to invest the trust principal "irrespective of whether the same may be authorized by the laws of [this] State…as investments for fiduciaries and without the duty to diversify and without any restrictions placed upon fiduciaries by any present or future applicable law."[28] The court found that the exoneration provision contravened EPTL 11-1.7, reasoning that the provision "would elevate the fiduciary above the law" if effectuated.[29]

## II. Exoneration Clauses in Inter Vivos Trust Instruments

EPTL 11-1.7 is silent with respect to inter vivos trusts, leaving the issue of the enforceability of exoneration clauses in such instruments to the discretion of the courts.[30] In exercising their discretion, however, courts have reached conflicting conclusions as to the applicability of EPTL 11-1.7 to inter vivos trust instruments and the enforceability of the exculpatory provisions contained in them.[31]

Most courts have historically enforced exoneration clauses in inter vivos trust instruments, applying a "more liberal rule" to such provisions than to exculpatory clauses in testamentary instruments.[32] "The rationale for this difference…is said to be the nature of an *inter vivos* transaction and the contracting freedom of the [grantor] and trustee to define the scope of the latter's powers and liabilities."[33]

Notwithstanding a grantor's freedom to contract as he or she wishes, several courts have found that EPTL 11-1.7 governs in cases involving inter vivos trusts.[34] Even the courts that have applied a more liberal standard to exoneration clauses in inter vivos trust instruments have held that there are limitations to the enforceability of such provisions.[35]

It is beyond dispute that the "trustee of a lifetime trust who is guilty of wrongful negligence, impermissible self-dealing, bad faith or reckless indifference to the interests of beneficiaries will not be shielded from liability by an exoneration clause."[36] Nor will the courts enforce exculpatory provisions that seek to render a trustee completely unaccountable;[37] to excuse the fiduciary of an inter vivos trust from the duty to account;[38] or to absolve an attorney-fiduciary who drafted the trust instrument of liability for all conduct other than acts committed in bad faith.[39] Even under the more liberal standard discussed above, the beneficiaries of an inter vivos trust are entitled to some level of protection, as loyalty, accountability and reasonableness are hallmarks of a trustee's fiduciary relationship.[40]

Additionally, the case law suggests that an exoneration clause contained in an inter vivos trust instrument is not enforceable when the fiduciary is involved, either directly or indirectly, in drafting or creating it.[41] The court recognized as much in *In re Shore*, where it found that an exculpatory clause contained in an inter vivos trust drafted by the trustee was void and unenforceable.[42]

The absence of statutory guidance as to the enforceability of exoneration clauses in inter vivos trust instruments has resulted in what appear to be decisional inconsistencies. These inconsistencies, together with the public policies discussed below, warrant legislative action declaring that broad exculpatory clauses in inter vivos trust instruments exonerating fiduciaries from the duties of reasonable care, diligence and prudence are void as against public policy.

## III. Other Policy-Based Reasons to Amend EPTL 11-1.7

While the freedom of contract, much like the freedom of testation, generally is favored,[43] it is not so sacred as to render enforceable a contract provision that contravenes public policy.[44] The freedom of contract has been restricted on public policy grounds in several contexts, including disputes concerning attorneys' fees,[45] collective bargaining conflicts involving public employees[46] and cases concerning contractual provisions exonerating caterers from liability for damages resulting from the caterer's negligence.[47] Moreover, as the law is anything but static, the courts have recognized that contract provisions that "were valid in one era may be wholly opposed to the public policy of another."[48]

In the trusts and estates context, the freedom of testation—which, much like the freedom of contract, is strongly favored—has already been restricted, yielding to public policy concerns that executors and trustees under testamentary instruments not be absolved of the duty of reasonable care.[49] There exists no public policy-based justification for differentiating between the standards of care owed by fiduciaries acting under testamentary and inter vivos trust instruments. On the contrary, public policy requires that fiduciaries acting pursuant to testamentary and inter vivos trust instruments alike adhere to the standards of reasonable care, diligence and prudence,[50] as they are unquestionably bound by the same duty of undivided loyalty.[51]

This is especially true in the case of a revocable trust. As a revocable trust is often used as a substitute

for a will,[52] a fiduciary acting under a revocable trust should be bound to the same duty of reasonable care, diligence and prudence that is imposed upon an executor or testamentary trustee.

Based upon the foregoing, EPTL 11-1.7 should be amended to reflect that inter vivos trustees are subject to its provisions. Doing so will further the public interest of ensuring that fiduciaries acting under lifetime trusts exercise reasonable care, diligence and prudence in connection with their fiduciary duties.

## IV. Conclusion

Since executors, testamentary trustees and inter vivos trustees are held to the same standard of absolute, undivided loyalty to the beneficiaries whom they serve, public policy necessitates that they be treated similarly, especially in the context of exoneration clauses. EPTL 11-1.7 should be amended to effectuate that goal by filling the statutory silence with respect to inter vivos trust instruments, regardless of a grantor's expressed intentions. Doing so will ensure that the state's public policy concerns regarding reasonable fiduciary conduct are served and that the courts address this issue uniformly.

## Endnotes

1. *Cf.* Turano, McKinney Practice Commentary: N.Y. Estates, Powers & Trusts Law 11-1.7 (2008) (discussing exoneration clauses).
2. *Boles v. Lanham*, 55 A.D.3d 647, 647-68, 865 N.Y.S.2d 360 (2d Dep't 2008); 41 N.Y. Jur. 2d Decedents' Estates § 1450 (2009); Ian W. MacLean, "Exculpatory Clauses in Inter Vivos Trusts: What Remains of a Trustee's Duty of Undivided Loyalty," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 5, No. 3 (Fall 2004).
3. *In re Wallens*, 9 N.Y.3d 117, 122-23, 847 N.Y.S.2d 156 (2007).
4. *See id.*
5. *See id.*
6. MacLean, *supra* note 2, at 5.
7. Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments*, 4 Hofstra Prop. L. J. 123, 124-25 (1992).
8. *Crabb v. Young*, 92 N.Y. 56, 65-67 (1883).
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *Cf.* Henry A. Shinn, *Exoneration Clauses in Trust Instruments*, 42 Yale L. J. 359, 365 (1933) (discussing the rapid depreciation of trust assets).
15. *In re Clark's Will*, 257 N.Y. 132, 138, 177 N.E.2d 397 (1931); *In re Balfe's Will*, 243 A.D. 22, 24-25, 280 N.Y.S. 128 (2d Dep't 1935); Turano, *supra* note 1.
16. *In re Stralem*, 181 Misc.2d 715, 719-20, 695 N.Y.S.2d 274 (Sur. Ct., Nassau Co. 1999).
17. Turano, *supra* note 1.
18. *Stralem*, 181 Misc.2d at 719-20.
19. *See id.*
20. *See id.*
21. *See id.*
22. EPTL 11-1.7(a)(1).
23. EPTL 11-1.7(a)-(b).
24. *In re Stralem*, 181 Misc.2d 715, 719-20, 695 N.Y.S.2d 274 (Sur. Ct., Nassau Co. 1999).
25. *In re Lang*, 60 Misc.2d 232, 234-35, 302 N.Y.S.2d 954 (Sur. Ct., Bronx Co. 1969); *In re Egerer*, 30 Misc.3d 1229(A), at *3, 923 N.Y.S.2d 308 (Sur. Ct., Suffolk Co. 2006).
26. *In re Lubin*, 143 Misc.2d 121, 122, 539 N.Y.S.2d 695 (Sur. Ct., Bronx Co. 1989).
27. *See id.*
28. *In re Allister*, 144 Misc.2d 994, 997-98, 545 N.Y.S.2d 483 (Sur. Ct., Nassau Co. 1989).
29. *See id.*
30. *See* Turano, *supra* note 1.
31. *In re Mednick*, 155 Misc.2d 115, 116, 587 N.Y.S.2d 127 (Sur. Ct., New York Co. 1992) (noting that "the limitations on the powers and immunities of testamentary trustees under EPTL 11-1.7 do not apply to *inter vivos* trustees"); *In re Shore*, 19 Misc.3d 663, 665, 854 N.Y.S.2d 293 (Sur. Ct., New York Co. 2008).
32. *In re Mankin*, File No. 330328, 2010 N.Y. Misc. LEXIS 3091, at *3-4 (Sur. Ct., Nassau Co. 2010), *aff'd*, 88 A.D.3d 717, 930 N.Y.S.2d 79 (2d Dep't 2011).
33. *See id.*
34. *In re Goldblatt*, 162 Misc.2d 888, 893, 618 N.Y.S.2d 959 (Sur. Ct., Nassau Co. 1994) (in the context of an SCPA Article 17-A guardianship proceeding, holding that an exoneration clause contained in a proposed supplemental needs trust was violative of public policy); *Shore*, 19 Misc.3d at 665 (finding that "the public policy in EPTL 11-1.7 against exonerating a fiduciary from liability for the failure to exercise reasonable care, diligence and prudence applies equally to an inter vivos trust where by its terms there is no one in a position to protect the beneficiaries from the actions of the trustee").
35. *In re Tydings*, 32 Misc.3d 1204(A), at 6 (Sur. Ct., Bronx Co. 2011) (citations omitted); *see also O'Hayer v. de St. Aubin*, 30 A.D.2d 419, 420-28, 293 N.Y.S.2d 147 (2d Dep't 1968) (addressing the application of an exoneration clause in an inter vivos trust instrument); *In re Cowles*, 22 A.D.2d 365, 76-78, 255 N.Y.S.2d 160 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 567, 215 N.E.2d 509 (1966).
36. *Tydings*, 32 Misc.3d 1204(A), at 6; *see also Boles v. Lanham*, 55 A.D.3d 647, 648, 865 N.Y.S.2d 360 (*citations omitted*) (2d Dep't 2008) (opining that a "trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries").
37. *In re Rivas*, 30 Misc.3d 1207(A), at 4 (Sur. Ct., Monroe Co. 2011).
38. *In re Shore*, 19 Misc.3d 663, 665, 854 N.Y.S.2d 293 (Sur. Ct., New York Co. 2008); *Stansbury v. Stansbury*, N.Y.L.J., May 21, 2007, at 45, col. 1 (Sur. Ct., Kings Co.).
39. *Tydings*, 32 Misc.3d 1204(A), at 6.
40. *Shore*, 19 Misc.3d at 666.
41. *Cf. In re Tydings*, 32 Misc.3d 1204(A), at 6 (Sur. Ct., Bronx Co. 2011) (citations omitted) ("Nonetheless, it is clear that where, as here, a trustee was neither directly nor indirectly involved in drafting or creating the trust, and may be presumed to have relied upon the explicit provisions of an exoneration clause contained in a lifetime trust instrument before agreeing to serve as fiduciary, generally the trustee will not be held liable for acts specified in the exoneration clause.").
42. *In re Shore*, 19 Misc.3d 663, 666-67, 854 N.Y.S.2d 293 (Sur. Ct., New York Co. 2008).

43. *The Bajan Gr., Inc. v. Consumers Interstate Corp.*, 28 Misc.3d 1227(A), at 7 (Sup. Ct., Albany Co. 2010) ("After all, even in commercial contracts between sophisticated business entities, a covenant against competition is subject to a rule of reason that requires courts to balance the competing public policies in favor of robust competition and freedom of contract.").

44. *Lustig v. Congregation B'Nai Israel of Midwood*, 65 Misc.2d 1052, 1054, 319 N.Y.S.2d 994 (Sup. Ct., Kings Co. 1971); *see also Brown v. Sup. Ct. I.O.F.*, 175 N.Y. 132, 137, 68 N.E. 145 (1903) (noting that despite "the general rule that the law permits great freedom of action in making contracts, there are some restrictions placed upon that right by legislation, by public policy and by the nature of things").

45. *Samuel v. Druckman & Sinel, LLP*, 50 A.D.3d 322, 324, 855 N.Y.S.2d 90 (1st Dep't 2008).

46. *Niagara Wheatfield Admin. Ass'n v. Niagara Wheatfield Cen. Sch. Dist.*, 44 N.Y.2d 68, 72 (1978).

47. *Lustig*, 65 Misc.2d at 1057-58.

48. *See id.* at 1054.

49. EPTL 11-1.7.

50. Hon. C. Raymond Radigan, *New Uniform Trust Code to be Submitted to Legislature,* N.Y.L.J., *available at:* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537636765&New_Uniform_Trust_Code_to_Be_Submitted_to_Legislature (last viewed January 12, 2012).

51. *Boles v. Lanham*, 55 A.D.3d 647, 648, 865 N.Y.S.2d 360 (2d Dep't 2008); *see also In re Quatela*, No. 355511, 2010 WL 4466757 (Sur. Ct., Nassau Co. Sept. 30, 2010) (citations omitted) ("A trustee is duty-bound to act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid any circumstances whereby the trustee's personal interest will come in conflict with the interest of the beneficiaries. The purpose of this rule is to ensure that the trustee's acts are above suspicion and that the trust receives the trustee's uninfluenced judgment.").

52. *In re Tisdale*, 171 Misc.2d 716, 720, 655 N.Y.S.2d 809 (Sur. Ct., New York Co. 1997); *see also In re Goetz*, 8 Misc.3d 200, 205, 793 N.Y.S.2d 318 (Sur. Ct., Westchester Co. 2005) (citations omitted) ("Further, revocable trusts are commonly employed as estate planning tools and are coordinated with the grantor's will, functioning in much the same manner as a will. Because the Goetz revocable trust was created as a part of the decedent's overall estate planning at the same time as his will, the trust can be deemed to 'function[] as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property.'"); *In re Davidson*, 177 Misc.2d 928, 930, 677 N.Y.S.2d 729 (Sur. Ct., New York Co. 1998) (noting that "revocable trusts—used increasingly as devices to avert will contests—function essentially as testamentary instruments (*i.e.*, they are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalents of wills in the eyes of the law").

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# Getting the Last Word, or, "A Good Stout Rope"

By Eric W. Penzer

*Before anything else is done [I direct that] fifty cents be paid to my son-in-law to enable him to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.*[1]

As a trust and estate litigator, I have always had a fascination with humorous or otherwise atypical provisions in Last Wills and Testaments. Aside from the standard joke with which I begin many of my lectures ("Did you hear about the testator who wrote in his will, 'To my first wife, Sue, whom I always promised to mention in my will, 'Hello Sue!'"), I've collected a number of unusual testamentary provisions, from reported cases, anecdotal reports in literature and online. These are some of my favorites.

Dr. William "Tiger" Dunlop, of Ontario, Canada, emigrated from Scotland to Canada with his British Army regiment during the war of 1812. He was one of the founders of the town of Guelph, at which was based the new company he was to lead, the Canada Company. One source reports that Dr. Dunlop enjoyed shocking people. At a public meeting in Goderich in 1840, for example, he publicly provided his reasons for not going to church, the first of which was that a man "should be sure to find his wife there," and the last of which was that he never liked singing without drinking. Dr. Dunlop, who died in 1848, left a will dated August 31, 1842. The will contained several unusual provisions, including a bequest to one of his sisters, "because she is married to nobody, nor is she like to be, for she is an old maid, and not market-rife," and a bequest to a brother-in-law "as a small token of my gratitude for the service he has done the family in taking a sister that no man of taste would have taken." My favorite provision from his will, however, is the following:

> I leave my silver tankard to the eldest son of old John, as the representative of the family. I would have left it to old John himself, but he would melt it down to make temperance medals, and that would be sacrilege—however, I leave my big horn snuff-box to him: he can only make temperance horn spoons of that.[2]

We all know of "sweetheart wills" that are intended to benefit a surviving husband or wife. Some people over the years have used their wills as opportunities to express their true feelings for their spouses. Take the 1791 will of one John George, for example, in which he made a not-so-generous bequest to his wife, Elizabeth. This was, of course, prior to any right of election.

> Seeing that I had the misfortune to be married to the aforesaid Elizabeth, who, ever since our union, has tormented me in every possible way; she has done all she could to render my life miserable; that Heaven seems to have sent her into the world solely to drive me out of it; that the strength of Samson, the genius of Homer, the prudence of Augustus, the skill of Pyrrhus, the patience of Job, the philosophy of Socrates, the subtlety of Hannibal, would not suffice to subdue the perversity of her character…weighing seriously all these considerations…I bequeath, to my said wife Elizabeth, the sum of one shilling.[3]

Continuing on the subject of husbands and wives, and family relationships in general, it has been reported that one Irishman left a will containing the following bequest: "To my wife, I leave her lover, and the knowledge that I was not the fool she thought me; to my son I leave the pleasure of earning a living. For 20 years he thought the pleasure was mine; he was mistaken."

In one of my favorite will provisions, a cigar aficionado named Robert Brett, who reportedly was not allowed to smoke in his house (I can sympathize with him), left his entire estate to his wife, but on the condition that she smoke five cigars a day for the rest of her life.

Some testators seek to exert their influence on their children from the grave. One Englishwoman bequeathed £50,000 to each of her three children on the condition that they not spend it on "slow horses and fast women and only a very small amount on booze." Two of the children were females.

In one of the few reported cases cited in this article, the court considered the will of a Canadian testator, who made his grandchildren beneficiaries of his will, "provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality" (*Woodhill v. Thompson*, 18 O.R. [Ch. Div. 1889]). Apparently, the judge determined that the provision was a valid condition subsequent, meaning that each grand-

child would get a share of the estate unless and until it were determined that they were lazy, drunkards, etc.[4]

Multimillionaire contractor John B. Kelly, father of Princess Grace (Kelly) of Monaco, left nothing in his will to his son-in-law, Prince Rainier of Monaco, explaining that "I don't want to give the impression that I am against sons-in-law. If they are [the] right type, they will provide for themselves and their families, and what I am able to give my daughters will help pay the dress shop bills, which, if they continue as they started out, under the able tutelage of their mother, will be quite considerable."[5]

Benjamin Franklin bequeathed to his daughter a picture frame studded with over 400 diamonds. Reportedly, he was concerned that she might seek to remove the diamonds, so he requested in his will that she not engage "in the expensive, vain and useless pastime of wearing jewels."[6]

Books could be written of other notorious bequests.

Harry Houdini requested that his wife hold an annual séance so he could reveal himself to her. She did so for 10 years, on Halloween. He never appeared.[7]

Canadian lawyer and investor Charles Vance Miller created the infamous "Great Stork Derby" when he bequeathed his residuary estate to the woman who gave birth to the highest number of children in the decade following his death. Ten years after his death in 1926, four Toronto women—each of whom gave birth to nine children—shared approximately $750,000.[8] (That's just under $21,000 per child.)

Napolean Bonaparte directed that his head be shaved and the hair divided among his friends. Ironically, it was a hair analysis that indicated that Napolean's death may have been caused by arsenic poisoning.[9]

Star Trek creator Gene Roddenberry arranged for his ashes to be flown into space on a Spanish satellite scheduled to orbit the Earth for approximately six years. Also on board were the ashes of LSD researcher Timothy Leary.[10] "Turn on, tune in, drop out" indeed.

Academy Award winning choreographer Bob Fosse died in 1987, leaving $378.79 to each of 66 people (including Liza Minnelli, Janet Leigh, Elia Kazan, Dustin Hoffman, Melanie Griffith, Neil Simon, Ben Gazzara, Jessica Lange and Roy Scheider), to "go out and have dinner on me."[11] They really didn't need the money but I'm sure they enjoyed their dinners.

George Bernard Shaw, who died in 1950, bequeathed a considerable portion of his estate for the purpose of developing a new phonemic alphabet containing 48 letters (each letter representing one individual sound) to replace the standard 26-letter English alphabet.[12] Needless to say, it didn't work.

German poet Heinrich Heine died in 1856 leaving everything to his wife, "on the express condition that she remarry. I want at least one person to be truly bereaved by my death."[13]

While his name is likely unfamiliar to anyone reading this article, employees of the Walnut Street Theatre in Philadelphia likely know of John "Pop" Reed, a stagehand who worked at the theater for more than 50 years in the first half of the nineteenth century. Reed stipulated in his will that he wanted his head

> to be separated from my body immediately after my death; the latter to be buried in a grave; the former, duly macerated and prepared, to be brought to the theatre, where I have served all my life, and to be employed to represent the skull of Yorick—and to this end I bequeath my head to the properties.

His request was honored and the skull was used in performances and signed by many famous actors of the day. It was discovered during a 1920 renovation of the theater.[14]

It appears that Mr. Reed started a trend. Polish concert pianist André Tchaikowsky, a Jewish holocaust concentration camp survivor and theater enthusiast, died in 1982. In his 1979 will, he bequeathed his skull to the Royal Shakespeare Company for the express purpose of being used as Yorick. Actors were initially hesitant to use human remains as a prop, but one actor began using the skull in 2008, with a special license from the Human Tissue Authority, and it is still in service.[15]

Likewise, in 1955, Argentinean Juan Potomachi bequeathed two hundred thousand pesos to the Teatro Dramático in Buenos Aires, provided it use his skull as Yorick in any future productions of "Hamlet."[16]

My working title for this article was "Pushing the Bounds of Testamentary Freedom." In the end, however, I realized that for many people—not just married men—a Last Will and Testament may be the only opportunity they have to get the proverbial "last word." After all, as the old saying goes, "he who laughs last, laughs best." I'm sure each of us knows someone to whom we would like to bequeath the proverbial "good stout rope."

## Endnotes


1. 8 Temp. L.Q. 297 (1934).
2. http://www.duhaime.org/LegalResources/ElderLawWillsTrustsEstates/LawArticle-1326/Dr-William-Tiger-Dunlops-Will-The-Eccentric-Scottish-Canadian.aspx.
3. http://www.nytimes.com/2000/5/21/weekinreview/word-for-word-poison-pen-wills-they-couldn-t-resist-oh-one-last-thing.html?pagewantedall=8src=pm.
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5. Listverse.com/2008/08/23/10-unusual-last-wills-and-testaments/.
6. *Id.*
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# 2012 Legislation Update: Changes to Interest on Legacies Law, Exempt Property and Commissions Highlight Legislative Agenda

By Jennifer F. Hillman and Michael S. Kutzin

In the midst of the contentious primaries, Presidential elections and high-profile Congressional and statehouse races that have attracted attention this year, "behind the scenes" governmental work has generally been overlooked. On March 6, 2012, Lobby Day, representatives of our Section met with leaders in the New York State legislature to address issues of concern that, while they may not be as prominent as taxation or debt ceilings, have real, and sometimes unanticipated, effects on real people.

## Interest on Legacies

As Ian W. Maclean and Robert Harper wrote about in last year's legislative update,[1] our Section has proposed substantial changes to New York Estates, Powers & Trusts Law 11-1.5 (EPTL), and the amendment of this provision continues to be a priority. Currently, EPTL 11-1.5 provides for a fixed interest rate of 6% on legacies that become payable seven months after preliminary or permanent letters are issued.[2] A higher interest rate of 9% may also be awarded if the delay is unreasonable.[3]

As Maclean and Harper explained in their article, there are multiple issues with the existing statutory scheme. The statute has been subject to conflicting interpretations as to whether interest may be awarded on a legacy only if the legatee commences a court proceeding to compel payment[4] and whether an initial demand for payment is required before commencing a proceeding,[5] whether the payment of interest is mandatory or a discretionary award by the court[6] and even who pays the interest—the residuary estate or the fiduciary.[7]

The Section's latest proposal would eliminate references to a demand for payment of the legacy or a proceeding in order to obtain interest on a legacy and, in the absence of contrary provisions in the governing instrument, would provide for interest to accrue seven months after preliminary or permanent letters are issued. Where no letters are required, interest would accrue seven months from the decedent's death or the date that the legatee becomes entitled to receive a legacy. The accrual of interest on the legacy would be mandatory and would be payable from the residuary estate, although a court would be permitted to surcharge a fiduciary in abusive cases.

In addition, the Section's proposal calls for the interest payable to a legatee to be computed at a rate that is more in line with commercial interest charges for the use of money rather than the fixed rate that is currently prescribed. In particular, the proposal would call for the interest on legacies paid in any calendar year to be set on the first business day of the year at the federal funds rate less 1%, but no lower than 0.5%.

Finally, the Section's proposal also calls for any interest on legacies to be treated as accounting income so that the residuary estate will be able to deduct the interest paid for fiduciary income tax purposes.

## Exempt Property and the Small Estate

As trusts and estates practitioners are aware, EPTL 5-3.1 provides that a surviving spouse, or if there is none, minor children, are entitled to a setoff from the estate of certain "exempt" property. Exempt property includes, among other things, the family bible, an automobile, domestic and farm animals, a computer, household furnishings and cash. The purpose of this setoff is to provide support to a decedent's surviving family members during the settlement of the estate.[8]

In 2010, EPTL 5-3.1 was updated for the first time in eighteen years to provide a more reasonable family allowance in view of inflation and the needs of typical families in the 21st century.[9] The updates included adding additional categories of exempt property to EPTL 5-3.1(a).

Unfortunately, Surrogate's Court Procedure Act 1301(1) (SCPA), which defines "small estate" for purposes of determining which estates may be settled without court administration, was not amended to reflect the changes in EPTL 5-3.1(a). The statute defines a small estate as one worth $30,000 or less, exclusive of property required to be set off for surviving family members. In describing such property, SCPA 1301(1) refers to specific subsections of EPTL 5-3.1(a) in its

pre-amendment form and thus fails to pick up the new categories of exempt property that were added by the 2010 amendments.

The Section has presented a simple proposal to coordinate the foregoing statutory provisions, namely, to amend the SCPA 1301(1) definition of "small estate" to read "an estate worth $30,000 or less, exclusive of property required to be set off under EPTL 5-3.1(a)." This proposal has been introduced in both houses of the New York State Legislature.[10]

## Power to Adjust

Since its inception, the power to adjust trust income has become an important and increasingly utilized tool for trustees. As a result, the potential effect of adjustments on commissions calculations under EPTL 11-2.3(b)(5) has become an issue for trustees and practitioners alike.

Section 11-2.3(b)(5)(A) empowers a trustee to make adjustments between principal and income if the trustee considers such an adjustment to be advisable to enable the trustee to make "appropriate present and future distributions" that would be "fair and reasonable to all of the beneficiaries." A trustee is prohibited from making such adjustments, however, where the adjustment would benefit the trustee, either directly or indirectly.[11] If a trustee decides to exercise the power to adjust, as provided by the statute, this adjustment could incidentally result in an increase in trustee's commissions. Yet it is unclear whether such an adjustment violates EPTL 11-2.3(b)(5)(C)(viii) as a prohibited indirect benefit to the trustee within the meaning of the statute.

In 2008, technical amendments to EPTL 11-2.3(b)(5)(C)(vii) added the parenthetical language "which, however, shall not include the possible effect on a trustee's commission"[12] in an attempt to settle the issue. The amendment clarified that any increase in commissions was not the kind of indirect benefit that should prevent a trustee from exercising the power to adjust. However, the use of the term "possible" still left unanswered the question of whether an adjustment between principal and income actually affects commissions.[13]

This issue arises in several contexts. For example, the trustee of a wholly charitable trust who exercises the power to adjust and transfers an amount from principal to income would also increase the base on which commissions are calculated. In another example, there is a potential for conflict between an individual and a bank or trust company who are acting as co-trustees of a trust. An individual trustee who exercises the power to adjust principal to income may prefer to continue to characterize the transferred amount as principal for purposes of calculating annual commissions. However, some banks and trust companies do not include such transferred amounts in the calculation of annual commissions, creating a potential conflict if an individual and a bank or trust company act as co-trustees.

In proposing a solution, a subcommittee considered the problem in light of the basic purpose of the Prudent Investor Act; the definitional section of the Uniform Principal and Income Act, codified at EPTL 11-A-1.2; and the technical corrections made to the Prudent Investor Act in 2008. The power to adjust is a tool to assist practitioners and trustees in navigating the realities of total return investments with the interests of the current beneficiaries and the remaindermen.

This subcommittee concluded that any assets that are transferred pursuant to the Prudent Investor Act from the income account to the principal account, or vice versa, should be deemed a re-characterization of such asset for purposes of calculating commissions. To remain consistent with the total return investment regime inherent in the Prudent Investor Act and the Uniform Prudent Investor Act, the relevant commission base should be analyzed after the adjustments are made, and not before.

Accordingly, the Section has proposed an amendment to EPTL 11-2.3(b)(5) which clarifies that a trustee's power to adjust between income and principal of a trust, whether such adjustment is made from income to principal or from principal to income, constitutes a re-characterization of the transferred asset for purposes of calculating commissions by adding a new subsection 11-2.3(b)(5)(G) reading as follows:

> Any exercise of the power to adjust under this subparagraph, whether from income to principal or from principal to income, shall constitute a re-characterization of the transferred amount from income to principal or from principal to income, as the case may be, for purposes of calculating commissions under Article 23 of the Surrogate's Court Procedure Act.

This result is consistent with the Principal and Income Act, the Prudent Investor Act and the 2008 technical corrections to the Prudent Investor Act.

## Conclusion

The Trusts and Estates Law Section is an active participant in efforts to effectuate trusts-and-estates-related legislative reforms. The three proposals discussed above are some of the legislative reforms supported by this Section. You can lend your support by contacting your New York State senator or assemblyman.

## Endnotes

1. Ian W. Maclean and Robert M. Harper, "2011 Legislation Update," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 44, No. 2 (Summer 2011) at 14.
2. EPTL 11-1.5(c) and (d).
3. EPTL 11-1.5(e).
4. *See, e.g.*, *In re Schwartz*, 161 Misc. 2d 471, 614 N.Y.S.2d 668 (Sur. Ct., N.Y. Co. 1994) (finding interest payable despite language of EPTL 11-1.5(d) even where legatee did not commence proceeding).
5. *See In re Erlich*, N.Y.L.J., July 6, 2001, p. 21, col. 1 (Sur. Ct., Kings Co.) (stating that a demand is required); *cf. In re Kasenetz*, 196 Misc. 2d 318, 765 N.Y.S.2d 216 (Sur. Ct., Nassau Co. 2003) (indicating demand not required).
6. *See In re Lancaster*, N.Y.L.J., Dec. 27, 1996 (Sur. Ct., Suffolk Co.) (holding demand to be mandatory); *cf. In re Park-Montgomery*, N.Y.L.J., May 19, 1997, p. 33, col. 4 (Sur. Ct., Nassau Co.) (finding demand discretionary).
7. *See In re Goodman*, N.Y.L.J., May 19, 2000, p. 31, col. 6 (Sur. Ct., N.Y. Co.) (interest payable from residuary); *cf. In re Bozzi*, N.Y.L.J. Mar. 31, 1999, p. 36, col. 5 (Sur. Ct., Nassau Co.) (interest payable by fiduciary).
8. EPTL 5-3.1(c).
9. 2010 N.Y. Laws 437.
10. A.8554 and S.6641.
11. EPTL 11-2.3(b)(5)(C)(vii).
12. *Id*.
13. *See generally*, Richard Nenno, *The Power to Adjust and Total-Return Unitrust Statutes: State Developments and Tax Considerations*, 42 Real Prop. Prob. & Tr. J. 657 (2008).

**Jennifer F. Hillman is an attorney at Ruskin Moscou Faltischek, P.C., in Uniondale, New York, where her practice concentrates in estate and trust litigation. She is a Vice-Chair of the Legislation and Governmental Relations Committee of the Trusts and Estates Law Section.**

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# The Liability Reporter

By Michael Ryan

This installment of the Liability Reporter focuses on two recent decisions, the first of which discusses procedural issues incidental to third-party practice while the second discusses the continuous representation toll of the statute of limitations.

In *Gallagher v. Keybank Nat'l. Ass'n.*, 2011 U.S. Dist. Lexis 107361 (NDNY, 2011), the trustee/bank was intent on beating the rap; investment imprudence was the charge and the federal district court was the forum. In the space of one year, a charitable remainder annuity trust had lost much of its value, and the settlor/beneficiary was pointing her finger at the bank. "I gave you," she complained, "almost $300,000 of stock, almost all of it in a single company, you didn't diversify and the company lost much of its value!"

The bank saw a procedural opportunity in the complaint and took it. If the plaintiff could frame a complaint alleging negligence (along with the standard claims of breach of contract, fiduciary duty, etc.), then the bank could commence a third-party proceeding against the attorneys who drafted the trust, alleging that an unidentified defect in the trust that required amendment somehow impeded the bank's ability to diversify. At this juncture, an estates practitioner may be curious—what was the defect? Was it a retention clause? We will never know because the district court does not tell us. Instead, the opinion focuses on motion practice to dismiss the third-party action, and that discussion is useful in itself.

The bank's third-party complaint advanced three theories against the estate planners: negligence, indemnification and contribution. The district court made short work of the negligence and indemnification theories, finding that the attorneys owed no duty of care to the bank and undertook no explicit or implicit duty of indemnification. But what about the claim over contribution? If the complaint alleged negligence, couldn't the defendant bank seek contribution from another tortfeasor? No, ruled the court. In New York, contribution is available only if the underlying action sounds in tort and is not available for purely economic loss resulting from a breach of contract. Citing *Scalp and Blade, Inc. v. Advest*, 300 AD2d 1068, 755 NYS2d 140 (3d Dep't 2002), the court noted that in that case a trust investment advisor who was sued for professional malpractice, breach of contract, breach of fiduciary duty and fraudulent misrepresentation was ineligible for contribution from a third party. The mere presence of the word "negligence" in a complaint was insufficient to allow the defendant to seek contribution from a third party because "merely employing language familiar to tort law does not transform a single breach of contract into a tort claim."

Whether this is an accurate assessment of New York law may still be a topic worthy of discussion. After all, even when purely economic losses have been alleged, the Court of Appeals has recognized the existence of tort duties in situations where the relationship between the parties was "so close as to approach that of privity" (*Ultramaris Corp. v. Touche*, 255 N.Y. 170, 182-183, 174 N.E. 441 [1931]; *Landon v. Knoll Lab. Specialists, Inc.*, 91 AD3d 79, 934 NYS2d 183 [2d Dep't 2011]).

Our next case of interest arises from the Supreme Court in New York County. *Allmen v. Fox Rothschild LLP*, 34 Misc. 3d 1224A (Sup. Ct., New York County 2011) involved the *bête noire* of trusts and estates malpractice concerns, the doctrine of continuous representation and its effect of keeping alive an otherwise stale claim. In this case, the plaintiff executed a will on July 27, 2005. The alleged malpractice included, among other things, an alleged increased exposure to estate taxes. The plaintiff died on June 15, 2006. The same law firm that prepared the estate planning documents was retained by the executor in connection with the administration of the estate. Suit was commenced more than three years after the will's execution. (New York does not (yet) follow a discovery rule for such malpractice claims (*Ackerman v. Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318 [1994]).) Therefore, the three-year statute of limitations (CPLR 214) had run unless the plaintiff could prove a toll existed. The tolling asserted by the plaintiff was continuous representation. Plaintiff asserted that the firm's subsequent engagement as attorneys for the executor tolled the statute. The court rejected this argument, ruling that the doctrine of continuous representation tolls the statute of limitations only when the continuing representation pertains specifically to the matter with respect to which the attorney is now being challenged. Here, because the defendant provided no other related services for the decedent after the will's execution, and more than three years had passed, the court dismissed this portion of the suit.

Interestingly, in the motion to dismiss pursuant to CPLR 3211(a)(5), the court assumed that the decedent enjoyed a continuous representation with his attorneys from the date the will was executed until he died approximately one year later, even though the decision did not list any work done for the decedent after the instrument was executed. Presumably, the assumption was caused by the favorable inferences to be drawn from such a dismissal motion. The court did go on to state the importance of the retainer agreement in such an analysis, quoting the Court of Appeals in *Williamson excel. Lipper Convertibles, L.P. v. Price Waterhouse Coopers LLP*, 9 NY3d 1, 840 NYS2d 730 (2007): "[T]he nature and scope of the parties' retainer agreement (engagement) play a key role in determining whether continuing representation was contemplated." It is not known what the retainer letter stated in *Allmen*, but it is a reminder of the care that must be taken in making sure that the attorney-client relationship terminates with the execution of the will, unless the parties expressly intend another result. With this last point in mind, the reader is referred to an excellent discussion of the topic in an article in the January 30, 2012, issue of the *New York Law Journal* by John C. Novogrod and Annie Mehlman. The article, entitled "An Estate Planner's Guide to Client Representation; Proper Termination Is Critical," contains the following words of wisdom:

> The pivotal issue for most courts is whether the client has a reasonable subjective belief that the attorney continues to represent her. [citation omitted] In fact, in New York, "[t]he client's belief must be reasonable, but if the lawyer has never formally terminated the attorney-client relationship (preferably in writing), then the client's belief stands a much better chance of being reasonable." [citation omitted] This point of view is relevant to the estate planner whose advice to clients on highly personal matters often creates a reasonable subjective belief in the client's mind of an enduring professional relationship.

**Michael P. Ryan is a partner in the Brooklyn office of Cullen and Dykman.**

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# TELS Inaugurates Summer Fellowship Program

By Betsy Hartnett

The Trusts and Estates Law Section has established a summer Fellowship Program to provide law students with an opportunity to experience trusts and estates law practice. Through the fellowship, students will be provided a meaningful and appropriate supervised work experience in the chambers of selected Surrogates in New York State. The ultimate goal of the program is to create a network and forge relationships among trusts and estates attorneys throughout the State of New York.

The summer of 2011 was the inaugural year of the Fellowship Program. The Section contributed $10,000 to The New York Bar Foundation to establish two fellowships for second-year law students currently enrolled in law schools in New York State. Claire H. Fortin of Amherst, a student at University at Buffalo Law School, and Lauren L. Morales of Melville, a student at Touro College Jacob D. Fuchsberg Law Center, were the recipients of the inaugural fellowships. For the ten-week period of June 6 to August 13, 2011, Ms. Fortin worked in the chambers of Erie County Surrogate Judge Barbara Howe in Buffalo and Ms. Morales worked in the chambers of Suffolk County Surrogate Judge John M. Czygier, Jr. in Riverhead.

Ms. Fortin, a *magna cum laude* graduate of the State University of New York at Albany, expects to graduate from the University at Buffalo Law School in May 2013. She is the executive editor of the *Buffalo Public Interest Law Journal*, a member of the Buffalo Public Interest Law and Alternative Dispute Resolution Programs and a participant in the Advocacy in Mediation Competition.

The valuable experience of working for Judge Howe was expressed by Ms. Fortin in this excerpt from her "Summary of Experience"

> I had an amazing experience working on the Erie County Surrogate's Court legal staff. I worked daily with some of the most knowledgeable Trust and Estates attorneys in the Buffalo area. I was given my own office and treated as a professional; each day, I was assigned multiple files containing petitions for probate and administration. During my short time in Surrogate's Court, I processed over one hundred petitions that resulted in a decree, and reviewed a multitude of files which needed additional amendments or documentation.
>
> I was also given the opportunity to do research and preliminary drafting on Judge Howe's decision granting a recent motion for summary judgment. In between reviewing petitions, I researched intricate issues that arose in pending proceedings, such as the ability of an Article 81 guardian to change the domicile of his or her ward. I was able to become much more familiar with the intricacies of the Surrogate's Court Procedure Act and thoroughly enjoyed researching complex issues and solving them quickly and efficiently.
>
> Most importantly, I had the opportunity to work with Judge Howe and observe her while on the bench. Not all events in Surrogate's Court are adversarial; I was invited to observe amicable proceedings such as adoptions and kinship hearings. After working closely with Judge Howe during my fellowship I look forward to the opportunity to stand before her in court as a practicing attorney. As a permanent resident of East Amherst, I plan to become part of the Buffalo legal community.
>
> Further, Judge Howe made sure that I was always kept updated with the improvements and changes in trusts and estates law. Judge Howe sent me daily emails and legal newspapers such as The New York Law Journal, The Daily Record, and the Buffalo Law Journal. I was also invited as her guest to the Trusts and Estates Law Annual Luncheon.

The second recipient, Lauren Morales, also came with superb credentials. Ms. Morales, a Boston College alumna, graduated from Touro Law in May 2012. She was an associate editor of *Touro Law Review* and student co-director of the Legal Education Access Program. She previously was a judicial extern for U.S. District Judge Leonard Wexler of the Eastern District of New York, Central Islip.

The experience of Ms. Morales in the Suffolk County Surrogate's Court was equally rewarding. Ms. Morales recounted her work there as follows:

> During the first two weeks of the internship I completed a rotation throughout each department in the Surrogate's Court includ-

ing Probate, Administration, Guardianship, Accounting, and the Public Administrator's office. In each department I learned about the application process, how the applications are filed, and how to spot issues with regard to the applications. It was interesting to see how each department played a vital role in administering a decedent's estate.

Throughout the summer I also observed conferences with each of the attorneys in the Law Department. Through this observation I was able to see the variety of styles used to facilitate constructive conversations between adversaries, with the ultimate goal being to achieve a settlement agreement. I have enrolled in a course entitled Interviewing, Negotiating, and Counseling this Spring semester and I hope to develop my own counseling style, incorporating many of the techniques I observed. I was surprised to hear that most cases in the Surrogate's Court are settled prior to trial because throughout the summer I was able to observe three bench trials. I also observed several guardianship hearings, as well as a kinship hearing. It was great to see what I learned in the classroom unfold in the courtroom on a daily basis. Lastly, I had the opportunity to research and draft several memoranda of law including one regarding the jurisdiction of Surrogate's Court over Shinnecock and Poospatuck Indian estates and another regarding the extension of the seminal New York disqualification case, *Riggs v. Palmer*.

The New York Bar Foundation processes applications for the Fellowship Program on behalf of the Section. Each of the New York law schools is provided the guidelines, application and a list of required documents to accompany the application for the January 31 deadline. Students must complete an application form and submit a letter of interest, transcripts, résumé, two letters of recommendation and a writing sample. A committee consisting of a representative of the Bar Foundation and several Trusts and Estates Law Section officers awards the fellowships. For the 2012 awards the committee consisted of Sanford J. Schlesinger for the Bar Foundation and Betsy Hartnett, Marion Fish and Ron Weiss for the Trusts and Estates Law Section. Sanford J. Schlesinger, a former Chair of the Trusts and Estates Law Section, said, "I have been honored to serve on this Committee for two years. I applaud the Section for its efforts to increase interest in the practice of trust and estates law and to strengthen the caliber of our practicing attorneys."

The 2012 summer fellowships were in the chambers of the Honorable Ava S. Raphael, Surrogate, Onondaga County Surrogate's Court, Syracuse, New York, and in the chambers of the Honorable Peter J. Kelly, Queens County Surrogate's Court, Jamaica, New York. Each fellow will be a guest member of the NYSBA Trusts and Estates Law Section for one year starting with the award of the fellowship. Additionally, the fellows will be invited to attend Executive Committee meetings of the Section during the fall of 2012.

The recipients of the New York Bar Association Trusts and Estates Law Section 2012 Fellowships were: Jay Yitzhak Oppenheim, a student at St. John's University School of Law, and Nicholas Everett, a student at Syracuse University College of Law.

Mr. Oppenheim interned for Surrogate Kelly in Queens County. He is a graduate of the Rabbinical Seminary of America and earned a Bachelor of Arts from Fairleigh Dickinson University. Mr. Oppenheim chose trusts and estates as his first elective course at St. John's School of Law. His application stated that the field of trusts and estates law was of interest to him because of the uniquely positive and satisfying experiences that come from assisting people with deeply personal, important and momentous issues.

Nicholas Everett, a Dean's list student at Syracuse Law School, expects to graduate in May 2013. Mr. Everett's interest in trusts and estate law began during his first year property class. He has taken every class offered at Syracuse Law School in the area of trusts and estates. In expressing his appreciation, Mr. Everett said, "Although I feel I have learned a tremendous amount about the law of trusts and estates, I know that I have just scratched the surface. I believe that this fellowship will offer a fantastic opportunity to strengthen my skills and prepare me for a future career in the field."

The success of the fellowship in providing valuable experiences for the interns is reflected in the concluding remarks of fellow Lauren Morales:

> [C]ontrary to the belief of many of my law school colleagues, trusts and estates law is one of the most interesting practice areas that I have encountered during my three years of classes and legal internships. I plan to continue pursuing trusts and estates as a portion of my practice once I become a member of the New York State Bar.

Given the success of the Fellowship Program, the Fellowship Selection Committee has requested that the Section's Executive Committee consider an increase in the number of fellowships awarded each year.

**Betsy Hartnett is a partner at Mackenzie Hughes LLP in Syracuse and former Chair of the Trusts and Estates Law Section.**

**Subpoena Power in Accounting Proceedings**

Subject: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Friday, March 9, 2012 5:19 p.m.
To: Trusts and Estates Law Section

Dear Listmates:

I am currently representing a beneficiary of an estate which has filed an accounting and we are at the 2211 examination stage, pre-objections. Executor is not being cooperative with respect to production of documents. In addition to making a motion to compel production, does the beneficiary have standing at this point in the proceeding (pre-objection) to also serve subpoena duces tecum on third parties in relation to the accounting for production of documents being withheld or claimed not to be in Executor's possession?

I believe the answer is yes, since jurisdiction is complete and the matter is still pending, even though "issue" as the term is used in adversarial proceedings, has not been "joined." Would appreciate opinions from my more "procedurally savvy" colleagues.

Eileen D. Stier, Esq.
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Subject: Re: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Friday, March 9, 2012 5:24 p.m.
To: Trusts and Estates Law Section

Eileen,

Pardon me for saying this, but you only need to read the statute:

> 2211. Voluntary account; proceedings thereupon
>
> 1. On the return of process issued as prescribed in the preceding section the court must take the account, hear the proofs of the parties respecting it and make such order or decree as justice shall require.
>
> 2. The fiduciary may be examined under oath by any party to the proceeding either before or after filing objections, if any, to the account, as to any matter relating to his or her administration of the estate. The party conducting such examination shall be entitled to all rights granted under article thirty-one of the civil practice law and rules with respect to document discovery, regardless of whether such examination takes place before or after such party files objections.

By statute, as the examining party, you have full Article 31 disclosure available to you. That includes CPLR 3120:

Rule 3120. Discovery and production of documents and things for inspection, testing, copying or photographing.

1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:

(i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served;…

2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph,…and…shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.

3. The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof.…

Go ahead and serve your subpoenas.

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Subject: Re: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Friday, March 9, 2012 5:59 p.m.
To: Trusts and Estates Law Section

Issue has not really been joined until objections are filed. You can only get pre-objection discovery (which I presume includes a subpoena) in very limited circumstances governed by the CPLR before objections are filed—you would have to check the CPLR to see the circumstances in which pre-litigation discovery is allowed (I am not at home so I can't refer you to the exact section). Other than that, you cannot serve a third party subpoena until objections are filed.

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Subject: Re: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Saturday, March 10, 2012 10:43 a.m.
To: Trusts and Estates Law Section

Sorry John, I still disagree that the scope of discovery afforded by the amendment to SCPA 2211 was intended to allow service of subpoenas on non-fiduciaries. I have not gotten the bill jacket of the amendment, but I do recall the discussions that led up to the amendment and the purpose of the amendment. An excerpt from Warrens Heaton below comports with my recollection that the provision was enacted to make the deposition of the fiduciary more meaningful by having the estate records in the possession of the fiduciary available prior to the deposition of the fiduciary. I would be wary of serving a subpoena to a non-party (except perhaps in Suffolk, where Judge Czygier appears to have interpreted the amendment expansively).

> New York Civil Practice: SCPA
>
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>
> ARTICLE 22 ACCOUNTING
> § 2211. Voluntary account; proceedings thereupon
>
> 5-22 New York Civil Practice: SCPA P 2211.08
> P 2211.08 Examination of the fiduciary.
>
> [a] Nature and purpose.
>
> SCPA 2211(2) subjects a fiduciary to inquisition "by any party to the proceeding either before or after filing objections, if any, to the account, as to any matter relating to his administration of the estate." A fiduciary owes a duty of absolute loyalty to the persons beneficially interested in the estate or fund and his conduct of its administration is subject to the close scrutiny of the court. The purpose of an examination is to enable the examining party to determine whether grounds exist for objection to the account. The arithmetical consequences of the acts and doings of the fiduciary are reflected by his account, but in many instances the reasons for the acts, or the failure to act, are matters peculiarly within his personal knowledge. The parties are fully entitled to inquire into, and the fiduciary is entirely responsible for a complete disclosure of, his conduct of the estate affairs.
>
> If, after trial, it appears that the absence of factual basis for a dismissed objection could have been ascertained by conduct of an examination, the court may penalize the objectant by imposition of costs for unnecessarily wasting its time in a futile trial at the expense of the estate. Accordingly, parties are encouraged to avail themselves of the absolute right to examine, granted by the statute, before subjecting the estate to the expense of trial.…
>
> [c] Distinction between examination under SCPA 2211 and disclosure under CPLR.
>
> There are areas of examination that cannot be reached under SCPA 2211. SCPA 2211(2) provides only for an examination of the fiduciary under oath. Thus, if disclosure is sought from someone other than the fiduciary, resort will have to be made to CPLR Article 31. In addition, even if disclosure is sought from the fiduciary, SCPA 2211(2) provides only for oral examination under oath. The use of other disclosure devices such as interrogatories or discovery and production of documents are governed by CPLR practice, which, in the past, could only be obtained after objections were filed.

In 2007, however, SCPA 2211(2) was amended to provide that a party conducting an SCPA 2211 examination is entitled to document discovery pursuant to Article 31 of the CPLR, whether such examination takes place before or after objections are filed. An SCPA 2211 examination of a fiduciary is not as meaningful when documents are not discoverable prior to the examination. According to the legislative history to this amendment, allowing document production before the filing of objections saves litigants the time and expense of conducting multiple examinations of the same fiduciary. Not allowing document production prior to the examination had previously led to inefficiency as well as speculation as to whether the potential objectant could depose the fiduciary a second time (after filing objections) about questions raised in discovered documents.

In *In re Beryl*, where the executors were accused, in part, of conflict of interest, discovery of certain documents was made under CPLR 3120. Discovery was sought of documents claimed to be needed to prove that the executors were motivated by either self-interest or the interest of an unrelated third party to act in a manner adverse to the interest of the estate. In allowing discovery of certain documents the court noted that the disclosure provisions of the CPLR are to be liberally interpreted and applied. In this case, the respondents "sufficiently particularized identifiable categories of documents which reasonably would apprize the petitioners of what they were expected to produce."

Once a fiduciary is examined under SCPA 2211, the courts will be reluctant to allow a second examination of the fiduciary under Article 31 of the CPLR. For example, in *In re Hambleton*, a guardian ad litem sought to examine the executor of the estate under CPLR Article 31. The Surrogate's Court determined and the Appellate Division affirmed that the matters sought to be examined had been thoroughly and comprehensively explored in an earlier SCPA 2211 examination. Since there were no new matters or special circumstances shown to justify a further examination of the executor, the Surrogate properly granted the executor's motion for a protective order. However, since the estate's accountant was not permitted to be questioned at the 2211 examination, the guardian ad litem should have been permitted to examine the accountant pursuant to CPLR Article 31. Thus, the Appellate Division modified the Surrogate's order to permit the deposition of the accountant. The guardian ad litem also sought discovery with respect to the decedent's withdrawal of a note from a marital trust that had been created by the will of the decedent's late husband. The note was payable to the husband's estate and was executed by the decedent's son, who was also a co-executor of the estate and a co-trustee of the trust. Since the trust had already been judicially settled and the distribution of the note from the trust was encompassed in the decree of the judicial settlement, the propriety of the distribution was res judicata and the Surrogate properly barred discovery with respect to that issue.

The right to disclosure under the CPLR 3101, et seq. is subject to review by the court. Upon an application for a protective order, the court may consider whether the examination sought is repetitive, or harassing in nature, or improper as to the subject matter, and may disallow it.

[d] Procedure for obtaining examination.

[1] Time.

SCPA 2211(2) expressly provides that an examination of the fiduciary may be had before or after filing objections to the account. The examination may not be had, however, before jurisdiction has been obtained over all necessary parties to the proceeding. Once the proceeding is terminated by entry of a decree judicially settling the account, the right to examine is lost. Nor is there a right to examine incidental to an application to vacate such decree. But where the decree is vacated, the parties are restored to their original position in respect to the conduct of the fiduciary as reflected in his account and are entitled to examine him in accordance with SCPA 2211.…

Under the CPLR, disclosure may be obtained of all evidence material and

necessary in the prosecution or defense of an action or proceeding, regardless of the burden of proof, but in most instances issue must be joined before disclosure may be sought.…

[e] Persons entitled to examine.

SCPA 2211(2) provides that "the fiduciary may be examined under oath by any party to the proceeding...." The word "party" is not defined in the SCPA. However, each person named in a petition as a person upon whom process must be served or concerning whom the court must have information is thereby made a party to the proceeding upon service. Since the word "respondent" includes every "party" to a proceeding except a petitioner, and since the accounting fiduciary is the petitioner, each person cited in SCPA 2210 as a necessary party is presumptively entitled to examine.

[1] Persons beneficially interested in the estate.

A person entitled to share in the estate or fund as a distributee or testamentary beneficiary is clearly entitled to examine the fiduciary.…

[f] Persons who may be examined.

Under SCPA 2211(2), the examination applies only to fiduciaries whereas an examination can be had of other interested parties (including distributees, beneficiaries, and creditors) under CPLR 3101, et seq.

Where the fiduciary professed ignorance of a number of important matters relating to his administration of the estate and advised the examiner that his accountant and lawyer could answer the questions, the accountant and the lawyer were required to submit to examination on the ground that denial of such right would frustrate the purpose of this section.[36] Examination of the lawyer and the accountant was also available pursuant to CPLR 3101(a)(4) on the ground of special circumstances.

The "special circumstances" requirement of CPLR 3101(a)(4) no longer applies. Pursuant to the current provisions of CPLR 3101(a)(4) disclosure may be sought, without court order, from a person who is not a party to the proceeding who has material and necessary information relevant to the action or proceeding. The notice must state the circumstances or reasons such disclosure is sought or required. Upon objection by another party to the proceeding or by the person from whom disclosure is sought, the court will order disclosure as long as there is a showing that disclosure from the non-party is material and necessary.…

[footnotes omitted]

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Subject: Re: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Saturday, March 10, 2012 3:18 p.m.
To: Trusts and Estates Law Section

Lori

I think John's reading of the statute is correct. Even Warren's seems to indicate that after the 2007 amendment, it was the intention of the legislature to give possible objectants broadest document discovery possible under CPLR:

> In 2007, however, SCPA 2211(2) was amended to provide that a party conducting an SCPA 2211 examination is entitled to document discovery pursuant to Article 31 of the CPLR, whether such examination takes place before or after objections are filed. An SCPA 2211 examination of a fiduciary is not as meaningful when documents are not discoverable prior to the examination According to the legislative history to this amendment, allowing document production before the filing of objections saves litigants the time and expense of conducting multiple examinations of the same fiduciary. Not allowing document production prior to the examination had previously led to inefficiency as well as speculation as to whether the potential objectant could depose the fiduciary a second time (after filing objections) about questions raised in discovered documents…
>
> The "special circumstances" requirement of CPLR 3101(a)(4) no longer ap-

plies. Pursuant to the current provisions of CPLR 3101(a)(4) disclosure may be sought, without court order, from a person who is not a party to the proceeding who has material and necessary information relevant to the action or proceeding.

It appears to me that anyone that has appeared as an interested party and has standing to object to the accounting can serve Subpoena Duces Tecum on a third party for production of documents relevant to the accounting. In my case the executor claims they are either not in possession of the documents or that they can be obtained by the interested party by other means. The only "other means" would be by subpoena since the documents are in the hands of third-parties. I don't view this as pre-litigation discovery because the accounting has already been filed and therefore an action has been commenced. The only thing that troubled me was that objections had not been filed, so "issue" wasn't joined. Based upon what Warren says and the statute as highlighted by John, I think the interested party can serve document subpoena on a third party pre-objection, as long as the request is tailored to issues raised in the accounting.

If the Executor disagrees, which I am sure will happen, their recourse will be to file for a protective order, which in view of the refusal to provide any documentation, including the filed 706 or appraisals supporting valuations, will, I hope, not be granted by the Surrogate.

I sincerely appreciate both your inputs on this "procedural" quandary.

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Subject: Re: Subpoena Power in Accounting Proceeding Pre-Objection
Date: Saturday, March 10, 2012 11:11 p.m.
To: Trusts and Estates Law Section

I yield! I did look up the bill jacket and discovery is supposed to be as expansive in an accounting proceeding as it is in a probate proceeding. As John pointed out to me, subpoena power is available on a 1404, so it should also be available in an accounting proceeding pre-objections. And on reflection, it does make sense if you want to only take one deposition of the fiduciary.

Always glad to have these discussions and learn something new. Thanks!

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## Estate Tax on Madoff Fund Account

Subject: NY Estate Tax Refund Attributable to a Madoff Account
Date: Wednesday, March 28, 2012 3:19 p.m.
To: Trusts and Estates Law Section

Decedent died in early 2006, a little less than two years before the Madoff Ponzi scheme was uncovered. Decedent owned a Madoff account, which was reported on her ET-706, and NY estate tax was paid.

In 2009, we filed an amended return to zero out the value of the Madoff account, and we received a refund of estate tax from NYS.

The State Tax Department has now assessed the tax as owing, claiming that when the decedent died, the Madoff scheme was unknown, and therefore the account had its reported value at the date of death.

We have protested this with the Tax Department, but they are standing by their assessment position.

We now have the choice of appealing to the Tax Department Bureau of Conciliation and Mediation Services or filing a protest petition in Surrogate's Court. We are inclined to file in Surrogate's Court because we think we may get a fairer hearing there.

Does anyone else have a similar case? Has anyone filed a petition to have the Surrogate's Court determine an estate tax question before? I would appreciate any thoughts or advice, particularly from someone who has done this or something similar before.…

Thanks,

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Subject: Re: NY Estate Tax Refund Attributable to a Madoff Account
Date: Wednesday, March 28, 2012 3:56 p.m.
To: Trusts and Estates Law Section

Lee—

An appeal has been argued and is sub judice in the New York State Court of Appeals in a case involving a partner at Paul Weiss who is seeking to overturn a matrimonial settlement in which he received a Madoff account and his ex-wife received "real" assets. The husband's claim is that the settlement was the result of a mutual mistake about the existence of the Madoff

account. The name of the case is *Simkin v. Blank* and the citation in the Appellate Division is 80 A.D.3d 401, 915 N.Y.S.2d 47 (1st Dept., 2011).

The Appellate Division ruled that the husband stated a claim and its decision contains a recounting of the husband's allegations that you might find useful. When the Court of Appeals renders it decision, it might provide some grist for your litigation mill. I am following the case for my matrimonial practice.

I agree you should litigate in the Surrogate's Court. You are more likely to obtain an equitable result there vs. pursuing your administrative appeal, which might be res judicata/collateral estoppel if you lose and subsequently wish to attack the ruling in court.

Good luck!

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Subject: Re: NY Estate Tax Refund Attributable to a Madoff Account
Date: Wednesday, March 28, 2012 4:23 p.m.
To: Trusts and Estates Law Section

I believe that in the case of the estate tax, the Surrogate's Court has primary original jurisdiction, not the administrative procedures and tribunals that usually apply to disputes with the DTF. Tax Law 998.

This is the vestige of the time when the estate tax actually was fixed and assessed in the Surrogate's Court by way of a "Tax Proceeding." When the determination of the tax became an administrative function, around 1990, the Surrogates insisted that they maintain a role, at least as the primary recourse for estates which disagreed with the DTF.

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Subject: Re: NY Estate Tax Refund Attributable to a Madoff Account
Date: Tuesday, April 3, 2012 7:22 p.m.
To: Trusts and Estates Law Section

For those who might be interested, the *Simkin* case was decided today by the New York Court of Appeals. The husband lost.

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## Hidden Treasure

Subject: Recovering estate assets
Date: Wednesday, April 4, 2012 10:23 a.m.
To: Trusts and Estates Law Section

Dear Listmates,

My client is the administrator of an estate of a person who was in a coma for 10 years before he died. The administrator never spoke with the deceased. The deceased died in 2010. He had a coop apartment which was sold by his court appointed guardian in 2007. One of the deceased's distributees recently mentioned that the decedent had constructed a false wall in the apartment and used to hide valuables behind it. The administrator found appraisals for jewelry that the decedent and his predeceased wife owned but this jewelry was not among the items found in the decedent's apartment. The administrator suspects that the jewelry may be behind the false wall in the apartment. According to the distributee, access to the hidden place is easy and would not involve any damage to the apartment.

My question: can the administrator get an order from the Surrogate which will require the current owner of the apartment to allow the administrator to look behind the false wall to see if there are any estate assets hidden there? The current owner is not the person to whom the guardian sold the apartment in 2007.

Thank you for your insights.

Robert J. Reid
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Subject: Re: Recovering estate assets
Date: Wednesday, April 4, 2012 2:11 p.m.
To: Trusts and Estates Law Section

Fascinating state of facts; sounds like a bar exam question. My addition to this is only to wonder whether or not the Administrator might be surcharged by not having spoken with the distributees and discovered the existence of the room at a time when his decedent was the owner of the property.

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Subject: Re: Recovering estate assets
Date: Wednesday, April 4, 2012 2:13 p.m.
To: Trusts and Estates Law Section

Is Geraldo Rivera on the listserve? He is an attorney.

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Subject: Re: Recovering estate assets
Date: Wednesday, April 4, 2012 4:18 p.m.
To: Trusts and Estates Law Section

As I see it, couldn't the jewelry at this point be deemed abandoned? The co-op was sold by the guardian of the deceased person in 2007. It is now 2012. He died in 2010. Deceased was an incapacitated person at the time the apartment was sold, but he had a legally appointed guardian. Isn't there a statute of limitations issue here?

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Subject: Re: Recovering estate assets
Date: Wednesday, April 4, 2012 4:46 p.m.
To: Trusts and Estates Law Section

Yes—CPLR 214.

And from a practical standpoint, how would you prevent the current owners of the apartment from tapping around, finding the wall and looking for the property? You would probably do better to have the beneficiary show up one day and say that they are related to the prior owner, blah, blah, blah, and if we look for a false wall together, we will share the contents with you. No legally enforceable right, but if I were the owner, I would do it!

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Subject: Re: Recovering estate assets
Date: Wednesday, April 4, 2012 4:51 p.m.
To: Trusts and Estates Law Section

Maybe the sales contract is rescindable based on a mutual mistake!

I can't wait to learn how this turns out.

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Subject: Re: Recovering estate assets
Date: Thursday, April 5, 2012 11:28 a.m.
To: Trusts and Estates Law Section

I disagree with the abandoned property argument. Since the Seller of the apartment (guardian) did not know about the jewelry and neither did the purchaser, I would think a court or judge would find that the jewelry was not part of the sale and could not have been abandoned by the true owner since he was in a coma. However, practically speaking, Lori is right, that if the current owners are put on notice of the potential false wall, they will probably look for it themselves. Your client's best alternative is either to obtain an OSC, without notice to the current owners, allowing your client to conduct a search (maybe with a sheriff or 3rd party), or to approach the owners and offer to split it (maybe 25/75?). How much is the jewelry worth? I would not mention a false wall to the current owners so that the owners don't know where to look (they might think floor boards or ceiling) since a false wall is so "out there."

I would also suggest that you put in a call to the Surrogate's Chief Clerk and perhaps the chief court attorney and run this scenario by him/her/them to get some guidance before doing anything.

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## Trust vs. Bequest of Annuity

Subject: Required Annuity Purchase via Will
Date: Thursday, April 5, 2012 11:46 a.m.
To: Trusts and Estates Law Section

Hi All:

Testator is reluctant to leave an outright share to adult son (irresponsible, etc.) and considering either in trust or requiring Executor to purchase an annuity at X% of the probate estate (a suggestion of another on this forum—thank you for that a bit back). Difficulty settling on a trustee, so annuity seems a better option, with the intent to provide an INCOME stream only for life of son, with no right for son to access any principal, with balance at death to testator's adult daughter. Have spoken with testator's financial advisor, who advises it can be done, etc., but prefer more expert insight(!) via this forum.

—Suggested language for the Will provision?

—Any other unique issues to be aware of/address?

Thanks in advance. . . .

Rob Brusca
Oyster Bay, NY
(516) 802-0255

Subject: Re: Required Annuity Purchase via Will
Date: Thursday, April 5, 2012 12:02 p.m.
To: Trusts and Estates Law Section

He can provide for an annuity with the desired stream of payments to the son, with nothing to be paid to anyone after the son's death. That would minimize the premium for the annuity, and maximize the amount of assets available for distribution to the other beneficiaries upon the client's death.

The advantages of the annuity are:

1. It's easier to administer than a trust.
2. It avoids the administration expenses of a trust.
3. It avoids the problem of wanting a corporate trustee for a trust that's too small for a corporate trustee to want to serve.
4. He doesn't have to tie up more money than needed to protect against the possibility that the son lives longer than expected.

On the other hand, the advantages of the trust are:

1. It allows flexibility if the son needs more money in one year and less in another year.
2. It allows flexibility if there is a reason not to make distributions to the son in a given year.
3. There is an economic cost to an annuity.
4. Annuities are more expensive when interest rates are lower (which is presently the case).
5. It's possible (at an additional cost) to get an annuity in which the payments are indexed for inflation. However, except for that, an annuity is essentially a fixed income investment. A trustee can better diversify the investments.

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Subject: Re: Required Annuity Purchase via Will
Date: Thursday, April 5, 2012 12:53 p.m.
To: Trusts and Estates Law Section

…I did not think about the option of solely an income stream for life, with no death benefit upon son's death. For argument's sake, assume son's half share would be $500G. If testator elects, he can provide for an annuity with the same income stream to son over son's life at, say, $250G premium if the annuity has no death benefit upon son's death, versus a premium of, say, $500G which would be required if both wanted the same income stream and a death benefit payable to the other beneficiary of testator's estate (adult daughter) at son's death?

Sorry about that convoluted analysis. Thanks again, Bruce, as you are raising things to consider not previously considered (not surprised!)!

Rob Brusca
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Subject: Re: Required Annuity Purchase via Will
Date: Monday, April 9, 2012 10:23 a.m.
To: Trusts and Estates Law Section

Testator can choose straight annuity—income for lifetime of son only, no remainder; or period certain annuity (say 10 years)—income for lifetime of son (but minimum of 10 years; so if he does not survive for 10 years daughter gets remaining payments); or two life annuity—son gets income for life, then if daughter survives she gets same income for life. Obviously the amount of income depends on interest rates and ages of annuitant(s) at time of annuity purchase. The amount of income is highest for straight annuity, somewhat less for period certain and even less for two life annuity. Other variations may be available such as two life annuity where son gets income for life, and daughter (if she survives) gets 50% (or 75%) of the amount son was getting for her life.

I agree annuities are useful—eliminates need for trustee, accountings, extended administration of trust. Downside is high up front fee (i.e. commission paid to insurance agent, so 100k purchase price might only put 90k to work); also once purchased rate is locked so if interest rates go much higher after purchase, annuitant doesn't benefit in same manner that beneficiary of a trust might (usually very high termination fees if annuity contract cancelled in first 10 years—so can't plan on cancelling and then reinvesting in higher rate annuity). Also be extremely wary of variable annuities where initial premium is invested in stock portfolio, and payout is dependent on performance of stock portfolio. Finally, be sure issuing company is highly rated for financial stability/strength.

Suggested language—any form book or ask the insurance agent to get it from any company (but Will should not instruct Executor to buy from specific company, just instruct Executor as to type of annuity and beneficiaries—i.e., fixed rate (not variable), two life annuity, son as primary beneficiary, daughter as secondary with secondary beneficiary to receive same income as first).

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Subject: Re: Required Annuity Purchase via Will
Date: Monday, April 9, 2012 12:13 p.m.
To: Trusts and Estates Law Section

Rob:

…In the personal arena of annuity uses, which your present request for information relates to, you would not fund, nor purchase the annuity today. The purchase would be made after the death of the testator, and paid for through the estate or a testamentary trust created for this specific purpose.

At such time in the future, the executor or trustee, as the case may be, would purchase an immediate annuity for the benefit of the son, choosing a benefit option for the life of the annuitant with a guarantee certain of the fiduciary's choice, possibly based upon the testator's wishes, or on the need of the situation.

Andrew's listing of the annuity options would all be available, at that time, and there is no need for an election to be made at this time. The high commissions which Andrew has mentioned relate solely to certain deferred annuities, usually of the "Equity Indexed" variety and which do not involve immediate annuities.

Please note that a deferred annuity is basically an investment vehicle, while an immediate annuity is basically a planning tool.

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Subject: Re: Required Annuity Purchase via Will
Date: Monday April 9, 2012 9:59 p.m.
To: Trusts and Estates Law Section

Frank and Andrew, thank you— very much. Appreciate the guidance and education on it. Invaluable—as always.

Testator has flipped and flopped a bit to date, but his intent currently is to require the Executor to purchase an immediate fixed annuity (if I am phrasing that properly) at death in an amount equal to a certain percentage of the Estate that he has not yet settled on. I believe it would be prudent to have it direct the Executor to purchase a fixed annuity with income to the beneficiary son for the son's life, without a death benefit to the other beneficiary—testator's surviving daughter. As Bruce suggested earlier in this string (thanks again, Bruce), I think it then frees up a greater amount to direct to the beneficiary daughter—to whom Testator has a desire to leave a greater share (at least at this point), as I understand that such an option would then provide for a greater income stream to the beneficiary son than if a death benefit option were packaged with that income stream.

Thanks all once again for leading me out of the dark(!). Very much appreciated.

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## Includibility of UTMA Account in Custodian's Estate After Beneficiary Attains Majority

Subject: UTMA account includible in custodian's gross estate
Date: Wednesday, April 11, 2012 1:54 p.m.
To: Trusts and Estates Law Section

In 1995, Aunt creates UTMA account (with Aunt as custodian) for minor Niece and transfers $25,000 to UTMA account at that time. Aunt makes no other transfers to UTMA account. Niece attains 21 years of age in 2002, but UTMA account never terminated. Aunt then dies in 2011. At Aunt's death, Niece is 30 years of age and UTMA account still in existence. Is UTMA account includible in Aunt's gross estate?

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Wednesday, April 11, 2012 4:53 p.m.
To: Trusts and Estates Law Section

I think no. Legally, Aunt had no control/discretion over the account for last several years other than to pay it out to Niece upon demand. In fact, if niece demanded it from bank while Aunt alive, Bank must pay as long as niece proves she is 18 or 21 as the case may be. I have similar situation where Testator set up a 10 year unitrust in 1991 payable to his adult issue after 10 years. Funds were never distributed, remained in brokerage acct titled "Testator, as Trust u/a/d ..1991." I am taking the position, funds absolutely belonged to the kids since 2001 and therefore not includible even though brokerage house took direction from Trustee right up to his death—but any such direction, other than "pay kids," was unauthorized action by Trustee.

If I'm wrong, someone please let me know.

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Wednesday, April 11, 2012 6:53 p.m.
To: Trusts and Estates Law Section

One might take the position that as a matter of law, de facto, if not de jure, the custodian/trustee was converted from fiduciary to mere nominee.

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Wednesday, April 11, 2012 10:01 p.m.
To: Trusts and Estates Law Section

I believe a strong argument can be made that the aunt lost her authority over the account when the minor niece attained the age of 21 (or 18, depending upon the account terms) and that therefore it is not includible in her estate. If the existence of the account was kept from the niece, however, then I would agree that her continued control requires inclusion.

Paul E. Roman
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Subject: Re: UTMA account includible in custodian's gross estate
Date: Thursday, April 12, 2012 1:27 p.m.
To: Trusts and Estates Law Section

Paul and Paul,

You both make very good points—so something like the IRS "reputable presumption" that non-marital joint assets are owned 100% by the 1st joint tenant to die & burden on Estate to prove otherwise (I have had a NYS audit on this).

Bottom line (always is):

* Do you need to disclose the asset on the 706/ET-706—even if you take the position that it is not includible in her taxable estate

* Will this trigger a NYS &/or IRS audit

* Is it worth the audit risk/expense

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Thursday, April 12, 2012 4:48 p.m
To: Trusts and Estates Law Section

It is more of a retained interest issue. The law is clear that if a donor-custodian dies while the minor is a minor, the account is includible because of the d-c's retention of a right to alter, amend or revoke under Section 2038. See Rev. Rul. 57-366. What is not clear is what happens if the d-c dies after the minor attains majority. If the former minor could have walked into the bank and claim the money, the d-c no longer has any retained rights. However, if the former minor never knew about the account because the d-c withheld any information about the account, then it looks like a retained right over the account.

If you decide to exclude the account, then no disclosure or explanation is necessary. If you decide that it should be included, then I would disclose it but still make the argument that the account should be excluded because the aunt's power under the statute ended when the minor attained majority. There is very little audit risk on a one-issue return. Especially if you disclose, it will either be yes or no.

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Thursday, April 12, 2012 5:41 p.m.
To: Trusts and Estates Law Section

…If the account is includible in the grantor's estate, unless there is an exoneration clause in the grantor's Will, EPTL 2-1.8 would require apportionment of the tax against the account.

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Subject: Re: UTMA account includible in custodian's gross estate
Date: Monday, April 16, 2012 11:16 a.m.
To: Trusts and Estates Law Section

Take a look at Rev. Rule 59-357, 1959-2 C.B. 212 which still stands as the authority on these issues.

The answer to the specific question seems to be that the account is not includible, since the donee reached 21 before the custodian's death.

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# Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

## DEAD BODIES

### Delay in Release of Decedent's Body Sufficient to Give Rise to Claim for Violation of Right of Sepulcher

Decedent's children brought an action for violation of their right of sepulcher, alleging that the defendant hospital failed to release the decedent's body to the funeral home until three days after death "despite their inquiries and efforts to obtain an earlier release." Supreme Court granted defendant's motion to dismiss. The Appellate Division reversed, holding that the facts alleged in the complaint were sufficient to state a cause of action because they alleged interference with the plaintiffs' "absolute right" to immediate possession of the decedent's body. The three-day delay might turn out to have been reasonable and proper under the circumstances, but that possibility could not be taken into account in deciding a motion to dismiss for failure to state a claim. *Henderson v. Kingsbrook Jewish Medical Center*, 91 A.D.3d 720, 936 N.Y.S.2d 318 (2d Dep't 2012).

## DISTRIBUTEES

### Son Has No Interest in Mother's Estate During Her Life

Son began a proceeding to impose a constructive trust on certain property transferred by his mother to his sister, alleging that his mother made the transfer under duress and undue influence by his sister. He alleged standing based on his status as his mother's agent under a power of attorney and as a potential heir of her estate. The Appellate Division affirmed Supreme Court's granting of a motion to dismiss based on lack of standing. The power of attorney had been revoked and there could be no standing based on potential heirship. While alive, his mother could dispose of her property as she wished; the son's only interest as a potential distributee was merely "speculative." *Sharrow v. Sheridan*, 91 A.D.3d 940, 937 N.Y.S.2d 320 (2d Dep't 2012).

William P. LaPiana

## EXECUTORS

### Attorneys for Executor Entitled to Reimbursement for Heirship and Title Searches

Former attorneys for the executor of the decedent's will appealed the Surrogate's decree fixing their fee and the amount of disbursements. The Appellate Division modified the decree by increasing the fee, noting that the original affidavit of services conformed to the requirements of the Uniform Rules (22 NYCRR § 207.45(a)), including the hours spent and the services rendered. Also allowed were the claims for disbursements in connection with the search for the decedent's heirs required to probate the will and for a title search for property specifically devised to the executor, which amount was payable by the executor. *In re Barich*, 91 A.D.3d 769, 937 N.Y.S.2d 112 (2d Dep't 2012).

## GUARDIANS AD LITEM

### Appointment of GAL Proper Although Ward Had No Interest

Mother and father created a trust. After their deaths, their daughter assigned all of her interest in the trust to her brother, who was serving with her as a co-trustee. Shortly after making the assignment, however, she purported to renounce all of her interest in the trust. If the assignment were invalid and the renunciation valid, the daughter's children would be remainder beneficiaries of the trust. The court appointed a guardian ad litem to represent the daughter's minor son in the subsequent accounting proceeding. The court agreed with the brother that the assignment was valid and the renunciation therefore was meaningless, discharged the guardian ad litem but found that the GAL was entitled to compensation for his services. The brother appealed, and the Appellate Division upheld the award of compensation, holding that the appointment of the GAL was made necessary by the minor's potential interest and that the amount of compensation awarded was not the result of an abuse of discretion. *In re Garrasi*, 91 A.D.3d 1085, 937 N.Y.S.2d 370 (3d Dep't 2012).

## JOINT ACCOUNTS

### Surviving Joint Holder Is Sole Owner

Decedent worked for many years in businesses owned by Scheurer, his life partner of three decades. Scheurer asked her sister and the decedent to open joint bank accounts with rights of survivorship into which Scheurer deposited her own funds. Parcels of real property were also conveyed to the decedent and Scheurer's sister as joint tenants with right of survivorship, which allegedly were purchased with Scheurer's funds. After the decedent's death, his estranged brother successfully petitioned for letters of administration and began a proceeding under SCPA 2103 to recover the assets in the joint bank accounts and the real property for the decedent's estate. After completion of discovery, the Surrogate's Court granted Scheurer's motion for summary judgment. The Appellate Division affirmed, holding that although the accounts were created for the convenience of Scheurer they were not convenience accounts with respect to either of the other joint tenants. *In re Grancaric*, 91 A.D.3d 1104, 936 N.Y.S.2d 723 (3d Dep't 2012).

**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).**


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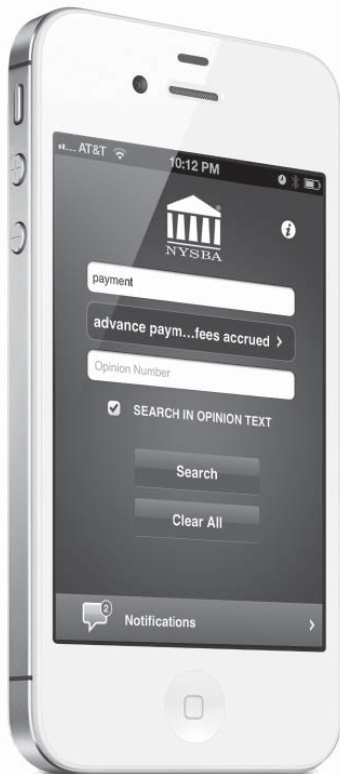


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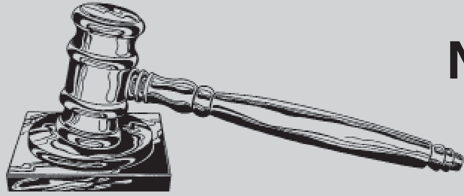

# Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

## Collateral Estoppel

In *In re Salvati*, the Appellate Division, First Department, unanimously reversed an order of the Supreme Court, New York County (Wilkins, J.), which held that the executor of a decedent's estate was collaterally estopped from objecting to certain portions of the guardian's final account.

The respondent was appointed guardian in 2003 for the decedent, who was then in a coma. Thereafter, the guardian filed annual accounts for the years 2003-2007. The reports for the period 2003-2006 were reviewed by a court-appointed examiner and approved by the court.

Following the decedent's death, the guardian prepared a final report and account and commenced a proceeding for its judicial approval, serving the executor of the decedent's estate as a party. The executor filed preliminary objections to the account and sought review of the guardian's books and records and discovery with respect to disbursements and property transactions. The court denied the executor's request for relief, except as to the accounts for 2007 and 2008, finding that the executor was collaterally estopped from objecting to the prior accountings and therefore not entitled to discovery for the years 2003 to 2006.

The Appellate Division reversed, concluding that the guardian had failed to establish any basis for the defense of collateral estoppel. The court held that to invoke the doctrine of collateral estoppel the guardian had to demonstrate that the executor, the decedent or any other person on her behalf, received notice and had an opportunity to be heard or that the guardian sought permission to render an intermediate report upon notice under the Mental Hygiene Law. The court opined that without this proof, the annual accounts were merely ex parte proceedings, which were not binding on the executor in the accounting proceeding.

*In re Salvati,* 2011 NY Slip Op 08666 (App. Div. 1st Dep't).

## Commissions

In a contested accounting by the former administrator of an estate, the court opined on the issue of commissions to which a former fiduciary was entitled. The court noted that a fiduciary who has resigned is not entitled to statutory commissions but instead may be awarded compensation, in the discretion of the court, on the basis of quantum meruit. Generally, commissions based upon quantum merit will be calculated in accordance with the statutory formula, but not exceeding statutory commissions, subject to the caveat that such an allowance will not include paying out commissions on the property that a resigned fiduciary has merely transferred to his successor.

The court further noted that "the compensation of a fiduciary in [New York] is not a function of the degree of ease or difficulty posed by his responsibilities, but rather, the value that his services have conferred on the estate." In this regard, the court held that the former administrator would not be allowed commissions on the decedent's funds in a Paris bank account that the administrator tried to marshal without success, saying that despite the pains he took in his attempts, a fiduciary could not receive commissions on property that he did not actually "receive" within the meaning of the statute.

*In re Korshunova,* N.Y.L.J., Jan. 31, 2012, p. 22 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

## Domicile

In a contested probate proceeding, the threshold question presented was the decedent's domicile at death. Although the proceeding had been instituted in Kings County, the objectant maintained that the decedent died domiciled in Suffolk County. The matter was determined on the papers submitted, without a hearing.

The record revealed that at the time of her death, the decedent owned two parcels of real property, one in Brooklyn and one in Suffolk County. In support of

his claim that the decedent died domiciled in Suffolk County, the objectant proffered (1) a copy of the federal estate tax return of the decedent's predeceased spouse, which listed the decedent's address as Suffolk County; (2) a copy of the decedent's health card, which listed her address as Suffolk County; and (3) a copy of a brokerage statement for an account in the names of the decedent and her spouse listing their address as Suffolk County.

The petitioner maintained that the request by the objectant for a change of venue was untimely and that in any event, the decedent's domicile at her death was Brooklyn. The petitioner submitted the following documentary proof listing her residence as Brooklyn: (1) a copy of the decedent's death certificate; (2) a copy of the decedent's New York State driver's license; (3) copies of two New York City health cards; (4) copies of correspondence from Medicare, health care providers and an automobile insurer; (5) a copy of a prescription medication label; (6) a copy of a Verizon statement and a National Grid statement; and (7) a copy of a petition filed by the decedent against the objectant in Family Court, Kings County.

In finding that the decedent died domiciled a resident of Kings County, the court opined that a determination of domicile is usually a mixed question of fact and law and frequently depends upon a variety of circumstances. Although the court acknowledged that the decedent might have been domiciled in Suffolk County at the time of her spouse's death, this did not preclude a finding that she changed her domicile to Kings County at a subsequent time. To that extent, the burden of proof rested with the party asserting a change of domicile to demonstrate by clear and convincing evidence that the decedent intended to effect such a change.

In assessing the proof submitted by both parties, the court discredited much of the petitioner's proof, except for the Family Court petition filed by the decedent, which resulted in a temporary order of protection and which referred to the decedent's home in Brooklyn. As for the objectant's proof, the court found the dates set forth in those documents too remote from the decedent's date of death to be considered relevant to the issue of her domicile at death.

*In re Estate of Halper,* N.Y.L.J., Jan. 20, 2012, p. 28 (Sur. Ct., Kings Co.) (Surr. Torres).

## Due Execution

In *In re Williams,* the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Suffolk County (Czygier, S.), which admitted the decedent's will to probate upon an order of the court granting the petitioner's motion for summary judgment and dismissing the objections to probate based on lack of due execution.

The court found that the petitioner had made a prima facie showing that the propounded will was duly executed by submitting an instrument with an attestation clause, together with the affidavits of the attesting witnesses. The court concluded that the objectant had failed to raise a triable issue of fact as to the petitioner's proof. Further, it held that the objectant's claim that the Surrogate's Court erred in considering the interrogatories of the attesting witnesses was improperly raised for the first time on appeal.

*In re Williams,* 2012 NY Slip Op 00219 (App. Div. 2d Dep't).

## Objections to Probate

In a probate proceeding, the respondent appealed from a decree of the Surrogate's Court, Chemung County (Hayden, S.), which among other things dismissed his objections to probate of the decedent's will.

In June 2009, after the filing of a petition for probate of the decedent's will, the respondent, on behalf of himself and other non-resident potential distributees, sought to examine the attesting witnesses before filing objections to probate. Although granted a 30-day extension to do so, the respondent did not conduct the examinations but instead served discovery demands upon the petitioners in January 2010. Apparently in response to the respondent's prolonged delay in seeking the discovery and the broad nature of the demands, the Surrogate's Court directed the respondent to post a $15,000 bond prior to any discovery taking place. The respondent failed to post the bond but filed objections to probate. The petitioners argued that the objections were untimely; the Surrogate's Court agreed and admitted the will to probate.

The Appellate Division, Third Department, affirmed. In doing so, the court opined that if pre-objection examinations pursuant to Surrogate's Court Procedure Act 1404 (SCPA) take place, objections to probate "must be filed within ten days after the completion of the examinations or such other time as is fixed by stipulation of the parties or the court." (SCPA 1410). The court found that although the respondent was given a substantial amount of time to complete the examinations, he failed to do so. The court concluded that his objections, filed more than six months after the examinations were to be completed, were untimely. Further, given the conclusory nature of the objections, the court held that the Surrogate's Court did not abuse its discretion in rejecting them.

*In re Scianni,* 2011 NY Slip Op 06174 (App. Div., 3d Dep't).

## Paternity

In *In re Konstantin,* the petitioner, the mother and natural guardian of an infant, requested, among other things, that the court vacate a decree directing the distribution of wrongful death proceeds, direct posthumous genetic marker or DNA testing of the decedent and grant a hearing to prove the decedent's paternity of the infant pursuant to New York Estates, Powers & Trusts Law 4-1.2(a)(2)(C) (EPTL). The record revealed that the respondent, the decedent's spouse, failed to list the infant as a distributee of the decedent when she petitioned for probate of his will and subsequently settled a proceeding for his wrongful death.

The petitioner alleged that she and the decedent began dating nine years prior to his death, and during the course of that relationship she gave birth to a child, whom the decedent openly and notoriously held out as his own. In support of this assertion, the petitioner submitted a photo of herself and the decedent in the hospital at the birth of the infant, as well as other photos of the decedent and the child at various family occasions, and the child's baptismal certificate, which identified the decedent as her father. In addition, the petitioner submitted four affidavits from family members and friends, each of whom attested that the decedent acknowledged he was the father of the child.

The application was opposed by the decedent's spouse.

At the time of the decedent's death, the provisions of EPTL 4-1.2(a)(2)(C) provided that paternity of a nonmarital child could be established by clear and convincing evidence and proof that the father of the child openly and notoriously acknowledged the child as his own.

The court found that the petitioner had satisfied the standard established by the Appellate Division in *In re Poldrugovaz*, 50 A.D.3d 117 (2d Dep't 2008), under which a pre-trial request for DNA testing will be authorized when evidence is offered that the decedent openly and notoriously acknowledged the non-marital child as his own and it is established that genetic marker testing is practical and reasonable under the totality of the circumstances. Specifically, the court found that the documents and photos submitted by the petitioner provided some evidence that the decedent had openly and notoriously acknowledged the child as his own and that the baptismal certificate demonstrated a reasonable probability that genetic testing would establish that the infant was the decedent's child. Moreover, the court was persuaded by an affidavit submitted by the petitioner from the chief executive officer of a company engaged in genetic testing, which indicated that exhumation would not be required in order to demonstrate that the infant was the decedent's child.

Accordingly, subject to certain defined conditions, the application by the petitioner was granted.

*In re Konstantin,* N.Y.L.J., Jan. 27, 2012, p. 39 (Sur. Ct., Westchester Co.).

## Power of Attorney

In *In re Marriott,* the Appellate Division, Fourth Department, reversed an order of the Surrogate's Court, Oneida County (Gigliotti, S.), which denied a motion for summary judgment as to the invalidity of a deed executed by an agent pursuant to a power of attorney executed by the decedent prior to her death.

The record revealed that the decedent executed a short form power of attorney granting certain powers to her sons and her daughter-in-law. She revoked the power two months later, after one of the decedent's sons transferred the property to himself and his brother, his co-agent, for $1 consideration. After the commencement of a discovery proceeding in Surrogate's Court by the executor of the estate, one of the decedent's sons transferred his one-half interest in the property back to the estate for no consideration, leaving the other one-half in the name of the decedent's other son. Thereafter, the premises were sold to a third party, and one-half the proceeds were held in escrow pending a determination as to the son's entitlement to them. The petitioner moved for summary judgment directing that the sale proceeds be released to the estate, and the Surrogate's Court denied the motion.

In reversing the order of the Surrogate's Court, the Appellate Division held that the purported conveyance of the property was unauthorized inasmuch as the power of attorney did not grant the agents power to transfer the property. Specifically, the statute in effect at the time the power of attorney form was executed and the directions on the form explicitly required the decedent to place her initials in the designated spaces on the form in order to provide a particular power to an agent. If the principal failed to initial a space, no such power was conferred to the agent.

The court noted that while the decedent placed an "X" in the space conferring all the powers set forth in the form to her agents, she failed to place her initials there. The court acknowledged that while an "X" may constitute a signature or an individual's mark in circumstances where an individual cannot sign his or her name in full, this exception did not apply in situations where, as in the case at hand, the principal could sign her name in full.

Accordingly, the court held that no authority was granted to the decedent's sons to convey or otherwise dispose of the subject property and directed that the sale proceeds be released to the estate.

*In re Marriott*, 2011 NY Slip Op 05885 (App. Div. 4th Dep't).

## Summary Judgment

In *In re Anella,* the Appellate Division, Second Department, affirmed a decree of the Surrogate's Court, Kings County (Lopez Torres, S.), which, among other things, granted the proponent's motion for summary judgment dismissing objections to probate based on lack of testamentary capacity and undue influence and admitted the propounded will to probate.

The proponent and the objectant were two of the decedent's five children. The decedent's prior will bequeathed his home to the proponent and her sister and a television and bank accounts to the objectant. After the execution of this will, the decedent and the objectant had an argument which provoked the objectant to cause damage to the decedent's home. The decedent then retained an attorney to draft his last will, which disinherited the objectant and another child, named a third child the executor of his estate and divided his residuary estate equally between his remaining two children.

The attorney-draftsman of the instrument and a psychiatrist who evaluated the decedent prior to the will execution opined that the decedent knew the natural objects of his bounty and was able to make decisions with respect to the distribution of his estate.

In support of her motion for summary judgment, the proponent submitted the deposition testimony of one of the attesting witnesses, the affidavit of the draftsman, the report of the psychiatrist and affidavits of family and friends, all of whom averred that the decedent was competent to make a will and intended to disinherit two of his children. Based upon this proof, the court concluded that the proponent had established a prima facie case of capacity, which the objectant had failed to refute.

Moreover, the court found that the proponent had established that the propounded will was not the product of undue influence. Specifically, the court held that even if the proponent had a confidential relationship with the decedent because she cared for him and tended to his financial affairs, that relationship was counterbalanced by the close family relationship that existed between them. The court concluded that the objectant had failed to raise a triable issue of fact under these circumstances.

*In re Anella*, 2011 NY Slip Op 07633 (App. Div. 2d Dep't).

## Trust

In *In re Chantarasmi*, the co-administrators of an estate requested court authorization to establish trusts for the benefit of the decedent's infant children in accordance with the terms of a prenuptial agreement. The guardian ad litem appointed on behalf of the children consented to the relief.

The record revealed that the decedent died without a will survived by a spouse and two infant children. Pursuant to the pertinent provisions of a prenuptial agreement he had with his spouse, the decedent agreed to make certain testamentary provisions in the form of trusts for members of his family. The co-administrators of his estate sought to fulfill his commitment by requesting that the court impose a constructive trust upon his estate and transfer funds to two irrevocable trusts for the family as required by the terms of the prenuptial agreement.

In granting the relief requested by the petitioners, the court found the circumstances appropriate for the imposition of a constructive trust. Specifically, the court held that the decedent's failure to leave a will constituted a breach of contract which could be enforced in equity by the imposition of a trust upon his estate.

The court opined that no particular words are required to create a trust, but rather, the establishment of a trust was dependent upon the decedent's intent. In this regard, the court found that the prenuptial agreement clearly set forth the necessary elements of a trust: to wit, the beneficiaries, the trustees and the subject property. Although the duration of the trust and the distribution of the assets during its administration were missing, the court held that the absence of these terms was not fatal to authorizing the co-administrators to establish the trusts.

Accordingly, the court authorized the petitioners to enforce the prenuptial agreement by establishing trusts for the benefit of the decedent' children, provided that the trust terms did not violate the provisions of EPTL 11-1.7 or SCPA 715, that the fiduciary's duty to account was not waived, that the fiduciary was not authorized to remove trust assets from New York and that the parties were not denied access to the courts by any mandatory arbitration clause.

*In re Braun*, 2012 NY Slip Op 22020 (Sur. Ct., Westchester Co.) (Surr. Scarpino).

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### Undue Influence

The Surrogate's Court decision in *In re Moles*, which granted summary judgment in favor of the proponent of a will, was discussed in this column last summer. Recently, the decree issued by the court was reversed by the Appellate Division, First Department, on the grounds that questions of fact existed as to the issues of testamentary capacity and undue influence.

The court found that there was considerable circumstantial evidence of undue influence, including the facts and circumstances surrounding the will signing, the nature of the will (in which the decedent disinherited all of the beneficiaries of her long-standing earlier will in order to leave her entire estate to her long-time companion and caregiver), the decedent's family relations, the condition of her health and mind, her dependency upon and subjection to the control of the petitioner, the petitioner's opportunity to wield undue influence on the decedent and the petitioner's acts and declarations.

Specifically, the court relied upon a report issued by Adult Protective Services several months before the execution of the propounded will, finding that the decedent's judgment was impaired and recommending an Article 81 guardianship proceeding to safeguard her. The court found it significant that the attesting witnesses were the petitioner's friend, who had recommended the draftsman of the will, and one of his former employees. Further, the court noted that the draftsman of the will was not the same attorney who had prepared the decedent's prior will. Citing *In re Elmore*, 42 A.D.2d 240 (3d Dep't 1973), the court opined that "[w]here a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact for the jury as to whether the proffered explanation is adequate."

In addition, the court observed that the decedent, both before and after signing the propounded will, expressed her intent to maintain her nephew, the objectant, as the beneficiary of the bulk of her estate. To that extent, she confirmed her prior will in a discussion with her prior attorney at the time she signed a durable general power of attorney in favor of her financial advisor.

*In re Moles*, 2011 NY Slip Op 08966 (App. Div. 1st Dep't).

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

# Florida Update

By David Pratt and Jonathan Galler

David Pratt

## CASE LAW UPDATE

### Incapacitated Person's Attempt to Amend Trust

Bernice J. Meikle executed a revocable trust in 1991 and subsequently executed a first amendment to the trust. Three years later, Meikle was judicially determined to be incapacitated, and a limited guardian was appointed over her property. Approximately one year later, Meikle attempted to execute a second amendment to the trust to change the distribution of her assets. Certain trust beneficiaries brought an action alleging, among other things, that the second amendment to the trust was "void and of no legal effect." The trial court granted summary judgment in favor of the beneficiaries, and the Fourth District Court of Appeal affirmed. Although evidence had been presented to demonstrate that Meikle had the requisite mental capacity to execute the second amendment, the trial and appellate courts determined that the plain, unambiguous meaning of a provision contained in the first amendment required that for Meikle to amend her trust further, her legal capacity had to have been restored by the court or she had to have obtained two opinions by licensed physicians that she was no longer incapacitated. Because neither condition was met, and because "in construing the provisions of a trust, the cardinal rule is to try to give effect to the grantor's intent," the court found that entry of summary judgment in favor of the beneficiaries was appropriate.

*Jervis v. Tucker*, 82 So. 3d 126 (Fla. 4th DCA 2012).

### Order of Preference of Personal Representative in Intestate Estate

The decedent died intestate leaving her husband and minor child as the sole heirs to her estate. The decedent's mother filed a petition for administration requesting that she be appointed personal representative of the estate. The decedent's husband filed a counter-petition for administration requesting that he be appointed personal representative. The trial court granted the decedent's mother's petition because of what the Second District Court of Appeal later vaguely referred to as "the serious nature of the allegations" in her petition, presumably concerning the qualification of the decedent's husband. The appellate court

Jonathan Galler

reversed the trial court's decision based on Section 733.301, Florida Statutes, which sets forth the order of preference for appointing a personal representative of an intestate estate and identifies the surviving spouse as having priority over all others. The appellate court held that although a trial court has discretion to appoint someone other than the preferred person, such a decision must be based on evidence that the preferred person lacks the necessary qualities and characteristics to act as personal representative. Because no evidence was presented by the decedent's mother to support her allegations, the trial court abused its discretion in appointing the decedent's mother instead of the decedent's husband. The appellate court remanded with instructions that the lower court hold an evidentiary hearing.

*Bowdoin v. Rinnier*, 81 So. 3d 582 (Fla. 2d DCA 2012).

### Tortious Interference with an Expected Inheritance

Following the death of their father, Mercedes and Brooke Saewitz sued their stepmother for conversion and tortious interference with an expected inheritance. The trial court ultimately entered a directed verdict in favor of the stepmother—but not for lack of evidence presented by the daughters of the tortious conduct of their stepmother. In fact, as the Third District Court of Appeal later stated, the daughters' appellate brief "persuasively chronicles the record evidence presented to the jury of manipulative activity taken by their stepmother during their father's dying days and preceding months to contravene their father's wishes with respect to the disposition of his estate." However, the trial court concluded, and the appellate court affirmed, that the daughters had failed to present prima facie proof of damages, a necessary element of their causes of action. Although three witnesses testified, in general terms, that the value of the assets in the estate and/or the assets at issue in the litigation was in the millions, none of the testimony was tied to a legally relevant time frame, nor did the testimony meet the "reasonable certainty" threshold necessary to be considered probative evidence. The daughters argued that they were prevented from proving their damages by the failure of their stepmother to produce relevant documents during discovery. The appellate court rejected that ar-

gument because the daughters never sought to compel further discovery and, in any event, had in their possession sufficient information to present a prima facie showing of damages.

*Saewitz v. Saewitz*, 79 So. 3d 831 (Fla. 3d DCA 2012).

### Malpractice Claim by Beneficiaries Against Guardian's Lawyer

Approximately three years before C.H. Cowart died, he was adjudicated partially incompetent, and the court appointed three guardians. The guardians obtained a court order directing the implementation of a plan to reduce Cowart's estate tax liability. The plan had initially been developed before the decedent was adjudicated incompetent but had still not been fully implemented when Cowart died two and a half years later. The beneficiaries of the estate sued the lawyers for the guardians, alleging that they committed malpractice by failing to properly implement the estate plan that would have reduced the estate taxes. The trial court granted summary judgment in favor of the defendants on the grounds that the beneficiaries lacked standing because no attorney-client relationship existed between the beneficiaries and the guardians' lawyers. The appellate court, however, reversed because a "limited exception to the privity requirement in the area of will drafting allows an intended beneficiary to file a legal malpractice claim for losses resulting from a lawyer's actions or inactions, where it was the apparent intent of the client to benefit that third party." Because an issue of fact existed as to whether or not the beneficiaries were "intended beneficiaries," the appellate court reversed the entry of summary judgment and remanded the case for further proceedings in the trial court.

*Hodge v. Cichon*, 78 So. 3d 719 (Fla. 5th DCA 2012).

### Trust Modification

After Robert R. Bellamy died, a series of disputes between the co-trustees of his revocable trust led to the filing of a petition for approval of a settlement agreement and approval of the resignation and discharge of the corporate trustee without the appointment of a successor trustee. The trial court granted the petition on the grounds that the proposed agreement served the best interests of the beneficiaries, despite language in the trust agreement that provided that where "the corporate Trustee fails or ceases to serve, the remaining individual Trustees or Trustee shall choose a successor corporate Trustee, so that there shall always be a corporate Trustee after the Settlor ceases to serve." The Third District Court of Appeal reversed. Critical to the appellate court's determination was a separate provision of the trust "prohibit[ing] a court from modifying the terms of this Trust Agreement under Florida Statutes Section 737.4031(2) or any statute of similar import." That statute, currently found in Section 736.04113, Florida Statutes, permitted judicial modification under certain circumstances, including where the terms of the trust are determined not to be in the best interest of the beneficiaries. Because Bellamy's trust expressly prohibited judicial modification of the trust agreement, even where modification is judicially determined to be in the best interests of the beneficiaries, and because the settlement agreement constituted a modification of the express requirement that there always be a corporate trustee, the appellate court held that it was error to approve the settlement agreement.

*Bellamy v. Langfitt*, 2012 WL 1436129 (Fla. 3d DCA 2012) (not yet final).

### Homestead Property Held by Revocable Trust

In 1996, while living in Massachusetts, Hillard J. Aronson created a revocable trust and conveyed certain property, including a Florida condominium titled in his sole name, to the trust. At the time of his death in 2001, Hillard and his wife had already sold their Massachusetts residence and were living in the Florida condominium. Upon Hillard's death, the trust provided a life interest to his wife in all remaining trust assets, which were to be distributed to Hillard's sons upon his wife's death. At the time of Hillard's death, the condominium was the sole asset of the trust. However, because the trust also provided that Hillard's wife was entitled to distributions from the trust, the trial court entered an order giving her the power to demand that the trustees execute a deed transferring an interest in the condominium to her each year she requested a trust distribution. The Third District Court of Appeal reversed the order, holding that the condominium qualified as the decedent's homestead and that the provision of the Florida Constitution governing homestead applied to property held by a revocable trust. The appellate court explained the consequences of that determination as follows: "At the moment of Hillard's death, his homestead property passed outside of probate in a twinkle of an eye, as it were, to his wife for life, and thereafter to his surviving sons, James and Jonathan per stirpes. From that moment forward, the trustees had no power or authority with respect to the former marital home." For this reason, it was error for the trial court to grant Hillard's wife an entitlement to transfers of an interest in the condominium to satisfy her entitlement to trust distributions.

*Aronson v. Aronson*, 81 So. 3d 515 (Fla. 3d DCA 2012).

### Discovery Related to Elective Share

The surviving spouse of the decedent served a notice of her intent to serve a subpoena for the production of documents upon the decedent's company, a nonparty to the probate proceeding. The purpose of the discovery was to aid the spouse in deciding whether to

take her elective share. In particular, the spouse sought to determine whether the value of the company's stock had increased during her marriage due to the efforts of the decedent. The trial court ruled that the value of the stock was excluded from the spouse's elective share calculation and that the discovery sought was therefore irrelevant. The Second District Court of Appeal granted certiorari review, noting that the spouse had a limited time within which to decide whether to take the elective share and, further, that discovery of financial information was relevant to her decision. The Second District quashed the trial court's order, concluding that although the full value of the stock in the decedent's revocable trust would not be included in the elective share, under the circumstances presented, any increase in the value of the stock attributable to the efforts or contributions of either party during the marriage would be included in the elective share.

*McDonald v. Johnson*, 83 So. 3d 889 (Fla. 2d DCA 2012).

**Cy Pres Doctrine**

Mary Ericson died in 1991. Her will contained a testamentary trust that provided that the remainder was to be distributed to the "International Wildlife Society." In 2007, the co-trustees filed a petition to determine beneficiaries, asserting that they could not identify an organization by the name of International Wildlife Society. The co-trustees presented affidavits demonstrating that it was the decedent's intent to have the trust assets distributed to a local benevolent animal organization. Several organizations were notified of the petition and were permitted to file responses. SPCA Wildlife Care Center filed a response asserting that the assets should be distributed to it based upon the cy pres doctrine. As the Fourth District Court of Appeal stated, the "cy pres doctrine is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable to fulfill, substitute another plan of administration which is believed to approach the original scheme as closely as possible." Rather than determine the appropriate beneficiary, however, the trial court, *sua sponte*, invalidated that provision of the trust altogether and determined that the trust remainder would pass by intestacy. The Fourth District reversed, holding that there was no evidentiary support for the trial court's conclusion and that the only evidence in the record suggested that the court could, consistent with the cy pres doctrine, fashion a plan to effectuate the testator's intent to provide for a charitable bequest to animals.

*SPCA Wildlife Care Center v. Abraham*, 75 So. 3d 1271 (Fla. 4th DCA 2011).

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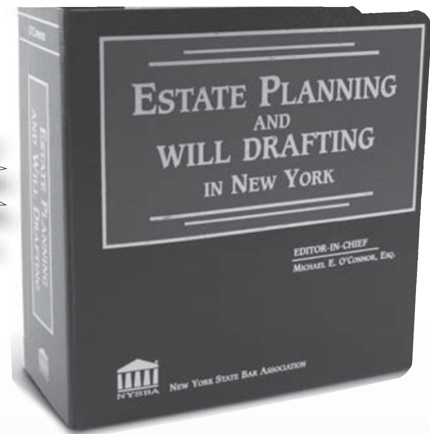


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ISSN 1530-3896 (print) ISSN 1933-852X (online)

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