NYSBA WINTER 2016 | VOL. 49 | NO. 4

Trusts and Estates Law Section Newsletter

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

Inside

- Surrogate's Court Procedure Act Article 17-A and Its Ever-Changing Landscape
- Four Practical Considerations When Making Charitable Donations
- Defeating Summary Judgment in an SCPA Turnover Proceeding

Your practice is about to change!

NYSBA Estate Planning System

ANNOUNCING

Created by Michael O'Connor, Esq.

The Newest Lexis/NYSBA Document Assembly Product

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

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

Special Introductory Price

NYSBA Members

Save over $300 off the list price.

Offer expires January 30, 2017

Product Code CD-ROM: 6270
Product Code Downloadable: 6270E
Member Price (before 1/30/2017): $974.25
Member Price (after 1/30/2017): $1,104.00
Non-Member Price: $1,299.00

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

Early praise for the NYSBA Estate Planning System:

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

- Gary R. Mund, Esq.

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

Table of Contents

Page

A Message from the Chair 4
Magdalen Gaynor

Editor's Message 5
Jaclene D'Agostino

Surrogate's Court Procedure Act Article 17-A and Its Ever-Changing Landscape 6
Robert M. Harper

Useful Mobile Apps for the Trusts and Estates Practitioner 11
Parth N. Chowlera

Four Practical Considerations When Making Charitable Donations 12
Andrew S. Katzenberg

A Sea Change in the Valuation Discount Rules: Proposed Regulations Under the Special Valuation Rules 14
Quincy Cotton

Defeating Summary Judgment in an SCPA Turnover Proceeding 18
Gary E. Bashian

Recent New York State Decisions 21
Ira M. Bloom and William P. LaPiana

Case Notes—New York State Surrogate's and Supreme Court Decisions 24
Ilene Sherwyn Cooper

Florida Update 29
David Pratt and Jonathan A. Galler

Message from the Chair

Over the past several years, the Section has supported the comprehensive review of provisions in New York Law regarding the creation and administration of gratuitous trusts. New York has substantial provisions enacted over many years in various sections of the EPTL and SCPA, some of which have their origins in statutes dating back to 1830.

Other provisions of New York's law of trusts and estates are found in case law, developed over more than 200 plus years and which has not been codified. Many states without this history of earlier provisions have enacted the Uniform Trust Code. Several states with a similar history to New York's, including our neighboring state of New Jersey, have enacted the Uniform Trust Code.

Ira Bloom, former chair of this Section and a professor at Albany Law School, and William LaPiana, a professor at New York Law School, have produced a report to the Legislature. It puts forth a proposal for enactment of a new Article 7A in the EPTL. Its purpose is to coordinate provisions and produce a modern New York trust code. The report will next be presented to the NYSBA for review and if approved, delivered to the Legislature.

In October, many Section members journeyed north of Albany to Saratoga Spa State Park for our Fall meeting, and stayed at the Gideon Putnam Hotel which has achieved National Historic Landmark status.

Attendees participated in various roundtables on topics and issues relating to persons with special needs, and also discussed the Treasury's proposed regulations under Section 2704 of the Internal Revenue Code. This was followed by a program on the area of special needs planning. The program addressed the types of documents that are required in such situations, as well as issues raised in supplemental needs trusts.

For our dinner event the attendees walked across the Saratoga Spa Park to the Automobile Museum. None of the members of our group had been aware that at an earlier time, New York State had almost 100 manufacturers of cars. In the early 1900's New York State residents were the largest owners of cars in the United States. This continued as New York built the country's first parkways in the 1920s and 30s. The auto industry was a large part of economic health in New York in the 1940s. The companies were small but produced famous cars of the time period. The industry eventually died as Detroit took over in later years. The evening allowed us to learn about this little known industry while dining and socializing with colleagues.

I have enjoyed the past four years as an officer of this Section. We are an active Section and successful because of the work of more than 16 committees and its members. A list of committees appears in the last pages of this *Newsletter*. I encourage those who have not yet joined a committee to do so. You will find the work rewarding and, in many cases, be a part of a change in laws that benefits our practice and our clients.

Magdalen Gaynor

NEW YORK STATE BAR ASSOCIATION

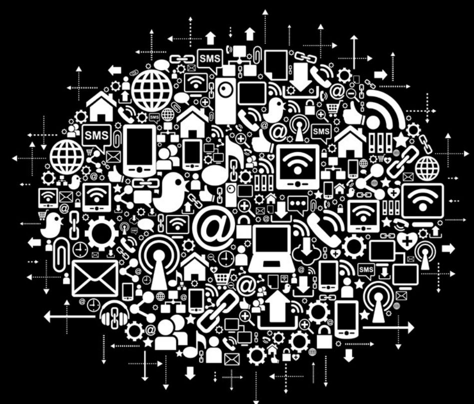
CONNECT WITH NYSBA

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

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

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

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



Message from the Editor

This issue of the *Newsletter* includes articles on some timely topics that address the changing landscape in certain areas of the law, which are particularly appropriate as we look ahead to a new year.

Quincy Cotton's article details the proposed regulations that the Treasury Department issued in mid-2016, which significantly modify rules applicable to the valuation of interests in family entities for gift, estate, and generation-skipping transfer tax purposes. Also addressing a seemingly changing area of the law is Robert Harper's article discussing Article 17-A guardianship proceedings in the face of several recent decisions scrutinizing the statute, and the commencement of federal litigation raising questions as to its constitutionality.

Also included in this issue is Gary Bashian's overview of the use of summary judgment motions in the context of SCPA turnover proceedings, Andrew Katzenberg's analysis of practical considerations in the context of charitable giving, and suggestions from Parth Chowlera of the Section's Technology Committee as to mobile apps that may be useful to the trusts and estates practitioner.

Our next submission deadline is March 10, 2017.

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

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

Naftali T. Leshkowitz
ntl@leshkowitzlaw.com
Associate Editor

Sean R. Weissbart
srw@mormc.com
Associate Editor

Thomas V. Ficchi
tficchi@cahill.com
Associate Editor

Jaclene D'Agostino

SOUTH DAKOTA TRUST COMPANY LLC

Serving Families in Perpetuity:

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

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

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

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

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

(paid advertisement)

Surrogate's Court Procedure Act Article 17-A and Its Ever-Changing Landscape

By Robert M. Harper

Article 17-A ("Article 17-A") of the Surrogate's Court Procedure Act ("SCPA") has garnered a great deal of attention in the past year. Indeed, as evidenced by the many recently published decisions interpreting Article 17-A, the Surrogate's Courts have been called upon to address novel issues involving the statute, including the extent to which a plenary guardianship of a person who is intellectually or developmentally disabled is warranted; whether a Surrogate's Court has the authority to tailor an Article 17-A guardianship; and whether a person who is intellectually or developmentally disabled has a right to assigned counsel in a proceeding commenced to appoint an Article 17-A guardian for that person. While these issues, among others, are anything but settled (and are almost certain to spark legislative action in the near future), this article seeks to provide practitioners with an update on the many recent developments involving Article 17-A.

The Historical Background

Article 17-A provides for the appointment of guardians for persons who are intellectually or developmentally disabled. As initially enacted in 1969, Article 17-A governed guardianship of persons who were mentally retarded.[1] In 1989, the Legislature amended Article 17-A in order to make it applicable to persons who were developmentally disabled.[2] The Legislature has since amended Article 17-A to omit references contained therein to mental retardation and to substitute them for intellectual disability.[3]

In first enacting Article 17-A several decades ago, the Legislature sought "to provide a means for parents of mentally retarded children to continue exercising decision making power after those children reached age twenty-one."[4] The underlying rationale was that mental retardation was a permanent condition, which had "no realistic likelihood of change or improvement over time", such that the powers that the parents had over minor children who were mentally retarded should last for the duration of the mentally retarded children's lifetimes.[5] The Legislature apparently made the same assumptions in extending Article 17-A to persons who were developmentally disabled.[6]

Of course, societal attitudes toward persons with intellectual and developmental disabilities have changed in the decades since the Legislature first enacted Article 17-A.[7] Now more than ever before, emphasis is placed upon maximizing the lives of those persons by way of supported decision making, rather than the substituted decision making that oftentimes arises from an Article 17-A guardianship.[8]

The Current Statutory Framework

A plenary guardianship under Article 17-A "wholly removes" the legal right of a person who is intellectually or developmentally disabled "to make decisions over one's own affairs and vests in the guardian virtually complete power over such individual."[9] When a plenary guardianship is granted under Article 17-A, the guardian has what courts have described as "virtually total power over [the] ward's life"; and is empowered to made decisions concerning the ward's medical care, place of abode, social associations, travels, employment, and living arrangements.[10] Consequently, the Surrogate's Courts have recognized that a plenary Article 17-A guardianship results in an "immense loss of individual liberty" for a person who is intellectually or developmentally disabled within the meaning of Article 17-A.[11]

Under Article 17-A, a person who is intellectually disabled is one "who is permanently or indefinitely incapable of managing oneself and/or one's own affairs because of an intellectual disability."[12] The respondent's condition "must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual disabilities."[13]

A person who is developmentally disabled is one who has a permanently "impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability," whose disability: "(a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury"; (b) "is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities"; or (c) "is attributable to [certain diagnoses of] dyslexia"; and (d) originates before such person attains age twenty-two."[14] The term person with a developmental disability also includes a person who has been certified as

> (i) having an intellectual disability, or
> (ii) having a developmental disability, as defined in [Mental Hygiene Law § 1.03], which (A) includes intellectual

> disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability.[15]

While not opining as to what the answer should be, at least one Surrogate's Court has raised the question of "whether a diagnosis of autism . . . should even be part of the statutory predicate for consideration of a person's eligibility for a 17-A guardianship."[16] It appears that this is because the autism spectrum is "increasingly extended" and may not lend itself to the "one size fits all" guardianship that typically arises under Article 17-A.[17]

Article 17-A does not obligate a Surrogate's Court to "make a specific finding of fact that the person requiring guardianship is mentally disabled."[18] On the contrary, where the evidence presented includes certifications from a licensed psychologist and a licensed physician (or two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual and developmental disabilities), and the respondent's best interest will be served by the appointment of a guardian, the Surrogate's Court has the authority to appoint a guardian under Article 17-A.[19] Critically, a showing that the respondent is a person who is intellectually or developmentally disabled is not, in and of itself, sufficient to justify an Article 17-A guardianship.[20]

The Best Interest of a Respondent

A party petitioning for Article 17-A guardianship must establish that the imposition of a guardianship would be in the best interest of the person with an intellectual or developmental disability.[21] The term "best interest" is not specifically defined in Article 17-A.[22] As a result, at least one Surrogate has described it as "amorphous," and noted that the "criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed."[23]

In the absence of statutory guidance as to what the term "best interest" involves, the Surrogate's Courts have considered the functional capabilities and limitations of the respondents who are alleged to be in need of Article 17-A guardians.[24] The courts also have concluded that Article 17-A guardianship is only warranted when a respondent's functional limitations render it necessary.[25] They have reasoned that doing so properly accounts for the "emerging awareness that there is a wide range of functional capacity found among persons with diagnoses of intellectual disability and developmental disability."[26]

What is more, in determining whether a respondent's best interest will be served by the appointment of an Article 17-A guardian, a court must consider "the due process requirement that any resulting deprivation of [the] respondent's liberty must employ the 'least restrictive means' available to achieve the objective of protecting the individual and the community."[27] To determine whether lesser restrictive alternatives to an Article 17-A guardianship are available, a court must inquire into the resources that are accessible to help the respondent.[28] The resources may include "a support network of family, friends, and supportive services."[29] As guardianship under Article 17-A oftentimes is viewed as an option of last resort, Surrogate's Courts have concluded that tailored guardianships under Article 81 of the Mental Hygiene Law ("Article 81") and the use of advance directives may be lesser restrictive means, which preclude the imposition of Article 17-A guardianships on respondents in appropriate circumstances.[30]

Thus, in *Matter of Sean O.*, Suffolk County Surrogate John M. Czygier, Jr. denied the petitioners' application to be appointed as Article 17-A guardians for their twenty-seven year-old son.[31] Surrogate Czygier reasoned that, although the respondent had cognitive limitations, he functioned "as a capable adult who engages in supportive decision making with his family and support professionals"; "is aware of his limitations and recognizes his need to turn to others for guidance on certain matters; and "had executed a health care proxy authorizing his parents to make medical decisions for him."[32] Those factors established to the court that it was not necessary to appoint Article 17-A guardians for the respondent.[33]

When advising clients whether to pursue guardianship under Article 17-A, practitioners should be careful to ensure that their clients will be able to establish that the requested guardianship is in the best interest of the respondent; that it is necessary; and that the guardianship is the least restrictive option that is available. If the clients fail to make those showings in seeking guardianship under Article 17-A, their petitions may be denied, even when uncontested.

To Tailor or Not to Tailor an Article 17-A Guardianship

Relatively recent case law suggests that guardianship under Article 17-A is an "all or nothing" remedy that does not permit the Surrogate's Court to tailor a guardianship to tend to the respondent's functional capabilities and limitations. Indeed, one Surrogate has gone so far as to describe Article 17-A as "a blunt instrument allowing for none of the tailoring available under Article 81", which specifically requires that a guardianship be tailored to address the actual needs of a respondent.

However, the conclusion that Article 17-A does not permit tailoring is not necessarily universally held.[34] Some Surrogate's Courts have appointed Article 17-A guardians "with tailored powers and subsequently imposed the type of detailed reporting requirements similar to those found in Article 81."[35] In stark contrast to the Surrogate that described Article 17-A as a "blunt instrument" that does not permit tailoring, another Surrogate found that a Surrogate's Court "that has the power to modify a guardianship order once it has been issued to meet the needs of the ward surely also has the power to tailor the order to meet such needs at the outset."[36]

Given that the Surrogates have reached differing conclusions as to whether an Article 17-A guardianship can be tailored to address the functional capabilities and limitations of respondents in guardianship proceedings before them, it may be necessary for the Legislature to amend Article 17-A to resolve this issue once and for all. Absent such legislative action, the issue of whether an Article 17-A guardianship may be tailored may vary from county to county, depending on how the local Surrogate's Court interprets the statute.

The Right to Assigned Counsel

Recent decisions from Surrogate's Courts in Chautauqua County and Kings County recognize that Article 17-A respondents who lack financial resources to retain counsel may have a constitutionally mandated right to assigned counsel.[37] The Surrogates have relied upon SCPA 407, which permits a Surrogate's Court to assign counsel for an indigent party when the court "determines that such assignment of counsel is mandated by the constitution of this state or of the United States."[38] In relying upon SCPA 407, the Surrogate's Courts have found that the right of an indigent individual to make his or her own medical decisions is protected by the due process clauses of the federal and state constitutions.[39] Thus, where an Article 17-A guardianship proceeding implicates the respondent's right to make medical decisions for himself or herself, a respondent who lacks the resources to afford counsel may have a constitutionally guaranteed right to assigned counsel.[40]

Kings County Surrogate Margarita Lopez Torres also has explained that the appointment of a guardian ad litem for the respondent does not obviate the need to assign counsel for the respondent.[41] The reason is that the role of the guardian ad litem is different from that of assigned counsel.[42] The role of the guardian ad litem—which Surrogate Lopez Torres has described as that of a "neutral evaluator"—involves conducting an investigation; rendering a report; and making recommendations concerning the respondent's needs to the Surrogate's Court.[43] In contrast, the role of assigned counsel is "to actually represent and advocate for the respondent" in safeguarding the respondent's "rights, explain[ing] the consequences, and counsel[ing] the respondent about available alternatives to the proceeding."[44] Presumably, the available alternatives include guardianship under Article 81 and the use of advance directives.

Chautauqua County Surrogate Stephen Cass's recent decision in *Matter of L.S.* is illustrative.[45] There, the petitioner petitioned to be appointed as an Article 17-A guardian for the respondent, seeking a directive authorizing the petitioner "to make all medical and dental decisions for [the respondent] and to render consent to all medical procedures that are necessary for the wellbeing of" the respondent.[46] Noting that the right to make medical decisions for one's self is a constitutionally mandated due process right, and that the respondent was indigent, Surrogate Cass found that the respondent had a right to assigned counsel, pursuant to SCPA 407.[47] Surrogate Cass explained that, according to the criteria propounded by the New York State Office of Indigent Legal Services, a person is presumed to be eligible for assigned counsel if the person's "net income is at or below 250 percent of the federal poverty level guidelines."[48] The presumption may be rebutted by "compelling evidence that the applicant has the financial resources to pay for a qualified attorney"; and the "resources of a third party shall not be considered [in the absence of the third party's consent] to pay for counsel."[49] Based upon the sworn allegations in the petition that the respondent had no property or income, the Surrogate appointed the Chautauqua County Public Defender to represent the respondent.[50]

Although Surrogate Lopez Torres reached a similar result in *Matter of Leon*, the Surrogate applied different reasoning in concluding that the respondent in an Article 17-A proceeding—who lacked the resources to pay for an attorney—had a right to assigned counsel.[51] Indeed, Surrogate Lopez Torres found that Article 17-A implicated the respondent's constitutionally protected due process rights to privacy, "to refuse unwanted medical treatment," and "to make personal decisions regarding marriage, procreation, contraception, family relationship, child rearing, and education."[52] As such, the Surrogate applied a three-pronged test to determine whether a respondent in an Article 17-A proceeding—whose physical liberty was not at stake—had a right to assigned counsel.[53] The three factors for consideration were: (a) "the private interest that will be affected"; (b) "the risk of an erroneous deprivation of such interest through the procedures used"; and (c) "the government's interests."[54] Applying those factors, Surrogate Lopez Torres held that fundamental liberty interests were at stake; the absence of counsel, among other things, subjected the proceeding to the possibility for an erroneous determination; and the government's financial interest in avoiding the obligation to pay for assigned counsel did not outweigh the respondent's interest in receiving such counsel.[55] As a result, the Surrogate appointed counsel for the respondent from the Kings County 18-B panel.[56]

The foregoing cases demonstrate that a respondent in an Article 17-A proceeding who lacks the financial means with which to retain counsel may have a constitutionally protected right to assigned counsel. What remains to be seen is whether—and to what extent—other Surrogate's Courts follow suit in assigning counsel for indigent respondents in Article 17-A proceedings.

The Right to a Hearing

Under SCPA 1754, the Surrogate's Court must hold a hearing in an Article 17-A proceeding, except when the petitioners are the respondent's parents; or the application is made by someone other than the respondent's parents, but with the consent of the respondent's parents.[57] The court has discretion to appoint a guardian ad litem for the respondent; the respondent has a right to a jury trial; and the court possesses discretion to dispense with the respondent's presence at a hearing where the physicians' certifications establish to the court's satisfaction that the respondent is "medically incapable of being present to the extent that attendance is likely to result in physical harm to" the respondent.[58] Practically speaking, the vast majority of Article 17-A guardianships are granted without a hearing, either before a court or a jury (which almost never occurs).[59]

To justify the appointment of a guardian, Article 17-A requires that the Surrogate's Court be satisfied that the "best interest" of the person who is intellectually or developmentally disabled "will be promoted by the appointment of a guardian."[60] Commentators have explained that the applicable standard of proof "is presumptively preponderance of the evidence."[61] In this respect, among many others, Article 17-A contrasts with Article 81, which specifically requires that the petitioner establish that a guardianship is necessary by clear and convincing evidence.[62]

Recent case law suggests that Surrogate's Courts are more carefully scrutinizing Article 17-A guardianship applications than they did in the past. Petitioners seeking guardianship under Article 17-A should be well prepared to make the evidentiary showing required by Article 17-A at a hearing, as the failure to do so is more likely now than ever before to result in the dismissal of their petitions.[63]

Complications Concerning Article 17-A

Closely related to the legal issues discussed above are concerns that recently have arisen relative to the constitutionality of Article 17-A and the manner in which it provides for persons who are intellectually or developmentally disabled to be treated. These concerns have resulted in federal litigation concerning Article 17-A, as well as the so-called Olmstead Cabinet, which has called for reforms to be made to Article 17-A. The underlying concerns are briefly discussed below.

In September 2016, a not-for-profit corporation called Disability Rights New York ("DRNY") commenced a federal lawsuit, alleging that Article 17-A is unconstitutional and impermissibly discriminates against people who have intellectual and developmental disabilities.[64] The complaint filed in the DRNY action seeks a judgment declaring that Article 17-A violates the United States Constitution and certain federal statutes, as well as injunctive relief concerning the granting, modification, and termination of Article 17-A guardianships.[65] It will be interesting to see whether DRNY's lawsuit—which appears to seek to transform Article 17-A's approach to guardianship into that which typically is granted under Article 81—sparks legislative action to amend Article 17-A. After all, guardianship under Article 17-A oftentimes is more streamlined, more user-friendly, and less expensive than an Article 81 guardianship.

Previously, Governor Cuomo created the Olmstead Cabinet to address concerns that arose as a result of the United States Supreme Court's 1999 decision in *Olmstead v. L.C.*[66] The *Olmstead* decision addressed how persons who had mental disabilities should be treated under the Americans with Disabilities Act of 1990.[67] Based upon the *Olmstead* decision, the Olmstead Cabinet's report recommends that Article 17-A be updated to permit guardianships granted thereunder to be tailored to meet each respondent's functional limitations. The Olmstead Cabinet further recommends that Article 17-A be amended to "mirror the more recent Article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision making." Although the Governor's office published it in October 2013, the Olmstead Cabinet's report has yet to bring about legislative action with respect to Article 17-A.

It remains to be seen what impact, if any, the DRNY lawsuit and recommendations of the Olmstead Cabinet will have in bringing about changes to Article 17-A. However, one fact that appears to be undeniable is that Article 17-A will change in the not-too-distant future, and the concerns that gave rise to the DRNY action and the Olmstead Cabinet certainly will be part of the conversation leading up to any statutory amendments that result.

Conclusion

While the text of Article 17-A has not changed much in the past few decades, the manners in which Surrogate's Courts are interpreting—and applying—Article 17-A appears to be evolving. In advising clients whether to commence Article 17-A guardianship proceedings, practitioners should be mindful of how the Surrogate's Courts are applying the statute. The failure to consider the many recent developments involving Article 17-A may well result in the denial of applica-

tions made thereunder, which is a result that both practitioners and their clients would like to avoid.

Endnotes

1. *Matter of Chaim A.K.*, 26 Misc. 3d 837, 842, 885 N.Y.2d 582 (Sur. Ct., N.Y. Co. 2009).
2. *See id.*
3. Mem. in Support of A.2125-a, *available at:* http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02125&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y (last viewed on October 10, 2016).
4. *Chaim A.K.*, 26 Misc. 3d at 842.
5. *See id.*
6. *See id.*
7. *Matter of D.D.*, 50 Misc. 3d 666, 669, 19 N.Y.S.2d 867 (Sur. Ct., Kings Co. 2015).
8. *See id.*
9. *See D.D.*, 50 Misc. 3d at 668 (citation omitted).
10. *Matter of Mark C.H.*, 28 Misc. 3d 765, 776, 906 N.Y.S.2d 419 (Sur. Ct., N.Y. Co. 2010).
11. *See id.*
12. *See D.D.*, 50 Misc. 3d at 667-68.
13. *See id.*
14. SCPA 1750-a(1).
15. SCPA 1750-a(2).
16. *See Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co.).
17. *See id.*
18. *Matter of Colette G.*, 221 A.D.2d 440, 440-41, 633 N.Y.S.2d 807 (2d Dep't 1995).
19. *See id.*
20. *See Sean O.*, *supra* note 16.
21. *Matter of Hytham M.G.*, 52 Misc. 3d 1211(A), at *3 (Sur. Ct., Kings Co. 2016); *Matter of Amber M.*, N.Y.L.J., Oct. 7, 2016, at 39 (Sur. Ct., N.Y. Co.).
22. SCPA 1750 and 1750-a.
23. *See Hytham*, 52 Misc. 3d 1211(A), at *3.
24. *Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co,); *Matter of D.D.*, 50 Misc. 3d 666, 669, 19 N.Y.S.2d 867 (Sur. Ct., Kings Co. 2015).
25. *See Sean O.*, *supra* note 16.
26. *See D.D.*, 50 Misc. 3d at 669.
27. *See Sean O.*, *supra* note 16..
28. *See D.D.*, 50 Misc. 3d at 669-70.
29. *See id.*
30. *Matter of Antonio C.*, 52 Misc. 3d 1212(A), at *3 (Sur. Ct., Kings Co. 2016); *D.D.*, 50 Misc. 3d at 675.
31. *See Sean O.*, *supra* note 16.
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*; *Matter of Yvette A.*, 27 Misc. 3d 945, 949-51, 898 N.Y.S.2d 420 (Sur. Ct., N.Y. Co. 2010); *Matter of Joyce G.S.*, 30 Misc. 3d 765, 769, 913 N.Y.S.2d 910 (Sur. Ct., Bronx Co. 2010); *see also Matter of Anonymous G.*, N.Y.L.J., Mar. 21, 1994, at 25, col. 4 (Sur. Ct., Nassau Co.) ("There could, of course, be an intermediate area where she may need a guardian for limited purposes only. In those cases where the court finds that full guardianship of the property is not required, limited guardianship of the property is authorized pursuant to SPCA 1756. Utilizing the court's inherent powers pursuant to SCPA 202, the court should be able to grant limited guardianship of the person as well.").
36. *Yvette A.*, 27 Misc. 3d at 949-51.
37. *Matter of L.S.*, N.Y.L.J., July 26, 2016, at 32 (Sur. Ct., Chautauqua Co.); *Matter of Zhuo*, N.Y.L.J., Oct. 7, 2016, at 43 (Sur. Ct., Kings Co.).
38. *See id.*
39. *See id.*
40. *See id.*
41. *Matter of Leon*, 2016 WL 5724234, at *5 (Sur. Ct., Kings Co. Oct. 3, 2016).
42. *See id.*
43. *See id.*
44. *See id.*
45. *Matter of L.S.*, N.Y.L.J., July 26, 2016, at 32 (Sur. Ct., Chautauqua Co.).
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *Matter of Leon*, 2016 WL 5724234, at *1-5 (Sur. Ct., Kings Co. Oct. 3, 2016).
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. SCPA 1754.
58. *See id.*
59. N.Y. City Bar. Ass'n Report of the Mental Health Comm. & Disability Law Comm., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 17 C.U.N.Y. L. Rev. 287, 304 (2015).
60. *Matter of Mueller*, 25 Misc. 3d 165, 166, 887 N.Y.S.2d 768 (Sur. Ct., Dutchess Co. 2009).
61. *See* N.Y. City Bar Ass'n Report, *supra* note 59.
62. *See id.*
63. *Matter of Sean O.*, N.Y.L.J., Oct. 7, 2016, at 26, col. 6 (Sur. Ct., Suffolk Co.).
64. Complaint, *Disability Rights N.Y. v. N.Y. St.*, 16-CV-07363 (S.D.N.Y.).
65. *See id.*
66. N.Y. St. Report & Recommendation of the Olmstead Cabinet: A Comprehensive Plan for Serving New Yorkers in the Most Integrated Setting, at 27-28 (Oct. 2013), *available at*: http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf (last viewed on October 10, 2016).
67. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Robert M. Harper is an estate litigation associate at Farrell Fritz, P.C. He serves as a Co-Chair of the Section's Legislation and Governmental Relations Committee and as a Special Professor of Law at the Maurice A. Deane School of Law at Hofstra University.

Useful Mobile Apps for the Trusts and Estates Practitioner

By Parth N. Chowlera

Greetings from the Technology in Practice Committee. This article is the first in a series that will highlight useful mobile apps for the Trusts and Estates practitioner.

This article focuses on three particular apps that contain electronic versions of New York's Estates, Powers and Trusts Law (EPTL), Surrogate's Court Procedure Act (SCPA), and Civil Practice Law and Rules (CPLR):

NY Estates Powers and Trusts Law 2016

Sold by PDA Wizard

Current Version Updated January 26, 2016

Cost: $6.99 in the Apple App Store

Currently not available in the Google Play store

NY SCPA 2016 - New York Surrogate's Court

Sold by PDA Wizard

Current Version Updated January 26, 2016

Cost: $6.99 in the Apple App Store

Currently not available in the Google Play store

NY Civil Practice Law and Rules 2016

Sold by PDA Wizard

Apple App Store Version Updated January 26, 2016

Google Play Store Version Updated February 4, 2016

Cost: $9.99 in the Apple App Store and the Google Play Store

These apps provide the practitioner with convenient access to the statutes and can make research more efficient. Because these apps are made by the same company, they offer similar attributes and functionality:

- All are downloaded directly to the mobile device, and once downloaded, do not require internet access.
- Each section of the statute can be e-mailed or printed (from a compatible printer) directly from the mobile device.
- The statutes can be searched by number (e.g. "2-1.8") or word (e.g. "apportionment").
  - A word search will produce all statutes that contain that word. For example, a search for the word "apportionment" in the EPTL app yielded EPTL sections 2-1.8, 5-1.1, 11-2.1, 11-2.2, 11-A-3.2, 11-A-3.3, 12-1.2, and 13-1.3.
  - Searches for a term containing multiple words on these apps are not like searches on Lexis or Westlaw, where the search can be restricted to a particular term. In these apps, searches for terms with multiple words may yield statutes that contain variations of the individual words. For example, a search in the EPTL app for the term "attorney general" produced EPTL sections that contained the term "attorney general" as well as sections that contained the words "attorney," and "attorneys."

A Note About Apps and Mobile Devices

Like computers, mobile devices are powered by operating systems. The two most popular operating systems are known as "iOS" and "Android." The programs that run on these operating systems are known as "Apps."

iOS was created by Apple, Inc. and runs exclusively on mobile devices produced by Apple, namely, the iPhone, the iPad, and the iPod Touch. Apps designed for iOS are downloaded from Apple's "App Store."

Android was created by Google Inc. and runs on mobile devices produced by several companies, such as Samsung, LG, and HTC. Apps designed for Android are downloaded from the "Google Play" store.

Parth N. Chowlera is the Chair of the Technology in Practice Committee and an Associate at Greenfield Stein & Senior, LLP. For ideas, comments, and suggestions, please contact him at pchowlera@gss-law.com.

Four Practical Considerations When Making Charitable Donations

By Andrew S. Katzenberg

Many individuals desire to be philanthropic. However, just handing over money may not be the best way for you to give. There are myriad issues that every donor should consider before making a substantial donation to a charity.

I. Use of Funds

When a donor simply donates to a charity, the charity has control of the funds and discretion on how to use them. However, some donors may prefer to direct the use of the donation for specific purposes. For example, a donation to a university could be directed to the athletic department or to endow a chair in an academic department.

Donors who prefer more control regarding the use of their donation, not only for the purpose, but also for the actual distribution/use of the donation, should consider the use of a grant agreement. Formalizing the donor's intentions and wishes in a grant agreement is the best way to guarantee certainty in the use of the funds. A grant agreement allows the donor to articulate specific requirements associated with the donation as well as the ability to name other individuals who can enforce the agreement after the donor's death. For instance, when creating a scholarship program, the donor can stipulate the amount of each scholarship, qualifications of recipients, the committee that will select the recipients, and the name of the scholarship.

Additionally, a grant agreement that provides for a series of donations over a period of time provides the donor more leverage to insure that the charity complies with the terms of the grant agreement. The ability to withdraw and/or cease donation payments is a very strong arrow in the donor's quiver.

II. Requests/Conditions/Restrictions

Donors should be mindful of requests they attach to donations. Otherwise, such requests can lead to the rejection of a gift by the charity. For example, when donating a piece of art to a charity, requiring a certain amount of insurance or using specific services to store the art may be too costly in the eyes of the charity. The net result is neither the charity nor the donor benefit.

Additionally, placing restrictions and conditions on donations that may seem prudent today may not be in the future. For example, creating an endowment fund for a charity that only permits the use of income may seem reasonable to insure a continued source of funds for the charity. However, if the charity's overall operating costs and debts exceed its revenue, the charity might not be able to sustain itself in spite of the endowment. This shortfall may not be a result of mismanagement of the charity, but rather of an unforeseen circumstance, such as a downturn in the market or a major capital expenditure due to a natural disaster. The inability to use the principal of the endowment to continue the operations of the charity may result in the charity ultimately dissolving.

"The ability to withdraw and/or cease donation payments is a very strong arrow in the donor's quiver."

Albert C. Barnes' and Georgia O'Keeffe's gifts of artwork to the Barnes Foundation and Fisk University, respectively, are perfect examples of restrictions gone awry. In both cases, the donor placed a prohibition on the sale or loaning of the gifted art work. Additionally, in Barnes' case, all works of art were required to be displayed in Mr. Barnes' mansion in Lower Merion, Pennsylvania and limited the number of days and visitors allowed to view the art each week. These restrictions increased the financial distress of the foundation and the university, so that both ultimately had to engage in lengthy and costly litigation to free themselves of the limitations in an attempt gain financial stability.

III. To Be Recognized or Not to Be Recognized

Often associated with major donations is the benefit of naming rights. However, this is not just for the ultra-wealthy for whom buildings and stadiums are named. A donor may be able to obtain the naming rights of a classroom or hall for a moderate donation. Naming rights can be used to honor loved ones or promote one's own legacy. Additionally, when discussing naming rights, the length and term of those rights should be carefully considered. Issues such as whether the name should continue if the room or building is renovated or razed and how the name will be displayed are important topics that should be detailed in a grant agreement.

Donors should also be aware of the political and social views/affiliations of the charities to which they are donating because donors themselves will be as-

sociated with the charity's underlying causes. In some instances, donors may prefer that their political and social views be kept private. This desire for privacy could be because of their religious affiliations or fears of ostracizing their customer base, which would negatively impact their business.

A grant agreement can be used to prohibit the charities from publicly recognizing the donor. However, if a donor prefers complete anonymity even from the charity itself, the donor could establish a "donor advised fund" ("DAF") to make the donation. A DAF is a fund maintained by a sponsoring organization (for example, a charitable organization) that has legal control over all of the assets in the fund. Separate accounts are maintained within the DAF for each donor who has advisory privileges over the distribution and investments of his or her separate DAF account. The donor would contribute to the DAF, and then the DAF would contribute to the charity. The DAF would designate its general account as the source of the contributed funds rather than the donor's specific DAF account. This results in only the institution administering the DAF being recognized for the donation and not the underlying donor of the DAF.

IV. Pledges

Donors may want to pledge to make donations over a period of years. Donors who have established foundations should avoid making personal pledges in order to provide greater flexibility in satisfying the pledge in later years. If the donor has a private foundation, his or her foundation cannot satisfy his or her personal pledge because this would be an impermissible use of the foundation's assets. However, if the foundation makes the pledge, the foundation's obligation can be satisfied by the donor personally.

There is no right way or wrong way to give, but donors should be well informed by their advisors and counsel of the options that exist so they can make the best informed decisions. In the end, just writing a check might be the best option for you.

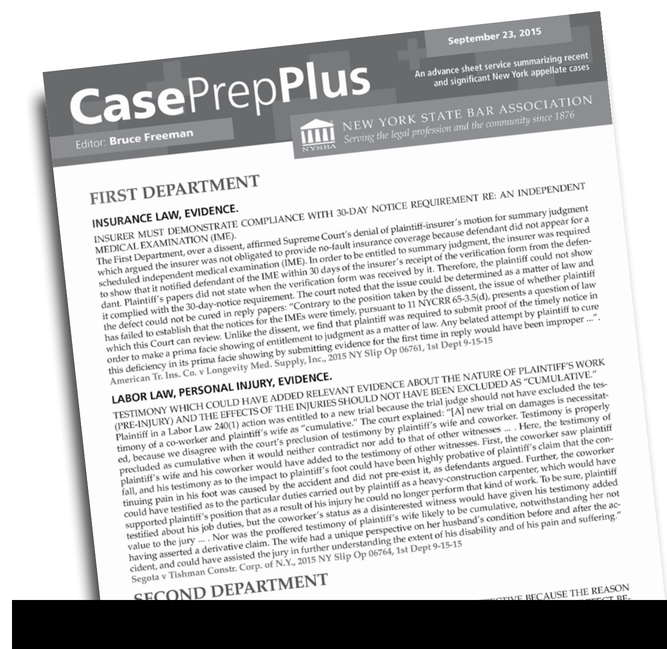
Andrew S. Katzenberg is Senior Counsel at Kleinberg, Kaplan, Wolff & Cohen, P.C. in the Trusts and Estates group, where his practice focuses on wealth preservation, estate and trust administration, nonprofit and tax-exempt organizations and charitable giving.

This article was originally published on June 6, 2016 by wealthmanagement.com.

Save time while keeping up to date on the most significant New York appellate decisions

An exclusive member benefit, the CasePrepPlus service summarizes recent and significant New York appellate cases and is available for free to all NYSBA members. It includes weekly emails linked to featured cases, as well as digital archives of each week's summaries.

To access CasePrepPlus, visit www.nysba.org/caseprepplus.



CasePrepPlus

September 23, 2015

An advance sheet service summarizing recent and significant New York appellate cases

Editor: Bruce Freeman

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876
NYSBA

FIRST DEPARTMENT

INSURANCE LAW, EVIDENCE.

INSURER MUST DEMONSTRATE COMPLIANCE WITH 30-DAY NOTICE REQUIREMENT RE: AN INDEPENDENT MEDICAL EXAMINATION (IME).

The First Department, over a dissent, affirmed Supreme Court's denial of plaintiff-insurer's motion for summary judgment which argued the insurer was not obligated to provide no-fault insurance coverage because defendant did not appear for a scheduled independent medical examination (IME). In order to be entitled to summary judgment, the insurer was required to show that it notified defendant of the IME within 30 days of the insurer's receipt of the verification form from the defendant. Plaintiff's papers did not state when the verification form was received by it. Therefore, the plaintiff could not show it complied with the 30-day-notice requirement. The court noted that the issue could be determined as a matter of law and the defect could not be cured in reply papers: "Contrary to the position taken by the dissent, the issue of whether plaintiff has failed to establish that the notices for the IMEs were timely, pursuant to 11 NYCRR 65-3.5(d), presents a question of law which this Court can review. Unlike the dissent, we find that plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law. Any belated attempt by plaintiff to cure this deficiency in its prima facie showing by submitting evidence for the first time in reply would have been improper ...". American Tr. Ins. Co. v Longevity Med. Supply, Inc., 2015 NY Slip Op 06761, 1st Dept 9-15-15

LABOR LAW, PERSONAL INJURY, EVIDENCE.

TESTIMONY WHICH COULD HAVE ADDED RELEVANT EVIDENCE ABOUT THE NATURE OF PLAINTIFF'S WORK (PRE-INJURY) AND THE EFFECTS OF THE INJURIES SHOULD NOT HAVE BEEN EXCLUDED AS "CUMULATIVE."

Plaintiff in a Labor Law 240(1) action was entitled to a new trial because the trial judge should not have excluded the testimony of a co-worker and plaintiff's wife as "cumulative." The court explained: "[A] new trial on damages is necessitated, because we disagree with the court's preclusion of testimony by plaintiff's wife and coworker. Testimony is properly precluded as cumulative when it would neither contradict nor add to that of other witnesses ... . Here, the testimony of plaintiff's wife and his coworker would have added to the testimony of other witnesses. First, the coworker saw plaintiff fall, and his testimony as to the impact to plaintiff's foot could have been highly probative of plaintiff's claim that the continuing pain in his foot was caused by the accident and did not pre-exist it, as defendants argued. Further, the coworker could have testified as to the particular duties carried out by plaintiff as a heavy-construction carpenter, which would have supported plaintiff's position that as a result of his injury he could no longer perform that kind of work. To be sure, plaintiff testified about his job duties, but the coworker's status as a disinterested witness would have given his testimony added value to the jury ... . Nor was the proffered testimony of plaintiff's wife likely to be cumulative, notwithstanding her not having asserted a derivative claim. The wife had a unique perspective on her husband's condition before and after the accident, and could have assisted the jury in further understanding the extent of his disability and of his pain and suffering." Segota v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06764, 1st Dept 9-15-15

SECOND DEPARTMENT

A Sea Change in the Valuation Discount Rules

Proposed Regulations Under the Special Valuation Rules

By Quincy Cotton

On August 2, 2016, the Treasury Department issued proposed regulations (the "Proposed Regulations")[1] that significantly modify the special rules applicable to the valuation of interests in family entities for purposes of the gift, estate, and generation-skipping transfer taxes ("transfer tax" purposes). If enacted in the form proposed, the regulations could largely eliminate the lack of control ("minority") and lack of marketability discounts that are often a major factor in gift and estate planning transactions.

The Proposed Regulations were issued primarily under section 2704,[2] one of the "special valuation rules" that apply with respect to the valuation of interests in a partnership or corporation that is owned, directly or indirectly, through trusts or other entities, at least 50% by members of a family (a "Family Entity").[3] These entities typically have governing documents that are tailored to achieve family goals, and family goals frequently give rise to restrictions that are subject to valuation discounts. For example, it is common for a Family Entity agreement to prohibit the withdrawal of a member, liquidation of the entity, or transfer of an interest (among other important rights) without the consent of the other members or manager (or both). A transfer (or attempted transfer) of an entity interest may trigger a buy-out right under which other members may purchase the entity interest for the fair market (discounted) value of the interest, with payments over time under the buyer's promissory note. These prohibitions and restrictions make the Family Entity interest unattractive (less valuable) to a potential creditor, such as a divorcing spouse (a future ex-son-in-law, for example), by making it extremely difficult for the member holding the interest to participate in the entity's affairs or to obtain the pro rata underlying net asset value associated with the interest. Not surprisingly, if the Family Entity owns net assets of $10,000,000, Junior's 10% interest, subject to all the restrictions described above, is worth a lot less than its $1,000,000 share of underlying net asset value, because Junior has essentially no way to get his hands on that value.

The reduction in value of the Family Entity interest compared to the underlying net asset value—the "discount"—has long been a source of tension between taxpayers and the IRS. The hypothetical buyer-seller standard for determining fair market value for transfer tax purposes necessarily takes into account the types of restrictions described above, because the hypothetical (third-party) buyer would not pay a price equal to pro rata underlying net asset value for such an entity interest; the third-party buyer would require a price incentive (a discount) to purchase such an interest. The government, however, has viewed discounts in the Family Entity context as a loophole allowing the difference between "real" value and discounted value to pass from one generation to the next, free of transfer tax.

Section 2704 is a special valuation rule that was enacted to address certain restrictions and limitations that were believed to be susceptible to valuation abuses in the Family Entity context—restrictions that "affect adversely the transfer tax value of an interest but that do not reduce the value of the interest to the family-member transferee. . . ."[4] If restrictions in a Family Entity agreement trigger the application of section 2704, the transfer tax value of the interest is determined without regard to those restrictions. This generally lowers the discount and raises the value of the interest. The Proposed Regulations contain many of the statutory changes that were proposed in the Obama Administration's revenue proposals in prior years. The last such proposal was part of the Administration's 2013 fiscal year revenue proposals and would have created

> an additional category of restrictions ("disregarded restrictions") that would be ignored in valuing an interest in a family-controlled entity transferred to a member of the family if, after the transfer, the restriction will lapse or may be removed by the transferor and/or the transferor's family. Specifically, the transferred interest would be valued by substituting for the disregarded restrictions certain assumptions to be specified in regulations.[5]

The regulatory authority under existing section 2704 authorizes regulations that disregard "other restrictions," but does not authorize the substitution of alternative assumptions for valuation purposes. The Proposed Regulations modify and expand the restrictions that are disregarded, but do not provide substituted assumptions. Rather, the Proposed Regulations state that an entity interest with respect to which restrictions are disregarded under the proposed new rules is valued under generally applicable valuation principles, as if the restrictions did not exist. As discussed further below, the meaning of this statement is unclear.

The major features of the Proposed Regulations are summarized below.

The Proposed Regulations expand section 2704 to apply with respect to limited liability companies ("LLCs"), which may be classified for federal tax purposes as partnerships or corporations or disregarded as separate from the owner, depending on how many owners there are and whether or not the LLC makes an election to be treated differently from its "default" classification.[6] Since section 2704 was enacted in 1990, LLCs have become the Family Entity of choice. Typically comprising multiple family members and trusts, the Family Entity is almost invariably an LLC classified as a partnership for federal tax purposes.

Section 2704(a) treats the "lapse" of a voting or liquidation right as a transfer, if the holder of such right (before the lapse) and members of the holder's family control the entity before and after the lapse.[7] The existing regulations provide an exception from this rule if the rights associated with a transferred interest are the same before and after the transfer.[8] This exception applies (under the existing regulations) even if the transferor moves from a controlling to a non-controlling position as a result of the transfer, and is consistent with the rejection, by the courts and the IRS, of a "family attribution" standard of valuation for Family Entity interests.[9] Transfer tax valuation is not based on the identity of the donor and donee (or decedent and heir) and the legislative history to section 2704 makes it clear that the special valuation rules did not change the hypothetical buyer-seller standard.[10] Indeed, the Senate Report explicitly recognized that minority or other discounts would continue to apply.

The Proposed Regulations deviate from this standard, however, for "deathbed" transfers. Under the Proposed Regulations, the exception for an entity interest that has the same rights before and after the transfer applies *only if the transferor survives for at least three years* following the date of the transfer. If the transferor dies within three years of the transfer, a lapse of the transferor's (now decedent's) voting or liquidation rights the loss—as a result of the transfer, of such rights held by the transferor/decedent before the transfer—under section 2704 is deemed to occur at death.[11] This requires a new date-of-death valuation (assuming death does not occur right after the transfer), presumably with respect to both the entity's underlying net asset value and the discount analysis.

The Proposed Regulations further provide that for purposes of the question whether the transferor and family can cause the interest to be liquidated (without which control section 2704 would not apply), certain "nonfamily-member" interests may be disregarded.[12] The new rules regarding nonfamily-member interests are discussed below.

The Proposed Regulations also significantly change the existing regulations with respect to "applicable restrictions" under section 2704(b). An applicable restriction, as defined by the statute, means any restriction which effectively limits the ability of the entity to liquidate, if such restriction lapses after the transfer or if the transferor and family members, alone or collectively, can remove the restriction after the transfer.[13] However, there is an exception for a restriction imposed or required to be imposed by law.[14] Under the existing regulations, the exception applies as long as the restriction provided in the entity documents is not more restrictive than the limitations that would otherwise apply (the "default" rule) under state law.[15] The Proposed Regulations significantly change this exception. Under the Proposed Regulations, there is no state law exception if the applicable state law applies only in the absence of, or may be superseded by, a contrary provision in the governing documents.[16] Only if the state law provision is *mandatory* will the exception apply. Apparently in anticipation of states modifying their laws as a result of these rules, the Proposed Regulations disregard any state law that is limited to certain narrow classes of entities (such as family-controlled entities), that provides an optional rule not including restrictions or allowing restrictions to be removed or overridden, or that provides a different statute for the creation and governance of the same type of entity that does not mandate the restriction, or makes it optional, or permits it to be superseded.[17]

"Perhaps the biggest change made by the Proposed Regulations is the creation of a new category of 'disregarded restrictions' under new Proposed Regulation section 25.2704-3."

Perhaps the biggest change made by the Proposed Regulations is the creation of a new category of "disregarded restrictions" under new Proposed Regulation section 25.2704-3. A "disregarded restriction" is any restriction that is a limitation on the ability to redeem or liquidate an interest in an entity that is described in a list (below), if the restriction lapses after the transfer or can be removed by the transferor or any member of the transferor's family, alone or collectively.[18] Certain nonfamily-member interests may be disregarded for

this purpose, as described further below. The disregarded restrictions are:

- a limitation on the ability of the holder of the interest to compel the liquidation or redemption of the interest,
- a buy-out provision that provides for a price less than a pro rata share of underlying net asset value (the "minimum value"),
- a buy-out provision that provides for payment more than 6 months after the buy-out date, or
- a buy-out provision that permits payment of the buy-out price in proceeds other than cash or property, which does not include Family Entity's (or another family member's) promissory note.[19]

Minimum value is defined as the entity interest's pro rata share of the entity's underlying net asset value, taking into account obligations of the entity only if they would be allowable (if paid) as claims against an estate that are deductible under section 2053.[20] The exception in the existing regulations that permits a restriction to be taken into account if it is not more restrictive than the default rule under state law is effectively eliminated.[21]

The Proposed Regulations contain new rules under which interests held by certain nonfamily members will—or will not—be taken into account in determining whether the family group has the power to remove the restrictions that are otherwise subject to section 2704. Nonfamily member interests become important when the entity is a "Family Entity," because it meets the section 2704 ownership test (generally 50% or more ownership by the family group), but is not 100% owned by the family. In such a case, the question under the Proposed Regulations is whether the rights and powers held by the nonfamily owners will count in the determination of whether the family owners have the power to remove the restrictions that the Proposed Regulations would otherwise disregard. In order for an interest held by a nonfamily member to count for this purpose, it must satisfy *all* of the following requirements:

- the interest has been held by the nonfamily member for at least three years prior to the date of the transfer;
- the interest constitutes at least 10% of the total equity of the entity;
- the aggregate entity interests held by nonfamily members constitute at least 20% of the equity of the entity; and
- each nonfamily member has an enforceable right to "put" the interest to the entity and to receive, within six months, cash or other property equal to the "minimum value" of the entity interest, payable in cash or other property generally not including the entity's (or a related person's) promissory note.[22]

The first three conditions may be satisfied in Family Entities where the members consist of a wider group of family members (cousins, for example, or the family foundation). However, it is extremely unlikely that any Family Entity agreement would contain the put right required in the fourth condition above—essentially a right to withdraw in exchange for pro rata underlying net asset value, payable within six months. Such a right could virtually ruin an active business entity. In many passive investment-type entities, such a right would be anathema to the entity's business purposes and role in family business and estate planning. Given the very real negative consequences of such a right, it is unlikely that many agreements will be amended in an attempt to fall within this exception.

The nonfamily member interest rules are relevant to the question whether the family group has the power to remove a restriction on liquidation of the entity (a Proposed Regulation section 25.2704-2 applicable restriction) or on liquidation (or buy-out) of the entity interest (a Proposed Regulation section 25.2704-3 disregarded restriction). If your cousin (or a group of employees, or the family foundation) owns a 20% interest and 100% member consent is required to withdraw from or liquidate the entity, such nonfamily member interests will be disregarded, unless they have a withdrawal right based on underlying "minimum value," even though their membership in the entity in fact limits the ability of all members to "monetize" their interests.

As noted above, the effect of disregarding a restriction under the Proposed Regulations is that the fair market value of the entity interest is determined under generally applicable valuation principles as if the restriction does not exist in the governing documents, under local law, or otherwise.[23] However, the "generally applicable valuation principles," which are supposed to be the basis on which the Entity Interest should be valued, pursuant to the Proposed Regulations, are unclear. What is the appraiser to assume about the rights associated with the interest, if the governing documents and local law (because the provisions of both are disregarded) are silent? Having disregarded a prohibition against withdrawal in the agreement and state law, should the entity interest be valued as if there is a right to withdraw? The Proposed Regulations do not require substituted valuation assumptions, but do they imply an appraisal assumption that the holder of the interest has the right that the disregarded provisions in fact restrict or prohibit? Surely not. It is one thing to disregard a restriction and quite another thing to assume the existence of a right that does not, in fact, exist. An interpretation of the Proposed Regulations that leads

to an assumption of an otherwise nonexistent right would raise significant validity issues. If a withdrawal right is *not* to be assumed, on what basis is the interest to be valued? Should the appraiser attempt to evaluate the merits of the interest holder's (fictional) lawsuit pursuing a claim of withdrawal through the courts, in the absence of any provision allowing or disallowing withdrawal under the agreement or state law? Given the length of time it would take to resolve such a lawsuit and the associated expense of maintaining it, one could envision an uncertainty discount as big as any minority or marketability discount that might apply under the existing regulations!

The Proposed Regulations generally are not effective until finalized (in the case of the new disregarded restrictions, 30 days after being finalized), and a hearing is scheduled on December 1, 2016, at which these concerns will presumably be aired. It is to be hoped that changes will be made before the regulations are finalized, to address uncertainties and validity issues.[24] If the Proposed Regulations are finalized in their current form (or close to it), many years may pass before we understand how Family Entity interests should be valued under the new rules. This is particularly problematic for closely held operating business entities, where an owner is generally unable to obtain a pro rata share of underlying net asset value without the entire business being liquidated (a result that Congress purports not to desire). If the Proposed Regulations are interpreted to grant (for valuation purposes) the rights that are disregarded (for valuation purposes), the decedent whose estate owns such an interest will be stuck with estate tax based on underlying net asset value, yet will have no ability to withdraw ("cash out") from the entity, and will be able to realize, on a sale of the interest, only its discounted value.

There is a window of opportunity to consider restructuring and/or making transfers of interests in Family Entities before the Proposed Regulations (in whatever form) are finalized. Note that unless an entity pre-dates 1990, there is no exception to the proposed rules merely on the basis that an entity was in existence on or prior to the effective date. It is necessary to take action—to transfer an interest or restructure the entity in a way that captures valuation discounts—in order to "lock in" the existing valuation discount rules. Many such transactions take time and effort to analyze and implement, but in view of the possibility of significant changes in the Family Entity valuation rules, it seems highly advisable to accomplish as much as possible before the Proposed Regulations are finalized.

Endnotes

1. *See* 316-36 I.R.B., p. 329.
2. Unless stated otherwise, section references are to sections of the Internal Revenue Code of 1986, as amended (the "Code").
3. Members of a family for this purpose means the transferor's spouse, any ancestor or lineal descendant of the transferor and/or the transferor's spouse, any sibling of the transferor, and any spouse of any of the foregoing. Section 2704(c)(2).
4. Preamble to Proposed Regulations, 216-36 I.R.B., p. 329. A letter from Richard Dees of McDermott Will & Emery to Treasury and the IRS, dated and printed in Tax Notes Today on August 31, 2015, provides an excellent summary of the background and legislative history of section 2704.
5. General Explanations of the Administration's Fiscal 2013 Revenue Proposals ("Greenbook").
6. Treas. Reg. § 301.7701-3.
7. Section 2704(a)(1). The Proposed Regulations provide that a voting right, with respect to an LLC interest, includes the right of a member to participate in management of the LLC. Prop. Reg. § 25.2704-1(a)(2)(iii).
8. Treas. Reg. § 25.2704-1(c)(1).
9. *See, e.g.*, *Estate of Bright v. U.S.*, 658 F.2d 999 (5th Cir 1981); Rev. Rul. 93-12, 1993-1 C.B. 202, revoking Rev. Rul. 81-253, 1981-1 C.B. 187.
10. The Senate Report states that transfer tax valuation "looks to the value of a hypothetical seller and buyer, not the actual parties to the transfer." Senate Report, 136 Cong. Rec. §§ 15679, 15681 (October 18, 1990).
11. Prop. Reg. § 25.2701-1(c)(1).
12. Prop. Reg. § 25.2704-1(c)(2)(i)(B).
13. Section 2704(b)(1).
14. Section 2704(b)(3)(B).
15. Treas. Reg. § 25.2740-2(b).
16. Prop. Reg. § 25.2704-2(b)(4)(ii).
17. Prop. Reg. § 25.2701-1(b)(4)(ii).
18. Prop. Reg. § 25.2704-3(b)(1).
19. Prop. Reg. § 25.2704-3(b)(1)(i)-(iv).
20. Prop. Reg. § 25.2704-3(b)(1)(ii). This eliminates many potential liabilities that in the "real world" impact the value of an entity. Query the effect on a valuation reduction for the inherent "built-in gains tax" with respect to Subchapter C corporations and some Subchapter S corporations.
21. Prop. Reg. § 25.2704-3(b)(5)(iii).
22. Prop. Reg. §§ 25.2704-3(b)(4)(i) and (b)(6).
23. Prop. Reg. §§ 25.2701-2(e) and -3(f).
24. Indeed, as of the date this article was delivered for publication, two bills had already been introduced in the House of Representatives to "halt the stealth death tax increase" arising under the Proposed Regulations.

Quincy Cotton, Esq. is a partner at Roberts & Holland, LLP in New York.

Defeating Summary Judgment in an SCPA Turnover Proceeding

By Gary E. Bashian

> *"Men would live exceedingly quiet if these two words, mine and thine, were taken away."*
>
> *—Anaxagoras*

Successful motions for summary judgment in an SCPA turnover proceeding—or any proceeding for that matter—require independent, objective, and verifiable proof in support of the movant's position. However, in SCPA turnover proceedings involving gifts and/or transfers of real property with little or no consideration, a movant is often hard pressed to present evidence that can afford them judgment as a matter of law—making any such motion for summary judgment ripe for defeat when and if the opposition can identify and point out the weaknesses in a movant's papers. To that end, understanding and appreciating the basic burdens of proof and standards of proof to which a movant is held remains key to defeating a motion for summary judgment in an SCPA turnover proceeding, and is explored in detail herein.

A typical fact pattern in many SCPA turnover proceedings involves a dispute over a gift and/or transfer of real property with little or no consideration allegedly made by the Decedent to either a fiduciary, or another individual—usually a family member, close friend, or even a caretaker.

More often than not, these gifts and/or transfers have rendered the estate insolvent, or with significantly fewer probate assets than would have been available for distribution had the gift(s) not been made. Almost invariably, the consideration for any transfer of real property involved—if any is listed—is simply "love and affection," or some such vague and non-specific language that makes clear there was no payment made to the decedent by the recipient.

Concerned that these gift(s) and/or transfers were the result of fraud, duress, undue influence, or other improper acts, the estate fiduciary,[1] or an interested party with standing,[2] seeks to have the assets returned to the estate so that they can then be distributed—usually to them—pursuant to a will or under the rules of intestacy.

Although there are any number of other, nuanced facts that underlie these types of SCPA turnover proceedings, this general framework remains remarkably consistent.

To that end, after CPLR discovery is concluded and the parties are in the best position to determine if they have reasonable grounds to seek an accelerated judgment,[3] very often the donee will seek summary judgment if he or she believes there is sufficient evidence to prove the validity of the gift(s) and/or transfer.

As with any motion for summary judgment, the movant in an SCPA turnover proceeding has the burden of proof to establish a *prima facie* case for entitlement to judgment as a matter of law. Moreover, a movant must show that there are no triable issues of fact which would need to be determined at trial.[4] Given that summary judgment is the procedural equivalent of a trial, "any doubt of the existence of a triable issue, or where a material issue of fact is arguable, the motion should be denied."[5]

If the movant can establish this *prima facie* case, the burden of proof then shifts to the party opposing the motion to produce evidence that establishes the existence of a material issue of fact that would require a trial.[6]

As the validity of a gift, or series of gifts, forms the core of these types of SCPA turnover proceedings, it is important to note that for a gift to be deemed legally valid, the donee has the burden of establishing, by clear and convincing evidence, the three basic gifting elements, including:

1. The Donative Intent of the Donor;
2. Delivery to the Donee (constructive or actual); and
3. Acceptance by the Donee.[7]

However, this is not the end of the gifting analysis, as "where there is a confidential relationship between the beneficiary and the grantor, '[a]n inference of undue influence' arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction."[8]

A confidential relationship can be established where the donee assists the donor with daily living needs, finances, health care, provides food, medication, transportation, etc. The question is generally one of dependence, and whether the donee was in a position to exert undue influence as a result of this dependent relationship.[9]

Alternatively, a fiduciary relationship might exist between the donor and donee that is distinct from a confidential relationship, and is created either by circumstances or a power of attorney. In such a fiduciary relationship, a presumption of impropriety attaches to the gift, increasing the donee's burden to prove that any transfers between the two parties were free of fraud and/or undue influence.[10] In the presence of a fiduciary relationship, the donee's duty to the donor to act in good faith and for the benefit of the donor even exists even when transactions between the parties are not made under the authority of the power of attorney.[11]

In summary, when a donee moves for summary judgment requesting that the court declare the gift(s) and/or transfers at issue to be valid and that the SCPA turnover proceeding be dismissed, he or she must offer evidence which not only establishes the donative intent of the decedent (delivery and acceptance are rarely, if ever, the issue in controversy), but, if he or she shared a confidential and/or fiduciary relationship with the decedent, he or she will have the heightened burden to prove that the transfer at issue was free from fraud and/or undue influence, etc.

Clearly, understanding these burdens and standards of proof are critical when considering how to oppose a motion for summary judgment in an SCPA turnover proceeding, and must be closely observed when analyzing the proof movant offers in support of his or her case. Indeed, the movant/donee will often submit his or her own affidavit in support of summary judgment detailing statements the decedent allegedly made regarding an intent to make the gifts, as well as describing the support and assistance the donee allegedly provided the decedent, in an effort to explain why "love and affection" was the only consideration needed to effect any transfer at issue. When available, the movant/donee often will also submit supporting affidavits from non-parties that describe the relationship the decedent had with the movant and/or the party seeking turnover, as well as what they know about the decedent's intent to make the alleged gift(s) and/or transfers. Commonly, all of these affidavits will assert that the decedent and the movant/donee had a mutual and long-standing relationship of trust, love, and admiration; that the movant provided financial, medical, and other forms of support for the decedent during his or her lifetime; that the affiant is "certain" that the decedent had the donative intent to gift all or most of his or her assets to the movant—even though these very same assets would have been distributed differently under the decedent's Will; and that the decedent and the party seeking turnover had a tense relationship punctuated with strife and acrimony.

Admittedly, when confronted with proof of this nature, even the most jaded litigator may second guess the strength of his or her case, and become concerned that the court will grant summary judgment in light of any such evidence. However, all is not lost as all of the applicable burdens of proof strongly favor the non-moving party. Accordingly, the opposition to summary judgment should highlight, first and foremost, the ways in which movant's papers do not meet these burdens, and therefore cannot establish a *prima facie* case for judgment as a matter of law.

Most, if not all, of the facts alleged in the movant/donee's affidavit regarding conversations had with the decedent will be barred by CPLR 4519, commonly known as "the Dead Man's Statute," as testimony of an interested witness concerning a personal transaction or communication between himself and a deceased person must be excluded at trial or when offered in support of a motion for summary judgment.[12] This rule alone can often be determinative in establishing that the movant has not established his or her *prima facie* case, as the decedent's donative intent cannot be established based on the movant's testimony alone; and, remember, if the movant has not established a *prima facie* case, the motion must be denied.

Conversely, as there is no such bar on the use of such testimony in opposition to a motion for summary judgment,[13] questions of fact can be raised regarding the Decedent's donative intent based on conversations he or she had with the party seeking turnover, which contradict the movant's presentation of the facts. This would create even more grounds for denial of the motion.

Furthermore, the movant's own offering of proof usually confirms that he or she enjoyed a confidential and/or fiduciary relationship with the decedent. Such proof will either personally describe, or include descriptions in the other supporting affidavits, the ways in which he or she assisted the decedent with his or her finances, medical care, personal hygiene, food shopping, etc. As indicated above, once a confidential and/or fiduciary relationship is established, the movant is subject to an even higher burden of proof, and in the unenviable position of having to prove that the gift at issue was not the product of fraud, undue influence, duress or other improper acts—a burden that only makes entitlement to judgment as a matter of law even more difficult to establish.

Moreover, all of the affidavits offered in support of summary judgment must establish the alleged gift(s) by "clear and convincing" evidence, a relatively high standard of proof that the draftsperson of the affidavit—or the affiant themselves—might overlook. Absent very specific language establishing the elements of a gift and comprehensive details about when, where, and why the decedent communicated this information to him or her, the "clear and convincing" standard will not be met. Neither conclusory allegations, hope,

belief, nor assumptions are enough to grant summary judgment. Given that it is the exception that an individual will tell even a close friend the intimate details, motivations, and/or financial reasons that he or she chose to gift away most, if not all, of his or her assets, it is rare that an affidavit in support of summary judgment will be able to present "clear and convincing" evidence of a decedent's donative intent—especially if subject to the heightened burdens imposed in the presence of a confidential and/or fiduciary relationship.

As I have written about in previous *Trusts and Estates Law Section Newsletter* articles, motions for summary judgment have been on the rise in Surrogate's Courts for the past several years, and what was once a tool only used sparingly is now commonplace. Similarly, although relegated to Article 21 as a "miscellaneous proceeding," SCPA discovery proceedings—or turnover proceedings as they are more frequently referred to—are an increasingly common proceeding before the Surrogate's Courts. Given this confluence, it is imperative that trust and estate litigators familiarize themselves with these basic burdens and standards of proof as they pertain to motions for summary judgment in SCPA turnover proceedings.

Endnotes

1. SCPA 2103.
2. SCPA 2102.
3. *See generally* CPLR 3212.
4. *See Erikson v. JIB Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661 (2d Dep't 2004); *Taub v. Balkany*, 286 A.D.2d 491 (2d Dep't 2001).
5. *Peerless Ins. Co. v. Allied Building Prods. Corp.*, 15 A.D.3d 373, 790 N.Y.S.2d 474 (2d Dep't 2005).
6. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Boz v. Berger*, 268 A.D.2d 453, 702 N.Y.S.2d 336 (2d Dep't 2000).
7. *See Gruen v. Gruen*, 68 N.Y.2d 48, 505 N.Y.S.2d 849 (1986); *In the Matter of Parisi*, 34 Misc. 3d 1204(A), 946 N.Y.S.2d 68 (Sur. Ct., Queens Co. 2011); *In re Kaminsky*, 17 A.D.2d 690, 230 N.Y.S.2d 954 (3d Dep't 1962).
8. *Juliano v. Juliano*, 42 Misc. 3d 1226(A), 984 N.Y.S.2d 632 (Sup. Ct., Kings Co. 2014) (emphasis added); *citing Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim*, 45 N.Y.2d 692, 412 N.Y.S.2d 593 (1978); *In re DelGatto*, 98 A.D.3d 975, 950 N.Y.S.2d 738 (2d Dep't 2012); *In re Neenan*, 35 A.D.3d 475, 827 N.Y.S.2d 164 (2d Dep't 2006).
9. *See generally In re Boatwright*, 114 A.D.3d 856, 980 N.Y.S.2d 554 (2d Dep't 2014), *citing In re Connelly*, 193 A.D.2d 602, 597 N.Y.S.2d 427 (2d Dep't 1993); *Hennessey v. Ecker*, 170 A.D.2d 650, 567 N.Y.S.2d 74 (2d Dep't 1991).
10. *See In re Boatwright*, *supra.*; *citing Mantella v. Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 (3d Dep't 2000); *In re Roth*, 283 A.D.2d 504, 724 N.Y.S.2d 476 (2d Dep't 2001).
11. *See In re Cooper*, 6 Misc. 3d 1001(A), 800 N.Y.S.2d 346 (Sur. Ct., Nassau Co. 2004); *citing In re Mazak*, 288 A.D.2d 682, 732 N.Y.S.2d 707 (3d Dep't 2001); *In re Camarda*, 63 A.D.2d 837, 406 N.Y.S.2d 193 (4th Dep't 1978).
12. *See* CPLR 4519; *Beyer v. Melgar*, 16 A.D.3d 532, 792 N.Y.S.2d 140 (2d Dep't 2005).
13. *Lauriello v. Gallotta*, 59 A.D.3d 497, 873 N.Y.S.2d 690 (2d Dep't 2009).

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

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

Request for Articles

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

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

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

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

POWERS OF APPOINTMENT

Burden of Proof Did Not Shift Under Constructive Fraud Doctrine Because Lawyers Who Drafted Partial Releases of Powers of Appointment Did Not Stand to Benefit from the Releases

The decedent, the founder of the Benihana restaurant chain, created a lifetime trust over his Benihana stock and other assets. Pursuant to the terms of the trust, the decedent was given a testamentary general power of appointment. After his marriage without a prenuptial agreement and his wife's refusal to execute a post-nuptial agreement, the decedent executed documents which irrevocably partially released his general power of appointment so that he could only exercise his power of appointment in favor of his descendants. The releases were prepared by two of his lawyers. Thereafter, the decedent executed a codicil to his will which appointed the trust property in favor of his wife, which was confirmed by a later will. The decedent also signed an affidavit that he did not realize that the releases were irrevocable and had he known, he would not have signed the releases.

After the decedent died, the trustees commenced suit to determine the validity of the releases. The Surrogate held that the releases were not voluntarily executed and hence invalid because the decedent would not have executed the releases absent the "misrepresentation, omission or concealment" of his lawyers. The Appellate Division unanimously reversed and declared the releases valid, ruling that the Surrogate "erroneously shifted the burden of proof to [the decedent's lawyers] to prove that the releases were not procured by fraud," because the two lawyers were neither parties to the releases nor could they benefit from them. *Matter of Aoki,* 117 A.D.3d 499, 985 N.Y.S.3d 523 (1st Dep't 2016).

The Court of Appeals, with one dissent, affirmed the Appellate Division's holding that the releases were valid so that the decedent's wife could not take under the trust. Although the burden to prove the absence of fraud could shift if as here a fiduciary relationship existed, the constructive fraud doctrine also requires a showing that a fiduciary was a party to the arrangement or would benefit therefrom. Because the lawyers were not parties to the releases, nor stood to benefit therefrom, the burden of proof did not shift from the wife, who failed to allege facts that the releases were fraudulently obtained. *Matter of Aoki,* 27 N.Y.3d 32, 29 N.Y.S.3d 864 (2016).

William P. LaPiana

PROBATE ESTATE

Joint Liability for Purchase Price Between Decedent and Ex-Spouse Gives Decedent's Estate One-Half Ownership Interest

Decedent and his ex-spouse purchased a motor vehicle and are both listed as purchasers on the certificate of sale. The insurance certificates are in the name of the ex-spouse alone and she drove, garaged, and paid to maintain the vehicle. The purchase was financed by a loan from the credit union of which both parties were members and the loan agreement provided that the decedent and his ex-spouse were jointly and severally liable on the loan. The ex-spouse made payments on the loan out of the monthly maintenance payments she received from the decedent as a result of their divorce, but those payments and payments on the loan ceased after the decedent's death. The credit union then deducted the entire amount due on the loan from the decedent's savings account in accord with the terms of the loan. The executor of the decedent's will then commenced a turnover proceeding seeking possession of the motor vehicle.

After a hearing, the Surrogate found that the decedent's estate retained a one-half interest in the vehicle, courts having found that when two names appear on the title document of a motor vehicle without express indication of the existence of rights of survivorship, the parties are tenants-in-common. The court accepted

the value for the vehicle that appears in the NADA Used Car Guide and found that the estate's interest was therefore worth $4,500. Because the ex-spouse does not have the financial resources to purchase the estate's interest, the turnover petition was granted; the executor must now sell the vehicle and recoup from the proceeds the value of the decedent's one-half interest as well as value of the funds taken from the decedent's savings account that exceed one-half the value of the loan. Any surplus should first be paid to the ex-spouse up to the value of her one-half interest in the vehicle ($4,500) with any remaining funds divided equally between the ex-spouse and the estate. *Matter of Murphy*, 52 Misc. 3d 895, 32 N.Y.S.3d 910 (Sur. Ct., Oneida Co. 2016).

RIGHT OF ELECTION

Relief for Failure to File More Than 12 Months After Issuance of Letters

In 2010, the Legislature amended EPTL 5-1.1-A(d) clarifying the procedure for exercising the right to the elective share. Before the amendment, the statute stated that the surrogate could relieve a surviving spouse from the failure to file the election within one year of the decedent's death so long as no decree settling the account of the personal representative had been made and 12 months had not elapsed since the issuance of letters. The amendment added a second limitation—not more than two years had elapsed since the decedent's death—but also gave the surrogate the authority to extend that two-year period "for good cause shown."

The surviving spouse attempted to take advantage of the extension "for good cause shown" where the decedent died in October 2004, the will was admitted to probate and letters issued to the nominated executor in March 2005, and the wrongful death action related to the decedent's death was settled in 2012. In January 2014 the executor, who was the decedent's son, petitioned the court to apportion all of the wrongful death recovery to him. The surviving spouse objected and then petitioned for permission to file a late right of election against the estate. The Surrogate granted the petition and gave the surviving spouse 60 days to file.

The executor appealed and the Appellate Division for the Third Department reversed, holding that the statutory language and the legislative history made it clear that the surrogate's authority to relieve from a late election "for good cause shown" applied only to a failure to fulfill the requirement that the election be made within two years of the decedent's death. There is no authority to grant relief from the requirement that the election be filed within twelve months of the issuance of letters. *Matter of Hornby*, 139 A.D.3d 1153, 30 N.Y.S.3d 762 (3d Dep't 2016).

SETTLEMENTS

Language of Settlement Binds Minor and Unborn Beneficiaries Claiming Through Beneficiaries Executing Settlement

Two of the decedent's three children objected to the probate of the decedent's will and codicil which benefited their stepparent. The two children settled their objections in consideration of an outright payment from the estate. The co-executors eventually filed a petition for the settlement of their account and the Surrogate's Court appointed a guardian ad litem to represent infant beneficiaries with an interest in the estate and unborn and contingent beneficiaries of testamentary trusts created under the will. The two children who had executed the settlement and the guardian ad litem filed objections. The Surrogate granted the co-executors' motion for summary judgment on the objections to the use of estate funds to pay legal fees incurred in defending an action in federal court brought by the two children and which was resolved by the settlement. The Appellate Division affirmed the Surrogate on appeal, *Matter of Mercer,* 113 A.D.3d 772, 979 N.Y.S.2d 608 (2d Dep't 2014).

The co-executors then moved to dismiss the remaining objections made by the two children and the guardian ad litem. The Surrogate granted the motion with respect to objections made by the children based on information available to them or their attorneys at the time the settlement was executed, but found that the two children did not intend to release claims based on information not known at the time of execution of the settlement, and that the guardian ad litem's wards were not bound by the settlement.

On appeal by the co-executors, the Appellate Division reversed. The court held that the terms of settlement expressly including "any and all claims and disputes raised or which could have been raised" including claims related to the administration of the decedent's estate, meant that the settlement was not limited to claims of which the two children or their attorneys had knowledge at the time of the execution of the settlement. The court also found that the guardian ad litem's wards were bound by the settlement because the terms of the settlement made it binding on the parties and on "their respective heirs, executors, administrators, successors, assigns, trustees and legal representatives." *Matter of Mercer*, 141 A.D.3d 594, 35 N.Y.S.3d 692 (2d Dep't 2016).

TRUSTS

Conveyance of Interest in Proceeds of Sale of Real Property to Trustee Does Not Create Interest in the Property

Settlors created an irrevocable trust and conveyed to the trustees a 5% interest in the proceeds of sale of specified real property. The trust was to terminate and

the interest distributed to the beneficiary when the property was sold. Less than two years after the creation of the trust, the settlors conveyed the real property to X, who then conveyed to Y, who then conveyed to Z, the current title holder. The trustee then sued Z on the grounds that the 5% had never been paid to the trustee and that all the deeds by which the property had been transferred after creation of the trust are invalid. The defendant moved to dismiss the complaint on the grounds that the action is barred by documentary evidence (CPLR 3211(a)(1)) and for failure to state a cause of action (CPLR 3211(a)(7)). The Supreme Court denied both branches of the motion, finding that the allegations in the complaint were sufficient to state a cause of action for an equitable lien on the property and that the documentary evidence did not definitely establish that the trustee had no such claim.

The defendant appealed and the Appellate Division reversed, holding that because a right to the proceeds of sale of property is not an interest in the property itself, the trust had no interest in the property. Without an agreement that the settlors' "obligations under the trust agreement" were secured "by the underlying property," the trustee had no standing to question the deed from the settlors to X, nor to assert that the subsequent deeds were invalid. *TDD Irrevocable Trust v. J&A Saporta Realty Corp.*, 139 A.D.3d 706, 31 N.Y.S.3d 541 (2d Dep't 2016).

TRUSTEES

Allegation that Trustee's Breach of Duty Resulted in Increased Income Taxes Not Supported by Evidence

Beneficiaries of testamentary trust commenced a proceeding under SCPA 711 seeking to remove the trustee and impose surcharges. The trustee voluntarily resigned and admitted that his accounting was incomplete. Surcharges were imposed which the trustee now appeals. The Appellate Division upheld the surcharges related to failure to distribute trust income and for counsel fees. The Surrogate also directed the trustee to reimburse the petitioning beneficiaries for the income taxes they paid on distributions of principal, which included qualified retirement plans. The express purpose of the trust, however, was to allow stretch distributions from the plans, that is, distributions only of the required minimum distributions.

Even accepting the beneficiaries' argument that the trustee breached his fiduciary duty by distributing the trust funds as a lump sum, the record is completely devoid of evidence of how a different distribution of the trust principal, including the retirement plans, would have resulted in lower income tax liabilities for the beneficiaries. While it is reasonable to assume that had the stretch distributions been made as the trust directed the beneficiaries would have had a lower income tax liability, in the absence of evidence of how the tax liability would differ, it was error to direct the trustee to reimburse the beneficiaries for all of the income tax paid on the trust distributions. *Matter of Braasch*, 140 A.D.3d 1341, 33 N.Y.S.3d 541 (3d Dep't 2016).

UNDUE INFLUENCE

Fiduciary Relationship Cannot Arise Where Defendant Had No Knowledge of Document Creating the Relationship

Some 15 months before his death, decedent executed a new will, a trust, and a power of attorney. The beneficiary of the trust and the agent under the power of attorney was the long-time caregiver for the decedent and his late wife. At the time the decedent executed the will and the trust he also executed a deed conveying his residence to the trustee. After the decedent's death, the decedent's children commenced an action to invalidate the trust and deed on the ground of undue influence. The defendant moved for summary judgment dismissing the complaint and the Supreme Court granted the motion. The plaintiff children appealed.

The Appellate Division affirmed. The defendant submitted evidence in support of the motion for summary judgment showing that she became aware of the power of attorney, which she also showed had been executed "within moments" of the execution of the trust, only after the execution of the trust of which she and her spouse were the beneficiaries. She therefore had no opportunity to abuse her fiduciary authority for her own benefit and the presumption of undue influence attendant on the existence of a fiduciary relationship between the person alleged to have been influenced and the alleged wrongdoer could not arise. In addition, the court stated that the defendant established *prima facie* that the decedent, although undergoing treatment for cancer, was "coherent, and financially, mentally, and emotionally independent" when he made the decision to establish the trust and made the defendant the beneficiary. *Bazigos v. Krukar*, 140 A.D.3d 811, 32 N.Y.S.3d 638 (2d Dep't 2016).

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

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

By Ilene Sherwyn Cooper

Attorney-Client Privilege/Legal Fees

In *T.D. Bank v. Interstate Fire Protection Inc.*, the Supreme Court, New York County, addressed the redaction of invoices at a hearing to fix and determine the legal fees of plaintiff's counsel, which defendants were ordered to pay. The invoices had been severely redacted, merely noting, in a majority of instances, a conversation or correspondence with individuals identified only with surnames with the remainder of the notation left blank. Plaintiff's counsel contended that the redactions were necessary to protect the attorney-client privilege. Plaintiff's counsel also admitted that it represented plaintiff on several matters in addition to the one that was the subject of the instant hearing. Defendants objected to the admission of the invoices, asserting that, because of the redactions, it was impossible to know whether an item referred to the underlying litigation or some other matter.

The court noted that actions to collect legal fees do not necessarily place communications between an attorney and client at issue. The court further observed that fee arrangements between and attorney and client do not, in the usual case, constitute a confidential communication, and thus are not privileged. The court opined that although some courts refuse to consider redacted invoices at all when the reasonableness of legal fees is at issue, a more reasoned approach would be to require that the invoices be produced with only the privileged communication redacted, but not the nature of the work performed, or the matter for which it was performed. Moreover, the court determined that since the attorney-client privilege only attaches to the substance of a communication between attorney and client, and not the fact that a communication took place, counsel would only be authorized to redact legal advice appearing on the invoice.

Within this context, the court found the redactions by plaintiff's counsel to be so extreme as to make it impossible to determine whether the redactions related to the subject representation at all. Since defendants were entitled to review the invoices to ascertain whether interviews, conversations or correspondence with particular individuals were appropriately related to the representation for which they were ordered to reimburse plaintiff, plaintiff's counsel was required to submit copies of the invoices in which only the actual communications were redacted from the items.

***T.D. Bank v. Interstate Fire Protection, Inc.*, N.Y.L.J., May 6, 2016, p. 33 (Sup. Ct., N.Y. Co.).**

Discovery Requests Stricken

In *In re Christie,* the Surrogate's Court, Suffolk County, denied the respondent's motion to compel petitioner to comply with his discovery demands, and directed that the demands be stricken.

The subject application was made during the course of a contested probate proceeding, in which the respondent filed objections to probate alleging lack of due execution, lack of testamentary capacity, undue influence and fraud. Pursuant to a so-ordered stipulation for discovery, respondent served a Notice for Discovery and Inspection, a Demand for Electronic Media, and a Demand for Authorizations on the petitioner. The petitioner objected to the requested disclosure, claiming that the demands were overly broad, vague, burdensome, and outside the scope of disclosure otherwise authorized for probate proceedings. As a result, respondent moved for a court order directing compliance.

The court noted that pursuant to the provisions of CPLR 3101(a) there shall be full disclosure of all matter "material and necessary" to the prosecution or defense of an action. In determining whether requested disclosure falls within the confines of this rule, the test is whether it will provide "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*see Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). In a contested probate proceeding, the parameters for discovery are further circumscribed by the three year/two year rule, which, in the absence of special circumstances, limits disclosure to the period three years prior to the date of the propounded instrument, and two years thereafter, or to the date of the decedent's death, whichever is earlier (*see* 22 NYCRR 207.27).

The court opined that on an application to compel discovery, the party seeking disclosure has the burden of making a proper demand, which is neither overbroad, lacking in specificity, nor seeking irrelevant documents. Within this context, the court observed that respondent's demand for discovery and inspection was several pages long, and appeared to be a template, with incorrect and incomprehensible references to "defendant" and "plaintiff," neither of which was applicable to the pending proceeding. Further, the court noted that the breadth of respondent's demands, seeking "all" or "any and all" records for a six year period, and its lack of specificity, made them overly burdensome and of questionable relevance to the pending proceeding.

Similarly, the court found that respondent's demand for electronic media was overly broad to the extent that it sought "all" records, regardless of content or subject matter, from the petitioner as well as nonparties, for a three-year period preceding decedent's death.

Finally, with respect to the respondent's demand for authorizations to obtain the medical records of two physicians, the court noted that there were other avenues available to obtain the requested disclosure, which included a HIPAA-compliant authorization executed by the preliminary executor. Additionally, the court concluded that the demand for authorizations to obtain legal records was unlimited as to time, and unconstrained as to matters affected by privilege.

Accordingly, in view of the foregoing, and concluding that it was not its duty to re-craft and limit the respondent's demands until appropriate, the court denied the respondent's motion, and directed that the demands be stricken.

***In re Christie*, N.Y.L.J., Apr. 14, 2016, p. 34, col. 1 (Sur. Ct., Suffolk Co.).**

Expansion of Examinations Pursuant to SCPA 1404

In *In re Trataros,* the Surrogate's Court, Bronx County (Lopez Torres, S.), was confronted with a motion for leave to examine an attorney employed by the attorney-draftsman's law firm and the decedent's spouse prior to the filing of objections to probate, pursuant to the provisions of SCPA 1404(4).

The decedent died survived by a spouse and three adult daughters. Before the court was a proceeding for probate of his Will, which expressly disinherited two of his daughters ("respondents"), and named the third daughter the executor thereunder. Once jurisdiction was complete, the decedent's two daughters, prior to filing objections to probate, sought examinations pursuant to SCPA 1404.

The subject motion followed, seeking to examine the attorney-employee of the draftsman's law firm on the grounds that he purportedly assisted the decedent in understanding the attorney-draftsman by translating their conversations regarding the Will and its terms into Greek. Further, the respondents claimed that the propounded instrument was drafted based on information provided the draftsman by the attorney, and that, as a result, his examination was important to ascertaining whether the Will reflected decedent's intent. Additionally, the respondents sought the examination of the decedent's spouse, claiming that special circumstances existed for doing so, based on her advanced age, and her purported personal knowledge of the circumstances surrounding the execution of the decedent's Will, and his testamentary wishes.

The motion was opposed by the petitioner, who argued that special circumstances did not exist requiring that the decedent's spouse be examined. Further, the petitioner cross-moved for a protective order to limit the scope of any such examination directed by the court, and to exclude the respondents from being present.

The court observed that the purpose of the limited discovery afforded by SCPA 1404(4) is to enable a potential objectant to ascertain whether there is any basis for filing objections. The statute allows for the examination of the attesting witnesses to the propounded Will, as well as the draftsman of the instrument. In addition, if the Will contains an *in terrorem* or a no-contest clause, the statute authorizes the examination of the nominated executor and proponent of the Will, and further, where special circumstances are found to exist, "any other persons whose examination the court determines may provide information with respect to the validity of the will…"

Based on the foregoing, the court opined that the plain language of SCPA 1404(4) clearly specified the category of persons who could be examined prior to the filing of objections to probate, none of which applied to the decedent's spouse. Moreover, the court held that since the propounded Will did not contain an *in terrorem* clause, the provision of the statute providing an exception to the scope of discovery where "special circumstances" were demonstrated, had no application.

Accordingly, the respondents' motion seeking to compel the examination of the decedent's spouse was denied. Further, the court denied the respondents' motion to depose the attorney-employee on the grounds that their assertions as to the need for his examination were made by counsel, rather than by an individual with personal knowledge of the facts.

***In re Trataros,* N.Y.L.J., May 12, 2016, p. 22, col. 1 (Sur. Ct., Kings Co.).**

Preclusion

Before the Surrogate's Court, Westchester County, in *In re Palmieri,* was a contested probate proceeding in which the objectant sought an order, *inter alia,* precluding the petitioner from offering evidence on the issue of undue influence, and suppressing use and admission at the trial of the matter of certain tape recordings, as well as derivative materials from the recordings, including copies of the recordings, transcripts thereof, and testimony concerning their contents.

The decedent died survived by her two daughters, the petitioner and the objectant, respectively. Pursuant to the pertinent provisions of her Will, the decedent devised and bequeathed her residuary estate to the petitioner, and bequeathed the objectant the sum of $100,000. In addition, the instrument contained an *in terrorem* clause, and named the petitioner the executor. A prior Will of the decedent bequeathed the principal portion of her estate in equal shares to the petitioner and the objectant. According to the probate petition, the estate was valued at approximately $500,000.

The subject of the motion before the court was a series of tape recordings made by the objectant, which the petitioner's husband admitted to having taken from the decedent's home, and copied, without objectant's knowledge or consent. More specifically, according to the objectant, these recordings were of telephone conversations that decedent had with persons, including the petitioner, as well as conversations that the decedent had with the objectant, while the objectant was living with the decedent in the decedent's home. The petitioner's husband testified during the course of his deposition that he copied the recordings onto the hard drive of a computer used by the petitioner, as well as to another computer that belonged to him, and listened to them on a tape recorder. He further stated that he subsequently returned all the recordings to the decedent's home, without the decedent's or the objectant's knowledge.

During the pendency of the proceeding, objectant served a Notice for Discovery and Inspection on the petitioner requesting, *inter alia*, all audiotapes and/or videotapes of the decedent, and all documents concerning disputes and strains on the relationship between the petitioner and the decedent. A privilege log was also requested. Thereafter, petitioner's husband sent to petitioner's counsel two flash drives purportedly containing copies of what he claimed were the tape recordings made by the respondent, and indicated that one such recording contained an argument with the decedent. Nevertheless, in response to the Notice for Discovery and Inspection, petitioner's counsel responded that she had no audiotapes or videotapes in her possession, and no documents regarding problems or difficulties or strains in the relationship between petitioner and the decedent.

In support of her motion, objectant claimed that petitioner should be precluded from introducing the tape recordings at the trial of the matter since she willfully failed to answer respondent's discovery demands. Moreover, objectant claimed that the authenticity of the recordings could not be established, since their chain of custody had been corrupted when petitioner's husband had illicitly removed them from the decedent's home. In opposition, petitioner claimed that her counsel inadvertently failed to produce the flash drives containing copies of the tape recordings, but that they were ultimately produced following the deposition of petitioner's husband. In addition, petitioner maintained that none of the tapes was tainted, and that she provided objectant with a list of the tapes and transcripts of the recordings, all of which matched the tapes objectant had in her possession in every respect.

The court opined that a party seeking the admission of a tape recorded conversation must present proof of the authenticity and accuracy of the tape by clear and convincing evidence, establishing that the offered evidence is genuine and that there has been no tampering with it. Within this context, the court found that the authenticity of the tape recordings could not be established and precluded the petitioner from introducing them at trial. Significantly, in this regard, the court pointed to the fact that petitioner's husband surreptitiously removed the tape recordings, and that one of the computers to which he had copied them had been discarded. Further, the court noted that although the objectant had indicated that she regularly taped the conversations the decedent had, both with her and the petitioner, none of the tape recordings contained petitioner's voice.

Additionally, the court held that even if the tape recordings could be authenticated, the failure of petitioner's counsel to timely disclose that they were in her possession precluded their use at trial. Pursuant to CPLR 3103(c), if any disclosure has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court may, on motion, make an appropriate order, including an order that the information be suppressed. In addition, the court noted that the provisions of CPLR 3126(2) provide that where a party or a party's agent willfully fails to disclose information that the court finds ought to have been disclosed, then the court may make an order prohibiting the disobedient party from supporting or opposing claims or defenses, or introducing in evidence designated items or testimony. Based on the totality of the record, the court found that the failure of petitioner's counsel to produce the subject recordings

was not merely inadvertent, and held that it would not countenance or tolerate the withholding of discovery material, or a failure to timely produce it.

Accordingly, objectant's motion was granted to the extent that petitioner was precluded from introducing the tape recordings, and all of their derivative materials, including copies of the taped materials, their transcripts, and testimony concerning their content.

***In re Palmieri*, N.Y.L.J., June 6, 2016, p. 24, col. 2 (Sur. Ct., Westchester Co.).**

Revocation of Letters

In *In re Williams,* the decedent's granddaughter sought to revoke the letters of administration issued to the decedent's son based on his representations that he was the decedent's sole distributee. The granddaughter also alleged that the decedent died with a Will which left her Bronx realty and her residuary estate to the granddaughter for her lifetime, and upon her death, to her two children. In a supporting affidavit, it was alleged that the decedent's son knew of the Will and its contents, and that, nevertheless, he was attempting to sell the Bronx realty. Though given the opportunity, the son failed to object to the relief requested.

The court held that the uncontroverted allegations of fact set forth in the granddaughter's verified petition, specifically, that the son knew that he was not the decedent's only distributee and intentionally failed to list all distributees in his petition for letters of administration, constituted due proof of the facts therein stated (*see* SCPA 509). Accordingly, the branch of the application seeking to revoke the letters of administration that issued to the son was granted based on his want of understanding, and based on the fact that his letters were obtained by a false suggestion of a material fact (*see* SCPA 711[4], [8]).

***In re Williams*, N.Y.L.J., March 31, 2016, p. 28 (Sur. Ct., Bronx Co.).**

Standing

Before the Surrogate's Court, New York County, in *In re Bruno,* was an application by the petitioner to dismiss the objections filed by one of the decedent's distributees on the grounds that she lacked standing to pursue her claims.

The decedent died survived by 11 first cousins once removed, who were her sole distributees. The approximate value of her estate at death was $482,000. Pursuant to the pertinent terms of her will, she bequeathed her cooperative apartment, valued at approximately $400,000, to Rose, who was one of her said distributees, and left the residue of her estate to the petitioner. Under a penultimate instrument, Rose received one-half of the cooperative apartment, and a one-fifth share of the residuary estate.

Objections to probate were filed by five of the decedent's distributees, including Rose, alleging, *inter alia*, lack of due execution, lack of testamentary capacity, fraud and undue influence. The petitioner moved to dismiss the objections filed by Rose claiming that she was not adversely affected by the probate of the propounded will and therefore lacked standing.

The court opined that the provisions of SCPA 1410 authorize any person whose interest in property or in the estate of the testator is adversely affected by the admission of the propounded will to probate to file objections to the probate of the instrument. The court noted that the "interest" contemplated by the statute need not be absolute, and can include a contingent stake in the estate.

Within this context, and based upon the estimated value of the estate, the petitioner argued that the objectant received more under the propounded instrument than under the penultimate will or in intestacy. The objectant, on the other hand, maintained that the petitioner was withholding assets from the estate that he wrongfully converted from the decedent, and that the recovery of those assets would result in the estate exceeding $2.5 million. She thus maintained that she would have more to gain under the prior instrument once the petitioner was made to turn over the property in issue.

The court held that where a party's standing to object in a probate proceeding is in question, it is generally recognized that the probate estate assets should be deemed to include "any property transferred before death which for one reason or another can or should be recovered or brought into the estate…" (*citations omitted*). Thus, where it cannot be readily determined whether a would-be objectant's interest will prove to be greater under the propounded instrument than it would be under a prior will or in intestacy, the court will rule in favor of standing.

Accordingly, the petitioner's motion to dismiss was denied.

***In re Bruno*, N.Y.L.J., Oct. 23, 2015, p.42 (Sur. Ct., N.Y. Co.) (Anderson, S.).**

Summary Judgment

In *In re Weissler,* summary judgment was denied on the issues of undue influence and fraud. Objections to probate were filed by the decedent's four grandchildren, who were children of her predeceased son. The decedent died survived by a son, daughter, and the four/objectant grandchildren. Pursuant to the pertinent provisions of her will, she bequeathed

her residuary estate in three equal shares to her two children, and a granddaughter, who was the child of the petitioner. She expressly made no provision for the objectants, expressing confidence that her predeceased son "had made ample financial provision for them…" The objections to probate alleged that the decedent lacked testamentary capacity, and that the instrument was procured by fraud and undue influence. The petitioner moved for summary judgment.

With respect to the issue of capacity, the court noted that as a general rule, and until the contrary is shown, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will. Further, the attorney who drafted the instrument testified that she knew the decedent for several years, had prepared her previous will, and had discussed the decedent's prior will and the propounded will with her. She recalled that the decedent could discuss matters clearly and intelligently, and was aware of her family and assets.

In opposition, the objectants, without any documentary or evidentiary support, claimed that the decedent was not in good health, and was despondent over the death of her son. Based on this record, the court found that the petitioner had satisfied his burden of proving testamentary capacity on the date she executed her will, and dismissed the objection on this ground.

With respect to the issue of undue influence, the court noted that undue influence is rarely proven by direct evidence, but rather is usually established by circumstantial evidence, involving such factors as the testator's physical and mental condition, whether the testator had the benefit of independent counsel to draft the propounded will, whether the propounded will deviated from the testator's prior testamentary pattern, and whether the testator was isolated from the natural objects of his affection. Further, the court observed that a claim of fraud required a showing that the proponent knowingly made a false statement that induced the decedent to make a will, and disposed of her property in a manner that she would not have, had the statement not been made.

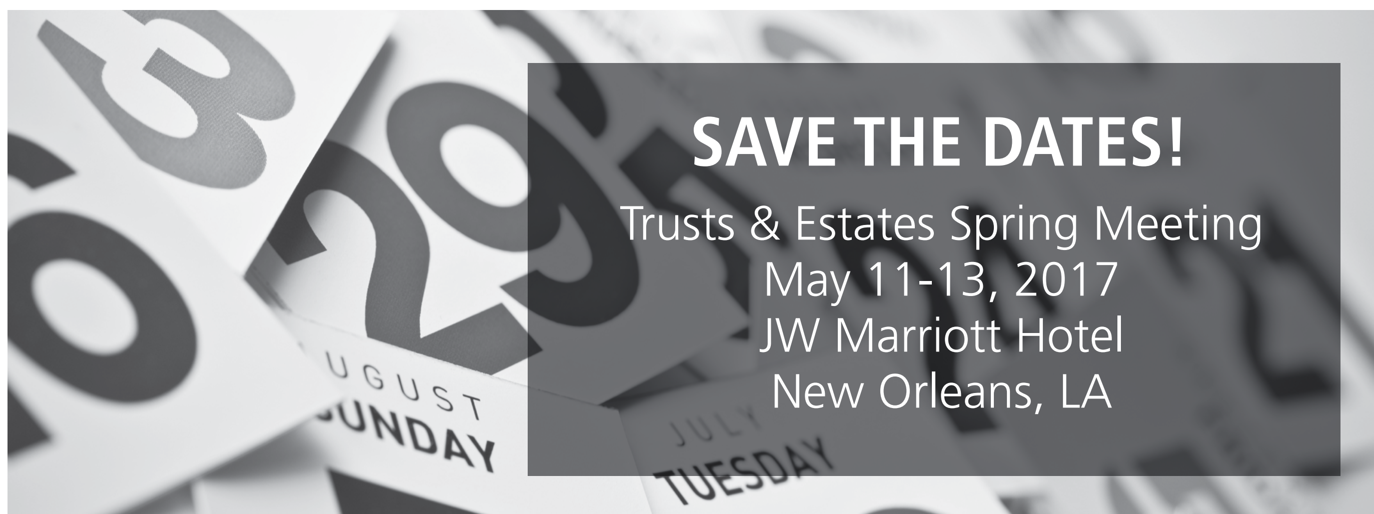
Within this context, the court noted that the petitioner and the decedent resided together in the same building, and the attorney who prepared the will was the petitioner's attorney. In addition, the petitioner drove the decedent to meet with the draftsperson, although the petitioner was not present during any discussions with counsel. Thirteen days prior to meeting with counsel, the decedent's son died, by committing suicide. According to the testimony of the attorney who drafted the will, much of her discussion with the decedent revolved around her son's death, and the decedent's belief that her son's children would be taken care of financially by their father's estate. The objectants alleged, however, that the decedent was misinformed by the petitioner and others about their father's estate, which was consumed by debt.

As a result of this allegation, the court found that a question of fact existed as to what information the decedent was provided when she discussed her will, and whether she knowingly was given incorrect information which caused her not to include the objectants as beneficiaries.

Accordingly, the court denied the petitioner's motion for summary judgment with regard to the issues of undue influence and fraud.

***In re Weissler*, N.Y.L.J., Oct. 23, 2015, p. 45 (Sur. Ct., Nassau Co.).**

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



Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Trust's Long-Arm Statute

Section 736.0202, Florida Statutes, is entitled "Jurisdiction over trustee and beneficiary" and sets forth specific instances in which Florida courts will have jurisdiction over an out-of-state trustee or beneficiary. In this case, the Southern District of Florida addressed whether that statute gave the court jurisdiction over Philip Abromats, a non-Florida resident. The case was brought by Clifford Abromats, also a non-resident, but as trustee of the revocable trust of his mother who was a Florida resident. Clifford alleged that Philip, who was the recipient of certain trust distributions during his mother's lifetime, had unduly influenced their mother to make certain trust amendments. After ten months before three separate courts, the court found that it did have long-arm jurisdiction over Philip—both *in rem* and *in personam*. The court found that it had *in rem* jurisdiction over Philip because the trust's principal place of administration was in Florida. And the court found that it had *in personam* jurisdiction over Philip because he had accepted a distribution from the trust during his mother's lifetime. In adjudicating the separate question of Philip's due process rights, the court found that the complaint arose out of his contacts with the forum state, that he purposely availed himself of the privilege of activities within the forum state, and that the interstate judicial system had an interest in resolving the matter with this forum.

Abromats v. Abromats, 2016 WL 4366480 (S.D. Fla. Aug. 16, 2016).

Fiduciary Lawyer-Client Privilege

Florida's rules of evidence are part-procedural and part-substantive. As a result, it is unclear whether they are subject to the approval of the Supreme Court (procedural) or subject to passage by the legislature (substantive). The result is somewhat unusual: rules of evidence go to the legislature to pass into law, *and* they go to the Supreme Court for approval. Most of the time, the Supreme Court adopts the amendment or new evidence provision "to the extent that it is procedural." But in 2014, the Florida Supreme Court *declined* to follow the evidence committee's recommendation to adopt new section 90.5021, Florida Statutes, intended to codify the fiduciary lawyer-client privilege, "because we question the need for the privilege to the extent that it is procedural." The problem is that in 2011, Florida's legislature passed the new section. Moreover, the Florida Supreme Court, at the time, adopted a probate rule change requiring that fiduciaries make clear to beneficiaries that communications with lawyers are privileged pursuant to the new evidence provision. In this case, the Southern District of Florida came out with the first published opinion to address the issue. Plaintiff was attempting to sue a guardian of a ward who had died, on behalf of the ward's estate, and was seeking the attorneys' communications with the guardian during the ward's lifetime. Among other things, plaintiff argued that lawyer-client privilege had been rejected by the Supreme Court. The court, however, held that the Supreme Court's decision "did not vitiate or overturn the statute." It merely declined to adopt the rule as procedural, and it left the legislative change.

Jonathan A. Galler

Bivens v. Rogers, 2016 WL 4702682 (S.D. Fla. Sep. 7, 2016).

Fiduciary Relation-Back Statute

Samuel Rosario discovered that he suffered from legal blindness after moving into the third-floor apartment of the Orlando Housing Authority (OHA). His request to move into a first-floor unit with live-in help was denied. In March 2014, Mr. Rosario fell in his apartment causing injury to his head and bruising to his eyes. He was in the hospital for nine days, and following his release, was found dead one day later in his apartment from a seizure or fainting. His daughter, Stephanie Fernandez, sued the OHA and others for a variety of causes of action. Defendants moved to dismiss on grounds that Fernandez was not the proper personal representative of the estate at the time that she filed the complaint. The Middle District of Florida denied the motion. Among other reasons, the court found that the relation-back rule applied and governed the personal representative's conduct. The relation-back rule provides that the "powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment" (Section 733.601, Florida Statutes). Because Fernandez had ratified the act of commencing a lawsuit against defendants after she became the personal representative, the relation-back rule kept the lawsuit alive.

Fernandez v. Orlando Housing Authority, 2016 WL 4382656 (M.D. Fla. Aug. 17, 2016).

Granting of Attorney's Fees for Benefiting the Estate

Mary Lou Jordan sued the Estate of Clifford L. Allen seeking specific performance of a real estate contract pending at the time of his death. Wanda Hampton, who was the specific devisee of the real estate under Clifford's will, filed a motion to defend against the action. The motion was granted, and the motion to seek attorney's fees was reserved pending Hampton's showing that she provided a benefit to the estate. Hampton prevailed in defending the estate but lost her motion in the trial court seeking fees. Section 733.106(3), Florida Statutes, provides fees for an attorney who renders services to an estate, but the trial court denied the motion for fees because Hampton's attorney did not enhance the assets of the estate. The Fifth District Court of Appeal reversed, however, because Hampton's attorney had provided services that successfully gave effect to the intention of the testator as set forth in the will. That, said the appellate court, is a service equally compensable by the estate.

Hampton v. Allen, 2016 WL 4158716 (Fla. 5th DCA Aug. 5, 2016) (not yet final).

Denial of Attorney's Fees for *Not* Benefiting the Estate

When Yolinda Doss was arrested and charged with the murder of Alphonso Doss, USAA Life Insurance Company deposited his life insurance proceeds into the court registry and filed an interpleader action. Under Florida's slayer statute, section 732.802, Florida Statutes, Ms. Doss would not take the proceeds, and she renounced her interest. The court appointed Michael Fackler as the guardian for the Doss' daughter and granted the personal representative of the estate, Shirley Hunter, the right to intervene in the proceeding. After determining that the insurance proceeds were properly distributed to Mr. Fackler, Ms. Hunter moved for an award of fees for the personal representative under section 733.6171, Florida Statutes. Even though Ms. Hunter was compelled to do work, the Middle District of Florida held that fees were not to be awarded because she had provided no benefit to the estate since the insurance proceeds were not traveling through the estate. For the same reason, it would be unfair to compensate Ms. Hunter from assets of the insurance proceeds.

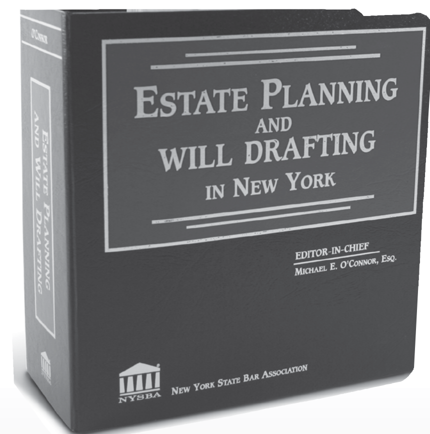
USAA Life Ins. Co. v. Doss, 2016 WL 4400657 (M.D. Fla. Aug. 18, 2016).

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

NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York

2016 Revision



Editor-in-Chief

Michael E. O'Connor, Esq.
Costello, Cooney & Fearon, PLLC
Syracuse, NY

Product Description

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

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

PRODUCT INFO AND PRICES

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

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

Contents at a Glance

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

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

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

Mention code: PUB8473N when ordering.

Section Committees and Chairs

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

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

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

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

Susan Miller King
Miller King LLC
599 Gatehouse Road
Tully, NY 13159
susan.king@millerking.com

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

Diversity
Anta Cisse-Green
NYU Langone Medical Center
One Park Avenue
New York, NY 10016
antac3@aol.com

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

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

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

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

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

International Estate Planning
Nathan W.G. Berti
Hodgson Russ LLP
The Guaranty Bldg.
140 Pearl Street Suite 100
Buffalo, NY 14202
nberti@hodgsonruss.com

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

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

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

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

Life Insurance and Employee Benefits
Albert Feuer
Law Offices of Albert Feuer
110-45 71st Road, Suite 7M
Forest Hills, NY 11375-4962
albertfeuer@verizon.net

Membership and Relations with Local Bars
Megan Michelle Knurr
Citi Private Bank
153 East 53rd Street - 23rd Floor
New York, NY 10022
megan.knurr@citi.com

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

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

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

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

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

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

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

Executive Committee District Representatives

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

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

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

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

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

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

Seventh District
Nancy E. Klotz
Tompkins Financial Advisors
179 Sully's Trail, Suite 200
Pittsford, NY 14534-3346
nklotz@tompkinsfinancial.com

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

Ninth District
Kevin H. Cohen
Law Offices of Kevin H. Cohen, P.C.
4 Westchester Park Drive, Suite 220
White Plains, NY 10603
kcohen@estatelawny.com

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

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

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

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

Have an IMPACT!

As the charitable arm of the New York State Bar Association, The Foundation seeks donations for its grant program which assists non-profit organizations across New York in providing legal services to those in need.

Why give to The Foundation

- We operate lean, fulfill our mission, provide good stewardship of your gift and contribute to a positive impact on legal service access across New York.

When you give to The Foundation your gift has a ripple effect

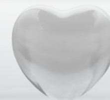
- Your donation is added to other gifts making a larger financial impact to those we collectively assist.

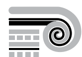
Make a difference-give today! www.tnybf.org/donation/

Double your gift...
Some companies have a matching gift program that will match your donation. See if your firm participates!

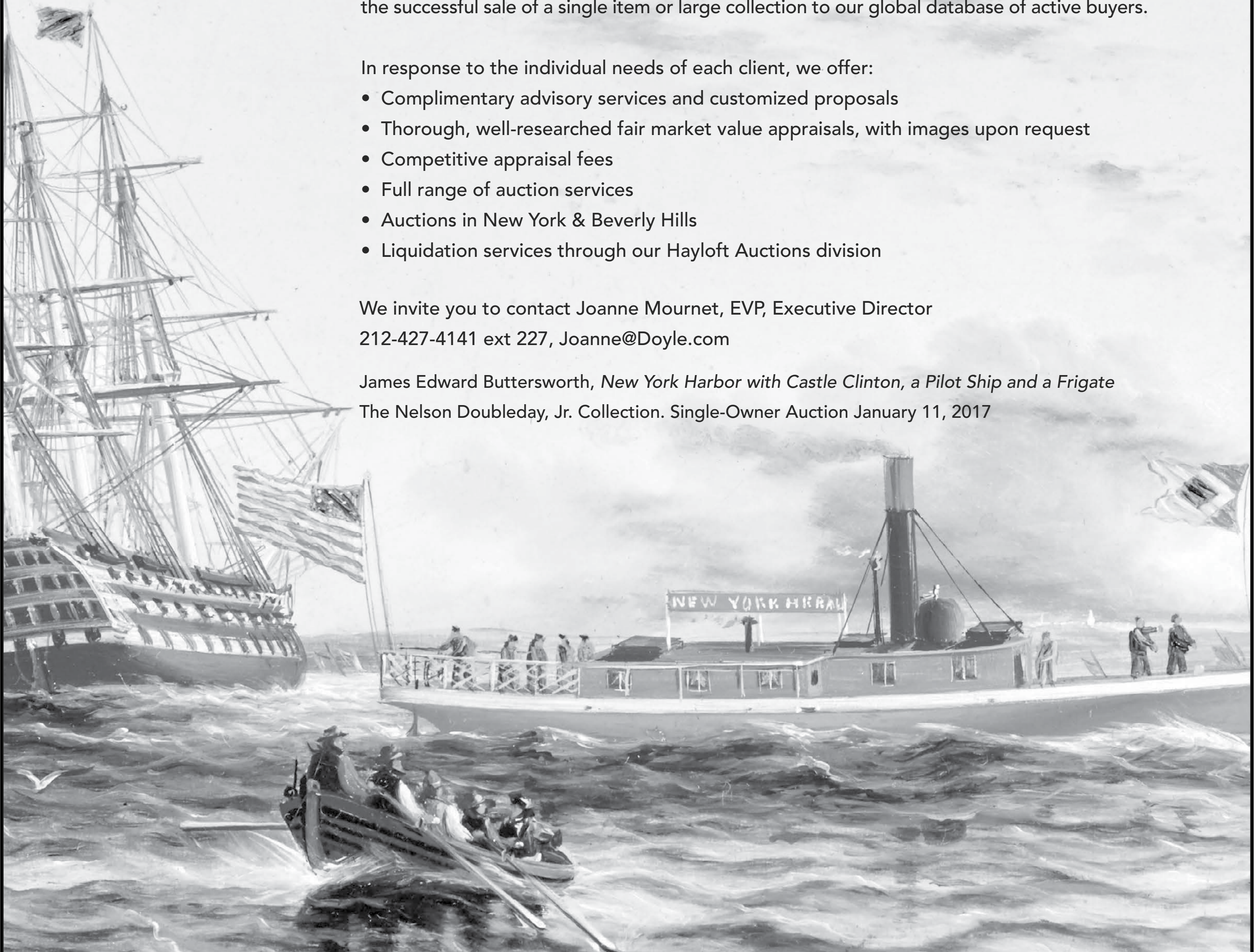
"I am proud to be a Fellow of The Foundation and serve as a Board member and Assistant-chair of the Grant Review Committee. I give to The Foundation because it supports legal services organizations across the State that provide essential legal services to people who otherwise would not be able to afford a lawyer. I have had the opportunity to meet with some of the grant recipients and have heard first-hand how lawyers make a difference to these organizations."

Roger Juan Maldonado
Balber Pichard Maldonado & Van Der Tuin, PC, New York, NY





THE NEW YORK BAR FOUNDATION
One Elk Street, Albany, NY 12207 (518) 487-5650



(paid advertisement)

Publication of Articles

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

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

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

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

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

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

TRUSTS AND ESTATES LAW SECTION NEWSLETTER

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

Section Officers

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

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

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

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

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

ADDRESS SERVICE REQUESTED

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

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2017

JANUARY 23–27, 2017

NEW YORK CITY

New York Hilton Midtown

TRUSTS & ESTATES LAW SECTION PROGRAM | January 25, 2017

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

WEDNESDAY EVENING COCKTAIL RECEPTION | SPONSORED BY DOYLE AND BROWN BROTHERS HARRIMAN

Pre-registration is required

REGISTER NOW!

www.nysba.org/am2017