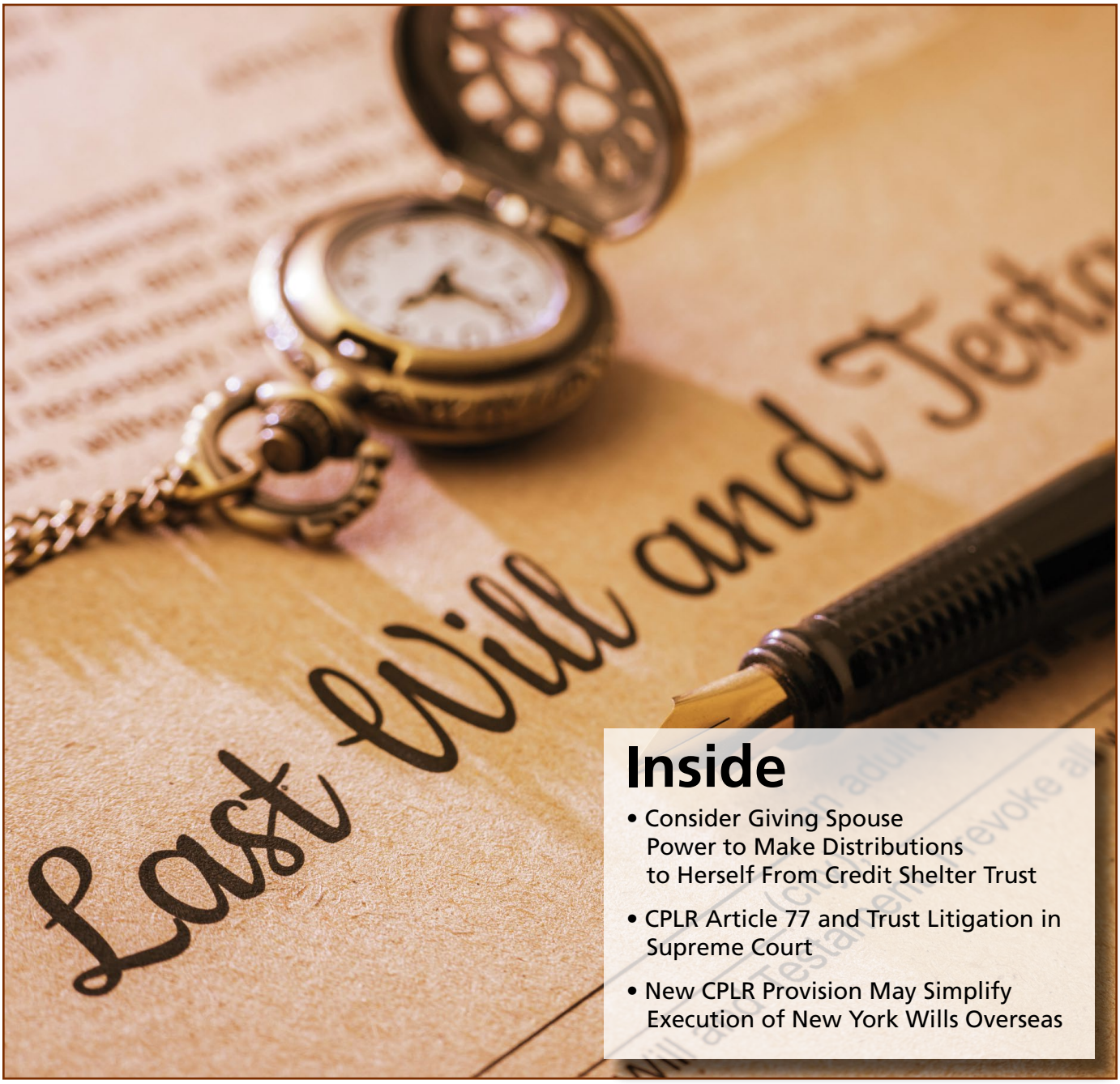
NYSBA FALL 2016 | VOL. 49 | NO. 3

Trusts and Estates Law Section Newsletter

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



Inside

Your practice is about to change!

NYSBA Estate Planning System

Created by Michael O'Connor, Esq.

ANNOUNCING

The Newest Lexis/NYSBA Document Assembly Product

- Through the power of HotDocs®, the leader in document automation technology, use interactive templates to pull in information you need throughout a document and across all related documents.
- Significantly reduce the time you spend drafting documents.
- Complete your clients' documents with confidence by relying on the expertise of one of New York's leading trusts and estates practitioners.

Created by Syracuse attorney Michael O'Connor, former Chair of NYSBA's Trusts and Estates Law Section and Elder Law Section and an estate planning lawyer with more than four decades of experience, the new **NYSBA Estate Planning System** is fully automated, document-assembly software that enables the user to draft customized estate planning documents.

Special Introductory Price

NYSBA Members

Save over $300 off the list price.

Offer expires December 31, 2016

Product Code CD-ROM: 6270
Product Code Downloadable: 6270E
Member Price (before 12/31/2016): $974.25
Member Price (after 12/31/2016): $1,104.00
Non-Member Price: $1,299.00

Annual Renewals by LexisNexis. Renewal price indicated does not include applicable taxes or shipping and handling as charged by LexisNexis. Prices subject to change.
Please call 1-800-833-9844 for more details. Multi-user pricing is available.

Early praise for the NYSBA Estate Planning System:

"Michael O'Connor, one of New York's leading experts in will drafting and estate planning, has succeeded in distilling his decades of experience into a straightforward, easy-to-use software package. Mike is the 'go-to' lawyer for cogent, well-drafted planning documents, based on a system he developed and perfected over his many years of practice. Now, every practitioner, regardless of area of concentration, can harness his expertise and generate estate planning documents in-house, economically and with confidence in their content, using the very same system."

- Gary R. Mund, Esq.

To view a brief demo of this product, and for more information visit **www.nysba.org/estateplansystem**.

NYSBA

Table of Contents

Message from the Section Chair

The Fall meeting was held in Saratoga Springs. We gathered at the venerable Gideon Putnam Hotel on October 6th and 7th. The district representative, Tara Pleat, was the chair of the meeting, which included roundtable discussions on Thursday afternoon.

The program on Friday focused on special needs planning and use of supplemental needs trusts including administration. We were fortunate to have the husband and wife team of Fran Pantaleo and Bob Freedman as the presenters.

And as with any meeting of our Section, there was a social event held at the Saratoga Automobile Museum where we dined among retired race vehicles and a display of cars built in New York State. The museum is located in the Saratoga Spa State Park and the building is a converted spa water bottling plant.

All in all it was a great visit to an area full of history during the Fall foliage season.

Looking ahead to the next several months, we hope to continue on the legislative successes made in the last session

The proposal concerning attorney-client privilege was presented to the Governor's Office after passing in both the Assembly and Senate, as was the proposal to extend the expiration of the QDOT sunset provisions from July 2016 to July 2019. Both were signed into law.

The Legislation Committee Co-Chairs, Rob Harper and Jennifer Hillman, were kept fully employed working on these proposals, as well as others.

Help on our many Committees is welcomed and I invite you to look at the range of Committees which are listed near the end of this *Newsletter* and contact me. I will be happy to help you join a Committee which works in an area of interest to you.

Magdalen Gaynor

Is YOUR Firm Participating?

The Foundation is announcing the 2016 Firm Challenge and invites firms of all sizes across New York to participate!

Stand out and be recognized as a firm that cares about making a difference as a philanthropic partner of The Foundation. Your support will help The Foundation meet the goal of doubling the much needed grant program.

The New York Bar Foundation wishes to thank the following firms that have committed to the Challenge and making a difference so far!

The deadline for the Firm Challenge is December 1! Don't be left out–visit www.tnybf.org/firmchallenge and get involved!

THE NEW YORK BAR FOUNDATION

Lawyers caring.
Lawyers sharing.
Around the corner.
Around the state.

Silver
$20,000 – $34,999

SULLIVAN & CROMWELL LLP

Patron
$5,000 – $9,999

MEYER SUOZZI
Meyer, Suozzi, English & Klein, P.C. | www.msek.com

RIVKIN RADLER
ATTORNEYS AT LAW

WHITEMAN OSTERMAN & HANNA LLP
Attorneys at Law
www.woh.com

Supporter
$2,500 – $4,999
Ingerman Smith

Friend
$1,000 – $2,499
Getnick Livingston Atkinson & Priore, LLP
Mitchell Silberberg & Knupp, LLP

Message from the Editor

In this issue of the *Newsletter*, two of our articles provide a closer look at provisions of the CPLR that are particularly useful to trusts and estates practitioners. Frank T. Santoro provides an overview of CPLR Article 77 and reminds us of the Supreme Court's jurisdiction over trust disputes, and Stephen L. Ham and Ronald J. Weiss address a recent change to CPLR 2106(b) that may simplify the process for executing a New York will in a foreign country. Also appearing in this issue is an article by Howard M. Esterces discussing the continued use of credit shelter trusts despite the increased federal exclusion amount and portability, and an article by Gary Bashian explaining factors courts consider in fixing legal fees in the context of SCPA 2110 proceedings.

Apologies to Darcy M. Kartis, whose bio was not published with her article, "Computation of Allowable Deductions for New York State Estate Tax—New Guidance," which appeared in our Summer 2016 issue. Ms. Katris is a partner at the firm of Hodgson Russ LLP in New York, New York where she practices in the areas of estate planning and estate administration. She is the co-chair of the Multi-state Practice Committee of the Trusts and Estates Law Section, and a Fellow of the American College of Trust and Estate Counsel.

Our next submission deadline is December 7, 2016. The editorial board of the *Trusts and Estates Law Section Newsletter* is:

Jaclene D'Agostino, *Editor-in-Chief*
jdagostino@farrellfritz.com

Naftali T. Leshkowitz, *Associate Editor*
ntl@leshkowitzlaw.com

Sean R. Weissbart, *Associate Editor*
srw@mormc.com

Thomas V. Ficchi, *Associate Editor*
tficchi@cahill.com

Jaclene D'Agostino

TEdec

Fiduciary Accounting System

Professional Fiduciary Accounting Software

TEdec provides attorneys, CPAs and other professionals with the most proven, reliable and full featured Trust and Estate Accounting Software on the market.

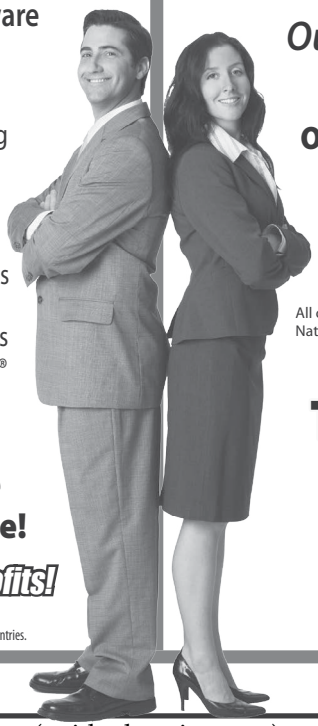
One-time data entry ensures accuracy while saving time in preparing:

- Court Inventories & Accountings
- Management Reports
- Estate Tax & Income Tax Returns by bridge to CCH ProSystems fx® and Lacerte® Tax Software
- Much more!

TEdec provides a Risk Free 100% Money Back Guarantee!

Eliminate Mistakes and Increase Profits!

ProSystems fx® is a registered trademark of CCH Corporation
Lacerte® is a registered trademark of Intuit Inc. in the United States and other countries.



Service Bureau

Outsource to **TEdec** for all your fiduciary accounting needs

Our Professional Team Can Provide:

- Data Entry
- Court Inventories
- Accountings - Formal or Informal
- Releases

All compliant with the official forms for: NY, PA, NC, FL, CA, National Fiduciary Accounting Standards.

TEdec Systems, Inc.
207 Court Street, Little Valley, NY 14755

Learn More. Try Us Today!
Online at **www.tedec.com**
Call **1-800-345-2154**

Two Ways to Improve Your Trust & Estate Practice

(paid advertisement)

Potts and *Freeman* Updated: Surrogate's Court Criteria and Rationale for Fixing Legal Fees in Estates

By Gary E. Bashian

In the seminal cases of *In re Potts' Estate*[1] and *In re Freeman's Estate*,[2] the Appellate Division and Court of Appeals provided guidance to New York State Surrogate's Courts by listing factors to take into consideration in a proceeding under Surrogate's Court Procedure Act (SCPA) 2110, regarding the fixing of attorney's fees. These factors are:

1. Time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented;
2. The lawyer's experience, ability and reputation;
3. The dollar amount involved and benefit resulting to the client from the services;
4. The customary fee charged by the bar for similar services;
5. The contingency or certainty of compensation;
6. The results obtained; and
7. The responsibility involved.

These original factors have since been refined and expanded upon, often by the attempts of attorneys to test the limits of the "fair value" of legal services rendered during the administration of an estate. The evolving jurisprudence surrounding SCPA 2110 is charted below. Examination of recent court decisions in New York reaffirms the importance of the *Potts* and *Freeman* factors, as well as the factors that are now emphasized by the Surrogate's Courts for determining legal fees. In reviewing cases that both limited and expanded the criteria of fees sought, the Courts have shown a willingness to ensure that attorneys are fairly compensated, but also to rein in attorneys who attempt to stretch the limits of reasonableness.

In recent years, when fixing legal fees Surrogate's Courts have invariably focused on (1) the importance of time spent on the matter, (2) the inherent authority of the Surrogate to reduce and fix fees, even when the parties involved have consented to the fee applications, and (3) the overall size of the estate. In addition:

1. The use of meticulous and contemporaneously maintained time records has been emphasized as being very important;
2. There has been a focus on the quality of the work done as courts increasingly analyze the type of work done; and
3. The necessity of the work is being scrutinized.

One of the most useful tools in supporting the legal fees sought in a SCPA 2110 proceeding has proven to be well kept and detailed time records of all work performed on a matter. Although the *Potts* decision did not disregard time spent on a matter, presiding Justice Hubbs in *Potts* placed more weight on factors such as the ability of the attorney and the outcome of the matter.[3] After *Potts*, courts have also considered the importance of contemporaneously maintained time records.[4] The importance of time records remains vital to an attorney's application for legal fees, and the lack of contemporaneous time records may "substantially weaken" a claim for fees.[5] And this makes sense, because unless records are contemporaneous and part of an attorney's ordinary practice, they become suspect. Surrogate's Courts will also scrutinize the amount of work billed by the most experienced, and usually most expensive, attorneys and determine whether it was appropriate for a senior attorney to complete the work, or whether it was more appropriate for a junior attorney to have done the work at a lower billing rate.[6]

Despite the importance of an attorney's contemporaneously maintained time records, a Surrogate is not obligated to rely solely upon the time records in determining the reasonableness of the fees requested. Surrogate's Courts have also judged the quality of the work for which fees are sought, rather than just considering the time spent. Former Bronx County Surrogate Lee Holzman, in *In re Estate of Blau*, not only disallowed legal fees requested for executorial services, but also stated in his decision that the attorney had been "spending significantly more time on issues than warranted."[7] The Surrogate concluded that the attorney spent "approximately 25% more time than he should have" on executorial rather than legal services, engaged in legal services involving issues that should have been conceded, and spent more time on issues than required by the complexity of the issues.[8]

The lesson learned from *In re Estate of Blau* is that the use of time records in determining the reasonableness of legal fees involves not merely an examination of the amount of time spent, but rather it is a qualitative and quantitative review under which a Surrogate will, in his or her discretion, reduce legal fees based on the amount of time in which work *should* have been completed. The subjective nature of this determination may prove difficult to accept for attorneys who disagree about the necessity of certain work or complexity of certain matters, or for attorneys encountering certain issues for the first time. Also, most attorneys are respectful of their clients' needs and costs of fiduciaries,

and will zealously assist an executor or executrix to understand their fiduciary responsibilities, and while some of this time may not be purely legal, nevertheless it is necessary, reasonable, and required. The distinction between legal services and other work done by an attorney during the course of a legal proceeding is not black and white, but the courts have a duty to protect estates, and in balancing that duty, when it comes to evaluating attorney compensation, the attorney may not necessarily evoke the court's sympathy.

Although a Surrogate is not obligated to accept at face value an attorney's summary of hours worked on a matter,[9] and the discretion of a Surrogate is indeed broad during the determination of the reasonableness of legal fees under SCPA 2110, this discretion may be abused by a Surrogate, under the guise of applying *Potts* and *Freeman* factors.

In *In re Elenidis*, the Appellate Division determined that even though the Surrogate considered relevant factors such as the size of the estate and whether the estate benefited from the services rendered, the reduction of time charges from thirty hours to twenty hours was an improvident exercise of discretion.[10] While the Surrogate had correctly reduced the overall attorney's fees for the attorney from the approximately $35,000 already paid, the Appellate Division determined that the attorney was entitled to fees for the thirty hours of service he had rendered.[11] The *Elenidis* decision is important for attorneys to be aware of because it provides support for the argument that even if the total amount of fees is determined excessive, the number of hours spent on the matter may still be considered reasonable, thus allowing attorneys the opportunity to further defend their time charges. In other words, a reduction in the total fee is not synonymous with a proper reduction in the time spent on a matter.

Especially difficult may be situations where contemporaneous time records are not maintained, even if the attorneys agree by stipulation to fix the fees for legal services as a certain percentage of the estate, which is an arrangement that does not require time records.[12] Despite the lack of time records, an attorney may submit evidence demonstrating the work completed on a matter and the breadth of an attorney's involvement in a matter.[13] Further, when a Surrogate makes a determination as to legal fees based on services provided by one attorney, that determination will be persuasive in the Surrogate's fixing of legal fees for another attorney in the matter who provided similar services.

For example, in *In re Greenfield*, the Surrogate's Court of Kings County awarded approximately $360,000 in legal fees for an attorney's services rendered to a co-administrator, but only approximately $150,000 to another attorney for similar services rendered to the Public Administrator, who was a co-administrator of the estate.[14] The Appellate Division determined that because the two attorneys had provided similar services, the Surrogate's determination based on the traditional SCPA 2110 factors was an improvident exercise of discretion.[15]

Interestingly, the Appellate Division remanded the redetermination of legal fees for one of the two attorneys to a Surrogate's Court in a different county, given his many years of service to the Public Administrator of Kings County. This was clearly an effort to ensure the impartiality of the Surrogate. While this case supports the well settled law within SCPA 2110 proceedings that courts are not bound by any retainer agreements or a party's consent to attorney's fees requested or already paid, it also supports the notion that a Surrogate should take into consideration similar work done by other attorneys in the same matter when determining reasonable and appropriate fees, as part of the consideration of the *Potts* and *Freeman* factors.[16]

"A Surrogate is permitted to ignore the quantity of the legal services rendered, as well as consider whether the substance and quality of the actual work completed benefited the estate."

Perhaps the most illuminating of recent decisions came last year in *In re Marsh* in which the Westchester County Surrogate's Court significantly reduced the attorney's fees sought by a White Plains firm.[17] The court first considered that the firm sought approximately $1,230,000 in legal fees, in addition to the approximately $993,000 in legal fees already approved by the Surrogate's Court up to that point, despite the estate having only $340,000 of remaining assets.[18] While there was no indication that the time records kept by the law firm were lacking, the court did not accept the firm's assertions of time spent on the matter and reduced the legal fees sought from approximately $1,230,000 to $472,000.[19] A Surrogate is permitted to ignore the quantity of the legal services rendered, as well as consider whether the substance and quality of the actual work completed benefited the estate.[20] The Surrogate refused to approve legal fees that amounted to nearly twenty percent of the estate.[21]

The law firm also sought legal fees related to the appeal of the Surrogate's decision on its fees. The court deemed such legal fees improper because the services related to the appeal provided no benefit to the estate and only benefited the firm. The court noted that even if legal fees for the appeal could be awarded, the $300,000 sought was "grossly excessive."[22] To this point, the court also stated that because the firm and one attorney partner were defendants in an action in which they also represented the fiduciary of the estate, the fact that the firm provided legal services to itself must be taken into consideration, even though a court may approve the use of estate funds to pay attorney's fees incurred by the fiduciary in such a situation.[23]

It is important to note that even fees that are related to estate administration may be challenged by a Surrogate should the time be spent "defending that which was not defensible."[24] Further, in *Marsh*, the law firm sought reimbursement for disbursements related to the defense of the fiduciary, which the Surrogate determined were not reimbursable under *Matter of Diamond*, which disallows reimbursement of expenses for travel, mailing, telephone, photocopies, fax, etc., as costs expected to be absorbed by the attorney.[25]

As can be seen from the discussion in *In re Marsh*, there are indeed limits for the type of legal services for which Surrogate's Courts are willing to approve legal fees, beyond those factors first described in *Potts* and *Freeman*. The Surrogate's determination in *Marsh* is an important lesson to seek legal fees only for services that benefited the estate, and not to seek legal fees that greatly exceed the total value of the estate.

A similar determination was made regarding attorney's fees incurred during the administration of a trust where the fees sought exceeded twenty percent of the trust assets.[26] Indeed, this determination follows the generally accepted rule that the legal fee must be reasonably related to the size of the estate.[27]

In re Askin involved one of the more nuanced applications of SCPA 2110, where the Surrogate's Court was tasked with determining the extent of its jurisdiction over an out-of-state law firm under SCPA 2110.[28] In *In re Askin*, the Decedent's Will was admitted to probate in New York, but the appointed executor was a Massachusetts resident who hired a Massachusetts firm, which retained New York law firms to appear on its behalf in Westchester County Surrogate's Court. The Westchester County Surrogate determined the court did not have authority to fix the fees of a Massachusetts law firm for legal work conducted solely out of state (as the law firm argued), but still ordered that attorney's fees already paid to an out-of-state attorney be returned to the estate.[29] The Appellate Division reversed, and held that the New York State Surrogate's Court indeed had jurisdiction to fix compensation owed to the Massachusetts firm, and that it should have made a determination as to the reasonableness of the fees sought rather than directing the return of all fees.[30]

As stated by the Appellate Division in *Askin*, SCPA 2110 does not limit Surrogate's Courts from fixing compensation for attorneys engaged in estate administration matters in New York State, even if they are out-of-state attorneys.[31] Per the Appellate Division, the Surrogate's Court acknowledged, but neglected to apply, the traditional *Potts* and *Freeman* factors, but should have done so to determine the reasonableness of the fees prior to requiring the Massachusetts firm to refund to the estate all fees previously paid.[32] The *Askin* decision affirms the broad reach of SCPA 2110, and teaches that an out-of-state address will not insulate an attorney from a Surrogate's Court's authority to fix attorney's fees for the administration of an estate.

A perhaps all too common dilemma faced by an estate's fiduciary who is unsure whether his or her attorney's fees are reasonable is the timing of payment. A fiduciary who pays attorney's fees without Court approval, and that are ultimately decided to be excessive, may be surcharged by the Court. However, should the fiduciary refuse payment until the fee is approved by the court, the court has the authority to impose interest on the amount owed to the law firm. In *Matter of Beiter*, New York County Surrogate Rita Mella rejected the decision of a Special Referee that imposed pre-decision interest on unpaid legal fees, since such interest is typically reserved for rare occasions, such as when fiduciaries carelessly or purposely delay a proceeding.[33] In *Beiter*, the fiduciary expressed his concern over the amount of the legal fees charged by two New York City law firms, so he stopped paying them.[34] The Surrogate determined that because the fiduciary expressed his concern over the fees in good faith and did not purposely delay the proceeding, the fiduciary "should not be forced to risk liability for surcharge in order to avoid exposing the estate to liability for pre-decision interest."[35] The *Beiter* decision resolves the conundrum by ruling that a fiduciary will not have to decide between a surcharge and interest, provided he or she takes the requisite good faith steps to timely communicate any legitimate concerns regarding fees to the attorney.

As demonstrated by the decisions discussed above, New York State Surrogate's Courts, as well as the Appellate Divisions, are mindful of attorney overreach with regard to legal fees. On the other hand, the courts will on rare occasion also correct a determination of legal fees that provides insufficient compensation for work completed on a matter. Therefore, it is important for attorneys to know both the limits of reasonableness during a SCPA 2110 proceeding, as described in cases such as *In re Marsh* and *In re Estate of Blau*, as well as be aware of situations where they may rightfully appeal when the hours they work on a matter warrant compensation, such as in *In re Elenidis*, and when the fixing

of legal fees must be consistent for services provided during a matter, such as *In re Greenfield*.

As a general maxim, attorneys who desire the best possible outcome in a SCPA 2110 proceeding should only seek fees that are (1) beneficial to the estate and not incurred serving the attorney's own interests, (2) not grossly excessive in relation to the size of the estate, (3) for services that were for legitimate claims and defenses, and (4) supported by contemporaneously maintained time records.

Endnotes

1. 213 A.D. 59, 209 N.Y.S. 655 (4th Dep't 1925).
2. 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974).
3. *In re Potts*, 213 A.D. 59 at 62.
4. *See, e.g., Estate of Ziegert*, N.Y.L.J., Jan. 29, 2016, p.35 (Sur. Ct., Bronx Co. 2016); *In re Marsh*, N.Y.L.J., July 14, 2015, p. 26 (Sur. Ct., Westchester Co. 2015); *In re Kelly*, 187 A.D.2d 718, 590 N.Y.S.2d 289 (2d Dep't 1992); *In re Phelan*, 173 A.D.2d 621, 570 N.Y.S.2d 202 (2d Dep't 1991); *In re Verplanck*, 151 A.D.2d 767, 543 N.Y.S.2d 138 (2d Dep't 1989); *In re Lanyi*, 147 A.D.2d 644, 538 N.Y.S.2d 183 (2d Dep't 1989).
5. *In re Brannen*, 14 Misc. 3d 1222(A) (Sur. Ct., Dutchess Co. 2007).
6. *Accounting by Smith*, N.Y.L.J., May 23, 2016, p.29 (Sur. Ct., Suffolk Co. 2016).
7. *In re Estate of Blau*, 24 Misc. 3d 1249(A), 901 N.Y.S.2d 897 (Sur. Ct., Bronx Co. 2009).
8. *Id.* at 3.
9. *In re Searah*, 44 Misc. 3d 1227(A), 998 N.Y.S.2d 308 (Sur. Ct., Dutchess Co. 2014).
10. 120 A.D.3d 1229, 992 N.Y.S.2d 128 (2d Dep't 2014).
11. *Id.* at 1232.
12. *In re Greenfield*, 127 A.D.3d 1189, 7 N.Y.S.3d 513 (2d Dep't 2015).
13. *Id*. at 1191-192.
14. *Id.*
15. *Id.* at 1192.
16. *See, e.g., In re Lewis*, 50 Misc. 3d 1208(A), 31 N.Y.S.3d 922 (Sur. Ct., Broome Co. 2016); *In re Bender*, 50 Misc. 3d 1207(A), 28 N.Y.S.3d 647 (Sur. Ct., Broome Co. 2015); *In re La Delfa*, 107 A.D.3d 1562, 968 N.Y.S.2d 759 (4th Dep't 2013); *In re Goliger*, 58 A.D.3d 732, 871 N.Y.S.2d 689 (2d Dep't 2009); *Stortecky v. Mazzone*, 85 N.Y.2d 518, 626 N.Y.S.2d 733 (1995).
17. N.Y.L.J., July 14, 2015, p.26 (Sur. Ct., Westchester Co. 2015).
18. *Id.* at 4.
19. *Id.* at 6.
20. *Id.* at 7-8.
21. *Id.* at 6.
22. *Id.* at 8.
23. *Id.* at 10.
24. *Id.* at 9.
25. *Matter of Diamond*, 219 A.D.2d 717, 631 N.Y.S.2d 748 (2d Dep't 1995).
26. *Matter of J.L.*, N.Y.L.J., p.25 (Sur. Ct., Bronx Co. 2015).
27. *In re Deluca*, 35 Misc. 3d 1210(A), 950 N.Y.S.2d 722 (Sur. Ct., Nassau Co. 2012); *Matter of Kaufmann*, 26 A.D.2d 818, 273 N.Y.S.2d 902 (1st Dep't 1966).
28. 113 A.D.3d 72, 976 N.Y.S.2d 492 (2d Dep't 2013).
29. *Id.* at 74.
30. *Id.* at 76-77.
31. *Id.* at 83.
32. *Id.* at 84.
33. N.Y.L.J., Aug. 19, 2013, p.25 (Sur. Ct., N.Y. Co. 2013).
34. *Id.* at 18.
35. *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 Patrick D. Coughlin, an associate at Bashian & Farber, LLP, for his assistance in the composition of this article.

NEW YORK STATE BAR ASSOCIATION

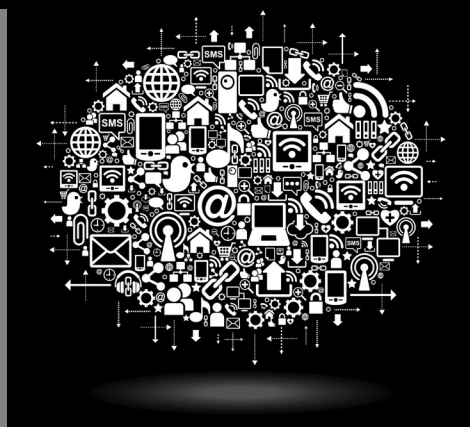
CONNECT WITH NYSBA

Visit us on the Web:**www.nysba.org**

Follow us on Twitter: **www.twitter.com/nysba**

Like us on Facebook: **www.facebook.com/nysba**

Join the LinkedIn group: **www.nysba.org/LinkedIn**



Consider Giving Spouse Power to Make Distributions to Herself From Credit Shelter Trust

By Howard M. Esterces

Credit Shelter Trusts are not a thing of the past despite an increase in the Federal Applicable Exclusion Amount to $5,450,000 for deaths in 2016, and portability. Although a decedent's unused exclusion amount ("the Deceased Spousal Unused Exclusion Amount" or "DSUEA") is available to a surviving spouse as a result of the Tax Relief Unemployment Reauthorization and Job Creation Act of 2010,[1] the amount is fixed as of the first spouse's death. By contrast, assets in a credit shelter trust designed to be excluded from the survivor's gross estate can appreciate to a far greater value than the fixed DSUEA of the first spouse to die, particularly when the survivor is young and may be expected to live for a good number of years.

For example, suppose the first spouse dies in 2016, leaving his entire estate outright to his wife. If the survivor dies 15 years later, the first spouse's frozen DSUEA of $5,450,000 would be excluded from the survivor's estate, in addition to her own Applicable Exclusion Amount. Suppose instead that $5,450,000 were put into a credit shelter trust on the first death, that income is paid out each year, and principal increases in value at an annual rate of 2%, compounded annually. The credit shelter trust would then be valued at over $7.3 million, all of which would be excluded from the survivor's taxable estate.[2]

It is by no means certain that the survivor will even be able to use the unused exclusion amount of the first spouse to die. For example, if the survivor remarries, and the new spouse pre-deceases her, the unused exclusion of the first deceased spouse will no long apply, since only the *last deceased spouse* counts in determining the DSUEA available to the survivor. If the newly deceased spouse had children of a prior marriage, chances are that his exclusion amount will be left to them and the surviving spouse will not have the use of *any* DSUEA. Portability also does not apply for Generation Skipping Transfer Tax purposes, which may be a consideration in the case of very large estates.

Furthermore, unlike the Federal estate tax, portability does not apply in determining New York State estate taxes. For example, suppose the first spouse's estate had been left outright to the survivor, and the survivor dies in 2016 with her own taxable estate of $5,450,000, an amount which is exempt from Federal estate tax this year. Although the New York basic exclusion amount is $4,187,500 beginning April 1, 2016, none of the exclusion will be available because the New York exclusion disappears entirely if the taxable estate is 105% or more of the basic exclusion amount. Here, the New York exclusion amount disappears entirely for a taxable estate of $4,396,875 (105% of $4,187,500). The New York estate tax accordingly, will be $444,800, despite there not being any Federal estate tax due.[3]

For that reason, in estates where a credit shelter is warranted, care should be taken to modify the full Federal Applicable Exclusion Amount, currently $5,450,000, in a formula clause establishing the credit shelter trust. The credit shelter should be limited to the highest amount which will not be subject to New York estate tax, unless your client will be happy to pay more than $400,000 of New York estate tax when the first spouse dies. This won't be necessary once the New York exemption will equal the Federal exemption on or after January 1, 2019. In the meantime, consider using the following language in designing the credit shelter formula:

> Notwithstanding the foregoing, however, the Credit Shelter Trust shall not exceed the highest amount which may pass without payment of State death taxes in my estate (except to the extent my taxable estate is increased as a result of my spouse's qualified disclaimer, or by reason of failure the qualify terminal interest property for a marital deduction).

There are, of course, other reasons to use a credit shelter trust on a first death, including for Medicaid planning, and where there have been multiple marriages to control the disposition of assets when the survivor dies. This is not to imply that a credit shelter trust as opposed to reliance on portability is always desirable. It depends on the size of the spouses' estates, their ages, health and consideration of income tax issues. The cost basis for income tax purposes of assets in a credit shelter trust will be stepped up to fair market value on the first death, but will not benefit from a further step up when the survivor dies.

Structuring the Credit Shelter Trust

Surviving spouses usually don't care for the idea of tying up assets in trust, particularly when distributions of principal to the survivor are under the control of another trustee. Consider the following to satisfy the survivor's desire for some control, while at the same time keeping the credit shelter trust out of the survivor's taxable estate: Name the survivor as a trustee, with sole authority to make withdrawals of principal for her own health, maintenance, and support. A co-trustee would

be named with authority to make distributions for any other purpose. A clause to accomplish this might look as follows:

> **The Trust for My Wife**
>
> The Trustees are directed to use income and principal of the Credit Shelter Trust for my wife's health, maintenance and support in the same standard she enjoys on the date of my death, after consideration of the income, support, and capital resources otherwise available to her. My wife shall have sole authority while she is a Trustee to exercise the discretion above, whether or not another Trustee is serving with her. In that case, any Trustee serving with my wife shall be exonerated and held harmless by my estate and her trust in following my wife's directions pertaining to distributions for her health, maintenance and support. If my wife is not serving, then the Trustees who are serving are directed to exercise the discretion provided in this Section.

Several issues come to mind in considering the clause above. Will the credit shelter trust still remain free of inclusion in the survivor's gross estate for estate tax purposes? Will it be subject to claims of the survivor's creditors, which, in turn would also cause the trust to be included in the survivor's gross estate? The answers to both of these issues are favorable.

To begin with, Estate Powers and Trusts Law (EPTL) 10-10.1 allows a trustee to make distributions of income or principal to herself for her "health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code …".

Margaret Valentine Turano, in discussing this in her 2004 Practice Commentaries to EPTL 10-10.1, states:

> Under the prior version of this statute, a trustee could not exercise a discretionary power in his own favor. Such a law prevented inclusion of the trust corpus in the trustee's gross estate for estate tax purposes as a power of appointment under IRC 2041 … The 2003 legislation also permitted trustees of other trusts (that is irrevocable trusts and trusts created by someone other than the grantor) to exercise the limited power to provide for his own maintenance, health, education or support (the ascertainable standard of 2041).

Professor Turano goes on to state, "[t]his section ensures that a trust will not be included in the trustee's gross estate because he has a general power of appointment."

> EPTL 10-7.1 provides further that, Property covered by a special power of appointment (or a general power of appointment that is exercisable solely for the support, maintenance, health and education of the donee within the meanings of Sections 2041 and 2514 of the Internal Revenue Code) is not subject to the payment of the claims of creditors of the donee, his estate or the expenses of administering his estate.

A further issue is whether the trustee-beneficiary in exercising discretion to pay principal to herself for her health, maintenance, education and support is obliged to take into consideration the beneficiary's other income, capital resources, and means of support. This does not seem to be the case under Treasury Regulations 20.2041-1(c)(2) (Treas. Reg.), which provides that "In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised." This probably exonerates the trustee beneficiary from necessarily even *considering* her other income, capital resources and means of support. It is probably safer, however, to include these additional requirements, since they are not specifically covered in the regulation.

Treas. Reg. 20.2041-1(c)(2) is reproduced below to provide further insight to the subject.

> **(2) *Powers limited to an ascertainable standard.* –** A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of Section 2041(b)(1)(A), not a general power of appointment. A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). As used in this subparagraph, the words "support" and "maintenance" are synonymous and their meaning is not limited to the bare necessities of life. A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite

standard. Examples of powers which are limited by the requisite standard are powers exercisable for the holder's "support", "support in reasonable comfort", "maintenance in health and reasonable comfort", " support in his accustomed manner of living", education, including college and professional education", "health", and "medical, dental, hospital and nursing expenses and expenses of invalidism". In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.

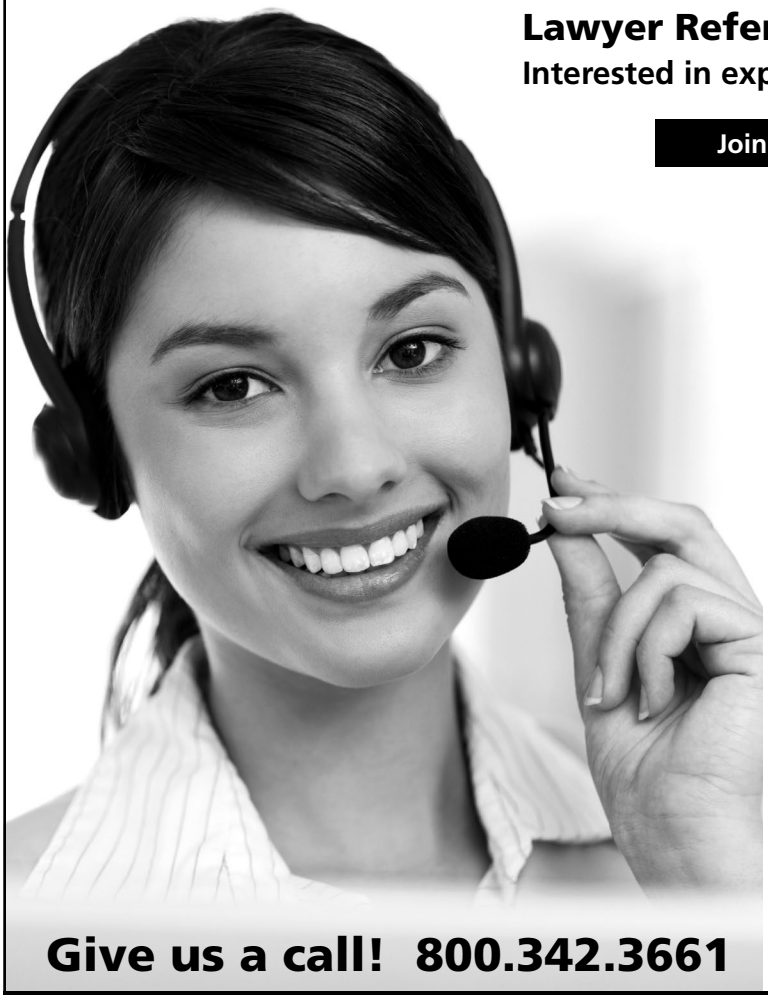
For the reasons stated above, credit shelter trusts limited to the New York estate tax exclusion amount, and providing the survivor with authority to pay principal to herself for her health, maintenance, and support, are still worth considering, despite portability provisions under Federal estate tax law.

Endnotes

1. The Tax Relief Unemployment Reauthorization and Job Creation Act of 2010, effective for deaths after January 1, 2011, amended IRC Sections 2010 and 2505.
2. The masculine and feminine are used interchangeably in this article and applies whichever spouse dies first or survives. It also applies to same-sex marriages.
3. Ch. 59 New York Laws of 2014 (Part X).

Howard M. Esterces is an attorney practicing at Meltzer, Lippe, Goldstein, and Breitstone, LLP in Mineola, New York. He is a Fellow of The American College of Trust and Estate Counsel, a Fellow of the New York State Bar Foundation, and is on the Board of Editors of *Practical Tax Strategies*, a Thomson Reuters publication.

NEW YORK STATE BAR ASSOCIATION



Lawyer Referral and Information Service

Interested in expanding your client base?

Join the Lawyer Referral & Information Service

Why Join?

> Expand your client base
> Benefit from our marketing strategies
> Increase your bottom line

Overview of the Program

The New York State Bar Association Lawyer Referral and Information Service (LRIS) has been in existence since 1981. Our service provides referrals to attorneys like you in 44 counties (check our website for a list of the eligible counties). Lawyers who are members of LRIS pay an annual fee of $75 ($125 for non-NYSBA members). Proof of malpractice insurance in the minimum amount of $100,000 is required of all participants. If you are retained by a referred client, you are required to pay LRIS a referral fee of 10% for any case fee of $500 or more. For additional information, visit **www.nysba.org/joinlr**.

Sign me up

Download the LRIS application at **www.nysba.org/joinlr** or call **1.800.342.3661** or e-mail **lr@nysba.org** to have an application sent to you.

NYSBA

MEETS ABA STANDARDS FOR LAWYER REFERRAL
AMERICAN BAR ASSOCIATION
THE RIGHT CALL FOR THE RIGHT LAWYER

Give us a call! 800.342.3661

LAWYER REFERRAL & INFORMATION SERVICE

CPLR Article 77 and Trust Litigation in Supreme Court

By Frank T. Santoro

For good reasons, trusts and estates litigators gravitate towards the Surrogate's Court as the appropriate venue for litigated matters pertaining to the affairs of decedents and lifetime trusts. The Surrogate's Court, with its expansive jurisdiction, routinely presides over cases involving substantive matters of law concerning trusts and estates.[1] Moreover, the Surrogate's Court has a structure and staff specifically geared to handle such matters, and the necessary resources to handle issues that arise in the administration of decedent's estates.[2]

While the Supreme Court, as New York's court of general jurisdiction,[3] has the power to probate a will and issue letters testamentary and trusteeship, the Surrogate's Court is really the only appropriate venue for a probate proceeding. Similarly, accountings, discovery proceedings, and other miscellaneous proceedings pertaining to estates and testamentary trusts most often belong in the Surrogate's Court.

However, the Surrogate Court's jurisdiction should not necessarily eliminate consideration of Supreme Court as an appropriate venue for disputes pertaining to trusts. Civil Practice Law and Rules (CPLR) 7701, which introduces CPLR article 77, authorizes a special proceeding for the determination of matters relating to express trusts.[4] Article 77 is intended to provide an economical and relatively expeditious method for the adjudication of trustees' accountings and other trust matters in Supreme Court.[5] Article 77 is seldom discussed at length—for example, *Siegel's New York Practice*, an old friend to all civil litigators, mentions article 77 only once, stating "[a] special proceeding is also used in the Supreme Court to determine matters relating to a trust."[6] Given the goals underlying article 77, economy and swift adjudication of disputes pertaining to trusts, Supreme Court is a venue worth considering when bringing such a proceeding. A closer look at article 77 is thus in order—this article addresses only the basics.

"While the Supreme Court, as New York's court of general jurisdiction, has the power to probate a will and issue letters testamentary and trusteeship, the Surrogate's Court is really the only appropriate venue for a probate proceeding."

The Statute and Cases Decided Thereunder

Article 77 has only a few sections and incorporates certain provisions of the Surrogate's Court Procedure Act (SCPA) by reference. CPLR article 4, governing procedure in all special proceedings, applies to special proceedings commenced pursuant to CPLR article 77.[7] As stated, CPLR 7701 introduces article 77, and is followed by five more sections that are specific to trusts.

- CPLR 7702 provides that a trustee seeking a judicial discharge on an accounting must file his accounting with an affidavit of accounting party in the manner prescribed by SCPA 2209.
- CPLR 7703 incorporates the SCPA's virtual representation provisions to article 77 proceedings.
- CPLR 7704 limits the court's power to appoint a referee in certain circumstances.
- CPLR 7705 and 7706 provides for the filing of an account settled informally and procuring an order thereon in a manner similar to SCPA 2202. CPLR article 4, governing all special proceedings applies in a special proceeding brought pursuant to article 77.

While article 77 contains only a few provisions, the Supreme Court has addressed a myriad of issues and disputes in article 77 proceedings. For example, the proper application of Estates Powers and Trust Law (EPTL) Section 7-1.9 was addressed in an article 77 proceeding in *Elser v. Meyer*.[8] In *Elser*, the Supreme Court held that a settlor of a lifetime trust could revoke a trust without the consent of the trustee notwithstanding language in the trust instrument which, in sum and substance, required the consent of the trustee to revoke the trust. The Appellate Division reversed, and remitted the matter to the Supreme Court to determine whether the trustee had unreasonably withheld his consent.[9]

In *Andrews v. Trustco Bank*,[10] the Supreme Court, *inter alia*, addressed objections to an accounting reviewing New York's former Principal and Income Act.[11] In *Addesso v. Addesso*,[12] the Supreme Court dismissed an article 77 proceeding to compel a trustee to account and compel a distribution where uncontroverted evidence before the court showed that there were no assets remaining in the trust account and the petitioner previously had been provided with an accounting.

In another article 77 proceeding where beneficiaries sought an accounting from a trustee, the court extended judicial approval of a sale of a parcel of real property.[13] Removal of a trustee on the grounds that the trustee has disregarded court orders and engaged in self-dealing has also been granted in an article 77 proceeding.[14]

Concurrent Jurisdiction and Removal to Surrogate's Court

Concurrent jurisdiction notwithstanding, the courts generally err on the side of transferring matters pertaining to trusts and estates to the Surrogate's Court. A petitioner seeking relief from the Supreme Court with respect to a trust may find himself mired in the delay and expense of motion practice, and may find himself ultimately awaiting the administrative transfer of his article 77 proceeding from Supreme Court to the Surrogate's Court following decision and order on a motion. Under N.Y. Const. art. VI, § 19(a) and CPLR 325, the Supreme Court may, and quite often does, transfer trusts and estates-related disputes to the Surrogate's Court.

Where there are existing proceedings pending pertaining to an estate or a trust in the Surrogate's Court, the Supreme Court will generally refrain from exercising its concurrent jurisdiction where all the relief requested may be obtained in the Surrogate's Court and where the Surrogate's Court has already acted.[15] Thus, by way of example, the Supreme Court is unlikely to exercise jurisdiction over a proceeding to remove a trustee where that trustee has petitioned the Surrogate's Court for judicial settlement of her account. However, the Supreme Court will retain jurisdiction over a dispute affecting a decedent's estate when it is the first court to assume jurisdiction over the matter, especially where no motion is made in Supreme Court asking it to exercise its discretion to transfer of the action to the Surrogate's Court.[16]

While the law favors the Surrogate's Court as a venue for adjudicating disputes pertaining to trusts, the cases cited above plainly show that the Supreme Court deals with trusts regularly. Moreover, the Supreme Court, and in particular the commercial division as it exists in some counties,[17] frequently addresses the kinds of issues that are featured prominently in trust litigation. For example, the administration and management of closely held businesses, solely owned or controlled by a trust, will often raise questions of self-dealing, prudence, and the proper exercise of fiduciary power. Issues surrounding corporate governance, complex taxation, business valuation, and real estate valuation are as commonly encountered in trust litigation as they are in business divorce litigation in the Supreme Court.

Under the right circumstances, the Supreme Court should be persuaded to decline to exercise its power to transfer an article 77 proceeding to the Surrogate's Court. It would seem, in a situation involving a lifetime trust over which the Surrogate's Court has never entertained jurisdiction for any purpose, that the Supreme Court should exercise and retain its jurisdiction to fulfill article 77's goals of expediency and economy in the adjudication of disputes pertaining to trusts. While the Supreme Court may not frequently delve into the minutiae of the Principal and Income Act[18] or explore the canons of trust construction, as New York's court of general jurisdiction, it is well-equipped to do so, and to administer justice in matters involving same.

Practical Issues May Arise

While it always falls upon the practitioner to ensure that jurisdiction is obtained over all necessary parties, and to ensure that all pleadings include the necessary information for the court to afford the relief requested by the petitioner, the Surrogate's Court is unique. The Supreme Court does not have an accounting clerk or a miscellaneous clerk who will evaluate accountings or pleadings and firmly inform the practitioner as to the minimum requirements that, in the clerk's view, must be met before process issues. While article 77 incorporates by reference the SCPA's provisions pertaining to virtual representation, and requires that an accounting and affidavit of accounting party be filed in a proceeding seeking judicial approval of accounting, it does not, for example, statutorily identify all of those parties entitled to notice in an accounting proceeding. Creditors, potential creditors, beneficiaries, legatees, devisees, co-trustees, successor trustees, court-appointed guardians, fiduciaries of deceased beneficiaries (or the beneficiaries or distributees of the deceased beneficiary where no fiduciary is appointed), and the New York State Attorney General[19] are all parties who may be interested in a trust accounting.[20] A binding decree in an accounting proceeding approving a trustee's accounting will only be binding on those who had notice and opportunity to be heard with respect to same, so it is critical that all interested parties be joined therein.[21] Moreover, the failure to join a necessary party, such as the New York State Attorney General where there is a charitable interest in the trust, can result in a motion to dismiss for failure to join an indispensable party, resulting in unnecessary delay and expense.[22]

Similarly, where the Surrogate's Court will almost always automatically appoint a guardian *ad litem* for an infant or a person under a legal disability to ensure that their interests are protected, the practitioner in an article 77 proceeding should highlight the necessity of a guardian *ad litem*, or move pursuant to CPLR 1202 to seek the appointment of a guardian *ad litem* where appropriate at the outset of the proceeding.

There are other practical considerations that must be considered before commencing an article 77 pro-

ceeding. For example, the service provisions of the SCPA are unique to the Surrogate's Court,[23] while the general service provisions of CPLR article 3 apply in a special proceeding under article 77.[24]

Conclusion

In sum, practitioners should not discount the Supreme Court as an appropriate venue for litigating disputes pertaining to trusts, especially with respect to lifetime trusts. Depending on the circumstances, deference to the Surrogate's Court's experience in matters pertaining to trusts and estates may yield to other considerations, and Supreme Court is a permissible and suitable venue for the adjudication of disputes pertaining to trusts.

Endnotes

1. *In re Piccione's Estate*, 57 N.Y.2d 278, 289, 456 N.Y.S.2d 669 (1982); *Wagenstein v. Shwarts*, 82 A.D.3d 628, 920 N.Y.S.2d 55 (1st Dep't 2011); SCPA 207; SCPA 209(6).
2. *Cipo v. Van Blerkom*, 28 A.D.3d 602, 813 N.Y.S.2d 532 (2d Dep't 2006); *Zamora v. State of New York*, 132 Misc. 2d 119, 503 N.Y.S.2d 262 (NY Ct. Cl. 1986).
3. N.Y. Const. Art. VI, § 7(a).
4. *Chiantella v. Vishnick*, 84 A.D.3d 797, 922 N.Y.S.2d 525 (2d Dep't 2011).
5. *See* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 7701.
6. Siegel, N.Y. Prac. § 547 (5th ed.).
7. Id. §§ 550-556.
8. 29 A.D.3d 580, 814 N.Y.S.2d 684 (2d Dep't 2006).
9. *Id.*
10. 289 A.D.2d 910, 735 N.Y.S.2d 640 (3d Dep't 2001).
11. *See* EPTL 11-2.1.
12. 131 A.D.3d 1052, 16 N.Y.S.3d 472 (2d Dep't 2015).
13. *In re Jensen*, 107 A.D.3d 1222, 967 N.Y.S.2d 495 (3d Dep't 2013).
14. *Gouiran v. Gouiran*, 263 A.D.2d 393, 693 N.Y.S.2d 127 (1st Dep't 1999).
15. *In re Tabler's Will*, 55 A.D.2d 207, 389 N.Y.S.2d 899 (3d Dep't 1976).
16. *Gaentner v. Benkovich*, 18 A.D.3d 424, 795 N.Y.S.2d 246 (2d Dep't 2005).
17. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70.
18. EPTL art. 11-A.
19. EPTL 8-1.4
20. *See* SCPA 2210.
21. *See In re Hunter*, 4 N.Y.3d 260, 794 N.Y.S.2d 286 (2005); *Estate of Monroe*, N.Y.L.J., June 20, 2001, p. 1, col. 5 (Sur. Ct., N.Y. Co.).
22. *See* CPLR 3211 (a)(10); CPLR 1001.
23. *See* SCPA 307.
24. *See* CPLR 403(c).

Frank T. Santoro is counsel with the trusts and estates litigation group at Farrell Fritz, P.C. in Uniondale.

SOUTH DAKOTA TRUST COMPANY LLC

Serving Families in Perpetuity:

- ✓ **Trust accounts** representing more than **$30 billion** in assets under administration
- ✓ **No products** of any kind – purely **trust administration services**
- ✓ Work with all **outside investment managers and custodians** of the **clients' choice** globally
- ✓ Work with most types of **non-financial assets** (both onshore and offshore)
- ✓ **Excellent**, timely and inexpensive **reformation/modification** and **decanting statutes and processes**
- ✓ Currently work with over **80 billionaire** and **200 centa-millionaire** clients
- ✓ **Private Family Trust Company relationships** worth in excess of **$80 billion** (www.privatefamilytrustcompany.com)
- ✓ **250** combined **years of experience**
- ✓ **15%** of clients are **international families**
- ✓ **Highest ranked trust jurisdiction** in the United States: #1 in all categories by *Trusts & Estates* magazine (January 2016)

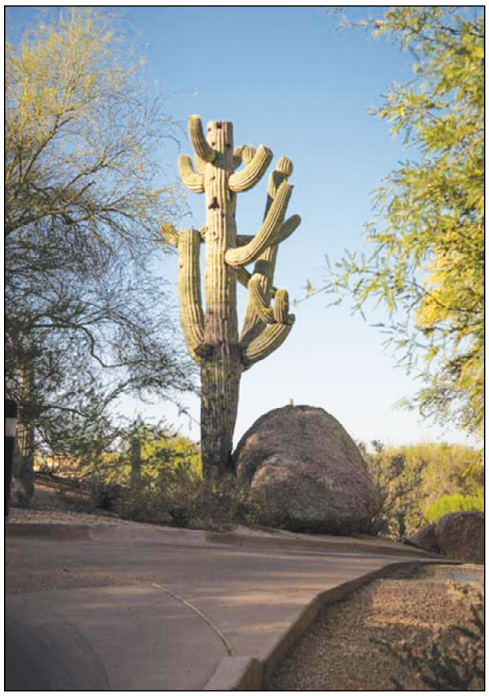
Pierce McDowell
(605) 338-9170
piercemcdowell@sdtrustco.com

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

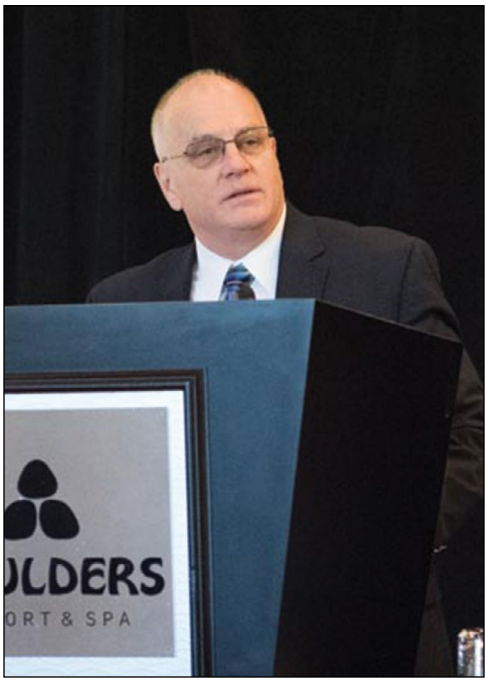
James Paladino
(212) 642-8377
jpaladino@sdplanco.com

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

(paid advertisement)



Spring Meeting in Arizona




BOULDERS


DANIEL


DICK

New CPLR Provision May Simplify Execution of New York Wills Overseas

By Stephen L. Ham IV and Ronald J. Weiss

A recent change to New York Civil Practice Law and Rules section 2106 may herald a new era of simplicity in advising New York-based clients who execute their wills outside the United States. Last year saw the addition of new paragraph (b) to CPLR 2106, which provides that affirmations made outside the jurisdiction of any state or territory of the United States will have the same effect as a sworn affidavit made inside the United States, so long as the person making the statement includes certain language subjecting himself or herself to perjury penalties in New York. CPLR 2106(b) thus has the potential to significantly simplify the creation of a self-proving affidavit—in technical parlance, a self-proving affirmation—that will be respected under New York law and limit the chance that witnesses will be called to testify in court as to the circumstances surrounding the execution of the will.

Before delving into new law, however, it is worth revisiting the statutory basis for a traditional self-proving affidavit. Surrogate's Court Procedure Act 1406(1) provides that the attesting witnesses to a will may (i) at the request of the testator or (ii) after the testator's death, at the request of (a) the executor named in the will, (b) the proponent or his attorney or (c) any interested person, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint.[1]

Although SCPA 1406(1) provides for several methods of creating a self-proving affidavit, in the authors' practice the affidavit is executed as part of the ceremony where the testator and witnesses subscribe their names to the will. SCPA 1406(1) provides that the self-proving affidavit shall be accepted by the court as an in-court statement by the witnesses unless (i) a party entitled to process in the proceeding raises an objection or (ii) for any other reason the court requires that the witnesses be produced and examined.[2]

While the presence of a self-proving affidavit is no guarantee that the Surrogate will apply the presumption of due execution when a will is offered for probate, it is highly unlikely that a supervising attorney would choose not to execute one under ordinary circumstances. That calculus changes, however, when the client is not physically present in the United States; trusts and estates practitioners with even occasional exposure to international clients know how onerous it can be for those clients to execute a will containing a self-proving affidavit that is valid under New York law.[3] Even if the client is in a jurisdiction where the equivalent of a "notary public" is recognized, a foreign notary's seal will not have the same effect in New York without some additional verification—often through a Hague Convention "apostille"—of the foreign notary's qualifications. The alternatives to foreign notaries are U.S. consular officers, but the delays concomitant with making an appointment at a local U.S. embassy or consulate and travel to and from the embassy or consulate make consular officers an unattractive choice for clients who are under time or other pressures to execute their wills.

Enter CPLR 2106(b), which, on its face, eliminates the hurdles that come with authenticating a foreign notary's seal or finding a consular officer. It provides that

> [t]he statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>
> (Signature)[4]

Thus, so as long as the person making a statement is outside the United States and accompanies the statement with the "magic words" provided by CPLR 2106(b), that statement can be used with the same effect as, and rather than, an affidavit in a court proceeding.[5]

It is not difficult to imagine how CPLR 2106(b) could drastically simplify the will execution process for

any testator or testatrix executing a New York will in a foreign country. The self-proving "affirmation"—no longer an affidavit, because it will not be attested to by a notary public or analogous official—will be signed by the witnesses as usual, but will also include the affirmation language provided by CPLR 2106(b) and a signature line for each attesting witness. Later, when the will is offered for probate, the self-proving affirmation should have the "same force and effect as" a self-proving affidavit, helping establish the presumption of due execution without the hassle of having authenticated a foreign notary's seal or tracked down a consular officer.

Regardless of the plain language of CPLR 2106(b) and its obvious utility in the will execution process, several commentators have expressed skepticism that attorneys should encourage clients to use self-proving affirmations when executing their wills overseas. First, no Surrogate's Court decision discusses whether to admit a self-proving affirmation with "the same force and effect" as a self-proving affidavit, meaning that the cautious attorney might wait to employ self-proving affirmations until the time when such an affirmation has met with specific approval from at least one Surrogate. Second, some commentators have pointed to the legislative history of CPLR 2106(b), which was primarily introduced as a means of simplifying commercial litigation, as counseling against its applicability in probate proceedings. Finally, there is a sense among some in the New York trusts and estates bar that a self-proving affirmation is not as reliable as a self-proving affidavit and that a Surrogate would be unlikely to accept the affirmation in the affidavit's place.

There are strong counterarguments to each of the foregoing concerns. The lack of a Surrogate's Court ruling is understandable given the combination of the short period of time CPLR 2106(b) has been in effect and the natural delays between its introduction, the actual use of its language in practice and the eventual offering for probate of a will containing its language. The plain language of CPLR 2106(b) does not limit its application to commercial transactions or exclude its use in Surrogate's Court proceedings; surely, if the drafters intended a narrow reading of its provisions, they would have explicitly constrained its applicability. Finally, although the stamp, seal and signature of a notary public or other official lends an air of formality and credence to a self-proving affidavit, the same can be said for the *mandatory* form of a CPLR 2106(b) affirmation, in which a witness states that he or she can be subject to fines or imprisonment for signing his or her name after a false statement.

Even with answers to these and other questions regarding the use of CPLR 2106(b) in the will execution context, attorneys may remain reluctant to put its provisions into practice until there is more definitive guidance from the legislature or the Surrogate's Courts. Until that time, however, there is no denying the potential of CPLR 2106(b) to simplify the will execution process for New York trusts and estates practitioners and their overseas clients.

Endnotes

1. *See* N.Y. Surrogate's Court Procedure Act 1406(1) (SCPA).
2. *See id.*
3. This does not foreclose the testator from executing a will valid under the law of the foreign jurisdiction but not necessarily valid under New York law. Estates, Powers and Trusts Law 3-2.1 provides that a will executed in a foreign jurisdiction is valid and admissible to probate in New York if it is (i) in writing, (ii) signed by the testator and (iii) executed and attested in accordance with (a) New York law, (b) the jurisdiction where the will is executed at the time of execution or (c) the jurisdiction in which the testator was domiciled, either at the time of execution or at death. An attorney admitted in New York but not admitted to practice law in another state or a foreign country, however, should be wary of advising the client on options (b) and (c) for reasons relating both to the attorney's own competence and liability for the unlicensed practice of law, making the self-proving affirmation a potentially safer alternative.
4. N.Y. Civil Practice Law & Rules 2106(b).
5. *See id.*

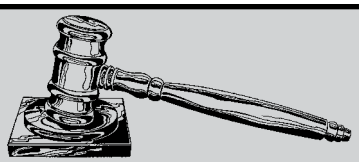
Stephen L. Ham IV is an associate, and Ronald J. Weiss is a partner in the Trusts and Estates Group at Skadden, Arps, Slate, Meagher & Flom LLP in New York. Mr. Weiss is a former Chair of the NYSBA Trusts & Estates Law Section.

Looking for Past Issues of the *Trusts and Estates Law Section Newsletter?*

http://www.nysba.org/TrustsEstatesNewsletter

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana



Ira M. Bloom

ADOPTION

Adoption Out Before Effective Date of DRL 117 Nevertheless Governed by Its Provisions

Decedent was survived by four sisters and two brothers and by five children of his pre-deceased half-brother who in 1949 was adopted by his father's sister. The administrator of the decedent's estate petitioned for advice and direction on the status of the children of the half-brother. The petitioner's position was that the children were not distributees because the adoption occurred before the enactment of DRL 117(1)(e) in 1987. The court denied the petition, holding that the children of the decedent's half-brother are the decedent's distributees because the statute lacks an effective date provision, was enacted to restore the right of the adopted-out persons to inherit, and the general rule is that the decedent's estate is governed by the law in effect on the date of death. *Matter of LaBelle*, 51 Misc. 3d 658, 26 N.Y.S.3d 445 (Sur. Ct., Erie Co. 2016).

PARENTAGE

Comity Requires that Same-Sex Spouse Be Recognized as Parent of Children Born During Legally Recognized Relationship

Kelly S. and Farah M., who was not a physician, began a romantic relationship in March 2000. In January 2004 they entered into a California registered domestic partnership. In March 2007 Farah gave birth to Z.S., through artificial insemination at home performed by Farah with sperm donated by Anthony S. The child was given Kelly's surname and Kelly was listed on the birth certificate as a parent. The couple legally married in California in August 2008. Farah once again became pregnant through artificial insemination with Anthony's sperm and once again the procedure was performed at home by Farah. E.S. was born in April 2009, given Kelly's surname, and Kelly was listed as a parent on the birth certificate.

The couple and the children moved to New York in 2012. The couple soon separated and Kelly moved to Arizona in the summer of 2013. In May 2014 Kelly filed a visitation petition in Suffolk County Family Court seeking visitation with Z.S. and E.S. Farah moved to dismiss on the grounds that Kelly lacked

William P. LaPiana

standing as a parent. In the alternative she asked for a hearing on the issue of standing and asked that Anthony S. be joined as a necessary party. The Family Court denied Farah's motion to dismiss the visitation petition holding that California law governed and under that law the presumption of parentage that arises when children are born within a domestic partnership or marriage applied.

On appeal, the Appellate Division for the Second Department affirmed. The court held that the couple's failure to comply with either California or New York statutes governing artificial insemination—the procedure must be performed by a physician with written consent—was not determinative because comity requires New York to recognize both the California registered domestic partnership and the marriage. The question is therefore to be decided under California law, and under that law the presumption of parentage arising when a child is born within marriage applies both to the children born to registered domestic partners as well as to a marriage couple. The failure to comply with the provisions of the California statute governing artificial insemination (Calif. Family Code § 7613) means only that the presumption of parentage that arises under that statute does not apply, but does not prevent the application of the presumption of parentage arising when a child is born within marriage (Calif. Family Code § 7611). Similarly, the failure to comply with Domestic Relations Law 73 does not automatically preclude the recognition of parental rights where the spouse who is not the biological parent of the child consents to the procedure, citing *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 856 N.Y.S.2d 258 (3d Dep't 2008). *Kelly S. v. Farah M.*, 139 A.D.3d 90, 28 N.Y.S.3d 714 (2d Dep't 2016).

POWER OF ATTORNEY

Agent May Effectuate Principal's Resignation as Article 81 Guardian under Authority of GOL 5-1502G(2)

Mother was appointed as son's guardian and father was appointed as standby guardian and sister as alternate standby guardian. After father's death, mother petitioned for discharge as guardian and also

submitted to the court a letter of resignation. Both documents were executed by the ward's sister under a power of attorney granted her by their mother. The court granted the discharge and accepted the resignation, holding that the agent's actions were not for her own financial benefit, and therefore were not contrary to the fiduciary duties of an agent under a power of attorney. In addition, the evidence of the guardian's inability to continue performing her duties shows that the resignation was in the ward's best interest. "Under these facts," the court wrote, the exercise of authority by the agent falls under the scope of "estate transactions" as defined in GOL 5-1502G(2), the authority to represent and act for the principal "in all ways and in all matters" affecting the estate of any incompetent person for whom the principal is a fiduciary. *In re Alan G.W.*, 51 Misc. 3d 998, 29 N.Y.S.3d 755 (Sup. Ct., Cortland Co. 2016).

WILLS

Failure to Read Attestation Clause Prevents Application of Presumption of Due Execution

One of the fundamental rules of due execution of wills is that a valid attestation clause raises a presumption of a will's validity. However, under some circumstances the presumption does not arise even though the will does include an attestation clause. The Appellate Division, Second Department has upheld summary judgment for the objectants where the deposition testimony of both attesting witnesses stated that they had not read the attestation clause. That being the case, the presumption could not arise and the objectants therefore met their prima facie burden of proof by showing that all of the pages of the purported will were not present at the time of the attempted execution. In addition, the proponent's evidence of the testamentary intent of the decedent does not raise a triable issue of fact because the only way to create a valid will is to comply with the legislature's command. *Matter of Costello*, 136 A.D.3d 1028, 26 N.Y.S.3d 545 (2d Dep't 2016).

Devise of Property to Children Subject to Right of Unmarried Children to Live in Property Does Not Create Fee Simple Absolute

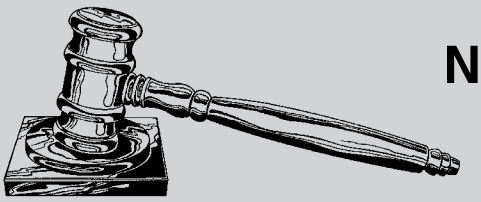
Decedent's will devised her "house and premises" to her four children "share and share alike" but went on to direct that the premises not be sold while any of her children were unmarried and living in the house. The will also required that the premises be sold and the proceeds divided equally among the children when all of the children were married or none were living in the house.

Fourteen years after testator's death three of the children brought a construction proceeding asking the court to construe the will to give the four children a fee simple as tenants in common. The fourth child, unmarried and living in the house, opposed the petition. The Surrogate denied the petition, holding that the language cutting down the devise of the fee simple is sufficiently "clear and explicit" to limit the fee simple, that the restriction was not against public policy as an inducement to forebear marrying or to divorce, nor did it violate the prohibition on the undue suspension of the power of alienation or create an unreasonable restraint on alienation because any unmarried child occupying the house could cease to do so at any time and accelerate the sale of the premises with consent of all of the children. Moreover, the language in the will giving the executor the power to sell, mortgage, or lease all of the decedent's real property did not prevail over the clear and unambiguous provision regarding the house and premises even though that language appears later in the will. *Matter of Bonanno*, 51 Misc. 3d 629, 29 N.Y.S.3d 100 (Sur. Ct., Queens Co. 2016).

Voidable Transfer Does Not Result in Ademption

Decedent's will devised real property to her two children, reserving a life estate for one of them, Watson. The other child, Fitzsimmons, was appointed executor. Watson had used her authority under a power of attorney executed by the decedent to transfer the real estate to herself. She then mortgaged the property. After decedent's death, Fitzsimmons began a turnover proceeding in which the Surrogate's Court held that the transfer was voidable rather than void ab initio (*Matter of Hill*, 32 Misc.3d. 1243, 938 N.Y.S.2d 226 [Sur. Ct.. Queens Co. 2011]). Fitzsimmons then moved for summary judgment, asking the court to find that the disposition of the real property had adeemed so that Watson's life estate on the real property would be cut off. The Surrogate's court held otherwise and the Appellate Division affirmed, holding that because the deed was voidable the decedent retained equitable title to the property which reverted to her estate when Fitzsimmons prevailed in the turnover proceeding. Fitzsimmons' motion for summary judgment was thus denied and summary judgment was awarded to Watson. *Matter of Hill*, 135 A.D.3d 938, 24 N.Y.S.3d 378 (2d Dep't 2016).

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).



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

By Ilene Sherwyn Cooper

Adoption

Before the court in *In re Evans* was a contested intermediate accounting proceeding in which the petitioner, the decedent's daughter, requested a determination that the respondent was not a distributee of the decedent on the ground that her adoption terminated her right of inheritance. The decedent died, intestate, with real property in New York and Virginia. The decedent had five children, one of whom predeceased her survived by three children, as well as a fourth child who was adopted prior to his death by an unrelated party.

As a predicate to its determination of the status of the respondent, the court held that it was required to consider whether the laws of Virginia or New York applied, in view of the fact that the decedent died with real property in each of these jurisdictions and personal property in New York. To this extent, the court noted that the manner in which real property descends when not disposed of by will is determined by the law of the jurisdiction in which the land is situated, while personal property descends in accordance with the laws of the decedent's domicile at death. Although the respondent argued that the decedent died a domiciliary of Virginia, the court held, based upon the record, that she died domiciled in New York.

In view thereof, the court held that, pursuant to the provisions of Domestic Relations Law 117(1)(b), the rights of the respondent to inherit from or through her birth father, i.e., the decedent's predeceased son, terminated upon the making of the order of adoption prior to her father's death, and that she did not qualify as a distributee entitled to inherit any portion of the decedent's personal property, or any real property located in New York. The disposition of the decedent's real property in Virginia was reserved for decision in the administrator's final accounting.

***In re Evans*, N.Y.L.J., Nov. 6, 2015, p. 30, col. 4 (Sur. Ct., Kings Co.).**

Compel Production of a Will

Before the Surrogate's Court, New York County, in *In re Slavin*, was a petition by the decedent's son, pursuant to SCPA 1401, seeking the examination of the respondent, the decedent's surviving spouse, and compelling the production of the decedent's will or any information or papers pertaining to the document. On July 10, 2015, the court issued an order directing the respondent to appear in court and to submit to an examination respecting paper writings purporting to be the last will and testament of the decedent, and further directed the respondent to produce the original of said writing. On the return date of the court's order, the respondent moved to dismiss the petition based on the assertion that jurisdiction over her had not been obtained, because she had not been timely served with the petition in the SCPA 1401 proceeding.

The court disagreed finding that neither SCPA 1401, nor any of the jurisdictional provisions of the SCPA upon which the respondent relied, required that she be served with the petition in the proceeding, as well as the order upon which it was based. Rather, the court noted that the provisions of SCPA 1401 specifically required that only the order be served upon the respondent. Moreover, the court rejected the respondent's argument that principles of due process required that the petition be served, together with the order, holding that the statutory requirement of SCPA 1401 that a copy of the order be personally served upon the respondent or in such manner as the court directed, was sufficient to ensure that the respondent was afforded notice of the proceeding and an opportunity to be heard.

Turning to the merits of the petition, the court observed that the respondent did not dispute the petitioner's standing to institute the proceeding, and that the circumstances set forth in the petition established reasonable cause to believe that the respondent had knowledge and was in possession or control of a testamentary instrument of the decedent. The court thus concluded that the statutory requirements for issuance of a court order directing the respondent to appear in court and produce such instrument were justified.

***In re Slavin*, N.Y.L.J., Jan. 15, 2016, p. 33 (Sur. Ct., N.Y. Co.).**

Disqualification of Counsel

In *In re Thiele*, the Surrogate's Court, Suffolk County, was confronted with a motion to dismiss the objections to probate of the decedent's will, or in the alternative, to disqualify counsel for the objecting and non-objecting parties.

The decedent died on July 21, 2014 survived by a daughter, who was the petitioner, three sons, and two grandchildren, who were children of a predeceased child. Following the decedent's death, an instrument, dated January 7, 1998, was offered for probate by her son, William, who was the nominated executor thereunder. Pursuant to the pertinent provisions of this instrument, the decedent bequeathed her jewelry, clothing, and personal effects to her daughter, and her residuary estate in equal shares to her children. Subsequent to the filing of the 1998 will, an instrument, dated May 20, 2014, was offered for probate by the decedent's daughter. The dispositive provisions of this instrument were similar to those in the 1998 will, with the exception that it devised the decedent's home in Southampton to her daughter. In addition, the instrument nominated the decedent's daughter and her son, William, as co-executors.

Objections to probate of the 2014 instrument were filed by the decedent's other two children and her two grandchildren, alleging, *inter alia*, that the signature on the instrument was not the decedent's, that the will was not duly executed, that the decedent was not competent to make a will, and that the instrument was procured by fraud and undue influence.

The decedent's daughter moved to dismiss the objections, arguing that they contained nothing but bare and conclusory allegations, and were insufficient to rebut the presumption of validity accorded the will, which was executed under the supervision of an attorney, and contained an attestation clause. In the alternative, she moved to disqualify counsel for the objectants, claiming that she had a conflict of interest in simultaneously representing the beneficiaries of the estate, the objectants, and the decedent's son, as nominated co-fiduciary of the estate.

The objectants opposed the motion, contending that dismissal was premature, and that petitioner had failed to submit any admissible evidence that would entitle her to summary relief. Further, in an affidavit to the court, one of the objectants claimed that he visited the decedent just 10 days after she executed her will, and she displayed confusion, and was under a physician's care for dementia. Additionally, it appeared that there was a discrepancy in the date of the will, and the attesting witness affidavits, which objectants argued raised an issue with the due execution of the instrument, and the attorney-draftsman of the will was deceased, and one of the attesting witnesses was unavailable to be deposed pursuant to SCPA 1404.

The court held that to the extent that the petitioner sought dismissal of the objections on the merits, the motion was premature. Specifically, the court noted that there were a number of outstanding issues that required additional discovery, one of the attesting witnesses to the will had not as yet been deposed, and the decedent's medical records had not been produced. In addition, the court found that the discrepancy between the date of the will and the attesting witness affidavits raised a factual issue which precluded dismissal.

With respect to petitioner's motion to disqualify counsel for the objectants on the grounds that she represented the objectants and the nominated co-fiduciary of the estate, the court noted that it was not clear that counsel represented the nominated co-fiduciary under the propounded will, inasmuch as he had defaulted in the proceeding. Moreover, and in any event, the court held that simultaneous representation of a fiduciary and beneficiary does not, in itself, create a conflict. It is only when the attorney advances the personal interests of the fiduciary in such a way as to harm his other client, or where the interests of the clients are at odds, that a conflict may arise. Inasmuch as there was no indication that counsel represented conflicting interests, petitioner's motion to disqualify counsel was denied.

***In re Thiele*, N.Y.L.J., Dec. 7, 2015, p. 33 (Sur. Ct., Suffolk Co.).**

Disqualification of Counsel

In *In re Recco,* the court, in a contested probate proceeding, had the opportunity to review this issue in the context of Rule 3.7. The petitioner was the decedent's niece. Objections to probate were filed by four of the decedent's five sisters, alleging lack of testamentary capacity, and undue influence by counsel, his mother, and the petitioner, and lack of due execution. Notably, the petitioner was counsel's sister, and the decedent's fifth sister was their mother. The objectants sought to disqualify counsel from representing his wife and sons in the proceeding on the grounds that he and his family were believed to have "masterminded" the propounded will; that counsel contacted the attorney-draftsman thereof, with whom he had a personal relationship, and arranged for the instrument to be executed. As a consequence, objectants claimed that counsel would most certainly be called as a witness at the trial of the matter. The court opined that, pursuant to Rule 3.7 of the Rules of Professional Responsibility, with limited exceptions, an attorney is prohibited from acting as an advocate before a tribunal in a matter in which the lawyer is likely to be called as a witness of a significant issue of fact. Additionally, Rule 3.7 prohibits an attorney

from advocating before a tribunal if precluded by Rule 1.9, addressed to duties to former clients. The burden of proof is on the party seeking disqualification. When confronted with such a motion, the court must balance the need to avoid even the appearance of impropriety against a party's right to be represented by counsel of his or her own choosing and the danger that such motions can be utilized for strategic purposes simply to gain advantage in litigation. As such, the court noted that disqualification rules should not be applied mechanically, and only upon a showing that the expected testimony of the attorney is necessary and prejudicial to his client. Based upon the foregoing, and noting, in particular, that the new rules of conduct governing the attorney as witness are substantially the same as the prior rule, the court held that counsel would not be disqualified until the trial of the matter.

***In re Recco*, N.Y.L.J., Aug. 10, 2015, p. 25, col. 3 (Sur. Ct., Suffolk Co.).**

Subpoena

In In *Gihon LLC v. 501 Second St. LLC*, the court quashed subpoenas issued to the plaintiff and non-party witnesses. The court found that the subpoenas were mislabeled, and despite the judge's name being placed on the subpoenas as a witness, it neither issued nor witnessed any of them. Moreover, the court found that the subpoenas served on the non-party witnesses were defective as they had not been served personally, failed to set forth the reasons why the discovery was sought, and did not include the statutorily required witness fees. Additionally, the court concluded that the subpoenas served on the non-party/LLCs had not been properly served on a member of the LLC or an agent or person personally authorized to receive process.

***Gihon LLC v. 501 Second St. LLC*, N.Y.L.J., Jan. 20, 2016, p. 28 (Sup. Ct., Kings Co.).**

Surcharge

In *In re Boscowitz,* the court granted the motion by the objectant, the New York State Attorney General, for summary judgment and surcharged the petitioner $960,000 for failing to fulfill his fiduciary duties. With respect to objections 1 and 6, addressing trustee's commissions, the Attorney General maintained that commissions should be denied based upon the petitioner's failure to file tax returns timely, provide an affirmation of legal services in support of the payment of fees, and to calculate his commissions in accordance with the statutory rates. Rather than providing support for his calculations of commissions, the petitioner simply referred to the statute and cast the onus upon the objectant to specify the correct calculations. The court disagreed, holding that the objectant's only burden was to demonstrate that the accounting was inaccurate or incomplete. Moreover, the court noted that the petitioner's assertion of his Fifth Amendment privilege against self-incrimination at his deposition failed to meet the standards of undivided loyalty required of every fiduciary, and could result in every inference being taken against him based upon the evidence. Further, the court found that petitioner failed to provide any sound basis for his failure to timely file tax returns, and offered no excuse for the penalties and interest that resulted therefrom. As for the objection to legal fees, the court noted that petitioner failed to submit his own affidavit of legal services, but instead, had his counsel submit an affirmation based on information and belief. The court declared the affirmation a nullity, holding that statements in an attorney's affirmation not based on personal knowledge are insufficient to raise a factual issue. Moreover, the Attorney General pointed out that the time charges could only sustain fees of $31,808.93 rather than the sum that petitioner paid to himself. Accordingly, the court allowed petitioner the fees incurred based upon his time records, and directed him to restore the balance, with interest at the rate of 6%. Further, the petitioner was surcharged on all other issues for his "abject failure to fulfill his fiduciary obligations."

***In re Boscowitz*, N.Y.L.J., Mar. 10, 2015, p. 23 (Sur. Ct., N.Y. Co.).**

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

Trusts and Estates Law Section
2017 Spring Meeting
JW Marriott New Orleans
614 Canal Street
New Orleans, LA 70130

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

LEGISLATIVE UPDATE

Fiduciary Access to Digital Assets

Florida has enacted an adaptation of the Revised Uniform Fiduciary Access to Digital Assets Act. The legislation addresses the conflicting interests of fiduciaries of a decedent or ward who seek access to that user's digital assets and the custodians who are in possession of the user's digital assets. Digital assets include, by way of examples, electronic communications, online content, documents stored in the cloud and electronic bank statements. Prior to this legislation, Florida statutes did not authorize fiduciaries to access digital assets. As detailed in the Senate analysis, the purpose of the legislation is twofold. First, it provides fiduciaries with the legal authority to manage digital assets in the same manner that they manage tangible assets. Second, it provides custodians of digital assets with the legal authority to interact with fiduciaries of their users while honoring the user's privacy expectations. Fla. Stat. Chapter 740.

Assets of Nondomiciliaries

The Florida legislature has enacted legislation to reaffirm the principle that the validity and effect of a disposition, whether intestate or testate, of real property located in Florida is governed by Florida law even when the real property is owned by a nonresident of Florida. The disposition of *personal* property located in Florida, when owned by a nonresident decedent, is governed by Florida law only when the testator's will directs the application of Florida law. The new legislation was passed in response to the decision in *Saunders v. Saunders*, 796 So. 2d 1253 (Fla. 1st DCA 2001). That case had reached a conclusion contrary to the principle reaffirmed by the new statute. Fla. Stat. § 731.1055; 731.106.

Use of Trust Assets to Defend Breach of Duty Actions

Florida has enacted legislation amending and clarifying existing law governing the use of trust assets to pay a trustee's attorneys' fees incurred in defending a breach of trust action. The law requires a trustee who seeks to use trust assets for this purpose to provide a written notice of such intent to beneficiaries and to inform the beneficiaries of their right to move to preclude the use of trust assets for that purpose. A beneficiary who files such a motion can prevail only if the court finds a reasonable basis to conclude that there has been a breach of trust. The opportunity to make such a showing occurs at a hearing at which the beneficiary and trustee are permitted to present evidence in the form of affidavits, answers to interrogatories, admissions, depositions or live testimony. Fla. Stat. § 736.0802(10).

Jonathan A. Galler

DECISIONS OF INTEREST

The Fiduciary's Relation Back Doctrine

The Florida Probate Code, like the statutes of many other states, provides that "[t[he powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment." Fla. Stat. § 733.601. A Florida appellate court recently addressed whether this "relation back doctrine" applies to the publication of the notice to creditors. In this case, the co-personal representatives published the notice the day *before* they were appointed. If effective, that publication would have triggered a three-month claims deadline for any creditors other than reasonably ascertainable creditors (on whom a copy of the notice to creditors must be served to trigger a claims deadline). One of the co-personal representatives, who was the decedent's surviving spouse, filed a claim after the three-month deadline had passed. The trial court found that the relation back doctrine did not apply because publication is a "duty" rather than a "power" of the personal representatives. The appellate court rejected that distinction and held that the publication had been effective. However, the court remanded the case for a determination as to whether the spouse was a reasonably ascertainable creditor (even though she herself signed the notice as a co-personal representative).

Richard v. Richard, 2016 WL 2340787 (Fla. 3d DCA May 4, 2016) (not yet final).

Breach of Trust—Application of Res Judicata and Laches

In 1996, a beneficiary of the Mary T. Woodward Trust sued the trustee for breach of trust alleging, among other things, that he had failed to serve any accountings. The action was subsequently dismissed, but during the pendency of the litigation, the trustee transferred the trust assets into two new trusts of which the plaintiff was not a beneficiary. In 2011, the trustee served accountings for the main trust, which by then had been terminated, and the two new trusts.

The accountings included a limitations notice, providing that any actions for breach of trust based on matters disclosed therein would be barred unless commenced within six months. This limitations notice is authorized under Florida law. Fla. Stat. § 736.1008(2). The beneficiary sued for breach of trust based on the transfer of its assets to the two new trusts. The trial court dismissed the action on summary judgment on the basis of res judicata and laches. The appellate court, however, reversed concluding that the mere fact that the trust termination had taken place during the pendency of the litigation did not bar the subsequent action under res judicata because the claims in the latter action differed from those asserted in the first action. Further, the action was not barred by laches because the trustee could not establish by clear and convincing evidence on summary judgment, in which no issues of fact may be decided, that the beneficiary knew of the termination of the trust (or knew that he was not a beneficiary of the two new trusts) in the years before the accounting was served in 2011.

Woodward v. Woodward, 2016 WL 2342152 (Fla. 4th DCA May 4, 2016) (not yet final).

Limitations on Court's Equitable Powers

It is oft-repeated that Florida's probate courts are courts of equity. A recent Florida appellate court decision serves as a reminder, however, that the equitable powers of the court are not without their limits. In this case, a law firm filed a claim against the decedent's estate based on a promissory note. The personal representative failed to file a timely objection, and the trial court denied the personal representative's motion for an extension of time to file the objection. The court then granted the firm's motion to compel payment on the promissory note but also granted the personal representative's motion for an "equitable setoff," limiting the amount of interest payments due on the note. According to the trial court, the firm had an obligation to prevent the accumulation of debt and, thus, should have moved to compel payment earlier than it did. The appellate court reversed the "equitable setoff" of the interest amount due because the statutes unambiguously provide for the payment of interest in this situation. Citing Florida Supreme Court precedent, the appellate court emphasized that "equity has no role" when there is already a complete and adequate remedy at law available to the court.

Oreal v. Kwartin, 189 So. 3d 964 (Fla. 4th DCA 2016).

Revocation of Trust by "Any Other Method"

The Florida Trust Code provides that a settlor may revoke a trust (a) by complying with a method provided in the terms of the trust or (b) if the terms of the trust do not provide a method, by a later will that expressly refers to the trust or "any other method manifesting clear and convincing evidence of the settlor's intent." Fla. Stat. § 736.0403(3). In a case that presented an issue of first impression, a Florida appellate was recently called upon to interpret the last of these methods of revocation. In this case, the decedent's will stated that she revoked "all other wills, trust and codicils previously made" by her. The decedent had, in fact, executed a trust some years earlier, and a dispute arose over whether the decedent had revoked that trust, if not by expressly referring to the trust in her will than by the "any other method" of revocation provided in the statute. The trial court ruled that, under this method, it could not even consider as evidence of intent the will because it failed to expressly refer to the trust. The appellate court reversed, holding that such a construction is too narrow and would conflict with the purpose of revocable trusts and the plain language of the revocation statute. The appellate court was careful to note that the will, in and of itself, did not constitute clear and convincing evidence of the settlor's intent to revoke her trust, but the will should have been considered. Given the will and the other evidence presented, the appellate court held that clear and convincing evidence of the settlor's intent to revoke had been shown in this case.

Bernal v. Marin, 2016 WL 3265760 (Fla. 3d DCA Jun. 15, 2016) (not yet final).

David Pratt is the Chair of Proskauer's Private Client Services Department and the Managing Partner of the Boca Raton office. His practice is dedicated to 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 group and are admitted to practice in Florida and New York.

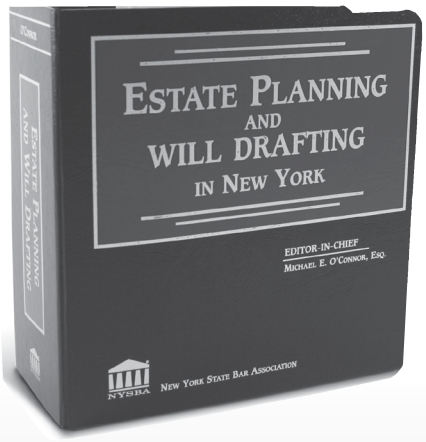
NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York

2016 Revision

Editor-in-Chief

Michael E. O'Connor, Esq.
DeLaney & O'Connor, LLP
Syracuse, NY



Product Description

Each chapter of the 2016 Revision has been reviewed and updated, including major changes to the chapters on IRAs and Tax-Qualified Plans and New York Estate and Gift Taxes.

This comprehensive text provides an excellent overview of the complex rules and considerations involved in estate planning in New York State. Whether your practice incorporates issues surrounding minors, marriage, the elderly, federal and state taxes, this text provides comprehensive guidance to attorneys. With useful practice comments, real-world examples and sample forms this text is also an invaluable practice guide for practitioners who are just entering this growing area.

Contents at a Glance

Estate Planning Overview
Federal Estate and Gift Taxation: An Overview
The New York Estate and Gift Tax
Fundamentals of Will Drafting
Marital Deduction/Credit Shelter Drafting
Revocable Trusts
Lifetime Gifts and Trusts for Minors
IRAs and Qualified Plans—Tax, Medicaid and Planning Issues
Estate Planning with Life Insurance
Dealing with Second or Troubled Marriages
Planning for Client Incapacity
Long-Term Care Insurance in New York
Practice Development and Ethical Issues

PRODUCT INFO AND PRICES

PN: 4095C | Book w/2016 revision | loose-leaf
NYSBA Members $185 Non-Members $220

PN: 50956 | 2016 revision for past purchasers | loose-leaf
NYSBA Members $120 Non-Members $150

To order call **1.800.582.2452**
or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8425N when ordering.

NYSBA

Section Committees and Chairs

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

Ad Hoc—Mulit-State Practice
Darcy M. Katris
Hodgson Russ LLP
1540 Broadway. 24th Floor
New York, NY 10036
dkatris@hodgsonruss.com

Susan H. Accetta
Stern Keiser & Panken LLP
1025 Westchester Avenue, Suite 305
White Plains, NY 10604
saccetta@skpllp.com

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

Susan Miller King
Miller King LLC
599 Gatehouse Road
Tully, NY 13159
susan.king@millerking.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
NYU Langone Medical Center
One Park Avenue
New York, NY 10016
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

Jeffrey A. Asher
Law Offices of Jeffrey A. Asher, PLLC
43 West 43rd Street, Suite 72
New York, NY 10036
jasher@asherlawfirm.com

Estate and Trust Administration
Michael S. Schwartz
Curtis Mallet-Prevost Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
michael.schwartz@curtis.com

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

International Estate Planning
Nathan W.G. Berti
Hodgson Russ LLP
The Guaranty Bldg.
140 Pearl Street Suite 100
Buffalo, NY 14202
nberti@hodgsonruss.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
Albert Feuer
Law Offices of Albert Feuer
110-45 71st Road, Suite 7M
Forest Hills, NY 11375-4962
albertfeuer@verizon.net

Membership and Relations with Local Bars
Megan Michelle Knurr
Citi Private Bank
153 East 53rd Street - 23rd Floor
New York, NY 10022
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
Peter K. Kelly
Ruskin Moscou & Faltischek PC
East Tower, 15th Floor
1425 Rexcorp Plaza
Uniondale, NY 11556-1425
pkelly@rmfpc.com

Surrogate's Court
Cora A. Alsante
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202
calsante@hancocklaw.com

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

Technology in Practice
Parth Chowlera
Greenfield Stein & Senior, LLP
600 Third Avenue, 11th Floor, 5th Floor
New York, NY 10016
PChowlera@gss-law.com

Executive Committee District Representatives

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

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

Third District
Deborah S. Kearns
Albany County Surrogate's Court
Albany County Courthouse
16 Eagle Street
Albany, NY 12207
dkearns@nycourts.gov

Fourth District
Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

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

Sixth District
Albert B. Kukol
Levene Gouldin & Thompson, LLP
P.O. Box F-1706
Binghamton, NY 13902-0106
akukos@lgtlegal.com

Seventh District
Nancy E. Klotz
Tompkins Financial Advisors
179 Sully's Trail, Suite 200
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.
4 Westchester Park Drive, Suite 220
White Plains, NY 10603
kcohen@estatelawny.com

Tenth District
Eric W. Penzer
Farrell Fritz P.C.
1320 RXR Plaza
Uniondale, NY 11556
epenzer@farrellfritz.com

Eleventh District
David N. Adler
125-10 Queens Blvd., Suite 12
Kew Gardens, NY 11415-1519
dnalaw@live.com

Twelfth District
Hon. Lee L. Holzman
Amy Holzman, Pllc
132 Larchmont Avenue, Suite 14
Larchmont, NY 10538-2843
llh2228@aol.com

Thirteenth District
Irini Nagy Bekhit
Richmond County Surrogate's Court
18 Richmond Terrace
Staten Island, NY 10301
ibekhit@courts.state.ny.us

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

DOYLE

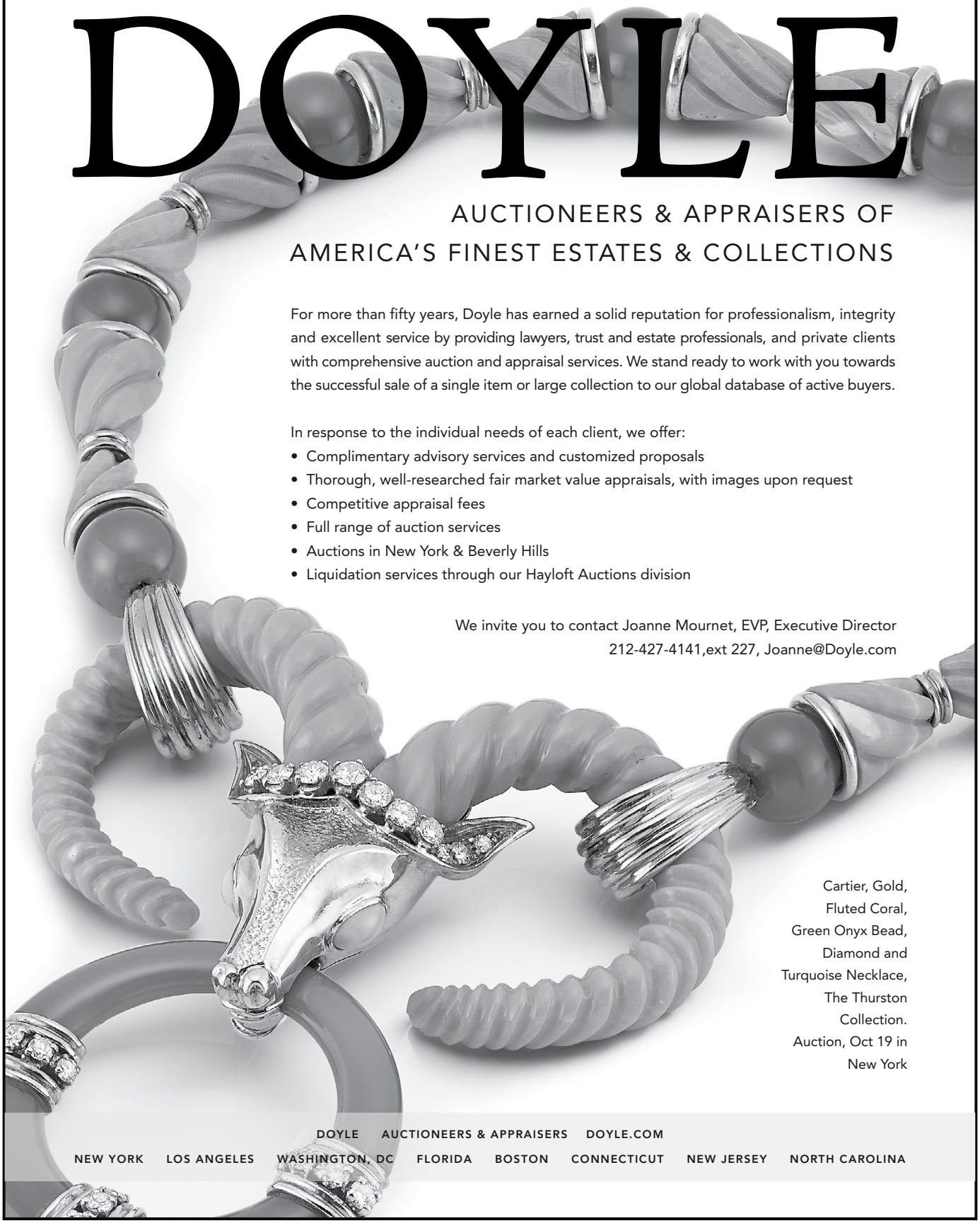
AUCTIONEERS & APPRAISERS OF AMERICA'S FINEST ESTATES & COLLECTIONS

For more than fifty years, Doyle has earned a solid reputation for professionalism, integrity and excellent service by providing lawyers, trust and estate professionals, and private clients with comprehensive auction and appraisal services. We stand ready to work with you towards the successful sale of a single item or large collection to our global database of active buyers.

In response to the individual needs of each client, we offer:

- Complimentary advisory services and customized proposals
- Thorough, well-researched fair market value appraisals, with images upon request
- Competitive appraisal fees
- Full range of auction services
- Auctions in New York & Beverly Hills
- Liquidation services through our Hayloft Auctions division

We invite you to contact Joanne Mournet, EVP, Executive Director
212-427-4141,ext 227, Joanne@Doyle.com



Cartier, Gold, Fluted Coral, Green Onyx Bead, Diamond and Turquoise Necklace, The Thurston Collection. Auction, Oct 19 in New York

DOYLE AUCTIONEERS & APPRAISERS DOYLE.COM

NEW YORK LOS ANGELES WASHINGTON, DC FLORIDA BOSTON CONNECTICUT NEW JERSEY NORTH CAROLINA

(paid advertisement)

Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word. Please include biographical information.

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

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

This *Newsletter* is distributed to members of the New York State Bar Association's Trusts and Estates Law Section without charge.

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

© Copyright 2016 by the New York State Bar Association.
ISSN 1530-3896 (print) ISSN 1933-852X (online)

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
Magdalen Gaynor
Law Offices of Magdalen Gaynor
10 Bank Street, Suite 650
White Plains, NY 10606
mgaynor@mgaynorlaw.com

Chairperson-Elect
Sharon L. Wick
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203
swick@phillipslytle.com

Secretary
Natalia Murphy
Citi Private Bank
153 East 53rd Street, 24th Floor
New York, NY 10022
natalia.murphy@citi.com

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

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2017

JANUARY 23–28, 2017

NEW YORK CITY

New York Hilton Midtown

TRUSTS & ESTATES LAW SECTION PROGRAM | January 25, 2017

9:00 a.m. | Grand Ballroom East | Third Floor | Followed by luncheon and cocktail reception

WEDNESDAY EVENING COCKTAIL RECEPTION | SPONSORED BY DOYLE
Pre-registration is required

REGISTRATION OPENS SOON. BOOK YOUR HOTEL TODAY!
www.nysba.org/am2017

NYSBA