NYSBA SUMMER 2000 | VOL. 33 | NO. 2

Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

The workload of the Trusts and Estates Law Section has exploded and is proceeding at a breakneck but exhilarating pace. The agenda for our April 27, 2000 Executive Committee meeting exceeded 800 pages and covered a staggering array of topics. Our Section now has 11 pieces of affirmative legislation that it is shepherding through the legislative process. If enacted, the legislation would accomplish the following:

1. Unification of the various professional privileges;
2. Elimination of the fiduciary exception to the attorney/client privilege;
3. Permitting unsold real estate that passes through the residuary estate to be commissioned;
4. Equalizing pre- and post-1956 commissions with respect to unsold assets;
5. Correcting errors to the procedure for service of process by mail;
6. Permitting posthumous DNA testing to establish paternity;
7. Amending EPTL 10-6.6 to conform to the new proposed GST regulation;
8. Amending short form powers of attorney with respect to the indexed amount of the annual gift tax exclusion;
9. Creating a constructional rule for pre-February 1, 2000 wills that include the credit for state death taxes in the credit shelter definition;
10. Modernizing the allocation of commissions of charitable trusts; and
11. Conforming state requirements for renunciations to recent federal changes in disclaimer law.

We continue to work with the EPTL-SCPA Advisory Committee on the second part of their Fourth

Inside

Editor's Message 3
Gifts of United States Savings Bonds 4
(Eileen Caulfield Schwab)
New Proposed Regulations Challenge Accelerated Charitable Remainder Trusts 8
(Myron Kove and James M. Kosakow)
Standardizing Due Diligence 11
(Ilene S. Cooper and Tricia Marcin)
Donations of Art to Charitable Organizations 12
(Laurence C. Zale and Philip T. Temple)
1999 New York State Legislative Changes Affecting Estate Planning and Administration 15
(Joshua S. Rubenstein)
Ten Plagues of Estate Planning 21
(Robert L. Moshman)
New York Estate Tax Changes 24
(Magdalen Gaynor)
Questions and Answers Column 27
(Kathleen M. Franklin and David J. Arcella)
Case Notes—Recent New York State Surrogate's and Supreme Court Decisions 29
(Arlene Harris and Donald S. Klein)
Recent New York State Decisions 32
(John C. Welsh)

NYSBA

Report (revocable trust legislation), their Fifth Report (revising the Principal and Income Act) and their incipient Sixth Report (which will consider the new Uniform Trust Act). We are also working with the Surrogate's Court Advisory Committee of the Office of Court Administration and with the New York State Bankers Association on their legislative projects, and we will keep everyone informed of any legislative enactments that have an impact upon our area.

The educational program at the Spring meeting was held on April 28, 2000 in Rochester and covered the practical but critical aspects of planning for and administering the estate of the sole practitioner, whether an attorney, accountant or physician. S. Jeanne Hall, Esq. of New York City began with an overview of the basic issues involved in the planning and administration of the estate of the sole practitioner. Robert L. Ostertag, Esq. of Poughkeepsie followed with a presentation on the sale of a law practice in the event of death or disability. Frances A. Ciardullo, Esq. of Syracuse made a presentation on rules relating to doctors in sole practice. The luncheon speaker was The Honorable Evelyn Frazee, Justice, Supreme Court, Seventh Judicial District, Rochester, who spoke about the work of the Committee on Public Trust and Confidence in the Law, of which she is Co-chair.

Following lunch, Ronald Prohaska of New York City followed with a presentation on malpractice and the sole practitioner. James A. Woehlke, Esq. of New York City then followed with a presentation on accounting for a deceased accountant. Concluding the program was John P. Schaefer, Chief Clerk of the Monroe County Surrogate's Court, who spoke on handling the estate of a sole practitioner from the perspective of the Surrogate's Court.

Our ranks have swelled to over 5,000 members, and we continue to need as many active members as possible to help with the important professional and civic committee projects we sponsor. Please take a moment to look at the committee list on the last page of this *Newsletter* and feel free to contact the committee chairs of any committee on which you might be interested in serving.

I look forward to seeing everyone in Santa Fe for our Fall meeting, which will be held from September 21 through September 24, 2000.

Joshua S. Rubenstein

Don't risk your client's goodwill with a poor business/partnership valuation

Empire Valuation Consultants can help you avoid unnecessary tax audit risks related to valuations of closely held businesses and partnership interests. We specialize in business valuations and have a fully trained, accredited staff with a broad range of industry experience. We provide your clients with thorough, accurate, timely and on-budget reports that meet all applicable IRS standards for estate or gift tax related appraisals.

Empire Valuation Consultants

Specialists in Business Valuations for:

- Estate & Gift Taxes
- Buy/Sell Agreements
- Recapitalizations
- ESOPs
- Redemptions
- Acquisitions/Sales
- Purchase Price Allocation
- Corporate Planning
- Fairness Opinions
- Litigation

William Lockwood, ASA, CBA
Scott Nammacher, ASA, CFA
350 Fifth Avenue, Ste. 5713
New York, NY 10118
(212) 714-0122

Paula Heermance, ASA
Terry Griswold, ASA
3255 B-H Town Line Road
Rochester, NY 14623
(716) 475-9260

(Paid Advertisement)

Editor's Message

As this *Newsletter* was being finalized, a new uniform court rule regarding "affidavits of due diligence" in probate and administration proceedings was proposed and a report is included. It has yet to be adopted by the Chief Judge. New York also released its new estate tax return and Form ET-706 has been reproduced for your information.

In this issue of the *Newsletter*, there are many articles covering a wide range of topics. Eileen Schwab has written an article on Gifts of U.S. Savings Bonds. Robert Moshman, a frequent contributor to our *Newsletter*, has written an enjoyable article on the Ten Plagues of Estate Planning. Larry Zale and Phil Temple have written about finding the proper home for works of art which clients wish to donate. Josh Rubenstein has updated his article which appeared in the NYS Bar *Journal* on legislative changes that affect our area of practice and it is included in this issue. Rounding out the variety of topics are from other frequent contributors, Jim Kosakow and Myron Kove, on the impact of proposed regulations on CRUTS.

The Question and Answer Column is inaugurated in this issue. Kathy Franklin and Dave Arcella took on the task of answering one inquiry each on behalf of the committee each chairs.

Don't forget that the Section travels to Santa Fe on September 21st for the Fall meeting. It is not too early to mark your calendars. Our Chair promises a great program on the topic of the issues facing a fiduciary when administering an estate from the perspectives of the fiduciary and the litigator. One portion of the program will highlight the problems and another portion will provide solutions for the fiduciary and the beneficiaries.

Magdalen Gaynor

REQUEST FOR ARTICLES

If you would like to submit an article, or have an idea for an article, please contact
Trusts and Estates Law Section Newsletter Editor
Magdalen Gaynor, Esq.
7-11 South Broadway
Suite 208
White Plains, NY 10601
(914) 949-3624

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

Gifts of United States Savings Bonds

By Eileen Caulfield Schwab

The Supremacy Clause[1] provides that the laws of the United States are the supreme law of the land. As a consequence, to the extent there is a valid federal law and a determination that a state law conflicts with the federal law, state law is preempted by and must yield to federal law.[2] Additionally, state law must yield to federal regulations even where the regulations merely supplement state law.[3]

The preemption doctrine requires state law to defer to federal law where (1) the scheme of federal legislation is so complete and pervasive that no room is left for the state to supplement it; (2) the federal interest is so dominant that state laws on the same subject must yield; or (3) the enforcement of the state statute presents substantial conflict with the administration of a federal program.[4] This is true even where the state law is within the power of the state to legislate. In order to determine whether a state law is preempted by federal law or regulation, a court must consider the underlying policy considerations of the state and federal laws or regulations, which requires an analysis of what is being regulated, by whom, for what purpose, the statutory language, congressional intent and the potential frustration of federal policy.[5]

While state law generally determines the completeness of a gift for property law and any limitations on the capacity of a donee to accept a gift, the doctrine of federal preemption extends into the gift area where gifts of U.S. savings bonds are concerned. Federal regulations[6] determine how and to whom a gift of savings bonds may be made, thus invalidating gifts which would otherwise be effective for state law purposes. The basis for federal preemption is Article 1, Section 8, Clause 2 of the Constitution which authorizes Congress "to borrow money on the credit of the United States." Pursuant to this clause, Congress has authorized the Secretary of Treasury to borrow money and, in return, to issue savings bonds in such form and under such conditions as the Secretary prescribes. Pursuant to this authorization, the Secretary of Treasury has promulgated regulations establishing the rights of owners and beneficiaries to savings bonds which, *inter alia*, determine how a gift of a savings bond may be effected and to whom such a gift may be made.

The savings bond regulations have been held by the Supreme Court to preempt contrary state law in *Free v. Bland*,[7] and *United States v. Chandler.*[8] The Court noted practical reasons for the preemption of state law by the Treasury Regulations. The *Free* Court noted that the regulations intended to establish a federal survivorship provision as a "convenient" way to avoid the complications of probate. The *Chandler* Court noted that the government's need "for uniformity and for proper recordkeeping alone demand and justify something less than absolute freedom of transfer."[9] Considerations of safety, avoidance of "chaotic conditions" and an inherent "great potential for abuse" and an aspect of permanency were additional factors underlying the regulations and justifying preemption.[10]

In *Free*, bonds were bought with community property funds and were registered in the name of Mr. *or* Mrs. Free. Pursuant to Treasury Regulations, the bonds were paid to Mr. Free upon Mrs. Free's death. A dispute arose between Mr. Free, who claimed exclusive ownership of the bonds, and Mrs. Free's son from a prior marriage, who was the principal beneficiary under his mother's will, who claimed an interest in the bonds under the Texas community property laws.

Under Texas law, property purchased with community property retained its community character. Based on this law, decedent's son demanded either one-half of the bonds or reimbursement for the loss of Mrs. Free's community half interest in the bonds, which had been, in effect, converted into the husband's separate property by operation of the Treasury survivorship provisions.

The Supreme Court held that the Texas law, in prohibiting a married couple from taking advantage of the survivorship provisions of U.S. Savings Bonds, was unconstitutional. In writing for the Court, Chief Justice Warren stated the "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[11] The Court concluded that any state law, however clearly within a state's acknowledged power to legislate, which interferes with or is contrary to federal law must yield to the federal law,[12] and specifically that the regulations which provided that a surviving co-owner of a savings bond issued in the "or" form would be the sole and absolute owner of the bond would prevail over Texas law.

The Court held that allowing Texas law to require the co-owner of the bonds to account for half of the value of the bonds to the decedent's estate would render federal regulations meaningless. Doing

so would permit a state to frustrate Treasury's survivorship provisions through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner, with the result that the state would directly interfere with a legitimate exercise of the power of the federal government to borrow money.

The Court did recognize in *dictum*, that in certain instances where fraud was alleged, the regulations would not serve as a shield and relief would not be available in a case where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property.

In *United States v. Chandler*, the Supreme Court upheld the Treasury regulations on how to make an effective gift of bonds. In *Chandler*, the Court held that an *inter vivos* delivery with donative intent was not sufficient to make a gift of U.S. savings bonds, even though under applicable state law, the gift was complete. The bonds were not reissued in the names of the co-owners, as required by Treasury regulations, to effect a change in ownership. This being the case, the Court concluded the gifts were incomplete. The Court noted that bonds are issued subject to transfer limitations, such limitations are clearly spelled out to the purchaser who buys them subject to the conditions and, further, that such limitations are not an undue or improper restriction of transfer rights.

Notwithstanding the holding in *Free*, the 1992 elective share statute in New York[13] contained a provision which sought to circumvent the survivorship provisions of Treasury's regulations. In New York, a surviving spouse has a right of election against the decedent's net estate if the decedent does not leave the spouse outright an amount equal to the spousal elective share. A decedent's net estate basically includes the decedent's probate assets, property passing through intestacy and "testamentary substitutes," generally property passing by operation of law, for example, pursuant to beneficiary designation.

Testamentary substitutes were first made subject to a spousal right of election in 1966. However, for decedents dying after September 1, 1966, but before September 1, 1992, the value of United States savings bonds payable to a designated person was expressly excluded from the definition of testamentary substitutes.[14] According to the Practice Commentary to 5-1.1, U.S. savings bonds were excluded because inclusion "would present serious constitutional questions," citing *Free v. Bland*.[15]

For decedents dying after September 1, 1992, the definition of testamentary substitutes was amended to include "any disposition of property made by the decedent" after August 31, 1966 whereby property held by the decedent and another person as joint tenants with a right of survivorship is payable on death to a person other than the decedent or the decedent's estate.[16] The statute expressly includes U.S. obligations, including savings bonds, in this category of testamentary substitute.[17] The New York legislature, aware of the issue of federal preemption, attempted to avoid it with the enactment of 5-1.1-A(b)(7), which provides as follows:

> If any part of this section is preempted by federal law with respect to a payment or an item of property included in the net estate, a person who, not for value, received that payment or item of property is obligated to return to the surviving spouse that payment or item of property or is personally liable to the surviving spouse for the amount of that payment or the value of that item of property, to the extent required under this section.

Therefore, in the case of U.S. savings bonds, this provision would require a person who was a beneficiary, or a co-owner, of a bond to give a surviving spouse the spouse's elective share in the bond when the bond is paid pursuant to the federal survivorship provisions.[18]

EPTL § 13-3.1 provides that the survivorship provisions of U.S. savings bonds will not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy except as provided in § 5-1.1-A.[19] Consequently, there is no doubt that New York intentionally ignored the holding in *Free*. No case has challenged the provisions as yet. It would seem such a challenge would prevail and that a spousal right of election in U.S. obligations would be defeated.

Limitations on Donees

A gift of a savings bond is complete under federal regulations when the bond is reissued in the donee's name. A bond registered in single ownership form may only be reissued (1) to add a co-owner or beneficiary; or (2) to name a new owner, with or without a co-owner or beneficiary.[20] However, the owner of a bond is limited by federal regulations as to who may be named as owner or beneficiary.

A new owner must be related to the previous owner by blood (including adoption) or marriage; or must have been married to the previous owner and their marriage is being dissolved. Additionally, the owner may have a bond reissued in the name of a trustee of a trust created by the previous owner for the owner's benefit or one which names either the owner or a person related to the owner by blood (including adoption) or marriage as beneficiary.[21] Consequently, the owner may not give the bond to a non-family member after it has been originally issued if the non-family member was not originally named on the bond as a co-owner or beneficiary.

A bond registered in co-ownership form may only be reissued during the lifetime of both co-owners in the name of another individual related by blood (including legal adoption) or marriage to either co-owner (1) as single owner, or (2) as owner with one of the original co-owners as beneficiary, or (3) as a new co-owner with one of the original co-owners. Additionally, a bond registered in co-ownership form may be reissued in the name of either co-owner alone or with another individual as co-owner or beneficiary if, after the issuance of the bond, either co-owner married, or the co-owners were divorced or legally separated, or their marriage was annulled; or both co-owners are related by blood (including legal adoption) or marriage to each other. A bond in co-ownership form may also be reissued in the name of a trustee of a trust created by either co-owner or some other person if either co-owner is a beneficiary of the trust, or the beneficiary of the trust is related by blood or marriage to either co-owner.[22]

A request for reissue of co-ownership bonds, during the lifetime of the co-owners, must be signed by both co-owners. However, if a request for reissue is to eliminate the name of one co-owner, only that co-owner's signature is required.[23]

A bond registered in beneficiary form may only be reissued to name the beneficiary as co-owner; to eliminate the name of the owner and to name as owner a custodian for a minor beneficiary under a Uniform Transfers or Gifts to Minors statute; to eliminate the beneficiary or to substitute another individual as beneficiary; or to eliminate the names of the owner and the beneficiary and to name as new owner a trustee of a trust created by the previous owner for the owner's benefit or which names either the previous owner or a person related to him or her by blood (including adoption) or marriage as beneficiary.[24]

Deceased Owner, Co-Owner or Beneficiary

If the owner of a single owner bond dies, the bond becomes property of the decedent's estate. If one co-owner named on a bond dies, the surviving co-owner is the sole owner and payment or reissuance will be made as though the bond were registered in the name of survivor alone. If both co-owners die, the bond becomes the property of the estate of the co-owner who died last and payment or reissuance will be made as if the bond were registered in the name of the last deceased co-owner alone. If both co-owners die under circumstances where it cannot be established, either by presumption of law or otherwise, which co-owner died first, the bond is deemed to be property of both equally and payment or reissuance will be made accordingly.[25] If the owner of a beneficiary bond dies and is survived by the beneficiary, the beneficiary becomes the sole owner of the bond and payment or reissue will be made accordingly.[26] If the beneficiary dies either before or simultaneously with the owner, payment or reissue will be made as though there were no beneficiary.[27]

During estate administration, a legal representative may request payment of bonds, which belong to the estate, or have bonds reissued in the name of persons entitled to share in the estate. If there is more than one legal representative, all must join in the request for payment or reissue and the request must be signed in the form of "Mary Smith, administrator of estate, of Jane Smith, deceased," and be supported by evidence of legal representative's authority to act. If the bond is to be reissued, the legal representative must certify that each person to be named is entitled and to what extent and that each named person has consented to the reissue.

If the estate has been settled judicially, the bond will be reissued upon the request of a person shown entitled to the bond as reflected in the court order. This must be supported by a certified copy of the legal representative's court-approved final account, the decree of distribution, or other pertinent court records. If two or more persons have an interest in a bond, they must have an agreement regarding the bond's disposition.[28]

United States Savings Bonds, Series EE and HH

The rules governing United States Savings Bonds, Series EE and HH are found in Code of Federal Regulations, Title 31, Part 353. The rules pertaining to the reissue and transferability are substantively the same as the rules governing the Series A-K Savings Bonds.

Endnotes

1. U.S. Const. art. VI, cl. 2.
2. *Gibbons v. Ogden*, 9 Wheat 1, 210-211, 6 L. Ed. 23 (1824).
3. *Campbell v. Hussey*, 368 U.S. 297 (1961); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).
4. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Hines v. Davidowitz*, 312 U.S. 52 (1941).
5. *Baltimore Shippers & Receivers Ass'n. v. Public Utilities Comm. of Cal.*, 268 F. Supp. 836, 842 N.D. Cal., *aff'd* 389 U.S. 583 (1967).
6. 31 C.F.R. 315.15.
7. 369 U.S. 663, 82 S.Ct. 1089 (1962).
8. 410 U.S. 257, 93 S.Ct. 880 (1973).
9. *Id*. at 262, 93 S. Ct. at 883.
10. *Id*. at 261, 93 S. Ct. at 882.
11. 369 U.S. at 666, 82 S. Ct. at 1092 citing art. VI, cl. 2.
12. *Id*., citing *Gibbons v. Ogden*, 9 Wheat 1, 210-11, 6 L. Ed. 23 (1824); additional citations omitted.
13. McKinney's Estates, Powers and Trusts Law ("EPTL") 5-1.1-A(b)(7).
14. EPTL 5-1.1(b)(2).
15. *Op. cit*.
16. EPTL 5-1.1-A(b)(1)(E).
17. EPTL 5-1.1-A(b)(3).
18. See, New York State Assembly, Memorandum in Support of Legislation, Bill No. A8316-B, SR21011 at 3-4 (1992).
19. See, New York State Assembly, Memorandum in Support of Legislation, Bill No. A8316-B, SR21011 at 5 (1992).
20. 31 C.F.R. § 315.47(a).
21. 31 C.F.R. § 315.47(a)(2).
22. 31 C.F.R. § 315.47(b).
23. 31 C.F.R. § 315.51.
24. 31 C.F.R. § 315.47(c).
25. 31 C.F.R. § 315.70(b)(3).
26. *Id*.
27. 31 C.F.R § 315.70(c)(2).
28. 31 C.F.R. § 315.71(b).

Eileen Caulfield Schwab is the Partner-in-Charge of the Private Clients Group of Brown & Wood LLP. She is also an Adjunct Professor of Law at New York Law School and a fellow of the American College of Trust and Estate Counsel. She was given an award in 1998 by the New York State Bar Association for her work in achieving passage of legislation repealing New York's separate estate tax and gift tax. She is a graduate of Columbia Law School and Hunter College (Phi Beta Kappa, Magna Cum Laude).

Save the Dates!

Trusts and Estates Law Section

FALL MEETING

September 21-24, 2000

Sante Fe, New Mexico
The Eldorado Hotel

New Proposed Regulations Challenge Accelerated Charitable Remainder Trusts

By Myron Kove and James M. Kosakow

The IRS recently issued proposed regulations to ensure that accelerated charitable remainder unitrusts are not used for tax avoidance purposes.[1] The IRS relied on its authority to issue regulations to prevent abusive transactions, claiming that the form of accelerated charitable remainder trust targeted by the new regulations is inconsistent with the purposes of the charitable remainder trust rules.[2]

Accelerated CRUTs—Background

In 1997, the Code was amended to prohibit what Congress determined were abusive charitable remainder trust (CRT) structures known as accelerated charitable remainder unitrusts (CRUTs). An accelerated CRUT is a standard fixed percentage CRUT with a very high annual percentage payout (80%) and a very short term (two years). With a fixed percentage CRUT, if the trust does not have adequate income to pay the unitrust amount, the trustee must invade principal to make up the difference.

The Four Tier Tax System

A noncharitable beneficiary of a CRT receives either an annuity, in the case of a charitable remainder annuity trust (CRAT), or a unitrust amount in the case of a CRUT. An annuity is the right to receive, annually, a specific amount or percentage of the CRAT assets contributed to the trust. This is a fixed amount and is not subject to change by reason of any change in the value of the CRAT assets. The unitrust amount is the right to receive annually a fixed percentage of the CRUT assets determined annually. The amount of the CRUT payout is therefore determined by the value of the assets on the valuation date and will change as the value of the CRUT assets change. If values rise, then the unitrust amount will increase.

Although payments to CRT noncharitable beneficiaries are unrelated to trust income, the four tier tax system was designed to ensure that trust taxable income is taxed to beneficiaries. The four tier system provides that CRT distributions are deemed to have the following characteristics, in the order listed, when received by the noncharitable beneficiary:

First as ordinary income;

Second as capital gain;

Third as tax exempt income; and

Fourth as a nontaxable distribution of trust corpus.

If a charitable remainder trust has no ordinary or capital gain income, and the distribution is out of principal, the noncharitable beneficiary will not pay any income tax on the distribution.

Example (prior to 1997 amendment): John creates a two year CRUT funded with appreciated property having a value of $1 million and zero basis. John is the beneficiary. The unitrust payout is 80 percent annually. The CRUT does not produce any income. No payments are made to John in year one. At the beginning of year two the appreciated assets are sold for $1 million and the CRUT distributes $800,000 to John before April 15. The CRUT payout in year two is $160,000 which is paid to John and the balance of $40,000 is paid to charity. John will not pay income tax on any part of the $800,000. He will only pay a capital gain tax on the $160,000 distribution.[3]

Timing the CRT Payment

To qualify as a CRT, the trust must pay the annuity or unitrust amount at least annually to the noncharitable beneficiaries. The regulations have, however, permitted the payment to be made within a reasonable period of time after the end of the year in which it is due.[4]

In April 1997, the IRS issued proposed regulations which required that the annuity or fixed percentage unitrust amount be distributed by the close of the taxable year in which it is due. The purpose of the proposal was to force accelerated CRUTs to sell appreciated assets in the year for which the distribution is required to be made rather than waiting until after the close of the tax year. The sale would require the noncharitable beneficiary to recognize the taxable gain under tier 2 of the four tier tax system rather than treating the distribution as a nontaxable return of corpus. The proposed regulations would apply to taxable years ending after April 18, 1997.

Borrowing to Cover the CRUT Payment

Although the proposed regulations appeared to be strong medicine, they also provided a significant loophole. The trustees could avoid selling the appre-

ciated assets by borrowing the funds in year one to make the distribution and then sell the assets in year two to pay the loan. The year one distribution should be classified as a nontaxable return of corpus.

1997 CRT Amendments

In August 1997, the Taxpayer Relief Act of 1997 (TRA '97) amended the definition of a CRT to include a maximum allowable percentage of fifty percent for calculating the annuity or unitrust amount and a minimum present value of ten percent for the charitable remainder interest.[5]

In response to comments that the proposed regulation would be unduly burdensome on CRTs, in November 1997, the IRS announced that the proposed timing regulations would not be effective for certain CRTs for the 1997 tax year.[6] In December 1998, the IRS issued final regulations which significantly modified the prior April 1997 timing proposal.[7]

Although the IRS recognized that the 1997 statutory changes "reduced the potential tax benefits of accelerated CRTs," there nevertheless was concern about the "potential abuse of the post-year-end grace period to produce a tax-free return of appreciation" in CRT assets.[8] Therefore, the final regulations retain the requirement that the annuity or fixed percentage unitrust amount be paid by the close of the tax year, but contain an exception, thereby permitting payment within a reasonable time after the close of the year for which the payment is due if:

(1) the character of the annuity or unitrust amount is income in the recipient's hands under tiers 1 (ordinary income), 2 (capital gain) or 3 (other income); and/or

(2) the trust distributes property (other than cash) that it owned as of the close of the taxable year to pay the annuity or unitrust amount and the trustee elects (on Form 5227) to treat any income generated by the distribution as occurring on the last day of the taxable year for which the amount is due.[9]

For anyone engaged in accelerated CRUT planning, the exception is of no value since the payment may not be delayed unless the income is recognized in year one. To comply with the year one required payout, and avoid recognition of gain, the CRUT borrowed the funds (or engaged in some similar device to obtain the cash), sells the assets in year two and pays the loan.

Additionally, if the CRAT or fixed percentage CRUT was created before December 10, 1998, and the percentage used to calculate the annuity or unitrust amount is 15 percent or less, then the annuity or unitrust amount may be paid within a reasonable time after the close of the year.[10]

The Fifty Percent CRUT

The statutory change, however, did not eliminate what the IRS deems to be an abuse. Promoters of accelerated CRTs simply reduced the percentage payout to 50 percent with a short trust term (two years) so as to comply with the ten percent remainder requirement. Although the trust is required to distribute the fixed percentage CRUT payment before the end of the year in which it is due, this may be accomplished either through borrowing, a forward sales contract or similar device. The cash raised in this manner is then distributed to the noncharitable beneficiary in year one. The noncharitable beneficiary claims that the year one distribution is a tax-free return of trust corpus. In year two the appreciated assets are either sold and the loan paid or after year two, the assets are distributed to the charitable remainder interest subject to the obligation.

Recharacterization of the Transaction

The proposed regulation would prevent the result described by recharacterizing the distribution as if the assets had been sold in the year for which the distribution is due to the extent necessary to satisfy the unitrust payout (less any income actually received by the CRUT and cash contributed to the CRUT for which a charitable deduction is allowable).[11]

Example: Anne creates a two year CRUT funded with appreciated property having a value of $1 million and a basis $100,000, plus cash of $10,000 (for which a charitable deduction is allowable). The CRUT payout is 50 percent. Anne is the beneficiary. The CRUT earns dividend income of $10,000 in year one. In year one, the trustee borrows $500,000 secured by the appreciated assets. As of the valuation date, the CRUT has a value of $1,020,000 and, prior to the end of the year for which the CRUT payment is due (year one), the trustee distributes 50 percent or $510,000 to Anne. Of the distribution, $10,000 is taxed as ordinary dividend income, $10,000 is not taxed (the cash contribution for which a charitable deduction is allowable), while the balance of $490,000 is treated as if the CRUT sold that amount of appreciated assets. The gain on the sale is $441,000 which is characterized as a realized capital gain and $49,000 (allocated share of basis) as a tax-free return of trust corpus.

Statutory Authority for the Proposed Regulations

The proposed regulation was issued by the IRS based on the authorization in IRC § 643(a)(7) to "prescribe such regulations as may be necessary or appropriate to carry out the purposes" of the provisions relating to the taxation of estates, trusts, and beneficiaries, "including regulations to prevent avoidance of such purposes." The IRS rationalizes that the current version of accelerated CRUTs are no less abusive than those covered by the TRA'97.

Although this may appear to be clear to the IRS, advocates of accelerated CRTs might think that the opposite is true. The abuse addressed by Congress in 1997 were CRTs that provided for payouts of more than 50 percent. The abuse which the IRS is addressing in the proposed regulation is the fact that the CRT does not recognize income when the IRS says that it should. The failure to sell appreciated assets also existed in 1997, but Congress did not determine that remedial legislation was necessary. Congress also stated that the new 50 percent rule was not intended to "limit or alter" the timing (payout of CRAT or CRUT in the same year in which the payment is due) regulations proposed by the IRS earlier in 1997.[12]

Congress did not prohibit CRTs from borrowing or entering into other devices to raise cash to make the distribution. It only imposed a limit on the amount of the payout. Deciding when appreciated assets are sold is a timing issue to be decided by the CRT trustees, not by the IRS. If the trustee determines that it may be better to sell in year two, and if the beneficiaries derive an income tax benefit, that is not necessarily abusive, it is simply good tax planning.

The proposed regulations apply to distributions made after October 18, 1999. With respect to prior years, the IRS states that will continue to examine those transactions and take appropriate action to recast or recharacterize income, challenge trust qualification, and impose self-dealing excise tax and penalties as required.

Endnotes

1. REG-116125-99; Prop. Reg. 1.643(a)-8.
2. Code § 643(a)(7).
3. IRS Notice 94-78, IRB 1994-33, 15.
4. Reg. §§ 1.664-2(a)(1) and 1.664-3(a)(1).
5. P.L. No. 105-34, § 1089, 111 Stat. 960,961; IRC § 664(d)(1)(A)(D) and (2)(A)(D).
6. Notice 97-68, 1997-2 CB 330.
7. TD 8791 (12/9/1998).
8. TD 8791.
9. Regs. §§ 1.664-3(a)(3)(g), (k)(3)(b)(i).
10. Regs. § 1.664-3(a)(3)(h).
11. REG-116125-99; Prop. Reg. 1.643(a)-8.
12. Senate Report, § 1089, TRA '97.

Myron Kove and James M. Kosakow are members of the firm of KOVE & KOSAKOW, LLC, with offices in New York City and Westport, Connecticut. The firm's website is www.kovkos.com.

Myron (Mike) Kove is the executive editor of *Insights & Strategies*, a nationally recognized monthly financial and estate planning newsletter for professionals. He is also coauthor of the recently published Real Estate Professionals' Tax Guide, published by Warren Gorham & Lamont. Mike received his J.D. degree from Harvard Law School and his LL.M. and A.B. degrees from New York University.

James M. Kosakow is admitted to practice in Connecticut, New York, Florida, the District of Columbia and before the U.S. Tax Court. He is a frequent contributor to estate planning publications and coauthor of Handling Federal Estate and Gift Taxes, Fifth Edition, Cumulative Supplement, published by West Group. Jim received his Bachelors degree from Connecticut College and his law degree from Benjamin N. Cardozo School of Law at Yeshiva University.

Copyright 2000 MK & JMK

Standardizing Due Diligence

By Ilene S. Cooper and Tricia Marcin

On the 31st day of March, 2000, the Surrogate's Court Advisory Committee of the Office of Court Administration, under the auspices of the Honorable Renee R. Roth, unanimously agreed upon an addition to Uniform Court Rule § 207.16, concerning affidavits of due diligence in probate and administration proceedings.

Presently, Uniform Court Rule § 207.16 reads, in pertinent part, as follows:

> (d) If the petitioner alleges that any of the distributees of the decedent or others required to be cited are unknown or that the names and addresses of some persons who are or may be distributees are unknown, petitioner must submit an affidavit showing that he or she has used due diligence in endeavoring to ascertain the identity, names and addresses of all such persons.

The proposed addition to the Rule is designed to define the criteria for due diligence, and should thus prove to be a useful measure for unifying the requirements of UCR § 207.16(d) in each of the Surrogate's Courts throughout New York State. Additionally, the purpose of the recommended standards is to avoid the burden upon an estate of costly or time-consuming searches.

The Surrogate's Court Advisory Committee was assisted in its efforts by a subcommittee of the New York State Bar Association's Committee on Estate and Trust Administration, chaired by Ilene S. Cooper, which, after many months of work by its members, drafted a suggested statutory amendment as a means of standardizing the due diligence criteria.

The proposed addition to Uniform Court Rule § 207.16, which is set forth below, is currently under consideration by the Office of Court Administration:

> In an administration or probate proceeding, the "diligent inquiry" or "due diligence" required by the court with respect to service upon possible distributees whose identities or whereabouts are unknown depends upon several factors, including the value of the potential interest of the person in the estate, the degree of relationship of the person to decedent and the extent to which decedent's records and known relatives may be a source of information concerning the person.
>
> However, absent special circumstances, the due diligence requirement should not burden the estate with costly or too time-consuming searches. In most cases, the requirement may be satisfied, without placing undue burden upon the estate, by an affidavit indicating the results obtained from among the following:
>
> a) examination of decedent's personal effects, including address books;
>
> b) inquiry of decedent's relatives, neighbors, friends, former and/or, last business associates and employers, the post office and financial institutions;
>
> c) correspondence to the last known address of any missing distributee;
>
> d) correspondence or telephone calls to, or internet search for, persons of same or similar name in the area where the person being sought lived;
>
> e) examination of the records of the motor vehicle bureau and board of elections of the state or county of the last known address of the person whose whereabouts is unknown.
>
> In probate proceedings, the court may accept, in lieu of the above, an affidavit by decedent setting forth the efforts that he or she made to ascertain relatives.

Ilene S. Cooper is counsel with the firm of Farrell Fritz, P.C., where she concentrates in the field of trusts and estates, and is a Vice-Chairperson of the New York State Bar Association's Committee on Estate and Trust Administration. Tricia Marcin is counsel with the firm of Farrell Fritz, P.C., where she concentrates in the field of trusts and estates, and is a member of the New York State Bar Association's Committee on Estate and Trust Administration.

Donations of Art to Charitable Organizations

By Laurence C. Zale and Philip T. Temple

Art as an Asset and its Psychological Possibilities

"There is no such thing as Art. There are only artists." E.H. Gombrich's epigram, written at the beginning of his 1950 classic text *The Story of Art*, is still true today. Art with a capital "A" does not exist. Only through the actions of artists themselves does art achieve an identity.

Similarly, there is no such thing as an Art Collection. There are only individuals who have the desire to collect art. They are driven by passion, status, curiosity, financial gain, or a tax deduction. But all of them will be affected by the inevitable forces of the three Ds: disputes, divorce, and death. Some will also experience the additional D as dollars.

It is therefore important for collectors to plan properly for the lifetime and testamentary disposition of their art collections. Before making that decision, however, collectors should first consult with their legal counsel and financial advisor. If there is agreement that from a trust, estate, and tax planning standpoint that the collection should be donated, then finding recipient museums to display the art properly is crucial. To achieve those objectives, collectors would be wise to use the services of an independent art advisor.

Determine the Appropriateness of Art as a Charitable Contribution

Current tax laws favor collectors who donate art to museums or other qualified charitable organizations. The basic tax rules are described below. Encouraged by the generosity of those laws, individuals, families, and corporations now donate in excess of $11 billion a year to the arts. According to a recent 18 month study by the Rand Corporation, donors account for 10% of all households.

Finding Organizations that Are Suitable for Art Donations

A collector who decides to donate works of art should create a realistic comprehensive plan in consultation with his or her legal counsel, financial advisor, and art advisor. The works of art to be donated should be professionally appraised. The appraised value of the art, together with its provenance, quality, size, condition, medium, rarity, historical importance, authenticity, subject matter and style, will determine what plan is best.

Many collectors mistakenly believe their donated works of art will find a permanent home in the museum of their choice. They assume once accepted their art will be displayed and promoted under favorable terms. Some also assume their art will become part of the museum's permanent collection and never sold. This is not the case.

Due to decreasing funding, limited storage space and highly selective art acceptance committees, major museums have limited their acceptance of works of art. Their best solution, short of selling art from the collection, is to expand. Few can.

A notable example of expansion is the Philadelphia Museum of Art. After years of searching for additional space, the museum contracted to buy a 100,000-square foot art deco building last year to satisfy their desperate need to display their collection of 300,000 works. Expressing satisfaction at the outcome, museum director Anne d'Harnoncourt, described the building as "almost too good to be true." The Philadelphia Museum of Art story is an exception. Most major museums remain full with no room for expansion.

The Importance of an Art Advisor

Most major museums will reject a work of art unless it fills a gap in its permanent collection. For collections, the likelihood of rejection is higher. The art, alas, will be homeless, unless it is a masterpiece.

To avoid this dilemma, collectors should consult with an art advisor about prospective recipient museums or other charitable organizations to ensure their donation will be accepted under favorable terms. Caveat Donor. "All gifts have to be unconditional," according to Glenn D. Lowry, Director of the Museum of Modern Art, before they will be considered for acceptance. This is standard practice for many museums.

Nonetheless, the art advisor can be valuable by querying prospective recipient museums about the percentage of their collections on permanent display. What arrangements will they offer to display the work of art? Will an endowment be required with the donation? And what is their policy on deaccessioning art?

Most important, the art advisor should be independent. He or she should not represent museums, auction houses, dealers, or artists. His or her compensation should be fee based and not determined

by commissions. Those arrangements will promote trust, stewardship and clarity between the art advisor and the collectors.

Basic Tax Rules

An income tax charitable deduction is allowed for a lifetime gift of a work of art to charity.[1] The extent of the deduction depends on a number of factors:

a. The type of charitable organization.[2]

b. The kind of property.[3]

c. Does the gift meet the related use rule?[4]

d. Does the donor have a qualified appraisal?[5]

Type of Organization. Most donee institutions for art are museums or schools that are public charities. But, some may be private foundations. A donor should get a copy of the Internal Revenue Service determination letter given to the charity that states its status.

Generally, an art gift to a private foundation generates a deduction for cost basis only and not for full fair market value as is the case with a gift to a public charity.[6] (But see below).

Type of Property. Generally, a work of art held by a collector is capital gain property. It is ordinary income property if (i) the donor created it, (ii) the donor received it as a gift from the creator, (iii) it is held as inventory by a dealer, (iv) its sale would generate short-term capital gain because it was held for one year or less.[7]

If the work is capital gain property, the gift qualifies for deductibility at full fair market value if it meets the related use rule described below. The contribution is deductible up to 30% of adjusted gross income with any excess contribution deductible over the five following years—up to 30% of adjusted gross income in each carryover year—until exhausted.[8]

If it is ordinary income property, the deduction is for cost basis only but the ceiling for deductibility is 50% of adjusted gross income with a five-year—50% carryover for any excess.[9]

Related Use. To obtain a full market value deduction for a gift of art, the use by the donee institution must be related to its charitable purposes or functions. If not, the deduction is for cost basis only (or, if less, fair market value).[10]

A gift of a painting to a museum should clearly be a related use gift. A gift of a work of art to a school with a museum, or which uses it for art instruction, should also be a related use gift. However, if the work of art is contributed, for example, to The American Red Cross, which is a public charity, but which from the outset intends to sell and in fact promptly does sell the work of art, the deduction will be for cost basis only and subject to the 50% ceiling.

The regulations[11] provide that a donor may treat a contribution of a work of art as meeting the related use rule if:

(a) The donor establishes that the work of art is not in fact put to an unrelated use by the donee institution; or

(b) At the time of the gift, it is reasonable to anticipate that the work of art would not be put to an unrelated use by the donee organization.

A number of situations are not so black and white. And, there have been few litigated cases but some private letter rulings:

For example, *Private Letter Ruling 7751044* where the Service held that the rule was met when lithographs were displayed in a camping center devoted to handicapped and retarded children because the lithographs were used in connection with an art appreciation program. Also see *Private Letter Rulings 7911109 and 7934082*. In *Private Letter Ruling 8208059*, the Service held that the related use rule was met when a donor gave his stamp collection to a college because the college would exhibit the collection and had, as part of its curriculum, a course in engraving skills.

These matters are fact specific. It is important that a donor obtain from the donee institution a clear indication of how it intends to use the gift property.

Qualified Appraisal. Regulation § 1.170A-13 issued on May 4, 1988, provides that a gift of property (other than money or readily marketable securities) that has a claimed value exceeding $5,000 requires that the donee (i) obtain a qualified appraisal for the property and (ii) attaches a fully completed appraisal summary to the income tax return on which the deduction is claimed.

A qualified appraisal is an appraisal by a qualified appraiser dated not more than 60 days before the date of the gift.[12] It should contain the following information:

1. A detailed description of the property.
2. The property's physical condition.
3. The date or expected date of the gift.
4. The terms of any agreement or understanding entered into or expected to be entered into by or on behalf of the donor that relates to the use, sale or other disposition of the gift property.

5. The appraiser's name, address and taxpayer identification number.
6. A detailed description of the appraiser's background and qualifications.
7. A statement that the appraisal is prepared for income tax purposes.
8. The date on which the property was appraised.
9. The property's appraised fair market value.
10. The appraiser's method of valuation.
11. The specific basis for the valuation such as comparable sales.
12. A description of the fee arrangement between the donor and the appraiser.

Because a qualified appraisal must be detailed and must be performed by someone with the appropriate qualifications, it is likely to be expensive. Keep careful records; that will immensely help the appraiser.

Form 8283 contains the Appraisal Summary.[13]

If the work of art is sold within two years from the date of gift, the donee institutions must report that sale on form 8282 and furnish a copy of the form to both Internal Revenue Service and the donor.[14]

Clearly, this is designed to let the Service know when a work of art or other gift property is sold at a price significantly less than its appraised value dating from when the donation was made. This should have a chilling effect, both on the appraiser and the donor, on highly overinflated appraisals.

Gifts in Trust. What if a donor wishes to transfer the work of art to a qualified charitable remainder trust (a unitrust or annuity trust described in Internal Revenue Code § 664)?

Some commentators believe the gift should be treated like a gift of any other capital gain asset. The Service maintains, first, that there is no charitable contribution deduction until the work of art is sold and, second, the deduction is for cost basis only because it is clearly a gift for an unrelated use.

Testamentary Gifts. The estate tax charitable deduction is unlimited[15] and the related use rule does not apply.[16] The valuation issue still exists and, therefore, an appropriate appraisal should be obtained and attached to the estate tax return.

Summary. The rules are complicated. A donor should get competent professional counsel in structuring any gift of works of art to charity.

Endnotes

1. IRC § 170(c).
2. IRC §§ 170(b)(1)(A)(i)-(viii), 170(b)(1)(B), (E)(i)-(iii), 509(a); Treas. Reg. § 1.170A-9.
3. IRC §§ 170(b)(1)(C)(iv), 1221; Treas. Reg. §§ 1.170A-8(d)(3), 1.170A-4(b)(2); IRC §§ 1221(d), 170(e)(1)(A); Treas. Reg. §§ 1.170A-8(d)(3), 1.170A-4(b)(2).
4. IRC § 170(e)(1)(B)(i); Treas. Reg. § 1.170A-4(b)(3).
5. Treas. Reg. § 1.170A-13.
6. IRC § 170(b)(1)(C)(i).
7. IRC §§ 1221(d), 170(e)(1)(A); Treas. Reg. §§ 1.170A-8(d)(3), 1.170A-4(b)(2).
8. IRC § 170(b)(1)(C)(i).
9. IRC § 170(d)(1)(A), (b)(1)(B) last sentence.
10. IRC § 170(e)(1)(B)(i); Treas. Reg. § 1.170A-4(b)(3).
11. Treas. Reg. § 1.170A-4(b)(3)(i), (ii).
12. Tax Reform Act of 1984, § 155(a)(2); Treas. Reg. § 1.170A-13(c)(3)(i).
13. Treas. Reg. § 1.170A-13(c)(4).
14. Treas. Reg. § 1.6050L-1.
15. IRC § 2055(a).
16. IRC § 170(e)(1)(B)(i); Treas. Reg. § 20.2055-1(a)(4).

Laurence C. Zale is president of the independent art advisory firm Laurence C. Zale Associates, Inc., located in New York City. He was educated at Washington University, New York University and The Courtauld Institute of Art, University of London. He is a trustee on the executive committee of The Brookdale University Hospital Medical Center, and participates in the American Friends of the Courtauld Institute of Art.

Philip T. Temple is a partner in the White Plains law firm of McCarthy, Fingar, Donovan, Drazen & Smith, LLP and a graduate of Columbia University Law School. He is former chair of the Committee on Non-Profit Organizations of the Association of the Bar of the City of New York and was a member of its counsel on taxation. He is also a member of the National Association of College and University Attorneys and is a member of the founding faculty of the American Institute for Philanthropic Studies in Long Beach, California.

COST	$1,000
Fair Market Value	10,000
Deduction (Within 30% limit)	10,000
Tax Saved (@ 39.6% rate)	3,960
Cost	1,000
Untaxed Gain	$2,960

In addition, the donor of the work of art enjoyed it for the period of ownership.

1999 New York State Legislative Changes Affecting Estate Planning and Administration

By Joshua S. Rubenstein

The 1999 Legislative Session brought numerous substantive changes to the laws affecting estate planning and administration. There were many tax-related changes, designed primarily to conform New York tax treatment to federal tax treatment. There were a number of important substantive and procedural changes as well, particularly in the areas of tax apportionment and estate litigation. The following is a review of each such change.

Tax Law

Estate, Gift and GST Taxes

1. Tax Law § 951(a), which sets forth the date through which applicable Internal Revenue Code provisions are incorporated into the Tax Law, has been amended to provide that references to the Internal Revenue Code include all amendments enacted on or before July 22, 1998. This change is effective immediately.[1]

2. Tax Law § 954(d)(1) has been amended to delete the cross reference to Internal Revenue Code § 2033A, family-owned business exclusion. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[2]

3. Tax Law § 954(c)(1), which sets forth the sections of the Internal Revenue Code defining the federal gross estate, has been amended to delete the cross reference to Internal Revenue Code § 2033A, family-owned business exclusion. This change is effective for estates of decedents dying on or after February 1, 2000.[3]

4. Tax Law § 954-c, which had created a family-owned business exclusion, has been repealed. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[4]

5. Tax Law § 954(g) has been relettered subsection (h), and a new subsection (g) has been added to create a deduction for family-owned business interests. If a deduction for family-owned business interests allowable under Internal Revenue Code § 2057 is elected pursuant to this section, the following provisions of § 2057 shall not be applicable to the deduction for family-owned interests allowed for the purposes of the New York Tax Law:

> (A) Paragraph 3 of subsection (A) of such section (relating to coordination with the unified credit);
>
> (B) Subsection (F) of such section (imposing an additional estate tax for failure to materially participate in business or dispositions of interest);
>
> (C) Subsection (H) of such section (requiring the filing of an agreement with the commissioner); and
>
> (D) Any other provision of such section which is not relevant to the deduction for family-owned business interest allowed by this section.

Where no federal estate tax return is required to be filed under the Internal Revenue Code, the time for making the election referred to above shall be the same as would be required under the federal estate tax had a federal estate tax return been required to be filed, and the election shall be made on the New York estate tax return. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (i.e., as of the enactment of the sop tax).[5]

6. Tax Law § 955(h)(1), as relettered by Chapter 407 of the Laws of 1999, which sets forth the provisions of the Internal Revenue Code specifying the deductions allowable for federal estate tax purposes, has been amended to add a cross reference to Internal Revenue Code § 2057, family-owned business interests. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997,

but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[6]

7. Tax Law § 958-a(i), which prevented a qualified use credit from being claimed if the family-owned business exclusion was elected, has been amended to replace the reference to the family-owned business exclusion with a reference to the family-owned business deduction. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[7]

8. Tax Law § 958-b(f), which prevented a closely held business credit from being claimed if the family-owned business exclusion was elected, has been amended to replace references to the family-owned business exclusion with references to the family-owned business deduction. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[8]

9. Internal Revenue Code § 2031(c)(6) contained in § 2 of Chapter 1013 of the Laws of 1962 (relating to the imposition of a tax on the transfer of estates of certain decedents) has been amended to provide that the qualified conservation easement election shall be made on or before the due date of the estate tax return and shall be made on such return, and to delete the requirement that the election be irrevocable. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[9]

10. Internal Revenue Code § 2031(c)(9) contained in § 2 of Chapter 1013 of the Laws of 1962 has been renumbered paragraph 10, and a new paragraph 9 has been added to allow the deduction for qualified conservation easements in the case of easements granted after death and before the due date including extensions of the estate tax return, provided that no charitable deduction is allowable with respect to such grant. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[10]

11. Internal Revenue Code § 2033A contained in § 2 of Chapter 1013 of the Laws of 1962 is renumbered § 2057 and has been amended to replace the family-owned business exclusion with a deduction for family-owned business interests. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[11]

12. Internal Revenue Code § 2057(b)(2)(A) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the parenthetical "without regard to this section." This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[12]

13. Internal Revenue Code § 2057(b)(3) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the subtraction from includible gifts of family-owned business interests of the amount of such gifts from the decedent to members of the decedent's family otherwise included in the gross estate. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[13]

14. The opening paragraph of Internal Revenue Code § 2057(c) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the parenthetical "determined without regard to this section." This change is effective for estates of decedents dying after December 31, 1997, except that estates of

decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[14]

15. Internal Revenue Code § 2057(e)(1) contained in § 2 of Chapter 1013 of the Laws of 1962, dealing with the definition of the term "qualified family-owned business interest," has been amended to provide that a decedent shall be treated as engaged in a trade or business if any member of the decedent's family is engaged in such trade or business. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[15]

16. Internal Revenue Code § 2057(e)(2) contained in § 2 of Chapter 1013 of the Laws of 1962, dealing with limitations to the definition of the term "qualified family-owned business interest," has been amended to include an interest in a trade or business where a certain portion of the income from such trade or business would constitute the personal holding company income if such trade or business were a corporation. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[16]

17. Internal Revenue Code § 2057(f)(2)(A) has been amended to delete the parenthetical "as determined under rules similar to the rules of § 2032A(c)(2)(B)," and to add a definition of "adjusted tax difference" attributable to a qualified family-owned business interest. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[17]

18. Internal Revenue Code § 2057(f) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended by adding a new paragraph 3 to provide that a qualified heir shall not be treated as disposing of a qualified family-owned business interest by reason of ceasing to be engaged in a trade or business so long as the property to which such interest relates is used in a trade or business by any member of such individual's family. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[18]

19. Internal Revenue Code § 2057(g)(1) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the reference to subparagraph "(M)" of subsection (i)(3). This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[19]

20. Internal Revenue Code §§ 2057(i)(3)(L),(M) and (N) contained in § 2 of Chapter 1013 of the Laws of 1992 have been relettered (N), (O) and (P), and two new subparagraphs (L) and (M) have been added referencing Internal Revenue Code §§ 2032A(G), (H) and (I). This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[20]

21. Internal Revenue Code § 2057 contained in § 2 of Chapter 1013 of the Laws of 1992 has been repealed effective with the repeal of the estate tax. This change is effective for estates of decedents dying on or after February 1, 2000.[21]

22. Internal Revenue Code § 6166(b)(7)(A)(iii) has been amended to provide that the 2% portion shall be treated as being zero. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[22]

23. Internal Revenue Code § 6166(b)(8)(A)(iii) contained in § 2 of Chapter 1013 of the Laws of 1992 has been amended to provide that the 2% portion shall be treated as being zero. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York State tax returns in accordance with the law in effect prior to the effective date of this section.[23]

24. Tax Law § 1020(a) has been amended to provide that all references to the Internal Revenue Code include amendments through July 22, 1998. This change is effective immediately.[24]

25. Internal Revenue Code § 2652(b)(1) contained in § 1025 of the Tax Law has been amended to delete the sentence providing that the term "trust" shall not include any trust during any period the trust is treated as part of an estate under § 646. This change is effective for estates of decedents dying after August 5, 1997.[25]

26. Internal Revenue Code § 2654(b) contained in § 1025 of the Tax Law has been amended to provide that a trust shall be treated as part of an estate during any period that the trust is so treated under § 645. This change is effective for estates of decedents dying after August 5, 1997.[26]

27. Section 38 of part A of Chapter 56 of the Laws of 1998, repealing Tax Law § 954-c effective with the repeal of the estate tax, has been repealed. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York State tax returns in accordance with the law in effect prior to the effective date of this section.[27]

28. Tax Law § 976 has been amended by adding a new subsection (e), providing that if any recovery under a cause of action pending at the time of death or relating to the decedent's death is taxable, the commissioner shall waive any penalty and interest associated with such cause of action which accrues from the date that the return disclosing such cause of action is filed, provided that such penalty and interest may not be waived for periods beyond one year after the date of final judgment or settlement of the cause of action. This change is effective immediately.[28]

State Lottery for Education

29. Tax Law § 1613(b), dealing with payments to minors of prizes on any winning ticket of less than $5,000, has been amended to replace references to banks with references to financial institutions. This change is effective immediately.[29]

Banking Law

30. Banking Law § 2(26) has been amended to replace references to the New York Uniform Gifts to Minors Act with references to the New York Uniform Transfers to Minors Act. This change is effective immediately.[30]

31. Banking Law § 100(c)(1) has been amended by adding a reference to any Uniform Transfers to Minors Act and to the New York Uniform Transfers to Minors Act. This change is effective immediately.[31]

32. Banking Law § 100(c)(9)(a)(iii) has been amended to replace references to the Uniform Gifts to Minors Act with references to the Uniform Transfers to Minors Act. This change is effective immediately.[32]

33. Banking Law § 134(9) has been amended to refer to the age 21 election provided in part 6 of Article 7 of the Estates, Powers and Trusts Law. This change is effectively immediately.[33]

34. Banking Law § 202(h)(5) has been amended to add a reference to the age 21 election provided in part 6 of Article 7 of the Estates, Powers and Trusts Law. This change is effective immediately.[34]

Estate, Powers and Trusts Law

Definitions

35. Estates, Powers and Trusts Laws § 1-2.9-a, which defines "infant or minor," has been amended to replace the reference to the New York Uniform Gifts to Minors Act with a reference to the New York Uniform Transfers to Minors Act. This change is effective immediately.[35]

Rules Governing Dispositions

36. Estates, Powers and Trusts Law § 2-1.8 has been amended by repealing existing paragraph d-1 (referring to the effect of general non-apportionment directions in a will on taxes imposed on qualified terminable interest property and on excess retirement accumulations), and replacing it with a new paragraph d-1, providing that taxes allocable to qualified terminable interest property shall be apportioned at the incremental, as opposed to average, rate. This change is effective for decedents dying on or after February 1, 2000 (the date when existing Estates, Powers and Trusts Law § 2-1.12 was repealed).[36]

Charitable Trusts

37. Estates, Powers and Trusts Law § 8-1.4(b) has been amended to provide that non-profit medical and dental indemnity or health and hospital service corporations shall not be subject to the registration and reporting requirements affecting charitable trusts. This change is effective immediately.[37]

Surrogate's Court Procedure Act

General

38. Surrogate's Court Procedure Act § 103(27), which deals with the definition of the term "infant," has been amended to replace the reference to the New York Uniform Gifts to Minors Act with a reference to the New York Uniform Transfers to Minors Act. It has also been amended to make plain that the age 18 limitation is inapplicable to Surrogate's Court Procedure Act § 1716, dealing with applications for ancillary letters to foreign guardians. This change is effective immediately.[38]

General Provisions Relating To Bonds

39. Surrogate's Court Procedure Act § 801(1)(a) has been amended to replace the $10,000 threshold for requiring a bond with the monetary amount (currently $20,000) defined as a small estate pursuant to Surrogate's Court Procedure Act § 1301(1). This change is effective immediately.[39]

Small Estates

40. Surrogate's Court Procedure Act §§ 1304(4) and (5) have been amended to provide that the clerk shall enter small estate proceedings in the records and indices of the court, as opposed to keeping index books; to permit notice to be given by letter as well as by postcard; to delete the 25¢ charge for certificates of authority; to permit the clerk to indicate on the certificate that it is valid only for the transfer or transaction as specified thereon; to amend the list of certificate recipients to include any person holding or having custody, possession or control of any personal property of the decedent which the voluntary administrator seeks to affect the title thereof; and to charge a fee of $1.00 for the filing of the affidavit. [40]

41. Surrogate's Court Procedure Act § 1306(1), dealing with the powers of voluntary administrators, has been amended to amend the monetary limitation to be the amount (currently $20,000) defined as a small estate pursuant to Surrogate's Court Procedure Act § 1301(1) and to make this section gender neutral. This change is effective immediately.[41]

Probate Proceedings

42. Surrogate's Court Procedure Act § 1404 has been amended by adding two new subdivisions 5 and 6, providing that unless the Court directs otherwise for good cause shown, the estate shall pay the costs of attesting witness examinations conducted before objections are filed in the case of the first two attesting witnesses within the state who are competent and able to testify and who are produced by the proponents, or if no witnesses are within the state who are competent and able to testify, the witness without the state who resides closest to the county in which the probate proceeding is pending and who is competent and able to testify, as well as the cost of the stenographer and of one copy of the transcripts of such examinations for the court and for any guardians ad litem. The costs of all other examinations conducted prior to filing objections, including subsequent examinations of the foregoing witnesses, the costs of all examinations conducted after objections are filed, and all costs of document discovery in connection with all such examinations, shall be governed by Article 31 of the Civil Practice Law and Rules. In addition, unless the Court directs otherwise for good cause shown, if more than one person shall have been involved in the preparation of the will, the term "person who prepared the will" shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator. This change is effective immediately.[42]

Costs, Allowances and Commissions

43. Surrogate's Court Procedure Act § 2302 has been amended to provide that in a contested probate proceeding, costs payable out of the estate may be awarded to a person named as executor in a prior will on file in the Court that is not admitted to probate when such person participates in the proceeding in good faith. It has also been amended to make it gender neutral. This change is effective immediately.[43]

Business Law

Limited Liability Companies

44. Business Law § 606 has been amended to eliminate the ability of a member to withdraw with the vote or written consent of at least two-thirds in interest of the members, or in the absence of such consent, upon not less than six months' prior written notice. This change is effective immediately, provided that a limited liability company whose original article of organization was effective prior to August 31, 1999 shall continue to be governed by prior law.[44]

Endnotes

1. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
2. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
3. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
4. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
5. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
6. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.

7. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
8. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
9. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
10. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
11. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
12. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
13. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
14. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
15. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
16. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
17. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
18. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
19. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
20. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
21. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
22. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
23. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
24. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
25. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
26. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
27. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
28. Chapter 232 of the Laws of 1999, S1463, A4636-A, signed July 13, 1999.
29. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
30. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
31. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
32. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
33. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
34. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
35. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
36. Chapter 380 of the Laws of 1999, S5062, A7989, signed July 27, 1999.
37. Chapter 424 of the Laws of 1999, S2733-A, A4662-A, signed August 31, 1999.
38. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
39. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.
40. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.
41. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.
42. Chapter 460 of the Laws of 1999, S3401, A7159, signed September 7, 1999.
43. Chapter 460 of the Laws of 1999, S3401, A7159, signed September 7, 1999.
44. Chapter 420 of the Laws of 1999, S1640, A2844, signed August 31, 1999.

Joshua S. Rubenstein is a partner at Rosenman & Colin, where he is Chair of the Firm, Chair of the Firm's Trusts and Estates Department and Chair of the Firm's Private Client Services Group. Mr. Rubeinstein is Chair of the Trusts and Estates Law Section of the New York State Bar Association.

©Joshua S. Rubenstein

Ten Plagues of Estate Planning

By Robert L. Moshman

Avoiding 10 Classic Mistakes of Estate Planning

Will an estate plan work? Despite the best laid plans and all the experience in the world, life has a way of unfolding in a manner that appears designed to illuminate the chink in our armor. The recurrence of certain "unforeseen" problems should warrant an upgrade in their status to "foreseeable," and yet some estates will undoubtedly find themselves in the very same predicaments. Let's examine 10 situations that continue to plague estates.

1. Let My Assets Go

In the book of *Exodus*, Moses demanded that Pharaoh release the Israelites. Egypt then experienced 10 persuasive afflictions commencing with rivers that turned to blood. The river, source of life, turned sour.

Similar symbolism may be seen in a *damnosa hereditas*, a large and productive estate that, instead of nurturing heirs, turns out to be financially ruinous to every supposed "beneficiary" whom it purports to enrich.

A devise of environmentally contaminated property is an example that promptly comes to mind. The cost of remediating its problems is greater than the property's value and even then you can't sell it or even give it away. Other properties may, likewise, be so encumbered by intractable difficulties that one is better off not owning them in the first place.

The Deathbed Gift: A more subtle example of a nurturing estate gone bad has its roots in the commonplace procrastination and last-minute decision-making that, through innate human nature, will always play a role in estate planning.

Unfortunately, the very circumstances of such end-of-life transfers raise a number of separate problems. Testamentary capacity is an obvious inquiry where the testator's health is deteriorating. The circumstances of an infirm individual who is dependent upon an heir may lend themselves to an allegation of undue influence as well. In addition, certain transfers within three years of death, such as a transfer of life insurance, are not completed transfers under § 2035(d)(2). Aside from these potential issues, an estate plan must address the impact of capital gains on the beneficiaries that will follow from any lifetime transfers.

The Kiss of Debt: Mrs. B. owned a New England summer camp and planned to leave it to her three children. One of the children had plans for developing the camp into single-family homes and wanted to form a partnership of Mrs. B and the three siblings. These plans had been discussed, but had not been finalized. Upon learning that his mother was near death, the ambitious son took the partnership papers to the hospital. Mrs. B signed them before lapsing into a coma. As a result, three-fourths of the camp was transferred with its cost basis instead of a stepped-up basis.

The estate valued the camp at $860,000, double the purchase price of half of the property. The IRS valued the property at $4.6 million, based on the retail value of individual lots. In retrospect, the heirs might have argued that the value of the property was offset by development costs or reduced by minority interests. A judge valued the property at $2.7 million. Disclaimers might have undone the harm of the gift as well.

Start with an ill-advised transfer that forfeited the stepped-up basis, overlook the available post-mortem tools of valuation and disclaimers, allow tax penalties and interest to start gaining momentum, and the end result was the destruction of a family. The heirs in this actual case now face $12 million of tax liens and have incurred $1 million of legal expenses over eight separate legal actions and 13 years of battle with the IRS. They can't accumulate assets lest they be seized. The financial and legal problems have broken up marriages and ruined lives, and the case remains unresolved even now.[1]

2. GST Exempt? Hands Off!

We can only guess how ancient Egyptians dealt with a surplus of frogs. For purposes of our analogy, the second of the 10 plagues may be associated with the tactic of leap-frogging generations in transferring estates.

In regard to generation-skipping transfer (GST) trusts, there are many potential mistakes that need to be avoided. Practitioners are certainly aware of the GST tax under Chapter 13, §§ 2601 *et seq.*, as well as the exemption which, for 2000, now stands at $1.03

million. A more subtle problem arises when a transfer is made to a preexisting trust which is tax exempt in either of two ways.

First, a trust to which all or a portion of an individual's GST exclusion has been allocated and which has a zero inclusion ratio, i.e., is completely covered by the exemption, should not be increased beyond the limits of the exemption because of the burdensome tax and tax accounting that will result. Second, and perhaps more significant, is the need to preserve the exempt status of GST trusts which were in existence and irrevocable on September 25, 1985, and are therefore grandfathered. Adding property to the trust may negate the exempt status proportionately.[2]

3. Marriage, Ethics, and Estate Practice

Lice are small and might be ignored. Alas, before long, lice multiply. For the third plague, then, perhaps a comparison may be drawn with an ethical shadow of doubt that, being initially hard to identify, can sneak up on practitioners and become overwhelming. O.K., that's a stretch. Nevertheless, it needn't distract one from considering the all-too-typical dilemma of representing both husband and wife.

Obviously, if one spouse has children from a previous marriage or each spouse has objectives that may conflict with the other's, a professional's prudent, but rarely followed course of action may mean representing one spouse or the other or neither. Consider the unintended consequences of representing both spouses.

The Dirty Deed: Erskine Esquire represents both Giles and Mumsy, a perfectly ordinary couple who have been married for 25 seemingly contented years. Erskine inquires as to prior marriages and other children, but there are none. The interests and objectives of Giles and Mumsy overlap entirely. Everything is copacetic.

No sooner has an estate plan been designed and executed, than Giles takes Erskine aside to reveal that he has been discreetly carrying on a "liaison dangereux" with a courtesan named Ginger who, coincidentally, is in her eighth month of pregnancy. "Be a good fellow there, Erskine," said Giles, forcing a nervous smile, "and don't breathe a word to Mumsy."

Erskine now has a dilemma. Is he ethically required to reveal to Mumsy, his client, the unpleasant but significant news about the likelihood of a paternity suit even though to do so will necessarily breach the confidence of his other client, Giles? Answer: Yes.[3]

With such a cautionary tale in mind, the pragmatic practitioner may want to 1) speak in private to each spouse to ask about indiscretions in the cupboards, 2) advise clients in writing about the potential for an ethical conflict stemming from the representation of spouses and indicating the right to a separate attorney that each might prefer, 3) decline to represent the spouse of a client with whom there is a long-standing relationship.

4. Feuding Family Syndrome

Finding an estate-planning analogy to the fourth plague of flies was not easy, but we somehow arrived at feuding families. Siblings have been known to fight over every penny of their respective shares of an estate. Perceived inequities, differing levels of participation in a family business, and distribution of the family home or personal property are all potential flash points that can derail the administration of an estate and provoke vengeful litigation that exceeds the value of an estate in expenses.

Naming one heir as an executor and having that news come as a surprise to that heir's grieving siblings may be ill advised. On the other hand, naming siblings as co-executors in an attempt to be fair may be even more counterproductive. Siblings who have had conflicts during the testator's lifetime are not likely to mend their differences by making joint decisions about money. A professional fiduciary is preferable.[4]

5. The Recapture Surprise

The fifth plague, murrain (cattle disease) may be associated with farms, which in turn are subject to an insidious tax pitfall that can result years after an estate has availed itself of special-use valuation for farmland under IRC § 2032A. To qualify for special-use valuation, the operation of the farm must remain in family hands.

If the farm is sold or transferred to non-family members within 10 years of the decedent's death, a recapture tax can take its toll on an inheritance faster than a dormant *fusarium oxysporum lycopersici* fungus can regenerate from the soil, years after being vanquished, to wilt tomato plants once more.[5]

6. A Stitch In Time

One might be at a total loss on an estate-planning pitfall corresponding with the sixth plague of boils were it not for the homonym of *U.S. v. Boyle.* Upholding prior case precedents, the Supreme Court held that good-faith reliance on an attorney's advice

was not a reasonable cause for filing an untimely estate tax return.

A simple fiduciary act like filing a tax return on time wouldn't seem to merit inclusion on a list of major plagues. Yet tax penalties and interest for late filing can add up significantly. Consider the recent case of *Estate of Sowell v. U.S.* In that case, the estate owed about $2.33 million in estate tax but had about $1 million in liquid assets. The estate filed Form 4768 for a five-year extension but did not appeal the denial of that extension. Nor did the estate demonstrate a reasonable cause for the delay under § 6651. As a result, an additional $448,585 of penalties and interest were owed.[6]

7. The Excessive Nonmarital Trust

The basic two-trust arrangement for spouses calls for a marital trust and a nonmarital credit shelter trust. Although the nonmarital trust is generally designed to remain outside of the surviving spouse's estate, it is not necessary to build a complete firewall between the nonmarital trust and the surviving spouse.

For example, a trustee's discretion to sprinkle income to various heirs, including the surviving spouse, would not preclude the use of the nonmarital trust. Additional funds may be allocated from the nonmarital trust to the surviving spouse by providing the spouse with certain invasion power if there is an ascertainable standard for doing so under § 2040(b)(1)(A). A surviving spouse may also have a limited power of appointment without disqualifying the nonmarital trust.

However, the desire to provide as much financial support to a surviving spouse as possible may, in some cases lead to undesirable tax results. A number of estate plans inevitably go too far and inadvertently create a general power of appointment in the assets by making the spouse a trustee with unbridled powers, thereby disqualifying the entire credit shelter.[7]

8. Consumed Alive

How ironic that a cautious individual who, during life, assiduously avoided luxuries and hunted for bargains so as to amass an estate, could leave an estate plan that allows those assets to be so swiftly dissipated that they fail to have a meaningful purpose. Like the eighth plague of locusts, laying waste to the countryside, creditors and heirs alike can descend upon an estate and consume it, aided in part by the "bargain" of a "free" executor who waives fees but makes mistakes.

Forced conservation of assets begins with professional trust and estate administration to control the unlimited use of funds by heirs. Long-term trust arrangements can ensure that funds are set aside for specific purposes—piano lessons, a car upon graduation, tuition for college, etc. Trusts can also be very useful in shielding assets from the creditors that beneficiaries may be exposed to.[8]

9. A Blind Spot

For the ninth plague of darkness, we may take note of a classic blind spot that testators have about their beneficiary designations. People tend to assume that a divorce will change beneficiary designations on insurance policies as a matter of law, much as a divorce affects wills in many jurisdictions. However, insurance policies are separately created contracts that establish their own rules for changing beneficiaries.

Example: Within a year of being married, an individual developed multiple sclerosis, which soon rendered him blind. After five years, the individual separated from his wife and was cared for by his father for the final seven years of his life. At his death, his will left all his property, including insurance benefits, to his father. Yet, applying state law (New York), the will's general testamentary statement was insufficient to affect a specific insurance policy's designated beneficiary. The method prescribed by the insurance contract must be followed in order to effect a change of beneficiary.

Two reasons were given for this unexpected result. First, it is important that insurance companies have a definitive means of ascertaining beneficiaries so as to promptly pay them. Uncertainties about language in wills raise the potential for additional claimants turning up and double liability for the insurer. Second, the law precludes speculation about the insured's intent.[9]

10. A Back-up Plan

Death of all first born was the final plague because it is the ultimate tragedy to every family. It is difficult enough for testators to confront their own mortality by establishing estate plans, but to plan for a predeceased child is to contemplate the unimaginable. Nevertheless, we make assumptions about longevity that are not always accurate. The estate plan that does not allow for contingent beneficiaries is simply incomplete.[10]

Endnotes

1. Johnston, *A Gift or an Estate?* The New York Times, BU-16 (Oct. 31, 1999).
2. Egyptians might have been felled by poisonous varieties of frog or by salmonella which a 1996 study found in 12 of 25 samples of frog legs from Bangladesh. Or, perhaps Egyptians became divided into violent factions favoring frog legs served with green onions and water chestnuts vinaigrette as opposed to burgundy and garlic sauce with fettuccini. On adding property to grandfathered trusts, see Reg. § 26.2601-1(b)(1)(i), Prop. Regs. §§ 26.2601-1(b)(4)(i)(A) through (D), and Letter Rulings 9308007, 9508025, and 199917022. For background, see, Moshman, *Avoiding a GST Asteroid*, *Property & Probate*, p. 24 (Sept., 1999), which appeared in alternate form in *The Estate Analyst* (Aug., 1998). For excellent analysis see, Eisen, *Planning to minimize generation-skipping tax: tools and traps*, 27 EP 2, p. 73 (Feb., 2000).
3. In a recent New Jersey Supreme Court case, *A. v. B. v. Hill Wallack,* A-86 (1999), it was held that the firm's duty of disclosure to one spouse outweighed its duty of confidentiality to the other. Hence, Mumsy must be told, even if that disclosure results in the decapitation of Giles.
4. With deepest apologies, the fourth plague of flies was free associated with "The Flies" by Jean-Paul Sartre from which we got to the theme of man's hostility to his fellow man and, hence, to family feuds. See, *The Art and Science of Planning for Siblings*, The Estate Analyst (April, 1997).
5. A recapture tax also applies to the family-owned business deduction under § 2057(c)(2)(A)(ii)—this was redesignated from § 2033A.
6. *U.S. v. Boyle,* 469 U.S. 241 (1985); *Estate of Sowell v. U.S.*, Court of Appeals, 5th Cir., No. 98-11066 (1999). The time demands of an executor's own business were rejected as an excuse in *Reinhold,* 7 TCM 697 and *Bevan*, TC Memo. 1989-256. A flurry of excuses—executor's youth and inexperience, complexity of assets, valuation problems, multiple wills, illiquidity, etc.—were rejected in *DePaoli*, 66 TCM 1493, TC Memo. 1993-557. However, there are exceptional circumstances that meet the test. In *Buring v. Comm'r,* TCM 1985-610 (1985), reasonable cause was established where there was an affirmative act consisting of an erroneous statement of the filing deadline by the estate's accountant. In *Brown v. U.S.,* U.S. Dist. Ct. Tenn. (1985), the attorney handling the estate tax return was hospitalized shortly before it was due and the elderly executor lacked the business prudence to take the proper actions.
7. An admittedly tenuous connection: The seventh plague, a hailstorm, is reminiscent of brimstone destroying Sodom and Gomorrah in Genesis due to sinful excesses, which leads to excessive spousal power over a nonmarital trust.
8. *Asset Protection for Estate-planning Clientele*, The Estate Analyst (Aug., 1995).
9. *McCarthy v. Aetna Life Ins. Co.*, 92 N.Y.2d 436 (1998).
10. Thank you for indulging these many plague analogies.

Bob Moshman publishes newsletters, practices law, and serves on the Town Council in West Milford, New Jersey. He can be contacted at bmoshman@compuserve.com.

New York Estate Tax Changes

By Magdalen Gaynor

1. For estates where date of death is on or after February 1, 2000, tax waivers are no longer necessary in order to transfer bank, brokerage or insurance assets of the decedent. For those estates where the date of death is before February 1, 2000, waivers are still required.
2. The payment of 90% of estate tax which was due seven months after date of death is no longer required for estates of persons who die on or after February 1, 2000. The due date of tax payment is nine months after date of death. Interest on under payments is computed from that date. The late payment penalty is one-half percent of the unpaid amount for each month or part of the month it is not paid beginning with the due date of payment. The maximum penalty is 25%. The penalty may be waived if an explanation showing reasonable cause is attached to the return.
3. New York has released its form ET-706. The two-page document has been reproduced for your information.

For office use only

New York State Department of Taxation and Finance

New York State Estate Tax Return

ET-706 (4/99)

For estates of decedents whose date of death is on or after February 1, 2000

Check here if this is an amended return ☐

Decedent's last name	First	Middle initial	Social security number
Address of decedent at time of death *(number and street)*			Date of death; Check box if copy of death certificate is attached *(see inst.)* ☐
City, village or post office	State	ZIP code	County of residence

On the date of death, decedent was a: ☐ Resident of New York State ☐ Nonresident of New York State *(attach completed Form ET-141, Estate Tax Domicile Affidavit)*

Executor – If you are submitting Letters Testamentary or Letters of Administration with this form, indicate in this box the type of letters. Enter ***L*** if regular, ***LL*** if limited letters. If you are not submitting letters with this form, enter ***N***. ☐

Attorney's or authorized representative's last name / First / MI / Check box if POA is attached ☐	Executor's last name / First / Middle initial
In care of *(firm's name)*	If more than one executor, check box and see *Instructions* ☐
Address of attorney or authorized representative	Address of executor
City, village or post office / State / ZIP code	City, village or post office / State / ZIP code
Social security number of attorney or authorized rep. / Telephone number ( )	Social security number of executor / Telephone number ( )

If the decedent possessed a cause of action or was a plaintiff in any litigation at the time of death, check this box and complete *Schedule 3* on the back *(see instructions).* ☐

Installment payments of tax for closely held business.
Do you elect to pay the tax in installments as described in IRC section 6166 (NY Tax Law section 997)? If *Yes*, attach Form ET-415 in duplicate. ☐ Yes ☐ No

Releases of lien are requested
Attach Form(s) ET-117 *(see instructions)* *(Enter number of counties)* ☐

Federal estate tax return required.
If *Yes*, attach a completed copy. ☐ Yes ☐ No

Federal gross estate tax from line 10 of Form 706 ☐ Federal taxable estate from line 3 of Form 706 ☐

Tax Computation

1	Federal credit for state death taxes *(from line 15 of federal Form 706 or line 9, Part II, of Form 706-NA)*	1
2	Estate tax or inheritance tax payable to another state(s), allowable as a federal credit *(if none, skip lines 3, 4, 5, 6, and 12 through 19, enter zero on line 7, and enter the amount from line 1 on line 8)*	2
3	**Residents:** enter amount from line 14 **Nonresidents:** enter amount from line 19	3
4	Federal gross estate from line 1 of federal Form 706 or line 1, Sch. B, pg. 2 of Form 706-NA	4
5	Divide line 3 by line 4 *(carry the decimal to four places).* The result should not be greater than 1.0	5
6	Multiply the amount on line 1 by the decimal on line 5	6
7	Limitation - enter the **smaller** of line 2 or line 6, if any; otherwise, enter zero	7
8	New York State estate tax *(subtract the amount on line 7, if any, from the amount on line 1)*	8
9	Prior tax payments, if any *(attach a schedule of dates and amounts)*	9
10	If line 9 is less than line 8, subtract line 9 from line 8. This is the **amount you owe**	10
11	If line 9 is greater than line 8, subtract line 8 from line 9. This is the amount to be **refunded to you**	11

If an attorney or authorized representative is listed above, he or she must complete the following declaration:

I declare that I am *(check one or more):* ☐ an attorney; ☐ a certified public accountant; ☐ an enrolled agent; or ☐ a public accountant enrolled with the New York State Education Department; and agree to represent the executor for the estate, and I am authorized to receive tax information regarding this estate.

Signature of authorized representative — Date

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge. Furthermore, I/we, as executor(s) for this estate, authorize the person, if any, named as my/our representative on the front of this return to receive confidential tax information regarding this estate.

Signature of executor	Date	Signature of co-executor	Date
Signature of preparer other than executor			Date
Address of preparer	City	State	ZIP code

Mail your return and payment (if any) to: NYS Estate Tax, Processing Center, PO Box 5556, New York NY 10087-5556

Schedule 1 - Resident

List below each item of real and tangible personal property **located outside New York State.** Include the item number, the schedule of federal Form 706 on which it was reported, and the reported value of the property.

Item number	Description	Value	

12 Total value of property listed above	**12**		
13 Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)*	**13**		
14 Subtract line 13 from line 12; enter the result here and on line 3, page 1	**14**		

Schedule 2 - Nonresident

15 Federal gross estate from line 4, page 1	**15**		

List below each item of real and tangible personal property **located in New York State.** Include the item number, the schedule of federal Form 706 or 706-NA on which it was reported, and the value reported.

Item number	Description	Value	

16 Total value of property listed above	**16**		
17 Property subject to a limited power of appointment created before September 1, 1930, includable in the New York gross estate under section 957 of the Tax Law, if any *(see instructions)*	**17**		
18 Add lines 16 and 17	**18**		
19 Subtract line 18 from line 15, enter the result here and on line 3, page 1	**19**		

Schedule 3 - Description of litigation or cause of action

In the area provided, describe any litigation in which the decedent was a plaintiff, or litigation that is pending or contemplated on behalf of the decedent. Include the actual or estimated values of such litigation *(see instructions)*.

This return must be filed within nine months after the date of death unless an extension of time to file the return has been granted.

If you use **any** private delivery service, address your return to: The Chase Manhattan Bank, NYS Government Tax Processing, 12 Corporate Woods Blvd-4th Floor, Albany NY 12211-2524.

Refer to the separate instructions for additional information.

Reminders: Sign this return. If there is an amount due on line 10, make check payable to the ***Commissioner of Taxation and Finance.*** Also, if you must file a federal estate tax return, attach a copy of your completed federal return along with any accompanying schedules and supplementary information.

Questions and Answers Column

By Kathleen M. Franklin and David J. Arcella

Question: Does the divorce of an insured and his or her spouse, subsequent to the creation of an irrevocable insurance trust created for the benefit of such former spouse, have any effect upon the dispositive provisions of such trust for the benefit of such former spouse, absent any provisions of the trust agreement?

Answer: The short answer is NO. Termination of the marriage does not automatically revoke gifts to a former spouse pursuant to an inter vivos trust or other non-testamentary inheritance created prior to the divorce. Section 5-1.4 of the EPTL, by its terms, applies only to wills. This statute provides that the termination of the marriage automatically revokes any disposition or appointment of property made by a will to a former spouse (as well as any provision in the will naming the former spouse as executor or trustee) unless the will expressly provides otherwise. It is therefore prudent to specifically discuss with your client what he would like to happen in the event of a subsequent divorce, and specifically address his or her intent in the provisions of the trust agreement. Some practitioners specifically provide in the trust agreement that the former spouse will be treated as having predeceased the grantor in the event of a divorce or other termination of the grantor's marriage to that spouse.

Question: Can a fiduciary execute a power of attorney?

Answer: The powers of a fiduciary are enumerated in EPTL § 11-1.1, which among other things permits an executor or a trustee to hire a bank or trust company as custodian for stocks and other securities. A fiduciary can hire accountants and attorneys, as well as delegate investment or management functions under EPTL § 11-2.3 (The Prudent Investor Act [PIA]). The term "management" is not defined in the statute and not explained in the memoranda in support of the PIA legislation in any context other than investment management. The practice of delegation before PIA was not widespread except within the framework of expressly provided language in a trust instrument. In the absence of such language, a fiduciary delegated investment responsibility at his or her peril and paid for it out of his or her own pocket.

The purpose of the PIA is to allow a fiduciary to take advantage of the superior investment skills of a delegee, compensate the delegee, and hopefully improve the investment experience of the portfolio to the advantage of the estate entrusted to the fiduciary. But this, as in the case of the accountant, the attorney, the appraiser, managing agent, or custodian is in the nature of an employment contract to provide services to the fiduciary. Neither the PIA nor other powers enumerated in EPTL § 11-1.1 were intended to give the fiduciary the right to empower an individual as an agent to compromise the rights of the estate entrusted to the fiduciary.

The powers embraced in a general, or for that matter limited, power of attorney (apart from ministerial acts) endow the attorney-in-fact with the right to receive, transfer or convey good and marketable title to an asset on behalf of his or her principal. The third party doing business with an attorney-in-fact must satisfy himself that the attorney-in-fact is authorized to convey title. Nothing in the law permits an executor or trustee to empower an agent to convey good and marketable title on behalf of the estate, unless such a power is expressly provided for in the governing instrument. The fiduciary of a testamentary estate has been generally nominated by the testator and appointed by the Surro-

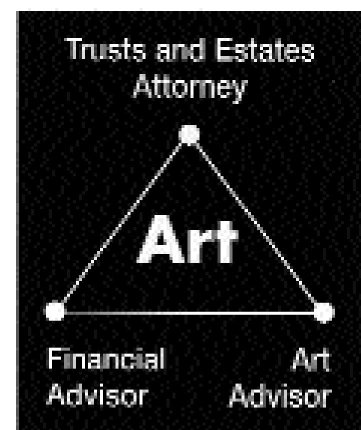
gate. The Surrogate has appointed the fiduciary and no one else, as the personal representative of the decedent. The Surrogate has not authorized the fiduciary to grant the power to transfer legal ownership of an estate asset to an agent.

Interestingly, the IRS accepts the fiduciary's appointment of an attorney-in-fact to represent the fiduciary. See IRS Form 2848 "Power of Attorney and Declaration of Representative." But the universe of permissible representatives is strictly limited to those eligible to practice before the IRS and the purpose of the power is to authorize the representative to perform such acts as signing consents, extending the time to assess tax, or to execute waivers. Once again, this kind of "power of attorney" is more in the nature of an engagement of the attorney-in-fact by the fiduciary to perform limited services, and a recognition on the part of the IRS of such engagement. It is not an assumption of the right to collect and take possession of assets, or transfer title or ownership to property.

NOTE that this question has generated much interest and raised other issues. An article will appear in the next issue of the *Newsletter* that will discuss the subject in more depth as well as examine the broader issue of the limits of delegation.

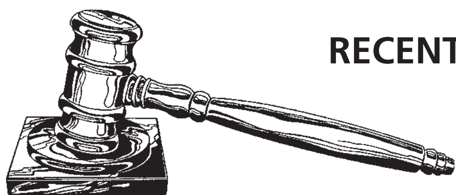
Problems with Trusts and Estates That Include Works of Art?

Laurence C. Zale Associates, Inc. is well qualified to solve existing or potential client problems. We identify recipient museums for those who wish to donate works of art, and offer independent client services that include advice on art values and market conditions, while maximizing tax benefits. We also assist in the buying and selling of works of art.



340 East 80th Street, #18H, New York, NY 10021
212-772-2673 ● Fax 212-772-6538 ● LCZale@aol.com

(Paid Advertisement)



CASE NOTES— RECENT NEW YORK STATE SURROGATE'S AND SUPREME COURT DECISIONS

Arlene Harris and Donald S. Klein

ABANDONMENT

After a short marriage and during the course of the divorce action, the wife died in a car accident. After trial, and despite the divorce action in which the wife did not claim abandonment, the Court found that the husband had abandoned his wife and that there had been no reconciliation. The Court received in evidence proof of the decedent's state of mind as to abuse upon her to show that the decedent did not consent to the separation and that her mindset was that she would go back to him if he would let her. The Court held that fault goes to the element of abandonment concerning whether the separation by the surviving husband was unjustified. The Court found that the estate established that the husband abandoned the wife as he voluntarily chose to live apart from his wife and infant child, evicting them from the marital home without the wife's consent, without justification and with a hardened and obstinate refusal on his part to return to the marital relationship. The Court also found constructive abandonment on the basis of an unjustified refusal of sexual obligations and a "lock-out" from the marital house. *In re Reisman*, N.Y.L.J. February 8, 2000, p. 31, col. 3 (Nassau Co. Surr. Radigan).

ACCOUNTING

The Court found that the objectant failed to establish by a fair preponderance of the evidence that the fiduciary's conduct necessitated the denial of commissions, which denial is within the discretion of the Court where a fiduciary is derelict in the performance of her duties, exhibits bad faith, gross negligence and wanton disregard for the rights of those persons interested in the estate. The Court further stated that a fiduciary may be surcharged for poorly administering the assets of the estate, including the late payment of federal and state estate taxes, in the amount of interest and penalties assessed against the estate, but a fiduciary may avoid being surcharged for the amount of such interest and penalties by showing that the delay was not caused by her own misconduct. The Court found that the fiduciary established her burden by a fair preponderance of the credible evidence that the failure to timely pay the estate taxes was due to the estate's insolvency prior to the sale of the decedent's residence. *In re Winifred Henry*, N.Y.L.J. January 13, 2000, p. 34, col. 4 (Suffolk Co. Surr. Prudenti).

CONSTRUCTION

The Court was asked to construe the effect that an *in terrorem* clause has on the interest of the named children as income beneficiaries of a trust if a child should proceed as an objectant. The Court noted that it is well settled law that "a will must be admitted to probate before a court may construe it. . . ." However, the Court pointed out that 1404 hearings are exempt from the *in terrorem* clause and that a construction proceeding does not breach the *in terrorem* clause. Accordingly, the Court denied the application to construe the *in terrorem* clause. *In re Shear*, 700 N.Y.S.2d 369 (Allegany Co. Surr. Euken).

CONSTRUCTIVE TRUST

The Court found that petitioners' allegations constitute all elements required to support a cause of action based on constructive trust: a confidential relationship, a promise made in the context of the relationship, a transfer of property in reliance or the promise and unjust enrichment. Decedent and his friend (petitioners' uncle) made wills leaving their estates to each other and the remainder equally to each other's nieces and nephews. The friend predeceased the decedent and left his entire estate by will to the decedent. Thereafter, the decedent made a new will which did not provide for his friend's nieces and nephews who thereafter petitioned the Court. The Court found that the petitioners could not sue in contract for failure for make provisions for them in view of the statute of frauds requirements of EPTL § 13-2.1. Yet, the Court recognized that for more than a century New York courts have allowed the remedy of constructive trust in appropriate cases despite the failure of a cause of action in contract where the promise in question lacked the requisite writing to satisfy the statute of frauds. The Court found that decedent had the right to change his will, but "what he could not do was accept the benefits of the alleged mutual promise and then renege on his promise to provide for petitioners." The Court, however, limited its restraining order to only those assets passing from

the friend's estate. *In re Melvin Blake*, N.Y.L.J. March 7, 2000, p. 27, col. 3 (N.Y. Co. Surr. Preminger).

GUARDIANSHIP—WITHDRAWALS

The Court stated that the Court's ultimate responsibility is to preserve the infant's funds and to deliver the funds intact upon the infant reaching majority. The Court stated further that it has discretionary power to authorize the withdrawal of an infant's funds where the purpose of the withdrawal is to provide necessities required by the infant or for the infant's education. The Court denied the application to withdraw funds for the purchase of furniture, television sets, VCRs, bicycles and $600 a month for living expenses. *In re Stephen and Anthony Murray, infants*, N.Y.L.J. February 15, 2000, p. 23, col. 1 (Kings Co. Surr. Feinberg).

INTEREST

The Court found that interest may be imposed on the amounts surcharged against a suspended executrix to fully compensate the beneficiaries for losses they have sustained. The Court held that the objectant may compute interest at 9% per annum on each disallowed expenditure from the date it was made or in the alternative impose interest at 9% per annum on the total surcharge commencing with the close of the accounting on August 31, 1997 to the approximate date of the decree together with a per diem interest charge thereafter at 9% per annum until payment. *In re Joseph J. Shebar*, N.Y.L.J. February 3, 2000, p. 35, col. 5 (Nassau Co. Surr. Radigan).

MURDER—DISQUALIFICATION

In proceeding for damages, the estate of child moved to disqualify parents as distributees. Mother who had pled guilty to two counts of assault in the second degree of her child and who had contributed significantly to child's ultimate death as a result of parental abuse, was disqualified as a distributee of the child's estate. The Court referred to the disqualification provisions of EPTL 4-1.4 and 5-4.4. In addition, the Court referred to the failure or refusal to provide for said child under the Family Court Act. *Mark G. by Jones v. Sabol*, 694 N.Y.S.2d 290 (N.Y. Co. Sup Ct. Justice Schoenfeld).

POWER OF ATTORNEY

The Court granted summary judgment to plaintiff, finding that the defendant had breached a fiduciary duty to plaintiff in connection with the use of a power of attorney. Plaintiff, an 83-year-old widow, brought the action to have declared void various security transfers and purported gifts made by the defendant, her niece, through the use of a power of attorney. The Court found that the power of attorney was defective and deficient for the intended uses as execution of any gift or transaction in excess of $10,000 is beyond the statutory scope of the document as attempted to be employed by the defendant. The Court declared the power void *ab initio*. *Lucan v. Honahan*, N.Y.L.J. February 28, 2000, p. 28, col. 6 (Bronx Co. Sup. Ct. Justice Esposita).

PROBATE—VACATUR OF WAIVER

About a year after signing a waiver and consent to probate, the decedent's son petitioned to vacate the decree admitting the will to probate, alleging the waiver was procured by fraud. The second husband who received the whole estate urged the son to sign the waiver. Within days of signing, the son asked the husband to withdraw the document and the husband said it would be "taken care of." The Court found that the delay in the son's petitioning to vacate the waiver was not unreasonable and vacated the waiver and decree, as the husband could not show absence of fraud and overreaching. The Court found a close, confidential relationship between the father (an attorney and the nominated executor) and the son (who the father had adopted). The Court, relying on *In re Greiff* (92 N.Y.2d 341), stated that it would review the evidence in light of the fact that it was the father's burden of proof to show absence of fraud. The Court also said that even if the burden was the son's, he would have sustained that burden by clear and convincing proof of fraud and overreaching. *In re Margaret Beth Davis*, N.Y.L.J. January 11, 2000, p. 25, col. 3 (Nassau Co. Surr. Radigan).

REAL PROPERTY

In an estate accounting, the issue presented was whether the estate had responsibility for a mortgage on the marital residence. Before he married, the decedent opened a line of credit with a bank, secured by a mortgage on his home. After the marriage, he conveyed his interest in the house to his wife and himself as tenants by the entirety. On death, $26,000 was owed to the bank, which made a claim against the estate. The Court agreed with the executor that the liability ran with the land and was the responsibility of the surviving spouse. *In re Griffith*, N.Y.L.J. January 19, 2000, p. 31, col. 6 (Nassau Co. Surr. Radigan).

REVOCATION OF LETTERS

The surviving spouse sought to revoke successor letters testamentary and trusteeship issued to Marine Midland Bank. The Court stated that it has final discretion with respect to the revocation or suspension of a fiduciary's letters. The Court stated further that

a Trustee will generally not be removed unless it appears that his acts or omissions endanger the trust fund, or evince a lack of honesty, reasonable fidelity or proper capacity to administer its affairs. The Court refused to revoke the letters, finding that there was no showing that the bank lacked understanding of its function as a fiduciary or breached its duties, nor has there been any showing of prejudice or injury to the economic interests of the beneficiaries. *In re Arnold Gunther*, N.Y.L.J. February 28, 2000, p. 37, col. 3 (Westchester Co. Surr. Emanuelli).

SPECIFIC BEQUEST

The Court analyzed when it may authorize the Executor to sell specifically devised real estate. The Court stated that the law is clear that the Court can order specifically devised real estate to be sold to pay administrative expenses (commissions and legal fees). In the matter, all assets were specifically bequeathed or devised and the trust for the decedent's mother specifically authorized the executor to sell real property to fund the bequest. As to another bequest, the Court found no language specifically authorizing the sale of specific property within the paragraph establishing the bequest. The Court noted the powers clause which contained a general authority to sell, but stated that the cases do not find that a general power of sale is sufficient to authorize the sale of specifically devised property. The Court reserved the matter for the accounting proceeding. *In re Edith Edwards*, N.Y.L.J. February 18, 2000, p. 33, col. 5 (Kings Co. Surr. Feinberg).

SUPPLEMENTAL NEEDS TRUST

Parents and brother of alleged incapacitated person are not precluded from being co-trustees and successor trustees of Supplemental Needs Trust even though they were contingent remainderpersons. *In re Pace*, 699 N.Y.S.2d 257 (Suffolk Co. Sup. Ct. Justice Leis).

TRUSTS—REFORMATION

The Court granted an application to reform an *inter vivos* trust to qualify it for treatment as a qualified domestic trust ("QDOT") with the consent of all interested persons. The Court also granted the part of the application seeking the appointment of a domestic corporate trustee to serve in conjunction with the non-resident individual co-trustees. The Court found that the proposed corporate trustee had a long relationship with the family and that there is no appropriate individual to serve as a U.S. trustee. The Court also noted the benefit of the appointment of a U.S. domestic corporation of obviating the security requirements under the treasury regulations, thus sparing the trust significant costs. *In re Howard J. Gould* N.Y.L.J. January 31, 2000, p. 29, col. 3 (N.Y. Co. Surr. Preminger).

TRUSTS—TERMINATION

In an accounting proceeding, the Court permitted the termination of a trust the principal of which would be under $25,000 after the payment of legal fees, commissions, a surety bond and other administration expenses. The Court permitted the payment of the remaining principal to the income beneficiary in accordance with the testator's intent to benefit her over the remaindermen and all the remaindermen having consented. The Court stated that there is precedent for permitting the assets of a trust to be distributed outright where continued administration is economically impractical. *In re Benjamin Nedlin* N.Y.L.J. January 11, 2000, p. 31, col. 1 (Bronx Co. Surr. Holzman).

WILL—DUE EXECUTION

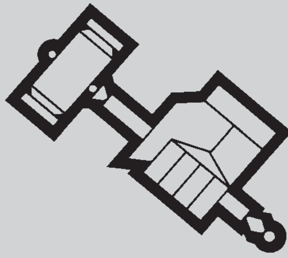
The will was prepared on a preprinted commercial form. The attestation clause contained the typed names of three witnesses, but lacked their signatures. On the back of the form is a "self proving affidavit" signed by the three witnesses. The Court found that the signatures of the witnesses and the testator appear at the end of the propounded instrument below all dispositive provisions. The Court found the will to have been duly executed. *In re Kenneth W.P. Cheng*, N.Y.L.J. January 31, 2000, p. 29, col. 6 (N.Y. Co. Surr. Preminger).

VOLUNTARY ADMINISTRATION

The Court found that a voluntary administrator had no power to assert a claim on the decedent's behalf alleging discrimination against the decedent under the Americans with Disabilities Act. The Court stated that such claim can be asserted by a "personal representative" on behalf of a decedent who is a "person who has received letters to administer the estate of a decedent." "A voluntary administrator by statute shall have no power to enforce a claim for the wrongful death or a claim for personal injuries to the decedent." SPCA § 1306. The claims were thus dismissed without prejudice to refile if plaintiff becomes the decedent's personal representative. *Squires v. Lephrology Foundation of Brooklyn Inc.*, N.Y.L.J. January 18, 2000, p. 40, col. 3 (EDNY J. Nickerson).

Arlene Harris—Counsel, Kaye, Scholer, Fierman, Hays & Handler, LLP, New York City.

Donald S. Klein—Donald S. Klein, P.C., White Plains, New York.



RECENT NEW YORK STATE DECISIONS

John C. Welsh

WILLS

UNDUE INFLUENCE

In a contested probate proceeding, the Surrogate granted summary judgment to the proponent and dismissed the objections based upon lack of capacity and undue influence. The Appellate Division reversed and found that the record contained sufficient circumstantial evidence of undue influence to warrant a trial. It appeared that the proponent, decedent's widow, had not disclosed her marriage to decedent's children. She was instrumental in the execution of the proffered will one month before testator died and only three days after their wedding. She had motive, opportunity and the will may have been based upon her improper acts. *In re Pennino*, ____ A.D.2d ____, 698 N.Y.S.2d 265 (2d Dep't 1999).

PROBATE—WITHDRAWAL OF WAIVER AND CONSENT

Decedent's will left his entire estate to his sister and named her executrix. After signing a waiver and consent to probate, decedent's daughter sought to withdraw the waiver and challenge the will as a forgery. The Appellate Division reversed the Surrogate who had found against the daughter. This court found that issues of fact with respect to procurement of the waiver had been raised as well as issues concerning the potential invalidity of the will. One witness stated in her deposition that she had signed as a witness after the death of the testator. A handwriting expert had filed an affidavit setting forth his opinion that testator's signature had been forged. *In re Sisko*, ____ A.D.2d ____, 704 N.Y.S.2d 114 (2d Dep't 2000).

CONSTRUCTION—ANTI-LAPSE PROVISION

Testatrix left her residuary estate to four named children in equal shares, "or all to the survivor should only one of them survive me." Three children survived testatrix and the deceased child left children who asserted a claim to a share of the estate under EPTL 3-3.3. The Appellate Division affirmed the Surrogate's conclusion that testatrix intended to avoid application of the anti-lapse statute by making a gift to the children who would be living at her death. The three surviving children took in equal shares. Testatrix could not have intended that the grandchildren should take the share of a deceased child when two or three of the child's siblings survived but not if there was only one survivor. *In re Souter*, ____ A.D.2d ____, 701 N.Y.S.2d 546 (4th Dep't 1999).

CONSTRUCTION—STOCKS OR BONDS

Testator's will left "all stocks and/or bonds which shall be owned by me at the time of my death" in trust to pay the income for the education of his cousin's grandchildren with principal to be distributed to family members when the youngest grandchild reached the age of 30. The residuary gift benefited five charities, the ancestors of the income beneficiaries and other cousins. At his death, decedent owned shares of stock valued at $171,400 and interests in brokerage accounts valued at $324,516. The Surrogate found that the brokerage accounts were not included in the gift in trust and fell into the residuary estate. On appeal, the Appellate Division concluded that the wording was ambiguous and that the parties should be given an opportunity to introduce parol evidence to show testator's intent. As written, the will does not show a dominant plan to benefit a particular class of beneficiaries. The brokerage accounts were comprised of assets not held directly by decedent and not within the usual meaning of "stocks and/or bonds." No detailed explanation of the composition of the brokerage accounts was provided. At least one account was in existence when the will was made. *In re McCabe*, ____ A.D.2d ____, 703 N.Y.S.2d 559 (3d Dep't 2000).

CONSTRUCTION—TAX APPORTIONMENT CLAUSE

Testatrix's will provided that all estate, inheritance and succession taxes were to be charged against the residuary estate which was divided into three equal parts. A charitable beneficiary of a one-third share sought to have the two charitable shares exempted from contribution so as to impose the entire estate tax on the third share which was divided among three relatives. The Appellate Division agreed with the Surrogate that all shares of the residuary estate were obligated to contribute to payment of the taxes. In addition to stating the source of funds, the will explic-

itly directed that there was to be no proration or apportionment of applicable taxes. The basic statutory apportionment plan of EPTL 2-1.8 was thereby eliminated. *In re Beebe*, ____ A.D.2d ____, 702 N.Y.S.2d 683 (3d Dep't 2000).

CONSTRUCTION—FORFEITURE PROVISION

Decedent's will directed that certain periodic payments to a named beneficiary terminate if the beneficiary, after decedent's death, involved himself in any of the estate's businesses or began litigation adverse to such interests. Despite the admonition, the beneficiary petitioned to have one of the businesses dissolved or, alternatively, that his interest in the business be bought out. The Appellate Division agreed that the forfeiture provision was not against public policy and that it was proper to end the periodic payments. The beneficiary consciously elected to exercise his rights as a minority stockholder in preference to the testamentary benefits. *Koeppel v. Koeppel*, ____ A.D.2d ____, 701 N.Y.S.2d 382 (1st Dep't 2000).

CONSTRUCTION—*IN TERROREM* CLAUSE

Decedent's son sought a construction of decedent's will not yet admitted to probate which contained an *in terrorem* clause. The Surrogate followed the usual rule and declined to entertain the proceeding prior to probate, citing SCPA 1420(3) in support of this result. The son would receive a larger share of the estate if an earlier will were probated. In addition, he was concerned about the effect any objections filed by him would have on his children's interests as income beneficiaries of a trust established under the propounded will. The son unsuccessfully argued that a failure to construe the will before probate placed an unreasonably high risk of loss of benefits on himself and his children. *In re Shear*, 182 Misc. 2d 684, 700 N.Y.S.2d 369 (Sur. Ct., Allegany Co. 1999).

CONSTRUCTION OF DEVISE

Decedent's will, in a single article, devised all of his interest in a two-family house to his daughter, C, and thereafter gave the right of use to his daughter, M. Upon the death of M, the premises was to be sold with the proceeds to be equally divided into one share for C and one share for M's two children. In a prior proceeding, the court found that the provision was ambiguous and directed that a referee hear extrinsic evidence. In that hearing, the attorney-draftsman testified that decedent intended a division of the proceeds of sale between C and M's children. The first sentence that purported to give C a fee simple was part of a model will in the attorney's computer that should have been deleted but, through inadvertence, was not. Decedent's former wife, with whom he continued to live, testified that C was intended to take the fee simple and take care of M and her children. C's husband, the named executor, testified that C was intended to be the owner subject to M's right to live on the premises because of her illness. The court reviewed the conflicting testimony and found that of the attorney-draftsman to be more credible. The children of M were found to have an undivided one-half interest in remainder. *In re Florio*, 182 Misc. 2d 385, 697 N.Y.S.2d 908 (Sur. Ct., Kings Co. 1999).

PROBATE—UNDUE INFLUENCE

The will of testatrix gave a legacy of $250,000 to an area hospital which was also named as the residuary beneficiary. The attorney-draftsman also served as chairman of the board of directors of that hospital and was a member of the law firm ordinarily representing it. Testatrix's son and granddaughter sought to invalidate those gifts on the grounds of fraud and undue influence. The son and his mother had been estranged for a long period. He was not mentioned in the last ten wills executed by his mother and was specifically disinherited in the last five of these. However, the amount to be received by the hospital increased in each succeeding will executed contemporaneously with the drafter's chairmanship of the hospital board. The court was unwilling to apply the Putnam presumption of undue influence to these legacies. Issues of fact involving the relationship of decedent with the drafter and the CEO of the hospital concerning hospital matters and disclosures relating to a proposed inter vivos gift that was never completed precluded summary judgment for the estate. *In re Edel*, 182 Misc. 2d 878, 700 N.Y.S.2d 664 (Sur. Ct., Cattaraugus Co. 1999).

INTESTATE SUCCESSION

STATUTORY EXCLUSION OF FIRST COUSINS ONCE REMOVED

Upon decedent's death intestate, he was survived by three paternal first cousins and twenty paternal first cousins once removed. Under EPTL 4-1.1(a)(6), a person who dies intestate survived by first cousins as the closest relatives has the estate distributed to those first cousins as grandchildren of grandparents. This subsection expressly excludes from taking any issue of grandparents who are more remote than grandchildren. Great-grandchildren of grandparents are allowed to take only when decedent leaves no first cousins or anyone with a closer relationship. The Surrogate correctly found that the first cousins once removed lacked standing to object to the administrator's final account. A dissenting judge in the Appellate Division treated the statutory benefits given to the issue of grandparents "by representation" as intending a distribution to two generations. Thus, the great-grandchildren would be included with the grandchildren under (a)(6). *In re Shumavon*, 260 A.D.2d 140, 701 N.Y.S.2d 84 (2d Dep't 1999).

ADMINISTRATION OF ESTATES

LEGAL FEES

The attorney for the executor and sole beneficiary of decedent's estate sought to recover the balance of allegedly reasonable legal fees for the settlement of an uncontested estate. Upon completion of one-half of the work, the attorney presented a bill for $10,000 which was paid, apparently without question. When a second bill in the amount of $9,740 was presented upon completion of the work, the executor refused to pay. The attorney asserted that the aggregate agreed fee was calculated at 5% of the gross estate, the customary fee charged in that county. Upon the review of a sparse record, the Surrogate fixed the total legal fee at $3,000 plus $210 in disbursements and ordered return to the estate of $6,790. The Appellate Division found that there was no abuse of discretion by the Surrogate, who was not bound by any agreement that may have existed between the parties. The affidavits attesting to the hours of service did not include a breakdown of time spent by each of the two participating attorneys nor a time allocation for each service performed. *In re Middagh*, ____ A.D.2d ____, 699 N.Y.S.2d 506 (3d Dep't 1999).

RECOVERY OF ABANDONED PROPERTY BY ESTATE

Upon the death of decedent intestate with no known distributees, the Public Administrator was appointed personal representative of the estate. Thereafter, the Public Administrator learned that shares of decedent's stock were being held by the State Comptroller in the abandoned property account. When the stock was demanded on behalf of the estate, the Comptroller refused to process the request because the possibility of an escheat still existed. The final accounting of the Public Administrator listed the Comptroller as a debtor of the estate and the court awarded summary judgment directing that the stock be delivered to the estate. The Appellate Division agreed that the Public Administrator was merely trying to carry out the obligation to take possession of all estate property. Failure to do so might frustrate the conduct of a diligent kinship investigation which was a necessary effort to identify the proper beneficiaries of the estate. *In re Gahan*, ____ A.D.2d ____, 703 N.Y.S.2d 51 (2d Dep't 2000).

SPOUSAL BENEFITS UNDER STIMULATION OF SETTLEMENT

In a suit by the executor of decedent's estate against decedent's surviving spouse to recover the proceeds of an IRA, the Appellate Division affirmed the lower court's decision in favor of the estate. A stipulation of settlement of the wife's threat to file objections to probate provided that the spouse would receive $235,000 in addition to life insurance proceeds and jointly held property taken through survivorship. Unknown to the executor, the spouse had also received $215,855 from the IRA prior to execution of the settlement. The stipulation and the spouse's receipt stated that the amounts set forth, with the IRA omitted, represented the agreed amount of the spouse's interest. Had the IRA been disclosed, it would have been included in the base of decedent's estate for calculation of the spousal elective share. As a testamentary substitute passing to the spouse, it would reduce the additional amount to which she was entitled. It was proper to enforce the stipulation according to its terms. *Briggs v. Hemstreet-Briggs*, ____ A.D.2d ____, 701 N.Y.S.2d 178 (3d Dep't 2000).

ACCOUNTING—STANDING TO OBJECT

Decedent's will was admitted to probate and proceeded through the process of administration without objection until the executor sought a judicial settlement of his final accounts. Decedent's disinherited son argued that one-half of the residuary estate passed through intestacy because the trust designated as beneficiary did not exist. The Appellate Division affirmed the Surrogate's decision that the son had no standing to object. If the trust did not exist, the remaining charitable residuary beneficiary would take the share designated for the trust. Under no circumstances would the son share in the estate. *In re Vaughn*, ____ A.D.2d ____, 700 N.Y.S.2d 271 (3d Dep't 1999).

ACCOUNTING—ESTATE ASSETS

The sons of decedent conceded on appeal that decedent was neither incompetent nor subject to undue influence when he transferred his interest in his wholly owned company to the executrix. A separation agreement entered into between decedent and his former wife (mother of objectants) required decedent to make an irrevocable will naming his sons as beneficiaries. An inter vivos gift of the corporate interest was not precluded. *In re Schott*, ____ A.D.2d ____, 704 N.Y.S.2d 47 (1st Dep't 2000).

ACCOUNTING BY ATTORNEY-IN-FACT

In an accounting proceeding, the son of decedent, a nonparty, appealed from an order directing him to account for the periods of time he served as decedent's attorney-in-fact and as administrator c.t.a. of decedent's estate. The Appellate Division agreed that the Surrogate, on his own motion, had authority to require a fiduciary to file an accounting when it was deemed to be in the best interests of the estate. Evidence showed that the son had a substantial influence over decedent which was exacerbated by the creation of the durable power of attorney. *In re Morrison*, ____ A.D.2d ____, 703 N.Y.S.2d 190 (2d Dep't 2000).

DISQUALIFICATION OF DISTRIBUTEE

Decedent died intestate leaving eight nephews and nieces as his distributees. One of the nephews had been convicted of second-degree murder in connection with the death of his aunt and of first-degree manslaughter in connection with the death of his father. Both decedents were siblings who predeceased this intestate by six years. Had the father of the assailant survived the intestate, the father and not the assailant would have been one of the intestate's distributees. The Surrogate determined the assailant became a beneficiary of the intestate's estate through the wrongful act of manslaughter and that conviction disqualified him from sharing in this estate. A failure to disqualify would allow the assailant to profit through his own wrong. No cases are cited where a conviction for homicide in one death resulted in the forfeiture of a share in the estate of one to whom no wrong was perpetrated. *In re Macaro*, 182 Misc. 2d 625, 699 N.Y.S.2d 634 (Sur. Ct., Westchester Co. 1999).

OBLIGATION OF ESTATE TO PAY MORTGAGE LIEN

H secured a credit line mortgage on his residence and thereafter conveyed it to himself and his new wife as tenants by the entirety. At H's death survived by W, a balance of $26,000 was owed on the credit line. In a controversy over whether the debt was a personal obligation to be paid by the estate or an encumbrance on realty passing to the spouse without exoneration, the Surrogate found that the estate had only secondary liability. The bank failed in its argument that the mortgage prevented H from creating a tenancy by the entirety so as to leave H and W as tenants in common. Under federal law, the transfer of an interest in mortgaged premises to a spouse does not activate a due-on-sale provision. If W had taken the premises through intestacy or as a devisee, she would have received an encumbered gift. A similar result should occur when the taking is through survivorship. Although W has no personal liability because she never assumed the debt in writing, the equities were with the estate because at the time H conveyed to himself and W, W executed the usual transfer tax affidavit reciting the existence of the credit line mortgage which was not used until after their marriage. The value of the house far exceeded the amount of the mortgage debt. *In re Griffith*, ____ Misc. 2d ____, 702 N.Y.S.2d 789 (Sur. Ct., Nassau Co. 2000).

TRUSTS

REIMBURSEMENT FOR IMPROPER MEDICAID PAYMENTS

Decedent, a resident of a nursing home for her last six and one-half years, was originally admitted as a private-pay patient. At that time, decedent was the income beneficiary of a self-settled irrevocable trust which gave the trustee discretion to apply all or any part of the principal to her support, care and maintenance. After the Department of Social Services denied an application for Medicaid benefits in May 1991, a second application filed four months later found decedent to be eligible. A copy of the trust agreement was filed with each application. The parties agree that the terms of the trust disqualified the decedent from benefits and that the finding of eligibility was improper. The Court of Appeals reversed the Appellate Division and reinstated the finding of the trial court that the Department was entitled to recover from the trustee the payments made in error. By statute, the Department was required to recover all overpayments, including payments made to ineligible persons. Although the ability of the Department to recover medical assistance amounts "correctly paid" was severely limited, funds disbursed in error without statutory authority are not "correctly paid" even though the applicant made a full and truthful disclosure. *Oxenhorn v. Fleet Trust Co.*, 94 N.Y.2d 110, 722 N.E.2d 492, 700 N.Y.S.2d 413 (1999).

MEDICAID REIMBURSEMENT FROM SELF-SETTLED TRUST

H created an inter vivos trust which empowered his trustees (two children) to make such distributions to him, from income or principal, as they deemed necessary to continue his existing standard of living. The grantor retained a power to change beneficiaries but excluded any authority to name himself, his wife, or their creditors. Three years later, H applied for Medicaid home care assistance for his wife and executed a statement of refusal to provide for her. Apparently, some aid was provided. Three years after the first application, a new application for nursing home care for his wife was submitted by H. At this time, the existence of the trust was disclosed to the Department of Social Services but the application denied that H was a beneficiary. Nursing home benefits were paid for three years until the death of the wife. It was undisputed that H possessed sufficient assets to pay the entire expense of $131,774 provided by Medicaid. Case law indicated that all of the assets held in a self-settled trust subject to discretion in the trustees to pay the same to or for the benefit of the settlor may be treated by creditors as assets of the settlor. Since there was a statutory implied contract that H would pay for services to his wife, the Department had the right to bring an action for reimbursement. Under Social Services Law § 104, the right of recovery embraces the latest ten-year period. All of the benefits were provided within that time and reimbursement of the entire amount was properly within the statute of limitations. There was no proof that the creation of the trust produced an insolvency that was in fraud of creditors. Since the Department might have known of the trust

when benefit payments were begun and continued to pay thereafter by mistake, no interest was awarded. *Case v. Fargnoli*, ____ A.D.2d ____, 702 N.Y.S.2d 764 (Sup. Ct., Tompkins Co. 1999).

SUPPLEMENTAL NEEDS TRUST—CONFLICT OF INTEREST

In a prior proceeding, the parents of an adult brain-damaged son were appointed co-guardians of his person and property and authorized to create a supplemental needs trust with the proceeds of a structured settlement made with court approval more than ten years earlier. Here, the court authorized the appointment of the parents as co-trustees of the trust with another son named as successor trustee. Their status as potential distributees of the incapacitated son did not automatically disqualify them from acting as trustees. Under the terms of the trust, any principal and income not paid to the injured son or used as reimbursement for care provided at state expense would be paid to the administrator of the son's estate and pass through intestacy. Obligations imposed upon the trustees by Social Services Law § 366(2) and related regulations are sufficient safeguards against potential loss to the funding agency motivated by the trustees' conflict of interest. The court analogized the relationship as similar to the approved appointment of family members as guardians of disabled persons even though they have the potential to inherit as distributees upon the death of their ward. *In re Pace*, 182 Misc. 2d 618, 699 N.Y.S.2d 257 (Sup. Ct., Suffolk Co. 1999).

REFUSAL TO CREATE SUPPLEMENTAL NEEDS TRUST

The sister and guardian of an incapacitated person sought to create a supplemental needs trust which would be funded solely by Social Security disability income payments. By this trust, the incapacitated person would be sheltered from making his monthly payments for care of $293 which were necessary to qualify for Medicaid benefits. The Surrogate declined to authorize creation of the trust since the disability payments were intended to help provide the recipient with the necessities of life and not as a vehicle to obtain additional governmental assistance. *In re Lynch*, ____ Misc. 2d ____, 703 N.Y.S.2d 653 (Sur. Ct., Onondaga Co. 1999).

MISCELLANEOUS

AUTHORIZATION OF GUARDIAN TO MAKE GIFTS

Petitioner, one of three guardians of the property of an incapacitated person appointed pursuant to Art. 81 of the Mental Hygiene Law, was authorized by court order to make four $10,000 charitable gifts for the estate of the ward. The sole beneficiary under the ward's will sought to vacate the order based upon failure of the petitioner to give him notice of the hearing which deprived him of the opportunity to appear and contest the gifts. By statute, any beneficiary of the ward's estate whose share would be diminished is entitled to notice of any hearing involving a proposed transfer of assets of the incapacitated person. The Appellate Division found that the required notice had not been given and the matter was remanded for further consideration. *In re Burns*, ____ A.D.2d ____, 699 N.Y.S.2d 242 (3d Dep't 1999).

BREACH OF DUTY BY ATTORNEY-IN-FACT

The son of an incapacitated person used a power of attorney executed by his mother prior to her mental deterioration to convey a parcel of her real property to himself and his wife without consideration. About five months later, the incapacitated person died leaving a will bequeathing her entire estate to her two sons, equally. Thereafter, the grantees conveyed the premises to their daughter. Plaintiff sought to have both deeds invalidated so as to restore the realty to the residuary estate where he would succeed to a one-half share. The obligation of the attorney-in-fact to act in the best interests of his principal creates a presumption of impropriety when the transaction made by the agent accrues to his personal benefit. This presumption may be rebutted only by a clear showing that the principal intended to make a gift. The attorney-in-fact was unsuccessful in showing that the transfer was made for consideration, the son's promise to care for his mother for life. *Mantella v. Mantella*, ____ A.D.2d ____, 701 N.Y.S.2d 715 (3d Dep't 2000).

JOINT BANK ACCOUNTS—EXCESS WITHDRAWALS

Decedent and K were named as owners of eight bank accounts, jointly with the right of survivorship. Prior to her death, decedent withdrew more than one-half of three accounts and K withdrew more than one-half from others. Neither party consented to the excess withdrawals by the other. As a result, the estate of decedent and the surviving depositor have claims against each other for the withdrawals in excess of that depositor's share. The joint tenancy does not continue to exist in withdrawn funds. *In re Mullen*, ____ A.D.2d ____, 702 N.Y.S.2d 35 (1st Dep't 2000).

ATTORNEY'S FEES—MISCONDUCT OF CONSERVATOR

In a prior proceeding, the conservator of the personal needs of a conservatee was removed from office for false statements made under oath that she was the wife of the conservatee. In this proceeding, her attorney was unsuccessful in obtaining legal fees from the estate of the incapacitated person for defending the conservator in the removal proceeding and for services rendered in the reconstruction of financial records that were the basis for the conservator's intermediate and final account. Where a fiduciary is removed for misconduct, legal fees incurred in defending the removal

are the obligation of the fiduciary. Similarly, the organization of the financial records was caused by the failure of the conservator to keep precise records and document all transactions as she was required to do. In addition, the court concluded that no legal fees were due for the defense of the conservator in an action brought by the conservatee's children to annul the marriage of the conservator to the conservatee. These services were rendered to the conservator in her individual capacity and formed the basis of her personal obligation. *In re Brown*, 182 Misc. 2d 172, 697 N.Y.S.2d 838 (Sup. Ct., Queens Co. 1999).

John C. Welsh is a professor at Albany Law School, Union University, Albany, N.Y.

Life is full of uncertainty. Your plan for long-term care shouldn't be.

Long-Term Care Insurance is coverage you can count on if you can no longer take care of yourself.

Considering the average annual cost for long-term care is about $38,000,* being prepared for the unexpected is a smart idea.

John Hancock's Long-Term Care Insurance Policy helps you with future needs by:

- Paying for skilled care in your home or nursing home
- Covering you in case of Alzheimer's Disease

Long-Term Care Insurance lets you maintain your independence — without using up your savings.

*NAIC, 1996

INSURANCE FOR THE UNEXPECTED.
INVESTMENTS FOR THE OPPORTUNITIES.SM

BRUCE L. BIRNBAUM,
J.D., LL.M
1900 Hempstead Turnpike
Suite 206
East Meadow, N.Y. 11554

LTC-96 LTC-AD2 11/96

CALL NOW FOR MORE INFORMATION **516-794-9696**

John Hancock Life Insurance Company, Boston, MA 02117

(Paid Advertisement)

©1999 Neuberger Berman, LLC

NEUBERGER BERMAN TRUST COMPANY
BECAUSE A TRUST AND A GOOD INVESTMENT
SHOULD NOT BE MUTUALLY EXCLUSIVE.

If your clients have $2 million or more in investable assets, they should look into our customized fiduciary services. We combine the skills of our Trust Company professionals with the investment expertise of our money managers. What's more, we're sensitive to the emotional issues that arise when developing and administering trust and estate plans.

Please contact Elizabeth Mathieu, Esq. 212.476.9103 or Diane E. Lederman, Esq. 212.476.5411
Neuberger Berman Trust Companies

NEUBERGER BERMAN

(Paid Advertisement)

Section Committees & Chairs

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

Committee on Charitable Organizations
Beth D. Tractenberg (Chair)
1114 Avenue of the Americas
New York, NY 10036

Committee on Continuing Legal Education
Richard P. Wallace (Chair)
279 River Street
P.O. Box 1530
Troy, NY 12181

Stephen B. Hand (Vice-Chair)
300 Garden City Plaza
Garden City, NY 11530

Committee on Elderly and Disabled
Warren H. Heilbronner (Chair)
2400 Chase Square
Rochester, NY 14604

A. Robert Giordano (Vice-Chair)
235 Mamaroneck Avenue, Suite 205
White Plains, NY 10605

Michael F. Teitler (Vice-Chair)
1114 Avenue of the Americas, 45th Floor
New York, NY 10036

Committee on Estate Litigation
Colleen F. Carew (Chair)
350 Broadway, Suite 515
New York, NY 10013

Karin Johnson Barkhorn (Vice-Chair)
250 Park Avenue
New York, NY 10177

Gary E. Bashian (Vice-Chair)
235 Main Street, 6th Floor
White Plains, NY 10601

Gary B. Friedman (Vice-Chair)
600 Third Avenue
New York, NY 10016

Charles F. Gibbs (Vice-Chair)
30 Rockefeller Plaza
New York, NY 10112

Marilyn Ordover (Vice-Chair)
19 Grace Court
Apt. 6A
Brooklyn, NY 11201

Committee on Estate Planning
Denise P. Cambs (Chair)
One Lincoln Center, Suite 275
Syracuse, NY 13202

Susan Taxin Baer (Vice-Chair)
140 Grand Street, Suite 503
White Plains, NY 10601

Louis W. Pierro (Vice-Chair)
21 Everett Road Extension
Albany, NY 12205

Richard E. Schneyer (Vice-Chair)
The Chrysler Building
405 Lexington Avenue
New York, NY 10174

Committee on Estate and Trust Administration
David J. Arcella (Chair)
1211 Avenue of the Americas, 34th Floor
New York, NY 10036

Ilene S. Cooper (Vice-Chair)
West Tower, 14th Floor
EAB Plaza
Uniondale, NY 11556

Anne Farber (Vice-Chair)
100 Park Avenue
New York, NY 10017

Susan Greenwald (Vice-Chair)
250 Park Avenue
New York, NY 10177

Robert W. Sheehan (Vice-Chair)
101 Park Avenue
New York, NY 10178

Committee on Governmental Relations
Michael K. Feigenbaum (Chair)
170 Old Country Road
Mineola, NY 11501

Thomas J. Collura (Vice-Chair)
111 Washington Avenue
Albany, NY 12210

Thomas E. Dolin (Vice-Chair)
One Commerce Plaza
Albany, NY 12260

Committee on International Estate Planning
Michael W. Galligan (Chair)
200 Park Avenue
New York, NY 10166

Davidson T. Gordon (Vice-Chair)
78 Elmwood Avenue
Rye, NY 10580

Committee on Legislation
Ronald J. Weiss (Chair)
919 Third Avenue, 28th Floor
New York, NY 10022

Richard J. Bowler (Vice-Chair)
10 Bank Street, Suite 650
White Plains, NY 10606

Lenore W. Tucker (Vice-Chair)
233 Broadway, Suite 915
New York, NY 10279

Committee on Life Insurance and Employee Benefits
Kathleen M. Franklin (Chair)
100 State Street, Suite 900
Albany, NY 12207

Robert F. Baldwin, Jr. (Vice-Chair)
100 Clinton Square
126 North Salina Street, Suite 320
Syracuse, NY 13202

David A. Pratt (Vice-Chair)
3 City Square
Albany, NY 12207

Committee on Membership and Relations with Local Bar Associations
Robert W. Johnson, III (Chair)
279 River Street
P.O. Box 1530
Troy, NY 12181

George E. Riedel, Jr. (Vice-Chair)
42 Delaware Avenue, Suite 300
Buffalo, NY 14202

Committee on Newsletter and Publications
Magdalen Gaynor (Chair)
7-11 South Broadway, Suite 208
White Plains, NY 10601

Michael Stephen Markhoff (Vice-Chair)
123 Main Street, 9th Floor
White Plains, NY 10601

Glenn M. Troost (Vice-Chair)
114 West 47th Street
New York, NY 10036

Committee on Practice and Ethics
Carl T. Baker (Chair)
One Broad Street Plaza
P.O. Box 2017
Glens Falls, NY 12801

S. Jeanne Hall (Vice-Chair)
116 West 76th Street
New York, NY 10023

Jerome L. Levine (Vice-Chair)
345 Park Avenue
New York, NY 10154

M. Anne O'Connell (Vice-Chair)
331 Madison Avenue, 3rd Floor
New York, NY 10017

Committee on Surrogates Court
Cathryn M. Doyle (Chair)
Albany County Surrogates Court
County Courthouse
Albany, NY 12207

Donald S. Klein (Vice-Chair)
7-11 South Broadway
White Plains, NY 10601

Stacy L. Pettit (Vice-Chair)
1971 Western Avenue
Albany, NY 12203

Abbe G. Shapiro (Vice-Chair)
30 Rockefeller Plaza, 23rd Floor
New York, NY 10112

Committee on Taxation
Georgiana James Slade (Chair)
1 Chase Manhattan Plaza
New York, NY 10005

Ira M. Bloom (Vice-Chair)
80 New Scotland Avenue
Albany, NY 12208

Committee on Technology
David Goldfarb (Chair)
200 Park Avenue South, 14th Floor
New York, NY 10003

Ad Hoc Committee on Multi-State Practice
William P. Lapiana (Chair)
57 Worth Street
New York, NY 10013

Richard H. Bernstein (Vice-Chair)
9104 East Palm Tree Drive
Scottsdale, AZ 85255

Glenda A. Fowler (Vice-Chair)
3850 Chaneyville Road
Owings, MD 20736

Philip G. Hull (Vice-Chair)
One Battery Park Plaza
New York, NY 10004

Executive Committee District Representatives

First District

G. Warren Whitaker
126 E. 56th Street, 17th Floor
New York, NY 10022
(212) 751-3900

Second District

Marilyn Ordover
19 Grace Court, Apt. 6A
Brooklyn, NY 11201
(718) 780-0254

Third District

Thomas E. Dolin
One Commerce Plaza
Albany, NY 12260
(518) 487-7630

Fourth District

Michael R. Suprunowicz
1430 Balltown Road
Niskayuna, NY 12309
(518) 374-3399

Fifth District

Elizabeth A. Hartnett
4 Clinton Square, Suite 106
Syracuse, NY 13202
(315) 476-0532

Sixth District

Kathryn Grant Madigan
P.O. Box F-1706
Binghamton, NY 13902
(607) 763-9200

Seventh District

Philip L. Burke
2 State Street, Suite 700
Rochester, NY 14614
(716) 987-2850

Eighth District

Victoria L. D'Angelo
5888 Main Street
Wiliamsville, NY 14221
(716) 634-4407

Ninth District

Richard J. Bowler
10 Bank Street, Suite 650
White Plains, NY 10606
(914) 993-0936

Tenth District

John M. Czygier, Jr.
214 Roanoke Avenue
P.O. Box 449
Riverhead, NY 11901
(516) 727-2500

Eleventh District

Madaleine S. Egelfeld
125-10 Queens Boulevard, Suite 311
Jamaica, NY 11415
(718) 544-6363

Twelfth District

Sanford B. Glatzer
1500 Astor Avenue
Bronx, NY 10469
(718) 655-6100

בס"ד

THE LIFETIME CARE FOUNDATION FOR THE JEWISH DISABLED

Who will care for my child with disabilities when I am no longer here?

- GUARDIANSHIP AND ADVOCACY
- CASE MANAGEMENT & SERVICE COORDINATION
- CREATIVE HOUSING SOLUTIONS
- POOLED THIRD PARTY & SELF-SETTLED SUPPLEMENTAL NEEDS TRUSTS
- ELDER CARE

Everyone needs a family. Include us in yours.

4510 16TH AVE. • BROOKLYN, NEW YORK 11204 • 718-686-3275 • 800-603-OHEL

(Paid Advertisement)

NYSBACLE Publications

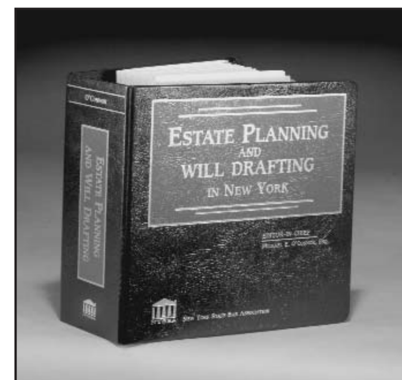
Estate Planning and Will Drafting in New York

NEW RELEASE

Estate planning involves much more than drafting wills. As the introductory chapter of *Estate Planning and Will Drafting in New York* notes, good estate planning requires the technical skills of a tax lawyer; a strong understanding of business, real property and decedent's estate law; and the human touch of a sensitive advisor. This book is designed to provide an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State.

Written by practitioners who specialize in the field, *Estate Planning and Will Drafting in New York* is a comprehensive text that will benefit those who are just entering this growing area. Experienced practitioners may also benefit from the practical guidance offered by their colleagues by using this book as a text of first reference for areas with which they may not be as familiar.

Annual updates to *Estate Planning and Will Drafting* will make this reference a "must buy" for all practitioners.



Editor-in-Chief
Michael E. O'Connor, Esq.
DeLaney & O'Connor, LLP
Syracuse

2000 • 700 pp., loose-leaf • PN: 4095

List Price: $140
(incls. $10.37 tax)

Mmbr. Price: $110
(incls. $8.15 tax)

Contents

1. **Estate Planning Overview**
   James N. Seeley, Esq.
2. **Federal Estate and Gift Taxation**
   William R. Dunlop, Esq.
   Karin J. Barkhorn, Esq.
   Sanford J. Schlesinger, Esq.
3. **The New York Estate and Gift Tax**
   Carl T. Baker, Esq.
4. **Fundamentals of Will Drafting**
   Denise P. Cambs, Esq.
5. **Marital Deduction/Credit Shelter Drafting**
   Mary Beth Ritger, Esq.
6. **Revocable Trusts**
   Howard B. Solomon, Esq.
   David C. Reid, Esq.
7. **Lifetime Gifts and Trusts for Minors**
   Susan Porter, Esq.
   Magdalen Gaynor, Esq.
8. **Qualified Plans and the IRA in the Estate**
   Robert F. Baldwin, Jr., Esq.
9. **Estate Planning with Life Insurance**
   Douglas H. Evans, Esq.
10. **Dealing with Second or Troubled Marriages**
    Willard H. DaSilva, Esq.
11. **Planning for Client Incapacity**
    Louis W. Pierro, Esq.
12. **Long—Term Care Insurance**
    Peter Danziger, Esq.
13. **Practice Development and Ethical Issues**
    Arlene Harris, Esq.
    Jack Evans, Esq.

To order

Call 1-800-582-2452
Source code: cl1115

New York State Bar Association

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted to Magdalen Gaynor, 7-11 South Broadway, Suite 208, White Plains, NY 10601. Authors should submit a 3-1/2" floppy disk (preferably in Microsoft Word or WordPerfect) along with a printed original and biographical information. Please contact Ms. Gaynor regarding further requirements for the submission of articles.

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

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor
Magdalen Gaynor
7-11 South Broadway, Suite 208
White Plains, NY 10601

Recent Decisions Editor
John C. Welsh
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Section Officers

Chair
Joshua S. Rubenstein
575 Madison Avenue, Room 2204
New York, NY 10022

Chair Elect
Stephen M. Newman
1800 M&T Plaza
Buffalo, NY 14203

Secretary
Arlene Harris
425 Park Avenue
New York, NY 10022

Treasurer
Timothy B. Thornton
75 State Street
Albany, NY 12207

This Newsletter is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge. The views expressed in articles in this Newsletter represent only the author's viewpoint and not necessarily the views of the Editor or the Trusts and Estates Law Section.

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

© 2000 by the New York State Bar Association.

ISSN 1530-3896

Trusts and Estates Law Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1096

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