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Trusts and Estates Law Section Newsletter

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A Message from the Chair


Ronald J. Weiss

At the end of my law school income tax exam was a three-part bonus question: "Who was Helvering?" "What was his first name?" and "What was his middle initial?" The professor later posted what he deemed to be the best answers and the first on the list read as follows: "Helvering was a public spirited American citizen who, in the early days of the income tax laws, helped the I.R.S. collect revenue."[1] While perhaps not possessing quite the same degree of noble public-spiritedness with which the unnamed student imbued Mr. Helvering, the members of the various committees of our Section perform, on a volunteer basis, the indispensable services without which our Section could not function.

Emblematic of such an effort is the work of a Section subcommittee formed in 2007 to address the provisions of EPTL 11-1.5(d)—the payment of interest on the deferred payment of a pecuniary legacy. That subcommittee, initially consisting of Bob Taisey, Susan Porter, Dave Arcella, Mark Altschuler and Natalia Murphy, tackled three problems with the existing law. First, that under the economic conditions that existed then (and today) a fixed interest rate of 6% was simply unfair; instead of compensating the legatee for the delay in payment of the legacy, it provided a windfall to the legatee at the expense of the residuary beneficiaries. Second, to receive that interest, the legatee had first to make a demand upon the fiduciary for the payment of the legacy before commencing a proceeding in the Surrogate's Court. Third, while the payment of interest was taxable income to the legatee, it was not deemed a distribution of accounting income and, hence, was not a part of the distributable net income of the decedent's estate; for tax purposes it was treated as

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a payment of nondeductible personal interest, resulting in a further burden on the residuary estate. The subcommittee members drafted a bill that addressed each of these issues, with interest to be based on a floating rate akin to the applicable rate for federal tax purposes. That bill was introduced in both the Assembly and the Senate—where it sat and sat and sat.

Several of the members of the committee moved on and others came to take their place. But the effort continued, chaired by Natalia Murphy with the assistance of the chairs of our Legislation and Governmental Relations Committee, Ian MacLean and, more recently, Rob Harper and Jen Hillman. For several years the resulting bill passed the Assembly, only to stall in the Senate. Concerns were raised; concerns were addressed. The support of other interested organizations—the City Bar, the New York State Bankers Association and the OCA Committee—was obtained. In June 2013, the bill (now numbered A01185/S04952) passed the Assembly by a vote of 140 to 1. On January 22, 2014, it again passed the Assembly, this time by a vote of 132 to 0. But once again it appeared to be stalled in the Senate.

On March 20 I received an email that started "YAHOO!" Was this spam from the Internet company by that name? But it went on: "Interest on Legacies has passed the Senate." So the bill is now waiting to be sent to the Governor, where I trust this now seven-year journey will come to a happy conclusion.

It is said of baseball that it is a simple game: see the ball, hit the ball. However, for anyone who has played the game, you quickly discover that actually hitting that ball is one of the hardest things to do in sports. But when you do connect, it can also be one of the most satisfying.

I am not sure that Natalia Murphy or any of her other subcommittee members are baseball fans. But if they are, they just had a 10-pitch at bat and hit the 10th pitch out of the park. Whether or not you are a fan, you have to appreciate that kind of effort.

As you read this, Section members will have returned from what promises to be an interesting and enjoyable meeting at the Four Seasons Hotel in Toronto. And please mark your calendars for our Fall Meeting on October 16-17 at the Hyatt Regency Hotel in Rochester.

Enjoy your summer.

Ronald J. Weiss

Endnote

1. Trivia question: What are the answers to these questions? Answer: Guy T. Helvering was the longest serving Commissioner of the Internal Revenue Service, serving from 1933 until 1943, when he became a federal district judge. The reason his name is associated with so many seminal cases is that up until the mid-1940s cases were captioned with the last name of the I.R.S. Commissioner. So, for example, in *Lucas v. Earl*, the famous "fruit and tree" case, Robert Lucas was the Commissioner of the I.R.S.

Editor's Message

We always strive to produce a Newsletter addressing a wide variety of subjects, especially the latest developments potentially affecting the trust and estate practitioner. I believe this issue does so particularly well. One such development is New York's Non-Profit Revitalization Act of 2013, which was signed by Governor Cuomo in December. Andrew Katzenberg's article provides a thorough overview of the Act, summarizing the changes that it made to previously existing law. Robert Lyons and Sean Weissbart further address that subject, specifically analyzing whether incorporating in Delaware remains beneficial for New York-based corporations in light of the Act.

C. Raymond Radigan and Peter K. Kelly discuss another timely topic: the duties of a fiduciary where an estate's assets include, or a decedent bequeaths, weapons and/or ammunition in view of the New York SAFE Act of 2013 and the new SCPA 2509. In addition, Amy F. Altman, Karin Sloan DeLaney, Antar P. Jones, Paulina Koryakin and Michael S. Schwartz, all members of our Section's Estate and Trust Administration Committee, have collaborated on an excellent article opining on the need for a New York statute pertaining to lost trusts.

Also appearing in this issue is an article by Karl Dowling on the likely unfamiliar subject of procedures for administering estates owning assets located in Ireland. Finally, on a lighter note, Jonathan Rikoon has provided an entertaining piece entitled "Shakespeare Was a T&E Lawyer!" Enjoy!

Our next submission deadlines are June 9, 2014 for our Fall 2014 issue, and September 4, 2014 for our Winter 2014 issue.

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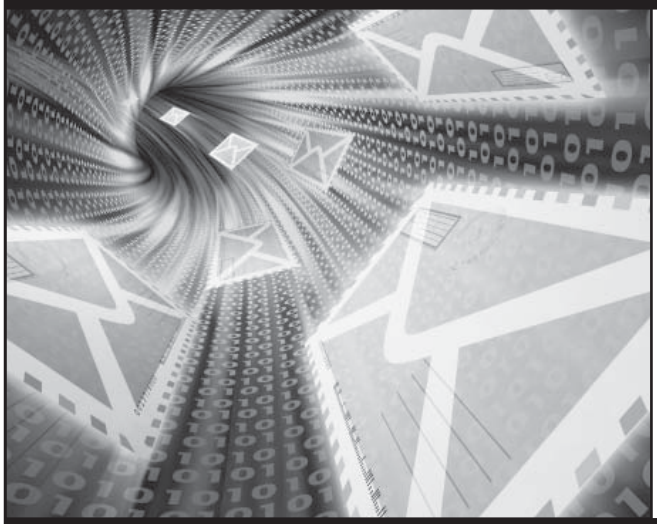

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/TrustsEstatesNewsletter

New York Law Update: Non-Profit Revitalization Act of 2013

By Andrew S. Katzenberg

The New York Non-Profit Revitalization Act of 2013 (the "Act") was signed into law by Governor Andrew Cuomo on December 18, 2013, and goes into effect as of July 1, 2014. The Act made significant changes to New York Not-for-Profit Corporation Law (NPCL), the Estates, Powers & Trusts Law (EPTL) and Article 7-A of the Executive Law ("Article 7-A"), and is designed to simplify the administrative procedures for charitable organizations while strengthening the governance and credibility of such organizations.

Section 8-1.9 was added to Article 8 of the EPTL to implement the new audit, related party transactions, and conflicts of interest and whistleblower policy requirements for charitable trusts as discussed below.

I. Increased Thresholds for Heightened Reporting Requirements

Pursuant to section 172 of Article 7-A, every charitable organization (including charitable trusts required to register under Article 8 of the EPTL) that intends to solicit contributions from any person or government agency in the State of New York is required to register with the Attorney General and file a financial report annually (Form CHAR500).[1] These charitable organizations are also required to file an independent CPA review report ("CPA Review") or an independent CPA audit report ("CPA Audit") with the Attorney General if the gross revenue (and support) of the charity reaches certain thresholds. The Act increased the CPA Review threshold from $100,000 to $250,000,[2] and increased the CPA Audit threshold from $250,000 to $500,000. The CPA Audit threshold will increase further to $750,000 as of July 1, 2017, and $1,000,000 as of July 1, 2021.[3] The increased thresholds reduce burdens placed on smaller charitable organizations.

II. Simplification of Administrative Procedures

One of the main purposes of the Act was to simplify the establishment of charitable organizations, as well as their operations. The following highlight several such improvements:

(1) eliminates categories of not-for-profit corporations as a Type A, B, C or D and replaces the categorical classification with a much simpler charitable or non-charitable classification;[4]

(2) permits electronic delivery of notices, consents, waivers, proxies and financial statements;[5]

(3) permits videoconference attendance for directors at board meetings;[6]

(4) reduces the voting requirement to purchase, sale, mortgage, lease or other disposition of real property from two-thirds to a majority vote of the board of directors, unless the purchase or disposition constitutes substantially all of the assets of the corporation;[7]

(5) permits the following acts of a charitable organization to be approved by the Attorney General rather than a petition to the New York Supreme Court: (1) disposition of all or substantially all assets,[8] (2) merger and consolidation of charitable corporations[9] and (3) dissolution of charitable corporations;[10]

(6) no longer requires charitable organizations whose purpose includes education to obtain consent of the Commissioner of Education if its purposes explicitly exclude the purpose to be chartered by the Board of Regents (purposes described in (a) to (v) of NPCL § 404); and[11]

(7) no longer requires the purpose clause in the certificate of incorporation to identify the activities the corporation will undertake or state how it will achieve its purposes.[12]

III. Increased Oversight Internally

Charitable organizations with gross receipts of $500,000[13] or more must designate an audit committee comprised of at least three "independent directors" (or if it does not designate an audit committee, the board of directors with only independent directors participating) to review the accounting and financial reporting processes of the organization.[14] Specifically, this committee must (1) retain and renew the agreement with the independent auditor, (2) review the results of the audit and (3) oversee and administer the conflict of interest policy.[15]

The term "independent director" means a person:

(1) who is not and has not been an employee of the organization within the last three years,[16]

(2) does not have a relative who is or has been a "*key employee*" of the organization within the last three years,[17]

(3) who has not or does not have a relative who has received more than $10,000 in compensation from the organization in any year during the last three years,[18]

(4) is not an employee of or does not have a substantial financial interest in any entity which had made a payment[19] to or received a payment for property or services from the organization exceeding the lesser of $25,000 or 2% of the organization's gross revenue within any year during the last 3 years, or

(5) does not have a relative who is an *officer* or does not have a substantial financial interest in any entity which had made a payment to or received a payment for property or services from the organization exceeding the lesser of $25,000 or 2% of the organization's gross revenue within any year during the last 3 years.[20]

If a charitable organization had in the prior year or reasonably expects to have in the current year gross receipts exceeding $1,000,000, it must also: (1) review the scope and planning of the audit with auditor before it commences; (2) upon completion of the audit, discuss with the auditor (a) risks and weaknesses of the organization's internal controls, (b) restrictions on the auditor's activities or access to information, (c) any significant disagreements between the auditor and management, and (d) adequacy of the organization's accounting and financial reporting processes; and (3) annually consider the performance and independence of the auditor.[21]

Additionally, charitable organizations are prohibited from engaging in "related party transactions"[22] unless it is determined that it is fair, reasonable and in the best interest of the organization. In order to approve a related party transaction, the board must (1) consider alternatives, (2) approve the transaction by majority vote excluding the related party, and (3) contemporaneously document the basis for approval including consideration of the alternatives.[23]

All charitable organizations are now required to adopt a conflict of interest policy to ensure that directors, trustees, officers and key employees act in the organization's best interests.[24] The audit committee will oversee and administer the conflict of interest policy if such committee exists; otherwise it will be overseen by the board of directors.[25] The conflict of interest policy must include the following:[26]

(1) a definition of the circumstances that constitute a conflict of interest;

(2) procedures for disclosing a conflict of interest;

(3) a requirement that the conflicted person not be present at or participate in deliberations on the matter;

(4) a prohibition against the conflicted person's attempt to influence the deliberation or voting on the matter;

(5) a requirement that the existence and resolution of the conflicts be documented;

(6) a procedure for disclosing, addressing and documenting the conflict; and

(7) a requirement that directors and trustees, before the initial election or appointment and annually thereafter, must disclose conflicts of interest.

In addition, charitable organizations with (1) 20 or more employees *and* (2) gross revenue in excess of $1,000,000 in the prior fiscal year must adopt a whistleblower policy to protect persons who report suspected improper conduct from retaliation.[27] The whistleblower policy must be administered by a committee of independent directors, if one exists; otherwise by the board of directors.[28] The whistleblower policy must include the following:[29]

(1) procedures for reporting violations and preserving confidentiality;

(2) designation of a director, trustee, officer or employee to administer the policy and report to the appropriate committee; and

(3) a requirement that the policy be distributed to all directors, officers, employees and volunteers.

Finally, no employee of the organization may serve as chair of the board or any other position with similar responsibilities.[30]

IV. Increased Oversight Externally

The Act provides for increased powers of the Attorney General's Office in order to oversee the activities of charitable organizations. The Attorney General may now enjoin, void or rescind any related party transaction, as well as seek the removal of directors, trustees or officers.[31] The Attorney General may also independently bring an action against a charitable organization which has not obtained all of its required consents or complied with the registration requirements of Article 7-A or the EPTL.[32] Additionally, any non-domiciliary of New York who is serving as a director, trustee, officer, or key employee is subject to personal jurisdiction in the Supreme Court of New York, and the Attorney General may serve process on any such person.[33]

V. Conclusion

The Act is an improvement over the old law, especially for "mom and pop" charitable organizations, by driving down administration costs to establish and maintain the organization. Conversely, large organizations will need to implement various procedures to comply with the Act and become more diligent in their day-to-day operations. Attorneys and advisors should be mindful to reach out to their clients and review their operating documents to ensure they are in compliance with the Act.

Endnotes

1. N.Y. Executive Law § 172-b(2-a) (EXCL).
2. EXCL § 172-b(2).
3. EXCL § 172-b(1).
4. N.Y. Not-for-Profit Corporation Law § 402(a)(2) (NPCL).
5. NPCL §§ 605(a), 606, 609(b)–(c), 614(a)–(b), 708(b).
6. NPCL § 708(c).
7. NPCL § 509(a).
8. NPCL § 511.
9. NPCL § 907.
10. NPCL § 1002.
11. NPCL § 404(w); *see also* EXCL § 216.
12. NPCL § 402(a)(2).
13. Increasing to $750,000 as of July 1, 2017 and $1,000,000 as of July, 1 2021 pursuant to EXCL § 172-b(1).
14. NPCL § 712-a(a) and NPCL § 712(a) require committees to have at least three directors. A grace period is provided for organizations with annual revenues less than $10,000,000 in the last fiscal year ending before January 1, 2014 for which the requirement becomes effective on January 1, 2015 instead of July, 1 2014. Non-Profit Revitalization Act of 2013, Assembly Bill A8072, § 132 (2013).
15. NPCL §§ 712-a(a), 715-a(b)(2).
16. "Employee" is not defined and arguably it would not include an uncompensated officer. However, that would lead to an odd result: an uncompensated president of the organization could be considered an independent director, but if he had a relative who was an officer (key employee), he would not be independent under the test. Therefore, the conservative approach would be to assume all officers will be considered "employees" when applying this test, whether or not compensated.
17. A "key employee" is any person in a position to exercise substantial influence over the foundation. NPCL § 102(a)(25). Based on this definition, the key employee could be a director or officer, even if not an "employee" of the foundation.
18. Does not include expenses or reasonable compensation for services as a director as permitted by NPCL § 202(a). NPCL § 102 (a)(21).
19. "Payment" does not include charitable contributions. *Id.*
20. *Id.*
21. NPCL § 712-a(b).
22. "Related party transaction" is any transaction which a director, officer, key employee or one of their relatives or an entity in which one of the preceding individuals has a 35% interest (in the case of a partnership, an interest in excess of 5%), has a financial interest and the charitable organization or its affiliate is a participant. NPCL § 102 (23)–(24).
23. NPCL § 715.
24. NPCL § 715-a(a).
25. NPCL § 715-a(b)(2)
26. NPCL § 715-a(b).
27. NPCL § 715-b(a).
28. NPCL § 715-b(b)(2).
29. NPCL § 715-b(b).
30. NPCL § 713(f).
31. NPCL § 715(f).
32. NPCL § 115(b).
33. NPCL § 309.

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Lost Trusts in New York—The Case for Statutory Intervention

By Amy F. Altman, Karin Sloan DeLaney, Antar P. Jones, Paulina Koryakin and Michael S. Schwartz

New York does not have a statutory mechanism for dealing with lost or destroyed lifetime trusts. The need for clear guidelines is becoming increasingly important as more individuals use lifetime trusts as will substitutes. Practitioners have reported numerous situations where only an unsigned copy, abstract or other secondary evidence of a trust agreement could be found, while assets such as bank accounts, securities, or real property have been registered in the name of those trusts. Some of these situations are the result of the destruction of lifetime trusts, along with other documents, in the devastating attacks on September 11, 2001. More commonly, however, writings establishing lifetime trusts are lost or destroyed as a result of carelessness or lack of procedures for safekeeping of these documents by clients or their attorneys.

Although New York case law has provided some assistance in dealing with this issue, clear statutory guidance may be beneficial to ensure that assets held in a trust continue to be held and administered for the trust beneficiaries in accordance with the settlor's intent. Such guidance already exists for lost or destroyed wills and the testamentary trusts established thereunder.[1] When an individual wishes to establish a lifetime trust, he or she should be given the same measure of comfort that his or her wishes will be honored, whether the trust is created under a will or under a separate trust instrument.

Lost or Destroyed Trusts in New York

Estates Powers and Trusts Law (EPTL) 7-1.17 requires all lifetime trusts created on or after December 25, 1997 to be in writing, executed and acknowledged by the settlor and at least one trustee. Even though SCPA 1407 clarifies the issue of how to prove a lost or destroyed will and the testamentary trusts created thereunder, neither EPTL 7-1.17 nor any other provision of New York law directly addresses how to establish the existence of lost or destroyed lifetime trusts.

A review of New York case law, on the other hand, reveals that there is a strong history of cases that have addressed the issue of lost documents. For example, in cases dealing with the statute of frauds, New York courts have consistently ruled that parol evidence can be used to prove the existence of a valid trust.[2] These cases stand for the proposition that the absence of an original or copy of an executed trust document is not dispositive of the issue of the document's existence, and that the trust could still be deemed to be valid.[3] Nevertheless, there is no legal presumption given to the existence of a trust and, instead, there are certain elements that must be proven by the party claiming that the writing establishing the lifetime trust in fact exists.[4] These elements include: a designated beneficiary, a designated trustee, a clearly identifiable res to enable title of the res to pass to the trustee, and delivery of the res by the settlor to the trustee with the intent of vesting legal title in the trustee.[5] For lifetime trusts created after 1997, courts will likely require further proof that the trust was validly formed in conformity with EPTL 7-1.17, such as an attorney affirmation.

This standard appears to have been most recently applied in *Greene*, a case in the Kings County Surrogate's Court in which petitioners could not find the original or signed copy of a writing establishing a lifetime trust.[6] Complicating matters further, a deceased settlor purportedly conveyed to the petitioners, as successor co-trustees, two parcels of real property. In an unpublished decision, the court stated that as long as the four above-described essential elements of a trust are clearly demonstrated, absence of the executed original trust document does not prevent a finding that a valid trust exists. In addition, although EPTL 7-1.17 was not directly cited by the court, it seems that the burden was on the petitioners to also demonstrate that the trust was originally validly formed in conformity with EPTL 7-1.17.

The petitioners in *Greene* offered the following evidence to establish the existence of these essential elements: (1) an abstract of the trust signed by the settlor and his attorney; (2) an unexecuted copy of the trust; (3) two executed deeds showing the transfer of property to the trust and the date on which they were filed; and (4) an attorney affirmation wherein the draftsperson stated that he prepared the trust agreement, that it was duly executed by two uninterested witnesses, that the settlor retained the executed version and that to the draftsperson's knowledge, the settlor never revoked the trust. Based on this offered evidence, the court in *Greene* found that the trust was valid, in spite of the lack of an original or a copy of the signed trust document.

Lost or Destroyed Trusts in Other States

Jurisdictions other than New York have also struggled with the issue of how to handle lost or destroyed trusts. Although the authors are aware of no other state that has enacted a statute specifically addressing this

issue, both case law and other non-legislative sources from across the country provide some guidance.[7]

In Kansas, for example, a bar association treatise suggests that generally the rules of construction that govern wills also apply to revocable trusts. However, the treatise maintains that the presumption of revocation of a will by a testator that arises if the original will cannot be found does not apply to revocable trusts.[8] Therefore, the inability to find a lifetime trust does not preclude a finding that the trust is still valid.

Courts in other jurisdictions have gone even further. In Connecticut, for instance, the courts have relied on the Restatement (Second) of Trusts § 49, which provides that "the loss or destruction of a memorandum does not deprive it of its effect as a satisfaction of the requirements of the Statute of Frauds, and oral evidence of its contents is admissible unless excluded by some rule of the law of evidence." In the Connecticut case of *Estate of Richard Getman*, the court adopted the position of the Restatement (Second) of Trusts and found that the trust was valid in spite of the lost trust document, because it had been established to the satisfaction of the court that (1) the loss of the original document had been proven by clear and convincing evidence; (2) the contents of the trust had been proven; (3) due execution of the trust instrument had been proven; and (4) the fact that the trust was not revoked had been proven by an attorney affidavit.[9] The court also relied upon case law in New Jersey, Oklahoma and Illinois in arriving at its decision to allow outside evidence to prove the validity of a lost trust document.[10]

Similarly, the California Court of Appeals has stated that secondary evidence is admissible to substantiate a lost trust in that state.[11] Under California law, a writing must be authenticated before it or secondary evidence of its contents can be admitted into evidence.[12] In order for a document to be authenticated, sufficient evidence must be introduced to sustain a finding that it is the writing that the proponent of the evidence claims it to be.[13] Moreover, California law also provides that the contents of a writing may be proven by otherwise admissible secondary evidence, as long as (1) there is no dispute concerning material terms of that writing and justice does not require exclusion; and (2) the admission of the secondary evidence would not be unfair.[14]

Texas courts have also addressed the issue of lost or destroyed trusts. In the case of *In Re Estate of Berger*, the Texas Court of Appeals dealt with both a trust and a will, neither the original nor a copy (signed or unsigned) of which could be found.[15] The Texas Trust Code provides that a party asserting the existence of a trust that holds real property (which the trust in question supposedly held) must present evidence of the trust terms, with the signature of the settlor.[16] However, in its decision, the Texas Court of Appeals relied on an evidentiary rule which allows the admission of other evidence to establish the contents of a writing if the original of that writing has been lost or destroyed.[17] Under this evidentiary rule, one must first prove that there was a search and inability to secure the document, and then prove the contents of that writing.[18] Ultimately, the Texas Court of Appeals held that there was enough proof to overcome a summary judgment motion dismissing the case for lack of an original or copy of the trust.

This is only a sampling of the authorities that have grappled with the issue of lost or destroyed lifetime trusts across the country. With the rise in use of revocable trusts as substitutes for wills, this will increasingly become a more common issue to deal with in every jurisdiction.

Possible Legislative Solution

The authors of this article propose that it would be beneficial for the New York State legislature to consider enacting legislation that would provide clear guidance for proving the existence of lost or destroyed lifetime trusts. Doing so would provide certainty and comfort to both settlors and beneficiaries, as they would be assured that assets held in lifetime trusts would continue to be held and administered in accordance with the settlor's intent. This is especially important as the use of revocable trusts, as opposed to wills, is generally gaining favor among practitioners.

In addition, with more certainty as to the treatment of lost or destroyed trusts, such legislation may discourage some unnecessary litigation, and may also provide courts with clearer guidance when a controversy actually arises. This could bolster lower court opinions with respect to these matters, the result of which may be to dissuade appeals of these lower court decisions. This could potentially further save the parties, and the State, unnecessary expense.

This legislation would conform the rules that already exist for lost or destroyed wills, and the trusts established thereunder, to lost or destroyed lifetime trusts. Enacting a statute to address this issue would codify tested New York State case law that is consistent with case law and guidance from other jurisdictions.

Critics of such proposed legislation may argue that the current state of case law in this area is sufficient, and that formal codification of a statute would be unnecessary. However, it is axiomatic that many statutes have been passed to codify, clarify or slightly alter the effects of existing case law. Enacting such a statute could offer certainty and clarity that case law may not be able to provide.

In light of the possibility of loss or destruction of lifetime trusts in the normal course of events, not to

mention potential loss or destruction of such documents as a result of, hopefully rare, extraordinary events (such as terrorism, civil unrest, hurricanes or other acts of God), legislation in this context may very well be desirable and cost efficient for both settlors and beneficiaries.

Just because the physical document evidencing a trust has been lost or destroyed, the assets of that trust and the rights and interests therein should not be lost or destroyed as well.

Endnotes

1. N.Y. Surrogate's Court Procedure Act (SCPA) 1407.
2. *See, e.g.*, *Lynch v. Savarese*, 217 A.D.2d 648, 650, 629 N.Y.S.2d 804 (1995); *Webb & Knapp v. United Cigar-Whelan Stores Corp.*, 276 A.D. 583, 584, 96 N.Y.S.2d 359 (1st Dep't 1950); *Posner v. Rosenbaum*, 240 A.D. 543, 546, 270 NYS 849 (1st Dep't 1934).
3. *In re Marcus Trusts*, 2 A.D.3d 640, 641, 769 N.Y.S.2d 56 (2d Dep't 2003).
4. *Id.*
5. *In re Doman*, 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).
6. *In the Matter of the Proceeding for Determining the Status of Real Property Concerning the Estate of Eureka Greene, Deceased, and the Greene Trust*, Sur. Ct, Kings County, March 14, 2013, López-Torres, M., No. 2011/2194/A.
7. The Uniform Trust Code, adopted by 25 jurisdictions, does not appear to contain provisions directly addressing the issue of lost or destroyed lifetime trusts.
8. The Kansas Bar Association publication of Kansas Probate & Trust Administration After Death § 4.4.3(b)(3).
9. *Estate of Richard Getman*, 15 Quinnipiac Prob. L.J. 257 at 262 (2001).
10. *Id*. at 262-265, citing *J.A.B. Holding Co. v. Nathan*, 194 A. 829 (N.J. E&A 136); *Kimberly v. Cissna*, 16 P.2d. 1090 (Okla. 1932); and *Hiss v. Hiss*, 81 N.E. 1056 (Ill. 1907).
11. *Penny v. Wilson*, No. B161317, March 24, 2004.
12. Cal. Evid. Code, § 1400.
13. Cal. Evid. Code, § 1401.
14. Cal. Evid. Code, § 1521.
15. *In Re Estate of Berger*, 174 S.W.3d 845 (Tex. App. 2005).
16. *Id.*, relying on Tex. Prop. Code Ann. §112.004.
17. Texas Rule of Evidence 1004a.
18. *Id*.

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Scenes from the Trusts and Estates Law Section

SPRING MEETING

May 1-4, 2014

Four Seasons • Toronto, Ontario, Canada

The Effect of the New York Non-Profit Revitalization Act of 2013 on Incorporating New York-Based Charities in Delaware

By Robert R. Lyons and Sean R. Weissbart

Historically, many New York-based not-for-profit corporations have incorporated in Delaware instead of in their home state. Under New York law, any not-for-profit corporation with an "educational" purpose[1] had to obtain the consent of the New York Department of Education ("Education Department") before it could incorporate,[2] a process that could take several months. Thus, New York organizations that desired to begin operating without delay often followed a two-step process where they incorporated in Delaware, where the incorporation process could be quickly completed, and subsequently applied for authority to conduct business in New York.

In December 2013, Governor Cuomo signed into law the New York Non-Profit Revitalization Act of 2013 (the "Act"), which addressed, for the first time in over forty years, many of the inefficiencies in New York laws regulating not-for-profit organizations. Among the changes, the Act eliminated the requirement that many organizations with an educational purpose obtain Education Department consent before they can incorporate. When this law takes effect on July 1, 2014,[3] these organizations will be able to complete the New York incorporation process without the delays previously caused by the Education Department.

This article addresses whether New York-based organizations should still continue to incorporate in Delaware. As explained below, although the Act will improve the speed of the New York incorporation process for many organizations, in certain instances, incorporating in Delaware may still be beneficial. First, notwithstanding the Act, some organizations will still need their certificates of incorporation approved by a state agency other than the Education Department, which would result in similar delays. Second, even organizations that can now quickly incorporate in New York may select Delaware because its laws provide increased operational flexibility and more limited state-level governance.

I. Background

Before addressing whether New York-based not-for-profit organizations should still follow the two-step process where they incorporate in Delaware and subsequently apply for authority to do business in New York, the article (a) provides an overview of the New York law that had led so many New York organizations to incorporate in Delaware; (b) addresses the benefits of incorporating quickly, and (c) explains why the Act should improve the speed of the New York incorporation process for organizations that previously needed consent from the Education Department.

"In December 2013, Governor Cuomo signed into law the New York Non-Profit Revitalization Act of 2013, which addressed, for the first time in over forty years, many of the inefficiencies in New York laws regulating not-for-profit organizations."

A. Historical Overview of Incorporating in New York

New York law made the receipt of Education Department consent a prerequisite to incorporation if the organization had any "educational" purpose.[4] Organizations with an educational purpose had to obtain Education Department consent to ensure no corporation was operating an institution that had to be chartered or incorporated by the State Board of Regents, such as schools and universities. However, the Education Department took the broad position that a corporation needed its consent if its name or description of its activities in its proposed certificate of incorporation merely "implied" an educational purpose[5] or had educational purposes that are "incidental" to its primary mission.[6]

Although the Education Department does not define the term "educational," it does not use the narrow definition of "educational organization" that entitles an organization to *per se* recognition as a public charity.[7] Rather, in the authors' viewpoint, the Education Department defines educational at least as broadly as the definition given in the Treasury Regulation,[8] which identifies the following organizations as educational:

- An organization, such as a primary or secondary school, a college or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.[9]
- An organization whose activities consist of presenting public discussion groups, forums, panels, lectures or other similar programs.[10]

- An organization which presents a course of instruction by means of correspondence or through the utilization of television or radio.[11]
- Museums, zoos, planetariums, symphony orchestras and other similar organizations.[12]

Thus, organizations from after-school programs, all varieties of cultural organizations, senior centers with recreational activities, and many in between, were subject to review by the Education Department.

In many cases, the Education Department took months to issue its consent, thus causing long delays in the organization's ability to form and operate. The Education Department's website provided that in certain cases, receipt of consent "may exceed 15 days."[13] From the authors' viewpoint, the emphasis should be on the word "exceed."

By incorporating in Delaware, organizations avoided the delays caused by New York's consent requirement. Delaware law contains no such impediment. In fact, the Delaware website advertises that incorporation can be completed in as quickly as an hour.[14] Once the organization incorporated in Delaware, it was immediately able to begin conducting its affairs and begin carrying out the important tasks discussed in the section below.

It is important to note that incorporating in Delaware only delayed—but did not eliminate—the requirement that a New York-based organization receive Education Department consent. Any Delaware corporation that planned to conduct business in New York still had to complete the second step of applying for authority to conduct business in New York as a foreign corporation.[15] At that time, the charity would need to obtain Education Department consent before New York would grant it authority to do business in New York.[16] However, by following this strategy, the organization had already formed a corporation that could begin operating and carrying out the important formative tasks discussed below without waiting for Education Department to issue its consent.

The only downside to this strategy was that the corporation had to pay fees to both Delaware and New York. However, the majority of organizations found these relatively minimal added fees were worth avoiding the delays caused by the Education Department.

B. The Benefits of Incorporating Without Delay

The ability to incorporate quickly provides two main benefits to not-for-profit organizations: (1) the ability to file an application for recognition of exemption from income tax ("Form 1023")[17] and (2) the ability to receive tax-deductible contributions.

First, the federal government makes incorporation a prerequisite to filing an application for recognition of exemption from income tax ("Form 1023").[18] Form 1023 is the application that charitable organizations must file with the Internal Revenue Service ("IRS") to receive classification as a Section 501(c)(3) organization. This IRS review of Form 1023 can take between several months to more than a year, but the application cannot be submitted unless the corporation has incorporated.[19]

Second, incorporation is also a prerequisite to receiving tax-deductible contributions. The Code generously permits a donor to deduct contributions made to not-for-profit corporations, provided the entity submits its Form 1023 within twenty-seven months[20] of the date of its incorporation and the IRS ultimately approves the application. Provided both requirements are met, tax-exempt status is retroactive to the date of incorporation. But tax-exempt status is not retroactive to the date the Education Department receives a certificate of incorporation to review. Consider the example of a wealthy donor who is looking to make a year-end tax-deductible contribution to a new organization. The organization may lose the contribution if the Education Department did not provide its consent by the year's end. Timely incorporating in Delaware eliminates this problem.

C. The Increased Speed of the New York Incorporation Process Under the Act

As a result of the Act, consent from the Education Department or Board of Regents is only required if the corporation will be operating a school, college, university, library, museum or historical society.[21] Other corporations with an educational purpose must only provide a certified copy of their Certificate of Incorporation to the Education Department within thirty days of the date of incorporation[22] and include the following language in their Certificate of Incorporation:

> The Corporation's purposes and powers do not include any of those described in paragraphs (a) through (v) of this section.[23]

The majority of corporations that previously needed to obtain Education Department consent as a prerequisite to incorporation would now be able to incorporate without delay. In fact, when these organizations submit their certificate of incorporation to the New York State Department of State, the incorporation process should be able to be completed within a similar time frame as a certificate submitted to the Delaware Department of State.[24] Similar to Delaware, New York offers incorporation on an expedited basis, though these services are subject to additional fees.[25]

II. The Remaining Benefits of Incorporating in Delaware

Although the Act will improve the speed of incorporating in New York, incorporating in Delaware will still be advantageous to certain organizations. First, certain organizations must still obtain the consent of a New York agency as a prerequisite to incorporation. These organizations may still wish to follow the two-step process outlined above. Second, organizations that desire greater operational flexibility and more limited state-level governance should still consider incorporating in Delaware; however, as discussed below, before selecting Delaware for these reasons, the organization should evaluate to what extent it would be forced to comply with the New York laws it is trying to avoid by operating in New York as a foreign corporation or in an effort to obtain and maintain its exemption from federal income tax.

A. Consent from Agencies Other Than the Education Department

The Education Department is not the only state agency that must approve or consent to an organization's incorporation. Indeed, the Not-for-Profit Corporation Law contains more than twenty categories of organizations that must first obtain approval or consent from a specified New York agency as a prerequisite to incorporation.[26] For example, certain health-related organizations are required to obtain approval from the Commissioner of Health or Public Health Council;[27] similarly, certain child-care organizations must obtain the consent of the Commissioner of Social Services.[28]

The Act only eliminates the requirement that many organizations with an educational purpose receive the consent of the Education Department. Organizations with other specified purposes must still receive the requisite approval or consent as a prerequisite to incorporation.[29] Additionally, a subset of educational organizations, namely organizations that will be operating a school, college, university, museum, library or historical society, must still receive consent from the Education Department or authorization from the Board of Regents.[30] If time is of the essence, these organizations should still consider incorporating in Delaware.

B. Delaware's Operational Flexibility and Limited State-Level Governance

New York-based organizations may still wish to incorporate in Delaware because of its greater operational flexibility and more limited state-level governance. However, before incorporating in Delaware, New York-based organizations should consider whether they would be forced to comply with the New York laws they are trying to avoid by operating in New York as a foreign corporation or in an effort to obtain and maintain their exemption from federal income tax. This section begins with an overview of the general laxities of Delaware law and subsequently addresses some of the provisions of New York law, including provisions of the Act, which might still lead a New York-based organization to consider incorporating in Delaware.

Delaware, a state well known for being a haven for the formation of corporations, has one of the most lax bodies of laws regulating not-for-profit corporations. In fact, it is one of few states that do not even have a separate body of law governing not-for-profit corporations. Delaware not-for-profit corporations are governed by the Delaware General Corporation Law ("DGCL"), the same body of law that governs for-profit Delaware corporations. Comparatively, New York not-for-profit corporations are governed by the Not-for-Profit Corporation Law, a separate body of law that highly regulates the affairs of such corporations.

The DGCL is so lax that it permits corporations to disregard its default provisions provided the corporation does not adopt provisions "contrary to the laws of Delaware."[31] For example, the DGCL provides that the Certificate of Incorporation can include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors,…or the members of a nonstock corporation."[32] As another example of Delaware's overall laxity, the DGCL permits not-for-profit corporations to authorize less than one-third of the voting directors as a valid quorum.[33] The New York Not-for-Profit Corporation Law does not approach that same level of flexibility.

Despite the great flexibility of the DGCL, before rushing to Delaware, New York-based corporations must remember that their governing documents must still conform to the standards of the Internal Revenue Service, which reviews governing documents to ensure that not-for-profit corporations are not organized for the private benefit of any individual.[34] Thus, although Delaware permits corporations to have a single director or for quorum to be reached with fewer directors, the Internal Revenue Service would abhor that concentrated level of control.

Incorporating in Delaware may also be attractive to New York-based entities that wish to avoid some of the Act's governance-related provisions. For example, the Act imposes a three-step process that every New York not-for-profit corporation must follow before entering into a transaction with a related party.[35] However, New York's three-step process for entering into related-party transactions largely mimics the Treasury Regulation's recommended procedure[36] that public charities[37] should follow, irrespective of their state of incorporation. Thus, the rules that New York-based entities might look to avoid may actually "inure" to their benefit by helping them maintain their exemption from federal income tax.

On the other hand, by incorporating in Delaware, New York-based organizations will benefit from certain advantages of Delaware law that may not be of concern to the Internal Revenue Service. For example, with respect to the dissolution of a not-for-profit corporation, Delaware law does not require an organization to petition its Attorney General for approval to dissolve.[38] Generally, not-for-profit corporations dissolve in Delaware by filing a certificate of dissolution with the Secretary of State.[39] Comparatively, although the Act simplified the dissolution process required for New York corporations, the procedure remains more complicated than Delaware. The prior law mandated a two-step process of review by the Attorney General followed by court approval. The Act permits a one-step process of approval by the Attorney General.[40]

Additionally, Delaware not-for-profit corporations must manage funds in accordance with the Uniform Prudent Management of Institutional Funds Act,[41] whereas New York corporations are governed by the more stringent requirements of the New York Prudent Management of Institutional Funds Act.[42]

Finally, before a New York-based organization incorporates in Delaware for the purpose of avoiding specific New York laws, it must remember that it may be required to abide by certain provisions of New York law, including certain provisions of the Act, by operating in New York as a foreign corporation.[43] For example, the Act clearly imposes financial reporting requirements on most charities operating or fundraising in New York regardless of their place of incorporation.[44] Before incorporating in Delaware, New York-based organizations should carefully evaluate the New York laws they must comply with by virtue of operating in the state as a foreign corporation.

Conclusion

The Act should reduce the number of New York-based organizations that follow the two-step process where they incorporate in Delaware and subsequently apply for authority to do business in New York. Certain organizations may still find incorporating in Delaware attractive, particularly those that would still need to obtain the approval or consent of a New York State agency as a prerequisite to incorporation. Organizations that can now quickly incorporate in New York may also find Delaware attractive for its operational flexibility and more limited state-level governance; however, before selecting Delaware, these organizations must evaluate to what extent they would be forced to comply with the New York laws they are trying to avoid by operating in New York as a foreign corporation or in an effort to obtain and to maintain their exemption from federal income tax.

Endnotes

1. N.Y. Education Law § 216 (Educ.) (amended 2013).
2. *Id.*; NPCL § 404(d) (amended 2013).
3. Non-Profit Revitalization Act of 2013, Bill S5845-2013 § 132 (December 2013).
4. Educ. § 216 (amended 2013) ("No institution or association which might be incorporated by the regents under this chapter shall, without their consent, be incorporated under any other general law [i.e., not-for-profit corporation law].").
5. http://www.counsel.nysed.gov/forms/ques.html (available as of April 2014).
6. https://www.nysm.nysed.gov/charter/ (available as of April 2014).
7. Section 509(a)(1); Section 170(b)(1)(A)(ii).
8. Treas. Reg. § 1.501(c)(3)-1(d)(3).
9. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 1.
10. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 2.
11. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 3.
12. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 4.
13. http://www.counsel.nysed.gov/forms/ques.html (available as of April 2014).
14. http://corp.delaware.gov/expserv.shtml (available as of April 2014).
15. Not-for-Profit Corporation Law (NPCL) § 1304; http://www.dos.ny.gov/corps/nfpcorp.html#appauth (available as of April 2014).
16. NPCL § 1304(a). Under the Act, foreign corporations with an educational purpose (other than a school, library, museum or historical society) will no longer need to be pre-approved by the Education Department. NPCL § 1304(c) (amended 2013). Instead, the Act requires such foreign corporations to send a certified copy of their certificate of authority to the Education Department by certified mail with return receipt requested within ten days of the date the corporation receives notification that its application has been approved. NPCL § 1304(d).
17. Organizations that apply for recognition of exemption from income tax under a different section of the Code other than Section 501(c)(3) file a Form 1024.
18. Treas. Reg. § 1.501(c)(3)-1(b)(v)(6) ("any organization which seeks a determination of exemption after July 26, 1959, must have articles of organization which meet the rules of this paragraph").
19. As an alternative to forming a corporation, an organization can be formed as a trust or association and submit its Form 1023.
20. Treas. Reg. § 1.508–1(a) requires that a new organization must file Form 1023 within 15 months of the end of the month it was organized. However, Treas. Reg. § 301.9100–2(a)(2)(iv) provides an automatic 12–month extension for a total of 27 months.
21. Educ. § 216; NPCL § 404(d).
22. NPCL § 404(d).
23. NPCL § 404(w).
24. http://www.dos.ny.gov/corps/nfpcorp.html (available as of April 2014).
25. http://www.dos.ny.gov/corps/expedite.html (available as of April 2014).
26. NPCL § 404.

27. NPCL § 404(c), (o), and (t).
28. NPCL § 404(b).
29. NPCL § 404.
30. NPCL § 404(d).
31. DGCL § 102(b)(1); *see also* DGCL § 141(j).
32. DGCL § 102(b)(1).
33. DGCL § 141(j) ("The certificate of incorporation of any corporation organized under this chapter which is not authorized to issue capital stock may provide that less than 1/3 of the members of the governing body may constitute a quorum thereof"); *cf.* NPCL § 707.
34. Treas. Reg. § 1.501(c)(3)-1(b).
35. NPCL § 715.
36. Treas. Reg. § 53.4958-6. For federal tax purposes, this procedure is referred to as the "Rebuttable Presumption of Reasonableness." By following the procedure, transactions that might be considered excess benefit transactions are presumed to be reasonable unless the IRS can show "sufficient contrary evidence."
37. Private foundations are subject to the more rigid self-dealing rules in Section 4941.
38. DGCL § 276.
39. DGCL § 275.
40. NPCL § 511-A. If the Attorney General does not approve, the corporation can seek redress in Court. NPCL § 511-A(d).
41. 12 Del. C. §§ 4701-4710.
42. NPCL § 550-558.
43. NPCL § 1320.
44. N.Y. Executive Law 172-b.

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Administering an Estate in the Republic of Ireland

By Karl Dowling

America in general and New York in particular have large populations of Irish immigrants and descendants of Irish immigrants. The density of the Irish population in New York increases the likelihood of a New York practitioner administering an estate that owns property in Ireland. As a barrister specializing in wills and succession planning, the author encounters all types of private international succession law issues arising in Ireland.

This article highlights the procedures for extracting an Irish Grant of Representation (the "Grant")—the equivalent to letters issued by the Surrogate's Court—in circumstances where the decedent died possessed of property in Ireland.

Foreign Domicile

When person dies domiciled outside of the Republic of Ireland, but leaving property in Ireland, the Grant is required for the decedent's estate representative to collect and administer that property. The Grant will be given according to the law of the country of the decedent's domicile at death where the property is movable (personal property), but according to Irish law (Lex Situs) where the property is immovable (real property).

Section 102(1) of the Succession Act, 1965, provides that a testamentary disposition shall be valid as regards form, if it complies with the internal law:

(a) of the place where the testator made it, or

(b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

(c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

(d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or

(e) so far as immovables are concerned, of the place where they are situated.

Required Documentation

Both Movable and Immovable Estate in Ireland

The applicant must show entitlement under Irish law by showing title in the oath, and must show entitlement under law of domicile by lodging:

(i) a sealed and certified copy of the Grant (and will, if applicable) from the appropriate court in the country of domicile; or

(ii) where no such Grant has issued, an affidavit of law from a lawyer practising, or who has practised, in that jurisdiction.

Movable Estate Only in Ireland

The applicant must show entitlement under law of domicile by lodging:

(i) a sealed and certified copy of the Grant (and will, if applicable) from the appropriate court in the country of domicile; or

(ii) where no Grant has issued, an affidavit of law from a lawyer practising or who has practised in that jurisdiction.

If the applicant also has entitlement under Irish law, such title should be shown in the oath and a full Grant in respect of both movable and immovable estate can issue.

If, however, the applicant does not have entitlement under Irish law, a Grant limited to the movable estate only can issue under Order 79, rule 5(8)(a) of the Rules of the Superior Courts.

Immovable Estate Only in Ireland

The applicant must show entitlement under Irish law by showing title in the oath. If the applicant can also show entitlement under the law of domicile, *i.e.*, a sealed and certified copy Grant (and will, if applicable) or an affidavit of law, a full Grant in respect of both immovable and movable estate can issue.

If, however, the applicant does not show entitlement under the law of domicile, a Grant limited to the immovable estate can issue pursuant to Order 79, rule 5(8)(a) of the Rules of the Superior Courts.

Foreign Domicile and Executor Applying in Ireland

Where the decedent died domiciled outside of Ireland and a Grant has been extracted by the executor in the jurisdiction of domicile and where the executor intends to apply for a Grant in this jurisdiction, the normal set of executor papers should be lodged. The only difference is that a sealed and certified copy of the will and Grant (from the court of foreign domicile) is exhibited in the oath (*i.e.*, in place of the original will). A full Grant can issue in these cases.

Foreign Domicile and Same Applicant Is Applying in this Jurisdiction

Where the deceased died domiciled outside of Ireland and a Grant has been extracted in the country of domicile and the same applicant intends to apply for a Grant in this jurisdiction (and has title here) and the will is not in a foreign language, the process is again straightforward. The normal set of papers should be lodged with the application, along with a sealed and certified copy of the Grant (and will) if applicable (from the court of foreign domicile). Entitlement under Irish law is set out in the oath and the sealed and certified copy Grant will confirm entitlement under the law of domicile. Hence, a full Grant can issue.

Will in a Foreign Language

Where there is a foreign language will, it is necessary to obtain a Probate Officer's order before lodging the application for a grant of representation.

Requirements for an Affidavit of Law

The affidavit should be sworn by an independent lawyer practising, or who has practised, in the relevant jurisdiction. His/her qualification to make the affidavit should be stated. The following matters should be addressed:

1. The facts of the particular case should be set out and all relevant documents exhibited.
2. The legislation of the relevant jurisdiction governing entitlement to administer the deceased's estate should be referred to and quoted.
3. Whether a Grant has issued in the country of domicile.
4. When the affidavit is required to deal with the validity of a foreign will, the legislation of the relevant jurisdiction governing the requirements for the valid execution of a will should be referred to and quoted.
5. When the affidavit is required to show entitlement to extract a Grant, it should state who is or are the person or persons entitled to administer the deceased's estate under the law of the country of domicile.
6. If more than one person is entitled to administer the estate, it should be stated whether they are entitled to administer independently of each other, or if all must administer together.

Types of Grant of Representation

A grant of representation is a document granted under seal by the High Court which gives authority to a named person (or persons) to deal with a deceased's person's estate. The three most common types of grants of representation are:

1. Grant of Probate

When a person dies leaving a valid will and appointing an executor, a grant of probate issues to the executor. The person's assets are dealt with by the executor, according to the terms of the will. The deceased is said to have died testate. If any of the following applicable documentation is missing from the application, the Probate Office may refuse to issue the Grant:

- Original Will and Codicil (if applicable) and Engrossment
- Death Certificate
- Oath of Executor (and copy)
- Renunciation of Executor (if applicable)
- Inland Revenue Affidavit
- Schedule of Lands
- Affidavit of Attesting Witness (if required)
- Affidavit of Plight and Condition
- Affidavit of Testamentary Capacity (if required)
- Charitable Bequest Form (if required)

2. Grant of Letters of Administration Intestate

When a person dies without having made a valid will, he or she is said to have died intestate. A grant of letters of administration issues to the person or persons who were the nearest next of kin at the date of death. Next of kin is determined by the Succession Act 1965. The following proofs are required:

- Original Will and Codicil (if applicable) and Engrossment
- Death Certificate
- Oath of Administrator (and copy)
- Renunciation of Executor (if applicable)
- Inland Revenue Affidavit
- Schedule of Lands
- Affidavit of Attesting Witness (if required)
- Affidavit of Plight and Condition
- Affidavit of Testamentary Capacity (if required)
- Charitable Bequest Form (if required)
- Power of Attorney (if applicable)
- Evidence of Current Market Value of Property
- Bond

3. Grant of Letters of Administration with Will Annexed

When a person dies leaving a valid will and a person other than the executor applies, a grant of letters of administration with will annexed issues to the person entitled by law. When the Grant issues to the applicant, he or she is called the legal personal representative. The application must include:

- Death Certificate
- Oath of Administrator (and copy)
- Inland Revenue Affidavit
- Schedule of Lands
- Evidence of Current Market Value
- Bond
- Justification of Surety

Personal Public Service (PPS)

For every type of Grant, it is important to note that a Personal Public Service (PPS) number is required for a deceased person or for beneficiary resident overseas. Lack of a PPS number will result in the affidavit being returned to the executor/solicitor, thereby causing a delay in the processing of the application for the Grant of Representation. The Department of Social Protection (Client Identity Services) will need to be contacted prior to any application being made for a Grant of Administration.

Karl Dowling is a practising barrister focusing on wills, succession law and probate litigation. He is a Committee Member of the Society of Trust and Estate Practitioners (STEP) Ireland and the co-author of the *Irish Probate Practitioners' Handbook* and the Editor of the *Irish Probate Journal*, published by Thomson Reuters.

Disposal of Decedent's Firearms Under Gun Control Law

By C. Raymond Radigan and Peter K. Kelly

Early in January, 2013 the New York State Legislature enacted a package of gun control legislation in response to the horrors of the Newtown, Connecticut massacre. This act has commonly been referred to as the New York SAFE Act (Secure Ammunition and Firearms Enforcement Act).[1] The act is a major revision of New York gun laws, particularly the reinstitution of the expired federal "assault weapon ban" in New York. The federal assault weapon ban was enacted in 1994 and expired on September 13, 2004.

"[The New York SAFE Act] has important provisions for regulation of weapons owned by a decedent which must be disposed of by his fiduciary after death and also weapons that are specifically bequeathed under a decedent's Will."

This statute has important provisions for regulation of weapons owned by a decedent which must be disposed of by his fiduciary after death and also weapons that are specifically bequeathed under a decedent's Will. Besides the assault weapon ban, regulation of the sale and purchase of ammunition, the possession of certain magazines and ammunition feeding devices, safe storage requirement and possession of weapons and/or ammunition by person with mental health issues, impact a fiduciary who possesses and must dispose of these weapons.

A new Surrogate's Court Procedure Act (SCPA) 2509 has been added to require that whenever a fiduciary (or an attorney of record) by regulation, rule or statute must file an inventory of assets, such inventory must include a particularized description of every firearm, shotgun, and rifle, as those terms are defined in the Penal Law. Notice to fiduciaries of their obligation under the statute is being provided in forms sent to fiduciaries upon their appointment by the Unified Court System.

Such notice also advises the fiduciaries that they must also mail a copy of the firearms inventory to the Division of Criminal Justice Services in Albany as required under SCPA 2509. The Office of Court Administration has also promulgated a standard form for firearms inventory, Form I-2 of the Official Forms of the Surrogate's Court. The firearms inventory form requires a listing of each and every weapon, the make, the model, the caliber or gauge, the serial number, and the valuation. It requires a signature by an attorney and a certification by the fiduciary.

The firearms inventory form indicates that the inventory will be filed with the Surrogate Court, but will be kept in a secure location separate from the public estate file and will be made available for inspection only to persons interested in the proceeding and/or their counsel unless otherwise ordered by the Court. Thus, the firearms inventory is not available to the general public.

Firearms are defined in Penal Law §265.00 and do not include shotguns and rifles. Shotguns and rifles are separately defined in §265.00 of the Penal Law.

A "firearm" is defined in the Penal Law as any pistol or revolver, a "sawed off" shotgun less than an eighteen-inch barrel, a "sawed off" rifle less than a sixteen-inch barrel, any modified or altered shotgun or rifle less than twenty six inches in an overall length, and an assault weapon.[2] The definition of an "assault weapon" has been amended.[3] The new definition of an assault weapon is more expansive than the definition in the now expired federal assault weapon ban and includes any semi-automatic weapon with a detachable magazine and any single designated feature commonly associated with military weapons.[4]

A "rifle" is defined in the Penal Law as any weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned or made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.[5]

A "shotgun" is defined in the Penal Law as a weapon designed or redesigned, made or remade and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shots or single projectile for each single pull of the trigger.[6]

Transfer and Safe Storage

Possession of shotguns or rifles in certain parts of the State of New York (except for local laws prohibiting

the same) are not prohibited and a person who possesses any of them need not be licensed. In an effort to control the disposition of weapons generally, including rifles and shotguns, the legislature has enacted a crime Penal Law §265.17 entitled "Illegal Disposal of a Weapon." Criminal sale or disposal of a firearm, rifle or shotgun to a person knowing that that person is prohibited by law from possessing such firearm, rifle or shotgun, is now a Class D Felony.

Under the new statute private sales of guns require federal background checks under all circumstances of the purchaser except for sales to immediate families. Thus, executors as a private seller of a firearm, rifle or shotgun may not transfer such weapon to the buyer unless they have obtained a federal criminal background check of the buyer. Transfers between immediate family members are exempt from the requirements of this section. An issue is immediately apparent as to whether or not a bequest of a particular weapon to a specific beneficiary who is not a member of the immediate family of the decedent would be a private sale governed by the requirements of the new statute and punishable as a Class D Felony upon a violation of such sale to a person not authorized to possess a firearm, rifle, shotgun.

The statute also raises questions with respect to the continuation of New York's assault weapon ban which requires all assault weapons to be registered and prohibits the owners of these banned weapons from transferring the weapons to anyone other than a firearms dealer or an out-of-state buyer. Similar criminal penalties exist for transfer of an assault weapon by an owner, which obviously could include a fiduciary of a decedent who possessed these types of assault weapons.

In addition, the statute requires registration of ammunition and prohibits magazines holding more than seven rounds of ammunition. Note that larger magazines existing before the effective date of the legislation are grandfathered in but may only contain seven rounds. The sellers of any ammunition must register with the State Police. Should the decedent be in possession of an assault rifle or a magazine which exceeds seven rounds, the fiduciary should immediately consider registration with the New York State Police and prior to the sale of the ammunition consider sale to a licensed commercial dealer for the purchase of weapons.

The new statute also provides in great detail for safe storage requirements for firearms, rifles and shotguns. A fiduciary who may come into possession of a firearm, rifle or shotgun owned by a decedent is bound by the safe storage provisions in the Penal Law §265.45 and must take appropriate action with respect to the safe storage of those weapons, particularly where they are possessed in a home or dwelling where a person prohibited from possession of such weapons resides, such as an infant, a felon, a mentally defective person, a person who has been convicted of a crime of domestic violence, or a person subject to an order of protection.

Constitutional Challenges

The constitutionality of various provisions of the SAFE Act have been challenged in the Federal District Court of Western New York by various gun owner associations, manufacturers, suppliers and some individuals.[7] That court upheld the SAFE Act's ban on assault weapons and large capacity magazines as constitutional holding that it does not infringe on the plaintiff's Second Amendment rights. However, the federal court did find that provisions of the Act related to the seven round limit failed the constitutional test. Additionally, that court found the SAFE Act's requirement that all ammunition sales be conducted in-person (and not over the Internet or by mail order) does not violate the Commerce Clause of the United States Constitution. The plaintiffs in that case have publicly expressed an intention to appeal the portion of the opinion which upheld the SAFE Act.

Burdens on Fiduciary

The intention of this statute is to identify individuals who purchase unusually high volumes of ammunition or weapons to ensure the registration of such weapons and to require every licensed holder to recertify their gun licenses every five years. The legislation also intends to create electronic data bases which will permit regular matching of state records of prohibited persons as against other data bases to ensure that licensing records are proper and up to date. While the statute in its many ramifications has laudable goals, it presents a mine field of dangers for a fiduciary charged with disposing of weapons and ammunition owned or possessed by a decedent and which may or may not have been bequeathed specifically in the decedent's will. It is recommended that in the event that a fiduciary comes into possession of weapons of the decedent that consultation with a licensed gun dealer to dispose of such weapons promptly is most appropriate.

Because previous exemptions for law enforcement and licensed gun dealers still exist, a fiduciary in possession of weapons and/or ammunition should carefully consider disposition of such weapons or ammunition through them. Where the weapons or ammunition are valuable, a licensed gun dealer is appropriate. If the weapons or ammunition must just be disposed of for safety, turning them over to the police is also appropriate. Transferring weapons or ammunition to another buyer without obtaining a background check is fraught

with concern for criminal and civil liability for a fiduciary. Particularly with respect to assault weapons, unless lawfully removed from the State of New York with notification to the State, an assault weapon becomes contraband upon the death of the registered owner.

Safe storage of weapons or ammunition is particularly burdensome as it places a requirement on the fiduciary in possession to secure the weapon to protect it from a person not legally entitled to possess a gun and to be aware of the presence in the dwelling where the weapon is stored of such a person.

There are provisions of the Penal Law which are defenses or exemptions with respect to crimes defined in that article of the Penal Law which may be applicable in certain circumstances related to the acts of a fiduciary in disposing, storing, selling and inventoring weapons of a decedent. Suffice it to say that this area of the law has become highly regulated in this state and a fiduciary should act with extreme caution with respect to firearms, rifles and shotguns of a decedent.

Endnotes

1. Ch 1, L.2013, effective 1-15-2013.
2. Penal Law §265.00(3).
3. Penal Law §265.00(22).
4. See Laws of 2013, Chapter 1, §37.
5. Penal Law §265.00(11).
6. Penal Law §265.00(12).
7. NYSRPA v. Cuomo, NYLJ 2-1-14, NYLJ 1202635549147 (WDNY J. Skretny).

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Shakespeare Was a T&E Lawyer!

By Jonathan Rikoon

I just met with a new client whose recently deceased aunt, Bertha Shakespeare, was actually a great-great-great-etc.-grand-niece of William Shakespeare. In the decedent's attic was a very old trunk, and when the niece, who is the executor, opened it, she found a centuries-old trove of papers. It appeared to be a scrapbook or journal maintained by the Bard himself. Knowing of my firm's strong entertainment industry ties as well as its excellent trusts & estates practice, she came in for advice about authenticating, appraising and monetizing the collection of previously undiscovered Shakespeare material.

It's utterly riveting. There are many hints in this material that, like Dickens after him, Shakespeare actually started out training as a trusts & estates lawyer. First off, there is his first pay stub, as a summer associate at the London firm of Rosencrantz and Guildenstern, L.L.P. Now at least we know where he got those names in *Hamlet*.

It seems that Uncle Bill had a tough time at the firm of R&G, LLP. The literary talents that later brought him fame started peeking through in some drafts included in his scrapbook that are of astonishing relevance to us. For example, we think that the debate about the use of pourover revocable trusts is new. Not so. Even in the Sixteenth Century, just a few years after the Statute of Wills and the Statute of Uses were enacted during the reign of Henry VIII (1540 and 1536), we find Bill experimenting with the form of soliloquy that will later stand him in such good stead. Here is what he wrote in his journal:

> To will, or not to will: that is the question:
>
> Whether 'tis nobler in the mind to suffer
>
> The slings and arrows of outrageous probate clerks,
>
> Or to take arms against a sea of technocrats,
>
> And by opposing end them?
>
> To pour over: perchance to a revocable trust; ay, there's the rub;
>
> For in that sleep of death what dreams may come
>
> When we have shuffled off this mortal coil,
>
> Must give us pause: incorporation by reference hath not yet been enacted.
>
> For who would bear the whips and scorns of probate clerks,
>
> The oppressor's wrong, the proud man's contumely,
>
> The pangs of despised love, the law's delay,
>
> The insolence of office and the spurns that patient merit of the unworthy takes.
>
> But hie thee to the enlightened state of Delaware, where
>
> Reference may in troth be incorporated;
>
> And uses and trusts support unworthy progeny, even unto perpetuity,
>
> With no taxes to burden the unfettered growth of yon treasure trove.

His law firm was really quite advanced for its time. It sponsored a seminar on new client business development for the associates. As was his wont, Bill distilled that in poetic fashion, in the process coining the term "rainmaker":

> The quality of business generation is not strain'd,
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath. It is twice blest:
>
> It blesseth him that originates, and him that is responsible.
>
> 'Tis mightiest in the mightiest: it becomes
>
> The throned senior partner better than his crown;
>
> His sceptre shows the force of temporal power,
>
> The attribute to awe and majesty,
>
> Wherein doth sit the dread and fear of his partners;
>
> But new business is above this sceptred sway,
>
> It is enthroned in the hearts of partners,
>
> It is an attribute to the firm's founders themselves.

It seems that the trusts and estates practice at Rosencrantz and Guildenstern, L.L.P. was not held in the same esteem as the corporate and litigation departments. We see some of Uncle Bill's frustration boiling over in another draft passage in his scrapbook that also presages some of his later success. This is written just after Bill's partnership promotion was deferred for the third time, at the behest of the Presiding Partner. He

figures the difference between his associate salary and a partner share is hundreds of thousands annually and the frustration is palpable. Bill's emotions are clearly so strong that he can't even bear to name the object of his despair, but the context makes it clear:

> He hath disgraced me, and hindered me half a million, laughed at my losses, mocked at my gains, scorned my practice area, thwarted my bargains, cooled my friends, heated mine enemies; and what's his reason? I am a trusts and estate lawyer. Hath not a T&E lawyer eyes? Hath not a T&E lawyer hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same means, warmed and cooled by the same winter and summer, as a corporate lawyer is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?

Uncle Bill used this in his outline of a new play he was thinking about. He was not very good at titles yet. The working title was "The Shyster of Venice." The protagonist, of course, was Shylock the shyster, a very unsympathetic character. Shylock's plan of revenge for not getting promoted (due to his practice area) was an NLRB discrimination complaint, frivolous litigation, burdensome discovery and endless interlocutory appeals. The market research, however, persuaded Bill to drop Shylock as a lawyer character and go with the less offensive merchant/pound of flesh idea.

The last draft in the scrapbook shows that Uncle Bill finally figured he had had enough. Consigned to permanent Counsel status and denied a partnership slot, he has an offer from a smaller firm that has just lost its T&E department. The firm is Mudd, Rose, Woody, Alex & We'redone, and Bill's notes say something like "Though thy name be Mudd, yet by any other name the rose smells as sweet." Seems he still needed to work on that one a little.

As he contemplates leaving Rosencrantz & Guildenstern, LLP, once again he is drawn to the soliloquy format as he considers this major career move:

> To leave, or not to leave—that is the question:
>
> Whether 'tis nobler in the mind to suffer
>
> The slings and arrows of an outrageous Management Committee,
>
> Or to leave for a firm that may soon collapse?
>
> To run a practice group and hope to end
>
> The heartache, and the thousand natural shocks
>
> That flesh is heir to. 'Tis a consummation
>
> Devoutly to be wish'd. To leave, to join another firm;
>
> Perchance to reach the dream of partnership
>
> Ay, there's the rub;
>
> For in that new firm what dreams may come
>
> When it has shuffled off this mortal coil,
>
> The risk of liability must give us pause: there's the respect
>
> That makes calamity of so harsh a choice.
>
> For who would bear the whips and scorns of billable hours,
>
> Th' oppressor's wrong, the proud partner's contumely
>
> The pangs of a despised practice, the law's delay,
>
> The insolence of office mates, and the spurns
>
> That patient merit of th' unworthy takes,
>
> When he himself might his quietus make,
>
> With a bare quill? But the dread of something after dissolution,
>
> The undiscovered country, from whose bourn
>
> No traveler returns, puzzles the will,
>
> And makes us rather bear those ills we have
>
> Than fly to those that we know not of?

Unfortunately Bill's journal ends there. Perhaps he was too busy and happy with his new firm, and his new career as a playwright and actor, to continue his observations.

Mr. Rikoon was an Associate and Principal Attorney (Counsel) at Paul, Weiss, Rifkind, Wharton & Garrison from September 1979 through January 1995; Counsel at Mudge, Rose, Guthrie, Alexander & Ferdon from February through October, 1995, when that firm dissolved; Counsel and then Partner (and Department Chair) at Debevoise & Plimpton, LLP from October 1995 until April, 2013; and is currently a partner at Loeb & Loeb, LLP, where his department moved. This material is adopted from his remarks at a Debevoise Trusts & Estates department farewell dinner upon the department's move.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

COURTS

No Jurisdiction to Set Fee for Personal Representation of Decedent

The Surrogate ordered payment from the decedent's estate of counsel fees incurred by a legatee in connection with two Article 81 proceedings brought by another legatee who sought to have the first legatee declared an incapacitated person. The first legatee was the primary beneficiary of the estate and the second legatee was a residuary legatee of the estate. When the executor sought judicial settlement of his account, the second legatee objected to the payment of the first legatee's legal fees and the Surrogate sustained the objection. The Appellate Division affirmed, holding that ordering the payment would exceed the subject matter jurisdiction of the Surrogate's Court which has jurisdiction over claims by creditors of the decedent but not over claims by creditors of a distributee or legatee, and although the Surrogate does have jurisdiction to award legal fees for services which benefited the estate, the record supports the Surrogate's finding that the services provided to the first legatee benefited him personally rather than the estate. *Matter of Tarlow*, 111 Misc.3d 751, 975 N.Y.S.2d 109 (2d Dep't 2013).

Surrogate Has Jurisdiction to Set Fees for Out-of-State Law Firm Providing Services to Estate

Decedent's will was admitted to probate in Westchester County and letters issued to the nominated executor, decedent's daughter who was a resident of Massachusetts. The executor retained a Boston law firm to represent her. The Boston firm retained New York counsel to appear on the executor's behalf in the New York courts. The executor moved to New York and hired New York counsel who filed a petition for final settlement of the estate, which included a request for approval of the fees already paid to the Boston law firm. A legatee objected and the Surrogate ordered a supplement accounting to include an affidavit of legal services by the Boston firm, which was duly filed. The court concluded that it did not have authority under SCPA 2110 to fix the fees of an out-of-state attorney because under Judiciary Law § 470, it could fix the fee of an attorney for a fiduciary only if the attorney has an office in New York. The court did find that it had the authority to direct the return of fees paid to an out-of-state attorney and ordered the Boston firm to return to the estate all fees that had been paid to it.

William P. LaPiana

The Boston law firm appealed and the Appellate Division reversed, holding that the Surrogate did have jurisdiction to set the fees because they were incurred for the benefit of the estate and their payment clearly affects the administration of the estate. The matter was remanded for the Surrogate to determine the reasonableness of the fee and if the court determines that any part of the amount paid exceeds the fair value of the services a refund may be ordered. *Matter of Askin*, 113 A.D.3d 72, 976 N.Y.S.2d 492 (2d Dep't 2013).

FIDUCIARIES

No Further Inquiry Rule Does Not Apply; Choice of Law Rules Allow Surrogate to Decide Issue Involving Real Property in Another State

Executor petitioned for approval of his accounting and decedent's daughter objected. The Surrogate dismissed certain objections but relying on *Matter of Massaros*, 262 A.D.2d 322, 692 N.Y.S.2d 90 (2d Dep't 1999), held that he did not have subject matter jurisdiction over an objection related to the executor's treatment of the decedent's interest in a promissory note secured by real property in New Jersey. The Appellate Division reversed because the choice of law rules in EPTL 3-5.1 are just that, and do not have anything to do with subject matter jurisdiction. To the extent *Massaros* is to the contrary, it is not to be followed. The court also affirmed the dismissal of an objection based on the no further inquiry rule because the rule, which allows a beneficiary to set aside a transfer by a fiduciary to the fiduciary or to an entity in which the fiduciary has an interest, does not apply "merely because the fiduciary is related to the transferee," citing Restatement 2d of Trusts § 170, Comment e. *Matter of Parisi*, 111 A.D.3d 941, 975 N.Y.S.2d 459 (2d Dep't 2013).

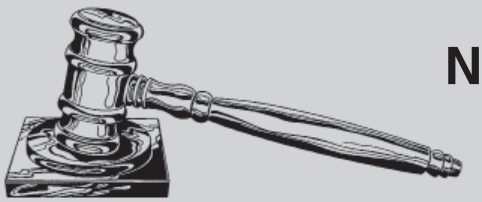
WILLS

Witnesses Need Not Recall Execution of Will

Decedent's surviving spouse and nominated executor offered will for probate. Decedent's children by a previous marriage held 1404 examinations of the witnesses who invoked their Fifth Amendment rights

against self-incrimination and refused to testify. The attorney who drafted the will and supervised the execution did testify and described an execution ceremony that satisfied the requirements of EPTL 3-2.1. The children then filed objections, and moved for summary judgment. Proponent also moved for summary judgment. The Surrogate denied the objectants' motion and admitted the will to probate. On appeal by the children, the Appellate Division held that the will had been properly executed but remanded for further proceedings on the allegations of undue influence and testamentary capacity. According to the appellate court, the witnesses' refusal to testify is equivalent to a failure to recall the events surrounding execution of the will, and the presumption of due execution that arises when execution is supervised by the lawyer who drafted the will is sufficient to establish due execution in this case. *Matter of Buchting*, 111 A.D.3d 1114, 975 N.Y.S.2d 794 (3d Dep't 2013).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, *Drafting New York Wills and Related Documents* (4th ed. Lexis Nexis).



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

By Ilene Sherwyn Cooper

Advice and Direction

Before the Surrogate's Court, New York County (Anderson, S.) was a petition by the corporate fiduciary for advice and direction and construction of the decedent's will under which it was named as donee of a power in trust for the benefit of her twin great-grandchildren. The proceeding was provoked by well-documented disagreements between the petitioner, the great-grandchildren, and their mother.

Although the petitioner couched its application as one seeking the assistance of the court to enable it to appropriately meet its fiduciary obligations, the court concluded that the requested relief could not be granted. More specifically, the court held that the petitioner's request for a determination as to whether a successor trustee would automatically succeed to the power in trust could not properly be raised within the context of a proceeding for advice and direction. The court found that there were no unusual circumstances that would warrant advice and direction (SCPA 2107(2)), nor a basis for providing the petitioner with a determination in advance of an appropriate application for relief being filed.

Further, the court denied petitioner's request for instructions as to the scope of its power and authority under the will to make income and principal distributions that incidentally benefit persons other than the principal beneficiaries under the will, finding, as before, that the request was not within the purview of SCPA 2107. Moreover, and in any event, the court noted that the language of the will regarding the scope of the specific powers conferred upon the petitioner was clear. The fact that the petitioner was seeking the court's intervention in order to avoid future disagreements with the beneficiaries and their mother was insufficient grounds for the court substituting its judgment for the petitioner's in routine, albeit difficult, matters of administration.

Similarly, the court determined that the petitioner's request for a construction of the will, and more specifically, whether it had the power and authority to compromise claims, was answered by the terms of the instrument. Further, the court held that the issue of whether to compromise a claim was a matter of discretion for the fiduciary, and not the proper subject of a proceeding for advice and direction.

Finally, with regard to the petitioner's request for a direction that as a donee of a power in trust it was entitled to the commissions of a corporate trustee, the court held that it was not the function of the court, under the guise of a proceeding for advice and direction, to spare the fiduciary of the need to do legal research.

In re Duke, N.Y.L.J., Jan. 3, 2014, p. 29 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Attorneys' Fees

In a contested accounting proceeding, the court addressed the reasonableness of legal fees incurred by the three fiduciaries, two of whom were objectants. The record revealed that the value of the decedent's estate at death was approximately $1,851,000.

The court opined that counsel representing the fiduciary of an estate is allowed "such compensation for [their] legal services as appear to the court to be just and reasonable"(SCPA 2307[1]). While counsel has the burden of proof on the issue of compensation, the court noted that the Surrogate bears the ultimate responsibility to decide the reasonableness of fees for legal services rendered to an estate.

To this extent, the court observed that the fees requested by counsel amounted to 117 percent of the gross value of the estate, or a combined sum of $2,157,013.14. Nevertheless, the court opined that while the size of an estate is a permissible factor in calculation of fees, it is only one of a number of factors to be considered in the analysis. Indeed, where an estate is particularly complicated or bitterly contested, substantial legal fees have been found to be appropriate.

Further, the court noted that while the time spent on estate matters is the least important factor to be considered in fixing legal compensation, contemporaneous time records are important to the court's determination of whether the time spent was reasonable for the various tasks performed. To this extent, the court found that while it was not unreasonable for each of the co-executors to retain separate counsel, where the practice

of retaining separate counsel leads to duplication of legal services and excessive fees, it is appropriate for the court to limit the fees awarded to an amount which might reasonably be paid to a single attorney. Moreover, if the services rendered by counsel separately employed were of benefit to the estate as a whole, rather than to the fiduciary in his individual capacity, the legal fees incurred are usually justified as a charge against the estate.

Nonetheless, the court recognized that an exception to the "single fee" rule has been made when the adversarial positions taken by the co-fiduciaries necessitate separate counsel and additional fees. Review of the voluminous time records submitted by counsel revealed that at each stage of the estate's administration, the parties were unable and unwilling to agree on even the most mundane issues. In addition, the court found that at least with respect to two of the firms there was a significant amount of duplication and overlap of activities, as well as impermissible charges by counsel for services that were secretarial in nature, and attributable to the preparation of affirmations of legal services.

Upon consideration of the foregoing, as well as the professional standing of counsel, the court reduced counsel fees to a combined sum of 31 percent of the gross estate, and directed that the fees awarded objectants' counsel be paid from estate funds based upon the financial benefits derived by the estate as a result of their efforts.

In re Heimo, N.Y.L.J., 1202639807252, Jan. 28, 2014 (Sur. Ct., Kings Co.).

Compel Distribution

Pending before the court was a petition to compel the executor to account as well as a petition by a beneficiary to compel payment of her beneficial interest. On its own initiative, the court held the latter application in abeyance, opining that the decision to compel payments of a legacy before the executor has accounted rests in the sound discretion of the court. It explained that the usual procedure is to hold the relief in abeyance, particularly when an accounting has already been directed, in order to avoid prejudice, unless there is adequate reason why payment should be directed immediately.

Under the circumstances, the court found no reason to stray from that procedure, noting that the petitioner had not alleged any personal need, emergency, or wrongdoing on the part of the fiduciary, or egregious or unreasonable delay by the fiduciary which would provide cause for the court to grant the relief requested. Further, the court noted that petitioner had not demonstrated that her requested relief would not adversely affect or possibly prejudice the rights of others.

Accordingly, the petitioner's request to compel payment was held in abeyance pending the directed accounting by the executor.

In re Cain, N.Y.L.J., Jan. 16, 2014, p. 25, col. 2 (Sur. Ct., N.Y. Co.) (Surr. Mella).

Due Execution

Before the court in *In re Leslie* was an uncontested petition to probate a purported will of the decedent, despite the failure of the decedent to sign the document on the line following the attestation clause.

The decedent died survived by two sons and a daughter. The record revealed that the decedent prepared the instrument, and that its execution was not attorney-supervised. It further appeared that although the decedent did not sign on the line for her signature following the dispositive provisions, she signed the bottom of every page of the document, including the last page, following the attestation clause and the signatures of the witnesses.

The court opined that the provisions of EPTL 3-2.1, and the case law thereunder, require that the testator and attesting witnesses sign "at the end" of the will, *i.e.*, at the end of the dispositive scheme. Examination of the instrument offered for probate revealed compliance with these dictates.

Accordingly, the instrument was admitted to probate.

In re Leslie, N.Y.L.J., Jan. 17, 2014, p. 23, col. 4 (Sur. Ct., Bronx Co.).

Lapsed Bequest

In *In re O'Brien*, the administrators cta of the estate requested that the Surrogate's Court, Bronx County, apply the anti-lapse statute (EPTL 3-3.3) to the residuary clause of the decedent's will.

The decedent died at the age of 93 survived by 13 nieces and nephews, a grandnephew, and three grandnieces, all of whom were children or grandchildren of three predeceased brothers and a predeceased sister. Pursuant to the terms of the residuary clause of her will, the decedent devised and bequeathed the residue of her estate to her sister, and one of her nephews, or the survivor of them, in equal shares. The will did not name alternate residuary beneficiaries.

The record revealed that the named residuary beneficiaries predeceased the decedent, provoking a request by the fiduciaries that the residue of the estate be paid, pursuant to the anti-lapse statute, to the children of the decedent's sister, *i.e.*, the decedent's three grandnieces.

The Court noted that, pursuant to the provisions of EPTL 3-3.3(a)(1), applicable to wills executed prior to September 1, 1992, where a testator makes a bequest to a named beneficiary without making an alternate disposition in the event the beneficiary should fail to survive, there is an inference that the testator intended to benefit the issue of the named beneficiary, who are to receive the named beneficiary's legacy. Nevertheless, because the eligible beneficiary class contemplated by the statute is limited to the issue, brothers, and sisters of the decedent, the court determined that the residuary bequest to the decedent's sister passed to her issue, but that the bequest to the decedent's nephew lapsed. Under such circumstances, pursuant to the applicable statute, EPTL 3-3.4, the interest of the decedent's predeceased nephew reverted to the decedent's sister, and, because she predeceased the decedent, her issue.

Accordingly, the court determined that the decedent's residuary estate passed to the issue of the decedent's sister, per stirpes.

In re O'Brien, N.Y.L.J., Jan. 17, 2014, p. 23, col. 5 (Sur. Ct., Bronx Co.).

Late Filing of Objections

In *In re Pisacano*, the Surrogate's Court, Nassau County, authorized the decedent's son to file objections to the probate of the decedent's will despite petitioner's claims that they were untimely.

The record revealed that in response to the submission of a decree by the petitioner, the decedent's son filed objections to probate alleging, in support thereof, that the decree was premature. The petitioner requested that the objections be rejected and the decree signed.

It appeared that following the completion of SCPA 1404 examinations, and following a discussion with counsel for the petitioner, counsel for the decedent's son "understood" that the deadline for the filing of objections would be 10 days from the receipt of the transcripts. This understanding was never reduced to writing or a stipulation between counsel. Moreover, counsel for the petitioner maintained that neither he nor his associate "recalled" there being any such understanding or discussion with his adversary. At the time the objections were submitted for filing by the decedent's son, the transcripts of the SCPA 1404 examinations had not yet been received.

The court noted that SCPA 1410 requires that objections to be filed 10 days after completion of examinations under SCPA 1404 unless there is a stipulation otherwise between the parties or the court fixes a different date. Nevertheless, it observed that pursuant to CPLR 3012(d) the court is given the discretion to relieve a party from a default in pleading or appearance upon a showing of a reasonable excuse. Moreover, the court noted that pursuant to the provisions of CPLR 2004, it had the discretion to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown."

Accordingly, based upon the foregoing, and recognizing that the Surrogate's overriding concern is that only valid wills be admitted to probate, the court, in the exercise of discretion, authorized the late filing of the objections.

In re Pisacano, N.Y.L.J., Dec. 13, 2013, p. 47 (Sur. Ct., Nassau Co.).

Removal of Fiduciary

In a bitterly contested estate pending before the Surrogate's Court, Richmond County, the decedent's granddaughter petitioned to have her father removed as trustee of the trust created for her benefit, alleging maladministration and self-dealing. The principal asset of the trust was a parcel of realty consisting of four rental units that the fiduciary managed.

At a hearing of the matter, the respondent/trustee admitted that he co-mingled trust funds with his own personal accounts, stating that he was unaware that he was forbidden to do so. The respondent further admitted that although he was a plumber by trade, he performed various home improvements, unrelated to plumbing, on the real property belonging to the trust, for which he was compensated less than the standard rate. He claimed that he performed this work in an effort to save the trust money. Additionally, when questioned about the kinds of services he rendered, as well as the financial transactions of the trust that took place during his stewardship, the respondent conceded that he failed to maintain any such records, albeit he did have some receipts for materials purchased by him for the upkeep of the premises.

The court opined that it was the respondent's responsibility to protect the corpus of the trust for the benefit of his daughter, and to provide her with a substantiated explanation of the numerous questionable transactions in which he had engaged as trustee. Based on the foregoing testimony, and the many other admissions of wrongdoing made by the respondent on the record, the court concluded that he had failed to fulfill his role as fiduciary by co-mingling trust funds with his own, failing to keep accurate records, and self-dealing.

Accordingly, the respondent was removed as trustee, and ordered to account.

In re DeSantis, N.Y.L.J., Nov. 26, 2013, p. 25, col. 2 (Sur. Ct., Richmond Co.).

Sanctions

In a contested discovery proceeding, the respondent, co-executor of the decedent's estate, sought to dismiss the petition of her co-executor brother on the grounds that he failed to comply with her discovery demands. The genesis of the discovery proceeding was petitioner's claim that after the decedent's death, the respondent removed valuable items of the decedent's personal property from the decedent's apartment without petitioner's consent.

During the course of pre-trial discovery, respondent served the petitioner with a notice for discovery and inspection and interrogatories. Petitioner did not object to the discovery demands or seek a protective order, nor did he provide any response to the demands. As a result, respondent sought dismissal of the petition.

Although the court recognized that it could, in its discretion, strike a pleading as a sanction for failure to comply with discovery demands or orders, it noted that such a drastic remedy was inconsistent with the courts' preference for dispositions on the merits wherever possible. Accordingly, dismissal is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious.

Within this context, the court held that respondent had failed to sufficiently demonstrate that petitioner's conduct justified the remedy of dismissal. Specifically, the court found that petitioner had not completely disregarded his discovery obligations; he produced some discovery informally and he submitted to an examination before trial. Further, the court noted that respondent could have extended the petitioner a brief extension of time before seeking judicial intervention, when he alleged that he was confused about the end date of the discovery period. Indeed, the court observed that respondent's moving papers did not contain an affirmation that she attempted to resolve the discovery dispute, as required by 22 NYCRR §202.7(a), before seeking court intervention, nor did she move to compel discovery.

Accordingly, the court declined to order dismissal of the petition or to assess costs and legal fees against petitioner, but forewarned that such remedies may be appropriate if petitioner did not provide the relevant discovery in a thorough manner without further delay.

In re Rosen, N.Y.L.J., Feb. 21, 2014, p.31 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Summary Judgment

In a contested probate proceeding pending in the Surrogate's Court, New York County (Mella, S.), the petitioner moved for summary judgment dismissing the objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence, duress and fraud.

The decedent died at the age of 89, survived by a brother, the objectant, and ten nieces and nephews, children of predeceased siblings, one of whom was the petitioner and beneficiary of the entire estate.

In support of her motion for summary judgment, the petitioner relied on the affidavit of the attesting witnesses stating, inter alia, that at the time of the execution of the propounded will the decedent was free from restraint. However, the court found that the affidavit was insufficient to establish that the instrument was not the product of undue influence, fraud or duress, and therefore denied summary judgment as to these issues, without prejudice to renewal upon the completion of discovery.

On the other hand, with respect to the issues of testamentary capacity and due execution, the petitioner relied on the fact that the execution of the instrument had been supervised by an attorney, the instrument contained an attestation clause, and the attesting witnesses had averred in an affidavit that at the time the decedent executed his will he "was suffering from no… mental impairment" that would affect his ability to make a valid will. Within this context, the court held that the petitioner had made a prima facie showing that the decedent had testamentary capacity and that the propounded instrument was duly executed.

In opposition, the objectant submitted two documents: a photograph of the decedent at the age of 85, and a copy of the will of the decedent's mother. Although the petitioner claimed that the documents had not been authenticated and therefore could not be considered on the motion, the court held that regardless of this fact, the objectant's proof was insufficient to defeat the motion. Accordingly, the objections as to due execution and testamentary capacity were dismissed.

In re Marotty, N.Y.L.J., Dec. 9, 2013, p. 22 (Sur. Ct., N.Y. Co.) (Surr. Mella).

Turn Over

In a contested turn over proceeding, the petitioner moved for summary judgment directing the respondent to turn over property belonging to the estate in her possession. The respondent opposed the application.

The record revealed that the petitioner retained the respondent as her attorney to pursue litigation on behalf of the estate. The litigation was settled, and the proceeds of settlement were placed into the respondent's escrow account. Despite repeated requests, petitioner maintained that respondent failed and refused to deliver the property.

Upon review of the respondent's papers in opposition, the court concluded that she failed to understand the nature of the proceeding, and found, as a matter of law, that approximately $241,000 was on deposit at Capital One Bank in respondent's escrow account. Further, the court noted that respondent had been disbarred in August 2013, and could not access the funds in the subject account.

Accordingly, the court held that no reasonable explanation existed for respondent's failure to turn over the property in issue that belonged to the estate, and granted petitioner summary judgment.

In re Bonavoglia, N.Y.L.J., Nov. 22, 2013, p. 41 (Sur. Ct., Suffolk Co.).

Vacate Default

In *In re Dorfsman*, the Surrogate's Court, Nassau County, denied the request by a co-executor and beneficiary of the decedent's estate to vacate her default in pleading.

The decedent died survived by his wife and three children, two sons and a daughter, and named his three children as the executors of his estate. Several years after the decedent's death , his two sons filed their account as co-executors, and petitioned to compel their sister to file her account. The respondent co-executor failed to appear on the return date of citation of her brothers' account, or their compulsory accounting petition. Accordingly, the court directed her to file her account and to cause citation to issue thereon within 10 days of personal service upon her of a copy of the court's order.

Two months following the return dates of citation, the respondent co-executor appeared by counsel. Thereafter, her two brothers filed an order to show cause to enforce the order directing her to account and to punish her for contempt by revoking her letters testamentary. In response, the respondent filed a motion to be relieved of her default and allow her to file objections to her brothers' account, as well as to file her own account.

The court set the matter down for conference, noting that a notice of appearance had been filed on behalf of the respondent. Subsequent thereto, the respondent filed her account.

In support of her motion to file late objections to her brothers' account, the decedent's daughter argued that her default was not willful, intentional, or dilatory, and that she was unaware that the matter was on the court's calendar. Further, she alleged that there was no prejudice in allowing her to file late objections given the short delay, and that she had meritorious claims to pursue. In opposition to the motion, the decedent's sons claimed that their sister's default was intended to delay the administration of their father's estate, and that as an attorney herself, she was fully aware of the significance of the citation and the return date.

The court opined that to be relieved of a default in pleading, a party must show a reasonable excuse for the default, and a meritorious claim in the underlying proceeding. In concluding that the decedent's daughter had failed to present a reasonable excuse for her default, the court noted that the decedent's daughter was a practicing elder law attorney, and that she did not reach out to counsel to represent her until two days after the return date of citation. Moreover, and in any event, the court found that there was no merit to the proposed objections she sought to file to her brothers' account.

Accordingly, the motion by the decedent's daughter to be relieved of her default was denied.

In re Dorfsman, N.Y.L.J., Jan. 10, 2014, p. 37 (Sur. Ct., Nassau Co.).

Ilene S. Cooper, Esq., Farrell Fritz, P.C., Uniondale, New York.

Florida Update

By David Pratt and Jonathan Galler

David Pratt

LEGISLATIVE UPDATE

Assessment of Attorneys' Fees Against Particular Share of Estate or Trust

It is anticipated that the Florida legislature will enact revisions to several statutes that govern the circumstances under which a Florida court may assess attorneys' fees and costs against a particular beneficiary's share of an estate or trust. Sections 733.106, 736.1005 and 736.1006, Fla. Stat., provide that when awarding fees and costs to an attorney whose services provided a benefit to an estate or trust, a court may direct from what part of the estate or trust those sums are paid. A few relatively recent appellate court decisions have created a split among the districts as to whether a court must make a finding of bad faith or frivolous conduct by a beneficiary before assessing fees and costs against that beneficiary's share of an estate or trust. The proposed legislation seeks to eliminate that inconsistency among the courts by providing a broad, non-exclusive list of factors that the courts may consider in directing that fees and costs be paid from a particular share. The proposed revisions do not mandate a finding of bad faith or frivolous conduct as a prerequisite to such a determination.

CASE LAW UPDATE

Modification or Termination of an Irrevocable Trust

Florida's Trust Code authorizes judicial and nonjudicial modification of irrevocable trusts under certain conditions. *See* sections 736.0410–736.0416, Fla. Stat. For example, section 736.04113 provides that a court may modify the terms of an irrevocable trust if, among other things, the purposes of the trust have been fulfilled or a material purpose of the trust no longer exists. Critically, though, the statute also provides, in subsection (4), that "[t]he provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts." That subsection made all the difference in a recent opinion by Florida's Second District Court of Appeal. There, the settlor and co-trustee of an irrevocable trust, together with the beneficiaries thereof, petitioned the court to terminate the trust. The other co-trustee objected because the trust's purposes remained unfulfilled and, thus, the requirements of 736.04113 had not yet been satisfied. However, the trial and appellate courts both

Jonathan Galler

concluded that, under Florida common law, the courts have the authority to modify or terminate an irrevocable trust upon the consent of the settlor and beneficiaries even if doing so defeats the purpose of the trust. Because section 736.04113 provides that its provisions are in addition to and not in derogation of the common law, the appellate court affirmed the trial court's ruling granting the petition to terminate the trust.

Peck v. Peck, 2014 WL 768827 (Fla. 2d DCA 2014) (not yet final).

Diversity Jurisdiction: Citizenship of a Personal Representative

Federal courts maintain diversity jurisdiction over civil actions where the amount in controversy exceeds $75,000 and the litigants are citizens of different states. The latter requirement is satisfied only in circumstances where every plaintiff is diverse from every defendant. The Eleventh Circuit Court of Appeals recently issued an opinion explaining how the "citizenship" of a personal representative is determined for purposes of federal diversity jurisdiction. In *Leyva v. Daniels*, the beneficiaries of an estate sued its personal representative in federal court for breach of fiduciary duty. The personal representative was a citizen of Texas, while the beneficiaries were citizens of Colorado and Florida. However, as the trial and appellate courts both held, a personal representative is deemed to be a citizen only of the state of the decedent, which, in this case, was Florida. Although the lawsuit sought to impose personal liability on the personal representative, the allegations concerned only his actions as a personal representative, not his actions individually. Thus, only the *decedent's* citizenship was relevant, and the lawsuit was dismissed for lack of diversity jurisdiction.

Leyva v. Daniels, 530 Fed. Appx. 933 (11th Cir. 2013).

Is the "Estate" a Proper Party?

The comments to the Rules Regulating the Florida Bar note that "[i]n estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries." That is an important point that comes up in various contexts ranging from ethical queries to basic civil procedure.

A Florida federal court recently addressed the issue in *Garcia v. Diamond Marine Ltd.* In that case, the plaintiffs brought a Fair Labor Standards Act claim for unpaid wages against the estate of the decedent for whom they worked. The estate was being probated in Venezuela and the personal representative was Venezuelan. The plaintiffs named the estate as a defendant and served the complaint on an attorney who had previously done work for the decedent. The court held that Florida substantive law governed the issue of who is a proper party and concluded that (1) the estate (as opposed to the personal representative) is not a proper party and (2) to subject the "estate" to the jurisdiction of the court, the personal representative of the estate must be served in his or her representative capacity. On this basis, the complaint was dismissed with leave to amend and to effectuate proper service.

Garcia v. Diamond Marine Ltd., 2013 WL 6086916 (S.D. Fla. 2013) (not yet final).

Powers of Personal Representative Relate Back in Time

The only party with standing to bring a wrongful death action in Florida is the personal representative of the decedent's estate. When Lucy Roughton, the widow of Daniel Dean Roughton, opted out of a class action seeking damages for injuries caused by smoking, and did not pursue an individual action within the limitations period, she was unable to then commence such an action when class members who had *not* opted out were later granted leave to commence individual actions. Ms. Roughton's argument on appeal was that her opt-out notice should be deemed ineffective because she was not yet formally appointed as personal representative at the time she signed the notice. However, as the Second District Court of Appeal pointed out, section 733.601, Fla. Stat., provides that "[t]he powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring thereafter." As to the question of whether the act of opting out was beneficial to the estate, the appellate court explained that the "beneficial" requirement is not an escape hatch for the personal representative to disavow actions simply because later events make them seem undesirable. Rather, the test is whether the personal representative could have reasonably believed that the earlier action was beneficial at the time of the action.

Roughton v. R.J. Reynolds Tobacco Co., 129 So. 3d 1145 (Fla. 1st DCA 2013).

Competing Jurisdictions in Probate Proceedings

A decedent's domicile at the time of his or her death will typically determine where the primary probate proceedings will take place. Florida courts are no strangers to these types of jurisdictional battles. For the many Florida retirees who still have homes and family in northern (and other) states, the domicile issue can sometimes result in a "race to the courthouse" in competing jurisdictions. That is what happened in *Perelman v. Estate of Perelman*. Following Ruth Perelman's death, her son commenced proceedings to probate a 2010 will in Pennsylvania. Her husband, however, commenced proceedings to probate a 1991 will in Florida, contending that she was domiciled in Florida and that her 2010 will was invalid because of undue influence. The decedent's son petitioned the Florida court to stay the proceedings in favor of the Pennsylvania proceedings, but the Florida court denied that petition. The Fourth District Court of Appeal reversed, explaining that, absent extraordinary circumstances, a Florida court should adhere to the principles of priority and comity by staying its proceedings when a court in another state was the first to exercise jurisdiction over a matter. Whether the court of another state has "exercised jurisdiction," however, is not simply a question of where the case was filed first. Instead, concluded the appellate court, it is a question of whether "the ball is rolling, so to speak" in that court. The court held that the ball was, in fact, rolling first in Pennsylvania, and the Florida probate court should have stayed the case during the pendency of the Pennsylvania proceedings.

Perelman v. Estate of Perelman, 124 So. 3d 983 (Fla. 4th DCA 2013).

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