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Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

Ira M. Bloom

As I prepared to write my final column as Chair of the Trusts and Estates Law Section, I began to reflect on the past and future. For better or for worse, my reflections inevitably led me to New York's Power of Attorney legislation, which has dominated my year and will continue to dominate the remainder of my term.

New York's Power of Attorney legislation (Chapter 644 of the Laws of 2008) was signed into law by Governor Paterson on January 17, 2009, the day before I became Section Chair. Because the law had a March 1, 2009 effective date, I began working on extender legislation to January 1, 2010, which would have prevented the current chaos. Unfortunately, the legislature would only agree to a September 1, 2009 effective date. The extender legislation was signed into law by Governor Paterson on February 27, 2009 (Chapter 4 of the Laws of 2009).

I had initially anticipated that I, along with other Section members, would be involved in educational efforts about the Power of Attorney (POA) legislation. Indeed, in the spring we had programs that provided education about the POA legislation, both at the Spring Meeting in Amelia Island and at the statewide CLE programs later in the spring. Little did I know that most of my energies would be devoted to improving the law.

By early March it became apparent that the law had several glitches for which technical corrections would be necessary. An ad hoc committee on POA legislation was formed and based on their work, I presented various changes to Rose Mary Bailly, Executive Director of the Law Revision Commission, which was the body responsible for producing the current legislation. Eventually, a technical corrections bill was crafted and passed by the Assembly on June 15, 2009 by the controversial vote of 127-0 (A8392a). Unfortunately, the dysfunctional Senate failed to pass a companion bill (S5190), although in July it did manage to pass a private bill preventing escheat. (That legislation was subsequently vetoed by Governor Paterson.)

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NYSBA

On August 27, 2009, our Section sponsored a webcast on the new POA legislation. I served as moderator and executive committee members Bob Freedman and Ron Weiss, along with Rose Mary Bailly, were the panelists. The bar reported that over 600 individuals watched the webcast, as did a small live audience.

Once September 1 came and went, it became clear that the Assembly-passed technical corrections legislation could not be enacted into law because it would retroactively require a statutory short form different from the form that was required as of September 1, resulting in the invalidation of statutory short forms executed after August 31. Why couldn't the Assembly simply have changed the effective date to avoid the retroactive problem? That's simple. The Assembly adjourned in June and will not be in scheduled session until January 2010.

By early October, when we had our Fall Meeting in Syracuse, new glitches in the law had surfaced, particularly in the commercial/business areas. For example, proxies literally must comply with the non-statutory rules under GOL 5-1501B, as must stock powers and powers granted in financing agreements.

As Program Chair for the Syracuse meeting, Marion Fish wisely included a segment on POA legislation. She along with Betsy Hartnett and Mike O'Connor discussed numerous issues involving the statutory short form and the Statutory Major Gifts Rider. In addition, Marion explained new form POA1-IND that must be used in state and New York City tax matters if powers were granted after August 31. I discussed the history of the POA legislation along with the problems in the commercial/business areas, as well as other areas in need of technical correction.

For my talk, I decided to look at the Executive Committee minutes from 2002, when talk of new POA legislation first surfaced. Although our Section made suggestions to the Law Revision Commission throughout the years, approval of the eventual legislation was never put to a vote. Indeed, the only legislation that our Section proposed after 2002 was to increase the gift making authority under the old statutory form from $10,000 to the indexed annual exclusion amount.

In October, NYSBA President Getnick created a working group to deal with the POA legislation, with former President Kate Madigan, a Section member, as chair. The Group, which consists of over 10 sections of the bar, will be working on proposed technical corrections legislation. Hopefully legislation, with appropriate retroactive effect, will be passed in early 2010 by a responsible New York State legislature.

In any event, the POA legislation (in whatever form) will surely be alive and kicking in 2010. Indeed, POA legislation will be an important topic for our Section's January 27, 2010 Program at the Annual Meeting. And, I venture to guess that POA legislation will be the topic of many more programs throughout 2010 and into the foreseeable future.

In closing, I want to thank the officers, Executive Committee members and bar staff for all their help in making my year a most memorable one. I leave with the knowledge and comfort that our Section, which is a wonderful and highly respected body, will be in the hands of my capable successor and friend, Gary Freidman.

Ira M. Bloom

Editor's Message

By the time you're reading this it will be January 2010. Happy New Year!

As I am writing this, however, it is the ides of November; the weather is grim and the holiday spirit, it seems, has yet to arrive. The Senate has just delayed a vote on a bill that would amend the Domestic Relations Law to recognize (legalize) marriages between persons of the same gender, agreeing to vote by the end of 2009. While same-sex marriage legislation is on hold, the legislature, some say, has its attention on the state budget deficit. Currently on the agenda is a law requiring a new New York State license plate with a new and renewal registration fee of $25 for all vehicles, plus another $20 if you want to keep your current license plate number. That's one way to address the budget deficit. Marriage license fees from same-sex couples would be another.

In this issue we have more commentary on the new Power of Attorney law, this time focused on the Statutory Major Gifts Rider. The new Power of Attorney law has certainly got the attention of many New Yorkers. The new Power of Attorney law has addressed a lot of problems in the area of abuse, but it has unintentionally created some new challenges in the area of real property transfers, title insurance, other property transfers for good and adequate consideration, and discretionary powers over certain assets like annuities and life insurance. As Ira Bloom, our Section's outgoing Chair, notes in his *Message*, NYSBA President Michael Getnick has created a multi-section working group to deal with the new Power of Attorney legislation, led by former President Kate Madigan, as chair. This multifaceted group will be working hard on recommending amendments to the new law.

Among the other articles in this issue is one that addresses a serious inconsistency between the Domestic Relations Law and the Estates, Powers and Trusts Law in the area of void and voidable marriages and the marital right of election. The article concludes with a recommendation for a change to the EPTL. I encourage you to submit an article discussing a case or matter or issue that you are or have been recently involved in; perhaps it will be the springboard for an improvement in the laws of the state and the lives of people in your community.

Ian W. MacLean
Editor in Chief

Editor's Postscript: In late December the Governor withdrew the registration fee bill.

With a Name Like SMuGgeR It Has to Be Good

By Stephen Diamond

Effective September 1, 2009, the New York State statutory short form Power of Attorney (sometimes hereinafter "POA") was amended, and a new instrument (the Statutory Major Gifts Rider (sometimes hereinafter "SMuGgeR") was created.[1]

The new statutory short form Power of Attorney (sometimes hereinafter "POA") will probably receive most of the attention, because it is a commonly used instrument. Substantively, however, the new POA is a lesser document than it was before September 1, 2009. A few bells and whistles have been added, but all gift-giving powers have been decanted into the new SMuGgeR.

Gift-giving powers have been clarified and rationalized in the SMuGgeR, and new powers given. In the author's opinion, a radical new gift-giving power may have been legitimized by the SMuGgeR, overturning centuries of practice.

I. Statutory Short Form Power of Attorney; Gift-Giving Powers in Old POA

In the first instance, a Power of Attorney would spell out each and every power granted. The statutory short form Power of Attorney streamlined the instrument. Instead of setting forth all of the powers in full in the instrument, the instrument simply cross-referenced to sections of a statute (in New York, the General Obligations Law), which sets forth the powers in full, including certain gift-giving powers.

II. Gift-Giving Powers in the New SMuGgeR

A. Annual Exclusion Gifts

The power to make annual exclusion gifts (gifts which can be made annually free of federal gift tax) is the only gifting provision expressly set forth in the SMuGgeR.[2] To grant the agent the power to make annual exclusion gifts, the principal must initial this section (as set forth below). All other gifting provisions (other than certain *de minimus* of up to $500 total per annum) must be listed in the Modifications section of the SMuGgeR.[3]

B. Other Direct Gifts

The new statute specifically authorizes a principal to make direct gifts other than gift tax annual exclusion gifts. GOL § 5-1514(3)(a) and (b) provide that a principal may include in a SMuGgeR an authorization to "make gifts up to a specified dollar amount, or unlimited in amount" and to "make gifts to any person or persons."

C. Indirect Gifts

A principal may, on a SMuGgeR, authorize an agent to make the following indirect gifts:

1. Insurance Policies

To "change the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contracts for the benefit of the principal,"[4] and to "procure new, different or additional contracts of insurance on the life of the principal or annuity contract for the benefit of the principal."[5]

2. Retirement Plans

To "designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan."[6]

3. Joint and Other "Pay on Death" Accounts

To do the following with joint accounts:

(a) Joint Accounts: "open, modify or terminate a deposit account in the name of the principal and other joint tenants,"[7] and "open, modify or terminate any other joint account in the name of the principal and other joint tenants."[8]

(b) Bank "In Trust" Accounts: "open, modify or terminate a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law [where trust interest is inalienable], and designate or change the beneficiary or beneficiaries of such account."[9]

(c) Transfer on Death Accounts: "open, modify or terminate a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account."[10]

4. Inter Vivos Trusts

A new statutory power, with no equivalent under the old law, is GOL § 5-1514(c)(8), by which a principal may authorize an agent to "create, amend, revoke, or terminate an inter vivos trust." Although this provision has not been the subject of much discussion, it could be one of the most radical and significant of the changes in the amended law. Revocable Trusts are in common use as Will substitutes. A person can create a Revocable Trust and transfer all of his or her assets to it, and at his or her death the assets will pass to the remaindermen named in the trust agreement. The new statute offers significant new opportunities for estate planning.

There are a few powers which cannot be delegated, under either the old law or under the amended law, such as the power to vote in a governmental election. Another non-delegable power is the power to make a Will.[11]

5. Other Miscellaneous Indirect Gifts; Restrictions on Acts of Agents

The powers discussed above are buttressed by GOL § 5-1514(c)(9), by which a principal may, on a SMuGgeR, authorize an agent to "create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein."

An agent acting pursuant to authority granted in a major gifts rider or a non-statutory Power of Attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.[12]

C. Permissible Donees

The new statute clarifies the permissible donees of direct and indirect gifts. Gifts may be made: (i) outright to individuals; (ii) to trusts established or created for the benefit of an individual; (iii) to Uniform Transfers to Minors Act Accounts for individuals; and (iv) to tuition savings accounts or prepaid tuition plans as defined under § 529 of the Internal Revenue Code for the benefit of an individual.[13]

D. Modifications to SMuGgeR

Because the only gifts specifically authorized in the SMuGgeR are annual gift tax exclusion gifts, gifts in excess of the annual gift tax exclusion, or to beneficiaries other than those in the class of permissible donees set forth in the annual gift tax exclusion section, or other types of transfers (including "indirect gifts") must be custom drafted in the part (b) MODIFICATIONS section of the SMuGgeR. Suggested modifications are discussed below.

III. How and When a SMuGgeR Can and Should Be Used

A. Gift Giving under the Old Power of Attorney

The gift giving aspects of the old Power of Attorney didn't require much reflection. Even if the Attorney-in-Fact tried to abuse the gift giving powers to his/her own benefit, the powers were limited.

1. The maximum amount of the annual exclusion gift was $10,000 per donee (or $20,000 if the principal were married and the spouse agreed to "gift-splitting").
2. The old Power of Attorney had a fuzzy category of indirect gifts. The Attorney-in-Fact could be authorized (i) to make beneficiary designations for insurance policies and retirement plans, and (ii) to open joint accounts with the principal. These powers were not particularly subject to abuse, in part because they were buried in the provisions of the General Obligations Law and were not apparent from the face of the Power of Attorney. In addition, there was case law that these powers could not be exercised unless the principal had separately granted gifting powers to the Attorney-in-Fact.[14]

B. Gift Giving with a SMuGgeR

The legislators in Albany made it as difficult to modify a SMuGgeR as they made it easy to grant powers under a Power of Attorney.

The new statutory Power of Attorney is wide open and totally accessible. There are 15 categories of transactions in which the power to act can be delegated.[15] Boxes for each category are set forth on the form. All the principal has to do is initial each category. If this is too much trouble, the principal need only initial ONE BOX, indicating that he or she wants to delegate all of the previous categories.

The SMuGgeR, on the other hand, is very difficult to access. Other than the annual gift tax exclusion gifts, the SMuGgeR is as opaque as the Power of Attorney is transparent.

C. Optional Suggestions for Modifications to SMuGgeR

Suggested options for gifting provisions are set forth in Schedule A attached to the form SMuGgeR appended to this article (p. 10).

1. Options for Indirect Gifts (Other Than Inter Vivos Trusts)

The suggested formulations on Schedule A to the form SMuGgeR start off with paragraphs numbered 1 through 9. These are based on the provisions of General Obligations Law § 5-1514(3)(c), and relate to indirect gifts (gifts in which the principal retains a current interest, and in most cases in which the beneficial interest of the beneficiary does not come into effect until a later date).

(a) Items 1 and 2 authorize the agent to open, modify or terminate joint bank accounts (with rights of survivorship or as convenience accounts, which are payable to the principal's estate on his or her death).[16]

(b) Item 3 authorizes the agent to open, modify or terminate a Totten Trust bank account. The principal would have unfettered control of the account during his or her life, and the agent would have no present interest. On the principal's death, the account would be payable to the named beneficiary.[17]

(c) Item 4 authorizes the agent to open, modify or terminate a Transfer on Death Security Registration Account.[18]

(d) Items 5 and 6 authorize the agent to change beneficiaries of existing insurance or annuity policies, or to procure new or different policies, and name the beneficiaries thereof.[19]

(e) Item 7 authorizes the agent to designate or change the beneficiaries of any type of retirement or benefit plan.[20]

(f) Item 8 (discussed below) authorizes the agent to create or alter trusts during the principal's lifetime.

(g) Item 9 is a catchall authorization for the agent to "create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiaries therein."

2. Inter Vivos Trusts

The Item 9 catchall is very broad, but in my opinion by itself would not be sufficient to authorize an agent to do a new Will for the principal. Article 3 of the Estates, Powers and Trusts Law (New York's version of the Statute of Wills) provides strict requirements for the execution of a Will. Item 8, however, could radically change the situation.

As noted above, revocable trusts have long been used as Will substitutes. A trust used in this manner is often called a living trust. Revocable "living" trusts are not subject to the execution requirements of Article 3 of the EPTL. Because a revocable trust is a functional equivalent of a Will, it appears from a literal reading of the new statute that the barrier prohibiting an agent from executing a Will on behalf of a principal may have been functionally breached, and Item 8 on Schedule A takes full advantage of this opening. It reads:

> TO CREATE, AMEND, REVOKE OR TERMINATE, AND TO FUND, AN INTER VIVOS TRUST (INCLUDING WITHOUT LIMITATION A REVOCABLE TRUST FOR MY LIFE BENEFIT, WHICH MAY [BUT NEED NOT] INCLUDE PROVISIONS FOR PAYMENT OF PRINCIPAL AND INCOME TO ANOTHER PERSON(S) DURING MY LIFE, AND FOR THE TRANSFER OF TRUST ASSETS TO ANOTHER PERSON(S) AT MY DEATH).[21]

3. Direct Gifts

The bottom half of Schedule A contains suggested formulations for direct gifts. This is broken down into two parts: (i) amounts of gifts, and (ii) permissible donees.

The suggestions listed for amounts are:

- up to $__________ per year
- up to an aggregate of $____________
- unlimited in amount

The suggestions for permissible donees are:

- to ______________________ [name of person]
- to ______________________ [name of person]
- to _____A___, _____B___ and ____C____ [names of persons], [in equal amounts; or: in equal or unequal amounts (including all to one and none to one or more of them)]
- to members of a class consisting of [e.g., my children, my descendants], [in equal amounts; or: in equal or unequal amounts (including all to one and none to one or more of them)]
- to _________________________ [name of charity]
- in equal or unequal amounts to one or more organizations gifts to which qualify for the federal income tax, estate tax and gift tax charitable deduction

These suggestions are not exhaustive, and are not based on any specific statutory language. Other formulations are possible.

4. Agent as Permissible Donee[22]

One more detail should be emphasized, because it can be so easy to overlook, and so conducive to a malpractice suit if you forget to cover it: if the agent is to be a permissible donee, specific authorization must be given in a section of the SMuGgeR other than the section in which the gift giving is authorized.[23] Each of the gift-giving authorizations can be listed separately in this provision. Suggested alternate provisions are:

- All transfers listed in Section (a) (annual exclusion gifts)
- All transfers listed in Section (b) (other gifts)
- All transfers listed in Sections (a) and (b)

IV. Opinion as to Use of a SMuGgeR

I would be remiss if I set forth the options available with respect to a SMuGgeR and failed to give you any thoughts as to what options to use. I emphasize that this is opinion only, and reasonable persons could disagree.

The first tier of options would be annual exclusion gifts. I would side with the reasoning of the persons who crafted the new POA and the SMuGgeR, and say that the federal annual gift tax exclusion authorization is pretty much universal, and should be offered to clients as a matter of course. I would even go so far as to say that it needn't necessarily be discussed in detail at initial meetings with clients. It could be presented to and discussed with clients at the time of execution of other testamentary instruments. There are two main reasons for this opinion:

(i) In my opinion, the annual exclusion gift-giving power is one of the most valuable, useful and inexpensive, but under-appreciated, estate planning techniques available.[24] It can lie dormant

(i) ... for years until needed. It often is not considered until it is needed because of a deterioration in the principal's health (such as Alzheimer's), but by then the client often does not have the capacity to execute an instrument granting the power.

(ii) Conversely, with its limitation on the amount which can be given per person, it would be hard for an agent to do much damage even if he or she tried to abuse the power.

The next tier would be the indirect gifts discussed above. While the power to make these gifts could be very useful, they could be subject to serious abuse by an agent (such as a child who is unhappy because his or her siblings had more toys when they were little; or the child who decides he or she is entitled to more because he or she is taking care of the parent in the parent's dotage, and his or her siblings don't contribute financially, emotionally or logistically). I suggest they be discussed as a matter of course with the client, and implemented where useful.

The third tier would be direct gifts (other than annual gift tax exclusion gifts). While this could be a valuable power, it is likely that it should be used only in limited circumstances. It could be raised with the client if the estate planning interview indicates it might be useful.

V. Conclusion

The SMuGgeR is rich in opportunities for bringing estate planning for clients into the 21st century, but is equally rich in opportunities for abuse. If the estate planner takes the time and effort to learn about it and use it properly, it can be a valuable new tool.

Endnotes

1. 2009 N.Y. Laws ch. 644; 2009 N.Y. Laws ch. 4. For ease of reference, all instruments granting gifting powers shall be referred to as "Statutory Major Gifts Riders" (which are riders to a Power of Attorney). The gifting powers can also be contained in a stand-alone "non-statutory Power of Attorney."
2. The new statute corrects a glitch in the previous statute. Former N.Y. GOL § 5-1502M(1) referred to gifts of $10,000. Although IRC 2503 refers to $10,000 as the annual amount, the $10,000 is subject to cost-of-living adjustments. In 2009 the amount is $13,000. GOL § 5-1514(6)(a) automatically adjusts these cost-of-living increases.
3. "(b) MODIFICATION

    Use this section if you wish to authorize gifts in excess of the above amount [the gift tax annual exclusion amount] [or] gifts to other beneficiaries…

    (__) I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.
4. GOL § 5-1514(c)(5).
5. GOL § 5-1514(c)(6).
6. GOL § 5-1514(c)(7).
7. GOL § 5-1504(c)(1).
8. GOL § 5-1504(c)(2).
9. GOL § 5-1514(c)(3).
10. GOL § 5-1514(c)(4).
11. The law governing the execution of Wills is set forth in Article 3 of the EPTL.
12. GOL § 5-1514(5).
13. GOL § 5-1514(3)(c) (last unlettered, unnumbered paragraph).
14. Rose Mary Bailly and Barbara Hancock, *Changes for Powers of Attorney in New York*, NYSBA Trusts and Estates L. Section Newsl., Spring 2009, Vol. 42, No. 1, p. 7.
15. These categories are: real estate transactions; chattel and goods transactions; bond, share and commodity transactions; banking transactions; business operating transactions; insurance transactions; estate transactions; claims and litigations; personal and family maintenance; benefits from governmental programs or civil or military service; health care billing and payment matters; records, reports and statements; retirement benefit transactions; tax matters; and "all other matters."
16. *1. to open, modify or terminate a deposit account in the name of the principal and other joint tenants (with rights of survivorship, or as "convenience"' accounts).*

    2. to open, modify or terminate any other joint account in the name of myself the principal and other joint tenants (with rights of survivorship or as "convenience" accounts).
17. *3. to open, modify or terminate a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law (a "Totten Trust"), and designate or change the beneficiary or beneficiaries of such account(s).*
18. *4. to open, modify or terminate a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law (a Transfer on Death Security Registration Account), and designate or change the beneficiary(ies of such) account.*
19. *5. to change the beneficiary(ies) of any contract of insurance on my life or annuity contract for my benefit.*

    6. to procure new, different or additional contracts of insurance on my life or annuity contracts for my benefit and designate the beneficiary(ies) of any such contract.
20. *7. to designate or change the beneficiary(ies) of any type of retirement benefit or plan.*
21. Disclaimer: this formulation pushes the envelope, and I cannot guarantee that it would be upheld.
22. There could be some concern that the power of an agent to make gifts to himself or herself might be considered by the IRS to be a taxable general power of appointment. I don't believe this is a serious concern, but it needs mentioning.
23. The form contains the following provision: *If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted and any limitations and guidelines.*
24. It can also be very effective: for example, a married person with 4 children or grandchildren could give away $104,000 a year free of transfer tax ($13,000 per donee exclusion, doubled for a spousal split gift—$26,000 per donee—times 4 donees).

Stephen C.F. Diamond is a trusts and estates attorney focusing his practice on taxation, planning, administration and Surrogate's Court at Teahan & Constantino in Millbrook, New York. He has lectured in NYSBA Practical Skills Courses and the Dutchess County Guardian Ad Litem Training Program (primarily on the topic of accountings), and has also published in the field.

APPENDIX

POWER OF ATTORNEY
NEW YORK STATUTORY MAJOR GIFTS RIDER

AUTHORIZATION TO MAKE MAJOR GIFTS OR OTHER TRANSFERS

CAUTION TO THE PRINCIPAL: *This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the "Grant of Authority" section of the statutory short form Power of Attorney (under personal and family maintenance), or other transfers of your money or other property during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (I) of the "Grant of Authority" section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Major gifts or other transfers" are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.*

This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS:

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. ***If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.***

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(______) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. ***If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.***

(_____) I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

____

____

____

____

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE MAJOR GIFTS OR OTHER TRANSFERS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(_____) I grant specific authority for the following agent(s) to make the following major gifts or other transfers to himself or herself:

____

____

____

____

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Major Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

IN WITNESS WHEREOF, I have hereunto signed my name on ____________________, 20_____.

PRINCIPAL signs here: ____

[signature of principal]

ACKNOWLEDGMENT IN NEW YORK STATE

STATE OF NEW YORK)

COUNTY OF) ss.:

On the _________ day of ___________________, in the year _____________, before me, the undersigned, a Notary Public in and for said state, personally appeared ____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

____

Notary Public

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. ***I am not named herein as a permissible recipient of major gifts.***

Signature of Witness 1	Signature of Witness 2
Date	Date
Print Name	Print Name
Address	Address
City, State, Zip Code	City, State, Zip Code

(g) THIS DOCUMENT PREPARED BY:

____

SCHEDULE A

Suggested Formulations for Modifications to SMGR

1. *To open, modify or terminate a deposit account in the name of myself and other joint tenants (with rights of survivorship).*
2. *To open, modify or terminate any other joint account in the name of myself and other joint tenants (with rights of survivorship).*
3. *To open, modify or terminate a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law (a "Totten Trust"), and designate or change the beneficiary or beneficiaries of such account(s).*
4. *To open, modify or terminate an account as described in part four of article thirteen of the estates, powers and trusts law (a "Transfer on Death Security Registration Account"), and designate or change the beneficiary(ies) of such account.*
5. *To change the beneficiary(ies) of any contract of insurance on my life or annuity contract for my benefit.*
6. *To procure new, different or additional contracts of insurance on my life or annuity contracts for my benefit and designate the beneficiary(ies) of any such contract.*
7. *To designate or change the beneficiary(ies) of any type of retirement benefit or plan.*
8. *To create, amend, revoke or terminate, and to fund, an inter vivos trust (including without limitation a revocable trust for my life benefit, which may [but need not] include provisions for payment of principal and income to another person(s) during my life, and for the transfer of trust assets to another person(s) at my death).*
9. *To create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary(ies) therein.*

* * *

To make gifts, in my agent's discretion

- *up to $__________________ per year*
- *up to an aggregate of $__________________*
- *unlimited in amount*
- *to ____ [name of person]*
- *in equal or unequal amounts to __A__, __B__ and __C__ [names of persons] (including all to one, and none to one or more of them)*
- *in equal or unequal amounts to a class consisting of [e.g., my children, my descendants] (including all to one and none to one or more of them)*
- *to ____ [name of charity]*
- *in equal or unequal amounts to one or more organizations gifts to which qualify for the federal income tax, estate tax and gift tax charitable deduction*

'Til Death Do Us Part: Post-Death Annulment of Marriage and the Right of Election

By Hon. C. Raymond Radigan and Jennifer F. Hillman

New York Estates, Powers and Trusts Law (EPTL) 5-1.1-A allows a surviving spouse a personal right of election to take a share of a decedent's estate when the parties are in fact married on the date of the decedent's death. A husband or wife is a surviving spouse within the meaning of EPTL 5-1.1-A unless it can be established satisfactorily to the court that any of the grounds for disqualification contained in EPTL 5-1.2 exist.

This article specifically addresses post-death annulment of marriages and an inconsistency in the law highlighted by several recent cases. Essentially, under DRL § 140, a voidable marriage may be annulled post-death. However, under EPTL 5-1.2, the disqualification statute, status as a surviving spouse and any disqualification from taking an elective share is determined at the time of death of the decedent. Thus, a marriage may be annulled post-death, yet the former spouse will still be able to take his or her elected share of the decedent's estate. This incongruous result should be remedied by the legislature.

Post-Death Annulments

Section 140 of the Domestic Relations Law provides for the commencement of an action to annul a marriage. This action may be brought by one of the parties to the marriage or, under certain circumstances, by a guardian of the person, guardian *ad litem*, parent, relative who has an interest to void the marriage, or next friend of the party to the marriage.[1]

Further, it is possible and permissible to bring this action after the death of one of the spouses. For example, in *Bennett v. Thomas*,[2] the decedent's sons, suing individually and as executors of their mother's estate, alleged an interest in their mother's estate as grounds to void their mother's marriage to her surviving husband after her death. The court determined that such an allegation was sufficient to survive a motion for summary judgment. However, because the husband's "right to elect against his wife's estate became fixed and unalterable upon the wife's death," the sons would have to establish at trial an interest in the estate other than simply defeating the husband's right of election, in order to have the allegedly voidable marriage declared a nullity after the spouse's death.[3]

This is where the DRL and the EPTL begin to differ. The term "surviving spouse" in EPTL 5-1.1-A presupposes that a valid marriage existed at the time of death. Status has even been deemed a condition precedent to taking an elective share under the EPTL.[4] It has long been the rule in the Surrogate's Court that as a threshold issue, status of an objectant to a will, including a surviving spouse, should be determined in a preliminary hearing.[5]

In addition, EPTL 5-1.2 sets forth circumstances in which a surviving spouse may be disqualified from taking an elective share. In particular, EPTL 5-1.2(a)(1) states a surviving spouse is disqualified if it is satisfactorily established to the court having jurisdiction of the action or proceeding that:

> A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state, ***was in effect when the deceased died*** (emphasis added).

Thus, a post-death annulment would not disqualify a surviving spouse from taking an elective share.

The distinction between void marriages and voidable marriages has proven interesting in this context of survivor rights and an elective share. Void marriages, as defined by DRL §§ 5 and 6 including bigamous marriages, incestuous marriages and those involving minors, are a legal nullity that never existed in the first place.[6] Because the marriage never legally existed, it did not exist at the time of the decedent's death, and thus the surviving spouse is unable to take an elective share. For example, in *Estate of Antonio Sgagliardich*, the court stated it was a question of fact whether there was a void bigamous marriage, and if the marriage was void, the alleged surviving spouse would be unable to take an elective share.[7] Conversely, voidable marriages are valid unless and until they are attacked in an annulment proceeding. Currently, only a few states allow after-death challenges of voidable marriages on grounds of standing.[8] Thus, in most states the status as a surviving spouse and the right to an elective share are fixed at the time of death.

However, New York is one of the states where after-death challenges are permitted under the DRL. Yet, this status change has no effect on property rights to the decedent's estate. This is so because of the explicit requirement within the disqualification statute that an annulment or declaration that the marriage was a nullity must have been in effect when the deceased died.

Essentially, a voidable marriage due to force, duress, or incompetence may be annulled after death, but a so-called scoundrel spouse or death-bed bride or groom will still be able to take an elective share of the decedent's estate. Recent cases illustrate this inequitable result.

Recent Case Law

In re Wang,[9] a recent case out of the Surrogate's Court, Kings County, highlights this inconsistency between the DRL and the EPTL. In *Wang*, the petitioner had served as the decedent's caretaker for the last ten years of his life and married him just one year before he died. Procedurally, the petitioner filed a petition seeking a decree determining that she was entitled to take her elective share against the estate and that her Notice of Election was properly served, filed and recorded as required by law. Respondents, the co-executors of the estate and the decedent's sons, filed a verified answer alleging various affirmative defenses and counterclaims, including those seeking to have the marriage between the decedent and the petitioner deemed null and void *ab initio*, to annul the marriage *nunc pro tunc* based upon the decedent's mental state, and otherwise to dismiss the petition and vacate the Notice of Election. Petitioner moved for summary judgment on her entitlement to take an elective share of the estate.

In examining the motion, the court first dismissed respondents' claims that the motion was premature and required discovery, finding that this could be determined on the legal issues raised. The court opined that pursuant to DRL § 7, a marriage is voidable, not void, if one of the parties was incapable of consenting to marriage for want of understanding, or if any defenses to the marriage existed including force, duress or fraud. The court stated that it is established law that a voidable marriage is only void from the time its nullity is declared by a court. Thus, even if the marriage were annulled, it would be declared a nullity as of the date of the annulment, and the decedent and the petitioner would have been deemed married at the time the decedent died. Accordingly, the requirements for disqualification under EPTL 5-1.2 did not exist, and the petitioner was able to take her elective share. In addition, because the respondents had not provided any legal authority for the court to do so, the court declined to apply equitable estoppel.

While this result is clearly required by the law, it is facially unjust. Indeed, the court explicitly took note of this injustice:

> While this may appear incongruous and seemingly invite a plethora of surreptitious 'deathbed marriages' as a means of obtaining one third of a decedent's estate immune from challenge, this is simply the state of the law. It is not for this Court to write disqualifications into EPTL 5-1.2 or alter Domestic Relations Law § 7, which makes a voidable marriage void from the time its nullity is declared, rather than from the time of the marriage.[10]

This concept that status is determined on the date of death is a long-standing legal principle. For example, the court in *In re McKinley's Estate*,[11] a 1910 case from the Surrogate's Court of Cattaraugus County, came to the same result, nearly a hundred years earlier, as the court in *Wang*. In *McKinley*, the surviving spouse had remarried believing in good faith that her first husband was dead. He was not, but had been absent for seven years. Even though her second marriage was deemed voidable by the court, she was entitled to her dower on the death of her second husband because the marriage was merely voidable and because it was not annulled during the decedent's lifetime. "Such marriage remained in full force and effect down to the time of his death, and the rights of claimant must be determined by the conditions existing at the time of his death."[12]

As a policy issue, there is a need for finality concerning status. This need for finality concerning status may be the rationale behind establishing status as of the date of death. This issue was addressed recently by the Surrogate's Court, Suffolk County, in *In re Creighton*.[13] In *Creighton*, there was a pending motion to dismiss an answer filed to the petition for probate of a testamentary instrument based upon the petitioner's alleged lack of standing. The only issue before the court was the threshold issue of the decedent's marital status. Respondent argued the decedent's physical state at the time the marriage ceremony was performed made it unfair to allow the marriage to be deemed valid. The ceremony occurred while the decedent was in hospice shortly before his death. In its decision, the court opined that marriages that may be annulled after the death of one of the spouses for some purposes cannot be used to disqualify a surviving spouse under EPTL 5-1.2. In addition, the court stated that while it was

> [m]indful of its position as a court of equity, this court is not, however, inclined to begin looking behind the validity of every marriage entered into when the decedent

> may have been in a weakened or compromised state, particularly where, as here, the person performing the ceremony was satisfied as to the decedent's competence to do so.[14]

Agreeing with the rule that "marriages that may be annulled after the death of one of the spouses for some purposes cannot be used to disqualify a surviving spouse under EPTL 5-1.2(a)(1),"[15] the court determined the son did not have standing to file objections to the testamentary instrument.

Proposed Legislation

As discussed above, EPTL 5-1.2, as drafted, leads to inequitable results. More importantly, however, it is inconsistent with the DRL on this issue. While the DRL allows voidable marriages to be annulled after death, the EPTL does not provide any recourse under similar circumstances.

As a potential solution to this inequity, the Uniform Probate Code bases the elective share on marital property, giving a surviving spouse very little or nothing by right if the marriage lasts less than a certain amount of time.[16] This is similar to the federal government's requirement that a valid marriage must last for nine months prior to death in order for a surviving spouse to receive federal Social Security benefits.[17] Although changes instituting these time limit concepts may alleviate the inequities of "deathbed marriages" by making these marriages less beneficial for disingenuous individuals, these changes could create other inequities where deaths are untimely and/or accidental.

Instead, the EPTL should be amended to make it compatible and consistent with the DRL. The EPTL should reflect and honor the remedial actions authorized under the DRL, while maintaining the appropriate right of election statute of limitations under EPTL 5-1.1-A. Such an amendment should provide consistency, while still being mindful of the policy need for finality. Moreover, it should embody the concept that the timing requirements for filing a right of election can also apply to challenges to status within the confines of that proceeding. Accordingly, we propose that subsection (1) of EPTL 5-1.2(a) be redrafted to state:

> A final decree or judgment of divorce,[18] of annulment or declaring the nullity of a marriage or dissolving such marriage on the grounds of absence, recognized as valid under the laws of this state, whenever effected.

This change would provide consistency, alleviate concerns regarding finality and still provide some recourse for the estate.

Endnotes

1. See N.Y. Domestic Relations Law § 5-7 & 140 (DRL) (West McKinney's & Supp. 2009) (and the cases cited therein).
2. 38 A.D.2d 682; 327 N.Y.S.2d 139 (4th Dep't 1971).
3. *Id.*
4. *In re Wang*, 20 Misc. 3d 691; 864 N.Y.S.2d 710 (Sur. Ct., Kings Co. 2008).
5. *See In re Levi*, N.Y.L.J., March 18, 1996 , p. 31, col. 1 (Sur. Ct., Nassau Co.). This article does not address the circumstances where a fraudulent or invalid marriage exists. If the status of an individual as a surviving spouse is contested because it is believed that a valid marriage did not exist, that is also a preliminary issue, but is not the circumstances addressed in this article. Instead, this article focuses on the circumstances where a valid marriage exists, but because it was procured by force, or duress, or as otherwise defined by DRL § 7, that marriage was voidable.
6. Another recent case, *In re Kaminester*, N.Y.L.J., October 23, 2009, p. 36, col. 1 (Sur. Ct., N.Y. Co. 2009), determined that a marriage revoked under NY Mental Hygiene Law § 81.29, unlike a marriage annulled for lack of capacity under DRL § 7, is void *ab initio*, and thus is deemed never to have existed. Accordingly, the purported surviving spouse was unable to exercise a spousal right of election.
7. *Estate of Antonio Sgagliardich*, N.Y.L.J., July 2, 2008, p. 41, col. 1 (Sur. Ct., Bronx Co.).
8. *See* Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 K.Y.L.J. 275 (2007-2008).
9. 20 Misc. 3d 691; 864 N.Y.S.2d 710 (Sur. Ct., Kings Co. 2008).
10. *Id.* at 697; N.Y.S.2d at 716.
11. *In re McKinley's Estate*, 66 Misc. 126 (Sur. Ct., Cattaraugus Co. 1910).
12. *Id.* at 132.
13. *In re Creighton*, N.Y.L.J., July 23, 2008, p. 32, col. 5 (Sur. Ct., Suffolk Co.).
14. *Id.*
15. *Id.* (citations omitted).
16. Uniform Probate Code § 2-202.
17. 42 U.S.C. § 402(e) & (f). For a further discussion of this concept, see Turnipseed, *supra*.
18. To the extent that a final decree or judgment of divorce is necessary, this requirement is consistent with the DRL. Divorce proceedings terminate upon the death of a spouse, unless all that remains is signing the judgment by the court. *Cornell v. Cornell*, 7 N.Y.2d 164 (1959).

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Will the Economic Recovery Act Help Protect Your Home from the Cost of Long-Term Care?

By Anthony J. Enea

Although the answer to the question posed above is a resounding no, I am hopeful that the title of this Article will attract your attention to a subject that is all too often neglected until a health-care crisis has occurred. During this period of economic and financial turmoil, most Americans, including a significantly large percentage of seniors, have seen their life savings, if invested in securities, real estate or with Bernie Madoff, significantly diminished. It would be truly tragic if these same seniors fail to take the necessary steps to protect their homes and savings from the cost of long-term care. The Center for Retirement Research at Boston College has recently reported that approximately two-thirds of U.S. households are at risk of being unable to maintain their standard of living when long-term care costs are considered.[1]

Even with the recent downturn, it is not unusual for the home to be the single largest asset that one owns. In fact, as of January 2009, the median price of a home in Westchester County was reported to be $529,000. Thus, taking prudent steps to protect the primary residence from the cost of long term care (nursing home or home-care costs) is advisable.

For Medicaid purposes, the primary residence is known as the "homestead" and is an exempt asset (does not affect eligibility for Medicaid), so long as it is occupied by the applicant, the applicant's spouse or the applicant's minor, disabled or blind child.[2] The homestead can be a one, two or three family home, condo or co-op and still be exempt for Medicaid eligibility purposes but any net income is not exempt.[3] However, the homestead is an asset against which Medicaid can have a lien.

The homestead can be transferred to five categories of people without affecting Medicaid eligibility: (1) Spouse; (2) Minor Child; (3) Disabled or blind child of any age; (4) Adult child who has lived in the home of the parent for at least two years immediately prior to the parent being institutionalized and who has been a care giver to the parent; and (5) A sibling of the Medicaid applicant who has resided in the home for at least one year prior to the institutionalization and who has an equity interest in the home.

With respect to transfers of the homestead that are not exempt, the enactment of the Deficit Reduction Act of 2005, effective February 8, 2006 ("DRA"), affected Medicaid eligibility and the transfer of asset rules in three significant ways:

1. Creation of a sixty (60) month look back period for all transfers of assets, irrespective of whether they are outright transfers or transfers to certain trusts.

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

Under the DRA, the penalty period for a non-exempt transfer of assets made within the sixty (60) month look back period will commence when the applicant has $13,800 or less, is receiving institutional care (in a nursing home), has applied to Medicaid for assistance, and the application would be approved but for the penalty period imposed because of the gift.

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

3. An applicant's Homestead (house, condo, co-op) in New York with equity above $750,000 will render an applicant ineligible for Medicaid. This provision does not apply if a spouse, child under age of 21, or a blind or disabled child resides in the house. Homeowners will have the ability to reduce their equity through a reverse mortgage or home equity loan.

Once the decision is made to transfer the primary residence to someone other than a spouse, for Medicaid planning purposes, there are generally three planning options available:

(a) **Outright Transfer of the Residence Without the Reservation of a Life Estate**. Perhaps the least desirable option available, as the transferee of the property will receive the transferor's original cost basis in the property (original purchase price/value upon receipt plus capital improvements), and the outright transfer is a completed gift subject to gift taxes. The outright transfer of the residence would be subject to a sixty (60) month look back period.

Additionally, from a tax perspective, the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code ("IRC") § 121(a) principal residence exclusion for capital gains of $250,000 (single person) or $500,000 (married couple) unless the transferee owns and resides in the premises for two out of the five preceding years. Any Veteran's, STAR and Senior Citizen's Exemptions are also lost by an outright transfer.

(b) **Transfer of the Residence with the Reservation of a Life Estate**. The DRA has significantly reduced the effectiveness of this option. Under the DRA a transfer of real property by deed with a retained life estate will create a five (5) year look back period and effectively a five (5) year period of ineligibility.

The most significant problem in utilizing a deed with the reservation of a life estate occurs if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the step up in cost basis that is generally available upon the death of the transferor; and (b) pursuant to Medicaid rules the life tenant is entitled to a portion of the proceeds of sale based on the value of his or her life estate. Depending on the age of the life tenant, this portion of the proceeds could be significant, and will be considered an available resource for Medicaid eligibility purposes. The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored with the client.

(c) **Transfer to an Irrevocable Income Only Trust a/k/a ("Medicaid Qualifying Trust")**. As a result of the enactment of the DRA, and from a purely Medicaid Planning perspective, the use of the Irrevocable Income Only Trust remains, in my opinion, the most logical and best option. The period of ineligibility resulting from a transfer of the residence to the Trust will effectively be five (5) years. Use of the Trust will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as it is possible to utilize the transferor's personal residence exclusion of up to $500,000 if married, and $250,000 if single, by reserving in the trust instrument the power to the Grantor(s), in a non-fiduciary capacity and without the approval and consent of a fiduciary, to reacquire all or any part of the trust corpus by substituting property in the trust with property of equivalent value. The Grantor(s) will be considered the owner for income tax purposes.[4] Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor.[5]

The transfer of the residence to the Irrevocable Income Only Trust is a taxable gift of a future interest and, thus, the annual exclusion is not available ($13,000 per person). Full value of the premises must be reported on the gift tax return. If the value is more than the transferor's remaining lifetime gift tax exclusion ($1,000,000), gift taxes are due.

If a limited power of appointment is retained, the gift to the trust is incomplete and no gift tax return is technically required.[6]

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

Conclusion

Irrespective of which specific measures are taken to protect the primary residence, the critical element is that some steps be taken to do so. As I often tell clients, until the premises are transferred nothing has been done to protect the premises from a potential Medicaid claim or from affecting your eligibility for Medicaid.

Endnotes

1. Alicia H. Munnell, et al., *Long Term Care Costs and the National Retirement Risk Index*, The Center for Retirement Research at Boston College, March 2009, No. 9-7, available at http://crr.bc.edu/images/stories/Briefs/ib_9-7.pdf.
2. N.Y. Social Services Law § 366(2) (a), 18 N.Y.C.R.R. § 360-1.4(f).
3. 18 N.Y.C.R.R. § 360-1.4(f), § 360-4.3(d).
4. IRC § 675(4).
5. IRC § 2036(a).
6. Treas. Reg. § 25.2511-2(b).

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Raising the Gates (and Valuation Discounts) on Hedge Fund Interests

By Marcus A. Ewald, CFA

Although its roots trace to the mid-20th century, the hedge fund industry began to attract significant attention in the early 1990s from institutional and individual investors alike seeking to obtain additional returns and to diversify their respective portfolios with alternative investment opportunities. Hedge funds are essentially private investment vehicles that pursue absolute returns on their underlying investments through a combination of both traditional and non-traditional portfolio management techniques. These funds are largely identifiable by their structure, which in the most simple form is a limited partnership whereby the manager is the general partner and the investors are the limited partners. Further, the investors in these alternative investment vehicles must be accredited investors, as defined by certain earnings and net worth thresholds based on jurisdiction. As a result, many wealthy individual investors currently hold limited partner interests in various hedge funds.

Oftentimes, these interests are overlooked as estate planning opportunities, or even as investments for which valuation discounts are applicable in the context of a gift or estate tax filing. This may be due to the fact that the managers of the hedge funds typically provide periodic reports to their respective investors outlining the net asset value ("NAV") of the fund, which is often assumed to represent the value that could be realized by the investor in a relatively short period of time. However, most hedge funds are subject to a limited partnership agreement or similar document that includes lock-up periods preventing the investor from withdrawing its investment for a certain period of time following the initial funding. Further, upon the expiration of the lock-up period, the fund may include a notice period whereby the fund is not required to immediately honor an investor's redemption request. These factors limit the liquidity available to the owner of a hedge fund interest and support the notion for consideration of a valuation discount. Thus, simply relying upon a client's pro-rata allocation of the NAV of a particular fund may lead to an overvaluation of such interest and a corresponding overpayment of gift and estate taxes.

In addition, the opportunity for seeking valuation discounts is further heightened during periods of economic uncertainty and market decline, such as the environment that prevailed for much of 2009 following the financial crisis precipitated by the failures of several large investment banks in 2008. Although hedge funds historically provided superior returns to investors, the performance of the industry declined significantly during this period. In response, many hedge funds received increased requests for redemptions from investors, prompting such funds to indefinitely suspend redemptions, or "raise the gates," in an attempt to relieve existing market pressures. The suspension of withdrawals, or at least the threat of such occurrence for a particular fund, further reduces the liquidity available to a hedge fund investor.

Applicability of Valuation Discounts

Hedge funds are unique as investment opportunities for a number of reasons, including their investment flexibility, performance-based fees, and minimum investment requirements. Yet, perhaps one of the industry's most notable characteristics is the legal structure of many hedge funds. In this capacity, a hedge fund interest is generally subject to a limited partnership agreement that contains a number of provisions limiting the marketability of such interest beyond normal supply-and-demand considerations.

Although hedge fund agreements are generally less restrictive than that of a typical family limited partnership, valuation discounts are still applicable, albeit on a reduced scale, primarily as the result of (1) lock-up provisions and (2) notice periods. In particular, most hedge funds impose lock-up periods that prevent an investor from withdrawing its investment for a certain stated period of time following the initial date of funding. Additionally, even following expiration of the lock-up period, hedge funds maintain notice periods that limit redemptions to certain time intervals, such as quarterly or semiannually, during which period of time the investor is subject to risk that the NAV of its interest will decline. In other words, investors can only redeem their interests at certain points throughout the year and only after providing the general partner or manager with stated advance notice. Given that the hedge fund itself is often invested in illiquid investments, the notice period provides the manager with the time required to generate the funds necessary to redeem a particular interest.

The specific terms and characteristics of an individual fund's particular lock-up provisions and notice periods are pertinent in deriving an appropriate valuation discount. The most important factor in this regard is a determination of the length of time that an investor would incur prior to the realization of a return of its investment. For example, an investor that invested one year ago in a fund with a three-year lock-up period has a minimum holding period of two years. Further, even at the three-year anniversary of the initial investment, the investor may only redeem its interest upon providing sufficient advance notice, at which point the manager is generally allowed a period of time before it is required to distribute any funds to the investor.

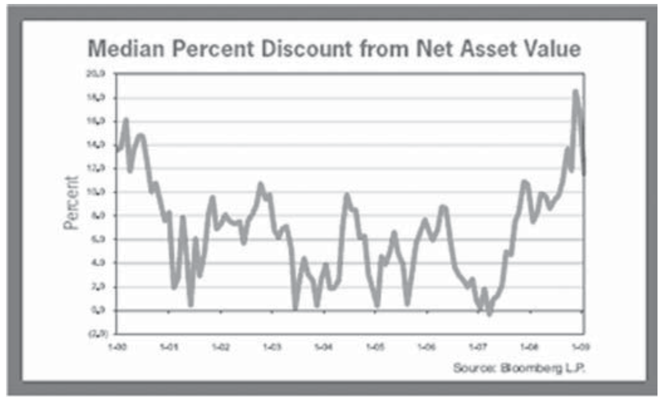
The duration of the holding period is a key factor, for the longer the likely holding period, the higher the applicable discount. The estimated period of time to redeem the interest can then be considered in conjunction with empirical evidence of discounts for lack of marketability of publicly traded securities, as determined from observations of transactions of restricted stock. Based on these transactions, a correlation is made between the implied discounts investors are willing to accept for illiquid securities and the duration of illiquidity they accept. Numerous studies have been completed that attempt to quantify discounts associated with the sale of restricted stock. One particular study analyzes the relationship between the expected holding period and the magnitude of average restricted stock discounts.[1] This study enables a comparison of the holding period of the subject interest to those of the interests in the study. As shown in the following table, even for those restricted stocks maintaining an average holding period of two quarters, the median and average discounts were 17.5% and 23.2%, respectively. Given the notice periods provided by most hedge funds, an investor will often be subject to a similar holding period, even after expiration of the lock-up period.

MPI Study: Analysis of Discounts by Holding Period

	Estimated "Dribble-Out" Period			
	< 1 Year	1-5 Years	> 5 Years	Overall
Number of Transactions	12	29	8	49
Median Qtrs. to Dribble Out	2	10	40	9
Median Discount	17.5%	26.0%	33.5%	28.8%
Average Discount	23.2%	26.8%	37.6%	27.7%

A second indication for appropriate hedge fund discounts may be identified through a review of closed-end funds. Closed-end funds are publicly traded holding companies that typically invest in portfolios of publicly traded securities. However, since closed-end funds do not redeem shares once they are issued, investors must buy and sell shares in the open market. In some respects, the circumstances encountered by a hedge fund investor are similar to those of the closed-end funds in that an owner of a hedge fund interest does not own the underlying assets, but rather owns an interest in an entity that owns the underlying assets.

Closed-end funds tend to trade at a discount relative to NAV in the open market. As the following graph demonstrates, the median discount from NAV exhibited by the selected closed-end investment funds since 2000 ranged from a net premium of 0.4% to a net discount of 18.6%, with the average of the medians indicating a discount of 6.9%.



Impact of a Recessionary Economy

In addition to establishing valuation discounts based upon consideration of the lack of control of the underlying investments, and, more importantly, the expected holding period that would be encountered by a hedge fund investor, prevailing economic and market conditions also have an impact.

Historically, hedge funds have represented an attractive option for accredited investors to diversify their portfolios, as these funds are established to generate superior returns given their risk profile and flexibility to engage in a number of investment strategies. However, most recently, the global economic crisis and resulting volatility in the financial markets had a material detrimental impact on hedge funds. According to *HedgeFund Intelligence*, the mean average return from global hedge funds was down nearly 15% in 2008.[2] In fact, the HFRI Fund Weighted Composite Index declined for only the second calendar year since 1990, falling 18.3% for all of 2008.[3]

As a result of the lower returns and increased volatility, investors withdrew a record $152 billion in capital in the fourth quarter of 2008. In fact, the full year 2008 reflected only the second time in which the industry experienced a net outflow of investor capital over an annual period since 1990. In response, a significant number of funds suspended redemptions, or raised the gates, for an indefinite period of time. The resulting inability of investors to readily access their capital as a result of these gate provisions further increases the expected duration of their holding period, thus heightening the level of applicable valuation discount.

Cost of Redemption Suspensions

In general, the manager will attempt to honor redemption requests after compliance with the standard lock-up and notice periods discussed above. However, most hedge fund agreements do, in fact, provide for suspensions on redemptions, with the manager afforded the ability to implement such gate provisions at its discretion. These provisions are intended for situations in which the fund receives an increased number of redemption requests, such as what happened in recent periods, following the financial market collapse of late 2008. In the absence of these gate provisions, the fund would likely be required to liquidate a number of its underlying assets at fire sale prices, and to incur high transaction costs in the process, in order to meet the redemption requests.

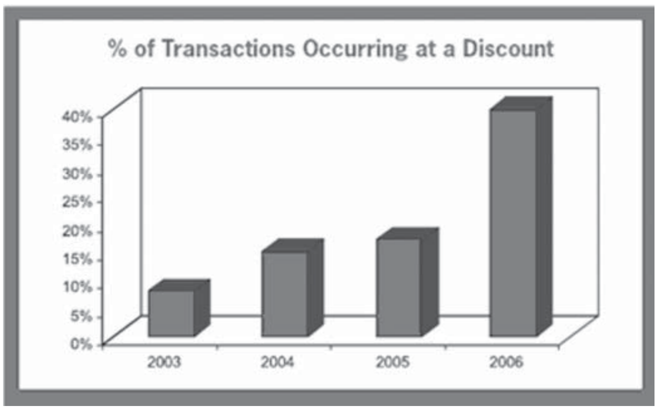
There are a number of factors that influence the magnitude of potential valuation discounts applicable to hedge fund interests. Ultimately, these factors are considered in the context of the probability that an interest will decline in value prior to an investor's ability to withdraw. These factors, the effects of which are not incorporated within a fund's NAV, impact an investor's assessment of the fair market value of its interest. Several of the more significant factors that warrant consideration are outlined below.

- **Age:** The age of a fund is one determinant influencing the value of a hedge fund interest, as it may affect the probability of failure. In fact, based on data derived from the Center for International Securities and Derivatives Markets, the most common durations for defunct funds ranged from two to four years, indicating that many funds fail early in their lives.[4] This factor was further heightened during 2009, given the large number of fund closures in 2008. In particular, it is estimated that 1,471 funds liquidated in the fourth quarter of 2008, representing an increase of over 70% from the prior year.[5]
- **Expected Return:** Expected return is also an important determinant of the value placed by an investor on a hedge fund interest. This is due to the fact that a lower expected return not only increases the probability that a fund's NAV will decline over a restriction period, but also that the fund may fail completely. There are several empirical studies supporting the premise that liquidated hedge funds are more likely to have had poor past performance. These findings are fairly intuitive, as managers have an incentive to close funds with low cumulative returns since their fees are often dependent upon returning to a high water mark. Moreover, investors are more likely to withdraw capital from poorly performing funds, thus requiring asset liquidations and potential fund closure. In fact, one study concluded that funds with a cumulative return less than one standard deviation below the mean return have a 38% increased risk of failure.[6] Thus, a comparison should be made between the expected return of the fund being analyzed and the average benchmark returns.
- **Volatility:** The volatility of a fund also has a direct correlation to the probability that such fund may fail. One specific factor influencing the volatility of a fund is the strategy employed by the hedge fund manager. In other words, funds employing a strategy involving a greater degree of risk, such as commodities or currency trading, will likely experience a greater level of volatility relative to funds employing a more straightforward equity buy-and-hold strategy.
- **Liquidation Cost:** The liquidation cost refers to the percentage of NAV that investors will receive upon liquidation of the fund. Based on one study analyzing data derived from a secondary market for hedge fund investments, hedge funds may incur, on average, a loss of 25% of NAV upon failure. Further, for transactions involving complete collapse or failure, the discount on NAV approached 50%.[7] The nature or level of illiquidity of a fund's underlying investments may reduce the manager's ability to orderly liquidate the fund without incurring significant transaction costs and discounts on asset sales.

While the above factors should always be considered in assessing the liquidity of a hedge fund interest, they are of increased importance during a recessionary economic environment, recognizing the likelihood that the gates have been or will be raised. At the same time, expected returns are lower, the level of volatility is heightened, and liquidation costs are higher. As one indication of the impact of these factors, a recent study modeled the cost of restriction provisions as the corresponding reduction in value of a "liquidity option" held by the hedge fund investor. In other words, the value of the option held by an investor, which may be exercised by seeking redemption at NAV, is effectively eliminated when gate provisions are invoked. Based thereon, it was determined that the cost of illiquidity could exceed 10% of the initial investment, and in some cases approach 20%, depending on each of the above factors.[8]

Review of Empirical Data

Empirical evidence regarding the impact of prevailing economic conditions on the valuation of hedge fund interests may be observed from Hedgebay Trading Corporation, which operates the only secondary market matching buyers and sellers of hedge fund interests. With the increased level of gate provisions put in place during late 2008 and much of 2009, this secondary market provided investors with an option to obtain liquidity. The average discount for a hedge fund interest increased from 1.6% in the first eight months of 2008 to 3.5% in the nine months ended in September, indicating that the discount increased significantly in September alone. In certain cases, observed discounts on hedge fund interests have been as high as 50%.[9]



Historically, the secondary market was primarily utilized as a vehicle for investors to obtain access to attractive funds that had been closed to new investments. However, more recently, the primary purpose of the secondary market has been trending toward a liquidity strategy. This trend has occurred as the result of several factors. First, the performance of the hedge fund industry as a whole has declined in recent periods. At the same time, even prior to the financial crisis, hedge funds have generally increased the length of their lock-up and notice periods. Thus, investors are hesitant to pay more for an increasingly illiquid investment. This situation was further exacerbated by the illiquidity afforded by the number of gate provisions being invoked. As shown in the preceding table, which incorporates data available through 2006, a review of the Hedgebay secondary market discount index indicates that the number of overall transactions occurring at a discount to NAV has been steadily increasing.[10]

Conclusion

Hedge funds continue to attract attention from accredited investors as alternative investment vehicles. Given the nature of these investments, however, there are many liquidity constraints that are imposed on the owner of a hedge fund interest. In particular, most hedge funds outline standard lock-up and notice periods applicable to their respective investors. These provisions support the application of a valuation discount, although at a lower level than that applicable to a typical family limited partnership. However, in an economic environment such as the one experienced in late 2008 and much of 2009, the liquidity of hedge fund interests is significantly diminished due to the redemption suspensions put in place by hedge fund managers. These gates effectively eliminate the investor's option for prompt liquidity at the time when the investor is most likely looking to exercise such option (i.e., during periods of poor performance, extreme volatility, and increased probability of failure), thereby raising the overall valuation discount from NAV. As a result, such recessionary economic environments present a unique opportunity for hedge fund interests to be a key component within an individual's overall estate planning process. As the economy continues to improve, the opportunity for significant discounts at the LP level is certainly declining. However, a certain amount of discount (however small) would still remain applicable given the various lock-up provisions and notice periods included in hedge fund agreements.

Endnotes

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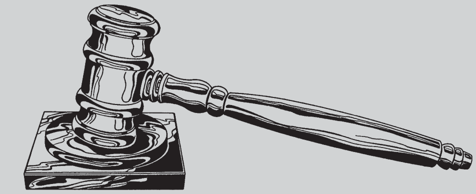
Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

ADMINISTRATION

Intestate's Father Is Qualified to Be Administrator in Spite of Absence of English Literacy

Administrator of the estate of an infant sought permission to resign and petitioned for the appointment of the infant's father as administrator. The father is literate in and speaks only Spanish. SCPA 707(2) states that the Surrogate may disqualify from acting as a fiduciary a person who cannot read and write English. In a wide-ranging opinion detailing the numerous legislative and administrative actions taken to ensure full participation in society and especially in the legal system by persons not literate in English and noting that the decedent's father will be represented by counsel and has a brother who acts as interpreter for him, Surrogate Glen held that lack of proficiency in English should not, standing alone, disqualify a person from acting as a fiduciary. *In re Toribio*, 24 Misc. 3d 1024, 885 N.Y.S.2d 182 (Sur. Ct., N.Y. Co. 2009).

JOINTLY HELD PROPERTY

Deed Created a Joint Tenancy with Right of Survivorship Between Individual and Married Couple as Tenants by the Entirety

Decedent and her married daughter and the daughter's husband purchased real property and took title by a deed that granted the property to the daughter and son-in-law described as "[h]usband and wife, as to a one-half interest and as joint tenants with rights of survivorship with [the decedent] as to a one-half interest." A second daughter of the decedent as executor petitioned for a determination that decedent owned a one-half interest in the property as tenant in common, so that her interest would pass under the will. The Surrogate granted summary judgment to the daughter and her husband and dismissed the petition.

The Appellate Division agreed with the Surrogate that, as a matter of law, the language of the deed created a tenancy by the entirety to the married couple, as an entity, and a joint tenancy with right of survivorship between that entity and the decedent. "The express terms of the grant are sufficient to overcome the presumption of a tenancy in common." *In re Flaherty*, 65 A.D.3d 745, 883 N.Y.S.2d 812 (3d Dep't 2009).

William P. LaPiana

MARRIAGE

New York Court Will Not Hear Proceeding to Dissolve Vermont Civil Union

In a lengthy opinion extensively examining authorities, the Supreme Court has held that it lacks jurisdiction over a proceeding to "divorce" the same-sex parties to a Vermont civil union because a civil union is not a marriage. Because the civil union is not a marriage, the court held that the general marriage recognition rule, which has led several New York courts to recognize same-sex *marriages* validly entered into in other jurisdictions, is not applicable. However, the court also held that the moving party "must be afforded a legal avenue" to accomplish a "fair and equitable dissolution" of the relationship. The court therefore dismissed the action without prejudice to the plaintiff's right to file a complaint for dissolution of the Vermont civil union addressed to the court's general equitable jurisdiction. *B.S. v. F.B.*, 25 Misc. 3d. 520, 883 N.Y.S.2d 458 (Sup. Ct., Westchester Co. 2009).

POWERS OF APPOINTMENT

Rights of Creditors and Validity of Exercise Determined by Law Selected by Donor of Power of Appointment

Trustee, a New York bank, brought a proceeding for advice and direction regarding the distribution of the property of three irrevocable lifetime trusts created by a domiciliary of Connecticut. The trust property of all three trusts was intangible personal property located in New York, each trust had a New York trustee, and each trust stated that it shall be "construed and regulated" by New York law. The proceeding was occasioned by the death of the income beneficiary of the trusts who was also the donee of a general power of appointment over each trust, which must be exercised by will or by an instrument "executed like a will."

The donee of the powers died in 2007, domiciled in Connecticut. Her will gave her residuary estate in equal shares to her son, daughter, and two grandchildren, but made no mention of the powers of appointment. The donee, however, did leave a handwritten note she signed and acknowledged before a Connecticut notary by which she purported to leave all three trusts to her husband.

Surrogate Glen first held that New York law governs the question of whether the appointive property is subject to the decedent's creditors based on the trust's requirement that New York law control. Under New York law, the powers were postponed general powers of appointment that had become exercisable before the decedent's death when the attached conditions were satisfied. Under New York statute (EPTL 10-7.2), property covered by a postponed general power that has become exercisable is subject to the creditors of the donee. The Surrogate held that property of the three trusts was therefore subject to the claims of the donee's creditors.

Surrogate Glen also held that the question of whether the powers had been exercised was governed by New York, including New York's conflict of laws rules. Under New York law, the question of exercise of the power should be decided under Connecticut law because Connecticut is the jurisdiction with the paramount interest in the matter. The handwritten note had only one witness, the notary, and since Connecticut law requires that a will have two witnesses, the note could not exercise the powers, which require by their terms that they be exercised by a will or by an instrument executed like a will. Further, under Connecticut law, unlike New York law, a general residuary clause does not exercise a general power of appointment of which the testator is donee. The Surrogate held that the trust property therefore must be distributed to the takers in default under each power. *In re Chappell*, 25 Misc. 3d 704, 883 N.Y.S.2d 857 (Sur. Ct., N.Y. Co. 2009).

UNDUE INFLUENCE

Error in Charge Regarding Confidential Relationship Leads to Reversal

Although there was conflicting evidence on the question of the existence of a confidential relationship between the donor and the donee, the Surrogate charged the jury that a confidential relationship existed as a matter of law. The jury rendered a verdict finding that assets that had been transferred to the donee had come about through undue influence. The Appellate Division reversed, even though the donee had not objected to the charge. The error was so fundamental as to require a new trial in the interest of justice. *Prievo v. Urbaniak*, 64 A.D.3d 1240, 882 N.Y.S.2d 796 (4th Dep't 2009).

WILLS

Letter Expressing Wish for Disposition on Surviving Spouse's Death Is Not Binding Contract nor Basis for Constructive Trust

Decedent's will disposed of his estate to his surviving spouse. The estate included several commercial properties. In a letter addressed to the surviving spouse, decedent expressed the "wish" that on the surviving spouse's death or remarriage the commercial properties be conveyed to their children. After a series of disagreements the surviving spouse wrote a new will disinheriting one of the couple's three children. The surviving spouse and the other two children eventually brought a proceeding seeking to have the decedent's letter declared to be unenforceable.

Supreme Court declared the letter to be precatory and non-binding and dismissed the disinherited child's request that a constructive trust be imposed on his mother. The Appellate Division affirmed, holding that the letter did not contain a "clear and unambiguous promise" by the surviving spouse to convey the properties to the children and therefore was not a contract between the spouses. The lack of a promise also defeated the request for the imposition of a constructive trust. Although unjust enrichment can be the basis for imposing a constructive trust, the decedent's will gave the properties to his spouse outright without any conditions and could not provide the basis for a finding any unjust enrichment of the surviving spouse. *Aaron v. Aaron*, 64 A.D.3d 1103, 882 N.Y.S.2d 776 (3d Dep't 2009).

Amendment Adding Lawyers' Employees to Scope of SCPA 2307-A Is Not Retroactive

Decedent's will was executed in 1994 and nominated as executor a legal secretary in the office of the lawyer who drafted the will. The secretary was a personal friend of the decedent and the decedent's husband, who had died four months before the execution of the will. The secretary retired in 1994. The decedent's will was offered for probate and the executor sought commissions.

The Legislature amended SCPA 2307-a—requiring a testator to make a written acknowledgment of receipt of certain disclosures if a lawyer is to receive full commissions for serving as executor of a will drafted by the lawyer—to include lawyers' employees nominated as executors effective August 31, 2007, applicable to all wills executed on or after that date. The amendment was not expressly made applicable to the estates of decedents dying after the effective date as was the original enactment of the statute (effective as to estates of decedents dying one year after the effective date). In addition, there is case law holding that amendments made in 2004 are not retroactive.

Surrogate Peckham held that the 2007 amendment was not retroactive and did not apply to the executor. In addition, the statute authorizes the Surrogate to waive the statutory disclosure requirement for wills executed before the original effective date, January 1, 1996. Because the decedent's will was executed before the effective date of the original enactment and the executor is a lay person, Surrogate Peckham found that good cause had been shown to excuse the absence of a written acknowledgment of disclosure. *In re Winters*, 25 Misc. 3d 631, 883 N.Y.S.2d 703 (Sur. Ct., Broome Co. 2009).

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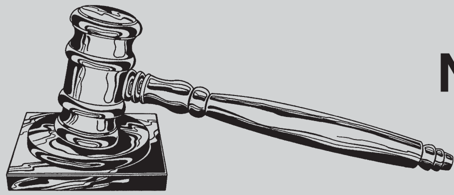
Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, *DRAFTING NEW YORK WILLS* (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Attorney-Work Product

In *Siewert v. Greater Atlantic Beach Water Reclamation District*, the court denied the defendant's motion for a protective order seeking to quash a subpoena *duces tecum* served on a non-party witness on the grounds that the documents sought, consisting, in part, of engineering reports, constituted attorney work product, material prepared in anticipation of litigation, and were otherwise privileged. The record revealed that the documents had been inadvertently disclosed by the defendant to the plaintiff, and consequently defendant requested that the order to be issued direct that the originals be returned and all copies be destroyed. The defendant maintained that at no time did it intend that the documents in issue be produced, and that the inadvertent production of the records did not result in a waiver. The court opined that inadvertent disclosure will not act as a waiver if it can be shown that (1) the client intended to maintain the confidentiality of the document; (2) reasonable steps were taken to prevent disclosure; (3) the party asserting the privilege acted promptly to remedy the situation; and (4) the parties who received the document will not suffer undue prejudice if a protective order is issued.

In opposition to the motion, the plaintiff alleged that it had a substantial need for the requested material, and could not obtain it from any other source without undue hardship.

After examining the criteria for disclosure under the CPLR, and case law as it pertained to the privileges asserted, the court noted that the attorney-client privilege could not be used as a means of shielding disclosure of discoverable information such as an investigative report. Citing the opinion by the Court of Appeals in *Spectrum Systems International Corporation v. Chemical Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991), the court stated that an investigative report does not become privileged merely because it was sent to an attorney; nor is the report privileged merely because it was conducted by an attorney.

Indeed, when an attorney is retained for business or personal advice, or to do the work of a non-lawyer, the resulting communications from the lawyer are not necessarily protected by the attorney-client privilege, nor for that matter, do they constitute attorney-work product. Rather, attorney-work product is limited to only those materials which are the product of the lawyer's learning and professional skills.

Finally, with respect to the claim that the materials were prepared in anticipation of litigation, the court found it significant that the subject reports were commissioned almost six months prior to the commencement of the litigation, and there was no indication of who requested that they be prepared or for what purpose. Given these deficiencies, the court held that the defendant had failed to satisfy its burden of proving that the documents constituted attorney- work product or materials prepared in anticipation of litigation.

Accordingly, the court denied the defendant's motion for a protective order, and held, as such, that a determination of the issue of waiver was no longer required.

Siewert v. Greater Atlantic Beach Water Reclamation District, N.Y.L.J., June 12, 2009, p. 28 (Sup. Ct., Nassau Co.) (LaMarca, J.).

Examinations Pursuant to SCPA 1401

In a proceeding instituted pursuant to SCPA 1401, the respondent moved for a protective order to vacate a notice to take his deposition. The respondent argued that he complied with the provisions of the statute by producing copies of two prior wills of the decedent. The movant, who was either a successor executor or successor co-executor and co-trustee and beneficiary under the prior instruments, nevertheless alleged that he was entitled under the statute to the respondent's examination.

The court opined that the purpose of a proceeding instituted pursuant to SCPA 1401 "is to discover whether any paper purporting to be a will was drafted and executed or was ever in existence." As such, the court concluded that the section is not designed to discover evidence that may be used in any other proceeding, has no relation to any other proceeding, and defines no rights but merely directs the filing of the will. An examination pursuant to SCPA 1401 can only be utilized to determine whether any paper writing purporting to be a will was in existence, but not to question the validity of that instrument.

Accordingly, inasmuch as the respondent produced the wills in his possession, the Court granted his motion for a protective order, noting that the movant was not without options to examine the respondent within the context of the pending probate proceeding.

In re Oppido, Decided May 29, 2009, File No. 353581, (Sur. Ct., Nassau Co.) (Surr. Riordan).

Life Estate

The threshold issue before the court in *In re Gullo* was whether the provisions of the decedent's will provided the petitioner with a life estate in the decedent's residence. The petitioner requested leave of court to purchase the premises, and to credit herself with the value of her life estate in the property and improvements she made to the premises subsequent to the decedent's death. The application was opposed by the trustee under the decedent's will on the grounds that the petitioner did not receive a life estate in the realty, but rather a fee on limitation. Petitioner claimed the contrary, maintaining that the language in the decedent's will provided her with a life estate, and that a sale of the property was both expedient and in the best interests of the estate.

Pursuant to the pertinent provisions of his will, the decedent devised and bequeathed the subject property to the petitioner, his daughter, as a "life estate," and authorized her to reside and remain in the premises for as long as she wished, so long as it remained her principal residence. If for any reason the decedent's daughter declined the life estate, or decided to vacate the property, the will directed that the property be sold and the net proceeds be distributed pursuant to the provisions of the residuary clause.

In analyzing the issue as to the nature of the petitioner's interest in the subject premises, the court held that a life estate in property conveys exclusive ownership of the land during the lifetime of the life tenant, subject only to certain well-defined limitations or duties. Moreover, the holder of a life estate may, under certain circumstances, be able to force the sale of the property and collect the value thereof, assuming it is demonstrated that the sale is expedient. The court opined that in comparison to a life estate, a right of occupancy or a lesser interest to a life tenancy is a personal privilege that does not confer the benefits of a life estate.

Although the language of the decedent's will utilized the words "life estate" in referring to the petitioner's interest, the court did not consider that fact dispositive of the issue raised. Further, the Court found that the conditions expressed in the will requiring the petitioner to pay taxes and maintenance on the property were inconsequential to the result, and insufficient to elevate petitioner's ownership from a right of occupancy to a life tenancy. Rather, the Court held that the language employed in the instrument was significant of a "fee on limitation," as defined in EPTL 6-1.1(a)(3). That being the case, the court concluded that petitioner's interest did not lend itself to computation or application of a credit for a life estate.

Accordingly, the court determined that the petitioner held a fee on limitation in the property and was not entitled to a credit for a life estate. The court further opined that the expediency of the sale was unclear from the record inasmuch as the circumstances which usually give rise to such a conclusion usually involve sales to third parties, and not necessarily parties in possession of the property.

In re Gullo, N.Y.L.J., July 6, 2009, p. 37 (Sur. Ct., Suffolk Co.) (Surr. Czygier).

Malpractice

Before the court in *Leff v. Fulbright & Jaworski* was a suit for malpractice by the decedent's widow, who alleged that defendants failed to adequately represent her interests in the planning of her late husband's estate. The defendants moved for summary judgment on the grounds that the plaintiff failed to establish the existence of an attorney-client relationship with them and thus lacked standing to sue.

The record revealed that the plaintiff was the decedent's third wife, and that his first marriage had ended in divorce. Pursuant to the terms of his divorce settlement, the parties had entered into a separation agreement providing, *inter alia*, that the decedent would provide by will no less than one-half of his probate estate to the child of their marriage. Counsel who prepared the agreement were partners of a firm that subsequently merged into the defendant law firm.

Prior to the marriage of plaintiff and decedent, they entered a prenuptial agreement that provided that each party would have the right to dispose of their property as they saw fit. Thereafter, the decedent executed a will which provided the plaintiff with the marital residence and a bequest. Plaintiff had no part in the preparation of this instrument. A year later, the decedent executed a codicil to his will, and plaintiff was present at its signing.

In the ensuing years, the defendants prepared and supervised the execution of multiple wills for the decedent and the plaintiff. Plaintiff was not involved in the preparation of these instruments, but was aware of the contents of and was present at the execution of at least one of them. Defendants maintained that while they represented each party with regard to their separate estate plans, at no time did they reveal to either party any aspect of the other's plans. Nevertheless, plaintiff maintained that the decedent had assured her that she would receive one-half of his adjusted gross estate, and that defendants had indicated the same to her as well. Plaintiff admittedly was unaware of the size of the decedent's estate at the time these assurances were made.

Subsequent to the decedent's death, his son filed a claim against his estate seeking to enforce the provisions of the separation agreement the decedent had made upon the dissolution of his first marriage. It was only then that the separation agreement was found in the files of the defendant law firm. Ultimately, the claim of the son was settled, and he was paid as a creditor of the estate.

In support of her claim for malpractice, plaintiff alleged that defendants had a duty to protect her interests in the decedent's estate plan so as to fulfill his desire to provide her with one-half of his entire estate, and that they breached this duty to the extent that the interest of the decedent's son in the estate left her with less than what was anticipated and planned for. Toward this end, plaintiff maintained that she and the decedent were joint clients of the defendants, or that they had a joint estate plan in which the defendants represented both her and the decedent jointly. The court disagreed, finding that the interactions between plaintiff and defendants were insufficient to establish an attorney-client relationship between them, or even a relationship approaching "near privity." The court held that the mere fact that plaintiff might have had a subjective belief as to the existence of an attorney-client relationship was not enough to create such a relationship.

Accordingly, defendant's motion for summary judgment was granted.

Leff v. Fulbright & Jaworski, N.Y.L.J., July 10, 2009, p. 32 (Sup. Ct., N.Y. Co.) (Shafer, J.).

Motion to Strike Objections

In a contested probate proceeding, the petitioner moved, *inter alia*, to dismiss the objections filed by two distributees of the decedent on the grounds that they lacked merit, that her discovery demands had been ignored, and that their counsel lacked the authority to represent them.

The court stated that while actions should be resolved on the merits whenever possible, a court may, in its discretion, strike pleadings or parts thereof as a sanction against a party who "willfully fails to disclose information which the court finds ought to have been disclosed." CPLR 3126(3). Within this context, the court found that the willful and contumacious conduct of the objectants could be inferred from their failure to either comply with or object to the petitioner's discovery demands for almost five years, coupled with their failure to oppose the petitioner's motion by offering an excuse for not responding.

Accordingly, petitioner's motion to dismiss the objections of the two distributees was granted.

In re Covo, N.Y.L.J., May 13, 2009, p. 40 (Sur. Ct., N.Y. Co.) (Surr. Webber).

Protective Order and Sanctions

In a contested proceeding instituted, pursuant to SCPA 2110, by the attorney for the former fiduciary of the estate, the respondents moved for sanctions pursuant to CPLR 3126 based upon petitioner's alleged failure and refusal to provide adequate responses to their Notice of Discovery and Inspection of documents, and for her failure to produce these items at her deposition. In addition, respondents indicated that petitioner failed to execute her deposition transcript, and moved to strike petitioner's Note of Issue. Petitioner cross-moved for an order pursuant to CPLR 3126 as well, based upon respondents' failure to respond to her outstanding discovery request, and for sanctions based upon respondents' alleged frivolous conduct.

The court opined that the nature and degree of any penalty awarded under CPLR 3126 for nondisclosure is a matter of discretion. Sanctions, however, will not be imposed unless it can be demonstrated that a party's failure to disclose is "willful, contumacious or in bad faith." *See Harris v. City of New York*, 211 A.D.2d 663, 664, 622 N.Y.S.2d 289, 291 (2d Dep't 1995). Based upon this standard, the court held that no such showing had been made by either the petitioner or the respondents. Nevertheless, it found that petitioner had provided respondents with only verbal responses to many of their requests for documents, and therefore, granted respondents' motion to preclude, unless petitioner produced the documents responsive to respondents' Notice and those requested at her deposition by a date certain.

With regard to petitioner's failure to execute her transcript, the court held that the unexecuted copy may be used at trial (CPLR 3116(a)) unless an executed copy was filed with the court, within the time required for the production of documents.

Further, the court denied petitioner's cross-motion for sanctions, finding that petitioner's request for discovery was palpably improper on the grounds that the information sought was confidential in nature and not relevant to the issues underlying the proceeding. Accordingly, the court also denied the motion to strike the petitioner's Note of Issue.

Prowley v. Estate of Wendloyn Lavant Thomas and Zellie Mae Rogers, N.Y.L.J., July 31, 2009, p. 38 (Sur. Ct., N.Y. Co.) (Surr. Glenn).

Statute of Limitations

In an action for breach of contract and legal malpractice, the defendant moved to dismiss plaintiff's claims on the grounds that his legal malpractice claim and contract claim were barred by the statute of limitations. Defendant also moved to dismiss for lack of personal jurisdiction.

Plaintiff failed to submit any evidence that the original or amended complaint were ever served on the defendant after it was filed. Thus, the action was dismissed with prejudice, on the grounds that it was time-barred.

The court opined that CPLR 214(6), as amended, provides that an action to recover for legal malpractice must be commenced within three years, regardless of whether the underlying theory is based in contract or in tort. The court noted that the original complaint alleged that the defendant's representation of the plaintiff terminated on September 14, 2005, and that the complaint was not filed until September 30, 2008. Although the plaintiff attempted to controvert the date on which it terminated defendant's services, by alleging that it had not retained new counsel until October, 2005, the court concluded that plaintiff had failed to show that it was being continuously represented by plaintiff until that date.

Moreover, the court held that plaintiff's breach of contract action was not maintainable, as it was duplicative of plaintiff's malpractice cause of action, and thus also barred by the three-year statutory period.

Fur OnLine, Inc. v. Rivkin Radler LLP, N.Y.L.J., July 23, 2009, p.26 (Sup. Ct., N.Y. Co.) (Friedman, J.).

Stipulation of Settlement

In a matrimonial action, the plaintiff moved, *inter alia*, for an order setting aside the stipulation of settlement entered between her and the defendant, her former spouse.

At the time the settlement was entered the plaintiff was represented by counsel. Subsequently, she retained new counsel and moved to set aside the agreement. In support of the requested relief, plaintiff maintains that she entered the agreement under duress, and that the terms thereof were so one-sided as to be unconscionable as a matter of law. Specifically, plaintiff argued that at the time the stipulation was entered, her sole concern was to free herself from the wrath of her abusive husband. Further, she alleged that although she had a basic understanding of the English language, she did not understand the ramifications of the agreement and what proved to be its onerous terms. She claimed that she did not know the value of her husband's business and did not realize that she was not receiving the marital residence. Moreover, plaintiff alleged that she had a number of part time jobs during the course of the marriage, for which she was not well-compensated, and that the defendant paid all the household expenses from his employment income and his business. Additionally, she stated that while a tenant resides in the marital home, he no longer pays rent. As a consequence, plaintiff maintained that she did not have the financial resources to support and clothe her children, or to provide for their medical expenses.

Despite arguments by the defendant that an agreement may not be set aside when the parties have been represented by counsel and have had the opportunity to conduct disclosure, the court granted plaintiff's application. Relying upon the opinion by the Court of Appeals in *McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693 (2002), the court found that plaintiff had stated sufficient grounds for a determination that the agreement for equitable distribution was ambiguous, overreaching and unconscionable, and ordered that the judgment reciting these provisions, as well as the provisions for maintenance and child support, be vacated.

Infante v. Infante, N.Y.L.J., May 13, 2009, p. 39 (Sup. Ct., Nassau Co.) (Zimmerman, J.).

Subpoenas

During the course of a contested probate proceeding, the petitioner moved to quash certain HIPAA releases executed by the Public Administrator, or alternatively, to limit the time for which the medical records were sought to a period three years prior to the execution date of the propounded will, and two years thereafter, pursuant to the provisions of Uniform Court Rule ("UCR") 207.27.

The objectant opposed the application, and argued that deviation from the three year/two year rule was appropriate under the circumstances. In support of his contention, the objectant submitted a copy of a report from a psychiatrist, which indicated that after speaking with the decedent he learned that she had a history of depression with numerous hospitalizations, as well as bipolar disorder for which she had been treated with lithium for many years. Additionally, the objectant submitted a statement from the decedent's daughter in which she recalled that her mother was hospitalized due to a psychiatric condition as far back as the 1970s, and periodically continuing through the date of her husband's death in 2004.

Based upon the foregoing, the court concluded that sufficient special circumstances existed for deviating from the time restrictions set forth in the UCR. Moreover, the court opined that the provisions of UCR 207.27 may not be applicable to subpoenas, given the language of the rule which specifically refers to examinations before trial.

In any event, the court concluded that an application to quash a subpoena should only be granted when it is apparent that the requested information will not uncover information relevant to the subject matter of the proceeding. In view of the fact that the capacity of the decedent to execute the propounded will was a central issue to the pending probate proceeding, the court concluded that the documents sought by the subpoena were appropriate. The court rejected the movant's argument that the objectant was estopped from raising issues related to the decedent's capacity on the grounds that an Article 81 proceeding instituted on behalf of the decedent had been dismissed after a hearing. Referring to the decision in *In re Gallagher*, N.Y.L.J., October 29, 2009, p. 19 (Sur. Ct., Kings Co.), the court noted that the standards for finding an individual incompetent for purposes of an Article 81 proceeding differed from those required to execute a will. Thus, the determination of the court in the Article 81 guardianship proceeding did not preclude the objectant from litigating issues related to the decedent's lack of testamentary capacity.

Accordingly, the motion to quash the HIPAA releases and any subpoena related thereto, or alternatively to limit the time frame for discovery, was denied in all respects.

In re Cugini, N.Y.L.J., July 29, 2009, p. 36 (Sur. Ct., Richmond Co.) (Surr. Gigante).

Three Year/Two Year Rule

In a contested probate proceeding, the objectant moved to extend the time frame for discovery beyond the three year/two year period set forth in UCR 207.27. Objections to the propounded instrument were filed by one of the decedent's children alleging fraud, duress and undue influence, irreparable harm and injury if the nominated executor under the propounded instrument was appointed, and incompetence of the nominated executor to serve.

Examinations pursuant to SCPA 1404 were held, a notice of discovery and inspection was filed and answered, and depositions of both the petitioner and the objectant were taken. Thereafter, the objectant moved for expansion of the three year/two year rule on the grounds that: (1) the petitioner and his wife sold property owned by the decedent during the decedent's lifetime; (2) there was a delay in offering the propounded will for probate; (3) the petitioner exercised a health care proxy resulting in the decedent's death; (4) the petitioner failed to investigate injuries sustained by the decedent while in the hospital, and did not bring a wrongful death action; (5) the propounded will failed to recognize the forced heirship laws of India; (6) the petitioner and his counsel were nonresponsive during the probate proceeding, and were not forthright in their disclosure; and (7) the proposed executor's wife was interceding in the management of the estate.

The court opined that the time period created by three year/two year rule is not rigid and may be extended when special circumstances exist. While allegations of a scheme to defraud or a continuing course of conduct of undue influence may be sufficient to constitute special circumstances, the court held that the reasons set forth by the objectant in support of his application did not justify deviating from the rule. Accordingly, the objectant's motion was denied.

In re Estate of Das, N.Y.L.J., May 1, 2009, p. 31 (Sur. Ct., Nassau Co.) (Surr. Riordan).

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