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Trusts and Estates Law Section Newsletter

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A Message from the Chair

Marion Hancock Fish

A game of Texas Hold'em, the recipe for chocolate chip cookies, and a client saddling up to ride along: what do these things have in common? Believe it or not, these words were heard on the campus of Syracuse University College of Law where the New York Court of Appeals held court on March 25, 2015. The Melanie Gray Courtroom, the centerpiece of the new College of Law building, overflowed with students, faculty, local attorneys and interested community members to hear arguments on four cases of local interest. As it happened, one of those cases was a "T&E" case that many of us have followed: *Matter of Estate of Robyn R. Lewis*. And in fact, it was the argument on this case that elicited the rather unusual references (especially in a "T&E" case) to gambling, baking and riding.

In 1996, Robyn Lewis and her husband resided in Texas when she made a will naming her husband and in the event he predeceased her, her husband's father, as her beneficiaries. The couple divorced in 2007. Ms. Lewis then moved to New York, and in 2010 passed away a New York domiciliary.

Given these facts, the probate of the Texas will meant that Robyn Lewis' former father-in-law stood to inherit her estate, the bequest to her surviving ex-spouse being treated as revoked under EPTL 5-1.4. Ms. Lewis' family argued that general principles of fairness and equity (the recipe for which is like the recipe for chocolate chip cookies) should prevail to prevent the father-in-law from inheriting.

The debate provided a tremendous opportunity to watch experienced appellate practitioners debate and answer the Court's many questions. While we await the Court's decision, I must mention that a legislative fix has been suggested by the New York State Office of Court Administration. The OCA has proposed an amendment to EPTL 5-1.4 to adopt a rebuttable presumption extending the revocatory effect of divorce to relatives of the decedent's former spouse. Rob Harper, as Co-Chair of the Legislation and Governmental Relations Committee, will be reviewing and reporting on the proposal to our Executive Committee. Regardless of the outcome of the *Lewis* case, legislative relief may be in the offing for what many view as a deficiency of Section 5-1.4.

Inside

There is more to report on the legislative front. Once again, under the leadership of Susan Taxin Baer and Sharon Klein as the Co-Chairs of our Taxation Committee, we drafted legislation for several "fixes" to the new New York Estate Tax rules implemented last year. These included proposals for New York portability, a New York QTIP, a shortening of the gift add-back rule from three years to one year, and a softening of the tax "cliff." At this point, it appears that none of those improvements were adopted, though several corrections and clarifications were made. The new law prevents the lapsing of last year's rules; clarifies that the gift add-back does not apply after December 31, 2018, and addresses confusion surrounding taxation of estates of non-resident decedents and tangible personal property. The outcome, of course, was not for lack of effort. In addition to Sharon and Susan, Ron Weiss, Rob Reynolds and Deborah Kearns, together with NYSBA Associate Director of Governmental Relations Kevin Kerwin, made themselves available right up to the printing of the budget to provide information, resources and suggested language for consideration.

As for the TELS' efforts on the technical amendments to the New York Power of Attorney law approved at our Executive Committee meeting in January, our proposal was presented in tandem with the broader proposal of the Elder Law and Special Needs Section at the "Big Bar's" Executive Committee meeting on March 27th. Given the differing views and strategies of the two Sections, the Executive Committee has asked our Sections to collaborate on a proposal seeking additional input from other Sections, including General Practice and Real Property Law. President Glenn Lau-Kee recognizes that the POA form potentially affects every New Yorker, and he is committed to working with all of the interested Sections on the efforts to improve the law. Ron Weiss and Bob Freedman will continue to shepherd this matter and we thank them for their ongoing efforts. Thanks as well to Jennifer Hillman who helped by drafting our memorandum of support. I am also pleased to report that the New York Bankers Association invited Bob Freedman to speak on this topic at their April 23, 2015 meeting in Albany.

Our Section has once again sponsored Fellowships at several Surrogate's Courts across the State: Michael Schroeder from SUNY Buffalo Law School will be working for the Hon. Barbara Howe in Erie County; Imaan Moughal from Hofstra Law School has accepted a Fellowship with the Hon. Peter J. Kelly in Queens County; the Hon. Robert J. Gigante in Richmond County (Staten Island) will host Marie Elizabeth Villefranche from Benjamin N. Cardozo School of Law; and the Hon. Ava Raphael here in Onondaga County will welcome Deanne Cucharale from Albany Law School. The Fellowships provide invaluable opportunities for these law students and also serve to promote our practice area. Speaking as a Board Member of the New York Bar Foundation, let me add that Fellowship programs such as ours are welcomed as an effective way to help law students while also promoting our profession, the NYSBA and the New York Bar Foundation. We thank the Surrogates who have participated and invite judges interested in participating to contact me or others in the Section for more details.

Mentoring such as through our Fellowship program goes hand-in-hand with our work to promote Trusts and Estates Law Section membership and membership activity. If you are a new member to our Section or a continuing member who now wants to get more involved, I encourage you to visit the New York State Bar Association Trusts and Estates Law Section page at the Bar's Website. All of our many Committees such as Estate Planning, Estate and Trust Administration, Newsletter and Publications, and Practice and Ethics are listed here. To join a committee, complete the Committee Assignment Request form and send it to Lisa Bataille, NYSBA Chief Section Liaison, and your name will be added to the committee roster. But don't stop there. Reach out to your Committee Chair, attend our Section Meetings, and raise your hand when volunteers are needed to write articles, study and report on cases or legislative proposals, or attend or host NYSBA TELS functions.

Speaking of Section Meetings, please mark your calendars now for our Fall Meeting, which will take place on October 29th and 30th, 2015 at the Turning Stone Resort Casino in Verona, New York, where you can try your hand at a *real* game of Texas Hold'em. More professionally speaking, we will offer top-notch continuing legal education, including a variety of Roundtables on Thursday afternoon, and Committee Meetings and a half-day of CLE on Friday.

And in the meantime, here's to a Happy Summer 2015!

Marion Hancock Fish

Editor's Message

In this edition of our *Newsletter*, we are pleased to publish submissions from members of two subcommittees within the Trusts and Estates Law Section. Representing our Section's Life Insurance and Employee Benefits Committee, Dana Mark and Timothy Ferges explain the circumstances under which a decedent's non-probate assets will be protected from creditors after his or her death, and representing our Estate and Trust Administration Committee, Victoria D'Angelo and Nathan Berti summarize their committee's proposal to revise SCPA 1310 regarding the Settlement of Small Estates, a proposal that has been approved by the New York State Bar Association Trusts and Estates Law Section's Executive Committee.

Also featured in this issue is Robert Adler's article providing an informative look at the non-taxable exchange of life insurance contracts under Section 1035 of the Internal Revenue Code, and Anthony Enea's article containing an overview of the often pleaded "undue influence" objection to probate.

Our readers may recall an article in our Spring 2015 *Newsletter* entitled *The Interplay of the Health Care Proxy and the Living Will* by C. Raymond Radigan and Jennifer F. Hillman. Following publication, the authors received an inquiry that led them to submit a note, appearing below, to clarify a particular point:

> **Authors' Note:** In our article entitled *The Interplay of the Health Care Proxy and the Living Will* in the last *Newsletter*, we discussed the issues which occur when an individual does not have a healthcare proxy in the context of ending life-sustaining treatment. As a clarification of one of the statements, the Family Health Care Decisions Act does have a list of "surrogates" who can act in the absence of a healthcare proxy. However, those surrogates are not authorized to end life-sustaining treatment unless and until they can prove by clear and convincing evidence that it is the incompetent patient's wishes to do so.
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> **C. Raymond Radigan and Jennifer F. Hillman**

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. Our next submission deadline is September 8, 2015. Enjoy the Summer!

Jaclene D'Agostino

In the Red: Decedent's Creditors and Non-Probate Assets

By Timothy M. Ferges and Dana L. Mark

Traditionally, wills were the primary vehicle under which wealth was transferred to heirs. A will generally contains an express declaration that the executor satisfy the testator's debts. Very generally, the executor or administrator is not merely the representative of the decedent's estate, but also a representative of the rights of the decedent's creditors. It is clear that the decedent's probate assets (assets controlled by the decedent's will or by intestacy) must be used to pay the decedent's debts. But there is less clarity about the responsibilities of a personal representative with respect to the decedent's non-probate property assets, *i.e.*, property transfers at death not controlled by a decedent's will or by intestacy, to the extent, if any, the same may be used to satisfy those same debts.

There has been a substantial increase in the use of non-probate transfers. The cost and time involved in probate administration and privacy concerns have prompted many individuals to transfer their property via testamentary substitutes. In particular, transfers may occur by beneficiary designations through vehicles such as life insurance, retirement plans, and transfer on death accounts. These are non-probate transfers unless the designated beneficiary is the decedent's estate. Such transfers mean that an individual, who at his death has assets with a date of death value substantially in excess of his debts, may leave an insolvent probate estate. However, as Surrogate Preminger noted, "[t]he proliferation of testamentary substitutes… has left the law in a state of confusion over the rights of creditors to other assets that do not pass under the will or as part of intestate administration."[1]

It is the personal representative's duty to pay the decedent's debts to the extent that the decedent's probate assets are subject to such claims.[2] If the fiduciary distributes assets to beneficiaries while debts are unpaid or fails to recover assets from transferees subject to the decedent's debts, he or she may be personally liable if the remaining probate assets are insufficient to pay debts.

Statutes and other guidance govern the extent to which the decedent's non-probate assets may be used to satisfy creditors' claims. Certain non-probate assets, such as pension benefits[3] under the Employee Retirement Income and Security Act of 1974 (ERISA), tax-qualified retirement accounts,[4] annuity, and life insurance proceeds[5] payable to a beneficiary other than the decedent's estate are generally exempt from the claims of the decedent's creditors under federal or state statutes.

To the extent that the decedent maintained control over certain other non-probate assets upon his or her death, such as Totten trust accounts, payable on death accounts, revocable trusts, joint accounts, and the like, the assets may be reached by creditors of the decedent even if not payable to the decedent's estate.

Other assets over which the decedent maintained no control at the decedent's death, *i.e.*, assets that were irrevocably conveyed, may, except as described below, also generally be secure from creditors.

A personal representative's responsibility is not limited to the identification of probate assets, *i.e.*, assets that are, or may be, subject to his or her control. In reviewing lifetime transfers made by the decedent vis-à-vis creditor claims, the personal representative should also consider when an asset was conveyed. If a transfer was made while the decedent was insolvent, if the conveyance caused the decedent's insolvency, or if the decedent made the conveyance with the expectation that the decedent would become insolvent, the transfer may be deemed a "fraudulent conveyance."[6] Under such circumstances, a creditor may have an enforceable claim to the asset even if the asset is otherwise statutorily exempt or if the decedent irrevocably conveyed the property during his or her lifetime without retained rights or control.

I. The Decedent's Personal Representative Must Consider the Nature of Non-Probate Property

A. Certain Statutorily Exempt Non-Probate Assets Are Not Subject to Creditors' Claims

Certain non-probate assets are statutorily safeguarded from the claims of creditors. Some of these assets are protected under federal law, while others are protected under New York law.[7]

Under federal law, ERISA imposes a strict prohibition on the assignment, alienation and garnishment of covered pension plans,[8] subject to limited exceptions.[9] ERISA's alienation prohibition exempts a decedent's covered pension plan benefits from the claims of the creditors of the decedent and the decedent's estate.[10]

ERISA governs "top-hat" plans, *i.e.*, unfunded pension plans that are maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.[11] They are not subject to ERISA's alienation prohibition.[12]

ERISA, however, does not govern plans benefiting only owner-employees and their spouses,[13] or plans sponsored by state or local governments.[14] Although not protected by ERISA or its alienation provisions, these assets may be protected from creditors' claims under state law or other federal law.[15]

Estates, Powers & Trusts Law (EPTL) 13-3.2 prevents the decedent's personal representative from impairing the benefit rights of a beneficiary of several specified non-probate assets, including pension plans, retirement accounts, death benefits, annuities, stock bonuses, profit sharing plans, and life insurance proceeds. This provision provides that the beneficiary's right to such property "shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy."[16] A personal representative therefore may not seek to use any of these statutorily exempt assets to satisfy the decedent's debts,[17] other than for the payment of their share of estate taxes under EPTL 2-1.8. Nor may creditors of the decedent enforce their debts against any of these beneficiaries, unless there was a fraudulent conveyance.[18]

In line with EPTL 13-3.2's general prohibition, various New York State anti-alienation provisions protecting the assets described in the EPTL have been enacted—for example, New York State employee retirement plans (New York Retirement and Social Security Law § 110), and New York State teachers' retirement plans (New York Education Law § 524). These protections apply to both the beneficiaries described above and the participants accruing the benefits, and also prevent creditors from wresting benefit distributions from the recipients.[19]

To the extent that non-probate assets are protected by these provisions, whether federal or state, claims of the decedent's creditors may not be satisfied with such protected assets.

B. Non-Probate Assets Controlled by the Decedent Upon the Decedent's Death Are Subject to Creditors' Claims Absent an Explicit Statutory Exception

To the extent that any of the decedent's non-probate assets were subject to the decedent's control upon his or her death, such assets may be reachable by the decedent's creditors, absent an explicit exemption, such as those for ERISA pension plans subject to the alienation prohibition and for tax-qualified pensions plans both discussed above, or for life insurance proceeds.[20] "The test used by the New York courts for creditors' access to non-probate assets is whether the decedent maintained the power to dispose of the asset during his or her lifetime."[21]

Revocable trusts are perhaps the most common non-probate property over which decedents maintain control. Under New York law, as well as under the law of most other jurisdictions, such a trust could not protect a decedent's assets from his or her creditors. The public policy reason behind this law is easy to understand. Absent this law, debtors could very easily evade their obligations while retaining the use and enjoyment of their assets.[22]

Under this same rationale, Totten trusts and payable on death accounts may be subject to creditors' claims. Totten trust accounts are typically revocable by the decedent until his or her death.[23] They remain subject to the decedent's control and are thus subject to creditors' claims.[24]

Likewise, to the extent a joint account consists of funds that were deposited by the decedent, the joint account is subject to the claims of the decedent's creditors.[25] However, funds that are deposited in a joint account by the other account holder may be protected.[26]

A personal representative should consider non-probate assets over which the decedent maintained control as a joint tenant with rights of survivorship separate and apart from other non-probate assets over which the decedent maintained control. New York courts have held that to the extent other non-probate assets without joint ownership with right of survivorship exist (such as Totten trust accounts), the proceeds of those other non-probate assets should be available to the personal representative prior to the proceeds of a joint bank account.[27]

On the other hand, assets over which the decedent maintained no control or in which the decedent retained no beneficial interest upon his or her death, such as the assets of an irrevocable trust,[28] generally[29] may not be used to satisfy the debt of the decedent/grantor.[30]

II. The Personal Representative Must Consider the Timing of the Decedent's Lifetime Transfer of Property

The analysis does not end with a determination that an asset is otherwise statutorily exempt from creditors' claims or that the asset was irrevocably conveyed during the decedent's lifetime without retention of control. The personal representative should also consider the circumstances that existed *when* the asset was conveyed.

If a decedent made a conveyance knowing or expecting that his outstanding debt will ultimately cause him to become insolvent, the conveyance is deemed fraudulent and the asset conveyed may be susceptible[31] to the claims of creditors.[32] A fraudulent conveyance might be characterized as the attempt to transform a non-exempt asset into an exempt one.

Moreover, even if there is no fraudulent intent, a conveyance may be deemed fraudulent. If the conveyance occurred when the decedent was insolvent or if the conveyance caused the decedent to become insolvent and therefore unable to satisfy his or her existing debts, it is deemed "fraudulent," regardless of the decedent's actual intent.[33] Such a "conveyance" includes "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance."[34] Beneficiary designations are not included in the definition of "conveyance" under New York's Debtor and Creditor Law.[35]

If the conveyance is deemed "fraudulent," the nature of the asset may be irrelevant and the conveyance may be subject to creditors' claims. Thus, an irrevocable conveyance under which the decedent maintains no ownership or control rights becomes susceptible to creditor claims if the conveyance is deemed "fraudulent" under the New York Debtor and Creditor Law. Such an asset, which absent application of the Debtor and Creditor Law could not be reached by creditors, is no longer immune from creditors' claims.[36] Assets that are otherwise statutorily exempt under New York law likewise remain subject to §§ 273 and 275 of the New York Debtor and Creditor Law and are susceptible to the claims of creditors.[37]

ERISA, on the other hand, preempts the application of state legislation related to any employee benefit plan regulated by ERISA.[38] Thus, ERISA preempts New York's Debtor and Creditor Law, which would otherwise operate to determine the payment of benefits from a plan governed by ERISA.[39] While the New York Court of Appeals has held that a creditor of an ERISA plan participant could compel an ERISA pension plan to pay the creditor the participant's benefit if the plan's very creation was fraudulent,[40] the courts have since held that while a creditor may collect a debt from the participant or beneficiary of the plan, it may not reach the plan itself.[41] These rulings addressing the preemption of state law collection actions against ERISA plans are in line with later United States Supreme Court rulings that rejected equitable exceptions to ERISA's alienation prohibition.[42] There is considerable disagreement about whether creditors may enforce their claims against the recipient of benefits distributed from a pension plan subject to the alienation prohibition,[43] although as discussed above, a decedent's creditors may not generally wrest survivor benefits that were paid to the decedent's beneficiary under the terms of tax-qualified pension plan, stock bonus plans, profit-sharing plans, or life insurance and annuity policies.

Thus, the timing of a transfer is crucial. If a creditor seeks satisfaction of a debt through a non-probate asset or an asset that was irrevocably conveyed during the decedent's lifetime, the personal representative must consider when that debt was incurred. If the debt was existing on the date of the transfer, was the transfer made when the decedent was insolvent? Did the transfer cause the decedent to become insolvent? Was the transfer made when the decedent anticipated that he or she would become insolvent? If the answer to any of these questions is yes, the property may be susceptible to the creditor's claims.

III. Satisfaction of the Duty of a Personal Representative to the Decedent's Creditors

As set forth above, the personal representative has a duty to the decedent's creditors to satisfy his or her debts with probate assets.[44] However, if the personal representative has identified specific non-probate assets or other property transferred during the decedent's lifetime that is indeed subject to the claims of the decedent's creditors, and if the fiduciary has actual or constructive notice of such claims, what is his or her fiduciary responsibility to recover these assets and satisfy those claims?

New York law does not definitively describe the extent of a personal representative's obligation, if any, to bring an action to recover non-probate assets over which the decedent maintained control[45] at death. New York courts have recognized that personal representatives are authorized to pursue claims to recover non-probate assets on the estate's behalf to satisfy claims. However, whether the personal representative has an affirmative duty to initiate an action to recover such assets is not clearly stated under New York law.[46]

Although New York has not adopted the Uniform Probate Code or the Uniform Nonprobate Transfers on Death Act, they may be instructive as to how a New York court might react to these issues. Under these acts, it is ultimately the creditor's own obligation to have its claim determined as part of the probate administration.[47] Case law demonstrates that creditors may likewise initiate actions before New York's Surrogate's Courts to compel fiduciaries of insolvent estates to satisfy their claims with non-probate assets.[48]

To the extent a probate estate's assets are insufficient to satisfy all of the decedent's creditors, the personal representative should join the creditors as interested parties in a formal accounting proceeding. The proceeding would include a proposal for the allocation of the assets remaining in the estate among the creditors and/or a request for a judicial determination of same. Judicial settlement of the fiduciary's account would allow for the release of the fiduciary and the avoidance of potential personal liability by the fiduciary.[49] The account should fully disclose the non-probate assets and the fiduciary's efforts to ascertain all relevant information about those assets, *e.g.*, the validity of the beneficiary designations, the identity of the designated beneficiary, the timing of the transfer, any encumbrances on any such assets, such as a security interest in a payable on death brokerage account, etc.

With respect to assets that are deemed "fraudulently" conveyed during the decedent's lifetime, New York law is clear: the personal representative may, but is not obligated to, pursue recovery of these assets. Under EPTL 13-3.6 "(a) fiduciary *may*, for the benefit of creditors or others interested in property held in trust, treat as void any act done, or disposition or agreement made in fraud of the rights of any creditor, including himself, interested in such property…" (emphasis added). The creditor may similarly make such a claim.[50]

To the extent that no probate administration is pending through which a creditor may pursue its claim (for example, if the decedent died leaving no probate estate) or if no personal representative has been appointed, the creditor itself may seek administration by applying for letters of administration as a person interested in the decedent's estate.[51]

Finally, the personal representative must consider the source of the payment of the decedent's funeral expenses and expenses incurred with the administration of the decedent's estate. If the probate estate is insufficient to pay these expenses, noting that these expenses are a priority,[52] it would appear equitable for the beneficiaries of the non-probate assets, including the exempt assets, to pay their pro-rata share of any shortfall. However, not all beneficiaries may be eager to contribute and it may be necessary to include the reluctant takers in any accounting proceeding brought by the fiduciary. The administration expenses will likely include attorney and/or accountants' fee and a cautious service provider should consider the source of payment of his or her fees and expenses before undertaking representation of an estate which appears to have no probate assets of substantial value.

Conclusions

Personal representatives of a decedent are responsible for using a participant's probate assets to pay the debts of such decedent before paying any of the decedent's legacies, devises, or distributive shares. In the course of marshaling probate assets, the personal representative is responsible for determining whether the decedent's estate is the beneficiary of the decedent's testamentary substitutes, in which cases such assets will be included within the decedent's probate assets, and the extent to which creditors have encumbered those assets with claims. It is becoming increasingly common for personal representatives to find that solvent decedents have left insolvent probate estates, and have to ascertain what additional fiduciary responsibilities are imposed because of the personal representative's duty to the decedent's creditors.

Although a decedent's creditors may enforce their claims against (1) the decedent's interest in some testamentary substitutes, such as payable on death accounts, but not others, such as life insurance proceeds, and (2) those assets that the decedent conveyed fraudulently, the representative appears to have no obligation under New York law to enforce the creditor's claims against such assets. If the decedent's debts exceed the value of the decedent's probate assets, it is advisable that the personal representative make reasonable efforts to identify the decedent's testamentary substitutes and their beneficiaries, any assets that may have been fraudulently conveyed by the decedent, and any encumbrances on those non-probate assets. The personal representative should disclose such information in the course of a formal accounting so that any creditors whose debts remain unpaid may decide on their next steps and the representative may be released from any personal liability with respect to such creditors.

Endnotes

1. *In re Gallet*, 196 Misc. 2d 303, 307, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003).
2. *In re Moose*, 241 A.D. 329, 330, 272 N.Y.S. 140 (4th Dep't 1934) (finding that the proceeds from the executor's sale of decedent's real property should be applied to pay the decedent's debts before certain legacies set forth in the decedent's will).
3. Employee Retirement Income and Security Act of 1974 § 206(d) (ERISA), 29 U.S.C. § 1056(d).
4. N.Y. Civil Practice Law & Rules 5205(c) (CPLR).
5. N.Y. Insurance Law sections 3212(b)(1) and 3212(d)(3) provide that the rights of a beneficiary of an annuity or insurance prevail over the claims of a decedent's creditors (and thus over the claims of a personal representative for the payment of obligations to the decedent's creditors).
6. *See generally* N.Y. Debtor & Creditor Law art. 10 (DCL).
7. However, if an asset that is otherwise statutorily protected under New York law was "fraudulently conveyed," as discussed herein, it still may be subject to creditors' claims. There are also exceptions for the enforcement of orders of support, alimony, or maintenance that will not be discussed in this article.
8. These plans are required to provide spousal survivor benefits. ERISA §§ 201, 205. Thus, such plans are often referred to as "Spousal Survivor Benefit Plans."
9. ERISA §§ 201, 206(d).
10. *See generally Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) (the creditors of a participant in a pension plan required to provide spousal survivor benefits may not compel such a plan to make benefit payments to the participant's creditors). *See also In re King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003) (noting that ERISA's anti-alienation provisions exempt a participant's survivor benefits from a Spousal Survivor Benefit Plan from any claims of the participant's creditors).

11. Although exempt from ERISA's participation, vesting, and funding rules, top-hat plans are subject to ERISA's enforcement provisions and reporting and disclosure requirements.
12. ERISA §§ 201, 206.
13. 29 C.F.R. §§ 2510.3-3(b), 2510.3-3(c)(1).
14. 29 U.S.C. § 1003(b)(1).
15. *In re King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003) (finding that the death benefit from the decedent's insurance policy and the survivor benefits from the teachers' pension plan and the § 403(b) plan were exempt from the claims of the decedent's creditors pursuant to New York insurance law, New York education law's anti-alienation prohibition, and Estates, Powers & Trusts Law 13-3.2, respectively).
16. Estates, Powers & Trusts Law 13-3.2(a) (EPTL).
17. *See*, *e.g.*, *In re Clotworthy*, 294 A.D.2d 720, 722-23, 742 N.Y.S.2d 168 (3d Dep't 2002) (finding that pursuant to EPTL 13-3.2, an annuity received by decedent's beneficiary under structured settlement was not subject to the claims of the decedent's creditors).
18. EPTL 13-3.2(b). Thus, if the conveyance of this interest is deemed a "fraudulent" conveyance (as discussed herein), it may still be subject to creditors' claims.
19. *See supra* note 15.
20. *In re Gallet*, 196 Misc. 2d 303, 307, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003).
21. *Id.* at 307.
22. *See* EPTL 7-3.1 (providing that a disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator).
23. *See In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748 (1904) (noting that Totten trusts are "revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary").
24. *See*, *e.g.*, *In re LaPine*, 18 A.D.3d 552, 553, 795 N.Y.S.2d 294 (2d Dep't 2005) (providing that the administrator was obligated to refund to the estate money that she received as beneficiary of the decedent's Totten trusts as the general assets of the estate were insufficient to pay creditors' claims); *In re Satnick*, 142 Misc. 2d 268 (Sur. Ct., Bronx Co. 1989) (providing that "the beneficiary of a Totten trust bank account is responsible for decedent's debts in an insolvent estate to the extent of the balance in the account"); *In re Bleier*, 75 Misc. 2d 436, 439, 347 N.Y.S.2d 895 (Sur. Ct., N.Y. Co. 1973) (finding that the proceeds of a mutual fund certificate of a decedent, who had designated his wife as his beneficiary upon his death, were available to the executor of his insolvent estate to satisfy creditors' claims); *In re Chaikowsky*, 94 Misc. 2d 70, 72, 404 N.Y.S.2d 510 (Sur. Ct., N.Y. Co. 1978) (holding that Totten trust accounts over which the decedent had exercised control up to the time of his death were subject to decedent's creditors' claims as "a decedent, who is the owner of property up to the time of his death, as far as creditors are concerned, cannot cut off the creditors' rights by his death and non-testamentary transfer").
25. *See In re Donleavy*, 41 Misc. 2d 28, 32, 244 N.Y.S.2d 730 (Sur. Ct., N.Y. Co. 1962) (noting that the decedent's "right to the absolute disposition of [the joint account] during his lifetime makes it his and therefore subject to his creditors").
26. *See id*.
27. *Id.* (citing *In re Haggerty*, 38 N.Y.S. 2d 433, 434-35 [Sur. Ct., N.Y. Co. 1942]).
28. However, if the trustee of the irrevocable trust has discretion to make distributions to the decedent/transferor, the assets of the irrevocable trust could remain subject to the claims of the decedent's creditors because of the creator's retention of a beneficial interest in the trust. Restatement (Third) of Trusts § 60, cmt. F (2003) (Transfer or Attachment of Discretionary Interests). It should be noted that there are certain states with asset protection statutes which permit the settlor of an irrevocable trust to be a permissible beneficiary without subjecting the assets to the settlor's creditors. A discussion of these asset protection statutes is beyond the scope of this article. For a review of these statutes see www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdfwww.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdfwww.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf.
29. However, if such property was fraudulently conveyed, as discussed herein, it still may be subject to creditors' claims.
30. *In re Gallet*, 196 Misc. 2d 303, 307, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003) (noting that an irrevocable trust in which the grantor/decedent retained no power to withdraw the assets of the trust or to change the beneficiary of the trust is not subject to creditors' claims).
31. Unless the asset is statutorily safeguarded under federal law, such as ERISA, which, in most cases, may not be trumped by New York's DCL.
32. *See* DCL § 275 ("(e)very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors").
33. *See* DCL § 273 ("(e)very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration"); *cf. In re King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003) (the decedent's estate became insolvent, but the decedent was not insolvent during her lifetime, so the fraudulent conveyance exception did not apply to her life insurance, state retirement fund or 403(b) account, and the estate's creditors could not reach them).
34. DCL § 273.
35. *Id*. at 524. In contrast, the purchase of a life insurance policy may constitute a fraudulent transfer, in which case the creditor may recover the premiums, but not the insurance proceeds. N.Y. Insurance Law § 3212(e) (2).
36. *In re Gallet*, 196 Misc. 2d 303, 307, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003).
37. *See*, *e.g.*, EPTL 13-3.2(b) (providing that EPTL 13-2.2 is subject to article 10 of the DCL, which includes DCL § 273); CPLR 5205(c)(5) (providing that custodial accounts, annuities, insurance contracts, individual retirement accounts, and other statutorily exempt assets are not exempt from the claims of creditors if they are deemed to have been fraudulently conveyed under New York's DCL).
38. *See* ERISA § 514(a); *see*, *generally*, Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. Marshall L. Rev. 145, 366-70 (2013) (available at http://ssrn.com/abstract=2440008http://ssrn.com/abstract=2440008http://ssrn.com/abstract=2440008) (discussing the extent of ERISA preemption of state laws).
39. *Id.* at 336-38 (discussing the disagreement about whether ERISA generally preempts the application of state creditor law

remedies to benefit payments by any ERISA plan, including top-hat plans and group life insurance plans that are not Spousal Survivor Benefit Plans, and concluding that ERISA does preempt those laws).

40. *Planned Consumer Mktg. v. Coats & Clark*, 71 N.Y.2d 442, 450, 527 N.Y.S.2d 185 (1988) (finding that New York's DCL did "not purport to relate, directly or indirectly, to terms and conditions of employee benefit plans" and thus that ERISA did not preempt judgment creditor's cause of action for turnover of funds deposited into a qualified ERISA plan, the creation of which was in violation of that New York law); *Tompkins County Trust Co. v. Gowin*, 163 Misc. 2d 418, 421, 621 N.Y.S.2d 476 (Sup. Ct., Tompkins Co. 1994) (concluding that, although ERISA's anti-alienation clause preempted state equitable exceptions, the fraudulent transfer could be voided because the transfer fell outside the scope of ERISA and thus the ERISA alienation prohibition was not applicable).

41. *Majteles v. AVL Corp.*, 182 Misc. 2d 140, 145, 696 N.Y.S.2d 748 (Sup. Ct., Kings Co. 1999) (finding that (1) the Court of Appeals' decision in *Planned Consumer Mktg*. was no longer valid, and (2) a creditor of an ERISA plan participant may not collect the debt from the ERISA pension plan if it is a Spousal Survivor Benefit Plan, but may collect the debt from plan benefits distributed to the participant).

42. *See, e.g.*, *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) (holding that ERISA's alienation prohibition prevented a union from compelling a Spousal Survivor Benefit Plan to pay to the union sponsor of the plan the benefits of a participant who had embezzled funds from the same union), and *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA preempted the application of a state community property law to ERISA plan benefit entitlements).

43. Feuer, *supra* note 38 (discussing the division and arguing that ERISA preempts state-law attempts to wrest benefits from participants or beneficiaries in Spousal Survivor Benefit Plans).

44. *In re Moose*, 241 A.D. 329, 330, 272 N.Y.S. 140 (4th Dep't 1934).

45. For example, Totten trust accounts.

46. *See Matter of Halbauer*, 34 Misc. 2d 458, 460, 228 N.Y.S.2d 786 (Sur. Ct., Suffolk Co. 1962) (providing that "(t)he estate representative has the authority and *may* have a duty to seek to set aside Totten trusts to the extent necessary to protect creditors when the estate is insufficient").

47. Under the Uniform Probate Code § 6-102(g) (UPC) (available at http://www.uniformlaws.org/Act.aspx?title=Probate%20 Code) and under the Uniform Nonprobate Transfers on Death Act § 102(g) (UNTDA) (available at http:// www.uniformlaws.org/Act.aspx?title=Nonprobate%20 Transfers%20on%20Death%20Acthttp://www.uniformlaws. org/Act.aspx?title=Nonprobate%20Transfers%20on%20 Death%20Acthttp://www.uniformlaws.org/Act. aspx?title=Nonprobate%20Transfers%20on%20Death%20Act), the creditor must make a written demand on the personal representative to bring a proceeding to enforce its claim against the nonprobate transferee. It is the personal representative's choice to bring this proceeding or to decline to bring such an action. UNTDA § 102(g). If the personal representative declines to bring the action, he is absolved of liability as long as he or she declines in good faith. *UNTDA* § 102 cmt. 12 ("It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants"). If the personal representative declines to bring the action, the creditor may bring its own action in the name of the decedent's estate at the creditor's own expense (not at the expense of the estate). *Id*.

48. *See*, *e.g.*, *In re King*, 196 Misc. 2d 250, 252, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003).

49. *See* Surrogate Court's Procedure Act 2210 (SCPA) (providing that upon judicial settlement of the fiduciary's account, process must be issued to "(a)ll unpaid creditors or persons claiming to be creditors of the decedent").

50. EPTL 13-3.6.

51. SCPA 1002.

52. SCPA 1811.

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Proposal to Make SCPA 1310 More User Friendly for Collection of Assets Without Administration

By Victoria L. D'Angelo and Nathan W. G. Berti

Section 1310 of the New York Surrogate's Court Procedure Act may soon receive a needed facelift. The New York State Bar Association Trusts and Estates Law Section Executive Committee has approved a proposal that will ask the legislature to adopt a number of changes to SCPA 1310, last substantially updated in 1993, which will increase the statute's visibility and utility.

Background

SCPA 1310, part of Article 13 of the SCPA that contains the rule for Settlement of Small Estates Without Court Administration, can be used by individuals and creditors to avoid the costs and formalities of estate administration when a decedent's assets are below a certain statutory threshold. More specifically, SCPA 1310 provides an abbreviated procedure allowing certain individuals to collect a "debt" owed to a "creditor" simply by providing an affidavit to the "debtor" that complies with certain statutory requirements. The amount that can be collected under the SCPA 1310 affidavit procedure depends upon the claimant's relationship to the creditor and the amount of time that has elapsed since the creditor's death.

Comparison to the Uniform Probate Code

Subsequent to the original enactment of SCPA 1310, the National Conference of Commissioners on Uniform State Statutes issued the Uniform Probate Code of 1969 (the "UPC"). The UPC, which has been enacted in 17 states, includes a similar provision to SCPA 1310. As compared to SCPA 1310, Section 3-1201 of the UPC, "Collection of Personal Property by Affidavit," provides a more streamlined mechanism for the collection of certain assets of a decedent.

Notably, the UPC is written with the individual collecting the decedent's asset as the target audience, rather than the financial institution holding it, and provides that within 30 days after the decedent's death a successor may claim up to $25,000 in assets upon providing an affidavit to the holder of such assets. Many states, including the 17 that have adopted the UPC, have a provision similar to SCPA 1310.[1] New York appears to be the only such state whose statute's target audience is the financial institution, rather than the individual utilizing the statute to collect the assets of a decedent.

Discussion of Current Statute and Proposed Revisions

Under present law, in the first 30 days following a creditor's death his or her surviving spouse is entitled to collect up to $30,000 using the SCPA 1310 affidavit procedure. Once at least thirty days have elapsed since the creditor's death, a debtor may pay up to $15,000 to the following individuals (with preference given in the order named): the creditor's surviving spouse, one or more of the creditor's adult children, either of the creditor's parents, any of the creditor's siblings, any of the creditor's nieces and nephews, or a party to whom the creditor is indebted or a person who paid the creditor's funeral expenses (but only upon the request of the decedent's surviving spouse or relative). The $15,000 limit is an aggregate total—the total payments by all debtors to all relatives or parties to whom the creditor is indebted cannot exceed $15,000. The statute is unclear on whether a surviving spouse who collects $30,000 in the first 30 days is also entitled to receive an additional $15,000 once after thirty days have elapsed.

After more than six months have elapsed since the creditor's death, the debtor may pay up to $5,000 to any of the creditor's distributees, or to a party to whom the creditor is indebted. A debtor who makes a good faith payment under SCPA 1310 is expressly relieved from liability, even if the information in the affidavit supplied to the debtor is false or the payment was not made in the required order of preference, provided the creditor is in fact deceased, the applicable number of days have elapsed since the creditor's death, and the individual claiming payment under the affidavit in fact either bears the stated relationship to the creditor or is a party to whom the creditor is validly indebted.

The primary revision proposed by the Trusts and Estates Law Section of the New York State Bar Association is to change the terminology used throughout SCPA 1310. As currently worded, the target audience of the statute is the financial institution holding the decedent's asset for which payment is sought. Indeed, the statute refers to the person or entity holding the decedent's asset as a "debtor," refers to the decedent as a "creditor," and refers to the amount that is owed to the decedent as a "debt." The proposed changes update the lens of SCPA 1310 to comport with the changing landscape of legal research—that individuals, especially individuals seeking to collect a decedent's modest assets, are increasingly turning to the internet to understand estate administration procedure and options. To the layman, and the unseasoned practitioner, even the title of SCPA 1310 itself, "Payment of certain debts without administration," does not convey the intended meaning—that the statute provides a mechanism to collect an asset of the decedent without resorting to formal, court-supervised estate administration.

As a result, the proposed revisions will increase the visibility of SCPA 1310 by focusing its title and definitions towards the individual or attorney seeking to use the statute to collect a decedent's asset. This will in turn make the SCPA 1310 procedure more widely used by families of many decedents with modest estates, or those with larger estates that consist of very few probate assets so that they can enjoy the benefit of collecting the decedent's assets without judicial intervention or involvement.

The proposed revisions also streamline the procedure for receiving payment, and clarify the entitlement of the surviving spouse. SCPA 1310 currently provides that the surviving spouse may receive up to $30,000 owed to the decedent, and that once more than 30 days have elapsed since the decedent's death, any member of a class of people (including the surviving spouse) may receive $15,000. The proposed revisions establish a priority of entitlement to payment based on relationship to the decedent and eliminate any waiting period for the collection of the decedent's assets. Also, the proposed revisions clarify that the surviving spouse is entitled to a maximum of $30,000 under the provisions of SCPA 1310, adjust the limitation for other relatives or creditors to $15,000, and clarify that any amount received under SCPA 1310 is credited against the amount to which the recipient is entitled under EPTL 5-3.1 (the family exemption statute).

Finally, the proposed revisions provide further protection to financial institutions that make payments under SCPA 1310. The statute currently provides that if the payee is a relative of the decedent, the financial institution is absolved from liability so long as, *inter alia*, the individual collecting the asset in fact bears the stated relationship to the decedent. If the payee is a creditor, the financial institution is absolved from liability so long as the creditor is in fact a creditor or in fact paid the decedent's funeral expenses. This puts the responsibility of confirming the decedent's familial relationships and legitimacy of alleged debts upon the financial institutions making payment under SCPA 1310, which are not in a position to confirm these facts. The proposed revisions absolve the payor from liability simply upon production of an affidavit from the individual or entity collecting the asset and confirmation of the decedent's death, irrespective of whether the payee bears the stated relationship or the legitimacy of the alleged debt.

Proposed Revisions

The following illustrates the revisions being proposed to SCPA 1310:

§1310 Payment of Certain Debts without Administration

1. The title of SCPA 1310 should be amended to read as follows:

   "[Payment of certain debts without administration] Expedited collection of certain assets by affidavit"

2. Subparagraph (a) of Paragraph 1 of SCPA 1310 should be amended as follows:

   "(a) ['Debt'] 'Asset'"

3. Subparagraph (b) of Paragraph 1 of SCPA 1310 should be amended to read as follows:

   "(b) ["Debtor"] "Holder" means the person or persons, partnership, corporation, government or government agency [by] from whom [a debt] an asset defined in this section is to be paid,"

4. Subparagraph (c) of Paragraph 1 of SCPA 1310 should be amended to read as follows:

   "(c) ["Creditor"] "Decedent" means the employee, depositor, member, or other person, to whom, or to whose estate, or to a beneficiary designated by whom, [a debt] an asset defined in this section is to be paid [and shall include any beneficiary validly designated by such a creditor],"

5. Subparagraph (d) of Paragraph 1 of SCPA 1310 should be amended to read as follows:

   "(d) A "designation of a beneficiary" means any writing, signed by the [creditor] decedent and delivered to the [debtor] holder purporting to designate the person to whom [a debt] an asset shall be paid on death of the [creditor] decedent or any transaction which operates pursuant to statute as such a designation."

6. Paragraph 2 of SCPA 1310 should be amended to read as follows:

   "2. [Upon the death of a creditor, unless] Unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the [debtor forthwith] holder to pay [to the surviving spouse of the decedent] not more than fifteen thousand dollars (or, in the case of a payment to the decedent's surviving spouse, not more than thirty thousand dollars) of the [debt, upon an affidavit made by the spouse showing that the payment and all other payments received by the spouse under this subdivision do not in the aggregate exceed thirty thousand dollars.] asset to:

(a) one or more of the following persons (but only if they are eighteen years of age or older), preference being given in the order named:

(i) the surviving spouse of the decedent,

(ii) the children of the decedent,

(iii) the grandchildren of the decedent,

(iv) the father or mother of the decedent,

(v) the brothers or sisters of the decedent,

(vi) the nieces or nephews of the decedent, or

(b) a creditor of the decedent or a person who has paid or incurred funeral expenses of the decedent, but only upon the direction of the then living relative of the decedent named in subdivision 2(a) with the highest priority, or

(c) not less than six months after the decedent's death, a distributee or, to the extent that the asset is not exempt from claims of creditors, a creditor of the decedent or a person who has paid or incurred funeral expenses of the decedent."

7. Paragraph 3 of SCPA 1310 should be amended to read as follows:

"[Not less than thirty days after the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay not more than fifteen thousand dollars of the debt to (a) the surviving spouse, (b) one or more of the children eighteen years of age or older, (c) the father or mother, (d) the brother or sister, (e) the niece or nephew of the decedent, preference being given in the order named if request for payment shall have been made by more than one such person, (f) a creditor of the decedent or to a person who has paid or incurred the funeral expense of the decedent, upon the request of the surviving spouse or of one of such relatives. Payment under this subdivision may be made upon an affidavit by the surviving spouse or relative to whom or at whose request the payment is made, showing (i) the date of the death of the decedent, (ii) the relationship of the affiant to the decedent, (iii) that no fiduciary has qualified or been appointed, (iv) the names and addresses of the persons entitled to and who will receive the money paid, and (v) that such payment and all other payments made under this section by all debtors, known to the affiant, after diligent inquiry do not in the aggregate exceed fifteen thousand dollars. This subdivision does not limit the right of a debtor to make payment to a surviving spouse within less than thirty days after the death of the creditor as provided in subdivision two.] Payments under this section may be made only upon receipt by the holder of:

(a) an affidavit by the surviving spouse, relative to whom or at whose request the payment is made, or other such person or entity entitled to payment under subdivision 2 stating:

(i) the date of death of the decedent,

(ii) the relationship of the affiant to the decedent,

(iii) that no fiduciary has been appointed by a court of competent jurisdiction,

(iv) that, in the case of a payment to or directed by a relative named in subdivision 2, the decedent was not survived by a person whose priority under subdivision 2(a) is higher than the priority of such relative,

(v) the names and addresses of the persons or entities entitled to and who will receive the money paid,

(vi) that, in the case of a payment under subdivision 2(c), the affiant is entitled to the payment, and

(vii) that such payment and all other payments made under this section by all holders, known to the affiant, after diligent inquiry do not in the aggregate exceed fifteen thousand dollars (or with respect to payments to the surviving spouse, do not exceed thirty thousand dollars), and

(b) a certified copy of the decedent's death certificate.

8. Paragraph 4 of SCPA 1310 should be deleted as follows:

"[Not less than 6 months after the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay a debt which does not exceed $ 5,000, or any part of such debt, to a distributee or, to the extent that the funds are not exempt from claims of creditors, to a creditor or to a person who has paid or incurred the funeral expenses upon an affidavit made by the person paid showing (a) the date of the death of the decedent, (b) that no fiduciary has qualified or been appointed, (c) that the decedent was not survived by a spouse or minor child, (d) that the affiant is entitled to the payment, and (e) that such payment and all other payments made under this section by all other payments made under this section by all debtors, known to the affiant, after diligent inquiry, do not in the aggregate exceed $ 5,000.]

9. Paragraph 5 of SCPA 1310 should be renumbered and amended to read as follows:

"[5.] 4. A payment made in good faith under this section shall be a complete discharge to the [debtor] holder to the extent of the payment, even though the affidavit on which payment is made be false [, and even though payment pursuant to subdivision 3 was not made in the order of preference indicated in that subdivision, provided only that the creditor be dead and that the required number of days elapse between death and payment and, in the case of a payment under subdivision 2 or subdivision 3 that the affiant in fact bear the stated relationship to the decedent and in the case of a payment under subdivision 4 that the affiant be in fact a distributee or creditor or have paid or incurred the funeral expenses]."

10. Paragraph 6 of SCPA 1310 should be renumbered and amended to read as follows:

"[6.] 5. Any person or entity receiving payment pursuant to this section is accountable therefor to any one or more persons or entities whose priority under subdivision 2 is equal to or higher than the priority of the recipient, the fiduciary of the decedent if one be appointed or to the public administrator of the county having authority to take possession of the money or property constituting the [debt] asset except that a surviving spouse or child of the decedent entitled to have property set [aside] off to him or [to] her pursuant to EPTL 5-3.1 need not account [for such payments] to any such fiduciary or public administrator to the extent of the exemption provided [therein, and] in EPTL 5-3.1. In addition, to the extent that the amount [so] received under this section does not exceed the exemption in EPTL 5-3.1, such amount received hereunder shall be credited to such exemption."

11. Paragraph 7 of SCPA 1310 should be renumbered and amended to read as follows:

"[7.] 6. Nothing in this section shall deprive any person or entity of any right which he, she or it would otherwise have to receive payment of [a debt] an asset, except as against a [debtor] holder who has made a payment which is a discharge under subdivision [5] 4, nor shall anything in this section deprive any [debtor] holder of any right to make or refuse payment which it would otherwise have. This section does not limit article 26 of the tax law."

12. Paragraph 8 of SCPA 1310 should be renumbered and amended to read as follows:

"[8.] 7. It shall be lawful for the [debtor] holder to pay [a debt] an asset which does not exceed [five] fifteen thousand dollars or any part of such [debt] asset, under subdivision [four] 2 of this section, to the department of social services or a social services district where the [debt] asset is money payable on account of a deposit with the [debtor] holder for the personal needs of the [deceased creditor] decedent while residing in a medical institution or other facility, or otherwise, and the [deceased creditor] decedent is indebted to the department or district on account of medical assistance furnished to or on behalf of the [deceased creditor] decedent."

13. Paragraph 9 of SCPA 1310 should be renumbered and amended to read as follows:

"[9.] 8. This section applies only to [creditors] decedents who die on or after September 1, [1952] 2015."

If the proposed amendments are adopted, the New York State Bar Association Trusts and Estates Law Section Executive Committee plans to publish a form affidavit to be added to the New York State Uniform Forms, which will assist anyone seeking to collect an asset under SCPA 1310.

Conclusion

The proposed amendments to SCPA 1310 will increase the use of the affidavit procedure by changing the statute's terminology to target the individual relying upon it to collect an asset, streamlining and clarifying the procedure for collecting the asset, and providing additional protections to financial institutions and individuals that make payments based upon the SCPA 1310 affidavit procedure.

Endnote

1. States that have similar provisions include, but are not limited to, AK, AZ, CA, CO, HI, ID, MA, ME, MI, MN, MO, MT, NC, ND, NE, NJ, NM, SC, SD and UT.

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Non-Taxable § 1035 Exchange of Life Insurance Contracts

By Robert Adler

I. Introduction

Internal Revenue Code ("I.R.C.") § 1035 permits owners of life insurance and annuity contracts to exchange their contracts for similar or related types of contracts without the recognition of any unrealized gain which may have accrued in the contract surrendered in the exchange.[1]

There are a variety of circumstances in which the holder of a life insurance or annuity contract may wish to exchange the original policy for a different type of insurance product or a similar product having different premium costs or other features.

While such exchanges would ordinarily be taxable transactions with gain or loss measured by the difference between the fair market value of the new policy and the owner's basis in the old policy, exchanges that meet certain basic requirements are granted non-recognition treatment by I.R.C § 1035. I.R.C § 1035 does not provide a permanent income tax exclusion for gains on such exchanges, but merely a deferral—since the basis of the contract given up is carried over as the basis of the new contract received.

II. Tax-Free Exchanges

Non-recognition under I.R.C. § 1035 applies to an exchange of:

1. a contract of life insurance for another contract of life insurance or for an endowment or annuity contract; or
2. a contract of endowment insurance (a) for another contract of endowment insurance which provides for regular payments beginning at a date not later than the date payments would have begun under the contract exchanged, or (b) for an annuity contract; or
3. an annuity contract for an annuity contract.[2]

The contracts involved must meet the basic definitions of life insurance contract, endowment contract and/or annuity contract, as set forth in I.R.C. § 1035(b).[3] In all cases, the policy received must relate to the same insured as the policy given up in the exchange (although the contract issuer may be different).[4]

III. Debt Release as Boot

If an exchange would come within I.R.C. § 1035 except that other property or money is also received "to boot," gain (in the policy given up) is recognized up to the value of the boot received.[5]

If a policy which is subject to an outstanding loan is exchanged in a transaction otherwise qualifying for non-recognition under I.R.C. § 1035, the balance of the loan at the time of the exchange is treated as boot to the extent that it exceeds the amount of any loan balance outstanding on the new policy received.[6] This rule is necessary to prevent abuse of the non-recognition provision in a disposition transaction intended to yield cash (which would otherwise be taxable as boot) by structuring the transaction as a non-taxable loan followed by a non-recognized exchange.

A. Illustrative Example

W owns a life insurance policy with a basis of $50,000 and a current value of $80,000. He takes out a $60,000 loan against the policy. The receipt of the loan proceeds is not income. The following week, W exchanges his policy, subject to the loan balance, for a new life insurance policy with a value of $20,000. The $60,000 loan balance on the old policy is treated as boot (as well as part of the amount realized on the disposition of the old policy). Thus, there is a realized gain of $30,000, all of which must be recognized because the boot amount exceeds the gain. The basis in the new policy is $20,000 ($50,000 carryover, reduced by the $60,000 of boot and increased by the $30,000 of recognized gain). If the outstanding loan on the policy given up were not treated as boot, W would have received $10,000 cash in excess of his basis (at the time of the loan) and a policy worth $20,000, having a carryover basis of $50,000, with no recognition of any gain at any point.

B. Planning Pointer

If a policy subject to an outstanding loan is exchanged for a new policy, and the new policy is issued with an identical outstanding loan amount, there is no boot.[7]

If the new issuing company will not issue a policy subject to indebtedness, another way of avoiding boot is to pay off the loan on the old policy prior to the I.R.C. § 1035 exchange and then, if necessary, borrow against the new policy.

IV. Multiple Policy Exchanges

Several private letter rulings have dealt with various factual situations in which exchanges involved not a straight exchange of one life policy for another life policy, or one annuity for another, but rather combinations of contracts, or contracts plus additional cash invested. For example:

- Private Letter Ruling 9708016 approved an exchange of two separate life insurance contracts for one annuity contract.[8]
- Private Letter Ruling 9644016 approved an exchange of a single annuity contract for two new annuity contracts.[9]
- Private Letter Ruling 9820018 approved a transaction in which a new annuity contract was acquired by, in effect, "trading in" an existing life insurance policy (issued by another company) and paying the balance of the cost of the new annuity in cash.[10] The ruling held that the fact that a cash payment by the taxpayer was part of the exchange would not render I.R.C. § 1035 inapplicable. It also concluded that the issuance of the new annuity in two steps, as the two elements of payment were separately received, would not disqualify the transaction.
- Private Letter Ruling 200323012 approved an exchange of two annuity contracts for a single new annuity contract.[11]

V. Examples of Exchanges That Do Not Meet the Same Insured Requirement and Thus Do Not Qualify for § 1035 Treatment

In Private Letter Ruling 9542037, the Internal Revenue Service (the "IRS") concluded that exchanges involving policies insuring a single life for a policy insuring two lives do not qualify for non-recognition treatment under I.R.C. § 1035.[12] In the letter ruling, the IRS sets forth five examples, none of which qualify for I.R.C. § 1035 treatment:

1. Spouse A exchanges a policy insuring only his life for a policy which insures the lives of both Spouse A and Spouse B.
2. Spouse A exchanges two life insurance policies, one of which insures Spouse A and the other of which insures Spouse B, for a single second-to-die policy insuring the lives of both Spouse A and Spouse B.
3. Spouse A and Spouse B jointly exchange separate policies, each of which insures the life of one spouse, for a single jointly owned second-to-die policy which insures the lives of both Spouse A and Spouse B.
4. A trust owns and exchanges a policy insuring the life of Spouse A for a policy which insures the lives of both Spouse A and Spouse B.
5. A trust owns and exchange two life insurance policies, one of which insures Spouse A and the other of which insures Spouse B, for a single second-to-die policy insuring the lives of both Spouse A and Spouse B.

VI. Policy Exchanges Involving Modified Endowment Contracts

A modified endowment contract (a "MEC") is defined as any life insurance contract entered into on or after June 21, 1988 that meets the life insurance requirements of I.R.C. § 7702, but which fails to meet a special seven-pay test or is received in exchange for a MEC.[13]

If a life insurance contract that is grandfathered from the seven-pay test because it was issued before June 21, 1988 is exchanged on or after June 21, 1988, the grandfathering is lost and the new policy must qualify under the seven-pay test to avoid qualifying as a MEC.[14] If a MEC is exchanged for another policy, the new policy is also a MEC (even if it would not otherwise qualify).[15]

VII. Commonly Overlooked Planning Opportunity to Preserve Basis

A. Facts

Seventeen years ago, Client purchased a universal life insurance contract, paying premiums of $5,000 per year. This policy offered no cash value for the first 20 policy years. As such, it was essentially equivalent to a level premium, annually renewable term insurance contract (and was probably sold on that basis), but the contract was filed with regulatory authorities as a universal life product. (This type of universal life contract, sometimes referred to as "term look-alike," was commonly offered when Client purchased his policy.)

Seventeen years have now passed, and Client is about to replace this policy with a new product recommended by his insurance adviser, Joe. Joe prepares an application for the new policy, and Client signs it and submits the initial premium. The new policy is issued and the old policy is simply allowed to lapse. Should anything more have been done?

Like other assets, life insurance contracts have a tax basis in the hands of the policy owner. It is commonly accepted that the basis of an insurance contract includes all of the premiums paid in, and that this "cost" basis is used as the recoverable investment in the contract for purposes of computing any gain on the taxable disposition of a policy and determining the portion of cash value withdrawals which represent tax-free cost recovery. In general, this measure of basis is applicable without regard to the policy's cash value at any given time. (Thus, after seventeen years of annual $5,000 payments, Client's tax basis in his surrendered policy was $85,000.)

As is the case with other forms of tax-deferred exchange transactions, when a life insurance contract is exchanged for another life insurance contract in a tax-deferred exchange transaction under I.R.C. § 1035, the basis in the newly acquired policy is equal to the basis in the old policy at the time of the exchange, plus any premiums paid with respect to the new policy.

This carryover basis rule is a fundamental aspect of sales, exchanges or other dispositions of property in which no gain is recognized for tax purposes. It is through the carryover of a below market value basis that any unrealized gain at the time of the exchange is effectively deferred for potential taxation later, when the asset is disposed of in a taxable transaction. However, the carryover of basis can operate to the taxpayer's advantage in situations where the holder of a life insurance policy intends to replace it with a new policy—even in instances where surrender of the old policy would not result in any taxable gain.

B. What Client Could Have Done

In the scenario described above, no thought was given to exchanging the old policy for the new one. Section 1035 exchanges of insurance policies are typically employed in situations where the policy given up has a cash value great enough that a taxable gain would be realized upon its surrender. In Client's case the cash value was zero, even though there was an $85,000 basis in the surrendered contract.

However, by surrendering or lapsing Client's original universal life, term look-a-like policy, his $85,000 of basis is forever lost. What if Joe were to have taken an extra step and structured the sale of the new policy as an exchange for the old universal life policy? This would seem to involve no more than a bit of additional paperwork, but could have provided Client with a potentially valuable tax benefit down the road—an $85,000 increase in the basis in the new policy from day one. The practical effect is that Client could have enjoyed $85,000 more in tax-free withdrawals from the new contract in future years.

This potential preservation of basis by simply completing additional paperwork to effect an I.R.C. § 1035 exchange is sometimes overlooked when replacing low cash value universal life policies or universal life, term look-alike contracts having no cash value. Since it has long been accepted that a life insurance contract has a tax basis equal to the aggregate premiums paid—without regard to the level of the cash value at any particular time—a policyholder who simply terminates his or her old policy at the time of replacement with a new one is wasting an opportunity to transfer that basis to the new policy, with potentially substantial benefits down the road.

C. Conclusion

The point made in the immediately preceding paragraphs—that preservation of basis through an I.R.C. § 1035 exchange can provide a substantial future tax benefit for clients—is the central message of the example provided. It is important to note that the focus is on exchanges of universal life contracts for universal life contracts (or other life insurance contracts *other than term life insurance*). This includes even term look-alike contracts that may be viewed by insureds as term insurance but are actually universal life contracts with no current cash value.

Endnotes

1. 26 U.S.C. § 1035(a).
2. *Id.*
3. 26 U.S.C. § 1035(b).
4. 26 C.F.R. § 1.1035-1.
5. 26 U.S.C. § 1031(b).
6. *See* 26 C.F.R. § 1.1031(b)-1(c).
7. *See* Priv. Ltr. Rul. 8604033 (Oct. 25, 1985); Priv. Ltr. Rul. 8816015 (Jan. 11, 1988).
8. Priv. Ltr. Rul. 9708016 (Nov. 20, 1996).
9. Priv. Ltr. Rul. 9644016 (July 18, 1996).
10. Priv. Ltr. Rul. 9820018 (Feb. 11, 1998).
11. Priv. Ltr. Rul. 200323012 (Feb. 20, 2003).
12. Priv. Ltr. Rul. 9542037 (July 21, 1995).
13. 26 U.S.C. § 7702A(a). A contract fails to meet the seven-pay test when the amount paid under the contract at any time during its first seven years is greater than "the sum of the net level premiums which would have been paid on or before such time if the contract provided for paid-up future benefits after the payment of 7 level annual premiums." 26 U.S.C. § 7702A(b).
14. *See* Priv. Ltr. Rul. 9044022 (July 31, 1990).
15. 26 U.S.C. § 7702A(a)(2).

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Understanding the "Undue" in "Undue Influence"

By Anthony J. Enea

Frequently, a potential client or fellow attorney will express a strong opinion that a Last Will & Testament is definitely the product of "undue influence." While he or she may truly believe this to be the case, in most instances that belief is not supported by the facts, and results from too much emphasis on the word "influence," and not enough emphasis on the word "undue."

While undue influence is one of the most frequently alleged objections to the probate of a Last Will & Testament, it is also one of the most misunderstood and over relied upon objections. It is an objection whose burden of proof is extremely difficulty to meet, and only in rare instances satisfied by the evidence.

Black's Law Dictionary defines undue influence as follows:

> Persuasion carried to the point of overpowering the will, or such a control over the person in question as prevents him from acting intelligently, understanding, and voluntarily, and in effect destroys his, and constrains him to do what he would not have done if such control had not been exercised.… Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress.

As can be seen from the above definition, undue influence is much more than just influencing the testator's decisions vis-á-vis the beneficiaries and amounts bequeathed in one's Last Will & Testament. Merely encouraging and influencing the testator's decision will not rise to the level needed to prove undue influence. The influencer's conduct has to rise to the level of breaking the testator's free will, judgment, or volition.

The definition of undue influence seems to inherently require a testator who is in some form of a weakened state, whether physical, medical or emotional. This can result because of advanced age, and the infirmities and dependencies (physical and emotional) often associated with aging. However, again because the emphasis is on "undue," it is necessary to demonstrate the significant level of dependency and weakened state of the testator.

In *Matter of Burke*, the Appellate Division, Second Department provided a highly informative description of undue influence:[1]

> Undue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another.

The Court in *Matter of Burke* emphasized the repetitive and persistent nature of the influence required to reach the requisite level of undue influence, as well as the need for the testator to be in a weakened condition. Additionally, the Court noted the importance of a "relationship of trust" between the influencer and testator. In *Matter of Burke*, the Court further opined that circumstantial evidence may be used to show persistent suggestions imposed upon a weaker mind. To be sufficient, the circumstantial evidence must be the only reasonable conclusion drawn from the facts.[2] However, if the facts can also reasonably support a contrary inference, then the Surrogate must conclude that undue influence is not present.[3]

The objectant in a probate proceeding bears the burden of proving undue influence.[4] Some of the factors to be considered are the influencer's (1) motive to influence, (2) opportunity to influence, (3) whether said opportunity to influence was used, and (4) whether the influencer's moral coercion destroyed testator's free will. The Courts have held that, "without a showing that undue influence or fraud was actually exercised upon the decedent, evidence that opportunity and motive existed to exert such influence will not suffice to raise a triable issue as to whether the Will reflected the intent of the testator."[5]

The potential existence of a "confidential relationship" by and between the alleged influencer and the testator is an issue that necessitates careful examination once the issue of undue influence has been raised. In *Matter of Bach*, the Appellate Division, Second Department recognized that the burden of establishing undue influence rests upon the objectant to a Last Will.[6] However, where there is a confidential relationship between the decedent and the beneficiary, the bequest alone may give rise to an inference of undue influence absent a satisfactory explanation for the bequest. For example, an unsatisfactory explanation giving rise to an inference of undue influence may be where there is no familial relationship and/or long-standing friendship or relationship between the beneficiary and the testator.

The types of relationships which are generally categorized as confidential relationships include those between the (a) attorney and client, (b) doctor/nurse and patient, (c) priest/cleric and parishioner, (d) administrator of nursing home and patient, and (e) financial advisor and client. The finding of the existence of a confidential relationship significantly and detrimentally impacts the admission of a Last Will to probate.

If the existence of a confidential relationship of the nature described above has been identified, thus shifting the burden to the named beneficiary to explain the bequest, it is then still necessary to identify and allege the circumstances evidencing the undue influence. For example, consider whether the individual with the confidential relationship with the testator participated in the preparation or execution of the Last Will or directed the testator to the attorney draftsperson. Consider examining whether the Last Will benefits the individual with the confidential relationship to the extent that he or she receives more than he or she would receive in intestacy. It is also crucial to assess and examine the testator's physical and mental health and determine whether the individual with the confidential relationship to the testator exercised control over the testator's affairs and whether the testator was dependent upon the alleged individual with the confidential relationship at the time of the bequest. A showing that the testator was dependent on the influencer for his health, safety and well-being may be telling in this regard. In the cases where the bequests under the testator's Last Will favor the testator's attorney/draftsperson, an inference of undue influence will arise.[7]

In the cases where a Last Will excludes the natural objects of the testator's bounty in favor of his or her attorney, the document is automatically viewed with suspicion. If the attorney is unable to provide a satisfactory refutation, then the inference of undue influence will be warranted. The attorney must explain that the gift was freely given in a "Putnam Hearing."[8] Gifts to physicians, nurses, clerics and administrators of nursing homes and other senior living facilities may also be the subject of a "Putnam Hearing."

It should also be noted that generally when undue influence is alleged as an objection to probate, it is accompanied by an independent objection that the Last Will is a product of "fraud" practiced upon the testator. *Black's Law Dictionary* defines fraud as follows:

> An internal perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.…

The objectant has the burden of demonstrating by clear and convincing evidence that a knowingly false statement, misrepresentation or accusation was made that caused the testator to dispose of his assets differently than he or she would have in the absence of the fraud. Unlike undue influence, fraud must be established by a fair preponderance of the evidence.[9] The objectant must demonstrate actual fraud and not constructive fraud.

In conclusion, while at first blush it may appear that a Last Will is the product of influence exercised upon the testator, the real issue is whether the influence exerted rose to the level of being deemed "undue." Demonstrating this is often a challenge. Indeed, undue influence is relatively easy to allege but difficult to prove.

Endnotes

1. *In re Burke*, 82 A.D.2d 260, 441 N.Y.S.2d 542 (2d Dep't 1981).
2. *In re Walther's Will*, 6 N.Y.2d 49, 159 N.E.2d 665 (1959).
3. *In re Ruef*, 180 A.D. 203, 167 N.Y.S. 498 (2d Dep't 1917), *aff'd*, 223 N.Y. 582, 119 N.E. 1075 (1918).
4. *Connelly v. Connelly*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 343 (Sup. Ct., Kings Co. 2004).
5. *In re Zirinsky*, 43 A.D.3d 946, 841 N.Y.S.2d 637 (2d Dep't 2007).
6. *In re Bach*, 133 A.D.2d 455, 519 N.Y.S.2d 670 (2d Dep't 1987).
7. *In re Putnam's Will*, 257 N.Y. 140, 177 N.E. 399 (1931).
8. *In re Henderson*, 80 N.Y.2d 388, 605 N.E.2d 323 (1992).
9. *In re Beneway's Will*, 272 A.D. 463, 71 N.Y.S.2d 361 (3d Dep't 1947).

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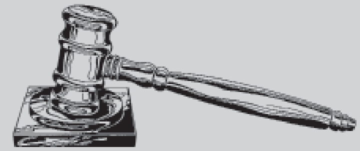
Recent New York State Decisions



By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

ATTORNEY AND CLIENT

Contingent Fee Agreement Enforceable; Continuous Representation Doctrine Did Not Apply to Toll Period of Limitations in Controversy Over Gifts from Client to Lawyers

The litigation over the estate of real estate magnate Sylvan Lawrence had gone on for 24 years after his death and ended with the estate agreeing to settle with the decedent's widow and children for more than $100,000,000. At the beginning of 2005, the widow, Alice Lawrence, entered into a retainer agreement with the firm that had been representing her; under the agreement the maximum charges she would pay in any one year, exclusive of disbursements, was $1,200,000 plus 40% of whatever was eventually paid to the beneficiaries minus the fees and disbursements already paid. The case settled five months later and under the retainer agreement the fee equaled more than $44,000,000.

In 1998, after she and her children received distributions from the estate of more than $120,000,000, Alice Lawrence made gifts to the lawyers who had been representing her up to that time of more than $5,000,000 and paid gift taxes of $2,700,000.

Litigation over the fee and the validity of the gifts began soon after the settlement. The Surrogate affirmed the finding of the Referee to whom she sent the matter that the fee should be $15,800,000 but reversed the Referee on the gifts, holding them invalid. *Matter of Lawrence*, 33 Misc. 3d 1206(A), 939 N.Y.S.2d 741 (Sur. Ct., N.Y. Co. 2011). The Appellate Division held that the statute of limitations on the claims related to the gifts was tolled under the continuous representation doctrine and that the retainer agreement itself was procedurally and substantively unconscionable. *Matter of Lawrence*, 106 A.D.3d 607, 965 N.Y.S.2d 495 (1st Dep't 2013).

The Court of Appeals reversed. In the Court's view, the retainer agreement was not procedurally unconscionable; Alice Lawrence fully understood it and in fact sought it. All of the evidence showed that she was in control of her faculties and understood the agreement. The retainer agreement was not substantively

William P. LaPiana

unconscionable given the length of time of the litigation, the possibility that it would go on much longer, and the possibility that the firm would be fired. In short, determining whether or not a contingent fee agreement is unconscionable in hindsight is "dangerous."

Finally, the six year catch all period of limitation of CPLR 213(11) applies to the claim for refund of the gifts. The claims are time barred unless the statute is tolled by the continuous representation rule which does not apply. The gifts do not involve representation of the client in the matter or transaction that gives rise to the claim, and no purpose is served by allowing tolling where the "disputed act is not the subject of any prior or ongoing representation."

Judge Rivera dissented from the portion of the opinion holding that the continuous representation doctrine did not apply. *Matter of Lawrence*, 24 N.Y.3d 320, 998 N.Y.S.2d 698, 23 N.E.3d 965 (2014).

Retainer Agreement Strictly Construed

Sisters were co-executors of their mother's will and hired counsel under a retainer agreement setting the legal fee at 5% of the taxable value of the estate plus expenses, with a provision for additional fees "should extenuating circumstances occur," and should such circumstances occur, "consultation and pre-approval will be first sought and secured." The basic fee under the agreement was approximately $20,000 and on an accounting by one co-executor the Surrogate allowed a total fee of $58,000, which was appealed by the other co-executor resulting in a remand (*Matter of Benware*, 86 A.D.3d 687, 927 N.Y.S.2d 173 [3d Dep't 2011]) and the setting of the fee at $50,000. The second co-executor appealed again and the Appellate Division again reversed, finding that counsel did not identify which fees were the result of extenuating circumstances. Assuming without deciding that additional work was caused by the co-executors' inability to cooperate, there was no proof in the record of the consultation and approval required by the retainer agreement. The court noted in a footnote that the definition of extenuating circumstances "and the unfortunately not-so-rare scenario where co-executors regularly cannot agree or cooperate" left the court unpersuaded that counsel's difficulty in getting the co-executors to work together constituted "extenuating circumstances." The court then set the fee at the 5% plus expenses provided in the retainer agreement. *Matter of Benware*, 121 A.D.3d 1331, 995 N.Y.S.2d 311 (3d Dep't 2014).

Retainer Agreement Valid and Determines Fee

Attorney agreed to represent a party in a contested probate proceeding. The probate proceeding was settled approximately four weeks after the execution of the retainer agreement and under the agreement the attorney received a $5,000 retainer and a contingent fee of $585,000. Client brought a proceeding to fix the attorney's fee under SCPA 2110 and the Surrogate granted the attorney's motion for summary judgment. The Appellate Division held that in a proceeding under SCPA 2110, the Surrogate must consider not only whether a contingency fee retainer agreement was wrongfully procured, but also the reasonableness of the fee and the reasonableness of the agreement itself. *Matter of Talbot*, 84 A.D.3d 967, 922 N.Y.S.2d 552 (2d Dep't 2011).

On remand, the Surrogate found the fee under the retainer agreement reasonable and set the fee at $585,000 plus the $5,000 retainer. The client again appealed and the Appellate Division affirmed, holding that the evidence supported Surrogate Czygier's conclusion that the fee is reasonable in light of the difficulty of the issues involved, the favorable terms of settlement to which the lawyer's work contributed, and the risk the lawyer took that the fee would be only the original retainer. Under these circumstances there was no basis to disturb the Surrogate's determination (citing, among other cases, *Matter of Lawrence,* above). *Matter of Talbot*, 122 A.D.3d 867, 997 N.Y.S.2d 153 (2d Dep't 2014).

DEAD BODIES

Burial in Wrong Grave Followed by Proper Reburial Does Not Violate Right of Sepulcher

"Sparse" allegations that the defendants, the town and funeral home, buried plaintiffs' decedent in the wrong grave and then exhumed and reinterred the decedent in the correct plot "without their notice or consent" is not sufficient to give rise to a claim of violation of the common law right of sepulcher, which gives a decedent's next of kin "the absolute right" to possession of the decedent's body for disposition of the remains and the right to damages from anyone interfering with that right. Nor do the allegations give rise to a cause of action for desecration of a grave. In addition, there is no cause of action for wrongful disinterment under New York common law. *Toppin v. Town of Hempstead*, 121 A.D.3d 883, 994 N.Y.S.2d 194 (2d Dep't 2014).

DOMICILE

Guardian Could Not Change Ward's Domicile

Decedent resided in Kings County for many years before her death, first in her home and then in a residential care facility. In 2008, five years before her death, she was admitted to a residential health care facility in Richmond County, where she died. The Public Administrators of both Kings and Richmond Counties sought and were granted letters of administration of her estate, the first grant being to the Kings County Public Administrator. In *Matter of Bonora*, 44 Misc. 3d 171, 984 N.Y.S.2d 562 (Sur. Ct., Richmond Co. 2014), the Richmond County Surrogate held that the decedent was domiciled in Richmond County at her death and ordered the Kings County proceeding transferred to Richmond County.

The Kings County Public Administrator appealed and the Appellate Division reversed. Under SCPA 704 a person who applies for letters in good faith and receives them before anyone else receives letters has exclusive authority to administer the estate. Here the Kings County Public Administrator did apply in good faith before he had knowledge of the proceeding in Richmond County. The Kings County Surrogate's Court had subject matter jurisdiction because the decedent was a domiciliary of New York State. Domicile is irrelevant because improper venue is not a valid ground for revocation of letters. In any event, the decedent was domiciled in Kings County at the time of her death. Not only did decedent lack capacity to change her domicile, but her guardian's authority extended only to choosing her place of abode, and it cannot be assumed that he therefore had the authority to change her domicile. *Matter of Bonora*, 123 A.D.3d 699, 998 N.Y.S.2d 400 (2d Dep't 2014).

PARENTAGE

Marital Presumption Does Not Apply to Child Born to Woman Married to a Same-Sex Spouse Where Child Conceived Through Intercourse

Q.M. asserted his parental rights as the biological father of J.C. who was born to B.C. while she was married to her same-sex spouse, J.S. The Family Court, Monroe County, held that the presumption of legitimacy of a child born to a married woman did not apply because first, there is no dispute that J.S. could not be the second parent of the child, and that the Marriage Equality Act "does not require the court to ignore the obvious biological differences between husbands and wives." According to the court, J.S. is in the position of any other stepparent. In addition, Q.M. rights are not barred by equitable estoppel. The court determined it would order a genetic marker test unless the parties waived the testing. *Matter of Q.M.*, 46 Misc. 3d 594, 995 N.Y.S.2d 470 (Fam. Ct., Monroe Co. 2014).

PRACTICE

E-Filing of Objections Is Sufficient

Decedent's daughter applied to become voluntary administrator of decedent's estate and was issued the appropriate certificates to deal with the one asset in the probate estate. Daughter eventually petitioned to settle her account as fiduciary of the estate and two of her siblings filed objections before the return date of the citation in the accounting proceeding. Daughter then moved for summary judgment seeking dismissal of the objections because they were not served on her before filing with the court in accord with Uniform Rule § 207.41. Surrogate Howe dismissed the summary judgment motion, declining to follow the Second Department's opinion in *Matter of DeSantis*, 266 A.D.2d 391, 698 N.Y.S.2d 158 (2d Dep't 1999), which affirmed the decision of the Rockland County Surrogate's Court refusal to consider objections that had been filed with the court before being served on the fiduciary.

Surrogate Howe first held that the matter was e-filed from the beginning and by participating in e-filing, Daughter agreed to accept service of all documents electronically. Uniform Rules § 207.4-a(g)(2). Thus Daughter was served when the objections were uploaded into the e-filing system three days after being filed in paper in the court. Second, citing *Matter of Rad*, 2008 WL 8833514, 2008 N.Y. Misc. Lexis 10876 (Sur. Ct., N.Y. Co. 2008), *aff'd*, 73 A.D.3d 595, 901 N.Y.S.2d 43 (1st Dep't 2010), Surrogate Howe held that strict application of § 207.41 is not required where no prejudice to the accounting fiduciary can be shown. Therefore, because Daughter was properly served within three days of the filing of the objections with the court, she could in no way be prejudiced by the failure to strictly comply with § 207.41, and the objections must be considered on their merits. *Matter of Faragiano*, 46 Misc. 3d 646, 998 N.Y.S.2d 794 (Sur. Ct., Erie Co. 2014).

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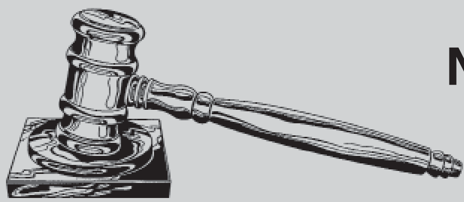

Case Notes—New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Abandonment

In a proceeding for leave to compromise and settle a medical malpractice action arising out of the conscious pain and suffering and wrongful death of the decedent, the petitioner, one of the decedent's four children, moved for summary judgment seeking a determination that the respondent, the decedent's husband, and petitioner's stepfather, be disqualified as a distributee of the decedent's estate. More specifically, the petitioner maintained that the respondent's departure from the household prior to the decedent's death, his failure to support the decedent, and his criminal behavior towards the decedent's minor daughters constituted grounds for a finding of abandonment. The respondent opposed the application.

The record revealed that at the time the respondent had left the marital home, the decedent's youngest daughters believed that he never intended to return. However, when he unexpectedly reappeared, they reported that the respondent had raped and sexually abused them over a period of years. Ultimately, the respondent was convicted on 95 counts of raping and sexually abusing the girls, and was incarcerated. Despite the foregoing, the respondent maintained that his marriage to the decedent remained intact until her death, as evidenced by her visits to him in prison, her payment of the legal fees associated with his defense, and his return to the family home prior to his arrest.

The court observed that while the provisions of EPTL 5-1.2(a)(5) authorize a finding of disqualification on the grounds of abandonment, that term is not defined in the statute. Rather, courts have consistently found that the standard used to determine whether a surviving spouse has abandoned the decedent is the standard used to determine whether the party would have been entitled to a decree of separation or divorce on the grounds of abandonment under the Domestic Relations Law.

The court opined that the party asserting abandonment must establish that a spouse's departure from the marital home was without justification, and without the intention of returning. Noting that a person's intent was the more difficult element to prove, the court stated that it could best be gleaned from the actions of the person involved. To this extent, the court observed that while unfaithfulness, cruelty, or inhumanity did not per se disqualify a spouse from inheriting, where the conduct of a spouse fundamentally strikes at the institution of the marriage between the parties, a charge of abandonment will be sustained.

Within this context, the court found "that there are few acts more despicable, more destructive of the fabric of family and marriage, more profoundly emblematic of spousal abandonment, than the repeated rape and sexual abuse of two young girls by their stepfather." Moreover, the court held that the respondent's departure from the home was unjustified, concluding that his intentional and criminal behavior resulted in his incarceration and separation from the decedent for more than a year prior to her death.

Accordingly, the petitioner's motion for summary judgment was granted.

In re Atta, N.Y.L.J., Feb. 27, 2015, p. 41 (Sur. Ct., Kings Co.).

Contested Accounting

In a contested accounting proceeding, the objectants moved for summary judgment, *inter alia*, denying approval of the petitioner's account, directing petitioner to pay to them the amounts due them as a result of non-pro rata distributions, surcharging the petitioner, awarding interest at the rate of 9 percent per annum, and denying petitioner commissions.

The court found that the petitioner had made distributions of the estate to herself but that no similar pro rata distributions had been made to the objectants at the same time. In her defense, petitioner claimed that she made the distributions in error, but in good faith, and requested that any surcharges or interest charges be mitigated.

The court held that every fiduciary has a duty to deal impartially with the beneficiaries. As such, when a distribution is made to one residuary beneficiary, an equal distribution should also be made to the other residuary beneficiaries. The court found that petitioner's claim of good faith in making the payments to herself was belied by the record, that ignorance of the law was no excuse, and that although petitioner had been aware of her overpayments, she had not made the trust whole despite representations by her counsel to the contrary.

Accordingly, summary judgment on this issue in objectants favor was granted.

As to the rate of interest to be charged, the court held that a decision to award pre-judgment interest and at what rate, for surcharges based on breach of fiduciary duty rests within the discretion of the court. That is, pursuant to its power, the court may properly impose interest on surcharges when the interest is warranted to fully compensate a beneficiary for any losses which he may have suffered or gains which he may not have fully realized due to the fiduciary's negligence. Based on the foregoing, the court imposed interest at the rate of nine per cent per annum, to be surcharged against the petitioner and paid directly to the objectants.

With respect to commissions, the court held that statutory commissions must be awarded in the absence of bad faith, breach of trust or mismanagement, neglect of duty, misconduct, disregard of fiduciary duties or other comparable acts of malfeasance or nonfeasance. Based upon its finding of bad faith, and its conclusion that the petitioner was familiar enough with her authority as trustee to be able to make significant payments to herself of trust funds, the petitioner was denied commissions.

In re Wennagel Family Trust, N.Y.L.J., Jan. 22, 2015, p. 34, col. 4 (Sur. Ct., Suffolk Co.).

Document Production

Before the court in *In re Klein* was a contested discovery proceeding in which the petitioner sought the return of certain artwork and furnishings from the decedent's long-time companion. The respondent opposed the relief, claiming that the decedent had given the subject property to her as gifts, and moved to compel the production of the documents related to gifts the decedent had given to others. In response to this demand, the petitioner produced many documents, including the decedent's gift tax returns, but redacted the amounts of all gifts given by the decedent to others, including other confidential information, such as social security numbers. The respondent then moved to compel the production, *inter alia*, of unredacted gift tax returns, and all documents related to the purchase and ownership of the artwork in issue. The petitioner opposed, contending that the redacted portions of the returns were irrelevant to the issue of whether the respondent received the artwork as a gift.

The court agreed with the petitioner, holding that given the confidential nature of tax returns, a party seeking such disclosure must demonstrate that the information contained in the returns is indispensable to the litigation and unavailable from other sources. Within this context, the court held that to the extent that the returns reflected gifts to the respondent and information about the subject artwork, they were relevant to the underlying proceeding and should be produced. In all other respects, production was unwarranted. Although respondent maintained that the redacted portions of the returns could demonstrate the decedent's propensity for gift giving, and whether the decedent had a practice of making substantial gifts, the court concluded that she failed to sufficiently explain how this information related to the issue of whether the decedent had made a gift to her of the artwork. Further, the court held speculative the respondent's claim that information derived from the returns, related to other donees of gifts from the decedent, could provide her with the ability to ascertain whether they had knowledge of the gifts made by the decedent to her.

Finally, although finding the information relevant, the court denied the respondent's request for the production of documents related to the purchase, ownership and insurance coverage of the artwork, based upon the petitioner's representation that he had produced all such documents and had no other such documents in his possession, custody or control.

In re Klein, N.Y.L.J., Dec. 24, 2014, p. 22, col. 3 (Sur. Ct., N.Y. Co.).

Removal of Fiduciary

Before the court were contested proceedings for the removal of a co-trustee and the appointment of a successor co-trustee. The record revealed that the decedent died, testate, survived by a spouse and two sons. Pursuant to the pertinent provisions of his will, the decedent created a trust for the benefit of his spouse, and nominated and appointed his wife and one of his two sons as co-trustees. The will also named the decedent's second son as successor co-trustee in the event his other son was unable to serve, and his sister-in-law (his spouse's sister) as his successor. (The decedent's second son post-deceased him in 2012). Further, the instrument gave the decedent's spouse the power to remove any co-trustee and to substitute another fiduciary by delivering to the then-acting fiduciary a written demand to that effect, provided that the substitute fiduciary be a bank or trust company with fiduciary powers and had a trust department with assets of not less than one billion dollars. Upon admission of the will to probate, letters of trusteeship issued to the named trustees, who each duly qualified.

Thereafter, the decedent's spouse petitioned for removal of the decedent's son as fiduciary, claiming that he borrowed substantial sums of money for his individual use from the trust. She further alleged that she served a written notice and demand upon him in accordance with the decedent's will, and that he refused to cease to act as fiduciary. Simultaneously therewith, the decedent's sister-in-law petitioned for her appointment as successor. The decedent's son opposed both petitions, contending, *inter alia*, that he did not borrow funds from the trust estate, but pledged the trust assets as collateral for a loan, that the powers clause of the will authorized the fiduciaries to borrow funds from themselves or others and to pledge any property as security, that the decedent's spouse agreed to the loan, and that the trust was not in jeopardy by virtue of his stewardship. Further, respondent claimed that if a successor was to be appointed, it could only be a corporate fiduciary, not the decedent's sister-in-law, as provided by the terms of the decedent's will.

The court opined that the testator provided a specific protocol allowing the decedent's spouse to remove her co-fiduciary, and that the decedent's son was effectively removed when he was given written notice of his removal in accordance with the provisions of the decedent's will. Further, the court held that pursuant to those provisions, his replacement must be a corporate fiduciary. Nevertheless, the court concluded that inasmuch as the will directed that at no time could the decedent's spouse act alone, the decedent's son would continue to serve until such time as a corporate fiduciary qualified to act in his place and stead.

In re Buffalino, N.Y.L.J., Jan. 22, 2015, p. 27, col. 6 (Sur. Ct., Suffolk Co.).

Removal of Fiduciary

In *In re Terzani, Jr.*, the decedent's parents sought to remove his estranged spouse as administrator of his estate on the grounds that she had neglected her fiduciary duties and due to hostility.

The decedent died as a result of gunshot wounds suffered during a standoff with the police, who had been called to the marital residence by his spouse after an altercation with him. The decedent was estranged from his spouse and in the midst of divorcing her at the time of his death.

Following the decedent's death, the decedent's parents filed a Notice of Claim with the New York State Police and Office of the Attorney General, and advised the decedent's spouse of their intention to pursue a cause of action for his wrongful death. However, the decedent's spouse refused to sign a waiver and consent to the issuance of limited letters of administration to the decedent's parents allowing them to pursue this claim, and stated at the time that she was disinclined to proceed with the claim herself. Nevertheless, several weeks later, the decedent's spouse petitioned for limited letters of administration, listing, *inter alia*, as an asset of the estate, a possible action for wrongful death against the New York State Police.

The court opined that the burden of proof for removal of a fiduciary rests upon the petitioner. To this extent, a potential conflict between the fiduciary and a party interested in the estate does not necessarily warrant removal, nor does friction or hostility in and of itself require a finding of ineligibility. Rather, when such animosity interferes with the proper administration of an estate, removal is required. Pointedly, the court noted that a fiduciary's dereliction in dealing with pending litigation, or resisting or failing to commence litigation on behalf of the estate without adequate explanation, can be evidence of misconduct or impassable hostility between the parties.

Against this backdrop, the court found, based upon the record at the hearing of the matter, that the decedent's spouse had failed to completely inventory the decedent's assets, had failed to keep a record of the estate property she had discarded, had been cavalier in her attitude regarding the disposal of the decedent's personal effects despite knowing their sentimental value to the decedent's parents, and had unduly delayed in filing a notice of claim or pursuing a cause of action for the decedent's death from which the decedent's parents could benefit. Moreover, given the separation and impending divorce between the decedent and his spouse, and the circumstances surrounding the decedent's death, the court found the relationship between her and the decedent's parents to be hostile.

Accordingly, the court ordered that the decedent's spouse be removed as fiduciary, concluding that the decedent's spouse had been delinquent in her duties, and that the palpable hostility between the parties impeded the administration of the estate.

In re Terzani, Jr., 45 Misc. 3d 1221(A) (Sur. Ct., Dutchess Co.).

Vacate Default

In a contested proceeding for the turnover of assets to the decedent's estate, the Surrogate's Court, Suffolk County, in *In re Krasner*, was confronted with a motion by the respondent to vacate a decree striking her answer. The proceeding had been commenced by the petitioner, the decedent's surviving spouse, against the respondent, the decedent's brother, seeking recovery of one-half of the funds in an annuity account, which petitioner claimed belonged to the estate. The decedent's brother, who had been in a coma since 2010, was represented in the proceeding by his attorney-in-fact. In response to the petition, the respondent, though his attorney-in fact, filed an answer, and a discovery order was issued. Nevertheless, the respondent repeatedly failed to provide responses to petitioner's discovery demands resulting in petitioner moving to strike his answer to her petition. The court conditionally granted the motion, which was unopposed, and the petitioner was awarded monetary sanctions. When respondent still failed to comply with the demands, the court issued a decree awarding petitioner one-half of the disputed funds in issue.

Thereafter, the respondent instituted the subject proceeding to vacate the decree. In support thereof, counsel then representing the respondent alleged that both partners in the firm handling the litigation on respondent's behalf were suffering from medical disabilities at the time the motion to strike was made, which precluded them from opposing the motion, and respondent's timely compliance with the court's directives. More specifically, the respondent explained that one of the partners was being treated for leukemia, and the other was on administrative leave and undergoing psychological evaluation and counseling.

Petitioner opposed the application, arguing that respondent had failed to satisfy the requirements of CPLR 5015, noting, in particular, that the partner in the firm undergoing counseling had participated in court conferences, entered stipulations, and filed motions seeking affirmative relief on the respondent's behalf during the period of time he was purportedly unable to do so. Under these circumstances, petitioner maintained that counsel's recent claims of being medically incapable of representing his client should serve as no excuse for his default on the motion to strike his client's pleading. In addition, petitioner argued that respondent had failed to establish a meritorious defense to the underlying proceeding.

In denying the respondent's application, the court, *inter alia*, relied upon the opinion in *Fremming v. Niedzialowski*, 93 A.D.3d 1336, 940 N.Y.S.2d 764 (4th Dep't 2012), in which the Fourth Department held that while an attorney's illness may, under certain circumstances, constitute a reasonable excuse for a default, it will not in all cases suffice, particularly where counsel is able to practice law despite mental health issues. To this extent, the court noted that it was not entirely clear that respondent's counsel was suffering from his mental issues at the time of the default on the motion, or that these issues prevented him from responding to the motion on his client's behalf despite having ample time to do so. Accordingly, the court found that respondent's default was not excusable.

Further, the court held that respondent had failed to establish a meritorious defense to the application, finding, as petitioner had argued, that there were a number of inconsistencies in respondent's affidavit of merit and her prior assertions during the course of the litigation.

In re Krasner, N.Y.L.J., Jan. 21, 2015, p. 27, col. 4 (Sur. Ct., Suffolk Co.).

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

Florida Update

By David Pratt and Jonathan Galler

David Pratt

DECISIONS OF INTEREST

Attempt to Void One's Own Adoption

In 1961, Lisa Chisholm was given up for adoption by her unwed biological mother in Texas. Her biological father, Teofil Shablowski, did not know that he had a daughter, nor did Texas law at that time require that he be given notice of the adoption. Many years later, Chisholm and Shablowski became acquainted, and he acknowledged that she was his biological daughter. When he died intestate in 2010, a resident of Florida, several distant relatives petitioned to be determined beneficiaries under Florida's intestacy laws. Chisholm, however, argued that as the decedent's birth daughter, she should be the rightful beneficiary. She argued that her adoption was void because, despite Texas law at the time, the decedent's due process rights were violated, having never been provided with notice of the adoption. Florida's Fifth District Court of Appeal reversed and upheld the validity of the adoption, pointing out that both the United States Supreme Court and Florida courts have recognized a distinction in the constitutional protection afforded to married fathers, on the one hand, and unwed fathers, on the other. The Fifth District further stated that in reaching its conclusion it was also guided by the public policy goal of promoting the finality and permanence of adoptions.

Kemp & Associates, Inc. v. Chisholm, 2015 WL 477856 (Fla. 5th DCA Feb. 6, 2015) (not yet final).

Preservation of Personal Jurisdiction Defense

Asserting the defense of lack of personal jurisdiction can be tricky. The defendant generally has to assert the defense at the earliest opportunity and, just as important, the defendant must be cautious not to seek any affirmative beneficial relief, which might inadvertently subject the defendant to the jurisdiction of the court. In this recent Florida breach of trust case, the decedent's son sued the co-trustees of a testamentary trust created under his father's will. The co-trustees served a notice of intent to pay their attorneys' fees from trust assets, pursuant to section 736.0802(10), Fla. Stat. Under this statute, a trustee must serve notice prior to using trust assets to pay its attorney's fees in connection with its defense of a breach of trust claim. Upon receipt of such notice, a beneficiary can move to preclude this use of trust assets. The decedent's son argued that by serving the notice of intent, the co-trustees had sought affirmative relief from the court and had waived their defense of lack of personal jurisdiction. The trial court disagreed, and the Fourth District Court of Appeal affirmed. As the Fourth District explained, any action taken by the court under section 736.0802(10) would be on behalf of the beneficiary seeking to preclude the use of trust assets and would likely not be beneficial to the co-trustees. Merely serving a notice of intent did not constitute action taken by the co-trustees for affirmative relief.

Jonathan Galler

Snider v. Metcalfe, 2015 WL 444497 (Fla. 4th DCA Feb. 4, 2015) (not yet final).

Validity of Trust Protector's Amendment to Trust

There are not many Florida appellate court decisions addressing trust protectors, which is why this recent Fourth District Court of Appeal opinion has drawn plenty of attention. At issue was a family trust for the benefit of the settlor's spouse, who was also the trustee. Upon her death, the remainder was to be divided into two trusts, one for each of the settlor's children, to be administered by an institutional trustee. The children sued the spouse for breach of her duties as trustee of the family trust. The spouse moved to dismiss for lack of standing because the children's trusts, not the children individually, were the remainder beneficiaries. The trial court, however, denied the motion, ruling that under its unambiguous terms, the family trust was to be divided into two shares rather than two new trusts. In response, the spouse appointed a trust protector, as authorized under the terms of the trust, who amended the instrument to make clear that the family trust was to be divided, upon the spouse's death, into two trusts, not just two shares, thereby repositioning the spouse to move to dismiss once again for lack of standing. The trial court again denied the motion, finding that the trust protector's amendment was invalid because it did not further the settlor's unambiguous intent and did not promote the remainder beneficiaries' interests. The appellate court reversed. It held that the terms of the trust were ambiguous, and that the trial court could therefore consider extrinsic evidence of the settlor's intent, including the trust protector's own testimony. The appellate court concluded that the extrinsic evidence presented supported the conclusion that the trust protector's amendments were consistent with the settlor's intent, and the amendments were thus deemed to be valid.

Minassian v. Rachins, 152 So. 3d 719 (Fla. 4th DCA 2015).

Fiduciary's Petition for Review of His Own Attorney's Fees

In this case, one of the beneficiaries of an estate, who was also serving as its personal representative, petitioned for a review of the fees being charged by the attorney that he hired to represent him as personal representative. Initially, the beneficiary did not name himself, in his fiduciary capacity, as a party to the petition. Subsequently, however, he added himself, in his capacity as personal representative, as a co-petitioner. The attorney whose fees were to be reviewed moved to dismiss on grounds that the personal representative is not entitled to petition for review of his own attorney's compensation because it is his burden, as the personal representative, to *defend* such a petition. The trial court agreed and dismissed the petition, but the Second District Court of Appeal reversed. The appellate court held that under section 733.6175, Fla. Stat., the personal representative *does* have the right to ask for review of his own attorney's fees because he is subject to being surcharged for the payment of excessive fees. Further, the appellate court held that even if the fees that were used to pay the attorney's compensation came from a non-probate asset, the probate court is not divested of its authority to determine the reasonableness of those attorney's fees.

Faulkner v. Woodruff, 2015 WL 968723 (Fla. 2d DCA Mar. 6, 2015) (not yet final).

Contractual Arrangement Defeats Testamentary Disposition

The decedent in this case held a 50% ownership interest in a limited liability company. The operating agreement of the LLC imposed certain restrictions upon each member's ability to convey his interests in the company but allowed for transfers to immediate family members during a member's lifetime or at his death. The operating agreement also provided that if the member had not transferred his ownership interest in one of the authorized manners, then upon his death, ownership immediately vests in the deceased member's children. Here, the decedent executed a will, under which his membership interests were to be distributed to his trust. And under the terms of his trust, his girlfriend was to receive a portion of the distributions from the LLC interest. The decedent's children challenged a trial court order determining that the decedent's ownership interest was a probate asset. The Fourth District Court of Appeal reversed, holding that under the provisions of the operating agreement, the decedent's membership interest immediately vested with his children upon his death. Accordingly, the interest was never a probate asset to be distributed to the decedent's trust. The appellate court determined that the children had an immediate property interest under the operating agreement (which was governed by New Jersey law) and, citing another of its own decisions, explained that language contained in a contractual agreement specifically addressing the disposition of property upon death will defeat a testamentary disposition of that same property.

Blechman v. Estate of Blechman, 2015 WL 71730 (Fla. 4th DCA Jan. 7, 2015) (not yet final).

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Trusts and Estates Law Section
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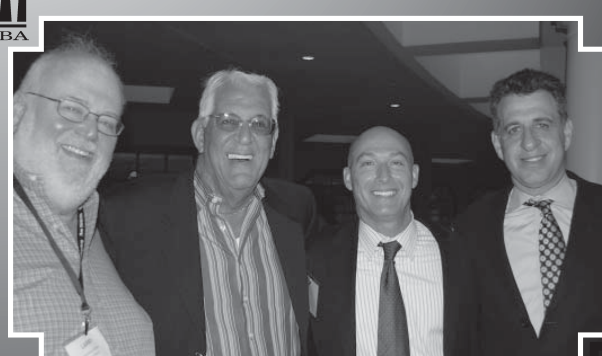

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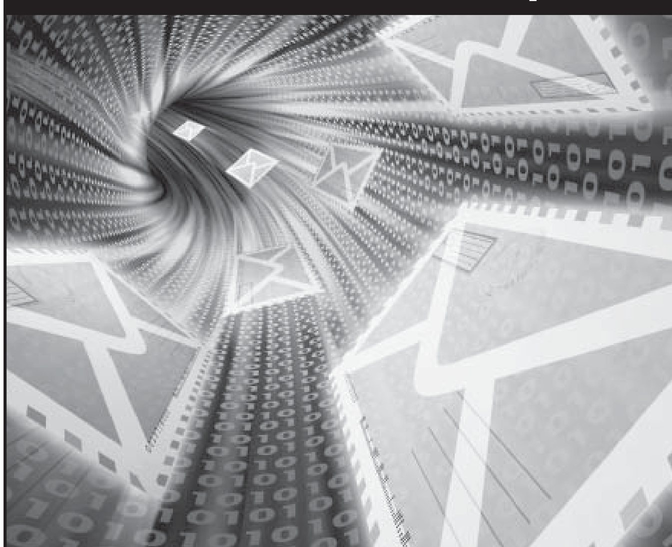

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

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