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(paid advertisement)

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Message from the Chair

By Robert M. Harper

As I write the Fall 2019 Chair's Message, the leaves have changed colors, the temperatures have dipped, and the Holiday Season is only weeks away. Despite those seasonal changes, our Section's members have remained as busy and enthusiastic as ever. I write to provide you with a brief update of our Section's many activities over the past few months.

Robert M. Harper

First, in late October, our Section hosted a joint Fall Meeting with the Elder Law & Special Needs Section. I would like to thank Elder Law & Special Needs Section Chair Tara Pleat, program co-chairs Ellyn Kravitz, Nicole Clouthier, Frank Santoro, and Salvatore DiCostanzo, and speakers Katherine Carpenter, Joanna Feldman, William Keniry, Ian MacLean, Arlene Markarian, Hon. Tanya Kennedy, Hon. Paul Morgan, Anthony Lamberti, Ira Salzman, Professor Ira Bloom, Robert Freedman, Robert Abrams, Ilene Cooper, Joseph LaFerlita, Hon. Rita Mella, Hon. Brandon Sall, Nancy Rudolph, and Daniel Weitz for their contributions in making the Fall Meeting the tremendous success that it was. In addition, I would like to recognize Bar Association staff members Lisa Bataille and Cathy Teeter for the wonderful work that they did in organizing the Fall Meeting. The Fall Meeting could not have gone any better than it did, which reflects very well on the time and hard work that Tara, the program chairs, the speakers, Lisa, and Cathy invested into it. Thank you for your efforts.

Second, I would like to thank Hon. Stacy Pettit of Albany County, Surrogate Sall of Westchester County, and Hon. Acea Mosey of Erie County for hosting our law student fellows this summer; and to recognize our law student fellows, Emma Schwab, Briana Krawczyk, and Erika Panzarino, for their participation in the Section's law school fellowship program (for which our Section provides financial support through the New York Bar Foundation). Considering how few young attorneys practice in our field, and how difficult it is for many junior attorneys who wish to do so to break into trusts and estates practice, our Section is pleased to provide law students with the opportunity, and financial support, to learn about our practice area and to develop related skills. We greatly appreciate the Surrogates' involvement in this important program, and hope that our 2019 summer fellows enjoyed their experiences in our practice area.

Third, I would like to commend my predecessor, Natalia Murphy, for organizing our Section's inaugural Family Governance Symposium, which took place in July. Natalia assembled an impressive group of speakers to address family governance topics, for which there appears a tremendous appetite among trusts and estates practitioners. The inaugural Family Governance Symposium was a well-attended success, and the Section's officers and I appreciate Natalia's efforts in organizing it.

Fourth, in short order, our Section will renew its efforts (which Professor Bloom has spearheaded) to lobby for the enactment of the New York Trust Code. If enacted into law, the New York Trust Code would (a) codify New York's trust law (which is, in many respects, case-based at the present time), (b) significantly improve the administration of trusts by providing greater clarity as to what New York law requires, and (c) make New York more competitive for trust administration business with the many states that already have enacted trust codes of their own. In short, if the Legislature enacts it into law, the New York Trust Code would be tremendously beneficial to New York attorneys, their clients, and the public, and our Section will continue to advocate in favor of it.

Finally, difficult as it is to believe that the tenure of our inaugural Trusts and Estates Law Section Rising Star Fellow (Sarah Pickering) is nearly complete, our Section is now seeking applicants for the 2020 Trusts and Estates Law Section Rising Star Fellowship. Intended for attorneys who have three to six years of relevant legal practice, the Rising Star Fellowship is a one-year appointment, which affords the Fellow the following benefits, among others: (a) placement on a Section committee; (b) pairing with a mentor on our Section's Executive Committee; (c) opportunities to speak at a Section event and to write for our Section's *Journal*; and (d) fee waivers for our Section's Annual Meeting, Spring Meeting, and Fall Meeting, and certain related travel expenses. Through the 2020 Rising Star Fellowship, we hope to encourage attorneys who are new to our practice area to become more involved in our Section and, more broadly, trusts and estates practice. We ask that interested, eligible attorneys apply for the 2020 Rising Star Fellowship by November 25, 2019.

As the foregoing shows, our Section's members have remained active in recent months. The Section's officers and I look forward to providing you with further updates of the many ways in which Section members continue to contribute to making our profession better and to the development of trusts and estates law. If you have any ideas about how to contribute, please do not hesitate to let the Section's officers and me know.

Message from the Editor

By Jaclene D'Agostino

Jaclene D'Agostino

Thank you to all of our authors for their valuable contributions to this issue of our *Journal*. This edition addresses a wide variety of topics pertinent to trusts and estates practitioners, including IRA's, the developing world of cryptocurrency, Florida mediations, and tax deductions under both New York and Federal laws.

We continue to urge Section members to participate in our publication. CLE credits may be obtained. Our next deadlines for submissions are December 10, 2019 and March 3, 2020.

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

Non-Compliant Trusts and Circular 230 Issues

By Seymour Goldberg

Please note that whenever the word trust is used it shall mean a trust which is the beneficiary of an IRA in whole or in part.

Many individuals have accumulated a considerable amount of wealth in their individual retirement accounts (IRAs). This can happen because the IRA account holder rolled over or directly transferred retirement assets that were accumulated in his or her qualified plan accounts such as a 401(k), a 403(b) arrangement or a 457(b) governmental plan to his or her IRA account.

These retirement accounts may represent the major portion of a taxpayer's wealth and must be considered in developing an estate plan for the client. Often clients are concerned about the welfare of their beneficiaries after they are gone.

As a result of the Supreme Court opinion in *Clark v. Rameker* issued on June 12, 2014, it was held that inherited IRAs are not considered to be "retirement funds" that are protected under the bankruptcy code. This opinion is significant especially if the nonspouse beneficiary of an inherited IRA account has actual or potential problems with his or her creditors.

Some states have enacted legislation that protect inherited IRAs from creditors of the nonspouse beneficiary. These states include Alaska, Arizona, Florida, Missouri, North Carolina, Ohio and Texas. The nonspouse beneficiary, however, must satisfy certain domiciliary requirements in order to protect his or her inherited IRA accounts in a protected state. There is nothing to stop additional states from amending their laws from time to time to protect inherited IRAs from creditors of the nonspouse beneficiary.

The Supreme Court did not address the issue regarding a spouse beneficiary who treats the IRA as a beneficiary IRA and does not transfer or roll over the IRA into a spousal rollover IRA. It is generally best for the surviving spouse to transfer or roll over the deceased spouse's IRA to his or her own IRA to the extent permitted by law. The surviving spouse, however, may not roll over or transfer an unpaid required minimum distribution attributable to the deceased IRA owner to his or her own IRA.

Many practitioners suggest that a trust be established for the beneficiary of an inherited IRA from an asset protection point of view. If the deceased IRA owner's account is payable to a spendthrift trust, then the trust is generally protected from creditors of the trust beneficiary under Section 541(c)(2) of the Bankruptcy Code.

If a trust is used for asset protection purposes but flunks the IRS stretch payment rules, then the trustee of the non-compliant trust may have significant liability issues with both the trust beneficiaries and the IRS.

The problem is that in order to take advantage of the stretch payment rules with respect to a trust, the trust must satisfy certain IRS post-death trust compliance rules and also must be drafted in a manner that satisfies the IRS regulations and IRS letter rulings. If a trust involves a QTIP trust, then it must also satisfy Revenue Ruling 2006-26.

Accordingly, there are stringent rules that apply to a trust for a nonspouse beneficiary and there are much more complex rules that apply when a trust is created for the benefit of a surviving spouse if a QTIP trust is involved. A credit shelter trust can also be established for a surviving spouse as well.

The author has reviewed a number of IRA trusts for nonspouse beneficiaries and found them to be non-compliant from an IRS point of view and/or from a drafting point of view.

In order to satisfy a key IRS compliance rule regarding any type of trust, the trustee must file certain paperwork with the IRA financial institution by no later than October 31 following the year of the IRA owner's death.

The trustee must send a copy of the trust document or certain trust certification paperwork to the IRA financial institution by no later than the October 31 deadline mentioned above.

The post-death IRS trust documentation requirement must be satisfied with the IRA institution by no later than October 31 following the year of death of the IRA owner. Under the IRS rules the trustee of the trust must either:

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1. Provide the IRA institution with a final list of all beneficiaries of the trust (including contingent and remainderman beneficiaries) with a description of the conditions on their entitlement as of September 30 of the calendar year following the calendar year of the IRA owner's death; certify that, to the best of the trustee's knowledge, this list is correct and complete and that certain requirements described in the regulations are satisfied; and agree to provide a copy of the trust instrument to the IRA institution upon demand; or

2. Provide the IRA institution with a copy of the actual trust document for the trust that is named as a beneficiary of the IRA owner under the IRA agreement as of the IRA owner's date of death.

The author generally recommends that the second method be used since it is not as complicated as the first method.

No matter which method is used, the trustee should document the fact that the paperwork was timely satisfied with the IRA institution by the October 31 deadline. This should be done with a transmittal letter that is sent to the IRA institution by certified mail, return receipt requested.

The failure of the trustee to satisfy the post-death IRS trust documentation requirement is a fatal error. It prevents the trustee from using the life expectancy of the appropriate trust beneficiary in determining the required minimum distributions that must be made from the deceased IRA owner's account to the trust. There is currently no authority under the IRS rules to remedy this oversight.

The author has been involved in continuing education programs involving trusts as IRA beneficiaries for over 15 years and found that many advisors were not aware of the October 31 post-death IRS documentation compliance deadline regarding these trusts.

This is not only a problem for the IRA advisor but is also a major problem for the tax return preparer who prepares the fiduciary income tax return for the trust.

If it turns out that the trustee of the trust is improperly using a stretch payment of the trust beneficiary incorrectly, then the trustee can have significant liabilities to the trust beneficiaries and to the IRS. This can occur because the trustee failed to timely satisfy the post-death IRS trust documentation requirement.

Obviously, the fiduciary income tax return preparer of the trust should look into this issue and advise the trustee accordingly. If the fiduciary income tax return preparer finds out about this fatal error after the October 31st deadline, then the fiduciary income tax return preparer must immediately advise the trustee about the issue.

Example 1

Facts

Assume John, an IRA owner, designated a trust as the beneficiary of his IRA. His grandson, Joey, is the trust beneficiary of the trust. Assume that John died on July 1, 2012 at age 68. Joey is age 18 in 2012. Further assume that the trust started to receive required minimum distributions from John's deceased IRA account commencing in 2013 based on Joey's IRS single life expectancy as determined in the year after John's death. Since Joey is age 19 in 2013, the trustee assumed that the single life expectancy of Joey as determined in 2013 could be used in determining the stretch IRA distributions to the trust. As a result the trustee uses the IRS single life expectancy table for an individual age 19 in determining required minimum distributions that is made from John's deceased IRA to John's trust for the benefit of Joey. The IRS single life expectancy for an individual age 19 is 64.0 years.

Assume that Jack, the trustee of John's trust, failed to timely file the post-death IRS trust documentation paperwork with the IRA institution by the October 31, 2013 deadline. Jack was never advised to do so by his then professional advisor.

Question 1:

May the trustee of John's trust use Joey's term-certain IRS single life expectancy of 64.0 years commencing in 2013 in determining the required minimum distributions that are made from John's deceased IRA to John's trust?

Answer:

No. According to the IRS regulations, the post-death IRS trust documentation requirement (among other requirements) must be timely satisfied in order to use the IRS single life expectancy of Joey in determining the required minimum distributions that are made to John's trust.

Question 2:

Based on the violation of the October 31, 2013 deadline requirement, by when must John's deceased IRA account be paid to John's trust?

Answer:

By no later than December 31, 2017. However, John's deceased IRA account does not have to pay any amount to John's trust for the calendar years 2013 through 2016. All that matters is that John's deceased IRA account is cleaned out by December 31, 2017.

Question 3:

What is the reason for the answer of December 31, 2017?

Answer:

John died on July 1, 2012 at age 68. This date of death is before John's required beginning date. Since John's trust does not satisfy one of the rules that allows Joey's IRS single life expectancy to be used, it is as if John died before his required beginning date without a designated beneficiary. In essence, John's IRA trust is a non-compliant trust.

Since John died before his required beginning date without a designated beneficiary, the five-year rule is operative. John's trust must receive John's entire IRA account by no later than December 31, 2017.

Question 4:

Assume that Murray is the new IRA advisor to the trustee of John's trust and is also a CPA who is retained in March 2019 to prepare John's IRA trust fiduciary income tax return for the year 2018. Also assume that John's trust for the calendar years 2016 and 2017 reflects stretch payments based on the use of Joey's remaining term-certain single life expectancy. Murray CPA finds out from Jack trustee in 2019 that Jack trustee never filed the post-death IRS trust documentation paperwork with the IRA institution.

What action should Murray CPA take?

Answer:

Murray CPA must immediately notify Jack, the trustee of John's trust, about the potential tax penalties that can be imposed on the trust.

For example, if the balance in John's IRA as of December 31, 2017 amounts to $300,000, then the potential penalty is a 50% penalty on the shortfall amount of $300,000. Therefore, the 50% potential penalty amounts to $150,000.

Under the five-year rule, John's entire deceased IRA account balance had to be paid out to John's trust by no later than December 31, 2017.

Since this was not done, Jack the trustee has a major IRS penalty problem to the extent of $150,000, plus delinquency penalties and interest.

Question 5:

What should Murray CPA recommend to Jack trustee to possibly mitigate the $150,000 excise tax penalty?

Answer:

Murray CPA should tell Jack trustee to immediately close out John's deceased IRA account in its entirety and pay it to John's trust. If done in 2019, then this would trigger a fiduciary income tax liability to the trust for 2019 to the extent such IRA distribution is not timely paid to Joey under the terms of John's trust.

After that is done, the Jack trustee should file a Form 5329 for the calendar year 2017 for the John trust and request that the 50% penalty of $150,000 be waived.

According to the regulations, the IRS can waive the 50% penalty on the basis of reasonable error. The penalty can be waived by the IRS if the payee establishes to the satisfaction of the IRS the following:

1. The shortfall in the amount of the distributions was due to reasonable error; and
2. Reasonable steps are being taken to remedy the shortfall.

The IRS instructions to IRS Form 5329 explains the procedure for filing for the waiver.

It is important that John's IRA be closed out as soon as possible after the error is discovered by Murray CPA in 2019. This assumes that Jack trustee acted promptly as well after Murray CPA brought it to his attention.

Question 6:

If Jack trustee is not cooperative in making the correction and filing the Form 5329 for 2017, then what should Murray CPA do?

Answer:

Murray CPA should indicate to Jack trustee that according to the 2011 Tax Court opinion in *Paschall v. Commissioner*, there is no statute of limitations on an IRA penalty in the absence of filing a Form 5329 for 2017. In effect, the IRS can assert the 50% penalty excise tax at any time if a Form 5329 is not filed with the IRS for 2017, the year of the shortfall.

Important Author's note

According to IRS reg. sec. 54.4974-2 at Q-5, an additional 50% penalty is imposed for each subsequent year after December 31, 2017 if as of December 31 of such subsequent year there is a remaining balance. The 50% penalty will apply with respect to such remaining balance. A Form 5329 would then have to be filed for such subsequent year. A waiver should be requested for such subsequent year as well. Accordingly Jack should file Form 5329 for 2018 as well.

Question 7:

If Jack trustee fails to cooperate with Murray CPA's suggestions, then what must Murray CPA do?

Answer:

Murray CPA cannot prepare a 2018 fiduciary income tax return for John's trust by improperly using Joey's remaining term-certain single life expectancy. Murray CPA must resign from the engagement once Murray CPA knows of the error and Jack trustee refuses to take the action that Murray CPA suggested.

This resignation is necessary from both an ethics point of view as well as under the rules that are found in Circular 230.

Question 8:

What provision under Circular 230 is on point?

Answer:

Treasury Department Circular No. 230 covers regulations governing practice before the Internal Revenue Service, Section 10.21. Knowledge of Client's Omissions is applicable and states as follows:

> A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service knows that the client has not complied with the revenue laws of the United States or has made an error or omission from any return, document, affidavit or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error or omissions.

Question 9:

What additional provision in Circular 230 should Murray CPA be concerned with?

Section 10.22 in Circular 230 covers diligence and states in part as follows:

> (a) In general a practitioner must exercise due diligence –
>
> In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters ….

Question 10:

What other provision effective June 12, 2014 in Circular 230 should practitioners be concerned about?

Answer:

As of June 12, 2014, new final regulations were issued by the IRS with respect to Circular 230. Section 10.35 is one of the changes that is of major importance to practitioners and follows:

§ 10.35 Competence

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

(b) Effective/applicability date. This section is applicable beginning June 12, 2014.

Author's note

Practitioners may be in violation of the Circular 230 provisions if they are not aware of the IRA compliance issues. These issues may include improper rollovers, excess contributions, required minimum distribution violations and improperly preparing a fiduciary income tax trust return of a non-compliant trust.

Example 2

Facts

Assume the facts in Example 1 except that John would have attained age 73 in the year of his death in 2017 had he not died. John died after receiving his entire required minimum distribution for the calendar year 2017. Also assume Jack, the trustee of John's trust, failed to timely file the post-death IRS trust documentation paperwork with the IRA institution by the October 31, 2018 deadline.

Question 1:

Can Jack the trustee receive IRA distributions from John's deceased IRA account over Joey's then single-life expectancy which is a 59.1 year term-certain period commencing in 2018?

Please note that Joey is age 24 in the calendar year 2018. The IRS single life expectancy at age 24 is 59.1 years.

Answer:

No. See previous discussion regarding this fatal noncompliance error that was made by Jack trustee with respect to John's trust.

Question 2:

Over what period may Jack trustee receive required minimum distributions from John's deceased IRA?

Answer:

Since John died in 2017 after his required beginning date, then Jack, trustee of John's trust, may receive required minimum distributions under the remaining life expectancy rule. This remaining term-certain period is a 13.8 year period commencing in 2018 and reduced by one for each year thereafter.

AUTHOR'S NOTE

Had John died in 2017 prior to receiving his entire required minimum distribution for the year 2017, then the unpaid required minimum distribution for 2017 must be paid to John's trust as well.

Question 3:

How is the remaining term-certain period of 13.8 years determined?

Answer:

Since John died after his required beginning date having a non-compliant trust as the beneficiary of his IRA, then for post-death IRA distributions you look tentatively at the attained age that John would have reached in the year of death had he not died. You then take the following steps:

1.	John's attained age in 2017 had he not died (assume age 73).	73
2.	IRS single life expectancy in 2017 (used to determine post-death IRA distributions if John died on/or after his required beginning date since you have a non-compliant trust as the beneficiary of an IRA).	14.8
3.	The remaining term-certain period for distributions from John's deceased IRA to the non-compliant trust is 14.8 years -1 or 13.8 years commencing in 2018.	13.8

AUTHOR'S NOTE

The term-certain period commencing in 2018 is 13.8 years and is reduced by one for each year thereafter.

The 59.1 year term-certain period with respect to Joey's life expectancy is lost because of this non-compliance error. See discussion in Example 2, Question 1 above.

Please note that the remaining life expectancy rule described above applies when an IRA owner dies on or after his/her required beginning date having designated as his/her beneficiary the estate, a non-compliant trust or a nonspouse beneficiary who is older than the IRA owner.

FURTHER AUTHOR'S NOTE

A trust can be non-compliant as well if the trust is not properly drafted. This could happen if the provisions in the trust document do not satisfy the IRS regulations and/or the IRS rulings.

Example 3

Facts

Martin, an IRA owner, designates as his IRA beneficiary the Martin trust for the benefit of his daughter, Jane. Martin is age 72 in the year of his death. His date of birth is October 15, 1945. He died on November 1, 2017. He received his entire required minimum distribution from his IRA for the calendar year 2017 before the date of his death. The trust document provides that Jane shall receive the income from the trust each year. The trust remainderman of the Martin trust is the XYZ Charity. Jane is age 19 in 2017 and the trustee of the trust is Clark.

Clark, the trustee, has been advised by his IRA advisor Jeff to timely file the trust document with the IRA institution by the October 31, 2018 deadline. Clark does so and believes that Jane's term-certain single life expectancy can be used in determining the required minimum distributions that can be made to Martin's trust.

Jane is age 20 in 2018 and her IRS single life expectancy is 63.0 years. Steve CPA calculates the required minimum distribution based on the 63.0 year stretch payment period and $9,206.00 is received by Martin's trust in 2018. This computation is based on Martin's deceased IRA account balance as of December 31, 2017 of $580,000 divided by 63.0 ($580,000 ÷ 63 = $9,206). Steve CPA then tells Clark, the trustee, to pay out the $9,206 from the Martin's trust to Jane and deducts that amount on the fiduciary income tax return for the calendar year 2018.

Question 1:

May Clark, the trustee, use Jane's single life expectancy in determining the required minimum distributions that must be made to Martin's trust?

Answer:

No. According to the IRS rules, Jane is an income beneficiary and not the beneficiary of the required minimum distributions according to the terms of the IRA trust. If the trust beneficiary of a trust is an income beneficiary, then under the IRS rules, the single-life expectancy of the oldest beneficiary of the trust is used in determining the required minimum distribution payout period. Since the XYZ Charity is the trust remainderman, then there is a stretch payment rule problem since a charity has no life expectancy. The charity is considered to be the oldest trust beneficiary. Because of this issue, the 63.0 year life expectancy of Jane cannot be used for IRS stretch payment purposes.

Question 2:

Assume the facts in Example 3 except that Clark, trustee of Martin's trust, has discretion pursuant to the terms of the trust to invade principal on behalf of Jane.

Would that change your answer to question 1?

Answer:

No. Clark as trustee has discretion to invade principal under the terms of the trust document but is not mandated to pay the required minimum distributions to Jane each year. Under the IRS rules, the single life expectancy of Jane may not be used in determining the stretch payments to Martin's trust. This is so since Jane is not considered to be the oldest trust beneficiary. Charity is the oldest beneficiary and has no life expectancy.

Question 3:

Based on the above, over what term-certain period must Clark as trustee use in determining the required minimum distributions that must be made from Martin's deceased IRA account to Martin's trust?

Answer:

Clark as trustee of Martin's trust uses the deceased IRA owner's remaining life expectancy. These rules were previously explained. This is so because Martin died after his required beginning date at age 72. Under the remaining life expectancy rule, Clark the trustee can receive required minimum distribution over 14.5 year term-certain period commencing in 2018 and reduced by one for each year thereafter.

Question 4:

Assume that Clark, the trustee of Martin's trust, received a $40,000 required minimum distribution during the calendar year 2018. This was determined by dividing Martin's deceased IRA account balance as of December 31, 2017 of $580,000 by 14.5 ($580,000 ÷ 14.5 = $40,000) of $40,000.

How much must Clark the trustee pay to Jane, the mandated income beneficiary of the Martin trust for the calendar year 2018?

Answer:

Under the state trust laws the definition of income for fiduciary accounting purposes is often not the same as the definition of income for income tax purposes. Most jurisdictions define trust accounting income to be 10% of the required minimum distribution amount that is paid to the Martin trust. Accordingly, Clark trustee under the 10% rule would distribute 10% of $40,000 or $4,000 to Jane, the mandated income beneficiary for the calendar year 2018.

Question 5:

What drafting approach could have been used to allow Martin's trust to use Jane's term-certain single life expectancy in determining the required minimum distributions that are paid from Martin's deceased IRA account to Martin's trust?

Answer:

If the trust document provides that the required minimum distributions received by the trust must be paid to Jane each year and Clark the trustee timely satisfied the post-death IRS trust documentation requirements by the October 31, 2018 deadline, then Martin's trust can use the term-certain single-life expectancy of Jane. Thus, the Martin trust could then receive required minimum distributions from Martin's deceased IRA account over a 63.0 year term-certain period commencing in 2018. This number would then be reduced by one for each year thereafter.

Author's Note

If the two rules described above are met, then the life expectancy of all other trust beneficiaries are ignored and Jane's term-certain single life expectancy account is used in determining the required minimum distributions from Martin's deceased IRA to Martin's trust.

Question 6:

Should Steve CPA know about the state trust law's 10% rule when he prepares the fiduciary income tax return for the Martin trust?

Answer:

It would appear to be yes. The AICPA "Practice Guide for Fiduciary (Trust) Accounting, a Guide for Accountants Who Perform Fiduciary Accounting Services," issued December 2007 by the AICPA Tax Division, states in part in the Executive Summary as follows:

- Fiduciary Tax Return Preparers must realize that taxable income and fiduciary accounting income are not the same. Accountants who unwisely prepare tax returns using only Forms 1099 and a check register face undaunted malpractice exposure to trustees and beneficiaries. Recent IRS regulations recognize changes in fiduciary accounting concepts in tax return reporting.
- Reading and Understanding the Terms of the Trust Instrument and/or Will is the initial step in preparing a fiduciary accounting. The instrument overrides local law (e.g., statutes in the state of the trust's or estate's situs).
- Accountants who Perform Fiduciary Accounting Services need to be knowledgeable of the Uniform Acts and Model Codes as adopted in the state of situs because these provisions and case law provide guidance as to local law if the trust or will is silent or poorly drafted. Seeking advice or counsel from knowledgeable attorneys can also be helpful and resourceful.

In the introduction to the practice guide, the following comments are made:

The challenges facing accountants who provide accounting and services for trusts and estates include:

A. Lack of familiarity with estates, trusts and fiduciary accounting principles.

B. ****

C. ****

D. Lack of consistency among the 50 states [plus District of Columbia] because each has its own statutes and legal interpretations vary from state to state.

Conclusion

Using an IRA trust for asset protection purposes is a challenging engagement. To effectively represent clients in connection with such matters, practitioners should be well versed in the applicable rules, as illustrated by the various examples set forth above.

Bitcoins, Blockchains and Bubbles: A Trusts and Estates Practitioner's Guide to Cryptocurrency

by Angelo M. Grasso

Few subjects are as prevalent in the news, yet completely foreign and confusing to readers, as cryptocurrency. In an effort to demystify one of the more intriguing innovations of this century, below is a Q&A for trusts and estates practitioners that discusses the concepts of cryptocurrency and blockchain, why they have received so much attention over the past few years, and what to know when discussing them with clients, colleagues, or at cocktail parties.

What is cryptocurrency?

Answering this threshold question requires first asking and answering an even more fundamental question...

What are money and currency?

Without getting too philosophical, money is any item or verifiable record that is generally accepted as payment for goods and services and the repayment of debts. Currency is a generally accepted form of money in circulation in the form of coins and notes, which then becomes the basis for trade. Stated another way, currencies are "systems of money" for a particular nation (such as the U.S. Dollar) or a confederations of nations (such as the Euro). Currencies are also referred to as "mediums of exchange."

Okay, fine. So what is a cryptocurrency?

It is also a medium of exchange, but unlike "hard" currencies, a cryptocurrency only exists in the digital world; a "physical cryptocurrency" is an oxymoron. The "crypto" portion of the portmanteau signifies that it relies on encryption to ensure that transactions using it are secure. And unlike most currencies—dollars, yen, yuan, rubles, pesos, reals—a cryptocurrency is not issued by a government or confederation.

Currency issued by something other than a government? I've never heard of such a thing.

Actually, you probably have without knowing it. Tokens issued by private vendors—such as amusement parks, subways, or driving ranges—act as a form of currency. They have intrinsic value for the particular vendor or commercial entity, and allow you to do things within that vendor's purview, such as go on a merry-go-round, ride the train, or hit golf balls. But those tokens are not legal tender,[1] and generally speaking, cannot be used for most transactions. Try using your ride tickets from Playland to buy a slice of pizza in Manhattan. I suspect it will go nowhere.

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What are some examples of cryptocurrencies?

Bitcoin is by far the most famous. Other (relatively) well-known cryptocurrencies include Ethereum, Litecoin, and Ripple. There are at least 1,500 known cryptocurrencies in the world, and that number is only growing.

How did cryptocurrency start?

The notion of a digital currency is as old as the internet. One of the first people to try to come up with a secure mechanism for digital currency was David Chaum, who in the early 1980s wrote the paper *Blind Signatures for Untraceable Payments*.[2] Therein, Chaum described acquiring digital currencies from banks, and spending them in manners that could not be traced by the bank, or for that matter, any third party. A later paper by Chaum attempted to address the problem of "double-spending," i.e., ensuring that the holder of a unit of digital currency did not spend or use that particular unit more than once.[3]

Despite Chaum's papers and the work of many others, no well-accepted online currency developed over the next two decades. For example, Chaum's major attempt at a cryptocurrency—Ecash—failed because it was dependent upon credit card companies and governments to provide the infrastructure and maintain a ledger of transactions. The innovators of cryptocurrency wanted it to be completely untethered from governments and third parties, both philosophically and practically. The problem was that until 2008, nobody devised a method to ensure that a unit of digital currency was not spent multiple times without involving a third party to keep and maintain the ledger.

What changed in 2008?

The breakthrough came in October 2008, when Satoshi Nakamoto[4] published the white paper *Bitcoin: A Peer-to-Peer Electronic Cash System*.[5] The paper summarized the double-spending issue:

> The problem of course is the payee can't verify that one of the owners did not double-spend the coin. A common solution is to introduce a trusted central authority, or mint, that checks every transaction for double spending. After each transaction, the coin must be returned

> to the mint to issue a new coin, and only coins issued directly from the mint are trusted not to be double-spent. The problem with this solution is that the fate of the entire money system depends on the company running the mint, with every transaction having to go through them, just like a bank.

To cut out the middleman—i.e., a private third party that would maintain the ledger—Nakamoto proposed a *public* ledger where every single transaction using the cryptocurrency would be made public. This would mean that every person or entity using the currency would know that each coin had not been spent multiple times:

> We need a way for the payee to know that the previous owners did not sign any earlier transactions. For our purposes, the earliest transaction is the one that counts, so we don't care about later attempts to double-spend. The only way to confirm the absence of a transaction is to be aware of all transactions. In the mint based model, the mint was aware of all transactions and decided which arrived first. To accomplish this without a trusted party, transactions must be publicly announced, and we need a system for participants to agree on a single history of the order in which they were received. The payee needs proof that at the time of each transaction, the majority of nodes agreed it was the first received.

How would this work?

The system would record each and every transaction using the cryptocurrency in a data form known as a "block." Every block would contain certain pieces of information concerning the transaction, including the date, time and amount of money exchanged. The block would also record the parties to the transaction, but would do so anonymously by assigning each party a unique "digital signature," which is largely an unintelligible group of numbers and letters. Finally, each block would also contain a unique code (called a "hash") to distinguish that particular block from each individual transaction. For example, if every Tuesday at 8:30 a.m. you bought a dozen donuts from the same vendor using a cryptocurrency for the same amount of money, each entry in the ledger would have a different hash because each was a different, discrete purchase.

But how do these transactions get processed?

If you'd like the answer complete with numerous Greek letters and math that goes beyond A.P. Calculus, the white paper lays it out pretty thoroughly. Assuming that you're looking for a more simplified version of the process:

- A transaction needs to occur. For the sake of this example, let's say you're buying a crate of bespoke bathroom tiles from a merchant in Alabama. You make the purchase online for a set price.
- Next, the transaction needs to be verified. This is done by an array of computers around the world that are connected to the cryptocurrency's network. Their job is to verify the date, time, amount, and parties to the transaction.
- Once a transaction has been verified, its details are stored in a block. This won't be the only transaction in the block; there will be hundreds of others joining it. What these transactions have in common is that they were all verified at roughly the same time.
- Once *that* happens, the block is given its hash, which includes the hash of the most recent block that was published. Once this has happened, the new block is ready for publication.

What does publication mean?

Blocks that have been given a hash are then published in chronological order on the cryptocurrency's ledger. This ledger is known as the "blockchain"—literally, a chain of blocks in chronological order, linked by the hashes (the prior one and the new one). And this blockchain can be viewed by anyone.[6]

Wait, so I can see what other people have done with their cryptocurrency?

Sort of, not really. Anyone—including you!—can log on to the blockchain and review each and every transaction in a particular block. But doing that will likely be unedifying. Remember, the parties to a transaction were made anonymous by their digital signatures. So while you can see the date and time and amount of money exchanged, all you will know is that it was between two anonymous digital signatures. You will have no idea who was part of the transaction or why it occurred. It could have been people buying pizzas,[7] couches from Raleigh, weapons from Moldova, or gambling proceeds from Antigua.

Okay, so a block is added to the ledger. Why is this a big deal?

This goes back to the "hash," which is what ensures against double-spending. As noted above, each transaction's code includes two hashes: the one in the immediately prior block, and the one in the current block. The hashes are created by a mathematical function that relates to the specific data contained in the block. Hence, if someone tried to edit any portion of a prior block, its hash would change. This would break the blockchain, because the adulterated hash would no longer link up with the prior or subsequent block. To fix this, a hacker would have to edit the prior block, and then the block before that one, etc. This makes the blockchain virtually impossible to edit or delete.

So what's the big deal about making the ledger public?

Remember how we said you could view the blockchain at any time? You can go a step further and connect your computer to the blockchain network. This gives you a copy of the blockchain and all updates to it—think of it like a constantly updating feed on Instagram or Twitter. This is known as "peer to peer" networking, where there is no central computer, but the data and information live on all the users' computers. The most famous example of "peer-to-peer" networking was Napster, where you could download a kajillion songs not off of some central repository, but rather off of the myriad computers of other people in the Napster network.

The peer-to-peer setup means that if someone wanted to change what's in the blockchain—presumably nefariously—she wouldn't only have to change the ledger that's in the hands of a private third party. She would have to change the ledger that's in the possession of *every person* who is linked to the blockchain network. In the case of large cryptocurrencies like Bitcoin or Ethereum, this would require altering hundreds of thousands of computers, and is, practically speaking, next to impossible.

So transactions are public and yet not public. This sounds sketchy.

That's certainly one interpretation and what many other people have concluded. Another conclusion is that it's not that different from dealing with cash, when there's no oversight or records of transactions at all.

I think I understand how a blockchain works. But what does this have to do with Bitcoin?

The blockchain is the ledger that contains a record of how all of the units of a particular currency move from party to party, and ensures that there are no shenanigans when people enter into transactions using cryptocurrencies. The currency itself—be it Bitcoin, Ethereum, or IceNineCoin[8]—is what is actually used between the parties for the transactions. If you want to actually conduct a transaction using cryptocurrency, you care about the coin itself, and the blockchain is the apparatus that gets the transaction done.

If cryptocurrencies aren't tangible items, how can I get one?

What you'll first need is to get a wallet. Not a pleather item from Canal Street, a digital wallet, which is software that is designed to make cryptocurrency transactions and view balances. While we could spend paragraphs going over the different types of wallets, what's important to know is that digital wallets have two forms of identification: a public key and a private key. The public key is analogous to a username, and is the code that appears in the blockchain to show you are the person making the transaction—think back to the digital signature we discussed earlier. The private key is your password to transact with cryptocurrency.

Broadly speaking, there are two different types of wallets: "hot" and "cold" wallets. The difference is how the cryptocurrency is stored—hot wallets keep the currency online, while cold wallets keep the currency on a hard drive, or more often, a flash (USB) drive.

I thought the whole point was this currency was online. Why would I want to then store my currency on a flash drive?

Security. If you're holding your currency in a "hot" wallet, it's probably through one of the many cryptocurrency exchanges where you can buy and sell cryptocurrency and effectuate transactions. Probably the most popular exchange in the United States is Coinbase, in large part because it's fairly easy to use, has an app, and trades multiple currencies (Bitcoin, Ethereum, Litecoin, and some others).

The issue with an online exchange is the same issue we see in stories every month concerning life online: they can be hacked. Infamously, Mt. Gox was a popular Japanese exchange, and in 2013 handled over half of all Bitcoin transactions. Then in 2014, it was hacked, and lost 750,000 of customers' Bitcoins, plus another 100,000 of its own. Since then, many people have been skittish about keeping their currency online, despite the exchanges' assurances that their security is top notch.

I don't blame them! I think I'll keep my currency on a flash drive. There's no downside, right?

Well . . . not quite. That flash drive with your cryptocurrency on it is quite literally the entire record of the currency's existence and your ownership of it. If you lose the flash drive, your money is gone. If you forget the password, you're in trouble. If you drop dead and don't leave your heirs with instructions about how to find and access your cold wallet, odds are they're out of luck. Think of it like having a buried treasure chest with gold. It's great if you know it exists and where to find it. It's worthless if you can't.

That's far-fetched. I'm sure that almost never happens.

If only that was true. QuadrigaCX was a Canadian cryptocurrency exchange founded by Gerald Cotten that traded currencies including Bitcoin and Litecoin. At the end of 2018, QuadrigaCX had over 100,000 clients and $190 million in cryptocurrency and regular money (also called "fiat"). To protect the currency from hacking, Cotten elected to keep most of the exchange's currency in a hard wallet on his laptop. This proved to be a problem with Cotton died of Crohn's disease in

India in December 2018, and nobody knew the password to his laptop that held all of the currency. As of the writing of this article, there's no reason to believe the QuadrigaCX account holders will be getting their currency back.[9] One cryptocurrency analyst estimates that of the 17.5 million Bitcoins that have been created, four million have been lost forever.[10]

Suddenly that hot wallet doesn't sound so bad after all.

No, and you're probably going to want one anyway if you actually want to conduct any transactions with your cryptocurrency.

Got it. So circling back, what do I need to do to get some Bitcoins?

After creating a wallet, you'll need a secure internet connection (of course). You'll also need proper government identification to comply with SEC regulations and, if you're using an exchange, their internal compliance. Then you'll need a credit card or a bank account to link with your wallet—you do have to pay for the cryptocurrency somehow.

> *"While cryptocurrencies were initially intended to be used as a currency to replace (or supplement) the Dollar and Euro, many have treated them as investments and have purchased them in the hope that their value will skyrocket, and they can sell them for a profit."*

Finally, you need to pick an exchange. (Often the wallet and exchange are the same, but they do not need to be.) As we mentioned earlier, Coinbase is a popular exchange. There are many others such as Gemini, Binance, Coinmama, Kraken, and BitPanda. We are not making any recommendations or judgments on any of these exchanges, except to note that some of their names are absolutely fabulous.

Can you buy or use only part of a Bitcoin?

Yes—transactions can be carried out to decimal points. For example, if you want to pay for an $80 rug using your Bitcoins, and Bitcoin is presently trading for $5,600, you would send the seller 0.0142857 Bitcoin. Generally speaking, the exchanges will do the math for you.

How much does a cryptocurrency cost?

Much like traditional currencies, the prices fluctuate. We've all heard about times the dollar was "strong" or "weak," especially in relation to other currencies such as the Pound Sterling or Euro. The big difference is how volatile they are. Over the last five years, the value of a Euro has ranged from $1.05 to $1.38. Over that same time period, a Bitcoin has been worth between $327 and nearly $20,000.

That type of volatility sounds more like a stock than a currency.

A fair point. While cryptocurrencies were initially intended to be used as a currency to replace (or supplement) the Dollar and Euro, many have treated them as investments and have purchased them in the hope that their value will skyrocket, and they can sell them for a profit. Of course, they're not stocks because they're not equity in anything. When you own 100 shares of AT&T, you are a part owner of the corporation. Owning 100 Bitcoins doesn't make you the owner of anything except 100 Bitcoins.

This sounds like a bubble.

That's exactly the conclusion many people have drawn. And there are a lot of elements of a bubble here: new technology, a lot of press, a lack of understanding by people as to what exactly they're buying, and blind speculation about the future. Most important, the prices of the most popular cryptocurrencies have soared like a bubble. In January 2017, one Bitcoin was worth less than $1,000. By December 11, it had peaked at $19,511, before crashing down to under $3,500. Ethereum and Litecoin followed similar trajectories. All of these currencies are still operating today, they just cost a lot less than they did in December 2017.

Is inflation a concern? What's to stop someone from just minting a billion Bitcoins?

Not really, because there are only a finite number of Bitcoins that can be created, and there's a process to generate them, known as "mining," which is how all Bitcoins came into existence after the first block. Mining is a two-step process: auditing and proof of work. On the front end, miners are the auditors for the Bitcoin blockchain, and they verify the transactions. When a miner has verified a certain number of transactions (1 megabyte's worth, to be precise), they have satisfied the first condition and are eligible to earn a set number of bitcoins that decreases over time. (Presently, it is 12.5 coins.)

To earn those coins, the miner then has to engage in the "proof of work" phase, which involves providing the right answer to a numeric problem—namely, correctly guessing the next hash in the blockchain. This is basically asking someone to guess what number a computer is thinking of, only here, it's a number with 64 digits and that can also include the letters a, b, c, d, or e. In other words, it's almost impossible to guess, which is why miners have devoted inordinate amounts of computing power to guessing these hashes.

I heard about this. Isn't Bitcoin mining going to melt the polar icecaps?

That's overstating the case, but only slightly. By some estimates, the amount of energy used to mine Bitcoins in 2018 exceeded Hungary' energy consumption for the same year.[11] There has been some speculation that this might change with Bitcoin's decline in value, but no real indication this is happening.

What are the differences between all these various cryptocurrencies?

There are some differences from a technological perspective which are too complex for this essay. For example, Bitcoin and Litecoin use different cryptographic algorithms. Litecoin purports to have a faster transaction speed than Bitcoin: the claim is Litecoin's transactions can be completed in two minutes, versus five hours for Bitcoin. Ripple has attempted to brand itself as the best cryptocurrency for cross-border transactions. Possibly the most interesting one for the long-term is Ethereum, which has a secondary purpose of having what are called "smart contracts" utilize the blockchain.

Now that I've read all of this, I don't understand why this is necessary. Other than sounding cool, why would people use cryptocurrencies instead of regular currencies?

Setting aside speculators who are hoping just to get rich from cryptocurrencies, there are a couple of advantages. The first is speed: for long-distance transactions, cryptocurrencies are quicker than wires, which requires multiple banks to communicate with each other and update their respective ledgers, whereas with Bitcoin, you would only need to update the blockchain. It's less costly to transact on a blockchain because there are no fees to the banks or middlemen. The transactions are more secure; even noting concerns about Mt. Gox, it is still far more difficult to hack a blockchain than a company like Equifax or Yahoo.

Finally, cryptocurrencies offer unmatched privacy. This has its obvious benefits, but more cynically, can be used for nefarious means. For example, The Silk Road was a notorious site for the buying and selling of narcotics on the black market. Most if not all transactions were performed using cryptocurrencies because it allowed the transactions to be completed and remain anonymous. The same is true for other illicit transactions like gambling and arms sales.

You know what? I'm going to stick with dollars.

A perfectly reasonable conclusion. But hopefully now you understand what all the fuss is about.

Endnotes

1. "Legal tender" is defined in the U.S. Code as "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues." Coinage Act of 1965, 31 U.S.C. § 5103 (1982).
2. *Blind Signatures for Untraceable Payments*, D. Chaum, Advances in Cryptology Proceedings of Crypto 82, D. Chaum, R.L. Rivest, & A.T. Sherman (Eds.), Plenum, pp. 199-203.
3. *Untraceable Electronic Cash*, D. Chaum, A. Fiat, & M. Naor, Advances in Cryptology CRYPTO '88, S. Goldwasser (Ed.), Springer-Verlag, pp. 319-327.
4. Trillions of electrons have been expended on the internet fruitlessly attempting to identify the person(s) behind this pseudonym.
5. https://bitcoin.org/bitcoin.pdf.
6. https://live.blockcypher.com/btc.
7. May 22, 2010 is known as Bitcoin Pizza Day, as on this day, a programmer paid someone 10,000 bitcoins to bring him two large Papa John's pizzas. At the time, the coins were worth $30. On January 1, 2019, those same Bitcoins were worth around $38 million.
8. A completely fictional currency. But Kurt Vonnegut would have had a field day writing a satirical novel based on cryptocurrency.
9. There are many more layers to the QuadrigaCX story that will not be delved into here, including a belief by many that Cotten faked his death in order to steal the money or to conceal the fact that the exchange actually did not have most of the funds it claimed to have in the first place.
10. https://coincodex.com/article/2018/jameson-lopp-estimates-4-million-bitcoin-are-lost-forever/.
11. https://www.newsbtc.com/2019/03/14/bitcoins-energy-consumption-equalled-that-of-hungary-in-2018/.

Update from Our Section's Membership and Law Student Committee

In this issue of the *Journal*, the Membership and Law Student Committee highlights two exciting opportunities for newly admitted attorneys and law students, respectively.

2020 Trusts and Estates Law Section Rising Star Fellowship

Applications are open for the 2020 Trusts and Estates Rising Star Fellowship! This is a great opportunity for junior attorneys (with 3 to 6 years of experience) to become an active part of the New York trusts and estates community and the Trusts and Estates Law Section. Among other opportunities, Fellows will be placed on a committee and attend regular committee meetings; work with a committee chair or vice-chair to develop a topic for an article and/or speaking engagement at an NYSBA event, and attend Executive Committee meetings throughout the year.

Sarah Pickering, Esq., the 2019 Rising Star Fellow, has this to say about her experience:

> It was a tremendous honor to be named a Rising Star fellow at the beginning of this year. I applied to the program not only because I wanted to become more involved in the Trusts and Estates Law Section of the New York State Bar, but also because of the many opportunities the program offered: from writing and speaking engagements to mentorship and networking.
>
> Halfway through the year, the Rising Star Fellowship has already exceeded my expectations. I have learned so much about our Section by attending Executive Committee meetings, as well as meetings for the Estate and Trust Administration Committee. I did not realize that we are one of the most active Sections in terms of drafting legislation. I appreciate the chance to discuss and collaborate with other Section members on timely issues. The collective knowledge of the Trusts and Estates Section is truly an impressive resource. As part of my Fellowship, I am writing an article on digital assets. My mentor was able to connect me with experts in this cutting-edge area of the law, including attorneys who helped draft the New York Fiduciary Access to Digital Assets statute.
>
> I highly recommend the Rising Star Fellowship to any lawyer who is looking to enhance their career and further develop their practice. I have enjoyed my experience so far and am very much looking forward to the second half of the program.

Please see page 20 for a copy of the 2020 Rising Star Application. Applications must be received by **Monday, November 25, 2019.**

The New York Bar Foundation 2020 Trusts and Estates Law Section Fellowship

This Fellowship, established by the New York Bar Foundation through a gift from the Trusts and Estates Law Section, will give three first-year (1L) or second-year (2L) law students currently enrolled in law schools in New York State the opportunity to work in public sector trusts and estates law positions during the summer of 2020. Students will be provided with a meaningful and appropriately supervised work experience in Surrogate's Courts in counties throughout New York State. The Fellowship provides a stipend to each student to spend the summer of 2020 (10 weeks) working on trusts and estates law matters in Surrogate's Court. Moreover, Fellows will be a guest member of the Trusts and Estates Law Section for one year, and will be invited to attend an Executive Committee meeting of the Section during the year.

Bradley C. Murray, Esq., a 2017 Fellow, worked in the chambers of Honorable Vincent W. Versaci, Schenectady County Surrogate's Court. Bradley had this to say about his experience:

> The T&E Fellowship was a great opportunity to obtain hands-on Surrogate's Court experience. Working closely with Judge Versaci, the Chief Clerk, and members of the Court's staff, I gained exposure to a wide variety of trust and estate matters, strengthening my understanding of the law and solidifying my interest in the practice area. I am a better attorney because of all I learned through the Fellowship and am thankful to the Section for the opportunity.

Please stay tuned for more information about the 2020 Fellowship.

Trusts & Estates and Elder Law & Special Needs Joint Fall Meeting | October 24-25, 2019

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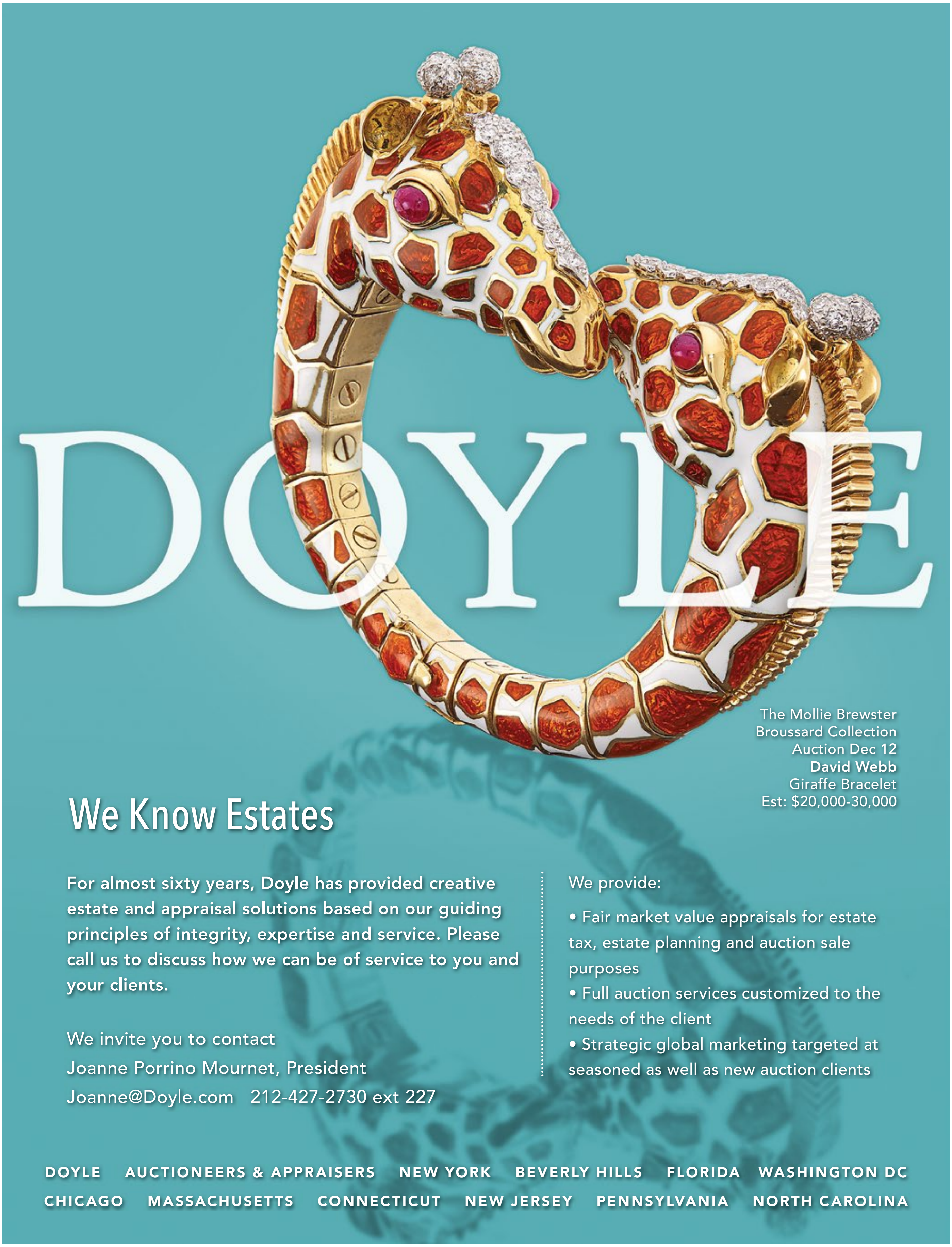

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Specific Considerations in Trust and Estate Mediations

By Amy B. Beller

Make fun of Florida if you wish. There are certainly ample grounds. We have a season for python hunting; almost all of our gas stations are self-service despite our elderly population, and for some unfathomable reason, we cannot produce decent Chinese food anywhere in the State. But there are two areas in which, with no disrespect to my birthplace, Florida is superior to New York: our winter weather, and the requirement of pre-trial mediation.

Florida requires mediation in almost every civil litigation proceeding before the parties can proceed to trial. In addition, Florida has a set of rules for mediators and mediation participants, codified in Florida Rule of Civil Procedure 1.720, as well as a set of Rules for Certified and Court-Appointed Mediators. Finally, the Florida Supreme Court has a certification process for mediators, which requires a 40-hour course plus mediation observations, co-mediations, and continuing education requirements.

"The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." Florida Rules for Certified and Court-Appointed Mediators, Rule 10.220."

Mediation of trust and estate matters in Florida is a requisite just as in other civil litigations. It is a widely accepted belief that trusts and estates matters are highly specialized and clients are best served by experienced trust and estate counsel with in-depth knowledge of the substantive law. This premise applies equally to mediation of trusts and estates matters: mediators with substantive trusts and estates knowledge are a great asset in efforts to resolve a case.

There are lessons to be learned by New Yorkers from those of us who regularly participate in trust and estate mediations in Florida. To maximize the potential of reaching resolution, the participating professionals should give due attention to the special considerations involved in preparing for and conducting mediation in our niche area. This article will identify some of these considerations and will provide some practical recommendations for mediations of trust and estate disputes.

1. Choice of Mediator

"The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." Florida Rules for Certified and Court-Appointed Mediators, Rule 10.220.[1] While normally selection of a mediator should be deliberate and with forethought, picking a mediator in a trusts or estates litigation is of particular importance when the emotional temperature is running high and when the matter involves complex tax matters or substantive issues of law.

Many estates and trusts litigations involve personal and emotional issues, and it is sometimes those issues that are actually driving the litigation. In such matters, having a mediator with excellent people skills is essential. The mediator must be able to connect and earn the litigant's trust. He or she must be a great listener and must be able to make the litigant believe they were heard and understood. Sometimes a shared cultural or geographical background, similar age, or even a shared hobby, can be helpful. Gender may also play a factor: since about half of the litigants in these matters are women, consideration should be given as to whether a female mediator might more easily establish a rapport with a female party. If the litigant prides him or herself on a prestigious academic background, choosing a mediator with a similar background could be wise. Of course, there are those litigants for whom a retired judge or similarly-seasoned and established mediator with a premier resume may be the best choice.

It is also important that the mediator has the essential knowledge base and skill set. Under Rule 10.370(c), a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Ironically, it is the certified mediator's statutory prohibition against rendering an opinion on the matter that sometimes causes advocates to prefer a non-certified mediator.[2] (This differs from the "settlement conference" model, in which the conference moderator frequently tells participants how she thinks the judge will decide.) Under the Florida rules, a mediator may provide relevant infor-

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mation, raise issues, and discuss strengths and weaknesses of positions underlying the dispute. Experience with similar cases is also important: the mediator can then credibly speak to his or her own history in helping the client to explore what might occur with continued litigation.

A mediator may also help the parties evaluate resolution options and draft settlement proposals, and "may call upon their own qualifications and experience to supply information and options." Rule 10.370, Committee Notes, 2000 Revision. Thus, while the mediator will not be called upon to make decisions, a mediator's experience in trusts and estates law remains an essential component of a successful mediation. (Parties wishing to have someone who renders a decision on the disposition of the matter are really seeking arbitration, not mediation.)

> *"While the mediator will not be called upon to make decisions, a mediator's experience in trusts and estates law remains an essential component of a successful mediation."*

It is also very helpful if the mediator can identify problems and solutions that may arise in connection with a settlement. In some trusts and estates mediations, the mediator's familiarity with estate and trust administration or tax issues may be essential in achieving a settlement, at least one that does not later turn into additional litigation. A mediator without a sufficient background will not be able to assess whether a party's concerns about a particular issue are justified (e.g., that there may be an estate tax liability), whether there are additional steps which will need to be taken (e.g., obtaining a Private Letter Ruling or noticing other interested persons with a motion for court approval of a settlement), or whether a provision contemplated as part of a settlement may be a non-starter (e.g., the decedent's friend who is not a Florida resident wants to serve as Personal Representative). While it is not the mediator's job to provide legal advice to anyone, a knowledgeable and experienced trusts and estates mediator may prove to be an invaluable asset.

2. Non-Party Participants

Often, a party attending a trust or estate mediation will want to bring with him or her a spouse, adult child, friend or other confidante. The other party, or other party's lawyer, may initially react in a knee-jerk fashion and seek to block the non-party's attendance. The better approach, however, is to determine whether the non-party is likely to assist in achieving a settlement. If the non-party's attendance is likely to be a positive factor, or at minimum it will not be an impediment, then it may be useful to have such person attend and participate.

Consider, for example, a litigation involving a surviving second spouse litigating against adult children by an earlier marriage of the decedent. The surviving spouse may be elderly, possibly vulnerable, insecure, and maybe unsophisticated. Perhaps her relationship with her own lawyer is not strong, and she will be very hesitant to enter into any settlement without the advice and approval of her own adult child. In that case, having the adult child present at mediation may be useful or even necessary to resolving the case.

If, on the other hand, the non-party's attendance is likely to increase the level of hostility or that person may be unreasonable as compared to the party herself, then the other party's counsel may wish to exclude the non-party from attending. This decision, which should be communicated by the mediator if possible, may start the mediation off on a bad foot, as the party being denied will at best be irked and at worst may resolve not to settle. It may be best if counsel determines in advance whether a non-party's attendance will be permitted, so as to avoid the possibility of increasing tension on the actual day of mediation.

A middle ground may be to allow the non-party to sit with the accompanying party during private caucus sessions or at least during those periods where the mediator is working with other parties.

A non-party who attends and participates in mediation is a mediation participant under Fla. Stat. 44.403(2) even though he may not be a mediation party under Fla. Stat. 44.403(3). A mediation participant shall not disclose a mediation communication to any other person other than another mediation participant or a participant's counsel. Fla. Stat. 44.405(1). Such mediation participant should be informed of the rules regarding confidentiality set forth in the Mediation Confidentiality and Privilege Act, Fla. Stat. 44.401 et seq., and that he or she is bound thereby. The mediator may wish to have this confirmed in writing.

3. Preparation for Mediation

Attorneys know that it is important to provide the mediator with a summary of the case and important pleadings and documents. In a trusts and estates litigation, the operative testamentary documents should be summarized and provided with the mediation summary. If there are multiple competing instruments, the mediator will appreciate a chart or other summary of the differences among the instruments.

It is also helpful in a trusts and estates mediation for the parties to provide a chart or list of all assets at issue including current values. Account statements for estate and trust accounts or other assets in dispute should be available, at least online. For real estate and tangible personal property, valuations may be essential. The parties should, at minimum, have informal estimates of the value of assets, obtained through internet research or other means. Do not wait until a settlement agreement is being inked to start looking on Zillow or EBay to determine the value of a disputed asset. The parties expecting to receive items to be shipped should also have estimates of shipping costs.

Attorneys are often reluctant to provide the mediator a candid assessment of the weaknesses or problems in that party's case. A mediator is not a decision maker, and it is not the job of an attorney for a party going to mediation to convince the mediator that he or she will prevail. Rather, the mediator's task requires that she is armed with the negative aspects of the case so that she can assist the parties in making a sound decision on settlement. For that reason, a confidential mediation summary should include brief discussions concerning evidentiary issues, credibility problems, financial concerns and other factors which will have an impact on the case.

A mediation summary should also include a summary of prior settlement discussions. While the parties are not bound to pick up where they left off, it does help the mediator to know the context of such prior discussions. In addition, the parties' counsel should know the amount of fees and costs incurred if there is going to be any chance of payment from an estate or trust or any fee-shifting.

4. Preparation for Settlement

Attorneys often prepare for mediation but fail to prepare for settlement. In an estate litigation, a settlement may require a party to sign a document to be filed in the probate, such as a waiver of service of a petition for discharge of a Personal Representative, or a Satisfaction of Claim. Having such documents ready to be signed at the mediation is very helpful, and sometimes essential. Counsel must determine in advance of mediation what documents and instruments may be needed to wind up administration or accomplish some other task such as transfer of real property or ownership of accounts. If there are small items in dispute that may have to change hands, such as keys to a house or a photograph album, it makes sense to have the client bring those items to the mediation.

If a settlement may require a successor fiduciary, a lawyer should come to mediation with suggestions for such appointment. If appropriate, fee schedules, resumes or CVs, or other information about potential fiduciaries should be available to provide to the other parties.

While not specific to trust and estate mediation, it is worth mentioning that counsel for parties going to mediation must be prepared with at least a shell settlement agreement and a means for revising, printing and executing that agreement. See Rule 10.420(c) (the mediator shall cause the terms of any agreement reached to be memorialized appropriately). Attorneys would not go to court on a motion without having an order granting the relief being requested, because if the judge is deciding in your favor, you want the judge to sign the order on the spot. This same logic applies to mediation. Once an agreement is reached, you will want the parties to sign an agreement as soon as possible. Lawyers who are not prepared with a draft settlement agreement may cost their client money (time = fees) as the lawyers begin drafting something from scratch on the spot, or worse yet, may jeopardize finalizing an agreement altogether.

Settlement of trusts and estates matters may require the joinder or consent of other individuals who are not present. The mediator is to promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at the mediation. Rule 10.320. It is wise for attorneys at mediation to have a contact list including cell numbers and email addresses for all persons who may need to be consulted about settlement, or who may need to sign an agreement.

Finally, if there will be tasks required after mediation in order to implement a settlement, such as moving for court approval or filing a final accounting, counsel should be aware of those tasks in advance, think through who can accomplish the tasks most efficiently, and have an idea of what it will cost to get to the finish line.

Endnotes

1. All references in this article to "Rules" are referenced to the Florida Rules for Certified and Court-Appointed Mediators.
2. Although perhaps it is a biased view, in this certified mediator's experience, being unable to render "an opinion" on the merits or likely outcome of a case during mediation has never impeded the ability to get a case settled. The approach has a little more finesse—it involves the power of identification and trust more than coercion—but for a skilled and experienced mediator, the desired outcome is just as achievable. For an interesting analysis relating to this issue, *see* Mediator Ethics Advisory Committee (MEAC) Opinion 2010-006 (October 12, 2010).

Miscellaneous Thoughts on Miscellaneous Itemized Deductions: Updates on Federal and New York Law

By Katie Lynagh and Michael S. Schwartz

As many practitioners are aware, a newly enacted section 67(g) of the Internal Revenue Code (the "Code") was added by the Tax Cuts and Jobs Act of 2017 (the "Act"). Section 67(g) suspends miscellaneous itemized deductions for tax years 2018 through 2025. And although there was initial uncertainty, IRS Notice 2018-61 has since confirmed that administration expenses described in section 67(e)(1) are still deductible even with the enactment of new section 67(g). However, there are still other expenses that an estate or trust could have deducted before the Act, including investment advisory fees, which an estate or trust will no longer be able to deduct pursuant to section 67(g). Adding to the complication regarding these deductions, New York State enacted a law on April 12, 2019 (but effective for 2018 tax returns), in which New York State "decouples" from the new federal treatment of these deductions, and will allow an estate or trust to deduct expenses that may not be deductible for federal purposes.

This article will summarize the new New York State law as it relates to deductibility of certain expenses so that practitioners and tax preparers can review 2018 returns to ensure no amendments should be made, and to guide the preparation of tax returns going forward. This article will also re-examine the way certain expenses (specifically "bundled" fees, such as fiduciary commissions, legal fees and accounting fees) can be treated in the most tax efficient manner in light of changes to federal and New York State law.

New York Decouples from Federal Law and the Need to Review 2018 Returns

On April 12, 2019, just days before the income tax filing deadline, New York State passed the 2020 Executive Budget, and, as a result, estates and trusts may now be able to deduct many expenses on their New York State income tax returns that are not allowed as deductions at the federal level.[1] Importantly, these changes also apply to the 2018 tax year. Specifically, New York will allow deduction of state and local real estate taxes, even if those amounts are in excess of the $10,000 State and Local Tax (or SALT) deduction limitation which applies at the federal level following the Act.[2] In addition, New York will allow deductions for miscellaneous itemized deductions that are no longer allowed at the federal level as a result of the enactment of section 67(g) of the Internal Revenue Code.[3]

Interestingly, this decoupling was already in effect for individuals pursuant to Technical Memorandum TSB-M-18(6)I, which was issued in December of 2018.[4] However, that Technical Memorandum did not appear to apply to estates or trusts. Thus, many tax preparers filed 2018 income tax returns for estates and trusts prior to April 12, 2019, not deducting these expenses, as they are no longer allowable at the federal level. In addition, many of the commonly used tax preparation programs took several weeks to update to account for this change following the April 12, 2019 enactment.

Thus, it is important to review 2018 New York State income tax returns that were filed for estates or trusts in order to determine whether any additional deductions can be claimed.

Allocating "Bundled" Fees

With the enactment of section 67(g), practitioners and fiduciaries should continue to focus on reviewing estate and trust expenses in order to determine if they are being treated in the most tax efficient manner. Specifically, much of the analysis surrounding allocating "bundled" fees from the time of the issuance of Treasury Regulation Section 1.67-4 is of increased importance following the disallowance of miscellaneous itemized deductions under section 67(g) of the Act.

Common examples of trust or estate expenses that are deductible when computing the trust's or estate's adjusted gross income (AGI) are preparation fees for certain tax returns, including estate and generation-skipping tax returns and fiduciary income tax returns, and fiduciary commissions.[5] These expenses, which remain deductible for both federal and New York State income tax purposes, have the effect of reducing a trust's or estate's taxable income dollar-for-dollar. Certain other expenses of a trust or estate, including investment advisory fees and other costs that a hypothetical individual would incur in connection with

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owning the same property (such as condominium fees or insurance for real property, if deductible and not considered personal expenses), are miscellaneous itemized deductions that are deductible in New York State only to the extent that total miscellaneous itemized deductions exceed a floor equal to 2% of AGI.[6] These expenses are currently nondeductible for federal income tax purposes following the enactment of section 67(g). If fees that are deducted when calculating AGI are bundled with fees that are miscellaneous itemized deductions, and the bundled fee is not computed on an hourly basis, as is often the case with fiduciary commissions, the portion of the bundled fee that represents investment advisory fees (almost always a miscellaneous itemized deduction) must be separated from the remaining portion of the bundled fee (which can be taken into account when calculating AGI).[7]

In their article published in connection with the final release of Treasury Regulation Section 1.67-4 in 2014, Austin Bramwell, Elisabeth Madden, and Sharon Klein analyze a variety of methods that have the potential to be considered "reasonable methods" for purposes of Treasury Regulation Section 1.67-4 (c)(4), including the following methods:[10]

(1) ***Comparison to other fees.*** For example, the portion of the trustee's commission allocated to investment advisory fees would be equal to the fee that an outside investment manager would charge for investment advisory services, the portion of the trustee's commission taken into account in calculating AGI would equal the fees that would be paid to a directed trustee who takes action with respect to investments only when directed to do so pursuant to a trust instrument and a state directed trust statute, or the portion of the trustee's commission taken into account in calculating AGI would equal the cost of fiduciary liability insurance, because compensation for taking on risk of liability cannot also be considered compensation for performing the investment advisory functions of a fiduciary.

> *"On April 12, 2019, just days before the income tax filing deadline, New York State passed the 2020 Executive Budget, and, as a result, estates and trusts may now be able to deduct many expenses on their New York State income tax returns that are not allowed as deductions at the federal level. Importantly, these changes also apply to the 2018 tax year."*

Treasury Regulation Section 1.67-4(c)(4) provides that "any reasonable method" may be used to allocate a bundled fee.[8] The regulation adds that:

> [F]acts that may be considered in determining whether an allocation is reasonable include, but are not limited to, the percentage of the value of the corpus subject to investment advice, whether a third party advisor would have charged a comparable fee for similar advisory services, and the amount of the fiduciary's attention to the trust or estate that is devoted to investment advice as compared to dealings with beneficiaries and distribution decisions and other fiduciary functions.[9]

Since fiduciaries are not obligated to use a specific method of allocation, fiduciaries should consider which reasonable method or combination of reasonable methods would cause the greatest portion of a bundled fee to be allowed as a deduction in calculating AGI (and, by extension, the smallest portion of the bundled fee to be considered an investment advisory fee, which is almost always a miscellaneous itemized deduction that is subject to the 2% of AGI floor in New York State and is currently not deductible for federal income tax purposes).

(2) ***Percentage of portfolio subject to investment advice.*** For example, the portion of a trustee's commission taken into account in calculating AGI would equal the percentage of the trust that is directed to be retained by the trustee and is therefore not subject to investment discretion by the trustee (for example, a closely-held stock that the trustee has retained pursuant to a retention instruction in the trust instrument and instructions/releases from all trust beneficiaries) or the portion of the trust corpus that is invested in an asset that falls outside of normal investment classes (for example, real property held primarily for the purpose of providing a residence to a beneficiary in accordance with the trust instrument, and not for the primary purpose of generating an investment return).

(3) ***Amount of time devoted to investment matters.*** For example, a bank or trust company acting as trustee could consider allocating its bundled fee by analyzing how many officers devote time to the trust and the specific expertise of such officers (i.e., investment professionals vs. trust officers whose main role is to liaise with beneficiaries) and/or, if hourly time records are maintained, the number of hours that officers spend on various aspects of the trustee function.

Conclusion

It is essential that practitioners and tax preparers familiarize themselves with the changes to the deductibility of miscellaneous itemized deductions over the last year or so, first under the Act and then by reason of the 2020 Executive Budget. Not only are 2018 New York State fiduciary income tax returns potentially in need of amendment if the trust or estate is eligible for deductions that were not claimed on the originally filed return (assuming that the tax savings would exceed the cost of preparing an amended return), but the recent changes at the state and federal level may affect how expenses should be classified going forward. Specifically, the prohibition of miscellaneous itemized deductions at the federal level increases the importance of the allocation of bundled fees between fees deductible as part of the calculation of AGI and miscellaneous itemized deductions, and fiduciaries should consider employing one or more reasonable methods of allocating bundled fees to ensure that the fees are allocated in the most tax efficient manner.

Endnotes

1. New York (State). Legislature. *FY 2020 Executive Budget*.
2. *Id.*
3. *See id.*
4. N.Y. Dep't of Taxation and Finance. Technical Memorandum TSB-M-18(6)I. *New York State Decouples from Certain Personal Income Tax Internal Revenue Code (IRC) Changes for 2018 and after* (2018).
5. Treas. Reg. § 1.67-4.
6. N.Y. Tax Law § 619(e)(2) and Internal Revenue Code § 67.
7. Treas. Reg. § 1.67-4(c).
8. *Id.* § 4(c)(4).
9. *Id.*
10. *See* Austin Bramwell et al., *How to Allocate 'Bundled' Fees*, LISI Income Tax Planning Newsletter #73 (July 14, 2014), at http://www.LeimbergServices.com (providing a comprehensive discussion on allocating bundled fees).

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

William P. LaPiana

FIDUCIARIES

Conclusory Statements About Debts and Assets Not Sufficient to Allow Permission to Sell Real Property

Administrator brought an unopposed petition requesting the removal of restrictions in the letters of administration prohibiting the sale of the decedent's real property. The petition stated that the real property was encumbered by a mortgage in the amount of $870,000, that the fair market value was $325,000 and that the premises were in need of repairs that would cost approximately $133,000. The administrator, therefore, requested lifting of the restrictions to allow a short sale in the amount of $308,750. The petition was unopposed. The Surrogate, nonetheless, denied the petition on the grounds that the administrator had failed to show that the sale was in the best interests of the estate.

The petitioner appealed and the Appellate Division affirmed, in an opinion emphasizing the Surrogate's responsibility to "order" the conduct of executors and administrators using principles of "justice and reason" and to make a decision on a petition only after examining its basis. Here, the facts fully support the Surrogate's denial of the petition. While the petitioner did submit an appraisal establishing the value of the property and the cost of the needed repairs and waivers and consents signed by the administrator and another distributee, the petitioner did not submit evidence of the extent of the decedent's other debts, the existence of the mortgage, and the identities of other possible distributees. The resulting conclusory statements were not sufficient to support granting the petition. *Matter of Kahn*, 173 A.D.3d 744, 102 N.Y.S.3d 648 (2d Dep't 2019).

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INTESTACY

Evidence Insufficient to Support Summary Judgment on Question of Parent's Abandonment of Child

Decedent died testate. The will gave the majority of the decedent's estate to two employees of the decedent's business. The beneficiaries, however, were also the only witnesses to the execution of the will so that under EPTL 3-3.2 the dispositions to them were void and, therefore, pass in intestacy. The decedent was survived by the decedent's mother and siblings. One of the decedent's brothers began proceeding to disqualify the mother as a distributee under EPTL 4-1.4(a), excluding a parent from a distributive share in the estate of the parent's child if the parent abandoned or failed or refused to support the child while the child was under 21 years of age.

The Surrogate granted the decedent's mother's summary judgment dismissing the petition seeking to disqualify her on the basis of both the mother's deposition and the evidence contained in records of a Canadian social service organization which had cared for the decedent for part of the decedent's youth. On appeal by the brother, the Appellate Division reversed and remanded for further proceedings. The court found that the mother's testimony and the written records were insufficient to eliminate a triable issue of fact as to whether the mother's efforts to maintain contact during the decedent's childhood were sufficient to fulfill parental obligations. In addition to inconsistences in the mother's testimony regarding dates of visits to the decedent, the brother's testimony was that he and his siblings were unaware of the decedent's existence until the decedent was 16 years of age. Nor is there sufficient evidence in the record to determine if the mother had the financial ability to support the decedent, leaving another issue of fact for trial. *Matter of Martirano*, 172 A.D.3d 1610, 102 N.Y.S.3d 120 (3d Dep't 2019).

WILLS

Evidence Insufficient to Show Undue Influence

Decedent's 2009 will gave the decedent's interest in the farm on which she resided to her niece, who had helped to care for her from 2006 until her death. The niece offered the will for probate and the decedent's brother filed objections alleging undue influence. The Surrogate granted the niece's summary judgment motion, dismissed the objections and admitted the will to probate.

On appeal the Appellate Division affirmed. First, even assuming a confidential relationship between the niece and the decedent, there was no evidence that the niece exercised undue influence. The niece was not involved in the drafting of the will nor was the niece present when the decedent executed the will. The lawyer who drafted the document testified that the decedent was "focused" and fully understood how she wished to dispose of her assets and the attorney and the other witness to the execution of the will, a paralegal, both stated that the decedent did not appear to be under coercion. In addition, the decedent's physician submitted an affidavit stating that the decedent was of "sound mind" and that the physician had not seen any evidence of anyone's attempting to influence the decedent. Although the niece received more under the 2009 will than under a prior will, the attorney testified that the larger gift intended to recognize the niece's role in caring for the decedent and, in any event, the family relationship between the niece and the decedent counterbalanced any presumptions arising from any possible confidential relationship or from the fact that the niece was a beneficiary. *Matter of Ruhle,* 173 A.D.3d 1389, 104 N.Y.S.3d 355 (3d Dep't 2019).

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

By Ilene Sherwyn Cooper

Discovery of Matrimonial Records

In *In re Wichman*, the Surrogate's Court, Bronx County, was confronted with an unopposed motion by the decedent's sister to unseal the matrimonial records concerning an alleged prior marriage of their predeceased father, and to permit her counsel and counsel for an alleged niece and nephew of the decedent ("claimants") to copy pertinent portions of those records for purposes of determining kinship. Alternatively, the petitioner sought to have the file transferred to the Surrogate's Court for an *in camera* review.

The decedent died, intestate, survived by his sister. He was divorced, never had children, and his parents predeceased him. Based on her knowledge at the time, the decedent's sister filed a petition for letters of administration, together with an affidavit of heirship, listing herself as the decedent's sole distributee. Thereafter, she was informed by her counsel that her father had previously been married, that he had a son of that marriage, who had since deceased, and that the son's children were claiming to also be the decedent's distributees. In support of their contention, the claimants submitted, *inter alia,* copies of the son's death certificate, listing one of the claimants as his daughter and the father's first wife as his mother; the son's birth certificate, listing the decedent's father and his first wife as his parents; the son's certificate of marriage, listing the decedent's father, as his father; and a certificate of disposition by the New York County Clerk stating that a judgment of divorce between the decedent's father and his first wife had been entered.

The sister opposed the claimants' position, and moved to examine her father's divorce records in order to ascertain whether the son was listed as her father's child, or whether paternity was disputed. In support thereof, the sister argued that her father and his prior spouse, as well as the purported son of that marriage, were long deceased, that the claimants did not oppose the application, and that no one would be harmed by the relief sought.

Pursuant to the pertinent provisions of Domestic Relations Law § 235, the record in a matrimonial action shall not be available to any person other than a party, or the attorney or counsel of a party, except by order of the court. The section further provides, *inter alia*, that the confidentiality accorded by the section shall expire 100 years after the date of filing, at which time it shall be fully subject to public inspection.

Within this context, the court noted that before access to matrimonial records can be ordered, it must be demonstrated that disclosure is warranted, and that special circumstances exist for breaching the confidentiality otherwise accorded the information. Given the present record, *i.e.*, that no father was listed on the son's death certificate, that the parties to the matrimonial action and the alleged son of that marriage, were deceased, that the application was unopposed, and that 100 years had not elapsed since the entry of the judgment of divorce, the application was granted to the extent of providing for the court's *in camera* examination of the matrimonial records for the purpose of ascertaining whether there was a son of the marriage.

***In re Wichman*, N.Y.L.J., June 14, 2019, at p. 28 (Sur. Ct., Bronx Co.).**

Elective Share

Before the Appellate Division, Third Department, in *In re Bordell*, was an appeal from an Order of the Surrogate's Court, Madison County (McDermott, S.), which granted the executor's motion for summary judgment declaring the surviving spouse's waiver of her elective share to be valid and enforceable. The guardian ad litem, appointed to represent the interests of the spouse, argued that issues of fact existed as to whether the spouse was incompetent and/or suffered from impaired vision at the time she executed the waiver.

In affirming the Surrogate Court's Order, the Appellate Division opined that because a person's competency to engage in a transaction is presumed, the guardian ad litem was required to demonstrate that the spouse's mind was " 'so affected as to render [her] wholly and absolutely incompetent to comprehend and understand the nature of the [waiver].' " Within

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this context, the court noted that in support of his motion for summary judgment, the executor submitted the deposition testimony of the spouse's long time attorney, who testified that while he did not meet with her at the time she executed the subject waiver, he had met with her more than once thereafter for the purpose of her executing documents and found her to be lucid, rational, and competent. The court found that this proof, coupled with the presumption of capacity, was sufficient to shift the burden to the guardian ad litem to produce evidence creating a triable issue of fact. Nevertheless, the guardian ad litem countered only with an attorney's affidavit stating that the spouse had been diagnosed with dementia nine months after executing the waiver, and had undergone cataract surgery more than one year after the document was signed.

The court found that neither one of these circumstances created a factual issue as to whether the spouse possessed the ability to comprehend the nature of the subject waiver. Indeed, the court held that even if the wife had been diagnosed with dementia at the time the waiver was executed, it would not, in itself, be sufficient to defeat summary relief. Accordingly, the court concluded that summary judgment in the executor's favor had been properly awarded.

***In re Bordell*, 162 A.D.3d 1262, 79 N.Y.S.3d 706 (3d Dep't 2018).**

Expert Witness

In *In re De Sanchez*, the court addressed the sufficiency of an expert witness disclosure. Before the court were related trustee accounting proceedings in which objections were filed alleging, *inter alia*, that the trustee, in making investment decisions, failed to consider or protect the interests of the remainderpersons, failed to communicate with them, and made self-serving investments in trustee-sponsored funds without disclosing its conflict of interest. Prior to trial, the trustee demanded and received disclosure regarding objectants' proposed expert witnesses. Nevertheless, the trustee argued that the disclosure was deficient and failed to comply with the provisions of CPLR 3101(d)(1), and did not disclose in reasonable detail the substance of the facts and opinions on which the experts were expected to testify, the grounds for their opinions, and the relevant standards applicable to their conclusions. More specifically, the trustee argued that the objectants failed to specify which of the trust investments was imprudent, the amount of loss incurred by each investment, and the particular fiduciary standard that was violated by each investment.

Upon review of the pleadings, the court noted that the objectants were not critical of the individual investments made by the trustee, but rather the trustee's overall investment strategy. To this extent, the court concluded that the nature and extent of the disclosure sought by the trustee was not material to the issues framed. Moreover, the court held that even if the disclosure sought was material, the level of particularity sought by the trustee exceeded that required by the provisions of the CPLR. While disclosure of the subject matter and substance of the expert's testimony was required, the detailed facts and opinions underlying same was not. Indeed, toward that end, objectants provided sufficient detail of the experts' anticipated testimony, the standards applicable to that testimony, and, although not required, the reports prepared by the experts in satisfaction of their discovery obligations. Accordingly, the trustee's motion was denied.

***In re De Sanchez*, N.Y.L.J., Apr. 22, 2019, at 21 (Sur. Ct., N.Y. Co.).**

Jurisdiction

In *In re Mahoney*, the court, on a motion to dismiss the petition, addressed the issue of its jurisdiction over a discovery proceeding. The decedent was a New York domiciliary but also spent time in her home in Florida, where she resided with the respondent. The discovery proceeding sought information and valuations of the decedent's personal and real property. The respondent claimed that the court lacked jurisdiction over the decedent's Florida property. The court disagreed, finding that because the decedent was a New York domiciliary whose will was probated in Albany, it had subject matter jurisdiction over all of the decedent's personalty despite its location in Florida. It also found that since the discovery proceeding did not raise an issue of title to the Florida realty, it had subject matter jurisdiction with respect to the claims involving the real property as well.

***In re Mahoney*, N.Y.L.J., Nov. 30, 2018, at 38 (Sur. Ct., Albany Co.).**

Power of Attorney

In *In re Argondizza*, the Appellate Division, First Department, affirmed an Order of the Surrogate's Court, New York County (Mella, S.), which denied the petitioners' cross-motion for summary judgment directing a turnover of assets, and granted respondent's motion for summary judgment dismissing the petition.

The underlying proceeding, which had been commenced by the decedent's children against their stepfather, the decedent's surviving spouse, involved ownership of shares of stock in a cooperative apartment. The apartment had been owned by the decedent and the respondent, as tenants in common, until a year before her death. At that time, the respondent, utilizing a durable power of attorney, which had been signed by the decedent in the presence of one of the petitioners, transferred the decedent's one-half interest in the residence to himself.

The decedent named the respondent her power of attorney two years before she passed away in contemplation of her future medical and financial needs. Petitioners acknowledged that they were aware of the power of attorney, and its intended use. The record further reflected that the decedent and respondent had signed a letter to the managing agent of the cooperative housing corporation directing the transfer of the share certificate from her and the respondent's name to the respondent's name alone. Petitioners maintained that the transaction constituted a breach of fiduciary duty by the respondent, as attorney in fact, and required a return of the share certificate to the decedent's estate. Respondent claimed that the transfer comported with the decedent's wishes.

The Surrogate observed that when an agent acting under a power of attorney transfers an asset of the principal to himself or herself, a presumption of breach of fiduciary duty by the agent arises. However, the court recognized that his presumption may be rebutted by a showing that the principal intended for the transfer to be made, or that it was in the best interests of the principal. Toward this end, the respondent submitted the power of attorney, which provided him with the authority to make gifts to himself, together with the said letter to the managing agent, and the deposition testimony of the decedent's physician, who stated that the decedent, despite her declining health, was capable of expressing her wishes and had always indicated her desire that the respondent have the apartment. Moreover, respondent maintained that the transfer was in the best interest of the principal for Medicaid planning purposes.

In opposition to respondent's motion and in support of their cross-motion, the court found that petitioners had provided nothing but bare conclusory allegations in support of their claim that the transfer was the result of fraud, or any lack of capacity by the decedent. Indeed, in addition to her treating physician, the decedent's brother, who was also doctor, testified that he had found the decedent to be lucid and aware until her death. Based upon this record, the Surrogate denied the petitioners' motion for summary relief, and granted the respondent's motion.

The Appellate Division agreed, concluding that the Surrogate had properly found that the respondent had overcome the presumption of self-dealing, and that the petitioners had offered no evidence to contradict respondent's contention that the decedent had wanted him to have ownership of the premises.

***In re Argondizza*, 168 A.D.3d 426, 91 N.Y.S.3d 387 (1st Dep't 2019).**

Removal of Trustee

In *In re Gadsden*, the court granted the petitioner's motion for summary judgment and removed the trustee of the subject inter vivos trust. In support of her request for removal, the petitioner alleged, *inter alia*, that the respondent had failed to comply with court orders, failed to distribute trust assets in a timely manner, neglected to pay real estate taxes since 2012 on the trust real estate, and converted trust funds to his own personal use. The application was opposed by the respondent who indicated, *inter alia*, that he was ready to transfer title to each of the trust beneficiaries in compliance with a prior court order. Further, respondent alleged that the rental income he was collecting on the trust property was being utilized by him to pay the living expenses of four out of the six trust beneficiaries. Noting that the removal of a fiduciary is to be exercised sparingly and only upon a clear showing of serious misconduct, the court found, upon the record presented, that the petitioner had established a prima facie case for removal, and that respondent had failed to raise the existence of any material issues of fact to preclude summary relief. In pertinent part, the court found that the respondent had failed to distribute the assets of the trust in accordance with the express provisions of the trust instrument, and, by his own admission, had been distributing trust assets to some but not all of the beneficiaries, including the petitioner. Further, the court observed that the respondent had failed to comply with court orders. As a result of the foregoing, the court held that the respondent's conduct evidenced a want of understanding of his fiduciary duties, as well as a willful refusal to obey or neglect court orders, without good cause, and endangered the trust estate.

***In re Gadsden*, N.Y.L.J., Mar. 25, 2019, at 29 (Sur. Ct., Kings Co.).**

Pleading

In *In re Silverstein*, the court was confronted with a motion to dismiss a discovery proceeding requesting recovery of the shares and proprietary lease of a cooperative apartment. The decedent had owned the apartment individually until October, 2014, when he purportedly transferred title to the premises to himself, and the respondent, his surviving spouse, jointly. The co-executors of the estate alleged that the transfer was the result of fraud, undue influence and lack of capacity. The respondent moved to dismiss the proceeding pursuant to CPLR 3211(a)(7), alleging that petitioners failed to plead fraud and undue influence with sufficient particularity (SCPA 302; CPLR 3016 (b)), and to make an adequate showing of lack of capacity.

In support of their claim of fraud, the petitioners alleged that the respondent had told the decedent that she would not be permitted to remain in the apartment following his death, unless the shares and lease were transferred into both their names. Nevertheless, the court observed that the petitioners offered no facts that demonstrated that the statement was false when made, nor any basis for their contention that respondent knew, or could have known, the statement was false. At best, the petitioners simply parroted the elements of fraud, without providing particulars of the alleged wrong.

The court opined that the mere recitation of the elements of fraud in a pleading is insufficient to state a cause of action. Rather, to plead fraud with the requisite particularity, the petitioner must detail the circumstances and provide factual support for the alleged wrong. Thus, a pleading claiming fraud will only survive dismissal when the facts alleged permit a reasonable inference of the purported misconduct. Considered within these parameters, the court held that the petitioners failed to plead facts sufficient to sustain a cause of action for fraud, and the claim was dismissed.

On the other hand, the court concluded that the petitioners set forth their claims of undue influence and lack of capacity in sufficient detail to withstand dismissal. Towards that end, petitioners alleged that the decedent had diminished mental and physical capacity, that the respondent had a controlling influence over him, and that the severity of his illnesses rendered him incapable of comprehending the nature of the transfer at issue. Accordingly, respondent's motion was granted in part, and denied in part.

***In re Silverstein,* N.Y.L.J., Apr. 24, 2019, at 23 (Sur. Ct., N.Y. Co.).**

Standing

In *In re Tesoriero*, the court dismissed a reverse discovery proceeding on the grounds of standing. The petitioner sought recovery of, and a restraint on the sale of certain real property, claiming that the decedent's son, as her attorney in fact, transferred the realty into an irrevocable trust without the power under a statutory gift rider to do so. The petitioner maintained that the property was an asset of the decedent's estate and subject to the terms of her will.

Respondent moved to dismiss the petition, arguing that petitioner lacked standing inasmuch as she had no personal interest in the property as required under SCPA 2105. The court held that in order to institute a proceeding pursuant to SCPA 2105, the petitioner must have a personal right to the premises or the right to immediate possession of the asset in question. Although petitioner was a beneficiary under the decedent's will, no proceeding for its probate had been commenced. Moreover, while she held a vested remainder in the subject irrevocable trust, a current life estate existed under the instrument.

Nevertheless, the court noted that petitioner could seek limited letters in order to pursue recovery of the realty. Accordingly, the proceeding was dismissed without prejudice to the right to renew upon the issuance of limited letters.

***In re Tesoriero,* N.Y.L.J., Mar. 5, 2019, at 27 (Sur. Ct., Richmond Co.).**

Summary Judgment

In *In re Robinson*, summary judgment was granted in the proponent's favor on the issues of due execution, testamentary capacity and fraud, but was denied on the issue of undue influence. The objectant argued that he had a close and loving relationship with the decedent, his father, but claimed that after his father's wife died, his stepdaughter, who lived with him, took control of his affairs and prevented him from freely communicating with his son. Nevertheless, the objectant visited his father twice monthly, despite hostility in the home. Further, objectant maintained that during his visits, the decedent looked unhappy and was unwilling to speak when his stepdaughter was present in the room. Ultimately, objectant was told to leave the premises, and not to return.

Proponent argued that the will was executed under the supervision of an attorney, and that as evidenced by the transcripts of the attesting witnesses, the will was duly executed in compliance with the provisions of EPTL 3-2.1. Proponent also averred that the self-proving affidavit affixed to the will established prima facie that the decedent had testamentary capacity at the time the will was executed, and that the will specifically referred to the only piece of realty that the decedent owned at death, thereby establishing the decedent's testamentary capacity at the time the will was signed. According to the witnesses and the supervising attorney, the decedent read the instrument himself and indicated that he approved of it and had no changes. The guardian ad litem, appointed to represent the interests of a distributee whose whereabouts were unknown, aligned with the position of the objectant that the will should be denied probate.

Based on the foregoing, and the evidence presented, the court concluded that the proponent had provided sufficient evidence to establish that the will was duly executed and that the testator possessed testamentary capacity when the instrument was signed. The objectant offered nothing to the contrary. Further, the court found that the objectant failed to present any evidence to show that the proponent made any false statements that may have altered the decedent's testamentary plan. However, the court found questions of fact existed as to whether the proponent may have exercised undue influence over the decedent. Accordingly, the court found issues of fact warranting a trial with respect to undue influence.

***In re Robinson,* N.Y.L.J., December 12, 2018, at 25 (Sur. Ct., Bronx Co.)**

Summary Judgment

In *In re Penick*, the court denied petitioner's motion for summary judgment, finding that a triable issue of fact existed as to the objections based upon due execution, undue influence and fraud. At the oral argument of the motion, the objection based on testamentary capacity was withdrawn. The propounded instrument was a marked departure from the decedent's prior will to the extent that it left the decedent's entire estate to the proponent, her surviving spouse, from whom she was purportedly estranged. By comparison, the decedent's earlier will disinherited her spouse and left her estate to her siblings, the objectants. The record revealed that the propounded will was executed five days before the decedent's death, while she was a resident at a care facility where she was being treated for ALS. The one-page instrument stated that it had been dictated by the decedent and read aloud twice in front of the attesting witnesses, who allegedly entered the decedent's room through a side entrance. There was no indication as to who transcribed the instrument, which was signed by the decedent with an "x" mark. Three of the five attesting witnesses to the will, and another person in the room, but who did not serve as a witness, each submitted affidavits supporting its admission to probate.

On the other hand, the evidence opposing the proponent's motion, notably from the director of the care facility and the decedent's medical records, indicated that the decedent could not speak at the time she signed her will, and could only verbalize through gestures. Moreover, the director of the facility placed in doubt the circumstances surrounding the execution of the will, as he alleged that the side entrance through which the witnesses purportedly entered was always locked, and there was no report of anyone entering the building through that door on the day in question. Accordingly, given the disputed record, the court held summary relief in proponent's favor was inappropriate.

***In re Penick,* N.Y.L.J., Nov. 30, 2018, at 41 (Sur. Ct., N.Y. Co.).**

Summary Judgment

In *In re Ryan*, the court denied summary judgment in proponent's favor on the issue of due execution. The propounded instrument did not appear to have been drafted by an attorney, but was witnessed by two individuals, whose names followed what appeared to be an attestation clause. Both witnesses testified that they were friends with the proponent, and through that friendship became friendly with the decedent. In addition, they each testified that they were called over to the decedent's home by the decedent, who showed them each a document which she identified as her will. A notary was also present when the instrument was executed. According to her testimony, she went to the decedent's home, saw her sign the document that had been identified as her will, notarized her signature, and witnessed the other two witnesses sign the instrument as well. The proponent denied being present when the instrument was signed, and claimed that she did not know of its existence until after the decedent's death, when she found it inside a small briefcase in a closet. In opposition to the foregoing, the objectant claimed that the decedent could not have signed the instrument inasmuch as she had suffered a stroke two years before the propounded instrument was signed, which left her paralyzed on the right side of her body and very weak.

The court opined that since the subject will did not appear to have been drafted by an attorney, or its execution attorney-supervised, there was no presumption of regularity that the will was properly executed. However, the court noted that the instrument contained an attestation clause, which did create that presumption. Nevertheless, the court observed that in all respects it was its duty to consider all the circumstances surrounding a propounded will to insure itself of its validity. Towards that end, the court expressed concern that neither of the witnesses to the will testified during the course of their examinations that they saw the decedent sign the instrument before they each signed it, or that the decedent acknowledged to them that she signed the document. Further, absent from the record was any indication of who prepared the instrument, especially given the undisputed proof that the decedent was physically frail at the time it was executed. Indeed, the decedent had retained an attorney to prepare a prior will for her. Additionally suspect was the fact that no one, with the exception of the notary and two witnesses, was aware the document existed until after the decedent's death, and that the proponent did not offer it for probate until many years thereafter, despite her being the sole beneficiary thereunder. Accordingly, in view of the circumstances, the court found summary judgment on the issue of due execution to be unwarranted.

***In re Ryan,* N.Y.L.J., Jan. 4, 2019, at 27 (Sur. Ct., Kings Co.).**

Will Defined

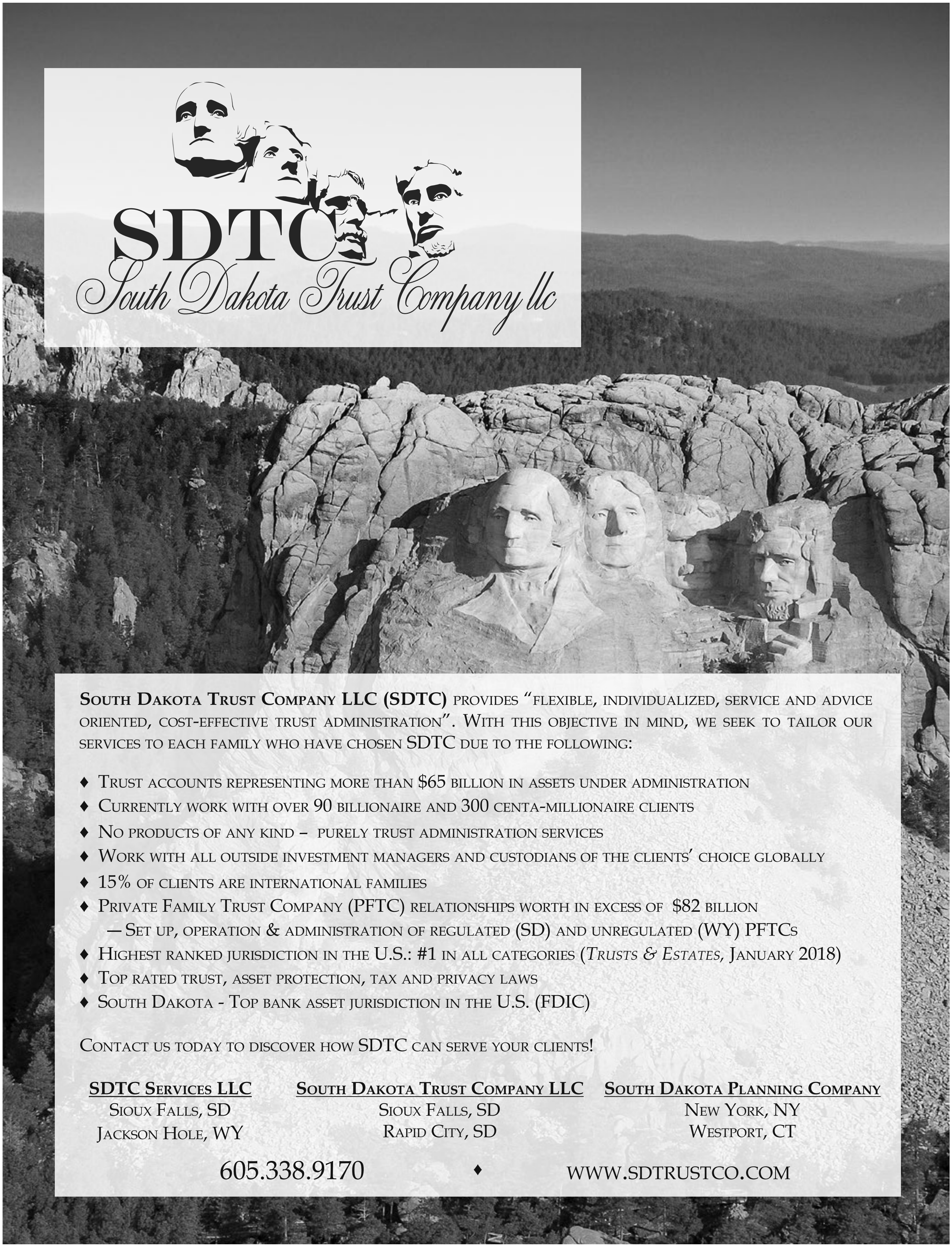
Before the Surrogate's Court, New York County, in *In re Katz*, was a motion to compel the examination of witnesses pursuant to SCPA 1404. The Public Administrator on behalf of unknown distributees cross-moved to dismiss the probate petition and to vacate the preliminary letters testamentary issued to the proponent.

The propounded instrument was prepared by a legal document preparation service and was executed at the proponent's office. The sole dispositive provision thereof bequeathed decedent's entire estate to proponent "to distribute to people and charities on a list to be provided to him by testator." It was undisputed that the list never existed.

In support of her motion, the Public Administrator contended that the propounded instrument was not a testamentary instrument because it lacked a dispositive provision. The court noted, however, that the pertinent provisions of EPTL 1-2.19 define a will as a "written instrument, made as prescribed by [EPTL] 3-2.1 or 3-2.2 to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of...or makes any other provision for the administration of his estate. . . " In view thereof, the court, citing precedent, rejected the Public Administrator's position and held that it has refused to deny probate to an instrument based on the lack of a dispositive provision. Indeed, the court observed that the propounded instrument still contained provisions for the revocation of wills, the payment of debts and expenses with estate assets, and the designation of the person to serve as executor, each of which could serve as the basis for a testamentary document. Moreover, despite the Public Administrator's arguments to the contrary, the court found that her motion was nothing more than a request for construction of the decedent's will, which was procedurally improper prior to the admission of the instrument to probate.

Accordingly, the cross-motion was denied, and examinations pursuant to SCPA 1404 were directed.

***In re Katz*, 2019 N.Y. Misc. LEXIS 1797.**



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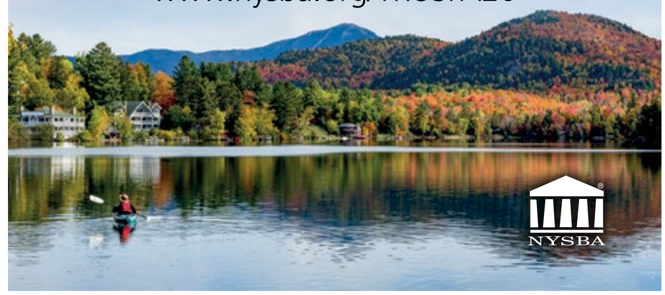

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