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Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

I am no doubt biased, but I thought this year's Fall Meeting in Victoria, British Columbia, was one of the most enjoyable we have ever experienced. My recollections are of the fair weather, the stimulating program with its practical applications, the elegant Fairmont Empress Hotel, the most unusual and sumptuous movable feast and unique exhibits at the Royal British Museum, the bustling harbor, the 80 or so orca whales, the Olympic View Golf Club, and the lighthearted entertainment by Her Majesty, Queen Elizabeth, II, who seemed uncannily to know many of our distinguished guests from previous experiences. This is evidenced by the photos from the trip that are on p. 28 in this issue. Now you may understand some of my comments at the end of the last Chair's Message. Whether or not you were able to join us in Victoria, please make plans to join us in Savannah, Georgia, next Fall from October 14 to October 17, 2004 at the lavish new Westin Savannah Harbor Resort.

I have just returned from the First Annual Trusts and Estates Law Institute held on November 20th and 21st at the New Yorker Hotel in Manhattan. This Institute is sponsored jointly by our Section and the CLE Committee of the State Bar. Although the Association and our Section have always presented programs and speakers of the highest caliber, this was the first time we have assembled some of the leading experts from across the nation to present a truly national conference.

With over 250 attendees from 13 different states, the program was chaired by our own former Chair, the incomparable Joshua Rubenstein, managing partner of the national firm of Katten, Muchin, Zavis & Rosenman and State Laws Chair of ACTEC, who is one of the most knowledgeable people I know in our field of practice.

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The first two speakers were familiar to us all since they are members of our Section. Arthur D. Sederbaum, Esq. of Patterson, Belknap, Webb & Tyler, LLP, who spoke to us the last time we were in Bermuda, spoke on recent developments from an outline prepared by our former Chair Sanford J. Schlesinger of Kaye Scholer, LLP.

Following Arthur, the Immediate Past Chair of ACTEC and arguably the most knowledgeable person on GRATS, Carlyn McCaffrey, Esq., spoke on planning with GRATS. Space does not permit me to name the other 12 speakers and topics, but they were all outstanding.

We would like to acknowledge the support of the sponsors of this program, including Lexis Nexis which sponsored the luncheon, Empire Valuation Consultants, Inc. and Sotheby's who sponsored the cocktail reception, Christie's, Management Planning, Inc., and Williamette Management Associates who sponsored the refreshment breaks, and the exhibitors, Appraisers and Planners, Inc., Doyle New York, Eddy and Schein Family Office Consultants, Foundation Source and Fiduciary Trust.

Our next meeting takes place as you receive this issue of the Newsletter at the Marriott Marquis. The Program Chair, Philip Burke, Esq., of the firm of Woods, Oviatt, Gilman, LLP, will be presenting a program on taxation and wealth transmission issues peculiar to New York State.

Our Section achieved some success with its legislative initiatives this year having seen the following bills enacted: Chapter 232, authorizing Article 17A guardians to make health care decisions for their wards; and Chapter 639, amending EPTL 8-1.8 to conform New York law with federal law with respect to prohibited transactions of private foundations.

A list of the bills affecting our practice enacted during the last legislative session can be obtained from our Section's Web site. Be sure to check the Surrogate's Court Procedure Act, Estates Powers and Trusts Law, the Tax Law and General Obligations Law.

Our primary legislative priorities for this year and next remain the bill to amend the principal and income act and our efforts to address the lack of conformity between the federal and New York estate tax exemption equivalents.

My final message is to report, sadly, that we have lost one of our long-standing Executive Committee members. Donald S. Klein, Esq., who was a Vice Chair of the Surrogate's Court Committee, a former Principal Court Attorney at the New York County Surrogate's Court and Deputy Chief Clerk of the Westchester County Surrogate's Court, and who for many years prepared the downstate case notes for the Newsletter along with our immediate past Chair, Arlene Harris, died peacefully on November 15. His cheerful disposition and keen intellect will be missed by all who knew him.

Timothy B. Thornton

Upcoming Meetings of Interest

Spring 2004 — New York State Bar Trusts and Estates Law Section and the NYSBA CLE Committee (co-sponsors). "Discount Gifting Techniques." Presented in four locations.

May/ June 2004 — New York State Bar Trusts and Estates Law Section and the NYSBA CLE Committee (co-sponsors). "Settling an Estate." (Half-day program.) Presented in eight locations throughout the state.

October 14-17, 2004 — New York State Bar Trusts and Estates Law Section. Fall Meeting. Savannah, Georgia.

October 2005 — New York State Bar Trusts and Estates Law Section. Fall Meeting. New Orleans, Louisiana.

Editor's Message

Included in this issue are contributions from Mal Barasch and Kara Schissler regarding the New York non-resident tax and Warren Whitaker, who becomes this Section's Chair at the Annual Meeting, regarding planning. Josh Rubenstein, who has been a regular contributor, has supplied us with the annual review of New York State law changes that affect our practice. A tax change introduced personal tax to Israeli residents on January 1, 2003. However, it did not address the subject of taxation of trusts. A collaborative effort from lawyers in Israel discusses how to tax such trusts.

The Case Notes section of the Newsletter is now solely edited by Ilene S. Cooper. Donald S. Klein, the co-editor passed away in November. He worked on this valued portion of the Newsletter for more than a decade. His untimely death is noted with sadness.

This Section has many committees, which are listed in the Newsletter. The Chairs of these committees are always happy to get new participants. Each committee has its own tasks. For example, the Committee on Practice and Ethics focuses its efforts on issues relating to the conduct of a Trusts and Estates practice and ethical considerations involved in both estate planning and estate settlement work. Current projects include: technology for the Trusts & Estates practice; ethical checklists for T & E practitioners; issues relating to the settlement of the estate of a sole practitioner (e.g., handling of client files, special issues for the fiduciary, and pre-planning for the sole practitioner's retirement, disability, or death); Retainer Agreements for planning and settlement practices; and issues arising between the attorney and estate fiduciary (responsibility, compensation, etc.); among others. Anyone wishing to become involved with these projects or the Committee on Practice and Ethics should contact the Committee Chair, M. Anne O'Connell at 212-818-1485.

Major changes to the power of attorney statute are a subject of proposed legislation. An article on this topic will appear in the next Newsletter. I bring this to your attention as the power of attorney is an important document in estate planning and you should be aware that change is coming.

Over the four years I have been editor, more than fifty of our colleagues have been kind enough to share their knowledge by writing articles for this Newsletter. I am grateful to each author and particularly those who helped out more than once as the need for articles arose. I also want to thank the Vice Chairs who were an integral part of seeing that the issues came out on a timely basis and in proper form. They are Glenn Troost, Michael Markhoff, and Amy Beller.

This issue contains photos from the Fall Meeting in British Columbia (pp. 28-29). You will note that "Queen Elizabeth" had time to visit one reception and was kind enough to "knight" two of our members. The trip was wonderful and I remind you to mark your calendars for October 14-17, 2004 for the next Fall Meeting, which will be in Savannah, Georgia.

Magdalen Gaynor

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The New York Non-Resident Estate Tax: A Tax That Can Be Less Than It Seems to Be

By Mal L. Barasch and Kara B. Schissler

The de-coupling of the federal and New York estate taxes has raised a number of questions with regard to the calculation of the New York estate tax. One of these involves the proper amount of the tax on the estate of a U.S. citizen who died domiciled in a jurisdiction that does not impose a state death tax and owned property that is taxable in New York. On its face, New York would seem to impose a tax equal to the full amount of the credit for state death taxes calculated on the decedent's entire federal taxable estate, less only the amount of tax levied by other states. In other words, New York would seem to take for itself any portion of the full potential credit for state death taxes that is not absorbed by other state taxes. However, in a recent unreported case, the State Tax Commission has determined that this is not the case. The difference in tax was dramatic. The decedent owned approximately $50,000 of property that was taxable in New York. Following the instructions to Form ET-706, after subtracting state death taxes payable to other states, the State Tax Commission initially proposed a New York estate tax of over $400,000. After consideration of the position set forth below, the New York tax was finally determined to be about $3,000.

The taxation of the estate of a non-resident is governed by Section 960 of the New York State Tax Law (the "Tax Law"). Section 960(a) imposes a tax on the transfer by a non-resident "of *real and tangible personal property having an actual situs in New York State*" which is includible in his federal gross estate (emphasis added). Pursuant to Section 960(b) of the Tax Law, with an exception not relevant here, the tax due on the estate of a non-resident is the same as the tax due on a New York State resident under Section 952(a) of the Tax Law. Section 952(a) of the Tax Law imposes a tax on the estate of a New York State resident in "an amount equal to the *maximum amount allowable*" against the federal estate tax as a credit for state death taxes under Section 2011 of the Internal Revenue Code (emphasis added). (Under Section 951(a) of the Tax Law, the Internal Revenue Code is defined to mean the Internal Revenue Code of 1986, with all amendments enacted on or prior to July 22, 1998 [the "Code"].) Section 952(b) of the Tax Law reduces the amount of the New York estate tax in situations where the estate of a deceased resident is subject to a tax imposed by another state with respect to which credit is allowed under Section 2011 of the Code by the lesser of (a) the amount of the death tax paid to the other state that is allowable as a credit for state death taxes and (b) the fraction of that credit that is attributable to non-New York property.

Since the maximum amount of New York estate tax imposed by Section 952 is the "maximum amount allowable against the Federal estate tax as a credit for state death taxes under Section 2011 of the Code," the initial inquiry must be to determine the amount of the credit for state death taxes that would be allowed in determining the federal estate tax on the decedent's estate under the Code.

There is a basic United States constitutional proposition that a state has no power to tax the transfer of a decedent's intangible personal property that lies outside its jurisdiction.[1] And a state may not do indirectly, by taking the whole of a decedent's estate as the basis for measuring the tax on the portion that lies within its jurisdiction, that which it may not do directly.[2] The Internal Revenue Service applied these principles in Revenue Ruling 56-230, 1956-1 C.B. 660 in determining the amount of credit allowable for state death taxes in a situation very similar to the situation here under discussion.

Revenue Ruling 56-230 involved the estate of a non-resident non-citizen of the United States who owned real property in one state of the United States and intangible personal property situated in another state, all of which was included in his gross estate for federal estate tax purposes. Like New York, the state in which the intangible personal property was situated did not impose an estate tax on the intangible personal property of a non-domiciliary. The state in which the real property was situated imposed an estate tax on that real property and, in addition, sought to impose an additional estate tax (a "Sop Tax") in an amount sufficient to avail itself of the full credit for state death taxes allowable under then-Section 813(b) of the Internal Revenue Code of 1939 (the predecessor to Section 2011 of the Code). The estate advised the Internal Revenue Service that it was prepared to pay this additional Sop Tax if it would get a credit against the federal estate tax for the amount of the payment.

Citing the aforecited Supreme Court cases for the proposition that a state "has no power to tax the transfer of intangible personal property of the decedent's estate which lies outside its jurisdiction," and that a state, being without the power to tax directly the transfer of property outside its jurisdiction, "cannot accomplish the same thing indirectly by taking the whole of the decedent's estate as the basis for measuring the tax on the transfer of that part of the estate which lies within its jurisdiction," the Internal Revenue Service ruled that the credit for state death taxes would be "limited in the instant case *and will be limited in all other similar cases* to the proportion of the full Federal credit allowable to the estate which is attributable to that part of the gross estate situated in State A" (i.e., the state seeking to impose the Sop Tax) (emphasis added).

Following the principles set forth in Revenue Ruling 56-230, the State Tax Commission determined that the only property with respect to which a credit for state death taxes would be allowable under Section 2011 of the Code is property within the jurisdiction of states of the United States the transfer of which was constitutionally subject to tax by those states and that the New York tax would be its pro-rata share of that credit.[3]

Accordingly, the first step required to calculate the amount of the New York estate tax was to determine the value of the decedent's property situated in states of the United States which could constitutionally be subject to tax. This property consisted of his real and tangible personal property located within those states and, in the case of the states that exercised their jurisdiction under *Utah v. Aldrich*[4] to tax certain intangible personal property, such as the stocks of corporations formed or headquartered within their bounds, also the value of that property.[5]

Since the credit under Section 2011 of the Code is calculated as a fraction of "the adjusted taxable estate," it was next necessary to determine what the adjusted taxable estate would be in a situation where the gross estate for the purpose of determining the credit for state death taxes (the "State Death Tax Gross Estate") was not the same as the gross estate for determining the federal estate tax. The term "adjusted taxable estate" is defined in Section 2011(b)(3) of the Code as the "taxable estate reduced by $60,000." The term "taxable estate" is defined in Section 2051 of the Code as the value of the gross estate, less the deductions provided for in Part IV of Subchapter A of Chapter 11 (namely, after deductions for administration expenses, indebtedness and taxes under Section 2053 of the Code, losses under Section 2054 of the Code, transfers for public, charitable or religious uses under Section 2055 of the Code and bequests to a surviving spouse under Section 2056 of the Code). In determining the adjusted taxable estate for the purpose of calculating the credit for state death taxes, the State Tax Commission allowed deductions from the State Death Tax Gross Estate for expenses, such as ancillary probate fees, appraisal costs and fees of attorneys situated in the states where the taxable property was located that were directly related to the administration of the taxable property and granted a marital deduction for such of that property as passed to the decedent's spouse. No deduction was claimed or granted for a pro-rata portion of the total of the decedent's debts and the expenses of administering the estate. The credit for state death taxes allowable to the decedent's estate was then determined by applying Section 2011(b) of the Code to this adjusted taxable estate.[6]

Pursuant to Revenue Ruling 56-230, the New York estate tax was limited to the portion of the credit for state death taxes which was attributable to that part of the adjusted taxable estate that was situated in New York. The numerator of that fraction, therefore, was the portion of the above-calculated adjusted taxable estate that was situated in New York and the denominator of the fraction was the total of the above-calculated adjusted taxable gross estate.[7]

The case discussed in this article involved a decedent whose estate was subject to a United States estate tax and who died domiciled in a jurisdiction that did not impose any estate or inheritance tax and, therefore, none that qualified for the federal credit for state death taxes. However, the principles announced in Revenue Ruling 56-230 would be equally applicable to the estate of a non-resident of New York who dies in a Sop Tax state which has not de-coupled its estate tax from the federal estate tax and who also owned property taxable in New York. In such a situation, New York should not be able to gain any additional tax simply because the decedent's domiciliary state imposes a lesser tax because of the reductions required by Section 2011(b)(2) of the current Code than its full share of the credit for state death taxes calculated under Section 2011(b)(1) of the current Code. In such cases, depending upon the amount of the estate tax actually payable to New York and other states which do not have a Sop Tax conformed to the federal tax, the credit for state death taxes under Section 2011 of the current Code might not be subject to the limitations imposed by Section 2011(b)(1) of the current Code. Each case will require a separate calculation.

Endnotes

1. *Frick v. Pennsylvania*, 268 U.S. 473 (1925); *Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939); *State Tax Com. v. Aldrich*, 316 U.S. 174 (1942).
2. *Frick v. Pennsylvania, supra; Treichler v. Wisconsin*, 338 U.S. 251 (1949).
3. If one were to construe Sections 960 and 952 of the Tax Law as measuring the New York estate tax on the estate of a non-domiciliary on a decedent's entire gross estate, the Sections would be unconstitutional. *Treichler v. Wisconsin, supra*.
4. 316 U.S. 174 (1942).
5. Section 3 of Article 16 of the New York State Constitution provides that intangible personal property shall be deemed located at the domicile of the owner for purposes of taxation.
6. This methodology was approved by the Internal Revenue Service in determining the credit for state death taxes to be allowed for federal estate tax purposes.
7. The correct result for a non-resident cannot be obtained by following the instructions for Form ET-706. It is suggested that the correct tax be shown on the face of the return and that the basis for its calculation be set forth in detail, including a reference to Revenue Ruling 56-230, in a rider to the return.

Mal L. Barasch is of counsel to the Trusts and Estates Group at the law firm of Katten Muchin Zavis Rosenman and immediate past Chair of the Association of the Bar of the City of New York's Committee on Trusts, Estates and Surrogate's Courts. Kara B. Schissler is an associate in the firm.

Trusts and Estates Law Section Newsletter
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State Budget Shortfall in 2003 Was Impetus Behind Many Changes Affecting Trusts and Estates

By Joshua S. Rubenstein

The state's unprecedented budget shortfall in 2003 was the impetus behind many of the changes during the past year to the laws affecting the Trusts & Estates practice. Filing fees, attorney registration fees, and tax rates were increased as part of an overall attempt to cover the shortfall.

The remaining changes dealt with notice and thresholds in abandoned property proceedings, permissible acts by trusts and trustees, standby guardianships, appointment of fiduciaries, the right to a jury trial in Surrogate's Court proceedings, small claims assessment review of homes held in trusts, amendments to the state's 529 college savings program and new environmental liability protection for certain fiduciaries and beneficiaries. A summary of the changes follows.

Abandoned Property Law

Banking Organizations

Subdivision 1(h)(iii) of section 300 of the Abandoned Property Law (APL), dealing with mailing of notice to apparent owners of securities, was amended to delete the reference to now-repealed subdivision 6 of section 301. This change took effect immediately.[1]

Subdivision 6 of APL § 301, formerly providing for annual notice to owners of abandoned property, was repealed. The repeal took effect immediately.[2]

Miscellaneous Property

A new subdivision 4 was added to APL § 1315 to provide that any check issued by New York State that remains unpaid after one year from issuance shall be deemed abandoned property. This change took effect April 1, 2003.[3]

Subdivision 7 of APL § 1317, formerly providing for notice by title companies to owners of security deposits, has been repealed. The repeal took effect immediately.[4]

General Provisions

Subdivision 2(a) of APL § 1406 was amended by (a) raising the threshold amount or value of claims requiring a court proceeding from $1,500 to $5,000, and (b) requiring that the court that had original jurisdiction of the underlying matter must issue the order. The change took effect immediately.[5]

Subdivision 2(b) of APL § 1406 was amended by (a) providing that where the amount or value of the claim is less than $5,000, it shall be determined by the state comptroller; and (b) adding that the state comptroller's decision that there is insufficient information to establish a claim does not mean that the claim has been denied. The change took effect immediately.[6]

A new section 1422 has been added to the APL. It requires that any holder of unclaimed property not otherwise required to perform owner notification mailings send, not fewer than 90 days before the reporting date of the property, written notice by first-class mail to each person listed as owner of the property. The holder does not have to send written notice if the holder does not have (a) an address for the owner, or (b) the current address of the owner. Where notice is otherwise required, for unclaimed property valued at more than $1,000, the holder must send, not fewer than 60 days before the reporting date of the property, a second written notice by certified mail with a return receipt. The holder does not have to send a second written notice if: (a) the holder has received a claim from the owner; or (b) the first notice was returned as undeliverable. Both the first written notice and the second written notice should notify the owner that the property will be reported as abandoned property if the owner or an agent of the owner fails to claim it before the remittance date. The change took effect immediately.[7]

Estates, Powers and Trusts Law

Charitable Trusts

Section 8-1.8 of the Estates, Powers and Trust Law (EPTL) was amended to permit charitable split-interest trusts to retain excess business holdings or make jeopardizing investments, which was previously prohibited by EPTL 8-1.8 but allowed by the Internal Revenue Code, where (a) there is no income beneficiary who is a charity with more than 60 percent ownership of the trust assets, or (b) the charity's only interest in the trust is as a remainderman. It has also been amended to make certain stylistic changes. The amendment took effect immediately.[8]

Powers

EPTL 10-10.1 was amended to permit a trustee to exercise the power to make distributions to himself or herself as beneficiary, where (a) the trustee is also the grantor and the trust is revocable; (b) the power is to provide for the beneficiary's health, education, maintenance or support under Internal Revenue Code §§ 2041 and 2514; or (c) the trust instrument by express reference to this section expressly so provides. This amendment took effect immediately.[9]

Judiciary Law

Fees

Section 468-a of the Judiciary Law was amended by raising the biennial attorney registration fee from $300 to $350. The new fee took effect July 15, 2003.[10]

Surrogate's Court Procedure Act

Trials and Hearings

Section 502 of the Surrogate's Court Procedure Act (SCPA) was amended to extend the right of a jury trial, if duly demanded, to proceedings in which the validity of a revocable lifetime trust is contested, provided that the proceedings (a) commence after the death of the creator, and (b) raise a controverted question of fact. The amendment took effect immediately and applies to proceedings pending on or commenced after the effective date.[11]

Letters

SCPA 709 was amended to provide that a nominated co-fiduciary has standing to file objections to the grant of letters to a co-fiduciary. The amendment eliminates the anomaly that a co-fiduciary can have a co-fiduciary removed once the co-fiduciary has been appointed (pursuant to SCPA 711) but lacks standing to oppose such an appointment in the first place. The amendment took effect immediately.[12]

Guardians

SCPA 1726(1) was amended (a) to expand the definition of standby guardian to include individuals appointed to succeed not only the infant's parent but also the infant's legal guardian, legal custodian or primary caretaker upon death, incapacity, debilitation or death; (b) to add a definition of "legal guardian," meaning the court-appointed guardian of the infant's person and/or property; and (c) to make certain other conforming, definitional amendments. This change took effect January 1, 2004.[13]

SCPA 1726(2) was amended to make all of the provisions of Article 17 applicable to standby guardianships. The change took effect January 1, 2004.[14]

SCPA 1726(3) was amended to (a) include the petitioner's consent as one of the triggering events for a standby guardian's authority to act; (b) permit the petitioner's death to be established other than by a death certificate; and (c) delete the last sentence of subdivision 3(d)(ii), because it is inconsistent with the statutory language allowing the parent/or legal guardian, legal custodian or primary caretaker the option of specifying which event(s) will trigger his or her authority to act. These changes took effect January 1, 2004.[15]

SCPA 1726(4) was amended to (a) update the statutory form of designation of standby guardian to reflect these changes; (b) provide that a designation of standby guardian will be effective (even if made in another state) as long as it was validly executed in the jurisdiction (i) where the designator was domiciled at the time of execution, (ii) where it was executed, or (iii) where the designator is domiciled at the time the designation becomes effective; (c) provide that the most recent designation is given effect when there are conflicting designations; and (d) include death as one of the triggering events for a standby guardian's authority to act. These changes took effect January 1, 2004.[16]

SCPA 1726(5) was amended to add legal guardians, legal custodians and primary caretakers as individuals who must receive notice of a standby guardian's petition for appointment. This change took effect January 1, 2004.[17]

SCPA 1726(6) was amended to add legal guardians, legal custodians and primary caretakers as individuals whose incapacity or debilitation must be established in writing by an attending physician. This change took effect January 1, 2004.[18]

SCPA 1726(7) was amended to add legal guardians, legal custodians and primary caretakers as individuals whose preexisting rights in such capacity are not diminished by the appointment of the standby guardian. This change took effect January 1, 2004.[19]

SCPA 1726(8) was amended to make clear that the standby guardian is appointed pursuant to SCPA 1726. This change took effect January 1, 2004.[20]

Mentally Retarded Persons

SCPA 1750-b was amended to allow not-for-profit agencies certified, licensed and regulated by the Office of Mental Retardation and Developmental Disabilities that have been appointed as Article 17-A guardians to make healthcare decisions for mentally retarded persons. The amendment took effect immediately.[21]

Court Fees

SCPA 2402 was amended to increase many of the user fees for the Surrogate's Court. The new fees are listed in Exhibit A. The new fees took effect July 15, 2003.[22]

Exhibit A: Surrogate's Court Fees

Service	Statutory Authority	Previous Amount	New Amount
Recording an instrument settling an account	SCPA 2402(4)	$5 per page	$6 per page
Fee schedule for probate or administration	SCPA 2402(7)	Estate value	
		* less than $10,000: $35	$45
		* $10,000 – $20,000: $60	$75
		* $20,000 – $50,000: $170	$215
		* $50,000 – $100,000: $225	$280
		* $100,000 – $250,000: $335	$420
		* $200,000 – $500,000 $500	$625
		* Over $500,000 $1000	$1,250
File petition to:	SCPA 2402(8)(a)		
* Punish for contempt		$25	$30
* Suspend letters of fiduciary		$60	$75
* Suspend letters of custodian		$25	$30
* Fiduciary resigns		$25	$30
* Suspend fiduciary powers in war		$25	$30
* Produce will		$15	$20
* Will construction		$60	$75
* Determine right of election		$60	$75
* Appoint trustees		$35	$45
* Release versus State		$40	$50
* Guardian appointment		$15	$20
* Open safe deposit box		$15	$20
* Proceedings against fiduciary		$15	$20
* Proceedings by fiduciary		$60	$75
* Advice and directions		$60	$75
* Continue business		$35	$45
* Corp. trustee comp.		$7	$10
* Compel fiduciary accounting		$25	$30
File demand for jury	SCPA 2402(9)(i)	$120	$150
File objections to probate	SCPA 2402(9)(ii)	$120	$150
Note of issue	SCPA 2402(9)(iii)	$35	$45
Objection or answer in non-probate proceeding	SCPA 2402(9)(iv)	$60	$75
Will for safekeeping	SCPA 2402(9)(v)	$35	$45
Bond (less than $10,000)	SCPA 2402(9)(vi)	$15	$20
Bond (more than $10,000)	SCPA 2402(9)(vi)	$25	$30
Transcript of decree	SCPA 2402(10)	$15	$20
Certificate of letters	SCPA 2402(11)	$5	$6
Copy of will	SCPA 2402(12)(a)	$5 per page	$6 per page
Authenticating copy	SCPA 2402(12)(b)	$15	$20
Search or certify record under 25 years	SCPA 2402(13)	$25	$30
Search or certify record over 25 years	SCPA 2402(13)	$70	$90
Produce papers under subpoena within county	SCPA 2402(14)(a)	$25	$30
Produce papers under subpoena in other county	SCPA 2402(14)(b)	$0.25 per day	$0.30 per day
Recording an instrument	SCPA 2402(15)(a)	$6 per page	$8 per page
File authenticated copy of foreign will	SCPA 2402(15)(b)	$6 per page	$8 per page
Tax bill of costs	SCPA 2402(15)(c)	$10 per page	$15 per page

Real Property Tax Law

A new subdivision 9 was added to Real Property Tax Law § 730 in response to the increase in the placement of homes in trusts. A requirement for small claims assessment review of homes is that they be owner-occupied. Because a trustee is the legal owner of trust property, unless the trustee resides with the trust beneficiary the home is no longer owner-occupied. In some instances, trust beneficiaries have been denied access to small claims assessment review even though they are title occupants of their homes. The subdivision makes trust beneficiaries owners of their homes within the context of small claims assessment review. The subdivision took effect immediately.[23]

Tax Law

Estimated Tax for Passthrough Entities

A new paragraph 4 was added to subsection (c) of Tax Law § 658. The paragraph requires partnerships, K limited liability companies and S corporations to pay estimated taxes on New York source income for their non-resident partners, members and shareholders. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002. Estimates due pursuant to this change were considered timely if paid by September 15, 2003.[24]

A new paragraph 11 was added to Tax Law § 197-b. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 197-a. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[25]

A new paragraph 2 was added to subsection (d) of Tax Law § 213-b. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 213-a. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[26]

A new paragraph 2 was added to subsection (d) of Tax Law § 1461. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 1460. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[27]

A new paragraph 2 was added to subsection (d) of Tax Law § 1514. The paragraph requires that any amount paid under paragraph 4 of subsection (c) of Tax Law § 658 is to be applied against the estimated tax of the taxpayer for the taxable year shown on the declaration filed under Tax Law § 1513. The paragraph took effect immediately and applies to taxable years ending after December 31, 2002.[28]

A new subsection (i) was added to Tax Law § 686. The subsection provides that when an entity required to pay estimated tax under paragraph 4 of subsection (c) of Tax Law § 658 overpays, the entity receives a refund of the excess of the overpayment. The subsection took effect immediately and applies to taxable years ending after December 31, 2002.[29]

Fees

Tax Law § 658 was amended by (a) increasing the multiplier for the LLC filing fee from $50 to $100, and (b) raising the bounds of the LLC filing fee from $325 and $10,000 to $500 and $25,000 (i.e., the filing fee can be neither less than $500 nor greater than $25,000). The new multiplier and bounds took effect immediately and apply to taxable years beginning in 2003 and 2004; they expire on January 1, 2005.[30]

Exhibit B: Trusts and Estates Tax Rates

2003	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000*	$6453 + 7.5% over $100,000
Over $500,000	$36,453 + 7.7% over $500,000

2004	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000	$6453 + 7.375% over $100,000
Over $500,000	$35,953 + 7.7% over $500,000

2005	
AGI less than $8000	4%
$8000 – $11,000	$320 + 4.5% over $8000
$11,000 – $13,000	$455 + 5.25% over $11,000
$13,000 – $20,000	$560 + 5.9% over $13,000
$20,000 – $100,000	$973 + 6.85% over $20,000
$100,000 – $500,000	$6453 + 7.25% over $100,000
Over $500,000	$35,453 + 7.7% over $500,000

*$125,000-$500,000, for heads of households
$150,000-$500,000, for married taxpayers

Rates

Tax Law § 601 was amended by raising the tax rates for trusts and estates. The new rates are listed in Exhibit B. The new rates are effective immediately.[31]

Two temporary tax rates for personal income have been added for 2003 through 2005. The first rate, for 2003, is 7.5% of taxable income if Adjusted Gross Income (AGI) is above $100,000 but less than $500,000 for single or married taxpayers filing separately; above $125,000 but less than $500,000 for heads of households; and above $150,000 but less than $500,000 for married taxpayers filing jointly. In 2004 the 7.5% rate is reduced to 7.375% for all filers. The rate is reduced further in 2005 for all filers to 7.25%. The second rate is 7.7% for all filers if AGI exceeds $500,000. The second rate stays at 7.7% for 2003 through 2005. The new rates took effect immediately and are scheduled to expire in 2006.[32]

Education Law

Education Law §§ 695-b and 695-e were amended to make several changes to the state's 529 college choice tuition savings program. The changes include (a) permitting a person acting as fiduciary or agent on behalf of a trust, estate, partnership or corporation, in addition to an individual, to be an account owner; (b) simplifying necessary procedures for making withdrawals; (c) increasing the cumulative contribution limit per designated beneficiary from $100,000 to a "maximum account balance" that is currently $235,000; and (d) eliminating the three-year minimum holding period requirement. These changes took effect immediately.[33]

Environmental Conservation Law

The New York State Superfund Refinancing and Brownfield Cleanup Act of 2003 amends the Environmental Conservation Law (ECL) to ensure the most efficient utilization of public and private funds for the investigation and remediation of contaminated sites. Specifically, it adds a new section ECL § 27-1323 to provide fiduciaries acting solely in fiduciary capacities with new liability exemptions and caps. Affirmative defenses are also provided to persons who acquired contaminated property by inheritance or bequest and have been exercising due care with respect to the hazardous waste. The affirmative defenses are consistent with federal law. These changes took effect immediately.[34]

Endnotes

1. 2003 N.Y. Laws ch. 62, pt. P. § 2. (Governor's veto S.1406-B, A.2106-B overridden on May 15, 2003).
2. 2003 N.Y. Laws ch. 62, pt. P. §§ 1, 8.
3. 2003 N.Y. Laws ch. 62, pt. P. §§ 3, 8.
4. 2003 N.Y. Laws ch. 62, pt. P. §§ 4, 8.
5. 2003 N.Y. Laws ch. 62, pt. P. §§ 5, 8.
6. *Id*.
7. 2003 N.Y. Laws ch. 62, pt. P. §§ 6, 8.
8. 2003 N.Y. Laws ch. 639 (signed on Oct. 7, 2003).
9. 2003 N.Y. Laws ch. 633 (signed on Sept. 30, 2003).
10. 2003 N.Y. Laws ch. 62, pt. J. §§ 17, 38.
11. 2003 N.Y. Laws ch. 631 (signed on Sept. 30, 2003).
12. 2003 N.Y. Laws ch. 612 (signed on Sept. 30, 2003).
13. 2003 N.Y. Laws ch. 632, §§ 1, 2 (signed on Sept. 30, 2003).
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. 2003 N.Y. Laws ch. 232 (signed on July 29, 2003).
22. 2003 N.Y. Laws ch. 62, pt. J, §§ 30, 38.
23. 2003 N.Y. Laws ch. 363 (signed on Aug. 19, 2003).
24. 2003 N.Y. Laws ch. 62, pt. L3, §§ 1, 7, 8.
25. 2003 N.Y. Laws ch. 62, pt. L3, §§ 2, 8.
26. 2003 N.Y. Laws ch. 62, pt. L3, §§ 3, 8.
27. 2003 N.Y. Laws ch. 62, pt. L3, §§ 4, 8.
28. 2003 N.Y. Laws ch. 62, pt. L3, §§ 5, 8.
29. 2003 N.Y. Laws ch. 62, pt. L3, §§ 6, 8.
30. 2003 N.Y. Laws ch. 62, pt. L3, §§ 1, 2.
31. 2003 N.Y. Laws ch. 62, pt. Y3.
32. *Id*.
33. 2003 N.Y. Laws ch. 593 (signed on Sept. 22, 2003).
34. 2003 N.Y. Laws ch. 1, pt. E, §§ 9, 13 (signed on Oct. 7, 2003).

Joshua S. Rubenstein, Chair of the Trusts and Estates Department and managing partner at KMZ Rosenman in New York City, is a past Chair of the Trusts and Estates Law Section of the NYSBA.

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Classic Issues in Family Succession Planning

By G. Warren Whitaker

Let's choose executors and talk of wills.

—Richard II, Act III, Scene ii

As estate planners spend hours immersed in document drafting, legal research and keeping up with the latest Tax Reform Act, they can lose sight of the fact that they are involved on a daily basis with the deepest psychological issues that confront human beings. The same issues that clients routinely bring into the estate planner's office have been explored for thousands of years in mythology, religion, art and literature. This article will examine some of these great human issues as they have been portrayed over the centuries, and will consider how estate planners could have helped to resolve the conflicts they reflect.

Parent-Child: The first of these timeless issues is the relationship between parents and children. The parent/child relationship evokes the strongest of all emotional bonds, and is recognized as paramount by all cultures. Scientists like Richard Dawkins tell us that this bond is an inherent evolutionary trait that is essential to insure the perpetuation of our genes via our progeny.[1]

Nevertheless, the parent-child relationship can also be a source of great conflict. A classic exploration of this subject is *King Lear* by William Shakespeare.[2] In that play Lear, the aging King of Britain, decides to divide his kingdom among his three daughters. He then plans to spend the remainder of his days alternately visiting with each of them. At the last moment he disinherits his youngest daughter because she is not sufficiently demonstrative in showing her gratitude.

After he has made the gifts, Lear discovers that his daughters no longer show him the appreciation he had expected, and instead regard him as a bothersome old man. He is ejected from their castles and forced to wander the heath on foot, vainly seeking refuge from a howling storm. Lear realizes too late that the daughter he has disinherited is the only one who remains loyal to him. She is killed, and Lear is brought to the brink of madness. Alone and abandoned, he too dies.

From the estate planner's perspective, Lear made some wise and brave decisions. First, he recognized that he was too old to run the kingdom of England. Rather than cling to power, he sought to provide for an orderly transition to younger hands. Second, he sensed that his daughters could not work together to keep the kingdom intact and would fight amongst themselves over its division after his death. He therefore chose to divide the kingdom among them as he saw fit during his lifetime.

Unfortunately, Lear went too far by making irrevocable outright gifts of the entire kingdom. Instead, he should have been advised to give each daughter's share to a separate revocable trust for that daughter's benefit. Each daughter could have selected a trustee to manage her share of the kingdom. However, Lear would have retained the power to revoke the trusts and take back the assets if he needed them or if he found that his daughters were not sufficiently grateful. (The mere existence of this power to revoke would likely have insured their eternal gratitude.)

It appears that Lear lived in a jurisdiction that imposed no estate or gift taxes (or perhaps, since he made the laws of the jurisdiction, he exempted his own estate from those taxes). If he had lived in the modern United States and wanted to make completed gifts for transfer tax purposes, he might have transferred the interests in the kingdom to irrevocable discretionary trusts for the benefit of his daughters. (He would thus incur a gift tax, but could claim a substantial discount for the minority, non-controlling interest in the kingdom he gave to each trust.) He could allow each daughter to participate in the selection of her trustee, but could also incorporate in the trust agreements a power to remove and replace the trustee, exercisable by an independent protector loyal to Lear or possibly by Lear himself.[3] If he created the trusts in a state such as Delaware or Alaska, Lear could even have remained a permissible beneficiary of these trusts in the trustee's discretion without pulling the kingdom back into his gross estate at his death.

Lear should also have held onto certain assets that he would need to provide for himself during his lifetime. Among these assets would be a cottage on the heath to reside in. (Lear was probably too old to consider putting the cottage into a Qualified Personal Residence Trust.) He would also want to retain his favorite means of transportation (presumably his Learjet) and sufficient liquid assets to provide for their maintenance and for his other needs.

The delicate issue of incapacity should have been raised with Lear. This can be an awkward subject to broach, particularly with older clients, but as Lear had already shown signs of erratic behavior it should have been addressed. Lear could have been encouraged to put the assets he wanted to retain in a separate revocable trust for his lifetime benefit, with a trustee selected by him who could manage the assets and see that his needs were met if he became incompetent.

Lear, like many clients, might have suggested that one or more of his daughters be named as trustee of his revocable trust; clients often prefer naming a family member to look after them during incompetence. However, Lear should have been alerted that he might impose a burden on his daughters, and that conflicts among them (or between them and him) over management of his assets might arise in the future. He should have considered appointing an institution or an independent person, such as the loyal and devoted Earl of Kent, to be trustee instead.

With this structure in place, Lear could have provided for his own security while facilitating the orderly transfer of the kingdom to the next generation. Shakespeare's dark tragedy would have been transformed by competent estate planning into a cheerful comedy, or maybe even a TV sitcom about a dotty old monarch and his wisecracking, lovable daughters.

Mother-Son: Traditionally the relationship between mother and son has been particularly celebrated and revered. Bruno Bettelheim has called the bond between mother and son the most positive and unambiguous relationship that can exist between two human beings.[4] Nevertheless, conflicts can arise here as well, particularly when the father dies and the mother remarries.

The greatest exploration of this theme is another play by Shakespeare, *Hamlet*.[5] At the outset of the play, the King of Denmark has died. His son, Hamlet, assumes that he will inherit the family business, the State of Denmark. However, the King has not planned for his succession. His wife remarries with unseemly alacrity, and her new husband becomes Denmark's King. Hamlet is angry, frustrated and resentful. Five acts later, everyone is dead.

What could the King have done to avoid this situation? The answer should be apparent to all of us: he should have left Denmark in trust. This is the precise situation for which the legal relationship known as the trust was developed in the Middle Ages. At that time the Crusades and the Black Death were carrying off men in their prime, leaving behind both young children and still-marriageable widows. The trust was designed to insure the proper maintenance of the widow, protect the inheritance of the children and provide competent management of the property by a loyal and experienced retainer.[6]

The King could designate the Queen as the sole beneficiary of the trust with the right to reside in the castle at Elsinore for her life (thus making the castle eligible for the marital deduction if a qualified terminable interest property election were made). However, she would have no right to convey the principal, which would pass on her death to Hamlet.

The major issue to be resolved is who should have been given the authority to manage the primary asset of the trust, namely the State of Denmark. Because Denmark is a closely-held country, the King would probably not have wanted to give this power to an institutional trustee. Nor should he have given management power to his wife if he wanted to avoid influence by a second husband. One possibility was for the King to give Hamlet this authority. However, Hamlet had shown a tendency to be indecisive, and he might have been too young and inexperienced to effectively wield this power.

The King could have given management power to his Lord Chamberlain, Polonius. Polonius had for many years been the King's principal advisor, in effect the CEO of Denmark, and he might at first have seemed the logical choice. However, the King should have had certain concerns regarding Polonius. First, because of his advanced age, the King should have appointed someone of a younger generation as Polonius's successor (perhaps one of the junior court attendants, Rosencrantz or Guildenstern). Second, Polonius had known Hamlet since Hamlet was a child, and he would probably always regard Hamlet as a child, tending to infantalize him and condescend towards him. Placing Polonius in the role of surrogate father might have evoked resentment in Hamlet over his lack of empowerment instead of encouraging him to mature into the role of King.

Perhaps the best solution would have been to delegate investment responsibility for Denmark to a Management Committee that had both Polonius and Hamlet as members. Hamlet could have benefited from Polonius's experience while Polonius would have been compelled to recognize Hamlet as having an equal voice on the Committee. The King might have wanted to name an independent outside party, such as an institutional trustee or the family attorney or accountant, as the third member of the Committee to avoid deadlocks and bring in a neutral voice.

In this way, the King could have insured that things did not become unduly rotten in the State of Denmark.

Sibling Rivalry I: Another traditional arena of psychological conflict is in the relationship between siblings. Biologically, siblings are the closest relatives that exist, being products of the same gene pool. Phrases such as "brotherhood," "band of brothers," and "brotherly love" acknowledge that the relation between siblings can produce the highest form of loyalty.

But the sibling relationship can also produce great rivalry and competition. A classic example of this occurs in the Biblical story of Cain and Abel, the sons of Adam and Eve.[7] Abel was a herdsman who tended animals, while Cain was a farmer who tilled the land. According to the story, God asked Cain and Abel to offer a sacrifice in order to receive a blessing. Abel went to his herds and sacrificed a great ox and a mighty ram. Cain went to his fields and offered as his sacrifice a medley of seasonal vegetables, perhaps accompanied by a green salad. This was not satisfactory; only animal sacrifices were acceptable. Cain did not receive a blessing, and he became angry, frustrated and jealous of Abel. In a rage, Cain killed Abel, and God then cursed Cain and his descendants.

This story illustrates the perils of the incentive trust. This concept was devised for wealthy parents who were concerned that their children would not be motivated to become productive members of society but would instead become trust-fund babies, living off their parents' success and failing to use or develop their own abilities. An incentive trust might provide that a child receives a dollar from the trust for each dollar that he or she earns, and that distributions are increased by a fixed percentage for every degree that a child earns, or for other stated achievements.

The flaw with this approach is that it is impossible to measure empirically all of the ways by which a child can become productive and lead a worthwhile life. A son may choose to forego college in order to become a successful musician or artist. A daughter may choose to become a social worker or a teacher, or devote her life to caring for the poor in another country. Or the child may find satisfaction making pottery or raising a family. These children may be just as industrious and productive in their own way as their siblings who become doctors, lawyers and investment bankers, but they are not rewarded by the incentive trust because the trust formula does not give due credit to their achievements.

This is what happened with Cain and Abel. Cain was a successful and hard-working farmer. However, he was confronted by a system that measured productivity according to a single standard: the number of dead animals one could produce. Cain was not employed in an industry that provided him ready access to dead animals, as Abel was. Therefore, Cain was not rewarded despite his hard work and achievements, and he felt slighted and became envious of his brother.

The creation of discretionary trusts can be a wise and farsighted plan, and is generally preferable to paying large sums to children outright. Careful selection of the trustees, a thoughtful mechanism for choosing successors, and general guidelines for the exercise of discretion are essential ingredients of such a trust. However, any effort to reduce life to a mathematical formula will inevitably fail.

Sibling Rivalry II: Another Biblical story about sibling rivalry, brimming with issues of family succession, is that of Jacob and Esau, the sons of Isaac and Rebekah.[8]

(It will be recalled that Isaac is the same person who, as a boy, was taken to a mountain by Abraham, his father, to be sacrificed. At the last moment, Abraham found a ram in a thicket and sacrificed it instead. This raises the issue of the effect of childhood psychological trauma upon a person's behavior as an adult, which will not be explored here.)

Esau was the oldest son of Isaac and Rebekah. He was big, strong and handsome and a brave hunter. However, intellectual prowess and business judgment were not Esau's forte.

Jacob, the younger son, was not as big, as strong or as handsome as Esau. He liked to cook with his mother while Esau was hunting. But Jacob was clever.

One day when Esau returned from a long hunt he found Jacob cooking a pot of lentils and asked for a portion. Jacob proposed that in return for the lentils Esau renounce his birthright. (Under the inheritance laws of the jurisdiction in which they resided Esau, as the first-born son, was entitled to inherit all the lands and property of their father.) Esau, never the businessman, concluded that this was a fair deal, executed an acknowledged instrument of renunciation and ate the lentils.

Already this story raises several succession issues. Was Esau's renunciation of his forced heirship share binding even though it was executed prior to his father's death? (Such a pre-death renunciation is

ineffective in some countries that have forced heirship laws, such as France.)[9] Is the renunciation invalid because Esau did not file an affidavit disclosing that he had received consideration (lentils) from a person whose interest was accelerated by the renunciation, as required in New York and some other states?[10] Was the renunciation obtained under duress? (This probably depends on how hungry Esau was.) Finally, should Esau's inheritance be left in a spendthrift trust?

The story continues. Years later, Isaac is old and blind. He tells Rebekah that he believes himself to be near death and wishes to give Esau his blessing before he dies. (Blessing *causa mortis?*) However, Rebekah had always favored Jacob (no doubt a result of all the cooking they did together) and she instead tells Jacob to go to his father, claim that he is Esau and obtain his father's blessing. Jacob is concerned that his father, though blind, will touch Jacob's arms and notice that they are not hairy, as Esau's are. Rebekah tells Jacob to wrap his arms in goat skins, to make them feel hairy. Jacob does this, and Isaac, though suspicious, is convinced by the hairy arms that he is giving Esau his blessing, when in fact Jacob receives it. As a result of these deceptions, Esau is angered, Jacob must flee for his life, and Isaac sees his family torn apart by discord.

Several additional succession issues are thus presented. First, we see the pattern of a father and mother who each have a favorite child. When the father is at the pinnacle of his powers, one child benefits from his preferred status. However, as the father ages, and becomes physically impaired, his wife, who has heretofore remained in the background, assumes a more influential role and is able to promote the interests of the other child, who has quietly simmered in his number-two status over the years.

Finally, this story raises an issue that is always lurking in the background of our practice, which our testamentary formalities are designed to protect against: the issue of forgery. In this case, the forgery was not of a will or a trust agreement, but of a pair of arms.

To deal with his family's multitude of issues, Isaac should have considered the creation of a private trust company. Isaac's sons have different talents that should be harnessed towards the common good of the family. Jacob and Esau did not innately hate each other, but they were thrust into a situation in which competition was unavoidable.

Isaac could have created a private trust company during his lifetime in a jurisdiction such as Bermuda, the Bahamas, South Dakota or Delaware. He could have put his lands and his hunting business into a trust of which the private trust company was the trustee. (Trusts created in some of these jurisdictions are not subject to forced heirship claims arising in the country of the grantor's domicile, such as the birthright of Isaac's oldest son.)[11]

Isaac could have been the CEO of the private trust company. Esau could have been vice president in charge of hunting operations, and also the marketing chief responsible for meeting and greeting clients. Jacob could have been the accountant in the back room keeping the books, and could negotiate contracts on behalf of the trust. Finally, Jacob and his mother could have operated the prepared foods division.

Hopefully this structure would have enabled Jacob and Esau to continue to work together after Isaac's death in order to keep the family business intact and provide opportunities for future generations. (For instance, someday Jacob's son, Joseph, might have wanted to start a designer outerwear line and open an outlet in Egypt.)

Mortality: The last psychological issue is the most significant of all in its impact both on clients and on estate planners. It is the ultimate issue, the issue of human mortality.

It has been said that man is the only animal who knows that he is mortal. At the same time, according to Sigmund Freud "our own death is unimaginable. At bottom no one believes in his own death."[12] It is this tension between what we know and what we are unable to believe that causes such unpredictable and irrational behavior around the subject of estate planning.

Therefore, it should not be surprising when a client with significant succession issues refuses to do any planning, or when a client gives instruction for preparation of a will and then allows it to languish unexecuted for months. These people are grappling with the great existential issue that confronts all humans, and they cannot be expected to behave as if they were selecting drapes for their living room.

Then there are clients who go to the other extreme, spending enormous time and energy to create intricate and detailed estate plans involving dynasty trusts and foundations that are designed to rigidly control the management and distribution of their assets for all eternity. These structures are meant to create a form of immortality by permitting the creator to exercise his will over future, unborn generations, to the exclusion of any input from those generations.

One of the earliest examples of immutable estate planning structures was the construction of the pyramids by the ancient pharaohs of Egypt. The pharaohs spent their entire lives (and the lives of their subjects) building enormous stone edifices designed to dominate their surroundings for ages to come. And because the pharaohs lived before the invention of the adage "You can't take it with you," they tried to do exactly that: each one had entombed with him all of his jewels, silver and gold, his valuable furnishings and chariots, his cattle and sheep, his wives, servants and leading advisors, all in order to exercise the same degree of dominion over his property after his death that he had held during his life.

These structures were doomed to failure because they were egocentric, designed solely to satisfy the pharaoh's wish to rage against the night of his own death, without concern for the needs and welfare of future generations. As a result, it became difficult for an aging pharaoh to obtain cooperation from advisors and family members in creating this testamentary scheme, and even more difficult to find anyone who would support and defend these structures after the pharaoh's death. Routinely, within a few years after the pharaoh died his pyramid would be looted and all the gold, silver and precious belongings would disappear. Who committed these thefts? Typically they were carried out at the behest of the new pharaoh, who wanted the contents to adorn his own palace, fill his own coffers, and ultimately be deposited in his own pyramid, only to then be looted in turn by a successor.[13] Thus we have the first recorded instances of "trust busting" by dissatisfied heirs.

To prevent this result, and to insure that testamentary plans will have a long and useful life, they should not be rigid and controlling. Instead, they should be flexible and organic, capable of responding to changes in circumstances, the varying needs of beneficiaries and the recommendations of advisors. If clients want to give specific instructions to future trustees regarding distributions ("pay all to John at age 25, even if he is in the midst of a divorce and about to file for bankruptcy") and investment ("hold Enron, buy Tyco"), they should be encouraged to do this in a non-binding, precatory letter of wishes. In this way the client can satisfy his need to kibbitz and cajole from beyond the grave without robbing the fiduciary of discretion, as mandatory directions in the trust agreement would do.

Conclusion: Estate planners deal every day with the great issues of the human psyche, the issues that men and women have struggled with for thousands of years, the issues that define what it means to be human. They should not attempt to reduce these issues to mere numbers and formulas. Clients do not want glib answers and spreadsheets. They welcome insights, they appreciate empathy, and they ask for acknowledgement of the magnitude of the issues they are facing. And estate planners owe these things to their clients.

Endnotes

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G. Warren Whitaker is a partner in the New York office of the law firm of Day, Berry & Howard LLP Including Hughes and Whitaker. He is a former vice chair of the ABA Committee on International Planning for Foreign Property Owners. He is the Chair of this Section. **This article is reproduced with permission by the American Bar Association. "Classic Issues in Family Succession Planning" appeared in *Probate & Property*, Volume 17, No. 2, March/April 2003.**

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New Recommendations for Taxing Trusts in Israel

By Alon Kaplan and Jimmy Chotoveli (in cooperation with Leon Harris)

The tax reform which became law in Israel on January 1, 2003 introduced the concept of personal taxation. One of the objects of this reform was to change the tax regime from territorial to global taxation. An Israeli resident is now taxable on his worldwide income. However, some Israeli residents used overseas trusts for investment and management of their financial assets. It became inevitable that taxation of trusts be examined carefully since the legislation of the tax reform did not deal with this subject. Due to the complexity of the subject, the Income Tax Commissioner appointed a special committee: "The Committee for the Taxation of Trusts" (hereinafter the "Committee") whose task was to recommend how trusts should be taxed in Israel. Members of the Committee included public servants and senior practitioners from the private sector.[1] The Committee was headed by Ms. Frida Israeli, CPA, a senior officer of the Tax Commissioner.

After long deliberations, the Committee published a report on July 24, 2003 presenting its recommendations.

Before examining the main points of the Committee's recommendations, it may be beneficial to review some basic points about trusts.

I. Trusts and Their Uses

The creation of a trust may have numerous uses and advantages. It may be a flexible and private arrangement for holding and managing assets. Many people create trusts to preserve family wealth and ensure the orderly flow of assets from one generation to the other.

Israel recognizes the common law concept of trusts and has enacted the Trust Law 1979.

The Israeli law distinguishes between revocable and irrevocable trusts. Briefly, whether a trust will be classified as a revocable or irrevocable trust depends on the amount of control that the settlor preserves for himself for the management of the trust assets. In most cases, the settlor completely separates himself from the trust assets from the moment he transfers the assets to the trustee and provides him with discretionary powers to manage the trust assets. This is an irrevocable trust. The taxation of revocable trusts is already regulated by existing tax laws. The Committee's recommendations relate to the taxation of irrevocable trusts.

We can now examine the Committee's recommendations.

II. Principles of the Recommendations

The Committee has adopted the following key principles:

- A trust is not a separate entity for tax purposes and the taxpayers are the beneficiaries. The Committee recommends imposing the same tax rates on assets held by trusts for the benefit of Israeli beneficiaries as would have been imposed had the assets been held by the beneficiaries personally.
- The recommendations only apply to irrevocable trusts.
- The trustees will be served with an assessment of tax to be paid from the trust fund on behalf of the beneficiaries.
- Revenues of trusts will be taxed on a current basis, i.e., even if not distributed to the beneficiaries.
- The place of residence of the trustee has no importance in terms of tax liability.

The Committee dealt with four categories of trusts and these are outlined below.

A. "Trusts of Israeli Residents"

In this category, the settlor and the beneficiaries are Israeli residents.

- ***Transfer of property to the trust*:** This will be exempt from tax if the settlor can prove that an outright transfer of the property directly to the beneficiary would have been exempt from tax (e.g., as a gift, exempt from tax in Israel).
- ***Taxation*:** Trust revenues will be taxed on a current basis and a tax assessment will be sent to the trustee for settlement. The applicable tax rates will reflect the normal income tax rates in Israel applicable to individuals (10 percent, 15 percent, 25 percent and 35 percent according to each case).
- ***Distribution to beneficiaries*:** This will not be regarded as a taxable event since the revenues of the trust have been taxed on a current basis.

B. "Foreign Beneficiary Trusts"

In this category, the settlor is an Israeli resident but the beneficiaries are foreign residents.

- ***Transfer of property to the trust*****:** A transfer will also be exempt from tax if the settlor can prove that an outright transfer of the property directly to the beneficiary would have been exempt from tax (e.g., a gift).
- ***Taxation*****:** Trust revenues accrued outside Israel will not be taxed but all revenues accrued in Israel will be taxed according to the tax status of the foreign beneficiary.
- ***Distribution to beneficiaries*****:** This will not be regarded as a taxable event since the revenues of the trust have been taxed on a current basis.
- ***Enforcement*****:** The settlor and the trustees will be obliged to declare that the trust does not have any Israeli beneficiaries.

C. "Foreign Settlor Trusts"

In this category, the settlor has been a "foreign resident" for more than 15 consecutive years and the beneficiary is an Israeli resident.

- ***Transfer of property to the trust*****:** The Committee recognizes the wish of the Israeli government to encourage transfers of foreign assets to Israeli beneficiaries and therefore recommends that various tax allowances must be provided to achieve this goal. The transfer of the settlor's property to the trust will also be exempt from tax if he can prove that an outright transfer of the property directly to the beneficiary would have been exempt from tax (e.g., a gift).
- ***Taxation*****:** Only trust revenues accrued in Israel will be taxed in this situation. Foreign trust income will be exempt from tax.
- ***Distribution to beneficiaries*****:** This will also not be regarded as a taxable event.
- ***Enforcement*****:** The beneficiary must prove that the settlor has been a foreign resident for more than 15 consecutive years and must also report all distributions made to him throughout the trust's life.

D. "Limited Foreign Settlor Trusts"

This is a situation where the settlor has been a foreign resident for fewer than 15 consecutive years or is a foreign company and the beneficiaries are Israeli residents.

- ***Transfer of property to the trust*****:** Again, the transfer of the settlor's property to the trust will be exempt from tax if he can prove that an outright transfer of the property directly to the beneficiary would have been exempt from tax.
- ***Taxation*****:** Only trust income accrued in Israel will be taxed. Both the trustee and the beneficiary may choose the tax liability as for "Trusts of Israeli Residents" and the beneficiary may at the time of a distribution prove to the Tax Commissioner what the exact amount of tax would have been had the beneficiary received it directly. The beneficiary may then pay such amount of tax together with interest and linkage increments.
- ***Distribution to beneficiaries*****:** The beneficiaries will be liable for 15 percent tax on all distributions made to them from the trust without distinguishing between capital and income. The Committee recommends this stipulation as it is convinced that under this scenario it will be difficult to obtain information from the trustees as to the "financial history" of the trust assets.

The Committee's recommendations also address the following special topics:

- ***Multiple settlors or beneficiaries:*** The Committee made special provisions for trusts with multiple settlors and multiple beneficiaries with different places of residence.
- ***Changes in the country of residence:*** Detailed recommendations have been made relating to the migration of settlors and beneficiaries to or from Israel.
- ***Corporate entities as settlors or beneficiaries:*** The Committee made special provisions in order to combat tax avoidance by the use of companies as settlors or beneficiaries.
- ***Charitable Trusts:*** The Committee recommends to exempt income of charitable trusts from tax upon the fulfillment of certain conditions.
- ***Trusts holding real estate:*** Numerous recommendations have been made regarding trusts holding Israeli real estate.

III. Encouraging the Use of Israeli Trustees and Companies

Until now, settlors and practitioners preferred appointing foreign trustees out of concern that hav-

ing an Israeli trustee could create tax liabilities in Israel. Following the Committee's recommendations, the place of residence of the trustees will not affect taxation. It is the tax status of the beneficiary and the settlor that will determine Israeli tax liability.

This can be seen as an important development in the Israeli tax system. It also provides opportunities to both Israeli and overseas trust companies and trust and estate practitioners. The appointment of Israeli trustees is encouraged by the Income Tax Commission. Not only will it stimulate the use of domestic professional services, but it will also enable the Income Tax Commission to communicate directly with trustees. Foreign trustees seeking assistance and better communication with the tax authorities may cooperate with Israeli trustees in order to fulfill their duties in Israel.

Furthermore, the Committee recommends that Israeli companies may serve as underlying companies of trusts which could hold the assets without incurring tax liabilities. This may also be regarded as a positive provision to aid trustees.

IV. Conclusion

The Committee's recommendations provide a distinction between the various categories of trusts and recommends taxing them according to the status of the beneficiaries and the settlors.

It remains to be seen to what extent the Knesset (the Israeli Parliament) will adopt the Committee's recommendations. If the recommendations are enacted by the end of 2003 as planned, the resulting measures could take effect retroactively to January 1, 2003.

Endnotes

1. Alon Kaplan was appointed as a member of the Committee from the private sector together with Meir Linzen, Advocate, and Alex Hilman, CPA.

Alon Kaplan, LLM practices as an Advocate in Tel Aviv, is a member of the New York Bar and practices law in Germany as a Rechtsbeistand. Mr. Kaplan is Chairman of the Israeli Branch of the Society of Trusts and Estate Practitioners (STEP) and a Council member of STEP. E-mail: alon@kaplex.com.

Jimmy Chotoveli, LLB, MSc, is currently articling at Alon Kaplan Law Firm. He concentrates inter alia in international taxation, trusts and estate planning.

Leon Harris, FCA (UK), CPA (Israel) is an International Tax Partner at Ernst & Young, Israel.

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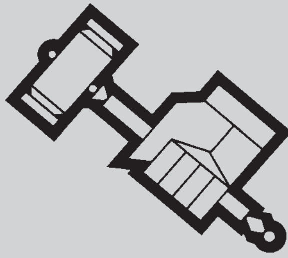

RECENT NEW YORK STATE DECISIONS

Ira Mark Bloom and William P. LaPiana

ADMINISTRATION OF ESTATES

Deceased Fiduciary—Guardian of Pretermitted Child Entitled to Letters

The executor of decedent's estate, decedent's father, died shortly after decedent. No successor executor was named in the will which left decedent's entire estate to his father and mother. However, the decedent was also survived by a minor child who would take her father's estate if she was determined to be a pretermitted child under EPTL 5-3.2. Decedent's wife, who had been appointed guardian of the property of the couple's daughter child, petitioned for letters of administration c.t.a. alleging that the daughter is an after-born child because she is not mentioned in the will nor did her father make any provision for her. Father's administrators also petitioned for letters on decedent's estate. The Surrogate found that because the child was presumptively an after-born child who was entitled to all of the estate under EPTL 5-3.2, her mother as guardian would be entitled to letters under SCPA 1418(1)(a) and (5). *In re Nelson*, 195 Misc. 2d 652, 761 N.Y.S.2d 469 (Sur. Ct., Nassau Co. 2003).

Totten Trusts—Administrators May Not Be Liable for Totten Trust Assets Mistakenly Paid to Estate by Bank

At the time of his death decedent was the depositor of a Totten trust account, the beneficiary of which died three months after decedent without ever having collected the account. Approximately one month later, the bank mistakenly paid the account to the depositor's estate. The beneficiary's estate sued the bank which in turn sued decedent's administrators. The Supreme Court granted summary judgment to the beneficiary's estate against the bank and for the bank in its third-party action against the administrators. The Appellate Division reversed the summary judgment grant for the bank, holding that the administrators would be liable only if they had failed to exercise reasonable care, diligence and prudence (EPTL 11-4.7(b)), and that the bank had not established that failure as a matter of law. In addition, the possibility that the bank's nine-month delay in notifying the administrators of its error prejudiced the administrators is also an issue of fact, further justifying denial of summary judgment. The administrators alleged that by the time the bank notified them they had already distributed the funds to creditors and distributees of the decedent. If they had indeed changed their position to their detriment in reliance on the bank's mistake, recovery may be denied the bank. *Collins v. HSBC Bank USA*, 305 A.D.2d 361, 759 N.Y.S.2d 156 (App. Div. 2d Dep't 2003).

Expenses—Equal Division Among Distributees Is Reasonable

Decedent died intestate. One half her estate was distributed to a single distributee and the other half equally divided between the minor children of a deceased sibling of the other distributee. The guardian *ad litem* for the infants challenged the Surrogate's determination that the adult distributee should pay one-half the expenses and the infants the other half. The Appellate Division upheld the Surrogate, finding that the apportionment was reasonable and justified. *In re Cummings*, 305 A.D.2d 675, 759 N.Y.S.2d 549 (App. Div. 2d Dep't 2003).

ATTORNEYS AND CLIENTS

Attorney's Fees Awarded Fiduciary—Private Action to Enforce Charitable Gift

In the landmark case of *Smithers v. St. Luke's-Roosevelt Hospital*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (App. Div. 1st Dep't 2001), the Appellate Division held that the estate of the donor of a charitable gift had a private right of action to enforce the terms of the gift. Having successfully asserted her right of action, decedent's widow, who had been appointed special administratrix c.t.a. sought her attorney's fees from the estate. The application was opposed by the Attorney General and by beneficiaries of a portion of the residuary estate on the ground that the estate did not benefit from the enforcement action. The Surrogate held that reasonable attorney's fees could be awarded from the estate because a contrary result "would vitiate the right of a private cause of action created by the Appellate Division [in *Smithers v. St.*

Luke's-Roosevelt Hospital]." The Surrogate also noted two well-accepted exceptions to the pecuniary benefit rule: attorney's fees can be awarded to the unsuccessful party in a will contest and to any party in a construction proceeding. Both exceptions stem from the state's policy of encouraging good faith efforts to insure that the decedent's wishes are carried out. *In re Smithers*, 195 Misc. 2d 510, 760 N.Y.S.2d 304 (Sur. Ct., Nassau Co. 2003).

TRUSTS

Trustee Indemnification—Trustee Will Not Be Indemnified for Breaching Its Duties Absent Unequivocal Contract Language

After being sued by a remainderman of an inter vivos trust for breaching its investment duties, J.P. Morgan & Co. Inc., as trustee, impleaded the income beneficiary asserting the right to contractual indemnification, indemnification by estoppel and unjust enrichment if Morgan lost its case to the remainderman. The basis for the original suit was that Morgan failed to diversify the trust assets that had been held in tax exempts due to a potential problem for the income beneficiary that ceased to exist by the mid-1970s. The income beneficiary had signed an agreement to indemnify Morgan for any claims made by other trust beneficiaries by Morgan converting the trust principal to tax exempts.

The Court granted the income beneficiary's motion for summary judgment on Morgan's third party claims, relying on New York's strong public policy against exculpatory provisions. Where an unsophisticated party such as the income beneficiary is involved, summary judgment can be granted even by resorting to the surrounding facts and circumstances. Nor could there be contractual estoppel against the income beneficiary because the indemnification provision did not apply to Morgan's investment actions which allegedly were in breach. Finally, there was no unjust enrichment because the court would need to apply a lost profits approach which it rejected in *Williams v. J.P. Morgan & Co., Inc.*, 199 F. Supp. 2d 189 (S.D.N.Y. 2002). *Williams v. J.P. Morgan & Co. Inc.*, 248 F. Supp. 2d 320 (S.D.N.Y. 2003).

Supplemental Needs Trusts—Trustee May Not Make Gift of Trust Assets to Beneficiary's Child

Trustee of supplemental needs trust who was also an Article 81 guardian of the beneficiary sought permission to make a gift of approximately one-third of the trust's assets to the beneficiary's daughter and to use another third to pay for nursing home costs during the resulting Medicaid ineligibility period which would arise by making the gift. Application was opposed by the Social Services Department. The court denied the request. First, the trust was not an asset of the guardianship estate. As a result, Mental Hygiene Law Article 81 provisions dealing with transfers of an incapacitated person's property (MHL § 81.21(d)) did not apply. Second, the court found the proposed distribution was not permissible under the terms of the supplemental needs trust. Third, a Medicaid ineligibility period will not result from a transfer of trust assets over which the Medicaid recipient has no control. Instead, the state's interest in the remainder would immediately become due. Finally, even if there were no statutory or regulatory prohibition of the transfer, the court held that diminishing the corpus of the trust would not be in the beneficiary's best interest. *In re Greenstein*, 195 Misc. 2d 628, 760 N.Y.S.2d 810 (Sup. Ct. 2003).

Totten Trusts—Beneficiary May Waive Rights

Decedent was the owner of three Totten trust accounts. His ex-wife was beneficiary. As part of their divorce, they came to a comprehensive property settlement by which they waived all rights to each other's property and recited that all bank accounts had been equitably divided. Decedent died without having changed the beneficiary of the Totten trust accounts. Both decedent's estate and the beneficiary claimed the accounts. The Court of Appeals affirmed judgment for the beneficiary, holding that the decedent had not performed any of the acts set out in EPTL 7-5.2 that would have revoked the beneficiary designation. The Court also held that while the beneficiary could have waived her rights to the accounts, the separation agreement did amount to an explicit, voluntary waiver made in good faith because it did not explicitly refer to the Totten trust accounts. The Court distinguished *Silber v. Silber*, 99 N.Y.2d 395, 757 N.Y.S.2d 227, 786 N.E.2d 1263 (2003), where it held that a QDRO could be an effective waiver to rights to a pension plan. *Eredics v. Chase Manhattan Bank, N.A.*, 100 N.Y.2d 108, 760 N.Y.S.2d 737, 790 N.E.2d 1166 (2003).

Jurisdiction—Surrogate's Court Lacks Jurisdiction Over Lifetime Trusts

Decedent created three lifetime charitable remainder trusts. Although decedent was a New York domiciliary, after her death none of the trustees resided in New York, none of the trust assets were in New York and of course decedent was no longer a New York domiciliary, domicile having "evaporate[d]" at death. Therefore, none of the jurisdictional prerequisites of SCPA 207(1) were present. The charitable remainder beneficiary of all three trusts commenced accounting proceedings in Surrogate's Court which held it had jurisdiction based on SCPA 1501(1)(c) which applies the SCPA to those lifetime trusts over which the Supreme Court would

also have jurisdiction. The Appellate Division reversed, holding that SCPA 1501 does not confer subject matter jurisdiction which is conferred only by SCPA 207, none of the requirements of which are met in this case. *In re Witherill*, 306 A.D.2d 674, 761 N.Y.S.2d 698 (App. Div. 3d Dep't 2003).

WILLS

Construction Proceeding—Virtual Representation Not Warranted

Decedent died in the September 11, 2001 terrorist attack on the World Trade Center. His will contained a formula clause creating a credit shelter trust of the applicable exclusion amount and a marital deduction trust. Decedent's widow is executrix and she and the decedent's brothers are trustees of the trusts. Decedent's brothers brought a construction proceeding contending that the formula bequest should be governed by the provisions of the Victims of Terrorism Relief Act of 2001 which would increase the credit shelter trust and eliminate the marital deduction trust. The remainder beneficiaries of the two trusts are the decedent's two children, an adult son and a minor daughter. The son, represented by counsel, submitted an affidavit supporting his mother's opposing construction of the formula clause which would result in funding the marital trust and potentially reducing his own interest because of the taxable nature of the marital trust in his mother's estate and her "five and five" power over the marital trust. The Surrogate held that the son could not virtually represent his sister even though their interests are parallel because his proposed interpretation of the will is contrary to his sister's economic interests. Accordingly, appointment of a guardian *ad litem* for the sister would be necessary. *In re Dickey*, 195 Misc. 2d 729, 761 N.Y.S.2d 473 (Sur. Ct., Nassau Co. 2003).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, *Drafting New York Wills* (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).

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Scott Nammacher, ASA
New York, New York
(212)714-0122
Lockwood@Empireval.com
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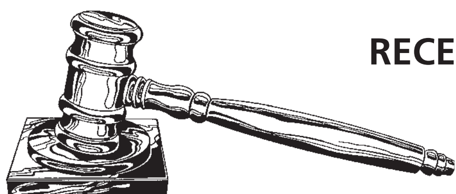

CASE NOTES— RECENT NEW YORK STATE SURROGATE'S AND SUPREME COURT DECISIONS

Ilene Sherwyn Cooper

Abandonment

In a contested administration proceeding, the Court granted summary judgment to the decedent's sister and brother and dismissed the cross-petition for letters of administration by the decedent's father, finding that he had abandoned the decedent prior to her death and was thus disqualified from serving.

The Court determined that the father's long distance love and his occasional visits with the decedent did not constitute the 'natural and legal obligations of training, care and guidance' (*In re Arroyo*, 273 A.D.2d 820) owed by a parent to a child, and concluded that he was perfectly satisfied to have others take the responsibility of caring for the decedent and her siblings when they needed care and support.

In re Estate of Gomez, N.Y.L.J., Sept. 5, 2003, p. 21 (Sur. Ct., Bronx Co., Surr. Holzman).

Burial Rights

In an uncontested proceeding, the executor of the decedent's will sought an order preventing the cremation of the decedent's remains and delivery of those remains to a Jewish chapel for burial in accordance with the Jewish faith.

Upon the testimony and proof at the hearing of the matter, the Court granted the relief requested, holding that although the spouse or surviving next of kin have a right to possession of a decedent's remains for preservation and burial, a decedent's wishes respecting the burial process will be given effect over the objections of family members when a dispute arises. Moreover, where a decedent is separated from his spouse, as in the case presented, the survivor does not have the right of a widow(er) concerning the remains. Nor does a surviving child, where cordial parental and filial relations do not exist between a parent and child at the time of the parent's death.

Based upon the foregoing, the Court concluded that the decedent intended to be buried in accordance with Jewish law. The Court found particularly compelling the fact that the decedent was Jewish and would deem cremation unacceptable, that he was Bar Mitzvahed; that he maintained a kosher home; that he went to synagogue on high holidays; that he wore a Star of David; that he said nightly Jewish prayers before going to bed; and that the decedent gave monies to Jewish charities in Israel and to his synagogue. Additionally, the decedent's prior will made reference to a headstone, which indicated that he anticipated an internment.

In re Estate of Salomon, N.Y.L.J., June 20, 2003, p. 25 (Sup. Ct., Nassau Co., Raab, J.).

Construction of Wills

In an uncontested construction proceeding, the Court held that the death of the life tenant before the testator accelerated the remainder of the trust. The law is well settled that the death of the life tenant before the will can take effect will not defeat the subsequent limitation "upon the death" of the life tenant.

In re Estate of Hanfield, N.Y.L.J., Sept. 17, 2003, p. 19 (Sur. Ct., New York Co., Surr. Preminger).

Construction/Reformation of Wills

Before the Court was an application to dismiss a construction proceeding which had been instituted by the decedent's surviving spouse, who sought to have a bequest to the decedent's nieces and nephews construed as a conditional, rather than an absolute cash disposition of the estate. The effect of the bequest as it read reduced the surviving spouse's inheritance by $700,000.

Petitioner premised her argument on a reading of the will and the constructional preferences in favor of a surviving spouse and the advantageous tax treatment accorded testamentary dispositions to spouses. In addition, petitioner relied upon an affidavit from the attorney/draftsman of the will which affirmed that the omission of the conditional language was a drafting error.

In opposition to the petitioner's application, the respondents, the decedent's nieces and nephews, maintained that the language of the disposition in issue was clear and unambiguous and comported

with the decedent's intent to ensure that they, in addition to his wife, would inherit from his estate. Further, they claimed that since there was no latent or patent ambiguity in the will, construction of the instrument was unwarranted, requiring dismissal of the proceeding.

In denying the motion to dismiss, the Court found, from a reading of the will in its entirety, that the intent of the testator was unclear and as such, a cognizable clam for relief had been stated by the petitioner. In reaching this result, however, the Court recognized that it could not rewrite or reform the decedent's will in order to rectify a purported mistake which did not appear on the face of the instrument. The Court opined that while the construction of a will requires the court to ascertain the meaning of the words utilized in the instrument, a reformation requires the court to change the language in the will by the addition or deletion of words in order to correct an apparent drafting error. In deference to the sanctity of wills, reformation is sparingly granted, though it has been considered to conflict with the traditional duty of the court to carry out the intention of the testator, when discernible. As such, courts often blur the distinctions between will construction and will reformation, relying less upon labels, and more upon a desire to effectuate a just and natural result.

Thus, under the circumstances presented, the Court held that whether the action proceeded as a construction or a reformation, sufficient basis existed for petitioner to proceed forward with her application and to pursue pre-trial discovery.

In re Estate of Schumer, N.Y.L.J., July 9, 2003, p. 24 (Sur. Ct., Suffolk Co., Surr. Czygier).

Costs

The decedent was survived by her brother and two nephews, children of a predeceased sister. Pursuant to the pertinent provisions of her last will and testament, the decedent bequeathed 80% of her estate to her nephews, and nominated them as the co-executors thereunder. The balance of the decedent's estate was bequeathed to her grandniece and grandnephew. The decedent's brother filed objections to probate.

The petitioners applied to the court to have the objectant post costs as a non-domiciliary, which application was granted in the sum of $3,000. At the conclusion of the proceeding, the objectant requested that the money be released to him, and the petitioners moved that he be assessed with costs, sanctions and fees pursuant to 22 N.Y.C.R.R. 130-1.1.

The record revealed that while the petitioners complied with the objectant's requests for discovery, the objectant did not make himself available to be deposed, nor did he respond to the petitioners' demand for interrogatories or notice to admit. Indeed, the petitioners offered to take the objectant's deposition in New Jersey, however, that request was ignored. Multiple conferences were held in an attempt to have the objectant complete discovery, but to no avail.

As a consequence, the petitioners moved for summary judgment, which application was granted.

In granting the petitioners' motion, the Court held that where an objectant persists in pursuing objections well beyond the point where it should have become apparent there is no basis in law or fact to support them, sanctions will be imposed. Further, the proceeding must be so lacking in merit as to demonstrate an intention to abuse judicial process.

Within this context, the Court determined that objectant's bad faith in proceeding with the prosecution of his objections, and the resulting delay in the administration of the estate were grounds for ordering him to reimburse the estate for the legal fees incurred as a result of his frivolous conduct; to wit, for services rendered in connection with discovery motions and the multiple conferences that the petitioner was forced to attend because of the actions of the objectant. Based upon the affidavit of legal services of petitioners' counsel, the Court assessed costs against the objectant in the sum of $3,000.

In re Estate of Epstein, N.Y.L.J., Aug. 20, 2003, p. 23 (Sur. Ct., Nassau Co., Surr. Riordan).

Gift

Before the Court was a proceeding for a turnover of funds in four bank accounts: one in the decedent's name alone, and three in the name of the decedent or the respondent. Petitioner maintained that the three accounts were established for convenience purposes only; the respondent maintained that they were joint accounts and that she was entitled to the proceeds thereof at the decedent's death.

The signature cards contained the requisite survivorship language making the presumption of the Banking Law applicable. The Court noted, however, that the presumption may be rebutted by clear and convincing evidence that the account has been opened as a matter of convenience.

Based upon the proof presented, the Court found that the petitioner rebutted the presumption that the decedent intended the accounts to be joint accounts

with right of survivorship by presenting clear and convincing evidence that the accounts were for decedent's convenience. In fact, the Court noted that the testimony of the respondent established that this was their purpose. Although under certain circumstances a joint account may be found when it also suited the convenience of the decedent, additional evidence is required to support decedent's intent to create a joint account and make a present gift to the joint tenant. The Court held that the respondent failed to present such evidence.

Additionally, despite the respondent's claim that the decedent intended to make a gift to her of the proceeds remaining in the accounts at her death, the Court concluded that the only proof of same was her own self-serving statements that the decedent intended to make a gift to her at some time in the future.

Accordingly, the respondent was directed to turn over to the petitioner the proceeds of the four accounts.

In re Estate of Esposito, N.Y.L.J., July 7, 2003, p. 19 (Sur. Ct., N.Y. Co.).

Guardian *ad Litem*

In a probate proceeding, the Court held that a prisoner could file objections to the propounded instrument, despite the fact that the guardian *ad litem* appointed to represent his interests found no reasonable basis for doing so. The Court determined that even when a person is sentenced to life imprisonment, he does not lose his right to commence or defend legal actions. A guardian *ad litem* is appointed where a person's incarceration prevents him from appearing and representing his own interests. Where, however, a prisoner retains counsel of his own choosing, who appears on his behalf, the decisions of the guardian *ad litem* are not preclusive, and the prisoner shall have the right to decide whether, if at all, to proceed with litigation.

In re Estate of Gormely, N.Y.L.J., Aug. 28, 2003, p. 22 (Sur. Ct., Kings Co., Surr. Feinberg).

Judgment Notwithstanding the Verdict

After a jury trial in a contested probate proceeding, in which the jury found that the propounded will had not been duly executed, that it was the product of undue influence, and that the decedent lacked testamentary capacity, the Court granted the petitioner's motion to set aside the verdict.

As to the issue of due execution, the Court found that the jurors chose to disregard the testimony of the three attesting witnesses, who appeared to be totally disinterested, as well as the testimony of the attorney draftsman who had previously drafted a will benefiting the objectant. Instead, they curiously accepted the otherwise unsupported testimony of interested witnesses, the objectant and her daughter, that the signature on the will did not appear to be the decedent's. However, in the absence of a party adducing any proof based upon a comparison of the signature of the will with the decedent's signature on other documents, the Court directed that a new trial be had on this issue.

In re Estate of Schneider, N.Y.L.J., July 16, 2003, p. 20 (Sur. Ct., Bronx Co., Surr. Holzman).

Jurisdiction

In a proceeding brought by the trustee of a testamentary trust for the appointment of a receiver pursuant to SCPA Article 19, the Court determined that it lacked jurisdiction to hear and determine the matter. The Court found that factually the application was for certain relief directed to corporate entities in which the trust was a shareholder; i.e., it was in the nature of a claim by the trust, as a shareholder, for waste of corporate assets, rather than a proceeding to sell real property pursuant to Article 19. As such, the Court found the proceeding akin to a derivative action, whereby the petitioner sought a return of the cash value of the trust's shares in the subject corporations which had liquidated their real property assets, as well as a share in the management of the corporations, and a share in the decision making concerning the operation and/or sale of one of the corporations.

Notwithstanding the fact that the corporations were closely held, the Court held that inasmuch as the relief did not directly affect trust assets it lacked jurisdiction over the proceeding. The Court opined that the derivative suit could be heard in Supreme Court, where the trustee's concerns over self-dealing as well as corporate waste could be resolved in that forum by the appointment of a receiver.

In re Estate of Lever, N.Y.L.J., July 23, 2003, p. 23 (Sur. Ct., Nassau Co., Surr. Riordan).

In a contested miscellaneous proceeding, the Court granted a motion to dismiss a proceeding to recover monies allegedly owed to the estate of the decedent as a result of breaches of fiduciary duty committed by the respondent with respect to the decedent and to certain entities in which the decedent had an interest.

Although the Court noted that the trend in New York is one of steady expansion of Surrogate's Court jurisdiction, it concluded that the claims asserted by

the petitioner would, for the most part, enure to the benefit of the entities at issue, rather than directly to the decedent's estate. The Court found that the petitioner's assertion that the estate owned part of the entities did not confer it with the authority to resolve all matters concerning alleged corporate waste and mismanagement.

The Court drew a distinction between those cases in which the estate brought such derivative claims on behalf of an ongoing corporation or partnership, and those in which the estate fiduciary was sued derivatively, citing *Porazzo v. Danaher*, N.Y.L.J., June 9, 2003, p. 34.

Accordingly, the Court determined that inasmuch as the Supreme Court was vested with complete jurisdiction over the matters asserted in the petition, judicial economy dictated that the proceeding be dismissed pursuant to the provisions of CPLR 3211(a)(2).

In re Estate of Tsunis, N.Y.L.J., July 23, 2003, p. 18 (Sur. Ct., Suffolk Co., Surr. Czygier).

Posthumous DNA Testing

In a contested kinship proceeding, the Court accepted posthumously obtained DNA test results as clear and convincing evidence of paternity pursuant to EPTL 4-1.2(a)(2)(C), and urged the legislature to amend the provisions of both EPTL 4-1.2(a)(2)(C) and EPTL 4-1.2(a)(2)(D) so as to enable DNA test results, whether obtained pre-death or post-death, to be admitted as "clear and convincing evidence" of paternity.

The issue of paternity arose during the course of a kinship hearing involving the estate of a deceased child. The child's putative father was the administrator of his estate. The child's grandmother moved the Court for DNA testing of blood samples available from the infant in order to determine whether the putative father was indeed the father of the child for inheritance purposes pursuant to EPTL 4-1.2(a)(2)(C). The infant's grandmother sought to disprove paternity of the putative father through the DNA test results.

The Court noted that although the provisions of EPTL 4-1.2(a)(2)(D) had been interpreted to preclude the admission of post-death DNA test results, recent cases had advanced the position that posthumously obtained DNA test results were admissible pursuant to the provisions of EPTL 4-1.2(a)(2)(C). *See In re Bonnano*, 192 Misc. 2d 86 (2002), "([t]o hold otherwise would ignore the precision that DNA testing contributes to the paternity issue."). Indeed, the Court observed, "[t]he state of technology for DNA testing post EPTL 4-1.2 has advanced to the point that it can determine paternity to a 99-100 percent scientifically acceptable certainty, clearly meeting a 'clear and convincing' standard. . . ." *See People v. Wesley*, 83 N.Y.2d 417 (1994).

Hence, the Court concluded that the provisions of EPTL 4-1.2(a)(2)(C) and EPTL 4-1.2 (a)(2)(D) should be amended in order to allow DNA test results to serve as the exclusive basis under these statutes for determining whether paternity has been established by "clear and convincing evidence." The Court opined that developments in the field of DNA testing should encourage the legislature to rectify the current injustice created by the statutory prohibitions on use of posthumously obtained DNA test results, particularly where the samples are available without the need for exhumation, safeguards are invoked in order to ensure that the blood samples are drawn under strictly controlled laboratory conditions, and the chain of custody is meticulously documented.

In re Estate of Santos, N.Y.L.J., July 28, 2003, p. 22 (Sur. Ct., Kings Co., Surr. Feinberg).

Reformation of Wills

In an uncontested accounting proceeding, the petitioner, J.P. Morgan Chase, requested that the Court reform the provisions of the decedent's will in regard to certain restrictions which required that it invest any cash held in the trust in an account paying interest at the prevailing rate "until such time as bonds become available . . . at interest not less than 8 percent."

The trustee maintained that bonds paying a return of 8 percent were unavailable, and thus, the restriction upon investments contained in the trust should be removed. The Court noted that at the time the trust was created, interest rates were unusually high. The Court further noted from the terms of the instrument that the Grantor believed government bonds would provide safety and a reasonable income stream to the beneficiaries. Given the prevailing circumstances in the market, i.e., the drop in interest rates, and the resulting lack of high-yielding bonds for a protracted period of time, the Court granted the relief sought, invoking the doctrine of equitable deviation.

In re Estate of Renee Regine Morgenstern, N.Y.L.J., Sept. 17, 2003, p. 19 (Sur. Ct., N.Y. Co., Surr. Preminger).

Vacate Default

In a probate proceeding, application was made by the decedent's distributees to vacate their default, so that they could appear in the proceeding, conduct 1404 examinations, and file objections to the will being propounded.

All the distributees were timely served with citation and no one appeared in opposition on the return dates of citation. The Court nevertheless, on its own motion, scheduled a hearing pursuant to *In re Putnam*, due to the confidential relationship between the petitioner and the decedent. On the hearing date, one of the distributees appeared with counsel on behalf of all distributees, and made application, on the record, to vacate any default in failing to appear on the return dates of citation. The application was opposed by counsel for the petitioner.

In support of the application, movant, on behalf of herself and the other distributees, maintained that she was unaware of any possible basis to challenge the will until she was in receipt of the order scheduling the Putnam hearing. Moreover, she stated that she was unaware of the concerns expressed by a friend of the decedent as to her mental capacity. Notably, the probate citations did not mention the possible confidential relationship between the petitioner and the decedent.

The Court opined that the standard for vacating a party's default in pleading is more lenient prior to the entry of a decree. In view of the fact that the Court, on its own motion, had scheduled a hearing regarding the drafting and execution of the will, the Court concluded that granting the application would not unduly prejudice the petitioner. Further, the Court found the record sufficient to raise an issue as to undue influence and the decedent's lack of capacity to execute the propounded instrument. Finally, the Court observed that the law favors the resolution of cases on their merits. Accordingly, the application was granted.

In re Estate of Kruk, N.Y.L.J., Aug. 25, 2003, p. 26 (Sur. Ct., Suffolk Co., Surr. Czygier).

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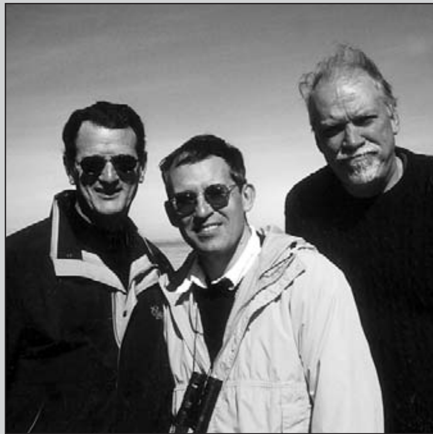

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Editor
Magdalen Gaynor
10 Bank Street, Suite 650
White Plains, NY 10606
E-mail: magdalen.gaynor@verizon.net

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