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Trusts and Estates Law Section Newsletter

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A Message from the Chair

Marion Hancock Fish

NYSBA President-Elect Claire Gutekunst hosted an informal gathering of Women Bench & Bar Leaders from Central and Western New York on Wednesday, September 16. Current President of the Central New York Women's Bar Association, Julia Martin, and I made the trip west on the NYS Thruway for an enjoyable event at the offices of Harris Beach in Pittsford. Present from the bench were Associate Justice Peradotto of the Appellate Division, Fourth Department, and Supreme Court Justices Deborah Karalunas and Sharon Townsend from Onondaga and Erie Counties, respectively. Maryann Saccomando Freedman, a recognized trailblazer as NYSBA's first woman President, and Past President A. Vincent Buzard also joined the group.

Inevitably, the conversation among the women attorneys and judges ranged widely from discussion of current caseloads, overladen court dockets, and pro bono activities to the best discount shoe stores (they're in New York City) and child care (too expensive!). In addition to these themes, all of us there share a commitment to NYSBA. Though we've taken different paths, I'd bet that each woman present would agree that her involvement with the Association has been instrumental to her career success.

To the readers of our Section *Newsletter* I am preaching to the choir. You recognize the value of the NYSBA membership. As you know, the effort to increase membership is a significant focus of activities for the Trusts and Estates Law Section and the Big Bar. In particular, our Section has undertaken several special membership efforts this year under the leadership of our Membership Committee. Five of our Districts have hosted events to welcome new members: Ian McLean for the First District, Mary King and Luke Beata for the Fifth, Kate Madigan for the Sixth, Vicki

Inside

Editor's Message 3
(Jaclene D'Agostino)

Constructive Trusts and the "Elastic" Power of Equity 4
(Gary E. Bashian)

Expansion of the 3/2 Rule—Prior Wills 6
(Ashwani Prabhakar)

A Comparison of Selected New York, New Jersey, and Delaware Trust Laws 8
(Richard W. Nenno)

After *Obergefell*: A Practitioner's Guide to Estate Administration Issues for the Surviving Spouse 19
(Thomas Sciacca)

Cross-Border Estate Planning—The Israeli Angle 22
(Alon Kaplan and Lyat Eyal)

POLST and Advance Directives: Friends or Foes? 25
(Gerald C. Tobin)

Recent New York State Decisions 27
(Ira M. Bloom and William P. LaPiana)

Case Notes—New York State Surrogate's and Supreme Court Decisions 30
(Ilene Sherwyn Cooper)

Florida Update 35
(David Pratt and Jonathan Galler)

NYSBA

D'Angelo for the Eighth, and Kevin Cohen for the Ninth. Beyond that, our Section takes advantage of every outreach opportunity. Larry Keiser represented our Section at the NYSBA "Dinner with a Lawyer" at Pace University Law School, Chris Cioffi and Tricia Shevy attended the NYSBA Women on the Move 2015 program in Albany, and Megan Knurr joined the NYSBA Lawyers in Transition program in Manhattan titled, "How to Jump Start Your Legal Career."

In order for our Section to continue to be recognized as a critical partner in the trusts and estates legal community, whether it is working with the OCA and the NYS Legislature on proposed legislation, providing top-notch CLE or otherwise, we must attract new members and encourage our members to take on Section leadership. I thank all of those mentioned and those I may have missed to express our appreciation in supporting the our Section and NYSBA, and in spreading the word about the benefits of being an active member of the Trusts and Estates Law Section.

Before I leave the topic of membership, let me also take this opportunity to mention that Megan Knurr has agreed to take on the Membership Committee Chair role, succeeding Jennifer Weidner, who has been an enthusiastic leader of the Committee for the past several years. Thank you Jennifer for your leadership and to Megan for stepping up.

As is now the tradition, I was invited to share a few remarks at the General Session of the Annual Trust and Investment Conference of the New York Bankers Association held at the Sagamore Resort in October. I spoke to the group about recent activities of our Section, including a matter of keen interest—the ongoing discussion within NYSBA about the statutory power of attorney form and potential revisions. The work of this task force continues. It is gratifying to know that the Bankers Association turns to our membership time and again for our perspectives and expertise. On this year's agenda are several of our Section leaders, including Joe Samulski who serves as our liaison with the Bankers Association. Jill Choate Beier updated the group on planning for digital assets, Sharon Klein talked about hot topics in estate planning, Judge Radigan added his perspectives to a discussion about portfolio management, and Nancy Klotz addressed the group about issues surrounding posthumously conceived children.

This past spring, our Section was contacted by Kenneth Larywon, Chair of the NYSBA Health Law Section, to seek our support of a program addressing aid in dying and end-of-life decision-making. Without question this is a matter of interest to our Section, and we have offered our sponsorship of the NYSBA/City Bar program to be held on Wednesday, December 16, in New York City with simultaneous webcast. The faculty includes Dr. Arthur Kaplan, a nationally recognized leader in the field of medical ethics, together with other doctors and several attorneys. Our Section should and will take an active role in educating New York lawyers on how to advise clients and their families facing end-of-life decisions, their choices surrounding death with dignity, and in the discussions about proposed legislation. You can expect to hear more about this important topic in the months and years ahead.

The Committee on Law Practice Management, with the leadership of Sarah Diane McShea, is just completing the enormous task of updating the Association's publication on law practice continuity. The Planning Ahead Guide, provided as a courtesy to all attorneys, offers helpful step-by-step plans that every lawyer should consider, most particularly solo and small office practitioners. The book includes articles, sample forms and agreements and checklists to consider when planning for practice transition due to death, disability or retirement. The Guide directly relates to the professional lives of more than 50% of our membership who are in solo and small offices. The Guide is also useful when administering the business affairs of a deceased attorney. As of this writing the updated Guide was in final edits, but will be available through the publications menu of the NYSBA website.

Please join me in congratulating NYSBA's Jean Nelson on his recent retirement. In his position as Associate Director of CLE, Jean has been steadfast (and unflappable) in working with our Section leaders to organize thousands, if not millions, of hours of CLE programming. Speaking on behalf of all who have chaired our CLE Committee, Jean made that volunteer job easy and fun! A resolution signed by the Executive Committee members at our October meeting has been presented to Jean in recognition of 37 years of stellar service to our Section and NYSBA.

Thanks for reading and for your ongoing support.

Marion Hancock Fish

Editor's Message

In this edition of our *Newsletter*, Gary Bashian provides an overview on the often misinterpreted topic of constructive trusts, Ashwani Prabhakar gives a primer on the "3/2 Rule" applicable to discovery in contested probate proceedings, Richard W. Nenno offers a thorough comparison of New York trust laws to those in three other states, and Thomas Sciacca discusses spousal rights in light of *Obergefell v. Hodges*, the recent United States Supreme Court decision requiring interstate recognition of same-sex marriages. Also in this issue, Alon Kaplan and Lyat Eyal's article addresses Israeli law in the contexts of foreign decedents with Israeli assets and Israeli decedents with foreign assets, and finally, Gerald C. Tobin's article explains and compares POLST ("Physician Orders for Life Sustaining Treatment") and advance directives.

Several changes have occurred within our Section's *Newsletter* and Publications Committee over the past few months. One of our longtime Vice Chairs, Wendy Sheinberg, has stepped down from our editorial board. Wendy's contributions to the *Newsletter* have been much appreciated, and she will be missed. However, we are pleased to have welcomed three new members to our Committee and editorial team: Shaina Kamen, Erika Goldstein, and most recently, Jay Sheryll. We look forward to working with each of them.

Finally, I would like to note that the published version of Andrew Katzenberg's article, "Are New York Real Estate Transfer Taxes For Real?," which appeared in our Fall 2015 *Newsletter*, did not include the author's citations to the New York City Administrative Code. A revised version of the article can be found on the NYSBA website.

Our next submission deadline is March 7, 2016.

Jaclene D'Agostino

The editorial board of the *Trusts and Estates Law Section Newsletter* is:

Jaclene D'Agostino — jdagostino@farrellfritz.com
Editor in Chief

Naftali T. Leshkowitz — ntl@leshkowitzlaw.com
Associate Editor

Sean R. Weissbart — srw@mormc.com
Associate Editor

Thomas V. Ficchi — tficchi@cahill.com
Associate Editor

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact the *Trusts and Estates Law Section Newsletter* Editor:

Jaclene D'Agostino, Esq.
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

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

www.nysba.org/TrustsEstatesNewsletter

Constructive Trusts and the "Elastic" Power of Equity

By Gary E. Bashian

> Law without principle is not law; law without justice is of limited value. Since adherence to principles of "law" does not invariably produce justice, equity is necessary.
>
> **—Aristotle, The Nicomachean Ethics**

Perhaps because of their equitable, ancient, and amorphous nature, constructive trusts are often misunderstood by both advocates and, on occasion, the judiciary itself. Nevertheless, though rooted in age-old equitable principles, constructive trusts have many applications. Indeed, constructive trusts are not to be underestimated or overlooked, and can prove invaluable tools for trusts and estates litigators when and where they are properly used.

Preliminarily, it must be noted that the very purpose of a constructive trust as a remedy is often misconstrued. Constructive trusts may be able to do many things, but the doctrine is limited insofar as it is not an "intent enforcing" mechanism, but rather a "fraud rectifying" device.[1] Advocates sometimes overlook this important distinction and seek the imposition of a constructive trust to enforce the stated, or presumed, intentions of an individual or entity, only to be met with dismissal either pre-answer or upon summary judgment, as it is simply not within the power of a constructive trust to force a defendant's compliance with an unfulfilled promise.

Indeed, it is sometimes helpful to think of a constructive trust as a cause of action sounding in fraud, but one that is subject to equitable review because some essential element necessary to sustain a cause of action for fraud is not present. As constructive trusts are often used as fraud-rectifying devices, it should come as no surprise that the applicable statute of limitations is six years, with a discovery rule based on the wrongful/proper "taking" analysis used in a conversion action.[2] A similar, but slightly different, way of thinking about constructive trusts as a fraud-rectifying device is to consider it as an equitable tool for preventing unjust enrichment.[3]

Generally, constructive trusts fall into one of two types.

1. Where one party has an equitable interest in an asset, but does not have legal title. Upon the party's attempt to enforce its equitable interests, the legal title holder refuses to acknowledge that the non-title holder has any rights. A good example of this situation is where one party invests monies in a real property, the deed is in another party's name, and legal owner of the real property thereafter denies the other party access, use, and/or rights to the real property.[4]
2. Where title of an asset is transferred from one party to another based on the promise that it will be returned,[5] or turned over to a rightful beneficiary, at a later time. Thereafter, when the party who no longer has, or can claim, legal title to the asset demands its return, the legal title holder refuses, and retains the asset in his or her sole ownership.

In order to establish that a court should impose a constructive trust in either instance, a plaintiff must plead, and subsequently prove, that:

1. A confidential and/or fiduciary relationship existed between the parties at issue;
2. Defendant made either an express or implied promise;
3. A transfer was effected by the defendant's promise; and
4. The defendant was unjustly enriched by said transfer.[6]

However, a plaintiff is not strictly bound by these elements, nor are constructive trusts restricted to the two most common examples described above. Equity, after all, has evolved throughout the history of jurisprudence to ensure justice when and where the rigid formalism of the law cannot. Indeed, given the nature of an equitable action and the fact that a constructive trust is primarily a device to prevent unjust enrichment, the courts have allowed flexibility in the pleading standards of a constructive trust, *i.e.*, a plaintiff need not necessarily prove each element, nor must the facts rigidly conform to the above listed elements. As the Court of Appeals has made clear that when imposing a constructive trust: "[t]he equity of the transaction must shape the measure of relief,"[7] thus allowing the doctrine of constructive trusts to remedy a myriad of wrongs in many situations where the power of equity is appropriately used.

Nevertheless, just because the courts have the equitable power to impose constructive trusts in a host of situations does not mean that they have not had issues determining the limitations of the doctrine, or the stan-

dards required to plead and prove why a constructive trust should be imposed.

In *Bower v. Bower*,[8] the Monroe County Supreme Court offered a thoughtful and detailed discussion about the "conundrum" a court faces when asked to impose a constructive trust outside the more familiar and commonplace fact patterns. Recognizing the "elasticity" of equity, and being guided by the broad powers outlined by the Court of Appeals in *Simonds v. Simonds*,[9] the court characterized constructive trusts as creatures of "[u]nfettered equity," which "converts the doctrine of a constructive trust into a subjective judicial judgment about the fundamental 'fairness' of a transaction."

Ultimately, the Supreme Court's analysis is that constructive trusts are a loose, equitable framework within which the court identifies wrongdoing, determines damages in terms of the degree to which a defendant was unjustly enriched, and orders restitution to the plaintiff so as to prevent the defendant from receiving a benefit from his or her wrongdoing.

Though it was not without hesitation that the court defined constructive trusts in this manner—nor without concern or consideration as to how the court should address the burden of proof, standards of proof, or even the absence of one or more of the accepted elements of the cause of action given the ill-defined boundaries of the doctrine—its analysis about the nature of the constructive trust doctrine, and the power which it affords courts to ensure that substantial justice is achieved, could not be more incisive or apt.

As a legal doctrine, constructive trusts can offer an effective means to protect a client's equitable rights. The broad and powerful nature of this form of relief cannot be discounted, and should always be considered where and when, in the presence of unjust enrichment, a more commonplace or familiar remedy simply cannot right the wrong that has been done.

Endnotes

1. *Bankers Security Life Ins. Society v. Shakerdge*, 49 N.Y.2d 939, 428 N.Y.S.2d 623 (1980).
2. *Sitkowski v. Petzing*, 175 A.D.2d 801, 572 N.Y.S.2d 930 (2d Dep't 1991).
3. *Sharp v. Kosmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976).
4. *See generally Washington v. Defense*, 149 A.D.2d 697, 540 N.Y.S.2d 491 (2d Dep't 1989).
5. *See generally Farano v. Stephanelli*, 7 A.D.2d 420, 183 N.Y.S.2d 707 (1st Dep't 1959).
6. *See Sharp v. Kosmalski*, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72, 75 (1976).
7. *Simonds v. Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359 (1978).
8. *Bower v. Bower*, 42 Misc. 3d 1231[A], 988 N.Y.S.2d 521 (Sup. Ct., Monroe Co. 2014).
9. *Id.*

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, and is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section. He is a past Chair of the Westchester County Bar Association's Trusts & Estates Section, past Chair of the Westchester County Bar Association's Tax Section, and a member of the New York State Bar Association's Commercial and Federal Litigation Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, a Sr. Associate of Bashian & Farber, LLP, for his assistance in the composition of this article.

TRUSTS AND ESTATES LAW SECTION

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www.nysba.org/Trusts

Expansion of the 3/2 Rule—Prior Wills

By Ashwani Prabhakar

A recent ruling by Surrogate Rita Mella of the New York County Surrogate's Court has clarified the extent to which the broad scope of document discovery allowed under New York Civil Practice Law & Rules (CPLR) Article 31 applies to New York Surrogate's Court Procedure Act (SCPA) 1404 examinations. In *In re Manoogian*,[1] the Court found that the proponent of a will was required to turn over all prior wills of a decedent even though the wills fell outside the time period for permitted disclosure mandated under Uniform Rule For The Surrogate's Court 207.27.[2] The following is an examination of the relevant statute, rules, and the effect of the *Manoogian* decision.

Under SCPA 1404(4), "any party to the [probate] proceeding…may examine any or all of the attending witnesses [to the will], the person who prepared the will, and if the will contains [an *in terrorem* clause], the nominated executors in the will and the proponents and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will."[3] Additionally, Surrogate's Court Rule 207.27 provides, *inter alia*, that "the items upon which the examination will be held shall be determined by the application of article 31 of CPLR."[4] Significantly, and relevant here, the same rule mandates that "[e] xcept on the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period."[5] This is colloquially referred to as the "3/2 period" or the "3/2 rule." Accordingly, during the document discovery phase which occurs prior to the taking of SCPA 1404 examinations, practitioners have traditionally limited the documents produced to the 3/2 period. This included the production of prior wills.

Courts have recognized that a continuing course of undue influence or a fraudulent scheme may constitute "special circumstances."[6] Accordingly, one must establish that the documents sought bear some relevance to their potential challenge to a will.[7]

Notably, the 3/2 rule conflicts with the broad discovery provided under Article 31 of the CPLR. For example, CPLR 3101(a) provides, *inter alia*, that "[t] here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."[8] It has been held that the test for disclosure in Surrogate's Court is materiality, that is, relevancy and usefulness.[9] Thus, there has been a longstanding tension between the broad relevancy test under the CPLR and the constraints of the 3/2 rule. This conflict recently came to a head in *In re Manoogian* before Surrogate Mella.

In *Manoogian*, a party interested in the subject will sought to compel disclosure of all of the decedent's prior wills even if those wills were executed outside the 3/2 time period.[10] The Court first noted that "[a]lthough by its terms the [3/2 rule] concerns examinations, it has been applied to all discovery devices."[11] Indeed, this is true as practitioners limit the documents they produce in response to a Notice of Discovery and Inspection to only those documents falling within the 3/2 time period. The movant seeking disclosure asserted that "prior testamentary instruments from whatever time period (1) will aid the Surrogate's determination under SCPA 1408 as to whether, under all the facts and circumstances, the will should be admitted to probate, and (2) [the prior wills are] frequently instructive to Respondent on whether or not to proceed with the filing of objections to probate."[12]

To resolve the conflict between the broad disclosure allowed under CPLR Article 31 and the restrictions of Surrogate's Court Rule 207.27, the Court looked to SCPA 1401. Under SCPA 1401, "[t]he court may…require the production and filing in court of any will of the decedent which it finds in the possession or under the control [of a person possessing the will]."[13] Accordingly, the *Manoogian* court found that "because a will can be compelled from any person under SCPA 1401 regardless of its date, prior testamentary instruments should be discoverable irrespective of Rule 207.27 unless there is some other basis for issuing a protective order."[14] However, the Court specifically noted that while the prior wills must be disclosed, questions during the 1404 examinations could not concern the prior wills absent a showing of special circumstances.[15] The *Manoogian* opinion was favorably cited by Surrogate Nora Anderson in *In re Llewellyn*.[16] Accordingly, the discovery of prior wills is firmly established in New York County.

This ruling has a significant effect on the conduct of disclosure prior to SCPA 1404 examinations and the potential for litigation in an estate, as the disclosure of prior wills may substantially dissuade or persuade a respondent to file objections. Additionally, it remains

to be seen whether courts will require the disclosure of trusts created outside the 3/2 period, since the *Manoogian* decision noted that "prior instruments may have a bearing on the testamentary scheme.…"[17] Arguably, all trusts created by a decedent have bearing on her testamentary scheme. Furthermore, CPLR 4503(b) provides that in a probate contest, "information as to the preparation, execution or revocation of any will or other relevant instrument" is not shielded from disclosure by the attorney-client privilege, unless that information constitutes a privileged communication that would "tend to disgrace the memory of the decedent."[18] While the *Manoogian* court rested its holding squarely on SCPA 1401 concerning wills, which statute has no corollary concerning trusts, CPLR 4503(b) may become a sword used by objectants to discover trusts created outside the 3/2 period. This change to the legal landscape and its aftermath will be interesting to observe.

Endnotes

1. N.Y.L.J., Feb. 24, 2014, p.36 (Sur. Ct., N.Y. Co. 2014).
2. *See id.*
3. N.Y. Surrogate's Court Procedure Act 1404(4).
4. N.Y. Uniform Rule For The Surrogate's Court § 207.27.
5. *Id.*
6. *See In re DuBray*, 132 A.D.2d 914, 518 N.Y.S.2d 245 (3d Dep't 1987); *In re MacLeman*, 9 Misc. 3d. 1119[A] (Sur. Ct., Westchester Co. 2005).
7. *See In re Delisle*, 149 A.D.2d 793, 539 N.Y.S.2d 588 (3d Dep't 1989) ("SCPA 1404(4) permits inquiry as to 'all relevant matters which may be the basis of objections to the probate of the propounded instrument.'").
8. N.Y. Civil Practice Law & Rules 3101(a).
9. *See In re Schneier*, 50 A.D.2d 715, 716, 374 N.Y.S.2d 872 (4th Dep't 1975).
10. *In re Manoogian*, N.Y.L.J., Feb. 24, 2014, p.36 (Sur. Ct., N.Y. Co. 2014).
11. *Id.* at *4.
12. *Id.*
13. SCPA 1401.
14. *Manoogian* at *4.
15. *See id.* at *5 ("Disclosure of these prior wills does not permit examinations as to them without a showing of 'special circumstances' as required by [Rule 207.27].").
16. *See* N.Y.L.J., Jan. 5, 2015, p.19 (Sur. Ct., N.Y. Co. 2014).
17. *Manoogian* at *5.
18. CPLR 4503(b).

Ashwani Prabhakar is Senior Counsel at Hogdson Russ, LLP in Buffalo, New York.

Upstate Members Celebrate NYSBA CLE Employee Jean Nelson's Retirement

Incoming Section Chair Meg Gaynor, left, Jean Nelson, right.

Meg Gaynor presenting Jean with a proclamation from the Executive Committee, acknowledging his 37 years of service.

A Comparison of Selected New York, New Jersey, Connecticut, and Delaware Trust Laws

By Richard W. Nenno

I. Introduction

Some attorneys will be surprised to learn that there are considerable differences among the trust and related laws of New York, New Jersey, Connecticut, and Delaware.[1] This article explores three of them:

- The directed trust
- The self-settled trust
- The creditor protection offered by the family-limited partnership ("FLP") or the limited-liability company ("LLC")

Clients often will benefit from creating trusts in another state to take advantage of these and other differences.

II. The Directed Trust

A. New York

New York does not have a directed trust statute so that the effectiveness of directed trust language in trusts governed by New York law is unpredictable. For instance, one case held that a directed trust worked, but a later case held that it did not.[2]

In *In re Estate of Rubin*, the decedent's Will named his son and daughter as co-executors but specified that, in the event of disagreement, they were to act as directed by two named individuals.[3] At the son's request, the two named individuals directed that he be given sole check-writing authority and management responsibility over five commercial properties. Rejecting the daughter's claim that the arrangement violated her rights as co-executor, the court held that "the designation of advisors…to make directives controlling the actions of the co[-]executors in any disputes is a valid limitation upon the powers of such executors."[4]

But, in *In re Rivas*, the corporate trustee objected to a direction by the Investment Advisory Committee formed under the governing instrument of a charitable trust to invest in the charitable donee's long-term investment pool.[5] The court held:

> [T]his Court cannot allow the proposed investment of the Helen Rivas Trust corpus, as such investment in the LTIP is contrary to the Agreement and the intent of the settlor, may give rise to an impermissible division of fiduciary loyalties among the majority of the Advisory Committee, and would also violate the Prudent Investor Act.[6]

Efforts began in New York several years ago to draft directed trust legislation, but that legislation has not yet become law.

B. New Jersey

Although drafting efforts are under way, New Jersey currently does not have a directed trust statute.

C. Connecticut

Connecticut does not have a directed trust statute.

D. Delaware

Delaware has honored directed trusts since early in the 20th century, and the practice was codified in 1986.[7] Delaware's directed trust statute currently provides in pertinent part:

> (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.
>
> (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act…
>
> (d) For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein

(including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or sub-custodians other than the trustee, the selection and compensation of, and delegation to, investment advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

(e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1) Monitor the conduct of the adviser;

(2) Provide advice to the adviser or consult with the adviser; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

(1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;

(2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and

(3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.[8]

In *Duemler v. Wilmington Trust Company*, a Delaware Vice Chancellor ruled that a corporate trustee was not liable for the failure of a sophisticated (*i.e.*, securities lawyer) investment adviser to direct it on an investment decision where the trustee forwarded relevant information to the adviser.[9] The Vice Chancellor held:

> The Court…finds that section 3313(b) of title 12 of the Delaware Code insulates fiduciaries of a Delaware trust from liability associated with any loss to the trust where a governing instrument provides that the fiduciary is to follow the direction of an advisor, the fiduciary acts in accordance with such direction and the fiduciary did not engage in willful misconduct. The trust agreement involved in this case appointed Plaintiff as the investment advisor to the Trust and, at all times, Plaintiff made all of the investment decisions for the Trust, including not to tender the securities in the Exchange Offer. In connection with Plaintiff's decision not to tender the securities in the Exchange Offer, Wilmington Trust acted in accordance with Plaintiff's instructions, did not engage in willful misconduct by not forwarding the Exchange Offer materials to Plaintiff and

> had no duty to provide information or ascertain whether Plaintiff was fully informed of all relevant information concerning the Exchange Offer. Accordingly, 12 Del. C. § 3313(b) insulates Wilmington Trust from all liability for any loss to the Trust resulting from plaintiff's decision not to tender the securities in the Exchange Offer.[10]

III. The Self-Settled and Other Trusts

A. New York

1. Self-Settled Trusts

New York does not allow an individual to protect assets from creditor claims by creating an irrevocable self-settled spendthrift trust. A New York statute provides: "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator."[11] Another statute says, "[A]ll property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment."[12]

2. Lifetime QTIP and Other Trusts

New York does not have a statute that protects a donor's contingent interest in lifetime qualified terminable interest property ("QTIP") or other trusts from claims of creditors.

B. New Jersey

1. Self-Settled Trusts

New Jersey also does not permit an individual to protect assets through a self-settled trust. A New Jersey statute provides:

> The right of any creator of a trust to receive either the income or the principal of the trust or any part of either thereof, presently or in the future, shall be freely alienable and shall be subject to the claims of his creditors, notwithstanding any provision to the contrary in the terms of the trust.[13]

To reinforce the point, another statute says: "Except as provided in subsection b. of this section, every deed of gift and every conveyance, transfer and assignment of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against creditors."[14]

2. Lifetime QTIP and Other Trusts

New Jersey has not enacted legislation that protects a donor's contingent interest in lifetime QTIP or other trusts from creditor claims.

C. Connecticut

Connecticut does not have a statute that addresses the effectiveness of self-settled trusts or that shields a donor's contingent interest in lifetime QTIP or other trusts from claims of creditors.

D. Delaware

1. Introduction

On July 9, 1997, Governor Carper signed the Delaware Qualified Dispositions in Trust Act (the "Delaware Act").[15] The Delaware Act has been amended several times since its enactment.[16] Because it probably will be amended in the future, an attorney should confirm that he or she is working with the current statute in a particular case.

2. How to Create a Delaware APT

To create an asset-protection trust ("APT") under the Delaware Act (a "Delaware APT"), a person must create an irrevocable trust that contains a spendthrift clause, provide that Delaware law governs the trust's validity, construction, and administration, and appoint at least one "qualified trustee."[17] A "qualified trustee" is either an individual who resides in Delaware or a corporation that is authorized to conduct trust business in Delaware and is regulated by the Delaware Bank Commissioner or a federal agency.[18] The qualified trustee or trustees must maintain or arrange for custody in Delaware of some trust property, maintain records for the trust, prepare or arrange for the preparation of fiduciary income-tax returns, or otherwise materially participate in the administration of the trust.[19] If only one qualified trustee is acting, the trustee will be deemed to have resigned if the trustee ceases to meet these requirements.[20] Similarly, a trustee of a Delaware APT automatically ceases to serve if a court declines to apply Delaware law in determining the validity, construction, or administration of such trust or the effect of its spendthrift clause in a proceeding involving such trustee.[21] If a trustee ceases to act for one of these reasons, any successor trustee designated in the trust will take the trustee's place and the Delaware Court of Chancery may fill any vacancy. The trust may have non-Delaware co-trustees[22] and Delaware or non-Delaware advisers with authority to replace advisers and qualified trustees, participate in investment decisions, and/or perform other duties.[23]

The Delaware Act specifically permits the trustor of a Delaware APT to:

1. Consent to or direct investment changes;
2. Veto distributions;
3. Replace trustees or advisers; and/or
4. Reacquire trust assets in a nonfiduciary capacity under Internal Revenue Code ("IRC") § 675(4)(C) (effective in 2015).[24]

The Delaware Act also expressly authorizes the trustor to have:

1. The ability to receive income or principal pursuant to broad discretion or a standard as determined by Delaware trustees, non-Delaware trustees, and/or advisers;
2. The right to receive current income distributions;
3. An interest in a charitable-remainder trust ("CRT"), an interest in a qualified personal residence trust ("QPRT"), or a qualified annuity interest created if a residence in a QPRT ceases to be used as a personal residence;
4. An interest in a grantor retained annuity trust, an interest in a grantor retained unitrust, or up to a 5% interest in a total-return unitrust;
5. A non-general lifetime or testamentary power of appointment; and/or
6. The ability to provide for the payment of debts, expenses, and taxes following death.[25]

The Delaware Act addresses Revenue Ruling 2004-64,[26] which held, *inter alia*, that the grant of discretion to a trustee to reimburse the trustor for income taxes that he or she must pay on a grantor trust will not cause estate tax inclusion under IRC § 2036 if applicable local law does not subject the trust assets to the claims of the trustor's creditors.[27] The trustor might be reimbursed for such taxes pursuant to discretion given to the trustee, adviser, or protector under a Delaware APT.[28] For trustors who do not want to grant such broad discretion, the Delaware Act permits a Delaware APT simply to grant discretion to reimburse the trustor for income taxes attributable to the trust.[29]

Most Delaware APTs are structured as incomplete gifts. In such a trust, it is not disadvantageous from an estate planning standpoint to have the trust pay its share of income taxes. So, a Delaware APT may direct the trustee to pay income taxes attributable to the trust.[30]

Under the Delaware Act, the trustor may not be a trustee[31] and may only have the interests and powers described above.[32] Furthermore, the trustor has only the powers and authorities conferred by the trust instrument, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority is void.[33] To be conservative, Delaware attorneys counsel clients not to retain powers and interests that are not specifically authorized by the Delaware Act. Consequently, the trustor probably should not have the express right to get the assets back. Although the Delaware Act permits a variety of interests and powers, certain provisions might be inappropriate in a particular case. For example, the use of co-trustees who live in the trustor's state of residence or in the state in which the trustor's business is located might increase a trust's susceptibility to process in that jurisdiction and the possibility that Delaware law might be found not to govern the trust or, more importantly, the rights of beneficiaries and their creditors. Under the Delaware Act, a spendthrift clause will be deemed to be a restriction on the transfer of the trustor's beneficial interest in the trust that is enforceable under applicable non-bankruptcy law within the meaning of the United States Bankruptcy Code.[34]

3. Who May Defeat a Delaware APT

a. Introduction

Any action to set aside a Delaware APT (including an action to enforce a judgment from another jurisdiction) must be based on § 1304 or § 1305 of the Delaware Uniform Fraudulent Transfer Act ("UFTA") and any related changes to the Delaware UFTA by the Delaware Act.[35] The Delaware Act vests the Delaware Court of Chancery with exclusive jurisdiction over any action involving a Delaware APT.[36]

b. Creditors Who May Defeat a Delaware APT

Certain "super-creditors" (including the Internal Revenue Service ("IRS"), the Securities and Exchange Commission ("SEC"), the Federal Trade Commission ("FTC"), and minor children seeking support) may reach the assets of a domestic APT, in Delaware or any other state. Under the Delaware Act, the following four categories of creditors may defeat Delaware APTs.

(1) Pre-Transfer Claims

If a creditor's claim arose before the trust was created, the creditor must bring suit within four years after the trust's creation or, if later, within one year after the creditor discovered (or should have discovered) the trust.[37] The creditor must also prove by clear and convincing evidence that the creation of the trust was a fraudulent transfer.[38] To minimize the effect of the one-year limitation, the trustor might notify known pre-transfer creditors of the trust's existence within three years of its creation. If multiple transfers are made to the same trust, a subsequent transfer is disregarded in determining whether a creditor's claim with respect to a prior transfer is extinguished as provided above;[39] distributions to beneficiaries are deemed to come from the latest transfer.[40]

(2) Post-Transfer Claims

If a creditor's claim arose after the trust was created, the creditor must bring suit within four years after the trust's creation and must prove by clear and convincing evidence that creation of the trust was made with actual intent to defraud—not hinder or delay—that creditor.[41] Hence, as a practical matter, this exception is not available for a creditor who does not

exist or is not foreseeable when a Delaware APT is created because it will be extremely hard to prove that a trustor intended to defraud a nonexistent, unforeseen creditor. If multiple transfers are made to the same trust, a subsequent transfer is disregarded in determining whether a creditor's claim with respect to a prior transfer is extinguished as provided above.[42] In addition, distributions to beneficiaries are deemed to come from the latest transfer to the trust.[43]

(3) Family Claims

A person whose claim results from an agreement or court order providing for alimony, child support, or property division "incident to a judicial proceeding with respect to a separation or divorce" may reach the assets of a Delaware APT,[44] but only a spouse who was married to the trustor of the trust before it was created may invoke this exception.[45]

Shortly after the IRS issued Revenue Procedure 2005-24, the Delaware Act was amended to address it. Revenue Procedure 2005-24 required spouses of trustors of certain post-June 27, 2005, inter vivos CRTs to waive rights to reach such trusts by electing against the Will.[46] Under the Uniform Probate Code ("UPC") § 2205, a surviving spouse may reach the assets of an inter vivos CRT created during his or her marriage to the deceased spouse (but not while the deceased spouse was unmarried or was married to a prior spouse) by electing against the Will.[47] UPC § 2-205 (or the comparable provision of the earlier version of the UPC) is in effect in at least 14 states, including New Jersey.[48]

The surviving spouse of a Delaware decedent never has been able to reach trust assets by electing against the Will,[49] and Delaware law does not defer to the law of a decedent's domicile to determine a surviving spouse's elective-share rights.[50] Since the passage of the Delaware Act, Delaware attorneys have been of the view that a spouse may reach the assets of a Delaware APT only in circumstances specified in the Delaware Act (i.e., alimony, child support, or property division incident to a separation or divorce proceeding)[51] and that, because elective share rights are not specified, the surviving spouse of the trustor of a Delaware APT may not reach the assets of the trust by electing against the Will, whether or not the trustor lived in Delaware. To respond to Rev. Proc. 2005-24, the Delaware Act made this explicit. Thus, the final sentence of the pertinent section of the Delaware Act provides that a Delaware APT may not be reached to satisfy a claim for an elective share.[52] Although the IRS deferred the effective date of the revenue procedure in 2006,[53] it alerted taxpayers in 2008[54] and again in 2014[55] that it has not forgotten the issue by requesting comments on procedures to ensure that elective rights do not affect assets for which a charitable deduction was taken on the creation of a CRT. A client therefore should consider structuring a CRT as a Delaware APT so that the trust's assets will be protected in case the IRS issues similar restrictions in the future or in case a surviving spouse actually elects against the Will.

The trustor of a CRT that is structured as a Delaware APT may release a retained interest in favor of charity.[56]

In appropriate circumstances (e.g., if a trustor wants to make a completed gift and to exclude assets from the gross estate), it is worth exploring whether a current or former spouse is willing to waive this provision.

(4) Tort Claims

A person who suffers death, personal injury, or property damage for which the trustor is liable may reach trust assets if the death, personal injury, or property damage occurred prior to the transfer of the assets to the Delaware APT.[57]

4. Consequences if a Delaware APT Is Defeated

In any of the above circumstances in which a Delaware APT is defeated (and after payment of the trustee's costs as described below), the assets of the trust can be reached only to the extent necessary to pay that creditor's claim together with related costs, including attorneys' fees allowed by the court.[58] Thus, if a trustor is confronted by multiple creditors with the type of claim that is permitted to be pursued, each creditor must bring a separate action for avoidance.

Unless a creditor proves by clear and convincing evidence that a trustee acted in bad faith in accepting and administering the trust, that trustee may use trust assets to pay its costs of litigating the claim before satisfying the claim and related costs.[59] A trustee's mere acceptance of the trust is presumed not to be in bad faith.[60] Similarly, a beneficiary who received a distribution before a creditor brings a successful suit to defeat a Delaware APT may keep the distribution unless the creditor proves by clear and convincing evidence (by a preponderance of the evidence if the beneficiary is the trustor) that he or she acted in bad faith.[61]

In Delaware, "the Delaware Fraudulent Transfer Act does not create a cause of action for aiding and abetting, or conspiring to commit, a fraudulent transfer."[62] Nevertheless, the Delaware Act provides that the creation of a Delaware APT will not be treated as fraudulent or otherwise contrary to law for purposes of any action against any trustee, adviser, or protector acting under a trust instrument or against any attorney or other professional adviser involved in establishing the trust.[63]

5. Moving Trusts to Delaware

A trustee may create a Delaware APT either by establishing a Delaware APT or by transferring to Delaware a trust that meets the requirements of the Delaware Act,[64] except that the trust does not have to provide that Delaware law governs.[65] If a trustee of an irrevocable spendthrift trust creates a Delaware APT, the time that the trust existed before it is moved to Delaware counts toward the four-year period for pursuing post-transfer claims against the trust.[66] Thus, it might be possible for the trustee of an existing onshore or offshore trust to create a Delaware APT that cannot be defeated under the Delaware Act.

Under the Delaware Act, a trustor may have a lifetime or testamentary power to appoint to anyone except the trustor, the trustor's estate, the trustor's creditors, or creditors of the trustor's estate.[67] An existing trust will not qualify under the Delaware Act if it gives the trustor an inter vivos or testamentary general power of appointment. The existing trustee may, with the written consent of the trustor, bring such a trust into conformity with the Delaware Act by deleting the excessive power.[68]

6. Infrastructure

An important factor in evaluating the effectiveness of Delaware APTs is Delaware's longstanding tradition of leadership in the financial services industry. The original version of the Delaware Act was written and enacted over a three-month period in 1997, and amendments were drafted and enacted in short order.

Delaware has been a trust-friendly jurisdiction for generations. As evidence of this, a 2006 empirical study, which analyzed pertinent data beginning in 1969, found that "Delaware was clearly attracting trust funds from out of state in the early 1970s"[69] and that "[i]n 1986 Delaware had a disproportionate share of the nation's trust funds."[70]

The Chancellor and Vice Chancellors of the Delaware Court of Chancery (which the *Wall Street Journal* described in 2014 as "the nation's most influential business court")[71] and the Justices of the Delaware Supreme Court (the courts that handle corporate matters and that would handle challenges to APTs in Delaware) are not elected. Instead, the Delaware Constitution requires that they be appointed by the Governor with the consent of a majority of the members of the Senate and that all Delaware judges come as equally as possible from the two major political parties.[72] For this and other reasons, Delaware's liability system was ranked as the best in the country in a 2012 U.S. Chamber of Commerce study.[73]

In *TrustCo Bank v. Mathews*, Vice Chancellor Parsons of the Delaware Court of Chancery held that creditors' fraudulent transfer claims regarding transfers to Delaware APTs were time-barred.[74] In other contexts, Delaware judges have demonstrated a willingness to enforce Delaware statutes in difficult cases, similar to those that might arise if creditors were to challenge Delaware APTs.

The following excerpt from the opinion of Vice Chancellor Berger in *Gibson v. Speegle* is representative:

> In the absence of a statute, I would not hesitate to…allow Aetna's claim. I am not at all comfortable with the fact that Virginia Barwick, by use of a spendthrift trust, assisted her son in avoiding his obligation to pay for his crimes. [He was indicted on eight counts of arson, burglary, and criminal mischief and pled guilty to the lesser included offenses of criminal trespass in the first degree, arson in the third degree, and criminal mischief.] However, it is not the Court's function to write the law but only to interpret it. The statute enacted by the General Assembly contains no exceptions.… The proposed statute, which contained an exception for tort claimants…was available to the General Assembly in 1959 when § 3536 was amended. The fact that such a modification was not enacted leaves me no choice but to conclude that the General Assembly intended § 3536 to [be] an 'unrestrained' form of spendthrift provision. As a result, I reluctantly conclude that Aetna is a creditor within the meaning of § 3536 and its proof of claim must be denied.[75]

In another difficult case, *Delaware Trust Co. v. Partial*, Chancellor Allen of the Delaware Court of Chancery said:

> The policy of the legislature with respect to the seizure or garnishment of funds held by Delaware banks is clear. I cannot conclude that that policy may be ignored by the simple expedient of denominating the writ sought as one of injunction rather than one of garnishment. Therefore, I conclude that irrespective of the strong probability of merit shown by the complaint, it would be inappropriate for this Court to grant the remedy now sought insofar as it seeks to restrain *pendente lite* the disposition by the Wilmington Trust Company of funds held by it.[76]

7. Tenancy-by-the-Entireties Property Contributed to Trust

Several states recognize tenancies by the entireties in real and personal property.[77] In 2007, Vice Chancellor Parsons of the Delaware Court of Chancery described the rules for tenancy by the entireties in Delaware real property as follows:

> In Delaware, a husband and wife generally hold title to real property in a tenancy by the entirety. Consequently, neither interest can be sold, attached, or liened except by the joint act of both spouses. Specifically, a judgment against the husband cannot be executed against a property interest he holds in a tenancy by the entirety.[78]

A tenancy by the entireties also may be created in Delaware personal property.[79]

From an estate planning standpoint, working with tenancy-by-the-entireties property is problematic because, "[w]hen assets held as [tenants by entirety ("TBE")] are transferred to a trust in which only one party maintains control, the terms of the trust eliminate any TBE protection."[80]

Once the property's tenancy by entireties character is destroyed, it cannot later be restored:

> [E]ven if the trust were revoked, the Debtor provides no legal support for the assertion that the property will return to the Debtor and his wife as tenants by the entirety, and the Court can find nothing that would support such an assertion. To the contrary, the initial transfer of the property to the trust thirteen years ago terminated the tenancy by the entirety. While it is true that one spouse acting alone cannot terminate a tenancy by the entirety without the consent of the other, nothing prevents such termination by the two acting together. In the present case, when the Debtor and his wife together transferred the property to the trust, to be controlled by the Debtor alone, they terminated the joint ownership and control that is a requirement of a tenancy by the entirety. Such a tenancy does not renew itself automatically in the future. For these reasons, the Debtor's argument that creditors will only be able to reach his fifty percent interest in the property is irrelevant.[81]

In 2010, Delaware enacted a statute that allows tenancy-by-the-entireties property contributed to a revocable trust to retain its character and thereby retain its ability to protect the property from a spouse's separate creditors.[82] The statute, as amended in 2011 and 2013,[83] provides as follows:

> Where spouses make a contribution of property to 1 or more trusts, each of which is revocable by either or both of them, and, immediately before such contribution, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, the sole remedy available to the creditor with respect to such trust property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.[84]

The Delaware Act provides one more level of protection for tenancy-by-the-entireties property added to a Delaware APT. Under the Delaware Act, tenancy-by-the-entireties property transferred to a Delaware APT retains its character until the death of the first spouse, and, if the trust is set aside (e.g., as a fraudulent transfer or a sham), the property retains its traditional protection from creditors.[85] The current provision says:

> Where spouses make a qualified disposition of property to 1 or more trusts and, immediately before such qualified disposition, such property or any part thereof or any accumulation thereto was, pursuant to applicable law, owned by them as tenants by the entireties, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to such trust property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.[86]

In addition, the Delaware Act allows multiple transferors to contribute undivided interests to a Delaware APT as follows:

> "Qualified disposition" means a disposition by or from a transferor (or multiple transferors in the case of property in which each such transferor owns an undivided interest) to 1 or more trustees, at least 1 of which is a qualified trustee, with or without consideration, by means of a trust instrument.[87]

The conflict-of-laws issues relating to the funding of a Delaware APT with tenancy-by-the-entireties property are comparable to those for Delaware APTs. In short, Delaware and non-Delaware residents should be able to take advantage of this technique for tenancies in personal property, but its effectiveness for tenancies in non-Delaware real property is questionable.[88]

8. Lifetime QTIP and Other Trusts

a. The Delaware Statute

Thanks to recent federal tax legislation, the exemptions from the federal estate tax, gift tax, and generation-skipping transfer ("GST") tax have jumped to $5,430,000 per individual for 2015.[89] This might cause wealthier spouses to create inter vivos QTIP trusts for less wealthy spouses to enable the latter to use their estate and GST exemptions in whole or in part. One concern with this strategy is that the trust might be treated as self-settled if the donor spouse will benefit from trust assets if he or she survives the donee spouse, thereby producing adverse tax and asset-protection results. Long ago, the Treasury Department issued regulations specifying that trust assets would not be included in a donor spouse's gross estate under IRC § 2036 or § 2038 even if the donor spouse survives the donee spouse.[90] However, whether creditors could reach trust assets under state law remained unresolved for many years.

In 2009, Delaware amended its spendthrift trust statute to provide that an inter vivos marital-deduction trust generally will not be treated as self-settled even though the donor spouse might benefit from trust assets by surviving the donee spouse.[91] In 2014, the statute was expanded to cover lifetime credit-shelter trusts and other lifetime trusts.[92] The protection now extends to:

> A beneficial interest that is contingent upon surviving the trustor's spouse such as, but not limited to, an interest in an inter vivos marital deduction trust in which the interest of the trustor's spouse is treated as qualified terminable interest property under § 2523(f) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(f)), as amended, an interest in an inter vivos marital deduction trust that is treated as a general power of appointment trust for which a marital deduction would be allowed under § 2523(a) and (e) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(a) and (e)), as amended, and an interest in an inter vivos trust commonly known as a "credit shelter trust" that used all or a portion of the trustor's unified credit under § 2505 of the Internal Revenue Code (26 U.S.C. § 2505), as amended.[93]

b. The Supercharged Credit Shelter Trust℠

In 2007, Mitchell Gans, Jonathan Blattmachr, and Diana Zeydel introduced the concept of the Supercharged Credit Shelter Trust℠,[94] under which a donor spouse creates an inter vivos QTIP trust for the donee spouse and a credit-shelter trust for the donor spouse. The credit shelter trust is "supercharged" because it is treated as a grantor trust with respect to the donor spouse for federal income-tax purposes.[95] Treasury Regulation § 25.2523(f)-1(f) allays any IRC §§ 2036 and 2038 concerns, but is silent regarding IRC § 2041.[96] Accordingly, the designers of the Supercharged Credit Shelter Trust℠ recommend subjecting distributions to an ascertainable standard and creating the trust in a state that recognizes self-settled trusts.[97] Attorneys creating such trusts for clients also should consider the Delaware spendthrift trust statute, which was passed subsequent to the introduction of the Supercharged Credit Shelter Trust℠ concept, as an alternative to a self-settled trust because it is a straightforward solution and presents far fewer unresolved issues than the Delaware APT.

IV. FLP/LLC Laws

A good trust jurisdiction should have favorable FLP and LLC statutes. Specifically, those statutes should provide that a charging order is a creditor's sole remedy and that other remedies, particularly foreclosure, are not available. Delaware meets these requirements (including for single-member LLCs).[98] But Connecticut[99] and New York[100] allow foreclosure and other remedies to creditors. New Jersey satisfies the requirements for LLCs[101] but does not prohibit foreclosure of FLP interests.[102]

Because there has been some confusion over the status of FLPs and LLCs in Delaware, the rules are summarized below. Not only do Delaware's FLP and LLC statutes stipulate that a charging order is a creditor's sole remedy and that other remedies, including foreclosure, are unavailable, but Delaware and non-Delaware case law also confirm these results.

The pertinent provision of Delaware's LLC statute provides that:

> The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest and attachment, garnishment, foreclosure or other legal or equitable remedies are not available to the judgment creditor, whether the

limited liability company has 1 member or more than 1 member.[103]

The synopsis to the 2005 legislation that enacted the above provision describes the law in Delaware as follows:

> Sections 9, 10, 11, 12, 13, 14 and 15. These sections amend Section 18-703 to clarify the nature of a charging order and provide that a charging order is the sole method by which a judgment creditor may satisfy a judgment out of the limited liability company interest of a member or a member's assignee. Attachment, garnishment, foreclosure or like remedies are not available to the judgment creditor and a judgment creditor does not have any right to become or to exercise any rights or powers of a member (other than the right to receive the distribution or distributions to which the member would otherwise have been entitled, to the extent charged).[104]

Delaware's FLP statute[105] and the synopsis to the 2005 legislation that updated it[106] contain comparable language.

In 2010, Judge Sleet of the U.S. District Court for the District of Delaware wrote: "Because Delaware law does not permit foreclosure on charging orders, Bay Guardian would be unable to foreclose against New Times and the entities."[107]

In the same year, Judge Ericksen of the United States District Court for the District of Minnesota wrote: "[A] charging order is the exclusive remedy under Delaware law by which a judgment creditor may satisfy a judgment out of a member's interest in a limited liability company."[108]

If a resident of State 1 creates an LLC or FLP of personal property in State 2, which state's laws apply to determine whether a creditor may reach a member's or partner's interest? A 2011 article suggests that the laws of State 2 should be used.[109] The article states:

> [I]f an individual resides in one state but has a personal property interest in a limited partnership or LLC located in another state, he or she may be held to the law of the state where the entity is located. The courts have consistently leaned toward finding that the controlling law with respect to the entity is the state law where the entity was formed.[110]

Nevertheless, a federal district court in Florida held in *Wells Fargo Bank, N.A. v. Barber* that Florida law would determine whether a creditor could reach a Florida resident's interest in a single-member Nevis LLC.[111]

V. Conclusion

New York testators and settlors often may benefit by creating trusts and other entities in Connecticut, New Jersey, or Delaware. Besides the three factors featured in this article, potential benefits include:

- Deferring the disclosure of information until beneficiaries achieve "responsible" ages
- Lengthening the time that assets may remain in trust
- Accessing more flexible procedures for updating the terms of trusts (e.g., via merger or nonjudicial settlement agreement)
- Resolving challenges immediately rather than through expensive and divisive court proceedings following death
- Reducing state income taxes on accumulated ordinary income and capital gains of nongrantor trusts
- Achieving greater assurance that testators' and settlors' intent will be respected regarding the nondiversification of investments and other trust provisions
- Obtaining access to more flexible unitrust and power to adjust statutes
- Getting greater protection for beneficiaries' interests in traditional third-party trusts
- Accessing a more congenial trust infrastructure

Having worked for a Delaware trust company for over 30 years, I can offer assurance that a New York attorney can help create trusts elsewhere without losing the client. And, to accomplish all of this, one need not venture very far from home.

Endnotes

1. For in-depth coverage of New York income-tax planning for trusts, *see* Nenno, *Minimizing New York Income Taxes on Trusts After the 2014-2015 Budget Bill*, 47 NYSBA Tr. & Est. L. Sec. Newsltr. 4 (Winter 2014).
2. *In re Estate of Rubin* 143 Misc. 2d 303, 540 N.Y.S.2d 944 (Sur. Ct., Nassau Co. 1989), *aff'd*, 172 A.D.2d 841, 570 N.Y.S.2d 996 (2d Dep't 1991); *In re Rivas*, 30 Misc. 3d 1207(A), 958 N.Y.S.2d 648 (Sur. Ct., Monroe Co. 2011), *aff'd*, 93 A.D.3d 1233, 939 N.Y.S.2d 918 (4th Dep't 2012).
3. 143 Misc. 2d 303, 540 N.Y.S.2d 944 (Sur. Ct., Nassau Co. 1989).
4. *In re Estate of Rubin*, 143 Misc. 2d at 308.
5. *In re Rivas*, 30 Misc. 3d 1207(A), 958 N.Y.S.2d 648 (Sur. Ct., Monroe Co. 2011).

6. *Id*. at 18.
7. Del. Code Ann. tit. 12, § 3313.
8. Del. Code Ann. tit. 12, § 3313(a), (b), (d), (e), (f), as amended by DE Legis 153 (2015), 2015 Delaware Laws Ch. 153 (H.B. 164).
9. *Duemler v. Wilmington Trust Co.*, 2004 Del. Ch. Lexis 206 (Del. Ch. 2004).
10. *Id.* at 1–3.
11. EPTL 7-3.1(a).
12. CPLR 5205(c)(1).
13. NJSA § 3B:11-1(a).
14. NJSA § 25:2-1(a).
15. Del. Code Ann. tit. 12, §§ 3570–3576, 71 Del. Laws 159 (1997).
16. 71 Del. Laws 159 (1997); 71 Del. Laws 254 (1998); 71 Del. Laws 343 (1998); 72 Del. Laws 59 (1999); 72 Del. Laws 195 (1999); 72 Del. Laws 341 (2000); 73 Del. Laws 378 (2002); 74 Del. Laws 100 (2003); 75 Del. Laws 97 (2005); 75 Del. Laws 301 (2006); 76 Del. Laws 90 (2007); 76 Del. Laws 254 (2008); 77 Del. Laws 98 (2009); 77 Del. Laws 330 (2010); 78 Del. Laws 117 (2011); 79 Del. Laws 198 (2014); 80 Del. Laws 153 (2015). The current Delaware Act is available at http://www.delcode.delaware.gov/title12/c035/sc06/index.shtml (last visited Aug. 17, 2015).
17. Del. Code Ann. tit. 12, § 3570(11)(a)–(c).
18. Del. Code Ann. tit. 12, § 3570(8)(a).
19. Del. Code Ann. tit. 12, § 3570(8)(b).
20. Del. Code Ann. tit. 12, § 3570(8)(e).
21. Del. Code Ann. tit. 12, § 3572(g).
22. Del. Code Ann. tit. 12, § 3570(8)(f).
23. Del. Code Ann. tit. 12, § 3570(8)(c).
24. Del. Code Ann. tit. 12, §§ 3570(8)(d), 3570(11)(b), as amended by 80 Del. Laws 153, § 4 (2015).
25. Del. Code Ann. tit. 12, § 3570(11)(b).
26. Rev. Rul. 2004-64, 2004-2 C.B. 7 (July 6, 2004).
27. *Id*. at 9.
28. Del. Code Ann. tit. 12, § 3570(11)(b)(3), (6).
29. *Id.* § 3570(11)(b)(9).
30. *Id.* § 3570(11)(b)(9).
31. *Id.* § 3570(8)(d).
32. *Id.* § 3571.
33. *Id.*
34. *Id.* § 3570(11)(c); *see also* 11 USC § 541(c)(2).
35. Del. Code Ann. tit. 12, § 3572(a); Del. Code Ann. tit. 6, §§ 1301–1311.
36. Del. Code Ann. tit. 12, § 3572(a).
37. *Id.* § 3572(b)(1).
38. *Id*.; Del. Code Ann. tit. 6, § 1309.
39. Del. Code Ann. tit. 12, § 3572(f)(1).
40. *Id*. § 3572(f)(2).
41. *Id.* § 3572(a), (b)(2).
42. *Id.* § 3572(f)(1).
43. *Id.* § 3572(f)(2).
44. *Id.* § 3573(1).
45. *Id.* § 3570(9).
46. Rev. Proc. 2005-16 C.B. 909 (Apr. 18, 2005).
47. UPC § 2-205(2)(A) (2010).
48. *See* NJSA § 3B:8-3(a).
49. Del. Code Ann. tit. 12, §§ 901(a), 908(b).
50. *Id.* § 901(b).
51. *Id.* § 3573(1).
52. *Id.* § 3573.
53. Notice 2006-15, 2006-1 C.B. 501 (Feb. 21, 2006).
54. 2008 Tax Notes Today 93-33 (May 13, 2008).
55. 2014 Tax Notes Today 67-32 (Apr. 8, 2014).
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Richard W. Nenno is a Senior Managing Director and Trust Counsel in Wealth Advisory Services, Wilmington Trust Company, Wilmington, Delaware. He is a nationally known speaker and author on a variety of estate-planning topics.

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After *Obergefell*: A Practitioner's Guide to Estate Administration Issues for the Surviving Spouse

By Thomas Sciacca

Introduction

New York State residents have enjoyed the benefits and protections of marriage equality since 2011. Since that time, the United States Supreme Court has issued two rulings concerning married LGBT New Yorkers: first, a 2013 ruling requiring the Federal government to afford all married individuals all the rights and protections of Federal law;[1] second, a 2015 ruling deeming all remaining state same-sex marriage bans unconstitutional and requiring interstate recognition of same-sex marriages nationwide.[2] As a result of legislative action in New York and Court rulings in Washington, one can now remove all doubt that a surviving LGBT spouse in New York enjoys all protections afforded under New York and Federal laws.

For decades, those of us in the Trusts and Estates bar who represented the surviving member of a same-sex couple would routinely have heartbreaking conversations with our clients about the upcoming difficulties they would need to endure in Surrogate's Court and when filing tax returns. This is no longer the case. As a result of decades of activism, Trusts and Estates attorneys may now present a grieving surviving spouse with some good news.

While many articles exist that endeavor to provide the general public with information about these legal developments, authors have written little by way of hands-on guidance to New York attorneys. This article intends to do just that, calling one's attention to where issues may arise and potential resolution of those issues.

Finally, please remember that not every same-sex couple marries. Many people, regardless of sexual orientation, make a conscious decision not to marry for a variety of reasons. For the LGBT community, many couples have been denied relationship recognition for so long that they have simply learned to survive without it by creating advance directives and trusts, obviating the apparent need to immediately go out and marry once such rights were afforded to them. Like many couples of any sexual orientation, some couples have simply deferred getting married; unfortunately, a sudden death or loss of capacity may close the door to this possibility.

Routine Issues When Representing a Surviving Spouse

Trusts and Estates attorneys know that every new estate administration client is different; and there is often no such thing as a "routine" or "standard" administration. However, there are several issues that present themselves frequently, and are therefore addressed herein.

"As a result of legislative action in New York and Court rulings in Washington, one can now remove all doubt that a surviving LGBT spouse in New York enjoys all protections afforded under New York and Federal laws."

Disposition of Remains

All surviving spouses have the right to direct the disposition of a deceased spouse's remains, including decisions as to whether to arrange for a burial or a cremation, organ and cadaver donation, and whether there will be a religious service, a non-religious service, or no service at all.[3] Since 2011, a death certificate may indicate that the decedent was married at the time of death, and may list the name of the same-sex surviving spouse as the surviving spouse. Listing the surviving spouse on the death certificate as a surviving spouse, rather than as a "domestic partner" or a "friend," will be helpful when collecting retirement accounts and starting later Surrogate's Court proceedings (both discussed *infra*), and will obviate the need to obtain an amended death certificate, a process that could stall the estate administration process significantly.

For the surviving partner in a relationship not formalized by marriage, other options may exist. Since 2006, New Yorkers in domestic partnerships have enjoyed identical rights concerning disposition of remains as married couples.[4] Those who have taken affirmative steps to register their relationship with a county or municipality enjoy the immediate recognition of that relationship,[5] while a surviving unregistered domestic partner may need to provide proof of his or her relationship to enjoy such rights.[6] For those

couples who make an affirmative decision not to marry, registering their relationship may thwart any claims from the decedent's relatives that the relationship was as platonic roommates, thereby preventing a costly and emotional Surrogate's Court proceeding seeking to enjoin a burial or cremation when different parties try to exert their rights to different ends.

Surrogate's Court Proceedings

At the outset, the most marked difference when representing a surviving spouse as opposed to a surviving domestic partner is that the client now classifies as a distributee of the decedent.[7] This offers tangible benefits regardless of whether the decedent died intestate (without a Will) or testate (with a Will). If the decedent died intestate, this means that the client has priority to receive letters of administration and serve as the administrator of the estate.[8] This also means that the client is entitled to a distributive share of the estate, which is equal to at least half (if not the entire) estate, depending on whether or not the decedent left surviving descendants.[9] If the decedent died testate, the surviving-spouse client will not need to make service of process upon the decedent's parents, siblings, nieces, nephews, or more remotely related blood relatives, unless they are listed as beneficiaries in another Will on file with the Surrogate's Court.[10] This means that the client will no longer need to list these relatives in ¶ 6 of the Probate Petition,[11] nor will the client need to serve a citation upon them.[12] Since these relatives are no longer distributees of the estate, they are no longer adversely affected by the Will the client is propounding for probate, and, therefore, they lack standing to file objections to probate.[13] This also obviates the need for the client to hire a genealogist to identify remote next-of-kin unknown to the client, and also removes the need for a Guardian Ad Litem, the Public Administrator, or the New York State Attorney General to participate in the probate proceeding. Unfortunately, no such benefit exists to benefit a surviving unmarried domestic partner.

It is worth noting that, where the decedent's sole distributee is a surviving spouse, he or she may still need to provide the Surrogate's Court with a statement from a disinterested party that no other distributees exist.[14] Some Courts will require a petitioner in a probate or administration proceeding to bring in an original marriage certificate when filing the petition, which the court usually photocopies and returns to counsel of record.

When a decedent was married and subsequently divorced, an attorney must remember that the divorce automatically revokes any and all bequests to the former spouse and any and all beneficiary designations to the former spouse (unless otherwise specified in the Will).[15] Prior to marriage equality, many same-sex couples created estate plans that provided extensively or exclusively for each other. Unlike their heterosexual counterparts, the end of a same-sex relationship did not automatically terminate the beneficial interest. Therefore, it is not uncommon for a client to bring in a Will that names a former partner of the deceased, necessitating a construction proceeding in the Surrogate's Court. The likelihood of success in such a proceeding is murkier than if the decedent had divorced.

For estates with few probate assets, a surviving spouse client may completely avoid the need for any Surrogate's Court proceeding at all. Without seeking any judicial intervention, a surviving spouse is automatically entitled to household items and animals valued in excess of $40,000, a motor vehicle worth up to $25,000, and cash and securities worth up to $25,000.[16] Many financial institutions provide forms or sample affidavits attorneys can use when assisting a surviving spouse in claiming funds without administration, and the Department of Motor Vehicles similarly provides a form the surviving spouse can submit to transfer title absent a Surrogate's Court proceeding.[17]

Moreover, a surviving spouse may collect $30,000 from a financial institution upon the death of a creditor and $15,000 thirty days thereafter, without the intervention of the Court.[18] For a surviving unmarried domestic partner, he or she may make a similar claim more than sixty days after the death of the Decedent if he or she is a funeral creditor owed up to $5,000.[19] In practice, very few banks are aware of these statutory provisions available to either a surviving spouse or a surviving unmarried domestic partner, and sometimes a client may make a more cost-effective decision to start a voluntary administration proceeding pursuant to Article 13 of the Surrogate's Court Procedure Act than to pay hourly attorneys' fees to try to deal with a bank's legal department.

Finally, it is important to remember that any benefit a surviving spouse enjoys in the Surrogate's Court is contingent upon his or her not being disqualified from such benefits due to actions taken prior to the death of the decedent.[20]

Income Taxes and Estate Taxes

A surviving spouse is entitled to file a joint income tax return with the decedent in the year of his or her death, and can also file an income tax return for the decedent individually even without petitioning the Surrogate's Court for letters testamentary or letters of administration.[21] No such benefit is afforded to a surviving unmarried domestic partner, who never enjoyed the convenience of filing a joint income tax return with the decedent.

When named as a beneficiary under a qualifying retirement account, a surviving spouse may place the funds into a Rollover IRA, which results in no realized taxable income to the surviving spouse until he or she

is required to take distributions of same—generally at age 70.5.[22] This income tax benefit is not afforded to surviving unmarried domestic partners, who may place the funds into an Inherited IRA to defer the realization of taxable income, but must immediately begin taking required minimum distributions and reporting income in those amounts.[23] However, practitioners should be wary when dealing with retirement accounts that name beneficiaries other than a surviving spouse (if one exists), as the surviving spouse may become the default beneficiary unless he or she has expressly waived rights to the funds.[24]

On the estate tax side, the largest benefit is the unlimited marital deduction from estate taxes, which deducts any amount the surviving spouse receives outright from the gross taxable estate.[25] Therefore, a client who receives his or her deceased spouse's entire estate will pay zero estate taxes, regardless of the amount of the inheritance. No similar provision exists for a surviving unmarried domestic partner.

Finally, it is important to note that, since January 1, 2011, a surviving spouse may inherit the unused portion of the decedent's Federal estate tax credit (the "Deceased Spousal Unused Exclusion Amount"), which is automatic provided that the executor of the Decedent's Estate files a timely Federal estate tax return.[26] For example, a decedent who dies in 2015 may pass $5.43 million to any beneficiary free of estate taxes, assuming he or she has not made any taxable lifetime gifts. A decedent who leaves his or her entire estate to a surviving spouse receives no benefit from the exclusion amount, as all assets payable to the surviving spouse do not generate estate tax liability. By allowing the surviving spouse to inherit the unused portion of the exclusion amount, the surviving spouse will enjoy an increased exclusion amount upon their eventual death, greatly reducing or even eliminating estate tax liability. Unfortunately, no such benefit exists for unmarried surviving domestic partners.[27] A surviving spouse receives such a significant benefit in inheriting a decedent's unused exemption amount that attorneys should strongly consider routinely filing a Federal estate tax return whenever a decedent is survived by a surviving spouse, regardless of whether the gross taxable estate even approaches the filing requirements.

Conclusion

In conclusion, it is apparent that the savvy practitioner may save his or her client significant cost and delays if well versed with the provisions of this article.

Endnotes

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2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
3. N.Y. Public Health Law §§ 4201(2)(a)(*ii*); 4301(2)(a)(c) (PHL).
4. PHL §§ 4201(2)(a)(*ii-a*); 4301(2)(a)(c).
5. PHL §§ 4201(1)(c)(*i*); 4301(4)(a).
6. PHL §§ 4201(2)(a)(*ii-iii*); 4301(4)(b-c).
7. N.Y. Surrogate's Court Procedure Act 103(14) (SCPA) ; N.Y. Estates Powers & Trusts Law 4-1.1(a)(1-2) (EPTL).
8. SCPA 1001(1)(a).
9. EPTL 4-1.1(a)(1-2).
10. SCPA 1403(1)(a),(c).
11. SCPA 1402(2).
12. SCPA 1403(1)(a),(c).
13. SCPA 1410.
14. 22 NYCRR § 207.16(d).
15. EPTL 5-1.4.
16. EPTL 5-3.1(a).
17. Form MV-349.1, *Affidavit for Transfer of Motor Vehicle*, available online at http://dmv.ny.gov/forms/mv3491.pdf.
18. SCPA 1310(d)(2-3).
19. SCPA 1310(d)(4).
20. EPTL 5-1.2(a).
21. Internal Revenue Service Publication 559, *Survivors, Executors, and Administrators*, available online at http://www.irs.gov/publications/p559/index.html.
22. 26 U.S.C. § 401(a)(9)(B)(*iv*).
23. 26 U.S.C. § 401(a)(9)(B)(*iii*).
24. Discussed in further detail on the Department of Labor's FAQs about Retirement Plans and ERISA, available online at http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html.
25. 26 U.S.C. § 2056. Some exceptions exist for non-citizen surviving spouses. *See* 26 U.S.C. § 2056(d).
26. 26 U.S.C. § 2010(c)(4-5).
27. A surviving domestic partner may also face some hurdles when filing an estate tax return. For example, any beneficiary other than a spouse (a domestic partner is included in this class) who jointly owns assets with the Decedent, the Internal Revenue Code contains a rebuttable presumption that the entire value of the asset is subject to taxation in the Decedent's Estate. *See* 26 U.S.C. § 2040(a). When coupled with the loss of the marital deduction, a surviving unmarried domestic partner who is unable to rebut the presumption may face a staggering estate tax liability, necessitating the quick liquidation of assets to avoid late payment penalties.

Thomas Sciacca is Member/Manager of the Law Offices of Thomas Sciacca, PLLC (www.sciaccalaw.com). All information is accurate as of August 2015. Readers may contact the author at tom@sciaccalaw.com.

Cross-Border Estate Planning—The Israeli Angle

By Alon Kaplan and Lyat Eyal

Preamble

Cross-border estate planning is challenging in every jurisdiction and raises many legal issues. Adding to the uncertainties is the EU Succession Regulation effective as of August 17, 2015, creating additional planning hurdles. This article discusses a number of the main points to consider from the Israeli perspective. It is not intended to cover all aspects of planning and/or implementation.[1]

Israel is a country of immigration and emigration. In the global environment, individuals may reside in one country with their family members while maintaining business activities in other jurisdictions, thereby owning assets in a number of countries. Individuals also maintain multiple residences and domiciles (where applicable) or jurisdictions of residence where they spend time. Some high net worth families may also own assets in a number of jurisdictions irrespective of personal status in these countries. These are just a few examples of instances requiring careful consideration of the succession rules in each jurisdiction and planning accordingly before it is too late. The Succession Law 1965 and the Succession Regulations 1998 govern succession matters in Israel. Cross-border matters may require the review of additional legislation such as marital laws and tax laws as well as court precedents.

Probate Proceedings

Israel does not recognize foreign probate court orders. A petition for an inheritance or probate order, as the case may be, must be filed with the competent authority in Israel to obtain authority to distribute estate assets located in Israel. The procedure is required regardless of the place of residence, domicile, citizenship of the deceased or the situs of other assets of the estate. The procedure involves public notices, requires original duly authenticated documentation, legal opinions, and takes approximately one year to complete.

Jurisdiction

The Succession Law[2] provides that an Israeli court has jurisdiction to hear matters involving the inheritance of an individual residing in Israel at the time of his death or an individual who owned assets in Israel.

For the purpose of the Succession Law, one's residence is defined as the place of the individual's center of life. While the center of life is not defined in the Succession Law, it is defined by the Tax Ordinance 1961. Israeli law creates a rebuttable presumption that an individual is an Israeli resident if he is present in Israel for 183 days per year or 30 days in the current tax year and 425 days cumulatively during the previous two years. Additionally, an individual is an Israeli resident if his "center of life" is deemed to be in Israel. The center of life is a factual determination taking into account facts and circumstances such as: (i) the place of the individual's permanent home; (ii) the place of residence of family members; (iii) the individual's place of business or his place of employment; (iv) the individual's place of economic and social interests and activities; (v) the place in which the individual is active in various organizations. It has been established that one's center of life is not determined by the individual's intention at any given time but rather the place to which the individual has the most factual ties.[3]

The case of *Mastora Kahana v. Meir Kahana*[4] presented complicated familial and multi-jurisdictional issues. There, the decedent had immigrated to Israel from France in 1962. The decedent died in Israel in 1979. The decedent had been married 7 times and fathered 27 children. He owned assets in Israel and the then-current wife and their mutual children resided in Israel. He was also survived by family members in France. Decedent's Last Will and Testament bequeathed all assets to his then current wife, Mastora, who submitted the Will to probate in Israel. One of Decedent's sons objected to the probate proceedings in Israel on the grounds that the Israeli court did not have jurisdiction over the estate's assets in France. The Israeli Court ruled that once Section 136 of the Succession Law grants Israeli courts with jurisdiction over probate matters, such jurisdiction extends to the worldwide estate, and is not limited to assets located in Israel. Nonetheless, the governing law to be followed by the Israeli court may be foreign law, as detailed below.

Governing Law

As a general rule, Israeli Law provides that an estate is subject to the laws of the jurisdiction in which a testator resides at the time of the testator's death.[5] Unlike laws in other jurisdictions, the Succession Law does not impose forced heirship rules. As stated above, residence under Section 137 of the Succession Laws is determined by the "center of life" test de-

scribed herein, and not simply by the presence of the individual in Israel.

Notwithstanding where the laws of the decedent's country of residence refer to the laws of another foreign jurisdiction, the reference will not be recognized and the laws of the decedent's country of residence will be followed by the Israeli probate court. However, where the laws of the decedent's country of residence refer to Israeli laws, the Israeli probate court will rule based on Israeli laws.

The Israeli Supreme Court, in the decision of *Attorney General-General Guardian v. Anonymous,*[6] held that Section 137 establishes the choice of law relating to succession matters in Israel. Holding that the aforementioned provision established the bond which is central to the choice of law, the place of residence of the testator.

In *General Guardian v. Anonymous*, the Supreme Court considered whether a testator may choose the law governing her last will in order to avoid forced heirship provisions in her country of residence. The case concerned a last will validly executed in Israel by Ms. Klein, a citizen of Israel and the Netherlands residing in the Netherlands at the time of her death. The Israeli will bequeathed Ms. Klein's assets located in Israel to two of her three daughters. Based on the Succession Law, the Supreme Court held that the Decedent's estate was to be distributed in accordance with the laws of the Netherlands, the Decedent's place of residence at the time of her death. As the laws of the Netherlands include forced heirship provisions, the Supreme Court found that said laws would be considered by the Israeli probate court and would govern the distribution of the Decedent's estate throughout the probate proceedings in Israel.

The result was that assets located in Israel were bequeathed subject to laws of a foreign jurisdiction where the Decedent's place of residence was not Israel at the time of death.

In a more recent case, *Anonymous v. Anonymous*,[7] the Tel Aviv Family Court held similarly although to a different set of facts. The case concerned a Decedent who in 2010 executed a last will and testament bequeathing her estate to her son. The Decedent passed away a few days after executing the Will. The Decedent's husband objected to the admission of the Will on the grounds of undue influence and incapacity.

During the probate proceedings, the Decedent's husband also commenced legal proceedings in the Family Court seeking an order confirming his entitlement to the marital elective share under New York law. The Decedent's husband asserted that the spouses resided in New York, that New York was their center of life. These proceedings were added to proceedings also commenced in New York where the husband was appointed executor of the Decedent's estate.

The Family Court in Tel Aviv rejected the husband's claim for the marital elective share under New York law on the grounds that the husband did not raise an objection to the probate based on the Decedent's residence but had filed a separate action.

Although this Court based its rejection of the claim on a lack of standing, generally if the Court decided the ultimate issue the determination would apply the Decedent's center of life test in arriving at a decision.

Once jurisdiction is established in accordance with Section 136, the Israeli Court, relying on Sections 137 or 138 of the Succession Law, will determine the applicable law to govern each matter. Section 138 provides that the governing law with respect to assets located abroad held by estates of deceased Israeli residents will be the laws of the jurisdictions where the assets are located. In the above case of *Mastora Kahana v. Meir Kahana*,[8] the court found that while it possessed jurisdiction over the worldwide assets of the estate, the governing law with respect to the assets located in France was French law, to be applied by the Israeli probate court.

Conclusion

Clients with assets located in Israel (and their advisors) must consider the implications of estate planning under Israeli laws. Special consideration should be given to jurisdictions where the EU Succession Regulation is valid as to the interpretation of this Regulation by the Israeli courts. In addition, although outside the scope of this article, consideration must be given to estate tax considerations imposed by applicable jurisdictions.

Endnotes

1. This article is for general information only and may not be relied upon for any actions without obtaining legal advice.
2. Section 136.
3. *Shtark v. Birenberg*, C.A. 587/85 (1987).
4. C.A. 598/85 (1990).
5. Section 137 of the Succession Law.
6. C.A. 594/04 (2004).
7. C.A. 40521-07-10.
8. C.A. 598/85 (1990).

Alon Kaplan, PhD, TEP, was admitted to the Israel Bar in 1970 and appointed a notary in 1989. He was admitted to the New York Bar in 1990 and became a Member of the Frankfurt Bar Association in 2010. He has been an Adjunct Lecturer at the Law Faculty of Tel Aviv University and now lectures in its LLM program. Mr. Kaplan was among the founders of STEP Israel in 1998, currently serves as its President, and is Academic Coordinator and Lecturer of the STEP Diploma Program at the Institute of Advanced Studies at Tel Aviv University's Faculty of Law. Mr. Kaplan is an Academician of the International Academy of Estate and Trust Law and of the American College of Trust and Estate Counsel, and has advised the Israeli Tax Authority on trust legislation. He is General Editor of *Trusts in Prime Jurisdictions* (3rd ed., 2010). Mr. Kaplan obtained a PhD from Zurich University in 2014.

Lyat Eyal, Advocate, TEP, is a partner at Aronson, Ronkin-Noor, Eyal Law Firm. Ms. Eyal manages the firm's private client practice and represents clients in connection with multi jurisdictional trusts, estates, wills and business planning matters. Ms. Eyal is admitted to practice law in New York and in Israel. Ms. Eyal is a member of the New York State Bar Association Trusts and Estates Law and International Sections, the American College of Trust and Estate Counsel (ACTEC) and is an Academician of the International Academy of Estate and Trust Law (TIAETL). Lyat publishes regularly in distinguished professional publications and speaks at seminars and conferences internationally.

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Pierce McDowell
(605) 338-9170
piercemcdowell@sdtrustco.com

Al King
(212) 642-8377
alking@sdplanco.com

James Paladino
(212) 642-8377
jpaladino@sdplanco.com

www.sdtrustco.com ***www.directedtrust.com*** ***www.privatefamilytrustcompany.com***

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POLST and Advance Directives: Friends or Foes?

By Gerald C. Tobin

Many estate planning professionals prepare advance directives, such as health care proxies and living wills, for clients at the time they execute their wills.[1] These documents allow clients to appoint persons to make medical decisions for them when they cannot make their own choices so as to indicate what kind of end-of-life interventions they may or may not want. After these documents are executed, they are usually provided to the client. It is commonly presumed that the documents resolve most of the issues relating to end-of-life care and that the client's wishes, as expressed in the documents, will be carried out. However, there is a new document that must be taken into account with regard to the preparation of advance directives—POLST. POLST stands for "Physician Orders for Life Sustaining Treatment," and it could change the way estate planners advise clients regarding end-of-life interventions as currently expressed in advance directives.[2]

What Is POLST?

POLST is a document that is used to facilitate and improve end-of-life medical decisions. The form is typically prepared by the applicable state health agency and contains a series of questions concerning end-of-life interventions and goals. The POLST form is completed by means of discussions between the patient and his or her health care professional.[3] The POLST movement began in Oregon in the early 1990s because medical professionals found advance directives to be lacking as a method to implement a patient's end-of-life wishes. A similar movement developed around the same time in Wisconsin. Both groups found that advance directives were often too vague or incomplete. Oftentimes, they could not be located in a timely fashion. Advance directives are also not part of a patient's medical records and have to be implemented through additional medical orders. The POLST form was developed as a means for end-of-life instructions to be properly and effectively carried out. POLST is part of a patient's medical records much like a Do Not Resuscitate Order ("DNR"). By 2013, fifteen states had met the requirements for a POLST-endorsed program.[4] While the details and the name of the POLST may vary from state to state, the essentials of the program remain the same.[5]

How Does POLST Work?

The POLST program is dependent on a meaningful discussion between the patient and his or her health care professional. The common test for beginning this communication is whether the health care professional would not be surprised if the patient dies within the next year.[6] A person meeting this standard would be encouraged to engage in a discussion regarding his or her end-of-life wishes. This could include what medical interventions might or might not be desired in addition to the patient's goals for end-of-life care. It is a process engaged by the patient and the health care professional to arrive at an informed decision that will be implemented through a medical order. This discussion is supposed to be more than just signing off on the form. The discussion between the medical practitioner and the patient is memorialized in the POLST form. The POLST form includes decisions regarding cardiopulmonary resuscitation ("CPR"). If the patient decides not to have CPR, then the form can also serve as a DNR. The POLST form also addresses other types of medical interventions. The patient can decide on airway management, such as machine ventilation and intubation. He or she can also decide whether to have artificial fluids and nutrition administered and for how long. Finally, the form provides for goals of care. For example, a patient can choose what type and to what extent there will pain management. After the POLST form is completed, the patient can sign if he or she is capable. Otherwise a designated health care representative may be able to sign in his or her place.[7]

POLST and Advance Directives

POLST was developed because of the perceived inadequacies of advance directives as the means to implement end-of-life interventions.[8] Advance directives were often found to be vague and difficult to implement. For example, many advance directives state that the individual does not want artificial means of life support or extraordinary life sustaining measures. While the intent behind these phrases may be clear to the person who signed the form, they are difficult to implement. What are artificial means? Does that always mean no artificially administered nutrition and hydration? When are life sustaining measures extraordinary? The POLST resolves this problem by having the patient directly state what type of medical intervention he or she may or may not want for end-of-life care. For example, the New York POLST form (referred to as MOLST) has a section that allows for a patient to choose whether he or she wants a feeding tube and/or intravenous fluids. It also contains questions relating to intubation and the use of antibiotics.

Advance directives deal with the future needs of the patient while the POLST deals with current needs. A "living will" is, by definition, applicable only when

certain conditions are present, *i.e.*, the patient has a terminal disease. POLST, on the other hand, sets forth medical orders addressing the patient's present condition. Another problem with advance directives is that they often cannot be located in a timely manner and may not follow the patient from one health setting to another. In contrast, POLST becomes part of a patient's medical records and follows the patient wherever he or she goes.

Advance directives also may not be regularly modified to take into account changes with a client's condition. A POLST, on the other hand, is reviewed periodically to ensure that it is current with a patient's desires. Advance directives may also create problems when a patient needs emergency medical services (EMS). EMS professionals are required to provide life-sustaining treatments unless there is a DNR order in place or a POLST. POLST is actually more useful in such situations than the DNR, because it applies to a range of medical interventions.

Advance directives are also restricted by the legal requirements set by the various state laws. In many ways they are similar to other estate planning documents (*i.e.*, will, power of attorney) in that they require some formality of execution. POLST does not require the same type of formalities. While the formalities may be useful to ensure that the patient's actual wishes are expressed in the document, they also restrict a person's ability to change the document as conditions change.

However, POLST is not without limitations. Unlike advance directives, they are not appropriate for everyone. Advance directives should be executed by everyone, young, old and in-between, as they express what type of medical interventions the person wants at an undetermined future time. Contrast this with the test for POLST, to wit, whether the health care professional would not be surprised if the patient died within the next year. While this limitation ensures that the POLST will be current when implemented, it also limits the types of person who should have a POLST.

The Estate Planner and POLST

How does POLST affect estate planners? What should they do with regard to POLST? First, estate planners should learn about the document and understand the questions that are asked on it. Second, they should advise their clients about the POLST program and how it works. Third, they should ensure that any advance directive they prepare works hand in hand with POLST. For example, if the client does not want CPR at the end of life and so indicates in his or her advance directive, the estate planner should see that the POLST form contains the same instructions, unless, of course, the client changes his or her mind. Advance directives are an important part of effective estate planning. POLST was not intended to interfere with that, but rather to clarify end-of-life instructions so they can be efficiently implemented.

Conclusion

POLST was developed because advance directives often did not clearly state what type of end-of-life medical interventions a patient desired and were often not available when needed. As POLST is part of the person's medical records and not a legal document; it is more easily implemented in a medical setting. However, on the other hand, because it is so powerful in this regard, care must be taken that the patient's wishes as expressed in an advance directive are carried out in the POLST and not ignored or disregarded. POLST and advance directives should work together and complement each other. In only that way will the patient's end-of-life care be effectively implemented.

Endnotes

1. For purposes of this article, advance directives shall refer to living wills, health care proxies and powers of attorney for health care. New York does not recognize living wills by statute. *See* N.Y. Public Health Law Article 29-C et seq. However, various cases have recognized an individual's right to make medical decisions, including those at end of life. *See In re Storar*, 52 N.Y.2d 363, 438 N.Y.S. 2d 266 (1981) and *In re Westchester County Medical Center*, 72 N.Y.2d 517, 534 N.Y.S. 2d 886 (1988).
2. In New York State POLST forms are referred as MOLST (Medical Orders for Life Sustaining Treatment). In this Article, the term POLST is used to refer to all such documents.
3. Although POLST refers to physicians, if allowed under the applicable state law, the form may be completed by nurse practitioners and physician assistants. In New York State, however, a physician must sign the order.
4. The National POLST Paradigm Task Force has developed the standards for implementation of the POLST program throughout the nation.
5. For an excellent overview of the POLST program, see Robert B. Wolf, Marilyn J. Maag, Keith Bradoc Gallant, "The Physician Orders for Life-Sustaining Treatment (POLST) Coming Soon to a Health Care Community Near You," *Real Property Trust and Estate Journal,* Spring 2014, 71-101.
6. Robert B. Wolf, Marilyn J. Maag, Keith Bradoc Gallant, "The Physician Orders for Life-Sustaining Treatment (POLST) Coming Soon to a Health Care Community Near You," *Real Property Trust and Estate Journal*, Spring 2014, 71-101, at 81.
7. The POLST Paradigm recommends a surrogate have the power to prepare and sign the POLST form. New York State's program allows this.
8. *See Wolf et al.*, *supra* note 6, at 76.

Gerald C. Tobin practices in New York and New Jersey with his main office in Montclair, New Jersey. His practice is concentrated in estate planning, probate and estate administration as well as non-profit corporate law.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

NON-PROBATE PROPERTY

Failure to Remove Ex-spouse as Beneficiary of Life Insurance Policy as Expressly Allowed by Court Order Does Not Prevent Operation of EPTL 5-1.4

Insured and his spouse divorced. Both an insurance policy owned by the insured of which the spouse was beneficiary and all of the spouses' liquid assets were divided 60/40 between the insured and the spouse by a settlement agreement incorporated into the divorce decree. However, the policy could not be divided because it was a life insurance annuity and subsequent court orders resulted in insured buying out his ex-spouse's marital interest in the policy. The final court order expressly stated that after the buy-out the insured could remove the ex-spouse as beneficiary. The insured never did so, and when he died nine years later, the ex-spouse made a claim to the insurance company and the policy proceeds were paid to her. Insured's sister, executor and sole beneficiary of his will, began a turnover proceeding in the Surrogate's Court seeking payment of the policy proceeds to the estate.

In a thorough opinion, the Surrogate ordered the turnover, holding that EPTL 5-1.4 applied and revoked the beneficiary designation of the ex-spouse by reason of the divorce. The Surrogate rejected the argument that the express statement in the last divorce-related decree that the insured had the authority to remove the ex-spouse as beneficiary meant that the statute could not apply. Although the legislative history and commentary on the statute refer to the enactment as a remedy for inadvertence on the part of ex-spouses, nothing in the history or commentary or the language of the statute can be seen as limiting the operation of the statute by anything other than affirmative action by the owner of non-probate property to retain the owner's ex-spouse as a beneficiary. *Matter of Sugg*, 49 Misc.3d 455, 12 N.Y.S.3d 842 (Sur. Ct., Erie Co. 2015).

Lack of Survivorship Language on Signature Card Means Account Is Part of Depositor's Probate Estate

Decedent, a New York domiciliary, opened an account in a Vermont bank. Decedent, his step-great granddaughter (Petty), and his daughter all signed the

William P. LaPiana

signature card. After decedent's death, his daughter withdrew the funds in the form of a bank check payable to decedent's estate and presented the check to the executor of decedent's will. Petty then filed a notice of claim under SCPA 1803 demanding payment of one-half of the value of the account as of the date of decedent's death. The executor rejected the claim and Surrogate's Court dismissed Petty's subsequent application for an order directing payment. The Third Department affirmed.

The appellate court first rejected Petty's claim that the Surrogate erred in deciding the matter under New York law rather than the law of Vermont. The law of survivorship rights in the two jurisdictions is so similar that there is no conflict to resolve, and if there were a conflict, the court would decide that New York governs because New York is the jurisdiction with the "most significant relationship" to the issue (citing *Indosuez Int. Fin. v. National Reserve Bk.*, 98 N.Y.2d 238). Under Banking Law § 675 the presumption that a joint account is a survivorship account is triggered when survivorship language appears on the signature card, but no such language appeared on the signature card for the disputed account. Even if the presumption applied, however, the court noted that the executor came forward with clear and convincing evidence rebutting the presumption: Petty's withdrawals from the account were made only to make a purchase for decedent, decedent had a history of creating convenience accounts, the funds in the account were the "lion's share" of decedent's estate—which under the will was to be divided equally among 11 persons including Petty, and if she were to receive half of the funds in the account she would receive an amount "incommensurate" with what she otherwise would have received—and, finally, the decedent's daughter did not believe she had a survivorship interest in the account because she withdrew the funds and delivered them to the executor of decedent's will. Finally, Petty had no claim to the account under the common law. While the bank officer who helped decedent open the account testified that decedent indicated that all three signatories were to be owners of the account, given decedent's habit of opening convenience accounts, the testimony at most

only "invites conjecture" as to decedent's intent. *Matter of Farrar*, 129 A.D.3d 1261, 12 N.Y.S.3d 312 (3d Dep't 2015).

POWERS OF ATTORNEY

Agent's Closing of Totten Trust Accounts Not Authorized; Sale of Co-Op Apartment Causes Ademption

Decedent executed a power of attorney naming his cousin as agent and her daughter (Conklin) as successor agent. The power of attorney included a major gifts rider which allowed the agent to make gifts to herself in any amount but which also included language authorizing the agent to make gifts only to the principal's spouse, children and more remote descendants. Before the decedent's death the daughter used her authority as agent to close several Totten trust accounts, the beneficiaries of which were the decedent's two children, his ex-spouse and a friend. Conklin deposited the funds in an account in the decedent's name. Conklin and her mother then sold decedent's co-op apartment and deposited the proceeds in an account in the decedent's name.

Decedent died a little more than two weeks after the closing on the sale of apartment. Decedent's will directed that the apartment be sold and the proceeds divided equally among the decedent's two children and ex-spouse. The residue of the estate was given to Conklin's mother who was also named executor. Under the will, therefore, the money withdrawn from the Totten trust accounts and the proceeds from the sale of the apartment passed to Conklin's mother as residuary beneficiary. The beneficiaries of the Totten trust accounts and the beneficiaries under the will of the proceeds of sale of the co-op apartment objected to the executor's account. The Surrogate held that the agent did not have authority to close the Totten trust accounts, because although the major gifts rider gave the agent the authority to make gifts, it did not expressly give authority to "modify or terminate" a Totten trust account which may be given under GOL § 5-1514(3)(c)(3) and which must be given "in no uncertain terms" in order to comply with the requirements for changing or closing a Totten trust account found in EPTL 7-5.1. In addition, even if the major gifts rider had included proper language, the agent's closing the accounts was a breach of her fiduciary duty.

The evidence showed that the sale of the co-operative apartment was proper because it involved Medicaid planning for the decedent and therefore was in the decedent's best interests and did not involve a breach of fiduciary duty. The sale results in an ademption because under New York law it is clear that the proceeds of sale of specifically disposed of property are not the property disposed of and are not subject to tracing. The exception of EPTL 3-4.4 does not apply because an agent under a power of attorney is not a committee, conservator or guardian whose sales of specifically disposed of property give the beneficiary the proceeds remaining at death or any property into which the proceeds can be traced. *Matter of Conklin*, 48 Misc.3d 291, 6 N.Y.S.3d 449 (Sur. Ct., Nassau Co. 2015).

WILLS

Witnesses' Inability to Testify to Having Seen Decedent's Signature Leads to Dismissal of Probate Petition

Decedent's granddaughter petitioned for probate of a paper purporting to be the decedent's will and decedent's son, granddaughter's parent, objected. After the attesting witnesses were examined pursuant to SCPA 1404, the Surrogate granted objectant's summary judgment motion. The Third Department affirmed, noting that the deposition testimony of one of the witnesses showed that the witness neither saw the decedent's signature on the document nor that the decedent signed the will in the witness' presence. The second witness testified that she did not see the decedent's signature, the decedent did not acknowledge the signature to her, nor did the decedent state that the document was the decedent's will. In these circumstances, the grant of summary judgment, "unusual" in a probate proceeding, must be affirmed. *Matter of Yen*, 127 A.D.3d 1466, 8 N.Y.S.3d 456 (3d Dep't 2015).

Purported Contract to Devise Does Not Prevent Admission of Will to Probate

Decedent was a member of a Roman Catholic religious order and had taken a vow of poverty. Pursuant to that vow decedent executed a will leaving all of her property to the order. Three years after execution of the will, decedent was involved in a motor vehicle accident, was severely injured, and received a substantial settlement. Twelve years after the accident, decedent executed a new will leaving her estate to relatives, to the order, and to other Roman Catholic charitable institutions. The order moved for summary judgment denying probate on the grounds that the will violated the vow of poverty decedent had taken, and therefore she breached her contract with the order by leaving property to others. The other parties opposed the motion. The Surrogate denied summary judgment, holding that the alleged contract has no effect on the validity of the will. *Matter of Attea*, 49 Misc.3d 218, 12 N.Y.S.3d 522 (Sur. Ct., Erie Co. 2015).

Presumption of Revocation Raised by Possible Existence of Duplicate Original Wills Was Not Properly Addressed and Requires Remand

While residing in Texas, testator and her husband executed wills; hers left her estate to him and if he did not survive to his father. The couple divorced and testator moved to New York State where she died. After her death her former father-in-law presented the will for probate and it was admitted over objections from her parents who had applied for letters of administration on her estate. The Surrogate dismissed the objections and a divided Appellate Division affirmed on the grounds that EPTL 5-1.4 revokes dispositions to a former spouse but not to anyone else, including relatives of the former spouse. The majority found that the statute is "clear and unambiguous" and declined to decide the case on equitable principles. *Matter of Lewis*, 114 A.D.3d 203, 978 N.Y.S.2d 527 (4th Dep't 2014).

On appeal to the Court of Appeals, the case was remanded. The court's opinion focused on testimony that raised the possibility that the will had been executed in counterparts and that one of the counterparts was kept in the testator's home. The question is important because a thorough search of testator's home after death did not find a will. If the testator did have possession of an original will, the failure to find it after her death raises the presumption that she destroyed it with the intent to revoke. Because the nature of the document testator kept at home and the possible application of the presumption of revocation were not resolved at trial, the case must be remanded "so that these pivotal issues can be fully litigated and determined." *Matter of Lewis*, 25 N.Y.3d 456, 13 N.Y.S.3d 323, 34 N.E.3d 833 (2015).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Associate Dean for Academic Affairs and Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School. Professors Bloom and LaPiana are the co-authors of Bloom and LaPiana, DRAFTING NEW YORK WILLS AND RELATED DOCUMENTS (4th ed. Lexis Nexis).

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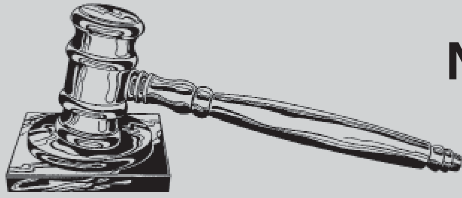

Case Notes— New York State Surrogate's and Supreme Court Decisions

By Ilene Sherwyn Cooper

Compensation of Attorney-in-Fact

Before the court was an application by the preliminary executor of the estate for permission to pay himself from estate funds for services he rendered the decedent during a six year period while serving as her attorney-in-fact. Objections to the relief were filed by the guardian ad litem, who claimed that the amount sought was not reasonable.

The record revealed that in 2008, at a time when her health was beginning to fail, the decedent asked the petitioner to take over her care. In that capacity, the petitioner then retained a firm to handle the decedent's finances and pay her expenses. In addition, he changed the address on her checking account to his office, managed her health care, tended to necessary repairs and maintenance as needed at her home, added himself as a signatory on her brokerage account, and opened a credit card account in his own name so that he could order medicine, food and supplies for the decedent.

The petitioner acknowledged that he did not have a written agreement for compensation with the decedent, and thus based his request for compensation upon the hours of time spent at his regular hourly rate as an attorney. Alternatively, the petitioner suggested that he be compensated as though he were a court-appointed guardian, pursuant to the provisions of SCPA 2307, 2309 and the Mental Hygiene Law.

The court noted that under the current statute, an agent appointed pursuant to a power of attorney is not entitled to compensation from the assets of the principal unless the principal specifically provides for such compensation in the instrument. However, inasmuch as that provision was not applicable to the power of attorney in issue, which was executed prior to the statutory amendment regarding compensation, the petitioner was entitled to reasonable compensation for services rendered, despite the fact that a provision for compensation was not included in the instrument.

To this extent, the petitioner conceded that the services performed by him as the decedent's attorney-in-fact were not legal in nature. Moreover, the court noted that petitioner provided no evidence that the decedent knowingly had agreed to pay him any set hourly rate, and certainly not a legal rate for non-legal services rendered. Accordingly, the court granted the petitioner's application for fees, denied his request that it be based on his hourly rate for legal services rendered, and authorized that he pay himself $79,432.50, instead of the $122,142.50 requested.

In re Smulyan, N.Y.L.J., July 16, 2015, p. 23, col. 5 (Sur. Ct., N.Y. Co) (Surr. Mella).

Discovery of Assets

In *In re Perelman*, the Appellate Division, First Department, unanimously reversed an Order of the Surrogate's Court, New York County (Anderson, S.), which, *inter alia,* denied the respondents' motion to dismiss the executor's amended petition to the extent it sought discovery, pursuant to SCPA 2103, of the decedent's ownership interests, if any, in family-owned businesses.

The Court held that the amended petition, insofar as it sought the foregoing discovery, should have been dismissed on the ground that the executor "failed to demonstrate the existence of any *specific* personal property or money which belong[ed] to the estate" (*citing In re Castaldo,* 180 A.D.2d 421, 580 N.Y.S.2d 862 [1st Dep't 1992]), or even a reasonable likelihood that such specific property or money might exist. Significantly, the Court noted that, in support of their motion to dismiss, the respondents offered contemporaneous documentary evidence indicating that, in 1990, the decedent had sold her interest, in the family-owned Hudson County News Company, for $28,500 cash, and a $200,000 promissory note payable in installments over five years. Following that sale, the record revealed that the decedent had no interest in that entity, or its successors, or in any other family enterprises.

In the face of this proof, the Court found that the executor had failed to come forward with any evidence suggesting that, aside from a 401(k) account not at issue on the appeal, the decedent may have held any interest in the family businesses after 1990. The Court opined that, notwithstanding the executor's suggestion of the possibility that the decedent may not have been paid in full for her interest in Hudson, his claims that the decedent might have held some interest after the 1990 sale transaction were speculative. Moreover, the Court held that any alleged cause of action based on a breach of contract or fraud in connection with the sale transaction would not confer a right to possession of

specific personal property or money as required by the provisions of SCPA 2103.

Additionally, although the executor alleged that the respondents' converted the decedent's interest in the family businesses, and that the estate had the right to inquire into any such conversion, the Court found that any such cause of action would have accrued long before the decedent's death in 2007, and thus was barred by the three-year statute of limitations set forth in CPLR 214(3). Finally, the Court concluded that any claim for breach of contract based on the 1990 sale transaction was subject to the six-year statute of limitations for breach of contract, and thus became time barred in 2001, *i.e.*, six years after 1995, the year in which the last installment payment for decedent's interest in Hudson was due.

In re Perelman, 123 A.D.3d 436, 999 N.Y.S.2d 2 (1st Dep't 2014), *mot. for lv. to app. denied with costs*, 25 N.Y.3d 905, 10 N.Y.S.3d 524 (2015).

Eligibility of Fiduciary

In a proceeding for the probate of the decedent's will, the court was confronted with the issue of whether the nominated executor was eligible to serve. The decedent died survived by a spouse and five children of a prior marriage. The will nominated her spouse as the executor, and her son, Robert, as the successor. The decedent's son sought to disqualify the spouse from serving, and have himself appointed the executor of the estate. The decedent's children joined in the application, claiming that the spouse was unfit to serve due to his improvident and dishonest handling of estate assets, including taking a large sum of money from her safe deposit box, and failing to pay required expenses on real estate.

The court opined that in order to disqualify the nominated executor, the objectants were required to come forward with strong proof of ineligibility, given the deference accorded a testator's choice of fiduciary. Further, the court noted that the kind of dishonesty needed to render a named executor ineligible to serve meant dishonesty in money matters such that the safety and preservation of estate assets would be jeopardized if left in the executor's hands. A mere isolated instance of dishonesty would not be sufficient.

Based on the testimony at the hearing of the matter, the court concluded that the proof was too conjectural to disqualify the named executor on the grounds of dishonesty. On the other hand, the court noted that disqualification due to improvidence required a lesser burden of proof, inasmuch as it did not include an element of moral turpitude. Rather, improvidence involved conduct that would likely render the estate unsafe and likely to be lost or diminished. In addition, the court remarked that a finding of improvidence may be based on a misappropriation or mishandling of the decedent's property.

Within this context, the court found it significant that the decedent's spouse admitted that he had not paid any of the carrying charges, including mortgage payments and real estate taxes, on the former marital home, an estate asset in which he resided, since the decedent's death. Further, he acknowledged that a foreclosure action had been commenced against the property. Additionally, as to other matters raised at the hearing, the court found the named executor's testimony to be vague, confused, and non-responsive.

Accordingly, after carefully assessing the demeanor, candor and credibility of the named executor, and considering his want of understanding of his duties and responsibilities as fiduciary, the court concluded that he was ineligible to serve due to improvidence and want of understanding, and his petition seeking letters testamentary was denied.

In re Knee, N.Y.L.J., July 7, 2015, p. 32, col. 1 (Sur. Ct., Richmond Co.).

Order to Attend and Production of Documents

Before the Surrogate's Court, Queens County, in *In re Eshagian*, was a proceeding pursuant to SCPA 2103, seeking the discovery and turnover of estate assets, in which the respondent, the decedent's brother, moved for a stay and for a protective order denying the document demand by the petitioners, the decedent's wife and daughter.

The record revealed that the decedent and the respondent were engaged in the business of owning and managing real estate until the decedent's death in May, 2003. Since that time, the petitioners were involved in multiple contested proceedings with the respondent concerning the ownership and valuation of real and personal property, worth several million dollars.

In the pending proceeding, the petitioners sought to examine the respondent regarding the entities involved in the management of the real estate in order to determine the extent and valuation of the decedent's ownership interest. The court issued an order to show cause directing the respondent to appear and be examined, and to deliver to the petitioners all of the decedent's records, as well as all other information, in his possession, concerning these issues. Following the issuance of the order, the petitioners served a demand for discovery and inspection of documents pertaining to twenty-one of the real estate entities. In response, a motion seeking a stay of the proceeding and protective order regarding the document demand was filed.

Respondent argued that a stay should be imposed pending the outcome of a separate proceeding filed by him against the petitioners in the Surrogate's Court,

allegedly dealing with the same issues as the pending proceeding. That separate proceeding was the subject of two appeals by the petitioners, which had yet to be decided.

The court opined that, except where otherwise prescribed by law, it had the discretion to grant a stay of proceedings in order to "'avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources' (*Matter of Tenenbaum*, 81 AD3d 1187, quoting *Zonghetti v. Jeromack*, 150 AD2d 561, 563)." A stay should not be granted, however, unless the other action presents complete identity of parties, causes of action and relief sought.

Within this context, the court concluded that there was no basis to delay the prosecution of the SCPA 2103 proceeding due to the pendency of appeals in the separate proceeding that had been instituted by the respondent. In particular, the court noted that the subject of those appeals was its dismissal of counterclaims alleged by the petitioners, on grounds that they had been improperly made. On this basis, the court held that it would unduly delay the administration and final distribution of the estate to impose a stay on the SCPA 2103 discovery proceeding, particularly since that proceeding had been properly commenced. Accordingly, that branch of the respondent's motion seeking a stay was denied.

With respect to his demand for a protective order, respondent argued that Article 31 discovery was not permitted during the inquisitorial phase of an SCPA 2103 proceeding. The court disagreed and found the cases cited by the respondent inapplicable under the current statutory scheme regarding pre-trial discovery. Significantly, the court opined that CPLR 3120 provides that a party may serve any other party with a notice for discovery and inspection "after commencement of an action." The court acknowledged that although issue in the pending proceeding had not yet been joined, the proceeding had nevertheless been commenced, thereby making the provisions of CPLR 3120 applicable. The court declined to adopt the position of other courts that had found otherwise, concluding that the analysis of those opinions was based upon outdated and repealed statutes.

Accordingly, the court denied respondent's motion for a protective order to the extent it sought to strike petitioners' notice for discovery and inspection. On the other hand, it held that respondent need not produce several categories of documents that had been demanded, which petitioners already had in their possession.

In re Eshagian, N.Y.L.J., June 9, 2015, p. 29, col. 6 (Sur. Ct., Queens Co.).

Reformation of Trust

Before the Surrogate's Court, Suffolk County, was an uncontested application by the petitioner, the decedent's niece, as successor trustee/beneficiary of the Victor Larsen Revocable Trust, the trustee/beneficiary of the Victor Larsen Irrevocable Trust, and beneficiary of the decedent's Will for a construction of certain enumerated dispositions of the three instruments.

The record revealed that pursuant to the terms of his Revocable Trust, created on July 1, 2008, the decedent directed that $25,000 of the trust funds be distributed to each of his two grandsons, and the remainder thereof be distributed to his niece and nephew. It also appeared that the same day he executed the Revocable Trust, the decedent executed his Will, wherein he directed that the residue of his estate pour over and be distributed in accordance with the terms of his Revocable Trust, or, in the event the trust could not be located, in accordance with the same dispositive scheme as set forth in the Revocable Trust instrument.

Several years after the execution of the foregoing documents, the petitioner, acting under decedent's power of attorney, met with counsel to discuss Medicaid planning on the decedent's behalf. As a result of that meeting, the petitioner created the Irrevocable Trust on behalf of the decedent, the terms of which mirrored the terms of the Revocable Trust and Will.

Unfortunately, the decedent died one month later, without all of his assets having been transferred into the Irrevocable Trust. The unintended result thereof was the existence of assets remaining in the decedent's name for disposition under both the Revocable and Irrevocable Trusts, and a duplication of the bequests to the decedent's grandsons; *i.e.*, pursuant to the terms of the Revocable Trust, as well as the terms of the Irrevocable Trust. Accordingly, the petitioner requested that the Irrevocable Trust be amended to delete the bequests thereunder to the grandsons.

The court opined that while it may be reluctant to construe a trust instrument when the language is unambiguous, it would be within its purview to reform the instrument in order to effectuate the settlor's intent. Towards that end, the court observed that it was required to review the dispositive scheme set forth in the decedent's will and trust instruments, and all the facts and circumstances surrounding the preparation of those documents. With this in mind, the court held that it was clear that the Irrevocable Trust was intended to maintain the integrity of the decedent's testamentary plan, and as such, to insure that the decedent's grandsons receive bequests of only $25,000 each from the decedent's estate.

Accordingly, in order to effectuate the settlor's intent, the court held that the Irrevocable Trust should be reformed in order to delete the specific bequests to the decedent's grandsons.

In re Larsen Irrevocable Trusts, N.Y.L.J., June 26, 2015, p. 43 (Sur. Ct., Suffolk Co.).

Revocation of Will

In *In re Powers,* the Surrogate's Court, Oneida County, was confronted with objections by the decedent's surviving spouse, who alleged that the propounded instrument had been revoked by the decedent prior to his death. Simultaneous with the filing of her objections, the decedent's spouse moved for summary judgment denying the Will probate, and the proponent cross-moved for summary judgment striking the objections.

The propounded Will was a typewritten instrument, but at the top of the first page there was handwritten and dated, in red, by the testator, the words: "This Will is no longer valid." In addition, the testator indicated that after two years of consideration, she handwrote a new Will, which she requested be "honored," until she was able to get the instrument "officially changed" and typed. Attached to the instrument, were twelve sheets of paper containing the testator's handwriting and signed by her. Notably, these handwritten sheets were never re-done in typed form prior to the testator's death. Moreover, none of the words of the testator on the top of the propounded instrument touched or obliterated any part of her Will. Nevertheless, the objectant maintained that the testator revoked her Will pursuant to the provisions of EPTL 3-4.1, which allows a Will to be revoked by an act of burning, tearing, cancelling, or obliteration by the testator.

The court opined that when words of revocation and the signature of the testator are written directly across the face of a Will, it obliterates the words on the instrument, thereby reflecting the intent of the testator to revoke it. However, in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject Will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute. Further, in response to the objectant's claim that the instrument had been cancelled by a writing, the court held that in order to be effective, such writing had to be executed in accordance with the statutory formalities of a duly executed Will. Inasmuch as those formalities had not been complied with, objectant's argument failed.

Accordingly, based upon the foregoing, the proponent's motion for summary judgment was granted, and the objections to probate were dismissed.

In re Powers, N.Y.L.J., July 14, 2015, p. 29 (Sur. Ct., Oneida Co.).

Scope of 2211 Examination

In a contested interim accounting proceeding, the court was confronted with the scope of discovery sought by the objectants, a residuary beneficiary, and a judgment creditor of the estate. The issues which framed the subject of the discovery demands pertained to the value of real property inherited by the decedent from her pre-deceased husband, allegedly excessive legal fees charged to the estate, and the loss of a claim worth many millions of dollars as the result of alleged malpractice by counsel representing the decedent and her husband, and their respective estates, in an action in the Supreme Court, New York County.

Towards this end, both objectants sought to examine the executor and a litigator, who represented the estate in the malpractice action, and one of the objectants sought to examine the attorney for the estate in the Surrogate's Court proceeding. The executor moved for a protective order, and the objectants, *inter alia,* cross-moved to enforce their respective deposition notices.

The court determined that to the extent that objectants sought 2211 discovery from the executor regarding his administration of the estate, their deposition notices were proper. However, the court held that the scope of the examination could not extend to the purported legal malpractice claim, inasmuch as the objectants lacked standing to pursue such a claim on behalf of the estate, and the inquiry was premature given the pendency of the Supreme Court action.

Further, the court opined that the notices to take the deposition of counsel who represented the estate in the Supreme Court action could not be enforced, since the provisions of SCPA 2211 did not authorize the examination of anyone other than the estate fiduciary. Moreover, even if broader discovery was to be allowed, the lawyer was not a party to the Surrogate's Court proceeding, and thus his examination could only be sought by means of a subpoena. Additionally, as in the case of the executor, the court held that objectants lacked standing to examine counsel, and any such inquiry would be premature.

Finally, to the extent that the objectant/beneficiary sought to examine counsel for the estate, the court held that because he, too, was not a party to the proceeding, a deposition notice seeking his testimony was unavailing. Moreover, the court held that the law imposed several preconditions before a direct inquiry of counsel could be had (*citing Matter of Cavallo,* 20 Misc. 3d 219, 858 N.Y.S.2d 564 [Sur. Ct., Richmond Co.] and cases cited thereunder), and as a result, an objectant's first recourse to information regarding counsel fees was an affidavit or affirmation of legal services, rather than a deposition of counsel.

In re Bush, N.Y.L.J., June 23, 2015, p. 22, col. 3 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Standing

A residuary beneficiary under the decedent's will petitioned for an order compelling the respondent to account for his actions as the decedent's attorney-in-fact. Respondent moved to dismiss the proceeding alleging, *inter alia*, that the petitioner lacked standing.

The record revealed that the respondent was one of two co-executors of the decedent's estate. The court noted that General Obligations Law §5-1510 provides for the commencement of a special proceeding to compel an attorney-in-fact to produce records of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal. However, according to the provisions of General Obligations Law §5-1505(2)(a)(3), the court found that the petitioner, as a beneficiary of a deceased principal's estate, was not a person authorized to institute such a proceeding. Nor, for that matter, was the respondent, as both a co-executor of the decedent's estate and the former attorney-in-fact, likely to compel himself to account.

Accordingly, the court held that in the event that the other co-executor of the estate failed or refused to commence a compulsory accounting proceeding against the respondent, the beneficiary could do so upon receipt of limited letters of administration from the court.

In re Barrett, N.Y.L.J., July 31, 2015, p. 36 (Sur. Ct., N.Y. Co.) (Surr. Anderson).

Summary Judgment

In *In re Johnson*, the court was confronted with a renewed motion for summary judgment dismissing the objections to probate on the grounds of lack of testamentary capacity and undue influence. The proponent, the decedent's daughter, had previously moved for summary relief, resulting in a decision that dismissed the objection as to due execution, and denied the motion as to the issues of testamentary capacity and undue influence pending the completion of discovery. Following discovery, the proponent renewed her motion with respect to these two issues.

In support of their objection on the grounds of capacity, the objectants, the decedent's two sons, alleged that the decedent was inexperienced in financial affairs and lacked knowledge of her assets. The court opined that a testator need only have a general awareness of the nature and extent of her assets in order to possess the requisite capacity to execute a will. Nevertheless, the court noted that while the decedent's real estate, *i.e.*, her family farm and homestead, may have been the most important assets to her and to the rest of her family, it was not her only asset. In fact, it appeared that the decedent died with bank accounts which approximated the value of her real estate; yet, the draftsman of the Will made no inquiry of her about her non-real estate holdings. Further, the court noted that the decedent's husband handled her financial affairs, and that the proponent had assumed complete control of the decedent's finances after her husband's death. In view thereof, the court held that a question of fact existed as to whether the decedent was generally aware of her substantial cash assets at the time of the preparation and execution of her Will, and denied summary judgment on the issue of capacity.

In re Johnson, 46 Misc. 3d 1213(A), 9 N.Y.S.3d 593 (Sur. Ct., Broome Co.).

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

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Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

Jonathan Galler

DECISIONS OF INTEREST

Court Lacks Jurisdiction Over Non-Florida Real Property

"Like lines in the sand, state boundaries determine a court's jurisdiction over real property." *Pawlik v. Pawlik*, 545 So. 2d 506, 507 (Fla. 2d DCA 1989). That is the lesson reiterated by the Fourth District Court of Appeal in this recent Florida probate matter. The decedent died with real property in both Florida and Georgia. The probate court ordered the personal representative to divide and distribute the assets of the estate to the beneficiaries, including the Georgia real estate. One of the beneficiaries appealed on the grounds that the court did not have jurisdiction to direct the personal representative to distribute non-Florida real property. The court agreed with the appellant and reversed the portion of the trial court's order requiring the distribution of the Georgia real estate. The appellate court held that to partition real property located outside of Florida, the personal representative must open an ancillary estate administration in the other state for that purpose.

Brown v. Brown, 169 So. 3d 286 (Fla. 4th DCA 2015).

Slayer Statute Does Not Bar Inheritance by Murderer's Descendants

Are the sins of a parent visited upon her children? That was the issue raised in this latest chapter of the estate of Ben Novack, the heir to the famed Fontainebleau hotel. Ben was murdered by his wife, Narcy, who was also responsible for the death of Ben's mother. Under Ben's estate plan, if Ben survived his mother, his fortune was to go to Narcy. The probate court administering Ben's estate, however, determined that based on Florida's Slayer Statute, section 732.802, Fla. Stat., Narcy was not entitled to participate in the estate and would be treated as having predeceased Ben. Under Ben's estate plan, if his mother and Narcy both predeceased him, then his fortune was to go to Narcy's daughter and grandsons. Ben's cousins argued, *inter alia*, that the Slayer Statute should also bar Narcy's daughter and grandsons from sharing in the estate. The trial and appellate courts both rejected this argument, holding that the statute is clear and unambiguous and disinherits only the killer or anyone who participates in the killing. Ben's cousins argued for a different result based on the fact that the courts of several other states have barred a killer's descendants from sharing in the victim's estate. The appellate court rejected that argument because the Slayer Statutes of those other states contain different language than Florida's Slayer Statute and could be construed to bar the killer's descendants from sharing in the estate.

Fiel v. Hoffman, 169 So. 3d 1274 (Fla. 4th DCA 2015).

Attempted Decanting Invalidated

This case is destined to be the go-to model in Florida for years to come on how not to be a good trustee. Although the trustee managed to escape liability in the trial court, the Fifth District Court of Appeal sharply disagreed and reversed, noting the trustee's failure to comply with the strict requirements of Florida's decanting statute, as well as the trustee's "numerous breaches of his fiduciary duty to the Trust." The trust at issue was created by the settlor for the benefit of her son during his lifetime, and her two daughters as remainder beneficiaries. The trustee committed a series of breaches. Despite a court order to file semi-annual accountings, the trustee filed only one. He also hired and paid commissions to his wife, without court approval, to serve as the realtor for real estate owned by the trust. He and his wife also entered into a poorly drafted "care agreement" with the beneficiary, pursuant to which the trustee and his wife received thousands of dollars for caregiving expenses, although the trustee testified that he never read the agreement and was unaware of any obligation thereunder to care for the beneficiary. And he hired an attorney who, together with her husband, administered a "pooled" special needs trust, into which the trustee transferred the assets of the trust at issue. That attorney and her husband later transferred all assets of the pooled special needs trust into another trust, and were subsequently convicted and sentenced to prison for the misappropriation of those assets. The appellate court held that the transfer of trust assets to the "pooled" special needs trust constituted an invalid attempt at decanting under section 736.04117, Fla. Stat. It was invalid because the trustee failed to give 60 days notice to the remainder beneficiaries and because the decanting had the effect of impermissibly adding remainder beneficiaries to the original class. The appellate court reversed the trial court's order dismissing the remainder beneficiaries' claims and remanded the case for an evidentiary hearing on damages. Notably, the court also rejected the trustees' "reliance on counsel" defense on the grounds that the trustee's misconduct resulted from his failure to comply with clear and unambiguous statutory requirements.

Harrell v. Badger, 2015 WL 4486610 (Fla. 5th DCA Jul. 24, 2015) (not yet final).

Automatic Post-Divorce Nullification of Inheritance

Section 732.507(2), Fla. Stat., provides that "[a]ny provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that person…the will shall be administered and construed as if the former spouse had died at the time of the dissolution, divorce, or annulment of the marriage.…" In other words, if a decedent forgot to cut his or her spouse out of his or her will after getting divorced, the law steps in, cuts the spouse out automatically, and treats the spouse as having predeceased the actual decedent. A recent case tested the limits of the legal fiction of being treated as having "predeceased" another person. The decedent's will, executed while he was still married, left the residue of his estate to his wife or, if she *predeceased* him, to a "Family Trust" for his wife's niece and nephew. But the Family Trust was a trust to be created, pursuant to the wife's revocable trust, upon her death. Because the decedent and his wife had divorced prior to his death, and because the decedent had no children, the decedent's mother argued that she was to receive the residue of his estate as his intestate heir. The former wife, however, argued that because she was to be treated as having predeceased her former husband, the residue ought to be distributed to her Family Trust for the benefit of her niece and nephew. The trial court agreed, but the appellate court reversed, labeling the former wife's argument as legal gymnastics. The appellate court held that because the former wife, in fact, "was very much alive" as of the date of the dissolution of the marriage, and because she was "very much 'affected'" by the residuary provision of the decedent's will, that provision was void under section 732.507(2). The appellate court would not countenance the rewriting of the former wife's estate planning documents so as to reimagine the Family Trust as having come into existence when the husband and wife divorced. The appellate court rejected this attempt to circumvent the Florida Probate Code's automatic post-divorce nullification statute.

Carroll v. Israelson, 169 So. 3d 239 (Fla. 4th DCA 2015).

David Pratt is the Chair of Proskauer's Personal Planning Department and the Managing Partner of the Boca Raton office. His practice is dedicated exclusively to the areas of estate planning, trusts, and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan A. Galler is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation Department and are admitted to practice in Florida and New York.

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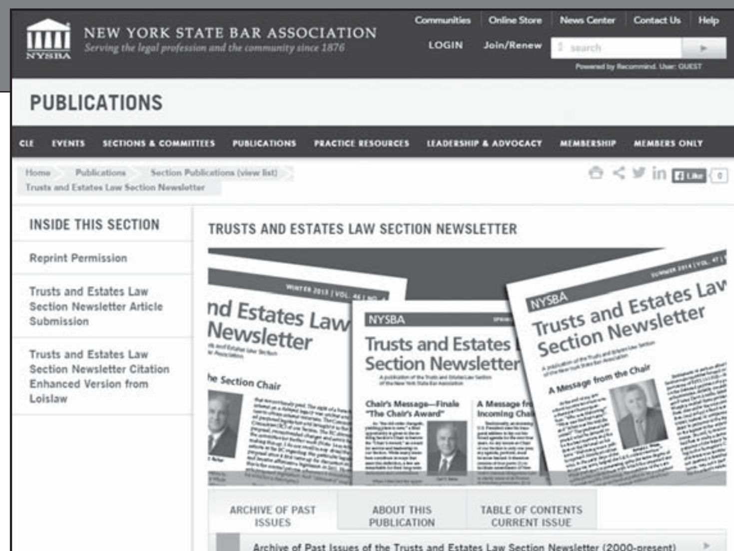

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Lisa Newfield
Murtha Cullina LLP
One Century Tower
265 Church Street, 9th Floor
New Haven, CT 06510
Lnewfield@murthalaw.com

Continuing Legal Education
Sylvia E. Di Pietro
Law Office of
Sylvia E. Di Pietro, Esq., LLC
55 West 14th Street, Suite 4H
New York, NY 10011-7400
femalelitigator@yahoo.com

Diversity
Anta Cisse-Green
Akin Gump Strauss Hauer & Feld
One Bryant Park
New York, NY 10036
antac3@aol.com

Elderly and Disabled
Ellyn S. Kravitz
Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP
630 Third Avenue, 5th Floor
New York, NY 10017
ekravitz@abramslaw.com

Estate and Trust Administration
Jill Choate Beier
Marymount Manhattan College
221 E. 71st Street
New York, NY 10021
jbeier@mmm.edu

Estate Litigation
John G. Farinacci
Ruskin Moscou Faltischek PC
1425 RXR Plaza
East Tower 15th Floor
Uniondale, NY 11556
jfarinacci@rmfpc.com

Estate Planning
Laurence Keiser
Stern Keiser & Panken LLP
1025 Westchester Avenue, Suite 305
White Plains, NY 10604
lkeiser@skpllp.com

Law Students and New Members
Alexandra Blair Copell
Katten Muchin Rosenman LLP
575 Madison Ave, Floor 20
New York, NY 10022-2511
ali.copell@gmail.com

Hyun Jung Kim
Norton Rose Fulbright
666 Fifth Avenue
New York, NY 10103-3198
christina.kim@nortonrosefulbright.com

Legislation and Governmental Relations
Jennifer F. Hillman
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
jhillman@rmfpc.com

Robert Matthew Harper
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556
rharper@farrellfritz.com

Life Insurance and Employee Benefits
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Law Offices of Albert Feuer
110-45 71st Road, Suite 7M
Forest Hills, NY 11375-4962
afeuer@aya.yale.edu

Membership and Relations with Local Bars
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45 Franklin Place
Summit, NJ 07901
megan.knurr@citi.com

Newsletter and Publications
Jaclene D'Agostino
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

New York Uniform Trust Code
William P. LaPiana
New York Law School
185 West Broadway
New York, NY 10013-2921
william.lapiana@nyls.edu

Ira M. Bloom
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
ibloo@albanylaw.edu

Practice and Ethics
Eric W. Penzer
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
epenzer@farrellfritz.com

Peter K. Kelly
Ruskin Moscou & Faltischek PC
East Tower, 15th Floor
1425 Rexcorp Plaza
Uniondale, NY 11556-1425
pkelly@rmfpc.com

Surrogates Court
Lisa Ayn Padilla
Estates for LifeMates
61 Broadway, Suite 2125
New York, NY 10006
lisa@eflm.com

Taxation
Sharon L. Klein
Wilmington Trust
350 Park Avenue, 9th Floor
New York, NY 10022
sklein@wilmingtontrust.com

Susan Taxin Baer
Law Offices of Susan Taxin Baer
399 Knollwood Road, Suite 212
White Plains, NY 10603-1937
stbaer@baeresq.com

Technology in Practice
Gary R. Mund
P.O. Box 1116
New York, NY 10002-0914
gmund@mundlaw.com

Executive Committee District Representatives

First District
Ian William MacLean
The MacLean Law Firm, P.C.
60 East 42nd Street, 40th Floor
New York, NY 10165
ianwmaclean@maclean-law.com

Second District
William A. Cahill, Jr.
Anderson & Cahill LLP
255 Flatbush Avenue
Brooklyn, NY 11217-2444
wacahill@andersoncahill.com

Third District
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Albany County Surrogate's Court
Albany County Courthouse
16 Eagle Street
Albany, NY 12207
spettit@nycourts.gov

Fourth District
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Cioffi Slezak Wildgrube P.C.
2310 Nott Street East
Niskayuna, NY 12309-4303
ccioffi@cswlawfirm.com

Fifth District
Mary C. King,
Hancock & Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
mking@hancocklaw.com

Sixth District
Kathryn Grant Madigan
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902-0106
kmadigan@lgtlegal.com

Seventh District
Nancy E. Klotz
Tompkins Financial Advisors
7 Springdale Lck
Pittsford, NY 14534-3346
nklotz@tompkinsfinancial.com

Eighth District
Victoria L. D'Angelo
Barclay Damon LLP
9276 Main Street, Suite 3B
Clarence, NY 14031-1913
vdangelo@barclaydamon.com

Ninth District
Kevin H. Cohen
Law Offices of Kevin H. Cohen, P.C.
30 Glenn Street, 2nd Floor
White Plains, NY 10603
kcohen@estatelawny.com

Tenth District
Joseph T. La Ferlita
Farrell Fritz P.C.
1320 RXR Plaza
Uniondale, NY 11556
jlaferlita@farrellfritz.com

Eleventh District
Mindy J. Trepel
Sweeney Gallo Reich & Bolz LLP
95-25 Queens Blvd, 11th Floor
Rego Park, NY 11374
mtrepel@msgrb.com

Twelfth District
Lorraine Coyle
Coyle & Associates, LLP
5911 Riverdale Avenue
Bronx, NY 10471
lcoylelaw@aol.com

Thirteenth District
Irini Nagy Bekhit
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TRUSTS AND ESTATES LAW SECTION NEWSLETTER

Editor
Jaclene D'Agostino
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jdagostino@farrellfritz.com

Section Officers

Chair
Marion Hancock Fish
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
mfish@hancocklaw.com

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Law Offices of Magdalen Gaynor
10 Bank Street, Suite 650
White Plains, NY 10606
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One Canalside
125 Main Street
Buffalo, NY 14203
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Treasurer
Natalia Murphy
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153 East 53rd Street, 24th Floor
New York, NY 10022
natalia.murphy@citi.com