NYSBA SUMMER 2001 | VOL. 34 | 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

Approaching the midpoint of my one year term as Chair, I cannot believe how quickly the year is passing. I also wonder, but am embarrassed to ask my predecessors, if I am the first to experience the feeling that by the time my term ends next January, I will finally have the hang of things!

Congratulations to Bill Lapiana for organizing a very interesting and enlightening program at the Spring Meeting in Buffalo. Our speakers (in addition to Bill): Bill's colleague, Professor Pamela R. Champine; Professor David M. English of the University of Missouri-Columbia School of Law; Arthur M. Sherwood, Esq., of the Phillips, Lytle firm in Buffalo; and Susan Egloff, Esq., (a former partner, and currently the real power behind the throne of our esteemed Surrogate Mattina) were uniformly outstanding. Kudos also to Victoria D'Angelo, our District Representative from the Buffalo area, who organized a wonderful tour of the Darwin Martin House (a prime example of the architectural genius of Frank Lloyd Wright) and an excellent dinner.

On Friday morning of the Spring Meeting, we held our Committee breakfasts. Circulating among the tables looking for more food, I was again reminded of how stimulating and rewarding involvement at the Committee level can be for our members. From the very recent law school graduate to the most experienced practitioner, the Committees provide not only an opportunity to become involved with topical and interesting projects, but also the opportunity to share experiences, problems and ideas with colleagues around the state. Anyone wishing to join a Committee and become involved in its work needs simply to contact the Chairperson or me.

Inside

NYSBA

With summer approaching, we are completing plans for the Fall Meeting. We will be traveling to the splendid Silverado resort in the Napa Valley, where we will gather over the weekend of October 3 (yes, that's a Wednesday—we T&E type start our weekends early!) through 7 to sample the region's outstanding cuisine and wine and to hear what promises to be one of our best programs. A panel of nationally prominent speakers will present a variety of timely topics dealing with current issues in tax and estate planning, recent legislative developments at both the federal and state level, and (in keeping with our locale) issues involving clients who move to and from community property jurisdictions. The Silverado resort offers a variety of amenities (including golf, tennis, and a magnificent spa) as well as a lovely setting in proximity to the outstanding wineries, splendid restaurants and other attractions of the Napa Valley. Please plan to join us for a wonderful educational and social experience.

I would be ashamed of myself if I did not take this opportunity to mention the truly outstanding staff at NYSBA headquarters in Albany, without which our Section could not function. The friendliness, efficiency, and dedication of everyone with whom I have come into contact is truly amazing and is a tribute, no doubt, to retiring Executive Director Bill Carroll. Bill, you will be missed! Thus far I have benefited enormously from the very able assistance of (among others) Kristin O'Brien, Director of Finance; Tony Moscatiello, Controller; Tom Barletta and Barbara McMahon, Governmental Relations; and Pat Wood (Membership) and Theresa Knickerbocker (MIS). Thanks to all, and a very special thanks to Kathy Heider and Kim McHargue of the Meetings Department, to whom we owe enormous gratitude for (among other things) the success of our Spring, Fall, and Annual Meetings.

Finally, remember that by July 1 we must comply with the F.T.C. Privacy Notice Requirements of the Gramm-Leach-Bliley Act, Public Law 106-102. Briefly, the rule published by the Federal Trade Commission applies to law firms which provide their clients with tax planning or tax preparation services and requires that by July 1, 2001, the law firm must provide an initial notice of the firm's Privacy Policy and Practices to any individual that has a "customer relationship." Additional information will be posted on our Web site and can be accessed at www.nysba.org/sections/tande/privacy.htm.

Best wishes to all for an enjoyable summer. See you all in Napa!

Stephen M. Newman

Editor's Message

At the Annual Meeting of the Section in January, a main topic was health care directives. Choosing a health care agent is often as difficult as being one. The Division of Bioethics of the Montefiore Medical Center/Albert Einstein College of Medicine prepared a handbook for persons who act as health care agents. It has been reproduced in this issue. The Division of Bioethics encourages distribution of the materials and I suggest you make copies for your clients.

The Section is putting the final touches on a revised directory of members. It will use the address where you receive this *Newsletter*. This is your last opportunity to make certain the information that is published is up-to-date. E-mail information, fax and telephone numbers will be included, if the Bar has the info.

A postcard has been included with this issue. Please complete and return by August 15, as the directory will be delivered to you in the fall.

This Section has many committees which are listed in the *Newsletter*. The Chairs of these committees are always happy to get new participants. Each committee has its own tasks. For example, the Committee on Elderly and Disabled focuses on issues which particularly affect our elderly population whose needs may change due to advanced age and/or diminished capacity and problems with developmental disabilities. The current projects of the Committee include:

1. Review of Article 81 of the Mental Hygiene Law and to propose changes to address concerns that have arisen since its conception, including clarification of process for turning over assets after the Incapacitated Person's death.
2. Propose legislation in the area of the establishment of self-settled supplemental needs trust with respect to the attachment of Social Services (Medicaid) liens on medical malpractice and other tort awards.
3. Work with proposed legislation to permit end-of-life decisions by guardians for persons with developmental disabilities.

Persons interested in serving on this Committee should contact its Chair, Warren H. Heilbronner, at (716) 232-5300.

Once again, the *Newsletter* has a great variety of topics for your reading pleasure. More information on IRA distributions is included in an article by pension expert Lee Snow. Bob Moshman, a frequent contributor, has again added a light note in his review of the present state of affairs in estate planning.

Photos from the Spring Meeting appear by kindness of Gary Freidman. It was an interesting program, highlighted by the personal tour of two Frank Lloyd Wright homes.

Remember to keep sending those questions to include in the Q&A column. My e-mail address is gaynor333@att.net.

The Section next meets in Napa, California. In addition to a great educational program, there will be golf and tennis events. I hope you enjoy your summer and will look forward to seeing you in California.

Magdalen Gaynor

Congratulations!

Another member of this Section has become a judge of the Surrogate's Court. Governor Pataki's nomination of **John M. Czygier, Jr**. as Suffolk County Surrogate's Court Judge was confirmed. He will serve for the remainder of 2001 and will run in November for full term.

John was a member of the Surrogate's Court Advisory Committee to the Chief Administrative Judge of the Courts of State of New York and recently completed his term as 10th District Representative to this Section.

Revised IRA Distribution Regulations Offer New Planning Opportunities

By Lee A. Snow

On January 11, 2001, the Internal Revenue Service issued revised proposed regulations[1] that made substantial changes to the existing rules concerning the calculation of required minimum distributions from individual retirement accounts (IRAs), qualified retirement plans, deferred compensation plans under Internal Revenue Code § 457 and § 403(b) annuity contracts. The new proposed regulations generally simplify the determination of required minimum distributions, eliminate the requirement to have a designated beneficiary in place by the taxpayer's required beginning date, provide a simple, uniform table that all account owners can utilize in determining their required minimum distributions and eliminate much of the disparity found in the prior rules between calculating post-death required minimum distributions where the account owner died before his required beginning date as opposed to after it.

This article provides an overview of the new required minimum distribution rules as they apply to IRAs and qualified retirement plans, provides several examples of how the rules work and analyzes several planning opportunities now available to account owners and their beneficiaries that may enable them to reduce the amount of their required distributions and, thereby, further defer taxes on their IRAs and qualified retirement plan account balances.

Effective Date

The new regulations are proposed to be effective for distributions beginning on or after January 1, 2002. However, the preamble to the regulations provides that taxpayers may use either the new regulations or the 1987 proposed regulations to determine required minimum distributions for calendar year 2001. Thus, whichever set of regulations results in the smaller required distribution and, hence, the more beneficial tax treatment may generally be utilized during 2001. (In order for participants in qualified retirement plans to be able to utilize the new rules, the sponsors of their plans will have to adopt an amendment to allow the new regulations to be applied for 2001 distributions.) It should be noted that, because the preamble's effective date language uses the word "taxpayers," as opposed to "account owners," "plan participants" or "employees," it appears that the new regulations may be relied upon not only by IRA account owners and qualified retirement plan participants but also by their beneficiaries.

In Announcement 2001-18, IRB 2001-10, 791, the IRS clarified that distributions that are required to be made by April 1, 2001 with respect to account owners who attained age 70½ in 2000 may not be calculated under the new regulations but instead must be determined under the old 1987 regulations. This pronouncement was reiterated in Announcement 2001-23, IRB 2001-10,791, which updated the IRS publications on pension and annuity income and IRAs (Publications 575 and 590) to take into account the new regulations.

Uniform Distribution Period

Under the new regulations, as well as under the 1987 regulations, an individual must begin receiving distributions from his IRA or qualified retirement plan no later than his required beginning date.[2] The required beginning date is generally April 1 of the year following the calendar year in which the account owner attains age 70½. (In the case of qualified retirement plans but not IRAs, the required beginning date is the later of April 1 of the year following the calendar year in which the participant attains age 70½ or April 1 of the year following the calendar year in which the participant retires, unless the participant is a 5% or more owner of the business sponsoring the qualified retirement plan, in which case the April 1st following the age 70½ date applies).

Under the new regulations, the minimum distribution at the required beginning date is determined by reference to the table found in new Prop. Reg. § 1.401(a)(9)-5, Q&A-4. (This table is the same table that was used for the minimum distribution incidental benefits standard found in § 1.401(a)(9)-2 of the old proposed regulations.) This table can be utilized by *all* account owners and plan participants regardless of whether or not they have a designated beneficiary in place at the required beginning date. The sole exception to the use of this table is if the account owner's sole beneficiary is the account owner's spouse and the spouse is more than ten years younger than the account owner.[3] In that case, the account owner is permitted to use the longer distribution period based upon the combined life expectancy of the account owner and his spouse. Under the new table, minimum distributions during the account owner's lifetime can now be determined by reference to just two factors: the account owner's age and the value of the account at the prior year end.

Age of the Employee	Distribution Period
70	26.2
71	25.3
72	24.4
73	23.5
74	22.7
75	21.8
76	20.9
77	20.1
78	19.2
79	18.4
80	17.6
81	16.8
82	16.0
83	15.3
84	14.5
85	13.8
86	13.1
87	12.4
88	11.8
89	11.1
90	10.5
91	9.9
92	9.4
93	8.8
94	8.3
95	7.8
96	7.3
97	6.9
98	6.5
99	6.1
100	5.7
101	5.3
102	5.0
103	4.7
104	4.4
105	4.1
106	3.8
107	3.6
108	3.3
109	3.1
110	2.8
111	2.6
112	2.4
113	2.2
114	2.0
115 and older	1.8

Examples

Michael was born on June 30, 1930, and reached age 70½ on December 30, 2000. Therefore, his required beginning date is April 1, 2001. His IRA is valued at $1 million on December 31, 1999. Michael's wife, Mona, who reached age 68 in 2000, is his beneficiary. Michael's required minimum distribution for 2000, which must be distributed to him no later than his April 1, 2001 required beginning date, must be calculated under the 1987 regulations. His required minimum distribution is $46,512, determined by dividing Michael's $1 million account by the 21.5 year joint life expectancy of Michael and Mona based upon their ages (70 and 68) at their birthdays in 2000, the year Michael reached age 70½, with their joint life expectancy determined under Table VI of Reg. § 1.72-9.

Richard was born on July 2, 1930 and reached age 70½ on January 2, 2001. His required beginning date is therefore April 1, 2002. The value of his IRA on December 31, 2000 is $1 million. Richard's wife, Sharon, who reached age 68 in 2001, is his beneficiary. Richard's required minimum distribution for 2001, which must be distributed to him no later than his April 1, 2002 required beginning date, may be calculated under the new regulations and is $39,526, determined by utilizing the 25.3-year divisor applicable to Richard at his birthday in 2001, the year in which he reached age 70½. (Richard's age at his birthday in 2001 is 71, therefore, his divisor is 25.3).

Curt was born on February 5, 1931 and his wife Mara was born on November 10, 1943. Curt reached age 70½ on August 5, 2001 and his required beginning date is therefore April 1, 2002. The value of his IRA on December 31, 2000 is $1 million. Curt's required minimum distribution for 2001, which must be distributed to him no later than his April 1, 2002 required beginning date is $36,232, determined (even under the new regulations) by dividing $1 million by the 27.6 joint life expectancy factor of a 70-year-old and a 58-year-old taken from Table VI of Reg. § 1.72-9.

Michael reaches age 72 on June 30, 2002. His IRA is valued at $960,000 on December 31, 2001. His minimum distribution for 2002 is $39,344, $960,000 divided by the 24.4 divisor factor for a 72-year-old from the new uniform distribution period table.

Elimination of the Life Expectancy Recalculation/Non-Recalculation Elections

Under the 1987 proposed regulations, an account owner had to have a designated beneficiary in place at his required beginning date in order to be able to minimize his required distributions by taking into account two life expectancies in determining his minimum distributions (subject to the old minimum distribution incidental benefits (MDIB) rule, which treats a nonspouse designated beneficiary more than ten years younger than the account owner as just ten years younger than the account owner, but only during the account owner's lifetime).[4]

In addition, at the required beginning date, the account owner also had to irrevocably elect to recalculate or not recalculate his life expectancy[5] and, if his designated beneficiary was his spouse, he had to also irrevocably elect to recalculate or not recalculate the life expectancy of his spouse.[6] The need to make the recalculation/non-recalculation election and the confusion that often resulted from the application or misapplication of the recalculation rules have now been eliminated by the new regulations.

Selection of and Changing a Designated Beneficiary

Under the 1987 regulations, the period over which distributions were to be made could never be extended once the required beginning date had passed.[7] For example, if the account owner's beneficiary died before the account owner and the account owner subsequently picked a new designated beneficiary who was younger than the deceased beneficiary, the combined life expectancy of the account owner and the deceased beneficiary (subject to the MDIB standard) would continue to be utilized for purposes of determining distributions to the account owner and, even after the account owner's death, to his new beneficiary. If, on the other hand, the account owner picked a new beneficiary who was older than the deceased beneficiary, the distribution period would be shortened to take into account the reduced combined life expectancy of the account owner and the new beneficiary.

Because minimum distributions are now calculated during the account owner's lifetime based upon the new uniform table, which takes into account *only* the account owner's age, the selection of a designated beneficiary or the change of a designated beneficiary will no longer affect the distributions to be made to the account owner during his lifetime.

With respect to post-death minimum distributions, the new regulations provide that the account owner's designated beneficiary is to be determined as of the end of the calendar year following the year of the account owner's death rather than as of the account owner's required beginning date.[8] As a result, any beneficiary eliminated by distribution ("cashing out") of the benefit to the beneficiary or by such beneficiary's disclaiming his benefit during the period between the account owner's death and December 31 of the year following the year of the account owner's death is disregarded for purposes of determining the post-death required minimum distributions to any remaining designated beneficiary(ies).

Examples

Harry designated his son Douglas and his granddaughter Karen as beneficiaries of his IRA. Under the old regulations, Douglas's life expectancy would govern distributions to be made to both Douglas and Karen after Harry's death (due to the rule that if there are two or more designated beneficiaries, the life expectancy of the beneficiary with the shortest expectancy is utilized for *all* beneficiaries, unless separate accounts are created.) However, under the new regulations, if Douglas disclaimed his interest in the IRA prior to December 31 of the year following Harry's death or had his entire interest distributed to him, Douglas's life expectancy would be ignored and the IRA could be distributed to Karen over her life expectancy, as determined in the year following the year of Harry's death.

Phil included a charity as one of a number of beneficiaries of his IRA. Under the old regulations, the fact that the charity as an entity has no life expectancy would result in the IRA's being required to be distributed to *all* of the beneficiaries by December 31st of the calendar year following the year of Phil's death if Phil had elected to recalculate his own life expectancy or over the remaining number of years in Phil's term certain single life expectancy if he had elected to not recalculate his life expectancy. Under the new regulations, if the charity's interest were cashed out prior to December 31st of the year following the year of Phil's death, the fact that the charity had no life expectancy would be ignored in determining the distribution period to be utilized for distributing the IRA to the remaining beneficiaries.

The new proposed regulations also indicate that where an account owner designates multiple beneficiaries of a single account, the account may be divided into separate shares even *after* the account owner's death.[9] Thus, the individual life expectancy of each of the individual beneficiaries can be utilized in determining the minimum distributions to be made to each such beneficiary from such beneficiary's separate account.

Post-Death Minimum Distributions

Death After the Required Beginning Date

Under the 1987 regulations, where an account owner died after his required beginning date, the account had to be distributed at least as rapidly as under the method in effect at the death of the account owner (ignoring, however, the MDIB rules).[10] Thus, post-death distributions had to take into account the life expectancy of the designated beneficiary who was in place at the account owner's required beginning date and the recalculation elections that were made or not made by the account owner at the required beginning date.

The complexity of determining required minimum distributions following the death of the account owner has been greatly eased under the new regulations. Now, where the account owner dies on or after his required beginning date and a designated beneficiary is in place by December 31st of the year following the year of the account owner's death,[11] the life expectancy of the designated beneficiary as determined at his birthday in the year after the death of the account owner will be utilized for purposes of determining the required minimum distributions to be made to such beneficiary.[12]

A significant benefit also provided by the new regulations is that if no designated beneficiary is in place as of the end of the year following the year of the account owner's death, the account may nevertheless be distributed over the remaining number of years in the account owner's life expectancy, as determined at his birthday in the year of death and as reduced by one for each subsequent year.[13]

This rule leads to a similar but slightly more generous result than that provided by the old regulations where an account owner died after his required beginning date and had elected to not recalculate his life expectancy. In that case, even if the account owner did not have a designated beneficiary in place, the account could still be distributed over the number of years remaining in the account owner's single life expectancy. Under the new regulations, when no designated beneficiary is in place and the account owner dies after his required beginning date, his account may be distributed over the remaining number of years in the account owner's life expectancy, as determined at his birthday in the year of death and as reduced by one for each subsequent year.[14] Because life expectancy generally increases the older one gets, this methodology will almost always produce a slightly longer distribution period than that provided in the old regulations.

Example

David was born on January 15, 1926, attained age 70½ on July 15, 1996 and reached his required beginning date on April 1, 1997. David dies in March 2001 at age 75. David designated his estate as beneficiary and the estate remains the beneficiary on December 31st of the year following the year of David's death. Under the old regulations, if David had elected to not recalculate his life expectancy at his required beginning date, the account would have to be distributed over 12 years (determined by reducing David's original 16 year life expectancy at his required beginning date by one for each subsequent year). Under the new regulations, the account could be distributed over 12.5 years (which is equal to David's life expectancy based upon his age, 75, at his birthday in the year of his death). Note that if, under the old regulations, David had elected to recalculate his life expectancy at his required beginning date, the entire account would have had to be distributed no later than December 31, 2002.

Death Before Required Beginning Date

Under the 1987 regulations, if an account owner died before his required beginning date, the account generally had to be distributed no later than December 31st of the calendar year containing the fifth anniversary of the account owner's death.[15] Alternatively, if the account owner had in place a designated beneficiary at his death, the account could be distributed over the life expectancy of the designated beneficiary, provided that minimum distributions began no later than December 31st of the year following the year of the account owner's death.

Under new Prop. Reg. § 1.401(a)(9)-3, Q&A-4, absent a plan provision to the contrary or election of the five-year rule by the beneficiary, the life expectancy rule will apply in all cases in which the account owner dies before his required beginning date, provided that a designated beneficiary is in place by December 31st of the year following the account owner's death. In such case, the account may be distributed over the life expectancy of the designated beneficiary. The beneficiary's life expectancy will be determined in the year following the year of the account owner's death. If, however, no designated beneficiary is in place by such December 31st date, the five-year rule will apply.

In the case of death before the required beginning date, the excise tax penalty for failure to take required minimum distributions may also be waived for the first four years after the year of the account owner's death (unless, for reasons unspecified in the new regulations, the IRS determines otherwise), provided that the entire account is distributed by the end of the fifth year following the year of the account owner's death.[16] Thus, if the account owner had a designated beneficiary in place but due to carelessness or otherwise, the designated beneficiary failed to take a required minimum distribution in any of the first four years following the account owner's death, the penalty for failure to take such distribution may be waived as long as the beneficiary elects to take advantage of the five-year rule by receiving the entire account by the end of the fifth year after the year of the account owner's death.

An interesting anomaly between the death before the required beginning date and death after the required beginning date rules occurs under the new regulations where the account owner fails to have a designated beneficiary in place by the December 31st of the year following his death. In such case, if the account owner dies prior to his required beginning date, the five-year rule must apply, i.e., since there is no designated beneficiary, the entire account must be distributed by December 31st of the fifth year following the year of the account owner's death. If, on the other hand, the account owner dies on or after his required beginning date without a designated beneficiary in place by December 31st of the year following the account owner's death, the account may be distributed over the remaining number of years in the account owner's life expectancy based upon the account owner's age at his birthday in the year of his death and reduced by one for each subsequent year.

Example

Jules and Jim were both born on June 30, 1930, reached their 70½ birthdays on December 30, 2000 and would reach their required beginning dates on April 1, 2001. Both designate their estates as the beneficiaries of their IRAs. Jim dies on April 2, 2001 whereas Jules dies on March 31, 2001. Because Jim died after his required beginning date, his account may be distributed over the next 15.3 years (which is equal to Jim's life expectancy based upon his age, 71, at his birthday in the year of his death). Because, however, Jules died prior to his required beginning date and does not have a designated beneficiary in place by December 31st of the year following his death, the five-year exception to the beneficiary life expectancy rule applies and his entire account must be distributed no later than December 31, 2006.

Trusts as Beneficiaries

The new regulations retain the provisions of the amendments to the proposed regulations made in December 1997[17] that allow the life expectancy of the underlying beneficiary of a trust to be taken into account for purposes of determining required minimum distributions where the following requirements are met:

1. The trust is a valid trust under state law or would be but for the fact there is no corpus.
2. The trust is irrevocable or will under its terms become irrevocable upon the death of the account owner.
3. The beneficiaries of the trust are identifiable from the trust instrument.
4. Certain documentation requirements are met.[18]

The new regulations make explicit that a testamentary trust will qualify for the trust as beneficiary (i.e., look-through) treatment.[19] The new regulations also substantially modify the documentation rules. Under the new regulations,[20] a certified list of the beneficiaries of the trust (including the contingent and remainderman beneficiaries with a description of the conditions upon their entitlement) or a copy of the trust instrument must be provided to the IRA custodian or plan administrator by December 31st of the calendar year following the year of the account owner's death. Under the old regulations, this documentation had to be provided by the required beginning date. This change is consistent with the new deadline for establishing the account owner's designated beneficiary. Because the determination of the designated beneficiary during the account owner's lifetime is no longer relevant for calculating lifetime minimum distributions, the burden of lifetime documentation requirements as contained in the 1997 regulations has appropriately been significantly reduced.

In this regard, the new regulations also clarify the impression of many commentators that the remaindermen of a trust must be taken into account as beneficiaries in determining the post-death distribution period for required minimum distributions if amounts may be accumulated for the remaindermen's benefit during the lifetime of the income beneficiary of the trust.[21] This would normally be the case where a credit shelter trust or a qualified terminable interest property (QTIP) trust is designated as beneficiary of the account and the trust instrument does not require that all distributions received by the trust be distributed to the income beneficiary.

Roth IRAs

No distributions are required to be made to the owner of a Roth IRA during the Roth IRA owner's life. Thus, no matter what age they are when they die, Roth IRA owners are always considered to have died prior to their required beginning date. Therefore, the new rules regarding death prior to the required beginning date will apply to post-death distributions from all Roth IRAs.

Spouses as Beneficiaries

As was true under the old regulations, a surviving spouse may under the new regulations roll over a deceased spouse's IRA (Roth or regular) to a new rollover IRA account in the surviving spouse's name. The surviving spouse may then designate new beneficiaries of such account. The new regulations also clarify the rules that allow a surviving spouse to treat an inherited IRA as his or her own where the surviving spouse has not formally effectuated a rollover.

The 1987 regulations provided that such an election was deemed to have been made by the surviving spouse if the surviving spouse contributed to the IRA still held in the name of the decedent spouse or did not take the required minimum distribution as a beneficiary from such IRA for a year following the year of death of the decedent spouse. The new regulations clarify that a surviving spouse is permitted to treat the IRA as his or her own only if the surviving spouse has the right to unrestricted withdrawals from the IRA, the minimum distribution, if any, for the year of the deceased spouse's death is made and the surviving spouse is the only beneficiary of the IRA. Thus, a surviving spouse may not elect to treat a decedent spouse's IRA as his or her own if a trust is named as beneficiary of the IRA, even if the surviving spouse is the sole beneficiary of such trust.

IRA Reporting Requirements

Because the new regulations substantially simplify the calculation of required minimum distribution amount from IRAs, the IRS intends to impose upon IRA custodians the requirement to calculate and report to account owners and to the IRS the amount of the required minimum distribution with respect to each IRA held by an account owner with the IRA custodian.[22] The IRS is soliciting comments regarding when this new reporting requirement should take effect.

Planning Opportunities

The new regulations offer several planning opportunities to account owners and their beneficiaries to enable them to decrease their required minimum distributions and, thereby, further defer taxation on their undistributed IRA or qualified retirement plan account balances. First, for account owners who have already reached their required beginning date, their previously irrevocable life expectancy recalculation or nonrecalculation elections will no longer apply if they elect to compute their minimum distributions under the new regulations.

For example, if an account owner had reached his required beginning date and designated his spouse as beneficiary, had elected to recalculate both his and his spouse's life expectancies and the spouse had died prior to the death of the account owner, under the old regulations, the required minimum distributions to the account owner would be based upon the account owner's single life expectancy. Under the new regulations, the account owner can now compute his required minimum distribution based upon the new uniform distribution period table, which will in all such situations extend the distribution period.

Continuing this same example, the account must no longer be completely distributed by December 31 of the year following the year of the account owner's death. Instead, provided that a designated beneficiary is in place by December 31st of the year following the year of the account owner's death, the account may be distributed over the life expectancy of the designated beneficiary. This is true despite the earlier election by the account owner to "irrevocably" recalculate life expectancies. Thus, all account owners who are past their required beginning dates should be sure that they have a designated beneficiary in place notwithstanding any prior "irrevocable" elections.

A second planning opportunity applies to beneficiaries of already deceased account owners. Under the old regulations, the beneficiary of a deceased IRA owner had to calculate the beneficiary's required minimum distributions based upon the life expectancy of the individual who was the account owner's beneficiary at the account owner's required beginning date and the life expectancy recalculation or nonrecalculation elections made by the account owner at such date. The designated beneficiary of an account owner who died during calendar year 2000 may now elect to determine his or her required minimum distributions for 2001 and subsequent years under the new rules. Thus, assuming a nonspouse designated beneficiary is in place by December 31, 2001, the beneficiary may calculate his required minimum distribution based upon the beneficiary's life expectancy at his birthday in 2001.

The new regulations are not as clear as they could be regarding whether the beneficiaries of account owners who died prior to 2000 may elect to determine their 2001 and subsequent year distributions under the new regulations, assuming that the new regulations will be more favorable to the beneficiaries than the old 1987 regulations. However, the changes made to IRS Publications 575 and 590 by Announcement 2001-23 (discussed above) indicate that such beneficiaries may take advantage of the new rules in determining such distributions. Thus, beneficiaries of *all* deceased account owners should revisit their minimum distribution calculations to see whether the new regulations may provide them with increased opportunities for tax deferral.

Because the designated beneficiary need not be determined until December 31st of the year following the year of the account owner's death under the new rules, an undesirable beneficiary with a short or no life expectancy can now be cashed out. This will allow the account to be distributed over the life expectancy of the remaining beneficiary with the desired long expectancy. Alternatively, separate accounts can be created for the benefit of multiple beneficiaries, even after the account owner's death, provided that they are in place by December 31st of the year following the year of death, Finally, one or more of the named beneficiaries may disclaim his or her interest in the account. Where this is done, the remaining beneficiaries may determine their required minimum distributions by reference to their individual life expectancies.

Surviving spouses of deceased account owners may, as before, roll over their accounts into new IRA rollover accounts in the surviving spouse's name or elect to treat the inherited IRA as their own, taking advantage of the new rules described above.

Finally, perhaps the most interesting planning opportunity available to account owners, which may provide them with both tax and nontax benefits, is to marry a spouse more than ten years younger than themselves. This will enable the account owner to utilize the actual joint life expectancy of the account owner and the younger spouse and may provide the account owner with other significant, intangible benefits as well.

Conclusion

The new proposed regulations offer significant planning opportunities that may allow account owners and their beneficiaries to reduce the amount of their required minimum distributions during lifetime and after death. The regulations clarify the conditions under which trusts may be utilized as a designated beneficiary and greatly simplify the calculation of required minimum distributions during lifetime and after death. Taxpayers and their advisors would be well advised to study the new regulations in order to be able to take advantage of the planning opportunities now available.

Endnotes

1. REG-130477-00, 66 Fed. Reg. 3928 (1/17/01); and REG-130481-00, 66 Fed. Reg. 3928 (1/17/01) revising Proposed Treas. Regs. §§ 1.401(a)(9)-0 through 1.401(a)(9)-8 that were first issued in 1987 (52 Fed. Reg. 28070). These regulations are hereinafter referred to as the "new regulations." Technical corrections to the new regulations were issued by the IRS on February 21, 2001 (66 Fed. Reg. 10981).
2. New Prop. Reg. § 1.401(a)(9)-2, Q&A-2.
3. New Prop. Reg. § 1.401(a)(9)-5, Q&A-4(b).
4. Old Prop. Reg. § 1.401(a)(9)-2.
5. Old Prop. Reg. § 1.401(a)(9)-1,E-6.
6. Old. Prop. Reg. § 1.401(a)(9)-1,E-7.
7. Old Prop. Reg. § 1.401(a)(9)-1, D-3 and D-4.
8. New Prop. Reg. § 1.401(a)(9)-4, Q&A-4.
9. New Prop. Reg. § 1.401(a)(9)-8, Q&A-2.
10. Old Prop. Reg. § 1.401(a)(9)-1, B-4.
11. New Prop. Reg. § 1.401(a)(9)-4, Q&A-4.
12. New Prop. Reg. § 1.401(a)(9)-5, Q&A-5(a)(1), (c)(1), (2).
13. New Prop. Reg. § 1.401(a)(9)-5, Q&A-5(a)(2), (c)(3).
14. *Id*.
15. Old Prop. Reg. § 1.401(a)(9)-1, C-1(a).
16. New Prop. Reg. § 54.4974-2, Q&A-8.
17. Old Prop. Reg. § 1.401(a)(9)-1, D-5.
18. New Prop. Reg. § 1.401(a)(9)-4, Q&A-5, 6.
19. New Prop. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 2.
20. New Prop. Reg. § 1.401(a)(9)-4, Q&A-6(b).
21. New Prop. Reg. § 1.401(a)(9)-5, Q&A-7(c)(3), Example 2.
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A version of this article previously appeared in *CCH Financial and Estate Planning Reporter*.

Making Health Care Decisions for Others: A Guide to Being a Health Care Proxy or Surrogate

Prepared by the Division of Bioethics, Montefiore Medical Center/Albert Einstein College of Medicine, Bronx, New York

Introduction

You are being trusted to make health care decisions for someone else. This is a very important responsibility. It can be rewarding and difficult. As the proxy or surrogate, you will be making health care decisions for someone who is no longer able to make them himself. Feelings of anxiety, isolation and even fear are common. You may be confused by medical words and procedures. You may feel uncertain, especially if the patient has not expressed his wishes about treatment. You may be worried about the patient's health and possible death, and afraid that the decisions you make will be wrong. You may feel alone, especially if there is disagreement within the patient's family about care decisions. All of these feelings are normal.

This Guide is designed to help you feel more secure in making decisions for someone else. It answers questions often asked by people who have faced the same responsibilities. It contains useful information about making decisions for others, guidance about preparing for the process and suggestions about additional resources. Perhaps most important, the Guide is intended to encourage you, to help you become a knowledgeable, confident person who can talk with health care professionals and speak out for what is in the patient's best interests.

Although the person for whom you will be acting may currently be healthy and able to make medical decisions, that will not be true when you assume the decision-making role. Therefore, the Guide refers to the person who needs decisions made as the "patient" and you, the substitute decision maker, as the "proxy" or "surrogate," depending on how you assumed your responsibilities. Solely for purposes of clarity, the Guide refers to the patient as "he" and the proxy or surrogate as "she."

Becoming a Health Care Proxy or Surrogate

1. Why Does a Patient Need Someone Else to Make Health Care Decisions?

Health care decision making is more complex than it used to be because there are more difficult choices to be made. Advances in scientific knowledge and medical technology now make it possible to cure illness and restore function. But these same advances pose risks. People may face a longer life of diminished quality. Medical care can even prolong the dying process. This brings up questions such as when to do what and how much to do. Who makes these medical decisions?

Usually patients make their own health care decisions based on their own values and preferences. This involves understanding the medical situation and weighing the possible benefits, burdens and risks of various treatment options. Then the patient communicates his decisions to others. Medical caregivers are legally and ethically bound to honor these choices.

However, doctors and lawyers, families and friends are aware that patients can lose the ability to make such decisions, can lose what is called decision-making capacity. This can occur, for example, when people are unconscious or brain damaged, overwhelmed by pain or confused by painkilling medications. The inability to make these decisions is known as loss of capacity or mental incapacity. What happens then? Even if he previously had very strong feelings about what he would or would not want in case of serious illness or injury, a patient's mental incapacity may prevent him from discussing his medical situation and desires. He loses the chance to express his wishes to medical caregivers and to make sure that his wishes are honored.

A substitute decision maker fills that void by stepping in and acting on the patient's behalf when the patient loses capacity. Through a substitute decision maker, the patient's voice can be heard in the care discussions so that his wishes are respected. She confers with his caregivers and evaluates the information. She makes the decisions she believes the patient would make if he were able. If the patient's wishes are unknown, the substitute decision maker then makes the decisions she thinks are in the patient's best interest.

A person is always presumed to have decision-making capacity, to be able to make his own health care choices. The loss of capacity must be demonstrated before someone else takes over the decision-making role. Once that occurs, there are two types of substitute decision makers in health care—the health care proxy and the health care surrogate.

2. What Is a Health Care Proxy? How Is a Proxy Created?

A health care proxy or agent is a person who has been chosen and legally appointed by a patient to make medical decisions when the patient is no longer able to do so. An appointed proxy has a legal right to make binding decisions on the patient's behalf. In most states, the proxy may make any and all decisions that the patient would make. The decision-making authority of a legally appointed proxy is not questioned unless she is incapacitated or asks the medical team to act in ways that are deemed clearly contrary to the patient's interest.

The proxy role is honored by law. More important, perhaps, the appointed proxy has the power of trust. By identifying a proxy in writing, the patient is saying, "I believe that you know my values and wishes and that you respect the things that are important to me. I believe you will make decisions for me that I would make if I were able to do so. I rely on you to honor the wishes I have expressed. If we have not discussed the medical situation in which I find myself, I depend on you to make the choices that will be best for me. I trust you to be with me and decide for me." This trusting relationship requires more than blindly following a set of instructions. Often, the proxy must use her own judgment in the patient's interest.

In all states, health care proxies must be competent adults over 18 years of age. A legally appointed proxy may but does not have to be a member of the patient's family. It may seem logical for next-of-kin to automatically assume decision making for patients at the hospital or in emergencies. But not all states permit this to happen. Without documents signed in advance, family who know the patient best may be hindered in guiding treatment plans. Thus, it is important that, in advance of illness or injury, people select and identify whoever is trusted to make medical decisions on their behalf in the future.

Appointing a proxy is a simple process. The patient signs a document naming the person he chooses to make health care decisions. The document may be called a health care proxy or durable power of attorney for health care. Although the term "proxy" is often used to refer to both the person who is the substitute decision maker and the document, the Guide uses the word "proxy" to refer to the person making health care decisions for a patient. The document may be drawn up by a lawyer, but it does not have to be. Standard forms are available at every hospital and nursing home, at the local offices of the medical and bar associations, and through Choice In Dying, Inc., based in New York City. State laws and state forms are not all the same. Each state has its own minimum requirements. Most states require two witnesses. Some require that the document be notarized.

The patient keeps the original appointment document. The proxy is given a copy, which is as good as the original. Copies should also be given to the patient's doctor and put in the patient's medical record at both the doctor's office and at the hospital. The proxy document should be readily available—not kept in a safe deposit box—to provide proof of legal appointment when needed. Legally appointed proxies should review the document to understand their responsibilities and any limits on their authority.

3. What Is a Health Care Surrogate? How Is a Surrogate Created?

What happens when medical decisions need to be made, the patient has lost the ability to decide and a proxy has not been appointed? There is an alternative. The doctor may identify a health care surrogate. While all states clearly recognize the authority of a health care proxy, the surrogate's authority varies according to 1) how the surrogate was identified, and 2) the laws of the state in which the patient is being treated. Next-of-kin or unmarried partners do not automatically become health care surrogates.

In all states, health care surrogates must be competent persons over 18 years of age. A person may become a health care surrogate in two ways:

Surrogate by state law—Many states have laws listing the people who may make decisions for patients who have not appointed proxies. The law usually lists who may become the health care surrogate and in what order, such as spouse, adult child, parent and court-appointed guardian. If the first classification of person is not available or is unable to make decisions, the medical care team will look for the next classification. Some states include on the list people unrelated to the patient, such as close friends or unmarried partners. Surrogates whose authority is based only on state law do not have any legal appointment documents signed by the patient.

Informal surrogate—What if the patient has not appointed a proxy and the state does not have a law that lists people who may make medical decisions for patients? Or what if no one fits any of the state-listed categories? Then the medical team may still ask someone to act as a surrogate decision maker and the Guide refers to this person as an informal surrogate. The informal surrogate may have limited decision making authority. Perhaps the care team asks for information and insights about the patient to guide the treatment plan. When physicians and the informal surrogate agree on a care plan, there is no problem. If they disagree, however, the informal surrogate has little power to enforce her decision.

4. How Is a Health Care Proxy or Surrogate Different from a Living Will?

People express their health care wishes in advance through what are called, in legal terms, advance directives. There are two types of advance directives—health care proxies and living wills. A health care proxy, as already described, is a person. A living will is a document, a piece of paper.

A living will is a document that gives instructions about treatments the patient does or does not want, usually at the end of life. The living will has the same weaknesses as any piece of paper—it is static. Written in advance when the patient cannot anticipate future health, the living will may not reflect his ultimate medical condition. It may not reflect the available choices.

The person called a health care proxy is more flexible. This person can make health care decisions for the patient at any time, not just at the end of life. The proxy can adapt as the patient's condition gets better or worse. The proxy can confer with the care team, the patient's family and friends. The benefit of a proxy to the patient is that a trusted person will be making decisions as needed, rather than depending upon medical people to interpret the intent of words on a piece of paper.

Some people have both a living will and an appointed proxy. This is not recommended. It can create confusion. The medical team may not know what to do when the proxy and the living will seem to disagree. If a patient wants both types of advance directives, it is advisable to say in the documents which one should control in the event of conflict.

5. Why Should the Patient Appoint a Proxy, in Writing, in Advance?

In all states, a legally appointed proxy has the most secure decision-making power. This is an advantage from the viewpoint of patient and proxy because:

- the proxy is the person specifically chosen by the patient and not just permitted by state law;
- the proxy is recognized as a person with legal authority;
- the appointed proxy is considered the person best suited to work with the medical team and explain the patient's medical care wishes;
- and having a clearly identified proxy resolves conflicts about who is going to speak for the patient.

Unfortunately, in some states a patient can legally appoint a proxy without notifying that person or obtaining her consent. It is very important that, before the appointment, the patient and potential proxy discuss the position, its rights and responsibilities, and the patient's health care wishes. Even people who understand the role of the proxy may not be comfortable accepting this role. If this is discovered in advance, the patient can select another proxy. In addition, it is wise to identify in writing an alternate proxy who agrees to step in if the legally appointed proxy is unavailable or unable to make decisions when needed. The patient is the only one who can appoint the proxy or alternate.

Appointing a proxy in writing is especially important if the patient chooses a non-family member as health care proxy. Some people think that someone outside the family will more accurately represent their wishes. Some people do not want to burden family members with health care decisions. It is wise for the patient to tell family members who exactly was appointed, especially if a non-relative was chosen.

6. What Kinds of Decisions Will I Be Able to Make?

In general, a proxy may make any and all treatment decisions a patient would make for himself if he were capable. The range of decisions that surrogates can make, especially informal surrogates, varies according to the laws of each state.

Proxies in all states and surrogates in some states have the right to receive the same medical information that a patient would receive. This might involve:

- conferring with the medical team;
- reviewing the medical chart;
- asking questions and getting explanations;
- discussing treatment options; and
- requesting consultations and second opinions.

Proxies in all states and surrogates in some states have the right to consent to or refuse tests, treatments and other medical or surgical interventions. This includes:

- refusing life-sustaining measures; and
- authorizing a transfer to another physician or institution, including another type of facility (e.g., hospital to skilled nursing home).

Patients are asked to give permission before many medical tests and treatments. Doctors are expected to describe the proposed test or treatment, explain why it is being recommended, discuss the benefits and risks, and the options. Because patients are required to receive all necessary information before consenting to or refusing a proposed intervention, this process is called informed consent.

The proxy or surrogate may become involved in the informed consent process. Just as the patient has the right to consent to or refuse some treatment, you may give or refuse permission. You have the right to get the same medical information as the patient and to spend just as much time talking with medical care providers. Just as the patient has the right to refuse a treatment, even if that choice shortens life, the proxy has the right to refuse treatments, knowing that the choice may shorten life.

The toughest decisions may concern beginning or stopping life-sustaining treatment. When the patient's condition has deteriorated seriously and it is clear he will not get better, it is not uncommon to discuss the value of life support and the use of machines that keep people alive and breathing. At that point, you and the physicians may determine that life-sustaining treatments are not helping the patient, but only increasing his suffering without providing benefit. You may decide that continued treatment will only prolong his dying. Rather than thinking of this as depriving the patient of necessary treatment, it may be more appropriate to see it as protecting the patient from unnecessary pain and suffering. Many patients have expressed the wish not to die slowly, hooked to machines.

Ideally, the decision to withhold or withdraw life-sustaining treatment is a joint judgment by the patient's physicians and the proxy, based on the patient's previously expressed wishes, his current condition and his prognosis. Under the best circumstances, the physician will help you bear the burden of this difficult decision. But often, the discussion arises at the hospital because the proxy raises the issue and insists that doctors discuss treatment plans and consider the patient's wishes. In recent years, many proxies have had to argue with doctors to get them to stop treatments. Now, with managed care insurance plans limiting payments to hospitals, proxies may find it necessary to argue for continued treatments.

Discussions between patient and physician are supposed to be confidential. So too, the rule of confidentiality covers discussions between a physician and the proxy or surrogate. Once the patient loses capacity, the physician and proxy or surrogate may discuss privileged information about the patient's health care and treatment. Family members who are not proxies or legally authorized surrogates are not automatically entitled to this information. Even so, most physicians will want to share medical information with family and beloved friends in an effort to promote good relations and facilitate good decision making. The physician should be guided by the proxy in deciding what information the patient would want disclosed and to whom.

7. Are There Some Decisions I Cannot Make?

Proxies and surrogates make only health care decisions. They are not required to make financial or other types of decisions for patients. When creating the document naming a proxy, patients can limit the type of medical decisions their proxies may make. State laws can limit the decision making of both proxies and surrogates.

8. How Do I Decide What to Do?

Your first task as proxy or surrogate is to make the decisions that the patient would make if he could do so. The choices you make should reflect the attitudes, values and preferences of the patient, rather than your own. Obviously this is much easier if you and the patient discussed health care wishes in advance or if the patient wrote down his preferences before losing the ability to do so. Then, decisions are based on what the patient said or wrote down.

Decisions are more difficult when you don't know what the patient would want. The patient's family and friends may be able to provide helpful information. Most proxies and surrogates find that reaching agreement with those who love the patient makes their job easier. Sometimes, however, there is not full agreement. Thus, others cannot make the decisions for you. The most important assets you have—even more important than written instructions—are your knowledge of the patient and his trust that you will make the decisions that are best for him.

In fact, there are three ways to make health care decisions for someone else:

- Following the patient's wishes

  You may know the patient's preferences very well. The patient may have told you what he wanted. He may even have written his wishes down. You should make these wishes known to the doctors. Give them copies of any related documents. Help the doctors evaluate and carry out these wishes in light of the patient's current and projected condition. If the patient has a living will, focus on what it says. It is an important indicator of the patient's wishes.

  Often the patient's condition does not match the written instructions. Often, the living will is too general to give you clear guidance. After all, no one can predict the exact course of any medical condition. Prior instructions may not address the actual medical care decisions that must be made. If so, you may find yourself in a position of trying to figure out what the patient would want.

- Figuring out the patient's wishes

  In the absence of specific instructions, based on your knowledge of the patient, try to figure out what kind of care the patient would want. This is called a substituted judgment. It requires imagining yourself in the patient's position. Imagine how he would evaluate and respond to different situations. If you know the patient well, think about his personality, religious beliefs, past decisions and important values. Consider also what the patient would not want. Consider different options, based on your intuition and your affection for the patient. As a reminder that they are acting for patients and not themselves, proxies and surrogates may find it useful to ask themselves the following questions:

  Although this is not what I would choose for myself, is this what the patient would do if he were able?

  Even though this is not what the patient instructed, is this the decision he would make if he could have anticipated his current condition?

- Deciding what is best for the patient

  Sometimes the patient has left no instructions and you are uncertain of what to do. Perhaps you do not know this person well enough to figure out what he would want. Then you and the doctors will have to make decisions based on what you think is best for the patient. This is called making decisions in the patient's best interest. Evaluate whether the proposed medical plan or treatments will cause pain or suffering and how likely they are to make the patient better. This is called a benefit-burden analysis.

9. What Can I Do to Make Decisions Easier?

Prepare in advance with the patient. Start making decisions before the patient loses capacity. Encourage the patient to fill out the document that legally appoints you or another trusted person as his proxy. Talk about his treatment wishes, formally or informally. Talk about his beliefs and values regarding life, death and spiritual matters. Try to go with the patient to a doctor's appointment, to meet his doctor, to learn about his medical condition and his attitudes toward treatment.

At the hospital, make yourself and your role known to the medical staff. See that documents naming you as proxy and any living will get into the medical chart. Introduce yourself to the medical team and give them a clear picture of your role. Give them a clear picture of what this patient wishes in terms of medical care. Let them know when you are likely to visit and how you can be reached at home or work. Medical staff may rotate, so you may have to introduce yourself as decision maker to many people on the medical staff. Identify the person you should contact for updates on the patient's condition, the person with whom you can discuss treatment plans.

Stay informed about the patient's condition as it changes. You are responsible for asking questions and requesting explanations. Don't be shy about asking for information. Medical conditions are complex and medical treatments change. Proxies and surrogates are entitled to as much information as they need to make decisions on behalf of patients. Try not to get overwhelmed by the medical or legal complexities. Try to stay flexible and respond to changing circumstances.

Keep the family informed, if appropriate. Unless you believe the patient would object, keep his family informed about what is happening. Ask for their ideas and support. Some people find it helps to share the burden of decision making with others. Some families have a history of joint decision making. Input from family, close friends, spiritual advisors and health care professionals may help you arrive at the best decisions. However, while interested parties may act as advisors, unanimous agreement is not required. Indeed, the reason for a single decision maker is to prevent confusion, to prevent a stalemate when people disagree. Be prepared to advocate on the patient's behalf and assert yourself with the medical team. Some medical people are not comfortable with proxy or surrogate decision making. They may hinder the process, consciously or unconsciously. Proxies and surrogates have a legal right and an ethical obligation to their patients to participate in care planning. Continued resistance to your involvement may signal the need for help from neutral on-site professionals. Ask for help from patient services or from a bioethics committee or consultant. An informal surrogate without legal authority may need to be more forceful in asserting her position as the patient's trusted advocate.

When It Starts and When It Stops

When do I start to act as a proxy or surrogate?

When do I stop acting as a proxy or surrogate?

10. When Do I Start to Act as a Proxy or Surrogate?

You are a proxy-in-waiting or surrogate-in-waiting until doctors determine that the patient lacks capacity to make medical treatment decisions. "Capacity" is often confused with "competence," but there are important differences. Competence is a legal assumption that, generally at age 18 years, a person has the ability to handle certain legal tasks, such as entering into a contract or making a will. Incompetence is a decision made by a court that a person lacks this ability and should be deprived of the right to do certain legal things.

Capacity is a medical determination. Capacity refers to a person's ability to make decisions about treatment and other health care matters. To evaluate a person's capacity, the attending physician usually confers with nurses and other involved staff. A psychiatric consultation may be requested.

People often have the capacity to make some decisions and not others. For example, a patient may be able to decide whether to have soup or a sandwich for lunch, but not whether to have surgery or discontinue life support. The required ability is specific to the particular decision that must be made. It is generally understood that capacity may vary (fluctuate) from hour to hour or from day to day. For example, some people, especially the elderly, are more alert and capable early in the day. Every effort should be made to engage patients in discussion at times when they are most capable. Discussion in moments of clear thinking can yield ethically and legally valid decisions.

11. When Do I Stop Acting as a Proxy or Surrogate?

The decision-making powers of the proxy or surrogate continue as long as the patient is unable to make health care decisions and stop once he is able to make them again. Loss of capacity may be temporary, as when the patient is unconscious or has been given medication that prevents clear thinking. Or loss of capacity may be permanent, as with someone having advanced dementia or Alzheimer's disease. During the course of a hospital stay or illness, a patient may lose and regain capacity several times. The proxy or surrogate must be ready to step in, make decisions and then step back.

The power of the health care proxy or surrogate generally also ends with the patient's death. Some states, however, permit proxies or surrogates to make certain after-death decisions, such as donating organs, consenting to an autopsy or making funeral arrangements. Even so, a proxy or surrogate is not required to make such non-medical decisions and is never financially responsible.

12. What If I Need Help Making Decisions or Resolving Disputes?

There are people at the hospital or nursing home who can help you make decisions. They can help resolve disputes with doctors or family members. Do not be shy. Ask for help if you need it. At the health care facility ask to speak to any of the following:

- bioethics consultant or committee member;
- patient representative or ombudsman;
- social worker; or
- clergy or spiritual advisor.

Understanding Information, Rights, Procedures and Legal Authority

Information about patient rights is usually provided upon admission to a health care facility. In the hospital or nursing home, the people listed above can help when you are confused about patient rights or institutional procedures, or when there are language problems. Remember that medical decisions are subject to the laws of the state in which the patient is treated. This is true even if the patient resides in another state. For the most up-to-date information about state laws, contact the state bar association, the local agency on aging or Choice In Dying, Inc.

Disputes With the Patient's Family

Proxies and surrogates may find themselves in the uncomfortable position of defending both their authority and their decisions. Such confrontations may be especially stressful if the proxy or surrogate was appointed at the time of a medical crisis.

Legally appointed proxies have the strongest position of authority when family conflicts occur because they have been specifically chosen by patients. This selection means that they have been trusted by the patient to make decisions consistent with the patient's values and wishes. The patient may have chosen the proxy because of her decision-making and advocacy abilities, because of her strength and clarity. This choice may be based on geography, availability, familiarity with the medical condition or shared values. Patients sometimes chose people other than family members precisely to avoid family resentments and conflicts or to avoid burdening relatives.

A legally appointed proxy's authority supersedes that of any other self-declared decision maker(s), including family members and next-of-kin. Still, many proxies are more comfortable if they at least try to achieve agreement among loved ones. Both proxies and surrogates may seek help in resolving family disagreements from the health care professionals listed earlier.

Disputes With the Medical Team

Medical treatment decisions are most appropriately made when they are based on 1) the medical team's assessment of the patient's condition; 2) the proxy's or surrogate's knowledge of the patient's wishes and values; and 3) the joint evaluation of the benefits and burdens of various treatment options.

If cooperation is not possible, disputes with the doctors can be resolved through mediation by trained professionals, such as those on a bioethics committee or bioethics consultation service. If all attempts at conflict resolution fail, the best interest of the patient may lie in changing doctors. This is an important last resort. A proxy or legally authorized surrogate may transfer the patient's care to another doctor or, in extreme cases, to a different health care facility.

Conclusion

Making health care decisions for others requires courage and preparation. It involves gathering information and a commitment to advocate for the best interest of the patient. Your job will be easier and far more effective if you can educate both yourself and the professionals who care for the patient. You need to understand your decision-making authority as a proxy or surrogate, the treatment wishes or attitudes of the patient, and the various medical factors that will influence your decisions. In turn, the medical team needs a clear picture of your role as the patient's decision maker and a picture of the patient's health care wishes. Then, you and the medical professionals will be better able to fulfill your shared responsibilities to the person whose well-being depends on you.

This material has been prepared in booklet form by The Division of Bioethics, Montefiore Medical Center/Albert Einstein College of Medicine, Bronx, New York. The Web site is www.bioethicsmontefiore.org. For more information, you can call the Montefiore Division of Bioethics at (718) 920-6226.

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Midsummer's Madness

By Robert L. Moshman

The Renaissance Arrives; The Age-Old Income/Principal Debate; Pardon My Boomerang; and Signs of the Apocalypse

Prologue

Like Rip Van Winkle awakening to a world that has moved on, an estate-planning editor returns from a hiatus to find the best of times and the worst of times in estate planning. Gentle reader, please indulge this troubled soul one final attempt to make sense of it all before retiring forevermore to the sanctity of his fortified bunker.[1]

Act I: A Renaissance of Our Own

Even as the dawning of the age of the estate-tax-less society looms huge over the entire horizon of estate planning, there are a series of developments giving new life to a host of estate planning techniques.

Family limited partnerships (FLPs) are on a major winning streak, thanks to several cases, most recently *Knight v. Commissioner*, and *Estate of Strangi.* Meanwhile, a trusted old friend, the grantor retained annuity trust (GRAT), had been gearing up for a comeback, thanks to a novel "guaranteed GRAT" approach as well as recent Tax Court decisions, one of which, *Walton v. Commissioner*, invalidated a portion of Treasury Regulations that the IRS had relied upon in valuing gifts under § 2702.

And every time you turn around, the new energetic IRS is producing Proposed Regulations 130477-00 and 130481-00 on minimum required distributions, Notice 2001-10 on equity split dollar arrangements, Proposed Regulation 106513-00 redefining trust income . . . and that only brings us to March. With all this guidance, a greater variety of techniques will become more reliable.

Is this the same profession that watched the IRS and Congress eviscerate one technique after another for the past 20 years? With so many new avenues to pursue and so many new considerations, we are undoubtedly entering a veritable Renaissance period of estate planning.[2]

Carryover Basis

The potential carryover basis for assets passing at death will open a whole new era in planning for capital gains.[3] Many estates need to be more concerned about a carryover basis than with estate tax. Fewer than 2% of estates now have estate tax liability, while virtually every estate has appreciated assets. Using data from the Survey of Consumer Finances, economists James Poterba and Scott Weisbenner concluded that unrealized capital gains make up 37% of the value of estates exceeding $1 million and about 56% of estates worth more than $10 million.

If we do switch to a carryover basis, but the new law provides for a stepped-up basis exemption of, say, $1.3 million for assets passing to any individual and $3 million for assets passing to a spouse, many estates would be shielded from the complexities of the carryover basis calculations. This may lend itself to a stepped-up basis exemption shelter trust that keeps highly appreciated assets available for the new exemptions.

Act II: The Song Remains the Same

Something is wrong. I'm feeling a little *Drye* and *Strangi*.[4] This is no Renaissance. Look who's still driving the bus—the same institutions that have been churning out complex and inscrutable rulings and TAMs and now even these internal Field Service Advice (FSA) Memoranda that folks use the Freedom Of Information Act to get disclosed. But even if we were to get hold of their doodle pads, would we gain a better understanding of their incoherent regulations and cryptic statutes and illogical cases? No, there is another side to this golden age of great new techniques. You can take away the estate tax, but you still have . . . Congress, the Courts, and the IRS—the same factory that manufactured our world of taxation in the first place.[5]

For example, something significant just hit the world of estate planning and it wasn't a repeal of the estate tax. The arrival of proposed regulations to redefine trust income has had an immediate impact on investment strategies and financial planning. Trusts qualifying for marital and charitable deductions will need to be drafted with the new rules in mind.[6]

It's encouraging to think that the IRS is capable of an enlightened understanding of modern portfolio theory and can adjust rules in somewhat timely fashion. But has anything been resolved? Given that trusts have been around so long, one might think that we'd have come to some consensus about what constitutes trust income by now. Yet the rules that apply to the distribution of income between a lifetime beneficiary and a remainderman are part of a timeworn debate of great lineage.

Consider how many times the National Conference of Commissioners on Uniform State Laws has offered model legislation addressing trust income. Versions of the Uniform Principal and Income Act arrived in 1931, 1962, and 1997. A Restatement of the American Law of Trusts was completed by the American Law Institute in 1935 and then revised and repromulgated as the Restatement of Trusts, Second in 1957. The Restatement Third of the Laws of Trust, a 307-page volume which included the new prudent investor rule, was adopted in 1992. The Uniform Prudent Investor Act arrived in 1992. The prudent investor rule and other modifications were then included in the new Uniform Principal and Income Act that was approved in 1997.

And related sets of laws spring up every time one turns around. There's the Uniform Fiduciaries Act, the Uniform Trusts Act, the Uniform Trustees' Accounting Act, the Uniform Common Trust Fund Act, the Uniform Testamentary Additions to Trusts Act, the Model Prudent Man Investment Act, the Uniform Trustees' Powers Act, the Uniform Act of Simplification of Fiduciary Transfer of Securities, the Uniform Probate Code, and the Uniform Commercial Code. And then there are all the state laws, which include New York's trailblazing statute, ever restless and oceanic, the Estates Powers and Trust Law.

The traditional approach to trust income has been to classify everything in one of two categories, income or principal. Interest and dividends are generally income and capital gains are generally part of principal. Though logical and clear in theory, even this concept provided little consensus in practice. For example, the treatment of corporate dividends resulted in three approaches.[7]

Times change. When the prudent-man standard was included in the Restatement 2nd of the Trusts in 1959, there were about 155 mutual funds. By 1998, the number was in excess of 8,000 and growing. Modern investors have self-directed IRAs, get current stock quotes on the Internet and have less patience for conservative portfolios. They are more concerned with total growth and not whether a dividend is issued. Perhaps as a result, income returns from equities have fallen in recent years, placing more pressure on the conflict between income beneficiaries and remaindermen. The compression of the income tax rate schedule, which hits the top rate of 39.6% for trust income in excess of $8,650 for the 2000 tax year, has also shifted investment emphasis away from income and toward equity growth.[8]

But the perpetual evolution of this area means there will never be a consensus. Even now, we are once again in transition, with 13 states adopting versions of the Uniform Principal and Income Act that have the power to adjust between principal and income. Four additional states, Delaware, Missouri, New York, and Pennsylvania, are considering legislation to allow unitrust definitions of income to be utilized in addition to a trustee's power to adjust income and principal. The Prudent Investor Rule was adopted in 1990 in Restatement of Trust 3d by the American Law Institute. It had been adopted by 29 states as of 1999.

Act III: Ouch, Is That My Boomerang, Back Again So Soon?

To repeal . . . or not to repeal. As Congress makes up its mind (and changes it retroactively), the mind wanders. What if . . .

What if the estate tax is repealed but the stepped-up basis for assets transferred at death remains? It could happen. Congress means to tidy up the tax code with a carryover basis in conjunction with the repeal to avoid a variety of loopholes,[9] but can't face the practical and political ramifications. Will the combination of no transfer taxes and a stepped-up basis open up a colossal loophole through which all capital gains could pass? Preposterous you say?[10]

Assets could pass through an elderly family member's estate and then return to the donor's estate with a stepped-up basis. True, this morbid asset laundering could work in theory . . . but in practice, this boomerang approach might come back to haunt you, so to speak.[11]

Hypothetical

It is 1986 and Simcha the Nephew is summoned by Uncle Sid the Land Baron. "Take over my kingdom," said Sid, "I'll make you a sweet deal because you're my favorite nephew." In return for a downpayment and future payments (in cash), Sid handed over a set of master keys, a Rolodex, and six buildings full of mental cases, code violations, and holdover tenants.

For the next 20 years, the management of the six buildings consumes Simcha's life with aggravation from the time he opens his eyes in the morning until the time he shut them again at night. Upon making the 240th and final payment to Sheldon the Accountant, Simcha announces that he's going to sell the properties immediately and be free at last.

But with a basis of $1 million and property worth $11 million, Simcha stands to pay $2 million of capital gains tax. "You're gonna leave money on the table?" asks Sheldon the Accountant. "There's another way." It is now 2006 and the estate tax has been repealed but the stepped-up basis for property passing at death remains in place. Since gifts are no longer taxed, Simcha transfers the buildings to Shlomo the Elder, who at the age of 99 has already surpassed all projections of longevity as well as the physicians who made them.

Simcha's Thinking: "He can't go on forever. I'll be ready to sell in about five years anyway and by then . . . Shlomo will be gone and, *boomerang*, the property is back to me. We'll just exchange oral promises . . . we're family, after all. He promises to leave the property to me and I'll put up with a few more years of managing the buildings. When nature takes its course, I'll be walking away with $12 to $14 million free and clear, and no capital gains tax."

Ten Years Later: It is 2016. Shlomo the Elder, now 109, spends most of his day watching CNN. He's sold three of the buildings off and one has literally collapsed. Though the remaining two buildings have declined somewhat in value due to massive termite damage, Simcha, despairing, is still waiting to receive anything from the transaction. Congress finally decides to go with the carryover basis.

Simcha's Diary, July, 2016: "Dear Diary: The man will not perish from this earth. He is the ageless wonder. Why, why, why did I ever listen to Sheldon?"

Shlomo the Elder's Diary: "Serves him right, that greedy putz. I'm going to hang on forever just to keep Simcha from getting that _______ property."

Epilogue: Apocalypse Now: Ha! Ha ha, aha . . . ahem. How we laughed at the idea that Congress would have the audacity to repeal the estate tax. Then we realized they were serious. But it was still a quixotic idea since it would get only as far as President Clinton's desk, where it would be vetoed. But now there's someone else behind the desk. In fact, the fat lady is warming up and may already be singing by the time you read this. But, friends, weep not for the transfer taxes and those who frequented them, for there will always be taxes and estate planning to concern ourselves with. Of greater concern is how much longer civilization itself can hold out. Submitted for your approval, signs that things are starting to unravel.[12]

Ruling Class: What's wrong with this picture? The Queen of England pays income taxes and has a Web site (and a bloody good one). English dukes and earls have to justify their seats in the House of Lords with essays. For example: "Am proactive self-starter with good working knowledge of estate management, horsemanship, dithering, dribbling, and claret drinking. *** Have experiences in the intricacies of the tax system—specifically, in relation to inheritance tax loopholes—and seller's knowledge of the art market."—*A model 75-word essay offered by columnist Giles Coren of The Times to hereditary members of the British House of Lords who must submit such essays to retain their seats*.

Ghost Discount: Maryland's Special Court of Appeals allowed a fraud suit against the estate of a developer more than 20 years after a graveyard had allegedly been covered over with a residential subdivision. Damages would include the diminishment in property values attributed to paranormal haunting. Can QPRT/poltergeist combo discount trusts be far off?

Posthumous Conception: Last year witnessed the arrival of twins who were not only born after the decedent's death, but were also conceived posthumously. In a case of first impression, a New Jersey court ruled that the twins were lawful heirs who were entitled to share in their biological father's estate. In a related note, scientists continue to monkey around with DNA from King Tut, the cloning of the Tasmanian tiger and other extinct mammals, and the precise mapping of the human genome. These modern body snatchers can launch their invasion of Earth without the seed pods—there is no telling what heirs or clones may pop out of the laboratories next. This is not happening!

Freeze Me, Dry Me . . . and leave me on the couch forever. *The Wall Street Journal* reported on the growing popularity of freeze drying pets. It is only a matter of time before the technique is applied to people. Why go to the trouble and expense of burial? You could be having a permanent "Weekend at Bernie's," just you, your DNA, and few of your favorite clones. And if you're still at home, there's got to be a tax angle here.

Endnotes

1. I'm not actually retiring, I just said that for effect. I had planned to provide the New York Section with a Year In Review in 1999, but, frankly, with the potential for Y2K and apocalypse and the final destruction of the world hanging over us, what was the point? Then I planned a Year In Review for 2000, but it turns out the actual millennium ended on December 31, 2000. Again, why go to the trouble of reviewing the year if there's no one left to read it? I therefore returned to the bunker and I'd be there still if I hadn't run out of Diet Coke in mid-February.
2. The Renaissance, stretching from 1350 to 1650 A.D., was a period of change and achievement. It was the rebirth of civilization that followed the Middle Ages and led to our modern age. Art, architecture, commerce, music, science—every discipline was revitalized and reexamined. Today, the estate-planning niche is being reinvented. Though planners have long focused on transfer tax avoidance, the rules of the game are now changing. Just as Leonardo da Vinci changed the direction of art history in painting the enigmatic Mona Lisa in 1503 with depth of perspective and emotional content, so too must modern-day Leonardos take leave of the estate-tax mindset and expand estate planning to its fullest potential, reexamining capital gains, income tax, state death taxes, and all the non-tax issues—asset protection, capital management, and the pursuit of meaningful goals.

3. We've tried this before, but with little success. The Tax Reform Act of 1976 would have converted America to a carryover basis, but the effective date of the law was postponed in 1978 and then repealed retroactively by the Crude Oil Windfall Profit Tax Act of 1980. Some of the problems that proved daunting in the late 70s involved the administrative task of calculating the original cost basis for a large and diversified portfolio. Modern information systems have simplified these burdens. Other problems remain. Computers are no help in ascertaining the original cost basis for assets purchased years ago and for which no records were retained.

4. These are just case names used as adjectives for a light touch, but for the sake of argument, one can find disquieting aspects to them. For example, in *Drye* the U.S. Supreme Court allowed federal law to be applied inconsistently based on local laws. It said the attachment of a federal lien to property disclaimed by an heir depended on the heir's local disclaimer law and distinguished "transfer" and "acceptance-rejection" jurisdictions. And the recent string of FLP cases such as *Strangi* all make one wonder how long this instant estate discount will be tolerated. It defies my understanding of taxation to think that a taxpayer would be permitted to secure a huge 40% or 60% discount in value for tax purposes merely by signing a paper and converting 100% ownership to 99.47% of various FLP interests. The Uncle Sam I know will sense taxable value escaping the net of taxation . . . if we still have an estate tax as part of that net.

5. Tax-writing committees need to justify their existence and each new Congress wants credit for tax reforms. There is also the cat-and-mouse process of taxpayers finding loopholes and lawmakers attempting to close them which makes instability the rule and consistency the exception. As a result, the tax code has grown from 100 pages in 1930 to 2,840 pages today, and the major components of our tax system are not as historically established as one might assume. The coordination of estate and gift taxes in a unified system is 25 years old. The generation-skipping transfer (GST) tax is 15 years old. And the estate tax, seemingly an unassailable fixture of imponderable age, has in fact been repealed on three previous occasions. The current version has been with us since 1916.

6. Consider the impact on marital deduction trusts. Under proposed amendments to Reg. §§ 20.2056(b)-5(f) and 25.2523(e)-1(f), the standard that all trust income must be paid to the spouse for life would be met even though the income interest is determined, based on state law, to be based on a reasonable apportionment of the trust's total return between income and remainder beneficiaries. Such "reasonable apportionment" can be accomplished by defining income in terms of a unitrust or by empowering the trustee to make equitable adjustments between income and principal. Note that the marital deduction can only be based on a unitrust payout or the power to adjust income and principal in those states that adopt the Uniform Principal and Income Act with the Power to Adjust Between Principal and Income or some comparable law. In the absence of such a law, an income interest would have to be drafted as "the greater of income or a unitrust." Other rules affect GST and charitable trusts. *See* Notice of Proposed Rulemaking, REG-106513-00.

7. The original Kentucky rule (now replaced by statute) had treated all cash dividends as income. The Pennsylvania rule, now abandoned, had required trustees to determine which dividends were derived from corporate earnings. The Massachusetts rule treated cash dividends as income and stock dividends as principal.

8. The income tax rates on nongrantor trusts were compressed to remove the incentive for multiple trusts, supposedly closing an exploited loophole. Yet the net result was to penalize the majority of personal trusts that provide living expenses. Prior to the Revenue Reconciliation Act of 1993, a 36% rate applied to income in excess of $115,000 and the top rate of 39.6% applied to income in excess of $250,000.

9. Transferring appreciated assets (without gift tax) to an individual with a negative income would also lead to a situation where the assets could be sold and the capital gains would then be offset by the recipient's losses or depreciation. Assets could also be transferred (without gift tax) to individuals in one of the seven states that do not have a state income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. (Note: New Hampshire and Tennessee do not tax income in general, but do tax dividend and interest income.) Future capital gains would then avoid state income tax. This would add to the loss of tax revenues states already face due to the repeal of the estate tax, since many states based their state death tax entirely on the federal state death-tax credit. And in the simplest scenario, just transferring appreciated assets (without gift tax) to multiple heirs who qualify for the 10% capital gains tax rate would cut the tax liabilities of selling the property in half.

10. Would Congress be careless enough to open a giant loophole through which all capital gains might escape taxation? Naugh! Never, ever, never, well . . . there was that first version of the 50% estate tax deduction for the proceeds of a sale of securities to an ESOP. The Joint Committee on Taxation suddenly realized that this was a potential $20-billion loophole. Congress closed it the following year by disqualifying the use of ESOP securities purchased on the open market after death. [Note: The ESOP deduction was § 2057 which has become the hermit crab shell of the tax code. Section 2057 had previously been used for the qualified minors' trust, then for the ESOP deduction and currently addresses family-owned business interests.] And there was also that whole episode with *Haffner v. Comm'r,* 85 F. Supp. 354 (1984), *aff'd* 757 F.2d 920 (CA-7, 1985), involving Project Notes issued under the Housing Act of 1937 that were exempted from "all taxes," and which the Supreme Court finally laid to rest in *U.S. v. Wells Fargo* (1988).

11. Not only might the older relative live for another 20 years or have a change of heart, but if the relative dies in less than a year, the step-up in basis would be disqualified under § 1014(e).

12. Wake up! The signs of the end are right here in our own backyard. Item: Talk about biblical overtones, our rivers of debt are now supposedly running backwards. The National Debt Clock was set up in 1989 on Fifth Avenue in New York by Seymour Durst to call attention to how rapidly the debt was rising. In June, the clock started running backwards and last September it was retired in a little ceremony. Don't you believe it! Item: The *New York Times* reports, "Scientists bring light to a full stop, hold it, then send it on its way." Today, light. Tomorrow, time itself. Item: There are ten new planets but in New York's Museum of Natural History, Pluto was wiped off the charts, a planet-non-grata. What's happening on Pluto that they don't want us to know about? Friends, this conspiracy is getting much too serious. I'm heading back to my bunker. Guard your DNA! Don't eat the Soylent Green! Boil water! Fight the future!

Various clones of Bob Moshman practice law and publish *The Estate Analyst* newsletter. Portions of the preceding material were abstracted from recent essays, the full versions of which can be found online at the estate-planning page of FinancialCounsel.com. Some of the clones welcome feedback at bmoshman@optonline.net, the rest are basically indifferent.

Florida Update: Florida Intangible Tax Lingers On

By Stephen N. Newman

While Florida continues to enjoy a reputation as a tax haven, at least compared with many of its northern neighbors, reports of the demise of the annual tax on intangible personal property appear to be premature.

Florida imposes no individual income tax return. Instead, a "net worth" tax is imposed upon Florida residents. The tax is based upon the January 1 value of certain intangible assets, most notably (at least for many clients) marketable securities. Generally, the tax is far less than the state income tax payable if the taxpayer resided in New York.

For at least the following three reasons, the Florida Intangible Personal Property Tax has been considered a relatively minor annoyance rather than a major tax concern:

1. Various categories of assets, including cash and Florida municipal bonds, are exempt. Thus, individuals moving to Florida can with relative ease restructure their portfolio to minimize or eliminate the tax.
2. The rate is low and has been dropping. Until recently, the tax was imposed at the rate of 2 mills: that is, $2,000 per $1 million of taxable assets. In 1999, the rate was reduced to 1.5 mills; last July the Florida Legislature further reduced the tax rate by one-third to one mill. Effective next year, the exemptions are increased from $20,000 (single) and $40,000 (married couple) to $250,000 and $500,000 respectively. A new $250,000 exemption is also available to entities. Furthermore, the tax can be claimed as an itemized deduction on the individual federal return.
3. With their eyes wide open (although perhaps blinded by the bright Florida sunshine), the Florida Legislature and Department of Revenue have approved creative "planning techniques"—short-term trusts and out-of-state partnerships, that have enabled very high net worth taxpayers to escape tax liability.

The purpose of this article is not to provide a comprehensive explanation of the Florida intangibles tax, but rather to give a sense of the current status of the tax and to explain some recent developments.

Until last year, trust assets were subject to the tax if the trust had a situs in Florida. As a result, and subject to exceptions for Florida banks, a tax could be imposed upon trust assets if the trustee were domiciled in Florida. This would be the case, for example, with respect to a standard funded living trust or a testamentary trust with Florida residents acting as trustees.

Fortunately for Florida taxpayers, the tax on these trusts could easily be avoided by having the taxpayer establish an irrevocable, short-term trust with either a Florida bank or an out-of-state individual or bank as trustee. Provided the trust was drafted properly and the otherwise taxable assets were in fact owned by the trust on January 1, the trust assets would not be subject to the Florida intangible tax. Upon termination of the trust (the trust might last for perhaps a month—some attorneys preferred a somewhat longer term, and certain rulings of the Florida Department of Revenue suggest the permissibility of even shorter terms), the assets would revert to the Grantor until the following December.

As a result of a change that became effective July 1, 2000, the requirement that the trustee be a non-Floridian (or a Florida bank) is eliminated. A new subparagraph (4) has been added to § 199.183 of the Florida Statutes, providing that property owned, managed or controlled by a trustee is exempt from the annual intangible tax. Thus, Floridians are spared the excruciating inconvenience of locating an out-of-state relative or friend to act as trustee and technically hold legal title to their assets for a brief interval. Furthermore, under the new law no requirement exists that the assets be physically removed from the state, whereas previously some uncertainty existed on this point.

For some reason, the new law seems to have generated the erroneous impression among some non-Florida advisors that the short-term trust is no longer a viable planning technique. On the contrary, the short-term trust not only survives; it has been made more user-friendly in the sense that any Floridian (with the likely exception of the grantor) can serve as trustee. All that remains is the requirement that no Florida resident possess a taxable "beneficial interest" in the trust. Section 199.183 also provides that a resident who has a taxable beneficial interest is not exempt from the tax. Fortunately, Florida defines the term "beneficial interest" as a current right to income and either a power to revoke the trust or a general power of appointment; attributes that can easily be avoided in drafting the trust instrument. For example, in order that the Floridian not be totally without resources and forced to survive on "earlybird" specials for the duration of the trust, legal advisors alert to these potential problems will provide in the trust document that distributions of income and principal can be made to the Floridian—grantor in the discretion of the Trustee. (One caveat: the Florida Department of Revenue has ruled as recently as last December that if the taxpayer is the grantor, trustee and beneficiary of the trust, the trust assets are considered to have a taxable situs in Florida and are thus subject to the tax.)

Following last fall's elections, those few Floridians not involved in complaining about the outcome of the election, litigating about the outcome of the election, or recounting the ballots, predicted the swift and certain end of the Florida intangible tax. Commonly accepted was the notion that instead of repealing the tax, the Florida legislature would reduce the taxable rate to zero. This would effectively eliminate the tax and yet preserve for future legislatures the option of simply raising the rate as an alternative to the presumably more difficult task of reinstating a repealed tax. At a minimum, those in the know predicted, the rate would be reduced to .5 mills.

As this article is laboriously researched and written in early May, the Florida legislature has shown surprising reluctance to offer further tax relief to its beleaguered citizens. Repeal, or reduction of the tax rate to zero, has been rejected. A proposed reduction of the rate to .5 mills similarly failed to pass and apparently resulted in a compromise to reduce the rate to .75 mills. Even that limited reduction, however, evaporated at the very end of the legislative session—the rate for next year will remain at 1 mill. With the increased exemptions, a married couple with $1 million of taxable assets will pay an intangible tax of $500. A couple with $5 million of taxable assets will pay $4,500. Meanwhile, knowledgeable (and high net worth) Floridians have switched their attention from all of these maneuverings in Tallahassee and await with baited breath the fate of the Bush administration's proposal to repeal the federal estate tax. Stay tuned!

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Appraisals of Tangible Personal Property

By Stephen S. Lash

Introduction

Appraisals of works of art are an important part of estate planning and financial planning, as well as being required for estate tax, charitable contribution or gift tax purposes. Due to the fluctuation of the art market and the trends in collecting categories, appraisals of fine art should be updated on a regular basis. For example, the market for American paintings has risen dramatically in the last ten years. An American painting that was purchased ten years ago is worth dramatically more today. This is just one of the reasons why it is important to keep appraisals current.

Choosing an appraiser is an important part of this process. An appraiser needs to be very familiar with the current market and its trend lines in his or her area of specialization in order to accurately value works of art, especially for those appraisals that will be submitted to the Internal Revenue Service (the "IRS"). There are many factors that can affect the value of a work of art and it is important that an appraiser has the knowledge and experience to accurately weigh these factors when assigning a value to a work of art. Some of these factors are the provenance, or history, of an object; rarity; quality; condition; and fashion, as society's taste changes over the years and something that was collected in the 1960s may not be so popular today, or the reverse.

It is also essential that the appraiser is aware of the IRS rules governing appraisals as set forth in the Internal Revenue Code of 1986 (the "Code"), the Treasury regulations promulgated under the Code, and interpreting authority. Neither Congress nor the IRS has yet sought to unify the appraisal requirements for income-, estate-, and gift-tax purposes. Crucial differences exist, such as (1) the requirement that certain estate-tax, but not income-tax or gift-tax, appraisals be made under oath, and (2) the minimum values (e.g., $3,000, $5,000, or $10,000) above which special appraisal requirements apply.

As a result, in contracting for an appraisal to be used for tax purposes, the practitioner should take care to state clearly the tax purpose for which the appraisal is being obtained. Further, the practitioner should review the draft appraisal for compliance with the specific requirements applicable to the particular tax purpose.

Although appraisals may be required with regard to several kinds of property, this article focuses only on appraisals of tangible personal property. The most common situations in which tangible personal property must be valued for tax purposes are when a taxpayer claims a charitable deduction on his or her income tax return for a contribution, when the executor of an estate values a decedent's household and personal effects, and when a taxpayer reports the value of a particular gift on his or her gift tax return. Other purposes are discussed below, including new regulations governing excess benefit transactions involving certain exempt organizations.

In each of these situations, the taxpayer or executor may be required to supply—or at least to obtain and rely upon—an appraisal of the property in question. The specific requirements in each situation, however, are different and are outlined below.

Income Tax Purposes

By far the most complicated of the appraisal requirements are those demanded of a taxpayer who claims a charitable deduction on his or her income tax return. For any item of tangible personal property valued at more than $5,000, the taxpayer must obtain a "Qualified Appraisal" and attach an "Appraisal Summary" to his or her income tax return. For any item valued at more than $20,000, the taxpayer must attach the Qualified Appraisal itself (and not just the Appraisal Summary) to his or her income tax return.

What Is a "Qualified Appraisal"?

The appraisal regulations[1] under § 170[2] specify in great detail the requirements of a Qualified Appraisal. These requirements are summarized in the IRS Publication 561, "Determining the Value of Donated Property," which is a useful guide to appraisal requirements.[3] The taxpayer and his or her advisor should bear in mind, however, that this publication is intended only for assistance in preparing income tax returns, not estate or gift tax returns.

The four general requirements of a Qualified Appraisal are as follows:

(A) It must be made not more than 60 days before the date of the contribution of the property to charity (and not later than the due date of the return on which a deduction for the contribution is claimed).

(B) No part of the fee for the appraisal can be based on a percentage of the appraised value of the property.

(C) It must be prepared and signed by a "Qualified Appraiser," whose qualifications will be discussed below, and all appraisers who contribute to its preparation must sign it.

(D) It must include:

(1) A detailed description of the property from which someone who is not generally familiar with the type of property could recognize this particular item;

(2) A description of the physical condition of the property;

(3) The date (or expected date) of the contribution;

(4) The terms of any agreement that the donor has entered into or expects to enter into with regard to the property;

(5) The name, address, and taxpayer ID number of the Qualified Appraiser or Appraisers and, if the Qualified Appraiser is employed or engaged as an independent contractor by another person or firm, the name, address, and taxpayer ID number of that person or firm;

(6) The qualifications of the Qualified Appraiser who signs the appraisal, including the appraiser's background, experience, education, and any membership in professional appraisal associations;[4]

(7) A statement that the appraisal was prepared for income tax purposes;

(8) The date or dates on which the property was valued;

(9) The appraised fair market value on the date (or expected date) of the contribution;

(10) The method of valuation used to determine the fair market value, such as the comparable sales or market data approach;

(11) The specific basis for the valuation, such as any specific comparable sales transactions; and

(12) A description of the fee arrangement between the donor and appraiser.

Who Is a "Qualified Appraiser"?

The regulations under § 170 provide very detailed guidelines concerning the qualifications of a Qualified Appraiser. These guidelines are intended to ensure that the Qualified Appraiser is competent to make the appraisal and is sufficiently disinterested to be able to render an honest opinion of value.

In broad outline, the regulations provide:

(A) Certain individuals are not allowed to be Qualified Appraisers, including:

(1) The donor of the property (or the taxpayer who claims the deduction);

(2) The donee of the property (i.e., the charity receiving the gift);

(3) A party to the transaction in which the donor acquired the property, such as the person who sold the property to the donor, unless the donor makes the donation within two months of acquiring the property and claims an appraised value no higher than the price at which it was acquired;

(4) A person who regularly prepares appraisals for one of the above and who does not perform a majority of his or her appraisals for other persons (e.g., the donor's curator);

(5) A person employed by or related to any of the persons in (1), (2), or (3) above.

(B) A Qualified Appraiser must certify on the Appraisal Summary (see below) that he or she:

(1) Holds himself or herself out to the public as an appraiser, or performs appraisals on a regular basis;

(2) Is qualified to make appraisals of the type of property being valued because of the qualifications described in the appraisal;

(3) Is not one of the excluded individuals named above;

(4) Is not receiving an appraisal fee based upon a percentage of the appraised property value; and

(5) Understands that there is a penalty for aiding and abetting an understatement of tax liability.

(C) A person cannot be a Qualified Appraiser if the donor has knowledge of facts that would cause a reasonable person to expect that the appraiser will overstate the value of the donated property.

The "Appraisal Summary"

A taxpayer who claims a charitable deduction greater than $500 must attach IRS Form 8283 to his or her income tax return and fill out Section A of the form, which requires information about the donated property and the donation. When a taxpayer claims a deduction for an item valued at more than $5,000, he or she also must fill out Section B of this form; Section B is the "Appraisal Summary."

The Appraisal Summary requires additional information about the donated property as well as the signature of the donee and a certification signed by the Qualified Appraiser containing the representations described above.

The Statement of Value

In 1996, the IRS issued Revenue Procedure 96-15, which provides the procedures through which a taxpayer may request from the IRS a binding (on the IRS and the taxpayer) "Statement of Value" as to any item of art that has been appraised at $50,000 or more. The taxpayer may then use the Statement of Value to substantiate the value of the item of art for income, estate, or gift tax purposes.

A taxpayer who requests a Statement of Value to substantiate **a charitable contribution of art** must submit to the IRS a Qualified Appraisal, a required user fee of $2,500, and an Appraisal Summary. Because the taxpayer can request a Statement of Value only *after* the contribution has been made, the procedure outlined in Revenue Procedure 96-15 is of little practical utility to the taxpayer.

A taxpayer seeking a Statement of Value for estate or gift tax purposes must submit to the IRS an appraisal containing certain specified information, a required user fee of $2,500, a description of the item of art, the appraised fair market value of the item, the cost, date and manner of acquisition, and the date of death (or alternative valuation date, if applicable) or the date of the gift. Again, obtaining a Statement of Value is often of little practical utility to the taxpayer, as it just accelerates review of values and therefore is not of assistance in planning.

Use of Appraisals by an Officer, Director, or Trustee of a Tax-Exempt Art Organization

Code § 4958 and newly-promulgated regulations[5] impose an excise tax on an officer, director or trustee of an organization that is exempt under Code § 501(c)(3) (other than a private foundation) or 501(c)(4). These categories include museums or similar organizations that own artworks (each, an "Applicable Art Organization"). Penalties apply if the officer, director or trustee knowingly participates in an "excess benefit transaction."

An example of an excess benefit transaction would be the bargain sale by a museum of a work of art to a trustee of the museum. However, the trustee could protect himself or herself if he or she fully discloses the factual situation surrounding the transaction to an independent valuation expert and then relies on a reasoned written opinion of that independent valuation expert with respect to the transaction.[6] The independent valuation expert must hold himself or herself out to the public as an appraiser, perform the relevant valuations on a regular basis, be qualified to make valuations of the type of property involved, and provide a written certification that these three criteria are satisfied. All of these criteria are similar to the qualified appraisal rules for valuing charitable contributions for income tax purposes.

Estate Tax Purposes

When an estate includes household and personal effects, the executor must file Schedule F of the estate tax return, itemizing the property and reporting its value. All items of property must be listed separately unless they have a value of less than $100 (this value has not changed in decades). Items having a value less than $100 and contained in the same room on the date of death can be grouped together. As an alternative to itemizing, the executor may provide a written statement, prepared under penalties of perjury, setting forth the aggregate value of the property as appraised by competent appraisers of recognized standing and ability (or by dealers in the class of personalty involved).[7]

Is an Estate Tax Appraisal Necessary?

As a practical matter, in large estates almost all "miscellaneous property" is valued by one or more appraisers. The reasons for this include (1) that the alternative to itemizing, mentioned above, requires that executors rely on appraisals by either a competent appraiser or a dealer, and (2) that the Internal Revenue Code prescribes penalties for both under-valuing and overvaluing estate property. These penalties may be waived on a showing of "reasonable cause and good faith," which may be demonstrated by justifiable reliance on a professional appraisal.

In determining whether reliance on a particular appraisal demonstrated "reasonable cause and good faith," the IRS will take into account: (1) the methodology and assumptions underlying the appraisal, (2) the appraised value, (3) the relationship between appraised value and purchase price, (4) the circumstances under which the appraisal was obtained, and (5) the appraiser's relationship to the taxpayer or to the activity in which the property is used.[8]

Certain types of tangible personal property must be appraised separately, specifically, items having marked artistic or intrinsic value in excess of $3,000, such as jewelry, furs, silverware, paintings, etchings, engravings, antiques, books, statuary, vases, oriental rugs, or coin or stamp collections. The appraisal of such items must be made by an "expert or experts" and it must be made under oath,[9] an often overlooked requirement. The appraisal must also be accompanied by the executor's written statement, made under penalties of perjury, as to the completeness of the itemized list of such property and as to the disinterested character and the qualifications of the appraiser or appraisers.[10]

Requirements of Estate Tax Appraisals

The regulations provide little general guidance regarding the preparation of estate tax appraisals. Otherwise, they merely provide guidance for appraisals of specific types of property:

(1) Books in sets by standard authors should be listed in separate groups;

(2) In listing paintings having artistic value, the size, subject, and artist's name should be stated;

(3) In the case of oriental rugs, the size, make, and general condition should be given; and

(4) In the case of silverware, sets of silverware should be listed in separate groups, groups or individual pieces of silverware should be weighed and the weights given in troy ounces and, in arriving at the value of silverware, the appraisers should take into consideration its antiquity, utility, desirability, condition, and obsolescence.[11]

Additional general and specific guidance for estate tax appraisals has been provided in Revenue Procedure 66-49. Revenue Procedure 66-49 suggests that, for general purposes, an appraisal report should contain at least the following:

(1) A summary of the appraiser's qualifications;

(2) A statement of the value and the appraiser's definition of the value he has obtained;

(3) The bases upon which the appraisal was made; and

(4) The signature of the appraiser and the date the appraisal was made.

According to the same Revenue Procedure, appraisals of art objects, and of paintings in particular, should include:

(1) A complete description of the object;

(2) The cost, date, and manner of acquisition;

(3) A history of the item, including proof of authenticity (such as a certificate of authentication) if such exists:

(4) A photograph of a size and quality fully identifying the subject matter, preferably a 10 x 12-inch or larger print; and

(5) A statement of the factors upon which the appraisal was based, such as:

   (a) sales of other works by the same artist particularly on or around the valuation date;

   (b) quoted prices in dealers' catalogs of the artist's works or of other artists of comparable stature;

   (c) the economic state of the art market at or around the time of valuation, particularly with respect to the specific property;

   (d) a record of any exhibitions at which the particular art object had been displayed; and

   (e) the standing of the artist in his profession and in the particular school or time period.

Gift Tax Purposes

A taxpayer who makes a completed gift is required to file a gift tax return on IRS Form 709 and, except to the extent of a deduction such as the charitable or marital deduction, pay tax on the transfer at graduated rates based on the value of the gift if the gift generates a tax in excess of the unified credit amount.

Is a Gift Tax Appraisal Necessary?

The instructions for the gift tax return and the applicable regulations[12] require that the taxpayer attach to the return either a detailed description of the method used to determine the fair market value of the gifted property or an appraisal of the gifted property.

Requirements of Gift Tax Appraisals

The regulations provide specific guidance regarding the preparation of gift tax appraisals. Although fairly general and applicable to gifts of many types of property, not just items of art, this guidance provides a good starting point for the taxpayer making a gift of art.

The regulations specify that a gift tax appraisal contain the following information:

(1) The date of the gift;

(2) The date on which the gifted property was appraised and the purpose of the appraisal;

(3) A description of the gifted property;

(4) A description of the qualifications of the appraiser;

(5) A description of the appraisal process used;

(6) Any information considered in determining the appraised value;

(7) The appraisal procedures followed, and the reasoning that supports the analyses, opinion and conclusions reached in the appraisal;

(8) The valuation method used, the rationale for the valuation method, and the procedure used in determining the fair market value of the gifted property; and

(9) The specific basis for the valuation, such as specific comparable sales or transactions.

The regulations also specify that a gift tax appraisal must be prepared by an individual who meets the following criteria:

(1) Holds himself or herself out to the public as an appraiser, or performs appraisals on a regular basis;

(2) Is qualified to make appraisals of the type of property being valued because of his or her qualifications, as described in the appraisal; and

(3) Is not the donor or recipient of the property or a member of the family of the donor or recipient (which includes spouses, ancestors, lineal descendants and spouses of lineal descendants) or any person employed by the donor, the recipient or a member of the family of either the donor or recipient.

Summary

In summary, the rules involving appraisals of tangible personal property may seem arcane but can become of critical importance if the advisor engages an appraiser who is not thoroughly familiar with them. For this reason, an advisor engaging an appraiser should make sure that the appraiser has up-to-date, in-depth knowledge both of appraisal formats and of the marketplace in which the most sustainable comparable values can be found.

Endnotes

1. The applicable Treasury Regulations are found at § 1.170A-13. These regulations were adopted in 1984 and amended in 1984, 1988, 1995 and 1996.
2. Unless otherwise noted, all section citations are to the Code.
3. This and other IRS publications are available free of charge on the IRS Web site or by calling 1-800-TAX-FORM.
4. The Qualified Appraiser can attach a current resume to the Qualified Appraisal rather than recite this information within the Qualified Appraisal itself.
5. The applicable Treasury Regulations are found at §§ 53.4958-1T *et seq*. These regulations were promulgated in temporary form in January 2001.
6. Treas. Reg. § 53.4958-1T(d)(4)(iii)(C).
7. Treas. Reg. § 20.2031-6(a).
8. Treas. Reg. § 1.6664-4(b)(1).
9. Treas. Reg. § 20.2031-6(b).
10. *Id*.
11. Treas. Reg. § 20.2031-6(d).
12. The applicable Treasury Regulations are found at § 301.6501(c)-1(f). This subsection of the regulations was adopted in 1999.

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Planning and Administering the Estate of the Sole Practitioner

By Philip L. Burke

The purpose of this article is to highlight some of the issues presented at the Trusts and Estates Law Section Spring Meeting held in Rochester, New York, on April 27-28, 2000. The author would like to thank the presenters, S. Jeanne Hall, Esq., Robert L. Ostertag, Esq., Frances A. Ciardullo, Esq., Ronald Prohaska, Esq., James A. Woehlke, Esq., and John P. Schaefer, Esq., for the time and effort spent in preparing the program and for their wonderful presentations during the conference.

As stated in the introduction to the session, "Handling the affairs of an incapacitated or deceased attorney, accountant or physician, who was in sole practice, can prove to be a daunting task. Issues pertaining to access to client files, confidential medical and legal records, as well as fiduciary duties and obligations need to be answered."

Due to space limitations, this article cannot cover all of the material presented. However, it should be noted that a full set of the materials referenced in this article can be obtained from the Bar Association.

There are several common issues to be addressed in the event of the death or disability of a sole practitioner, whether that practitioner is an attorney, an accountant or a physician. The first portion of this article will address, in general terms, some of these common issues and the second portion will highlight some of the issues that are unique to the three separate professions. Also, for ease of preparation, this article will assume that the sole practitioner has died, that an Executor of his/her estate has been appointed and that the Executor will be the individual responsible to close the practice. It should be noted, however, that these discussions would apply not only to an Executor after death, but, in some cases, to an agent acting under a durable Power of Attorney or a Guardian appointed during lifetime. Also, it is not always someone in a formal fiduciary capacity who assumes this responsibility. As we will see, it is possible for the sole practitioner, during lifetime, or for the estate, after death, to designate another professional who will close the practice.

Common Issues

As indicated, there are some common issues that need to be addressed by the Executor of the estate of a deceased sole practicing attorney, CPA or physician (hereinafter referred to as the "professional").

First, it is important to make sure that the office staff is retained to assist in closing the practice. The staff usually knows the "ins and outs" of the daily practice—how items are filed and stored, access to computerized records such as client/patient lists and appointments, schedules and /or court calendars. Of course, the staff employment arrangements also need to be reviewed. If the practice is to be sold or transferred to another professional, helpful and knowledgeable staff members may be able to parlay their ability into continued employment in the new practice.

Once access to records, files and calendars is obtained, the job of contacting clients/patients begins. The Executor needs to "triage" the files and immediately address those that are urgent and/or time sensitive. Obviously, in the attorney and CPA situation, meetings, trials, audits, etc., can, in most cases, be rescheduled. However, for the patients of a deceased physician who need prompt medical attention or surgery, another physician needs to be located as soon as possible.

After the emergency "fires" are extinguished, the job of notifying clients/patients of the death of the professional starts. Notice should be in writing and provide the client/patient with information on how to obtain a new attorney/CPA/physician, where the files are located and the procedure for picking up or transferring the file. (Specific concerns regarding client/patient files will be discussed in more detail later on in this article.) In some instances it may be desirable to send the notice by certified mail and/or put an ad in the local newspaper. Also, notification is not limited to current clients/patients, but also to any former clients/patients for whom the deceased professional continues to hold records and/or files. This is especially important with regard to original documents such as wills, x-rays and medical diagnostic results (discussed further below).

If former clients/patients cannot be found, the files are required to be retained for a certain period of time. For attorneys, the Code of Professional Responsibility does not specify how long closed files need to be retained. A good rule of thumb would be for a minimum of six to seven years for most files, but longer for files dealing with existing trusts, original wills and other documents that may become more important with the passage of time. The local Surrogate's Court should also be contacted with regard to the filing of original wills.[1] Also, see DR 9-102, which requires that certain records be retained for a minimum of seven years, such as deposit and withdrawal records for attorney accounts, copies of retainer and compensation agreements and more. For physicians, the Education Law mandates that medical records for an adult be retained for at least six years from the date of the last treatment and, for minors, *at least* six years and until one year after the minor reaches age 18.[2]

With regard to client/patient files, confidentiality is obviously a very important issue. Initially, files should only be reviewed to determine the names and addresses of the parties, the file status, existence of any time constraints (e.g., filing deadlines, statutes of limitation) and whether or not the deceased professional had arranged ahead of time for a successor professional to take over the matter.

The next step involves the practice itself. Lease agreements for the office space and equipment need to be reviewed, as well as any utility obligations. Check on the billing status for each file, as well as accounts receivable, and prepare and send out final bills (if appropriate). In the medical practice, this is another area where staff can be extremely helpful, especially in dealing with insurance and/or government claims and reimbursements (e.g., Medicare, Medicaid). Vendor contracts (equipment, library, office supplies) need to be reviewed and terminated or assigned. Review employment and payroll records for staff to make sure that the necessary withholdings are current and filed with the proper authorities. This is also important with regard to the tax records for the practice and any qualified plan benefits provided to the employees. Make sure that the Post Office is notified and appropriate forwarding instructions are in place.

With any of the three professions, it is also very important to contact the malpractice carrier to make sure that coverage continues for an appropriate time period. Since the 1970s, attorneys have been covered by "claims made" policies (not "occurrence" policies) and it is this author's understanding that "claims made" policies are more common with CPAs and physicians. However, the type of policy and the existence of continued coverage after death (known as a "tail") need to be investigated. With regard to the length of the "tail" coverage, usually the applicable statute of limitations for a particular matter is a good yardstick. However, be wary of services provided to a minor (e.g. obstetrician, guardianships, etc.) and the tolling of the statute during minority.

Once the issues discussed above have been taken care of, the next question to be addressed is the possible sale or transfer of the practice. Until recently, most states prohibited the sale of a law practice, but that has changed. New York now allows a law practice to be sold.[3] Accounting and medical practices have been "saleable" assets for quite some time. The real question on the sale of a practice is valuation. The selling party should consider hiring appropriate appraisers and/or brokers and investigate their qualifications to evaluate the practice being sold. "Rules of thumb" are generally available with regard to the value of accounting and medical practices. However, since the authority to sell a law practice has only recently come into play, valuation guidelines may be few and far between. Obviously, clients/patients need to be notified of the change and be given the opportunity to stay with the practice or move to another professional.

An overall consideration in all of this is to make sure that the Executor, or whoever is responsible for the closing of the practice, keeps good records of all activities. This activity will have to be accounted for to the estate beneficiaries and well-documented, organized records will significantly ease this process.

Individual Practice Issues

There are issues that the Executor needs to be concerned with that are specific to each practice. These will be discussed in the context of each practice.

Solo Law Practice

The Disciplinary Rules specifically cover many of the issues relating to the closing of a law practice. With regard to attorney fees, where a successor attorney completes a matter for a deceased attorney, DR 2-107(A) and 3-102 govern the fee arrangement and allocation. These sections deal with the required notice to the client with regard to any fee splitting and payment of fees to the estate of the deceased attorney. The Executor should make sure that full disclosure of the arrangement has been made and that the provisions of these rules are complied with.

The Disciplinary Rules also cover what happens to attorney trust, escrow or "special" accounts. DR 9-102 requires that where a deceased attorney was the sole signatory on such an account, the proposed successor signatory may apply to the Supreme Court for an order designating the successor, provided that the successor is a member of the bar in good standing and admitted to practice in New York State. Also, fees advanced to the deceased attorney for retainers and/or disbursements must be promptly refunded to the client,[4] referencing an attorney who "withdraws from employment"), or, possibly, transferred to a successor attorney with the client's consent. Also, fees earned for services rendered to a client who cannot be located can be paid out of funds held in escrow upon application to the Supreme Court in the county where the law office is maintained. An order directing payment of the fee can be obtained, and the court will require that any balance be paid to the Lawyers' Fund for Client Protection for safekeeping until claimed by the client.[5]

With regard to client files, unless a lien for fees is being asserted, a client is entitled to receive all papers that belong to them. Care should be taken in the distribution of client files to protect confidential and/or privileged information.[6]

With regard to the closing of a deceased attorney's office, it should be noted that the Appellate Division, Fourth Department, amended 22 N.Y.C.R.R. part 1022, effective November 27, 2000. For practitioners in that department, § 1022.24 now provides that the Appellate Division may appoint an attorney "to take possession of the attorney's files, examine the files, advise the clients to secure another attorney or take any other action necessary to protect the client's interests." The attorney appointed under this provision must file a status report within 30 days of the appointment and the Appellate Division is also authorized to fix the compensation for the attorney. It would appear that these provisions do not override the role of the Executor, etc., in closing the estate since the section is permissive ("may appoint") but would be useful where a successor cannot be found or where the Executor needs assistance from an attorney to close the practice.

Solo Accounting Practice

With regard to the accountant-client situation, the CPLR does not specifically categorize this as a privileged relationship in the same manner as attorney-client,[7] physician-patient[8] and others. However, the New York State Society of Certified Public Accountants does maintain ethical standards and guidelines which can be reviewed on their Web site, www.nysscpa.org. For example, confidentiality does not attach in the face of "a validly issued and enforceable subpoena or summons. . . ."[9]

File retention for accountants, and the length files need to be retained, depends to some extent on the work performed. Audit files, based on review and dissection of information provided by the client, may only have to be retained for a few years. However, tax matters should be retained for a longer period of time, presumably for as long as applicable state and/or federal statutes of limitation may dictate.

Solo Medical Practice

A medical practice presents a greater number of individual issues than legal or accounting practices. First, there are very strict regulations governing the collection and disposal of controlled substances. The local Drug Enforcement Agency office should be contacted (this is listed on the physician's certificate which should be displayed in the office) and the original certificate must be returned to the DEA along with a letter explaining the death of the physician. Also, syringes and "triplicate" prescription pads are treated in the same manner and must be disposed of in accordance with the provisions of 10 N.Y.C.R.R. 80.51. These regulations are extremely detailed and specific and need to be fully understood before taking any steps with regard to any activity dealing with controlled substances. Regular prescription pads should be shredded.

Medical or "hazardous" waste must be disposed of in accordance with environmental and health laws. Most offices have contracts with appropriate disposal companies, which should be maintained for as long as necessary. If not, contact the local hospital for instructions.

The New York Education Department, Division of Professional Licensing, should also be notified of the physician's death, and the physician's certificates should be returned to Education Department of the Department of Health (depending on which office issued them).

With regard to patient records, they may be placed with another physician for safekeeping, but cannot be used by that physician without the patient's consent. Patient files do not belong to the patient, unlike attorney and accountant files, but are subject to the right of access by the patient. Consequently, the files remain the property of the estate subject to transfer to another physician with patient consent. Therefore, if another physician is holding the files for safekeeping, an agreement between the estate and the physician should be entered into specifying factors such as ownership, access, separation from the physician's other files, confidentiality, how long the files will be retained, and others.

As indicated above, the medical record is owned by the physician subject to the patient's right of access. Public Health Law §§ 17 and 18 govern the release of medical records. Although it is not clear on their face if these sections apply to Executors, they should be reviewed for guidance. Normally, original records are not released—just copies, and a reasonable charge may be made for copying. However, federal and state law requires that original mammography films must be released if requested. Finally, records cannot be withheld from patients solely due to inability to pay for prior services or for copying costs.

Records for medical payments from insurance companies, government payors and others should be retained, with the length of time of retention being a function of who the payor is. For example, 31 U.S.C. § 3731, the Federal False Claims Act, sets forth the statute of limitations for violations of the act (false claims filed with a government employee or agency, e.g., Medicare, Medicaid) with a maximum period extending, under certain circumstances, to ten years. Individual payment records should be reviewed to determine the appropriate retention time for each file. The billing staff for the practice should be able to provide substantial assistance in this regard.

Planning Considerations

Up until this point, the discussion has revolved around the winding up of a practice after death or disability. Since the article is entitled "Planning and Administering the Estate . . ." some planning concepts need to be discussed.

For the sole practitioner, it is important to plan ahead and make arrangements with other professionals to be available to assist if the sole practitioner can no longer service the clients/patients. Most professionals have working relationships with others in their field, who may be in sole practice or with a firm or medical group. Arranging for these individuals or firms/medical groups to take over in the event of death or disability can be relatively simple when compared to what needs to be done if nothing is in place. Written arrangements are recommended so that clients/patients know, possibly in advance, who will be assuming responsibility for their file. The "successor" professional should also be introduced to the sole practitioner's office staff and how the staff can get in contact with the successor in the event of an emergency. The successor should also know how, or be able, to get access to the sole practitioner's office.

The sole practitioner should also make his or her family aware of the arrangements especially if a family member is going to be the Executor or agent under a durable Power of Attorney. Any corporate fiduciaries should also be notified.

Also, practitioners in larger firms or medical groups can take a proactive stance by contacting the sole practitioner and offering to assist in the event help is needed on short notice.

Obviously, the practitioner who is retiring has time to make sure that all of the loose ends are tied up and that the clients/patients have been taken care of. However, in instances where there is no time to plan, as in the event of a sudden illness or death, understanding what needs to be done, and how to do it, can save everyone—clients, patients, fiduciaries and beneficiaries—a lot of time, money and exasperation.

Endnotes

1. *See* SCPA 2507.
2. Education Law § 6530(32).
3. *See* DR 2-111(1200.15.a).
4. DR 2-110(a)(3).
5. DR 9-102(f-1).
6. DR 4-101, EC 4-6.
7. CPLR 4503.
8. CPLR 4504.
9. *See* Rule 301.

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HotDocs Surrogate's Forms—One Year Later

By Wallace L. Leinheardt

More than a year has passed since the Trusts & Estates Section introduced the official Office of Court Administration (OCA) Surrogate's Court forms which are electronically completed by use of the HotDocs program.

Initially, only Administration forms were available. Subsequent free updates provided all of the rest of the OCA forms for Probate, Guardianship, Small Estates, and Accounting Proceedings, including Wrongful Death.

In addition to the "official" OCA forms, additional forms suggested by court clerks and documents used by experienced attorneys were added to the program, such as Decrees, "Cover Letters" and Attorney Certifications.

The program, jointly marketed by the New York State Bar Association (NYSBA) and Matthew Bender, (the HotDocs publisher) is the first time that the NYSBA has partnered with an "outside" vendor on any of its Continuing Legal Education products.

The results have been successful beyond expectations. In the past year, more than 2,000 copies of the program were sold.

Firms have been able to eliminate the filing space necessary to stock a supply of all of the different paper forms for the numerous counties in the area where they practice. Because the forms are electronically merged on a computer rather than typed "the old-fashioned way," typographical errors have been eliminated and the speed and accuracy of the production of the forms have vastly increased.

"Help" screens were designed by a Committee of Clerks and Attorneys from all areas of the state. Many screens include the exact language of the statute. The latest version of the program includes "Links" to the Surrogate's Court Procedure Act (SCPA), the Estates, Powers and Trust Law (EPTL) and to the Uniform Rules for Surrogate's Court. Practice tips alert the user when affidavits are needed and when necessary parties, such as the Attorney General, have to be joined.

Users are provided two methods of completing the forms: typing the information onto the "onscreen" form, or by answering dialog boxes which request information. Either way, the program produces a neat, clean, tamper proof form. A history of which forms have been created and when is automatically entered for each client. The overall result is that attorneys are better able to file papers with fewer errors. Incidentally, the program automatically calculates the filing fee!

Judges and clerks have remarked that they are receiving "correct papers" on "current forms." The number of "returned" papers has been reduced substantially. The Courts have also been able to reduce the number of forms that they need to have printed since attorneys are now producing their own.

Attorneys (and their assistants) are raving about the ease of use of the program. It is infinitely easier to produce the documents that are needed and to have them signed literally while the client (or out of town relative) waits! The program also prints blank forms, if necessary.

As a result of the Trust and Estate Section's leadership, other Sections are considering similar programs. Most recently, a NYSBA/HotDocs Residential Real Estate Program was released. Plans are also underway for NYSBA/HotDocs Family Law and Article 81 Guardianship programs.

The forms will be updated as necessary. Plans are underway to add to the number of documents that would be useful to attorneys in their Surrogate's practice, including letters to banks; brokerage firms; the Social Security Administration; the Postal Service; utilities and credit card companies, so as to make the program an even more valuable tool for Surrogate's practice. Firms with Internet access will be able to download updates automatically.

It is this writer's hope that as a result of the hard work and dedication of the members of the Section's E-Forms Sub-Committee, in cooperation with the Legislature and the computerization of OCA, it will not be too long before these forms can be filed via the Internet.

Wallace L. Leinheardt is the principal of the Law Offices of Wallace L. Leinheardt, with offices in Garden City, N.Y. Wally writes and lectures regularly on Guardianship (Article 81); Surrogate's Court Practice; and Computer Use in Law Offices. He served as Chair of this Section's Surrogate's Court Committee and its E-Forms Sub-Committee which created the NYSBA/HotDocs Surrogates Forms Program. He is especially grateful to Sub-Committee members Howard F. Angione, Esq.; Robert F. Baldwin, Jr., Esq.; Michael Cipollino; Jennifer J. Corcoran, Esq.; Hon. Cathryn M. Doyle; Donald S. Klein, Esq.; Gary R. Mund, Esq.; Daniel J. McMahon, Esq.; Michael E. O'Connor, Esq. and Albert W. Petraglia, Esq. for their efforts which resulted in his being presented with the Russell A. Taylor Award by this Section.

Can a Fiduciary Execute a Power of Attorney?

By Jory Bard Zimmerman

1) What Is a Fiduciary?

A Power of Attorney is not a contractual relationship that can be rescinded. It is an appointment, which may be revoked by the principal.[1] It is well settled, an agency is a fiduciary relationship which is the result of a manifestation of consent by one person to another to enable that other to act on her behalf and under her control, provided that other so consents.[2] It is not a tremendous leap to state an agent is a fiduciary with respect to matters within the scope of her undertaking.[3] As a fiduciary, an agent must act in the best interests of her principal.[4]

A fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking, in the nature of a position of trust or holding confidence.[5] New York provides a statutory definition of fiduciary for the purposes of clarity in the meaning of terms and for efficient drafting.[6] In New York, a fiduciary is a person who meets the description of a personal representative[7] or who is designated by the creator or the court to act as an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee or donee of a power during minority.[8] Recently, the court acknowledged that an attorney-in-fact might be compelled to account under a power of attorney received from a decedent.[9] In effect, the court is holding an attorney-in-fact to the same standard of accountability as a fiduciary.

2) Power of Attorney[10]

In general, a power of attorney is a written document which enables a principal to appoint an agent or attorney-in-fact to act in her place and stead with respect to the principal's affairs, assets and property.[11] The principal authorizes the agent to act as her alter ego in connection with all possible matters.[12] The powers granted by the principal are either as enumerated in the New York statutory scheme or may be provided for in the power of attorney itself.[13]

The governing law of New York does provide statutory short forms of both durable and non-durable powers of attorney,[14] the former survives incapacity or incompetence while the latter does not. There is an ethical question as to whether a fiduciary, if permitted to do so at all, should be able to grant a durable power of attorney. For if the fiduciary becomes incompetent and cannot serve, the testator or grantor who originally nominated the fiduciary, may have nominated a successor. It is appropriate that the choice of a successor fiduciary be with the testator or grantor and not the fiduciary himself, unless the testator or grantor has specifically empowered him to name his successor. Both types of powers of attorney may be revoked during the life of the principal[15] and neither shall be irrevocable.[16] For services rendered as fiduciaries, attorneys-in-fact are entitled to compensation.[17]

The enumerated powers of attorneys-in-fact under the New York statute include authority with respect to estate transactions.[18] The agent is permitted "to represent and act for the principal in all ways and all matters affecting any estate of a decedent . . . or any trust . . . with respect to which the principal is a fiduciary.[19] An agent may accept, reject or receive a payment from any estate, trust or other fund.[20] In addition, an agent may enter into or rescind a contract "in any manner" to accomplish his purpose.[21] The attorney-in-fact is empowered to do any and all acts "with respect to the estate of a decedent . . . or the administration of a trust."[22] This includes interests in existence at the granting of the power of attorney and any which materialize thereafter, whether or not located in the state of New York.[23] However, the Bronx County Surrogate has held that the word "transactions" in a power of attorney shall be interpreted "merely to permit the attorney-in-fact to receive any property to be delivered to her principal." Here the agent was acting on behalf of a non-resident enemy alien beneficiary, who wanted the attorney-in-fact to compel the administrator of decedent's estate to account.[24]

The general New York statute governing powers of attorney gives the attorney-in-fact broad authority to act on behalf of a principal. The statute here does not go so far as to say a fiduciary may grant a power of attorney as principal. The law appears to acknowledge the fiduciary nature of an agent, but does not quite raise an attorney-in-fact to the level of fiduciary. There is a question of who can appoint a fiduciary. A fiduciary is often appointed by the court, as is the case with executors and testamentary trustees. However, a fiduciary may also be appointed by the governing instrument as in the case of a trustee of an *inter vivos* voluntary revocable trust, for example. It is of note to consider whether a fiduciary should be able to appoint a fiduciary, a successor fiduciary, or delegate to a co-fiduciary.

3) Powers of a Fiduciary

As established in 1967 by the New York State Legislature, a fiduciary had broad and numerous specific powers upon her appointment.[25] By the terms of the governing instrument, it is within the testator's or grantor's discretion to prevent the fiduciary from exercising one or more of the enumerated powers, or by the same token, to grant the fiduciary additional powers beyond the scope of the statute.[26]

Prior to the enactment of this statute, the Bennett Commission, the colloquial name for the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, engaged in an extensive review of the particular powers to include and those which were specifically not included. Of those not included, the Bennett Commission furnished an explanation and indication of legislative intent. It was, and is, understood by the framers that the testator or executor may always include these omitted powers in the governing instrument, and, similarly, a fiduciary could always petition the Surrogate to exercise an omitted power.[27]

Of the powers deliberately omitted were the power to employ agents and the power to delegate authority.[28] Absent a clear direction in the governing instrument it appears at first blush that a fiduciary may not execute a power of attorney in favor of a third party to carry out her duties as fiduciary. The power to employ agents was considered by the Commission to be one that needed to be reviewed on a case-by-case basis. Any attempt at a formulaic approach by statute would be futile. In their view, any statute could not be drafted with enough flexibility to encompass the myriad of agents for a variety of services a fiduciary might hire.[29] The very nature of this principle against delegation of fiduciary responsibilities was deemed by the Commission to be one that should be left well enough alone.[30]

However, the court has held a fiduciary is entitled to hire agents to perform work he cannot actually do himself. The court indicated, "each estate will determine whether or not the retention of agents is warranted. The law is clear that if a fiduciary rightfully delegates some of his executorial work to subordinates, he should be prepared to pay for such ministerial services out of his commissions even if they are men of affairs."[31] It appears that a fiduciary may be able to execute a power of attorney for limited ministerial acts pursuant to a power of attorney specifically so drafted.

With the adoption of the Prudent Investor Act, it is possible for a fiduciary to delegate investment authority.[32] The statute prescribes the fiduciary's[33] duty to invest and manage property held in a fiduciary capacity.[34] Further, this standard requires the fiduciary who decides to delegate investment and management functions to do so in a manner that is consistent with the duty to exercise skill, including special investment skills.[35] In particular, the law allows the delegation of investment and management functions, and requires the fiduciary to be prudent in selecting the delegee, to clearly define the scope of the delegation, to monitor the delegee's activities and to control the cost of the delegation. The terms of the governing instrument may opt out of the statute; prior law allowed delegation only if the governing instrument expressly so provided.[36] The marked absence of a definition of "management" is of note. It may be too simplistic, without further legislative clarification, for the practitioner to assume the interpretation of "management" here is "management of a portfolio" and not anything else.[37]

How far and to what extent may a fiduciary delegate? It had long been accepted in New York that a fiduciary could delegate ministerial acts and duties, but a fiduciary could not delegate those duties involving discretion and judgment.[38] It goes without saying that a fiduciary must use diligence and prudence in the management of the property she holds in a fiduciary capacity. "Delegation of such duties to another is no excuse."[39] Once a fiduciary accepted her undertaking, she had no power to delegate that authority.[40]

It has been long settled in New York, absent an express direction in the governing instrument, a fiduciary could not delegate.[41] However, the Legislature carved out an exception with the adoption of the Prudent Investor Act. The Act allows a fiduciary to delegate the "investment or management" of a trust.[42] The legislative history recognizes, when appropriate and under certain circumstances, that any fiduciary may need to delegate some investment responsibility because their own expertise is limited; for example, an individual fiduciary to obtain satisfactory portfolio management, or even a corporate fiduciary for venture capital or foreign security investments.[43] When the Court was presented with a question of whether a corporate fiduciary may delegate to a family financial advisor, at the request of the income beneficiary and as approved by the trustee, the Court answered in the affirmative.[44] In this arrangement colloquially known as a "directed trusteeship," the Court was favorably disposed to the cost-effective manner of the proposed delegation, as required by the statute, in which the corporate fiduciary would only charge a custody fee, as well as the fiduciary's "continuing oversight obligation."[45] Of note is the Court's acknowledgment, as another example of permissible delegation, of the then-recent legislation to allow banks to invest common trust funds in mutual funds.[46] This shift in philosophy illustrates the modern trend favoring proper delegation with continuing supervision by the fiduciary.[47] This delegation standard requires the fiduciary to "act with prudence in deciding whether and how to delegate to others."[48]

Another long-standing precept in New York is that a fiduciary may not turn over the management of her undertaking to the co-fiduciary, or anyone else, in order to escape liability.[49] The Prudent Investor Act, as enacted in other states, will exonerate a fiduciary who has exercised reasonable skill, care and caution in properly delegating.[50] The three key components of this delegation are the selection of a suitable agent, the establishment of the scope and terms of the delegation within the parameters of the trust instrument, and the periodic review and monitoring of the agent's actions.[51] Accordingly, the fiduciary who complies with these requirements is not liable to the beneficiaries or the trust for said agent's decisions or actions.[52] However, when the New York Legislature enacted its version of the Prudent Investor Act in 1994 it declined to go so far as to relieve the fiduciary of liability.[53] In order to delegate, the New York fiduciary must comply with essentially the same three components as other states. The two embellishments, for the New York fiduciary, are to take into account the nature and value of the assets when selecting a delegee and for the fiduciary to control the costs of the delegation.[54] Also, the New York statute does not refer to the delegee as an agent because the "respondeat superior" doctrine of agency law is negated when the delegee accepts the delegation of the fiduciary's function and, thereby, the delegee submits to the jurisdiction of the New York courts.[55] In addition, any exculpation or arbitration clause in a delegation agreement will be void as a matter of public policy.[56] It may be timely and appropriate for the Legislature to reconsider the incorporation of this exoneration language into the New York statute, particularly for those fiduciaries who exercise care, skill and caution by properly delegating within the express terms of the statute and then maintaining current and historic records of the delegee's activities in compliance with the fiduciaries' continuing duty to monitor and supervise said delegation.

The issue of whether a fiduciary may delegate authority often arises between multiple fiduciaries. That is, whether one co-fiduciary may delegate to another co-fiduciary. In many states, for discretionary acts, one fiduciary cannot delegate to the other, such as one co-fiduciary filing a lawsuit, concurrence of all the co-fiduciaries is required to file the claim.[57] However, under its Prudent Investor Act, New Jersey has created an exception to the general rule. Specifically, where two or more fiduciaries are serving but only one has "special investment and management skills or expertise", or has been named as a fiduciary in reliance upon said skills, then the fiduciaries without these skills may delegate the "investment and management functions" to the fiduciary with the skills.[58] This delegation is accomplished as if the specialized fiduciary were an agent within the meaning of the New Jersey statute.[59] The unanswered question is whether "management skills and expertise" could potentially be separated from the investment function and thereby delegated within the purview of the statute. For example, potentially delegable management functions are the fiduciary's power to invade corpus under the terms of the instrument, or the timing and dollar amounts of distributions to and among a class of beneficiaries pursuant to a spray trust.

The seemingly clear view of the New York court has been, and still is, that co-fiduciaries are regarded in law as one entity.[60] The Legislative answer to the actions of multiple fiduciaries is to distinguish between joint and several powers; a joint power requires a majority vote to be exercised, unless the governing instrument specifies otherwise, a several power may be exercised by any one of the co-personal representatives of a decedent's estate.[61] However, if there are only two co-fiduciaries, they must act together.[62] The court has acknowledged its ability to appoint a third co-fiduciary, to be a tie-breaker, if the two appointed by the decedent are consistently in a stalemate on most questions relating to the administration.[63] The judicial authority discerning when and to what extent co-fiduciaries must act as one unit is not entirely consistent. Traditionally, before the adoption of the Prudent Investor Act, the common practice had been to consider ministerial acts delegable and binding as between co-fiduciaries, but those acts involving an exercise of discretion to not be delegable or binding.[64] There is an unanswered question as to the framer's intent when they drafted the New York Prudent Investor statute in the disjunctive; that is, the apparent separation of "investment or management functions."[65]

The historic progeny of cases in New York illuminates this issue. New York Courts have held that one co-fiduciary can bring a lawsuit against another in a court of equity, to compel payment of a debt owed by the latter to the testator.[66] The act of one fiduciary in the execution of a bond and mortgage within the scope and authority of his agency will bind all the fiduciaries because the acts of any one are deemed the acts of all.[67] However, one co-fiduciary cannot borrow without the assent of the other and such assent cannot be assumed.[68] Similarly, one co-fiduciary cannot bind both by signing a deed to sell real estate.[69] In the same vein, one fiduciary cannot bind both and bring a proceeding to dissolve a corporation because this action "requires the exercise of judgment and discretion of the highest degree"; the acts performed by one fiduciary that will bind his co-fiduciaries are limited to those of a ministerial nature.[70] One fiduciary cannot endorse a note to bind the decedent's estate without the cooperation of his co-fiduciaries.[71] A single fiduciary can act without the co-operation of his co-fiduciaries only when performing ministerial duties, such as to collect or discharge a debt.[72] However, the acts of one fiduciary were deemed to be the acts of all the surviving fiduciaries where one interested co-fiduciary did not join in the objections to an account to determine whether proceeds of the sale of stock were income or principal.[73] The Surrogate considers co-fiduciaries one entity acknowledging that one co-fiduciary may act for both, especially with respect to a claim for federal taxes. Despite having the legal authority to pay the claim, it may be impossible to effect payment without the co-fiduciary's signature for the withdrawal of funds from a depository.[74] Recently, the court held a fiduciary may exercise her powers, to settle claims and pay administration expenses and counsel fees, "unilaterally, even without the consent of co-fiduciaries."[75]

The apparent frequency, albeit with limits, of co-fiduciaries delegating acts within the scope of their authority between each other brings to mind the issue of whether one co-fiduciary may execute a power of attorney in favor of her co-fiduciary. The appropriateness of an open-ended durable power of attorney running from one co-fiduciary to the other is dubious. However, a non-durable power of attorney limited as to time and for specific ministerial acts appears acceptable. Broader statutory authority and guidance would be helpful. In addition, if multiple fiduciaries are a single entity in the eyes of the law, then whether all acting co-fiduciaries must execute a power of attorney, if they may do so at all, in favor of a third person is a question.

4) Limited Statutory Authority for Utilizing Powers of Attorney by a Beneficiary

For the limited purpose of administering or receiving a beneficiary's interest in a decedent's estate, the New York statute allows a power of attorney to be used,[76] provided this power of attorney, or similar instrument, is in writing, acknowledged and proved in the same manner as for a conveyance of real property. In addition, every power of attorney must be recorded in the Surrogate's Court granting letters on the estate or having the jurisdiction to grant them.[77]

The Surrogate has discretion to determine whether the form, content, and manner of execution of the power of attorney are acceptable for recording.[78] The attorney-in-fact must provide the court with an affidavit setting forth the facts and circumstances surrounding this appointment; the address of the grantor; the nature of her relationship, if any, to the decedent; the exact terms of any compensation to the attorney-in-fact or disbursements including a copy of any fee agreement; and the name of counsel to the attorney-in-fact.[79]

The Surrogate has held the requirement of recording the power of attorney to be inviolate because "such recording confers *in personam* jurisdiction over an attorney-in-fact. . . . This statutory language does not prelude obtaining personal jurisdiction over an attorney-in-fact who has not recorded the instrument."[80] The court indicated that the purpose of this law is to discourage abuses which may occur between attorneys-in-fact and their principals.[81] In addition, the Surrogate has held a power of attorney not valid when its acknowledgment did not satisfy the requirements of New York's Real Property Law. In this case, the notary who took the acknowledgment could not certify that the person who appeared in front of him was the woman described in the power of attorney, particularly when the identity of this woman was undermined by the testimony of a priest.[82]

The purpose of recording a power of attorney is to give the Surrogate a supervisory role over all those individuals a party thereto. This was illustrated by a case involving foreign national distributees who executed a power of attorney under questionable circumstances in favor of a New York City law firm.[83] The court held that an attorney-in-fact's exercise under a power of attorney is conditional upon the recording of that power of attorney in order to give the court jurisdiction over the parties and to give notice to any persons interested.[84] However, the Court has distinguished between the general power conferred upon attorneys-at-law from those conferred upon attorneys-in-fact under EPTL 13-2.3, to indicate that the statute governing the latter only applies to the distribution of estate assets pursuant to a power of attorney. Here the court went on to say that the actual distribution of estate assets, such as the execution of a deed, would require a proper power of attorney pursuant to the statutory safeguards.[85]

The failure to record a power of attorney before services are rendered will result in the named attorney-in-fact lacking authority to perform any acts and can bar recovery for services rendered pursuant thereto.[86] The surrogate has held that it will not be bound by the terms of a retainer agreement and will fix any fees pursuant thereto in a reasonable amount. "The Surrogate shall have power to inquire into and determine the validity of every instrument executed by the attorney-in-fact and to require proof of the amount of compensation or expenses charged or to be charged by the attorney-in-fact and every person acting thereunder."[87] This is right in line with the intent of the statute to enable the Surrogate to fix and determine the validity and reasonableness of such compensation and expenses irrespective of any existing fee agreement.[88]

The commentators on this subject indicate that "powers of attorney are most often used by a beneficiary or other interested person who is out of the country or otherwise unavailable to appear but wants to participate in the proceeding."[89]

5) Conclusion

Whether a fiduciary can execute a power of attorney may depend on whether a fiduciary can, in effect, appoint another fiduciary. An infinite layering of fiduciaries may not be reasonable. In the current environment of specialized skills and a global economic community, the Legislature has recognized, for investment management purposes, "delegation by fiduciaries is already a common practice. It needs to be legitimized to the extent that it is beneficial, and controlled to the extent that it is dangerous."[90] It goes without saying; a grantor or testator may empower a fiduciary to execute a power of attorney by the terms of the governing instrument. However, a review of the statute seems warranted to clarify the appropriate utilization of powers of attorneys as well as to expand the use of existing statutory authority to facilitate the use of powers of attorneys by all fiduciaries for ease of administration of trusts and estates. It may also be appropriate to revisit the definition of fiduciary to include a reference to the role of agents and attorneys-in-fact since these are really fiduciaries who act on behalf of the principal. This is not a leap of faith since fiduciaries and their permissible agents and delegees are already subject to the supervision of the Surrogate. A fiduciary by any other name still stands in the shoes of the principal, testator or grantor.

Endnotes

1. *Behren v. Blumstein*, 165 A.D.2d 657, 560 N.Y.S.2d 768 (1990); citing *Zanber v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580.
2. *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 606 N.Y.S.2d 243; *Meese v. Miller*, 79 A.D.2d 237, 436 N.Y.S.2d 496; *Reed & Bunger*, 122 N.W.2d 290 (1963).
3. *Haluka v. Baker*, 34 N.E.2d 68 (1941); citing 1 Restatement Law of Agency, Chapter 1, Topic 1, § 13.
4. *Moglia v. Moglia*, 533 N.Y.S.2d 959 (1988).
5. *Haluka v. Baker*, *id*.
6. EPTL 1-2.7; Practice Commentaries, M. V. Turano; citing Memorandum from Temporary State Commission on Estates to Members of the N.Y.S. Legislature, 1966 Session Laws 2757.
7. EPTL 1-2.13.
8. EPTL 1-2.7; Reference to Committees and Conservators does not reflect the passage of Mental Hygiene Law Article 81 (L.1992, ch. 698, § 3), creating the position of guardian, Practice Commentaries, *id*.
9. *In Re M. Roccesano*, N.Y.L.J., Nov. 10, 1999, p. 31, col. 3 (Nassau Co. Sur. Radigan).
10. The discussion of Power of Attorney herein is intended as a brief summary of this subject as it is recognized in New York within the context of this article. An in-depth discussion of the New York Statutory Power of Attorney under G.O.L. 5-1501 *et seq.* is beyond the scope of this article.
11. D. P. Cambs, *Durable Powers of Attorneys and Revocable Living Trusts as Alternative Property Management Tools to Article 81 Guardianships*, NYSBA Trusts and Estates Law Section Newsletter, Fall 1999, Vol. 32, No. 3.
12. G.O.L. 5-1502O.
13. G.O.L. 5-1501.
14. *Id.*
15. *Id.*
16. EPTL 13-2.3(c).
17. EPTL 13-2.3; SCPA 2307.
18. G.O.L. 5-1502G.
19. *Id.*, G(2).
20. *Id.*, G(3).
21. *Id.*, G(6).
22. *Id.*, G(7).
23. *Id.*, G(10) *et seq.*
24. *In re Willer*, 179 Misc. 169 (1942).
25. EPTL 11-1.1; a discussion of the statutory enumerated powers is beyond the scope of this article.
26. *Id.*, Practice Commentary, S. Hoffman; *see also* New York Estate Administration, M. V. Turano and C. R. Radigan, Matthew Bender & Co., Inc. (1999 Ed.).
27. M. Freilicher, *The Fiduciaries' Powers Act—25 years later (Part II)*, 62 N.Y. St. B.J. 37, No. 31 (1990), citing Temporary Commission on Estates, Report No. 6.4C, Leg. Doc. 1964, No 19. pp. 471-591.
28. *Id.*; *see also* M. V. Turano and C. R. Radigan (1999 Ed.) at § 14-3(a); EPTL 11-1.1 Supplementary Practice Commentaries, P. J. Rohan (1969); Practice Commentary, S. Hoffman.
29. M. Frilicher at p. 39; citing Commission report at p. 588.
30. *Id.*
31. *In re Grace*, 62 Misc. 2d 51, 308 N.Y.S.2d 33 (1970); *aff'd*, 35 A.D.2d 783, 315 N.Y.S.2d 816 (1970); citing Third Report of Temporary State Comm. on Law of Estates; N.Y. Legis. Doc. 1964, No. 19, App. M, Report No. 6.4 C, p. 506; *In re Lester*, 172 A.D. 509; *In re Brodbeck*, 123 Misc. 743; *In re Musil,* 168 Misc. 529; *In re McDowell*, *rev'd on other grounds*, 178 A.D. 243; *see also* M. V. Turano and C. R. Radigan at § 14-3 (a).
32. M. V. Turano and C. R. Radigan at § 14-3 (a) and § 14-5; citing Prudent Investor Rule, L. 1994, ch. 609, effective January 1, 1995; an in-depth discussion of the Prudent Investor Rule is beyond the scope of this article.

33. The statute defines a fiduciary, utilizing the term trustee, to essentially mirror the definition of a fiduciary as prescribed by EPTL 1-2.7.
34. EPTL 11-2.3.
35. *Id*. at (b)(4)(c).
36. *Id*. at (c); *see also* Supplementary Practice Commentaries, M. V. Turano (1998).
37. Prudent Investor Rule, L. 1994, ch. 609, Memoranda in support of Legislation Senate Bill 7148-B, J.J. Lack; Assembly Bill 11683-A, Weinstein; Report of N.Y.S. EPTL-SCPA Legislative Advisory Committee, C.R. Radigan, Chair.
38. *In Re Palmer's Will*, 132 N.Y.S.2d 311 (1954).
39. *In re Marine Midland Bank,* 127 A.D.2d 999, 512 N.Y.S.2d 943 (1987).
40. *In re Will of Newhoff*, 107 Misc. 2d 589, 435 N.Y.S.2d 632 (1980).
41. EPTL 11-2.2(a)(1); *In re Riding*, 297 N.Y. 417, 79 N.E.2d 735.
42. EPTL 11-2.3(c).
43. N.Y.S. EPTL-SCPA Legislative Advisory Committee Supplement to 3d Report in Support of Legislation for Prudent Investor Act; letter from C.R. Radigan Chair dated July 8, 1994.
44. *In re Younker*, 174 Misc. 2d 296, 663 N.Y.S.2d 946 (1997).
45. *Id*. at p. 299.
46. *Id*.
47. Restatement of Trusts 3d, § 171 (1992), abrogating the former non-delegation rule of Restatement of Trusts 2d, § 171 (1959).
48. Restatement of Trusts 3d, § 227(c) (1992).
49. *In re Will of Newhoff* at p. 638.
50. NJ ST 3B:20-11.10(c); NJSA 3B:20-11.10(c); Ill. Rev. Stat. Ch. 17, 1675, 1675.1 and 2103; Uniform Prudent Investor Act, draft dated February 12, 1993.
51. *Id*.
52. *Id*.
53. EPTL 11-2.3(c); *see also* Third Report of the EPTL-SCPA Advisory Committee, § App. 3.01.
54. EPTL 11-2.3(c).
55. EPTL 11-2.3(c)(3); *see also* Third Report of the EPTL-SCPA Advisory Committee, § App. 3.01.
56. *Id*.
57. *Stone v. Jones*, 530 So. 2d 232 (1988).
58. NJ ST 3B:20-11.10(e); NJSA 3B:20-11.10(e).
59. *Id*.
60. *Zimmerman v. Pokart*, 242 A.D.2d 202, 662 N.Y.S.2d 5 (1997).
61. EPTL 10-10.7; EPTL 11-1.1, Supplementing Practice Commentaries, P. J. Rohan 1973.
62. EPTL 10-10.7, Practice Commentaries, M. V. Turano.
63. *Id*., Supplementary Practice Commentaries, M. V. Turano, 1996; citing *In re Duell*, N.Y.L.J., July 23, 1996, at 23, col. 1 (N.Y. Co.).
64. EPTL 11-1.1, Practice Commentary, S. Hoffman.
65. EPTL 11-2.3(c).
66. *McGregor v. McGregor*, 35 N.Y. 218 (1866).
67. *Barry v. Lambert*, 98 N.Y. 300 (1885); cited in dissent 66 Hun. 439.
68. *Bryan v. Stewart*, 98 N.Y. 270 (1880).
69. *Brown v. Doherty*, 93 A.D. 190 (1904).
70. *In re Ehret*, 70 Misc. 576 (1911).
71. *Union Bank v. Sullivan*, 214 N.Y. 332 (1915).
72. *In re Leopold*, 259 N.Y. 274, 233 A.D. 412 (1932).
73. *In re Heubach*, 165 Misc. 196 (1937).
74. *In re Bulova*, 60 Misc. 2d 151, 301 N.Y.S.2d 1008 (1969).
75. *In re Stanley*, 240 A.D.2d 268, 660 N.Y.S.2d 107 (1997).
76. EPTL 13-2.3.
77. *Id*., EPTL 13-2.3(a).
78. Surrogate's Court Rules (22 N.Y.C.R.R.) 207.48(a).
79. *Id*.
80. *In re Robinson*, 52 Misc. 2d 163 (1966); *aff'd*, 30 A.D.2d 702.
81. *Id*.; citing *In re Garrity*, 164 Misc. 910 and *In re Bargel*, 5 Misc. 2d 657.
82. *In re Kelodij*, 85 Misc. 2d 946 (1976); *see also* EPTL 13-2.3, Supplementary Practice Commentaries, P. J. Rohan (1976).
83. *In re Mitzkel*, 36 Misc. 2d 671 (1962).
84. *In Re Hoppe's Estate*, 65 N.Y.S.2d 390 (1946); *see also* EPTL 13-2.3, Practice Commentary, S. Hoffman.
85. *In re Estate of Bogom,* 181 A.D.2d 989, 582 N.Y.S.2d 308 (1992).
86. *In re Kraus*, 144 Misc. 2d 34, 543 N.Y.S.2d 620 (1989); distinguishable from *In re Hoppe's Estate*, 65 N.Y.S.2d 390 (1946), where the power of attorney was recorded before the hearing therein but not before services were rendered and the Court allowed the fees.
87. *In re Bargel*, 5 Misc. 2d 657 (1957).
88. EPTL 13-2.3(b)(3).
89. M. V. Turano and C. R. Radigan (1999 Ed.) at § 13-8; *see also* M. V. Turano and C. R. Radigan (1986 Edition), Chapter 13, § H, footnote one, "An executor cannot have an attorney-in-fact because he has no power to delegate his fiduciary duties." Said footnote was omitted in the 1999 Edition.
90. Prudent Investor Rule, L. 1994, ch. 609, Memoranda in support of Legislation Senate Bill 7148-B, J.J. Lack; Assembly Bill 11683-A, Weinstein.

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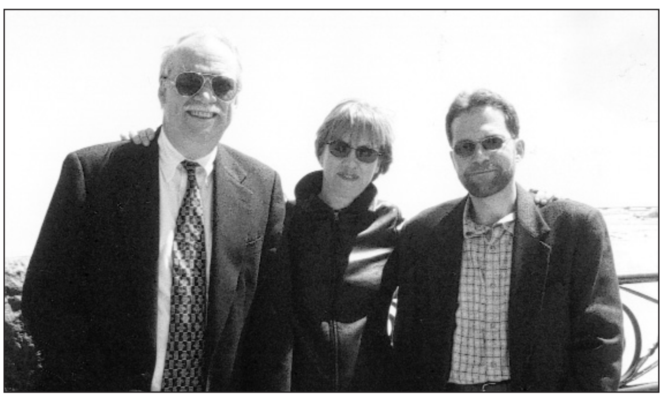
Victoria D'Angelo and Paul Comeau at the Frank Lloyd Wright House

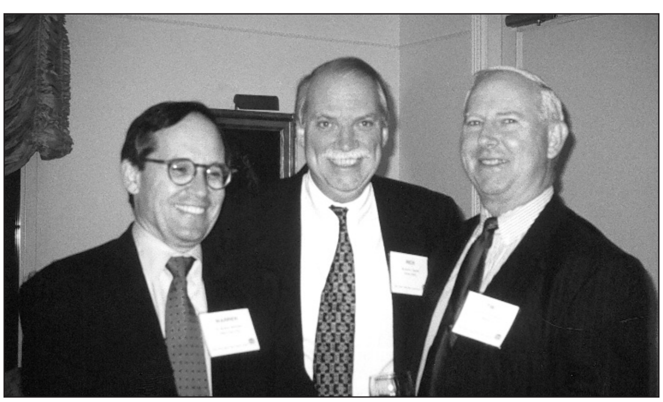
Brian Baird and Gary Freidman

Art Sherwood, Susan Egloff, Pam Champine, David English and Bill LaPiana, the Program Speakers

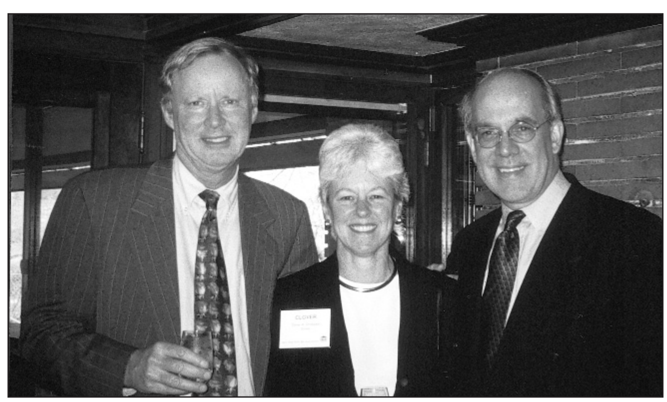


Rich Bowler, Colleen Carew and Gary Freidman at Niagara Falls

Paula Pierro, Lou Pierro, Jeanne Hall and Phil Burke



Warren Whitaker, Rich Bowler and Tim Thornton



Section Chair, Steve Newman; Former Chair, Clover Drinkwater; with the Director of the Darwin Martin House Complex, John Courtin

Answers by
Richard J. Bowler

Q What is a lawyer's responsibility when the client dies and the original will is in the attorney's safe? Does the lawyer have an obligation to notify or file the will?

A New York State Bar Association Committee on Professional Ethics issued opinion 724 two years ago. It is worth reviewing. It holds in part that an implied understanding exists that, after death, the lawyer will take steps to ensure the executor and beneficiaries are aware of the will's existence if that lawyer knows there is no later or valid will.

When agreeing to keep custody of the original will, a lawyer should make clear that the sole purpose is for safekeeping.

In addition, lawyers should keep track of the wills kept in the vault and periodically check with clients to make certain the wills have not been revoked by later documents. This is particularly helpful for the smaller law office. You do not want to be the attorney of an estate of a deceased lawyer with a will vault of old wills and no information about the documents' effectiveness.

* * *

Q Often in wills I see a tax clause that requires all estate taxes to be paid from the residuary estate, "without apportionment as otherwise required by law." Is this a sound approach?

A In too many cases, such a clause is used without measuring the consequences of its use. When a testator signs a will that gives one-half of the residuary estate to a charity (or a surviving spouse) and the other one-half to an individual who is not a spouse, that testator may not understand how the tax clause can wreak havoc on the intended plan. The rule of apportionment under EPTL 2-1.8 is that, unless the instrument says otherwise, bequests bear their share of the tax costs. Accordingly, a direction that all estate taxes are paid out of the residuary estate "without apportionment" will require the charitable or marital part of the residuary estate to, in effect, contribute to the payment of estate taxes. On the other hand, with a simple direction that estate taxes be paid out of the residuary estate, no estate taxes would be payable from a charitable or marital share of the residuary estate. Depending on the overall size of the estate, this could have a tremendous impact on the amount of estate taxes and the ultimate share received by the charitable and noncharitable beneficiaries.

In *Matter of McKinney*,[1] the court held that an ambiguity in the will as to whether or not the apportionment statute applied mandated that apportionment did apply. One clause in the will said that all estate taxes on any property included in the decedent's estate, "including that property passing by the terms of a trust created by me this date, be paid out of my testamentary residuary estate herein and that no portion thereof shall be apportioned or collected from the specific bequests contained in this will or from distributions made from said trust." A later clause said "after payment of all expenses, taxes and specific bequests as aforesaid," the residuary estate is given 70% to charity and 30% to an individual. Surrogate Brewster of Westchester County held that the words "as aforesaid" could have referred merely to the tax exoneration of the inter vivos trust and the specific bequests in the earlier clause. If there is any ambiguity about whether or not apportionment applies, there is a strong public policy in favor of tax apportionment.

The language in the will in *McKinney* left unclear whether there was to be apportionment *within* the residuary estate. If the tax clause had stated that estate taxes were payable from the residuary estate prior to the division thereof, that would provide a clear direction. A direction to pay all estate taxes from the residuary estate "without apportionment otherwise provided by law" also conveys the fact that the testator intended for the charitable residuary share to be reduced by the payment of estate taxes. The use of these clauses in the wills you draft is appropriate if that is the result sought by the testator. Caution should be used however, since, at times, clauses that provide for payment of estate taxes "without apportionment" are meant merely to exonerate specific bequests and not to cause a potentially huge reduction in the marital or charitable share provided for in the will. Make sure you really mean it when you draft to override the apportionment statute. The best course is to understand what the client is trying to accomplish, review the consequences of a given clause and draft the clause that reflects the client's understanding of who will bear the burden of the estate taxes.

Apportionment means let the bequest bear its share of the burden of the tax. It does *not* mean allocate the taxes on specific bequests to the residuary estate. I suggest that all readers review the wills they have drafted and perhaps look closer to see if the tax clause included is the appropriate one for the contemplated estate plan. You might consider using "taxes shall be paid as if they are administration expenses" instead of "without apportionment" if the client wants to have all parts of the residue contribute to the tax burden.

Endnote

1. 100 A.D.2d 477, 477 N.Y.S.2d 367 (2d Dep't 1984).

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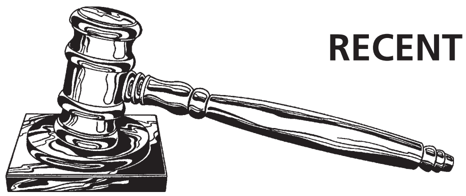

CASE NOTES— RECENT NEW YORK STATE SURROGATE'S AND SUPREME COURT DECISIONS

Arlene Harris and Donald S. Klein

Accountant Malpractice

The co-executor of an estate and co-trustee of an *inter vivo*s trust commenced a proceeding against his sister, the co-executor and co-trustee, for fraud, negligence and breach of fiduciary duty. The accountants for the trust and the estate were also sued on the same causes of action and the additional cause of action of accountant malpractice. The decedent's son alleged that the decedent's daughter, with the help of the accountants, conspired to reduce his inheritance through the manipulation and misappropriation of estate and trust assets. Although he executed a stipulation of settlement with his sister, the decedent's son continued litigation against the accountants. The alleged wrongful conduct of the sister and the accountants involved (1) payments to the sister that were treated as reimbursements; (2) a $400,000 payment from the decedent to her husband which was characterized as a loan that funded the decedent's credit shelter trust; (3) the exclusion of a Florida condominium from the credit shelter trust; and (4) the late filing of a gift tax return for a gift made to the sister.

The Court dismissed the causes of action against the accountants for fraud and breach of fiduciary, as they related to the reimbursements, for failure to allege facts in support of the action. The Court also dismissed the causes of action for negligence as it related to the reimbursements and for fraud and negligence as they related to the $400,000 payment and the late filing of the gift tax return for failure to assert damages. Damages were not required for the cause of action for breach of fiduciary duty and the Court denied summary judgment to the accountants on that claim. The Court allowed the accountants to amend their answer so as to include a counterclaim for contribution but denied the accountants leave to amend their answer so as to include the affirmative defense of contributory negligence. The Court held that the decedent's son did not provide the accountant with information and could not, therefore, have been contributorily negligent. The Court dismissed the claim for punitive damages in connection with the claim of negligence because the conduct of the accountants was not directed at the public, generally. With respect to the cause of action for punitive damages based on breach of fiduciary duty, since public injury was not required, the motion for summary judgment was denied. *Biblowitz v. Greenspan*, N.Y.L.J., Feb. 23, 2001, p. 24, col. 3 (Nassau Co. Sur. Riordan).

Construction—Will

In a proceeding to reform a trust created under a will, the Court held that the words used to create the trust were clear and unambiguous and the trust should not be reformed. The decedent's will established a trust to pay the expenses of the real estate from the trust as well as an annual cash payment to the beneficiary. The petitioner argued that the trust would not be able to continue making the payments and should be reformed. The decedent had specifically indicated in his will that if the income was not sufficient to meet these obligations, then principal should be invaded. The Court held that the decedent's words were clear and left no room for interpretation or construction. The petition was denied in its entirety. *In re Estate of Stahle*, N.Y.L.J., Jan. 23, 2001, p. 32, col. 6 (Onondaga Co. Sur. Wells).

A decedent's will gave an amount equal to the federal estate tax credit to his trustees, in trust for his wife. In the same article, the trustees were directed to pay the principal to the "Recipients" as the trustees deemed advisable for the "Recipients" support. Several other provisions in the same article referred to the trust beneficiaries in the plural. The decedent's wife believed that despite the reference to several beneficiaries, she was intended to be the only beneficiary of the trust. The Court concluded that it was the decedent's intent to benefit his wife. Finally, the Court had to determine the decedent's intent as to the distribution upon his wife's death "to my then living descendants, in equal shares, by representation." The Court noted that equal or per capita shares are not implicit when the distribution is made by representation. The Court held that there was nothing in the will that indicated the decedent intended parity among his children and grandchildren and concluded that "in equal shares" should be excised. *In re Sabella*, N.Y.L.J., Mar. 27, 2001, p. 24, col. 3 (Westchester Co. Sur. Scarpino).

Constructive Trust

The Court denied summary judgment and ordered a trial in a dispute over the proceeds of a life insurance policy. A union obtained a judgment against a clothing manufacturer for failure to make the requisite payments to several employees' benefit funds. The union sought the proceeds from a life insurance policy that the manufacturer had taken out on one of its three shareholders, the proceeds of which were payable to the manufacturer and were to be used to purchase the shareholder's shares upon death, pursuant to a shareholder's agreement. The estate of the deceased shareholder argued that the insurance proceeds belonged to a trust created pursuant to the shareholder's agreement and were not property of the manufacturer that could be used to satisfy the judgment against it. The Court held that while all four elements for a valid, express trust were present (i.e., a beneficiary, a trustee, a *res* and delivery of the *res*) there was no clear indication, without further evidence, that the manufacturer and shareholders intended to create a trust through the mere use of the word "trust" in the shareholder's agreement. The Court denied summary judgment and summary disposition and ordered a trial to determine the intent of the manufacturer and shareholders. *Rumelt v. CNA Life*, N.Y.L.J., Jan. 5, 2001, p. 27, col. 3 (Sup. Ct., N.Y. Co.) (Weissberg, J.).

Discovery

The inquisitorial stage of a discovery proceeding is "a licensed fishing expedition by the executor" to discover assets rightfully belonging to an estate and to discover the value of those assets. Where the executor of an estate knows the value of an asset and legal title to the asset has been claimed by another, the purpose of the inquisitorial stage has been achieved and the executor cannot use the proceeding to obtain documents to buttress a claim to the asset. Rather, the inquisitorial stage ends and actual discovery begins. In this case, the executrix asserted that even though the decedent's brother held legal title to certain premises, the decedent was the actual owner and the brother held the property as a constructive trustee. After the examination of the brother, the executrix sought documents from the brother's accountant as part of the inquisitorial stage of discovery. The Court held that because the value of the asset was known and legal title had been claimed by another, there were no reasonable grounds to examine the accountant at this stage in the proceeding. The Court ordered the decedent's brother to file a verified answer asserting his claim of title to the premises. *In re Estate of Boccia*, N.Y.L.J., Feb. 23, 2001, p. 24, col. 2 (Nassau Co. Sur. Riordan).

Estate Administration

The Court ordered the attorney/fiduciary to render an explanation for the delay in administration of the estate, and if she failed to render an explanation, she would be removed and her letters testamentary would be revoked. The decedent died in 1991. The attorney/fiduciary eventually completed the probate proceeding and letters were issued in December 2000, but the attorney/fiduciary still had not performed her duties. The Nassau County Department of Social Services was holding over $48,000 and jewelry belonging to the decedent which the attorney/fiduciary had not collected. *In re Estate of Smith*, N.Y.L.J.,, Mar. 8, 2001, p. 25, col. 4 (Nassau Co. Sur. Riordan).

Executors—Commissions

In a case of first impression, Surrogate Holzman held that an executor was entitled to an advance payment of commissions equal to the statutory commission under SCPA 2307(1) but was not entitled to an advance payment of commissions equal to 5% of the gross rents he had collected under SCPA 2307(6). The executor applied for advance commissions pursuant to SCPA 2311. That Section provides that the payment of commissions not exceed "receiving commissions." "Receiving commissions," in turn, refers to 2307(1). The Court concluded that compensation for collecting rent from and managing real property under 2307(6) is not a "receiving commission" because 2307(6) provides that any commissions allowed thereunder are "in addition to the commissions" otherwise allowed under 2307. The executor's advance commission, therefore, was limited to the statutory receiving commissions under 2307(1). *In re Estate of Butta*, 185 Misc. 2d 689 (Bronx Co. Sur. Holzman).

Executor—Disclosure Statement

Surrogate Riordan of Nassau County decided that an attorney/fiduciary was entitled to only one-half a statutory commission because a disclosure statement contained in a will did not meet the requirements of SCPA 2307-a. This issue was recently addressed by both Surrogate Roth in *In re Pacanofsky* and *In re Hinkson*, 186 Misc. 2d 15 (Sur. Ct., N.Y. Co. 2000) and Surrogate Holzman in *In re Winston*, 717 N.Y.S.2d 879 (Sur. Ct., Bronx Co. 2001). After reviewing the legislative history of SCPA 2307-a, Surrogate Riordan held that an acknowledgment in a will stating that "I hereby appoint my friend and attorney . . . to be Executor of this, my will. . . . I direct that my Executor shall receive a full commission in addition to a legal fee notwithstanding any rules or laws which prohibit a full commission" was not sufficient to comply with 2307-a and the fiduciary/attorney was only entitled to one-half a statutory commission. *In re Estate of Bruder*, N.Y.L.J., Mar. 15, 2001, p. 25, col. 3 (Nassau Co. Sur. Riordan).

Surrogate Feinberg of Kings County held that an attorney/fiduciary was entitled to only one half a statutory commission where the attorney/fiduciary could not show good cause why he had not obtained disclosure before the decedent's death. The decedent had executed his will in 1982. For wills executed prior to 1996, the statute allows a full commission for good cause shown. Good cause includes a good faith effort to make the required disclosure, obtain written disclosure or otherwise establish reasonable grounds to excuse the absence of disclosure. The attorney/fiduciary submitted an affidavit stating that he realized in 1999 that he would become an executor because the other nominated executors had predeceased the decedent. He stated that he did not bring up the issue of commissions at that time because of the decedent's ill health and the trauma of the death of the decedent's brother. Shortly thereafter, the decedent died. The Court held that the attorney/fiduciary's failure to obtain disclosure because of a concern that the testator would not be receptive did not constitute good cause. *In re Estate of Katz*, N.Y.L.J., Mar. 26, 2001 p. 30, col. 2 (Kings Co. Sur. Feinberg).

Fraud

The Court held that a daughter-in-law sufficiently pled a cause of action for fraud and constructive fraud even though she did not prove compensable damages. The settlor of an irrevocable trust purported to transfer his interest in a business to a trust for the benefit of his grandchildren. The settlor and his daughter-in-law were the co-trustees. The settlor's daughter-in-law was given the lease to the business by the trust and in turn agreed to pay the settlor a sum of money each month. After the death of the settlor's son, the daughter-in-law discovered that the settlor retained title to the business and had not transferred any interest to the trust. The Court held that the daughter-in-law adequately pled the elements of a claim for fraud and constructive fraud but was not entitled to summary judgment based on the pleadings. *Merrone v. Walsh*, N.Y.L.J., Feb. 6, 2001, p.31, col. 4 (Sup. Ct., Suffolk Co.) (Werner, J.).

Letters of Administration

The Court held that a third party who is not related to a decedent can qualify to act as an administrator of the decedent's estate where the surviving spouse and two infant children are non-resident aliens and the surviving spouse consents to the appointment. A distributee who is not eligible to receive letters of administration is eligible under SCPA 1001(6) to consent to the issuance of letters to a nondistributee. The consent of the decedent's infant children was not required because of their infancy. *In re Estate of Pesantez*, 714 N.Y.S.2d 652 (Nassau Co. Sur. Radigan).

Power of Appointment

A power of appointment that requires specific reference to the power in order to exercise it, is not properly exercised by boilerplate language purporting to exercise any power of appointment which the decedent possessed at death. The grantor of a charitable lead trust gave the remainder of the trust to the income beneficiary if he was living, or, if not, to such person(s) as the beneficiary appointed by specific reference to the power of appointment in his will. The beneficiary's will gave all of his tangible personal property and property "under the terms of any trust which I may be a beneficiary of any nature and to any extent or over which trust I may have a power of appointment, general or otherwise" to a friend. EPTL 10-6.1(b) provides that if the donor of a power requires specific reference in an instrument in order to exercise that power, an instrument not containing such a reference does not effectively exercise the power. The trustees contended that the boilerplate language contained in the beneficiary's will did not effectively exercise the power of appointment. The beneficiary's friend contended that the language of the charitable lead trust was insufficient to require a specific reference because it failed to include the exact language of EPTL 10-6.1(b). The Court held that it is not necessary to have the exact language of EPTL 10-6.1(b) and that the power of appointment given in the charitable lead trust was not effectively exercised by the beneficiary. The assets of the trust reverted back to the grantor's estate because the beneficiary died without issue and had not effectively appointed the trust corpus. *In re Burns*, N.Y.L.J., March 12, 2001, p. 25, col. 5 (N.Y. Co. Sur. Preminger).

Prenuptial Agreement

The Court held that a decedent's wife was not entitled to letters of administration where the wife effectively waived her interest in the estate pursuant to a prenuptial agreement and that the time to challenge the prenuptial agreement had passed. The decedent died intestate. In 1987, the decedent and his wife entered into a prenuptial agreement whereby each gave up any right or claim to the other's estate. It was alleged that the agreement was read to the decedent's wife in her native language. In addition, the decedent's wife admitted that she had a copy of the agreement in her possession for 13 years. The Court held that a prenuptial agreement is a contract and governed by a six-year statute of limitation. There was no evidence of fraud, duress, mistake or undue influence and the Court concluded that the statute should not be tolled. While the decedent's wife waived her rights to her husband's estate through the prenuptial agreement, the Court noted that she did not waive her right to the family exemption under EPTL 5-3.1. *In re Estate of Laudadio*, N.Y.L.J., Mar. 21, 2001, p. 20, col. 4 (Kings Co. Sur. Feinberg).

Probate

In a contested probate proceeding, the decedent's grandson objected to the probate of a will executed in August 1992. In January 1992, the decedent had executed a will in which she devised all her real property to her grandsons. In August 1992, the decedent executed a subsequent will in which she devised all her real property to her three daughters in equal shares. The August will was prepared by a retired plumber who was also a notary public. The instrument drafted was "one that no self-respecting attorney would draft." The two-page document misspelled the decedent's name, the first three paragraphs were spelled out in capital letters, the next paragraph was denominated paragraph number "1" and the final two paragraph numbers were spelled out, the subscribing witnesses had never witnessed a will before and had a relationship with the decedent and, finally, the decedent signed a photocopy of the typewritten instrument. After reviewing the testimony of the witnesses, the Court concluded that the subscribing witnesses gave credible testimony and the will was duly executed. The Court also reviewed the testimony of the expert witnesses qualified in handwriting identification and the testimony of the subscribing witnesses and concluded that the will was not a forgery. The estate was of extremely modest size, not one that would tempt anyone to commit conspiracy or perjury. The Court admitted the August 1992 will to probate. *In re Liquori*, N.Y.L.J., Mar. 1, 2001, p. 22, col. 4 (Kings Co. Sur. Feinberg).

Probate—Testamentary Capacity

The Surrogate of Kings County held that the due execution of a will does not require that a will be read to the testator, even when the testator does not read English and the will is written in English. In addition, the Court held that the inability to read English does not support a claim of lack of testamentary capacity. The decedent's will gave everything to three of her daughters and made no provision for a fourth daughter, stating that the fourth daughter received a great deal of money from other sources. The Court did not grant summary judgment on the issue of whether the decedent's three daughters unduly influenced the decedent into believing that the fourth daughter was receiving a great deal of money from other sources. Summary judgment is rarely granted in probate proceedings where the issue concerns undue influence or fraud because the proof depends on the credibility of the witnesses adduced at trial. *In re Estate of Mary Smolen*, N.Y.L.J., Jan. 29, 2001, p. 32, col. 5 (Kings Co. Sur. Feinberg).

Right of Election

The issues in this case were (1) whether 50 percent or 100 percent of the decedent's retirement plan proceeds were included in the elective share base and (2) whether options on two cooperative apartments transferred to decedent's daughters 18 months before death should be included in the elective share base. Retirement assets are fully includible in the estate for elective share purposes except for certain plans which are included at 1/2 the value of the plan. EPTL 5-1.1-A(b)(1)(G) provides that plans to which § 401(a)(11) of the Internal Revenue Code apply are included in the estate for elective share purposes at 1/2 the value of the plan. The Court held that the literal interpretation of EPTL 5-1.1-A(b)(1)(G), that only "qualified plans" under federal law are subject to the 1/2 value rule, was not a correct reading of the statute. Instead, the Court held that the reference in EPTL 5-1.1-A(b)(1)(G) to § 401(a)(11) of the Internal Revenue Code included plans both directly and indirectly subject to § 401(a)(11). Any plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) are also subject to the requirements of § 401(a)(11) by a Treasury Regulation, which is an indirect reference. Analyzing each of the retirement plans at issue, the Court held that (1) the Defined Contribution Plan was subject to ERISA and, therefore, indirectly subject to § 401(a)(11) and within the 1/2 rule; (2) the Tax Deferred Annuity was exempt from ERISA by virtue of 29 C.F.R. § 2510.3-2(f), not subject to § 401(a)(11), and fully included in the elective share base; and (3) the Transfer Payout Annuity Contract was not subject to ERISA, as indicated by decedent's ability to elect payment without her spouse's consent, not subject to § 401(a)(11) and fully included in the elective share base. The Court concluded that the options on the two cooperative apartments were not includible in the elective share base. The decedent, even though she was President of the Apartment Corporation and Chairperson of the Board of Directors, did not control the Corporation with respect to the granting of the options. The decedent did not participate in the vote on the options transaction. The options to the apartments, therefore, were not includible in the elective share base. *In re Estate of Cohen*, N.Y.L.J., Jan. 8, 2001, p. 26, col. 2 (N.Y. Co. Surr. Preminger).

Where the parties to a divorce have signed and acknowledged the written stipulation of settlement before a judge and the only action left to finalize the divorce was the ministerial acts of signing the judgment along with the findings of facts and conclusions of law, the parties have effectively divorced and the survivor is not a surviving spouse and cannot inherit as such. The decedent's will gave his wife an amount equal to her elective share under the EPTL. Prior to decedent's death, he and his wife had entered into a written stipulation of settlement in a divorce proceeding before a judge. The Court failed to sign the judgment before decedent's death and, in fact, the judgment was never signed. Nevertheless, Surrogate Fusco held that this was sufficient for a divorce and the end of the spouse's elective share. In the alternative, Surrogate Fusco held that even if the parties were not divorced at the time of the decedent's death, the wife could not receive an amount equal to her elective share under the will inasmuch as she waived her right to election in the settlement agreement. The settlement agreement did not merge with the proposed judgment but, rather, survived as a valid agreement between the parties. *In re Estate of Mirizzi*, N.Y.L.J., Mar. 27, 2001, p. 22, col. 4 (Richmond Co. Surr. Fusco).

Statute of Limitations

The Court rejected a motion to dismiss for lack of subject matter jurisdiction and on the ground that the proceeding brought by the executor of the decedent's estate was barred by the statute of limitations. The Supreme Court appointed Guardians of the Person and Property prior to decedent's death pursuant to Article 81 of the Mental Hygiene Law. The Co-Guardians were ordered to transfer the decedent's jointly held property into a separate account. The respondent was one of the joint account owners. The proceeds of the joint account were never transferred and after the decedent's death, the respondent removed a portion of the account. The Preliminary Executor demanded the return of the money to the estate and the respondent argued that 1) the Surrogate's Court lacked subject matter jurisdiction to enforce an Order and Judgment of the Supreme Court and 2) the proceeding was barred by the statute of limitations. The Court held that the allegations as set forth by the Preliminary Executor for the turnover of estate property was a matter in which the Surrogate's Court has subject matter jurisdiction. The Court also held that the action was governed by the three-year statute of limitations applying to conversion and that the proceeding was not barred as it was commenced within three years of the alleged conversion. *Estate of Flon*, N.Y.L.J., Feb. 27, 2001, p. 21, col. 3 (Queens Co. Surr. Nahman).

Stipulation Agreement

In a contested probate proceeding, the nominated executor filed a petition to probate a copy of a will executed in July 1999 and deny probate to a will executed in November 1999. The nominated executor alleged that the decedent was incompetent to execute the November 1999 will. The parties filed a stipulation, asking the Court to probate the second will subject to the terms of the stipulation. The members of the decedent's family signed a second stipulation which differed from the one signed by all the parties. The Court held that the stipulation signed by the family members was a valid contract and enforceable. Where the terms of the family stipulation differ from the general stipulation, the terms of the general stipulation control. The Court withdrew the petition to probate the July 1999 will and admitted the November 1999 will to probate under the terms of the stipulation. *In re Estate of Homsey*, N.Y.L.J., Feb. 1, 2001, p. 30, col. 6 (Kings Co. Surr. Feinberg).

Wrongdoer

A Court cannot disinherit a decedent's brother who allegedly murdered the decedent until an appeal was final. The executrix of decedent's estate attempted to disinherit the decedent's brother who was convicted by a jury for murder in the second degree for stabbing the decedent to death. The decedent's brother received 25 years to life in prison. The Appellate Division denied the brother's application for leave to appeal as a poor person and for the assignment of counsel, but gave him leave to renew upon filing papers setting forth his financial situation. The Court decided that it could not give collateral effect to the conviction until the appeal was final. As such, it could not disinherit the decedent's brother. The estate's only remedies were to urge the prosecution to dismiss the appeal, perfect the appeal in a timely manner or seek a renunciation from the brother. *In re Scott*, N.Y.L.J., Mar. 27, 2001, p. 23, col. 3 (Nassau Co. Surr. Riordan).

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RECENT NEW YORK STATE DECISIONS

John C. Welsh

WILLS

FELONIOUS DEATH—JOINT WILL

H killed W, his wife, and several minutes later committed suicide. The decedents left a joint will executed by H and W which provided that upon the death of the first spouse, the surviving spouse received the entire estate. Upon the death of the survivor, certain property passed to W's sister with the balance divided into three shares for (1) W's parents, (2) H's parents and (3) the siblings of both H and W. The Appellate Division found that as to the assets of each, H was deemed to predecease W and that the beneficiaries under the joint will would take as though W had truly survived. H's relatives were innocent of any wrongdoing and were not disqualified by their relationship to the assailant. The Surrogate had inconsistently ruled that H's relatives could share in his assets but not in those owned by W. Jointly held property passed through W's estate under the rulings of both courts. Additional assets of the husband were two life insurance policies listing W as the primary beneficiary and H's father as alternate and a retirement fund naming both of H's parents as alternate beneficiaries to W. The Surrogate incorrectly favored the takers under H's will over the alternate designated beneficiaries. *In re Estate of Covert*, 279 A.D.2d 48, 717 N.Y.S.2d 392 (3d Dep't 2000).

OBJECTIONS TO PROBATE

In a probate proceeding, decedent's son offered various objections to the validity of his father's will which limited him to a legacy of 1,000 loose pennies. The surviving attesting witness testified that the statutory requirements of due execution were satisfied. An attestation clause and a self-proving affidavit had been executed by both witnesses. Decedent lived independently, cared for himself and had his own social life. The attesting witness supported competency. Evidence to the contrary lacked probative value. No showing of fraud or undue influence was made. Although the principal beneficiary had motive and opportunity, she testified that she did not know the contents of the will until after it was executed. Decedent and his son were adversaries for years. After the death of his mother, the son sued decedent on four separate occasions. The disinheritance of the son was adequately explained. *In re Clapper*, __ A.D.2d __, 718 N.Y.S.2d 468 (3d Dep't 2001).

OBJECTIONS TO PROBATE

Sworn statements by the objectant and by one of decedent's children created an issue of fact concerning testatrix' testamentary capacity by their assertions that she was in deteriorated physical, mental and emotional states when she executed a codicil five months before her death. An additional issue of fact existed regarding the disinheritance of objectant because of the undue influence of her sister. Nine months before execution of the codicil, objectant and her sister had engaged in a bitter argument in decedent's presence. As a result, the sister allegedly prevented future contact between objectant and testatrix. *In re Rella*, __ A.D.2d __, 718 N.Y.S.2d 57 (1st Dep't 2000).

ADMINISTRATION OF ESTATES

ABATEMENT—RESTITUTION

The executor of decedent's will delivered a brokerage stock account to decedent's son as legatee less than two months after decedent's death. When the estate assets proved to be insufficient to satisfy all legacies, the Surrogate ruled that certain specific legacies should have been paid from the stock account prior to its distribution. After the executor paid the amounts due to the specific legatee from his personal funds, he was entitled to reimbursement from the son. A contrary result would cause unjust enrichment. The statute of limitations began running when the son refused to sell sufficient stock so as to allow payment of the specific bequests as directed by court order. *In re Estate of Allen*, __ A.D.2d __, 717 N.Y.S.2d 356 (2d Dep't 2000).

LEGAL FEES

Upon decedent's death, two individual attorneys agreed to perform jointly required legal services for the estate attorney ___ and the four distributees agreed that the attorneys were to be paid reasonable fees for their work. The Surrogate awarded ___ $84,750, the amount claimed by ___ with his supporting affidavit. The distributees made no objection. Attorney A asserted that each attorney was to be paid $75,000. He was supported by tax records signed by the attorneys and the distributees. However, no retainer agreement was ever signed and no time records were maintained by A. It appeared that most of the legal work was done by ___ and that A's efforts were mostly nonlegal. The Appellate Division affirmed the Surrogate's decision to limit A's fee to $37,500, the amount already paid. All relevant factors were considered by the Surrogate and no abuse of discretion was shown. *In re Guattery*, __ A.D.2d __, 717 N.Y.S.2d 764 (3d Dep't 2000).

LEGAL FEES

In a final accounting, a co-executor who had appointed himself attorney for the estate, or for himself while acting in his fiduciary capacity, sought to recover an additional $10,297 in legal fees. Apparently, the other co-executor had filed a competing accounting. The Surrogate denied the request and the Appellate Division affirmed that decision. No differentiation had been made between legal and executorial services as required by law. *In re Estate of Poulos*, __ A.D.2d __, 717 N.Y.S.2d 128 (1st Dep't 2000).

LEGAL FEES

In a proceeding to fix an attorney's fee, the attorney unsuccessfully appealed from the Surrogate's award to him in the amount of $3,000. All money paid in excess of that amount was ordered to be refunded to the estate. The fee was a provident exercise of discretion by the lower court which was in the best position to evaluate the attorney's work product. *In re Gluck*, __ A.D.2d __, 720 N.Y.S.2d 149 (2d Dep't 2001).

LEGAL FEES

In a proceeding to fix an attorney's fee, the law firm was directed to refund to the clients $56,078, an excessive payment that could not be attributed to legal services performed. Apparently, some of the charges were for services that were executorial in nature which were not unique, difficult or estate enhancing. Difficulties of administration caused by one co-executor's disagreement with policy decisions made by the other three co-executors did not warrant additional compensation. Most of the charges claimed were not attributed to that problem. *In re Ellis*, 277 A.D.2d 102, 716 N.Y.S.2d 53 (1st Dep't 2000).

WAIVER OF WIDOW'S RIGHT OF ELECTION

In the final accounting of the estate, the executor rejected the notice of election filed by the widow on the ground that she had waived her right to elect in a prenuptial agreement. When the executor moved for summary judgment, the widow submitted proof that she had never signed the agreement and that the acknowledgment was defective in form. The Appellate Division affirmed the Surrogate's denial of the widow's motion for summary judgment. Issues of fact were presented. *In re Beckford*, __ A.D.2d __, 720 N.Y.S.2d 176 (2d Dep't 2001).

VALIDITY OF *INTER VIVOS* TRANSFERS

Decedent's sister sought limited letters of administration to set aside alleged gifts of real and personal property to decedent's niece and her husband. The donees and one distributee opposed issuance of letters on the grounds that decedent had validly transferred all of his property prior to death and that recovery of the property would upset his estate plan. The sister and the transferees agreed to settle the matter by a transfer of all assets in question to the sister in exchange for $63,000. The issue remained unresolved when nine distributees who were parties to the proceeding refused to consent to the settlement and no stipulation of discontinuance or entry of judgment was properly filed. *In re Estate of Drake*, __ A.D.2d __, 718 N.Y.S.2d 767 (4th Dep't 2000).

FORFEITURE OF BENEFITS

Upon the death of H, his minor grandchildren through their guardian ad litem threatened to file objections to probate. Under a settlement approved by the court, the guardian ad litem agreed to refrain from filing objections to H's will and also to refrain from objecting to the probate of the will of his widow, W, upon her death. In return, the grandchildren received shares in irrevocable trusts that were created pursuant to the settlement agreement. W died eight years after H leaving a will which contained an *in terrorem* provision barring unsuccessful contestants from taking under the will. In earlier litigation, the Appellate Division admitted W's will to probate and ruled that the settlement agreement in H's estate barred the grandchildren from any contest of the grandmother's will. When the grandchildren sought payment of their legacies of $25,000 each under W's will, the executors claimed that the earlier conduct of the beneficiaries barred them from taking. The Surrogate agreed with the executors and found that the conduct of the grandchildren in resisting the issuance of letters testamentary in W's estate far exceeded conduct permitted under SCPA 1404. The grandchildren were not allowed to take their legacies. *In re Estate of Cagney*, 186 Misc. 2d 760, 720 N.Y.S.2d 759 (Sur. Ct., Dutchess Co. 2001).

LIMITATION ON EXECUTOR'S COMMISSIONS

In her will, testatrix named the attorney-drafter as executor and recited that she understood he would be entitled to fees as both executor and attorney and that her sister had declined to serve. The Surrogate ruled that the executor was not limited to one-half commissions for failing to comply with the disclosure provisions of SCPA 2307-a. Although the statutory plan envisions that the disclosure will usually be evidenced by a writing separate from the will, a separate writing is not statutorily mandated. When the will language is not mere boilerplate and manifests that a meaningful discussion has occurred between the testatrix and the designee, the disclosure requirement should be deemed to be complied with. The court noted that use of a separate writing continues to be the safe practice. *In re Estate of Winston*, 186 Misc. 2d 332, 717 N.Y.S.2d 879 (Sur. Ct., Bronx Co. 2000).

TRUSTS

ACCOUNTING—OBJECTIONS BY TRUST BENEFICIARIES

The beneficiary of a testamentary trust unsuccessfully filed objections to the accounting by the executor of the estate. No mismanagement of the estate assets occurred between the date of death and the date that the estate retained the services of a money management firm. The value of the stock appreciated significantly during that period. No undervaluation at the time of distribution was shown. There was no right in the income beneficiary to invade trust corpus without showing that a "bonafide emergency" existed. Expenses incurred for legal services and accounting services were personal obligations of the beneficiary and could be paid from his distributions of trust income or other assets. *In re Perlman*, __ A.D.2d __, 717 N.Y.S.2d 579 (1st Dep't 2000).

TRUST REFORMATION

The trustee of a grantor retained income trust (GRIT) created in a prior guardianship proceeding to manage the securities of the incapacitated grantor was unsuccessful in his attempt to reform the trust. Reliance was placed on earlier instruments that were said to show that the grantor intended to exclude benefits to any nieces or nephews of her late husband who were adopted or born out of wedlock. The Appellate Division found that such an intent, if present, would be irrelevant since no beneficiary nieces or nephews fell into either category. Although some of their issue were either adopted or born out of wedlock, nothing indicated that such an intention would be equally applicable to them. Additionally, the GRIT and other evidence strongly indicated that the grantor did not intend to exclude any of the issue from benefits. None of the trust beneficiaries joined in the trustee's petition even though they would have benefited if it were successful. *In re Von Gontard's Trust*, __ A.D.2d __, 720 N.Y.S.2d 111 (1st Dep't 2001).

LEGAL ISSUES

The Surrogate erred in failing to direct that the trust pay legal fees incurred in an appeal taken by the objectant from the trustee's account. The trustee's successful defense benefited the takers of the trust corpus and not the trustee individually. Under the circumstances, the fees were reasonably charged to the trust pursuant to EPTL 11-1.1(b)(22). *In re Matsis*, __ A.D.2d __, 720 N.Y.S.2d 179 (2d Dep't 2001).

ACCOUNTING—PASSIVE TRUSTEE

Testatrix's daughter, M, and H Bank served for 23 years as co-trustees of a testamentary trust created under the will of testatrix. In an accounting proceeding commenced by H Bank, the income beneficiary and two remaindermen (her sons) challenged the investment methods of H Bank. The Surrogate found that the trust instrument gave the trustees the broadest possible investment powers. M, a person with no training or experience, left the trust investment choices to H Bank exclusively. In discussions between M and the representative of H Bank, M ratified the investment choices made by H Bank. Deferring to the bank in this manner was permissible conduct by M but it would not have avoided liability for improper conduct by H Bank. Investment in common trust funds was authorized by the broad powers of the trust instrument. There was no showing that the investment policies were prejudicial to any class of beneficiaries. The required impartiality was found to be present. *In re Estate of Farley*, 186 Misc. 2d 355, 717 N.Y.S.2d 500 (Sur. Ct., Onondaga Co. 2000).

MISCELLANEOUS

MALPRACTICE—PRIVITY

The county treasurer acting as public administrator retained A as his attorney to represent him in the settlement of decedent's estate. Thereafter, the public administrator was arrested and convicted of grand larceny for his felonious use of funds from three estates. As a result, W, the new county treasurer, became the successor public administrator. When W and the estate beneficiaries brought an action against A for legal malpractice and other theories that were later dismissed, the Appellate Division agreed with the lower court that lack of privity was not a defense assertable by A against W. When W succeeded the discredited county treasurer, no new lawyer-client relationship was created. A represented the statutorily designated personal representative based upon incumbency in the office. A did not represent the removed county treasurer in his individual capacity. The three-year statute of limitations had not expired. Under the rule of continuous representation, the statute is tolled while the period of representation continues. A's representation continued at least through the decree closing the estate which was made less than three years before suit was brought. *Cherry v. Mallery*, __ A.D.2d __, 721 N.Y.S.2d 144 (3d Dep't 2001).

UNAUTHORIZED TRANSFER OF REALTY

In the two weeks prior to his death, decedent executed two powers of attorney in favor of his half-brother. The half-brother then used the power to convey decedent's real property to his wife. The real property transfer tax return filed at the time of the conveyance showed that the transfer was a gift. That recital placed upon the grantee and her husband the burden to show payment of consideration which they failed to do. Neither instrument gave the attorney-in-fact authority to make gifts. The remote grantees, who are apparently the current record owners, do not prevail as good faith purchasers since they were told about several title defects prior to their purchase. *In re Agrest*, __ A.D.2d __, 719 N.Y.S.2d 261 (2d Dep't 2001).

LEGAL FEES

A guardian for an incapacitated person was allowed to pay legal fees from that estate in the amount of $3,500 for legal services rendered in a real estate transaction in Puerto Rico. When the guardian was appointed in a New York court, that court retained jurisdiction over the guardianship and the assets of the incapacitated party. It was not bound by the judgment for $16,500 obtained in Puerto Rico by the attorney as compensation for the services in question. *In re Serrano*, 277 A.D.2d 80, 716 N.Y.S.2d 55 (1st Dep't 2000).

Upcoming Seminars/Meetings of Interest

	Practical Skills: An Introduction to Estate Planning New York State Bar Association Continuing Legal Education. Seven locations throughout the state:
October 16-17, 2001	New York City
October 23-24, 2001	Albany; Buffalo; Melville, LI; Rochester; Syracuse; Tarrytown
October 4-7, 2001	New York State Bar Association Trusts and Estates Law Section Fall Meeting. Napa, CA.
October 3-6, 2002	New York State Bar Association Trusts and Estates Law Section. Fall Meeting. Boston, MA

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

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TRUSTS AND ESTATES LAW SECTION NEWSLETTER

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.

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ISSN 1530-3896

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PERMIT NO. 155