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Message from the Chair

Day in and day out, I am reminded of the wonderful ways in which our Section's members contribute their time and energy toward advancing our Section's objectives, and making trusts and estates practice in New York better for attorneys, our clients, Surrogate's Courts, law students, and members of the public. It is both humbling and awe-inspiring to observe how Section members make policy-based contributions to our practice area, organize Section events, and assist one another (and, thankfully, me) as often as they do. I write to provide you with a small sample of the ways that our members have contributed to the Section in early-2019.

In January, the Supreme Court of the United States granted certiorari in *North Carolina Department of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust*. *Kaestner* addressed the extent to which the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits North Carolina to tax undistributed income earned by a trust that is administered outside of North Carolina, based solely upon the North Carolina residency of discretionary trust beneficiaries to whom no trust distributions were made during the relevant tax years. Shortly after the Supreme Court granted certiorari, the Section's officers and I created a committee consisting of Angelo Grasso, Lois Bladykas, Jeffrey Sheetz, and yours truly to draft an amicus curiae brief in *Kaestner*. In March, we drafted an amicus brief, obtained Bar Association approval for it, and filed the brief with the Supreme Court. On June 21, 2019, the Supreme Court unanimously ruled in favor of the party that our Association supported (finding that North Carolina's tax was unconstitutional), and it appears that our brief made a meaningful contribution in the matter. I would like to thank Angelo, Lois, and Jeff for their excellent work in drafting the brief; former Section Chair Gary Freidman for bringing *Kaestner* to the Section's attention; former Bar President Michael Miller and General Counsel Kathy Baxter for their assistance in the drafting process; and Nicholas Moneta for cite checking the brief before we filed it.

Robert M. Harper

In addition, our Section has advocated for policy changes at both the executive and legislative levels of the New York State government. In February and March, Kevin Matz, Jessica Goldsmith, and the Taxation Committee proposed changes to Governor Cuomo's budget. Thereafter, in March and April, Georgiana Slade and the Legislation and Governmental Relations Committee enjoyed two legislative successes, as the Assembly and Senate passed the following Section proposals: (a) technical amendments to the Estates, Powers and Trusts Law (EPTL) and Surrogate's Court Procedure Act (SCPA) to comport with the provisions of the Marriage Equality Act (as drafted by Darcy Katris); and (b) amendments to SCPA §§ 1001 and 1418 concerning the order of priority for granting Letters of Administration and Letters of Administration c.t.a. (as drafted by Michael Schwartz and Nathan Berti, and lobbied for by Chair-Elect Jill Beier). We hope that the Governor will sign those legislative proposals into law this year.

The officers and I have created a Digital Wills Committee – which Darcy Katris will chair – to study whether, and to what extent, the EPTL should be amended to permit digital wills. Nevada, Indiana, Arizona, and Florida have enacted legislation authorizing the creation of valid digital wills, and courts in Connecticut, Ohio, and Tennessee have addressed whether electronic wills should be admitted to probate (reaching different conclusions). Darcy, her committee, and I welcome any feedback that you have on the issue of whether New York should enact digital wills legislation.

Rob Harper, Lois Bladykas, and Angelo Grasso

Of course, our Section's members have not limited their efforts to policy-based matters. Michael Schwartz, Tara Pleat, Deborah Kearns, and Eric Penzer organized cocktail receptions in New York City, Albany, and Long Island, which were designed to welcome new members into our Section (and which Surrogate Nora Anderson, Surrogate Rita Mella, Surrogate Stacy Pettit, and Surrogate Brandon Sall graciously took time to attend). Equally important, Section members (including former Section Chair Sharon Wick and Treasurer Laurence Keiser) donated their time to ensure that the Section continues its past practice of supporting summer fellowships for law students, which Surrogate Pettit, Surrogate Sall, and Surrogate Acea Mosey have graciously agreed to host in Albany County, Westchester County, and Erie County, respectively.

In May, our Section hosted its Spring Meeting at the beautiful Ritz-Carlton Beach Resort in Naples, Florida (as selected by Cris Cioffi). I would like to thank program chairs Angelo Grasso and Brian Corrigan for organizing a wonderful program concerning trusts, and the following speakers for giving excellent presentations (in the order in which they presented): former Section Chair Natalia Murphy, Raymond Joseph, Elisa Shevlin Rizzo, Hon. Acea Mosey, Amy Beller, Michael Schwartz, Hon. John Czygier, Jr., Hon. Peter Kelly, Hon. Stacy Pettit, Hon. Margaret Reilly, Toni Ann Kruse, Angelo Grasso, Hon. Vincent Versaci, Gary Freidman, Frank Santoro, Hon. Theresa Whelan, and Eric Penzer. Additionally, I would like to recognize Darcy Katris, former Section Chair Ilene Cooper, and Edward Baker for raising more than $70,000 in sponsorship funds for the Spring Meeting. Working together with our wonderful Bar staff members, Lisa Bataille and Cathy Teeter, the aforementioned individuals contributed to making our 2019 Spring Meeting a tremendous success, and I appreciate their involvement a great deal.

To those of you who already are actively involved in our Section, thank you for your participation. To those of you who are interested in becoming involved in our Section, please do not hesitate to contact me. The officers and I are eager to welcome new members (and those who presently are less involved) into the fold of our Section.

Robert M. Harper

Message from the Editor

You may have noticed that there has been a significant delay in the publication of this issue. NYSBA underwent some staffing changes as we provided content for the Spring issue. Then, we received updates to certain articles to account for the time that had elapsed. So, this year's Spring issue has become a Spring/Summer edition.

One such update has been offered by Albert Feuer, whose article, *How Savings and Retirement Distributions May Prudently be Used to Make Charitable Gifts*, appears at page 7. Mr. Feuer writes:

> On May 23, 2019, the US House of Representatives approved H.R. 1994, the Setting Every Community Up for Retirement Enhancement Act of 2019 by a vote of 417 to 3. The bipartisan approval of the bill strongly suggests that the act will become law with few changes in 2019. The act would postpone the required beginning date for distributions from a traditional individual retirement account or individual retirement annuity ("IRA") from the April 1 following the taxpayer's attainment of age 70 ½ to the April 1 following the taxpayer's attainment of age 72. The age 70 ½ requirement for exclusion from a taxpayer's gross income for qualified charitable distributions ("QCDs") that meet the other requirements of IRC § 408(d)(8), as discussed in the article, would not be changed. However, there will be a new limit on the QCD exclusion from a taxpayer's gross income for any year after 2019. This limit will be based on the taxpayer's deductible IRA contributions for years starting with the year the taxpayer attains age 70 ½.

Jaclene D'Agostino

It should similarly be noted that Kevin Matz' article, *The Integrating of Estate Tax and Income Tax Planning Is Now Complete: A View from the Audience at Heckerling (2019)*, appearing on page 22, refers to the possibility that Governor Cuomo's Executive Budget, retroactively extending the three-year "clawback" provision for certain taxable gifts to January 1, 2026, be signed into law. The Governor's Budget Bill was signed since the date of that writing, to include the retroactive extension by way of amendment to Section 954(a)(3) of the New York Tax Law.

Our next deadline for submissions is September 9, 2019. Thank you for all of your worthwhile contributions.

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Hank Greenberg

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Trusts and Estates Law Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads On Diversity

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

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How Savings and Retirement Benefit Distributions May Prudently Be Used to Make Charitable Gifts

By Albert Feuer

Individuals often use their savings or retirement benefits to make charitable gifts. However, such benefit distributions, other than those from a Roth individual retirement arrangement, are generally included in the individual's gross income when received.[1] Furthermore, individuals may not be able to deduct for federal income tax purposes the charitable contributions they make during the period 2018 to 2025 because the 2017 Tax Cuts and Jobs Act substantially limited the deductibility of state and local taxes,[2] eliminated miscellaneous itemized deductions,[3] and dramatically increased the applicable standard deductions.[4] Thus, these individuals would incur an income tax liability without any offsetting tax benefit for the charitable contribution. This article discusses how savings and retirement benefit distributions may be prudently used to make charitable contributions.[5]

I. Tax-Favored Savings and Retirement Benefit Plans and Arrangements

The Internal Revenue Code of 1986, as amended (the "Code"), treats certain savings or retirement plans and their benefits favorably. For purposes of this article, we will confine our attention to plans and arrangements, such as 401(k) plans, pension plans, or individual retirement accounts, which do not restrict the purposes for which such distributions may be used.[6] We will not discuss arrangements, such as health savings accounts,[7] which restrict how the distributions may be used.[8] All section references are to the Code, unless otherwise specified.

A public or private employer may establish and maintain a pension, profit-sharing, or stock bonus plan that is funded with a trust, custodial accounts, or group annuity contracts. A tax-qualified trust plan is such a plan that meets the requirements of §§ 401(a) and (f). A 401(k) plan is a tax qualified trust plan that meets the requirements of § 401(k). The Federal Thrift Savings Plan, in which many federal civilian employees are participants, has terms similar to those of a 401(k) plan,[9] and is treated for federal income tax purposes as a tax-qualified trust plan.[10] An employer may also fund a pension or profit-sharing plan with individual annuity contracts issued by insurance companies. A tax-qualified annuity plan is such a plan that meets the requirements of § 404(a)(2). A pension, profit-sharing, or stock bonus plan that is either a tax-qualified trust plan or a tax-qualified annuity plan shall be referred to as a tax-qualified plan. Such a plan is not subject to the tax on its earnings,[11] and plan participants and their beneficiaries are not taxed on their benefits until and to the extent that their respective benefits are distributed.

A public school or a tax-exempt organization that is tax-exempt under § 501(c)(3) may establish and maintain deferred compensation benefits for their employees that is funded with individual annuity contracts issued by insurance companies or custodial accounts using regulated investment company stock. A 403(b) plan is such a plan that meets the requirements of § 403(b), including a limit on annual deferrals. These plans, like 401(k) plans, permit an employee to make tax-deductible (pretax) contributions of a portion of his or her compensation to a plan, and may, but need not, permit additional employer contributions. Such a plan is not subject to the tax on its earnings, and plan participants and their beneficiaries are not taxed on their benefits until, and to the extent that, their respective benefits are distributed.[12]

A government or a tax-exempt organization that is tax-exempt under § 501(c)(3) may also establish and maintain another kind of deferred compensation plan for its employees. A 457(b) plan is such a plan that includes a limit on annual deferrals. Non-governmental § 457(b) plans may not be funded,[13] but governmental § 457(b) plans must be funded.[14] Like 403(b) plans, employer contributions are permitted. As with tax-qualified plans, participants and beneficiaries in such plans only become subject to income tax on the benefits under such a plan when they receive the benefits.[15]

An individual may establish an individual retirement arrangement. An individual retirement account is such an arrangement funded with a trust, trusts or custodial accounts, that meet the requirements of § 408(a) or § 408(h). An individual retirement annuity is an arrangement funded with annuity or endowment contracts issued by insurance companies, that meets the requirements of § 408(b). An individual retirement account or an individual retirement annuity shall be referred to as an IRA, and the individual funding such an IRA shall be referred as an IRA participant, and the person or persons entitled to the survivor benefits shall be referred to as an IRA beneficiary, and the IRA shall

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become an inherited IRA.[16] An IRA may be part of an employer benefit plan, such as a SEP Plan,[17] a SIMPLE plan,[18] or a tax-qualified plan.[19] IRAs are not subject to tax on their earnings.[20] IRAs may be designated as Roth IRAs, and distributions from such IRAs are generally not subject to income tax.[21] IRAs not so designated are called traditional IRAs, and their benefits are taxed when received by a participant or beneficiary.[22]

Tax-qualified plans, 403(b) plans, 457(b) plans, and IRAs provide both lifetime and survivor benefits. Participants are entitled to the lifetime benefits, and beneficiaries of those participants are entitled to the survivor benefits. Each such plan or arrangement must file a Form 1099-R with the Internal Revenue Service each plan year that it makes any plan distributions, and distribute that form to each person receiving a benefit distribution for such year describing the person's distributions.[23] United States citizens, United States resident aliens, and their estates may choose on IRS Form W-4P whether to have any federal tax withheld from their benefit distributions that are not eligible for rollover.[24] Eligible rollover distributions are subject to 20 percent mandatory withholding.[25] Eligible rollover distributions do not include survivor benefits other than spousal survivor benefits, which are the only such benefits that may be rolled over by the recipient.[26] Others are subject to 30 percent federal tax withholding, unless they file with the plan administrator an IRS Form W-8BEN showing a tax treaty provision that reduces or eliminates the withholding.[27]

II. Tax-Favored Savings and Retirement Benefit Distributions

The Code has minimum distribution rules (the "MRD Rules"). In particular, most tax-favored savings and retirement plans must make minimum annual distributions to each participant who has reached age 70½.[28] If these rules are violated, the Code imposes on the participant a 50 percent excise tax which is imposed on the difference between the required minimum amount (MRD) and the actual amount distributed in such year.[29] This tax is in addition to the income tax payable on the benefit distributions the participant receives in a tax year. However, plan participants who do not own a large part of the plan sponsor need not begin their distributions until April first of the calendar year following the later of the termination of employment or reaching age 70½.[30] Traditional IRA participants must similarly begin taking distributions on or before the April first of the calendar year following the year the participant reaches age 70½.[31] The Code does not require Roth IRA participants to withdraw funds from their Roth IRAs, but does require their beneficiaries to begin taking distributions on or before the April first of the calendar year following the year when they reach age 70½.[32]

There may be a tax basis associated with a participant or beneficiary's interest in a tax-qualified plan, § 403(b) plan, § 457(b) plan, or an IRA. Such basis may arise from the participant's after-tax contributions or deemed after-tax contributions to the plan or arrangement.[33] The basis allocation rules depend on whether benefits are distributed to a participant or a participant's beneficiary or whether the benefits are transferred to another IRA or a tax-favored plan.

The taxable portion of each benefit distribution from a tax-qualified plan or a § 403(b) plan to a participant, or to the participant's beneficiary, is computed by allocating a pro rata portion of the basis to each distribution.[34] For IRA distributions the allocation is made by treating all of the recipient's traditional IRAs as a single traditional IRA, all the recipient's traditional IRA distributions during such year as a single distribution, and the contract is valued as of the end of the year, and that value includes all of the distributions during such year.[35] In contrast, plans and distributions are not consolidated for these basis computations even if they share a common sponsor.

If a benefit transfer is made from one plan or IRA to another plan or IRA, the first dollars are treated as coming from the pre-tax dollars.[36] Neither the amount of such a transfer nor the basis is added back to compute the gain (basis) on those benefit distributions from an IRA during the same year that are not transferred directly or rolled over to another plan or IRA. Otherwise, the IRA consolidation rules may not allocate the correct basis to those distributions to participants or beneficiaries.

Example: A participant, Jill, directs her traditional IRA, when it has a value of $100,000 and a basis of $20,000, to transfer $75,000 directly to her tax-qualified plan account. The IRA would continue to have a basis of $20,000, but the value would decrease to $25,000. If the $25,000 were then distributed to Jill, Jill would be subject to ordinary tax on the difference between $25,000 and the $20,000 basis, i.e., $5,000.

If the participant initially directs her traditional IRA, when it has a value of $100,000 and a basis of $20,000, to transfer $85,000 directly to her tax-qualified plan account, the transfer amount would exceed the pre-tax amount of $80,000 by $5,000. Thus, the basis would be decreased to $15,000, i.e., the remaining value of the IRA. There would only be gain on a post-transfer distribution to the participant if at such time the value of the IRA exceeded its post-transfer value of $15,000.

III. Charitable Contribution Options for a Participant or a Beneficiary

Many tax-qualified plans, § 403(b) plans, and § 457(b) plans provide that participants or beneficiaries may not assign their lifetime benefits to other persons, such as charities. However, neither tax-qualification rules nor the Employee Retirement Income Security Act of 1974, as amended and the regulations thereunder (ERISA), permit such assignments. The so-called alienation prohibition in both statutes[37] does not apply to voluntary revocable assignments.[38] Moreover, there is no assignment prohibition applicable to IRAs. Such assignments, however, do not affect the assignment-of-income principles, which would require that such distribution be included in the gross income of the participant. Thus, we will disregard assignments other than those pursuant to the qualified charitable distribution rules which, as discussed below, override those principles for certain IRA distributions.

For simplicity, the term participant will include any of the participant's individual beneficiaries. We will set forth considerations that determine the prudence of such individuals making charitable contributions with the individual's savings or retirement benefits. An earlier and more comprehensive article by the author about charitable giving describes how a participant who wishes to have a charity receive all or a portion of his or her survivor benefits may do so in a tax-efficient fashion.[39]

A. Direct Payments of Lifetime Benefits to a Charity

Code Section 408(d)(8) sets forth the conditions in which a charitable distribution of a participant's savings or retirement benefits is not includible in the participant's gross income.[40] A qualified charitable distribution (QCD) is a distribution which satisfies those requirements. It may not be deducted, and may only be made when such participant is required to withdraw savings or retirement benefits.[41] Such treatment is particularly helpful to lower-income and middle-income taxpayers required by the Code to take MRDs who wish to make charitable contributions without suffering adverse income tax consequences. However, the provision is not limited to such taxpayers nor to withdrawals made to satisfy the MRD Rules.

QCDs may only be made from IRAs.[42] IRAs that are part of a tax-qualified plan may be used to make QCDs.[43] Otherwise, QCDs may not come from a tax-qualified plan, § 403(b) plan, or § 457(b) plan.[44] A QCD may only come from an IRA associated with a SEP Plan or a SIMPLE Plan, if under the plan no employer contribution is made for the plan year ending with or within the IRA owner's taxable year in which the individual makes the charitable contribution.[45]

The distributions must be made "on or after the date that the individual for whose benefit the plan is maintained has attained age 70½."[46] Thus, it is not sufficient for the individual to reach 70½ during the year the distribution to the charity is made. Individual beneficiaries of an inherited IRA may make QCDs, which is why we treat them as IRA participants for these purposes.

The distributions must be made to an entity described in § 170(b)(1)(A) other than a supporting organization or a donor-advised fund.[47] The described entities include churches, tax-exempt educational or health organization, and charities with broad public support, but not private non-operating foundations.[48]

The exclusion is limited to $100,000 each taxable year.[49] The limit is not applied to each of the taxpayer's IRAs, but to all of the taxpayer's IRAs considered collectively. Each spouse is entitled to a separate $100,000 regardless of whether the spouses filed jointly or not. In contrast to the deduction for charitable deductions which may be carried over for five years if in excess of the taxpayer's annual limit, there is no provision for a carryover to future years of the exclusion for any excess distribution.[50] Nor is there any provision to carryover any unused portion of the $100,000 in one year to future years.

A deduction for the entire distribution must be otherwise allowable under § 170 (determined without regard to the contribution percentage limits of § 170(b)).[51] Thus, the distribution may not be used to make a transfer in part to a charitable gift annuity[52] or a charitable remainder trust,[53] because the entire distribution would not be deductible. The participant must obtain the same kind of substantiation as the participant would obtain for direct contribution of the same funds.[54] Furthermore, the distribution may not be used to obtain any *quid pro quo*, such as admission privileges to a museum in exchange for a contribution to a tax-exempt museum, or small gift for a contribution to a public broadcasting station. It is, therefore, advisable to separate QCDs to a charity that will result in no such exchange from any *quid pro quo* donations to the same charity. The fact that the participant benefits by using the distribution to fund a charitable pledge is not a benefit that prevents the participant from using the QCD provisions.[55]

The IRS has approved two ways for a participant to arrange for a distribution to a qualifying charity. Both use a "check from an IRA made payable to a [qualifying] charity."[56] The IRS permits participants, as well as plans, to deliver the check.[57] If the participant wishes to be responsible for transferring the check, the participant will deliver the check, which may also make it easier for the participant to obtain the acknowledgment of receipt by the charity. The financial institution may require these distribution requests not only be signed but be notarized or have a bank certification. Moreover, some institutions permit customers, who ask, to write checks on the IRA and send the checks to the charities. In any case, the participant may wish to ask the IRA trustee or custodian for copies of the presented check to show the charity received the funds. Furthermore, some institutions will, at an account holder's direction, transfer funds from the holder's IRA account directly to a charity's account, even at another institution. Such transfers eliminate any question about who received the funds, and that the funds were transferred in a taxable year, and appear to satisfy the QCD requirements, but do not provide a traditional cashed check as evidence of the transfer.

No income tax withholdings are required to be made from a QCD, which by definition is not includible in the participant's gross income and thus generates no income tax, even if a distribution directly to the participant would be subject to such withholding.[58] However, some financial institution QCD forms ask whether participants wish to have taxes withheld from such distributions.

B. IRS Reporting and Disclosure Rules for Qualified Charitable Distributions

The IRS has directed plans to report QCDs on IRS Form 1099-R in the same manner as if the distribution has been paid directly to the participant, i.e., "report the full amount of the charitable distribution on the line for IRA distributions." This is followed by:

> How do I report a qualified charitable distribution on my income tax return?
>
> To report a qualified charitable distribution on your Form 1040 tax return, you generally report the full amount of the charitable distribution on the line for IRA distributions [item 4a]. On the line for the taxable amount [item 4b], enter zero if the full amount was a qualified charitable distribution. Enter "QCD" next to this line. See the Form 1040 instructions for additional information.[59]

The 2018 Form 1040 instructions do not refer to, suggest or require that any backup for the QCD transfer or transfers to the charity be attached to the individual tax return.[60]

A QCD has the same effect on the basis of the participant's IRA as if the participant had transferred the same distribution to a tax-qualified plan rather than a charity. In short, the pre-tax dollars are treated as distributed first.[61] Thus, if the participant's QCD for 2018 exceeds the pre-tax dollar portion of the participant's IRA, the participant will be treated as withdrawing a portion of his or her total IRA basis. Although the Form 1040 instructions do not discuss the use of the IRS Form 8606 in these circumstances, it would seem appropriate to show the basis reduction on the IRS Form 8606 even though there is no gain.[62] In contrast, if the participant withdrew the same distribution amount from an IRA, as discussed above, a pro rata portion of the basis would be allocated to the distribution, whether he uses the proceeds for his personal needs or to make a charitable contribution. Thus, the basis would be reduced by a greater amount than with a QCD, and the taxable gain on subsequent distributions would be greater than would have occurred with a QCD.

Example: On November 23, 2018, Jeff, age 75, directed the trustee of his IRA to make a distribution of $24,000 directly to a qualified § 501(c)(3) organization (a public charity that is not a donor-advised fund or a supporting organization). This was the only distribution he requested for 2018, when his MRD was $3,000 and he had no other IRAs during 2018. Suppose that at the start of the year Jeff's IRA had a basis of $10,000, its value immediately before the distribution was $30,000, and its year-end value was $8,000, which is $2,000 more than its value immediately after the QCD. Because Jeff was at least age 70½ throughout 2018, and the distribution was made directly by the trustee to a qualified organization, and the $24,000 distribution exceeds the $20,000 of pre-tax dollars then in the IRA, the entire $20,000 is a QCD. The remaining $4,000 reduces his IRA basis from $10,000 to $6,000.

By contrast, if the $24,000 distribution were made directly to Jeff, the basis allocation would not be made until the end of the year. At such time we would add the $24,000 distribution to the year-end balance of $8,000 and get $32,000 before doing the pro rata basis adjustment for 2018. In particular, 24,000/32,000 or 75% of the $10,000 basis, i.e., $7,500, would be allocated to the distribution and the year-end basis would be reduced to $2,500, rather than $6,000. In both cases, the $3,000 MRD requirement is satisfied, but the direct payment to Jeff rather than a QCD would result in a smaller post-distribution basis and thus less favorable tax treatment on future distributions.

If Jeff chose the QCD option for 2018, the IRA trustee would have sent him a 2018 Form 1099-R showing a normal distribution of $24,000. Jeff would include the total distribution ($24,000) on line 4a of Form 1040. Jeff enters -0- on line 4b. He also enters QCD next to line 4b to indicate a qualified charitable distribution. Because Jeff made a $4,000 distribution of nondeductible contributions from his IRA, he would file Form 8606 with his return showing that his IRA basis decreased by $4,000 to $6,000.

If Jeff itemizes deductions and files Schedule A with his Form 1040, the $4,000 portion of the distribution attributable to the nondeductible contributions may be deducted as a charitable contribution if Jeff can itemize his deductions in such year. He could not deduct as a charitable contribution the $20,000 portion of the distribution that was not included in his income.

C. Non-Tax Detriments to Receiving Benefits Before Making Charitable Contributions

A participant or beneficiary who receives savings/retirement benefits that he or she then contributes to a charity may suffer a number of non-tax detriments to the extent the benefits are included in the individual's gross income, even if the individual may deduct the contribution in full.[63] To the extent the benefits are like other after-tax funds, which are excluded from the individual's gross income, such as distributions from a Roth IRA more than five years after the participant set up such accounts,[64] the below detriments may be disregarded.

First, for upper-income taxpayers, the inclusion of the savings/retirement benefits in gross income may cause the taxpayer's investment income to be subject to the 3.8 percent Medicare tax. Such tax applies to the lesser of net investment income or the excess of modified adjusted gross income more than $200,000 for single taxpayers and $250,000 for married couples filing jointly.[65] The savings/retirement benefits are not treated as investment income for purposes of this tax.[66] This would not be a concern for an individual with very high taxable income, who would be subject to the Medicare tax regardless of whether the savings/retirement benefits are included in the individual's gross income.

Second, upper-income taxpayers who qualify for certain non-tax benefits may not qualify for those benefits if their gross income is increased by savings/retirement benefits. For example, in New York City, a tenant may lose the right to pay below-market rent to reside in an apartment if his or her "federal adjusted gross income as reported on the New York state income tax return" exceeds $200,000 for two years.[67] Again, this would not be a concern for an individual with very high taxable income, who would not be eligible for such rent benefits regardless of whether the savings/retirement benefits are included in the individual's gross income.

Third, taxpayers of various incomes may not continue to qualify for lower Medicare Part B (physician coverage) or Part D (drug coverage) premiums if their gross income is increased by savings/retirement benefits. For example, the Part B monthly premium would be $134 if the modified adjusted gross income of a single taxpayer is at most $85,000 for single taxpayers and $170,000 for married couples filing jointly, but would be $428.60 if the modified adjusted gross income of a single taxpayer is more than $160,000 for single taxpayers and $320,000 for married couples filing jointly.[68] There are subsidies for Part D premiums for individuals and families with very low incomes,[69] so this will not be discussed further. Again, this would not be a concern for an individual with very high taxable income, who would in any case be charged the maximum Medicare premiums if enrolled in Medicare.

Fourth, lower-income taxpayers may not continue to qualify for an exclusion for all or a substantial part of their social security benefits if their gross income is increased by savings/retirement benefits. Fifty percent of the social security benefits of the taxpayer may be taxed if the sum of half of the social security benefits plus the modified adjusted gross income of a single taxpayer exceeds $25,000 for single taxpayers and $32,000 for married couples filing jointly.[70] Eighty-five percent of the social security benefits of the taxpayer may be taxed if the sum of half of the social security benefits plus the modified adjusted gross income of a single taxpayer exceed s $34,000 for single taxpayers and $44,000 for married couples filing jointly.[71]

D. Charitable Giving Alternatives to Qualified Charitable Distributions

Finally, it should be noted that a taxpayer may rationally prefer to make charitable contributions without taking advantage of the QCD rules. If the benefit distribution may be fully deducted and the inclusion in income has none of the adverse side effects described above, there is little reason to incur the administrative costs of complying with the QCD rules. If the taxpayer would have had to make a distribution in excess of the MRDs to fund the charitable contributions, it is usually more advantageous to donate appreciated long-term capital gains property (such as public securities) worth the excess, if any, which, like a QCD, is not included in gross income,[72] but, unlike a QCD, is fully deductible — a real advantage if the itemized deduction is available.[73] It may even be advantageous to take the capital gains deduction, if available, rather than the QCD for amounts less than or equal to the minimum required distribution because the taxpayer also obtains the benefit of avoiding the tax on the capital gain, which would be unavailable if the deduction were based on the required benefit distribution. Finally, many taxpayers made large contributions to donor-advised funds in 2017 to avoid the new limitations on itemized deductions for the period 2018 to 2025. Such taxpayers may wish to distribute such amounts to their traditional charities in the period 2018 to 2025 and thereby maintain their usual charitable-giving policies for those years, rather than make any additional charitable contributions with QCDs.

IV. Conclusions

There are tax-efficient ways to fund charitable contributions using tax-favored savings or retirement benefits, but other considerations, tax and otherwise, may make such usage imprudent. Lifetime savings or retirement benefits often do not need to be distributed, so may often be replaced with other sources for charitable contributions without adverse tax consequences. QCDs are often an advisable way to make charitable contributions if one has substantial interests in an IRA or IRAs, and has reached 70½, whether the IRA is inherited or not. This is particularly the case for those who wish to donate amounts equal to or less than the required minimum distributions and will not itemize their deductions, or those very concerned about avoiding inclusion of distributions in gross income, such as rent-regulated tenants with considerable income. However, if itemized deductions are available for the contributions, it may be more advantageous to use appreciated publicly traded securities to fund charitable contributions than QCDs, even if MRDs are required.

Endnotes

1. Earnings and benefits from a Roth individual retirement arrangement are generally not subject to taxes. Thus, such arrangements avoid rather than defer income tax liabilities.
2. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 § 11042.
3. § 11045.
4. § 11021.
5. This article is based on a more comprehensive article, Albert Feuer, *Tax-Efficient Charitable Giving of Savings or Retirement Benefits*, 49 Comp. Plan. J. 153 (2018), 43 Tax Mgm't Estates, Gifts, and Trusts J. 237 (2018), abstract and link to full article available at http://ssrn.com/abstract=3249827 (last visited February 25, 2019) ("Tax-Efficient Charitable Giving").
6. *But see* I.R.C. § 72(t)(2)(e) (the early distribution 10 percent penalty for distributions from individual retirement accounts does not apply for distributions used for higher education expenses). All section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and the regulations thereunder, unless otherwise specified.
7. § 223.
8. § 223(f)(4) (imposing a 20 percent surtax for distributions not used for qualified medical expenses).
9. *See* Summary of the Thrift Savings Plan (Jan. 2019), https://www.tsp.gov/PDF/formspubs/tspbk08.pdf (last visited Feb. 25, 2019).
10. § 7701(j).
11. §§ 402(a), §403(a)
12. § 403(b).
13. § 457(b)(6).
14. § 457(g).
15. § 457(a).
16. If the participant's surviving spouse is her or his beneficiary, the surviving spouse is treated as the IRA's participant, and the IRA is not treated as an inherited IRA. § 408(d)(3)(C).
17. § 408(k).
18. § 408(p).
19. § 408(q).
20. § 408(e).
21. § 408A(d)(4). There may be tax on income if distributions are made (1) less than five years after the establishment of any Roth IRA, or (2) to the participant before the participant attains age 59½. § 408A(d)(2). In such case, the basis for the arrangement would be the participant's contributions to the arrangement. § 408A(d)(4).
22. § 408(d).
23. *See generally* Department of Treasury, Internal Revenue Service, *2018 Instructions for Forms 1099-R and 5498*, https://www.irs.gov/pub/irs-pdf/i1099r.pdf (last visited Feb. 25, 2019).
24. § 3405(a)(2), §3405(b)(2).
25. § 3405(c).
26. *See, e.g.*, §402(c)(9).
27. *See* https://www.irs.gov/pub/irs-pdf/fw8ben.pdf (last visited Feb. 25, 2019).
28. § 401(a)(9).
29. § 4974.
30. § 401(a)(9)(C).
31. § 408(a)(6), § 408(b)(4).
32. § 408A(c)(5).
33. *See, e.g.*, § 72(f) (applicable to common-law employees participating in tax-qualified plans).
34. § 72(e). However, for lifetime annuities, the basis is allocated among the anticipated distributions. § 72(d).
35. § 408(d)(2)
36. Notice 2015-54.
37. § 401(a)(13) and ERISA § 306(d)(1), respectively.
38. Treas. Reg. § 1.401(a)-13(e).
39. Tax-Efficient Charitable Giving, *supra* note 5.
40. *See generally* I.R.S. Notice 2007-7, Part IX, 2007-1 C.B. 395, 400-01; Michael Kitces, *Rules and Requirements for Doing A Qualified Charitable Distribution (QCD) From an IRA*, https://www.kitces.

com/blog/qualified-charitable-distribution-qcd-from-ira-to-satisfy-rmd-rules-and-requirements (last visited Feb. 25, 2019).

41. § 408(d)(8)(E).
42. § 408(d)(8)(B).
43. § 408(q).
44. *But see* Tax-Efficient Charitable Giving, *supra* note 5, at 244-45 for an explanation of when funds transferred from such plans to an IRA may qualify for both the minimum distribution rules and a QCD.
45. I.R.S. Notice 2007-7, Q & A-36, 2007-1 C.B. 395, 401.
46. § 408(d)(8)(B)(ii)
47. § 408(d)(8)(B)(i).
48. § 170(b)(1)(A)(vii).
49. *Id.*
50. § 170(b)(1)(B), Reg. § 1.170A-10.
51. § 408(d)(8)(C).
52. § 501(m)(5).
53. § 664(d)(1).
54. § 170(f)(8) (describing the substantiation requirements for contributions of $250 or more).
55. I.R.S. Notice 2007-7, Q & A-44, 2007-1 C.B. 395, 401.
56. I.R.S. Notice 2007-7, Q & A-41, 2007-1 C.B. 395, 401.
57. *Id.*
58. I.R.S. Notice 2007-7, Q & A-40, 2007-1 C.B. 395, 401. The answer only refers to withholding from periodic payments, which are otherwise subject to withholding absent an election by the planned recipient.
59. *See* IRA FAQs – Distributions (Withdrawals) (May 30, 2018) https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras-distributions-withdrawals (last visited Feb. 25, 2019).
60. *IRS Instructions Form 1040* at 29 https://www.irs.gov/pub/irspdf/i1040gi.pdf (last visited Feb. 25, 2019).
61. § 408(d)(8)(D).
62. *See Distributions from Individual Retirement Arrangements (IRAs) for Use in Preparing 2018 Returns*, IRS Pub. 590-B (Jan. 24, 2019) at 13, https://www.irs.gov/pub/irs-pdf/p590b.pdf (last visited February 25, 2019) for an example.
63. The prior phase out of itemized deductions, and the dependent and personal exemption deductions for those with large gross incomes, may be disregarded because those provisions were removed for taxable years 2018 through 2025. *Supra* note 2, §§ 11025, 11041.
64. § 408A(d).
65. § 1411.
66. § 1411(c)(5).
67. L. 2011 ch. 97 Rent Act of 2011 §30.
68. *See* 42 U.S.C. § 1395r(i); Medicare.gov, *Part B costs*, https://www.medicare.gov/your-medicare-costs/part-b-costs/part-b-costs.html. (last visited Feb. 25, 2019).
69. *See* 42 U.S.C. § 1395w-114.
70. § 86(a)(1), § 86(c)(1).
71. § 86(a)(2), § 86(c)(2).
72. § 170(e)(1).
73. § 170(b)(1)(A). However, there are lower limits on the maximum contribution of such property than on cash contributions. § 170(b)(1)(C).

Inheritance Law and Procedure in Israel

Dr. Alon Kaplan and Meytal Liberman

1. Introduction

Israel is a small country, about the same size as Belgium in Europe or New Jersey in North America. It is located on the eastern shore of the Mediterranean Sea and has excellent access by air and sea to Europe, Africa, Asia, and North America.[1] Since 2010, Israel is a member of the Organisation for Economic Co-operation and Development (OECD).[2]

Israel is a country of immigration. Formal statistics[3] show that at the time of its establishment, Israel's population was only 872,700 people, out of which 716,700 (82%) were Jews, and 156,000 (18%) were Muslims, Christians and Druze. Formal statistics[4] further show Israel's phenomenal population growth, as Israel's population in the end of 2018 was 8,955,300, out of which 6,554,700 (73%) were Jews, 1,874,800 (21%) were Muslims and 525,800 (6%) others and all of whom enjoy equal legal rights in all areas of life. It is also interesting to note that since the establishment of the State of Israel and until 2017, approximately 110,000 immigrants were born in the USA.[5]

Israel is known as a "start-up nation" when relating to high-tech and technology. This sector of the economy is a source of tremendous wealth and has created a new generation of rich families. The magazine *Israel 21c* reported that in the year 2017[6] Israeli high-tech exits totaled in $7.44 billion. This amount represents an increase of 9% over 2016, and 9% of those deals were worth $400 million to $1 billion.

This demographic and economic environment provides a fertile ground for U.S. persons, whether U.S. or Israel residents, to invest in assets in Israel.

2. Preamble: Inheritance Law in Israel

Inheritance in Israel is governed by the Succession Law.[7] According to section 2 of the Succession Law, the estate of a deceased passes to his heirs in accordance with the law — intestate inheritance, unless the deceased has left a valid will, in which case the estate is bequeathed in accordance thereof.

3. Intestate Inheritance

In the absence of a valid will, the Succession Law provides a mechanism that determines the order of inheritance, and the portion of each heir. Accordingly, the first right of inheritance is divided equally between the spouse of the deceased and his children. The spouse receives one-half of the estate and the children divide the remaining half between them in equal shares.[8]

4. Inheritance Under a Will

Alternatively, the estate can be distributed as set out in the testator's will. Under the Succession Law, a will can be made in one of four ways, as set forth below:[9]

a) A handwritten will.[10] Such will shall be written entirely in the testator's own hand and shall be dated and signed by the testator.

b) A will made in the presence of witnesses.[11] Such will is written and dated, and signed by the testator before two witnesses after the testator has declared before the witnesses that it is the testator's will. The witnesses must attest by their signature upon the will that the testator declared and signed the will as stated.

c) A will made before an authority.[12] Such will must be made by the testator stating its provisions orally before a Judge, a Court Registrar, the Registrar of Inheritance, or a Member of the Religious Court, or by a deposit of a written will by the testator with any of these authorities. It is further provided that for this purpose, a notary is equivalent to a judge.

d) An oral will.[13] People who are on their deathbeds, or who in all circumstances reasonably regard themselves as facing death, may declare

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a will orally before two witnesses. The testator's directions and the circumstances of the making of the will must be recorded in a memorandum signed by the two witnesses and deposited with the Registrar of Inheritance. An oral will becomes invalid within one month, provided the circumstances which warranted its making has changed, and the testator is still alive.

Despite the formal requirements mentioned above, the court is authorized to validate a will even if it is defective or missing certain formal requirements, provided the court is convinced that it reflects the true and free will of the testator.

5. Freedom of Testation

The principle of Freedom of Testation is one of the cornerstones of the Israeli inheritance law. Section 27, whose title is "Liberty to bequeath", provides that an undertaking to make a will, to change it, or to cancel it, or not to make any thereof is invalid. It further provides, that a provision of a will that negates or limits the right of the testator to change the will or cancel it is invalid.[14]

The principle of Freedom of Testation is also evident in Section 8 of the Succession Law, which provides that "an agreement in respect of the succession of a deceased and a renouncement regarding such succession, executed prior to the demise of the deceased, are void."[15] The section further provides that that "a gift granted by a donor during the donor's lifetime, when such gift is to be effectively provided to the donee subsequent to the donor's demise, is also null and void, unless such gift was included within a valid will."[16]

Justice Cheshin stressed the importance of the freedom of testation in the *Lishitzky*[17] case:

> If there is a foundation principle, if you will, a super-principle, in inheritance law, there is none but the principle that instruct us that a person, any person, is at liberty to bequeath his estate, and the principle that derives from it, whereby the living are obliged to keep the deceased's wishes. The freedom of testation and the obligation to keep the deceased's wishes — two sides of the same coin — the two, as one, derive from the human dignity, and the personal autonomy derived from the dignity.[18]

The principle of Freedom of Testation also manifests in the fact that there is no forced heirship in Israel, and the order and portions of inheritance set forth in the Succession Law applies only in the absence of a valid will, and where a valid will is made with respect to the entirety of a person's estate, it shall apply on the entire estate accordingly.

6. Maintenance Out of the Estate

An exemption to the principle of the freedom of testation is the right to receive maintenance out of the estate.[19] Section 56 of the Succession Law provides that where the deceased left a spouse, children or parents that are in need of maintenance, they shall be entitled to such maintenance, regardless whether the deceased has made a valid will.

Moreover, section 63 of the Succession Law provides a "claw-back" rule and determines that in the event that the estate is insufficient to provide maintenance to all that are entitled to it, the court is authorized to view transfers of assets carried out without proper consideration during the two year period prior to the death of the deceased as part of the estate, except for gifts and donations made as customary under the circumstances.

Section 57 defines the scope of the right for maintenance out of the estate, and *inter alia* provides that a child under 18 years of age of the deceased, who is handicapped, or mentally ill, or cognitively disabled is entitled to maintenance.

Chief Justice Shamgar in the case of *Levitt*[20] clarified that it is insufficient to belong to the class of persons that are entitled to maintenance out of the estate, and that a "need of maintenance" should also be established, and where such need is not properly established, the testator may bequeath his entire estate to another. Chief Justice Shamgar continued and held that such need exists only when the applicant for maintenance cannot properly satisfy his basic needs. According to Shamgar, the wishes of the testator should be enforced only to a certain extent. The limit lies where a first degree relative of the testator becomes an unreasonable burden on the society. The maintenance out of the estate manifests the notion that the existence of a family relationship justifies imposing an obligation of maintenance, in specific instances, upon the estate.

7. Inheritance Procedure in Israel

Under the Succession Law, the rights of the heirs in the estate are created only upon the issuance of order with respect to the estate by the competent authority. In circumstances where the deceased left a will, an application should be made for a probate order, and only upon the issuance of the order the will becomes valid and enforceable. It should also be noted that only a probate order issued in Israel in accordance with the Succession Law is regarded as valid, and probate orders issued by foreign authorities are invalid.[21] However, in circumstances where the deceased left a will relating to only a part of his or her estate, or the deceased did not leave a will at all, an application should be made for an inheritance order.[22]

Both an application for a probate order and an application for an Inheritance order are made to the Registrar of Inheritance, and it is authorized to declare the rights of the heirs accordingly.[23] However, if the circumstances described in section 67A of the Succession Law are present, the Registrar of Inheritance must forward the application to the Family Court. Such circumstances arise, for example, when the application is contested, when the will is defected, or when the Administrator General represents in the application minor. The Family Court is authorized accordingly to issue the relevant order.[24]

Probate procedure in Israel requires that the original will be submitted with the Registrar of Inheritance, except to an oral will. In the absence of an original will, such as when the original has already been submitted in another jurisdiction, a separate application should be made to the court to approve the submission of a copy.[25]

> *"Under the Succession Law, the rights of the heirs in the estate are created only upon the issuance of order with respect to the estate by the competent authority."*

Section 54 of the Inheritance Regulations[26] provides that a copy of any application, including an application for a probate or inheritance order, shall be submitted to the review of the Administrator General, who may, in its discretion, conduct additional inspection of the application and require further information and documents.

Section 17 of the Inheritance Regulations requires that a notice with respect to the application for the inheritance or probate order be published in one daily newspaper and in the formal publication of the State of Israel (*Reshumot*). The notice includes an invitation to contest the application.

Section 14 of the Inheritance Regulations provides that an application for a probate or inheritance order shall be dismissed, unless notifications are sent with respect thereof as follows:

a) In the instance of an application for an inheritance order—notifications to the heirs under law listed in the application.

b) In the case of an application for a probate order—notifications to the beneficiaries under the will, together with a copy of the will itself.

If the beneficiaries under the will do not include children of the deceased or their children, parents of the deceased or their children, or the deceased's spouse, then such notifications should be delivered to the deceased's children and spouse at the time of his death, and if none of whom is alive, then to the deceased's parents, and if none of whom is alive, then to the deceased's siblings.

As evident from the above, the inheritance procedure in Israel is a complex and cumbersome procedure. It may also be uncomfortable for the deceased's family members due to the requirement to disclose the contents of the will.

8. Cross-Border Inheritance

The Succession Law deals with private international issues relating to one's estate in chapter 7, sections 135-144.

A. Jurisdiction of the Israeli Court

Section 135 and 136 of the Succession Law provide that the Israeli court has jurisdiction over the estate of any person (a) whose center of life was in Israel, or (b) has left assets in Israel, on the day of his or her death. Each of these two alternatives raises its own difficulties.

Determining one's Center of Life may prove to be a difficult task. In the case of *Nafissi*,[27] two spouses married each other in Iran in 1944. The husband visited Israel in 1979, purchased an apartment, and then returned to Iran. Later on, the spouses immigrated to Israel in 1983 with their children, and in 1987 a dispute arose between the spouse. Section 15 of the Financial Relations between Spouses[28] sets forth a default rule and provides that the applicable matrimonial regime is that of the spouses' center of life at the time of their marriage. The Supreme Court referred to section 135 of the Succession Law and affirmed that a person's center of life is where a person has the majority of ties to, whereas such ties are established on a factual basis, rather than a subjective one. In the case of *Nafissi*, the spouses had ties to more than one jurisdiction, thereby making the determination of where their center of life was complex. Furthermore, Justice Goldberg quoted Justice Barak, who said:

> Needless to mention, that it is often difficult to point out a specific point in time, where a person ceases from permanently residing in a country, and surly a space in time exists where one's center of life is as if floating between its previous location and its new location.[29]

The other alternative—that the deceased has left assets in Israel—arises further difficulties. The Succession Law does not set a minimal threshold such assets are required to meet, nor does it refer to types of assets. A common example of absurdity of this requirement is of a backpacker who visits Israel and dies as a result of a car accident. *Prima facie*, since the backpacker left an asset in Israel—the backpack—the Israeli court has jurisdiction over his estate. Furthermore, the location of certain types of assets may be difficult to determine, such as intellectual property or bearer shares of a company.

The complexity of described above may cause an adverse effect and prevent the fulfillment of the deceased's wishes. It is therefore recommended to write a separate will for each relevant jurisdiction.

B. The Applicable Law

Section 137 of the Succession Law continues and provides that the law of the deceased's center of life at the time of his or her death shall apply to his or her estate, unless an exception listed in Sections 138-140 is applicable.[30]

A person's center of life is determined in accordance with the person's ties to a specific jurisdiction, as detailed above with respect to the question of jurisdiction. The determination of the applicable law may have significant implications, such as when the applicable law is of a jurisdiction which has forced heirship rules.

Section 142 of the Succession Law deals with a situation of Renvoi, and provides that despite the aforesaid in the Succession Law, if the law of a jurisdiction A applies, and this law reverts to the law of jurisdiction B, than this reversion shall not apply and the law of jurisdiction A shall apply, unless the law of jurisdiction A reverts to the law of Israel, then the law of Israel shall apply.

In circumstances where the Israeli court has jurisdiction of the matter, it can nonetheless refuse to take jurisdiction where there is a more appropriate forum available to the parties — Forum Non Conveniens. The court shall accept such claim only if the ties of the parties and of the dispute between them to the foreign jurisdiction are significantly stronger than those to Israel. A Recent decision of the Supreme Court goes further and holds that the todays modern life and technological developments have reduced the importance of the "majority of ties" test with respect to Forum Non Conveniens claims.[31]

9. Conclusion

Inheritance law and procedure in Israel are very complex, and may result in adverse effects if not planned and managed properly. Therefore, for estate planning purposes, it is recommended to make a separate will relating to every relevant jurisdiction, thereby enabling the beneficiaries to initiate inheritance procedures in each jurisdiction separately.

It should also be noted that the Israeli law provides another instrument for estate planning—a private trust under the Trust Law.[32] Such trust can be created during the lifetime of the settlor, i.e., an *inter vivos* trust, or upon death, i.e., a testamentary trust. The *inter vivos* trust deed is a secret document, contrary to a will, and the only copy the trust deed is deposited with is the Notary. The settlor may set the terms and conditions of the trust as he sees fit. Once the assets are settled into the trust during the lifetime of the settlor, they are removed from his estate, and therefore the need for an inheritance or probate order with respect thereof becomes superfluous, provided the trust is irrevocable and was set properly.

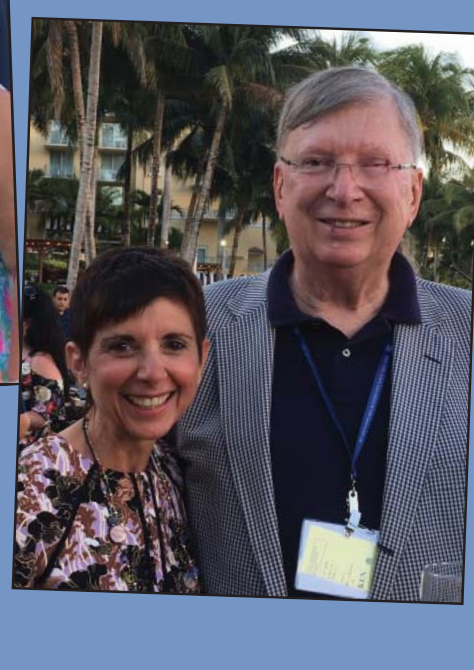
It is important to note that there are no estate tax and gift tax in Israel, and if the trust is created and managed properly, the transfer of assets from the settlor to the trustee is not considered as a tax event.[33]

Estate planning in Israel requires special expertise, including with respect to taxation, and, special care to the personal circumstances of a person, therefore it is highly recommended to consult with professionals for this purpose.

Endnotes

1. Alon Kaplan (General Editor), *Trusts in Prime Jurisdictions*, Fourth Edition (April 2016), chapter on Israel.
2. http://www.oecd.org/israel/israelsaccessiontotheoecd.htm.
3. *See* Central Bureau of Statistics, *Population, by Religion and Population Group, available at* https://www.cbs.gov.il/he/publications/DocLib/2004/2.%20Shnaton%20Population/st02_01.pdf (last accessed: Jan. 22, 2019).
4. *See* Central Bureau of Statistics, *Population, by Population Group, available at* https://www.cbs.gov.il/he/publications/doclib/2019/yarhon1218/b1.pdf (last accessed: Jan. 22, 2019).
5. *See* Central Bureau of Statistic, *Immigrants, (1) By Period of Immigration, Country of Birth and Last Country of Residence, available at* https://www.cbs.gov.il/he/publications/doclib/2018/4.%20shnatonimmigration/st04_04.pdf (last accessed: Jan. 22, 2019).
6. ISRAEL21c Staff, *Israeli high-tech exits in 2017 totaled $7.44 billion*, Israel21c (Dec. 31, 2017), available at https://www.israel21c.org/israeli-high-tech-exits-in-2017-totaled-7-44-billion (last accessed: Jan. 22, 2019).
7. Succession Law, 5725-1965, 19 SH 215 (1964-65) (Isr.).
8. *Id.* §§ 11, 12.
9. *Id.* §§ 18-23.
10. *Id.* § 19.
11. *Id.* § 20.
12. *Id.* § 22.
13. *Id.* § 23.
14. Section 36 of the Succession Law clarifies and provides that the testator may cancel a will by expressly stating so in a new will, or by destroying the will.
15. Succession Law § 8.
16. *Id.* § 8.
17. CA 4660/94 *Attorney-Gen. v. Lishitzky* 55(1) PD 88, 115 [1999] (Isr.).
18. *Id.*
19. Succession Law §§ 56-65.

20. CA 393/93 *Doe v. the estate of Israel Levitt* (Apr. 3, 1994), Nevo Legal Database (by subscription) (Isr.).
21. Succession Law, § 39.
22. *Id.* § 66.
23. *Id.* § 66.
24. *Id.* § 67A(b).
25. *Id.* § 68(b).
26. Inheritance Regulations, 1998, KT 5923 (Isr.).
27. CFH *Nafissi v. Nafissi* 50(3) PD 573 [1996] (Isr.).
28. Financial Relations between Spouses Law, 5733-1973, 712 SH 267 (1973) (Isr.).
29. *Nafissi*, at 598.
30. Sections 138-140 of the Succession Law list the exceptions to the center of life rule. Section 138 provides that assets inherited only according to the law of their location shall be subject to that same law; Section 139 provides that the capacity of the testator to bequeath his assets will be governed by the law of his center of life at the time of preparation of his will. Section 140 provides that (a) a will is valid according to its form if it is valid according to Israeli law, the law of the place where it was made, the law of the center of life or normal residence or citizenship of the testator at the time of making the will or at the time of his death, or, in the event that the will relates to fixed property, also according to the law of the location of the property *and* (b) regarding the applicability of the foreign law in accordance with this section, the necessary capacity of the testator or the witnesses to the will, will be viewed as relating to form.
31. PCA 2736/98 *Habboub Bros. Co v. Nike International Ltd* 54(1) PD 614 [2000] (Isr.).
32. Trust Law, 5739-1979, 33 SH 41 (1966-1967) (Isr.).
33. Income Tax Ordinance [New Version], 5721-1961, 6 DMI 120, §§ 75C-75R (1961) (Isr.).



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The Integration of Estate Tax and Income Tax Planning Is Now Complete: A View from the Audience at Heckerling (2019)

by Kevin Matz

The recently concluded 53rd Annual Heckerling Institute on Estate Planning in Orlando, Florida continued the theme of last year's Heckerling Institute of the seismic shift in the estate planning landscape brought about by the dramatic temporary expansion (to sunset in 2026) of the federal estate, gift and generation-skipping transfer (GST) tax exemptions — which has now further increased to $11,400,000 in 2019 ($22,800,000 for a married couple) and applies to only two out of every 1,000 Americans. Those gathered heard about how the focus of estate planning is shifting more and more to maximizing the step-up in basis upon death including via the use of qualified terminable interest property (QTIP) trusts, income tax planning, the use of dynasty trusts as an asset management and creditor protection vehicle, and planning for the care and needs of elderly Americans. But there was something very different about this year's Heckerling Institute. Rather than treating income tax planning as "a secondary aspect of estate planning," income tax planning was now thrust into the leading role. Thus, a significant portion of the recent developments program was devoted to qualified opportunity funds and opportunity zones (including dissecting the American College of Trust and Estate Counsel's [ACTEC's] recent comment letter to the U.S. Department of Treasury concerning the proposed regulations on qualified opportunity funds), and separate excellent programs were devoted to such income tax-centric topics as (i) the 20% pass-through deduction for qualified business income under section 199A, (ii) qualified small business stock under section 1202, (iii) charitable planning, and (iv) the tax consequences associated with divorce.

I. The Temporarily Expanded Federal Estate, Gift and GST Tax Exemptions and Clarification That "Clawback" Is Not a Concern Come 2026

The 2017 Tax Reform Act — and its effect on estate planning for high net worth individuals — was once again a major theme at this year's Heckerling Institute.

On December 20, 2017, Congress passed far-reaching changes to the Internal Revenue Code that were signed into law by the president on December 22, 2017 as Public Law 115-97 (the "2017 Tax Reform Act," also informally known as the "Tax Cuts and Jobs Act"). The new tax law provides significant estate planning opportunities for high net worth individuals to take advantage of a temporary doubling from $5,000,000 to $10,000,000 (subject to indexing) of the estate, gift and GST tax exemptions. This temporary doubling of the federal estate, gift and GST tax exemptions (as indexed) from $5,490,000 in 2017 to $11,400,000 per person (and to $22,800,000 for a married couple) as of January 1, 2019 creates both (1) a window of opportunity for gifting due to the significant expansion of federal gift and GST tax exemptions and (2) a need to review existing wills and other estate planning documents to ensure that they continue to carry out planning objectives.

Sunset of the Expanded Exemptions in 2026 Back to Pre-2018 Exemption Levels

There is a significant wrinkle in the new law, however, as it "sunsets" its doubling of the federal estate, gift and GST tax exemptions on January 1, 2026, reverting to their pre-2018 exemption levels, as indexed for inflation. This will create incentive for wealthy individuals to begin to use their increased exemptions at the risk of losing them come 2026.

That being said, there had been some concern that the sunset provisions of the new law could potentially pose a "clawback risk" if an individual were to gift away his or her entire gift tax exemption during that person's lifetime and then die after December 31, 2025, at a time at which the unified estate and gift tax exemption was less than the amount that the individual had gifted away during that person's lifetime. The U.S. Department of Treasury has now issued guidance in the form of proposed regulations—referred to by many as the "Anti-Clawback Regulations"—to clarify that this no longer poses a risk.[1]

II. Estate Planning with an $11,400,000 Exemption ($22,800,000 for a Married Couple)

As of January 1, 2019, individuals are now able to transfer $11,400,000 free of estate, gift and GST tax

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during their lives or at death. A married couple will be able to transfer $22,800,000 during their lives or at death. And due to the portability of the deceased spouse's unused exclusion amount, any unused Federal estate tax (but not GST tax) exemption for the first spouse to die may be used by the surviving spouse for lifetime gifting or at death. (The 2017 Tax Reform Act did not change the 40% tax rate for estate, gift and GST taxes, or modify the rules providing for a step-up in basis to fair market value at death that generally apply to most inherited property.)

Individuals who previously exhausted their $5,490,000 gift tax exemption now have the opportunity to gift another $5,910,000 (or $11,820,000 in the case of a married couple who has previously exhausted their gift tax exemptions), and can even make such gifts to grandchildren or more remote descendants (or to trusts for their benefit) without incurring a GST tax.

The annual exclusion gifting amount is $15,000 (or $30,000 if spouses elect to split gifts) for gifts made in 2019.

The increase of the exemptions gives individuals vast opportunities to leverage their gifting for multiple generations through the following techniques:

- Topping off prior planning by making gifts to existing and/or new family trusts including generation-skipping trusts, insurance trusts, spousal lifetime access trusts (SLATs) and grantor retained annuity trusts (GRATs)
- Making new sales to intentionally defective grantor trusts (IDGTs) or, where appropriate, making cash gifts to facilitate the prepayment of existing installment obligations to senior family members
- Making new intra-family loans (or, where appropriate, cash gifts to facilitate the prepayment of existing loans from senior family members)

State estate-tax-specific considerations may apply in the wake of the temporarily expanded Federal exemptions. For example, for those who reside in the Empire State (where New York imposes a state estate tax as high as 16% of the New York taxable estate), the expanded Federal exemptions give New Yorkers greater opportunities to plan ahead to reduce their New York taxable estates. New York has a unique feature of its estate tax law under which there is a "cliff" built into its estate tax calculation, which quickly phases out the benefits of the New York basic exclusion amount (currently $5,740,000) if the decedent's New York taxable estate (plus potentially certain taxable gifts made within three years of death, if certain provisions contained in Governor Cuomo's Executive Budget that was released on January 15, 2019 were to become law) is between 100% and 105% of the exclusion amount available on the date of death. The cliff completely wipes out the benefits of the exclusion if the decedent's New York taxable estate (and any such gifts added back—to the extent applicable) exceeds 105% of the exclusion amount available on the date of death. In addition, at certain taxable estate levels it can produce a confiscatory marginal New York estate tax rate that is substantially in excess of 100%. As a result, the New York estate tax exclusion only fully benefits individuals whose New York taxable estates (including taxable gifts made within three years of death if Governor Cuomo's proposal were enacted into law) fall below the New York exclusion amount in effect on the date of death. In addition, the New York estate tax exemption is *not* portable to spouses for lifetime gifting or for use on the survivor's New York estate tax return, in sharp contrast to the federal estate tax exemption.

As a result of the dramatic spread between the federal and New York estate tax exemptions ($11,400,000 federal versus $5,740,000 for New Yorkers dying in 2019), decedents whose estates are below the federal estate tax exemption amount may still owe significant New York estate tax if their estates exceed the New York estate tax exemption amount. In addition to confirming that will provisions can fully soak up the New York estate tax exemption of the first spouse to die (including via an executor's decision not to make a QTIP election for property in trust), New Yorkers may consider gifting such amount as would bring his or her taxable estate below the New York estate tax exemption amount. If such person dies more than three years after making the gift (or after the three-year addback rule has expired—as of this writing, it has expired for persons who die on or after January 1, 2019, but Governor Cuomo's Executive Budget released on January 15, 2019 would retroactively push back such expiration date to January 1, 2026), the New York estate tax can be completely eliminated on the first spouse's death. Depending upon the circumstances, the total combined New York estate tax savings for a married couple can potentially exceed $1,000,000.

III. Popular Wealth-Transfer Techniques to Leverage Expanded Federal Gift and GST Tax Exemptions Remain Viable

In light of the significant increase to the Federal estate, gift and GST tax exemptions under the 2017 Tax Reform Act, individuals who wish to reduce or eliminate future estate taxes may consider maximizing their use of the increased gift tax exemption before the exemptions revert to pre-2018 levels on January 1, 2026. Strategies that remain viable and attractive include dynasty (generation-skipping) trusts, spousal lifetime access trusts (SLATs), grantor retained annuity trusts (GRATs), intra-family loans and sales to intentionally defective grantor trusts. Brief explanations of two of these estate planning techniques—dynasty (generation-skipping) trusts and SLATs—are set forth below.

Dynasty (Generation-Skipping) Trusts

Through coordinated use of their federal gift and GST tax exemptions, individuals can create trusts with an aggregate value of up to $11,400,000 ($22,800,000 per married couple), which may benefit several generations of descendants while insulating the assets from gift, estate and GST taxes. These are sometimes referred to as "***dynasty trusts.***"

Dynasty trusts are generally structured as "intentionally defective grantor trusts" (or "IDGTs"). An IDGT provides two independent planning opportunities. First, the grantor will pay the income tax on the income generated by the trust, including capital gains tax, thereby allowing the trust to grow for the grantor's children and their issue unencumbered by the income tax, while reducing the grantor's estate. Second, the grantor may engage in transactions with an IDGT without any income tax consequences. (*See* Rev. Rul. 85-13)

Spousal Lifetime Access Trusts (SLATs)

In addition, dynasty trusts may be structured to give the grantor's spouse access to the trust as a discretionary beneficiary of trust income and principal. Such trusts can provide comfort that transferred wealth would still be available for a married couple if needed down the road, and can essentially serve as a "rainy day fund" while allowing one to take maximum advantage of the new tax laws. Such trusts with spousal access rights are sometimes referred to as "***spousal lifetime access trusts***," or "***SLATs,***" and they will generally be grantor trusts for income tax purposes during the grantor's lifetime.[2]

IV. Qualified Opportunity Funds and Opportunity Zones

The 2017 Tax Cuts and Jobs Act includes a new tax incentive provision that is intended to promote investment in economically distressed communities, referred to as "Opportunity Zones." Through this program, investors can achieve the following three significant tax benefits:

1. The deferral of gain on the disposition of property to an unrelated person until the earlier of the date on which the subsequent investment is sold or exchanged, or December 31, 2026, so long as the gain is reinvested in a "Qualified Opportunity Fund" within 180 days of the property's disposition;

2. The elimination of up to 15% of the gain that has been reinvested in a "Qualified Opportunity Fund" provided that certain holding period requirements are met; and

3. The potential elimination of tax on gains associated with the appreciation in the value of a Qualified Opportunity Fund, provided that the investment in the Qualified Opportunity Fund is held for at least 10 years.

An Opportunity Zone (sometimes referred to herein as a "QOZ") is an economically-distressed community where new investments, under certain conditions, may be eligible for preferential tax treatment. Localities qualify as Opportunity Zones if they have been nominated for that designation by the state and that nomination has been certified by the Internal Revenue Service (IRS). All Opportunity Zones have now been designated, as of June 14, 2018, and are available on the U.S. Department of Treasury website.[3]

A Qualified Opportunity Fund (sometimes referred to herein as a "QOF"), in turn, is an investment vehicle that is established as either a domestic partnership or a domestic corporation for the purpose of investing in eligible property that is located in an Opportunity Zone and uses investor gains from prior investments as a funding mechanism. The investor can get the tax benefits of Opportunity Zones even if the investor doesn't live, work or maintain a business in an Opportunity Zone—the investor just needs to invest in a Qualified Opportunity Fund.

To become a Qualified Opportunity Fund, the entity self-certifies itself. The entity must meet certain requirements, in particular a general requirement that at least 90% of its assets be "qualified opportunity zone property" used within an Opportunity Zone (as further discussed below), but no approval or action by the IRS is required. To self-certify, the entity merely completes a form which the IRS had said that it expected to release during the summer of 2018 (which did not happen), and then attaches that form to the entity's timely-filed federal income tax return for the taxable year (taking into account extensions). Proposed regulations issued in October 2018 (the "Proposed Regulations," as hereinafter defined) generally permit any taxpayer that is a corporation or partnership for tax purposes to self-certify as a QOF, provided that the entity self-certifying is statutorily eligible to do so. According to the preamble to the Proposed Regulations, it is expected that taxpayers will use Form 8996, Qualified Opportunity Fund, both for initial self-certification and for annual reporting of compliance with the 90-Percent Asset Test of IRC section 1400Z-2(d)(1), and that Form 8996 would be attached to the taxpayer's Federal income tax return for the relevant years.

Deferral of Gain Through Timely Reinvestment in Qualified Opportunity Funds and Possible Exclusion from Income of Up to 15% of Such Gains if the Reinvestment is Held for At Least 7 Years

To qualify for these tax benefits, the investor's reinvestment in the Qualified Opportunity Fund must occur during the 180-day period beginning on the date of the sale. The Proposed Regulations provide some relief in the case of certain pass-through entities.

Under IRC section 1400Z-2(a)(2), the taxpayer may elect to defer the tax on some or all of that gain. If, during the 180-day period, the taxpayer invests in one or more Qualified Opportunity Funds an amount that was less that the taxpayer's entire gain, the taxpayer may still elect to defer paying tax on the portion of the gain invested in the Qualified Opportunity Fund. If, in contrast, an amount in excess of the taxpayer's gain is transferred to the fund (a so-called "investment with mixed funds"), the taxpayer is treated, for tax purposes, as having made two separate investments — one that only includes amounts as to which the investor's deferral election is made, and a separate investment consisting of other amounts.

Importantly, the law requires only that the *gain* be reinvested in the Qualified Opportunity Fund, and not the total sales proceeds. The Proposed Regulations have clarified that, in general, only capital gains are eligible to be invested in a Qualified Opportunity Fund.

In addition, in contrast to Section 1031 "like-kind" exchanges (another mechanism of gain deferral through reinvestment), in the Qualified Opportunity Funds context the cash from the sale does not need to be specifically tracked or escrowed. Instead, the requirement is merely that an amount of cash equal to the gain on the sale be reinvested in a Qualified Opportunity Fund within 180 days of the property's disposition (subject to potential relief in the case of certain pass-through entities).

The taxpayer's basis in the Qualified Opportunity Fund is initially zero, but will be increased by 10% of the deferred gain if the investment in the Qualified Opportunity Fund is held for five years, and increased by an additional 5% (to 15% of the deferred gain in total) if the investment in the Qualified Opportunity Fund is held for seven years. Thus, if a gain on the sale of property is timely reinvested in a Qualified Opportunity Fund, the taxpayer may be able to decrease the taxable portion of the originally deferred gain by 15% (via a corresponding basis step-up) if the investment in the Qualified Opportunity Fund is held for at least seven years. The taxpayer makes an election to defer the gain, in whole or in part, when filing the tax return on which the tax on that gain would otherwise be due if it were not deferred.

Exclusion of Gain on Appreciation in the Value of Qualified Opportunity Fund if Held for At Least 10 Years

The tax incentives of this program go well beyond tax deferral (even putting aside the potential basis adjustments discussed above), as subsequent gain on the appreciation in the value of the Qualified Opportunity Fund is capable of being *fully excluded from income*. In order to qualify, the investor must hold its reinvestment in the Qualified Opportunity Fund for at least 10 years.

The Proposed Regulations

On October 19, 2018, the Internal Revenue Service released the first set of proposed regulations (the "Proposed Regulations")[4] and Revenue Ruling 2018-19 (the "Revenue Ruling") clarifying certain aspects of the Qualified Opportunity Zone (QOZ) provisions added by the tax reform legislation enacted in December 2017. The IRS indicated that it expected to issue additional guidance before the end of 2018 (which did not happen), and the IRS requested comments on a number of provisions in the Proposed Regulations. The Proposed Regulations state that they may apply to transactions occurring before the finalization of such regulations, provided they are applied consistently.

Only Capital Gains Eligible for Reinvestment

The Proposed Regulations provide that only capital gains may be "rolled over" into a QOZ investment. This would preclude ordinary income from the sale of inventory (and possibly would preclude gain recharacterized as ordinary income under certain "recapture" rules).

Partners in Pass-Through Entities May Reinvest Share of Entity's Gains From Asset Sales

The Proposed Regulations include special provisions by which gain recognized by a partnership may (except to the extent the partnership elects to rollover the gain itself) flow through to the partners and be reinvested by such partners into Qualified Opportunity Funds. It was previously unclear whether the partner or the partnership had to make such reinvestment. In addition, there is the potential for such partners to have an increased period during which to reinvest gain into a Qualified Opportunity Fund. The partnership's 180-day period begins on the date of its sale, but if the gain flows through to the partners, the partners' 180-day period begins on the last day of the partnership's taxable year. Partners may instead elect to use the partnership's 180-day period if they so desire (*e.g.*, if the desired investment is already lined up).

Qualified Opportunity Funds Always Tested at End of Calendar Year

The Proposed Regulations clarify that, while the initial testing date for a Qualified Opportunity Fund (for purposes of the 90% asset test, discussed below) may be as long as six months after the Qualified Opportunity Fund's start date, there is *always* a testing date on the last day of the calendar year. Accordingly, Qualified Opportunity Funds that are formed near the end of a calendar year may need to meet the 90% asset test sooner than expected.

The Proposed Regulations do, however, provide flexibility for Qualified Opportunity Funds to select the date on which they begin to qualify (although Qualified Opportunity Funds must qualify as such prior to receiving investments for such investments to qualify under the QOZ provisions), and for taxpayers to use pre-existing entities as Qualified Opportunity Funds.

LLCs Likely Permitted

The Proposed Regulations state that Qualified Opportunity Funds may include entities treated as partnerships for federal income tax purposes, which would presumably permit the use of limited liability companies.

Investors May Hold Investments Past Expiration of QOZ Designation

Although the statute provides that the QOZ designations expire after 10 years, the Proposed Regulations permit investors seeking to take advantage of the 10-year rule to hold their investments for an additional 20-year period—until December 31, 2047—and still receive the benefit of the exclusion from income of all post-acquisition appreciation.

Treatment of Land

The Proposed Regulations and Revenue Ruling provide that land is treated separately from the improvements thereon for purposes of the substantial improvement test, and provide several important clarifications regarding the treatment of land. The Revenue Ruling provides that land, given its permanence, may *never* be treated as originally used by a QOF in a QOZ. However, the examples in the Revenue Ruling indicate that the land may qualify as QOZ Business Property if the improvements thereon qualify, even if such land is not improved. Accordingly, for the substantial improvement test, a QOF need only substantially improve the *building* on a parcel of acquired land in order for the entire parcel to qualify for the 90% asset test.

In addition, the example in the Revenue Ruling involves the conversion of a factory building into residential rental property. As the building was already in existence and is being modified (rather than a new one being constructed), it must meet the substantial improvement test rather than the original use test. The example also seems to confirm that residential rental property does indeed qualify as potential QOZ property.

QOZ Business "Substantially All" Requirement to Mean at Least 70%

QOFs may own QOZ businesses (rather than directly owning qualified opportunity zone property), with the requirement that a QOZ business have "substantially all" of its assets be qualified opportunity zone property. The Proposed Regulations provide that, solely for this purpose, "substantially all" means at least 70%. Accordingly, a QOF that owns a QOZ business may have as little as 63% of its capital invested in qualified opportunity zone property (90% in the QOZ business, per the 90% asset test, times 70% of the business's property). This may provide additional flexibility as to the timing of capital investments into a QOF and the use of such capital.

Working Capital Safe Harbor

The Proposed Regulations provide certain safe harbors relating to working capital and asset composition of a QOF to the extent that such assets are held in QOZ businesses. Specifically, the "reasonable working capital" safe harbor of Section 1397C(e)(1) of the Internal Revenue Code now also extends to QOZ businesses for a period of 31 months. Thus, a QOZ business can have as long as 31 months to deploy working capital provided that the documentation requirements contained in the Proposed Regulations are satisfied. The IRS's draft instructions to the draft Form 8996 describe these documentation requirements in terms of the following four-part test that must be satisfied:

(1) The working capital is designated in writing for the acquisition, construction, and/or substantial improvement of tangible property in a qualified opportunity zone.

(2) There is a reasonable written schedule for the expeditious consumption of the working capital to achieve the goal set out in (1) above.

(3) The working capital will be completely consumed no later than 31 months after the amounts are first invested in eligible interests in the relevant QOF.

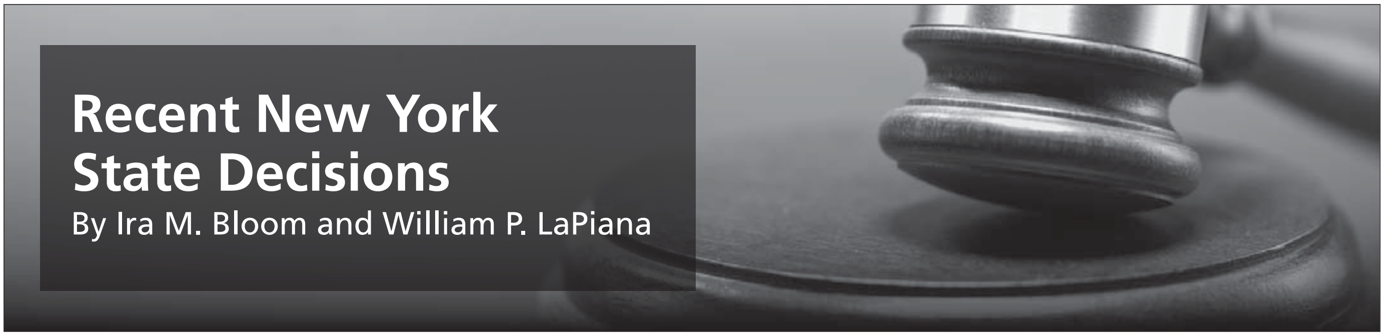
(4) The working capital is consumed in a manner that is substantially consistent with the requirements in items (1) through (3).

Comment Letters

A number of organizations including the American College of Trust and Estate Counsel (ACTEC) and the New York State Society of Certified Public Accountants (NYSSCPA) have submitted comment letters to address open points in the legislation and the Proposed Regulations.[5]

Endnotes

1. *See* https://www.federalregister.gov/documents/2018/11/23/2018-25538/estate-and-gift-taxes-difference-in-the-basic-exclusion-amount.
2. For a more comprehensive discussion of estate planning strategies in 2019, *see* Stroock Special Bulletin—Federal Estate, Gift and GST Tax Exemptions Skyrocket to $11,400,000—*Coupled With Extraordinary Market Volatility, Temporarily Opens Unprecedented Estate Planning Opportunities* (Jan. 8, 2019), (*available at* https://www.stroock.com/publications/federal-estate-gift-gst-tax-exemptions).
3. *See* https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx.
4. *See* https://www.federalregister.gov/documents/2018/10/29/2018-23382/investing-in-qualified-opportunity-funds.
5. ACTEC's comments may be found at this link: https://www.actec.org/assets/1/6/ACTEC-comments-to-Treasury-re-Qualified-Opportunity-Funds-2018-12-27.pdf. In addition, the NYSSCPA's comments may be found at this link: Comments to the U.S. Treasury: Investing in Qualified Opportunity Funds (REG-115420-18)—Proposed Regulations Under Code Section 1400Z-2.



Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

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ATTORNEYS

Contingent Fee Based on Amounts Received by Beneficiaries Ambiguous and Therefore Unenforceable

Attorney brought a proceeding to enforce a contingent fee agreement in which the Supreme Court grant summary judgment for the attorney and denied the clients' motion to dismiss. The clients appealed and the Appellate Division reversed and vacated the judgment. On appeal the clients raised for arguably the first time questions about interpreting the retainer agreements involved. The court considered those questions because they were issues of law and could be resolved on the record. The plain language of the agreements stated that the fee was to be calculated based on the amounts received by the clients as beneficiaries of the estate rather than on the "gross amounts collected by the estate" before the payment of costs and expenses. The court then stated that the agreements could be said to be ambiguous on the method for calculating the contingent fee, must be construed against the lawyer-plaintiff and were therefore unenforceable. *Rawlins v. Sheppard*, 169 A.D.3d 440, 94 N.Y.S.3d 24 (1st Dep't 2019).

FIDUCIARIES

Separation Agreement Does Not Prevent Appointment of Ex-Spouse as Administrator Where Separated Spouse Is Guardian of the Property of Sole Distributee

Decedent and the other parent of decedent's child entered into a formal separation agreement which included a mutual waiver of any right to act as executor or administrator of the other's estate. The other parent was appointed guardian of the property of the couple's child. Decedent died and the surviving parent, believing that the separation agreement prevented appointment as administrator even though the couple's child was the decedent's sole distributee, filed a petition for letters of administration naming surviving parent's sibling as administrator. Letters of the administration were granted to the sister who, with court approval, sold real estate belonging to the estate. The administrator died before a second property could be sold.

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The surviving parent-guardian then brought a second petition seeking the appointment of decedent's great-aunt, who resides in Oregon, as administrator d.b.n. On its own motion, the Surrogate's Court considered whether the surviving parent-guardian could be granted letters of administration in spite of the waiver in the separation agreement. The court decided that letters could be granted in the interest of the efficient administration of the estate, which would be much easier with an administrator who was resident of New York, and that the appointment was not barred by the separation agreement because the surviving parent would be appointed not as spouse but as guardian of the property of the sole distributee. *In re Piotrowski*, 62 Misc. 3d 683, 89 N.Y.S.3d 852 (Sur. Ct., Rockland Co. 2018).

NON-PROBATE PROPERTY

Change of Beneficiary of IRA Requires Completion of Custodian's Form

Decedent completed a number of documents connected to the transfer of decedent's investment accounts from one brokerage firm to another, including four IRAs. The decedent completed a "Client Data Form" which listed decedent's sister as beneficiary of the IRAs but which was not signed by the decedent. Decedent's sister was the designated beneficiary of the IRAs when they were held at the decedent's former broker. The required designation of beneficiary forms were sent to decedent but were not received by the brokerage firm, nor could they be found in decedent's residence after decedent's death. The brokerage firm paid the IRAs to the decedent's sister by creating "inherited IRA accounts" based on the information

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in the client data form, the sister's status as the only beneficiary of the predecessor accounts, and the personal knowledge of the firm's employees who had also advised the decedent when they were employees of the predecessor broker.

After decedent's death her brother received letters of administration in the decedent's estate and commenced a turnover proceeding in Surrogate's Court against decedent's sister and the brokerage firm. Surrogate's Court granted summary judgment to the administrator on the grounds that EPTL 13-3.2(e)(1), which requires a beneficiary designation for a wide variety of accounts including IRAs, must be made in a writing signed by the person making the designation and made in accordance with the rules governing the account. Here, the brokerage firm's decision that the unsigned client data form was sufficient to make the beneficiary designation could not stand in the face of the statutory requirement, and the absence of a signed designation also makes the concept of substantial compliance irrelevant.

The decedent's sister appealed and the First Department affirmed, agreeing that the statutory requirement was not satisfied. *In re Durcan*, 165 A.D.3d 585, 87 N.Y.S.3d 26 (1st Dep't 2018).

SURROGATE'S COURT

Court Has Jurisdiction Over Discovery Proceeding in Estate of Domiciliary Decedent Involving Foreign Real Estate and Personal Property

Testator's will gave testator's longtime companion the use of testator's Florida condominium and the use of certain personal property located therein. The will also included provisions creating a fund from which certain expenses related to the condominium were to be paid and a second fund for the benefit of the companion. The will was admitted to probate in the Albany Surrogate's Court and the nominated executors, the testator's children, received letters testamentary and then began a discovery proceeding against the testator's companion seeking information on the Florida real property and the personal property located in Florida, as well as the turnover of the certain personal property alleged to have been wrongfully diverted by the companion-respondent. The companion-respondent moved to dismiss the executors' petition on the grounds that the New York court lacked both personal jurisdiction over the respondent and subject matter jurisdiction.

The Surrogate granted the executors' petition and denied the respondent's motion. With respect to the personal property, the testator was a New York domiciliary and the will had been admitted to probate in the proper Surrogate's Court, which meant that the court had jurisdiction over all of the testator's personal property wherever located (EPTL 3-5.1(b)(2)).

Although the law of the situs governs questions of the validity and effect of the will's provisions dealing with the real property (EPTL 3-5.1(b)(1)), the issues in this discovery proceeding concerned inspection and valuation of the Florida condominium as part of the estate to be administered by the executors and did not involve matters that must be left to Florida law. The court therefore granted the executors' petition and denied the respondent's motion. *In re Estate of Mahoney*, 62 Misc. 3d 522, 90 N.Y.S.3d 819 (Sur. Ct., Albany Co. 2018).

TRUSTS

Failure to Transfer Title to New York Real Property to Trustee Means That Property Is Not Trust Property

Settlor's revocable trust was drawn in Illinois by an Illinois attorney but specified that the trust was governed by New York law. The trust provided that the decedent's companion had the right to reside in the decedent's house for 10 years after settlor's death, at which time the house was to be sold with the companion receiving $100,000 of the proceeds. The settlor's will poured over the residuary estate to the trust. Under Illinois law, the pourover provision means that the real estate is trust property even though title had never been transferred to the trustee by deed.

After settlor's death, settlor's son began a holdover proceeding against the companion based on a deed made by settlor transferring title to the residence to settlor and settlor's son as joint tenants with right of survivorship. The companion moved to dismiss the holdover proceeding.

The district court denied the motion to dismiss. First, the trust is governed by New York law, and under EPTL 7-1.18 the house could be made trust property only by a recorded deed from the settlor to the settlor as trustee. Even if the house were trust property, the settlor's execution of the deed changing title to the house was well within the settlor's power to revoke the trust. The court therefore set the matter for trial on the question of the validity of the deed creating the joint tenancy. *Dictor v. Martin*, 62 Misc. 3d 228, 88 N.Y.S.3d 857 (Dist. Ct., Nassau Co. 2018).

Failure to Diversify Not a Breach of Duty Under Trust Terms

Corporate trustee sought to settle its accounts of two trusts for the benefit of the same beneficiary. The corporate trustee was co-trustee with the child of the settlor of the lifetime and testamentary trusts from which the current trusts were formed. The child was the parent's partner in an investment management firm, and as co-trustee was given the authority to remove the corporate trustee at any time and for any reason, or even for no reason. During the service of the child as co-trustee, the trusts were invested in accord with the investment strategy favored by the family firm — 2% of the assets held in cash and the remaining 98% in equities, mainly large-cap United States stocks, with the most significant holdings in three different companies. The corporate trustee regularly reviewed the trust investments and made several suggestions to the co-trustee for diversifying the trusts' holdings, but the advice was always rejected. The co-trustees sought settlement of the accounts; after the resignation of the individual co-trustee the corporate co-trustee filed updated and amended petitions to settle its accounts. The beneficiary objected, alleging among other things that the corporate co-trustee had failed to diversify the trusts' investments. After a jury trial the Surrogate dismissed the objections and settled the accounts.

On appeal by the beneficiary the Appellate Division affirmed, agreeing with the Surrogate that the corporate trustee had acted with the "reasonable care, skill, and caution" required by the Prudent Investor Act (EPTL 11-2.3). The corporate trustee did advocate diversification of the trust investments but deferred to the co-trustee's decisions, deference which was proper, not only because of the co-trustee's expertise but also because the terms of the trusts showed the settlor's intent to give the individual co-trustee control of investment decisions by giving that co-trustee the power to remove the corporate trustee. In addition, the terms of original lifetime trust expressly stated the trustees were under no obligation to diversify investments. Finally, once the corporate trustee became sole trustee on the resignation of the co-trustee it began a gradual diversification of the trusts' investments. *In re Wellington Trusts*, 165 A.D.3d 809, 85 N.Y.S.3d 497 (2d Dep't 2018).

Provision for Establishment by Trustee of Minimum Commission Allows Use of Corporate's Trustee's Fee Schedule but Such Commission May Be Denied if Delay in Making Final Distributions of the Trust Assets to the Beneficiaries Was Sufficiently Egregious to Warrant Disallowance of Trustee's Commissions

Charitable beneficiary of decedent's revocable trust, which also received a pourover from the decedent's will, objected to the accounts of the corporate trustee, in part because the trustee computed its commissions using its published fee schedule. The Surrogate partially granted the trustee's summary judgment motion by approving the commissions shown on the accounting and the beneficiary appealed. The Appellate Division affirmed, agreeing with the Surrogate that the trust language concerning commissions, granting the trustee annual commissions allowed by New York law to testamentary trustees and allowing in any event "a minimum commission as set by the Trustee," allowed the trustee to calculate its annual commission in accord with its published fee schedules. However, as in the case of denying executor's commissions, *see In re Johnson*, 166 A.D.3d 1432, 89 N.Y.S.3d 381 (3d Dep't 2018), the Appellate Division affirmed the Surrogate's holding that the trustee's commission would be denied if it was determined that the trustee's delay in making final distributions of the trust assets to the beneficiaries was sufficiently egregious to warrant disallowance of trustee's commissions. *In re Johnson*, 166 A.D.3d 1435, 89 N.Y.S.3d 377 (3d Dep't 2018).

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

By Ilene Sherwyn Cooper

Amendment of Pleadings

In *In re Quinn*, the court granted the petitioner's motion to amend the petition in order to include specific allegations in support of her request for limited letters of administration. In reaching its result, the court opined that it need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit. Further, the court noted that a petitioner for limited letters of administration pursuant to SCPA 702 need only submit allegations made upon information and belief. Within this context, the court held that the proposed amendment was appropriate.

***In re Quinn*, N.Y.L.J., Aug. 6, 2018, p. 32 (Sur. Ct., Nassau Co.).**

Claim

In a proceeding pursuant to SCPA 1809, the petitioners, two of the decedent's five children, moved for partial summary judgment determining that they were entitled to a third of the decedent's net estate and his coin collection, and that they were not liable for their aliquot share of estate taxes. The motion was opposed by the executors of the estate, who cross-moved for partial summary judgment denying petitioners' claim and finding that the petitioners were liable for the estate taxes attributable to their recovery, if any.

The petitioners' claim was predicated on the terms of a Separation Agreement entered by the decedent and his first wife prior to their divorce. Specifically, the petitioners alleged that the terms of that Agreement required the decedent to bequeath them a third of his net estate, as defined in the Agreement, as well as all of his right, title and interest in his coin collection. The Agreement further provided that in the event the decedent failed to comply with its terms, the obligations thereunder would be a first charge and lien against his estate and its assets.

The decedent died survived by his second wife, three children of his first marriage, two of whom were the petitioners, and two children of his second marriage. Pursuant to the pertinent provisions of his will, the decedent bequeathed $2,000,000 to each of the petitioners, and directed that the balance of his estate be paid to two marital trusts for the benefit of his spouse during her lifetime, and upon her death, outright and free of trust in equal shares, per stirpes, to the petitioners' sibling and the two children of his second marriage. Further, Article First of the instrument contained a tax apportionment clause requiring that a beneficiary of the estate, other than a marital or charitable beneficiary, contribute his or her pro rata share to the estate tax liability. The nominated and appointed executors of the estate were the decedent's surviving spouse, his three children/remaindermen of the residuary trusts under his will, and a friend.

Following the admission of the decedent's will to probate, the petitioner's sibling executed a waiver of his interest under the Separation Agreement, but subsequently withdrew and retracted that waiver on notice to the executors. Although the petitioners claimed that the waiver was irrevocable, the court found otherwise, and determined that he was entitled to share in any recovery derived by the petitioners pursuant to the terms of the Separation Agreement.

In support of their motion for summary relief, the petitioners alleged that the Separation Agreement was a valid contract, which the decedent breached by failing to provide them with a third of his net estate, as well as his coin collection. To this extent, they maintained that the residuary provision in the will to their sibling was insufficient to satisfy the decedent's obligations to them, and moreover, the will made no mention of the decedent's coins.

In opposition to the motion, the executors alleged, *inter alia,* that nothing in the Separation Agreement required that the decedent provide equally for the three children of his first marriage, and that as such, the bequest of cash and the remainder interest in the marital trusts fully satisfied his obligations thereunder. In this regard, the executors also noted that the decedent had arranged for the petitioners to receive $200,000 per annum from his business, and had also made them, together with their sibling, the beneficiaries of a $2 million life insurance policy. Finally, the executors main-

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tained that the provision in the Agreement to make a testamentary bequest was unenforceable for lack of consideration.

In this latter regard, the court found the executors argument to be without merit. The court held that the terms of the Agreement specifically provided that it was "in consideration of the promises and of the mutual covenants and undertakings set forth [t]herein," regardless of whether in hindsight, adequate consideration was exchanged. Further, the court found that the decedent's obligation, pursuant to the terms of the Agreement, to keep in full force and effect a will that made a certain bequest to his children, constituted sufficient consideration for his commitment to bequeath them a third of his estate.

Turning to the issue of whether the decedent breached the Agreement, the court noted that this necessarily required it to determine (1) whether the decedent was required to make an outright bequest of a third of his net estate to his children, or whether he could satisfy that requirement by making one or more of them remaindermen of a trust; and (2) whether the decedent was required, by the terms of the Separation Agreement, to bequeath a third of his net estate equally to his children.

With respect to the first question posed, the court found, contrary to the petitioners' claims, that there was nothing in the Separation Agreement that required the decedent to make an outright bequest of his estate to his children, and that in fact, an interest as a trust remainderman would suffice. Moreover, the court held that the Separation Agreement was silent as to whether the decedent was required to bequeath a third of his estate equally to his three children. In view thereof, the court denied that branch of the petitioners' motion for summary judgment determining that the decedent breached the Separation Agreement to that extent.

However, the court denied the executors' motion for summary judgment as well, concluding that they had failed to establish a prima facie case that the one-third interest in the marital trusts of one child, combined with the general bequests to his other two children, amounted to a third of the decedent's net estate as defined in the Separation Agreement. To that extent, the court held that the determination of that issue would have to await a final accounting. Further, while the court held that the decedent had breached his Agreement to bequeath his coin collection to his children, it found that a question of fact existed as to the composition of the collection and the division of same among the petitioners and their sibling.

Finally, as to the issue of estate tax apportionment, the court concluded that since the petitioners' claim was lodged in a promise to make a testamentary disposition, any recovery thereunder was subject to their pro rata share of estate tax.

***In re Fisher*, N.Y.L.J., Dec. 11, 2018, p. 25 (Sur. Ct., Westchester Co.).**

Domicile

In a pending probate proceeding, the court was confronted with the issue of the decedent's domicile at death. An instrument purporting to be the will of the decedent was filed with the Surrogate's Court, Richmond County, by her son, who was the nominated executor thereunder. Subsequent thereto, the decedent's granddaughter, who was a child of a predeceased son, filed an Order to Show Cause requesting that the matter be transferred to Kings County Surrogate's Court pursuant to the provisions of SCPA 206 (1)(a) and SCPA 206 (3). More specifically, in support of the application, the movant alleged that the decedent had died domiciled in Poland, and as such, the proper venue for proceedings related to her will was the county where she left property. In opposition to the application, the petitioner alleged that the decedent had been a domiciliary of Richmond County for over two decades prior to her death.

The court opined that while every Surrogate's Court of the State has subject matter jurisdiction over the estates of domiciliary and non-domiciliary decedents who left property in New York, the proper venue of a proceeding related to a domiciliary decedent is the place of his/her domicile. Domicile was defined as a permanent place of residence to which a person intends to return. Thus, while a person can have multiple homes, there can only be one domicile. Under such circumstances, the issue of domicile is a mixed question of law and fact based upon such circumstances as where the decedent voted, registered his or her car, or filed income tax returns.

The court observed that when there are conflicting claims as to the domicile of the decedent at death, a hearing may be required to resolve the issue. To this extent, the burden of proof rests with the party alleging a change of domicile by clear and convincing evidence.

Accordingly, in view of the foregoing, the court directed that a hearing be held to determine whether the decedent died a domiciliary or non-domiciliary of New York at death, and, upon such determination, the proper venue for proceedings related to her estate.

***In re Grunwald*, N.Y.L.J., Jan. 28, 2019, p. 33 (Sur. Ct., Richmond Co.).**

Eligibility of Executor

In *In re Pepe*, the court granted the objectants' motion for summary judgment disqualifying the nominated executor in the propounded will from serving. The objectants argued that the respondent delayed filing the propounded will for probate, occupied a two family home constituting a part of the estate without paying use and occupancy, collected rents, and refused his siblings, who were equal beneficiaries under the will, access to the premises. They also claimed that the respondent, though not a fiduciary, instituted an eviction proceeding against the rent-paying tenant of the premises, who then ceased paying rent during the pendency of the proceeding, which was stayed until such time as a fiduciary was appointed. Although the court observed that a testator's selection of a fiduciary is generally given great deference, under the circumstances, the objectants had met their burden of proving that the nominated executor had wasted and improvidently managed estate assets. As such, the court concluded his disqualification was warranted.

***In re Pepe*, N.Y.L.J., Mar. 5, 2018, p. 19 (Sur. Ct., Bronx Co.).**

Paternity

In *In re Taylor*, the petitioner in a compulsory accounting proceeding moved for the issuance of a court-ordered subpoena directing the New York City Office of the Chief Medical Examiner to release DNA material of the decedent in its possession. In response to the motion, the court directed a hearing to determine whether it should order a posthumous genetic marker test, as the results thereof would be relevant to the petitioner's standing in the proceeding. The court opined that the determination of whether to order genetic marker testing required the balancing a various factors, including whether genetic marker testing was practicable and reasonable under the totality of circumstances, and also whether testing would impose undue hardship on the decedent's family.

At the hearing, petitioner's mother testified, *inter alia*, to having a relationship with the decedent for a number of years, and to a sexual relationship with him at the time of the petitioner's conception. She also stated that after the petitioner was born she listed the decedent on petitioner's birth certificate, and instituted a paternity and support proceeding against the decedent. On cross-examination, petitioner's mother admitted that she had only learned about the decedent's death in the 2001 World Trade Center attack when she had received paperwork indicating that the paternity proceeding had been dismissed as a result. The assistant director of the forensic biology laboratory at the medical examiner's office next testified that genetic material had been collected from the World Trade Center site, which were compared to material gathered from the decedent's toothbrush, and were positively identified as belonging to the decedent. The petitioner and the decedent's sister also testified at the hearing, the latter stating that she had never been told by her brother that he was the father of a child.

In its analysis of the proof, the court held that its decision to order a genetic marker test was not dependent on any showing by the petitioner that the decedent had openly and notoriously acknowledged his paternity. Within this context, the court held that it was reasonable and practicable, and not unduly burdensome, to direct a genetic marker test utilizing the genetic marker material in the possession of the medical examiner and a DNA sample from the petitioner. Further, the court ordered that such testing take place before any discovery relative to the open and notorious prong of EPTL 4-1.2(a)(2)(C), the court noting that the results thereof could dispose of the entire proceeding.

***In re Taylor*, N.Y.L.J., Apr. 18, 2018, p. 26 (Sur. Ct., N.Y. Co.).**

Reargument

In *In re Van Zwienen*, the court denied a motion to reargue its prior order finding that the movant had failed to demonstrate that it had misapprehended or overlooked any matters of law or fact. The decedent died survived by a spouse and four children. Pursuant to the pertinent provisions of his will, the decedent devised and bequeathed the residue of his estate to a revocable trust, the terms of which granted his spouse the right to live in his home for a six month period following his death, and thereafter directed that the premises be sold and the proceeds divided among his spouse and children. Following a contested probate proceeding, the decedent's will was admitted to probate, and letters testamentary issued to one of his children, who was also successor trustee of the revocable trust.

Thereafter, the trustee commenced a proceeding to recover possession of the property, and a judgment against the spouse for her use and occupancy of the premises. Upon default of the respondent/spouse, the application was granted, and the court directed that the property be vacated within ten days after service upon her of a copy of the court's order.

The respondent subsequently moved to vacate her default and filed an order to show cause seeking to restrain enforcement of the court's order. Following oral argument, the court denied respondent's motion to vacate and again directed her to vacate the subject premises. Respondent appealed from this determination. During the pendency of her appeal, respondent moved the court for a statutory stay pursuant to CPLR 5519 (a)(6). The application was granted conditioned upon respondent's filing of an undertaking in the amount of $2,400 per month, payable to petitioner, during the pendency of her appeal. The undertaking was never filed. Instead, respondent moved to renew and reargue the court's order.

Additionally, respondent submitted an order to show cause requesting a restraining order and stay of the proceedings. By decision and order, the court declined to sign the order to show cause finding that it sought the same relief as respondent's prior motion pursuant to CPLR 5519, which was subject to the pending motion for renewal and reargument. Respondent filed a motion to reargue this decision, therein requesting an order staying the undertaking and restraining her eviction.

The court noted that the provisions of CPLR 2221(d)(2) require that a motion to reargue be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining its prior motion. More specifically, the court opined that the purpose of the motion is to convince the court that it was wrong, rather than to serve as a vehicle to revisit questions previously decided.

Within this context, the court found that respondent's arguments were a reiteration of her prior arguments in support of a statutory stay, and concluded that she had failed to demonstrate that reargument was warranted.

***In re Van Zwienen*, N.Y.L.J., Dec. 17, 2018, p. 31 (Sur. Ct., Suffolk Co.).**

Revocation of Letters

Before the court in *In re Bishop* was an application by the decedent's son, a co-administrator of the estate, to revoke the letters of administration issued to his co-administrator, the decedent's daughter and only other distributee. In support of his application, the petitioner alleged that the respondent evinced a want of understanding and unfitness to serve as fiduciary, and accordingly removal was required pursuant to SCPA 711 (2) and (8). More specifically, the petitioner claimed that he had made multiple attempts to work with the respondent in selecting an appraiser for purposes of selling the decedent's real estate and she repeatedly delayed and failed to cooperate in the process. The respondent, though given the opportunity to file objections to the petition, failed to do so.

The court opined that while the provisions of SCPA 711 set forth the grounds which serve a basis for removal, even with proof of any one of those grounds, the court nevertheless had the discretion to determine whether removal was appropriate and in the best interests of the estate. To that extent, the court observed that removal is to be exercised sparingly, and only when the purported misconduct of a fiduciary endangers the estate.

Within this context, the court concluded that the petitioner's uncontroverted allegations regarding the respondent's refusal to take the necessary steps to collect and distribute estate assets, combined with her failure to state any reason why the assets should be retained, reflected a want of understanding of her fiduciary duties, and warranted the revocation of her letters of administration. Accordingly, the petitioner's application was granted.

***In re Bishop*, N.Y.L.J., Nov. 29, 2018, p. 27 (Sur. Ct., Bronx Co.).**

Summary Judgment

In *In re Gold*, a contested probate proceeding, the court granted summary judgment in petitioner's favor, finding, in particular, that none of the decedent's prior wills had provided for the objectant, that the attorney-draftsperson had noted that the decedent was clear-minded and handled his own personal and financial matters at or about the time of execution, and the witness affidavits made no mention of the decedent suffering from any physical or mental limitations. Finally, the court noted that the objectant had failed to submit any evidence that created a triable issue of fact as to the issues raised.

***In re Gold*, N.Y.L.J., Aug. 6, 2018, p. 27 (Sur. Ct., N.Y. Co.).**

Summary Judgment

Before the court in *In re Levick* was a contested probate proceeding, *inter alia*, in which the proponent moved for summary judgment dismissing the objections of the decedent's son alleging lack of due execution and undue influence. The decedent, a real estate attorney, died at the age of 73, survived by the proponent, who was his surviving spouse, and two adult children from a prior marriage.

The record revealed that shortly after being diagnosed with pancreatic cancer, he revised his estate plan with the assistance of a former colleague, who had drafted a will for him in 2002. The instrument that was prepared and executed provided cash bequests to his two children, and contained in *in terrorem* clause. In addition, the instrument created a trust for the benefit of the decedent's spouse, and gave her the power to appoint the remainder thereof to a class limited to her children and their issue. In comparison to the propounded will, the decedent's penultimate will, dated in April 2011, provided his children with a 50% remainder interest of a credit shelter trust created thereunder for the benefit of his spouse.

In support of her motion for summary judgment, the proponent submitted the testimony of the attesting witnesses to the instrument, together with that of the attorney-draftsperson, who oversaw the execution, all of which established that the requisite statutory formalities of due execution had been satisfied. Based upon the foregoing, as well as the presumption of regularity that arises from an attorney-supervised execution, the court determined that the proponent had established a prima facie case of due execution. The court found that the objectant failed to submit evidence to demonstrate any irregularity in the execution ceremony, and therefore granted summary judgment in proponent's favor dismissing the objection on the issue of due execution.

With respect to the issue of undue influence, the objectant relied on the fact that the proponent attended the initial meeting between the attorney-draftsperson and the decedent at their home, and may have commented on the will provisions. Further, the objectant referenced some discrepancies between the attorney-draftsperson's notes and the will provisions, and alleged that the proponent accompanied the decedent to counsel's office on the date the will was executed. Nevertheless, the court held that the evidence was insufficient to raise questions of fact on the issue, finding that even if it were enough to demonstrate motive and opportunity to exercise undue influence, it provided no basis from which to conclude that undue influence was actually exercised. In fact, while the objectant alleged that the proponent or her son had stood in a confidential relationship with the decedent, the court determined that the objectant had failed to provide any evidence that the decedent had reposed his trust in them to handle his affairs.

Accordingly, the proponent's motion for summary judgment was granted, and the objections to probate of the propounded will were dismissed.

***In re Levick*, N.Y.L.J., Nov. 9, 2018, p. 22 (Sur. Ct., N.Y. Co.).**

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