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Trusts and Estates Law Section Newsletter

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of the New York State Bar Association

A Message from the Section Chair

Colleen F. Carew

The Chair's Message usually follows a major event of our Section. This issue of the *Newsletter* follows on the heals of our successful Spring program in Buffalo, "An Insider's Guide to the Surrogate's Court." As the title implies, the program was devoted to exploring the nuances of Surrogate's Court practice.

Gary Mund (Chair of the Technology Committee) and Robert Constantine (Eighth District Representative) co-chaired the program, which began with a series of roundtables on subjects ranging from the problem client to winding up an estate. The ongoing interaction among the speakers and attendees throughout the two-day program spoke volumes of its effectiveness. An evening reception held at Hillebrand Estates Winery, which followed a short stop at Niagara Falls, was enchanting. CitiGroup and HSBC hosted this delightful evening. We are grateful for the support both banks have shown for our Section. All accolades should be addressed to Gary and Robert for their efforts in putting together such a highly educational and pleasurable program.

We owe a special thanks to Surrogate Barbara Howe (Erie County), the keynote speaker at the Spring program luncheon. Judge Howe cut short a Surrogates Association meeting in Cooperstown with her colleagues to discuss with us issues related to the utilization of DNA marker tests to determine paternity and proposed legislation to revoke a divorced spouse's interest in his or her ex-spouse's non-testamentary assets. Judge Howe's comments were incisive and thought provoking and we look forward to partnering with her in advancing our practice.

As a former Surrogate's Court Attorney-Referee and Law Secretary, I confess to a particular disposition toward the Surrogate's Court. Our Trusts and Estates Section is composed of attorneys who practice in a variety of concentrations: estate planners, litigators, corporate fiduciaries, Assistant Attorneys General of the Charities Bureau, and Surrogate's Court Attorney-Referees. I believe our practice is most effective when we recognize and understand the interdependency among these concentrations. In other words, integration of the various concentrations makes us most effective.

Inside

A review of the demographics of our Section has caused me to reflect on whether we are achieving such integration. Currently, the Trusts and Estates Section has 4,889 members (the largest Section of the State Bar Association). Fifty-three percent of our members are between 45 and 65 years old. Fifty percent are employed with firms with under four attorneys and ten percent with firms of more than 20 attorneys. Only three percent of members are employed by the courts and/or trust companies.

While some of the statistics parallel the composition of our practice (e.g., far fewer attorneys work in the courts than in private practice), they reveal an insufficient representation among the diversity of concentrations. To best serve the Section's members, and ultimately our clients, we should strive to improve upon this diversity.

Notwithstanding the disproportionate numbers of our members in a few concentrations, it is a tribute to our Section that we always strive to be representative when proposing legislation. However, there is no substitute for experience and expertise when it comes to proposing legislative initiatives or educating our Section about a particular concentration.

Recently, at two separate events I heard Surrogate Kristin Booth Glen (New York County) and Surrogate Anthony Scarpino (Westchester County) appeal to practitioners to become involved in improving the Court system. Under the leadership of Wallace Leinheardt (Section Secretary) and Gary Mund, our Section effectively assisted the State Bar in implementing uniformity of Surrogate's Court forms. Both Wally and Gary are presently active in studying the use and implementation of electronic filing in the Surrogate's Court. Surrogate Howe is spearheading a pilot project for electronic filing in her court.

While our Section has facilitated the filing of petitions and forms in the Surrogate's Courts, we should also be addressing the needs of the Court system from an insider's point of view. In that regard, the Executive Committee is fortunate to have Stacy Pettit, Chief Clerk of the Albany Surrogate's Court, chairing the Surrogate's Court Committee. But, we need to do more.

The Surrogate's Court is the center of our practice. Let us commit to listening to the Surrogates and their respective staffs to identify how our Section can actively support the Court system. We can start by encouraging the membership and involvement of court attorneys to ensure the Court system has an active voice within our Section.

At the same time, we baby boomers must plan for succession by reaching out to the next generation of practitioners. An easy way to start is to recruit new members to join us at the Four Seasons Hotel in Philadelphia at the Section's Fall program, from September 14–September 17, 2006. The program's title is "Anatomy of an Estate, or Why the Perfect Estate Plan Fails." I chose Philadelphia as the venue for the Fall program in hopes that its proximity will encourage new attendees. Philadelphia is an easy drive from upstate and downstate, or a quick train ride from Pennsylvania Station.

I hope many members, both new and seasoned, will join us in "Philly" this fall.

Colleen F. Carew

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION PRESENTS

Fall 2006 Meeting

September 14–17, 2006
The Four Seasons Hotel—Philadelphia, PA

"ANATOMY OF AN ESTATE"

Program Description:

It was the perfect estate plan, or was it? John and Elaine Kenworthy may disagree.

Our experts will dissect a fact pattern, which the registrants will receive, to address:

- How non-tax considerations can result in a failed estate plan;
- Can the succession of a closely held business survive the principal's death;
- Pre-mortem planning issues;
- How communication can aid successful planning and conflict resolution; and
- Litigation strategies.

FACULTY:

Co-Chairs: Gary B. Freidman, Esq. and Peter S. Schram, Esq.

Hon. Kristin Booth Glen, Surrogate, New York County

Hon. Anthony A. Scarpino, Jr., Surrogate, Westchester County

David Arcella, Esq., Principal & Associate Fiduciary Counsel, Bessemer Trust Co.

Carl Baker, Esq., Fitzgerald Morris Baker Firth, P.C.

Robert Fellows, Communication Strategies

Terrance A. Kline, Esq., Medina, PA

Michael Kutzin, Esq., Goldfarb & Abrandt

Eve Rachel Markewich, Esq., Blank Rome LLP

Donald Novick, Esq., Schwartzapfel, Novick, Truhowsky & Marcus, P.C.

Eileen Caulfield Schwab, Esq., Sidley Austin Brown & Wood LLP

PROGRAM AGENDA:

Friday—September 15, 2006

8:30–8:45	**WELCOME AND INTRODUCTIONS** **Colleen F. Carew Esq., Chair** **Kathryn Grant Madigan, Esq.—President-Elect NYSBA** Program Co-Chair, Gary B. Freidman, Esq.
8:45–9:35	How the "Perfect" Estate Plan Can Fail
	Eileen Caulfield Schwab, Esq., Sidley Austin Brown & Wood LLP
9:35–10:25	The Estate Transfer of a Business—Can the Second Generation Make it Work?
	David Arcella, Esq., Principal & Associate Fiduciary Counsel, Bessemer Trust Co.
10:25–10:40	Break
10:40–11:05	Perspectives from the Bench
	Hon. Kristin Booth Glen, Surrogate, New York County
	Hon. Anthony A. Scarpino, Jr., Surrogate, Westchester County
11:05–12:15	Communication Strategies
	Robert Fellows, Communication Strategies

Saturday—September 16, 2006

8:30–8:40	**WELCOME AND INTRODUCTIONS**
8:45–9: 35	Pre-mortem Probate–It May be the Trend
	Michael Kutzin, Esq., Goldfarb & Abrandt
	Eve Rachel Markewich, Esq., Blank Rome LLP
9:35–10:25	Retainer to Trial–Litigating in the Surrogate's Court
	Donald Novick, Esq., Schwartzapfel, Novick, Truhowsky & Marcus, P.C.
10:25–10:40	Break
10:40–11:05	How Many Ethical Violations Can One Law Firm Commit?
	Carl Baker, Esq., Fitzgerald Morris Baker Firth, P.C.
11:05–12:15	The Barnes Foundation Litigation–Public Policy Trumps Donor Intent
	Terrance A. Kline, Esq., Medina, PA
12:15	Adjournment

Yours, Mine or Ours? Joint Bank Account Miasma

By David Arcella

The Problem

Many of us are familiar with the following fact pattern: The mother was getting on in years and needed to do something about the fact that it was getting harder to stay on top of her financial affairs. In fact, she realized that there might come a time when she wouldn't be able to manage the bill paying at all. She shared this concern with her son, who was willing do what he could to help. Her daughter lived on the West Coast, so the son was the logical one to assist.

Neither she nor her son thought it necessary to consult a lawyer. Whether mother or son first suggested a joint bank account to solve the problem, we don't recall, but it happened. The bank account she had in her own name had a fair amount of money in it since it was one of the principal repositories of her life savings. She and her son went to the local bank that she had used for years, which has since merged or consolidated into other banks several times. It may not have even occurred to them that the problem could have been solved by adding the son as attorney-in-fact to her account through the use of either a short form statutory durable power of attorney or the bank's official power of attorney form. In any event, her account was transformed into a joint account with her son. A few years later, she did, in fact, become unable to handle her affairs, and the son ministered to his mother as her financial steward and oversaw her personal care until she died. Many times during the last few years of her life, the mother expressed deep gratitude to her son for his loving care and attention, suggesting that there was no way she could ever adequately repay him for his kindness.

Under the impression that the account now passes automatically to him, and rightly or wrongly feeling a sense of entitlement in light of all the work, care and attention he afforded his mother in her last years, the son is convinced that his mother intended that he should be entitled to whatever is left in the account at her death. His sister, of course, doesn't see it that way at all.

The Law

Our Surrogate's courts are plagued with the task of sorting through the facts surrounding the establishment of joint accounts and divining the intent of the owner at the time the joint account was opened. A synopsis of the present state of New York law on the subject is this:

If a savings or checking account is opened in joint names and the signature card or account agreement indicates that there is a right of survivorship (jtwros), there is a statutory presumption under Banking Law § 675 that the depositor intended to make a present gift of one-half of the account to the joint tenant, and further intended that the joint tenant take the balance in the account upon her death should the joint tenant survive her.

If the account is opened in joint name without words of survivorship, there is a presumption under a different statute (EPTL 6-2.2) that the depositor intended to create a tenancy in common. EPTL 6-2.2 also employs the presumption that the depositor intended to make a present gift of one-half of the funds to the other tenant. However, upon the death of the depositor, only one-half of what remains in the account is payable to the surviving tenant, with the balance payable to the depositor's estate.

The legal representative of the depositor's estate can overcome these statutory presumptions only by direct proof or substantial circumstantial evidence of a clear and convincing nature that the depositor intended to add the other tenant on the account as a convenience to her so that the co-tenant could assist her in paying her bills.[1] The presumption can also be overcome if it can be established that the surviving tenant was in a confidential relationship with the depositor such that it would be natural for the depositor to entrust her financial affairs or a portion thereof to the joint tenant. For instance, if the joint tenant were the depositor's lawyer, accountant, or paid caregiver, one would expect it to be clear that that individual was being entrusted with a fiduciary duty and was not the object of a gift. A confidential relationship, upon an examination of the facts and circumstances, can clearly extend to family members as well.[2]

These rules seems clear enough in principle, but in practice problems abound when attempting to properly apply the presumptions and the precedents. The threshold question is whether the Banking Law presumption applies. Banking Law § 675 provides that when a deposit of cash, securities, or other property has been made with any banking organization or foreign banking organization doing business in New York, or any savings and loan association or credit union, in the name of the depositor and anoth-

er person "to be paid or delivered to either, or the survivor of them. . . ," such deposit shall become the property of such persons as joint tenants, together with all additions and interest earned. A banking institution maintaining such an account is entitled, pursuant to the statute, to pay any part or all of the funds in the account to either of the tenants during the lifetime of both of them, or to the survivor of them upon the death of the first to die. The operative words of the statute are "to be paid . . . to either, or to the survivor . . ." Our Surrogate's courts, for the most part, and with the benefit of strong appellate precedent, have interpreted those words to mean that if the signature card or signed account agreement says "joint with right of survivorship" or "jtwros," then, in the absence of fraud or undue influence, such words shall be *prima facie* evidence of the intention of the parties to create a joint tenancy, vesting title to such deposits in the survivor.[3]

Most of the cases make it clear that the signature card or the account agreement signed by the depositor drives the train. That means that if words or initials of survivorship do not appear on the signature card or account agreement, then even though the passbook or the rules and regulations of the particular bank provide for survivorship, the statutory presumption under Banking Law § 675 is not applicable and a tenancy in common is presumed under EPTL 6-2.2. This principle is illustrated in *In re Ancell*,[4] where Surrogate Scarpino stressed the importance of the signature card, citing *In re Coon*[5] and *In re Camarda*.[6]

In *In re Coon*, the Court held that the presumption in § 675 (b) applied only where the specific words of survivorship appeared on the signature card signed by the decedent, and would not apply merely because the rules and regulations of the bank provided that joint accounts imply survivorship, irrespective of the testimony of bank personnel or whatever other bank documentation can be produced. This may also apply to the pamphlet that is legally required to be included in the package handed to the depositor when the account is opened, apparently in compliance with N.Y.C.R.R. § 15 (described below). These pamphlets include clear definitions of the terms and conditions of the joint account, but the likelihood is that without the depositor's signature on a document showing survivorship, the majority of courts won't presume that the depositor has read the pamphlet.

On the other hand, the court held in *In re Butta*[7] that if neither the signature card nor the account agreement can be found among the records of the bank, but the intent of survivorship can be established from the bank's records, through testimony of bank personnel or examination of contemporaneous bank rules and regulations, the statutory presumption under § 675(b) can be applied. This holding was apparently in reliance, at least in part, upon *Sutton v. Bank of New York*,[8] decided in 1998. The point made in *Butta* was that while precedent tells us that the signature card is the "best evidence" of intent to support the statutory presumption, it is not necessarily the exclusive means of establishing a survivorship account. This is because once the requisite quantum of proof is adduced, the surviving tenant will prevail even without the benefit of the statutory presumption by establishing a common law joint account with right of survivorship.[9] This position was supported in *In re Slavin*,[10] which concerned an individual who died in the World Trade Center disaster owning an account at JPMorgan Chase. No signature cards existed, since such records were destroyed in the collapse of the towers. Nevertheless, three different employees of the bank testified that at the time of opening of the accounts all joint accounts at that bank contained survivorship language. Based upon the strength of this testimony, the Court ruled that the presumption under § 675 applied.

There are several points worth observing with respect to the application of the Banking Law presumption:

1. Before June 1, 1965, the ownership rules for joint bank accounts were different depending upon which institution maintained the account. Deposits at savings banks were governed by Banking Law § 239, while deposits at commercial banks were governed by Banking Law § 134. With respect to the "savings bank rule" it was "conclusively presumed" to be the deceased depositor's intent that any balance left in the account be payable to the surviving tenant. The "commercial bank rule" provided for a "rebuttable presumption" to the same effect. One of the purposes of repealing these two sections and substituting § 675(a) and (b) in their place in 1965 was to provide a uniform rule for all banking institutions, creating a rebuttable presumption in favor of survivorship where the requisite words appear. Another central purpose was to continue the protection from liability afforded to banks in paying the survivor of a joint account, and to avoid the need for a probate proceeding instituted merely to collect a small bank account which was the only asset left in a joint depositor's name at death.

2. Banking Law § 675(c) was enacted in 1983, and provided that rules and regulations were to be established so that at the time an

account is opened depositors would be informed of the terms and conditions of the account, including the consequences to the parties, and the responsibilities of the institution at which the account is established. The memorandum in support of this amendment to the law referred to a survey conducted by one of the bill's sponsors, which pointed out that most senior citizens didn't realize that when they opened the account they might be giving away half of the funds to the other tenant. The memorandum observed that "most people assume that the other person would only get the money when they died. . . ."

3. Accordingly, New York Banking Regulations now provide that every banking institution shall furnish a written notice to each owner named in a joint account explaining in plain language the terms and conditions of the account.[11] Banks comply with this regulation by handing a pamphlet to depositors when the account is opened which explains the terms of the account. With respect to joint accounts, for most bank pamphlets this means survivorship.[12]

4. Unfortunately, individuals who establish joint accounts often don't bother to read the pamphlet. Some members of the Bar have suggested that one way to eliminate confusion would be to require banking staff to review with the depositor the various options available to the depositor for holding title to a bank account, including the alternative of adding an attorney in fact. This proposal is impractical. New York banks, savings and loans, and credit unions employ thousands of individuals. It would be unrealistic to expect the staff of retail banks, the overwhelming majority of whom have limited or no legal training, to explain to customers the difference between a joint account with right of survivorship and a tenancy in common with limited right of survivorship, and how both differ from an account opened for the convenience of the depositor with no right of survivorship. It would be folly to expect banks to agree to let their staff advise the depositor of the estate planning consequences of the various alternatives, especially where an aggressive younger relative of the depositor may have his or her own agenda.

5. Banking Law § 678, Accounts for Convenience Only, was enacted in 1990 to address the confusion surrounding the intent of a depositor in establishing an account "for the convenience" of the depositor. The establishment of such an account does not cause a present gift of one-half of the account to the co-tenant, and the co-tenant does not receive any survivorship right. The author knows of no bank that has, to date, offered such accounts. It is likely that this is because banks take the position that convenience accounts are superfluous since a short-form statutory durable power of attorney or each bank's power of attorney form already serves the exact same purpose and does it better. In fact, if certain revisions to the power of attorney form presently being considered in New York are enacted, it is arguable that power of attorney accounts will offer more protection to the depositor than convenience accounts.

The Advisory Committee of the Office of Court Administration has considered introducing a new § 679 to the Banking Law which would provide for an account to be opened in the name of the depositor and another person as "agent" of the depositor. Such an account would not constitute a gift to the agent, nor would the agent have any right to the proceeds of the account upon the death of the depositor. Presumably the Advisory Committee envisions such an account as serving as a codified alternative to the existing account in the name of a depositor with a statutory short form power of attorney, or bank form, on file with the financial institution. The new section would have to specify whether the agency so established is durable, and each party would have to be clearly identified on the account. Moreover, the new section would have to specify that the agency terminates upon the death of the depositor. It is uncertain whether the Advisory Committee intends that § 679 be an addition to or a replacement of existing § 678. Offering an "agency" account while maintaining the statutory "convenience" account would be unnecessarily confusing.

In any event, the new § 679 account would have to be permissive and not mandatory, and those financial institutions which choose to adopt it must take affirmative steps to implement its use. However, this poses the same problem as convenience accounts. If financial institutions take the position that § 679 is superfluous, since the General Obligations Law already provides for the wide use of statutory powers of attorney which do not creating survivorship rights in the agent, then the purpose and utility of the section will suffer.

Other Jurisdictions

What do the banking laws of neighboring states provide? Connecticut has statutory language, and

employs presumptions, very similar to New York's.[13] New Jersey has taken a different position on the issue of joint accounts. A joint account is defined under New Jersey law as follows: "'Joint account' means an account payable on request to one or more of two or more parties *whether or not mention is made of any right of survivorship*, and regardless of whether the names of the parties are stated in the conjunctive or the disjunctive" (italics added).[14] The statute further provides that "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."[15]

Pennsylvania law is similar to New Jersey law, and provides that during the lives of the co-tenants the funds in the account are owned in proportion to the co-tenants' respective contributions. Upon the death of the first to die, the balance in the account (irrespective of specific words of survivorship) belongs to the survivor, unless there is clear and convincing evidence that the deceased intended otherwise.[16]

Both New Jersey and Pennsylvania have adopted a version of the Uniform Probate Code, and the National Conference of Commissioners on Uniform State Laws has promulgated certain articles of the Code as free-standing acts. One such article (Article VI, part 2) is the Uniform Multiple-Person Accounts Act ("UMPA"), adopted in some form or other by many states. UMPA reflects the belief that most individuals don't intend to make a present gift of one-half of the joint bank account when it is opened (except as between spouses, where the net contribution of each is presumed to be of an equal amount), but rather view the account as an asset to be paid to the co-tenant upon the first death. UMPA offers a model account opening form for banks to use, which clearly identifies the nature and consequences of the various titles available. Nevertheless, accounts are governed by the Act whether opened with the model form or not.

There is a long-standing dynamic tension between these states and New York. With respect to bank accounts (but not other personal or real property[17]), New York law presumes a present gift to the joint tenant of one-half of the funds upon the opening of the account regardless of whether the intention of a present gift is specified, and does not presume survivorship, unless "survivorship" is specified on the account signature card. The presumption in these other states is the reverse. One could argue that even without the statutory presumption of Banking Law § 675, the presumption would be the same as a matter of law if the account specifies "survivorship."

The waters are further muddied with respect to spouses, since New York law provides that the property rights as between spouses to personal property owned jointly or as tenants in common are no greater than those afforded to such tenants who are not so related.[18] Once again, as the statute pertains to bank accounts, this is the reverse of the presumptions in many other states.

Finally, federal estate and gift tax law provides that each spouse is deemed to own one-half of the value of a "qualified joint interest" (i.e., a joint interest where the spouses are the co-tenants) for transfer tax purposes, and this applies to all types of personalty as well as real property interests. Jointly held interests which are not qualified joint interests are taxed for transfer tax purposes based upon contribution. Even the federal law of disclaimers makes an exception for jointly held bank accounts, providing that the disclaiming party may disclaim any interests not contributed by such party within nine months of the date of death of the contributing tenant, rather than at the time of the creation of the interest.[19] In other words, unlike New York law a present gift is not presumed by federal tax law upon the creation of a joint bank account.

A Proposed Solution

The Committee on Estate and Trust Administration of the Trusts and Estates Law Section has considered what legislative changes might best address the problems of joint bank accounts in New York. Although one option would be to amend the Banking Law, a simpler solution, and the one with a better chance of success, would be to add a definition to the EPTL identifying a new default rule for joint bank account ownership similar to that provided by UMPA. This might be accomplished by adding to the EPTL a section which would be a specific exception to EPTL 6-2.2:

> Joint Ownership of Bank Accounts. Notwithstanding section 6-2.2, a deposit account owned by two or more depositors in any banking institution or credit union transacting business in this state shall be presumed to be a joint tenancy with right of survivorship whether or not mention is made of any right of survivorship, unless there is clear and convincing evidence that the deceased co-tenant intended otherwise.

In considering a legislative solution, it is important to bear in mind a growing concern (noted by the Attorney General's Office Charities Bureau and oth-

ers)—the financial abuse of the elderly by caregivers and others on whom the elderly depend. Some of these abuses have been accomplished through the inappropriate use of joint bank accounts. For this reason, perhaps the presumption of survivorship should only apply to those relatives who would qualify as distributees in intestacy, or even only to spouses and domestic partners. Limiting the presumption to spouses and domestic partners would certainly restrict its application. Where two people unrelated by blood choose to live as life partners and solidify that relationship through the practice of commingling funds, that they would intend survivorship in so doing seems likely. Any such qualification in the law would, however, require adequate legislative history to address what constitutes cohabitation and life partnership.

While new legislation can change how joint accounts are administered in the future, it cannot resolve the confusion that may surround the intent of a depositor who opened a joint account years ago and is now deceased. No legislation, rule-making or procedural change can eliminate the need to discover the intent of the now deceased depositor of an account opened during a period which predates the legislative or procedural change. Only retrospective legislation can address that issue. But retrospective legislation is rare and considered by the legislature only under the most compelling circumstances. Retrospective joint bank account legislation does not appear to be appropriate, principally because it is impossible to divine, by the stroke of a pen, the intent of the now deceased depositor of such an account. The Committee on Estate and Trust Administration has struggled with what it believes to be the usual intent of an individual when opening a joint account, particularly a joint account with a relative, and has been unable to arrive at a consensus. This is one of the reasons why the Committee would not consider pursuing retrospective change.

The Committee arrived at the suggested change to the EPTL described above based on several considerations:

First is a recognition of the reality created by many New York banks, whose signature cards and account agreements automatically read "jtwros." In many banks today, the only way to open a joint account is with right of survivorship. This makes things very clear from the perspective of the retail banking community in New York and is intellectually consistent with the banks' position that account management for the convenience of the depositor may be made by the addition of an attorney-in-fact to the depositor's account.

Second is the widely held belief that many depositors who open joint accounts do contemplate some kind of survivorship. As the New York Court of Appeals stated in *In re Kleinberg*: "Experience indicates that most people who open such accounts, though lacking legal or business sophistication, do understand and intend some ultimate survivorship incident to a joint tenancy, at least with regard to funds remaining in such an account at the time of death."[20] Interestingly enough, the Court of Appeals cites a New Jersey case in support of that premise.[21] As mentioned above, New Jersey, Pennsylvania and many other states have codified survivorship as a presumption.

Finally, survivorship as a default rule prospectively makes sense to minimize unnecessary litigation in our judicial system. Much litigation in this area is caused by New York's insufficient statutory default rule on the question of intent. While many may not consider it fair to create an "arbitrary" default rule, the alternative is for the judicial system to continue to mediate disputes, often among relatives, over the disposition of joint account proceeds after death. It is a fact that many people decide themselves or are encouraged by friends and family to open joint accounts with younger relatives precisely to avoid the expense and delay of a probate proceeding in the Surrogate's court (ironically the very court which must later resolve the inheritance dispute the use of a joint account may create). This is most often done without consulting a lawyer, which many believe is unnecessary for something so straightforward as establishing a bank account.

In conclusion, the Committee believes that its proposal offers at once a measured compromise that appears to reflect widely held beliefs concerning a depositor's intent with respect to survivorship, is consistent with protocol already in practice at major New York banks, and at the same time does not presume to disturb the intent of a depositor who opened an account prior to the effective date of the proposed amendment to the EPTL. The Committee encourages readers to apply its proposed change in the default presumption to the hypothetical posed at the beginning of this article. The Committee would most appreciate hearing from readers of their experiences with clients as to intentions, beliefs, understandings and assumptions concerning the establishment of joint bank accounts with family, friends, neighbors and advisors, and invite readers to share observations and perspectives by e-mailing the Committee at: lpadilla@nyls.edu

Endnotes

1. *In re Stalter*, 270 A.D.2d 594 (3d Dep't 2000); *In re Coddington*, 56 A.D.2d 697 (3d Dep't 1977).

2. *In re Timoshevich*, 133 A.D.2d 1011 (3d Dep't 1987).
3. As a practical matter, proving fraud at the time of the opening of the account is extremely difficult and generally not a realistic alternative. The evidentiary issues are also complicated by the fact that the Dead Man's statute (CPLR 4519) generally precludes self-serving testimony by the proponent or objectant concerning discussions held by either with the now deceased depositor.
4. *In re Ancell*, 191 Misc. 2d 252 (2002).
5. *In re Coon*, 148 A.D.2d 906 (1989).
6. *In re Camarda*, 63 A.D.2d 837 (1978).
7. *In re Butta*, 192 Misc. 2d 614 (2002).
8. *Sutton v. Bank of New York*, 250 A.D.2d 447.
9. *Butta, supra*, note 7, at 619.
10. *In re Slavin*, N.Y.L.J., Apr. 1, 2004, at 20.
11. 3 N.Y.C.R.R. §§ 15.1(a), 15.2.
12. An informal survey of major downstate New York commercial banks and trust companies found that their current signature cards are printed with "jtwros" or similar words (so no confusion should result on accounts recently opened with such banks). However, thousands of accounts were opened in banks in past years, when there was no such standard practice. Moreover, many current banking institutions are the result of mergers and acquisitions, and the retrieval of records from the acquired and now extinct banks is problematic.
13. Conn. Gen. Stat. § 36a-290.
14. N.J. Stat. § 17.161-2(d).
15. N.J. Stat. § 17.161-5(a).
16. 20 Pa. Cons. Stat §§ 6303(a), 6304(a).
17. It is interesting to note that when title to personalty or realty is taken in New York between two persons not married to one another and the title reads "either or" or "and," it is a tenancy in common, but when it reads "as joint tenants" with no specific reference to survivorship, the property is taken as joint property with a right of survivorship. This appears to be contrary to the statutory default in § 675, which provides for no presumption of survivorship unless the specific word "survivor," or words to that effect, appears, whether or not the account or a party is characterized by the word "joint."
18. N.Y. General Obligations Law § 3-311.
19. Treas. Reg. § 25.2518-2(c)(4)(iii).
20. 38 N.Y.2d 836 (1976).
21. *Sadofski v. Williams*, 60 N.J. 385 (1972).

The principal author of this article, David Arcella, acknowledges with thanks the invaluable assistance and contribution of other members of the Committee on Estate and Trust Administration: Mark Altschuler, Lisa Padilla, Susan Porter, Susan Slater-Jansen and Robert Taisey.

The New Transfer-on-Death Security Registration Law

By Lee A. Snow

The Transfer-on-Death Security Registration Act (the "Act") took effect on January 1, 2006. Under this new law, owners of securities in New York State can register such securities to pass upon death to a named beneficiary or beneficiaries, outside of probate. This article explains the purpose of the law and how it operates, provides examples of beneficiary designations that a securities owner may now utilize, reviews the advantages of the new law over alternative means of transferring securities outside of probate (such as through joint ownership), and describes conforming changes made to other estate laws as a result of the passage of the Act.

"The purpose of the Act is to allow securities (and securities accounts) to pass outside of probate to the securities owner's named beneficiary or beneficiaries in a fashion roughly analogous to that available for bank accounts under the "Totten Trust" rules of EPTL 7-5."

The Act, which is contained in Estates, Powers and Trusts Law (EPTL) 13-4, was added to the EPTL in July 2005. The purpose of the Act is to allow securities (and securities accounts) to pass outside of probate to the securities owner's named beneficiary or beneficiaries in a fashion roughly analogous to that available for bank accounts under the "Totten Trust" rules of EPTL 7-5.

Section 13-4 consists of twelve subsections, Sections 13-4.1 through 13-4.12. The key operative section, Section 13-4.7, provides that upon the death of the sole owner, or upon the death of the last to die of multiple owners, of a security that is registered in beneficiary form, the security will pass to the named beneficiary or beneficiaries who survive the owner, or who survive the last surviving owner in the case of multiple owners. A "security" is defined in Section 13-4.1(j) to mean "a share, participation or other interest in property, in a business or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security and a security account." A "security account," as defined in Section 13-4.1(k), includes "a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account. . ."

An owner may register a security or securities account in beneficiary form by titling the security or account under any of the following alternatives:

John Doe Transfer-On-Death Jane Doe

John Doe TOD Jane Doe

John Doe Pay-On-Death Jane Doe

John Doe POD Jane Doe

A securities owner may also designate multiple beneficiaries, and multiple owners of a security (who own the security with right of survivorship but not as tenants-in-common) may register their ownership in beneficiary form as well. Section 13-4.2. Thus, the following may also be an appropriate beneficiary account registration:

John Doe and Jane Doe JTWROS TOD Benjamin Doe

This would not be appropriate:

John Doe and Jane Doe Tenants in Common TOD Benjamin Doe

A contingent beneficiary may also be named. Thus, this would be an acceptable beneficiary registration:

John Doe TOD Jane Doe SUB BENE Roger Doe

The statute provides that the TOD or POD beneficiary designation has no effect on ownership until the death of the account owner and that the registration of a security in beneficiary form may be canceled or changed at any time by the owner without the consent of the beneficiary. Thus, the beneficiary has no rights in the securities account until the death of the owner. Section 13-4.6. The TOD or POD beneficiary designation may also be revoked or amended by an express direction in the account owner's Will which specifically refers to the designation.

Section 13-4.6 illustrates the legislative intent in enacting Section 13-4. The Legislature wanted to allow securities owners to be able to effectuate nonprobate transfer-on-death arrangements without having to resort to creating a joint tenancy. Joint tenancy (with right of survivorship) for securities and securities accounts was recognized by the Legislature to have potentially unexpected and undesirable consequences for the securities owner. For example, if the securities owner retitled an individually held securities account in joint name with right of survivorship with her children, the children would obtain both

lifetime benefits and a degree of control over the account. In addition, there could be undesirable income and gift tax consequences for the securities owner. None of these consequences should arise as a result of a securities owner's establishing a TOD account.

The Act also amended EPTL 5-1.4, 2-1.11, 2-1.6 and 5-1.1-A to conform with the provisions of the Act. Under Section 5-1.4, the beneficiary of a TOD security loses his interest therein if he and the owner are divorced. Under Section 2-1.11, a beneficiary may renounce his interest in a TOD security. Under Section 2-1.6, the owner is deemed to survive the beneficiary in the event of a simultaneous death.

The State Assembly's committee report on the Act indicates the Legislature's intent not to impair spousal elective share rights or creditor's claims by allowing securities owners to register their ownership in beneficiary designation form. Thus, under amended Section 5-1.1-A, a TOD account is considered a testamentary substitute for elective share purposes. Similarly, under Section 13-4.9(b), the beneficiaries of a TOD security or TOD securities account may be subject to creditors' claims against the estate of the deceased owner.

The new law also offers certain protection to brokerage firms, transfer agents and other registering entities that offer registration in beneficiary form. Section 13-4.8 provides that a registering entity is not required to offer or to accept requests for a security registration in beneficiary form. This section also provides that a registering entity is discharged from all claims to a security by the estate, creditors, distributees, legatees or devisees of a deceased owner if the registering entity effectuates a transfer of the security in accordance with the new statute and does so in good faith reliance (i) upon the original registration and (ii) upon information provided to it by an affidavit of the personal representative of the deceased owner or by the surviving beneficiary or by the surviving beneficiary's representative. Thus, a registering entity will generally not have liability to third parties as a result of transferring a security to a beneficiary named in a TOD registration if it relies in good faith upon an affidavit provided by the surviving beneficiary. This protection will not apply if the registering entity has received written notice from any claimant of an interest in the security prior to the registering agent's re-registering the security.

Section 13-4.10 provides that a registering agent that offers registrations in beneficiary form may establish the terms and conditions under which it will establish such accounts. This section also allows registering entities to assist securities owners in registering securities in various beneficiary forms that may follow the owners' estate planning wishes. For example, after the name of the named beneficiary, the term "LDPS," meaning "lineal descendants per stirpes," can be added. Alternatively, the term "LDPR," meaning "lineal descendants by representation," can be added after the name of the named beneficiary. Thus, many clients' typical estate planning wishes regarding how they want their assets to be distributed upon their death can be effectuated in a fairly streamlined fashion.

"As a result of this new law, fewer assets may pass through probate, fewer probate proceedings may be needed, and many estates will be settled more efficiently, quickly and cost-effectively than in the past."

Section 13-4, as originally enacted, applied "to registrations of securities in beneficiary form made *before or after* January first, two thousand seven, by decedents dying on or after January first, *two thousand seven*" (Emphasis added). Thus, under the original effective date, after the law was enacted, owners of securities in New York could begin registering their securities in beneficiary form (assuming the relevant brokerage firm would allow it), but the registration would not be given effect if the account owner died prior to January 1, 2007. However, in March 2006 Governor Pataki signed a bill that amends the effective date of the Act so that its provisions will now apply to registrations of securities in beneficiary form for decedents dying on or after *January 1, 2006*.

Estate planners in New York now have a new tool in advising their clients. The new TOD account will provide a useful technique to avoid probate, particularly for smaller estates. In advising their clients regarding how to transfer securities and securities accounts, estate planners should be aware of the benefits available under the new law as well as its limitations. As a result of this new law, fewer assets may pass through probate, fewer probate proceedings may be needed, and many estates will be settled more efficiently, quickly and cost-effectively than in the past.

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The Deficit Reduction Act of 2005 and Its Effect on Transfers of Assets for Long Term Care Planning Purposes

By Anthony J. Enea

On December 18, 2005, the U.S. Senate, in a vote of 51 to 50 with Vice-President Dick Cheney casting the deciding vote, passed the Deficit Reduction Act of 2005 ("DRA"). As a result of some differences in the Senate and House versions, the legislation was sent back to the House of Representatives for a final vote. On February 1, 2006, the House of Representatives approved the DRA by a vote of 216 to 214. On February 8, 2006, President Bush signed the legislation into law. It will affect all non-exempt transfers of assets (those that create periods of ineligibility) made on or after February 8, 2006. Exempt transfers, such as inter-spousal transfers, transfers to a blind or disabled child, caretaker child-exempt transfers and sibling with an equity interest transfers are not affected by the DRA. Pursuant to the DRA, states have a specified period of time within which to adopt the provisions of the legislation or enact enabling legislation if determined to be necessary. It is anticipated that New York will soon adopt these changes or enact enabling legislation effective retroactively to February 8, 2006.

The DRA affects Medicaid eligibility and the transfer of asset rules in three significant ways:

1. The creation of a 60-month lookback period for all transfers of assets, irrespective of whether they are outright transfers or transfers to certain trusts. Under the prior law there was a 60-month lookback period for transfers to certain trusts (i.e., Irrevocable Income Only Trust) and a 36-month lookback for all other transfers. Thus, under the DRA, an applicant for Medicaid will be required to inform Medicaid of all transfers made and provide financial documentation to Medicaid for the five years preceding the date Medicaid is requested.

2. The penalty period (period of disqualification for Medicaid) created by a non-exempt transfer of assets will commence on the *later* of (a) the month following the month in which the transfer is made (as under prior law), or (b) the date on which an individual is both receiving institutional level of care (i.e., is in a nursing home or receiving care at home under the Lombardi program or other waivered program) and whose application for Medicaid would be approved, but for the imposition of a penalty period at that time for a non-exempt transfer made.

Thus, under the DRA, the penalty period for a non-exempt transfer of assets made within the 60-month lookback period will commence when the applicant has $4,150 or less, is receiving institutional care (in a nursing home or under a waivered long term home health care program), has applied to Medicaid for assistance, and where the application would be approved but for the penalty period imposed. Thus, the application has been rejected because of the transfer made. This is the most onerous measure contained in the new legislation. For example, if a Westchester County applicant has made a non-exempt transfer of $300,000 of assets on May 15, 2006, this would create an approximately 35-month period of ineligibility commencing on June 1, 2006 ($300,000/$8,724, the Westchester County monthly regional nursing home rate). However, pursuant to the provisions of the DRA, if the individual was to apply for Medicaid for an institutional level of care within the five-year lookback period, the ineligibility period for the above-stated transfer would not commence until the applicant has $4,150 or less of savings, has applied to Medicaid for an institutional level of assistance, and the application would be approved but for the penalty period imposed by the transfer. The DRA effectively imposes a five-year ineligibility period, irrespective of the dollar value transferred and the ineligibility period created by the transfer. This provision of the DRA is clearly punitive.

It should be noted that, pursuant to the provisions of the new DRA, and as under the prior law, no penalty period is imposed for transfers made by an applicant requesting non-waivered community Medicaid (homecare Medicaid).

3. An applicant's Homestead (house, condo, co-op) with equity above $500,000 will render an applicant ineligible for Medicaid. This provision does not apply if a spouse, child under age of 21, or a blind or disabled child resides in the house. Each state, however, is given the ability to increase the amount of permitted home equity to an amount not in excess of $750,000. It is anticipated that New York will opt for the $750,000 amount. Additionally, homeowners will have the ability to reduce their equity through a reverse mortgage or home equity loan. There is also an exemption from this home equity provision for an

applicant who has a spouse, minor, blind or disabled child living at home.

Some of the other significant changes contained in the DRA with respect to Medicaid are: (a) annuities will be required to name the state as a remainder beneficiary, and annuities that have a balloon payment will be considered a countable asset; (b) multiple transfers in more than one month must be aggregated; (c) the "income first" rule (community spouse's income shortfall must be made up from income of spouse in institution) will be mandatory in all states (already required in New York[1]); (d) penalty periods will be imposed for partial months (rounding down will no longer be permitted); and (e) partnership long term care insurance policies will be permitted in additional states other than the four presently permitted, which include New York.

How Will the DRA Affect the Planning Options Available to Preserve Assets and Real Property?

The most dramatic impact the DRA will have is upon those individuals who are facing an immediate long term care crisis. The single person with a small nest egg and/or a house and who requires immediate nursing home care will be most severely affected by the DRA. The DRA has effectively eliminated the possibility that an individual could give away approximately forty to forty-five percent of his or her assets, retaining the remaining sixty to fifty-five percent to pay the nursing home bill during the ineligibility period created by the transfer ("Rule of Halves" or "Half a Loaf" theory). However, there are still a number of planning options that are presently under consideration by the elder law Bar and may be available in the crisis planning scenario. One example is the use of an actuarially sound private annuity or promissory note within the context of a partial gift/partial sale of assets. However, because of the relative newness of the DRA, the actual effectiveness of these options is still uncertain.

Clearly, the best scenario is still one where the long term care planning has been implemented at least five years prior to the time the long term care crisis occurs. In the author's opinion, the DRA is built to exact punishment on the procrastinator. Those who sufficiently plan in advance to avoid needing Medicaid within the five-year lookback period will fare the best.

Even before the DRA was enacted, the decision to transfer the primary residence raised a number of important issues and concerns for both the attorney and the client (e.g., gift taxes, potential capital gains tax consequences and, of course, the impact on the Medicaid eligibility of the senior). However, once the decision is made to transfer the primary residence to someone other than a spouse, for Medicaid planning purposes there have been predominantly three planning options available:

(a) Outright Transfer of the Residence Without the Reservation of a Life Estate. This is perhaps the least desirable option available, as the transferee of the property will receive the transferor's original cost basis in the property (original purchase price/value upon receipt plus capital improvements), and the outright transfer is a completed gift subject to gift taxes. For Medicaid eligibility purposes and pursuant to the DRA, the outright transfer of the residence would be subject to a five-year lookback period, and if the transfer of the residence was made within the lookback period, the ineligibility period created would not commence until the individual enters the nursing home, has applied for Medicaid, and would otherwise be eligible but for the transfer. Regardless of the value of the real property transferred, the DRA effectively creates a five-year ineligibility period.

Additionally, from a tax perspective, the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code ("IRC") § 121(a) principal residence exclusion for capital gains of $250,000 (single person) or $500,000 (married couple). However, if the transferee owns and resides in the premises for two of the five preceding years, he or she will be able to use the principal residence exclusion. Any Veteran, STAR or Senior Citizen Exemptions are also lost by an outright transfer. It is necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the amount of the federal gift tax credit ($1,000,000 per person) used by the transfer.

(b) Transfer of the Residence with the Reservation of a Life Estate. Under prior law and from purely a Medicaid planning perspective relevant to the length of the ineligibility period created by a non-exempt transfer, this option had some important advantages. Because the retained life estate is assigned a value by Medicaid which is subtracted from the overall fair market value of the premises at the time of transfer, the period of ineligibility for Medicaid could, depending on the age of the transferor, be significantly reduced. It was possible to create a period of ineligibility for Medicaid that was often less than 36 months. This was a distinct advantage over the use of a deed without the reservation of a life estate and a transfer to an Irrevocable Income Only Trust, where no reduction in the value of the assets transferred is permitted for purposes of calculating the period of ineligibility. However, the DRA

has significantly reduced the effectiveness of this option. Although the period of ineligibility created by an outright transfer of real property with a reservation of a life estate would not be longer than 36 months, pursuant to the DRA if the transfer was made within the lookback period (60 months), the period of ineligibility would not commence until the applicant is receiving institutional care in a nursing home or under a waivered long term home health care program (Lombardi program) and was otherwise eligible for Medicaid but for the transfer made (i.e., has no more than $4,150). Thus, under the new law a transfer of real property by deed with a retained life estate will also effectively create a five-year period of ineligibility.

Pursuant to § 2036(a) of the IRC, the transfer of a residence with a retained life estate permits the transferee of the residence to receive a full step up in the transferee's cost basis in the premises to the fair market value of the residence on the transferor's date of death. This occurs because the residence is includible in the gross taxable estate of the transferor. A "life estate" pursuant to § 2036(a) of the IRC is the possession or enjoyment of, or a right to the income from, the property or the right either alone or in conjunction with another to designate the persons who shall possess or enjoy the property or income thereof. (Sample language included in the Appendix.)

The most significant problem in using a deed with the reservation of a life estate occurs if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the step up in cost basis, subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and (b) the requirement, pursuant to Medicaid rules, that the life tenant receive a portion of the proceeds of sale based on the value of his or her life estate. This portion of the proceeds could be significant and will be considered an available resource for Medicaid eligibility purposes, thus affecting the transferor's eligibility for Medicaid or being an asset against which Medicaid may have a lien. The possibility that the premises may be sold prior to the death of the transferor poses a significant risk that needs to be explored in great detail with the client.

If it is prudent to make the gift an "incomplete gift" for gift tax purposes, the reservation of a limited testamentary power of appointment to the Grantor should be considered. (Sample language included in the Appendix.)

It should be remembered that IRC § 2702 values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained. Retention of a life estate falls within one of the exceptions of § 2702. If the transfer does not fall within IRC § 2702, or if one of the available exceptions applies, the calculation of the life estate is performed pursuant to IRC § 7520, and the tables for the month of transfer need to be consulted to determine the correct tax value of the remainder interest.

Pursuant to IRC § 2702, if the homestead is transferred to a non-family member, the use of a traditional life estate will result in a completed gift of the remainder interest. It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion ($12,000 per donee for the year 2006).

(c) Transfer to an Irrevocable Income Only Trust (a/k/a "Medicaid Qualifying Trust"). As a result of the enactment of the DRA, and from a purely Medicaid Planning perspective, the use of the Irrevocable Income Only Trust may be the most logical option. As previously explained, irrespective of the fair market value of the residence transferred to the Trust, the period of ineligibility will effectively be five years (60 months) in order to avoid the harsh penalties contained in the DRA for transfers made within the lookback period. However, the properly drafted Irrevocable Income Only Trust will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as it is possible to utilize the transferor's personal residence exclusion ($500,000 if married, or $250,000 if single) by reserving in the trust instrument the power in a non-fiduciary capacity and without the approval or consent of a fiduciary, to reacquire all or any part of the trust corpus by substituting property of equivalent value. The Grantor will be considered the owner for income tax purposes (IRC § 675(4)). Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor (IRC § 2036(a)).

While the lengthy Medicaid ineligibility period must be considered, the tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax consequences make the Irrevocable Income Only Trust an ideal option in most circumstances.

Since the transfer of the residence to the Irrevocable Income Only Trust is a taxable gift of a future interest, no annual exclusion is available. The full

value of the premises must be reported on a gift tax return, and if the value is over $1,000,000, gift taxes are due. However, if a limited power of appointment is retained, the gift to the trust is incomplete and no gift tax return is required.[2]

As a result of the life income interest retained by the Grantor, on the death of the Grantor the date of death value of all assets in the trust will be included in the Grantor's taxable estate pursuant to IRC § 2036(a). Inclusion in Grantor's estate will result in a full step up in basis for all trust assets pursuant to IRC § 1014(e).

Conclusion

The new law severely punishes those who neglect to plan for their long term care. However, it is clear that through advance planning, such as the transfer of assets to an Irrevocable Income Only Trust, the use of a deed with a life estate or the purchase of long term care insurance, the extent of an individual's exposure to the costs of long term care can be contained.

Endnotes

1. *In re Golf*, 91 N.Y. 2d 656, 674 N.Y.S. 2d 600 (1998).
2. Treasury Reg. 25.2511-2(b).

Anthony J. Enea, Esq., a member of Enea, Scanlan & Sirignano, LLP of White Plains and Somers, New York, is a member of the Executive Committee of both the Trusts and Estates Law Section (as Vice-Chair of the Committee for the Elderly and Disabled) and the Elder Law Section (as Co-Chair of the Guardianship and Fiduciary Committee) of the New York State Bar Association. He is also Editor-in-Chief of the *Elder Law Attorney*, a publication of the Elder Law Section. Mr. Enea is a member of the National Academy of Elder Law Attorneys (and a member of the Board of Directors of its New York Chapter), is Certified as an Elder Law Attorney ("CELA") by the National Elder Law Foundation, and is President-Elect of the Westchester County Bar Association.

APPENDIX

SAMPLE LIMITED POWER OF APPOINTMENT

Grantor reserves the power to appoint the remainder and/or Grantor's life estate in the premises to any one or more of the issue of the Grantor, siblings of the Grantor, or issue of the Grantor's siblings, or the spouses or surviving spouses of any of the foregoing persons, with the term "issue" being deemed to include persons who have been adopted according to law or born out of wedlock. This power shall be exercisable or may be relinquished during the Grantor's lifetime by a deed executed to the Grantee(s) herein or to others who are members of the class of appointees set forth herein, making express reference to this power and recorded in the County Clerk's Office where this deed is recorded, prior to the Grantor's death. This power shall not be exercisable to a Will. No exercise of this power shall be deemed to release the Grantor's life estate unless such a release is explicitly made in a deed. The exercise of this power shall exhaust it, and unless the power is specifically released in such a deed, the deed recorded last shall control as to any ambiguities or inconsistencies. This power can not be exercised in favor of Grantor, Grantor's estate or Creditors of Grantor.

[Release and termination of the limited power of appointment "completes" the gift and requires the filing of a gift tax return for the full fair market value of the property (sale price).]

SAMPLE LIFE ESTATE

SUBJECT TO AND RESERVING UNTO the party of the first part, _____ , an estate in and to said premises during her lifetime such that the party of the first part reserves the right to the use and possession of the premises during her lifetime. The party of the first part shall pay for all maintenance and repairs, water and sewer charges, insurance charges and taxes related to the premises. The party of the first part reserves any and all real estate tax exemptions available to her including, but not limited to the STAR, Senior Citizens or Veterans exemption.

Second International Estate Planning Institute Is a Hit

By G. Warren Whitaker

Last year the NYSBA co-sponsored an International Estate Planning Institute in New York together with the Society of Trust and Estate Practitioners (STEP), a worldwide organization of over 11,000 estates lawyers, bankers and other advisors based in London. I was privileged to chair this first-time event and gather together a stellar roster of speakers. The favorable reception to the first Institute led us to hold the Second International Estate Planning Institute this past March, again in New York City and together with STEP. From all reports this year's event was another hit.

The Second Institute was held at the Millennium Hotel and adjacent Hudson Theatre in midtown Manhattan, and was again chaired by myself and focused on international estate, trust and tax planning from the U.S. perspective. Attendees filled the orchestra section of the theater and overflowed into the first balcony, while the speakers performed their song and dance on the proscenium. Only an orchestra was lacking to give the full flavor of a Broadway production.

While the majority of the over 200 attendees came from the New York area, a significant number also came from other parts of the United States and from Canada, the United Kingdom and other countries around the world. The Institute thus provided a forum for professionals to discuss the latest trends in international estate planning as well as an opportunity to hear presentations by some of the world's leading practitioners in the area.

Virginia Coleman of the Boston law firm of Ropes & Gray LLP opened the Institute with an overview of the U.S. income, estate, gift and generation-skipping taxation of non-U.S. persons. She discussed the U.S. residency rules, and then examined the use of foreign corporations to protect U.S. situs assets owned by non-residents from U.S. estate tax, and their benefits and drawbacks in comparison to alternative vehicles. She was followed by Arthur Winter, who addressed the particular issues relevant to planning for the peripatetic international executive, including careful counting of the days the executive spends in the U.S. during the first and last years of residence, stepping up basis of assets before entering the U.S., and withdrawing retirement benefits from the U.S. only after giving up U.S. residency status.

M. Read Moore of McDermott Will & Emery in Chicago then spoke about the complex rules that apply to foreign corporations held in trusts that have U.S. beneficiaries, which may result in their classification as either Controlled Foreign Corporations or Passive Foreign Investment Companies with resulting negative income tax consequences. Duncan Osborne of Osborne & Helman LLP in Austin, Texas followed with a presentation on asset protection techniques and the relative merits of onshore (Delaware or South Dakota) versus offshore planning structures.

After lunch, there were six focused and interactive breakout sessions, with attendees able to select four. These included three jurisdictional reviews: Ivan Sacks of Withers Bergman LLP in New York spoke on the latest developments in planning for Latin Americans, including planning for the blacklist laws as well as Mexico's more recent legislation based on rate of taxation; Edward Northwood of Hodgson Russ LLP in Toronto and Buffalo covered U.S.-Canadian planning issues, such as insuring the availability of credits and the effects of the U.S.-Canada Income Tax Treaty; and Alon Kaplan of Tel Aviv, Israel, spoke about planning for Israeli residents and the new Israeli offshore trust taxation rules. In addition, Jack Brister, an accountant with ERE LLP in New York, described the U.S. reporting requirements for foreign trusts and transactions and possible penalties for failure to comply with them; Dina Kapur Sanna of Day Berry & Howard LLP in New York addressed the latest U.S. expatriation rules and the tax treatment of persons who give up U.S. citizenship or green cards; and Karl Feitelberg of Sterling Resources in Boston reviewed the income tax advantages of using private placement life insurance for U.S. persons and in pre-immigration and foreign trust planning.

The first day concluded with a festive cocktail party in the hotel which was hosted by GAM USA. This was followed by a superb Speakers' Dinner at Gramercy Tavern hosted by Royal Bank of Canada Global Private Bank.

Alexander Bove opened Day Two of the program with a presentation on the role of the Protector in international trust planning, with particular focus on the potential liability of the Protector and whether the Protector's role is fiduciary in nature.

I then spoke about the recent *Pasquantino* case, in which the U.S. Supreme Court held that persons who committed acts within the United States to evade for-

eign taxes may be prosecuted for criminally defrauding the foreign government. My talk was the introduction to a presentation by John Rhodes and Sebastian Pritchard-Jones of the London law firm of MacFarlanes on the U.K. experience with money laundering and the reporting requirements for lawyers and bankers there of questionable transactions including possible evasion of foreign tax laws.

I then spoke about recent changes in the U.S. tax laws that make it possible for non-U.S. persons to create U.S. situs "offshore" trusts, and of the substantive laws that have been enacted in several U.S. states which make them attractive trust jurisdictions.

Sanford Goldberg of Roberts & Holland LLP in New York discussed how to avoid building up accumulated income in foreign trusts (such as by insuring that they qualify as grantor trusts or by using private placement life insurance) and of dealing with accumulated income once it has been created (i.e., by paying it to non-U.S. beneficiaries or a non-U.S. trust, or by using it to purchase residences).

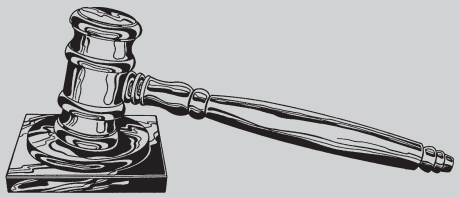
Ellen Harrison of Pillsbury Winthrop Shaw Pittman LLP in Virginia addressed international charitable giving, including the circumstances under which U.S. and non-U.S. persons can obtain U.S. charitable deductions for income, gift and estate tax purposes on gifts made to non-U.S. charities or for non-U.S. charitable purposes. Finally, Joshua Rubenstein of Katten Muchin Rosenman LLP in New York gave an amusing and informative talk about differing matrimonial laws around the world and their impact on international estate planning.

As the meeting concluded, there seemed to be general agreement that what had begun last year as a one-time event has metamorphosed into a highly valued annual tradition, an opportunity to be kept current on international estate planning issues and to exchange ideas with some of the leaders in the field, both formally and informally. We look forward to holding another successful institute next year.

We are all grateful to Terry Brooks and his staff at the NYSBA for their efforts in putting on the Institute; to STEP for promoting and supporting the Institute; and to the sponsors who helped make the Institute possible, including (in addition to GAM USA and Royal Bank of Canada) Christiana Trust Company (Delaware), Christie's, Commonwealth Trust Company (Delaware), Fiduciary Trust International, Sotheby's, South Dakota Trust Company and Trident Trust.

Recent New York State Decisions

By Ira Mark Bloom and William P. LaPiana



ADMINISTRATION OF ESTATES

Court Does Not Have Power to Cancel Contract for Sale of Estate Property for Insufficient Price

Decedent's will directed that her real property be sold and the proceeds distributed among her children. Almost a year after decedent's death, her executor contracted to sell the realty. One of the children, who had told the executor of her desire to purchase the property and her willingness to match any offer, petitioned the Surrogate's Court to cancel the contract on the grounds that the price was inadequate and that the sale was not in the estate's best interests. The Surrogate granted the petition by permitting the executor to perform the contract only if a sale to the petitioner or to a named nonparty could not be accomplished.

The Appellate Division reversed. The executor was required to use good business judgment in selling the realty and if his actions did not meet that standard the remedy is surcharge which can be obtained only if the executor acted negligently. In the absence of fraud, duress, overreaching, unconscionability or similar wrongdoing, the Surrogate's Court could not cancel the contract. SCPA 2107, which allows the Surrogate's Court to give advice and direction on the sale of estate assets, was held to be inapplicable because the record did not demonstrate the existence of the "extraordinary circumstances" required before the court can grant relief under that section. *In re Lovell*, 23 A.D.3d 386, 808 N.Y.S.2d 227 (2d Dep't 2005).

Elective Share: Surrogate's Valuation of Land Not Against Weight of Evidence

Decedent's surviving spouse properly claimed her elective share. The value of decedent's interest in real property was the issue before the Surrogate's Court. Portions of the land were zoned for commercial, residential, and industrial use. The Surrogate based the value on the separate zoning and rejected the estate's contentions that the parcel should be valued as a single working farm and that adjustments should be made taking into account the existence of a former landfill on the land, the location of part of the parcel in a flood zone, and an aquifer protection zone. The Appellate Division affirmed the Surrogate's valuation in light of a history of proposed development, the existence of several active plans at the time of death, and the completion of major development six years after decedent's death. In addition, it was proper to refuse to adjust the value in the absence of evidence of actual, as opposed to speculative, environmental contamination. *Estate of Piotrowski*, 25 A.D.3d 965, 809 N.Y.S.2d 239 (3d Dep't 2006).

Legal Fees: Contingent Fee for Medical Malpractice Limited by Statute

Administrator engaged a law firm to pursue a medical malpractice action and entered into a retainer agreement which correctly computed the maximum contingent fee pursuant to Judiciary Law § 474-a(2). Administrator orally agreed to an additional fee because the case was appealed. In affirming the Surrogate's disallowance, the Appellate Division held that the maximum fee schedule under Judiciary Law § 474-a(2) contemplates the handling of an appeal. Additional attorney fees may be awarded under Judiciary Law § 474-a(4) on a showing of extraordinary circumstances which make the statutory compensation inadequate. No such showing was made. *Estate of Cramer*, 24 A.D.3d 864, 804 N.Y.S.2d 865 (3d Dep't 2005).

Letters Refused Where Will Differs from Intestate Distribution and Death Occurred Twelve Years Before

Decedent died in 1993 leaving a will under which he gave his entire estate to his surviving spouse. The will was never offered for probate. In early 2005, surviving spouse petitioned for letters of administration. The petition was accompanied by the consents of decedent's two sons, his only other distributees. A copy of the purported will was attached to the petition for information purposes.

SCPA 1001(9) provides that letters of administration may be granted when a purported will is filed with the court and proceedings for probate "have not been instituted within a reasonable time or have not been diligently prosecuted." The Surrogate denied the petition because a useful purpose would be

served in probating the will. The Appellate Division affirmed, noting first that no appellate court has addressed this question. Reading the statute as giving the Surrogate's Court discretion to issue letters of administration under the circumstances, the appellate panel found no abuse of discretion. It is clear that the decedent wanted to leave his entire estate to his surviving spouse and that the only way to accomplish that goal was to admit the will to probate. While the court noted it was "sympathetic" to the surviving spouse's argument that her estate will save "hundreds of thousands of dollars in estate taxes," by distributing the estate in intestacy rather than according to the will, it did not believe that the surviving spouse "should be permitted to engage in post-death estate tax planning in the decedent's estate" nor that the delay in offering the will for probate should provide the basis for tax relief. Although the court said no more on the subject, presumably had the will been admitted to probate promptly, a timely renunciation by the surviving spouse would be a perfectly acceptable method of post-mortem tax planning. *Estate of Fischer*, 24 A.D.3d 858, 804 N.Y.S.2d 863 (3d Dep't 2005).

FIDUCIARIES

Commissions; Failure to Identify All Distributees Does Not Justify Denial of Commissions

Decedent's brother applied for and obtained limited letters of administration to pursue a medical malpractice claim which resulted in a judgment. The petition for letters failed to list seven surviving half-siblings and the children of a deceased half-sibling. Brother submitted his accounting for judicial settlement and the Surrogate denied the administrator his statutory commissions, citing his failure to identify the half-siblings in the petition.

The Appellate Division reversed, holding that the administrator's actions were not the sort of serious misfeasance justifying a denial of statutory commissions. The half-siblings became known to the administrator's counsel; they received notice of the accounting and will share in the distribution of the estate. In addition, the administrator was the only relative of decedent to pursue the malpractice claim and the record shows that the omission was the result of carelessness and was not done intentionally or maliciously. *Estate of Cramer*, 24 A.D.3d 864, 804 N.Y.S.2d 865 (3d Dep't 2005).

Trustees' Duties; Compelling Reason to Sell Stock Not Found

Charles Dumont created a testamentary trust funded almost exclusively with Kodak stock. The will contained a singular provision stating the testator's "desire and hope" that the Kodak stock would be retained by the executors and trustees for distribution to the "ultimate beneficiaries" (testator's great-grandchildren, and if none, named charities) and that neither the executors nor trustees "shall dispose of such stock for the purpose of diversification of investment." The testator then modified this language by stating that it "shall not prevent" the fiduciaries from disposing of the Kodak stock "in case there shall be some compelling reason" other than diversification.

The testator died in 1956. His daughter Blanche Hunter, who was the first income beneficiary of the trust, died in 1972, and her daughter Margaret Hunter then became the sole income beneficiary of the trust. Margaret and her only living child, the presumptive remainderperson, brought a compulsory accounting proceeding in 1998. In December of 2001 the trustee determined that Kodak's lack of participation in digital photography was a compelling reason to sell the stock and by the end of 2002 the entire investment had been sold.

The Surrogate first determined that the trustee breached its fiduciary duties, including adoption of a definition for compelling reason which only addressed the needs of the income beneficiary. The Surrogate opined that a compelling reason to sell meant that the interest of any beneficiary would be adversely affected by its retention. The Surrogate found that the trustee should have sold 95 percent of the Kodak stock on January 31, 1974 because problems with the stock, including a low income yield, then constituted a compelling reason. After calculating the proceeds, subtracting capital gains taxes, adding statutory interest and subtracting the dividends received and proceeds from actual sales during the accounting period, the trustee was surcharged just under $21,000,000; commissions were denied and commissions paid were to be returned with interest. (4 Misc. 3d 1003A, 791 N.Y.S.2d 868 (Sur. Ct., Monroe County 2004)).

The Appellate Division reversed, holding that the Surrogate could not *sua sponte* determine that the trustee should have sold the stock on January 31,1974 when that date was not mentioned by the objectants in their objections. But even if the Surrogate had such authority, there was no evidence that failure to sell on that date was imprudent, the contrary finding being impermissibly based solely on hindsight. In the appellate court's view, the facts indicate that it would have been *imprudent* to sell on that date and the amount of income produced by the investment in Kodak was irrelevant given the income beneficiary's other sources of income. *In re Chase Manhattan Bank (Hunter)*, 26 A.D.3d 824, 809 N.Y.S.2d 360 (4th Dep't 2006).

POWERS OF ATTORNEY

Elective Share; Attorney-in-fact May Exercise Right of Election for Principal

Surviving spouse's daughter as her attorney-in-fact signed a notice of exercise of the right of election by her mother and timely served it on the executor. At the time of spouse's death, surviving spouse lacked capacity and a guardian *ad litem* had been appointed to represent her in the probate proceeding. In addition, an Article 81 guardianship proceeding was pending at the time of the surviving spouse's death.

The executor petitioned for a determination that the exercise of the right of election by the agent was ineffective. The Surrogate held that the right of election had been properly exercised by the agent. EPTL 5-1.1-A(c)(3), which allows certain fiduciaries to exercise the right of election, is not applicable. Unlike the enumerated fiduciaries who must seek court approval for certain actions, the attorney-in-fact has "full authority" to act in the principal's place. In addition, the grant of authority with regard to estate transactions under GOL § 5-1502G gives the attorney-in-fact the authority to make elections and to do any act with respect to an estate in which the principal has or claims to have an interest. Taken together, an agent given this authority, as the agent here, can serve and file the notice of election.

The argument that the right of election could not be exercised without the approval of the guardian *ad litem* was without merit, as was the argument that it was necessary to await the outcome of the guardianship proceeding, which proceeding might have been dismissed given the existence of the power of attorney, or limited to guardianship of the person if no heath care proxy existed. In any event, guardianship was not necessary to allow the attorney-in-fact to exercise the right of election for the principal. *In re Lando,* 809 N.Y.S.2d 901 (Sur. Ct., Rockland County 2006).

Gifts; Ambiguity Allows Introduction of Extrinsic Evidence

Decedent gave his power of attorney to a grandnephew but modified the statutory gifting power allowing the attorney-in-fact to makes gifts to the principal's spouse, children, more remote descendants, and parents not to exceed $10,000 per person per year by striking the limitation on the amount and adding "in any amount, even to the attorney(s)-in-fact themselves." The attorney-in-fact transferred more than $1,000,000 of the decedent's assets to himself during a period that began one month before the decedent's death and concluded several days after death. The administratrix of decedent's estate sued to recover the transferred property. The Surrogate granted the administratrix's motion for summary judgment and denied the attorney-in-fact's motion to compel the decedent's attorney to testify as to the decedent's intent.

The Appellate Division reversed and remanded, holding that the language added to the gifting power was ambiguous because it either could mean that any attorney-in-fact who was also a spouse, child, more remote descendant or parent of the decedent could make gifts in unlimited amounts to him or herself or that any attorney-in-fact could be the donee of gifts unlimited in amount. Extrinsic evidence was therefore admissible to resolve the ambiguity and would be admissible even in the absence of ambiguity in order to present evidence of the principal's donative intent. If such intent existed, the attorney-in-fact could make gifts of the principal's property to himself even in the absence of an express grant of authority.

In addition, the administratrix had impliedly waived the attorney-client privilege. The admintratrix could not challenge the attorney-in-fact's authority and withhold the best evidence of that authority. The court also remanded that portion of summary judgment dealing with the transfers by the attorney-in-fact from the joint account made after death because the record was insufficient to allow it to deal with that portion of the motion. *In re Kislak*, 24 A.D.3d 258, 808 N.Y.S.2d 174 (1st Dep't 2005).

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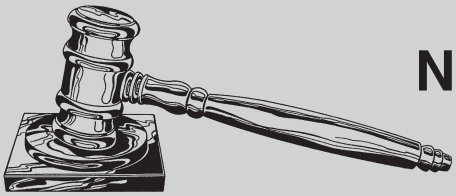

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Common Law Marriage

Petitioner brought a proceeding to determine her status as the decedent's common law spouse pursuant to the laws of Pennsylvania.

At a trial of the matter, petitioner called three witnesses. Through their testimony, it was revealed that the petitioner and the decedent participated in a wedding ceremony in Brooklyn in accordance with Albanian custom. Approximately 450 guests attended. It was undisputed that the wedding was not solemnized by an official authorized to do so under New York law. At a wedding a week later, the petitioner and the decedent held themselves out as husband and wife.

In addition, and in accordance with Albanian custom, petitioner wore her wedding dress at this function.

Several weeks later, petitioner and decedent traveled to Pennsylvania to visit petitioner's brother and then subsequently, petitioner's family. On both occasions, they held themselves out as husband and wife and stayed in their own room. Friends and relatives visited them and treated them as husband and wife. Several weeks later, the decedent died from injuries suffered from an accident at work.

Petitioner buried the decedent's body in Kosovo, where she participated in a religious ceremony as the decedent's wife. Additionally, a local death notice listed the petitioner as the decedent's wife. Further, an affidavit of a good friend of the couple's from the United States was introduced into evidence in which he stated that the petitioner and the decedent lived together in an apartment in Brooklyn as husband and wife, and also that he saw them on numerous occasions in Pennsylvania where they also held themselves out as such.

Based upon the foregoing, the court concluded that petitioner had established a marital relationship with the decedent pursuant to Pennsylvania law. The court opined that the parties' constant cohabitation, together with general reputation as husband and wife, was sufficient to raise a rebuttable presumption that the parties had contracted marriage in the State of Pennsylvania. Further, the couple's conduct in New York constituted strong evidence of the parties' intent to marry, and therefore, petitioner's application was granted.

In re Estate of Krasniqi, N.Y.L.J., Feb. 7, 2006, p. 26 (Sur. Ct., Kings Co.) (Surr. Torres).

Cy Pres

The petitioner hospital sought the court's permission to apply the *cy pres* doctrine pursuant to EPTL 8-1.1 to use $14 million from a trust to pay down its debt and finance an expansion of the facility and modernize equipment. The court found that the criteria for the application of the doctrine existed, i.e., that the testator made a charitable bequest in his Will; that the testator demonstrated a general charitable intent; and that the circumstances had changed since the making of the bequest so as to render literal compliance impractical or impossible. The court noted, in particular, that while the testator intended that the disposition to the hospital be utilized for ophthalmology services, it was equally clear from a reading of the Will that his general charitable intent was focused on increasing the hospital's ability to service the community as a whole. Without the financing necessary to achieve the modernization requested in the petition, the hospital would be caused to reduce community-related programs, or perhaps be forced into bankruptcy. Such a result would obviously frustrate the charitable intent of the testator.

In re Wolseley, N.Y.L.J., Jan. 4, 2006, p. 28 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

Deposition Testimony

Petitioner moved to vacate the decision of the court that dismissed his petition and granted respondent's motion to suppress the deposition testimony of a witness.

The record revealed that the witness had been deposed, but that his deposition had not been completed, and the witness had died prior to the conclusion of his examination. The transcript of his deposition had not been exchanged, as required by CPLR

3116, but instead, had been sent to petitioner eight months after the witness's death.

The court opined that deposition testimony will be suppressed where an adversary is deprived of the right to cross-examine the witness. However, such suppression will not be a bar to the introduction into evidence of any portion of the testimony of the witness as admissions if based upon a proper foundation.

The court found that there was no opportunity to cross-examine the witness, and therefore the deposition testimony was properly suppressed. Nevertheless, the petitioner argued that despite the fact that the deposition testimony was suppressed, a new trial was warranted in order to allow passages of the transcript to be admitted into evidence as admissions. The petitioner maintained that the certification of the transcript, notwithstanding that it was unsigned, was foundation enough for the excerpts of the deposition to be read into evidence for this purpose.

The court disagreed, holding that if a deposition transcript is not signed or certified, and a non-party witness was deposed, the deposition transcript is inadmissible, except where a proper foundation is laid. The court found that the petitioner failed to lay the proper foundation by demonstrating that the transcript was properly exchanged, or by calling as a witness at trial the stenographer, prior counsel who were present at the deposition, or any other parties who heard the testimony. Accordingly, petitioner's motion was denied.

In re Estate of Ciraolo, N.Y.L.J., Jan. 10, 2006, p. 27 (Sur. Ct., Kings Co.) (Acting Surr. Harkavy).

Due Execution

The decedent's five distributes filed objections to the probate of her Will alleging that it was not duly executed. The Will named the attorney-draftsman and the decedent's caretaker as executors of her estate, and bequeathed the residue of the estate to the caretaker.

Although the Will contained an attestation clause, the court held the existence of the clause would not validate a Will which otherwise failed to comply with the statutory requirements for execution. In this regard, the record revealed that none of the witnesses were present when the decedent signed the Will, and neither the attorney-draftsman nor any of the witnesses were present at the other's signing of the attestation clause. Moreover, the testimony of the first witness was directly contrary to the attestation clause. The second witness could not recall whether the decedent acknowledged her signature to her, and believed that it was the caretaker who asked her to sign the instrument as a witness. Finally, although the third witness recalled signing the Will, and seeing the decedent's signature on the instrument, her recollection was faulty as to the remaining events that occurred on the date it was executed.

Although the court recognized that a Will could be admitted to probate despite the failed memory of a witness, taken as a whole the record was insufficient to demonstrate that the elements of due execution were met.

Accordingly, probate of the instrument was denied.

In re Estate of Falk, N.Y.L.J., Jan. 12, 2006, p. 26 (Sur. Ct., New York Co.) (Surr. Preminger).

Fiduciary Discretion

In a proceeding seeking, *inter alia*, to set aside the transfer of assets into an irrevocable trust and for removal of the trustee, the petitioner, grantor and co-trustee of the trust moved for payment of her legal fees amounting to approximately $170,000. The respondent co-trustee of the trust cross-moved for an order directing the grantor's deposition and for an accounting of her expenses and income independent of income derived from the trust.

The subject trust was created by the petitioner, as grantor, and named the petitioner, together with her son, the respondent, as co-trustees. The trust required that income be paid to the grantor for her lifetime, and authorized discretionary payments of principal to the grantor for her support, care, maintenance and general welfare "in keeping with the standard of living that has been enjoyed by the [g]rantor. . . ."

The respondent trustee opposed the petitioner's request for invasion of trust principal on the grounds that the purpose of the trust was to preserve his mother's assets during her lifetime. He argued that acceding to his mother's wishes would contravene this purpose, and was particularly troublesome in view of her increasing expenditure of funds since her recent marriage to a man 45 years her junior. Moreover, respondent maintained that without a demonstration by the petitioner as to the necessity for and reasonableness of the invasion of principal, he was not required to do so.

The court held that it would not interfere with the exercise of discretion by a trustee to distribute principal to a beneficiary, except under circumstances where the trustee has misinterpreted the power granted or demonstrated an abuse of discretion. In determining whether there has been an abuse of dis-

cretion, the court noted that a discretionary distribution by a trustee without any exercise of judgment in itself would constitute abuse. Furthermore, the court opined that while attorney's fees might be allowable from the trust if the services rendered were beneficial to the trust, the services at issue were performed in order to set aside or deplete the trust.

Accordingly, given the absence of any discovery or other proof, the court held that the petitioner's motion was premature, and denied the application without prejudice. Further, the court denied the respondent's cross-motion and directed that he proceed with the requirements of CPLR Article 31 discovery.

In re Celeste Irrevocable Trust, dated November 22, 2002, N.Y.L.J., Dec. 14, 2005, p. 27 (Sur. Ct., New York Co.) (Surr. Preminger).

In Terrorem Clause

The respondent in a probate proceeding sought, by way of subpoena, to depose the nominated alternate co-executor under the propounded Will pursuant to the provisions of SCPA 1404(4). The instrument contained an *in terrorem* clause. The alternate co-executor moved to quash the subpoena contending that the provisions of SCPA 1404(4) did not authorize his examination. Specifically, the movant maintained that while the language of SCPA 1404(4) permitted the examination of "nominated executors" where the propounded Will contains an *in terrorem* clause, no mention is made in the statute of successor or alternate executors.

In denying the motion to quash, the court noted that despite the movant's designation as alternate executor in the propounded instrument, his present status, given the pendency of the probate proceeding, was, like that of the petitioner, a nominated executor. Further, in reaching its result, the court was persuaded by the rationale underlying the broad discovery provisions of the statute where an *in terrorem* clause is present, the purpose of which is to enable potential objectants to obtain sufficient information to make an intelligent decision whether to risk triggering an *in terrorem* clause and losing their inheritance. The court opined that such wide latitude in discovery is particularly necessary where a claim of fraud or undue influence is contemplated, given the circumstantial evidence upon which these claims are based.

In re Estate of Marshall, N.Y.L.J., Jan. 9, 2006, p. 45 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

In Terrorem Clause

In a miscellaneous proceeding, the court was requested, *inter alia*, to determine the validity of an *in terrorem* clause in the decedent's Will.

The decedent's Will and codicil were admitted to probate in 2002, without contest. He was survived by three children. Several years later, compulsory accounting proceedings were instituted by the petitioner against the fiduciaries, which resulted in a court order directing the filing of an accounting. The instant proceeding was instituted as a result of petitioner's concern that her filing of objections in the accounting proceedings would trigger the *in terrorem clause.*

The subject clause provides, in pertinent part, as follows:

> It is expressly understood that any attempt by any beneficiary under this my last Will and Testament, to hinder or delay, either directly or indirectly, whether for probable cause or not, the probate or administration of my Estate, or who precipitates, directly or indirectly any legal proceeding of any nature in any Court of competent jurisdiction by utilizing any pre-trial proceedings . . . including but not limited to document production, objections to fiduciaries' conduct, bad faith, or for any basis whatsoever, I give, devise and bequeath one ($1) dollar. . .

Petitioner argued that the subject clause was void as against public policy and violative of the provisions of EPTL 11-1.7. Respondent fiduciaries took the position that should petitioner object to their accounting, it would not violate the clause.

The court opined that while valid, *in terrorem* clauses are viewed with disfavor in New York and as such are strictly construed. On the other hand, clauses that attempt to preclude a beneficiary from questioning the conduct of the fiduciaries or from demanding an accounting by the fiduciaries, or objecting thereto, will be held void as contrary to public policy. In other words, to the extent that an *in terrorem* clause can be interpreted as an attempt to exonerate a fiduciary from the exercise of reasonable care, they have been deemed invalid.

Accordingly, within this context, the court held the subject clause, to the extent that it could be interpreted as preventing the estate beneficiaries from objecting to the fiduciaries' stewardship, or conduct-

ing pre-trial discovery relative thereto, to be void as against public policy.

In re Estate of Egerer, N.Y.L.J., March 15, 2006, p. 29 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

Reformation of Will

The co-trustee of two testamentary trusts sought reformation of her husband's Will so that the trusts created thereby met the requirements of qualified subchapter S trusts under the Internal Revenue Code, alleging that it was her husband's intent to permit the trusts to be funded with shares of stock in her husband's businesses and for them to maintain their S-corporation status. The court noted that if the trusts were to lose their subchapter S status upon funding, adverse tax consequences would result.

The court found that while reformation will generally be allowed in order to satisfy technical requirements of the tax code and to avoid unintended tax consequences, the application by petitioner went well beyond this purpose, and also requested the court to delete language in the instrument which limited the trustees' power to invade the principal of the trusts to an ascertainable standard. Upon review of the instrument, the court concluded that there was nothing in the language of the Will that indicated that the testator considered the interests of his spouse as paramount to those of the remaindermen.

Accordingly, the court granted that portion of the application that sought reformation in order to qualify the trusts for subchapter S status, and denied the balance of the relief requested.

In re Hicks, N.Y.L.J., Feb. 14, 2006, p. 20 (Sur. Ct., Nassau Co.) (Surr. Riordan).

Suspension of Letters

During the pendency of a proceeding to revoke letters of trusteeship issued to the petitioner's two stepsons, the court suspended the letters of the respondents, finding that the record raised serious concerns regarding the trustees' conduct.

In reaching this result, the court noted that suspension of letters was expressly authorized by SCPA 712 upon the issuance of process, but that the court need not await the return of process to suspend letters. Nevertheless, the court noted that summary removal of a fiduciary, whether by revocation or suspension of letters, will constitute an abuse of discretion where the facts are in dispute, where conflicting inferences may be drawn therefrom, or where mitigating facts are alleged, which, if established, would render removal an inappropriate remedy.

Based upon this standard, the court declined to suspend the letters of the respondents based upon the allegation that they had continued to violate a court order, concluding that there was a sharp issue of fact as to that issue. However, the court did find that the record unequivocally sustained a finding that one of the respondents had placed himself in a position of conflict with the petitioner, as beneficiary of the subject trust, which raised serious concerns respecting the fulfillment of his duty of undivided loyalty and objectivity in administering the trust. Moreover, as to the other respondent, the court was equally troubled and held that her non-participation in the activities of her co-trustee did not absolve her from liability and could result in a deadlock in the conduct of trust affairs.

Accordingly, the court determined that the trust would be better served by suspending the letters of trusteeship of both respondents, pending the hearing on revocation.

In re Chadrijian, N.Y.L.J., Feb. 28, 2006, p. 20 (Sur. Ct., Nassau Co.) (Surr. Riordan).

Real Property

The deceased Grantor's son instituted a proceeding to determine that the Grantor's surviving spouse had a right to occupy the Grantor's residence property, rather than a life estate. The trust language in issue granted an undivided 1/3 interest in the subject property to the Grantor's spouse together with a right "to reside in such property for as long as she shall desire." The language further provided that at such time as the property is sold, 1/3 of the sale proceeds are to be allocated to the spouse and be paid to her outright.

The court held that the language of the trust did not require the spouse to reside at the subject property to the exclusion of all other residences that she owned, but afforded her the right to reside for as long as she desired. To this extent, the court found that despite the fact that the spouse had resided in her home in Tennessee for an extended period, she nevertheless evidenced an intent to also utilize and reside in the subject premises, and was willing to continue to pay the expenses of its upkeep.

Accordingly, the court held that petitioner did not have the right to request a sale of the premises based upon the spouse's failure to occupy same as a primary residence for a period of time.

In re Estate of Reynolds, N.Y.L.J., March 16, 2006, p. 26 (Sur. Ct., Bronx Co.) (Surr. Holzman).

Termination of Trust

In an uncontested proceeding, the petitioner trustee sought termination of a trust created under the decedent's Will pursuant to the recently enacted EPTL 7-1.19. The provisions of this statute authorize a trustee or beneficiary of a non-charitable trust to seek termination when the expense of administering the trust is uneconomical. In support of the application, the petitioner maintained that if the trust were to continue, little—if any—income would be available to benefit the income beneficiary, the decedent's daughter, over the remaining course of her lifetime, estimated at an additional 20 years. Further, the petitioner argued that continuation of the trust would be uneconomical under any definition and would not be in the best interests of the trust beneficiaries.

Based upon the foregoing, and in the absence of opposition by the trust remaindermen, the court granted the application pursuant to EPTL 7-1.19 and directed that the remaining trust income and principal be distributed to the income beneficiary of the trust.

In re Estate of Kistner, N.Y.L.J., Jan. 23, 2006, p. 35 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

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