NYSBA WINTER 2000 | VOL. 33 | NO. 4

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

Buoyed by the great success in all respects of our Fall meeting in Santa Fe, both programmatically and socially, we are heading down the home stretch towards this year's Annual Meeting, which will be held at the New York Marriott Marquis on Wednesday, January 24, 2001. The focus of the program, which will be chaired by S. Jeanne Hall, will be the burgeoning controversies surrounding living wills, health care proxies and corporeal rights after death (such as control over burial, anatomical gifts, posthumous procreation and exhumation). Cocktails and lunch will commence at noon, and our luncheon speaker will be New York State Assemblywoman Ann-Margaret Carrozza. I hope that as many of you as possible will be able to attend both the program and the luncheon.

We commence the year 2001 with an ambitious legislative agenda. We have 12 pieces of affirmative legislation, including bills to permit exhumation for paternity testing, to conform EPTL 10-6.6 to the new federal GST regulations, to index for inflation the threshold for making annual gifts under statutory short form powers of attorney, to conform more closely the state renunciation statute to the federal disclaimer statute, to repeal the fiduciary exception to the attorney-client privilege, to unify the various professional privileges, to modernize and make more equitable executors' and trustees' commissions, to extend the benefits of the afterborn child statute to non-marital children, and to make corrections to the reporting requirements for private foundations. In addition, we will be working with the New York State Bankers Association on its legislative agenda,

Inside

Editor's Message 3

Management of Business Interests 4
(Eileen Caulfield Schwab)

1999-2000 New York State Legislative Session Changes Affecting Estate Planning and Administration....................11
(Joshua S. Rubenstein)

Surviving an Estate Tax Audit 19
(Philip A. Di Giorgio)

Relief Against a Fiduciary: SCPA 2102 Proceedings 23
(Gary B. Freidman)

What Every Trusts and Estates Attorney Should Know About Elder Law: A Primer....................29
(Anthony J. Enea)

Internal Revenue Service Issues Final, Temporary and Proposed Regulations Concerning Grantors, Transfers to Foreign Trusts and Related Gain Recognition 33
(Victoria A. Dalmas, Michelle B. Graham, Rahul M. Ranadive, Monica M. Robles and Marnin J. Michaels)

New York Estate Tax Compliance After the "Sop Tax" 42
(Sally B. Logan)

New York Should Enact the Uniform Anatomical Gift Act of 1987 44
(Ira Mark Bloom)

Case Notes—Recent New York State Surrogate's and Supreme Court Decisions 54
(Arlene Harris and Donald S. Klein)

Recent New York State Decisions....................58
(John C. Welsh)

the primary focus of which is dynasty trusts, asset protection trusts, partial repeal of the fiduciary income tax and exoneration of fiduciaries from state environmental liability. We will also be working with both (i) the EPTL/SCPA Advisory Committee on its legislative agenda, the primary focus of which is principal and income reform, trust legislation and the reformation of wills to correct mistakes, and (ii) the Surrogate's Court Advisory Committee of the Office of Court Administration on its legislative agenda (including amendments to SCPA 709, 1411(3), 1726 and 1813, EPTL 2-1.11, 10-10.1 and 10-10.7, and Domestic Relations Law § 73).

In an effort better to address the large volume of pending legislation in this area, Speaker Silver has appointed an Assembly EPTL Legislative Commission, headed by Assemblywoman Ann-Margaret Carrozza. We have met with Assemblywoman Carrozza, and we will be working closely with her Commission throughout the coming year in order to advance our legislative efforts.

We are also working with the Commission on Fiduciary Appointments, which was created by Chief Judge Kaye and is chaired by Sheila Birnbaum, in an effort to improve the existing system for the appointment of fiduciaries by judges, including in particular the appointment of guardians ad litem.

I cannot thank enough the hardworking chairs and members of our 17 substantive committees. They have worked tirelessly to address issues of concern to our Bar, and we are all in their debt for their fine efforts. On a personal note, my service as Chair of this Section has been one of the high points of my career to date. Since the outset of my assumption of the leadership of this dynamic Section last January, I have thoroughly enjoyed the varied and manifold challenges of the post of Chair. It is nevertheless with gratitude and optimism that I pass the baton to Stephen Newman, whom I know we will all support in his efforts to take our Section to new levels of achievement. It has been a privilege to serve as your Chair.

Joshua S. Rubenstein

2001 New York State Bar Association

ANNUAL MEETING

January 23-27, 2001
New York Marriott Marquis

Trusts and Estates Law Section Meeting
Wednesday, January 24, 2001

Editor's Message

This issue illustrates the varied nature of practices of our colleagues, who contributed articles for this issue. Gary Freidman, who is an estate litigator, writes about various options available in representing beneficiaries and claimants under SCPA 2102. Various members of the Private Banking Practice Group of the law firm of Baker and McKenzie have presented an insightful explanation of the finalization of regulations and issuance of temporary and proposed regulations with regard to transfers to foreign trusts. Eileen Caulfield Schwab has written on the issues to consider when planning an estate of a client with business interests. Anthony Enea presents a primer on elder law for estate planners. These are just some of the articles that appear within. I am most grateful to all the authors for taking the time to write for the *Newsletter*.

It is not too early to mark your calendars for the Section's Fall meeting which will take place in Napa. The new chair of the Section, Steve Newman, promises a great program and many opportunities to sample the region's great wines and cuisine. It will be October 4-7, 2001 and we will be staying at the famed Silverado resort. Those who came to Santa Fe this past September and Palm Beach the prior year experienced the combination of education and relaxation. The tradition will continue, so mark your calendars. Some photos from Santa Fe are included in this issue to prove my point. Thanks to Ira Harris and Glenn Troost who were the roving photographers.

The Spring meeting of the Section will be in Buffalo (April 26th and 27th). Bill Lapiana has assembled well known speakers for the program on Uniform Trust Law and Victoria D'Angelo has been able to gain access to the Frank Lloyd Wright Darwin Martin House complex for touring. A dinner will follow in a mansion setting. There is a select group of attendees who visit Niagara Falls whenever the Section visits Buffalo and I have been told there is room available for those who want to join in the pilgrimage.

Magdalen Gaynor

Request For Articles

If you would like to submit an article, or have an idea for an article, please contact

Trusts and Estates Law Section Newsletter Editor
Magdalen Gaynor, Esq.
7-11 South Broadway, Suite 208
White Plains, NY 10601
(914) 949-3624

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

Management of Business Interests

By Eileen Caulfield Schwab

Very simply put, the job of an executor is to collect a decedent's assets, pay her debts, funeral expenses, taxes, the expenses of administering her estate and to distribute the decedent's estate as she directed. Equally simply put, the job of a trustee is to invest the trust's assets and to make distributions to the trust's beneficiaries as the decedent directed or authorized. Where the decedent's assets include a business she operated, the job of an executor and trustee[1] is significantly more complex even though the pay is generally the same. The decedent's compensation for running the business is not a consideration.

Except for the compensation allowed to an executor[2] and trustee[3] "entitled or required to collect the rents of and manage real property," in New York an executor is compensated on the value of assets received and paid out and a trustee is compensated on the value of assets held. The nature of the assets, the obligations of the fiduciary in managing them and the time spent in doing so are irrelevant.

The additional compensation allowed to an executor collecting rents or managing real property is 5% of the gross rents collected. Receiving and paying commissions are also paid on the net rents. The additional compensation allowed to a trustee for doing so is 6% of the gross rents collected. The value of the net amount of the rents collected is also added to the trust fund to determine annual commissions.

An executor or trustee may be separately compensated as an officer or director of a decedent's business where the decedent's will has authorized the continuation of the decedent's business, or as an employee of the business, provided the services rendered are not executorial in nature.[4]

An executor steps into the shoes of the decedent to administer the decedent's property. The obligations and responsibilities of the two are not wholly co-extensive, however. When the executor is managing the decedent's business, the executor is only the legal owner of the business, not the beneficial owner, unlike the decedent. Consequently, the executor's fiduciary responsibilities to the beneficial owners are in addition to the responsibilities inherent in managing the business. The decedent was accountable only to herself; the executor is accountable to the decedent's beneficiaries.

Authority to Continue a Decedent's Business

It is the long-standing rule in New York that, absent authorization in the governing instrument, a fiduciary may not continue a decedent's business. In 1889 the Court of Appeals decision posited the general rule, which remains the rule today:

> The death of a trader puts an end to any trade in which he was engaged at the time of his death, and an executor or administrator has no authority virtute officii to continue it, except for the temporary purpose of converting the assets employed in the trade into money.[5]

This rule does not mandate an immediate sale of a decedent's business, but permits an executor a reasonable time in which to plan an orderly liquidation of the business or a sale of the business as a going concern.[6]

The *Willis* court noted that a testator may authorize the continuation of a business and it is well settled in New York that such an authorization is effective.[7] While the *Willis* court stated the authorization must be "direct, explicit and unequivocal," in practice, a court may infer such an authorization from the language of the will. In *In re Gibson's Estate*,[8] a direction in a decedent's will that his children were to become managers of his business upon reaching a certain age was interpreted by the court as an authorization to continue the decedent's business. However, a general authorization to retain a decedent's assets will not be sufficient to permit an executor to continue a decedent's business.[9]

Where a decedent has authorized the executor to continue her business, unless the decedent has also specifically authorized the executor to use estate assets to do so, the executor may not and may only use the assets of the business in continuing it.[10] The authorization to use other estate assets must be specific. A general authorization to sell estate assets and reinvest them is not specific enough to permit an executor to use other estate assets in the business.[11]

If the testator gives authority to the fiduciary to continue her business, defines the fiduciary's authority and specifies the estate assets that can be used to continue the business, the fiduciary does not need to petition the court for an order to continue the business.[12] In fact, the court may refuse to entertain a petition to continue the business if the will authoriz-

es its continuation on the theory that the fiduciary's decision to do so falls under the business judgment rule,[13] discussed *infra*.

Where the governing instrument does not authorize the executor to continue a business, an executor may petition the court for authorization to do so under SCPA 2108, if the business is a sole proprietorship. The court may enter an interim order pending return of process[14] authorizing the continuation of the business. The court may impose restrictions, conditions or requirements on the executor in authorizing the continuation of the business and may require the executor to incorporate the business. In addition, the court may determine what estate assets may be used for the business and may impose a time period in which the business may be continued.

If the executor continues the business in other than corporate form, SCPA 2108 requires the executor to file a certificate of doing business under an assumed name pursuant to the general business law. The certificate must reflect that the executor is conducting the business as a fiduciary and the extent to which estate assets are liable for the debts and other liabilities of the business. If the executor files the required certificate, the executor is relieved of personal liability for her actions in continuing the business but will remain liable in a fiduciary capacity.

SCPA 2108 only applies to a sole proprietorship. Consequently, a New York court will not entertain a proceeding under SCPA 2108 to continue a business in partnership or corporate form. In that event, where the executor is not authorized to continue the decedent's business, the executor must proceed with the orderly liquidation or sale of the decedent's business within a reasonable time.

SCPA 2108 also does not apply to a sole proprietorship which is a profession, with one exception. An executor may petition the court under SCPA 2108 for the continuance of a dentistry practice for a period not to exceed eight months. The Practice Commentary indicates that the purpose of the amendment was to ensure the value of the practice would not plummet. It is unclear why only the value of a dentist's practice is protected versus that of any other profession.

An executor of the estate of a professional does have duties towards the professional's business. When a doctor or lawyer dies, the executor must ensure that the decedent's office files are secured and inventoried. Files must be reviewed and the necessary steps should be taken to protect the clients' interests. For a lawyer, this would include such actions as notifying the decedent's clients, opposing counsel and the court of the lawyer's death where the decedent had appeared in a matter, returning unprobated wills to clients and wrapping up other pending matters. For a medical practice, this would include determining the ownership of the decedent's records. For both professions, arrangements must be made to retain records for the periods as required by law. Records must also be preserved for possible subsequent malpractice cases.

When drafting the will of a testator who owns a business, whether as a sole proprietor, partner or shareholder, the lawyer should discuss with the testator whether she wants her business continued and what powers the executor should have to do so. If the testator wants her business continued, the selection of the executor is critical. If the nominated executor is a business partner, the lawyer should discuss the inherent conflict of interest in such an appointment and the advisability of addressing the issue in the will. The lawyer should also determine how long the testator wants the fiduciary to operate the business and which estate assets the testator wants to commit to its operation. The lawyer should also discuss with the testator whether executor's commissions is the appropriate measure of compensation or whether there should be a set compensation.[15]

Controlling the Business Entity

The issue of control of the decedent's business arises in the context of partnerships and closely held businesses rather than in the context of a sole proprietorship. In the latter, where the executor is authorized to continue the business either by the governing instrument or the court, the executor has control over it. With respect to the former, the control the decedent had will determine the control the executor has. If the decedent did not have working control over the business, the essential decisions the executor has to make are how to maximize the value of the interest for the estate and whether to retain or sell the business interest.

Where the decedent's business was operated through a limited partnership and the decedent was only a limited partner of the partnership, the business will continue without any action on the part of the executor because a limited partnership does not terminate upon the death of a limited partner.[16] The executor succeeds to the decedent's rights and obligations under the limited partnership agreement but only becomes a substituted limited partner if admitted to the partnership pursuant to the provisions of the partnership agreement.[17] If the decedent was only a limited partner, she had no control of the partnership and the business, and neither will the executor.

Where the decedent was a general partner of a partnership or operated her business as a shareholder of a closely held corporation, obtaining control or a voice in the operation of a business interest depends on the nature of the legal entity and the amount of the decedent's ownership interest.

If the decedent was a general partner of a limited partnership, her death will dissolve the partnership unless the partnership agreement provides for continuation in such case or all partners consent to such continuation.

Where the decedent's business was operated through a general partnership, whether the executor may continue the decedent's business depends on the partnership agreement. Absent a specific provision in the partnership agreement continuing the partnership, the decedent's death will terminate the general partnership for all purposes except for liquidation and winding up its business.[18] The surviving general partners will not be required to accept the executor as a substituted general partner in order to continue the partnership. The interest of the executor will be an equitable interest in the partnership assets after the payment of partnership obligations.[19]

Where the decedent's business was operated through a corporation and the decedent did not have working control of the corporation, the executor's decision with respect to the stock is an investment decision. Where the decedent did have working control of the corporation, the executor must exercise that control to benefit the estate. The executor must either become a member of the board of directors of the corporation or have a representative named to the board, through which the executor may operate to exercise control.

If the executor cannot effectively exercise control and the executor owns 50% of the stock or can combine with other shareholders to reach the 50% threshold, in the worst case the executor can seek to have the corporation dissolved.[20]

The decedent may not have had working control of the corporation but the court will treat the estate as having such control where the interest of the executor, *qua* executor, when combined with the interest the executor owns individually, equals working control:

> Where fiduciaries are, in fact, in complete or substantial control of corporations by reason of stock ownership, the corporate acts are in reality those of the fiduciaries and the court, in pursuance of the policy of compelling complete disclosure of fiduciary acts, will, if importuned so to do, require a full recital of the corporate transactions. . . .[21]

In such a circumstance, the court has held it possesses "the equitable power to disregard the corporate entity . . . upon the basis that the fiduciaries and the management of the corporation are one and the same."[22] Therefore, under this reasoning, all corporate transactions are fiduciary transactions and are subject to review by the beneficiaries and the Surrogate.

However, where the interest of the executor, when aggregated with the estate's, is not working control, a court will not interfere with the executor's administration of a decedent's business. Therefore, where a fiduciary owned half of the voting shares of a corporation, individually, and more than half of the nonvoting shares, individually and as a fiduciary, the voting and non-voting shares did not equate to control and the Surrogate's Court had no jurisdiction over the corporation.[23]

There are limits to what a court will do. Commonly, where a testator wants her business to be continued, she nominates a business partner as executor. In determining whether to intervene in a conflict between the executor and estate beneficiaries, the court generally will not interfere with the executor's day-to-day business decisions unless the executor has breached her fiduciary duty to the beneficiaries in making those decisions.[24] In appointing a business partner as an executor, a testator is well aware of the self-interest of her partner. Consequently, estate beneficiaries will not be able to get the court to intervene simply because the executor is interested in a transaction.[25]

An example of this rule is *In re Carlisle*.[26] There, the testator named her nephew (who owned 70% of the shares of a closely held corporation and was the president and director of the corporation) as trustee of trusts owning 15% of the shares of the corporation. One of the trust beneficiaries filed objections to the trustee's accounting on the ground that the trustee, as majority shareholder, should have "caused the corporation to declare larger cash dividends so that the income-beneficiary would have received more income."[27] The Surrogate applied the business judgment rule, discussed *infra*, and held that the decision to pay dividends was to be determined by the board of directors and that "[a] court is not justified to interfere unless there is bad faith, fraud, a clear abuse of discretion, or dishonesty on the part of the directors."[28]

An executor has a duty to the beneficiaries to preserve and protect the estate. Where that duty is compromised by his own personal interests, in the

appropriate case, the executor will be personally liable.[29] Where the fiduciary has a conflict between his role as executor and individually, the fiduciary may petition the court under SCPA 2107 for advice and direction, discussed *infra*.

Advice and Direction—the Business Judgment Rule

An executor, generally, has an undivided duty of loyalty to estate beneficiaries. But, in the case of an executor-business partner, the testator is appointing someone with divided loyalty. What is a fiduciary to do where the fiduciary is making a decision for the estate that also will benefit the fiduciary individually? SCPA 2107 permits a fiduciary to petition the court for advice and direction as to the propriety, price, manner and time of sale of estate property where its value is uncertain. In addition, a fiduciary may petition the court for advice and direction "in other extraordinary circumstances" or where there is conflict among interested parties. However, the court has discretion to entertain jurisdiction over a SCPA 2107 petition, and often does not, where the advice and direction involve how to exercise business judgment.

The business judgment rule "presumes that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decision will serve the best interests of the corporation."[30] If directors of a corporation are sued with respect to a decision they have made, "the court will examine the decision only to the extent necessary to determine whether the plaintiff has overcome . . . the business judgment rule presumption. . . . If the presumption has not been overcome, 'then the business judgment rule prohibits the court from going further and examining the merits of the underlying business decision. . . .'"[31] The rule protects a corporation's directors from personal liability for their decisions and prevents court intervention into director's decisions.

Examples of applications under SCPA 2107 where the court made the determination that the advice and direction sought was a matter of the exercise of business judgment and did not rule are: *In re McCormack's Will*[32] (court would not approve of a lease of estate property, where court approval was not necessary); *In re Olensky's Estate*[33] (advisability of sale of bakery, and at what price, was a matter of business judgment); *In re Chapman's Estate*[34] (advice on disposition of estate real property, where executors were authorized by the will to lease, mortgage, sell, exchange or otherwise dispose of real property upon such terms as they determine, was a matter of business judgment).

Where jurisdiction is entertained, the court can still decline to give advice and direction. The court did entertain jurisdiction under SCPA 2107 in a case where an executor sought to exercise an option pursuant to an agreement with two other executors to buy the shares of a decedent's closely held business.[35] The estate beneficiaries objected to the exercise producing a logjam in estate administration.

Prior to the decedent's death, he had entered into an option agreement with the executor with an exercise date deadline. To avoid adverse income tax treatment to the corporation, which had been restructured into several corporations on the advice of the corporate accountants, the executor did not exercise his option. The executor entered into a revised option agreement with two "independent" executors, giving him an additional five years to exercise and changing the option to give the executor the power to select which stock of the several corporations to buy. The court concluded that the decedent had given his executors absolute discretion with respect to the disposition of the stock of the corporation and, based on that discretion, the court declined to give any advice or direction. The executor was permitted to exercise the revised option.

Another case, not involving the operation of a business but one where the court concluded it could have entertained jurisdiction under SCPA 2107, is the *Lazarus*[36] case. However, the fiduciary, to avoid the possibility the court would not entertain the petition under SCPA 2107, chose to bring a proceeding under SCPA 1813. There, the decedent had entered into a post-nuptial agreement with her husband which fixed each spouse's rights in the other's property in the event of separation, divorce or death.

Inter alia, the agreement provided for the rights and obligations for the parties in the event of a breakup of their marriage effective upon the commencement of an action for divorce or upon the certified mailing by either party to the other of a notice of the intention to terminate the marital relationship and to commence living separate and apart on a permanent basis. The agreement provided that, if the wife met certain conditions after giving such notice, the husband would pay her $10 million immediately and another $20 million on virtually the eve of the divorce. In addition, if either party died before the agreement had been fully performed, the personal representative of the decedent's estate could carry out remaining obligations.

One day before she died, the wife delivered a notice pursuant to the agreement and also a note which said that she was only doing it for her children. The fiduciary negotiated a $14 million settlement of the decedent's rights under the post-nuptial

agreement. The fiduciary asked the court to approve the settlement under SCPA 1813. A predicate of jurisdiction under SCPA 1813 is that a legal issue is involved in the matter. The court determined that a breach of contract claim was involved and directed approval of the settlement.

There is a general principle that a fiduciary is obliged to make his own judgment rather than the court's in discharging his duty to administer estate assets to the best advantage and that a court will not advise in such cases. To do so would merely substitute the court's judgment for that of the fiduciary and the court directed the approval of the settlement.

In determining whether to intervene in a conflict, the court will not do so simply because the executor/business partner received a benefit from a transaction involving the estate, but will do so if the transaction violated the executor's fiduciary duty to the beneficiaries.[37] A court may decline to interfere at one point and decide to do so at a later point in administration. Such a case is *In re Sylvan Lawrence*.[38] There, the decedent named his brother who was his business partner as executor of his will. The Surrogate determined that she would not interfere with the executor's exercise of the discretionary power to continue a partnership between the decedent and his brother unless there was a showing of abuse, noting that normally: "when a fiduciary is granted power to act in his absolute discretion, beneficiaries are not permitted to substitute their judgment . . . nor may the courts disturb that fiduciary's exercise of discretion in the absence of abuse."[39] The Surrogate determined the conflict of interest, which was inherent and unavoidable in the situation, did not in itself call for interference by the court, subject to the standard safeguards of good faith and fair dealing in the best interests of the estate.

Subsequently, in further litigation, the Surrogate appointed a referee who determined that the executor failed to sell certain partnership properties because of his own personal interest in obtaining income and estate tax advantages for his estate upon his death. The referee found the executor no longer should be allowed to exercise his discretion to continue the partnership. The Surrogate adopted the referee's recommendations. The court acted because the fiduciary had violated his obligations to the beneficiaries in substituting his interests for theirs.

Another case, recently settled, involving a trustee who continued a business in which he worked, was the *Estate of Harry Winston*, the well-known jeweler.[40] Harry Winston died in 1978 survived by his wife and his two sons, naming his older son who was in business with him as a fiduciary. Mr. Winston left roughly half of his estate in trust for his wife and the balance to a foundation. His wife died in 1986.

On Mrs. Winston's death the marital trust corpus was to be split equally between the two sons. The older son was to receive his half outright; the younger son's share was to be held in continuing trust for him until 25 years after his mother's death.

In 1991 the older brother/trustee directed an in-kind distribution of common stock of the family corporation to the continuing trust for his brother over the objections of his brother and the two independent trustees. The court approved the distribution, providing the older brother/trustee post a bond, which later was changed to an escrow arrangement. Later, the Surrogate rescinded his decision based on additional facts and concluded that the in-kind distribution was a violation of the fiduciary duty.

Pursuant to the authority in the executor's will, Harry Winston Incorporated was reorganized to create 100 shares of cumulative preferred stock and 100 shares of common stock. Ninety-five shares of the preferred stock were distributed to the Harry Winston Research Foundation and 90 shares of common stock were distributed to the marital trust in satisfaction of the marital bequest. The preferred stock was later gifted to a Bermuda trust, allegedly controlled by the older brother. The preferred stock was entitled to a guaranteed annual dividend of $332,500. There was no obligation to pay the dividend annually and the holder of the preferred stock could not demand or enforce payment. Any dividend not paid was accumulated. Payment of common stock dividends could not be made until all the preferred stock dividends were paid. The company did not keep current with its dividend obligations. Therefore, no dividend would be paid on the common stock in the younger brother's trust until the company was current.

A settlement between the brothers after 12 years of litigation was recently reported[41] in which the younger brother's trust received approximately $50 million. The younger brother will be allowed to withdraw 40–60% of his trust for tax and business reasons. In return, he agreed to give the day-to-day control of the business to his older brother. The history of the *Winston* case is primer for the difficulties that arise where a trustee, with a conflict of interest, continues a business. It also shows the difficulty in applying the business judgment rule.

Managing a decedent's business and being a fiduciary of the decedent's estate is a delicate balance. The fiduciary must keep in mind both the business judgment rule and the fiduciary duty. As the cases indicate, there is no bright line test to determine when the exercise of a business judgment runs

afoul of fiduciary duty when the interested fiduciary has an inherent conflict in estate administration.

Fiduciary Personal Liability

A fiduciary who continues a business, unless the testator provided otherwise, will be compensated like any other fiduciary notwithstanding the significant difference in the amount of work required of her. And, such a fiduciary may be exposing her personal assets in doing so, particularly where the business is a sole proprietorship or a general partnership. As noted by the court in *In re Ford's Estate*, "Once the . . . [fiduciary] undertakes to operate or continue the operation of the business she, of necessity, assumes certain liabilities and risks."[42]

Where the court has authorized a fiduciary to continue a business pursuant to SCPA 2108, that statute delineates the liability of the fiduciary. Providing the fiduciary acts within the authority granted by the court and has filed the certificate of doing business under an assumed name as required by the statute, the fiduciary is relieved of personal liability for operating the business, remaining liable, however, in her fiduciary capacity. The statute also limits the satisfaction of third party claims or causes of action against the business arising after the certificate is filed to the assets specified in the decree. The statute does not relieve the fiduciary of personal liability in running the business for her own wrongful acts or negligence.

In re Ford illustrates how the shield from liability of SCPA 2108 operates. There, the administrator received permission to continue the decedent's business and to incorporate the business. The administrator operated the business for almost six months and incurred, but did not pay, federal payroll tax. In imposing a surcharge for her failure to pay the taxes which was equal to the unpaid taxes, the court noted the fiduciary is shielded from personal liability in the general operation of the business under SCPA 2108 but the fiduciary is not insulated from "the responsibility and liability of acting in the capacity as a fiduciary."[43]

A court will not authorize a fiduciary to continue a business where the fiduciary is the sole distributee of an intestate estate.[44] In such an event, the estate interest merges with the beneficial interest and the beneficiary is vested with full legal title of the entire estate, including the decedent's business. The rationale for doing so is that in a sole proprietorship all of the owner's assets are available to the creditors and if the court allowed the fiduciary/beneficiary to shield the nonbusiness assets the creditors would be unfairly disadvantaged by the separation of the estate's business assets from its nonbusiness ones.[45]

A fiduciary cannot receive the partial protection from liability afforded by SCPA 2108 where the business is being operated through a general partnership or through a corporation. In the latter, a shareholder of a corporation has limited liability by the nature of the entity. Moreover, to the extent the fiduciary becomes an officer or director of the corporation, the corporation can obtain officer and director liability insurance, which will protect the fiduciary and her assets, except for willful wrongdoing and negligence.

With respect to a business operated as a general partnership, a fiduciary would be prudent to have the partnership converted into a limited liability corporation, which would protect the fiduciary and her assets from liability but which would continue to function like a partnership. Otherwise, the fiduciary has potential personal exposure.

If a fiduciary continues a business without authorization in the governing instrument or by the court, the fiduciary will be personally liable to the beneficiaries for any losses.

Valuation

If there are unusual or hard to value assets in an estate the executor can ask for advice and direction from the court under SCPA 2107. However, the court does so only in extraordinary circumstances and, where doing so is not an exercise of business judgment. In *In re Bernstein's Will*[46] the First Department opined that "it is only in extraordinary circumstances that the court should lend its approval to . . . [a] proposed sale."[47]

In *Bernstein*, the executors had one offer to purchase a minority interest in a closely held corporation, from the majority owner. The Appellate Division indicated that if the court were to relieve the executors of their "proper and sole responsibility in making such a sale" through the court's discretionary assumption of part of the responsibility, the court had to be satisfied the price was adequate. Consequently, the case was remanded to the Surrogate's Court to take proof that the price was adequate.

Conclusion

Issues relating to business interests should be addressed prior to the death of a client. Provisions addressing whether a business will be continued and the fiduciary's role, liability and compensation should be included in a client's will. Partnership agreements and other business documents should be reviewed to determine whether they conform to the decedent's intent with respect to continuation issues.

Endnotes

1. Collectively, "fiduciary."
2. N.Y. Sur. Ct. Proc. Act (SCPA) 2307(6) (McKinney 1999).
3. SCPA 2308(7), 2309(7).
4. *In re Smythe*, 6 Misc. 2d 130, 36 N.Y.S.2d 605 (Sur. Ct., Westchester Co. 1942); *In re Ridosh*, 5 A.D.2d 67, 169 N.Y.S.2d 54 (3d Dep't 1957).
5. *Willis v. Sharp*, 113 N.Y. 586 (1889).
6. *In re Ridosh*, *supra*.
7. *In re Gibson's Estate*, 46 Misc. 2d 954, 261 N.Y.S.2d 550 (Sur. Ct., Nassau Co. 1965); *In re Blaszkiewicz' Estate*, 33 Misc. 2d 884, 227 N.Y.S.2d 785 (Sur. Ct., Richmond Co. 1962); *In re Muller*, 24 N.Y.2d 336, 248 N.E.2d 164, 300 N.Y.S.2d 341 (1969).
8. *In re Gibson's Estate*, *supra*.
9. *In re Connolly*, 44 Misc. 2d 794, 255 N.Y.S.2d 196 (Sur. Ct., Kings Co. 1965).
10. *In re Muller*, *supra*.
11. *In re Gibson's Estate*, *supra*.
12. Margaret Valentine Turano and C. Raymond Radigan, *New York Estate Administration*, 421 (1999); *See also In re Etoll*, 101 A.D.2d 935, 475 N.Y.S.2d 654 (3d Dep't 1984).
13. *In re Civetta*, N.Y.L.J., May 25, 1998 at 25, col. 5 (Sur. Ct., Bronx Co.).
14. It is unclear to whom process must issue.
15. *See generally*, John G. McQuaid et al., *New York Wills and Trusts*, (3d ed. 1997).
16. N.Y. Partnership Law § 121-706 (McKinney 1999), for limited partnerships formed on or after July 1, 1991 or for limited partnerships formed before that date and governed by the Revised Limited Partnership Act. *See also* N.Y. Partnership Law § 110 (McKinney 1999), for limited partnerships formed before July 1, 1991, and not governed by the Revised Limited Partnership Act.
17. N.Y. Partnership Law § 121-702(a) (McKinney 1999) or N.Y. Partnership Law § 108(2) (McKinney 1999). See Note 16.
18. N.Y. Partnership Law § 62(4) (McKinney 1999).
19. *In re Lutz*, 202 Misc. 903, 112 N.Y.S.2d 640 (Sur. Ct., N.Y. Co. 1952); *aff'd*, 281 A.D. 809, 118 N.Y.S.2d 751 (1st Dep't 1953).
20. N.Y. Bus. Corp. Law § 1104 (McKinney 1999).
21. *In re Clarke's Estate*, 176 Misc. 187, 188, 26 N.Y.S.2d 948, 950 (Sur. Ct., Kings Co. 1941).
22. *Estate of Weinstein*, 25 A.D.2d 776, 269 N.Y.S.2d 475 (2d Dep't 1966); *See also In re Kahn's Estate*, 43 Misc. 2d 208, 250 N.Y.S.2d 781 (Sur. Ct., Westchester Co. 1964).
23. *In re Leibowitz's Will*, 34 A.D.2d 750, 310 N.Y.S.2d 529 (1st Dep't 1970).
24. *In re Leopold*, 259 N.Y. 274, 181 N.E. 570 (1932); *In re Tompkin*, 264 A.D. 612, 35 N.Y.S.2d 880 (2d Dep't 1942); *In re Shea*, 234 A.D. 176, 254 N.Y.S. 512 (3d Dep't 1931).
25. *In re Cohen*, 88 A.D.2d 290, 453 N.Y.S.2d 10 (1st Dep't 1982).
26. 53 Misc. 2d 546, 278 N.Y.S.2d 1011 (Sur. Ct., Suffolk Co. 1967).
27. *Id.* at 549, 278 N.Y.S.2d at 1015.
28. *Id.* at 553-554, 278 N.Y.S.2d at 1019; *See also In re Leibowitz's Will*, *supra*.
29. *See Estate of Mark Rothko*, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (1975), *aff'd and modified* 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), *aff'd* 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977).
30. Dennis J. Block et al., *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, 4-5 (5th ed. 1998).
31. *Id.* at 5, quoting *Cuker v. Mikalauskas*, 692 A.2d 1042, 1047 (Pa. 1997).
32. 4 Misc. 2d 646, 147 N.Y.S.2d 728 (Sur. Ct., N.Y. Co. 1955).
33. 123 N.Y.S.2d 883 (Sur. Ct., Kings Co. 1953).
34. 32 N.Y.S.2d 290 (Sur. Ct., Westchester Co. 1941).
35. *In re Dahly*, N.Y.L.J., Oct. 19, 1998 at 29, col. 2 (Sur. Ct., N.Y. Co.).
36. *Estate of Helen Singer Kaplan Lazarus*, N.Y.L.J., March 19, 1998 at 29, col. 3 (Sur. Ct., N.Y. Co.), *aff'd* 257 A.D.2d 436, 682 N.Y.S.2d 579 (1st Dep't 1999).
37. *In re Durston*, 297 N.Y. 64, 74 N.E.2d 310 (1947); *In re Balfe*, 245 A.D. 22, 280 N.Y.S. 128 (2d Dep't 1935).
38. N.Y.L.J. Dec. 14, 1990 at 22, col. 4 (Sur. Ct., N.Y. Co.), *aff'd* 181 A.D. 2d 576, 581 N.Y.S.2d 728 (1st Dep't 1992). Surrogate appoints referee, N.Y.L.J., Oct. 29, 1993 at 22, col. 6. Surrogate confirms first part of referee's report, N.Y.L.J., Feb. 8, 1996 at 29, col. 2. Surrogate confirms second part of referre's report, N.Y.L.J., Dec. 27, 1996 at 24, col. 1. App. Div. affirms Sur. Ct., proceedings 242 A.D.2d 416, 662 N.Y.S.2d 36 (1st Dep't 1997).
39. *Id.*
40. 167 Misc. 2d 295, 631 N.Y.S.2d 999 (Sur. Ct., Westchester Co. 1995), *aff'd* 222 A.D.2d 596, 636 N.Y.S.2d 635 (2d Dep't 1995).
41. N.Y.L.J., July 25, 2000 at 1, col. 3.
42. 78 Misc. 2d 213, 215, 356 N.Y.S.2d 952, 956 (Sur. Ct., Erie Co. 1974).
43. *Id.* 356 N.Y.S.2d at 957.
44. *In re Zedler's Estate*, 58 Misc. 2d 786, 296 N.Y.S.2d 681, (Sur. Ct., Westchester Co. 1968).
45. *Id.* at 787, 296 N.Y.S.2d at 683.
46. 13 A.D.2d 743, 215 N.Y.S.2d 138 (1st Dep't 1961) *appeal denied*, 10 N.Y.2d 708, 178 N.E.2d 715, 223 N.Y.S.2d 1025 (1961).
47. *Id.*

The author wishes to thank to Darcy M. Katris and Anne L. Stallman for their assistance. **Eileen Caulfield Schwab is the Partner in Charge of the Private Clients Group of Brown and Wood LLP. In 1998, she was given an award by the New York State Bar Association for her work in achieving passage of legislation repealing New York's separate estate tax and gift tax.**

1999-2000 New York State Legislative Session Changes Affecting Estate Planning and Administration

By Joshua S. Rubenstein

The 1999 Legislative Session brought numerous substantive changes to the laws affecting estate planning and administration. There were many tax-related changes, designed primarily to conform New York tax treatment to federal tax treatment. There were a number of important substantive and procedural changes as well, particularly in the areas of tax apportionment and estate litigation. The 2000 Legislative Session brought fewer but equally substantive changes, most notably in the area of reforming wills and trusts for tax purposes. The following is a review of each such change.

1999 SESSION

Tax Law

Estate, Gift and GST Taxes

1. Tax Law § 951(a), which sets forth the date through which applicable Internal Revenue Code provisions are incorporated into the Tax Law, has been amended to provide that references to the Internal Revenue Code include all amendments enacted on or before July 22, 1998. This change is effective immediately.[1]

2. Tax Law § 954(d)(1) has been amended to delete the cross-reference to Internal Revenue Code § 2033A, family-owned business exclusion. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[2]

3. Tax Law § 954(c)(1), which sets forth the sections of the Internal Revenue Code defining the federal gross estate, has been amended to delete the cross-reference to Internal Revenue Code § 2033A, family-owned business exclusion. This change is effective for estates of decedents dying on or after February 1, 2000.[3]

4. Tax Law § 954-c, which had created a family-owned business exclusion, has been repealed. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[4]

5. Tax Law § 954(g) has been relettered subsection (h), and a new subsection (g) has been added to create a deduction for family-owned business interests. If a deduction for family-owned business interests allowable under Internal Revenue Code § 2057 is elected pursuant to this section, the following provisions of § 2057 shall not be applicable to the deduction for family-owned interests allowed for the purposes of the New York Tax Law:

(A) Paragraph 3 of subsection (A) of such section (relating to coordination with the unified credit);

(B) Subsection (F) of such section (imposing an additional estate tax for failure to materially participate in business or dispositions of interest);

(C) Subsection (H) of such (requiring the filing of an agreement with the commissioner); and

(D) Any other provision of such section which is not relevant to the deduction for family-owned business interest allowed by this section.

Where no federal estate tax return is required to be filed under the Internal Revenue Code, the time for making the election referred to above shall be the same as would be required under the federal estate tax had a federal estate tax return been required to be filed, and the election shall be made on the New York estate tax return. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (i.e., as of the enactment of the sop tax).[5]

6. Tax Law § 955(h)(1), as relettered by Chapter 407 of the Laws of 1999, which sets forth the provisions of the Internal Revenue Code specifying the deductions allowable for federal estate tax purposes, has been amended to add a cross-reference to Internal Revenue Code § 2057, family-owned business interests. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to

the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[6]

7. Tax Law § 958-a(i), which prevented a qualified use credit from being claimed if the family-owned business exclusion was elected, has been amended to replace the reference to the family-owned business exclusion with a reference to the family-owned business deduction. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[7]

8. Tax Law § 958-b(f), which prevented a closely-held business credit from being claimed if the family-owned business exclusion was elected, has been amended to replace references to the family-owned business exclusion with references to the family-owned business deduction. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section, and provided further that the amendment of this section shall not affect the expiration or repeal of such section and shall be deemed to expire or repeal therewith (as of the enactment of the sop tax).[8]

9. Internal Revenue Code § 2031(c)(6) contained in § 2 of Chapter 1013 of the Laws of 1962 (relating to the imposition of a tax on the transfer of estates of certain decedents) has been amended to provide that the qualified conservation easement election shall be made on or before the due date of the estate tax return and shall be made on such return, and to delete the requirement that the election be irrevocable. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[9]

10. Internal Revenue Code § 2031(c)(9) contained in § 2 of Chapter 1013 of the Laws of 1962 has been renumbered paragraph 10, and a new paragraph 9 has been added to allow the deduction for qualified conservation easements in the case of easements granted after death and before the due date including extensions of the estate tax return, provided that no charitable deduction is allowable with respect to such grant. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[10]

11. Internal Revenue Code § 2033A contained in § 2 of Chapter 1013 of the Laws of 1962 is renumbered § 2057 and has been amended to replace the family-owned business exclusion with a deduction for family-owned business interests. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[11]

12. Internal Revenue Code § 2057(b)(2)(A) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the parenthetical "without regard to this section." This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[12]

13. Internal Revenue Code § 2057(b)(3) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the subtraction from includible gifts of family-owned business interests of the amount of such gifts from the decedent to members of the decedent's family otherwise included in the gross estate. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[13]

14. The opening paragraph of Internal Revenue Code § 2057(c) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the parenthetical "determined without regard to this section." This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[14]

15. Internal Revenue Code § 2057(e)(1) contained in § 2 of Chapter 1013 of the Laws of 1962, dealing with the definition of the term "qualified family-owned business interest," has been amended to provide that a decedent shall be treated as engaged in trade or business if any member of the decedent's fam-

ily is engaged in such trade or business. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[15]

16. Internal Revenue Code § 2057(e)(2) contained in § 2 of Chapter 1013 of the Laws of 1962, dealing with limitations to the definition of the term "qualified family-owned business interest," has been amended to include an interest in a trade or business where a certain portion of the income from such trade or business would constitute the personal holding company income if such trade or business were a corporation. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[16]

17. Internal Revenue Code § 2057(f)(2)(A) has been amended to delete the parenthetical "as determined under rules similar to the rules of § 2032A(c)(2)(B)," and to add a definition of "adjusted tax difference" attributable to a qualified family-owned business interest. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[17]

18. Internal Revenue Code § 2057(f) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended by adding a new paragraph 3 to provide that a qualified heir shall not be treated as disposing of a qualified family-owned business interest by reason of ceasing to be engaged in a trade or business so long as the property to which such interest relates is used in a trade or business by any member of such individual's family. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[18]

19. Internal Revenue Code § 2057(g)(1) contained in § 2 of Chapter 1013 of the Laws of 1962 has been amended to delete the reference to subparagraph "(M)" of subsection (i)(3). This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[19]

20. Internal Revenue Code §§ 2057(i)(3)(L),(M) and (N) contained in § 2 of Chapter 1013 of the Laws of 1962 have been relettered (N), (O) and (P), and two new subparagraphs (L) and (M) have been added referencing Internal Revenue Code §§ 2032A(G) and Internal Revenue Code § 2032A(H) and (I). This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[20]

21. Internal Revenue Code § 2057 contained in § 2 of Chapter 1013 of the Laws of 1962 has been repealed effective with the repeal of the estate tax. This change is effective for estates of decedents dying on or after February 1, 2000.[21]

22. Internal Revenue Code § 6166(b)(7)(A)(iii), contained in § 2 of Chapter 1013 of the Laws of 1962, has been amended to provide that the 2% portion shall be treated as being zero. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York estate tax returns in accordance with the law in effect prior to the effective date of this section.[22]

23. Internal Revenue Code § 6166(b)(8)(A)(iii), contained in § 2 of Chapter 1013 of the Laws of 1962, has been amended to provide that the 2% portion shall be treated as being zero. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York State tax returns in accordance with the law in effect prior to the effective date of this section.[23]

24. Tax Law § 1020(a) has been amended to provide that all references to the Internal Revenue Code include amendments through July 22, 1998. This change is effective immediately.[24]

25. Internal Revenue Code § 2652(b)(1) contained in § 1025 of the Tax Law has been amended to delete the sentence providing that the term "trust" shall not include any trust during any period the trust is treated as part of an estate under § 646. This change is effective for estates of decedents dying after August 5, 1997.[25]

26. Internal Revenue Code § 2654(b) contained in § 1025 of the Tax Law has been amended to provide that a trust shall be treated as part of an estate during any period that the trust is so treated under § 645. This change is effective for estates of decedents dying after August 5, 1997.[26]

27. Section 38 of part A of Chapter 56 of the Laws of 1998, repealing Tax Law § 954-c effective with the

repeal of the estate tax, has been repealed. This change is effective for estates of decedents dying after December 31, 1997, except that estates of decedents dying after December 31, 1997, but before September 8, 1999, may elect to file New York State tax returns in accordance with the law in effect prior to the effective date of this section.[27]

28. Tax Law § 976 has been amended by adding a new subsection (e), providing that if any recovery under a cause of action pending at the time of death or relating to the decedent's death is taxable, the commissioner shall waive any penalty and interest associated with such cause of action which accrues from the date that the return disclosing such cause of action is filed, provided that such penalty and interest may not be waived for periods beyond one year after the date of final judgment or settlement of the cause of action. This change is effective immediately.[28]

State Lottery for Education

29. Tax Law § 1613(b), dealing with payments to minors of prizes on any winning ticket of less than $5,000, has been amended to replace references to banks with references to financial institutions. This change is effective immediately.[29]

Banking Law

30. Banking Law § 2(26) has been amended to replace references to the New York Uniform Gifts to Minors Act with references to the New York Uniform Transfers to Minors Act. This change is effective immediately.[30]

31. Banking Law § 100(c)(1) has been amended by adding a reference to any Uniform Transfers to Minors Act and to the New York Uniform Transfers to Minors Act. This change is effective immediately.[31]

32. Banking Law § 100(c)(9)(a)(iii) has been amended to replace references to the Uniform Gifts to Minors Act with references to the Uniform Transfers to Minors Act. This change is effective immediately.[32]

33. Banking Law § 134(9) has been amended to refer to the age 21 election provided in part 6 of article 7 of the Estates, Powers and Trusts Law. This change is effectively immediately.[33]

34. Banking Law § 202(h)(5) has been amended to add a reference to the age 21 election provided in part 6 of article 7 of the Estates, Powers and Trusts Law. This change is effective immediately.[34]

Estate, Powers and Trusts Law

Definitions

35. Estates, Powers and Trusts Laws 1-2.9-a, which defines "infant or minor," has been amended to replace the reference to the New York Uniform Gifts to Minors Act with a reference to the New York Uniform Transfers to Minors Act. This change is effective immediately.[35]

Rules Governing Dispositions

36. Estates, Powers and Trusts Law 2-1.8 has been amended by repealing existing paragraph d-1 (referring to the effect of general non-apportionment directions in a will on taxes imposed on qualified terminable interest property and on excess retirement accumulations), and replacing it with a new paragraph d-1, providing that taxes allocable to qualified terminable interest property shall be apportioned at the incremental, as opposed to average, rate. This change is effective for decedents dying on or after February 1, 2000 (the date when existing Estates, Powers and Trusts Law 2-1.12 was repealed).[36]

Charitable Trusts

37. Estates, Powers and Trusts Law 8-1.4(b) has been amended to provide that nonprofit medical and dental indemnity or health and hospital service corporations shall not be subject to the registration and reporting requirements affecting charitable trusts. This change is effective immediately.[37]

Surrogate's Court Procedure Act

General

38. Surrogate's Court Procedure Act 103(27), which deals with the definition of the term "infant," has been amended to replace the reference to the New York Uniform Gifts to Minors Act with a reference to the New York Uniform Transfers to Minors Act. It has also been amended to make plain that the age 18 limitation is inapplicable to Surrogate's Court Procedure Act 1716, dealing with applications for ancillary letters to foreign guardians. This change is effective immediately.[38]

General Provisions Relating to Bonds

39. Surrogate's Court Procedure Act 801(1)(a) has been amended to replace the $10,000 threshold for requiring a bond with the monetary amount (currently $20,000) defined as a small estate pursuant to Surrogate's Court Procedure Act 1301(1). This change is effective immediately.[39]

Small Estates

40. Surrogate's Court Procedure Act 1304(4) and (5) have been amended to provide that the clerk shall enter small estate proceedings in the records and indices of the court, as opposed to keeping index books; to permit notice to be given by letter as well as by postcard; to delete the 25¢ charge for certificates of authority; to permit the clerk to indicate on the certifi-

cate that it is valid only for the transfer or transaction as specified thereon; to amend the list of certificate recipients to include any person holding or having custody, possession or control of any personal property of the decedent which the voluntary administrator seeks to affect the title thereof; and to charge a fee of $1 for the filing the affidavit. This change is effective immediately.[40]

41. Surrogate's Court Procedure Act 1306(1), dealing with the powers of voluntary administrators, has been amended to amend the monetary limitation to be the amount (currently $20,000) defined as a small estate pursuant to Surrogate's Court Procedure Act 1301(1) and to make this section gender neutral. This change is effective immediately.[41]

Probate Proceedings

42. Surrogate's Court Procedure Act 1404 has been amended by adding two new subdivisions 5 and 6, providing that unless the Court directs otherwise for good cause shown, the estate shall pay the costs of attesting witness examinations conducted before objections are filed in the case of the first two attesting witnesses within the state who are competent and able to testify and who are produced by the proponents, or if no witnesses are within the state who are competent and able to testify, the witness without the state who resides closest to the county in which the probate proceeding is pending and who is competent and able to testify, as well as the cost of the stenographer and of one copy of the transcripts of such examinations for the court and for any guardians ad litem. The costs of all other examinations conducted prior to filing objections, including subsequent examinations of the foregoing witnesses, the costs of all examinations conducted after objections are filed, and all costs of document discovery in connection with all such examinations, shall be governed by article 31 of the Civil Practice Law and Rules. In addition, unless the Court directs otherwise for good cause shown, if more than one person shall have been involved in the preparation of the will, the term "person who prepared the will" shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator. This change is effective immediately.[42]

Costs, Allowances and Commissions

43. Surrogate's Court Procedure Act 2302 has been amended to provide that in a contested probate proceeding, costs payable out of the estate may be awarded to a person named as executor in a prior will on file in the Court that is not admitted to probate when such person participates in the proceeding in good faith. It has also been amended to make it gender neutral. This change is effective immediately.[43]

Business Law

Limited Liability Companies

44. Business Law § 606 has been amended to eliminate the ability of a member to withdraw with the vote or written consent of at least two-thirds in interest of the members, or in the absence of such consent, upon not less than six months' prior written notice. This change is effective immediately, provided that a limited liability company whose original article of organization was effective prior to August 31, 1999 shall continue to be governed by prior law.[44]

2000 SESSION

Education Law

45. Education Law § 695-e has been amended to provide that family tuition account owners may designate contingent account owners in the event of the death of the account owner. The provision includes a person who enters into agreement as a fiduciary on behalf of a trust within the definition of "account owner." This change is effective immediately.[45]

Estate, Powers and Trusts Law

46. Estates, Powers and Trusts Law 2-1.7 has been amended to establish a presumption that where a person's absence follows exposure to a specific peril, a presumption of death may be made prior to the passage of three years from the date of such absence. The amendment further provides that where there is no known exposure to a specific peril, a presumption of death may be made prior to three years from the date of absence where clear and convincing evidence demonstrates that death is the only reasonable explanation for the absence. This change is effective immediately and applies to proceedings commenced on or after August 30, 2000.[46]

47. The Estates, Powers and Trusts Law has been amended by adding a new section, 2-1.12, to provide that all references in wills and trusts to the federal credit for state death taxes contained in a credit shelter formula bequest be deemed deleted unless the formula has been amended on or after February 1, 2000, or the will contains a specific indication to take the federal credit for state death taxes into account for non-tax reasons. This change is effective immediately and is applicable to estates of decedents dying after January 31, 2000.[47]

48. Estates, Powers and Trusts Law 8-1.8 has been amended to include a new paragraph (b-1), providing that trusts that are private foundations within the meaning of § 509 of the Internal Revenue Code are required to publish notice of the availability for public inspection of the private foundation's annual return,

filed with the Internal Revenue Service. This change is effective on January 1, 2001.[48]

49. The Estates, Powers and Trusts Law has been amended by adding a new section, 11-1.11, to permit the non-judicial reformation of trusts by trustees for certain tax purposes. Under the section, unless expressly prohibited by the trust instrument, trustees may amend administrative and other provisions of the trust which have no significant dispositive effect (defined as a variance of no more than 5% in the actuarial values of the pre- and post-amendment interests) to prevent the disallowance of a charitable deduction, or a marital deduction for a non-citizen spouse, or treatment for purposes of the gift tax as a qualified personal residence trust, or treatment as a charitable remainder trust. In order to be effective, such amendment must be acknowledged, signed by all of the trustees who are not the creator or a beneficiary, and filed in the court having jurisdiction over the instrument, after 30 days' prior notice of the right to object has been given to all persons interested in the trust (taking into account virtual representation). This change is effective immediately.[49]

General Business Law

50. General Business Law § 453 has been amended to provide that monies paid in advance for funeral merchandise or services may be deposited in trust in a credit union or federal credit union, in addition to other banking institutions. This change is effective immediately.[50]

Insurance Law

51. Insurance Law § 1113 has been amended by adding a subpart to clarify that a policyholder certified as chronically ill can qualify for acceleration of death benefits. Loss ratio requirements for life insurance policies that allow the acceleration of death benefits to pay for long-term care services have been eliminated. This change is effective on January 2, 2001.[51]

Mental Hygiene Law

52. Mental Hygiene Law § 15.01 has been amended to provide that any references in article 15 to mentally retarded persons shall be deemed to apply to persons who are developmentally disabled. This change is effective immediately.[52]

53. Chapter 744 of the laws of 1992 has been amended to provide that the expiration of certain provisions of law establishing the authority of the commission on quality care for the mentally disabled to contract with community dispute resolution centers for the provision of administrative support and assistance for the operation of the surrogate decision-making program has been extended until June 30, 2005. This change is effective immediately.[53]

Not-For-Profit Corporation Law

54. Not-for-Profit Corporation Law § 406 has been amended to include a new paragraph (b-1), providing that domestic not-for-profit corporations that are private foundations within the meaning of § 509 of the Internal Revenue Code are required to publish notice of the availability for public inspection of the private foundation's annual return, filed with the Internal Revenue Service. This change is effective on January 1, 2001.[54]

Retirement and Social Security Law

55. Retirement and Social Security Law § 448-a has been amended to provide that certain death benefits will apply to all new members of a public retirement system and to allow Tier 2, 3 and 4 members to be covered by the most advantageous death benefit. This change is effective immediately.[55]

Surrogate's Court Procedure Act

56. Surrogate's Court Procedure Act 103 has been amended by adding two new subdivisions, 35-a and 37-a, which define mailing by express mail and by special mail service, and by amending subdivisions 35, 36 and 37 to correct the references to the United States Postal Service. These changes are effective on November 1, 2000.[56]

57. Surrogate's Court Procedure Act 202-d has been amended to continue statutory requirements for publication of regulatory agendas in the State Register until December 31, 2002, and makes these documents more accessible by requiring the posting of regulatory agendas on agency Web sites. These changes are effective immediately.[57]

58. Surrogate's Court Procedure Act 307 has been amended to provide that service of process upon non-domiciliaries may be made by registered or certified mail or by special mail service without court order. These changes are effective on November 1, 2000.[58]

59. Surrogate's Court Procedure Act 308 has been amended to correct the cross-reference for service upon a consular official. This change is effective on November 1, 2000.[59]

60. Surrogate's Court Procedure Act 309 has been amended to provide that service by special mail service is complete upon receipt. This change is effective November 1, 2000.[60]

61. Surrogate's Court Procedure Act 1120 has been amended to correct the cross-reference for service upon an alien. This change is effective November 1, 2000.[61]

62. Surrogate's Court Procedure Act 1707 has been amended to permit the court to issue temporary letters

of guardianship for an infant's person or property or both. This change is effective November 19, 2000.[62]

63. Surrogate's Court Procedure Act 1708 has been amended to authorize guardians of infants' funds to invest those funds in accordance with the Prudent Investor Act[63] without subjecting the infants' funds to the cost of a bond. The amendment provides that a bond may be dispensed with wholly or partly when it authorizes the guardian to invest guardianship funds pursuant to an investment advisory agreement with a bank, trust company, brokerage house or other financial services entity acceptable to the court. This change is effective immediately.[64]

64. Surrogate's Court Procedure Act 1726(1)(c) has been amended to add a "progressively chronic" or "irreversibly fatal" illness to the definition of "debilitation." This change is effective November 19, 2000.[65]

65. Surrogate's Court Procedure Act 1726(3) has been amended to permit a legal custodian and, if the parent, legal guardian or legal custodian cannot be located, the primary caretaker of an infant to petition for the appointment of a standby guardian. This change is effective November 19, 2000.[66]

66. Surrogate's Court Procedure Act 1726(4) has been amended to permit a legal custodian and, if the parent, legal guardian or legal custodian cannot be located, the primary caretaker of an infant to designate a standby guardian by written designation. This change is effective November 19, 2000.[67]

67. Surrogate's Court Procedure Act 1726(8) has been amended to require the appointment or designation of a standby guardian to be delivered to the infant's legal custodian or primary caretaker. This change is effective Noember 19, 2000.[68]

Endnotes

1. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
2. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
3. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
4. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
5. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
6. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
7. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
8. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
9. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
10. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
11. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
12. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
13. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
14. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
15. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
16. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
17. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
18. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
19. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
20. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
21. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
22. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
23. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
24. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
25. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
26. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
27. Chapter 407 of the Laws of 1999, S6110, A9019, signed August 9, 1999.
28. Chapter 232 of the Laws of 1999, S1463, A4636-A, signed July 13, 1999.
29. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
30. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
31. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
32. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
33. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
34. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
35. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
36. Chapter 380 of the Laws of 1999, S5062, A7989, signed July 27, 1999.
37. Chapter 424 of the Laws of 1999, S2733-A, A4662-A, signed August 31, 1999.
38. Chapter 231 of the Laws of 1999, S1164, A3974, signed July 13, 1999.
39. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.
40. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.
41. Chapter 168 of the Laws of 1999, S3396-B, A7714, signed July 6, 1999.

42. Chapter 460 of the Laws of 1999, S3401, A7159, signed September 7, 1999.
43. Chapter 460 of the Laws of 1999, S3401, A7159, signed September 7, 1999.
44. Chapter 420 of the Laws of 1999, S1640, A2844, signed August 31, 1999.
45. Chapter 535 of the Laws of 2000, S8144, A8834, signed October 4, 2000.
46. Chapter 413 of the Laws of 2000, S6918, A10421, signed August 30, 2000.
47. Chapter 513 of the Laws of 2000, S6886, A10431, signed October 4, 2000.
48. Chapter 242 of the Laws of 2000, S7256, A10301, signed August 16, 2000.
49. Chapter 267 of the Laws of 2000, S3393-C, A7265-D, signed August 16, 2000.
50. Chapter 353 of the Laws of 2000, S4744, A7248, signed August 23, 2000.
51. Chapter 537 of the Laws of 2000, S6680-B, A9597-B, signed October 4, 2000.
52. Chapter 78 of the Laws of 2000, S6919, A11079, signed June 23, 2000.
53. Chapter 94 of the Laws of 2000, S8038, A11324, signed June 23, 2000.
54. Chapter 242 of the Laws of 2000, S7256, A10301, signed August 16, 2000.
55. Chapter 554 of the Laws of 2000, S8131, A11414, signed October 31, 2000.
56. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
57. Chapter 343 of the Laws of 2000, S8003-A, A11081-A, signed August 23, 2000.
58. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
59. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
60. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
61. Chapter 355 of the Laws of 2000, S6885, A9003, signed August 23, 2000.
62. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
63. Estates, Powers and Trusts Law 11-2.3.
64. Chapter 43 of the Laws of 2000, S6238-A, A4758-A, signed June 6, 2000.
65. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
66. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
67. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.
68. Chapter 477 of the Laws of 2000, S5170-A, A7646-A, signed September 20, 2000.

©Joshua S. Rubenstein

Don't risk your client's goodwill with a poor business/partnership valuation

Empire Valuation Consultants can help you avoid unnecessary tax audit risks related to valuations of closely held businesses and partnership interests. We specialize in business valuations and have a fully trained, accredited staff with a broad range of industry experience. We provide your clients with thorough, accurate, timely and on-budget reports that meet all applicable IRS standards for estate or gift tax related appraisals.

Empire Valuation Consultants

Specialists in Business Valuations for:

- Estate & Gift Taxes
- Buy/Sell Agreements
- Recapitalizations
- ESOPs
- Redemptions
- Acquisitions/Sales
- Purchase Price Allocation
- Corporate Planning
- Fairness Opinions
- Litigation

William Lockwood, ASA, CBA
Scott Nammacher, ASA, CFA
350 Fifth Avenue, Ste. 5713
New York, NY 10118
(212) 714-0122

Paula Heermance, ASA
Terry Griswold, ASA
3255 B-H Town Line Road
Rochester, NY 14623
(716) 475-9260

(Paid Advertisement)

Surviving an Estate Tax Audit

By Philip A. Di Giorgio

A sense of uncertainty and anxiety is often experienced by the wary fiduciary who has been charged with the responsibility of filing an estate tax return. Although not all estate tax returns are audited, every estate tax return filed with the Internal Revenue Service (IRS) will receive at least some level of scrutiny by an IRS Estate Tax Attorney or Manager. The inevitable review of the return (Form 706) by the IRS, however, should not trigger fear in the well-advised administrator or executor.

This article is intended to provide counsel to the fiduciary with practical insights that will minimize the risks of an estate tax audit.

"Obtaining Authority to Represent the Estate"

The IRS considers tax returns and return information to be confidential, and IRS employees will be hesitant to provide any information to a practitioner who has not been given written authorization by the taxpayer to receive it.[1] Therefore, it is recommended that a duly executed Power of Attorney Form 2848, designating the practitioner as the estate's representative, be filed along with the Estate Tax Return.

Always Provide Adequate Documentation

It is axiomatic that a well-documented return will reduce the odds of being audited and the uncertainties associated with the audit process. Conversely, a poorly documented or inaccurate return is almost certain to elicit additional scrutiny.

At a bare minimum, every return should include the data and documentation specified by Treasury Regulation 20.6018.[2] If all of the information specified in Regulation 20.6018 is not provided, the preparer runs a significant risk of being contacted by an IRS Estate Tax Attorney, even if the return does not otherwise include any items which would merit an Estate Tax Examination. On the other hand, if Treasury Regulation 20.6018 is fully complied with, the preparer is likely to avoid contact by an Estate Tax Attorney, unless the return presents at least one issue that the examiner deems likely to result in a material change in the tax liability.

Examples of documentation that should accompany the estate tax return include, but are not limited to:

- the decedent's death certificate
- a copy of the decedent's will
- copies of any relevant trusts
- appraisals for each parcel of real estate and for each business interest
- Form 712 for each life insurance policy
- all pertinent Gift Tax Returns

Avoid Inadvertently Omitted Assets

The preparer must bear in mind that all assets in which the decedent had an interest, as of the date of death, must be included in the gross estate.[3] Care should be taken to value all assets in accordance with the pertinent statutes, regulations and case law or an audit will likely ensue.

There are certain assets which are commonly omitted from the estate tax return due to ignorance of their existence or inadvertence. The absence of these assets from a return will give rise to questions in the examining attorney's mind and will increase the chances of an audit.

Some of the most commonly omitted assets include the following:

- miscellaneous personalty
- accrued dividends
- accrued interest
- refunds on prepaid premiums
- income tax refunds
- adjusted taxable gifts

As noted above, an IRS Estate Tax Attorney will routinely search for adjusted taxable gifts. Despite the preparer's best intentions, it is possible that the examining attorney may turn up a gift transfer in excess of the annual exclusion amount, which was inadvertently omitted from the return. The impact of such a discovery can be minimized when the estate is in a position to take advantage of the decedent's ability to split gifts with a spouse.[4] If the due date for filing the gift tax return has not yet passed, or if the due date has passed, but neither spouse has filed a gift tax return for the applicable year, then the executor should be advised to seek to split a gift on behalf of the decedent.[5] This of course assumes cooperation on the part of the decedent's spouse, or the spouse's executor, administrator, guardian or committee.

Aside from the obvious inadvertent omissions and mathematical errors, certain complex legal and valuation issues may make a return significantly more likely to be the subject of an estate tax audit. If the estate has hard-to-value assets and may be faced with such an issue, the preparer should promptly seek the advice of an experienced valuation expert.

No Double Dipping (The I.R.C. § 642(g) Election)

Some deductions may be claimed on either the Estate Tax Return or the Fiduciary Income Tax Return. If counsel believes an estate tax audit is likely, and not all such deductions were claimed on the estate tax return at the time of filing, the preparer may, depending on the circumstances of the estate and individual beneficiaries, wish to hold off on claiming those deductions on a Fiduciary Income Tax Return (Form 1041) until the IRS Estate Tax Closing Letter has been issued. This way the deductions may be used to offset any potential estate tax deficiency. Once the election is made to claim such a deduction on a Fiduciary Income Tax Return, that election is irrevocable.[6]

The Audit Process

If a return is selected for audit, the IRS Estate Tax Attorney is likely to review the following before scheduling a meeting with the estate's representative:

- decedent's final three years of income tax returns
- any Fiduciary Tax Returns filed by the estate
- all Gift Tax Returns filed
- the decedent's will
- trusts created by the decedent
- trusts in which the decedent had an interest
- the Surrogate's Court file created for the estate
- land records at the appropriate county clerks' offices

The IRS will also request detailed appraisals of any real property or business interests held by the decedent, if such appraisals have not already been included with the return. Consequently, the preparer should review all of the foregoing items prior to filing the return, in order to avoid an audit, but also to be prepared if one should occur.

Once the preliminary documentation is reviewed, the Estate Tax Attorney will then ordinarily schedule an audit meeting with the estate's representative. During the initial audit meeting the examining attorney will normally review the decedent's financial records, including but not limited to:

- bank statements
- savings passbooks
- check registers
- brokerage statements
- canceled checks for a three-year period

The examining attorney may also wish to review the estate's records of income and expenses, including the estate check register, bank statements, canceled checks, invoices and receipts. Therefore, all such records should be preserved to the extent possible, at least until an IRS Closing Letter has been issued, in order to avoid the expense and hassle of ordering them from a bank or other institution in the event of an audit. The fiduciary should be counseled to keep a thorough record of any expenses incurred in connection with the production of information requested by the IRS during an estate tax examination, as many of these expenses may be deducted on the Estate Tax Return as expenses of estate administration.[7]

It is noteworthy that the IRS Estate & Gift Tax Examination Groups are separate and distinct from the IRS Income Tax Groups. Although these groups will from time to time make referrals to one another, exchange information, and even occasionally coordinate efforts on a particular examination, the examining IRS Estate Tax Attorney sometimes neglects to give due regard to the income tax effects of an estate tax adjustment. The private practitioner cannot afford to make this mistake. Any increase in value of a particular asset for estate tax purposes will also increase that asset's basis for income tax purposes.[8] Also keep in mind that a deduction that is disallowed in an estate examination may sometimes give rise to a deduction that may be claimed on an individual or fiduciary income tax return.

Help From Within (The IRS Taxpayer Advocate)

If the practitioner believes that the examiner is not focusing adequately on an issue of concern to the taxpayer, or if the examination is not proceeding at a reasonably expeditious pace, the practitioner may seek relief from the IRS Taxpayer Advocate Office responsible for the District in which the examination is being conducted. If the Taxpayer Advocate elevates the issue to a "Problem Resolution Program issue," the examining attorney will be required to

address the issue in a reasonably expeditious fashion.[9]

Concluding the Estate Tax Examination

If any adjustments are proposed as the result of an audit, the IRS Estate Tax Attorney must provide the estate with a written Report of Estate Tax Examination Changes.

If a deficiency is assessed, interest will also be assessed on the deficiency or underpayment from the due date of the return, without regard to extensions, to the date payment is received.[10] However, an estate tax deduction may be claimed for any interest paid on the deficiency.[11]

If the estate agrees with the adjustments made by the examining attorney, the executor will be asked to execute Waiver Form 890. The estate should receive a closing letter from the IRS within a reasonable time after a waiver is received. If more than six weeks pass and no closing letter has been received, the estate's representative should consider calling the examiner to determine the status of the closing letter.

Agreed unpaid deficiencies and overpayments of $10,000 or more receive expedited processing. For cases in this category the case will be closed out, the tax assessed and the refund issued or collection proceedings initiated, as applicable, within a short period of time. This can present difficulties for the illiquid estate faced with a large deficiency. Such an estate may file for an extension of time to pay the deficiency.[12] If the deficiency involves a closely held business interest which makes up a significant portion of the estate, installment payment relief may be available.[13]

Your Appeal Rights

There are several options open to an estate if the estate's representative and the examining attorney cannot agree on an issue or issues. The estate's representative may request a conference with the managing attorney and the examining attorney to resolve an issue.[14] If at least 210 days remain before the statute of limitations runs, the estate may have the matter referred to the appropriate Regional Appeals Division of the IRS. The statute of limitations period for the assessment of estate tax liability, as is the case with income and gift tax liability, is three years from the due date of the return or three years from the date of filing, whichever is later.[15] Unlike the statute of limitations for an income tax or a gift tax return, the statute of limitations for assessing tax liability on an estate cannot be extended.[16]

If counsel for the estate does not believe that the IRS Estate Tax Attorney is being arbitrary or grossly unreasonable, it may be in the best interests of the estate to attempt to reach an expeditious agreement with the attorney, particularly where subjective valuation issues are involved. On the other hand, if the attorney's position appears to be arbitrary and unsupportable, or if a large sum of tax is at issue, it may be advisable to file an appeal with the IRS Appeals Division. The IRS Appeals Division has significantly more discretionary negotiating authority than does the examining attorney. If the initial appeal is unsuccessful, litigation in the Tax Court or the District Court is an option, but this option should be avoided unless justified by the amount involved, due to the inherent risks and costs of litigation.

If the estate and the examining attorney cannot come to an agreement, a 30-day letter will be issued. The 30-day letter will set forth any proposed assessments and will offer the estate an opportunity to file a protest to the assessment. If the estate files its protest with the managing attorney within 30 days of the date of this letter, the case will be referred to the Regional Appeals Division. The protest must set forth any issues with which the estate does not agree and the facts or law which support the position taken by the estate.[17]

If the estate fails to respond to the 30-day letter within 30 days, a notice of deficiency, also known as a 90-day letter, will be issued. If the estate wishes to litigate the dispute in the Tax Court, it must file a petition with the Tax Court within 90 days, or the tax will be assessed and the opportunity to litigate in that forum will be lost.[18] The biggest advantage to litigating a tax dispute in the Tax Court, rather than a Federal District Court, is that the taxpayer need not pay the alleged deficiency prior to litigating the matter.

An alternate forum for the litigation of tax disputes with the IRS is the appropriate Federal District Court. In order to file a petition with a Federal District Court, the taxpayer must first pay any assessed deficiency in full.[19] One advantage to filing in the District Court is that payment of the assessed deficiency means that interest will no longer be accumulating. In contrast, a taxpayer who files an unsuccessful suit in the Tax Court will have to pay interest on the deficiency through the time a decision is rendered and payment is made. Another possible advantage of filing in a District Court is that a jury trial is available in that forum, in contrast to the Tax Court where no jury trial is available.

Shifting the Burden of Proof to the IRS

Until recently, the burden of proof in tax litigation rested primarily with the taxpayer. Now, as long as the taxpayer complies with all reasonable requests for information by the Service, the burden of proof may be shifted to the IRS.[20] Consequently, it is almost always advisable to comply with reasonable requests for information made by an IRS Estate Tax Attorney during an audit. Holding back information which an examiner has requested and deems to be critical to an examination is not likely to serve the best interests of a client, especially since the IRS may well obtain the requested information through its fairly broad summons powers.[21]

Effect of the IRS Closing Letter

If a return is selected for examination, an IRS closing letter (L 627) will be issued once the examination is completed and any changes are assessed. Once a closing letter has been issued it is unlikely that a return will be the subject of further examination, unless there has been a substantial error, both in amount and in relation to the total tax liability, or there is evidence of fraud, malfeasance, collusion, concealment or the misrepresentation of a material fact.[22] This position has been enunciated by the IRS in Rev. Proc. 59-25 and IRS Rev. Proc. 85-13. At the present time an error may be considered "substantial" if it generates a change in tax of $10,000 or more. However, the safe harbor carved out by Rev. Proc. 59-25 is not a legal guarantee, as it is only a revenue procedure and is considered merely directory in nature and not mandatory.[23]

Experience Counts

Due to the highly complex and rapidly changing nature of estate taxation, the IRS utilizes Estate Tax Attorneys to conduct estate tax audits. In order to qualify as an IRS Estate Tax Attorney, a person must have passed the bar exam in at least one U.S. state or jurisdiction, and many have substantial experience in auditing returns. For the same reasons, it is advisable that an established trusts and estates attorney be consulted regarding the preparation of the estate tax return and critical upon the commencement of an estate tax audit.

Endnotes

1. I.R.C. § 6103.
2. Examples of the information required by Treasury Regulation § 20.6018 include, but are not limited to the following: The return must contain an itemized inventory, by schedule, of the property constituting the gross estate and lists of deductions claimed under the proper schedules, § 20.6018-3a; a legal description shall be given for each parcel of real estate, § 20.6018-3c. The regulations also require that certain basic information be provided for each bond, stock, bank account and annuity listed on the return. *See* Treasury Regulation § 20.6018-3c. IRS guidelines pertaining to the valuation of these, and many other assets, can be found in Treasury Reg. § 20.2031. Other documents which must accompany Form 706 include, but are not limited to, a certified copy of the decedent's will, a copy of Form 712 for each life insurance policy listed on the return, and a copy of any trust created by the decedent, or in which the decedent had an interest, as of the date of death. *See* Treasury Reg. § 20.6018-4.
3. I.R.C. § 2033.
4. I.R.C. § 2513.
5. Treas. Reg. § 20.2513-2(c).
6. Treas. Reg. § 1.642(g)-1.
7. I.R.C. § 2053.
8. I.R.C. § 1014.
9. Internal Revenue Manual Handbook 1.2.7.9, Chapter 5 Taxpayer Advocacy.
10. I.R.C. § 6601.
11. IRS Revenue Ruling 79-252, 1979-2 CB 333.
12. I.R.C. § 6161(a)(2).
13. I.R.C. § 6166.
14. *See* IRS Publication #1 "Your Rights as a Taxpayer."
15. I.R.C. § 6501(a).
16. I.R.C. § 6501(c)(4).
17. Estate representatives may wish to refer to Internal Revenue Service Publication #5, "Appeal Rights, and Preparation of Protests for Unagreed Cases," for a more detailed explanation of this procedure.
18. I.R.C. § 6213.
19. *Flora v. United States*, 357 U.S. 63 (1958).
20. I.R.C. § 7491.
21. I.R.C. § 7602.
22. IRS Rev. Proc. 59-25, 1959-2 CB 938 and IRS Rev. Proc. 85-13, 1985-1 CB 514.
23. *Von Hagke v. U.S.*, 43 AFTR 2d 79-1310.

Philip A. Di Giorgio is an associate in the Albany law firm of Pierro & Associates, LLC. He previously served as an Internal Revenue Service Estate Tax Attorney from 1991-1999. He authored *Your Estate Tax Return and the Internal Revenue Service*, and served as an instructor for the IRS.

Relief Against a Fiduciary: SCPA 2102 Proceedings

By Gary B. Freidman

Even the most cursory review of SCPA 2102 will cause you to wonder how seven such unrelated proceedings found their way into the same section of the SCPA. The answer is that SCPA 2102 is an amalgam of several sections contained in the former Surrogate's Court Act. This section is broadly entitled "Proceedings for Relief Against a Fiduciary." However, the only thing that these eclectic proceedings have in common is that they are all brought against a fiduciary. As you will see they can be important weapons in an estate practitioner's arsenal.

SCPA 2102 provides:

A proceeding may be commenced to require a fiduciary:

1. To supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.
2. To set apart and turn over exempt property to which a spouse or child is entitled or if it has been lost, injured or disposed of to pay the value thereof or the amount of injury thereto.
3. After reservation for the payment of the expenses of administration to pay the reasonable funeral expenses of a decedent if there are funds available for such payment.
4. To pay a claim which has been allowed, to deliver a specific bequest or property to a person entitled thereto or to pay a legacy, distributive share, interest in a trust or a claim for an administration expense, and when a trustee is unable to deliver personal property to the person entitled, to pay the value thereof.
5. To pay in advance to any beneficiary of an estate all or part of any beneficial interest to which he is entitled when the property of the estate applicable to the payment of debts, legacies and expenses exceeds by at least one-third the amount of all known claims, legacies having priority and beneficial interests of the same class and the beneficiary needs such payment for his support or education or of his family.
6. To comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate.
7. Pursuant to the provisions of paragraphs (d) and (e) of 11-1.5 of the estates, powers and trusts law, to pay interest on general dispositions at the legal rate unless the court otherwise directs.

To Supply Information:

This subdivision allows a person interested to commence a proceeding against a fiduciary "[t]o supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor."

Use of this subdivision is not limited solely to residuary legatees. As long as you can demonstrate that the information sought is relevant to your interest in the estate, you have standing to make the application. For example, a contingent, unliquidated claimant (i.e., a creditor) of the estate has been held to have standing to obtain an inventory of all of the assets of the estate.[1] There, the Court held that the statute's reference to "interest" does not limit its application to a "person interested" within the meaning of SCPA 103 [39] and that the inquiry is whether the information sought is relevant to the petitioner's interest in the estate. For example, in the case of a residuary beneficiary, information such as appraisals, listings of assets on hand, claims against the estate and similar kinds of information that would be detailed in an account can be obtained. However, in the case of a general legatee or a specific legatee, the entitlement to information will be much narrower in accordance with the beneficiary's interest.

A condition precedent to the commencement of a 2102, subd. 1 proceeding is the making of a written demand on the fiduciary (not counsel) for the information sought.[2]

In re Lauck,[3] Surrogate Radigan held that the duty to furnish information under this section should be read to embrace information which the fiduciary would be required to supply in an account, relevant to the petitioner's interest. Hence, the fiduciary was required to supply, *inter alia*, appraisals of estate assets and information concerning a close corporation that the estate controlled.

The cases do hold, however, that this section is not intended as a substitute for article 31 discovery. The mechanics of the section are simple: a written demand, served upon the fiduciary, for such information. If, after a reasonable period of time the infor-

mation is not furnished, a petition and an order to show cause should be filed to compel the fiduciary to show cause why the he/she/it should not supply the information requested. The failure of the fiduciary to comply with a court order directing that the information be supplied can be a basis for removal under SCPA 711.

To Set Apart and Turn over Exempt Property:

Subdivision 2 provides a mechanism for a surviving spouse (or children under 21 if there is no spouse) to compel the fiduciary to turn over the exempt property specified in EPTL 5-3.1. This is the section that provides that the spouse or child is entitled to receive the first $15,000 in money or other personalty, furniture, household effects, computer, family bible, car, farm animals and implements and other items as detailed in 5-3.1. Although the amounts involved are relatively small, in the appropriate case, a subdivision 2 proceeding may serve as useful leverage in negotiations or provide a vehicle to test the validity of the status of a "surviving spouse" either due to ineligibility under EPTL 5-1.2 or due to a waiver of exempt property in a pre-nuptial or separation agreement.

Since the "exempt property" is not considered a part of the estate, it is not subject to the payment of administration expenses (except reasonable funeral expenses, if there are insufficient assets), nor reachable by creditors of the estate. Hence, the family need not wait until the final accounting to receive these assets and such a proceeding will generally be entertained early in the administration of the estate.

An application for the turnover of exempt property should be by petition, which commences a separate proceeding, not by way of motion in an existing probate or other proceeding.[4]

Payment of Funeral Expenses:

This subdivision, which provides for the commencement of a proceeding for the payment of funeral expenses, after reservation for the payment of the expenses of administration is fairly straight-forward. Not surprisingly, there is little modern case law construing this subdivision. Any person who has paid the funeral expense may petition for reimbursement (including the director of a funeral home where the bill is unpaid). The petitioner must show that the amount expended was reasonable and that the estate has sufficient assets to pay the other administration expenses (as these expenses have priority over the payment of funeral expenses[5]). Since the petitioner generally is not privy to the size of the estate, it is incumbent on a contesting fiduciary to show that the assets are insufficient.[6]

To Compel Payment of a Claim or Legacy:

One of the most frequently used SCPA 2102 proceedings is found in subdivision 4, which authorizes a proceeding to compel a fiduciary:

1. to pay a claim that has been allowed, but is unpaid;
2. to deliver a specific bequest or property;
3. to pay a legacy;
4. to pay a distributive share, in intestacy;
5. to pay an interest in a trust;
6. to pay a claim for an administration expense.

This subdivision should not be confused with subdivision 5 which concerns *advance payments* upon a showing of need.

This is the proceeding to bring when representing an unpaid beneficiary or unpaid creditor (whose claim has been allowed) where the administration has gone on too long. It is far more efficient than a compulsory accounting proceeding. Although the resolution of a compulsory accounting proceeding is usually not delayed, it will generally be several months later until the accounting is actually filed and a proceeding for its settlement commenced. Using 2102, subd. 4, your proceeding can be before the court much sooner. This is not a vehicle for determining the validity of the claim for which separate proceedings are set forth in SCPA article 18; it is for claims that have been allowed, but not paid.

As a practical matter, you should wait at least seven months from the date of issuance of letters before bringing this proceeding—as this is period provided by SCPA 1802 in which a fiduciary acts at his or her peril, vis-à-vis creditors, if a legacy is paid out during this period. In other words, the fiduciary who pays legacies during this period runs the risk of personal liability to creditors if the assets are insufficient and he or she pays out estate assets to the beneficiaries.[7]

The statute of limitations for a proceeding by a legatee or distributee to compel payment of a legacy or distributive share is six years.[8] However, the beneficiary's time to commence the proceeding does not begin to run until the judicial settlement of the fiduciary's account.[9]

The fact that an accounting proceeding is pending is not a bar to the grant of relief under SCPA 2102, subd. 4.[10] There, trustees delayed for more than three years the payment of accrued, undistributed income to the estate of the deceased income beneficiary, because they were concerned with potential

objections to their account. The Surrogate, citing the strong policy interest in favor of the prompt settlement of estates, the willingness of the executors of the income beneficiary's estate to execute a refunding agreement and the consent of the current income beneficiaries, directed the payment of all accrued income.

In *In re Carvel Foundation*,[11] Surrogate Emanuelli directed the trustees of a charitable remainder unitrust created by Tom Carvel, which terminated on the death of Mr. Carvel's widow in August 1998, to pay out 90% of the principal to the sole remainder interest, the Carvel Foundation. In order to protect the trustees from possible claims on the final accounting, the Court directed that the remaining 10% be held as a reserve against contingent liabilities. It also required the Carvel Foundation to execute a refunding agreement, obligating the Foundation to refund to the trustees any amounts determined by the Court to be needed to satisfy any obligations in excess of the 10% reserve fund.

A proceeding under this subdivision has also been used to compel the payment of a sum of money due from a fiduciary pursuant to a stipulation of settlement.[12]

The predecessor of this subdivision (SCA § 217) has been used by an accountant employed by an executor to compel payment of his fees as an administration expense.[13]

To Compel an Advance Payment:

Subdivision 5, which authorizes the Court, under specified circumstances, to direct an advance payment of a beneficial interest in the estate, is perhaps the most litigated SCPA 2102 proceeding. Not only can the Court direct payment before the expiration of the seven-month period, but even before a will is admitted to probate.

The requirements are:

1. a beneficial interest in the estate;
2. the property of the estate for payment of debts, legacies and expenses exceeds by at least one third the amount of all known claims, legacies having priority and of the same class; and
3. the beneficiary needs such payment for his or his family's support or education.

In *In re Milbank*,[14] the First Department held that SCPA 2102(5) vests the Surrogate with the discretion to authorize an advance payment against a claimed beneficial interest in an estate, even when the question of spousal status is at issue, provided that the claimant is willing to post a full refunding bond.

One of the most well-known 2102(5) proceedings involved the estate of the real estate investor, Sol Goldman, whose estate was purported to have been valued at between seven hundred million and one billion dollars.[15] The Surrogate had denied Mrs. Goldman's request for an advance payment. Mrs. Goldman claimed her entitlement (a) under the terms of an agreement with the decedent, (b) under the will's marital trust provisions, and (c) under her elective share rights. Her children challenged, *inter alia*, Mrs. Goldman's status as a surviving spouse. The First Department found that Mrs. Goldman had demonstrated her need for an advance payment to meet her obligations for taxes and legal fees and directed an advance payment of two million dollars immediately and two million dollars annually thereafter on the condition that she post a full refunding bond.

An advance payment proceeding can be commenced during the pendency of a will contest. In *In re Weintraub*,[16] one of decedent's surviving daughters sought an advance payment from her father's estate (valued at $1.5 million) on the ground that she was either entitled to one third of the estate under the propounded will or one half of the estate in intestacy. The application was opposed on the ground that additional estate taxes may be owing, the requisite showing of need was not made and there may be another (as of then yet undiscovered) will which might disinherit the petitioner. Surrogate Holzman rejected these arguments and directed the distribution of $250,000, without the necessity for a refunding bond.

In another contested probate proceeding, *In re Gordon*,[17] Surrogate Roth directed the making of an advance payment, without a refunding bond, on behalf of an infant beneficiary (a child of decedent) where no funds were otherwise available for the infant's support and the infant would, under the will, be the income and discretionary principal beneficiary of a $3 million trust.

Where the petitioner's entitlement to a certain minimum amount from the estate is beyond peradventure, a refunding bond will generally not be required. However, if status is in issue as in *Milbank* or *Goldman* a full refunding bond or other appropriate security will be required by the Court.[18]

Since it is a virtual certainty that if a beneficiary's entitlement to share in the estate is in question, either because the will is being challenged or status is in issue, a refunding bond will be required, your focus should be on the other remaining elements of the statute. You must establish to the Surrogate's satisfaction that the amount of the estate exceeds by one third the amount needed to pay debts, administra-

tion expenses and legacies that are senior to the petitioner's. Allegations upon information and belief will not be sufficient. Obtain the information from the fiduciary and prepare a chart if it will make your presentation clearer. Of equal importance is demonstrating that the funds are needed for the petitioner's or his family's support or education. This means laying bare your client's financial circumstances. Remember, absent a showing of need the court is powerless to grant any relief.

For Direction of the Court When Two or More Fiduciaries Disagree:

This subdivision was broadened in 1993 to allow a person interested in the estate to petition the Court to resolve a dispute between fiduciaries who are unable to agree with respect to any issue affecting the estate. Formerly, this subdivision only authorized a proceeding where the dispute between the fiduciaries concerned the custody of money or other property of the estate committed to them. It remains to be seen how the broadening of this subdivision will be construed by the Surrogates as there is scant, post-amendment case law. Often disputes arise between co-fiduciaries concerning control and custody of estate records or estate assets, SCPA 2102, subd. 6 provides a vehicle to resolve such disputes, short of the drastic remedy of a removal proceeding.

In *In re Stanley*,[19] one of two fiduciaries sought the Court's advice and direction pursuant to this division concerning a dispute with an individual co-fiduciary over the use of estate funds to pay administration expenses.[20] The corporate fiduciary argued that prior to making estate funds available to the individual fiduciary for payment of administration expenses, it may seek the Court's advice and direction. The Surrogate rejected this argument as having previously been determined by the First Department, but noted that the individual's expenditure of estate funds would be reviewed in his accounting. Accordingly, the corporate fiduciary was directed to give the individual fiduciary independent control of estate funds, upon his posting a bond equal in amount to the funds.

An interesting example of how the courts dealt with disputes between fiduciaries when the statute was limited to issues concerning custody of money or other property of the estate is *In re Jacobs*.[21] There, the trustees were vested with discretion as to which charitable organization the remainder should be distributed. In a separate letter of instructions (which we all know is not binding on the fiduciaries), the decedent had made her wishes known. One trustee wanted to honor the decedent's wishes, but the other trustee had a different idea.

Surrogate Roth observed that the power to distribute the fund was a joint power which must be exercised by majority vote or where there is an even number, unanimity is required in the absence of a tie-breaking mechanism in the will. The Court then stated:

> However, neither this statute [EPTL § 10-10.7] nor any decision provides any guidance to the problem before the court—how to resolve a dispute between two fiduciaries who hold a joint power. In fact, the deadlock situation between the two trustees presents an issue of first impression in this jurisdiction.
>
> Except in extraordinary circumstances (citation omitted), the court has no power to direct trustees in whatever manner to exercise a joint power vested in their "sole discretion" by the testatrix. In fact, if such a direction were given by the court and not complied with, the court would have no power to enforce it.

The Court went on to hold that although it lacks the authority to give direction, it may, however, render advice and suggested to the trustees that if it were a trustee, it would respect decedent's request, but that the trustees are not required to follow the Court's advice. However, the Surrogate cautioned the trustees that:

> [i]f the advice is disregarded, the only other alternative to effectuate decedent's clear charitable purpose is for the court to appoint a third trustee, upon nomination by the present trustees, to cast a deciding vote. (citations omitted).

It may well be that post-amendment, the Court may intercede in such a situation and resolve the dispute. However, this runs counter to the long-standing rule that the court will not substitute its business judgment for that of the fiduciaries.[22]

A typical pre-amendment example of a 2102, subd. 6 proceeding is provided by *In re Stubing*.[23] There, one of three co-executors allegedly refused to make the estate's books and records available to the others so that a final account could be prepared. The recalcitrant executor ignored repeated requests for cooperation and the proceeding ensued. The Surrogate directed that the recalcitrant fiduciary deliver all estate books and records to the Clerk of the Court to permit free access thereto at all times by all three co-fiduciaries and that he cooperate in all respects

with the petitioner so that the final accounts of the fiduciaries may be rendered and judicially settled and distribution made. In so holding, the Court observed:

> The primary duties of an estate representative are to settle the estate and distribute the assets (Warren's Heaton on Surrogates' Courts, Vol. 3, § 218). Title of each executor to the books and papers of the deceased is equal. Each is entitled to inspect them and to know for himself just what they contain (Matter of Stein, 33 Misc. 542, 68 N.Y.S. 933) and each has an equal right to custody of the books and papers of a decedent (Matter of Shearn's Will, Sur., 157 N.Y.S.2d 495; Matter of Eisner, 6 App. Div. 563, 39 N.Y.S. 718).

To Pay Interest at the Legal Rate:

In 1985, EPTL 11-1.5 was amended to provide that in a proceeding to compel payment of a disposition, the court must impose interest either at the rate specified in the will or, if none, at six percent, beginning seven months after the issuance of letters to the fiduciary. If the Court finds that the delay in payment was unreasonable, interest may be awarded at the rate specified in CPLR 5004 (currently 9%). Subdivision 7 provides the vehicle to compel the award of interest contemplated by the EPTL.

There is a split of authority concerning whether interest is payable on a general legacy, absent the commencement of litigation. In *In re Schwartz*,[24] Surrogate Roth allowed interest on the legacy, even though no proceeding had been commenced, finding that to hold otherwise would encourage litigation. The Surrogate stated that a general legatee should be allowed a share of the income actually earned during administration if his or her payment is delayed and suggested that remedial legislation may be required. In *In re Park-Montgomery*,[25] Surrogate Radigan interpreted *Schwartz* not to require the payment of interest in all cases where there is no litigation, but would consider such an award, as a matter of discretion, on a case-by-case basis, dependent on the facts and circumstances.

The payment of interest is applicable to general legacies only and has no application to the payment of specific legacies (i.e., bequests of specified or identified property).[26] Under the statute, specific legatees are entitled to whatever income is earned on the specific property.

This brief overview of SCPA 2102 should convince you that serious consideration should be given to the use of one of these proceedings before you consider commencing a removal or compulsory accounting proceeding.

Endnotes

1. *In re Lefkowitz*, N.Y.L.J., Dec. 30, 1998, p. 26, col. 4 (Sur. Ct., Nassau Co. 1998).
2. *In re Kassover*, N.Y.L.J., Feb. 11, 1991, p. 28, col. 2 (Sur. Ct., Nassau Co. 1991) ("Having requested information relative to her interest in the estate, and that request having been denied, the petitioner has satisfied the criteria of SCPA 2102(1) to commence this proceeding."); *In re Gerstein*, N.Y.L.J. Aug. 14, 1995, p. 31, col. 6 (Sur. Ct., Queens Co. 1995) (Surrogate declined to entertain petition where the demand consisted only of an exchange of correspondence between counsel).
3. N.Y.L.J., May 28, 1982, p. 15 (Sur. Ct., Nassau Co. 1982).
4. *In re Leopold*, N.Y.L.J., June 26, 1995, p. 33, col. 3 (Sur. Ct., Suffolk Co.).
5. SCPA 1811, subd. 1.
6. *See, generally*, Turano and Radigan, *New York Estate Administration*, (1999 ed.), § 12-2 (e).
7. *In re Liebowitz*, N.Y.L.J., July 19, 1991, p. 28, col. 1 (Sur. Ct., Kings Co.); cf. *In re Feuer*, 212 A.D.2d 870, 622 N.Y.S.2d 619 (3rd Dep't 1995), *appeal withdrawn*, 85 N.Y.2d 968, 629 N.Y.S.2d 728 (1995); *In re Freidman*, N.Y.L.J., Dec. 12, 1994, p. 34, col. 3 (Sur. Ct., Kings Co.).
8. *In re Seaman*, 146 Misc. 2d 563, 551 N.Y.S.2d 454 (Sur. Ct., Nassau Co. 1990).
9. *Id*.
10. *In re Abrams*, N.Y.L.J., Oct. 7, 1998, p. 26, col. 3 (Sur. Ct., New York Co.).
11. N.Y.L.J., July 6, 1999, p. 34, col. 6 (Sur. Ct., Westchester Co.).
12. *In re Leopold*, N.Y.L.J., Nov. 18, 1998, p. 33, col. 4 (Sur. Ct., Suffolk Co.); *In re Foris*, N.Y.L.J., June 15, 2000, p. 33, col. 1 (Sur. Ct., Suffolk Co.).
13. *In re Musil*, 254 App. Div. 765, 4 N.Y.S.2d 577 (2d Dep't 1938) (statute is remedial in nature "to facilitate the payment of obligations where, by reason of controversy and litigation, final accounting is delayed.").
14. 49 A.D.2d 848, 374 N.Y.S.2d 105 (1st Dep't 1975).
15. *In re Goldman*, 150 A.D.2d 267, 541 N.Y.S.2d 788 (1st Dep't 1989).
16. N.Y.L.J., July 3, 1996, p. 30, col. 2 (Sur. Ct., Bronx Co.).
17. N.Y.L.J., Oct. 29, 1998, p. 29, col. 4 (Sur. Ct., New York Co.).
18. *See In re Levi*, N.Y.L.J., Oct. 17, 1995, p. 33, col. 5 (Sur. Ct., Nassau Co.) (surviving spouse whose status was questioned was permitted to give mortgage on her realty in lieu of a refunding bond).
19. N.Y.L.J., Feb. 10, 1998, p. 27, col. 1 (Sur. Ct., New York Co.).
20. The fiduciaries had previously litigated over the issue and the First Department held that each fiduciary is unilaterally empowered (i.e., without the consent of a co-fiduciary—a several power) to pay administration expenses including reasonable counsel fees and that each fiduciary is entitled to the custody of the assets of the estate or fund. *In re Schwarz*, 240 A.D.2d 268, 660 N.Y.S.2d 107 (1st Dep't 1997).
21. 127 Misc. 2d 992, 487 N.Y.S.2d 992 (Sur. Ct., New York Co. 1985).
22. *See* Turano and Radigan, *New York Estate Administration*, (1999 ed.), § 12-2(g) ("the court will ordinarily not substitute

its judgment for the fiduciaries' on investment of estate funds, timing of payment of a claim, or any other matter of business judgment, but the court may direct that no matter how the funds are invested, the fiduciaries control them jointly.").

23. 47 Misc. 2d 174, 261 N.Y.S.2d 914, (Sur. Ct., Kings Co. 1965).
24. 161 Misc. 2d 471, 614 N.Y.S.2d 668 (Sur. Ct., New York Co. 1994).
25. N.Y.L.J., May 19, 1997, p. 33, col. 4 (Sur. Ct., Nassau Co.).
26. EPTL 11-2.1 (d)(2)(A); *In re Miller*, N.Y.L.J., March 24, 1999, p. 32, col. 4 (Sur. Ct., Nassau Co.).

Gary B. Freidman is a partner of Greenfield Stein & Senior, LLP. His practice is in trust and estate-related and commercial litigation. He is a graduate of St. John's University School of Law and holds a Masters degree in Taxation from New York University Graduate School of Law. He is a Vice-Chair of the Estate Litigation Committee of this Section.

Life is full of uncertainty.
Your plan for long-term care shouldn't be.

Long-Term Care Insurance is coverage you can count on if you can no longer take care of yourself.

Considering the average annual cost for long-term care is about $38,000,* being prepared for the unexpected is a smart idea.

John Hancock's Long-Term Care Insurance Policy helps you with future needs by:

- Paying for skilled care in your home or nursing home
- Covering you in case of Alzheimer's Disease

Long-Term Care Insurance lets you maintain your independence — without using up your savings.

*NAIC, 1996

INSURANCE FOR THE UNEXPECTED.
INVESTMENTS FOR THE OPPORTUNITIES.SM

BRUCE L. BIRNBAUM,
J.D., LL.M
1900 Hempstead Turnpike
Suite 206
East Meadow, N.Y. 11554

LTC-96 LTC-AD2 11/96

CALL NOW FOR MORE INFORMATION 516-794-9696

John Hancock Life Insurance Company, Boston, MA 02117

(Paid Advertisement)

What Every Trusts and Estates Attorney Should Know About Elder Law: A Primer

By Anthony J. Enea

As the "baby boomer" generation ages, the frequency with which trusts and estates attorneys will be called upon by their clients to address elder law issues will inevitably increase. Although the practice of elder law has evolved in the last decade to encompass many diverse areas of law, Medicaid eligibility and asset protection planning continue to remain its core components. Interestingly, it is within these components of the practice of elder law that the most common misconceptions occur.

Distinctions Between Medicare and Medicaid

As a starting point, it is important to know the distinctions between Medicare and Medicaid. Briefly, Medicare is a federal program which is available to persons who are 65 years of age and older as well as certain disabled persons.

Since the passage of *Title XVII of the Social Security Act* in 1965, Medicare has basically been the health insurance component of Social Security.[1] Medicare provides health insurance for those 65 years of age and older *without* any asset or income requirements. The Medicare program is administered by the federal government.

There are three separate components of Medicare:

Medicare Part A—covers the costs of in-patient hospital care, home health care, hospice care and some "skilled" nursing care. The hospital care must be determined to have been medically necessary.[2]

Medicare Part B—covers part of the cost of physician services and other medical services and supplies. For example, if an individual is hospitalized, the hospital bill would be covered by Part A; however, the patient's physician services would be covered by Medicare Part B.[3]

Medicare Part C (Medicare Plus Choice)—this portion of Medicare was recently enacted to provide those eligible for Medicare to have the option of having physicians' services provided to them by various health care providers such as HMOs.[4]

For purposes of nursing home planning, it is important to remember that Medicare only covers a maximum stay in a skilled nursing facility of one hundred days, if the admission to the nursing home is within 30 days of the hospital discharge.[5] The patient must require skilled nursing or skilled rehabilitative services on a daily basis.[6] Medicare does not provide any coverage for custodial care, which is generally most of the care a nursing home patient receives. This is where the need for Medicaid eligibility is of importance.

Unlike Medicare, Medicaid is a "means tested" entitlement program which is jointly administered by the federal and state government. The Medicaid program was enacted in 1964 by *Title XIX of the Social Security Act*. As a "means tested" entitlement program Medicaid has income and resource limits as a pre-condition to eligibility. In order to participate in the Medicaid program, in 1965 New York State enacted the enabling legislation to effectuate the availability of Medicaid in New York.[7]

In addition to the income and resource requirements for eligibility for Medicaid, residency is an additional prerequisite for eligibility. For purposes of Medicaid eligibility, residency is defined as the location where the applicant has his permanent home.[8] Generally, to be eligible for Medicaid in New York, an individual must be a resident of the state.[9] Although, New York has no durational residency requirement, it still is necessary that the individual applicant be a resident of New York.[10] The intent to remain permanently or indefinitely is a critical factor in establishing residency.[11] Although it is not necessary that one be a citizen, it is necessary that one be a legal resident.[12]

Finally, to be eligible for Medicaid it is necessary that an individual be under the age of 21 or over the age of 65.[13] Those between the ages of 21 and 65 can become eligible for Medicaid if they are blind, disabled, eligible for public assistance, or recipients of Supplemental Security Income.[14]

Income and Resource Requirements for Nursing Home Medicaid Eligibility

For purposes of this article, I will focus on eligibility for Medicaid for institutional services in New York State, which most importantly includes nursing homes. There are also categories of Medicaid coverage for home care services as well as community Medicaid.

An applicant for nursing home Medicaid must have income and resources below specified amounts.[15] If the applicant for nursing home Medicaid is single, his or her monthly income in excess of $50 ("personal needs allowance") must be paid to the nursing home.[16] In addition to the aforestated $50 per month of income, the applicant for Medicaid is permitted to have $3,600 in resources. Resources are defined as property of any kind, whether real property, tangible or intangible, liquid or non-liquid. *Administrative Directive: 96 ADM-8 of the NYS Dept. of Social Services* provides that assets for purposes of Medicaid eligibility are defined as all of the individual's and spouse's income and resources. However, there are exceptions which I will discuss later. For a married couple who are both seeking eligibility for nursing home Medicaid, the combined resource allowance is $5,250 in the year 2000. Both the income and resource requirements are uniform throughout the entire State of New York.[17]

As can be seen from the above, one who is single can have neither a significant amount of income nor resources to satisfy the eligibility requirements for Medicaid. In order to encourage individuals to remain at home as long as possible, rather than entering a nursing home, the income and resource eligibility requirements for the spouse of an applicant for Medicaid are significantly higher than those for an individual applicant. The spouse of an individual who is applying for nursing home Medicaid is referred to as the "community spouse." For the year 2000, the "community spouse" is permitted to have resources that range in amount between $74,820 and $84,120.18.[18] Thus, if a couple's resources are between $149,640 and $168,240, the allowance permitted will be one half of the combined resources. If the resources exceed $168,240, the $84,120 resource limit will be applied. Additionally, if the resources exceed the $168,240, those excess resources will be subject to a claim by Medicaid to their full extent.[19]

In discussing the resource allowance for either a single person or for the community spouse, it is important to remember that only non-exempt resources are counted for purposes of Medicaid eligibility.[20] There are resources which are exempt, thus having no effect on eligibility for Medicaid. For example, personal belongings such as clothing, jewelry, automobile, and other tangible personal property such as the contents of one's home or apartment are exempt.[21] Most importantly, one's "primary residence," which is referred to as the "homestead" if occupied by the applicant, the applicant's spouse or a minor disabled child, is also an exempt asset for purposes of Medicaid eligibility.[22] The homestead will be considered exempt even if it is a two- or three-family residence, condo or cooperative apartment.[23] Further, if the homestead generates income, the homestead will remain exempt but the income generated is not exempt.[24] If the homestead is occupied solely by the applicant who is applying for nursing home Medicaid, the applicant would need to establish that he or she intends to return home. This is critical in avoiding Medicaid's determination that the occupant is in "permanent absent status," thus resulting in the homestead losing its exempt status.[25]

Although the homestead is exempt for purposes of eligibility, it is important to note that Medicaid will have a lien for Medicaid benefits paid for nursing home care or the equivalent thereof.[26] *Sections 104 and 369 of the Social Services Law* of the State of New York grant to Medicaid the right to recover against the estates of Medicaid recipients and their spouses. Additionally, under the provisions of the *Omnibus Budget Reconciliation Act of 1993 ("OBRA 93")*, the states were further mandated by the federal government to adopt estate recovery programs.[27]

Transfer of Asset Rules and Medicaid's Look-back Period

On numerous occasions, I have had both clients and colleagues advise me of their belief that all gifts or transfers of assets will automatically disqualify one from Medicaid for three years. This is perhaps the most often repeated and most common misconception that both the public and non elder law attorneys have about Medicaid eligibility. At times, I believe this misconception has taken on a life of its own; it's the equivalent of the Miranda warning of the elder law profession, often repeated, but rarely fully understood. Because Medicaid is a "means tested" program, if assets are transferred (gifted) without the receipt of something of equivalent value in return, an "uncompensated transfer" of assets has occurred, which, with a few exceptions which I will discuss later, triggers a period of ineligibility for Medicaid.[28] Calculation of this period of ineligibility is determined by taking the dollar value of the uncompensated transfer of assets and dividing it by the average cost of a nursing home (skilled nursing facility) in the region (county) in which the applicant resides as determined by the Department of Social Services.[29] For example, for the year 2000 the New York City Regional nursing home transfer rate is $7,730 per month and the rate for Westchester and other northern metropolitan counties is $7,123 per month. Thus, in Westchester, an uncompensated transfer of $100,000 utilizing the rate of $7,123 per month ($100,000 divided by $7,123) would create a period of ineligibility for Medicaid of approximately

14.03 months. The commencement date of the period of ineligibility is the first day following the month of the transfer.[30] For example, a non-exempt transfer made on September 1st would create a period of ineligibility commencing on October 1st.

With the enactment of OBRA 93, a 36-month look-back period was created. Thus, an individual who transfers assets of a high enough value to create an ineligibility period in excess of 36 months, (for example, $300,000 divided by the Westchester rate of $7,123.00 creates 42.11 months of ineligibility), and if that individual waits at least 36 months before applying for Medicaid, he or she can avoid the longer period of ineligibility (above 36 months). However, if one creates an ineligibility period in excess of 36 months and does not wait for the 36 months to end before applying for Medicaid, he or she would be ineligible for the full period of ineligibility created above the 36 months.[31] Thus, it is critical that the application for Medicaid not be filed until the entire period of ineligibility has expired. When applying for Medicaid for nursing home care all transfers of assets made within 36 months of the date of filing the application have to be disclosed to the Department of Social Services.

One important distinction with the Rules for the transfer of assets, applies to transfers made to or from an irrevocable lifetime trust. With the enactment of OBRA 93 a 60-month look-back period was created for transfers made to or from an irrevocable lifetime trust.[32] This 60-month look-back period has spawned the misconception that all transfers to a lifetime (inter vivos) trust will automatically create a 60 month period of ineligibility and a 60-month look-back period for Medicaid. If the ineligibility period created by funding the trust (same formula for outright transfers is used) is less than 60 months, assuming all other income and resource requirements have been satisfied, eligibility would be established when the penalty period ends. If the ineligibility period created by the transfer to the irrevocable lifetime trust is in excess of 36 months, a 60-month look-back period is created. For example, if $300,000 is transferred to an irrevocable lifetime trust, the ineligibility period created in Westchester would be 42.11 months, but the look-back period for the transfer to the trust is 60 months. However, if the ineligibility period created is 60 months or more, the applicant will have to wait for the 60-month period to expire before submitting his or her application for nursing home Medicaid.[33] It should be remembered that all the assets transferred to a revocable lifetime trust are considered available for Medicaid purposes and offer no protection for purposes of Medicaid eligibility. The irrevocable income only trust has established itself as the most commonly used trust for Medicaid asset protection planning. It provides to the client a level of comfort in knowing that they have taken a positive step to protect their assets for purposes of Medicaid eligibility, while allowing the client to receive all of the income from those assets. In most instances there is little if any change in the client's lifestyle as a result of the creation and funding of said trust.

The transfer of asset rules and the applicable ineligibility periods only apply with respect to applications made for nursing home Medicaid or its equivalent. Thus, no ineligibility period is created by any uncompensated transfers for Medicaid home care.

Finally, there are transfers of assets which do not create any periods of ineligibility for nursing home Medicaid. For example, the homestead can be transferred to (a) one's spouse, minor child, disabled or blind child (any age), (b) adult child who has lived in the home of the parent for at least two years prior to the parents' institutionalization and who has been a caregiver to the parent and (c) a sibling of the Medicaid applicant who has resided in the home for a least one year prior to institutionalization and who has an equity interest in the home.[34] In addition to the transfer of the homestead, any assets can be transferred without any period of ineligibility being imposed when the transfer is made for the benefit of a spouse or disabled child.[35]

Spousal Refusal in New York

Typical of the numerous complexities confronting the elder law attorney in New York is Medicaid's "spousal refusal" rule. Medicaid having previously delineated specific financial requirements relevant to the spouse ("community spouse") of the applicant for Medicaid, one would think there would be no way of sidestepping those requirements. However, under New York Law if the spouse of an applicant for Medicaid refuses to pay for the medical expenses of his or her spouse, then the eligibility of the applicant for Medicaid must be determined without giving any consideration to the income and resources of his or her spouse. Thus, once a spousal refusal statement has been filed with Medicaid, irrespective of the income and resources of the applicant's spouse that may be above the Medicaid eligibility levels, Medicaid will not be permitted to consider them.

Although the spouse is permitted to refuse to pay for his or her spouse's medical expenses, the execution of the spousal refusal does not obviate the refusing spouse's liability for Medicaid paid on

behalf of his or her spouse. Medicaid can initiate a support proceeding in the Family Court against the refusing spouse to recover the actual expenditures made by Medicaid. However, Medicaid's recovery is limited to the community spouse's resources and income in excess of the amount she is permitted to have ("community spouse resource allowance").[36]

The right to execute a spousal refusal provides the elder law attorney with a significant amount of flexibility in making recommendations to the client. Although Medicaid has in recent years been significantly more aggressive in pursuing reimbursement from the community spouse, there still exists the possibility that Medicaid will not pursue reimbursement. Furthermore, even if reimbursement is pursued, the amount Medicaid can seek reimbursement for is limited to the amount actually expended. Lastly, because Medicaid pays the nursing home a significantly reduced rate for a room versus the rate the applicant as a private pay patient would pay, the execution of a spousal refusal may be a prudent planning choice.

Conclusion

As you can see from the above even the most basic rules for Medicaid eligibility can be quite perplexing. Because of its dynamic and continuously changing nature, elder law requires a significant commitment.

Endnotes

1. 42 U.S.C.A.§§ 301–1397e.
2. 42 U.S.C.A. § 1395f(a)(2), 42 C.F.R. §§ 424.5(a)(4), 424.10-13.
3. 42 C.F.R. §§ 410.20, 410.22, 410.23.
4. 42 P.L. 105-33 § 4001, creating Social Security Act § 1857.
5. 42 C.F.R. § 409.85.
6. 42 C.F.R. § 409.31(b)(l).
7. Soc. Serv. L § 363.
8. N.Y.C.R.R. § 360-3.2(g).
9. Soc. Serv. L § 117, 18 N.Y.C.R.R. §§ 349.4, 360.2.
10. 18 N.Y.C.R.R. § 351.2(g).
11. 18 N.Y.C.R.R. § 360-3.2(g)(5).
12. Social Security Act, §§ 1901 *et seq*., 43 U.S.C.A. § 1396.
13. Soc. Serv. L. § 366 (1)(2)(3).
14. *Id*.
15. 18 N.Y.C.R.R. § 360-4.1.
16. 18 N.Y.C.R.R. § 360-4.9(a)(l).
17. 18 N.Y.C.R.R. § 360-4.9.
18. Soc. Ser. L § 366-c.
19. 96 ADM-8 N.Y.S. Dep't of Social Services.
20. 18 N.Y.C.R.R. § 360-4.7(a).
21. *Id*.
22. Soc. Serv. L. § 366(2)(a) and 18 N.Y.C.R.R. §§ 360-1.4(f), 4.7(a)(l).
23. 18 N.Y.C.R.R. § 360-1.4(f).
24. 18 N.Y.C.R.R. § 360-4.3(d).
25. 18 N.Y.C.R.R. § 360-4.10.
26. 18 N.Y.C.R.R. § 360-7.11(a)(3).
27. 42 U.S.C.A.§ 1396p(b)(l).
28. 18 N.Y.C.R.R. § 360-4.4(c).
29. 18 N.Y.C.R.R. § 3604.4(c)(l)(iii)(a)(2).
30. 96 ADM-11 N.Y.S. Dep't of Social Services.
31. P.L. 103-66, 1993 HR 2264.
32. 18 N.Y.C.R.R. § 360-4.4(c)(2)(i)(c).
33. *Id*.
34. 18 N.Y.C.R.R. § 360-4.7.
35. Soc. Serv. L. § 366(5)(d)(3)(ii).
36. *Commissioner of the Dep't of Social Services v. Spellman*, 173 Misc. 2d 979, 661 N.Y.2d 895 *aff'd* 243 A.D.2d 45.

Anthony J. Enea, Esq. is a member of Bashian, Enea & Sirignano, LLP, with offices in White Plains and Somers, New York. Mr. Enea is Co-Chair of the Elder Law Committee to the Westchester County Bar Association and a member of the National Academy of Elder Law Attorneys.

Internal Revenue Service Issues Final, Temporary and Proposed Regulations Concerning Grantors, Transfers to Foreign Trusts and Related Gain Recognition

By Victoria A. Dalmas, Michelle B. Graham, Rahul M. Ranadive, Monica M. Robles and Marnin J. Michaels

The Internal Revenue Service (IRS or "Service") recently issued a series of final, temporary and proposed regulations which impact upon U.S. persons who transfer property to foreign trusts. Effective July 5, 2000, the IRS finalized regulations (T.D. 8890) defining the term *grantor* for purposes of the grantor trust rules of Code §§ 671-679. On August 4, 2000, the IRS issued a pair of proposed regulations which address, respectively: (1) transfers of property by a United States (U.S.) person to a foreign trust which has one or more U.S. beneficiaries (REG-209038-89); and (2) the recognition of gain on certain transfers of property by U.S. persons to foreign trusts and estates (REG-108522-00).

Definition of Grantor

Final Regulations Published

The IRS published final regulations on trusts with foreign grantors. The final regulations are effective July 5, 2000, and adopt, without modification, the proposed regulations published on August 10, 1999. What follows is a summary of the prior law and the current law with respect to foreign grantor trusts.

Prior Law

Until the Small Business Job Protection Act of 1996 (SBJPA 1996), the grantor trust rules had been affirmatively used by taxpayers to establish foreign grantor trusts with U.S. beneficiaries. If, under the foreign trust rules, a foreign person was deemed to be the owner of the trust, tax-free distributions could be made to U.S. beneficiaries. So long as the foreign trust only had foreign source income not effectively connected with a U.S. trade or business, the foreign grantor would not be subject to U.S. income tax. Under prior law, protection from the abuse of these rules depended upon the application of § 672(f) of the Internal Revenue Code of 1986, as amended ("Code"), as enacted in 1990 and judicial doctrines such as substance-over-form, sham transaction and step-transaction.

New Foreign Grantor Trust Rules

SBJPA 1996 significantly expanded Code § 672(f). Under the new rules, except as provided below, the grantor trust rules only apply to the extent their application, without regard to Code § 672(f), results in any portion of the trust being treated as owned by a U.S. citizen or resident or a domestic corporation. In accordance with the grant of regulatory authority contained in Code § 672(f)(6), proposed regulations under Code § 672(f) were published on August 10, 1999 and were ultimately adopted, without modification, effective July 5, 2000. Code § 672(f) applies to domestic and foreign trusts. Any portion of the trust that is not treated as owned by a grantor or another person under these new rules will be treated as a nongrantor trust for tax purposes. The determination of the portion of a trust treated as owned by the grantor or other person will be based on the terms of the trust, the application of the grantor trust rules, and the regulations thereunder.

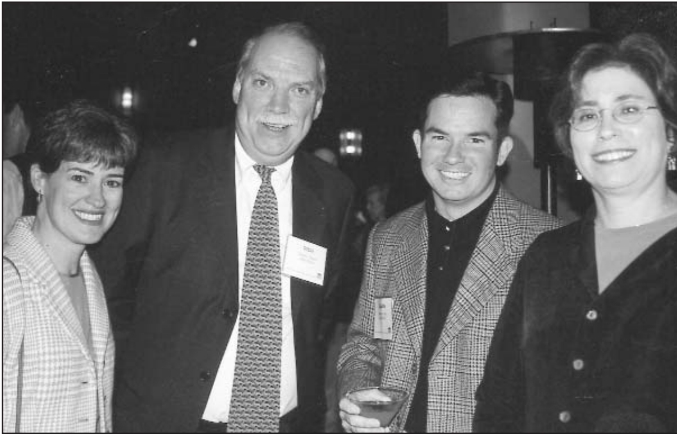
Special Rules for Certain Foreign Corporations

Code § 672(f)(3) provides that for purposes of the new foreign grantor trust rules and except as otherwise provided in regulations, a controlled foreign corporation (defined in Code § 957) will be treated as a domestic corporation, and the new rules will not apply for purposes of applying Code § 1297. Recently published final regulations provide additional guidance concerning the application of these rules to certain foreign corporations.

1. General Rule

Except as set forth below, if the owner of any portion of a trust upon application of the grantor trust rules, without regard to Code § 672(f), is a controlled foreign corporation defined in Code § 957 (CFC), a passive foreign investment company defined in Code § 1297 (FPIC), or a foreign personal holding company defined in Code § 552 (FPHC), the corporation will be treated as a domestic corporation for purposes of the new foreign grantor trust rules.

(Continued on page 36)

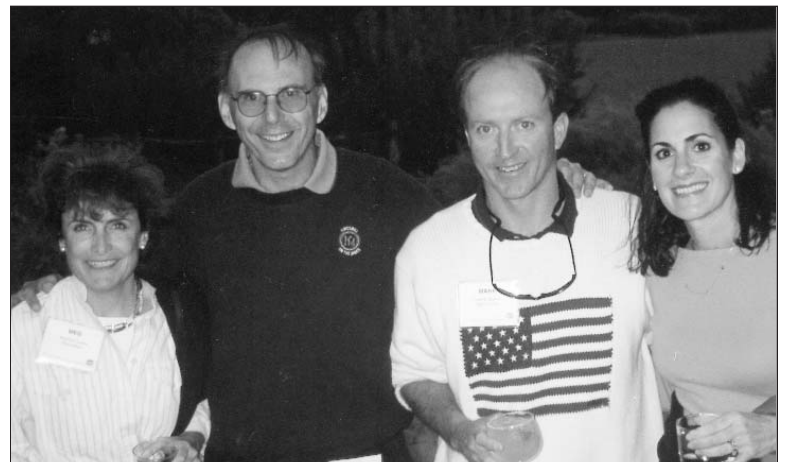


Darcy Katris, Rich Bowler, Glenn Troost, Susan Litwer

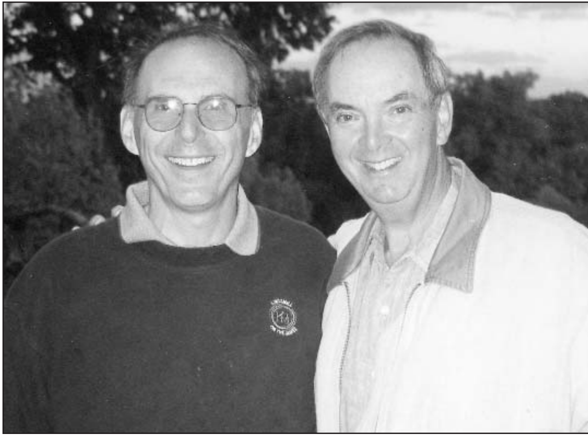
Arlene Harris, Josh Rubenstein, Don Klein

John Morken, Eileen Caulfield Schwab, Josh Rubenstein, Judith Siegel-Baum, Gary Friedman, Arlene Harris

Josh Rubenstein



Meg Gaynor, Dick Rothberg, Mark Haranzo, Gilda Haranzo



Dick Rothberg and Mike Zuckerman

Dick Rothberg, Arlene Haskel, Jules Haskel, Arlene Harris

Tom and Susan Amlicke, Lou and Paula Pierro,
Larry and Renee Edelman

Scott Nammacher, Paul Como, Victoria D'Angelo

Harvey Schneider, Susan Porter

(Continued from page 33)

2. Exception in the Case of Gratuitous Transfers to U.S. Persons

If a trust to which a CFC, PFIC or FPHC has made "gratuitous transfer" or a trust treated as owned by a CFC, PFIC or FPHC under Code § 678 makes a "gratuitous transfer" to a U.S. person, the entity will be treated as a foreign person for purposes of the rules allowing the IRS to recharacterize purported gifts from corporations or partnerships.

Exceptions to the New Foreign Grantor Trust Rules

1. Certain Revocable Trusts

The new foreign grantor trust rules will not apply to any portion of a trust if the grantor has the power, exercisable solely by the grantor without the approval or consent of any other person, to revest absolutely in the grantor title to the trust property to which such portion is attributable.

In the event of the grantor's incapacity, the power to revest title to trust assets in the grantor must be exercisable by a guardian or other person with unrestricted authority to exercise the power on the grantor's behalf. The grantor's power to revest trust assets exercisable only with the approval of a related or subordinate party who is subservient to the grantor will be treated as exercisable solely by the grantor. A grantor will be treated as having the power to revest trust assets for a taxable year of the trust only if the grantor has such power for a total of 183 or more days during the taxable year of the trust. If the first or last taxable year of the trust (including the year of the grantor's death) is less than 183 days, the grantor is treated as having the power to revest trust assets if the grantor has such power for each day of the first or last taxable year, as the case may be.

A trust (or portion of a trust) that fails to qualify for this exception for a particular taxable year of the trust will be subject to the foreign grantor trust rules for that taxable year and all subsequent taxable years of the trust.

Subject to the rules which require a separate accounting for gratuitous transfers to certain trusts after September 19, 1995, the new foreign grantor trust rules do not apply to any portion of a trust that was treated as owned by the grantor under Code § 676 on September 19, 1995, as long as the trust would continue to be so treated thereafter. This rule, however, does not apply to any portion of the trust attributable to gratuitous transfers made to the trust after September 19, 1995.

2. Certain Irrevocable Trusts

The new foreign grantor trust rules will not apply to any portion of a trust if the only amounts distributable from such portion (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor.

The final regulations continue to provide that amounts distributable to discharge a legal or support obligation of the grantor or the grantor's spouse are treated as distributable to the grantor or the grantor's spouse. An obligation is considered a legal obligation if it is enforceable under the local law of the jurisdiction in which the grantor (or the grantor's spouse) resides. An obligation to a related person, other than an individual who is legally separated from the grantor under a decree of divorce or separate maintenance, is generally not treated as a legal obligation unless it was contracted for adequate and full consideration in money or money's worth. Amounts distributable in support of individuals who (1) would be treated as dependents of the grantor or the grantor's spouse under Code § 152(a)(1) through (9) (without regard to the requirement that over half of the person's support be received from the grantor or the grantor's spouse), and (2) are either permanently and totally disabled or less than 19 years old, will be treated as amounts distributable to the grantor or the grantor's spouse. Potential support obligations that are not reasonably expected to arise under the circumstances are disregarded.

The final regulations clarify that this exception will not apply after the death of the grantor, even if the grantor's spouse survives and the grantor's spouse would be treated as owning the trust under Code § 678 without regard to Code § 672(f).

The trust cannot provide that any person other than the grantor or the grantor's spouse can receive distributions even if only for a limited time or purpose. If such temporary beneficiaries are permitted, the trust will not qualify for this exception even after such payments cease.

Subject to the rules which require a separate accounting for gratuitous transfers to certain trusts after September 19, 1995, the new foreign grantor trust rules do not apply to any portion of a trust that was treated as owned by the grantor under Code § 677 on September 19, 1995, as long as the trust would continue to be so treated thereafter. This rule, however, does not apply to any portion of the trust attributable to gratuitous transfers made to the trust after September 19, 1995.

3. Compensatory Trusts

Except as provided in regulations, the new foreign grantor trust rules will not apply to any portion of trust distributions from which are taxable as compensation for services rendered.

The final regulations describe the compensatory trusts exempt from the new foreign grantor trust rules (including non-exempt employees' trusts described in Code § 402(b), and so-called "rabbi trusts") and provide that the IRS may, in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin designate additional categories of compensatory trusts which shall be exempt from the new foreign grantor trust rules.

Anti-abuse Rule: Exception to the Exceptions

If a U.S. beneficiary of a trust has made direct or indirect gratuitous transfers of property (including cash) to a foreign person otherwise treated as the owner of any portion of the trust, the beneficiary will be treated, to the extent of the transfers made by the beneficiary, as the grantor of such portion of the trust. For purposes of this rule, annual exclusion gifts are not taken into account. In addition, the rule applies regardless of whether the U.S. beneficiary was a U.S. beneficiary at the time of any transfer. Finally, the rule will not apply if the U.S. person can prove that the transfers to the foreign person were completely unrelated to any transaction involving the trust.

Definition of "Grantor"

On August 10, 1999, the IRS issued proposed and temporary regulations defining the term "grantor." The proposed regulations were finalized and have been made effective as of July 5, 2000. Under the final regulations, the term "grantor" includes the persons described below.

1. Nominal Creator (whether the actual creator or an accommodation creator of the trust). A person who creates a trust, whether for himself or herself or for another person, is a grantor of that trust. Although treated as grantor, a person who creates a trust but makes no gratuitous transfers to the trust is not treated as an owner of any portion of the trust under the grantor trust rules.

2. Undisclosed Creator. A person on whose behalf a trust is created is a grantor of that trust.

3. Gratuitous Transferor. A person who, directly or indirectly, makes a gratuitous transfer of property (including cash) to a trust is a grantor of that trust. Although treated as grantor, a person who funds a trust with an amount that is directly reimbursed to such person within a reasonable period of time and who makes no other gratuitous transfers to the trust is not treated as an owner of any portion of the trust under the grantor trust rules.

4. Transferee Grantor. A person who acquires an interest in a trust from a grantor of certain investment trusts described in Treas. Reg. § 301.7701-4(c), liquidating trusts described in Treas. Reg. § 301.7701-4(d), or environmental remediation trusts described in Treas. Reg. § 301.7701-4(e) is a grantor of the trust in which the interest was acquired.

5. Corporate or Partnership Grantor. A partnership or corporation will generally be treated as the grantor of a trust if it makes a gratuitous transfer to a trust for a business purpose, i.e., to secure a legal obligation of the partnership to a third party unrelated to the partnership.

6. Partner or Shareholder Grantor. If a partnership or a corporation makes a gratuitous transfer to a trust, and the transfer is not for a business purpose of the partnership or corporation but is, e.g., for the personal purposes of one or more of the partners or shareholders, the gratuitous transfer will be treated as a constructive distribution to such partners or shareholders under federal tax principles, and the partners or the shareholders will be treated as the grantors of the trust. For example, if a partnership makes a gratuitous transfer to a trust that is for the benefit of a child of a partner, the gratuitous transfer will be treated as a distribution to the partner under § 731 and a subsequent gratuitous transfer by the partner to the trust.

7. Grantors of Transferor Trusts. If a trust makes a gratuitous transfer to another trust, the grantor of the transferor trust will generally be treated as the grantor of the transferee trust.

8. General Power of Appointment Transferors. If a gratuitous transfer of property is made from one trust to another pursuant to the exercise of a general power of appointment over the first trust, the holder who exercised the power will be treated as the grantor of the transferee trust, whether or not the grantor of the first trust is treated as the owner of that trust under the grantor trust rules. A holder of an

unexercised general power of appointment, while treated as the owner of the portion of the trust subject to withdrawal, is not treated as the grantor of the trust solely by reason of the right to withdraw.

Transfers by U.S. Persons to Foreign Trusts with U.S. Beneficiaries

Proposed Regulations Published

The IRS published proposed regulations on transfers by U.S. persons to foreign trusts that have U.S. beneficiaries. What follows is a summary of the prior law and the current law with respect to such transfers.

Prior Law

Prior to the enactment of § 679 of the Code, a U.S. person could establish a foreign *nongrantor* trust for the benefit of U.S. beneficiaries, regardless of whether the property transferred to the trust was made gratuitously or at arm's length. The U.S. income tax benefit of a foreign nongrantor trust was the avoidance of current U.S. income taxation to the trust on non-U.S. source income (other than capital gains) and on any income effectively connected with a U.S. trade or business (or treated as effectively connected with a U.S. trade or business). The tax-free accumulation of income to such trusts was also feasible on a world-wide basis provided the trust was sitused in a jurisdiction that imposed no income tax on trusts and the trust limited its investments in countries that imposed no tax on dividends and interest.

Section 679 of the Code

The U.S. Congress added § 679 to the Code in 1976 as part of the Tax Reform Act of 1976 ("1976 Act") in order to prevent the tax-free accumulation of income to foreign nongrantor trusts created by U.S. persons and having U.S. beneficiaries, which it perceived was an unwarranted advantage the foreign nongrantor trust had over domestic trusts. In broad terms, Code § 679 provides generally that where a U.S. person directly or indirectly transfers property to a foreign trust, the trust is treated as a grantor trust if the trust has a U.S. beneficiary. If the U.S. person is treated as the owner of the trust (or portion thereof), all income, deductions, and credits attributable to the trust (or relevant portion thereof) are taken into account by the U.S. person for purposes of determining his or her U.S. tax liability. The 1976 Act made certain exceptions to the general rule for arm's length transfers, testamentary transfers and for transfers to certain employee benefit trusts.

Subsequent amendments were made to Code § 679 as part of the Small Business Job Protection Act of 1996 ("1996 Act"). Specifically, deferred payment sale transactions were curtailed under the arm's length exception, so that only certain qualified obligations were taken into account. In addition, Congress included pre-immigration trusts within Code § 679 if the grantor became a U.S. person within five years of having transferred property to a foreign trust. The 1996 Act also made domestic trusts that migrated offshore subject to Code § 679 if a U.S. person transferred property to the trust and the trust migration occurred while the transferor was still alive. The 1996 Act also provided that U.S. beneficiaries of a foreign trust would be disregarded if such beneficiaries became U.S. persons more than 5 years after the date the U.S. person made a transfer of property to the trust. Finally, the 1996 Act added a new exception for certain charitable trusts.

The Proposed Regulations Enacted Pursuant to Code § 679(d)

The proposed regulations recently issued by the Internal Revenue Service further explain the application of Code § 679. The proposed regulations make it clear that Congress intended Code § 679 to override Code § 678, which treats a person other than the grantor as owner of any portion of a trust if such person retains certain powers.

The proposed regulations define a U.S. transferor as any U.S. person who makes a direct, indirect or constructive transfer to a foreign trust. An indirect transfer occurs, for example, when a U.S. person transfers property to an intermediary, who, in turn, transfers property to a foreign trust, and the transfer is made pursuant to a plan one of the principal purposes of which is the avoidance of U.S. tax. A transfer will be deemed to have as one of its principal purposes U.S. tax avoidance if the U.S. transferor is related to a trust beneficiary, or has another relationship to the trust that establishes a reasonable basis for concluding that the U.S. person would make a transfer to the foreign trust and the U.S. person cannot demonstrate the following: (1) the intermediary acted independently, (2) the intermediary is not an agent under agency principles, (3) the intermediary has a relationship with a U.S. beneficiary of the trust that establishes a reasonable basis for the intermediary's transfer to the trust, and (4) the intermediary timely complied with the reporting requirements of Code § 6048, if applicable. A constructive transfer includes any assumption or satisfaction of a foreign trust's obligation. A transfer also includes a guarantee, which (in broad terms) is defined as follows: (1) any arrangement under which a person, directly

or indirectly, assures, on a conditional or unconditional basis, the payment of another's obligation, (2) any form of credit support, and includes a commitment to make a capital contribution to the debtor or otherwise maintain its financial viability, and (3) an arrangement reflected in a comfort letter, regardless of whether the arrangement is legally enforceable.

The proposed regulations do not set forth guidance on the U.S. income tax treatment of joint grantors who are both U.S. persons and who transfer property to a foreign trust. In the Notice of proposed rulemaking, the U.S. Treasury and the Service did, however, invite comments with specific examples of areas that may need comments with specific examples or areas that may need clarification, i.e., the treatment of community property or the joint ownership of property by non-citizen spouses.

In determining whether a foreign trust is treated as having a U.S. beneficiary, the proposed regulations use a broad approach. A foreign trust that has a U.S. transferor is treated as having a U.S. beneficiary unless the following requirements are satisfied during the U.S. transferor's tax year: (1) no part of the trust income or corpus could be paid or accumulated to or for the benefit of, either directly or indirectly, a U.S. person, and (2) if the trust is terminated at any time during the tax year, no part of the trust income or corpus could be paid to or for the benefit of, either directly or indirectly, a U.S. person. Thus, for example, suppose A, a resident alien, transfers property to a foreign trust and the trust instrument provides that as long as B, a resident alien, remains a U.S. resident, no distributions of income or corpus may be made to him. The trust instrument also provides that if B becomes a non-resident alien, distributions of income, including previously accumulated income and corpus may be made to him. Consequently, during the years that B is a resident alien, the trust is treated as having a U.S. beneficiary. The example demonstrates that a provision should be included in the trust instrument of a complex trust that excludes U.S. persons from the class of persons entitled to receive accumulated income, including any persons who were U.S. persons during the taxable year such income was earned.

It is noteworthy that a contingent U.S. beneficiary is taken into account for purposes of determining whether a foreign trust has a U.S. beneficiary unless his or her interest in the trust is so remote as to be negligible. For example, a trust may be treated as having a U.S. beneficiary based on possible application of local law that would require a U.S. beneficiary unless the law is not reasonably expected to be applied under the facts and circumstances. Also noteworthy is that the proposed regulations make it clear that the determination of whether the trust has a U.S. beneficiary will be made on the basis of the trust instrument, all written and oral agreements and understandings related to the trust, memoranda or letters of wishes, all records that relate to the actual distribution of income and corpus, all other documents that relate to the trust, whether or not of any purported legal effect, and actual or reasonable expected disregard of the terms of the trust instrument by the parties to the trust.

The proposed regulations provide guidance on existing exceptions to Code § 679, namely, testamentary transfers and (more importantly), arm's length transfers. Transfers that are made on a non-deferred basis are treated as arm's length to the extent that the transfer is made for fair market value, i.e., the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. A transfer is for fair market value only to the extent of the value of property received from the trust, services rendered by the trust, or the right to use property of the trust. For such purposes, an interest in the trust is not considered to be property received from the trust. A deferred transfer does not qualify as an arm's length transfer if the obligation, which is defined to include any bond, note, debenture, certificate, annuity contract or other evidence of indebtedness, is issued by a related person and is not a qualified obligation. A related person includes, but is not limited to, the trust, any grantor, owner or beneficiary of the trust, and any person who is related to any grantor, owner or beneficiary of the trust. The proposed regulations set forth the requirements of a qualified obligation, which require (among other things) that it consist of a written agreement, with a term not in excess of five years, with all payments denominated in U.S. dollars, and a yield to maturity not less than 100% or more than 130% of the applicable federal rate. It is noteworthy that the issuance of additional obligations and the renegotiation of the loan terms can disqualify an otherwise qualified obligation.

The proposed regulations also make it clear that a Code § 679 grantor is treated as the owner of underlying stock held by the trust for purposes of § 958 of the Code. Code § 958 sets forth the rules for determining stock ownership of a controlled foreign corporation. Consequently, it is now clear that a Code § 679 grantor is treated as the owner of the stock owned by or for the portion of the trust over which he or she, as the case may be, is treated as a grantor.

Interestingly, although the proposed regulations are effective November 6, 2000 (with certain enumerated exceptions), the Service's Notice of proposed rulemaking states that the Service may apply the effective dates that are applicable to Code § 679 of the Code. The Notice also provides that the Service may apply general income tax principles to transactions prior to the effective dates of the proposed regulations to determine whether a transfer has been made to a foreign trust having U.S. beneficiaries.

Gain Recognition on Certain Transfers to Foreign Trusts and Estates by U.S. Persons

Proposed Regulations Published

The IRS published proposed regulations on transfers of appreciated property by U.S. persons to foreign trusts. What follows is a summary of the prior law and the current law with respect to such transfers.

Prior Law

In 1997, Congress repealed former Code § 1491 and eliminated the 35% excise tax on transfers of appreciated property to foreign trusts and estates. In replacement, Congress enacted Code § 684, which imposes an income tax on transfers of appreciated property to foreign trusts and estates. Unlike former Code § 1491, which applied to all transfers of appreciated property whether or not transferred at fair market value or with donative intent, Congress in Code § 684(a) explicitly provided the IRS regulatory authority to make exceptions to the general gain recognition rule of transfers subject to Code § 684. These new proposed regulations further explain application of Code § 684 and set forth certain regulatory exceptions from its application.

Code § 684

Generally, under Code § 684(a), any transfer of property by a U.S. person to a foreign trust or estate is treated as a taxable disposition of the property except to the extent provided in the regulations. Such transfers are treated as a sale or exchange of the property for fair market value and the U.S. transferor must immediately recognize gain equal to the excess of fair market value over the adjusted basis in the hands of the U.S. transferor. Pursuant to Code § 684(b), however, a U.S. person is not required to recognize gain on a transfer of appreciated property to a foreign trust if any person is considered the owner of such foreign trust under the grantor trust rules of Code §§ 671–679. Lastly, pursuant to Code § 684(c), if a domestic trust migrates and becomes a foreign trust, all of the domestic trust's assets are considered to be transferred to such foreign trust and subject to the general gain recognition rule unless one of the exceptions discussed below applies. Appreciated property owned by the domestic transferor trust is deemed sold on the date such trust changes status from domestic to foreign, and, therefore, gain must be recognized on such date in an amount equal to fair market value minus adjusted basis.

The Proposed Regulations

The proposed regulations recently issued by the IRS further explain application of Code § 684 and provide for certain limited exceptions to the general gain recognition rule of Code § 684(a). These proposed regulations governing gain recognition apply to transfers of property to foreign trusts or estates made after August 7, 2000.

Proposed Treas. Reg. § 1.684-1 further explains the general rule of immediate recognition of gain when a U.S. person transfers appreciated property to a foreign trust or estate. The rule of immediate gain recognition applies even if the U.S. transferor might otherwise have been eligible to defer gain recognition under other applicable Code provisions. Further, losses are not permitted to be recognized under Code § 684. A U.S. transferor may not offset losses in some property under Code § 684 against gains in other property where multiple assets are transferred to the same trust during the year. Lastly, the proposed regulations provide that a U.S. person who transfers property to a foreign trust must comply with the reporting requirements under Code § 6048 and, thus, must file Form 3520 or Form 3520-A, whichever is applicable.

The proposed regulations define a "transfer" broadly to mean any direct, indirect or constructive transfer. Determination of whether an indirect or constructive transfer has occurred is made under guidelines set forth in proposed regulation § 1.679-3(c) and -3(d), discussed above. The proposed regulations also provide that a U.S. person who is considered the owner of any portion of a grantor trust is treated as the transferor where such grantor trust transfers to another trust, property from such portion of the grantor trust owned by the U.S. person.

The most significant aspect of these proposed regulations are the additional regulatory exceptions to the general gain recognition rule for: (1) transfers to certain charitable trusts; (2) certain transfers upon death; (3) transfers for fair market value to unrelated trusts; and (4) certain distributions to trusts by non-trust entities (e.g., corporations, partnerships or limited liability companies) in which the trust holds an interest.

The proposed regulations provide a limited exception from gain recognition for transfers of property to a foreign charitable trust which has previously received a ruling or determination letter from the IRS, which has been neither revoked nor modified, recognizing such foreign trust's tax-exempt status under Code § 501(c)(3). The practical effect of this exception is very limited, however, because few foreign trusts or charities ever seek a 501(c)(3) determination letter from the IRS. Thus, in effect, this exception is available only for transfers made to a limited number of foreign charitable trusts.

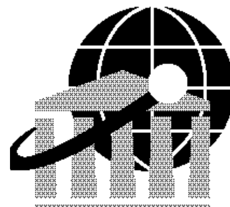
The proposed regulations also provide an exception for transfers of property by a U.S. transferor if such transferred property is included in the gross estate of the U.S. decedent-transferor for U.S. federal estate tax purposes, and the adjusted basis of the transferred property in the hands of the foreign trust is determined under Code § 1014(a).

The proposed regulations further provide an exception from Code § 684 for transfers of property for fair market value to a foreign trust that is not a "related" foreign trust as defined in Treas. Reg. § 1.679-1(c)(5). Presumably, however, such a transfer for fair market value to an unrelated foreign trust is still subject to general sale or exchange treatment under Code § 1001 and, thus, isn't really much of an exception at all.

Lastly, the proposed regulations provide an exception for distributions to a trust with respect to an interest held by such trust in a non-trust entity such as a corporation or partnership, or an interest in certain commercial trusts such as certain investment trusts, liquidating trusts or environmental remediation trusts. This exception applies to dividend payments, distributions and other similar payments made in the ordinary course of business from a foreign trust's underlying controlled entities to the foreign trust.

With respect to domestic trust migrations, the proposed regulations provide that a domestic trust is treated as transferring all of its assets to a foreign trust on the day the migrating domestic trust becomes a foreign trust, as its last act before becoming a foreign trust. A migrating domestic trust must immediately recognize gain on the deemed transfer of all of its assets unless one of the statutory or regulatory exceptions described above applies. A migrating domestic trust must also fulfill the reporting requirements of Code § 6048 by filing Form 3520 or Form 3520-A, as applicable. The proposed regulations do, however, incorporate relief for inadvertent trust migrations as provided in Treas. Reg. § 301.7701-7(b)(2). For example, if a trust's status changes from domestic to foreign because of an inadvertent change in the trustee due to death or resignation, such trust may avoid application of the general gain recognition rule under Code § 684 if, within 12 months, the trust makes any necessary remedial changes to the trustee in order to remain a domestic trust.

The authors are members of the Private Banking Practice Group of the law firm of Baker & McKenzie. These associates are located in various offices of the firm. Victoria A. Dalmas and Marnin J. Michaels are in Zurich. Michelle B. Graham and Monica M. Robles are located in the San Diego office and Rahul M. Ranadive is in the Miami office.



Visit Us on Our Web site:
http://www.nysba.org/
sections/tande

New York Estate Tax Compliance After the "Sop Tax"

By Sally B. Logan

"Change and flux are the law of life; they are also the life of the law."[1] New York estate tax practitioners are experiencing the changes that are the life of the law. Effective February 1, 2000, the estate tax imposed by New York on resident decedents is equal to the maximum amount allowable against the federal estate tax as a credit for state death taxes.[2] The total amount paid to New York State will reduce the federal estate tax on a dollar-for-dollar basis, so that the estate's total tax liability, federal and state, is no greater than the federal estate tax liability before the credit for state death taxes. If a New York estate does not meet the threshold for filing a federal return, no New York tax is assessed and no New York return is required.

As New York estate tax practitioners adjust to the new tax provisions, they are keeping a close eye on the possible repeal of the federal estate, gift and generation-skipping tax altogether. The New York tax department has indicated that if the federal government eliminates the estate tax, New York would not automatically follow suit. Although additional changes appear likely, the immediate need for New York estate tax practitioners is to comply with the changes summarized in this article.

Filing Thresholds

The current threshold for U.S. citizens and residents for filing the federal estate tax return is $675,000. The threshold remains the same for 2001 and increases gradually, reaching $1 million in 2006. For U.S. citizens who are New York State residents, the requirement to file a New York estate tax return is essentially the same as the federal requirement.

For nonresidents of New York, both U.S. citizens and non U.S. citizens, if the estate includes real or tangible personal property having an actual situs in New York State, the estate must file a New York estate tax return if the estate is required to file a federal estate tax return. In general, for non U.S. citizens, the estate must file a federal estate tax return (Form 706-NA) if the value of the decedent's gross estate located in the U.S. exceeds $60,000.

New Forms and Procedures

The New York Estate Tax Return is due nine months after the decedent's death, unless an extension of time to file the return is granted. The New York return is to be filed on a two-page form identified as ET-706. If no estate or inheritance tax is payable to another state which is allowed as a federal credit, no tax computation is necessary. The federal credit for state death taxes from line 15 of the federal Form 706, or line 9, Part II, of Form 706-NA, is equal to the New York State estate tax. If an estate is required to pay estate tax in another state or if a nonresident owns real property in New York, tax computations are necessary, as described below.

A complete copy of either Form 706 or Form 706-NA with all schedules and supporting documents must be submitted with the New York return. In addition, the following documents must be submitted:

1. A copy of the death certificate;
2. A copy of the decedent's will;
3. A copy of the Letters of Appointment, if obtained; and
4. A power of attorney.

As before, for the estate of an individual who was not a resident of New York State, the estate is required to file a Form ET-141, Estate Tax Domicile Affidavit, with the return.

Releases of Lien

Releases of lien are still required, unless the property was held jointly by the decedent and the surviving spouse as the only joint tenants with the right of survivorship. The release of lien may be requested on the Form ET-706 in the same manner as the releases of lien were obtained on the ET-90. If an estate is not required to file a federal estate tax return and a release of lien is required, the estate may file a Form ET-85, New York State Estate Tax Certification, to obtain the release of lien. As a reminder, effective August 11, 1997., New York eliminated its processing fee for issuing a release of lien for estates of individuals dying after May 25, 1990.

Estate Tax Waivers

New York has eliminated the need to obtain estate tax waivers, effective February 1, 2000, for estates of individuals dying on or after that date. Banks, trust companies, and brokerage firms may now deliver assets held in the decedent's name, without notifying the New York tax department or retaining any of the proceeds. Insurance companies may also release the entire proceeds of a life insurance policy on the life of a decedent dying on or after February 1, 2000, without requiring a tax waiver. For

estates where the date of death is prior to February 1, 2000, waivers are still required.

Safe Deposit Boxes

Estates of individuals dying on or after February 1, 2000 are not required to obtain a release of the safe deposit box from the New York tax department. Most banks will still require that a copy of the Letters of Appointment be presented before an Executor or Administrator may gain access to a decedent's safe deposit box.

Timing of Tax Payment

The due date of the New York tax payment is nine months after the decedent's death, the same as the federal due date. For estates of individuals dying on or after February 1, 2000, the payment of 90% of the estate tax by seven months after date of death is no longer required in order to avoid an interest charge.

Penalties and Interest

Interest on underpayments is computed from nine months after the date of death, even if an extension to file the return is obtained. The late payment penalty is one-half percent of the unpaid amount for each month or part of the month it is not paid beginning with the due date of payment. The maximum penalty is 25%. If an estate can show reasonable cause for failing to pay the tax when due, the penalties may be waived. The late filing penalties remain unchanged.

Apportionment of Credit where More than One State Involved

If estate tax or inheritance tax is payable to another state, a New York estate must complete Schedule 1 on the back of the ET-706 listing each item of real and tangible personal property located outside New York State, including the value, and the item number and schedule of the federal Form 706 on which it is reported. The New York tax is equal to the federal credit for state death taxes reduced by the lesser of the amount of the death tax paid to the other state or states that is allowable as a federal credit for state death taxes, or the amount determined by multiplying the federal credit by a fraction, the numerator of which is the value of the property located outside New York and the denominator is the federal gross estate.

Procedure for Nonresident Decedents with New York Property

For nonresident decedents required to file a New York return, Schedule 2 on the back of the ET-706 must be completed listing each item of real and tangible personal property located in New York State, including the value, and the item number and schedule of the federal Form 706 or 706-NA on which it is reported. The New York tax is equal to the federal credit for state death taxes reduced by the lesser of the amount of the death tax paid to the other state or states that is allowable as a federal credit for state death taxes, or the amount determined by multiplying the federal credit by a fraction, the numerator of which is the value of the property located in New York and the denominator is the federal gross estate.

Filing of New York Estate Tax Return with the Surrogate's Court

For estates of individuals dying on or after February 1, 2000, New York no longer requires the filing of a copy of the estate tax return with the Surrogate's Court, and the filing fees have been repealed. Practitioners will need to check with local Surrogate's Courts regarding their own filing requirements.

Amended Returns

Amending the New York estate tax return simply requires that the box on the top of Form ET-706 be checked. A copy of the amended federal estate tax return is to be attached if the federal return was amended. As before, if it is necessary to amend the New York return as a result of a federal audit, the estate must file Form ET-115, New York State Estate Tax Report of Federal Audit Changes and attach a copy of the federal audit changes and line adjustments.

Conclusion

The tax law changes result in a simplification of New York's estate tax filing requirements. They also eliminate what used to be an extra cost of dying in New York compared with Florida and other "sop tax" states. It remains to be seen whether this will have an impact on the thinking in New York about changing domicile.

Endnotes

1. Book Review of *Modern Mortgage Law and Practice* by Robert Kratovil, Chicago Bar Record, Dec. 1972, Vol. 54, No. 3, p. 144 (Prentice Hall, 1972).
2. The state death tax credit is computed under § 2011 of the Internal Revenue Code of 1986, as amended.

Sally B. Logan is a Senior Associate in the Trusts and Estates department in the Buffalo office of Hodgson, Russ, Andrews, Woods & Goodyear LLP.

New York Should Enact the Uniform Anatomical Gift Act of 1987

By Ira Mark Bloom

This article adapts my recent report to the Trust and Estates Section's Multi-State Practice Committee wherein I recommend that New York enact the Uniform Anatomical Gift Act of 1987. My recommendation is based on both the inadequacy of the 1968 Uniform Act which is currently in force in New York and the improvement made in the law by the 1987 Act.

The article first discusses the Uniform Anatomical Gift Act of 1968 (UAGA-1968) and its adequacies. The positive changes under the Uniform Anatomical Gift Act of 1987 (UAGA-1987) are then listed. Based on the experience of the states that have enacted UAGA-1987, New York will need to make variations in UAGA-1987. The enacted variations will depend on how numerous issues are resolved. The Appendix sets forth UAGA-1987 and raises several issues on a section-by-section basis.

Uniform Anatomical Gift Act of 1968

In 1968, the National Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Anatomical Gift Act (UAGA-1968) for the purpose of encouraging and facilitating the procurement of organs and other body parts from deceased persons (as distinct from living persons). In 1970, New York enacted its version of UAGA-1968. By 1973, all 50 states and the District of Columbia had enacted UAGA-1968.

New York's Anatomical Gift Act is currently codified under §§ 4300–4309 of the Public Health Law. As with most other uniform laws, New York enacted UAGA-1968 with variations.

Inadequacies of Uniform Anatomical Gift Act of 1968 Warrant Revised Uniform Anatomical Gift Act

Unfortunately, UAGA-1968 did not produce sufficient number of organs and other body parts by voluntary donations. In response, NCCUSL promulgated the Uniform Anatomical Gift Act of 1987 (UAGA-1987).

The following excerpts from the Prefatory Note to UAGA-1987 explain why UAGA-1968 was inadequate.

The contemporary significance of the Uniform Anatomical Gift Act (of 1968) has been recently assessed by the Hastings Center; in the Preface to its Report of the project on organ transplantation, "Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement" (October 1985), it is stated:

> The issue of transplantation remained quiescent for many years. It was only with the successes occasioned by the introduction of powerful new immunosuppressive drugs such as Cyclosporine and improvements in surgical techniques for transplanting organs and tissues in the past few years that the issue of organ procurement was brought back into the center stage of public policy concern. Enhancements in the capacity to perform transplants increased the demand for solid organs. It has become apparent that the public policy instituted in 1969 [by promulgation of the Uniform Anatomical Gift Act in 1968] is not producing a sufficient supply of organs to meet the current or projected demand for them.

The inadequacies in the present system of encouraging voluntary donation of organs were enumerated in the Hastings Center Report:

The key problems that hinder organ donation include:

1. Failure of persons to sign written directives.
2. Failure of police and emergency personnel to locate written directives at accident sites.
3. Uncertainty on the part of the public about circumstances and timing of organ recovery.
4. Failure on the part of medical personnel to recover organs on the basis of written directives.
5. Failure to systematically approach family members concerning donation.
6. Inefficiency on the part of some organ procurement agencies in obtaining referrals of donors.

7. High wastage rates on the part of some organ procurement agencies in failing to place donated organs.
8. Failure to communicate the pronouncement of death to next of kin.
9. Failure to obtain adequate informed consent from family members.

State and federal legislation have addressed several of these problems. For example, a majority of states have enacted a variety of "required request" laws that require hospital administrators to discuss with next of kin the option of donating, or requesting the donation of, the organs of a decedent. New York enacted such a law in 1985.[1] Congress enacted the National Organ Transplant Act in 1984 prohibiting the purchase of organs in interstate commerce and providing grants to organ procurement agencies and a national organ-sharing system. The Act also provides for appointment of a Task Force on Organ Transplantation to conduct a comprehensive examination of organ donation and procurement, organ sharing within the United States, access by patients to donor organs and transplant procedures, diffusion and adoption of organ transplant technology, and future directions in research.

The Task Force submitted a report in April 1986 entitled "Organ Transplantation: Issues and Recommendations." Among the findings:

> An overriding problem common to all organ transplantation programs as well as to the well-established programs in tissue banking (for corneal, skin and bone transplantation) is the serious gap between the need for the organs and tissues and the supply of donors. Despite substantial support for transplantation and a general willingness to donate organs and tissues after death, the demand far exceeds the supply.

Citing a recommendation of the Task Force, the bill for the reconciliation of the 1987 budget amended the Social Security Act[2] to require that hospitals, as a condition to receiving Medicare or Medicaid after October 1, 1987, establish written protocols "for the identification of potential organ donors that [make families] . . . aware of the option of organ or tissue donation and their option to decline."[3]

Several amendments to the Uniform Act have been made since it was promulgated in 1968. In 1980, the NCCUSL voted to make optional the language that previously required the donor card to be signed "in the presence of two witnesses who must sign the document in his presence." Amendments have been made by several states authorizing individuals other than doctors to remove eyes and to address specific emerging problems. As a result, the objective of the 1968 Uniform Act has been eroded, i.e., "When Generally Adopted, Even If the Place of Death, or the Residence of the Donor, or the Place of Use of the Gift Occurs in a State Other than That of the Execution of the Gift, Uncertainty as to the Applicable Law Will Be Eliminated and All Parties Will Be Protected."

Uniform Anatomical Gift Act of 1987

The Uniform Anatomical Gift Act of 1987 (UAGA-1987) was designed to overcome the numerous problems caused by UAGA-1968. The statutory provisions of UAGA-1987 are set forth in Appendix B.[4]

The Prefatory Notes to UAGA-1987 explain the numerous positive changes made by UAGA-1987:

> The proposed amendments simplify the manner of making an anatomical gift and require that the intentions of a donor be followed. For example, no witnesses are required on the document of gift (Section 2(b)) and consent of next of kin after death is not required if the donor has made an anatomical gift (Section 2(h)). The identification of actual donors is facilitated by a duty to search for a document of gift (Section 5(c)) and of potential donors by the provisions for routine inquiry (Section 5(a)) and required request (Section 5(b)). A gift of one organ, e.g., eyes, is not a limitation on the gift of other organs after death, in the absence of contrary indication by the decedent (Section 2(j)). The right to refuse to make an anatomical gift and the manner of expressing the refusal are specified (Section 2(i)). Revocation by a donor of an anatomical gift that has been made is effective without communication of the revocation to a specified donee (Section 2(f)). Hospitals have been substituted for attending physicians as donees of anatomical gifts (Section 6(b)), and they are required to establish agreements or affiliations with other hospitals and procurement organizations in the region to coordinate the procurement and utilization of anatomical gifts (Section 9). If a request for an anatomical gift has been made for transplant or therapy by a person specified in the Act and if

> there is no contrary indication by the decedent or known objection by the next of kin to an anatomical gift, the [coroner] [medical examiner] or [local public health official] may authorize release and removal of a part subject to specific requirements (Section 4(a) and (b)). The categories of persons that may remove anatomical parts are expanded to include eye enucleators and certain technicians (Section 8(c)). The sale or purchase of parts is prohibited (Section 10). Persons who act, or attempt to act, in good faith in accordance with the terms of the Act are not liable in any civil action or criminal proceeding. The categories of persons covered by this exemption are specified (Section 11(c)).

New York Should Enact UAGA-1987

As set forth above, the Prefatory Notes to UAGA-1987 make out a compelling case why New York should enact UAGA-1987. By enacting UAGA-1987, New York would join the 21 states that have already enacted the measure. UAGA-1987 states include: Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin.

Based on the experience of many of the enacting states, UAGA-1968 should be repealed. UAGA-1987 § 12 provides an appropriate transitional rule for preexisting documents.

New York's Version of UAGA-1987

Like most of the states that have enacted UAGA-1987, New York will want to make some variations from UAGA-1987. These variations will run the gamut from style to substantive changes. For example, § 1(5) of UAGA-1987 defines an enucleator as an officially certified or licensed individual who removes or processes eyes or parts of eyes. It turns out, however, that New York has no official certification or licensing procedure. Accordingly, New York would likely want to define enucleator as "an individual who removes or processes eyes or parts of eyes," following California's definition of enucleator.

An overriding substantive issue is whether New York should extend its anatomical gift act to pacemakers and other artificial devices. Issues also must be addressed under many of the provisions. For example, several issues arise under § 3(a) of UAGA-1987 which provides a prioritized list of persons who may consent to the making of an anatomical gift on behalf of an individual. The list does not include a health care agent under a health care proxy who has been authorized to make anatomical gifts. Should such a health care agent be added to the list and what should be that person's relative priority? Should the priority of a guardian be improved? Under UAGA-1987 the guardian has the lowest priority. Should a spouse be allowed to consent if the spouses were separated?

In at least one instance, developments after the promulgation of UAGA-1987 have rendered a portion of UAGA obsolete. Specifically, § 5(b) of UAGA-1987 (relating to notification by hospitals) is obsolete because of the 1998 Federal mandate that hospitals notify a federal organ procurement organizations when death has occurred or is imminent.[5]

New York Public Health Law § 4351 (Duties of hospital administrators, organ procurement organizations, eye banks and tissue banks) and the Department of Health's corresponding regulation under 10 N.Y.C.R.R. § 405.25 (Organ and tissue donation (anatomical gifts)), as amended July 25, 2000, reflect the 1998 federal requirements for notification by hospitals.

As explained in the Department of Health's proposed regulations to 10 N.Y.C.R.R. § 405.25, 2000-12 N.Y.S. Register 17, 18 (March 22, 2000), which were finalized on July 25, 2000:

> As medical advances have increased the number of individuals who could benefit from anatomical gifts, the number of available organs, eyes and tissue has not kept pace with the demand. As of September 30, 1998 there were 62,109 patients on the national waiting list for organs according to the United Network for Organ Sharing (UNOS). In New York State there were 6,099 patients on the waiting list. In 1997 4,331 patients on the national waiting list died while waiting for organs. To address this serious problem the Legislature amended the "Required Request" provisions [of Public Health Law § 4351] regarding anatomical gifts in the Public Health Law [for the purpose of increasing the supply of organs, eyes and tissue by enhancing the process by which anatomical gifts are requested and by requiring hospitals to notify organ procurement organizations and tissue banks of every death which has occurred or is imminent.

Specific legislation enacting New York's version of UAGA-1987 will also need to take into account variations that New York made to UAGA-1968. For example, Public Health Law § 4300(2) (§ 1 of UAGA-1967) defines a decedent as an individual "of any age" and includes a stillborn infant or fetus. UAGA-1987 § 1(2) defines a decedent as an individual and includes a stillborn infant or fetus, thereby omitting "of any age" presumably on the ground that it is redundant and it repeats itself. Should Public Health Law § 4308 (Prohibition on charging a fee to a donor's estate), which has no counterpart under UAGA-1987, be continued under New York's new anatomical gift laws?

Conclusion

There is a critical shortage of organs, tissues and eyes for transplantation. A few sobering statistics emphasize this shortage. From 1988 to 1998, the Secretary of the Department of Health and Human Services reported that "there has been a 200% increase in the number of patients on the waiting list for a transplant."[6] Although Secretary of the Department of Health and Human Services reported that the numbers of donors had increased since HHS launched its initiative in 1997, she also reported that there are over 70,000 persons on the transplant waiting list.[7]

As reported on the Government's organ donations Web site (http://organdonor.gov/): "Each day about 60 people receive an organ transplant, but another 16 people on the waiting list die because not enough organs are available." Finally, the UNOS[8] Web site notes that "every 14 minutes a new name is added to the national organ transplant waiting list."

The provisions of UAGA-1987 should help to alleviate the shortage of body parts in ways that UAGA-1968 cannot. Consideration might also be given to revising the Department of Health's Health Care Proxy form to add space and lines that specifically authorize the health care agent to make or not make anatomical gifts. For example, California recently enacted a statutory form for health care directives that includes a part for the donation of body parts at death.[9]

Appendix

UNIFORM ANATOMICAL GIFT ACT (1987) WITH NOTES AND ISSUES

Section

1. Definitions.
2. Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual.
3. Making, Revoking, and Objecting to Anatomical Gifts, by Others.
4. Authorization by [Coroner] [Medical Examiner] or [Local Public Health Official].
5. Routine Inquiry and Required Request; Search and Notification.
6. Persons Who May Become Donees; Purposes for Which Anatomical Gifts may be Made.
7. Delivery of Document of Gift.
8. Rights and Duties at Death.
9. Coordination of Procurement and Use.
10. Sale or Purchase of Parts Prohibited.
11. Examination, Autopsy, Liability.
12. Transitional Provisions.
13. Uniformity of Application and Construction.
14. Severability.
15. Short Title.
16. Repeals.
17. Effective Date.

§ 1. Definitions

As used in this [Act]:

(1) "Anatomical gift" means a donation of all or part of a human body to take effect upon or after death.

(2) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(3) "Document of gift" means a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeur's license, a will, or other writing used to make an anatomical gift.

(4) "Donor" means an individual who makes an anatomical gift of all or part of the individual's body.

(5) "Enucleator" means an individual who **removes or processes eyes or parts of eyes.**

(6) "Hospital" means a facility licensed, accredited, or approved as a hospital under the law of any state or a facility operated as a hospital by the United States government, a state, or a subdivision of a state.

(7) "Part" means an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body**.**

(8) "Person" means an individual, corporation, business trust, estate, trust, partnership, **limited liability,** joint venture, association, government, governmental subdivision or agency, or any other legal or commercial entity.

(9) "Physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery or osteopathy and surgery under the laws of any state.

(10) "Procurement organization" means a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts.

(11) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(12) "Technician" means an individual who is qualified to remove or process a part.

*Subsection (8) is varied by adding a limited liability corporation as a person.

*Although the Department of Health has extensive regulations governing anatomical gift banks, *see* 10 N.Y.C.R.R. Part 52 et seq., New York does not license enucleators, *see* subsection (5), or technicians, *see* subsection (12). For example, with respect to enulceation, a regulation (10 N.Y.C.R.R. § 52-7.3) provides as follows:

> Eye tissue removal shall be performed only by trained retrieval technicians under the supervision of the director of a licensed eye bank. The director . . . shall be responsible for developing policies, procedures, and standards for the educational background, training, certification, and continuing education of retrieval technicians.

The suggested definitions for enucleators and technicians are based on California and Washington law definitions.

Issues Under § 1

Should pacemakers be included within the anatomical gift act? Only California includes pacemakers. Should other artificial devices be included?

§ 2. Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual

(a) An individual who is at least [18] years of age may (i) make an anatomical gift for any of the purposes stated in Section 6(a), (ii) limit an anatomical gift to one or more of those purposes, or (iii) refuse to make an anatomical gift.

(b) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift must be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and state that it has been so signed.

(c) If a document of gift is attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, the document of gift must comply with subsection (b). Revocation, suspension, expiration, or cancellation of the license does not invalidate the anatomical gift.

(d) A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, technician, or enucleator to carry out the appropriate procedures.

(e) An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.

(f) A donor may amend or revoke an anatomical gift, not made by will, only by:

(1) a signed statement;

(2) an oral statement made in the presence of two individuals;

(3) any form of communication during a terminal illness or injury addressed to a physician or surgeon; or

(4) the delivery of a signed statement to a specified donee to whom a document of gift had been delivered.

(g) The donor of an anatomical gift made by will may amend or revoke the gift in the manner provided for amendment or revocation of wills, or as provided in subsection (f).

(h) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.

(i) An individual may refuse to make an anatomical gift of the individual's body or part by (i) a writing signed in the same manner as a document of gift, (ii) a statement attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, or (iii) any other writing used to identify the individual as refusing to make an anatomical gift. During a terminal illness or injury, the refusal may be an oral statement or other form of communication.

(j) In the absence of contrary indications by the donor, an anatomical gift of a part is neither a refusal to give other parts nor a limitation on an anatomical gift under Section 3 or on a removal or release of other parts under Section 4.

(k) In the absence of contrary indications by the donor, a revocation or amendment of an anatomical gift is not a refusal to make another anatomical gift. If the donor intends a revocation to be a refusal to make an anatomical gift, the donor shall make the refusal pursuant to subsection (i).

§ 3. Making, Revoking, and Objecting to Anatomical Gifts, by Others

(a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

(1) the spouse of the decedent;

(2) an adult son or daughter of the decedent;

(3) either parent of the decedent;

(4) an adult brother or sister of the decedent;

(5) a grandparent of the decedent; and

(6) a guardian of the person of the decedent at the time of death.

(b) An anatomical gift may not be made by a person listed in subsection (a) if:

(1) a person in a prior class is available at the time of death to make an anatomical gift;

(2) the person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or

(3) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift by a person authorized under subsection (a) must be made by (i) a document of gift signed by the person or (ii) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) A failure to make an anatomical gift under subsection (a) is not an objection to the making of an anatomical gift.

Issues Under § 3

Some states add to the list of third parties an agent under a health care proxy who has been given express authority to make anatomical gifts. Should New York follow suit? If so, what should be the agent's relative priority? For example, Arizona and California give the agent first priority whereas under Connecticut law the agent's priority is next-to-last.

Washington gives the guardian of the decedent the highest priority whereas UAGA-87 gives such guardian than the lowest priority. What should be the guardian's relative priority? Should a separated spouse be entitled to consent? Should that spouse's priority be lower than a spouse who is not separated?

§ 4. Authorization by [Coroner] [Medical Examiner] or [Local Public Health Official]

(a) The [coroner] [medical examiner] may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy, if:

(1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;

(2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent's medical records and inform persons listed in Section 3(a) of their option to make, or object to making, an anatomical gift;

(3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in Section 3(a);

(4) the removal will be by a physician, surgeon, or technician; but in the case of eyes, by one of them or by an enucleator;

(5) the removal will not interfere with any autopsy or investigation;

(6) the removal will be in accordance with accepted medical standards; and

(7) cosmetic restoration will be done, if appropriate.

(b) If the body is not within the custody of the [coroner] [medical examiner], the [local public health

officer] may release and permit the removal of any part from a body in the [local public health officer's] custody for transplantation or therapy if the requirements of subsection (a) are met.

(c) An official releasing and permitting the removal of a part shall maintain a permanent record of the name of the decedent, the person making the request, the date and purpose of the request, the part requested, and the person to whom it was released.

Note: New York currently allows the removal of corneal tissues for transplant under certain circumstances.[10]

Issues Under § 4

Should this section be omitted as under Nevada, Vermont and Washington law? Should there be a duty to inform and seek consent of persons under Section 3(a)? Should New York follow California's lead and authorize a hospital to release and permit removal if the body is not within the custody of the coroner or medical examiner and certain procedures are followed? Should New York join California by quantifying the number of hours when a search constitutes a reasonable time? California uses 12 hours.

§ 5. Routine Inquiry and Required Request; Search and Notification

(**a)** On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least [18] years of age: "Are you an organ or tissue donor?" If the answer is affirmative the person shall request a copy of the document of gift. If the answer is negative or there is no answer and the attending physician consents, the person designated shall discuss with the patient the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient's medical record.

Caveat: Subsection (b) is obsolete and should not be enacted into New York law.

(**b)** If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital [administrator] or a representative designated by the [administrator] shall discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to Section 3(a). The request must be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the gift is not suitable, based upon accepted medical standards, for a purpose specified in Section 6. An entry must be made in the medical record of the patient, stating the name and affiliation of the individual making the request, and of the name, response, and relationship to the patient of the person to whom the request was made. The [Commissioner of Health] shall [establish guidelines] [adopt regulations] to implement this subsection.

Caveat: Subsection (b) is obsolete and should not be enacted into New York law.

(c) The following persons shall make a reasonable search for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:

(1) a law enforcement officer, fireman, paramedic, or other emergency rescuer finding an individual who the searcher believes is dead or near death; and

(2) a hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information.

(d) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection (c)(1), and the individual or body to whom it relates is taken to a hospital, the hospital must be notified of the contents and the document or other evidence must be sent to the hospital.

(e) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to Section 3(a) or a release and removal of a part has been permitted pursuant to Section 4, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part.

(f) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability but is subject to appropriate administrative sanctions.

Caveat: Subsection (b) is obsolete and should not be enacted into New York law. In 1998, a federal regulation applicable to hospitals receiving Medicare mandates more stringent notification requirements than were imposed by federal law when § 5(b) of UAGA-87 was promulgated.[11]

Issues Under § 5

Should New York follow several states that omit section (a) regarding patient notification? Apparently, there is a concern that individuals will be afraid to make anatomical gifts fearing that efforts to save their

lives may be compromised and may instead execute a document refusing anatomical gifts.

Should section (b) be omitted or should Public Health Law § 4351 be moved into New York's version of UAGA-1987? Public Health Law § 4351(Duties of hospital administrators, organ procurement organizations, eye banks and tissue banks) and the Department of Health's corresponding regulation under 10 N.Y.C.R.R. § 405.25 (Organ and tissue donation(anatomical gifts)), effective as amended on 7/25/00, reflects 1998 federal requirements for notification by hospitals. Accordingly, § 5(b) is obsolete and should in no event be adopted by New York.

Note: Since Public Health Law § 4351 uses a prioritized list of persons to be notified for consent, the list should be the same as the one that is decided upon for UAGA-1987 § 3(a).

§ 6. Persons Who May Become Donees; Purposes for Which Anatomical Gifts May Be Made

(a) The following persons may become donees of anatomical gifts for the purposes stated:

(1) a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;

(2) an accredited medical or dental school, college, or university for education, research, **or** advancement of medical or dental science; or

(3) a designated individual for transplantation or therapy needed by that individual.

(b) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.

(c) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under Section 3(a), the donee may not accept the anatomical gift.

§ 7. Delivery of Document of Gift

(a) Delivery of a document of gift during the donor's lifetime is not required for the validity of an anatomical gift.

(b) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to expedite the appropriate procedures after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession shall allow the interested person to examine or copy the document of gift.

§ 8. Rights and Duties at Death

(a) Rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under Section 11(b). A donee may accept or reject an anatomical gift. If a donee accepts an anatomical gift of an entire body, the donee, subject to the terms of the gift, may allow embalming and use of the body in funeral services. If the gift is of a part of a body, the donee, upon the death of the donor and before embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.

(b) The time of death must be determined by a physician or surgeon who attends the donor at death or, if none, the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a part unless the document of gift designates a particular physician or surgeon pursuant to Section 2(d).

(c) If there has been an anatomical gift, a **[physician or surgeon who is not disqualified under subsection (b) or]** a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes, after determination of death by a physician or surgeon.

§ 9. Coordination of Procurement and Use

Each hospital in this State, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination of procurement and use of human bodies and parts.

§ 10. Sale or Purchase of Parts Prohibited

(a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.

(b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part.

(c) A person who violates this section is guilty of a [felony] and upon conviction is subject to a fine not

exceeding [$50,000] or imprisonment not exceeding [five] years, or both.

New York was ahead of the times on this issue. As enacted in 1970, Public Health Law § 4307 forbids the sale of organs.

Issue Under § 10

What should be the level of crime for violating this section? Under current New York law (Public Health Law § 4307), the crime is a misdemeanor.

§ 11. Examination, Autopsy, Liability

(a) An anatomical gift authorizes any reasonable examination necessary to assure medical acceptability of the gift for the purposes intended.

(b) The provisions of this [Act] are subject to the laws of this State governing autopsies.

(c) A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or a foreign country] or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.

(d) An individual who makes an anatomical gift pursuant to Section 2 or 3 and the individual's estate are not liable for any injury or damage that may result from the making or the use of the anatomical gift.

§ 12. Transitional Provisions

This [Act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after the effective date of this [Act].

§ 13. Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 14. Severability

If any provision of this [Act] or its application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 15. Short Title

This [Act] may be cited as the "Uniform Anatomical Gift Act (1987)."

§ 16. Repeals

The following acts and parts of acts are repealed:

(1)

(2)

(3)

§ 17. Effective Date

This [Act] takes effect ______________________.

Endnotes

1. *See* Former Public Health Law § 4351.
2. 42 U.S.C. § 1320b-8.
3. P.L. 99-509 § 9318.
4. *See generally* Fitzgibbons, *Cadaveric Organ Donation And Consent: A Comparative Analysis of the United States, Japan, Singapore and China*, 6 ILSA J. Int'l & Comp. L. 73 (1999) and Comment, *Regulating the "Gift of Life"-The 1987 Uniform Anatomical Gift Act*, 65 Washington L. Rev. 171, 183 (1990).
5. *See* 42 CFR § 482.45 (Condition of participation: Organ, tissue and eye procurement) (effective June 22, 1998).
6. *HHS launching national organ/tissue donor initiative*, 1997 WL 8941217.
7. *See* "HHS Announces Increase in Organ Donations and New Tool to Support and Empower Families Making Donation Decisions" at (http://www.hhs.gov/news/press/2000pres/20000912.html) (September 12, 2000). As of September 9, 2000, there were over 71,000 patients on the United Network for Organ Sharing (UNOS). *See* UNOS Web site at (http://www.unos.org/Newsroom/critdata_main.htm) (statistics updated weekly).
8. *See* http://www.unos.org/frame_Default.asp.
9. *See* Cal. Prob. Code § 4701 (operative July 1, 2000).
10. *See* New York Public Health Law § 4222 (Removal of corneal tissue for transplant and pituitary gland tissue for extraction of growth hormone).
11. *See* 42 CFR § 482.45 (Condition of participation: Organ, tissue and eye procurement) (effective June 22, 1998). N.Y. Public Health Law § 4351 (Duties of hospital administrators, organ procurement organizations, eye banks and tissue banks) and the Department of Health's corresponding regulation under 10 N.Y.C.R.R. § 405.25 (Organ and tissue donation (anatomical gifts)), as amended 7/25/00, reflects the 1998 federal requirements for notification by hospitals.

Ira Mark Bloom is a professor of law at Albany Law School and presently serves as Vice Chair of the Multi-State Practice Committee of the Trusts and Estates Section. He formerly served as Chair of the Taxation Committee of the Trusts and Estates Section.

Copyright 2000—Ira Mark Bloom

Drafting to Avoid Pitfalls in New York Wills

AN INVITATION TO THE 15th Annual Law Seminar

Co-Chairs

MARK E. HARANZO, Esq.,
Partner, Putney, Twombly, Hall & Hirson LLP

JOANN T. PALUMBO, Esq.,
Partner, Blank Rome Tenzer Greenblatt LLP

Speakers

HON. RENEE R. ROTH
Surrogate of New York County

ELIZABETH S. BENSON
Vice-President and Senior Counsel with Merrill Lynch & Co., Inc. in the Office of General Counsel in the Private Banking Group. Ms. Benson advises on trust-related issues. Prior to joining Merrill Lynch, Ms. Benson was the Deputy Chief of the Law Department of the New York County Surrogate's Court.

DAVID J. MCCABE
Partner in the New York office of Willkie Farr & Gallagher. Mr. McCabe's practice embraces all aspects of estate planning and administration, with emphasis on the development of sophisticated plans for high net worth individuals and their families.

JANINE RACANELLI
Vice President of J.P. Morgan's Wealth Advisory Group, where she develops and implements tax-efficient strategies to maximize wealth across generations. Prior to joining J.P. Morgan, Ms. Racanelli was an associate in the Personal Representation Department of Paul Weiss Rifkind Wharton & Garrison.

EILEEN CAULFIELD SCHWAB
Eileen Caulfield Schwab is a Partner at Brown and Wood LLP. Mrs. Schwab is also an Adjunct Professor of Law at the New York Law School, a member of ACTEC, and a frequent lecturer and author. Mrs. Schwab is Chair of the Archdiocese Planned Gift, Bequests and Endowment Committee, and a Director of the Catholic Communal Fund.

Saturday, February 3, 2001
8:15 a.m. – 1 p.m.

The Archdiocese of New York
Cathedral High School Mini Theater
1011 First Avenue (entrance on 56th Street)

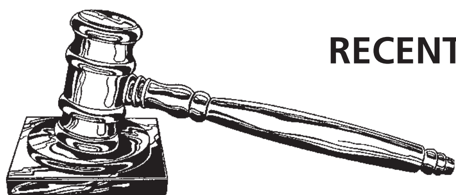
Registration fee: $110 *Includes coffee and danish.*
Check payable: Archdiocese of New York-Law Seminar.
Mail to: PLANNED GIFT DEPARTMENT, OFFICE OF DEVELOPMENT, 14TH FLOOR, 1011 FIRST AVE., NEW YORK, NY 10022
For reservations and information, call:
KATHLEEN FOLEY, 212-371-1000, EXT. 3317.
VISA, MasterCard, American Express accepted.

Your payment does not represent a tax deductible charitable contribution.

NYS Attorneys: 4.5 CLE GENERAL Credits; Florida CLE credits applied for.

4.5 HOURS OF CLE GENERAL CREDITS for this Seminar have been approved by The New York State Continuing Legal Education Board (Florida CLE credits have been applied for). Partially underwritten by a generous grant from the Merrill Lynch Trust Company. Sponsored by the Planned Gifts, Bequests and Endowment Committee of the Archdiocese of New York. Eileen Caulfield Schwab, Chair (Partner, Brown & Wood LLP).

(Paid Advertisement)



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

Arlene Harris and Donald S. Klein

Administration

The Court found the decedent's surviving spouse to be unfit to receive letters of administration. This was based on the facts that the spouse had entered the United States illegally from Mexico in 1989, she had kept her home in Mexico and did not intend to apply for legal residency, she had worked in the United States without filing tax returns, she was not inclined or able to obtain a social security number or a taxpayer identification number and was unable to read and write English. The Court issued letters of administration to the Public Administrator. *In re Julian Tapia*, N.Y.L.J. Aug. 1, 2000, p. 26, col. 5 (Queens Co. Surr. Nahman).

Construction—Real Property

The Will provided the following: "I direct my Executrix . . . to effectuate the transfer of my home . . . to Mildred . . . if there is sufficient funds in my estate to pay the administrative costs and taxes . . . and the Specific Bequest. In the event that the funds are insufficient to pay the aforementioned, then in that event the House shall be sold . . ." The Court held that the provision quoted does not make an absolute devise of the real property to the objectant with only a lien pursuant to EPTL 13-1.3 for the payment of administration and reasonable funeral expenses, debts and taxes. The Court held that a reading of the will as a whole shows that it was the decedent's intent to give the executor the power to sell the real property and that the will thus creates a power in trust over the real property in the executor. The Court further held that because the will gives the executor the power in trust over the real property, the executor had the duty to preserve the real property which existed not only after the probate of the will but prior to the probate of the will. The Court thus refused to dismiss the objections relating to the real property and alleging that the delay in probating the will and the failure to act caused damage to the property. *In re Matthew Skelly*, N.Y.L.J. Aug. 8, 2000, p. 27, col. 3 (Queens Co. Surr. Nahman).

Construction—Survivors

The Court considered whether the term "survivors" is a term of like input to "distributees" whereby the result would be that 50% of the residuary estate would be paid to the estate of the decedent's brother's post-deceased second spouse and would thus benefit her three children from a prior marriage instead of the three children from the brother's prior marriage. Although courts had construed "survivors" to mean "distributees," the Court reached a different conclusion on the facts of the case and determined that the word "survivors" meant the children of the predeceased brother of the decedent. The Court found that the word "survivors" is ambiguous and considered extrinsic evidence. The Court noted that the drafting of wills was not within the expertise of the attorneys who were involved in the drafting of the will in question and thus it would not place too great an emphasis on the use of different words "survivors" and "issue" in different paragraphs of the will. The Court was also wary of placing too much emphasis on statements of the decedent's purported intent when such statements are not supported by contemporaneously prepared notes. The Court found that there is no extrinsic evidence to indicate that the testator had a specific relationship with his brother's wife or that he would prefer that she and possibly her issue receive as much or more of his estate than his own nieces and nephews. The Court also relied on the preference in will construction proceedings to favor a disposition to blood relatives over those who are not so related. The Court based its determination on the alternative grounds that the word "survivors" in the context of this will means the brother's issue, or that the term is so ambiguous that it cannot be deemed a meaningful direction "otherwise" in the will to change the statutory presumption under EPTL 3-3.3 that a bequest to a sibling of the testator who predeceases the testator passes to the predeceased sibling's issue by representation. *In re Abraham Bernstein*, N.Y.L.J. Sept. 7, 2000, p. 24, col. 3 (Bronx Co. Surr. Holzman).

Default/Dismissal

In a proceeding to compel distribution of estate funds to the Board of Trustees of the United Lubavitcher Yeshivoth (ULY), where there was a dispute as to who was the legitimate Board of ULY, after the Court appointed a Receiver and a Referee regarding the settlement of the Executors' account, the Court

approved the Referee's recommendation that Petitioners be declared in default with respect to the proceedings resulting in the dismissal of the entire proceeding. The Court stated that it may order a default on account of failure to comply with court-ordered disclosure, and the sanction of dismissal may be warranted even where there was no violation of a prior Court order. The Court found that the petitioners had engaged in a willful, deliberate and contumacious course of conduct by failing to participate in meaningful disclosure and failing to comply with the Referee's mandates and the notices and demands for production of documents and subpoenas for depositions and this Court's order for discovery as well as Petitioners' firing of their counsel and bringing in new counsel on the day of trial. The Court also held that execution of the power to dispose of estate funds requires a majority agreement among multiple fiduciaries because that power is beyond what is purely ministerial. *In re Judah Leo Weinstock*, N.Y.L.J. Oct. 2, 2000, p. 31, col. 3 (Kings Co. Surr. Feinberg).

Evidence—Tape Recordings

In a contested probate proceeding, the objectant (son of the decedent) moved for an order determining in advance of trial that certain audio tape recordings are admissible in evidence. Over a period of three years prior to the decedent's death, his daughter (not an objectant but adversely affected by the Will) made three tape recordings of parts of telephone conversations she had with the decedent. The proponent's expert reported that there are numerous erasures, interruptions, and over recordings on the tapes and that the tapes do not represent the conversations as they actually occurred and are therefore not authentic. The Court stated that the burden of proving not only the authenticity of the tapes, but also their relevance and materiality, lies with the objectant. The Court held that the objectant failed in establishing that the tapes are complete, accurate and unaltered and the Court stated that it was not convinced that the tapes would be helpful in the jury reaching a determination of the issues. The Court thus denied the motion. *In re Raymond Revit*, N.Y.L.J. Sept. 28, 2000, p. 34, col. 4 (Westchester Co. Surr. Emanuelli).

Real Property—Partition

The Court granted an executor's application for permission to sell the specifically devised real property and to commence a partition action. The Court stated that the case is one where approval of the Court is required, since the specifically devised real property must be sold to pay debts and administration expenses that cannot be satisfied from other sources. The Court also stated that by granting permission to commence a partition action (SCPA 1901(c)(1)), the Court is not substituting its judgment for that of the fiduciary or directing the fiduciary to pursue a particular course of action. *In re Emil Lesko*, N.Y.L.J. July 14, 2000, p. 32, col. 1 (Westchester Co. Surr. Emanuelli).

Receiver

The decedent died intestate in 1984, owning many parcels of real property, and six properties remained unsold. The distributees and their assignees sought to have a receiver appointed for the real property and to remove the administrator. The Court found that the assignees had standing to request the appointment of a receiver and a receiver was needed to conserve the property and protect the interests of the assignees. The Court also ruled that summary removal of the administrator was warranted due to his failing to market the properties and keep them current in taxes and his failure to file the proper court-ordered accountings. The Court relied on rulings that "an abiding inertia, indifference . . . or design to thwart or retard the administration of an estate is sufficient cause for removal of a [fiduciary]." The Court distinguished *In re Duke*, 87 N.Y.2d 465 (1996) and found that a hearing was not needed because there was no untested hearsay present in the application to warrant a hearing nor is there any less severe action which can provide adequate redress for the wrongs committed by the fiduciary. *In re Margaret A. Capolino*, N.Y.L.J. July 26, 2000, p. 33, col. 4 (Dutchess Co. Surr. Pagones).

Renunciation

The Court denied an application to extend the time to renounce a bequest. Petitioner sought to renounce the bequest of a cooperative apartment, *nunc pro tunc*, more than two years after the nine-month deadline of the statute (EPTL 2-1.11(b)(2)). Her only explanation for the delay was that she thought the deadline ran from the date of issuance of letters rather than the date of death. The Court stated that although the statute authorizes the Court, upon a showing of reasonable cause, to extend the time for filing a renunciation, no provision is made for such filing *nunc pro tunc*, and the Court thus denied that request for relief. The Court then addressed the question of whether the applicant (a Connecticut attorney) showed reasonable cause to be permitted to file the renunciation "effective as of the date of such filing," and found that she had not, especially since she caused the delay in probating the will. *In re Evelyn Migdal*, N.Y.L.J. July 10, 2000, p. 26, col. 1 (N.Y. Co. Surr. Roth).

Right of Election—Summary Judgment

The Court granted the administratrix-surviving spouse's motion for summary judgment declaring that the decedent's transfer of two bank accounts to his grandniece shortly before his death are testamentary substitutes includible in his estate for the purpose of computing the right of election of decedent's wife pursuant to EPTL 5-1-1A. The Court stated that viewed in the light most favorable to respondent, the facts in her answer and affidavit (mostly inadmissible under the dead man's statute) do not establish that decedent's transfer to her of more than $166,000 was supported by adequate consideration. The Court found that the only inference that can be drawn from respondent's statements is that decedent was never under any financial obligation to her. The Court further stated that as a matter of law, any services rendered by the respondent in the past cannot be deemed consideration for the transfers thereafter, because, absent a written agreement, it is well settled that "past consideration is no consideration." *In re Freddy Richardson*, N.Y.L.J. Sept. 28, 2000, p. 28, col. 6 (N.Y. Co. Surr. Preminger).

Statute of Limitations

The Appellate Court found that the Surrogate had correctly found that the Distribution Committee of the New York Community Trust had abused its discretion in exercising its variance powers in 1971 to terminate specific bequests to the Community Service Society of New York, but reversed the Surrogate's determination insofar as it held that the Statute of Limitations did not bar the claims of the petitioner within the six years prior to the commencement of the proceeding and that the doctrine of laches did not bar such claims. The Appellate Court found that the Community Service Society knew of the termination many years prior to bringing the proceeding. The Court stated that the six-year statute of limitations applies under CPLR 213(1) which provides that six years is the applicable statute of limitations for an action for which no limitation is specifically provided by law and governs the time period in which an accounting may be demanded against a trust, but in order for the statute to be triggered, "mere lapse of time is not sufficient, but an act of repudiation is necessary," citing *In re Barabash*, 31 N.Y.2d 76. *Community Service Society of New York v. The New York Community Trust*, N.Y.L.J. Sept. 26, 2000, p. 29, col. 3 (App. Div. 1st Dep't).

Stay of Judgment

In a probate proceeding, the Court granted the application of a guardian *ad litem* for an order staying, until an accounting proceeding, the preliminary executor from enforcing a final judgment of possession against the ward's mother for nonpayment of rent. The Will specifically made no provisions for the child, but the Court stated that the minor child had both present (amounts due the child under EPTL 5-3.1) and contingent independent claims against the estate that warranted staying the summary proceeding. *In re Octavio Silva*, N.Y.L.J. Sept. 26, 2000, p. 31, col. 4 (Kings Co. Surr. Feinberg).

Surcharge

The Court addressed the procedural aspects of collecting money awarded by a Surrogate, and stated that a decree or order of the Surrogate's Court has the same effect as a similar judgment, decree or order of the Supreme Court and may be enforced in a like manner. The Court explained that if the Surrogate's Court issues a decree or order awarding possession of real or personal property or granting a money judgment, the same enforcement devises that are available in the Supreme Court under CPLR articles 51 and 52 are available to the Surrogate, save one, execution (SCPA 605). In addition, SCPA 606 and 607 also provide for enforcement of a decree or order of the Surrogate's Court by punishment for contempt. *In re Paul Civitano*, 708 N.Y.S.2d 833 (Nassau Co. Surr. Radigan, May 16, 2000).

Trusts—Jurisdiction of Court

The Court determined that two charitable inter vivos trusts fall within the jurisdiction of the Surrogate's Court. The trusts were created by producers and/or distributors of motion picture films and/or soundtracks and are operated for the benefit of the public at large. Each instrument provides that upon the death of the original Trustee a successor Trustee is to be appointed by the Secretary of Labor of the United States. The Court found that the suggestion that the Labor Management Relations Act be considered in connection with the jurisdiction issue as not being useful since Courts have drawn a distinction between a claim based on the establishment of a trust fund under the Act, which is within the jurisdiction of federal courts, and a claim, such as the instant one for authorization to resign, based on the administration of a trust fund subsequent to its establishment, which is outside the jurisdiction of federal court. *In re John C. Hall, Jr.* N.Y.L.J. Sept. 11, 2000, p. 24, col. 4 (N.Y. Co. Surr. Preminger).

Arlene Harris—Counsel, Kaye, Scholer, Fierman, Hays & Handler, LLP, New York City.

Donald S. Klein—Donald S. Klein, P.C., White Plains, New York.

"New York-Florida Connection"

Elder Law Program

Mid-February, 2001 • Orlando, Fla.

Mark your calendar now for an advanced program in elder law, scheduled for Orlando, Florida, February 16-18, 2001. Timed to coincide with spring break for New York schools, this program will provide those who attend with up to 16 MCLE credits for both New York and Florida. Cosponsored by NYSBA's Elder Law Section and the Elder Law Section of the Florida Bar, this program is designed for New York attorneys who have elder clients residing in or planning to retire in Florida, and will cover Florida elder law practice in detail, including a special half-day session comparing and contrasting New York and Florida elder law and practice. Topics concerning Florida practice to be covered in detail during the program include government benefits, fiduciary representation, employment and retirement advice, taxes, ethics, administrative and litigation advocacy, health care decision making, insurance issues, guardianship and legal capacity, nursing homes and housing issues, Medicaid planning, and pre-mortem legal planning. On the third day of the conference, panels of both New York and Florida experts will discuss issues for consideration when drafting wills, living trusts, and durable powers of attorney. They will also discuss health care surrogates and living wills, specific requirements of Florida law, the Florida homestead law, and state taxes.

Make your room reservations early at the DoubleTree Guest Suites Hotel in the Walt Disney World Resort in Lake Buena Vista at the special group rate of $169 per night (single or double occupancy) with a limited number of two-bedroom suites available at $249. In order to receive this special rate, mention the New York State Bar Association when you make your reservations.

If you would like to receive more details about the program as soon as they are available, please complete the coupon below and return to:

New York State Bar Association
New York-Florida Connection
One Elk Street
Albany, New York 12207

New York-Florida Elder Law Program — Attn. K. Hojohn

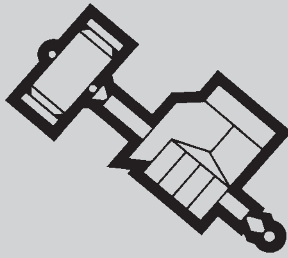
Name ______________________________

Firm ______________________________

Address ______________________________

City ______________ State ________ Zip ________

New York State Bar Association • One Elk Street • Albany, New York 12207



RECENT NEW YORK STATE DECISIONS

John C. Welsh

WILLS

IN TERROREM CLAUSE—DISABLED PERSON

A distributee of decedent who was also a beneficiary under decedent's will initially consented to probate but thereafter withdrew his consent and attempted to file objections. In addition, he began an action in federal court to have the in terrorem clause in the will declared invalid. This action was dismissed for lack of jurisdiction. After the withdrawal of the consent to probate, the petitioner in the probate proceeding listed the distributee as a person under a disability. A temporary guardian ad litem who was appointed to determine whether the distributee needed a permanent guardian ad litem to protect his person and property found that such a need existed. Following the admission of the will to probate, the petitioner sought a construction that distributee by his actions had forfeited his gifts by use of the provisions of the in terrorem clause. Under EPTL 3-3.5, an incompetent person may affirmatively oppose probate without loss of benefits if the attempt is unsuccessful. Since the Surrogate had determined that the distributee was a person under a disability, the Appellate Division agreed that the in terrorem provision could not be enforced against him. *In re Estate of Shuster*, ____ A.D.2d ____, 710 N.Y.S.2d 383 (2d Dep't 2000).

OBJECTIONS TO PROBATE

Decedent's will left her entire estate to the surviving child who lived with and cared for her until her death. Four of decedent's disinherited children filed objections to probate based upon improper execution, lack of competency, fraud and undue influence. The Appellate Division agreed with the Surrogate that summary judgment dismissing the objections was proper and the will was admitted to probate. Although the testimony of the attorney-draftsman who supervised execution and that of his secretary who was present at the time had some inconsistencies, they both asserted that decedent declared the instrument to be her will, signed the will in their presence and requested that they serve as attesting witnesses. An unexplained removal of staples was irrelevant since the will remained with the draftsman between execution and filing for probate. Proof of the other objections was inadequate. *In re Estate of Sweetland*, ____ A.D.2d ____, 710 N.Y.S.2d 668 (3d Dep't 2000).

STANDING TO FILE OBJECTIONS

In 1984, T transferred his partnership business interest to his son, S, who agreed, as partial consideration for the transfer, to renounce any share in the future estate of T and the existing estate of his mother. More than five years later, T made a will which left S a legacy of $5,000. A later, unproved will of T was said to have given one-half of T's residuary estate to S. The court found that these wills benefiting S were unilateral waivers of T's right to compel the agreed-upon renunciation. Consequently, S was a distributee and a party to the probate proceeding with a right to file objections since he would benefit from a successful contest. No new written agreement of waiver was required. *In re Estate of Prime*, 184 Misc. 2d 796, 710 N.Y.S.2d 810 (Sur. Ct., Erie Co. 2000).

DUPLICATE ORIGINAL WILLS

While in Israel, a New York domiciliary executed two virtually identical wills, one written in Hebrew and the other written in English. Following probate of the Hebrew-language will in Israel, the English-language will was offered for probate in New York. The court allowed probate, treating the two wills as one document for this purpose even though they were not executed at the same time and the translation process did not produce an exact copy. A partial sentence in the Hebrew will but not in the English will was found to be included by a scrivener's error and omitted from consideration. Both wills named two Israeli attorneys as executors. Since testator was a New York domiciliary, the disclosure requirements of SCPA 2307-a were applicable. The effect of non-disclosure was deferred until the time of the accounting. *In re Estate of Rosenak*, 184 Misc. 2d 807, 710 N.Y.S.2d 813 (Sur. Ct., Kings Co. 2000).

DESCENT AND DISTRIBUTION

DISQUALIFICATION OF PARENT FROM SHARING IN WRONGFUL DEATH PROCEEDS

A father who failed or refused to support his child for 2½ years prior to her death and who did not fulfill

the natural parental obligations of training, care and guidance was barred from sharing as a distributee in any of the proceeds of a wrongful death suit brought on behalf of the child. EPTL 4-1.4 barring such a parent from succeeding to a distributive share of a decedent child is equally applicable to a wrongful death action. The father failed in his attempt to use mental incompetence as an excuse for his abandonment. *In re Estate of Arroyo*, ____ A.D.2d ____, 710 N.Y.S.2d 492 (4th Dep't 2000).

ADMINISTRATION OF ESTATES

RETIREMENT PLAN—TESTAMENTARY SUBSTITUTE

Decedent began participation in her employer's retirement plan in 1964 when she was unmarried but with two daughters. Under the plan, she named "my children" as beneficiaries. At that time, there were no testamentary substitutes statutorily included in calculating a spouse's elective share. Decedent retired at the end of 1992 and converted her deferred annuity contracts into three pay-out contracts with her daughters as beneficiaries of the balances remaining at her death. Upon her death, her surviving husband filed a claim for his elective share and asserted that the pay-out contracts were to be treated as testamentary substitutes to be included in the calculation of the share due to him. To be successful, the husband had to show that conversion of the deferred annuities to pay-out contracts created a new retirement plan as an inter vivos disposition to the daughters or that the designations of the daughters as beneficiaries under the pay-out contracts constituted changes in beneficiary status. The Appellate Division agreed with the Surrogate that the pay-out contracts were not testamentary substitutes since they did not create a new retirement plan nor was there any change in beneficiaries after September 1, 1992 as required by EPTL 5-1.1-A(b). *In re Estate of Alent*, 271 A.D.2d 73, 709 N.Y.S.2d 902 (4th Dep't 2000).

LEGAL FEES

The Surrogate correctly denied summary judgment sought by the former attorney for an estate who had brought a proceeding to fix his fee. It is well settled that the court has authority to determine the reasonable amount of legal fees even when the issue has not been raised by any party. To the extent that services were performed for the named executrix, a legatee, for her individual benefit and not that of the estate, the court might direct that the client pay the attorney a reasonable fee from her personal assets. *In re Estate of Driscoll*, ____ A.D.2d ____, 709 N.Y.S.2d 597 (2d Dep't 2000).

LEGAL FEES

In a probate proceeding, the Surrogate allowed the attorney for the estate to withdraw for good cause and to keep his $20,000 retainer fee as compensation for services rendered. The Appellate Division limited the attorney to a recovery in quantum meruit based upon the extent of services performed and remitted the matter for a hearing to determine the proper amount. *In re Estate of Ehmer*, 272 A.D.2d 542, 708 N.Y.S.2d 436 (2d Dep't 2000).

ACCOUNTING—LACHES

An executor petitioned for a final accounting in the estate of his brother-in-law who had died 29 years before. The Surrogate found that the widow of decedent, who had filed objections, had retained exclusive knowledge and control over decedent's assets and possessed all estate records. The Appellate Division found that the executor had failed to show proper care and management of the estate assets and the doctrine of laches did not provide him with an adequate excuse. *In re Estate of Anolik*, ____ A.D.2d ____, 711 N.Y.S.2d 184 (2d Dep't 2000).

REFORMATION—USE OF PAROL EVIDENCE

By the terms of certain trusts, the principal was to be distributed to the issue of the settlor's son who survived him with an alternative gift in the event that there were no issue. Although adopted children were expressly excluded from the class of issue, an adopted child of the settlor's son sought to argue that the exclusionary language was intended to apply to disliked stepchildren of another son and not to him. The Appellate Division found that the lower court properly dismissed his attempt to discover and use parol evidence that would support his contention. The language was clear and no mistake in transcription by the drafter was evident. *In re Dickinson Trusts*, ____ A.D.2d ____, 709 N.Y.S.2d 69 (1st Dep't 2000).

ENFORCEMENT OF SURCHARGE ORDER

In a prior decision, the Surrogate imposed surcharges on an executor that continue to be unsatisfied. The Surrogate here decreed that the executor provide an account to the date of his removal and issued an order directing the executor to pay the surcharges. Upon failure of the executor to pay, the objectants have the enforcement powers of the Surrogate available to them. It was not necessary to seek the assistance of Supreme Court under the common provisions for the enforcement of a money judgment. *In re Estate of Bozzi v. Beovich*, 184 Misc. 2d 505, 708 N.Y.S.2d 833 (Sur. Ct., Nassau Co. 2000).

SUIT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

Decedent was a U.S. citizen residing in Israel who was killed in Israel as a result of a suicide bombing incident that was allegedly sponsored by the state of Syria. His widow sought limited letters of administration in Nassau County in order to pursue a cause of action

against Syria under one of the exceptions to foreign sovereign immunity as set forth in the Foreign Sovereign Immunities Act (FSIA). The court issued the limited letters requested even though SCPA 206 limits jurisdiction over the estate of a non-domiciliary decedent to cases where a cause of action for wrongful death exists against a New York domiciliary or decedent left property in New York. Even though neither of these circumstances was present, the FSIA specifically provides for jurisdiction in any state or federal court when a U.S. citizen is killed by an act of terrorism sponsored by a foreign state. *In re Estate of Weinstein*, 184 Misc. 2d 781, 712 N.Y.S.2d 300 (Sur. Ct., Nassau Co. 2000).

TRUSTS

AMBIGUOUS TRUST DISTRIBUTION PLAN

H and W created a joint revocable trust which provided, in part, that following the death of the first settlor to die, the surviving settlor would receive the income for life on the "family share" and hold a special testamentary power of appointment limited to the lineal descendants of both H and W. In default of appointment, if H predeceased W, "his residuary" was to be distributed 1/3 to his son, P, and 2/3 in trust to pay the income to P for life, remainder to his daughters, B and C, equally. Although this paragraph purported to be effective only upon the death of the surviving grantor who had failed to exercise the power of appointment, it also made three substantial gifts to W if she survived H. In addition, there appeared to be a conflict between the preamble which purported to cover the entire trust estate distribution plan and the words of distribution which related only to decedent's residuary estate. After H's death survived by W, the Appellate Division found that the distribution provisions were ambiguous and remitted the matter for an evidentiary hearing which would allow the introduction of extrinsic evidence. *In re Malasky Trust*, ____ A.D.2d ____, 711 N.Y.S.2d 868 (3d Dep't 2000).

FAILURE TO DIVERSIFY INVESTMENTS

In 1958, decedent's will created a trust to pay the income to his wife for life with remainder to his two daughters, equally. The trustee had authority to invade the principal as necessary for her support and maintenance. The trust was funded entirely with IBM stock which was retained for many years. In the second year of the trust, the daughters executed an agreement directing the corporate trustee to retain the IBM stock in lieu of diversification. Contact between the trustee and the daughters was very infrequent for more than 20 years. In 1986, after two years of occasional discussions, the daughters urged the trust officer to prepare a diversification plan but no further action was taken. An increase in the capital gains tax rate, effective in 1987, was not discussed with the beneficiaries. The trustee's written investment policy required diversification in accordance with the "prudent person" rule. The income beneficiary died in 1993 before implementation of any diversification plan. The daughters filed objections to the trustee's final accounting based upon failure to diversify and failure to follow a prudent investment policy. The Appellate Division agreed that the Surrogate's finding of imprudence was well documented. The bank failed to show that the Investment Direction Agreement purporting to absolve it from liability had been executed by the daughters with full knowledge of their legal rights. The breach of duty was found to have occurred in 1987. The matter was remitted for a recalculation of the proper amount of the surcharge. Despite the breach of duty, the trustee had a right to commissions. *In re Saxton*, ____ A.D.2d ____, 712 N.Y.S.2d 225 (3d Dep't 2000).

FAILURE TO DIVERSIFY INVESTMENTS

A charitable lead trust created by testator's will required annual distribution of 8% of the estate tax value of the corpus which was funded entirely with IBM stock. After five years of administration, the trustee continued to hold about 2/3 of the original shares and the corpus had declined in value almost 50%. Decedent's nieces who held the remainder interest successfully obtained an intermediate accounting and the Appellate Division found that the trustee was properly removed for misconduct and surcharged. Although the Prudent Investor Act requiring diversification of assets by trustees was not in effect for the period of the accounting, the formal written investment policy of the corporate trustee required diversification. In applying the applicable "prudent person" rule, it was clearly that the investment policy was imprudent for a trust for a 15-year term that was required to make substantial annual payouts. Annual dividends paid by IBM fell far short of the payout obligation. The surcharge was proper even though ten years remained in the trust life. The stock was readily marketable at the time of the intermediate accounting. The Surrogate's computation of damages was proper. *In re Rowe*, ____ A.D.2d ____, 712 N.Y.S.2d 662 (3d Dep't 2000).

ACCOUNTING—TRUSTEE MISCONDUCT

When testator died in 1956, he gave his widow a 1/3 share of the estate with the balance equally divided among his son and two daughters. Although the share of each daughter was to be held in trust until the daughter attained age 23, neither trust was formed and the son used the estate assets to enrich himself. The Appellate Division affirmed the Surrogate's decision to allow each daughter to choose either 2/9 of her father's estate or 1/3 of what remained in the father's estate as a fair and prompt resolution of a bitter family dispute. The son had already been directed to give a full accounting of nine parcels of realty. In a companion

action, the court affirmed a finding that the daughters were entitled to the appointment of a temporary receiver to oversee the nine parcels since the son's continued control of the properties would result in irreparable harm to them. The election of remedies doctrine did not prevent the sisters from changing the original option chosen by them to obtain more immediate tangible benefits as they advanced in age. *In re Estate of Sakow*, ____ A.D.2d ____, 712 N.Y.S.2d 540, 541 (1st Dep't 2000).

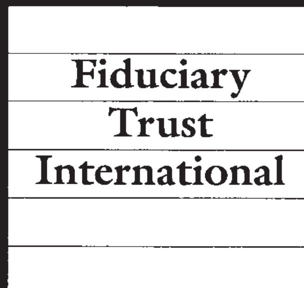
RESTRICTED CHARITABLE GIFTS—CY PRES

H and W died several years apart leaving very substantial restricted testamentary gifts to a named hospital which was described as being in "dire financial straits." After having received the funds which generated $10,000,000 in income in 1999, the hospital sought to use 2/3 of the gift to secure new financing for capital projects and working capital and an additional 1/9 to acquire and renovate a medical treatment facility. After finding that the donors had a general charitable intent, the court approved the hospital's request on the basis of cy pres. The hospital was on the brink of bankruptcy and the substantial annual income of the gift was not enough to save it on a long-term basis. It was clear that H and W, who were closely associated with the hospital during their lifetimes, would want it to continue to exist if possible. Substantial economic changes had occurred in the health care industry since the wills were made and the Attorney General approved the relief sought. *In re Estate of Othmer*, ____ Misc. 2d ____, 710 N.Y.S.2d 848 (Sur. Ct., Kings Co. 2000).

REIMBURSEMENT AND COMPENSATION

The co-trustees of a special needs trust were successful in their request for reimbursement for disbursements made and for the approval of annual commissions. In approving the disbursements claimed, the court found a number of special factors present that supported the request. The items in question were not included in office overhead and were actually incurred. Since the trust corpus was small, the court-approved compensation plan was to have the professional co-trustee and the family member co-trustee share one commission. In this case, reasonable and necessary disbursements to be reimbursed included routine and incidental expenses traditionally absorbed by the trustees. The court commended the professional co-trustee for her performance despite the expectation of totally inadequate compensation. *Perez v. Rodino*, 184 Misc. 2d 855, 710 N.Y.S.2d 770 (Sup. Ct., N.Y. Co. 2000).

John C. Welsh is a professor at Albany Law School, Union University, Albany, N.Y.



EXPERTISE, EXPERIENCE, EXTRAORDINARY CARE.

For 69 years, our clients have trusted us to protect and enhance their wealth, integrating investment management, trust and estate and custody services. Over $50 billion under management. Separately managed portfolios.

EXEMPLARY RESULTS

New York • Los Angeles • Miami • Washington, DC • Wilmington • London • Geneva • Hong Kong • Melbourne • Tokyo • Grand Cayman

INQUIRIES: FOR ACCOUNTS OF $2 MILLION OR MORE, PLEASE CALL ELLEN KRATZER OR THOMAS K. LOIZEAUX AT 877-384-1111

(Paid Advertisement)

©1999 Neuberger Berman, LLC

NEUBERGER BERMAN TRUST COMPANY
BECAUSE A TRUST AND A GOOD INVESTMENT
SHOULD NOT BE MUTUALLY EXCLUSIVE.

If your clients have $2 million or more in investable assets, they should look into our customized fiduciary services. We combine the skills of our Trust Company professionals with the investment expertise of our money managers. What's more, we're sensitive to the emotional issues that arise when developing and administering trust and estate plans.

Please contact Elizabeth Mathieu, Esq. 212.476.9103 or Diane E. Lederman, Esq. 212.476.5411
Neuberger Berman Trust Companies

NEUBERGER BERMAN

(Paid Advertisement)

Section Committees & Chairs

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

Committee on Charitable Organizations
Beth D. Tractenberg (Chair)
1114 Avenue of the Americas
New York, NY 10036

Committee on Continuing Legal Education
Richard P. Wallace (Chair)
279 River Street
P.O. Box 1530
Troy, NY 12181

Stephen B. Hand (Vice-Chair)
300 Garden City Plaza
Garden City, NY 11530

Committee on Elderly and Disabled
Warren H. Heilbronner (Chair)
2400 Chase Square
Rochester, NY 14604

A. Robert Giordano (Vice-Chair)
235 Mamaroneck Avenue, Suite 205
White Plains, NY 10605

Michael F. Teitler (Vice-Chair)
1114 Avenue of the Americas, 45th Floor
New York, NY 10036

Committee on Estate Litigation
Colleen F. Carew (Chair)
350 Broadway, Suite 515
New York, NY 10013

Karin J. Barkhorn (Vice-Chair)
245 Park Avenue
New York, NY 10167

Gary E. Bashian (Vice-Chair)
235 Main Street, 6th Floor
White Plains, NY 10601

Gary B. Friedman (Vice-Chair)
600 Third Avenue
New York, NY 10016

Charles F. Gibbs (Vice-Chair)
195 Broadway
New York, NY 10007

Marilyn Ordover (Vice-Chair)
19 Grace Court
Apt. 6A
Brooklyn, NY 11201

Committee on Estate Planning
Denise P. Cambs (Chair)
5701 West Genesee Street, Suite 100
Camillus, NY 13031

Susan Taxin Baer (Vice-Chair)
140 Grand Street, Suite 503
White Plains, NY 10601

Louis W. Pierro (Vice-Chair)
21 Everett Road Extension
Albany, NY 12205

Richard E. Schneyer (Vice-Chair)
405 Lexington Avenue, 8th Floor
New York, NY 10174

Committee on Estate and Trust Administration
David J. Arcella (Chair)
630 Fifth Avenue, 38th Floor
New York, NY 10111

Ilene S. Cooper (Vice-Chair)
West Tower, 14th Floor
EAB Plaza
Uniondale, NY 11556

Anne Farber (Vice-Chair)
17 Lester Place
New Rochelle, NY 10804

Susan Greenwald (Vice-Chair)
1211 Avenue of the Americas, 38th Floor
New York, NY 10036

Robert W. Sheehan (Vice-Chair)
101 Park Avenue
New York, NY 10178

Committee on Governmental Relations
Michael K. Feigenbaum (Chair)
170 Old Country Road
Mineola, NY 11501

Thomas J. Collura (Vice-Chair)
90 State Street, Suite 1011
Albany, NY 12207

Thomas E. Dolin (Vice-Chair)
One Commerce Plaza
Albany, NY 12260

Committee on International Estate Planning
Michael W. Galligan (Chair)
200 Park Avenue
New York, NY 10166

Davidson T. Gordon (Vice-Chair)
78 Elmwood Avenue
Rye, NY 10580

Committee on Legislation
Ronald J. Weiss (Chair)
919 Third Avenue, 28th Floor
New York, NY 10022

Richard J. Bowler (Vice-Chair)
10 Bank Street, Suite 650
White Plains, NY 10606

Lenore W. Tucker (Vice-Chair)
233 Broadway, Suite 915
New York, NY 10279

Committee on Life Insurance and Employee Benefits
Kathleen M. Franklin (Chair)
100 State Street, Suite 900
Albany, NY 12207

Robert F. Baldwin, Jr. (Vice-Chair)
100 Clinton Square
126 North Salina Street, Suite 320
Syracuse, NY 13202

David A. Pratt (Vice-Chair)
3 City Square
Albany, NY 12207

Committee on Membership and Relations with Local Bar Associations
Robert W. Johnson, III (Chair)
279 River Street
P.O. Box 1530
Troy, NY 12181

George E. Riedel, Jr. (Vice-Chair)
42 Delaware Avenue, Suite 300
Buffalo, NY 14202

Committee on Newsletter and Publications
Magdalen Gaynor (Chair)
7-11 South Broadway, Suite 208
White Plains, NY 10601

Michael Stephen Markhoff (Vice-Chair)
123 Main Street, 9th Floor
White Plains, NY 10601

Glenn M. Troost (Vice-Chair)
114 West 47th Street
New York, NY 10036

Committee on Practice and Ethics
Carl T. Baker (Chair)
One Broad Street Plaza
P.O. Box 2017
Glens Falls, NY 12801

S. Jeanne Hall (Vice-Chair)
163 West 76th Street
New York, NY 10023

Jerome L. Levine (Vice-Chair)
345 Park Avenue
New York, NY 10154

M. Anne O'Connell (Vice-Chair)
331 Madison Avenue, 3rd Floor
New York, NY 10017

Committee on Surrogates Court
Cathryn M. Doyle (Chair)
Albany County Surrogates Court
County Courthouse
16 Eagle Street
Albany, NY 12207

Donald S. Klein (Vice-Chair)
7-11 South Broadway
White Plains, NY 10601

Stacy L. Pettit (Vice-Chair)
1971 Western Avenue
Albany, NY 12203

Abbe G. Shapiro (Vice-Chair)
30 Rockefeller Plaza, 23rd Floor
New York, NY 10112

Committee on Taxation
Georgiana James Slade (Chair)
1 Chase Manhattan Plaza
New York, NY 10005

Ira M. Bloom (Vice-Chair)
80 New Scotland Avenue
Albany, NY 12208

Committee on Technology
David Goldfarb (Chair)
200 Park Avenue South, 14th Floor
New York, NY 10003

Ad Hoc Committee on Multi-State Practice
William P. Lapiana (Chair)
57 Worth Street
New York, NY 10013

Richard H. Bernstein (Vice-Chair)
9104 East Palm Tree Drive
Scottsdale, AZ 85255

Glenda A. Fowler (Vice-Chair)
P.O. Box 516
Tivoli, NY 12583

Philip G. Hull (Vice-Chair)
One Battery Park Plaza
New York, NY 10004

Executive Committee District Representatives

First District

G. Warren Whitaker
126 E. 56th Street, 17th Floor
New York, NY 10022
(212) 751-3900

Second District

Marilyn Ordover
19 Grace Court, Apt. 6A
Brooklyn, NY 11201
(718) 780-0254

Third District

Thomas E. Dolin
One Commerce Plaza
Albany, NY 12260
(518) 487-7630

Fourth District

Michael R. Suprunowicz
1430 Balltown Road
Niskayuna, NY 12309
(518) 374-3399

Fifth District

Elizabeth A. Hartnett
4 Clinton Square, Suite 106
Syracuse, NY 13202
(315) 476-0532

Sixth District

Kathryn Grant Madigan
P.O. Box F-1706
Binghamton, NY 13902
(607) 763-9200

Seventh District

Philip L. Burke
2 State Street, Suite 700
Rochester, NY 14614
(716) 987-2850

Eighth District

Victoria L. D'Angelo
5888 Main Street
Wiliamsville, NY 14221
(716) 634-4407

Ninth District

Richard J. Bowler
10 Bank Street, Suite 650
White Plains, NY 10606
(914) 993-0936

Tenth District

John M. Czygier, Jr.
214 Roanoke Avenue
P.O. Box 449
Riverhead, NY 11901
(631) 727-2500

Eleventh District

Madaleine S. Egelfeld
125-10 Queens Boulevard, Suite 311
Kew Gardens, NY 11415
(718) 544-6363

Twelfth District

Sanford B. Glatzer
1500 Astor Avenue
Bronx, NY 10469
(718) 655-6100

New York State Bar Association's Surrogate's Forms on HotDocs®

Generating New York Surrogate's Court Forms Electronically

Now you can electronically produce forms for filing in New York surrogate's courts using your computer and a laser printer. New York State Bar Association's Surrogate's Forms on HotDocs is a fully automated set of forms which contains all the official probate forms as promulgated by the Office of Court Administration (OCA). By utilizing the HotDocs document-assembly software, this product eliminates the hassle of rolling paper forms into a typewriter or spending countless hours trying to properly format a form.

The **New York State Bar Association's Surrogate's Forms on HotDocs** offer unparalleled advantages, including:

List Price $320

NYSBA Member Price $270

Members of NYSBA Trusts & Estates Law Section $245

- The Official OCA Probate, Administration, Small Estates, Wrongful Death, Guardianship and Accounting Forms, automated using HotDocs document-assembly software.
- A yearly subscription service, which will include changes to the official OCA Forms and other forms related to Surrogate's Court Practice, also automated using HotDocs.
- A review process by a committee that included clerks of the New York surrogate's courts (upstate and downstate) as well as practicing attorneys.
- Links to the full text of the Surrogate's Court Procedure Act (SCPA); the Estates, Powers and Trusts Law (EPTL); and the Uniform Rules for Surrogate's Courts.
- Presentation in a clear, easy-to-use graphical format that makes the forms tamperproof, protecting against accidental deletions of text or inadvertent changes to the wording of the official forms.
- Practice tips to help ensure that the information is entered correctly; automatic calculation of filing fees; and warnings when affidavits need to be completed or relevant parties need to be joined.
- The ability to enter data by typing directly on the form or by using interactive dialog boxes, whichever you prefer.
- A history of forms you've used and when they were created for each client.
- A "find" feature that allows you to locate any form quickly and easily.
- The ability to print blank forms.

To order

Call 1-800-582-2452

Source code: cl1215

New York State Bar Association

"Use of the program cut our office time in completing the forms by more than half. Having the information permanently on file will save even more time in the future when other forms are added to the program."

Magdalen Gaynor, Esq.
Attorney at Law
White Plains, NY

"The New York State Bar Association's Official Forms are thorough, well organized and a pleasure to work with."

Gary R. Mund, Esq.
Probate Clerk
Kings County Surrogate's Court
Brooklyn, NY

"Having already used this product, I am convinced that the NYSBA's Surrogate's Forms on HotDocs will markedly facilitate the filing of forms with the surrogate's courts."

Clover Drinkwater, Esq.
Former Chair
NYSBA Trusts and Estates Law Section
Elmira, NY

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted to Magdalen Gaynor, 7-11 South Broadway, Suite 208, White Plains, NY 10601. Authors should submit a 3-1/2" floppy disk (preferably in Microsoft Word or WordPerfect) along with a printed original and biographical information. Please contact Ms. Gaynor regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section or substantive approval of the contents therein.

Trusts and Estates Law Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor
Magdalen Gaynor
7-11 South Broadway, Suite 208
White Plains, NY 10601

Recent Decisions Editor
John C. Welsh
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Section Officers

Chair
Joshua S. Rubenstein
575 Madison Avenue, Room 2204
New York, NY 10022

Chair Elect
Stephen M. Newman
1800 M&T Plaza
Buffalo, NY 14203

Secretary
Arlene Harris
425 Park Avenue
New York, NY 10022

Treasurer
Timothy B. Thornton
75 State Street
Albany, NY 12207

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge. The views expressed in articles in this *Newsletter* represent only the author's viewpoint and not necessarily the views of the Editor or the Trusts and Estates Law Section.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

© 2000 by the New York State Bar Association.
ISSN 1530-3896

PRSRT STD
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155